

CANADA / JUDGMENT

Leaf v. Langley (Township)

2018 BCSC 335

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 335 Leaf v. Langley (Township)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leaf v. Langley (Township),

2018 BCSC 335

Date: 20180306

Docket: S181991

Registry: New Westminster

Between:

Doug Leaf doing business as T.O.P. Dog Training Corps.

Petitioner

And

The Corporation of the Township of Langley

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

The Petitioner appearing in Person:

D. Leaf

Counsel for Respondent Township of Langley:

R. Berger and

S. McCalla

Place and Date of Hearing:

New Westminster, B.C.

April 21, 2017

June 7, 2017

Place and Date of Judgment:

New Westminster, B.C.

March 6, 2018

Introduction

- [1] For approximately 15 years the petitioner carried on the business of a commercial dog kennel in South Langley under a business licence issued by the Township of Langley (the "Township") who is the respondent in this matter. The respondent licensed the petitioner to keep 24 dogs at his facility. One of the petitioner's neighbours reported hearing dogs barking on March 6, 2016, and April 6, 2016 repeatedly on the petitioner's property and that the noise disturbed them. As a result of the neighbour's complaints, the petitioner was charged with two offences under Langley Township, No. 4440, Animal Control Bylaw (2005), s. 32 [the "ACB"] with a prescribed penalty of \$200 for each offence.
- [2] He disputed the offence notices and after a hearing before an adjudicator, he was convicted of the offences and fined.
- [3] These reasons address the petitioner's application for judicial review of the adjudicator's decision.
- [4] At its core, the petitioner's argument is that the Township issued him a valid business licence to carry on the business of a kennel at his premises with full knowledge that dogs in kennels will, from time to time, bark. Barking dogs are an inherent characteristic of a kennel business and should not, in the circumstances of this case, result in a successful bylaw prosecution under the ACB.
- [5] The petitioner contends that he took reasonable steps to ensure that the ACB was not breached by dogs barking in his kennel and that it could not be within the reasonable contemplation of the Township that the noise of barking dogs emanating from his property in a rural environment can or should be construed as a breach of the bylaw.
- [6] In the overall context of his business, the location of his kennel and the authority granted to him by the respondent, he contends he has not breached the bylaw. Alternatively, he contends that the bylaw is unenforceable due to vagueness and uncertainty and should be struck down.

Background

- [7] The petitioner has a long history in animal training and has bred and boarded dogs at his home at 24333 12th Avenue, Langley, BC, since 2001. The respondent issued business licenses for "Top Dog Training Corps." to operate a commercial kennel. The petitioner's kennel is a permitted use of the property under the municipal zoning and represents the significant portion of the petitioner's income. He has been issued 24 dog licences.
- [8] The petitioner acknowledged receiving complaints in 2008-2009 with respect to noise/barking coming from his property. When faced with those complaints he made alterations to the land around his kennel and none of these complaints resulted in prosecution. After he took steps to ameliorate the problem no further complaints were made until January 2016.
- [9] In 2016, the Langley Township ACB was administered by the Langley Animal Protection Society ("LAPS") represented in this case by Ms. Jenny Ramirez ("Ms. Ramirez").
- [10] Beginning in January 2016, the Township began receiving complaints concerning barking dogs on the petitioner's property. The petitioner acknowledges receipt of several noise warning letters from Langley Animal Control Services concerning complaints that his dogs were disturbing the peace and quiet of his neighbours and that offence notices would be issued if the noise was not stopped. At one stage, the Township informed the petitioner that his dogs could not bark more than three minutes in any fifteen minute period.
- [11] Bylaw offence notices concerning disturbing noises from dogs under the petitioner's control were issued on March 6, 2016, and April 6, 2016.
- [12] The petitioner disputed the charges resulting in a hearing before adjudicator Miller on June 15, 2016. The petitioner had assistance in presenting his dispute to the offence notices.
- [13] At the hearing, the main complainants about the petitioner's barking dogs were Mr. and Mrs. Lazzara. They had moved into a residence adjacent to the petitioner's property in 2012. Their home is a considerable distance from the petitioner's kennel and cannot be seen from the kennel or dog runs, but they have chronicled an extensive list of dates and times when the petitioner's dogs barked for long periods of time, in both evening and morning hours.
- [14] A second complaint was received by Ms. Ramirez from Mr. Raymond Holdgate who lived on another street but near the petitioner's property. He did not hear much barking from the petitioner's property but expressed concern that a modular home at the back of his property might be disturbed by barking. His neighbour's dogs bark but he eventually complained that the petitioner's dogs barked seven times between May 16 and June 12, 2016. He did not complain about noise on any of the days described in the offence notices.
- [15] On conclusion of the hearing, adjudicator Miller gave brief reasons in which she decided that there was evidence that the enjoyment and peace of other people was "affected by noise of animals at this location" and upheld both offence notices. The transcription of her reasons is as follows:

I think you have a dispute based on a question of law, the wording of the bylaw, which I'm not allowed to rule on.

I can rule on the bylaw notices as they stand, and then it would be a judicial review to sort out the question of law where you're talking about the bylaw worded incorrectly to - - in effect, that's not a question that I'm permitted to rule on, as you had stated in your number 20.

I think that's what you are relying on, which is a question of law, which - - which I am not permitted to - - to rule with - - rule on, okay

it could be that they have to change the bylaw, but that's not - - this is not - - I'm not the person who can rule on that.

So in effect, then, what I do is - - and you certainly can't request a judicial review until I make a decision.

So, in effect, what I'm going to do, then, is rule and - - on what I have in front of me, which is a very restrictive bylaw and I know you know that. The bylaw wording:

No person shall suffer, permit any dog of which they are the owner, possessor or harbour to make any noise anywhere in the municipality which disturbs the quiet, peace, rest, enjoyment, comfort or convenience of the neighbourhood or a person or persons in the vicinity

What I have in front of me is exactly that, so I will be upholding both of the notices. People have documented, I have evidence to prove that they - - their enjoyment and peace is being affected by noise of animals at this location, so I will be upholding both notices. Okay

[16] The adjudicator confirmed her determination in a form captioned "Adjudication Judgment" in which she said:

I, Barbara Miller Determined that the alleged violation:

Did Take Place

Comments:

Under current bylaw I can only decide if one person is affected by the barking and I am satisfied this is so. Disputant rests on the fact that the bylaw may be too restrictive This is a question of law that I am not permitted to decide

Position of the Petitioner

[17] The petitioner is a lay litigant and personally argued this application. I endeavour to address his arguments in detail as they appear from written submissions, filed materials, the transcript of the hearing and the oral reasons of adjudicator Miller.

[18] The petitioner's arguments can be broken down as follows:

Evidentiary Issues

- [19] The petitioner submits the complainant's evidence was insufficient to prove dogs in his kennel were the source of noise that disturbed their peace, quiet and enjoyment on the dates listed on the offence notices.
- [20] He also contends that the adjudicator failed to take into account affidavit evidence filed indicating that nine neighbours or persons living nearby were not disturbed by the dogs. He also alleged that Ms. Ramirez failed to disclose to him information she had obtained from several other neighbours concerning noise in the neighbourhood.
- [21] He believes that if the adjudicator had given careful attention to this evidence she would rationally have reached a different conclusion.

