In the Provincial Court of Alberta

Citation: R. v. Gladue, 2014 ABPC 45

Date: 20140221
Docket: 130256571P1
Registry: Camrose

Between:

Her Majesty the Queen

Crown

- and -

Vernon Peter Gladue

Accused

Reasons for Judgment of the Honourable Judge B.D. Rosborough

[1] On March 14th, 2013 Vernon Peter Gladue ('Gladue') killed his wife's dog, Buttons. Gladue submits that he had a 'lawful excuse' to kill Buttons and that he was acting out of necessity or in self defence. This judgment considers the issue of 'burden of proof' in the context of the term 'lawful excuse' in s.445(1)(a) C.C. It also considers whether a person can rely upon the *Criminal Code's* defence of self-defence in response to the actions of an animal.

Offences & Procedure

[2] Gladue is charged that he:

> Count 1: on or about the 4th day of March, 2013, at or near Camrose, Alberta, did unlawfully assault Sandra Dianne Johnston ['Johnston'], contrary to Section 266 of the Criminal Code of Canada;
>
> Count 2: on or about the 4th day of March, 2013, at or near Camrose, Alberta, did wilfully and without lawful excuse kill, maim, wound, poison or injure a dog that was kept for a lawful purpose, contrary to Section 445(1)(a) of the Criminal Code of Canada;

[3] The offence of assault is included in the *Criminal Code*, *Part VIII - Offences Against the Person and Reputation (ss.214-320.1)* ('*Part VIII*'). It is created by s.266 C.C. and defined by

s.265 C.C. For the purposes of this case, the assault alleged would fall within the definition of that term in s.265(1)(a) C.C. which provides that:

> 265.(1) A person commits an assault when
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly

[4] The offence of 'injuring or endangering an animal' is included in the *Criminal Code, Part XI - Wilful and Forbidden Acts in Respect of Certain Property* ('*Part XI*'). It is created by s.445(1) C.C. and is expressed in the following terms:

> 445.(1) Every one commits an offence who, wilfully and without lawful excuse,
> (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose

[5] The term 'wilfully' in s.445(1) C.C. describes the *mens rea* of the offence and it, in turn, is defined by s.429(1) C.C. in the following terms:

> 429.(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[6] Both offences are 'hybrid' offences. In this case, the prosecution elected to proceed by summary conviction and the trial was heard in Camrose, Alberta on November 1, 2013. Having regard to the argument of counsel, judgment was reserved pending written submissions.

Essential Elements

[7] The essential elements of the offence of assault alleged in this case are as follows:

- the date of the occurrence, i.e. "on about March 4th, 2013"
- the jurisdiction in which it occurred, i.e. "at or near Camrose, Alberta"
- Gladue's identity as the person referred to by the witness Johnston in her evidence
- an intentional application of force to Johnston by Gladue
- application of that force without Johnston's consent

[8] The essential elements of the offence of 'injuring or endangering other animals' alleged in this case are as follows:

- the date of the occurrence, i.e. "on about March 4th, 2013"
- the jurisdiction in which it occurred, i.e. "at or near Camrose, Alberta"
- Gladue's identity as the person referred to by the witness Johnston in her evidence
- an act or acts of killing, maiming, wounding, poisoning or injuring
- perpetrating one or all of those acts on a dog

- the dog was kept for a lawful purpose
- the act or acts of killing, maiming, wounding, poisoning or injuring were undertaken 'wilfully'.

[9] Based upon the evidence I have heard and the submissions of counsel, proof beyond a reasonable doubt of the following essential elements has either been conceded or appears not to be in dispute:

- the date of the occurrence, i.e. "on about March 4th, 2013"
- the jurisdiction in which it occurred, i.e. "at or near Camrose, Alberta"
- Gladue's identity as the person referred to by the witness Johnston in her evidence
- Johnston did not consent to the application of force to her by Gladue
- Gladue's act or acts killed a dog
- the dog was kept for a lawful purpose

Notwithstanding these concessions, I have considered the evidence called at this trial in relation to each of these essential elements and am satisfied that the prosecution has led evidence sufficient to prove those elements beyond a reasonable doubt.

[10] It is incumbent upon the prosecution to prove the essential elements of both Counts #1 and #2 beyond a reasonable doubt. Both s.445(1)(a) C.C. (and Count #2) make reference to the term 'lawful excuse'. The defence notes that at least one other crime falling within *Part XI* (i.e. 'mischief') does not. For those reasons, the defence submits that the absence of a lawful excuse is an essential element of the crime created by s.445(1)(a) C.C. and that the prosecution must prove that absence beyond a reasonable doubt. The prosecution joins issue with that submission.

[11] Neither the presence nor the absence of particular wording in a statutory enactment (or information) *ipso facto*, transforms that wording into an element of a crime. For example, s.259(4) C.C. creates the crime of 'disqualified driving' in the following terms:

> 259.(4) Every offender who operates a motor vehicle, vessel or aircraft or any railway equipment in Canada while disqualified from doing so, other than an offender who is registered in an alcohol ignition interlock device program established under the law of the province in which the offender resides and who complies with the conditions of the program, ... (emphasis added)

[12] In ***R. v. Whatmore***, 2011 ABPC 320 ('***Whatmore***') I concluded that the emphasized passage did not change the definition of the term 'disqualified' or make proof of this exemption an element of the offence. In support of that conclusion, I noted the Supreme Court's ruling in ***R. v. Schwartz***, [1988] 2 S.C.R. 443 ('***Schwartz***') and commented:

> ... the statutory provision considered by the court in ***Schwartz***, viz. s.89(1) C.C. contained a limiting clause analogous to that in s.259(4)(b) C.C.. It was inserted into the offence

> provision itself. Subsection 89(1) C.C. prohibited anyone from possessing a restricted weapon "... for which he does not have a registration certificate ...". : Notwithstanding that inclusion, the Supreme Court concluded that s.106.7(1) C.C., a provision analogous to s.794(2) C.C., applied to fix the accused with the onus of proving that he had a registration certificate.

[13] Conversely, in ***R. v. Dhillon***, 2006 ABQB 109, the court considered whether it was incumbent upon the prosecution to prove the identification of an approved screening device in order to secure a conviction for the accused's failure or refusal to provide a breath sample on that device. Subsection 254(5) C.C. (the offence provision) makes no reference to an 'approved screening device'. Notwithstanding that absence, the court concluded that the prosecution bore the burden of proving that fact beyond a reasonable doubt in any circumstance where the use of an approved screening was part of the pattern of a refusal.

[14] Even if it could be said that the absence of a lawful excuse was an 'element' of the crime described in s.445(1)(a) C.C., this does not end the inquiry. The Supreme Court has recognized the distinction between 'elements' and 'essential elements' of a crime. In ***R. v. B.(G.)***, [1990] 2 S.C.R. 30, the court noted the distinction in the following terms (at para.38):

> Accordingly, while it is trite to say that the Crown must prove every element of the offence in order to obtain a conviction, it is, I believe, more accurate to say that the Crown must prove all the essential elements. The Crown need not prove elements which are, at most, incidental to the offence. What the Crown must prove will, however, of necessity vary with the nature of the offence charged and the surrounding circumstances.

See also: ***R. v. Allard***, 2013 ABPC 353 ('***Allard***'), at paras.44 - 64.

[15] The defence submits that, " ... section 445 differs from section 430, which is the section most frequently considered in conjunction with section 429(2) and which makes no mention of lawful excuse. This difference must be presumed to have been a deliberate choice by Parliament, to incorporate the lack of lawful excuse as an essential element of the offence pursuant to section 445 in a way that it it is not of an offence pursuant to s.430 ...".

[16] It should be noted at the outset that various forms of "exceptions, exemptions, provisos, excuses or qualifications" are included in the statutory definition of crimes found in *Part XI.* Examples include the offence of 'unauthorized recording of a movie' (s.432(1) C.C.) which excuses the accused's conduct when he has "the consent to of the theatre manager". Those making a 'false alarm of fire' (s.437 C.C.) are excused from criminal liability where the alarm is raised with "reasonable cause". And those who remove a natural bar necessary to the existence of a public harbour (s.440 C.C.) are excused from criminal liability where they do so with "the

written permission of the Minister of Transport". Indeed, s.440 C.C. explicitly notes that the burden of proving that permission "lies on the accused".

