

CANADA / JUDGMENT

Smith v. Central Okanagan (Regional District)

2013 BCSC 228

COURT

Supreme Court of British Columbia

DECIDED

15 February 2013

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2013 BCSC 228 Smith v. Central Okanagan (Regional District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Central Okanagan (Regional District),

2013 BCSC 228

Date: 20130215

Docket: 96292

Registry: Kelowna

Between:

Dave Smith

Appellant

And

Regional District of Central Okanagan

Respondent

Before: The Honourable Mr. Justice Barrow

On appeal from: Provincial Court of British Columbia, August 9, 2012,

(Central Okanagan (Regional District) v. Smith, Kelowna 74546-1)

Reasons for Judgment

Counsel for the Appellant:

R. Breder

Counsel for the Respondent:

T. DeSouza

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 21-22, 2013

Place and Date of Judgment:

Kelowna, B.C.

February 15, 2013

- [1] On August 9, 2012, following a four-day trial, the trial judge declared that the appellant's dog, Diesel, was a "dangerous dog" within the meaning of s. 49 of the Community Charter, S.B.C. 2003, c. 26. He also declared that he had no authority to make what has come to be known as a conditional order under that section. Finally, the court ordered that Diesel be humanely euthanized. Diesel is a mixed breed dog. His precise provenance is unknown, but he is predominantly German Sheppard crossed with Rottweiler. He weighed 95 pounds in the winter of 2010/2011.
- [2] David Smith is Diesel's owner and he has appealed from these orders.
- [3] The respondent, Regional District of Central Okanagan, first became aware of Diesel in April 2007 when it received a complaint from Heather Fedoruk. As a result of that complaint, an animal control officer issued a ticket to Mr. Smith alleging two infractions of the Regional District's animal control bylaw. Mr. Smith did not dispute the ticket and the infractions were deemed to have taken place. Over the next four years, various other complaints were made to the Regional District about Diesel. Some resulted in the issuance of further tickets, others led to warnings. On February 26, 2011, Linda Luscomb complained that her dog had been attacked and seriously injured by Diesel. As a result of her complaint, an animal control officer obtained a warrant under s. 49 of the Community Charter and seized and impounded Diesel. The Regional District then conducted further investigation which uncovered other incidents of concern. An application under s. 49 of the Community Charter was filed and resulted in the orders under appeal.
- [4] At the hearing of the application, the Regional District called a number of civilian witnesses who testified about their encounters with Diesel and/or Mr. Smith. In addition Leah Giesbrecht, an animal control officer employed by the Regional District, testified about the various dealings she and other animal control officers had had with Mr. Smith and Diesel. Finally, the Regional District called expert evidence about Diesel's propensity for violence or aggression. Mr. Smith, who represented himself at the hearing, testified on his own behalf

and he, too, called expert evidence about Diesel's disposition. The judge reserved his decision and delivered his judgment on August 9, 2012. He reviewed the evidence as to the various events which the Regional District relied on to establish that Diesel was dangerous, made findings of fact based on that evidence, and concluded Diesel was a dangerous dog within the meaning of s. 49. He then reviewed the law as it relates to whether a court hearing an application under s. 49 has the authority to make an order other than an order returning the dog to the owner or an order that it be destroyed. He held that the legislation did not permit any other orders. Finally, having concluded that Diesel was dangerous, he considered whether, notwithstanding that conclusion, he could be returned to Mr. Smith without exposing the community to an unacceptable level of risk. He concluded that Mr. Smith had a history of irresponsibility in supervising Diesel and could not be relied on to suitably control the dog. He therefore ordered that the animal be humanely euthanized.

- [5] The appellant argues that the trial judge erred in several respects. First, he argues that the trial judge erred in the findings of fact that he made. Second, he argues that he erred in concluding, based on the facts as he found them, that Diesel was dangerous. Third, he argues that the trial judge erred in reaching the conclusion he did about the availability of so-called "conditional orders" under s. 49 of the Community Charter.
- [6] I will deal first with the statutory context and then address the standard of review. Finally, I will turn to the issues.

Statutory Context and Standard of Review

- [7] The relevant portions of s. 49 of the Community Charter are as follows:

Special powers in relation to dangerous dogs

49 (1) In this section:

"animal control officer" means

- (a) a municipal employee, officer or agent designated by the council as an animal control officer for the purposes of this section, or

...