Due Diligence

- [22] The petitioner pleads he took reasonable steps to comply with the ACB and that these steps should have insulated him from being found in violation of the ACB. (I note here that the petitioner did not expressly state his defence as one of "due diligence" but rather his evidence and submissions were presented in such a way that leads me to conclude this is indeed what he was attempting to argue in his defence).
- [23] On this point, he contends that before receiving the offence notices, he contacted Ms. Ramirez in an effort to have discussions about steps that might be taken to ameliorate the problem. He contends she failed to consult with him in his efforts to find a solution to the noise complaints without resorting to prosecution.
- [24] He seeks to rely on the decision of Madam Justice Loo in *Coquitlam (City) v. Crawford*, 2008 BCSC 993 at para. 70 [Crawford #2], for the principle that, once a kennel owner has done everything reasonably possible to keep noise from disturbing his neighbours, he should not be convicted of breaching the ACB.
- [25] He points to the actions of the complaints in support of his due diligence defence. He contends that before the complainants purchased their residence their predecessors never raised concerns about the noise from the dogs in his kennels. He said the complainants were aware that their property was next to a licenced kennel where dogs would likely be barking; I inferred that he believed that because they knew about the kennel they were, in some way, estopped from complaining years later. The petitioner's kennel and home are in a rural area with substantial distances between his house and neighbour's houses. He notes he has satisfied the 91 metre requirement under s. 44 (2) of the ACB.

- [26] He contends the complainants aggravated the situation by choosing to cut down trees and plants in close proximity to his property, thus exacerbating the impact of any barking dogs. This was not evidence before the adjudicator. However, he claims the proximity of the two properties and the complainant's changes to the surrounding vegetation made them authors of their own misfortune. He believes the adjudicator did not take these factors into account.

Vagueness and Uncertainty

- [27] The petitioner argues s. 32 of the ACB should be found void for reasons of vagueness and uncertainty. He relied on the decisions of *R. v. Weltzin*, [1989] B.C.J. No. 1438, 8 W.C.B. (2d) 30 [Weltzin], and *Bell v. Toronto*, [1996] O.J. No. 3146, 39 C.R.R. (2d) 152 [Bell], to support his argument.
- [28] It is his position that there is no identifiable standard that a dog owner could reference in order to assess when his animals might be at risk of causing a breach of the bylaw. He contends the bylaw is arbitrary, subjective and incorporates a "standardless sweep" that permits such wide discretion that the bylaw is too vague and uncertain: see Bell at para. 47.
- [29] He contends that reliance on Township staff to interpret the bylaw in a sensible way involves a discretionary enforcement process that is the hallmark of vague and uncertain legislation.
- [30] The petitioner also points to the fact that he has a valid business licence to operate a kennel and argues interpreting the bylaw in such a way that precludes his ability to run the kennel with attendant noise cause by 24 dogs result in an absurdity not intended by the Township. Because there is no practical way to prevent dogs barking in his kennel from disturbing any person in the municipality, the ACB when read in conjunction with his business licence, was vague and unenforceable because the business could not be operated without some level of noise from the dogs.

The Respondent's Position

Evidentiary Issues:

- [31] The respondents contend there is an abundance of evidence supporting the adjudicator's decision that the peace and quiet of several neighbours was disturbed by dogs barking in the petitioner's kennel.
- [32] They point to the written logs of dates the petitioner's dogs barked persistently and disturbed their peace and quiet on an ongoing basis together with the evidence of Mr. Holdgate to support the findings of the adjudicator.
- [33] The Township contends that, during the hearing, the petitioner did not deny the complainants' assertions that barking was heard on the dates set out in the bylaw notices and in her conclusions. The adjudicator Miller accepted and confirmed that there was sufficient evidence to prove that the neighbours enjoyment and peace was being affected by the "noise of animals at this location".

- [34] The Township argues the absence of a denial by the petitioner concerning noise from his dogs is one consideration supporting the adjudicator's conclusion that the dogs barked on the dates set out in the offence notices and that the evidence was sufficiently clear and cogent that the offences were proved.
- [35] The respondent tendered new affidavit evidence for the purposes of this judicial review. I address the petitioner's argument against use of this evidence further in these reasons.

Vagueness and Uncertainty

- [36] The Township contends the ACB validly regulates nuisance noise caused by dogs including those in commercial kennels. The type of restriction in the Township's bylaw is identical to other noise control bylaws that have been affirmed and determined to be sufficiently certain and adequately focused to be enforced.
- [37] The respondent points to the fact that the petitioner was warned in the letters from LAPS that barking from his kennels constituted breaches of the ACB and if not controlled, would result in a fine. On more than one visit to the area, Ms. Ramirez personally heard dogs barking continuously for periods of 15 minutes. The Township's letters should have helped him understand the nature and extent of his obligations under the ACB; he simply failed to grasp the gravity of the complaints and his obligations under the bylaws. He was erroneously fixed on the view that, having received a business licence to operate a dog kennel and training facility, his business was not subject to the noise provisions in the ACB.
- [38] The Township argues that the legislative scheme was fair, flexible and comprehensive for efficient enforcement of municipal bylaws. Persons charged may pay the fine assessed or seek an adjudication. Adjudicators may accept or reject any type of evidence considered "credible, trustworthy and relevant to the dispute" and "in any manner the adjudicator considers appropriate". The respondent acknowledges the adjudicator does not have jurisdiction to decide a legal challenge to the validity of the bylaw alleged to have been contravened: see s. 16 the Local Government Bylaw Notice Enforcement Act, S.B.C. 2003, c. 60 [BNEA].

Standard of Review

- [39] The Township argued that, although the standard of review in relation to the current bylaw adjudication process has not been decided by any court, the starting point for consideration should be the factors set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [Dunsmuir], following the standard of review of applicable adjudicative decisions. It contends that the overall context of the bylaw and these charges will involve a consideration of the four legs of the Dunsmuir test discussed below.

- [40] The Township refers to comments in the Hansard record of debates which underscored the underlying reason for the new enforcement process stemming from the cost of operating the court system and creating efficient and more effective means to resolve disputes between citizens and agencies of government.
- [41] The Township argued that the issue in this case was either factual or mixed fact and law which attracted a reasonableness standard of review. It contends this court must be restrained in any judicial intervention into administrative matters: see *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 [Kinexus] at paras. 13-14.
- [42] The court is not to reweigh or reassess evidence but to determine whether there was evidence on which the adjudicator could base her findings: see the *Miller's Landing Pub Ltd. v. Liquor Control and Licensing Branch*, 2009 BCSC 1352 [Miller's Landing] at paras. 31-32.
- [43] Overall, the Township recognizes that the petitioner's licence permits operation of the commercial kennel business but does not permit breaches of the licence or the ACB. They also argued that if dogs barked while on the petitioner's property, he could not carry on business unless he complied with the terms of his business licence or the licensing provisions of the ACB.