[17] Parliament has unequivocally assigned to the accused the burden of proving any "exception, exemption, proviso, excuse or qualification" for committing the crimes found in *Part XI.* This includes the burden of proving a 'lawful excuse' for killing a dog. It has done so by virtue of both (or either) of ss.429(2) or 794(2) C.C. Subsection 429(2) C.C. provides that:

> 429.(2) No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right. (emphasis added)

[18] In addition, the prosecution of all summary conviction offences (including the offence described in s.445(1)(a) C.C.) is governed by the provisions of the *Criminal Code, Part XXVII - Summary Convictions* ('*Part XXVII*'). And s.794(2) thereof states:

> 794.(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[19] Both ss.429(2) C.C. and 794(2) C.C. have impressive pedigrees. And it is instructive to note an earlier version of what is now s.794(2) C.C. which stated:

> 717. Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant. S.C. 1909, C.9, s.2 (emphasis added)

It is apparent from this wording that whether or not the statutory provision creating the offence included a specific exception, exemption, proviso, excuse or qualification, the burden of proving any such exception, exemption, proviso, excuse or qualification remained with the defendant.

[20] Removal of the highlighted phrase in s.717 C.C. from later versions of that statutory provision (including s.794(2) C.C.) did not alter Parliamentary intent with respect to the burden of proving exceptions, exemptions, provisos, excuses or qualifications in summary conviction

proceedings. This is evident from the provisions of the *Interpretation Act*, R.S.C., 1985, c. I-21 which provide that:

> 44.(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

And further that:

> 45.(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

[21] Seen in this light, the presence of the term "lawful excuse" in s.445(1)(a) C.C. (or its absence from other offences to be found within *Part XI*) does not signal any Parliamentary intention to make disproof of a lawful excuse an element of the crime created by s.445(1)(a) C.C. What is not *prima facie* an essential element of a crime may become so in certain circumstances. See: ***Allard***, at paras.55-6. In this case, proof of a lawful excuse on a balance of probabilities may elevate it to the status of an essential element. Having regard to the discussion to follow, however, it is my view that the absence of a lawful excuse is not here an essential element of the crime created by s.445(1)(a) C.C.

Issues

[22] Johnston alleged that Gladue grabbed and shook her. Gladue denied having done so. Indeed, he denied any physical contact with Johnston. At issue in relation to Count #1 is whether the prosecution has proven beyond a reasonable doubt that Gladue intentionally applied force to Johnston.

[23] Gladue frames the issue(s) for resolution in relation to Count #2 succinctly and in the following terms:

> At issue is whether the Crown has proven the requisite *mens rea* beyond a reasonable doubt - that is, whether the accused acted wilfully - and whether, if he did, he can avail himself of an affirmative defence - either self-defence, necessity or lawful excuse.,

To like effect is the statement of issues by the prosecution, helpfully disaggregated as follows:

a. Did the accused have the necessary *mens rea* accompanying his actions for the court to convict him of the offence under s.445 of the *Criminal Code*?

b. Do the self-defense provisions of the *Criminal Code* (either under the previous sections 34-37 or the current section 34 apply when the aggressive actions being defended against are undertaken by something other than another person?

    i. If so, has the Crown proven beyond a reasonable doubt that the accused's actions in this matter did not amount to self-defense?

c. Is the defense of necessity available to an individual who is attached (*sic*) by an animal?

    i. If so, is the defense of necessity made out in this matter?

d. Lawful excuse: who bears the burden of proving or disproving whether the accused had a lawful excuse for his actions?

    i. In this case, is there either reasonable doubt as to lawful excuse or has it been proven on a balance of probabilities, as the case may be?

Position of the Parties

[24] The prosecution submits that Johnston's evidence ought to be believed and that it proves beyond a reasonable doubt that Gladue intentionally applied force to her and did so without her consent.

[25] The defence submits that Gladue's evidence denying that application of force ought to be believed and, if believed, it refutes the allegation of an assault. In the alternative, even if Gladue's evidence is not believed but, when considered in the context of the case as a whole, it raises a reasonable doubt that he intentionally applied force to Johnston. Finally, it is submitted that even if Gladue's evidence is rejected and raises no reasonable doubt, Johnston's evidence itself ought to leave the court with a reasonable doubt and lead to an acquittal.

[26] The prosecution submits that it has proven beyond a reasonable doubt that Gladue intended to kill or injure the dog in question (or that Gladue was reckless as to whether his actions would do so) and, accordingly, the *mens rea* of the offence described in Count #1 has been proven beyond a reasonable doubt. It further submits that the defence of self-defence (in either its current or previous form) is inapplicable in a case such as this. It is submitted that, even if the defence of self-defence is applicable to this offence, the prosecution has proven beyond a reasonable doubt that Gladue was not acting in self-defence or out of 'necessity'. Finally, the prosecution submits that Gladue has not proven on a balance of probabilities that he had a lawful excuse for killing the dog nor is there any reasonable doubt that he had any such excuse.

[27] The defence submits that the prosecution has not proven beyond a reasonable doubt that Gladue had the requisite *mens rea* to commit the offence described in Count #2. Gladue did not intend to kill or even injure Johnston's dog, nor was he reckless or wilfully blind to the fact that

his actions would bring about that death or any injury. Gladue acted "on the spur of the moment", "instinctively and impulsively".

[28] The defence further submits that Gladue was acting in self-defence when he killed the dog. While it is conceded that the court ought to apply the self-defence provisions of the *Criminal Code* extant on March 14th, 2013, those provisions are clarified by the newly-amended self-defence provisions in what is now s.34 C.C. They clearly apply to defending oneself from attacks by animals. Moreover, there is an air of reality to the defence of self-defence in this case and the prosecution has failed to prove beyond a reasonable doubt that Gladue was not acting in self-defence.

[29] The defence further submits that Gladue was "facing a situation of imminent peril" when he was bitten by the dog. He was thereafter entitled to limit that peril by his actions, even if they led to the injury or death of that dog. The 'defence of necessity' is open to Gladue on these facts and the prosecution has not proven beyond a reasonable doubt that it does not apply to excuse Gladue's conduct in this case.

[30] Finally, the defence submits that the prosecution bears the onus of proving beyond a reasonable doubt that Gladue had no 'lawful excuse' for killing the dog. It was clear that Gladue was defending himself from harm when he interacted with the dog. Even if Gladue had the burden of proving that he had a lawful excuse on a balance of probabilities, he has discharged that burden.

Burdens of Proof

[31] The accused is presumed to be innocent of the charges brought against him unless and until the prosecution proves all essential elements of the charge beyond a reasonable doubt. Reasonable doubt means a doubt that is based upon reason and common sense and is logically connected to the evidence or absence of evidence: it is not based on sympathy or prejudice. This does not mean that the Crown is required to prove all elements to an absolute certainty as this would be an impossibly high standard. However, the reasonable doubt standard falls much closer to absolute certainty than to proof on a balance of probabilities: ***R.v.Lifchus*** [1997] 3 S.C.R. 320 and ***R.v.Starr***, [2000] 2 S.C.R. 144.

[32] Since the accused has testified in this trial, I must consider his evidence and the issue of credibility within the analytical framework prescribed by the Supreme Court of Canada in cases such as ***R. v. W.D.***, [1991] 1 SCR 742 and ***R. v J.H.S.***, 2008 SCC 30. That framework has recently been commented upon by the Alberta Court of Appeal in the case of ***R. v. Gray***, 2012 ABCA 51 where the applicable framework has been restated in terms which I will paraphrase for the purpose of this trial:

> The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt, and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown.