"dangerous dog" means a dog that

- (a) has killed or seriously injured a person,
- (b) has killed or seriously injured a domestic animal, while in a public place or while on private property, other than property owned or occupied by the person responsible for the dog, or
- (c) an animal control officer has reasonable grounds to believe is likely to kill or seriously injure a person.

...

- (10) 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.
- [8] This appeal was filed pursuant to the Small Claims Act, R.S.B.C. 1996, c. 430. The appellant takes the position that s. 5 of that Act authorizes the appeal. The respondent agrees that the appeal can and should be heard whether under the Small Claims Act or otherwise. I do not read the Small Claims Act as authorizing this appeal. It affords a right of appeal in "proceedings under this Act", and the application which gave rise to the orders under appeal was not a proceeding under the Small Claims Act. The Offence Act, R.S.B.C. 1996, c. 338, however, does extend a right of appeal in this situation. It defines "proceedings" to include "proceedings in which a justice is authorized by an enactment to make an order". Section 49 of the Community Charter authorized the trial judge to make an order. Section 102 of the Offence Act provides in part that unless otherwise provided by law, a defendant has a right of appeal to the Supreme Court from an "order made against the defendant". Given the agreement of the parties and in view of the foregoing, I am satisfied that there is a right of appeal. Further, I am satisfied that it is properly before the court notwithstanding any deficiencies in the notice of appeal.
- [9] The standard of review applicable to findings of fact is that set out in *Housen v. Nikolaisen*, 2002 SCC 33. At paragraph 10 of that decision, Iacobucci and Major JJ. held that:
- [10] The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error"...
- [10] This standard applies to both findings of fact and factual inferences drawn from primary or direct facts (*Housen v. Nikolaisen* at para. 19). In this case, the trial judge was required to apply a legal standard to the facts as he found them. His conclusions as to whether Diesel was a dangerous dog are therefore conclusions of mixed fact and law. While such conclusions can be viewed on a spectrum along which the standard of review will tend towards correctness for those conclusions which are predominately legal, and towards a more deferential standard for those that are primarily factual, in the matter at hand, the parties agree that the test to be applied is the same as that applied to strictly factual findings. Finally, the trial judge's decision to grant a destruction order involved the exercise of discretion. The parties did not argue that a different standard of review ought to apply to this aspect of the trial judge's decision, and while I recognize that the degree of deference accorded to the exercise of a discretion by a trial judge may vary according to the nature of the discretion exercised, there is no basis in this case to apply a standard other than that of "palpable and overriding error".
- [11] The trial judge's conclusion regarding the availability of conditional orders is a pure question of law. The standard of review is therefore correctness.

Did the trial judge err in finding that Diesel is a dangerous dog and ordering his destruction?

[12] The trial judge concluded at para. 47 of his unreported decision that:

[47] ...Mr. Smith's animal is a dangerous dog as defined by section 49(10) of the Community Charter. This is based on my finding that the dog has seriously injured a domestic animal, while in a public place contrary to section 49(1)(a) [sic] as a result of the attack on Ms. Luscomb's dog Toska. I am further satisfied that Ms. Geisbrecht [sic], the Animal Control officer has reasonable grounds to believe the animal is likely to kill or seriously injure a person based on the above history.

The parties agree that the reference to s. 49(1)(a) is simply a typographical error, and it should be a reference to s. 49(1)(b).

[13] The trial judge held that on a plain reading of s. 49(10), the court must decide if the evidence establishes that the dog is dangerous, and if so, the court must then decide whether to grant a destruction order. The first aspect of the exercise involves a mixed question of fact and law, the second involves the exercise of discretion. I pause here to note that both parties agree that, although the section does not expressly confer a discretion to make or not make a destruction order, that discretion exists.

[14] There are therefore three aspects to this ground of appeal. First, did the trial judge err in concluding that Diesel was dangerous because he had "killed or seriously injured a domestic animal, while in a public place or while on private property, other than property owned or occupied by the person responsible for the dog". Second, did he err in concluding that the animal control officer had reasonable grounds to believe that Diesel was likely to kill or seriously injure a person? Third, did the trial judge err in exercising his discretion to order that Diesel be destroyed.

