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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

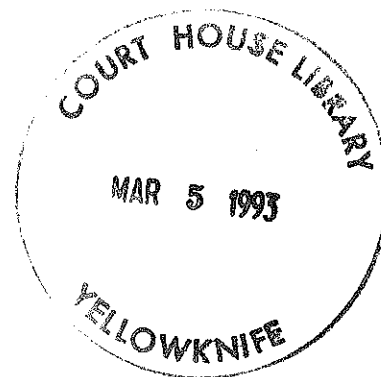
B E T W E E N:

CITY OF YELLOWKNIFE

- and -

GARY J. BOYD

Defendant



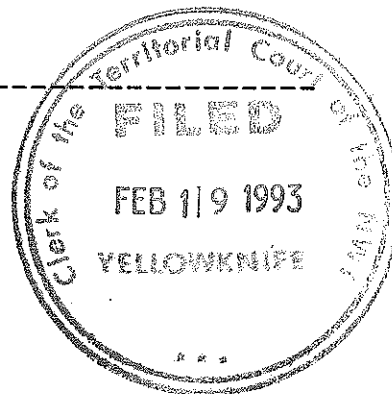
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Yellowknife City Parking Meter By-Law  
Section 6(1) and Section 11(2) - Charge Dismissed  
Heard at Yellowknife, N.W.T.

Reasons Filed: February 19, 1993

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REASONS FOR JUDGMENT

OF

HIS HONOUR JUDGE THOMAS B. DAVIS



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Counsel for the Plaintiff: Earl D. Johnson, Q. C.

Counsel for the Defendant: James Brydon Esq. and  
Diana Rutschmann, Articled Clerk

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

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FACTS:

In this case, under the Yellowknife (City) Parking Meter By-Law, the defendant was the registered owner of a motor vehicle on the 23rd day of May, 1991 when it had been ticketed by a City by-law officer for parking at a meter after any metered time had expired and the red flag was exposed on the parking meter.

The officer placed a parking violation ticket on the windshield of the vehicle, which may have been driven on that date by a person who often operated the vehicle when she was employed as a nanny for the defendant's children.

The defendant had not seen the original ticket but the officer stated that on August 18, 1991, a summons was left at the residence of the defendant, that being about three months after the meter violation.

The City by-law officers gave evidence about the numbers of motor vehicles in the City and about the numbers of parking meters, parking spaces, loading zones, taxi stalls and handicapped zones that exist in the downtown business district.

Evidence was presented about the number of City staff required to administer and enforce the Parking Meter By-law for six days per week and the revenue generated from such meters.

I am satisfied that, by such evidence, the City has proven the need for parking meters to effectively control and regulate parking spaces for the overall convenience of the people in the City of Yellowknife.

I acknowledge, for reasons stated in **R. v. Budget Car Rentals**, that if the municipal government has been authorized to pass by-laws respecting the use of parking meters and regulating parking at spaces controlled by parking meters, the courts should recognize the practical need to hold owners of vehicles liable to penalties imposed for parking meter violations.

In **R. v. Budget Car Rentals**, 1981, 31 Ontario Reports (2d) 161, the Court of Appeal held that an owner of a vehicle who is given proper notice of a parking meter violation involving that person's vehicle, and who then has open to him the full range of defences under the **Ontario Summary Offence Act**, can be found guilty of an offence and can be held liable for the payment of the fine imposed for that violation of a parking meter ticket even if the owner was not the driver at the time the offence was committed.

The Ontario Court of Appeal directs that a court must place a reasonable construction on the language of a statute in attempting to give effect to the intention of the legislature.

CITY BY-LAW:

City of Yellowknife By-law 2617 is known as the Parking Meter By-Law and was passed in 1980 with amendments being made by subsequent by-laws numbered 3431, 3433, 3144 and 3056.

The by-laws impose a minimum of \$30.00 and a maximum of \$5,000.00 as a fine or imprisonment for up to six months, or to both for a finding of guilt on violating Section 6 of the by-law if a voluntary penalty of \$5.00 has not been paid to the City.

The **Motor Vehicles Act of the N.W.T.**, Section 347 (1)(i) and (j) authorizes councils to appoint persons to enforce by-laws regulating the parking of vehicles. I take this section to mean the control by parking meters over parking meter spaces, as well as parking spaces designated by other means.

SERVICE:

A peace officer is deemed to effect personal service on a person charged with a violation of the Parking Meter By-law or on the owner of a vehicle if a ticket (summons) is delivered to the vehicle under Section 10 (3)(b) of the **Summary Convictions Procedures Act**, Chapter S-15 of the Northwest Territories.

I am satisfied that the referral in the authorizing territorial legislation in the N.W.T., that being the **Motor Vehicles Act**, Chapter M-16, Section 347, is sufficient statutory authority for the City to enforce its Parking Meter By-law.