Law:

Legislation and Bylaws

- [44] Municipalities receive their authority to regulate activities and behaviours within their boundaries from the Community Charter, S.B.C. 2003, c. 26. The Township's authority to regulate noise comes from s. 64 which includes the following:

Nuisances, disturbances and other objectionable situations

64 The authority of a council under section 8 (3) (h) [spheres of authority -- nuisances disturbances and other objectionable situations] may be exercised in relation to the following:

- (a) nuisances;
- (b) noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public;

- [45] The Township bylaw regulates noise emanating from dogs under its ACB, with the following:

Part VI - CONTROL OF ANIMALS

32. No person shall suffer or permit any dog of which they are the owner, possessor or harbinger to make any noise anywhere in the Municipality which disturbs the quiet, peace, rest, enjoyment, comfort, or convenience of the neighbourhood or of a person or persons in the vicinity.

[]

.

[]

Part VII - Licensed Kennels

37. All buildings used in connection with a licensed kennel shall:

- (1) be constructed in accordance with the Buildings Bylaws of the Municipality and shall contain at least 8 cm of insulation in all exterior walls and ceilings for the purpose of soundproofing;

[]

38. Except for hobby kennels, contain an internal communication system between the service area and all pens and runs which is capable of transmitting any sounds or noises emanating from the pens and runs to the service area and capable of transmitting the voice of the operator or other staff from the service area to the pens and runs for the purpose of voice control of the animals being kept therein.

[]

40. The outside perimeter of all areas of licensed kennels where animals are kept shall be enclosed by a solid fence or solid hedge at least 1.8 m in height to screen the areas from adjacent properties.

41. Every operator of a licensed kennel shall ensure that animals being kept therein are under control and restraint from barking, yelping, or howling

42. All animals being kept in a licensed kennel shall be indoors during the hours of darkness.

44. All buildings, pens and runs where animals are kept in connection with a licensed kennel shall be located:

- (2) Not less than 91 metres from any residence other than that occupied by the operator of the kennel or an employee thereof

[46] The Township's business Licensing Bylaw No. 5192 and ss. 5.1, 5.4 and 5.5. requires businesses to operate subject to the terms and conditions set out in its licence.

[47] All offences are enforced under the BNEA which includes the following:

Bylaw notice

4 (1) Subject to the regulations, a local government may designate bylaw contraventions which may be dealt with by bylaw notice under this Act.

- (2) If a matter is prescribed by regulation as only enforceable by bylaw notice, a local government bylaw in relation to the matter may only be enforced by bylaw notice.

[48] Bylaw disputes in the Township are dealt with through a dispute adjudication system created under Part 3 of the BNEA. Adjudicators are drawn from a roster in a manner that ensures their impartiality and independence: see Bylaw Notice Enforcement Regulation, B.C. Reg. 37/2017 [the "BNE Reg"]. The jurisdiction of an adjudicator is limited under s. 16 of the BNEA, which reads:

Limitation on jurisdiction of adjudicator

16 Whether or not the matter arises in the course of hearing and determining a dispute in respect of a bylaw notice or a compliance agreement, an adjudicator may not decide any of the following:

- (a) a matter involving the Canadian Charter of Rights and Freedoms;
- (b) a matter for which notice under section 8 of the Constitutional Question Act is required;
- (c) a matter involving a determination of aboriginal or treaty rights or claims;
- (d) a challenge to the validity of the bylaw that is alleged to have been contravened;
- (e) a prescribed matter.

Adjudicator determination

21 (1) The standard of proof for resolving a dispute referred to in section 14 [local government dispute adjudication system] is proof on a balance of probabilities.

Final determination by adjudicator

22 (1) The determination of an adjudicator under section 21 [adjudicator decision] is final and conclusive, and is not open

- (a) to review in a court except on a question of law or lack of jurisdiction, or
 - (b) to appeal to any body.
- (2) An application under the Judicial Review Procedure Act in respect of the determination of an adjudicator under this Act must be brought within 30 days after the determination is made.

Analysis

[49] Fairness, logic, consistency, and rationality do not always animate the rules governing the way neighbours behave in close proximity toward one another. Municipalities have an unenviable role of managing different lifestyles, occupations, property uses, and personalities that sometimes lead to friction between neighbours. Presumably it is difficult to craft bylaws that can address all possibilities when addressing property use conflicts. A

single bark or two from one dog may disturb the peace, quiet, tranquility, use and enjoyment of one neighbour but not another. The subjective condition of the person hearing the noise can be an important factor in that measurement. Conversely, some neighbours may be tolerant of louder or repetitive noises coming from their neighbours' property or animals. In the case of dogs in the Township, the council has decided that the dog noise bylaw can be used to prohibit all noise made by dogs that interferes with peace, quiet, rest, enjoyment, comfort or convenience of persons or neighbourhoods.

- [50] The infrequent and intermittent barking dog, as well as the persistent ongoing and aggravating barking dog, both expose their owners to prosecution. The Township has chosen to essentially leave the question of when dog noise will be accepted and when it will be punished to a complaint driven process. This is the nature of municipal discretion in bylaw enforcement.
- [51] The legislature has adopted a less complex and expensive process that better serves the needs of the municipality and potential offenders resolve bylaw prosecutions by adjudication rather than in the Provincial Court. Thus, the new prosecution system functions on the administrative model where offences are proven on the balance of probabilities and the principles of evidence are relaxed and left to the discretion of adjudicators trained to decide bylaw disputes. That being said, the prosecution of dog owners for breaches of noise bylaws has become simpler and more streamlined. As in this case, adjudicators have limited jurisdiction to decide some issues and customarily address factual issues without the usual considerations or tensions normally found in criminal prosecutions.
- [52] During argument, I asked if this complaint could be addressed under the Farm Practices Protection Act (Right to Farm) Act, R.S.B.C. 1996, c. 131 [FPPA]. It is interesting to observe that the FPPA includes protection from municipal prosecution against activity that is in the nature of a farm operation but s. 1 of that Act specifically exempts kennels from the protections offered to other farming businesses. It reads:

"farm operation" means any of the following activities involved in carrying on a farm business:

- (a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals;

but does not include

- (m) breeding pets or operating a kennel;

- [53] Thus, it is clear the legislature intended kennel operators to remain subject to municipal noise and animal bylaws.

Standard of Review

- [54] I agree with the respondent that the reasonableness standard outlined in *Dunsmuir* should apply. *Dunsmuir* sets out important considerations in determining the standard of judicial review the court must consider:
- a. is there a privative clause;
 - b. the purpose of the tribunal by interpretation of the enabling legislation;
 - c. the nature of the question at issue; and
 - d. the expertise of the tribunal.
- [55] In this case, the legislation contains a strong privative clause; the tribunal is trained specifically to deal with bylaw offences; and the enabling statute makes the tribunal's authority clear. All of these factors militate towards reasonableness standard of review over an adjudicator's findings. In this case the adjudicator said she was unable to decide questions of law with reference to the petitioner's challenge to the validity of the ACB. The statute only precludes an adjudicator from deciding issues where validity of a bylaw is impugned but not all questions of law.
- [56] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 the court discussed *Dunsmuir* and the principles concerning the adequacy of reasons:
- [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
- [57] In *Kinexus*, Wedge J. summarized other important considerations concerning judicial reviews of administrative decisions at paras 12, 13, and 18.
- a. courts must not interfere with adjudicator's decisions simply because it disagrees with the conclusion reached;
 - b. the review is not an appeal and not intended to retry the issues before the tribunal or to reweigh evidence or other findings made by adjudicator. It is limited to determining whether the decision was within the statutory authority or jurisdiction;

- c. the reviewing court must exercise restraint and interfere only if the applicable principles have been triggered;
- d. if an adjudicator' reasons disclose a failure to consider some evidence in relation to the ultimate issue or failed to consider an issue at the core of the dispute, the court may interfere

[58] In *J.J. v. School of District No. 43 (Coquitlam)*, 2013 BCCA 67 at paras. 24-28 [J.J.], the Court of Appeal said the correctness standard applies to questions of law and questions of mixed law and fact but "It is important that courts not be too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness."