[15] Before turning to the specific arguments advanced by the appellant, it is first appropriate to identify what is meant by "palpable and overriding error". In *Fisher v. Fisher*, 2009 BCCA 567, D. Smith J.A. wrote at para. 3:

[3] The standard of review on questions of fact is palpable and overriding error. Palpable error is one that is readily or plainly seen...overriding error is one that must have altered the result or may well have altered the result...A trial judge's findings of fact are to be accorded great deference...An appellate court may only overturn findings of fact if it is established that the trial judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from the evidence...Absent palpable and overriding error, an appellate court may not substitute its views of the evidence for those of the trial judge and may not interfere with the trial judge's decision provided there was some evidence upon which the trial judge could have reached his or her decision...[citations omitted].

[16] I will deal with each component of this ground of appeal separately.

a) Did the trial judge err in concluding that Diesel had seriously injured a domestic animal?

- [17] The trial judge based his conclusion on this issue on the evidence involving Ms. Luscomb and her dog.
- [18] Ms. Luscomb gave evidence about two events involving Diesel and her dog, a 75-pound Chinese Shar-Pei named Toska. Mr. Smith also testified about these events. The first of these events occurred on New Year's Eve 2008. Ms. Luscomb said that Diesel attacked her dog. Mr. Smith said that Ms. Luscomb's dog attacked Diesel. The trial judge concluded that the event happened as Ms. Luscomb described it. He rejected Mr. Smith's account of this event on the basis that it was "vague and unconvincing" and that it was at odds with common sense. He also found Mr. Smith's reaction to this event showed "callous indifference" toward Ms. Luscomb and her dog.
- [19] Ms. Luscomb said that she was walking her dog on a leash in the neighbourhood. She saw Diesel approaching from a distance of about 75 metres. Diesel was not on a leash. She said that she was about to greet him until she saw his face and his teeth. She said Diesel hit her dog "something fierce", bowling him over in the process. He continued to attack until Ms. Luscomb was able to put herself between the two dogs and grab Diesel's collar and twist his head to the ground. She said that she had to do that because Diesel was trying to go over or through her to get at her dog.
- [20] Ms. Luscomb testified that by the time this event was over, her coat was ripped, her watch was damaged beyond repair, she was "covered in blood", and her hands were lacerated. She did not say whether her lacerations were caused by Diesel biting her or were caused when she twisted his collar trying to put him to the ground. Toska was injured. He suffered a "severely lacerated...front leg, penis, stomach and anus". Ms. Luscomb had him treated by a veterinarian at a cost of \$779.52.
- [21] Ms. Luscomb said that she yelled for Mr. Smith to get his dog and then asked him to help her get her dog to the vet. She said that his only response was to say "send me the bill".
- [22] Mr. Smith said that he had lived in the neighbourhood since 1993. He said that he can be "a difficult person". He said that he was walking Diesel off leash. Diesel is, according to Mr. Smith, a large and agile dog. Diesel had wandered some distance from Mr. Smith. He said that he heard Ms. Luscomb yelling and realized there was a problem, so he began running to her location. He said that Ms. Luscomb's dog attacked or went after Diesel three times before Diesel retaliated. He said that he saw Ms. Luscomb getting to her feet but did not know how she was knocked down. The trial judge asked him how it was that he could see the interaction between the dogs but not how Ms. Luscomb ended up on the ground. He said that he must have looked down while running to the scene.
- [23] Mr. Smith said that he did say to Ms. Luscomb "send me the bill" referring to the veterinary bill that he thought Ms. Luscomb would be incurring. He said that he offered to take her to the vet but she refused, so he left.
- [24] Ms. Luscomb is in her 70s.

