

R. v. Pyle
Between
Her Majesty the Queen, and
Andrew Pyle

[2008] O.J. No. 5359
Information No. 999 07-0794
Ontario Court of Justice
Peterborough, Ontario

G. Wakefield J.

Heard: September 23, 2008.

Oral judgment: September 23, 2008.

(107 paras.)

Criminal law — Regulatory offences — Defences — Due diligence — Appeal of a conviction for allowing dogs to escape from their kennel contrary to the city by-law allowed — The defendant argued that as a strict liability offence, he should have been able to argue the defence of due diligence — The defendant established on a balance of probabilities that he had taken all reasonable steps to prevent the escape.

Appeal of a conviction for allowing dogs to escape from their kennel contrary to the city by-law. The parties agreed that the trial judge erred by characterizing the offence as an absolute liability offence rather than a strict liability offence. The defendant argued that as the offence was one of strict liability he had the defence of due diligence open to him and that he had taken all reasonable steps to prevent the dogs from escaping.

HELD: Appeal allowed. The defendant established on a balance of probabilities that he had taken all reasonable steps to prevent the escape.

Statutes, Regulations and Rules Cited:

Peterborough Municipal Code, s. 192.7.1(a)

Charges: s. 192.7.1(a), Peterborough Municipal Code -- Dog at Large.

Counsel:

A. Fordham: Counsel for the Provincial Crown.

M. Greco: Counsel for Mr. Pyle.

PROCEEDINGS

G. WAKEFIELD J. (orally):--

1 MR. FORDHAM: Good morning.

2 THE COURT: Good morning.

3 With a little bit of effort the justice secretary was able to get a copy of the transcript emailed to me of the trials so I've actually read that now.

4 MR. FORDHAM: Okay.

5 THE COURT: I've read the transcript of the August 19th, proceedings before Justice Graydon, where the Crown there took certain positions. And I believe on the last occasion before me it was forecast that the issue wasn't necessarily the Crown contesting whether or not there was an error in law and whether or not the appeal should be granted or not, but the fact I think defence wanted an opportunity to say that there would be a finding of fact based on that point today as opposed to it being remitted back to trial. Have I got basically where everybody is at so far?

6 MR. FORDHAM: Thank you. I believe so, and just for clarify, appearing on behalf of the Crown, Fordham, initial 'A'.

7 THE COURT: I should have let you introduce yourself.

8 MR. FORDHAM: Certainly. That is a very fair summary, yes. I understand Mr. Hughes, on behalf of the Crown, after discussion as you've indicated back in August, did take the position that the Crown's agreeing there was an error in law, that it's not an absolute liability. It is strict. And you're very fair in your portrayal of it. Mr. Greco is seeking a finding that there was a due diligence defence made out. The Crown is taking the position that there was not, and even though there was an error in law, the conviction should stand.

9 MR. GRECO: The facts, sir that had to have been heard have been heard. I don't think there's anything more Mr. Pyle could add to a new trial that would further advance his case.

10 Sir, in summarizing the evidence - in the evidence in-chief - we're dealing with a dog owner in Mr. Pyle who owned his dogs two to six years respectively. He was aware that these dogs by breed are prone to want to escape. He knew he was moving to Peterborough. He was aware of the legal requirements to keep these dogs properly contained. Prior to moving into the new home he took possession of the property two weeks early for the purpose of making preparations to facilitate these dogs. He hired a fencing company to erect a perimeter fence as well as to build a dog kennel; that being 50 by 40 foot chain link five foot high enclosure - we heard in the evidence in-chief - at a cost of approximately \$5,000.