[59] The Court of Appeal also said the correctness standard applies to questions involving "the application of a legal standard to uncontroverted facts" and where there are "no extricable issues of fact" that need to be considered. The Court held that issues of fact extricable from the mixed questions must be reviewed on the deferential standard. The court should avoid embarking on fact-finding functions that are best resolved by the adjudicator.

Insufficient Evidence

[60] The petitioner argues that there was no evidence demonstrating his dogs were continuously barking. He said there is only "unsubstantiated evidence from a neighbour". He contends it was entirely inappropriate to rely on one neighbour's evidence of complaint to register a conviction.

[61] He contends that the evidence of nine individuals he brought to the adjudicator indicating they had observed no significant disturbance of peace and quiet and enjoyment caused by the petitioner's dogs, should have persuaded the adjudicator the offence was not proved. Further, he contends that the LAPS staff did not disclose the results of their canvas concerning complaints about dog noise with the exception of Mr. Holdgate. He did not specifically ask for an adverse inference on this point, but I construed his comments regarding Ms. Ramirez's failure to present the results of her inquiry with other neighbours as an invitation to draw an adverse inference that those witnesses' evidence would not have supported the prosecution.

[62] The petitioner contends the cumulative effect of the evidence he tendered coupled with the Township's failure to adduce evidence it had gathered should have persuaded the adjudicator that it was not proved on the balance of probabilities that the noise heard by the complainants emanated from his kennel or was, at least, exaggerated. The complainant's evidence could not possibly be accurate and were likely inaccurate insofar as they recorded noise emanating from his kennel or that it was exaggerated. The court does not perform an appellate function and is not entitled to retry the issues of fact decided by the adjudicator. The court cannot weigh evidence or make any findings concerning credibility. These are the very functions the petitioner asks the court to perform on this review because he said she was wrong in her conclusions on the evidence. I find that the adjudicator reached

conclusions of fact based on the evidence and notwithstanding the economy of the reasons for judgment, cannot be said to have acted unreasonably. I am satisfied that the conclusions and decision of the adjudicator on the facts and evidence received in the hearing fall within a range of possible and acceptable outcomes in light of the evidence and statutes under which she operated with one exception for the reasons that follow.

- [63] It is not this Court's function to revisit the question of whether the evidence at the hearing was sufficient to persuade the adjudicator that the petitioner's dogs had disturbed the peace and quiet of the complainants.
- [64] Similarly, dealing with the question of the statements obtained from various of the petitioner's neighbours, I accept the Township's argument the adjudicator acted reasonably in not giving the petitioner's nine witnesses evidence any weight in her determination. It is unclear what, if any impact, that evidence might have had in the result but if, as inferred by the Township, she was entitled to reject that evidence, she discharged her responsibility on this point.
- [65] The petitioner contends that the adjudicator erred when she failed to consider evidence of various neighbours concerning their observations of barking emanating from his property and other locations because she did not mention the evidence in her reasons. When an adjudicator fails to address credibility of certain evidence, the result may be set aside as manifestly unreasonable: see: *Petrov v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 486 [Petrov]. In that case a driver had tendered an affidavit from his passenger confirming that he had not been offered a second ASD test before a prohibition was issued. The adjudicator did not consider the passenger's affidavit and the Court of Appeal discussed the obligation of an adjudicator to consider and weigh evidence contained in the passenger's affidavit. The court said the adjudicator was not entitled to ignore or reject the affidavit without first considering the evidence. The Court concluded:
- [34] In a sense, the adjudicator's error was similar to the error of the adjudicator in *Whyte*. As a result of the adjudicator's faulty reasoning, the adjudicator failed to address conflicting evidence that was central to the outcome of the review. The route to the decision was, therefore, demonstrably or manifestly unreasonable.
- [66] I am satisfied that s. 20 of the BNEA required the adjudicator to consider the credibility and trustworthiness of any evidence in deciding whether evidence should be accepted. If the adjudicator fails to perform the test the decision may be "demonstrably or manifestly unreasonable". On this point, I do not consider the adjudicator's omission on this point to be manifestly unreasonable.
- [67] It is reasonable to conclude that the evidence of his witnesses would not have assisted the petitioner. In the circumstances of this case, the complainants and Ms. Ramirez each said that they observed barking from the petitioner's kennel that disrupted their peace and quiet on the dates of the alleged offences. The evidence of the other witnesses was not specific nor related to the dates of the offences or the times described by the complainants. I conclude

that the adjudicator's conclusions were reasonable to the extent she accepted the evidence of the complainants and Ms. Ramirez concerning the source of dog barking heard by each of them on the dates of the offences without reference to the petitioner's other evidence.

Due Diligence

[68] The defence of due diligence was clearly set out in para. 11 of the Petition:

11. The petitioner has taken all reasonable and appropriate steps to ensure that noise that necessarily results from the commercial kennel is kept to a minimum and therefore has not breached the bylaw.

[69] The petitioner's submissions to the adjudicator include references to significant steps he took to ensure the bylaw was not breached. He listed six measures he took, including:

- a) Confining dogs indoors from 10:30 pm to 7:30 am;
- b) The public and clients are not permitted to enter kennel premises;
- c) There is a responsible adult on the premises at all times;
- d) Dogs are exercised daily in outdoor runs and trained and walked regularly;
- e) The dogs are fed once per day to reduce noise associated with feeding time;
- f) Dogs are moved around so that louder barking dogs are situated away from neighbouring houses;
- g) Numerous trees, bushes and shrubs have been planted around the northwest and south sides of the kennel and around the outer perimeter of the property.

[70] Although the petitioner framed his argument on this review without specific reference to words "due diligence", he clearly raised those issues in his pleadings, with the adjudicator and in his argument in this application. In challenging the ACB on the basis of "vagueness and uncertainty", I construed his contention, in part, to be that the noise from his dogs persisted in disturbing the complainants after he had taken all reasonable steps to comply with the bylaw. Because the bylaw created an insurmountable challenge to the operation of his kennel business, the ACB must was unduly restrictive and should be quashed as too vague to support these charges: see Bell, Weltzin and Crawford #2.

