Werner v. Town of Hay River, 2004 NWTSC 63

S-1-CV-2004000146

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY WERNER

Applicant

- and -

THE TOWN OF HAY RIVER

Respondent

Transcript of the Reasons for Decision by The Honourable Justice J. Z. Vertes, sitting in Hay River, in the Northwest Territories, delivered orally on the 15th day of September, A.D., 2004.

APPEARANCES:

Mr. H. Werner:	Representing Himself
Mr. M. Hansen:	Counsel for the Respondent

THE COURT: The applicant, Harvey Werner, challenges the validity of certain sections of By-Law No. 1530 of the Town of Hay River. That By-Law, entitled the "Hay River Traffic By-Law", deals with a number of matters including the parking of vehicles. In particular, it contains a section providing for the seizure, removal and impoundment of motor vehicles parked in violation of the by-law. It is this section, Section 36 of the by-law, that is the specific subject of this attack.

A copy of Section 36 of By-Law No. 1530 will be appended to these reasons for reference. In general terms, it provides that a peace officer may remove a vehicle from a roadway, and have it impounded, if it is parked in contravention of the by-law. The owner of the vehicle may recover it upon payment of the costs of removal and storage.

The factual underpinnings of this application are that the applicant's vehicle, being parked apparently illegally, was seized and removed to storage.

The applicant attacks the by-law's validity on a number of grounds which I will address in sequence. I will first, however, state the obvious.

The Supreme Court of Canada has repeatedly held that since municipalities are statutory bodies, they may exercise only those powers that are expressly

conferred on them by statute and those powers necessarily or fairly implied by the expressed power in the statute. If there is a conflict or inconsistency with the enabling statute, then a municipal by-law will be held to be invalid.

In this case, By-Law No. 1530 is expressly authorized by Section 347(1) of the Motor Vehicles Act which enables a municipal council to provide, by by-law, for the regulation and control of vehicles and, specifically, regulating the parking of vehicles on public roadways and, in subsection (n), to:

> provide for the impounding and removal from a highway or other public place of a vehicle in respect of which fees or charges for parking the vehicle have not been paid or of a vehicle parked in contravention of a provision of a by-law regulating the parking of vehicles on a highway or other public place;

The Act further provides, however, in Section 347(2)(a), that any such by-law must not be inconsistent with the Act.

On the subject specifically of seizures of

vehicles, the Motor Vehicles Act contains a number of provisions in sections 294 to 304. In terms of illegal parking, Section 300(1)(c), authorizes an officer to seize a vehicle and cause it to be removed and stored if the vehicle is parked in contravention of the Act or a by-law made under Part 12 of the Act (the part where Section 347 is found).

The first argument advanced by the applicant is that the by-law authorizes a seizure without the necessity of a warrant or even an explicit requirement that the officer effecting the seizure have reasonable and probable grounds to do so. Therefore, it is an infringement of a person's right to be secure against unreasonable seizures, as guaranteed by Section 8 of the Canadian Charter of Rights and Freedoms.

In my opinion, the answer to this argument is found in two provincial Court of Appeal decisions, one from Manitoba called R. v. Werhun, [1991] M.J. No. 2, and one from British Columbia called Brazier v. Vancouver, [1997] B.C.J. No. 2636. Both cases addressed similar attacks on similar by-laws. Both held that such removal and impoundment measures, to control illegal parking, did not constitute unreasonable seizures as that concept is understood in the Canadian Charter of Rights and Freedoms. While those cases are not binding upon this Court,

they are certainly highly persuasive.

I accept that the removal and impoundment of a person's property can be a seizure within the scope of Section 8 of the Charter. However, it is one made as an administrative and regulatory control measure, not as one in the criminal law context. There are no penal consequences to the vehicle owner. The only consequences are inconvenience and a financial cost to retrieve the vehicle. The seizure is not done with a view to gather evidence for some prosecution. It is a measure used to control illegal parking, something a municipality is authorized to do and thus a valid purpose. It is not a randomly-applied procedure. It is not arbitrary. It is a seizure authorized by law and reasonable. Therefore there is no breach of the Charter.

Seizure, for purposes of investigation of a possible contravention of the law, is authorized by Section 294 of the Motor Vehicles Act. But that has nothing to do with the seizure effected pursuant to Section 36 of By-Law No. 1530.

The next argument advanced by the applicant is that the by-law authorizes the entry on to private property without the need for a warrant. On the face of it, Section 36(b) does seem to allow it. That subsection empowers any peace officer to remove

any vehicle that is inoperable, wrecked or dismantled from private property. Subsection (d) empowers the Director of Public Works and Planning to dispose of any such vehicle after 30 days.

Subsection 36(b) is taken from Section 125 of the Cities, Towns and Villages Act, which provides that a municipality may, by by-law, provide for the removal and disposal of inoperable vehicles. However, that section also provides that before the power of removal is exercised there must be a hearing by the municipal council and a right of appeal. Those are contained in sections 178 to 180 of the Cities, Towns and Villages Act.