> In that context, if the accused's evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves me with a reasonable doubt that it may be true, then I am required to acquit.
>
> While I should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring me to decide that one of the conflicting versions is true. Any inability to decide between exculpatory evidence and other evidence that incriminates the accused will usually indicate that I have a reasonable doubt, which again must work to the benefit of the accused.
>
> In the event the accused's evidence (or where applicable, other exculpatory evidence) is entirely disbelieved such that it does not raise a reasonable doubt, I may not convict unless I am satisfied that the Crown has proven the accused's guilt beyond a reasonable doubt by other evidence that I do accept.

I pause to add that, in the event that I reject the evidence of the accused, that rejection does not add to or bolster the case for the prosecution.

[33] Unique questions as to burden of proof arise in the context of the crime created by s.445(1)(a) C.C. It has already been noted that this paragraph makes explicit reference to the crime being committed both wilfully and without lawful excuse. Parliament has provided express statutory direction on the burden of proving a lawful excuse or excuses for this crime both within the context of *Part XI* (i.e. s.429(2)C.C.) and in the broader context of summary conviction proceedings. See: *Part XXVII* (i.e. s.794(2) C.C.)

[34] The defence submits that either or both of these provisions ought to be interpreted so as not to assign to the accused a burden of proof on a balance of probabilities. Rather, they ought to be, " ... read as imposing only an evidentiary burden on the accused, to raise a reasonable doubt with respect to the existence of a lawful excuse...". Such an interpretation is said to be warranted on the bases that: (1) proof of that the dog was killed "without lawful excuse" is an essential element of the offence; (2) "There is something approximating consensus among courts to have considered the question that the constitutionality of section 429(2) is dependent on the words "he proves" being read as imposing only an evidentiary burden on the accused, ..."; (3) the rules of statutory construction mandate such a conclusion; and/or (4) the court is bound to follow the court's judgment in ***R. v. Plante***, 2013 ABQB 222 ('***Plante***') which found that the accused's burden of proving an analogous excuse (*viz.* 'reasonable excuse' in s.254(3) C.C.) could be discharged by raising an air of reality only.

[35] I have addressed the first of these submissions earlier in these reasons.

[36] In support of the second submission, the defence cites ***R. v. Gamey*** (1993), 80 C.C.C. (3d) 117 (Man.C.A.) ('***Gamey***'); ***R. v. Pena*** (1997), 45 C.R.R. (2d) 134 (B.C.S.C.) ('***Pena***'); ***R. v. Murphy***, 2010 NSPC 4 ('***Murphy***') and ***R. v. Hajek***, 2009 ONCJ 75 ('***Hajek***'). The judgment of the court in In addition, The decision of the court in ***R. v. Watson*** (1999), 137

C.C.C. (3d) 422 (Nfld.C.A.) (‘***Watson***’) is referenced by the defence in the context of interpreting s.429(2) C.C. in general.

[37] The constitutional validity of s.429(2) C.C. was not determined in ***Watson***. Indeed, the only reference to burden of proof in that court’s judgment is as follows (at para.8):

> The parties are agreed: (1) that s. 429(2) does not place a burden of proof upon the accused but rather it is for the Crown to establish the absence of legal justification or excuse and colour of right ...

[38] In ***Gamey***, the accused were convicted of the offence of mischief. No challenge had been taken to the constitutionality of s.429(2) C.C. at trial. That challenge arose, for the first time, on appeal. In addition, it pertained only to the burden of proving the absence of ‘color of right’. Two separate majority judgments were authored by the court. Neither judgment declared s.429(2) C.C. unconstitutional.

[39] In one judgment, Huband J.A. stated:

> “I say at once, that I find the argument compelling, but for reasons which follow, I do not think this is the case to make a declaration of constitutionality, for the simple reason that on any standard of proof there is an absence of evidence to sustain a defence based upon colour of right.”

[40] In the second, Kroft J.A. (for himself and Philp J.A.) agreed that there was no evidence to sustain a defence based upon colour of right. With respect to the constitutional issue, he commented:

> My colleague has concluded that s. 429(2) of the *Criminal Code*, because it places a burden of proof upon an accused person, likely offends s. 11(d) of the *Charter of Rights*. That was a ground of appeal argued by the accused Drul and adopted by the other accused. Although I find the reasons of my colleague on this issue to be most persuasive, I am of the view that the issue would be better left for determination in a proceeding where there is an evidentiary basis for the defences of "legal justification or excuse" or "colour of right."

[41] In a strikingly brief decision, the court in ***Pena*** declared s.429(2) C.C. unconstitutional. The prosecution conceded that the ‘reverse onus’ created by that subsection violated the *Canadian Charter of Rights and Freedoms* (‘*Charter*’), s.11(d). It elected not to attempt a justification of the provision as a ‘reasonable limit’ on that right (*Charter*, s.1). Given the position taken by the prosecution, it was perhaps understandable that reasons for judgment were brief.

[42] The constitutionality of s.429(2) C.C. was not in dispute in ***Murphy***. The court undertook no constitutional analysis and there is no reference to any *Charter*, s.1 justification. The court merely accepted that cases such as ***Gamey*** and ***Pena*** had resolved the issue.

[43] The constitutionality of s.429(2) C.C. was not in dispute in ***Hajek***. The court referenced the judgment in ***Gamey*** and elected to 'interpret' s.429(2) C.C. as requiring the prosecution to prove the absence of a lawful excuse beyond a reasonable doubt. As in all of the afore-mentioned cases, there was no reference to any *Charter*, s.1 justification.

[44] Of the authorities cited by the defence in support of the proposition that s.429(2) C.C. violates the *Charter*, s.11(d), only one, ***Pena*** actually makes that declaration. It does so in the context of an uncontested concession by the prosecution and without reference to any *Charter*, s.1 evidence. In the more than fifteen years since ***Pena*** was decided, only one judgment purports to follow it, i.e. ***Murphy***.

[45] This review is not intended to discredit the submission that the constitutionality of s.429(2) C.C. is a justiciable issue. The constitutionality of s.794(2) C.C., likewise, is a justiciable issue. That their constitutionality is justiciable does not equate to a settled determination that they are constitutionally infirm, however. Indeed, as I noted in ***Whatmore***, "The overwhelming weight of authority favours the conclusion that s.794(2) C.C. is constitutionally valid."

[46] Even a casual review of jurisprudence relating to'reverse onus' clauses demonstrates that courts have not followed a consistent methodology (or result) when determining their constitutional validity. Colvin and Anand properly observe that: "Rights like those under section 11(d) should be given their full meaning and limitations should be required to meet the test established by section 1. Unfortunately, the cases have not yet presented a consistent pattern of doctrine." *Principles of Criminal Law*, 3rd ed., Thomson Canada Ltd. at p.82 ('*Principles*').

[47] What is clear from this jurisprudence, however, is the fact that the Supreme Court has found that many 'reverse onus' provisions constitute 'reasonable limits' on the accused's *Charter*, s.11(d) right. "The Supreme Court has been generally responsive to arguments defending reverse onuses by reference to section 1. Section 1 has been invoked in Supreme Court decisions to justify requiring defendants to prove that they had no intention to set vehicles in motion, that their statements were true albeit hateful, that they suffered from mental disorder, that their actions were involuntary, and that they exercised due diligence to avoid committing regulatory offences." *Principles*, at p.86.

[48] The defence concedes that the constitutional validity of ss.429(2) C.C. and/or s.794(2) C.C. have not been challenged in this case. Alberta has a long-standing procedure available for those who seek to do so. See: *Judicature Act*, R.S.A. 2000, c.J-2, s.24. At the core of that procedure is the obligation to give notice to the Attorneys General of Canada and Alberta that the applicant seeks to impugn the constitutionality of a statutory instrument. The giving of notice is a jurisdictional condition precedent to the making of any declaration of constitutional infirmity. See: ***M.(R.E.D.) v. Director of Child Welfare*** (1988), 88 A.R. 346 (C.A.). In addition, proper notice helps to ensure that the court has the benefit of submissions from both

prosecution and defence before judicially nullifying statutory instruments enacted by democratically elected legislative bodies.