[71] The Township conceded that the petitioner had made some efforts at controlling noise from dogs on his property but said those efforts were inadequate; it said "more reasonably could have been done "

- [72] The adjudicator said: "I think you have a dispute based on a question of law, the wording of the bylaw, which I'm not allowed to rule on." Although she was alluding to the petitioner's argument concerning the validity of s. 32 of the bylaw, she may to have conflated his due diligence defence with the question of "vagueness". Thus, she did not address his claim that he had done everything possible to stop the dogs from disturbing neighbours.
- [73] In *Kinexus*, Wedge J. addressed the question of ignoring or omitting relevant evidence as reviewable error. She said:
- [28] Stated slightly differently, a tribunal's decision must contain some evidence logically capable of supporting its conclusion. On judicial review, the court cannot weigh and evaluate the evidence that was properly received and which has some probative value, but then/must confine its review to the initial question of whether there is some evidence capable of supporting the decision: *Re McInnes*, at p. 698.
- [29] If the Tribunal ignored or omitted relevant evidence when arriving at a material finding of fact, it has committed a reviewable error. An omission constitutes a reviewable error only if the court determines that the Tribunal failed to have regard to evidence relevant to a material finding of fact. Again, when considering whether the Tribunal erred, the court must avoid re-weighing the evidence and maintain an attitude of deference to the Tribunal's fact-finding role.
- [74] On this point, the adjudicator's treatment of the issues was unreasonable because she did not address the factual or legal issue of due diligence. This is not a case of questioning the adjudicator's treatment of the evidence or conclusions she may have reached based on that evidence. The adjudicator committed a reviewable error when failing to address this important aspect of the petitioner's defence which dealt with his efforts to ameliorate the noise caused by his dogs and the defence of due diligence.
- [75] I construe the adjudicator's reasons as an indication that either she did not have the authority to consider legal defences to the bylaw charge such as due diligence, vagueness or uncertainty or conflated due diligence with the vagueness challenge to the by law. It is clear from the submissions that the petitioner's reliance on *Crawford* and *Weltzin* was in part related to his assertion that the bylaw was vague or uncertain but also involves his claim that he had been diligent in his attempt to comply with the noise limitations. He argued:

If the Township applies a bylaw that requires Mr. Leaf not to permit any of his dogs to make any noise anywhere in the municipality which disrupts the quiet, peace, rest, enjoyment comfort or convenience of the neighbourhood or of a person or persons in the vicinity without using any qualifying words, such as excessive or reasonable, and with the requirement for only one person to be disturbed rather than a neighbourhood, the Township effectively makes it impossible for Mr. Leaf to use his land as it is legally zoned to be used as a dog kennel.

- [76] Here, the petitioner seems also to have conflated the issue of due diligence with the unenforceability of the bylaw for vagueness. He suggests that once he had taken all reasonable measures to prevent his dogs disturbing the neighbour's peace and quiet, he should not be convicted of the offence because s. 32 of the bylaw conflicts with the licence granted by the Township and was invalid.
- [77] It is notable that the actus reus of the defence is to "suffer or permit" noise to disturb others. It was essential to the charge that the petitioner had suffered or permitted dogs to make the offending noise. The bylaw does not prohibit noises from dogs; it creates an obligation on the owner to take steps to ensure that they do not suffer or permit the noise emanating from their lands.
- [78] The bylaw did not restrict the adjudicator from making decisions on questions of law; s 16 of the Act only prohibits an adjudicator from deciding: "(d) a challenge to the validity of the bylaw that is alleged to have been contravened".
- [79] In this case, below I have rejected the petitioner's claim that the bylaw is vague or uncertain and thereby unenforceable. However, the question of due diligence was considered in Saanich by Mr. Justice Pearlman. He noted that the defence of due diligence had been rejected by the Provincial Court and distinguished Crawford #2 on the basis that the trial judge in Saanich found that the appellants had failed to employ procedures or protocols available to control dogs barking and had done very little to stop barking. In this case there was evidence of the petitioner's efforts and evidence from the Township concerning other steps he might have taken to address the noise issue.
- [80] In Miller's Landing, Madam Justice Smith addressed the question of a due diligence defence on a contravention of the liquor regulations prohibiting service of liquor to minors. The petitioner argued that it had established a defence of due diligence concerning service to underage patrons. In that case, the adjudicator concluded the licensees system was not adequate to prevent the contraventions of the regulation. Smith J. concluded:
- [82] Here, the Adjudicator correctly understood and interpreted the defence of due diligence and accepted that the petitioner was entitled to that defence. However, after a careful and detailed review of the petitioner's policies and procedures, she held that the petitioner had failed to establish that defence. On the evidence before her, it was open to her to reach the conclusion that she did, which was that the licensee had not taken all reasonable steps to prevent the contravention.
- [81] This underscores adjudicator Miller's error in failing to consider the evidence or decide on the defence. Although an adjudicator's reasons are not required to reflect consideration of all the evidence, if the reasons demonstrate that the evidence was not taken into account and an issue relating to the evidence was not decided, a reviewable error occurs.

[82] The adjudicator considered only the question of her lack of jurisdiction to consider the bylaw's validity without ever addressing the issue of the petitioner's due diligence. She was not prevented from considering other legal defences to the charge and when she characterized his argument as raising a question of law concerning the wording of the bylaw she did not address the factual or legal question surrounding the due diligence defence. In this context, the adjudicator was required to "consider" the defence of due diligence and take into account the evidence about the steps taken by the petitioner to prevent dog barking from disturbing neighbours, the circumstances of the neighbourhood including the proximity of other houses, and the exigencies of a kennel business and resolve the issue of whether due diligence had been proven on the balance of probabilities. When she omitted any reference to the petitioner's due diligence defence, she acted unreasonably and in error.

Vagueness

- [83] The petitioner argues that the bylaw should be struck down because it is vague and uncertain and leaves Township staff to make a subjective determination about the interference with peace and quiet enjoyment that may be disturbed by his dogs. In my view, there is nothing vague or uncertain about the bylaw or the licensing portions of the ACB. Under the licence, the petitioner is obliged to abide by all Township bylaws and restrain his dogs from any barking, yelping or howling. Under the ACB, he is not to suffer or permit any dog in his possession to make any noise anywhere in the Township which disturbs the quiet, peace, rest, enjoyment, comfort or convenience of the neighbourhood or of a person or persons in the vicinity.
- [84] The petitioner also complains that the bylaw is something of an absurdity in regards to his licenced dog kennel because the propensity of dogs to bark were well known to the Township before he received his licence to maintain 24 dogs on the premises. He believes that because "all dogs bark" and in the context of his business "barking" is an inherent feature of dog training and kennel ownership, the bylaw prohibition against any noise from his dogs or any noise that might disturb the peace and quiet of his neighbours is overbroad. As noted by Pearlman J. in Saanich at para. 65, challenges to laws on the basis they are overly broad can only succeed when raised in the context of a Charter challenge.
- [85] The petitioner believes the bylaw is too vague to be enforceable in the context of his business licence to operate a multi-dog kennel in rural circumstances, where there is an inevitability those will dogs bark.
- [86] On this point, the plaintiff relied on Weltzin in which the court allowed that a municipality could regulate dog noise provided its bylaw did not effectively bar continued operation of a kennel on the property: see paras. 10-11.