VOLUNTARY PENALTY:

Mr. Justice Linden, in Re: **McCutcheon and The City of Toronto**, 1983, 147 O.L.R. 193, accepted as reasonable a scheme whereby a person may make a voluntary payment of part of the fine for such a

violation in order to avoid attendance in court. The court found that such a voluntary payment scheme did not offend the Charter so long as an alleged transgressor who refuses to make such a voluntary payment can go to trial in defence of the charge.

I am satisfied that the scheme for voluntary payment within a limited time of part of the minimum fine imposed under the by-law or statute is in fact a convenience to the public and eliminates much administrative time and expense to all concerned and does not offend the Charter.

BY-LAWS SUBJECT TO THE CHARTER:

Municipal by-laws were found to be subject to the Charter by Mr. Justice Linden in a reference by McCutcheon to quash parts of a City of Toronto parking by-law as reported in 1983, 147, D.L.R. (3d) 193. A person charged with a parking infraction under a by-law may claim the benefits of Section 11 of the Charter which presumes innocence until guilt has been proven, and affords a guilty person the maximum extent of the punishment available at the time of the offence but no additional penalty subsequently authorized by statute.

I accept Justice Linden's finding that Section 11 of the Charter, however, does not apply to a scheme whereby the early voluntary payment for a parking meter ticket can be made by the offender to prevent a prosecution or so as to avoid a higher penalty for later payment or upon a subsequent conviction for a parking meter violation.

If the early voluntary payment is less than the minimum fine for the offence, it is not a punishment but is an incentive for early payment, and as such is not subject to Section 11(i) of the Charter.

DELAY:

No evidence was presented by the defence that the accused was prejudiced in defending the charge due to a delay in service of the summons, other than the limitation imposed by the by-law, which eliminates the opportunity to pay only \$5.00 voluntarily rather than the \$30.00 minimum fine. I do not find that there is any ground on which to make any finding adverse to the City resulting only from the delay in serving the accused.

YELLOWKNIFE PARKING METER BY-LAW:

Section 6(1) reads as follows:

- "6. (1) Save as otherwise provided by law no vehicle shall be parked or allowed to remain parked, in a metered space while the disc or violation signal of the governing meter shows red, during the period commencing at nine o'clock in the forenoon and ending as of six o'clock in the afternoon on the day to which this by-law applies."

Section 11(2) as amended reads as follows:

- "11. (2) The owner of every vehicle which is parked or which is allowed to remain parked in contravention of Subsection (1) or Subsection (2) of Section 6 of this by-law is guilty of an offence and is liable on summary conviction to a fine not less than thirty dollars (\$30.00) and not exceeding five thousand dollars (\$5,000.00) or to imprisonment for a term not exceeding six (6) months or to both."

SUMMARY OF THE LAW:

A law that provides for imprisonment upon failure to pay a fine is not a trivial matter. Imprisonment resulting from statutorily imposed vicarious liability is not in accordance with principles of fundamental justice in matters of a criminal or quasi criminal nature without some protection being provided by affording the accused person the full opportunity to defend the charge on any legal basis available to that accused person, including the defence of due diligence and reasonable mistake of fact.

Potential for imprisonment is nothing more than a possibility which could develop into an actuality. If a potential exists, then the necessity of extraneous forces being required to change the potential into an actuality does not remove the existence of that potential.

The following cases, which have been disposed of differently by various Appeal Courts, have been the basis for my finding that the Yellowknife By-law is inconsistent with and offends Section 7 of the Charter, in that it is written as an absolute liability on the owner which could result in imprisonment without allowing the owner the full range of defences available in the law.

NO FORCE AND EFFECT:

I agree with Bayda, C.J.S., that where a by-law or statute provides for imprisonment as an alternative to non-payment of a fine, the potential for imprisonment for a conviction is real. *R. v. Burt*, 1988, 1 W.W.R. 385.

The court found that Section 7 of the Charter precluded the legislative body from passing a law which offends the principles of fundamental justice 'only' where that law deprives a person of his right to life, liberty and security. Neither absolute liability nor vicarious liability can be combined with imprisonment. To the extent that the by-law or statute is inconsistent with the provisions of the Constitution, it is of no force and effect.

Mr. Justice Linden in *Re: McCutcheon and The City of Toronto*, (supra) followed the Appeal Court of Ontario in *Federal Republic of Germany v. Rauca*, 1982, 38 O.R. (2d) 705, 70 C.C.C. (2d) 416 to find that the term "prescribed by law" in the Charter includes municipal by-laws.

I accept his finding that a municipal by-law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

The Ontario Court of Appeal also found that the section of the Highway Traffic Act which provides that the owner of a vehicle may be convicted of an offence for which the driver was responsible, unless the vehicle was in the driver's possession without the consent of the owner, was of no force and effect by reason of Section 7 of the Charter. The section under consideration in conjunction with other sections of the Act could result in imprisonment upon conviction. R. v. Pellerin, 1989, 47 C.C.C. (3d) 35.

The court upheld the dismissal of the charge following trial, by dismissing the appeal by Crown.

