

CANADA / JUDGMENT

Capital Regional District v. Kuo

2008 BCCA 478

COURT

British Columbia Court of Appeal

DECIDED

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2008 BCCA 478 Capital Regional District v. Kuo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Capital Regional District v. Kuo,

2008 BCCA 478

Date: 20081121

Docket: CA034447

Between:

Capital Regional District

Appellant

And:

Freiya Kuo

Respondent

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Bauman

The Honourable Mr. Justice Groberman

T. DeSouza

Counsel for the Appellant

No one appearing for the Respondent

Place and Date of Hearing:

Victoria, British Columbia

4 November 2008

Place and Date of Judgment:

Vancouver, British Columbia

November 21, 2008

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The Capital Regional District ("CRD") appeals an order made August 22, 2006, by a Supreme Court justice sitting in Chambers, which in turn dismissed the CRD's appeal of an order of a Provincial Court judge dated July 20, 2005 and made pursuant to s. 49 of the Community Charter, S.B.C. 2003, c. 26. The Supreme Court judge's reasons are indexed as 2006 BCSC 1282.
- [2] Section 49 is headed "Special Powers in relation to dangerous dogs" and in general terms, contemplates that an "animal control officer" (as defined at s. 49(1)) may take certain steps if he or she believes on reasonable grounds that a dog is a "dangerous dog", also as defined. Among other things, the control officer acting under s. 49 may seize such a dog and "enter a place" to do so, either with judicial authorization or in the presence of a police officer. Section 49(10) then states:

In addition to any other authority, if an animal control officer has reasonable grounds to believe that a dog is a dangerous dog, the officer may apply to the Provincial Court for an order that the dog be destroyed in the manner specified in the order. [Emphasis added.]

It is the meaning of this provision, and in particular, the scope of the authority given to a Provincial Court judge in making an order thereunder, that the CRD hopes to clarify by bringing this appeal.

- [3] Unfortunately, although it is clear from the case law that there is a genuine disagreement among judges concerning s. 49(10), this case is now not only moot, but lacks the necessary "adversarial context" that is so desirable at the appellate level. Because of this, I have concluded that this court should not exercise its discretion to decide this case on its merits and that the appeal should be dismissed as moot.

Factual Background

- [4] The dog in question in this case is a Belgian Malinois known as "Aba". The dog was owned by the respondent Ms. Kuo, and Dalibar Tesar, who kept Aba in their yard in Metchosin. Palmer P.C.J. heard testimony from various witnesses as to several incidents that had occurred involving Aba, which had led various neighbours and others to lodge complaints with the CRD. The Court also heard the testimony of the animal control officer, Mr. Hurrell, who confirmed his attendance at Ms. Kuo's property and his conclusion that Aba was a "dangerous dog" for purposes of s. 49. Mr. Hurrell seized Aba pursuant to a warrant on or about April 21, 2005.
- [5] The Provincial Court judge also received a report prepared by Dr. Breadner, a veterinarian who assessed Aba at Ms. Kuo's request. Dr. Breadner's report did not address whether Aba was a "dangerous dog" as defined by the Community Charter, but stated that "technically this dog cannot be considered vicious". The veterinarian stated that Ms. Kuo's home was not suitable for Aba, but suggested the dog could be managed safely by a Ms. Hack, who was said to have a home in Aldergrove where Aba's sister lived. Evidently, Ms. Hack was willing to abide by any guidelines the Court might prescribe.
- [6] At para. 29 of his reasons, Palmer P.C.J. found that Mr. Hurrell had had, at the time of his application to the Court in April 2005, reasonable grounds for his belief that Aba was a dangerous dog - i.e., a dog that would likely kill or seriously injure a person. However, he continued:

On the evidence it is my opinion that this finding must be tempered by the conclusion that Aba, as of June 29, 2005 (the date of Hearing), will "likely" kill or seriously injure a person unless steps are taken, such as those as recommended by Dr. Breadner, that will ensure the safety of the public. In other words, given the expert evidence before me, I am not persuaded that ACO Hurrell's grounds for his belief are currently reasonable where a recommended and viable alternative exists. [Para. 30.]