- [87] Where the bylaw prohibited any dog noise from a licenced kennel that might disturb a person, the court found the bylaw unduly restrictive and unenforceable because it effectively stopped operation of the business. The court said that a municipality did not have the right to regulate property use if it effectively barred the continued lawful use of that property.
- [88] The petitioner cited Bell as an example of an unreasonable prohibition of activity. In Bell, Toronto's bylaw prohibited naturalized gardens that included growth of excessive weeds and grass. The accused failed to comply with a city work order that he cut the weeds and grass and was fined. The court found that interpreting the word "excessive" in the context of weed and grass was subjective and arbitrary and the bylaw void for vagueness.
- [89] The accused's challenge in Bell, was also based on a Charter infringement of his right to freedom of expression. In Toronto, the bylaw was struck down because it offended his Charter rights. There, the petitioner believed that the bylaw was too subjective and arbitrary and created the opportunity for what was described as a "standardless sweep" that threatened the accused's use of a garden he considered part of his expression. The court considered the phrase "excessive" meaningless and considered the benefits of the bylaw disproportional to the abrogation of his freedom and in the context could not be justified under s. 1 of the Charter.
- [90] I find little help for the petitioner's argument in Bell. First, the petitioner did not advance a Charter challenge to the bylaw. Next, in Bell the property owner attacked the bylaw because the alleged offence was committed when a person failed to keep property clean and free from "excessive growths of weeds and grass". The court concluded that "a bylaw will be found unconstitutionally vague if it so lacks in precision as not to give sufficient grounds for legal debate. The requirement of legal precision arises from the need to provide citizens of fair notice "of any prohibited conduct and the need to proscribe enforcement discretion: Bell at para. 39.
- [91] In Bell, the court recognized that the word "weed" may include some ambiguity but accepted that where a word has common usage and there is consensus in a community with respect to the meaning of the word, it would not constitute vagueness for the purposes of interpreting the bylaw. However, the phrase "excessive" was subject to interpretation and lacked the precision necessary to inform a citizen of standard of behaviour that would inform a person of what duty is created by the bylaw.
- [92] In this case, the words quiet, peace, rest, enjoyment, comfort or convenience of any person disturbed would not be so lacking in precision that an owner of dogs would be confused by any ambiguity in those terms. As compared with the adjective "excessive" in Bell, there is no practical uncertainty inherent in realities of noise, peace and quiet.

- [93] The petitioner says that absent an objective noise standard the Township has adopted an entirely subjective determination of what might constitute a breach of the "quiet enjoyment of property". Without any ability to measure and apply a standard, any noise in the community could constitute a breach of the bylaw and that would be unreasonable. In my view there is no uncertainty in a bylaw that proscribes any noise of a barking dog that disturbs the quiet of a person in the vicinity.
- [94] In *Kelowna Mountain Development Services Ltd. v. Central Okanagan (Regional District)*, 2014 BCCA 369 at paras. 17 and 35, the court framed the question concerning vagueness as whether a reasonably intelligent person would be unable to determine the meaning of the bylaw. Madam Justice MacKenzie summarized the principles as follows:

Vagueness

17 The leading authorities applicable to the vagueness challenge in this case are *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Okanagan Land Development Corp. v. Vernon (City)*, 2012 BCCA 332. The relevant principles from those authorities include:

- * Laws need not achieve absolute precision in order to survive a vagueness challenge. However, a law will be found to be unconstitutionally vague if it so lacks in precision as not to provide an adequate basis for legal debate - that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria: *Nova Scotia Pharmaceutical Society* at 643.
- * By stating certain propositions, legal provisions outline permissible and impermissible areas of conduct, and they also provide some guidance to ascertain the boundaries of these areas. They provide a framework, a guide as to how one may behave, but certainty is only reached in a given case, where law is actualized by a competent authority. By setting out the boundaries of permissible and impermissible conduct, these norms give rise to legal debate. They bear substance and they allow for a discussion as to their actualization. By introducing boundaries, they therefore limit enforcement discretion, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens: *Nova Scotia Pharmaceutical Society* at 638-640.
- * In the context of municipal bylaws, the test for assessing vagueness asks whether a reasonably intelligent person would be unable to determine the meaning of the bylaw and govern his or her actions accordingly. Mere difficulty in the interpretation of the bylaw is not sufficient: *Dhillon v. Richmond (Mun.)* (1987), 16 B.C.L.R. (2d) 80 (S.C.) at 85-86; *Okanagan Land Development Corp.* at para. 50.
- * A municipal bylaw is not necessarily void for uncertainty merely because its terms may be susceptible to more than one interpretation: *The City of Montreal v. Morgan*, (1920), 60 S.C.R. 393 at 404.
- * Municipal bylaws are to be interpreted benevolently and supported if possible: *The City of Montreal* at 404; *Okanagan Land Development Corp.* at para. 50.

[]

[35] The appellant submits the definition of agri-tourism and the bylaw generally are vague and uncertain (issue #5). As mentioned, if a law is capable of interpretation, then it is not vague. A law capable of interpretation provides sufficient guidance for legal debate and is one for which a reasonably intelligent person would be able to determine the meaning. The task of determining whether a law is capable of interpretation is distinct from the actual task of interpretation.

[95] The test of whether a bylaw is vague or uncertain was also considered in *Dhillon v. Richmond (Municipality)* (1987), 16 B.C.L.R. (2d) (80) (B.C.S.C.) at para. 22. Mr. Justice Oppal said that when grounds of uncertainty and vagueness are advanced, the bylaw will not be vague unless no reasonable, intelligent person would be unable to determine the meaning of the bylaw. A difficulty in interpretation is not sufficient.

[96] Mr. Justice Oppal addressed the subjective element in the interpretation of words in the bylaws:

26 Whether words in a by-law are so broad that a reasonable reader would be unable to determine the meaning of the by-law and thus govern his actions accordingly is of course a matter for a court to decide on the basis of the particular words and context of each by-law. Although there are some subjective elements in the words "tend to disturb", "quiet", "peace", "rest", "enjoyment", "comfort" and "convenience", I do not think that these subjective elements cause special or particular problems in interpretation. Moreover the words "neighbourhood or vicinity" should not lead to any confusion in that it would be a matter of evidence in each individual case. It should be noted, however, in *Doman* the court considered the words "environment" or "surroundings" as being too uncertain, and in *Barthropp* a municipal by-law which prohibited building without a permit "near the bank of any watercourse" was too uncertain.

[97] In *Coquitlam (City) v. Vivanco*, [1993] B.C.J. No. 3201 at para. 3, and *Sunshine Coast (Regional District) v. Sheppard*, 2007 BCSC 1754 at paras. 28-38, this Court dealt with bylaws containing similar language concerning the disruption of an individual's "quiet, peace, rest, enjoyment" etc. In each case the bylaw was not found to be vague or uncertain. Reasonably intelligent people can determine the meaning of those provisions that are substantially identical to the ACB and ordinary citizens will know what type of noise will disturb their neighbour.

[98] I find that the ACB is neither vague nor uncertain because it can be understood by any reasonably intelligent person that owning or harbouring a dog that barks at a volume sufficient to disturb neighbours is prohibited. The bylaw may be enormously restrictive considering the common propensities of dogs to bark in many situations, sometimes provoked by external factors, but the bylaw only requires owners to not "suffer or permit" dogs from disturbing neighbours. Thus, the defence of due diligence is available to any owner who has been diligent in attempting to limit offending noise; the bylaw limits the level of noise that is suffered or permitted by an owner but does not preclude dogs from barking.