[49] I have previously commented upon the efficacy of notice provisions in constitutional litigation and will not repeat those comments here. See: ***R. v. Bull***, 2010 ABPC 68. Nevertheless, the comments made in ***Bull*** in the context of the *Constitutional Notice Regulation,* A.R.102/1999 apply, *mutatis mutandis* to this case, *viz.* (at para.47):

> The constitutional validity of the *Constitutional Notice Regulation* is not an issue before me. I reference these authorities only in response to the suggestion that its provisions may not bind the Provincial Court of Alberta having regard to comment by other courts. With respect, I do not accept that suggestion. If anything, jurisprudence to date has confirmed the constitutional validity of the *Constitutional Notice Regulation*. Neither this court nor counsel appearing before it are at liberty to disregard this law unless and until its constitutional validity has been effectively impugned.

[50] I reiterate my earlier comment that the constitutionality of ss.429(2) C.C. and 794(2) C.C. are justiciable issues. Nevertheless, jurisprudence from the courts of other provinces does not support the submission that either or both are obviously unconstitutional. Even if they were, however, it would be unfair and unjust to make any declaration of constitutional infirmity without, at the very least, notifying the respective Attorneys General of that potential in this summary conviction proceeding. To do so would violate one of the oldest principles of natural justice: *audi alterem partem*.

[51] The defence also submits that the rules of statutory interpretation would suggest that s.429(2) C.C. (and, by extension, s.794(2) C.C.) ought to be interpreted as assigning only an 'evidentiary burden' of proving the absence of lawful excuse to the accused. Reliance is placed, in part, on the inclusion of that term in the body of s.445(1)(a) C.C. and that provision's suspect constitutionality. I have dealt with these concerns in my earlier comments.

[52] In ***Re Rizzo & Rizzo Shoes Ltd.***, [1988] 1 S.C.R. 27, the court adopted the following comment from *Construction of Statutes* (2nd ed.1983) in relation to the interpretation of statutes, (at p.41):

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

I have previously commented upon the "entire context" of provisions such as ss.429(2) and 794(2) C.C. and will not repeat them here.

[53] The "grammatical and ordinary sense of words" such as "where he proves" (s.429(2) C.C.) or "the burden of proving" (s.794(2) C.C.) is that they assign a persuasive burden of proof. There is no proof element attaching to what is sometimes referred to as the 'evidential

burden'. Indeed, it may constitute reversible error for a court to rule that the accused must 'prove' that a defence has an 'air of reality' (an 'evidential burden'). This was made clear in ***Schwartz*** where Dickson C.J.C. commented (in dissent but not on this point, at p.466):

> Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." While any combination of phrases has its advantages and drawbacks, I prefer to use the terms "persuasive burden" to refer to the requirement of proving a case or disproving defences, and "evidential burden" to mean the requirement of putting an issue into play by reference to evidence before the court. The party who has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed. The phrase "onus of proof" should be restricted to the persuasive burden, since an issue can be put into play without being proven. The phrases "burden of going forward" and "burden of adducing evidence" should not be used, as they imply that the party is required to produce his or her own evidence on an issue. As we have seen, in a criminal case the accused can rely on evidence produced by the Crown to argue for a reasonable doubt. (emphasis added)

[54] In ***R. v. Lewko***, 2002 SKCA 121 ('***Lewko***'), the court held that s.794(2) C.C. only created an evidential burden on the accused seeking to rely upon a "reasonable excuse" for failing to comply with the demand authorized by s.254(3) C.C. (refusing or failing to comply with a demand). The court characterized this evidential burden as follows (at para.20): "What is the extent of the evidential burden? The defendant need only raise the question of the possibility of a reasonable excuse." Can it be said that Parliament, when enacting s.794(2) C.C. in the late 1800s, intended to call upon courts trying summary conviction offences to "determine whether the accused had discharged his burden of proving the question of a possibility of a reasonable excuse"? Does this characterization give to ss.429(2) C.C. and 794(2) C.C. the "grammatical and ordinary sense" of these words?

[55] It may be argued that ss.429(2) and 794(2) C.C., in assigning a persuasive burden of proving an exception, exemption, proviso, excuse or qualification to the accused, operates unfairly or prejudicially to the defence. That argument was addressed by the court in ***R. v. Lee's Poultry Ltd.*** (1985), 17 C.C.C. (3d) 359 (Ont.C.A.) ('***Lee's Poultry Ltd.***') in the following passage:

> Lawton L.J. in R. v. Edwards, supra, said, referring to the experience of centuries, that the exception was needed "to ensure justice is done both to the community and the defendant." Weighing the fundamental rule, the exception with which he was concerned and justice, he clearly did not consider the exception put the accused "in a most unfair position", rather that it was a just position and I think it is fair to say that our Legislature and Parliament, has so regarded it over these many years. As my brother Dubin commented during the argument: How could it be unfair to ask a person to produce his licence or evidence that he has one? Surely it is the sensible thing to do.

[56] Indeed, our Court of Appeal has noted that the “sense and purpose” of a persuasive burdens such as this is evident for both summary conviction proceedings and proceedings by indictment. It commented:

> While the *Criminal Code* does not provide for the burden of proving exceptions in indictable offences, it does address their pleading (s.581) where the common-law rule seems to be continued. While s. 794(2) is located in Part XXVII of the *Criminal Code* which guides summary conviction procedure alone, the rule, even s. 794(2) itself, has been relied upon in prosecutions by indictment in Canada. This is so even though the exception-onus provision is not reproduced in those Parts of the *Criminal Code* relating to procedure in trials by indictment. The sense and purpose of the exception-onus rule is clear. I am not persuaded that its application in Canada should be repressed simply because of the place of its statutory expression in the *Criminal Code*. (emphasis added)

R. v. Thompson, 131 A.R. 317 (C.A.).

[57] In the exercise of its criminal law power, Parliament is entitled to legislate the *mens rea, actus reus* of criminal offences and the breadth or burden of proving defences. The ordinary and grammatical meaning of the words used in both of ss.429(2) C.C. and 794(2) C.C. is such that they assign to the defendant a persuasive burden of proving an exception, exemption, proviso, excuse or qualification in summary conviction proceedings. While that interpretation may work unfortunately for the accused in a given case, it does not operate unfairly.

[58] The final argument raised in support of the submission that the ‘burden’ created by s.429(2) C.C. is ‘evidentiary’ arises from the judgment of the court in ***Plante***. ***Plante***, in turn, places reliance upon the judgment of the court in ***Lewko***. And the court in ***Lewko*** rested its decision largely on the wording of s.794(2) C.C. in the context of the language used in s.254(5) C.C.

[59] Subsection 254(5) C.C. is contained within *Part VIII* and states:

> 254.(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply wit a demand under this section. (emphasis added)

There is no specific provision in *Part VIII* analogous to s.429(2) C.C.

[60] Rather, the court in ***Lewko*** turned to s.794(2) C.C. for guidance in determining whether a reasonable excuse for refusing the demand in that case had been 'proven'. Bayda C.J.S. concluded that s.794(2) C.C. must create an evidential burden only. If the burden were persuasive (i.e. on a balance of probabilities) it would make no sense to speak of the prosecution's later opportunity to address it "by way of rebuttal". Once a reasonable excuse had been proven on a balance of probabilities, nothing could rebut that conclusion.

[61] It is important to observe the operation of the burden of proof in the context of the trial process as a whole. As noted by the court in ***Lewko***, burden of proof directs the court on the standard which must be met at the end of the day; when it is called upon to determine whether (in a criminal prosecution) guilt has been proven. However, burden of proof also informs the entire criminal trial process, from the election to prosecute to the application to call rebuttal evidence. In this broader context, s.794(2) C.C. makes a great deal of sense.

[62] The prosecution must (and invariably does) consider burden of proof *ab initio*, long before a trial has commenced. The existence of "exceptions, exemptions, provisos, excuses or qualifications" may be material to that consideration. Nevertheless, many "exceptions, exemptions, provisos, excuses or qualifications" may be unknown or unknowable by the prosecution at that stage of the criminal proceeding. By virtue of s.794(2) C.C., prosecution will not be deflected on that basis. Rather, in the absence of some evidence indicating that the crime was probably committed only because of such an "exception, exemption, proviso, excuse or qualification", prosecution can be initiated.