- [7] Given these findings, the judge said he was required to decide whether, under the provisions of the Community Charter, the Court could make a "conditional" destruction order and if so, whether it would be contrary to the public interest. (Para. 31.) The Court contrasted s. 49 of the Community Charter with s. 8(1) of the Livestock Protection Act, R.S.B.C. 1996, c. 273, which was repealed after s. 49 came into force in January 2004. Section 8(1) had provided:

The Provincial Court may, on application and on being satisfied that a dog has killed or injured, or is likely to kill or injure, a person or a domestic animal, order that the dog be killed in a manner specified in the order.

It will be noted that the subject (in the grammatical sense) of this sentence was the Provincial Court, whereas the subject of s. 49(10) is the animal control officer. Section 49(10) simply states that he or she may apply to Provincial Court for an order that the dog be destroyed.

[8] Palmer P.C.J. referred to a case decided under the former provision, *R. v. Dempster* [1995] B.C.J. No. 2264 (C.A.), in which this court had quoted from the reasons of Dohm, A.C.J. in the court below. The Associate Chief Justice had observed:

I have read the reasons of Judge Lemiski. He has set them forth rather extensively and I cannot find any error on his part, either with respect to the law or on the facts as he has found them to be. That is to say, the evidence adduced before him, which was carried out over a period of three or four sittings, clearly support[s] the trial judge's findings. The owner before me essentially says the dog was given no opportunity to change, inasmuch as the dog has been in the City Pound since April the 22nd, '94 and that, given the opportunity to do so she, the owner, would see that the dog was properly trained and/or confined in a way that the dog would not be allowed to come into contact with members of the public.

I am not able, nor was the provincial judge able, to consider that sort of conditional order. It seems to me that if the court is satisfied that the dog is dangerous within the terms of the statute, there is no alternative but to order that the dog be destroyed. In the case of the other dog, the learned trial judge found that the dog was not dangerous, within the confines of the statute, and accordingly released the dog to the owner. In the case of the German shepherd his finding was not the same, indeed, the contrary, and accordingly ordered the dog destroyed.

I see no alternative in this case but to confirm that order and confirm also the destruction order in the terms as set out by the trial judge. [Emphasis added.]

The question posed on the appeal to this court in *Dempster* was the meaning of the word "injure" in s. 8(1) of the Livestock Protection Act. The ability of the Provincial Court to make a so-called "conditional order" was not raised and this court did not comment specifically on the passage underlined.

[9] Palmer P.C.J. in the case at bar contrasted s. 8(1) with s. 49(10) of the Community Charter and concluded that *Dempster* was no longer applicable. In his view, the new provision did not prohibit or restrict the discretion of the court "to make any Order in respect of a dog provided, of course, that such Order is not contrary to the public interest." (Para. 36.) He continued:

This would include, in my view, a "conditional" Destruction Order that provides for the adoption of the dog under certain conditions and a stay of execution so long as those conditions are being met. It would also provide for immediate implementation of the Destruction Order upon a summary Application where the conditions are breached.

As s. 49 of the Community Charter is clearly directed at public protection, I would expect that any such Order would be made only upon the Court being presented with a detailed plan for the dog's care that would ensure protection of the public, together with opinion evidence from a qualified expert that endorses the plan's viability and advisability. [Paras. 37-8.]

[10] Ultimately, the Provincial Court judge ordered that Aba be delivered to Ms. Hack in Abbotsford and that:

- (2) In the event Ms. Hack refuses to accept Aba under the terms of this Order, the CRD may apply to this Court without notice to any party for immediate implementation of the Destruction Order;
- (3) Aba is to be kept under control at all times, leashed and muzzled when off the Hack property, and generally in accordance with the recommendations of Dr. Breadner outlined at page 6 of her Report;
- (4) In the event Ms. Hack intends to sell or give away Aba, she is to notify the local Animal Control authority not less than 30 days prior to the intended date of such transfer of ownership;
- (5) Ms. Hack is to report to the local Animal Control authority any incidents of aggression that involve Aba attacking or biting any human, on or off her property, whether injury occurs or not, within 24 hours of any such incident;
- (6) Ms. Hack is to notify the local Animal Control authority forthwith upon the death of Aba by natural or any other causes;
- (7) In the event of any report being received under (5) from Ms. Hack or any other person, any Animal Control Officer authorized under the Local Government Act may, in his or her discretion, seize Aba and apply to this Court, with reasonable notice to Ms. Hack, for immediate implementation of the Destruction Order;
- (8) In the event that the CRD or local Animal Control authority becomes aware of any breaches of this Order, or, upon receipt of notice under (4), any Animal Control Officer authorized under the Local Government Act may, in his or her discretion, seize Aba and apply to this Court with, reasonable notice to Ms. Hack, for immediate implementation of the Destruction Order; and
- (9) At any time, any Animal Control Officer authorized under the Local Government Act may, where Ms. Hack consents, apply to this Court without notice to any person for immediate implementation of the Destruction Order.

- [11] The CRD appealed to the Supreme Court on the ground that "the Provincial Court has no jurisdiction under s. 49(10) of the Community Charter to grant a conditional order for destruction, that there is jurisdiction only to confirm or deny a destruction order proposed by an animal control officer." The CRD advised the Court that at that stage it was no longer seeking the destruction of the dog and was content to allow the provisions of the "conditional order" to remain in place - notwithstanding its characterization of the issue as a jurisdictional one. Counsel for the CRD urged the Chambers judge to entertain and decide the appeal. (The lawyer who had acted for Ms. Kuo at the Provincial Court hearing took no active part in the Supreme Court proceeding, but appeared only as a courtesy.)
- [12] The Chambers judge agreed to hear and decide the matter. After reciting the facts before the Provincial Court judge and the legal arguments advanced by the CRD on the question of jurisdiction, he concluded that s. 49(10) gave "wide discretion" to the Provincial Court and that such discretion was a reasonable way of effecting a "balance of public protection from dangerous dogs against the property rights of owners of those dogs." He continued:

As earlier mentioned, Dempster was decided under the Livestock Protection Act. There, s. 8(1) conferred on the Provincial Court the jurisdiction to conduct a hearing in order to decide whether a dog had killed or injured, or was likely to kill or injure. That statute achieved a balance between public protection and an owner's property rights in a dog by requiring the finding of a judge, on a balance of probabilities, after hearing both sides of the issue.

The argument of the CRD in this case would, if accepted, deprive the owner of a hearing into whether the owner's dog was likely to kill or seriously injure a person under s. 49(10), and would substitute for that hearing a hearing into whether an animal control officer believed that a dog would likely kill or seriously injure, and whether that belief was reasonable. That would effectively remove the determination whether a dog was sufficiently dangerous to warrant its destruction from the court to the animal control officer. It would deprive the dog's owner of any meaningful hearing into what should be the essential question - whether the dog is dangerous enough to warrant its destruction. If the legislature had intended by s. 49(10) of the Community Charter to permit a dog owner to be deprived of his or her property rights without a hearing, it would have said so directly. That it did not make this intention plain I consider quite significant.

- [34] The decisions of this court and the Court of Appeal in Dempster do not prevent conditional orders under s. 49(10) of the Community Charter. [At paras. 32-4; emphasis added]

In the result, the order made by the Provincial Court judge was found to lie within his jurisdiction and the Supreme Court judge dismissed the appeal. He declined to order costs in view of the CRD's willingness to refrain from destroying the dog and in view of the "limited involvement" of counsel for Ms. Kuo in the appeal.

On Further Appeal

[13] In this court, Ms. Kuo was again not represented by counsel; nor did she appear in person, presumably because the determination of this appeal would have no practical effect. Indeed, we were told that Aba has now been destroyed voluntarily by Ms. Hack, the new owner, after various difficulties arose with the dog and other dogs on her property.