11 THE COURT: Including reinforcing the bottom of the gate ...

12 MR. GRECO: Exactly.

13 THE COURT: ... after examining it first.

14 MR. GRECO: Exactly. And adding additional clips and pouring the entire perimeter of cement and trying to imagine as best he can any possible escape routes the dogs may try to employ. And he did a lot of this work himself. He did hire a professional for the balance of it and states that in his opinion as he was moving through these steps that he believed he was acting diligently and doing everything he could do as a responsible dog owner to properly maintain his dogs. He even has an explanation as per how the dogs were able to get out in finding that proverbial one in a million one weak link in the chain, they were able to prop their body underneath the gate, force it open about ten inches where the dogs were able to escape. And I'd like to point out that the latch lock itself did not fail. It was simply a bending of the gate itself. And he couldn't have imagined that would've happened. I suppose in his physical examination it felt sturdy enough to him when he inspected it and add in his extra clips etcetera. The contractor - the professional he relied on did

not express any concern with respect to the stability and the ability for this enclosure to keep these dogs ...

15 THE COURT: I understand it's the same contractor that the appellant used in a previous residence without any difficulty.

16 MR. GRECO: Exactly sir. That being said, I'm suggesting that the evidence in-chief demonstrated that Mr. Pyle did everything that a reasonable and prudent person would do in similar circumstances, and actually gone beyond that threshold in comparison to what we normally hear of dog related escape matters. The cross-examination, sir, was actually in assist to the defendant in my respectful opinion. Twice the prosecutor with respect to that case applauds the defendant's efforts in reasonable dog ownership, and I think it's difficult to say the man is morally guilty of an offence when you've just - by your opening and closing statements - complimenting his efforts in attempting to be responsible in proper dog care. And through the cross-examination we were able to establish a number of additional steps taken by the accused in trying to secure this compound and in his instructions to the contractor themselves.

17 As far as the law is concerned, I do appreciate the Crown's position in conceding that there was an error in law and I do appreciate the Crown's position in agreeing that this is a strict liability offence. I think our interpretation though of that standard is different and that's the issue we're bringing to you today, sir. I think the court had closed its mind to the possibility of due diligence so none of that argument was fleshed out in the judgment itself, as the court had already closed its mind to the possibility that there could be a due diligence defence. The three cases I've included in my factum, sir, I think speak to the point. In *R. v. Sault Ste. Marie*, [\[1978\] 2 S.C.R. 1299](#), I believe would be my leading case, Supreme Court decision, and this may very well be the leading case with respect to all Provincial Offences matters in this country certainly quoted on a number of different references, sir. If we were to look at - there's a few sections in this case I'm going to ask the court to consider. One would be the general principle laid out at the very bottom of page five, and this is where the court draws on - it would be the last three quarters of the last sentence where the court references that, "There is generally a revulsion against the punishment of the morally innocent." It's that one sentence that I'd like to bring to the court's attention because I believe the defendant in the case before the court is morally innocent when we consider the standard of this offence. On page six, sir, if we were to draw to - I believe it's the third paragraph down - it's the paragraph that begins with, "Arguments greater force", and if we look several sentences in there's a sentence that begins with the term, "If a person is already taking every reasonable and precautionary measure" - I'll allow the court to find that.

18 THE COURT: Already found it.

19 MR. GRECO: Thank you.

- "He is likely to take additional measures knowing that however much care he takes it will not serve as a defence in event of a breach. If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of a conviction lead to Sinicism and disrespect for the law on his part and on the part of others?"

20 And with respect, sir, I suggest that that meets this case at bar virtually a hundred percent. Mr. Pyle is morally innocent. He has acted diligently. General and specific deterrents were both touched on in the transcript, sir, and submissions made by defence. Mr. Pyle can't be deterred. He believed he did everything a human being could do in the circumstances. To punish him accomplishes nothing, and as far as general deterrence is concerned, what are we telling the community in a whole? All of us, try as hard as you may, make every effort a person could, try to foresee the wrongs, try to address them early irregardless of all the positive efforts you make, you may very well be convicted of an offence. And I do believe that would lead to the sinicism and disrespect for the law that the Supreme Court of Canada drew upon in this case.