[63] Both before and during the trial process the defence is instructed by s.794(2)'s assignment of the burden of proof. That burden helps define the nature or quality of evidence necessary to defeat the *prima facie* case to be presented by the prosecution. A "question of a possibility of an excuse" will be legally insufficient to achieve that purpose. The "exception, exemption, proviso, excuse or qualification" to be presented must rise to the point of probability. In other words, an otherwise unknown exemption must be more probable than not before it can operate to exculpate the accused

[64] To reinforce that notion, Parliament has provided that, in summary conviction proceedings, an "exception, exemption, proviso, excuse or qualification" must be of sufficient probative value that it will lead to acquittal unless met by rebuttal evidence. The court in ***Lewko*** correctly notes that the concept of 'rebuttal evidence' would make little sense if s.794(2) C.C. operated only at the end of the day. Viewed holistically, as part of an organic trial process however, s.794(2) C.C. makes eminent sense.

[65] The efficacy of s.794(2) C.C. (and, by analogy, s.429(2) C.C.) cab be illustrated by an example. Assume that the prosecution leads evidence at trial that a peace officer lawfully demanded breath samples from the accused in accordance with the provisions of s.254(3) C.C.

The accused purports to blow into an approved instrument but does not, after multiple attempts, provide a suitable breath sample. There is nothing apparent to the peace officer that would explain the accused's failure to provide suitable breath samples. Without more, the Crown could initiate prosecution could effectively argue that it has proven beyond a reasonable doubt a failure to provide breath samples. The accused is in jeopardy of conviction.

[66] The accused may relinquish his right to remain silent, however, and testify in his defence. Assume that he testifies that he suffers from asthma and could not, in fact, provide a breath sample on the occasion in question. At that stage, and without more, the court would be justified in concluding that the accused had proven on a balance of probabilities that he had a reasonable excuse for his failure to provide breath samples. An acquittal would follow.

[67] Nonetheless, assume further that the prosecution, now aware of a potential 'reasonable excuse, obtains evidence "by way of rebuttal" from the accused's doctor. That doctor gives evidence that the accused had been tested for asthma at all relevant times and that, in his expert opinion, the accused was not suffering from asthma at the time he failed to provide breath samples. This evidence could effectively rebut the allegation of reasonable excuse and justify conviction.

[68] The court in ***Lewko*** noted that there were 'reverse onus' clauses that did, in fact, operate to assign a persuasive burden of proof to the accused. It stated (at para.18):

> Situations however will occur where Parliament deems it in the public interest to impose a persuasive burden on a defendant. It did so in respect of the burden of rebutting the presumption contained in s. 224A(1)(a) of the Criminal Code, 1953-54 (Can.), c. 51, later s. 237(1)(a) of the Criminal Code, R.S.C. 1970, c. C-34 (see ***The Queen v. Appleby***, supra; and ***R. v. Whyte***, [1988] 2 S.C.R. 3.) Both of these cases are distinguishable from the present case in that not only is the wording of the statutory provision there under consideration different from that in the present case, but the cases involve the rebuttal of a statutory presumption, a circumstance not existent in the present case.

[69] While the wording of the respective statutory provisions in ***Appleby*** and ***Whyte*** may be different form the wording of s.794(2) C.C., the same cannot be said of the statutory provision considered by the court in ***R. v. Lee's Poultry Ltd.***. I reviewed that judgment in ***Whatmore*** at paras.19-24 and will not repeat that review in these reasons. In summary, the statutory provision under scrutiny in that case was virtually identical to s.794(2) C.C. It was found by the court not to infringe the *Charter*, s.11(d) when it assigned the burden of proving any exception, exemption, proviso, excuse or qualification to the accused on a balance of probabilities. The judgment in ***Lee's Poultry Ltd.*** was referenced by the court in ***Schwartz*** and, more recently, in ***R. v. Williams***, 2008 ONCA173. It is not mentioned, however, in ***Lewko***.

[70] In ***Plante***, Graesser J. commented: "There is significant disagreement in Canadian case law on the relative obligations of the Crown and accused to prove or rebut whether a reasonable excuse exists." I agree. In addition to the several authorities reviewed by him, superior courts in both Nova Scotia and Ontario have recently expressed disagreement with the judgment in ***Lewko.***. See: ***R. v. Lunn***, 2012 NSSC 190 (at para.40) and ***R. v. Butler***, 2013 ONSC 2403. There is contrary authority in this province as well. See: ***R. v. Pye***, [1993] A.J. No.149 (Q.B.) ('***Pye***'). I am bound to follow the judgments in both ***Plante*** and ***Pye***. As those judgments cannot be reconciled, I must elect to follow one or the other of these judgments. For the reasons given by me in ***R. v. Spracklin***, 551 A.R. 323 (Prov.Ct.) and in this decision, I elect to follow the decision of Veit J. in ***Pye***.

[71] In conclusion, it is my view that Gladue bears the burden of proving on a balance of probabilities that he had a 'lawful excuse' to kill Johnston's dog.

Credibility of Witnesses

[72] The assessment of credibility requires that I apply common sense to the evidence of each witness, both standing on its own and in the context of the case as a whole. Doing so often requires consideration of factors such as motive, interest, opportunity to observe, ability to recollect and do so accurately.

[73] In ***R. v. White***, [1947] S.C.R. 268 the Supreme Court noted that, " … [i]t is also important to determine whether he [the witness] is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive." The same notion was expressed by our own Court of Appeal in ***R. v. Maygard***, 2013 ABCA 214 where it was noted that, " … assessing credibility is not limited to applying objective factors like inconsistencies or motives to lie."

[74] Nevertheless, it is important to emphasize that, when considering the credibility of witnesses, I must determine not only whether the witness is attempting to be deceitful by lying or misrepresenting the facts but also whether the witness's evidence is reliable in the sense of accurately reporting the facts. In short, I must pay heed to the distinction between the 'credit' to be accorded a witness' evidence as well as its 'reliability'. I note the distinction between these terms as noted by the authors of *Canadian Criminal Evidence* at page 27-2.

Findings of Fact

[75] Gladue and Johnston were married on June 23rd, 2012. At some point in time, Gladue gave Johnston a 'shih-tzu cross' dog as a Christmas gift. Johnston named the dog 'Buttons'. Although varying estimates were given of Buttons' size, I am satisfied that Buttons was a very small dog. She was approximately 18" in length and weighed between 5 and 15 pounds. Gladue could lift Buttons with one hand. Johnston owned Buttons and did not, at any time, give Gladue permission to kill it.

[76] On the evening of March 3rd, 2013 Johnston had retired for the evening with Buttons sleeping at the foot of her bed. She testified that Gladue was drunk and watching television. Gladue confirmed that he was starting to feel the effects of the alcohol he had been drinking that evening and I accept his evidence in that regard. Eventually, he came into the bedroom and began 'pestering' Johnston. Gladue, " ... got in one of his moods where he was nitpicking and just bugging me; trying to keep me awake when I was trying to sleep." The pestering continued for approximately 1 hour, at which point in time Gladue tried to kiss Buttons.

[77] Buttons responded by nipping Gladue's upper lip, causing it to bleed. There was "very little" bleeding. On cross-examination, Gladue acknowledged that Buttons could not cause him any real harm by biting him. He was not afraid of the dog nor did he have any cause to fear for his life or safety as a result of having been bitten. I accept that evidence.

[78] Gladue then, " ... grabbed Buttons' head and started shoving her into the bed. And then he got madder and grabbed her, threw her up against the door frame in between the bedroom and the - - sorry, and the kitchen. And at that point Buttons was limping, and she - - he went to go after her and she ran back into the bedroom, and he grabbed his pellet gun and started shooting at her with - - or BB gun, pardon me, shooting at her underneath the bed. And she started running again. And she got into the kitchen, and he grabbed her and started squeezing her throat. And I told him at that point, I said, you're going to kill her. And he said, any dog that bites and draws blood needs to be killed. And he just kept on squeezing her, and she ended up on the mat in the kitchen in front of the sink, and she was limp." Gladue shot at Buttons more than once with the BB gun.