- [99] Although there may be technology capable of measuring noise in some objective fashion, the bylaw focuses on any that subjectively interferes with the quiet, peace and enjoyment of other people is the substance of the offence. Technological can not measure disturbance levels of a person's peace or quiet. A person owning or harbouring a dog must be taken to have general knowledge of the impact of noise on other people and it is that knowledge that informs the owner of any measures must be taken when dogs under his control make noise.
- [100] In conclusion, the decision concerning the permissible level of noise from dogs is within the Township's authority to manage noise that "is liable to disturb the quiet, peace (etc) of individuals or the public": s. 64 of the Community Charter.
- [101] The petitioner does not attack the Community Charter and there is sufficient certainty in the bylaw, consistent with the Community Charter, that it is not so vague or uncertain as to be void.

Undue Restriction on His Business

- [102] In the conclusion of the petitioner's written submissions, he advanced an argument in terms that varied slightly from his claim that the bylaw was void for vagueness. He argued he had a legal right to operate the kennel on his property under a valid business licence in an area zoned for kennel use. He referred to Crawford #2 and said that "the Township effectively makes it impossible for me to use my land as it is legally zoned to be used - as a dog kennel." This claim that the bylaw restrictions unduly limited his right to carry on a kennel business on land legally zoned for that use relies on the proposition in Weltzin that an unduly restrictive bylaw that prohibits kennel dogs from disturbing any person in the municipality was so restrictive that it prevented the operation of the kennel and was unenforceable.
- [103] In Weltzin, the court declared that the by-law was unenforceable because it effectively barred the continued lawful use of the property as a kennel by the owner without any qualification that the offending noise was "excessive" or "unreasonable". Selbie CCJ pointed out he had not been asked to consider whether the appellant was violating the terms of the Dog Licencing, Control and Impoundment By-law.
- [104] The petitioner contends that the inconsistency between the ACB and his business licence and s. 32 of the ACB amounts to a blanket prohibition against dog barking noise. The respondent contends that regardless of the noise limits in the ACB, the petitioner's business licence requires him to conform to all municipal bylaws, in particular s. 32 of the ACB. It contends that the reasons from Saanich parallel the complaint in this case. He argues that the Court of Appeal decision in *Society of Fort Langley Residence for Sustainable Development v Langley (Township)*, 2014 BCCA 271 at para. 18 support the view that municipal legislation must be considered in the spirit of "searching for the purpose broadly targeted by the enabling legislation and the elected council "

- [105] The respondent contends that Pearlman J.'s analysis supports the approach that the regulatory scheme includes clear indications of the Township's intention that commercial kennels be bound by the noise restrictions under the ACB. I accept that bylaws are to be interpreted benevolently and supported if possible.
- [106] The Township highlights Pearlman J.'s conclusion concerning the tension between noise disturbances and dog kennel operations;
- [36] I have no doubt that Saanich was well aware that dogs bark when it permitted the appellants to operate a kennel on their property. However here, where the trial judge found they had done little to stop the dogs' barking, the appellants' submission that the Noise Suppression Bylaw imposes an absolute prohibition on their use of their property for the kennel and boarding business permitted under Saanich's Zoning Bylaw is tenuous. Section 5 of the Noise Suppression Bylaw does not impose an absolute prohibition against the appellants keeping dogs that bark on their property. Rather, the respondent has sought to restrict and control the noise of dogs barking by making it an offence to keep a dog that barks continually, sporadically or erratically for more than 10 minutes.
- [107] The respondent contends that Crawford #2, Saanich, and Weltzin have no application to this case. First, it argues that Saanich affirms the purpose of the overall regulatory scheme that kennels be bound by noise restrictions in the ACB. In this case, the licensing bylaw requires the owner to prevent dogs from barking yelping or howling in order to lawfully carry on the kennel business. Thus, in order to have the lawful right to carry on business, dogs must be controlled and restrained from barking howling or yelping.
- [108] Because dogs in kennels must be restrained from barking, the respondent argues whenever an owner of animals fails to take reasonable care to prevent dogs from barking, any such noise from a kennel is also a breach of the terms of the owner's licence and the licence bylaw. In this case there was no charge concerning breaches of the licensing provisions but, even if s. 32 of the ACB was void for vagueness, the petitioner would be in breach of the other requirements of his business license if he failed to control or restrain his dogs from barking, yelping or howling.
- [109] Thus, the respondent contends the decisions noted are not helpful to the s. 32 was not binding on him because he had an independent right to carry on his kennel business. The Township contends the details in the cases of Saanich and Crawford #2 are not applicable because, in this case, there are lawful means by which a licensee can keep a dog in a kennel if the dog when the owner complies with the licencing requirements. Thus ACB is not too restrictive.
- [110] In my view, the petitioner has failed to fully consider all of his occasions under the licensing provisions of the ACB. For example, the licensing by law requires; significant insulation of the kennel structures for noise abatement purposes; a communication system between the petitioner's home in the kennel to enable him to communicate with the animals; a solid fence or solid hedge enclosing the licensed kennels at least 1.8 m in height

to screen the kennel areas from adjacent properties; and a distance of 91 metres between the kennel and any neighbours house. Lastly, animals are to be kept indoors during the hours of darkness.

- [111] There was no evidence of the petitioner's compliance with these parts of the bylaw and absent those measures, a business licence would not be effective in insulating him from municipal prosecution for dog noise. Presumably, if those measures were in place, barking dogs would not disturb his neighbour's peace and quiet and the petitioner's business could function without challenge. It is notable that if the petitioner was in compliance with the parts of the licensing bylaw, he could be on stronger footing arguing a defence of due diligence. That evidence was not before the adjudicator.
- [112] Thus, I conclude that the ACB does not prohibit the petitioner from keeping dogs on his property or from barking. His responsibility is to act in a way that does not suffer or permit dogs to disturb the quiet and peace of neighbours. The adjudicator's analysis would have taken into account the context of the kennel, proximity of the neighbour, vegetation and barriers to sound, in forming her view that the volume of noise from the petitioner's kennel rose to such a level that the peace and quiet of neighbours was disturbed. Considering the broad scope of the adjudicator's treatment of the evidence, I find she was entitled to conclude that the reported barking on the dates of the alleged offences disturbed the complainants and the factual basis of the charge was established.
- [113] The petitioner is wrong in suggesting that the ACB effectively prohibits him from carrying on the business permitted by the Township. In my view, the due diligence defence was an important consideration in the defence presented to the adjudicator. I accept that if the ACB was unenforceable because it restricted the owner from permitting any noise to disturb the neighbours, the noise made by the dogs also offended his licence obligations and breaches of the licence by law would be subject to revocation for breach of the noise restrictions in the licensing provisions subject to the exercise of due diligence in preventing dog noise from disturbing his neighbours.
- [114] Overall, I presume that proof of due diligence might include proof that he had taken all measures required by the licensing parts of the ACB in addition to the things he described to the adjudicator.
- [115] Except on the question of the petitioner's due diligence defence, the adjudicator's decision to apply s. 32 of the bylaw to the facts she accepted as proven cannot be challenged.

The Petitioner's Evidentiary Challenge

- [116] The respondent tendered six affidavits on this judicial review hearing. Two were from Ms. Ramirez, three were from Mr. and Mrs. Lazzara and one from Alanna Holdgate.