- [25] The appellant argues that the trial judge made palpable and overriding error by dismissing the appellant's evidence, which explained the surrounding circumstances, and by finding him callous and indifferent to Ms. Luscomb's situation by not offering to help her or her dog.
- [26] There is no suggestion that the trial judge ignored relevant evidence in reaching his conclusions nor is there any basis to conclude that his conclusions were manifestly wrong. He accepted Ms. Luscomb's evidence and explained why. His reasons for doing so are unassailable. He noted that she was closely cross-examined and not shaken. He rejected Mr. Smith's evidence and explained why and, again, his reasons are unassailable. It is implicit in his reasons that Mr. Smith's claim that he saw Ms. Luscomb's dog attack his dog and yet did not see how Ms. Luscomb ended up on the ground, while in the midst of those very events, is at odds with common sense. To that, one might add that it was odd for Mr. Smith to offer to pay Ms. Luscomb's vet bill if the altercation was instigated and pursued by her dog.
- [27] In summary, the trial judge's findings of fact relating to this event are supported by the evidence. He did not err in reaching the conclusions he did.
- [28] Given the facts as found by the trial judge, there can be no dispute but that Diesel seriously injured a domestic animal, while in a public place within the meaning of the second definition of "dangerous dog" in s. 49 of the Act.
- [29] Although that finding is sufficient to dispose of the appeal from the declaration that Diesel is a dangerous dog, I will deal with the second basis on which the trial judge rested his conclusions as well. I do that because the evidence on that issue is relevant to the issue of whether the trial judge erred in choosing to exercise his discretion not to return Diesel to Mr. Smith and instead ordering that he be destroyed.
- b) Did the trial judge err in finding that the animal control officer had reasonable grounds to believe that Diesel was likely to kill or seriously injure a person?
- [30] The third definition of "dangerous dog" provides that a dangerous dog is a dog that "an animal control officer has reasonable grounds to believe is likely to kill or seriously injure a person". This definition turns on the animal control officer's belief and whether that belief is reasonable. Three features of this definition are worthy of note. First, unlike the other two definitions which rest on past events (killing or seriously injuring a person or domestic animal), this definition deals with likely future events. Second, it is only the likelihood of killing or seriously injuring a person that matters. The likelihood of killing or seriously injuring a domestic animal is not enough. Third, the legislature made the animal control officer's opinion, as opposed to the court's opinion, determinative. The only limitation is that the opinion must be reasonable.
- [31] There are at least two components which an animal control officer must consider to reach a reasonable opinion. The first is the disposition of the dog, and specifically whether the dog is aggressive, and if so, whether there is reason to believe the dog would be aggressive towards people. The second relates to the dog's owner. A dog that has a tendency to be

aggressive towards people would not ground a reasonable belief that it is likely to kill or seriously injure a person if the owner keeps the animal either on a leash or otherwise under close control when in the presence of people. A reasonable basis to believe the dog will be seriously aggressive towards people and an owner that is either incapable or unwilling to control the animal when in the presence of people is what the definition implicitly requires.

- [32] Animal Control Officer Giesbrecht testified that she had been an animal control officer for 15 years. She explained the various interactions she or other animal control officers had had with Diesel and Mr. Smith based on her personal knowledge and on a review of the Regional District's file on Diesel. She said that the record of complaints involving Diesel began in 2007, and by 2012, it had grown to the most extensive history of complaints she had yet come across. She testified that Diesel had been impounded in February 2011, as a result of Ms. Luscomb's second encounter with him, and that he had been kept at the pound ever since. Ms. Giesbrecht has a work station at the pound and had regular contact with Diesel as a result. She said that Diesel behaves aggressively in the kennel: he barks and snarls, bites his kennel and froths. She said testified that:

Diesel is only approximately six and a half to seven years old...These allegations with Diesel, the incidents started when he was very young. No correction was ever given to Diesel. We have asked Mr. Smith, keep your dog on a leash. He doesn't do it. And we say, Mr. Smith keep control of your dog. He doesn't do it.

- [33] She testified that, in her opinion, Diesel was likely to seriously injure a member of the public.
- [34] The Regional District also retained an expert in canine behaviour, Dana Eklund, who prepared a report on Diesel and also testified at the hearing. Ms. Giesbrecht considered that report in forming her opinion.
- [35] From the Regional District's file, as explained by Ms. Giesbrecht, it was open to the trial judge to conclude, and he did conclude, that Diesel had the following history (para. 10 of the reasons for judgment):
- a. June 22, 2007 - a Municipal Ticket information for, "failure to control dog" contrary to section 17.5 of the District bylaws as a result of the Fedoruk incident.
 - b. June 22, 2007 - a Municipal Ticket information for, "failure to have a dog licence" contrary to section 3 of the District bylaws.
 - c. February 10, 2008 - the dog is impounded pursuant to District bylaw 366. Mr. Smith collected his dog and paid the \$100.00 impound fee.
 - d. April 22, 2009 - a Municipal Ticket information for, "failure to control dog" contrary to section 17.6 of the District bylaws. Mr. Smith disputed the ticket. On the date set for trial the then animal control officer was not available to testify and an adjournment application was refused by the trial judge. The ticket was dismissed for lack of evidence.