In my opinion, while subsection 36(b) is valid, it is incomplete as it stands and really should not be contained within Section 36, the aim of which is to deal with the removal of illegally parked vehicles, not inoperable or dismantled ones. By-Law No. 1530 is, as its name says, a traffic by-law. Section 125 of the Cities, Towns and Villages Act is addressing the use of property. Thus, subsection 36(b) should be severed from the rest of the by-law. But, I repeat, it by itself is still valid legislation provided it is read in conjunction with the requirements of sections 178 to 180 of the Cities, Towns and Villages Act.

Nothing, however, authorizes the Director of

Public Works and Planning to simply dispose of any seized vehicle. Therefore, subsection 36(d) is invalid, in the sense of not being authorized by any enabling legislation, and thus must be severed and ruled inoperative. But that does not affect the validity of the rest of Section 36 of By-Law No. 1530, nor does it affect the factual situation that underpins this application.

I note, in passing, that the Motor Vehicles Act has numerous protections regarding search and seizure on private property in sections 291.1 through 291.4. All of them impose a requirement for a warrant except in emergency circumstances.

The applicant also argues that the By-Law is inconsistent with the Motor Vehicles Act because there is no time restriction on the seizure. Section 300(3) of that Act stipulates that a seizure made by an officer in contravention of a by-law, such as By-Law No. 1530, terminates after 24 hours. The by-law, however, provides that any vehicle removed will be kept impounded until the reasonable expenses for storage and removal have been paid.

On this point, I agree with the submissions of counsel for the respondent municipality. The seizure is the act of the officer empowered to remove the vehicle. The officer's role ends after 24 hours. After that, the vehicle is kept impounded

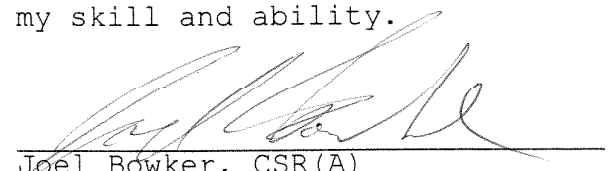
as a lien pending payment of the costs by the owner. That is a civil matter and one clearly provided for by Section 302 of the Act which provides first, that the owner of the vehicle is responsible for all charges, and second, that the reasonable charges for the care and storage of the vehicle are a lien on the vehicle in favour of the proprietor of the place where the vehicle is stored. Thus, I find no inconsistency.

The applicant argued that Section 296 of the Motor Vehicles Act imposes the liability for costs on the police force or municipality. But that applies only in the case of a seizure made under Section 295 of the Act for purposes of investigating a contravention of the Act. It does not apply to the removal and impoundment of vehicles pursuant to a by-law regulating parking.

Finally, the applicant argues that there are no notice requirements in the by-law. In my opinion, this does not affect the validity of the by-law. Notice requirements are set out in Section 301 of the Motor Vehicles Act and the officer effecting the seizure has to comply with them.

Therefore, for all of these reasons, the application to declare the by-law invalid is dismissed.

Certified correct to the best of my skill and ability.



Joel Bowker, CSR(A)
Court Reporter

APPENDIX

REMOVAL OF OFFENDING VEHICLE

36. (a) Any peace officer may remove, or cause to be removed, any vehicle from a highway at the risk and expense of the owner of such vehicle to the nearest garage or other place of safety where such motor vehicle is parked in contravention of this by-law.

(b) Any peace officer may remove, or cause to be removed, any vehicle that is:

(i) inoperable, wrecked or dismantled,

(ii) not located in a building, and

(iii) does not form part of a business lawfully operated on the premises

at the risk and expense of the owner, occupant or person in charge or care of the vehicle, and without liability to the owner of the premises from which the vehicle was removed.

(c) A motor vehicle parked on private property without the consent of the owner, occupier or person in charge of such property may be removed and impounded upon the request in Form 1, attached to and forming part of this By-Law, of the owner occupier or person in charge of the property to a peace officer.

(d) Any vehicle removed as provided for in sub-section [36(b)] may be disposed of as directed by the Director of Public Works and Planning upon the expiry of thirty (30) days from the date of removal.

(e) Any motor vehicle removed from a highway, as provided for by this section, shall be held at the risk and expense of the owner of the vehicle by a peace officer or authorized delegate until the reasonable expenses for removal and storage of the vehicle have been paid to the Senior Administrative Officer during normal business hours or, in the case of a vehicle removed pursuant to sub-section [36(b)], upon the expiry of thirty (30) days from the date of removal.

(f) Where a peace officer has authorized the removal of a motor vehicle from a highway, and the owner of the motor vehicle can be reasonably ascertained, such owner shall be notified of the removal of the vehicle and of the removal and storage costs, within seven (7) days of the motor vehicle being moved and stored.