[79] It was suggested to Johnston in cross-examination that Gladue was actually trying to throw Buttons out of the room; through the door frame and not at it. Johnston disagreed and remained adamant that Gladue had deliberately thrown Buttons at the door frame. Gladue acknowledged having bent over to kiss Buttons. When the dog bit his lip, Gladue testified that he, " ... just grabbed the dog, ripped it away from me and turned around and threw it."

[80] Gladue clarified the manner of his 'turn around' by testifying that it was approximately 180º. He threw the dog at chest level a distance of 10 feet toward the bedroom doorway. I believe this evidence. When asked by the court why he had thrown Buttons at all, Gladue responded: "It was - - I - - just to get it off of me, I don't know." I disbelieve that evidence and find as a fact that after the biting had ended, Gladue turned and deliberately threw the dog across the room in a fit of anger. I am not satisfied that Gladue intended to strike the door frame in particular. However, I am satisfied that he threw Buttons toward the bedroom doorway with the intention of injuring her and was reckless as to whether she would strike the doorframe, wall or anything else. Buttons did, in fact, strike the door frame.

[81] Gladue acknowledged owning a BB gun (a handgun) as well as a Winchester pellet rifle. He testified that he used the pellet rifle "like a broom" to get Buttons out from under the bed where she hiding. I accept that evidence. Gladue also testified that neither the BB gun nor

the pelllet gun were loaded and that he did not shoot the BB gun at Buttons. I disbelieve his evidence on those points and accept the evidence of Johnston that he fired more than one shot from the BB gun at Buttons in order to force her out from under the bed.

[82] Following these events, Johnston decided to leave the premises. She knew that Buttons would not live. The dog's breathing was irregular, her tongue was hanging out of her mouth and her eyes were glassy "like a dead dog". Johnston retrieved her overnight bag and purse but, before she could depart, Gladue grabbed her "by the scruff of the coat" and shook her. Johnston did not retaliate nor did she wish to engage in a physical altercation with him. She informed Gladue that, " ... there was no way on earth I would ever live in that house ever again." She then left.

[83] In cross-examination, Gladue testified that he did not want Johnston to leave the premises that evening. At one point, he grabbed one of the bags she was carrying in an attempt to stop her from leaving. She continued on, however, and he asked her, "Where are you going?" I accept that evidence. In direct examination, Gladue denied having any physical contact with Johnston that evening. I disbelieve his evidence in that regard.

[84] The next day, Gladue sent a text message or messages to Johnston. In them he stated, *inter alia*: " ... dog doesn't bite hand that feeds it an (*sic)* if it does its gone," and "Dog bit me an (*sic)* lost ..." and "Because I've told you, any dog that bites its master am (*sic)* draws blood dies. You get it?"

[85] Police attended Gladue's residence the following day and seized a silver Marksman BB gun with a holster case (Exhibit #3). They also questioned Gladue about the whereabouts of Buttons. Acting on information received from him, they travelled to a location approximately .7 km. south and east of Camrose, Alberta. They found Buttons' carcass in a plastic bag in the east ditch by a tree.

[86] Except where expressly noted in the preceding passages, I disbelieve Gladue's evidence. His evidence is internally inconsistent, conflicted with previous statements and was significantly self-serving. Having disbelieved his evidence, I have reconsidered it in the context of the case as a whole and it leaves me with no reasonable doubt on any essential element of the offence or as to the narrative given by Johnston.

[87] The events on the evening of March 3rd, 2013 were not complex and Gladue's reaction to having been bitten by Johnston's dog would seem obvious. The dog bit him, he pulled the dog away and was angry. Pulling the dog away and even dropping it would have been fully justifiable in the circumstances (even if it injured the dog). This was not Gladue's response, however. Gladue struck the dogs head on the bed, choked it and then threw it across the room. When asked why he had thrown the dog, he replied: " ... just to get it off me. I don't know." There was no need to turn and throw the dog in order to "get it off me". I find as a fact that Gladue choked the dog for a period of time, struck its head on the bed, turned 180º and threw

the dog toward the doorway. He did so because he was angry at having been bitten and with the intention of injuring the dog.

[88] Gladue's evidence that Buttons never annoyed him by soiling his residence is difficult to accept. He testified that he enjoyed having a well-kept house. Nevertheless, Buttons was routinely urinating and defecating in his household and on his bed. He denied that this was a problem for him; that it angered or even frustrated him. At one point in his testimony, Gladue stated that, "... at home, I don't get angry." Notwithstanding this evidence, he acknowledged that he was shocked, 'pissed off' and angry at Buttons for having bitten him in his home.

[89] Gladue also gave contradictory evidence about whether he was mad enough at being bitten by Buttons that he would have shot the dog with his BB gun, had it been loaded. That examination is as follows:

> Q. Okay. You were mad enough that if the - - any of either the BB or pellet gun had been loaded, you would have used it, wouldn't you?
>
> A. No.
>
> ...
>
> Q. I'm going to provide you with a copy of the statement you gave to the police. Now I just asked you, you were angry enough to use your BB gun, and you indicated, "No." I'm going to direct you to page - - page 8. Well, I'll begin at the bottom of page 7 where you see 'L' which represents Constable Lofgren and 'G' represents you, so at the very last line on page 7:
>
> > L: Did you shoot it with a BB gun?
> >
> > G: No.
> >
> > L: Because what if the autopsy - -
> >
> > G: No, I was mad enough to, but ah - -
>
> So you told - - or did - - do you recall being asked those questions and giving those answers?
>
> A. Yes.
>
> Q. So you told the officer that you were, in fact, angry enough to use a BB gun on the dog?
>
> A. Well, yes, I was angry.
>
> Q. Okay. You were angry enough to use a weapon on the dog, weren't you?
>
> A. Well, it didn't even occur to me but, no, I - - I wouldn't.

Q. You were frustrated and the dog biting you caused you to snap at the dog, didn't it?

A. I was just - - I was - - I was just - - like, I was shocked. I never expected anything like that.

[90] Having rejected Gladue's evidence and being without any reasonable doubt arising from it in the context of the case as a whole, I turn to the case for the prosecution. Clearly, I must accept the evidence of Johnston if I am to conclude that the prosecution has proven beyond a reasonable doubt the essential elements of either or both of the crimes against Gladue. This requires a consideration of her credibility.

[91] I believe Johnston's evidence. Her evidence remained consistent on all significant issues notwithstanding fair but directed cross-examination. Unlike Gladue, Johnston immediately and candidly admitted that Gladue's acts in relation to Buttons made her "very upset" and "mad". Johnston innocently erred in direct examination about the nature of the floor covering in Gladue's residence. When confronted with the suggestion that the covering was actually tile instead of linoleum, she did not hedge or feign lack of memory. She candidly admitted that she had erred.

[92] Johnston's evidence was supported by significant physical evidence. That the dog was significantly injured was corroborated by the evidence of Dr. Tawnya Copland and Exhibits #2 and #5. Her allegation that Gladue possessed a BB gun was supported by the accused's own evidence and the seizure of such a gun from his premises at a time proximate to the time of the offence. See: Exhibit #3. Her allegation that the accused was drunk was confirmed by him. Her evidence that he had a hostile *animus* towards Buttons is corroborated by the text messages sent by Gladue to her shortly after the dog was killed. See: Exhibit #1. Gladue also agreed that he did not want Johnston to leave the apartment that evening and that he had grabbed her bag in an attempt to keep her there.

[93] Finally, and to the extent that demeanor plays a role in the assessment of credibility, Johnston's demeanor supported her evidence. She was not coy or elusive when responding to questions. She did not hesitate when responding. The sequence of events is coherent and rational for an event such as the one she narrated.

[94] The parties have agreed that, based upon the findings of fact I have made, the essential elements of both Counts #1 and #2 would be proven beyond a reasonable doubt. I find the accused guilty of the offence of assault. Nevertheless, both counsel provided detailed written submissions on the issues noted above. I will respond to each.