DISMISSALS BY APPEAL COURTS:

Mr. Justice Armstrong, in *The Town of Kindersley v. Boisvert*, 1986, 6 W.W.R. 636, made a finding that the only penalty for a violation of a parking by-law was a fine, and that to apply Section 7 of the Charter to parking by-law violations would trivialize the use in the courts of the Charter. On that basis he upheld the by-law that made an owner of the vehicle liable for the breach, no matter who had been the operator.

This position seems to have been opposite to a subsequent decision by Mr. Justice McLellan in *R. v. Hanson*, 1987, 65 Sask. R. 127, when he dealt with two more serious offences on appeal. He held the sections of the Motor Vehicles Act to be subject to the Charter and approved the dismissal of both charges. He found the charges were inoperative because the Motor Vehicles Act held a registered



owner vicariously liable to the potential penalty of imprisonment, thereby violating Section 7 of the Charter by breaching the person's right not to be deprived of life, liberty and security except in accordance with the principles of fundamental justice.

I prefer the decision of Mr. Justice McLellan for cases where there is either a direct possible penalty of jail upon conviction or where jail is a potential penalty upon failure to pay a fine.

Judge Cacchione in *R. v. Doyle*, 1988, 84 N.S.R. (2d) 1, found that sections of the **Motor Vehicles Act** which made an owner of a vehicle vicariously liable for the acts of the driver and imposed a fine or imprisonment upon default were inconsistent with Section 7 of the Charter and to the extent of that inconsistency were of no force and effect. On appeal, he entered a verdict of not guilty.

On an appeal to the Saskatchewan Queen's Bench, McLellan, J. in *R. v. Hanson*, 1987, 65 Sask. R. 127 held that the vicarious liability of an owner of a vehicles for the violations of the **Motor Vehicles Act** to be inoperative as it contravened Section 7 of the Charter by failing to allow the owner defences other than to show that the driver was operating the vehicle without the consent of the owner. The Appeal Court upheld the dismissal of the charges.

REMITTALS FOR TRIALS BY APPEAL COURTS:

In a recent decision, *R. v. Rube*, of the Supreme Court of Canada, 1993, 1 W.W.R. 385, the Chief Justice confirmed that the wording in a statute is open to interpretation if it does not explicitly exclude a defence of due diligence. The court presumes that parliament intends its legislation to conform to the exigencies of the Charter and that a statute imposing severe penalties could not, without offending the Charter, be one of absolute liability. The court confirmed that Sections 5(1) of the **Food and Drugs Act** must

be classified as a strict liability offence, with due diligence being available as a defence to the accused.

In *R. v. Rube* the Trial Judge, in determining that two Sections of the **Food and Drugs Act** were absolute liability offences which offended Section 7 of the **Canadian Charter of Rights and Freedoms** and were therefore unconstitutional, entered a stay of proceedings.

On appeal, the sections of the Act were determined to be strict liability offences (that being upheld by the Supreme Court of Canada) and the charges were remitted to the Trial Court for a hearing on the merits of the case.

The Appeal Court of British Columbia in *R. v. Alston*, 1985, 22 C.C.C. (3d) 563 found that the provisions of Section 88(2) of the **Motor Vehicles Act**, attributing knowledge to a driver by the filing in court of a certificate from the superintendent, violated a person's right to be presumed innocent until proven guilty. The court referred the matter back for a new trial.

In *R. v. Williams*, 1992, 14 C.R. (4th) 218, Chipman, J.A. directed that the absolute liability offence of speeding, carrying a minimum fine and imprisonment in default, offends the **Charter** and must be treated as an offence of strict liability.

Because the accused had not lead evidence directed to a defence of due diligence or reasonable mistake of fact at the trial, and such defences should be available to an accused person, the court set aside the conviction and ordered a new trial.

Having noted that some Appeal Courts, when considering similar charges to that before me, have dismissed appeals resulting in confirmations of acquittals, while other courts have found similar


legislation to have no force and effect, thereby also effectively confirming acquittals, while other courts in more recent decisions have referred charges back to the Trial Court to be dealt with as strict liability offences rather than absolute liability offences, there appears to be a variety of ways that I might deal with this matter.

Although in most circumstances it would be more appropriate to refer more serious charges back to the Trial Court, I recognize that the accused before me has had the burden of presenting not only a defence at trial but of submitting legal argument requiring substantial research on a changing, or at least a recently changed, field of law. His defence was presented in compliance with the terms of the by-law as it was written.

At this time I find that it is appropriate to dismiss this charge, which is of a minor nature, rather than attempt to reopen the case for trials so as to allow the parties to submit further evidence to be then assessed by the court on the same charge, but reading into the by-law the right of the accused to use additional defences which should be available to him.

I wish to thank counsel for the valuable submissions made to me and for their research and documentation provided in support of their submissions.

The charge is dismissed.

  
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JUDGE THOMAS B. DAVIS