[14] We raised with Mr. DeSouza, counsel for the CRD, the question of mootness. He acknowledged the principles set forth by the Supreme Court of Canada in the leading case of *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. He urged us nevertheless to exercise our discretion in favour of deciding the appeal on its merits and to issue a declaratory order clarifying that a "conditional order" like that made by the Provincial Court judge does not lie within the Court's authority under s. 49(10).

[15] In *Borowski*, Sopinka J. stated:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. [At 353; emphasis added]

The factors said to be relevant to the exercise of the court's discretion in favour of deciding a moot question are well-known. First, the existence of an "adversarial context" will normally help "guarantee that issues are well and fully argued by parties who have a stake in the outcome", even if that stake has been reduced to a "collateral consequence" by the time of the appeal. (*Borowski*, 358-9.) Second, the Court referred to judicial economy, although as Sopinka J. noted at 360, this may be answered if there are special circumstances that "make it worthwhile to apply scarce judicial resources to resolve it." Alternatively, where a point of law is of a recurring nature but of brief duration, it may be appropriate for a court to determine the issue lest it evade review. Sopinka J. added, however, that:

The mere fact that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved. [At 361; emphasis added.]

As a final factor affecting the exercise of a court's discretion, Sopinka J. noted the need for the court to demonstrate "a measure of awareness of its proper law-making function" and to be sensitive to its adjudicative, as opposed legislative, role in the Canadian political framework.

- [16] Mr. DeSouza submitted that the CRD's appeal in the case at bar, although lacking an adversarial context at this level (and largely at the Supreme Court level), raised a point that was recurring and unlikely to reach this court again in the near future, given the small amount of money usually involved in cases under s. 49. He brought to our attention various instances in which Provincial Court judges have struggled with the meaning of s. 49 and in particular, the Court's role under ss. 10. Does the Court determine whether the animal control officer reasonably believes that the animal is a dangerous dog, or does the Court itself determine whether the dog is dangerous? On this, the cases seem to be divided: see, e.g., *In the Matter of Ashley Newcomb and Chris Wharton* ((unreported) March 17, 2006, Provincial Court #27103, Williams Lake Registry); *Prince George (City) v. MacLeod* 2004 BCPC 8, [2004] B.C.J. No. 123; and *R. v. Koehler*, ((unreported), April 1, 2005, Provincial Court #128728, Victoria Registry). This question arises in addition to the narrower one of whether a "conditional order" can be made under s. 49(10). On this point, Provincial Court judges also appear to have differed as to whether *Dempster* remains applicable: see, e.g., *Prince George (City) v. Sedlock* 2001 BCPC 419, [2001] B.C.J. No. 2843 at para. 19, and the cases cited at para. 52 of *R. v. Whittle* 2005 BCPC, [2005] B.C.J. No. 2833.
- [17] Mr. DeSouza does not pretend that these issues are of large public or national importance, but he does submit that clarification of the status of *Dempster* would be very helpful to local district and municipal governments. It is perhaps unnecessary to say that these authorities would prefer, in Mr. Hurrell's words, a "straight up or down decision" in cases like this.
- [18] I agree with counsel that the appeal engages the proper interpretive function of this court. I also appreciate it raises a legal issue of some importance to local governments and that the CRD has gone to some trouble and expense to have it resolved by this court. In my view, however, the lack of "adversarial context" - i.e., argument from someone representing the interests of dog-owners who would be affected - makes it inappropriate for us to embark on the merits of this appeal. The situation would have been different had an intervenor appeared to serve that function, but no one did so. We are left with a one-sided argument and would have to try to imagine what issues counsel opposed to the CRD's position would raise and what cases he or she would cite in support.
- [19] In my respectful opinion, the issue raised by the CRD is sufficiently important that it demands full argument between two adversaries. We should not, in the absence of such argument, try to determine the merits of this appeal.
- [20] I would therefore dismiss the appeal as moot, with thanks to Mr. DeSouza for his able submissions.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Bauman"

I Agree:

"The Honourable Mr. Justice Groberman"

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