21 If I could please move on with respect to this case on page nine. My apologies - page 12. This is where in the second paragraph we see this quotation a number of times in a Provincial offences matter where the court expresses and defines what the three classic offences are. Paragraph two would be the definition of a strict liability offence, but before we get there, at the very top of the page I'm going to read, "While the prosecution must prove beyond a reasonable doubt that the defendant has committed the prohibited act" - and on a prima facie basis, sir, we had no contest - the dogs had a stake. The Crown had proved their prima facie case. "The defendant must only establish on the balance of probabilities that he has a defence of reasonable care." And moving onto that second paragraph sub two - this is where the court defines what the standard is in order to defend yourself.

- "Leaving it open to the accused to avoid liability by proving that he took all reasonable care".

22 And I please ask for emphasis on "reasonable".

- "This involves a consideration of what a reasonable man would do or would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which if true would render the act or omission innocent or if he took all reasonable steps to avoid the particular event."

23 With respect, Mr. Pyle has done that in mass over and over again. He has done everything and beyond what a reasonable and prudent person would do in trying to enclose dogs. He hired a contractor, gave specific instructions and then personally followed up on the matter himself. And that would be drawing to R. v. Sault Ste. Marie - if I may speak to my other two cases very briefly - R. v. Kanda - that is a Court of Appeal decision, [\[2008\] O.J. No. 80](#), I believe a unanimous decision. This involved a seatbelt, sir, and with respect to a father who had latched his children, who had made sure that they were latched before departing, it's presumed that one of the children had removed his seatbelt which formed the offence before the court. And in that case on paragraph 39 on page six the court examined this charge. In addressing the standard of the offence directed that the "Prescribed conduct resulted directly" - sorry - "That this prescribed conduct in the comparison case resulted directly from a person's own action." In this case it deals with a situation in which another person - the child passenger - is potentially involved in creating the violation, and I think that has bearing in this case because it wasn't the defendant's actions that caused the dog to escape. The dogs contributed. They essentially unbuckled the seat. They found the weak point and were able to escape.

24 My last case, sir, in R. v. Hickey just simply reinforces the standard as laid down by the Supreme Court of Canada, and again addresses the standard that one being on a reasonable ground in a state of facts of true it's reasonable ground, sir. It's a balance of probabilities. This is not the defendant having to prove his diligence beyond a reasonable doubt, and I'm going to respectfully submit that Mr. Pyle has come pretty close to that threshold as well.

25 The Sault Ste. Marie case, sir, being the leading case, I'm going to submit the facts are somewhat similar in that the corporate defendant hired and assigned a task of waste management to the trust of a waste management company. And through the course of the trial in Sault Ste. Marie all the potentials should've done, could've done were examined as far as other additional steps that the corporation defendant may have taken, but the court ruled that on a balance of probabilities the defence of reasonable care if raised, would succeed, and that was simply by assigning the task, not by personally inspecting the work and the continual efforts of the company that was hired. In Mr. Pyle's case, he went well beyond simply hiring a professional to build a fence. He took many additional steps over and above and proves his diligence in doing so.

26 So in this case, sir, I'm asking if the court feels on a balance of probabilities, on a 51 percent standard, that the defendant acted diligently. The court would have to accept that the evidence tendered by Mr. Pyle was honest, and if the court feels that Mr. Pyle was honest, was he acting on reasonable grounds? Which would then cause if the court accepts that he was being reasonable and prudent, that would make his conduct innocent. And if the court accepts that, based on the precedence put before the court now that he did take reasonable care - he was prudent - this is not a standard of the utmost perfection. To stand here today, hindsight's always twenty twenty, sir. We can draw all kinds of potentials he could have done and steps that he has taken since then. That's not what the standard is today. We have to look at the mindset of the accused on the offence date and the actions taken prior. Does the court feel that's reasonable and prudent? I think it comes down to common sense. I don't own a dog myself, sir, but I've dealt with a number of these types of matters, and I've seen - we have a problem in Peterborough - we have a number of dogs running at large and escaping because people don't take the type of actions and care as much as Mr. Pyle has cared to do all the things he has done. I think given the additional reinforcements that were prescribed at the human society he certainly won't be before the court again, but it's my respectful submission, sir, that he has established due diligence in abundance. Pending any questions you may have, sir, those would be my comments.