Mens Rea

[95] *Mens rea* for the offence described in s.445(1)(a) C.C. (i.e. that the offensive conduct be undertaken 'wilfully') is defined in s.429(1) C.C. Gladue effectively summarizes the

application of that standard to this case in the following submission: " ... the Crown must prove beyond a reasonable doubt that he [Gladue] intended to cause, or was reckless or wilfully blind to whether he caused death, maiming or injury to the dog that he killed."

[96] I have found in this case that Gladue intended to cause injury to Buttons when he choked it (twice), struck its head on the bed, threw it across the room, shot BB pellets at it and tried to strike it with his pellet gun. Nevertheless, his liability for the offence described in s.445(1)(a) C.C. would also be satisfied by proof beyond a reasonable doubt that he was 'reckless' as to whether his acts would cause injury.

[97] I have previously discussed the concept of recklessness in ***R. v. Potts***, 2012 ABPC 78, at paras.41 - 44 and will not repeat that discussion in these reasons. I am satisfied that Gladue knew there was risk of danger brought about by the his actions in relation to Buttons. That risk would involve, at the very least, the danger of causing injury to the dog. Gladue elected to persist nonetheless. He saw the risk of harming the dog and elected to take the chance.

[98] The 'awareness' required for the recklessness inquiry need not amount to studied reflection, formulation of ideas about the risk or deliberation. Nor is it incumbent upon the prosecution to prove the degree of risk attendant upon the accused's acts. I observe in this regard that Gladue's violent acts toward this dog were not momentary or fleeting. His awareness of risk lasted for some period of time. Moreover, I have no doubt that his violent acts either singularly or taken in combination prove convincingly that Gladue knew of some risk of injury. Indeed, I find that he was aware that his conduct would produce grave injury to Buttons.

[99] My findings of fact refute the notion that Gladue's conduct may have constituted a 'reflex action'. I have considered the judgment in ***R. v. Hughes***, (1983), 51 N.B.R. (2d) 181 (Q.B.) wherein the court appeared to excuse what might otherwise constitute 'wilful' acts on the basis that they occurred "on the spur of the moment". The court considered it important that the accused might not have committed the *actus reus* if he "had time to reflect for a longer and calmer period". I can respond to that suggestion no better than has Crown Counsel in her submission that, "The fact that someone may act differently after careful reflection does not excuse actions taken intentionally out of anger. To provide such an exception would result in absurdities, for example it could conceivably create the defense of road rage."

[100] In short, I find that the prosecution has proven beyond a reasonable doubt that Gladue intended to cause injury to Buttons by his acts. In the alternative, he was aware of a risk of causing injury to the dog and was reckless as to whether those acts would bring about that injury. His acts both injured and ultimately brought about the death of Johnston's dog.

Self-Defence

[101] Gladue raises the question of whether the defence of self-defence applies to acts taken to protect a person from an attack by or the otherwise aggressive actions of an animal? In this

case, was he authorized by law to act ‘in self-defence’ when Buttons bit his lip? If so, has the prosecution proven beyond a reasonable doubt that he was not acting in self-defence?

[102] It is important to emphasize at the outset that terms such as ‘self-defence’ and ‘assault’ are used in the *Criminal Code* as terms of art. They are statutorily defined. Self-defence operates as a defence and assault as a crime in Canadian criminal law only to the extent and only in the manner prescribed by the *Criminal Code.* Both terms are also used in common parlance, however. Speaking in non-legal terms, one may well be the victim of a dog’s ‘assault’ and have to act in ‘self-defence’. That these terms may be utilized colloquially, however, does not mean that they take on the character or legal force of their *Criminal Code* counterparts.

[103] There is scant jurisprudence dealing directly with this issue. Those courts that have considered it have rejected the availability of self-defence in this context. See: ***R. v. Barr***, (1982), 1 C.C.C. (3d) 47 (Prov.Ct.) (‘***Barr***’); ***R. v. Greeley***, [2001] N.J. No.207 (Prov.Ct.) (‘***Greeley***’). Orr P.C.J. summarized the rulings in both ***Greeley*** and ***Barr*** as follows (at paras.15-16):

> In the case of ***R v. Barr*** 1 C.C.C. (3d) 47 the accused was charged with injuring a police dog that was assisting a police officer in the accused's arrest. In that case the accused was seen late at night in a school yard attempting to break into a school. The police officer used the dog to attempt to stop the accused. The accused struck the dog with a crow bar injuring him. The issue was whether the use of the police dog constituted excessive force in the circumstances and therefore the dog was no longer "kept for a lawful purpose". If the actions did constitute excessive force then the accused would be justified in striking the dog. In considering this issue Judge Oliver stated at p. 52 of the decision:
>
> > "The accused main defence is that he acted with legal justification or excuse and with colour of right within the meaning of section 386(2) and therefore should not be convicted... In commenting on the defence provided by section 386 (2), defence counsel referred to court to the criminal code sections on self-defence, namely sections 34 to 37, inclusive. However, I find great difficulty in attempting to apply the wording of the sections in the present situation. Section 34(1), for example, speaks about a person being justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm. Surely, grievous bodily harm to an animal is not intended. Section 34(2) speaks of an "assailant" and must be taken to refer in that regard to a person and not to an animal."
>
> I agree with Judge Oliver's analysis and consequently I find that a literal application of the self-defence sections is inappropriate in cases of attack by an animal. The sections clearly relate only to situations involving application of force to human assailants.

[104] In support of his position, Gladue submits the following: (1) since the self-defence provisions of the *Criminal Code* can justify using force or causing harm to human beings, they should also, as a matter of criminal law policy, operate to justify causing harm to animals; (2) certain legislative instruments appear to contemplate people employing 'self-defence' when 'assaulted' by animals. Reference is made to *Authorizations to Carry Restricted Firearms and Certain Handguns Regulations*, SOR/98-207, s.3(b) ('*Regulation*'), the *Regina Animal Bylaw*, No.2009-44 and Calgary's *Responsible Pet Ownership Bylaw* #23M2006 ('*Bylaws*'); and (3) the judgments in ***R. v. Frank***, 2012 BCCA 2 ('***Frank***') and ***R. v. McLeod*** (1993), 84 C.C.C. (3d) 336 (Yuk.C.A.) ('***McLeod***) support the application of the defence of self-defence to the offences in *Part XI*. I will respond to each of these submissions in turn.

[105] Gladue separately argues that he had a 'lawful excuse' to injure or kill Johnston's dog. I will deal with that submission in the reasons to follow. Nevertheless, it is clear that the term 'lawful excuse' embraces a range of conduct or justification broader than that associated with the defence of self-defence. I will use one example only. The owner of a pet dog who discovers that the dog suffers from a terminal illness would be justified in having the dog euthanized. Indeed, our society views that as a compassionate response to the dog's plight. The same cannot be said in the context of human beings, however. A parent who discovers that his child suffers from a terminal illness would not be justified in having the child euthanized. Our society would view that as murder. See: ***Rodriguez v. B.C. (A.G.)***, [1993] 3 S.C.R. 519. The policy of our criminal law does not militate in favour of extending *Criminal Code* provisions relating to 'Defence of Person' to animals (or vice versa) for that reason.

[106] Gladue submits that the *Regulation*, s.3(b) is, " ... evidence that Parliament contemplates self-defence against animals ...". He encourages the court to be, " ... extremely cautious about answering [the legal issues in this case] in ways that would, taken together, make it easier to escape liability for wilfully harming a person than for wilfully harming an animal.". For this reason, it is submitted that the *Criminal Code* defence of self-defence ought to be extended to protecting oneself from aggressive animals.

[107] The *Regulation*, s.3(b) provides that individuals may need firearms "for use in connection with his or her lawful profession or occupation" where:

> 3.(b) the individual is working in a remote wilderness area and firearms are required for the protection of the life of that individual or of other individuals from wild animals

[108] There is no doubt that the *Regulation* (and no doubt other statutory instruments) recognize that people may be required to harm or even kill animals in order to protect themselves. For example, one might be justified in shooting a grizzly bear walking towards an infant who had entered an enclosure at a zoo. This would likely be a 'lawful excuse' for the killing. It would be doubtful that a similar act would qualify as self-defence were an inmate at a prison to walk towards that infant in his cell-block. Paradoxically, were this right of

'protection' restricted in its application to the *Criminal Code* defence of self-defence, it would be much more limited in scope.