- e. April 22, 2009 - a Municipal Ticket information for, "failure to control or enclose an aggressive dog" contrary to section 17.2 of the District bylaws. This ticket was also dismissed when the animal control officer failed to attend Court and an adjournment was denied.
 - f. April 22, 2009 - Mr. Smith was sent a letter called a "Fence Notice" indicating that he had fourteen days to construct an adequate fence to contain his dog(s) as required by the District bylaws. He has never done so.
 - g. April 22, 2009 - he received another "aggressive dog notice" requiring him to contain his animal on either a short leash or inside an enclosure.
 - h. August 3, 2010 - a bylaw violation warning notice for, "failure to control dog" contrary to section 17.6 of the District bylaws and, "failure to leash dog" contrary to section 13.2 of the bylaws.
 - i. August 3, 2010 - a bylaw violation warning notice for, "failure to control" and "failure to leash a dog" contrary to section 17.6 and 13.2 of the District bylaws.
 - j. August 24, 2010 - a bylaw violation warning notice for, "failure to control a dog" contrary to section 17.5 of the District bylaws.
 - k. August 24, 2010 - a Municipal Ticket information for, "failure to control a dog" contrary to section 17.6 of the District bylaws.
 - l. August 25, 2010 - a bylaw violation warning notice for, "failure to control a dog" contrary to section 17.6 of the District bylaws.
 - m. March 11, 2011 - a judge of this Court issued a warrant to enter and search for and seize Mr. Smith's dog.
- [36] The trial judge was aware that many of the tickets issued to Mr. Smith in relation to Diesel were successfully disputed, either on the merits or because the Regional District's witnesses were unavailable. What he took from this history was that Mr. Smith had received many, many warnings that his dog was a concern to his neighbours and to the Regional District. In spite of this Mr. Smith had refused to control his dog or modify his dog's behaviour.
- [37] The appellant argues that the trial judge erred when he relied on this history to conclude that Diesel is dangerous. I do not read his reasons that way. He relied on this evidence, and other evidence, to conclude that Mr. Smith was either unwilling or incapable, despite years of warnings, to control his dog. That is a conclusion amply supported by the evidence.
- [38] Before leaving this aspect of the matter, I note that Ms. Giesbrecht testified that, in some cases, complaints were made, but the complainant did not wish the Regional District to take action because the complainant felt intimidated by Mr. Smith. Indeed, she said that she thought he attempted to intimidate her when she dealt with him directly. She explained that on one occasion, he was "very much in my face" when she was speaking to him. She also explained that the Regional District, and specifically the animal control authorities, had not

pursued this case as they might otherwise because "it has a lot to do with the intimidation factor and trying to bring...witnesses to come forth...and people were just too scared".

[39] The appellant argued on this appeal that the Regional District's approach to this matter is somehow wanting because it did not exhaust its own internal remedies. In particular, it did not take steps under its animal control bylaw before pursuing this application. I make two observations as to this contention. First, there is no legal obligation on the Regional District to exhaust or even pursue internal or lesser remedies before seeking an order under s. 49 of the Community Charter. Second, while the failure to do so may be suggestive of bad faith or a precipitous response, that is not so in this case. To the contrary, Mr. Smith has demonstrated by his reaction to this application that lesser remedies or a more nuanced response was unlikely to achieve the desired result. After this proceeding was launched, Mr. Smith sued Ms. Eklund, Ms. Luscomb, George Bandol (another witness), five employees of the Regional District, and the Regional District. His claim was launched on the eve of the trial. An application to strike it was argued on July 9, 2012, following the taking of the evidence in this case but before the trial judge issued his decision. Master Young heard the application and dismissed all the claims for reasons indexed at 2012 BCSC 1561. She set out in her decision at paras. 3 and 4 the nature of Mr. Smith's claim:

[3] The notice of civil claim was filed on May 3, 2012. In it the claimant seeks the following relief:

1 Relief Sought Against:

1-C.O.R.D.