27 THE COURT: You are in agreement that the elements of the offence ...

28 MR. GRECO: They were of a prima facie case.

29 THE COURT: And the only issue for me is whether or not the defence has been made out.

30 MR. GRECO: Yes, sir.

31 THE COURT: Okay. Thank you.

32 MR. GRECO: Thank you.

33 THE COURT: Which would then lead me to ask you to focus not on the elements, because clearly that's not issue, but what sounds like the one test of on a balance of probabilities have reasonable efforts been made.

34 MR. FORDHAM: Yes. Thank you. And in responding to that, Your Honour, certainly there is a great deal of evidence that was heard. He hired a contractor. In lieu of wire he had post put at the bottom the fencing. Subsequent to that he put a concrete pad in. But as we go through the evidence, and he's asked on page 31 at line 24 of the transcript by Mr. Greco, "Did the contractor who installed the fencing system warn you that the gate would be a weak point for the dogs to escape?" And the answer is, "No". Well, whether the installer warned him or not it goes back to what queries did he pose to the installer. In fact, as Mr. Greco points out, he's hired him. He's directing what's being done. The appellant in this matter made it abundantly clear at trial that he governed how the structure was built. Instead of the wire at the top and bottom through the chain link he chose to go to the posts with the clips to tie it in. And if we look further, in fact, Mr. Greco says he gave specific instructions. Well, if he's governing it then we can no longer rely upon the contractor didn't tell him. He assumes full responsibility for that conduct. So it then comes down to did he act as a reasonable man would. Well, in fact, yes, he's built the compound. Yes, he's put a concrete pad in and he put the pad in because these dogs are known to dig. They're known to try and get out through the bottom. What we never heard through the testimony was in fact, that he ever turned his mind towards that gate. He turned it towards the fence structure itself, but there's no evidence of him truly turning his mind towards the gate and whether or not knowing that these animals try to get out through the bottom area of the compound, that there were steps taken to ensure that that could not occur through the gate. That's what's missing. In fact, Mr. Staples, as the prosecutor that day, goes on and actually asks on page 35 of the transcript at line six, "Are you familiar with the term called a "came bolt"? I have to admit when I read the transcript I had to first say, "What's a came bolt?" The individual says, "Came bolt? No, I'm not". He goes onto say what it is. The individual then becomes familiar with it. And this becomes in my submission, somewhat crucial. Here's a mechanism that could have been placed at the bottom of the gate where we know that these animals would be likely to try and escape from because we've already built the rest of the compound to try and prevent escape through the base and it wasn't taken. We haven't heard any evidence aside from blaming the contractor in some capacity of not telling us the gate could be a weak point. It's his compound. It was built based on what appears in the transcript to be by his specifications because there's no evidence called showing that he actually relied upon advice of this individual being in the fencing industry for years; simply, "He built another compound for me in Bethany." In fact there's no evidence even led as to whether it was the appellant who gave direction on that one or whether he relied upon this individual for his expert knowledge. And I appreciate it's on the balance of probabilities, but when you start to move forward it's for the appellant to put forward the defence; it's not for the crown to test it until it's truly out there. There wasn't, in my respectful submission, enough evidence called to cause the Crown to have to test it, and there's not enough that was called towards this point to demonstrate that he relied upon advice of an expert nature that was - caused him to take the steps he did. In fact it appears from the transcript that he did govern the conduct of how things were put in. He did the concrete himself after the fact. The court was very right in their analysis about what the gate is. It was the weakest point, and it goes back to the analysis of a chain is only as strong as the weakest link. That was a weak link. There's no evidence that there was ever consideration of that gate itself as to whether the animals could or could not get out through the

bottom, and whether or not as we made all these other modifications of the post at the top and bottom of the fencing and the concrete padding, if something should be done there. Had there been evidence of consideration, I would suggest that then the defence of due diligence may have been made out, but in the absence of that evidence I would suggest it's not. Subject to any questions, those would be my comments.

35 THE COURT: I have a couple of questions.

36 MR. FORDHAM: Yes.

37 THE COURT: Actually I'll just ask you one more question about that last submission. If there had been evidence of consideration for a came bolt in the testimony ...