[117] The petitioner objected to the court relying on these affidavits because they do not meet the test for introducing new evidence in a judicial review application. He contends the evidence is irrelevant, will not assist the court in determining the issues and would cause the applicant serious prejudice and not serve the interests of justice.

[118] He contends that the goal of tendering these affidavits was described to him by respondent's counsel in a January 6, 2017 letter including the following:

with respect to further affidavits, they are being tendered only to show that there is evidence of ongoing noise breach of the bylaw, in the event that becomes an issue at the hearing. If you do not challenge the fact that there is ongoing noise as in the affidavits, they are not material to the petition. You do not need more time to counter it.

[119] He argued that the test for admission of new evidence is set out in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503; *R. v. Palmer*, [1980] 1 S.C.R. 759.

[120] To succeed the respondent must demonstrate that:

- a. the new evidence must be relevant;
- b. the new evidence must serve the interests of justice;
- c. the new evidence must assist the court;
- d. the new evidence must not cause substantial or serious prejudice to the other side;
- e. the new evidence must not have been previously available or previously anticipated, as being relevant.

[121] The petitioner argues that the information contained in the new affidavits was not evidence before the adjudicator and should not be in evidence on a judicial review of her decision. The new evidence is irrelevant to the issues raised on the judicial review application because it concerns events that occurred after the adjudication and did not relate to any issue regarding the validity of the Township's bylaws.

[122] He also argues that the Township has failed to meet the second part of the test, that is whether it will assist the court. Again, because the information is irrelevant to any new issue raised, he argues it will not assist the court.

[123] Addressing the third part of the test, the petitioner says the evidence contained in the new affidavits will cause substantial or serious prejudice to him. This evidence was not before adjudicator and should not be challenged. Lastly, he believes it is not in the interests of justice and will have wasted time.

[124] The respondent contends that the admissibility of new evidence on this judicial review process is warranted because the question of the validity and applicability of the bylaw was not before the adjudicator. This court is requested to determine and weigh the evidence on that point.

- [125] It concedes that the affidavits from December 2016 are not relevant or significant to the dispute. However he contends that the affidavits from August 2016 are relevant. The August 2016 affidavits focus primarily on evidence obtained by Ms. Ramirez before and after the offence dates. Mr. Lazzara's affidavit also comments on evidence that was in existence before the hearing and about things that happened after the hearing. Similarly, Ms. Lazzara's affidavit addresses events that happened before and after the hearing and deal with other allegations concerning the petitioner's dogs. Lastly, an affidavit from Alan Holdgate, deals with allegations concerning events related to the petitioner's dogs before and after the hearing. Ms. Holdgate did not give evidence at the hearing.
- [126] Ms. Ramirez August 30, 2016 affidavit includes a lengthy report about the complaints received from Mr. and Ms. Lazzara, an explanation of humane ways to control or stop dogs from barking and her activities relating to the offences. Their affidavits are largely commentary on their experience with noise from the petitioner's property and their interactions with Ms. Ramirez. Lastly, Ms. Holdgate's affidavit refers to dog noise incidents that occurred on the day of or after the offence dates.
- [127] The question of what evidence can be considered on a judicial review was discussed in *Canwood International Inc. v. Bork*, 2012 BCSC 578 by Harris J. (as he then was) as follows:
- [9] It is clear that as a general rule judicial review is based on the record of the inferior tribunal, see *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17. This is inherent in the nature of judicial review. In conducting a judicial review a court exercises a supervisory jurisdiction to ensure that statutory decision-makers do not overstep their legal authority. Judicial review involves ensuring that a tribunal acts within its jurisdiction in deciding matters it is authorized to decide by its governing legislation and that it does not lose jurisdiction by breaching principles of natural justice or rendering decisions going beyond the deference owed to it, see *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244; and *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 [Actton].
- [10] Recently, in *Actton*, the Court of Appeal disapproved of a court receiving evidence that was not before the Employment Standards Tribunal. Coincidentally, that new evidence went to the very question before this Court: namely, did the employment and labour relations of a corporate entity fall within federal jurisdiction.
- [128] Further evidence may be received only if it assists in ensuring a new issue, not considered by an adjudicator is properly and fairly joined and decided. Harris J. said:
- [15] To put the matter another way, the proposed amendment and affidavits do not assist in ensuring that the true dispute between the parties is properly and fairly joined and decided. This is a consequence of the fact that judicial review is, with limited exceptions, based on the record of the administrative tribunal under review. The supplementary affidavits are irrelevant, therefore, to the issue before the Court.

- [129] Overall, I am not satisfied that the evidence contained in the four August 2016 affidavits addresses the issue of the validity of s. 32 because of vagueness or uncertainty in any significant way or that it will assist in resolving the new issue raised on this judicial review. Ms. Ramirez's affidavit contains historical information and information about steps that the petitioner could have taken to prevent or limit noise emanating from the petitioner's kennel. Although the adjudicator did not address that issue, there was evidence before her of the petitioner's efforts to comply with the bylaw.
- [130] The respondent contends that restrictions against new evidence do not apply when a question is raised in the first instance on the judicial review. The respondent agrees that the courts power to admit evidence beyond the record of the proceeding must be exercised sparingly and only in exceptional cases.
- [131] It argued that the evidence concerning the judicial review process deals only with the transcript of the proceedings.
- [132] The Township argues that the petitioner's challenge to s. 32 of the ACB was not considered by the adjudicator because she lacked jurisdiction. It also contends that the validity of s. 32 requires a reconsideration of whether that part of the bylaw provision falls within the Township's Community Charter power to regulate nuisance and noise, whether the provision applies to commercial licenced kennels and whether the provision imposes an absolute prohibition on an otherwise lawful use of land. The Township contends the evidence from both before and after the adjudication is relevant and necessary for determination of those issues: see *R. v. Blackman*, 2008 SCC 37 [Blackman] at para. 29.
- [133] In my view, Ms. Ramirez affidavit does not meet the test described in *Blackman*, *Palmer* or *Rosenstein*. Similarly, the affidavit evidence from Mr. and Ms. Lazzara and Ms. Holdgate are not germane to the petitioner's challenge to the validity of s. 32 of the ACB. In part, the vagueness argument was not a new issue on this review but was an issue raised at the hearing but left to be decided on this review.
- [134] In my view, the facts set out in the affidavits for the most part, address only the issues already decided by the adjudicator and do not address the significant issue of the validity of s. 32. I do not take into consideration on this judicial review the affidavits tendered by the respondent.

Conclusion

- [135] In this case, the adjudicator did not address the efforts made by the petitioner to ameliorate dog noise. She confined her reasons to a very narrow question of fact concerning the noise and the disturbance to others without any reference or consideration to his due diligence defence. She said the issue was whether one person's enjoyment and peace were "affected by the barking" of animals at this location. She said there was evidence to prove this fact and "so I will be upholding both notices." She deferred the question of the vagueness and validity of s. 32.

[136] On this point, the adjudicator failed to address a significant legal and factual issue surrounding the events of March 6, 2016 and April 6, 2016 and the petitioner's efforts to comply with his bylaw obligations. In my view the adjudicator committed a reviewable error of law in not addressing this defence and I exercise my discretion and direct that the adjudicator reconsider and determine the question of the petitioner's due diligence defence.

"Armstrong J."

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