[109] Moreover, the common law has been interpreted and applied to situations where animals have attacked humans without resort to the 'Defence of Person' provisions in the *Criminal Code.* 'Lawful excuse' has been extended even to situations where animals have been killed when they have threatened other animals. See, for eg.: ***R. v. Broklebank*** (2000), 336 A.R. 183 (Prov.Ct.); ***Greeley, R. v. Etherington***, [1963] 2 C.C.C. 30 (Ont.Mag.Ct.).

[110] Gladue notes that the *Bylaws* both reference attacks by animals utilizing the term 'assault' or 'assaulted'. He submits that, "While these bylaws are not enactments of Parliament, they do show that, at least in some circumstances, the word 'assault' legally encompasses actions by animals." I have earlier noted that the terms 'self-defence' and 'assault' can be used colloquially or as terms of art. The *Bylaws* illustrate that those terms may be used in different ways, even as terms of art. With respect, this does not advance the submission that the defences described in ss.34 to 37 C.C. ought to be extended in the manner suggested by Gladue.

[111] Finally, Gladue submits that either or both of the ***Frank*** or ***McLeod*** cases suggest that the defence of self-defence should be extended to the crimes contained in *Part XI* and that dogs are capable of 'assaulting' human beings. In ***Frank***, the accused was charged with a series of offences arising from a situation where a neighbor shot and seriously injured a 13 year old girl who had been in Frank's company. Frank obtained his shotgun, walked to his neighbor's residence and testified that he fired it in the air to ensure that his neighbor knew that Frank, too, had a rifle. Frank felt that this would deter any further attack. He advised police that he told others that he had shot at the neighbor's door but that these statements were untrue.

[112] Frank's appeal from conviction for possessing a dangerous weapon, using a firearm and mischief was ultimately dismissed. It was argued by the defence, however, that the defence of self-defence ought to have been left to the jury. The trial judge had found that there was no air of reality to the defence. In his reasons for doing so, he stated:

> While there is evidence to support the position that subjectively Mr. Frank believed he needed to arm himself and fire the weapon as a means of defending himself and the others in the Dick residence against another possible attack, I find the evidence fails to establish that he held this belief on reasonable grounds.
>
> In reaching this decision, it must be kept in mind the defence of self-defence would only arise in the present circumstances as a defence to the mischief charge if the jury rejected Mr. Frank's denial that he shot at the [neighbor's] residence, and found that he actually did shoot at and strike the house. (emphasis added)

[113] The essence of the appeal court's ruling in ***Frank*** is that an individual who is acting in self-defence and thereby causes damage to property, can be acquitted of the offence of mischief for that reason. Gladue argues that the appeal court, " ... implicitly accepted that the defence

was at least theoretically available to a charge of mischief." I note, parenthetically, that the court could just as easily have ruled that if Frank were acting in self-defence in this scenario, he had a lawful excuse for causing damage to the neighbor's house.

[114] Gladue makes reference to ***McLeod*** in support of the proposition that animals can be used as weapons. In that case, the accused was charged with assault with a weapon. The allegation was that she ordered her dog to bite or otherwise harm the victim. Gladue then argues that, "Thus, if a dog is being employed as a weapon, the target of its attack is clearly being 'assaulted', and is thus able to act in self-defence." If I understand the submission correctly, Gladue argues that the dog is assaulting the victim and, as a result of that assault, the victim can avail himself of the defence of self-defence.

[115] The flaw in this latter argument is that the victim was not defending himself against the dog; he was defending himself against McLeod who was using the dog as a weapon. The appeal court accepted that 'animate things' could be used as weapons. And, as the court ruled (at para.23), "In the case at bar the animate thing was a dog whose use was effective only if it obeyed instructions. The evidence admits of no doubt: the accused intended the result which followed her command to the dog." Put somewhat less formally: Dogs can't assault people; people assault people.

[116] I resist the temptation to consider how the defence of self-defence would apply to this case if it were legally available. Did Gladue assault or even sexually assault Buttons by his unwanted kiss? Was Buttons provoked? How much force may a man use to repel a nip on the chin from a Shih-Tzu dog?

[117] In summary, it is my view that the self-defence provisions of the *Criminal Code* were designed to regulate conduct between human beings; not between human beings and animals or inanimate objects. Animals are considered to be 'property' under the provisions of the *Criminal Code*. Paragraph 445(1)(a) C.C. is contained within the *Criminal Code, Part XI - Wilful and Forbidden Acts in Respect of Certain Property* (emphasis added). While, as a form of property, they are accorded special protections, this does not make applicable s.37 C.C., as is argued by Gladue.

[118] Having regard to this finding, it is not necessary for me to consider the effect of any amendments to the *Criminal Code's* self-defence provisions subsequent to March 3rd, 2013.

Necessity

[119] The defence of necessity was summarized by the court in ***R. v. Perka***, [1984] 2 S.C.R. 232 in the following terms:

> It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse; (2) it should be recognized in

> Canada as an excuse, operating by virtue of s. 7(3) of the Criminal Code; (3) necessity as an excuse implies no vindication of the deeds of the actor; (4) the criterion is the moral involuntariness of the wrongful action; (5) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure; (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril; (10) where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

[120] I am satisfied that the defence of necessity exists as a defence at common law. However, it quite conveniently comes within the definition of 'lawful excuse' in s.429(1) C.C. as well. I will not review each component of the defence in these reasons, however. It is my view that the situation confronting Gladue did not constitute an 'imminent risk' creating the need to avoid a 'direct and immediate peril'. In addition, I am convinced beyond a reasonable doubt that Gladue's acts were not involuntary; that he had reasonable legal alternatives available to him other than injuring and/or killing the dog.

[121] There is no exhaustive definition of 'imminent risk' or 'direct and immediate peril'. There may well be situations where an animal attack could put one in danger or create a situation of imminent peril. A nip on the lip by a small Shih-Tzu dog is not one of them. I have no doubt that the nip was unpleasant and deserved to be repulsed. However, Gladue was not 'in danger' or in peril. At worst, he suffered a temporary discomfort.

[122] Gladue also had a variety of reasonable legal alternatives available to him other than choking, striking the head, throwing and shooting BBs at this dog. He could have simply stood up and pulled the dog off his lip. He could have struck it until it let go. He could even have pried its jaw open, if necessary. However, Buttons had been disengaged from Gladue's lip before he choked, struck, threw and shot at the dog. As I have found, he undertook these acts out of anger and with intent to injure the dog; not to save himself from a situation of imminent peril.

[123] I am satisfied that the prosecution has proven beyond a reasonable doubt that Gladue did not act out of necessity.

Lawful Excuse

[124] I have previously concluded that the burden of proving that Gladue had a lawful excuse for injuring or killing Johnston's dog is on him. It can be discharged on a balance of

probabilities. Given my findings of fact, there is no lawful excuse sufficient to meet that burden of proof.

[125] Even if the burden of proof were on the prosecution to disprove lawful excuse beyond a reasonable doubt, I would find that is has discharged that burden. Gladue lost his temper when bitten by Johnston's dog. I find that his loss of temper was fuelled by his consumption of alcohol. He did not merely take steps to disengage Buttons from his chin and otherwise prevent further bites. Rather, he decided to take out his anger by injuring Buttons and chose the methods noted above to do so. Those methods, leading to the death of the dog, prove beyond a reasonable doubt that his acts did not constitute a lawful excuse.

Verdicts

[126] In find Gladue guilty of the crimes described in Counts #1 and #2.

Heard on the 1st day of November, 2013.

Dated at the City of Camrose, Alberta this 21st day of February, 2014.

B.D. Rosborough

A Judge of the Provincial Court of Alberta

Appearances:

K. Stewart

for the Crown

S. Smith

for the Accused