38 MR. FORDHAM: Yes?

39 THE COURT: And no came bolt was installed, would that not be the contrary to evidence of due diligence, but evidence of not meeting due diligence standards because you knew of an additional security measure and elected not to utilize it.

40 MR. FORDHAM: I would say that it could be, and it depends upon the source upon which you seek that guidance from and what knowledge you have. An example being, this individual knows of these animals and knows of their nature that they're prone to try and escape through any means. So the installation of the came bolt to reject it I would say is an individual who doesn't act with due diligence once it's now been brought to his attention. Certainly if it's - and I don't want to disparage individuals who have smaller dogs, but a Shitzshu, as an example - I don't see this as an animal that if somebody were to say, "Well, have you thought about putting a came bolt in?", that to neglect to do so would constitute a lack of due diligence. It's not a dog that from my understanding is known to have the strength and propensity to push a gate apart or push it out enough for them to escape, and that's the issue here is they were known to escape. They were known to be prone to it, and they were known to engage in escape at that level of the fencing area.

41 THE COURT: In other words, every case is fact dependent.

42 MR. FORDHAM: It's very fact driven, certainly, sir.

43 THE COURT: And then are we in agreement that the learned Justice of the Peace at page 44 of the transcript - just after line 15 - when canvassed - having made the determination it's an absolute liability, goes onto say, "I would suggest even if a due diligence defence was applicable here, had he gone to every reasonable effort he would certainly not be here today." If I understand that paragraph correctly being the test of due diligence being applied, were to be applied. Do you adopt that or do you agree that perhaps it's a result driven test that the due diligence is not met if there's been an escape as opposed to assessing - again, as I understand it, the test whether the defendant had an honest and on reasonable grounds of belief in a state of facts which if true would have made this conduct innocent, which I would suggest is a lesser standard to meet than as I understand that particular paragraph.

44 MR. FORDHAM: I would say that certainly, yes, His Worship in that matter did impose somewhat of a higher standard than that which the courts have set out in the test. An escape becomes a component by which the court can perform their analysis,

but it is truly fact driven. Even if there hadn't been an escape, were the steps taken? The escape is what drew the investigation to bring about the analyses.

45 THE COURT: That triggers the charge.

46 MR. FORDHAM: But even if there was no escape, the question is had they taken the steps of a reasonable man?

47 THE COURT: On a slightly different note - and I'll get back to a couple of other things in a second - I was confused as to the calculation of the fine. As I understand it there's just the one count at trial?

48 MR. FORDHAM: Yes.

49 THE COURT: ... of the bylaw breach, and if Mr. Greco's submissions were correct at trial that there was a set fine of \$105 for the offence, and we ended up I gather with I think the \$250 per dog count.

50 MR. GRECO: Three hundred dollars per dog.

51 THE COURT: Three hundred dollars per dog?

52 MR. FORDHAM: Two hundred and fifty for each dog and I'm looking at the transcript at page 46.

53 THE COURT: Yea. The prosecutor was seeking \$300 for each offence.

54 MR. FORDHAM: Yes.

55 THE COURT: And I think Mr. Greco then reminds everybody there was just one offence, and His Worship imposed a fine of \$250 for each dog.

56 MR. FORDHAM: Yes.

57 THE COURT: Would that also be something that would not be founded in the bylaw penalties whether it should just be a one \$105 penalty if found guilty of the offence? And I'm hesitating here because ...

58 MR. FORDHAM: Yes.

59 THE COURT: His Worship is clearly far more experienced in Provincial offence matters and bylaw matters than I am, and I'm treading very delicately here and mostly seeking some guidance from you.

60 MR. FORDHAM: Thank you.

61 THE COURT: Whether that is an appropriate disposition on what is permitted by the by-law or not.

62 MR. FORDHAM: Thank you. With respect to the fine structure itself under the Provincial Offences Act, the set fine is set by the Chief Justice. The purpose of a set fine is to be an out of court settlement, whereby it is a reflection of your acknowledgment and ownership of your actions, and it provides an effective means for you to have a penalty imposed without going to court. There are various decisions around that deal with the fact that once you elect to have a trial then that

set fine is no longer applicable. The court then balances in their mind whether or not is there a prejudice to the individual if I impose a higher penalty because am I then punishing them for having come and elect to have a trial and exercise their right to defend themselves. So I'm not going to go too far because ...

63 THE COURT: No, just that it was open for him to come to those numbers.

64 MR. FORDHAM: It was open to him and to consider the totality of it, certainly in terms of the number of animals and then assess a penalty appropriate on that, whether it be one animal or two animals, we're dealing with an issue of well, should we elected to have two charges or should we have elected to have one charge and let the court assess a penalty in totality of the facts they heard. And I don't know - I think Mr. Greco - I don't know if he has a comment to my analysis there.

65 MR. GRECO: I didn't speak to the issue of the fine, sir, because as our position is that the conviction on its face was in error, I felt the issue of sentence became moot. Certainly there was an error in my respectful submission with no record, no prior incident, with a DOLA - a dog owners, liability mechanism built in for a civil remedy for the loss of the cat - that I felt it was excessive given the circumstances. I certainly felt the Justice of the Peace would've imposed a much higher standard than appropriate for the due diligence defence, especially on page 44 when suggesting ...

66 MR. FORDHAM: Well, actually I'm just going to stop - I was just offering him the opportunity to speak on my analysis of the fine.

67 THE COURT: I was about to interrupt myself.

68 MR. GRECO: Thank you.

69 THE COURT: In terms of the one issue that it was open to His Worship to assess those numbers ...

70 MR. GRECO: As far as being able to impose the higher fine that is in his power, yes.

71 THE COURT: That's all I really wanted to clarify. The other question I have for you is this - how do you propose I deal with both the prosecutor at trial ...

72 MR. FORDHAM: Yes.

73 THE COURT: ... essentially, and it comes through on Mr. Greco's factum, I'm just trying to find the beginning of the ...

74 MR. FORDHAM: The two comments of applaud?

75 THE COURT: The beginning of the cross-examination just so I can refresh my memory. But, yea, "We applaud your efforts for your attempts at responsible dog ownership", which I think is - can be looked at as at least a concession in balancing whether or not reasonable efforts were made, and then I add to that His Worship's comment on page 43,

- "We have heard evidence today to the extent to which you've gone to prevent the dogs from escaping, steps taken certainly prior to this event - extensive efforts as evidenced by photographs and the testimony given, significant costs involved."

76 Which I interpret as essentially a finding of fact by His Worship as extensive and significant efforts being made on the part of the defendant.

77 MR. FORDHAM: yes.

78 THE COURT: Would you agree that - those are findings that I can rely upon in making a final determination here?

79 MR. FORDHAM: Dealing with the comments, firstly, of the prosecutor ...

80 THE COURT: And I appreciate that sometimes hyperbole and a starting step up so to speak in your cross-examination of any witness, and if you're going to suggest that I don't put too much weight on that ...

81 MR. FORDHAM: And that's the difficulty with reading transcripts is what starts out as a matter of stability in the courtroom sometimes you know can then paint a different picture afterwards, and an example being if I were to look at page 14 of the transcript at the start of Mr. Greco's examination when speaking to the Human society officer he starts out, "Good afternoon, Constable", so in fact he identifies him as a police officer. There's things that upon the record that as they're read after the fact could take on interpretation that they don't have or were meant to take on at the time, and I would suggest that certainly with the opening of the cross-examination it's matter of stability that was being put forward and a matter to politeness to start out the cross-examination that certainly allows that rapport to be built. With respect to His Worship's comments, yes, there was extensive evidence heard, and that is what he weighed, but even with extensive evidence called it's a very simple test that he's applying. We can call hours of evidence, which would bring us to extensive - but at the end of the day was he satisfied the test had been met?

82 THE COURT: Okay. Thank you. Is there anything further?

83 MR. FORDHAM: Thank you.

84 MR. GRECO: If I could, please. When my friend touched upon the issue of instructing the contractor, I'd just would like to remind the court that in cross-examination that issue was raised and it was the instruction my apologies - of the court - and I just missed my page sorry. But the court did instruct or the defendant did instruct the contractor to provide a secure compound, so the instruction was set as far as the query to the contractor is concerned, and that I believe would be page 34. That's right - at the bottom of page 34 when asked he told him, "I wanted a secure fence", so the instruction was clearly laid. With respect to the evidence in carrying the defendant's mind to the gate, I respectfully submit that when we talked about the inspection of the compound in a whole, the gate is part of that. Simply put, sir, if I'm inspecting my car, I'm inspecting the totality of my car and the doors form part of that car. The same way when the defendant inspected the gate or the compound, the gate forms part of that entire compound. To say that he has to single out the gate as being some separate entity with special standard, I respectfully submit that would be taking the standard higher than it's set to be on a balance of probabilities and would be suggesting a standard of perfection, which is not what due diligence calls for. Again, touching on the point my friend raises with respect to the came bolt - Sault Ste. Marie addressed these points. We can't look at the could've, should've and didn'ts - it is what was done, and what was done is in my respectful submission, a due diligence effort on behalf of Mr. Pyle. The came bolt was something extra. It's something we could draw hypotheticals all day about additional

steps he could've taken. That's not the issue before the court today. With that being said sir, my friend conceded in his submissions that he didn't think this breed would have the strength to push out the gate, and certainly if a crown attorney who's used to dealing with dog owner liability matters on a regular basis didn't think a husky could do this, how could Mr. Pyle?

85 THE COURT: I missed that point in terms of the prosecutor.

86 MR. GRECO: Well, thank you. It was a comment I had caught, sir.

87 MR. FORDHAM: Where is it?

88 MR. GRECO: As you were making submissions, sir, about five minutes ago.

89 THE COURT: What page is that?

90 MR. GRECO: No, no he was commenting. Mr. Fordham made submissions to the court today.

91 THE COURT: Submissions you mean? I see what you mean. Okay.

92 MR. GRECO: That being said, sir, I just remind the court that the initial trial prosecutor's compliments to the defendant didn't just happen in opening, sir. They happened at the end as well. And those would be my reply to ...

93 THE COURT: I didn't take the prosecutor to quite make a concession on the point.

94 MR. FORDHAM: Thank you.

95 THE COURT: But having said that

96 MR. GRECO: It is an acknowledgment of effort though, sir.

97 THE COURT: I think what I have to do is focus simply on the test as I understand it, whether having found a breach of the by-law, and focusing solely on whether on a balance of probabilities the defendant honestly and on reasonable grounds believed the state of facts, which if true would have made his conduct innocent, and not looking at a standard of perfection, and not looking at a result driven assessment and looking at the finding of fact of His Worship that there were substantial significant and extensive efforts made by the defendant and having reviewed the transcript, reviewed the cases provided with very real deference to His Worship because as I inferred earlier, His Worship is far more experienced in these sorts of matters than I could possibly be.

RULING

98 I have to make a decision and my decision is that the defendant did meet on a balance of probabilities that he had believed in the state of facts which if true would have made his conduct innocent, and that state of facts was honestly based and on reasonable grounds given the finding of facts of His Worship.

99 So, yes, I will grant the appeal, and I gather I have the jurisdiction in which to enter an acquittal in its place.

100 MR. FORDHAM: yes.

101 THE COURT: Thank you, gentlemen.

102 MR. GRECO: Thank you, Your Honour.

103 THE COURT: Thank you both, gentlemen. That was interesting.

104 MR. GRECO: Thank you kindly. Thank you, Mr. Fordham.

105 THE COURT: I'll pass back to Madam Clerk the material filed. There was also a photocopy that I had the courts make of the information to assist me in preparing for the hearing.

106 MR. FORDHAM: Thank you and I'll let Mr. Gilkinson know that we've completed our matters so that he can bring the criminal trials back in.

107 THE COURT: If you would, and again, I thank you an informative morning.