A-Termination of employment for all employees who failed to investigate allegations.

B)-Suspension of Don Plamondon

C)-Termination of Dana Eklund's position as court expert

D)-The sum of \$10,000 for legal expenses

E)-The sum of \$250,000 in punitive damages

F)-Erase Diesel's record totally.

2-Don Plamondon - \$50,000.00

3-Rhoda Mueller - \$50,000.00

4-Alan Dunkin - \$50,000.00

5-Kellie Howe \$50,000.00

6- Michal Pesta \$50,000.00

7-Lynda Luscombe \$50,000.00

8-Dana Eklund - \$50,000.00

9-George Bandol - \$50,000.00

[4] The claimant's stated legal basis for these claims, as set out in the notice of civil claim, is as follows:

1 1-Failure to perform basic job duties.

2-Abuse of Authority

3-Malicious prosecution/persecution

3 [sic]-Failure to Observe Procedural Fairness

4-Unprofessional Conduct

5-Bias

6-Labor Code re- Reasons for Termination

7-Character Assassination

8-Psychological damage to both Diesel and Dave Smith

9-Stress and Mental Distress caused by treatment by staff of animal control

8 [sic]-False Declaration/Statement

9 [sic]-Rogier v Halifax- Hfx No 302339

10-Roden v Toronto Humane Society C40519 and C41024

[40] I will digress to deal with the application to adduce fresh evidence because it relates to the foregoing. At the outset of the appeal, the appellant applied to introduce fresh evidence. The evidence is an exchange of settlement offers made between the respondent and the appellant prior to the hearing and evidence about a fence that Mr. Smith built around his property following the conclusion of the hearing. Generally, fresh evidence is not admissible on appeal. In *Topgro Greenhouses Ltd. v. Houweling*, 2004 BCCA 39, Smith J.A. summarized the principles governing the admission of such evidence at para. 26:

[26] The admissibility of fresh evidence is governed by the principles set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 at 775-76:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and

- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [41] The evidence regarding the fence that Mr. Smith has constructed around his yard does not meet the first criteria in *Topgro*. I realize that the fence was built after the hearing and, in that sense, could not be adduced by due diligence, but the fence could have been built prior to the hearing, and if Mr. Smith wanted the court to take account of it, he should have done so. To admit it now would be contrary to the policy goals that are served by the limits on the admissibility of fresh evidence. A litigant may choose to argue his or her case and, if the result is not in their favour, take remedial steps secure in the knowledge that such steps will be considered. Moreover, for reasons which follow relating to whether a conditional order should be made, the evidence does not bear upon a potentially decisive issue.
- [42] The evidence regarding the settlement offers is not admissible as fresh evidence because it would not be admissible had it been tendered on the hearing of the application. It would not have been admitted then for the same reasons that settlement offers more generally are not admissible. They are privileged in part because the law favours efforts to resolve cases by agreement, and if parties knew that their settlement discussions might become evidence should they not lead to a resolution, it would have a chilling effect on such discussions. Those same considerations apply to attempts to resolve disputes such as the one at hand. Further, the settlement offers are not relevant. The appellant argues that they show that the Regional District was prepared to return Diesel under certain conditions, and that belies the notion that Diesel is a dangerous dog or that Ms. Giesbrecht reasonably believed he was. As Mr. DeSouza observed, there are many factors that go into whether a local government will take a matter to a hearing. Not least among those is cost. It does not follow that in an effort to save significant legal and pound expenses, a local government may be prepared to resolve a case otherwise than in accord with the merits as it perceives them.
- [43] The Regional District called evidence about many of the events that Ms. Giesbrecht relied on in forming her opinion. Those events include an encounter with 12-year-old Brittany Fedoruk, an event involving Maria and George Bandol, and a second event involving Ms. Luscomb. There were several other instances which involved Diesel being off leash and at large in the neighbourhood, sometimes chasing cats, and other times simply wandering the streets.
- [44] There were two events involving Brittany Fedoruk. The first occurred on November 8, 2006, and the second on April 3, 2007. As to the first event Heather Fedoruk, Brittany's mother, testified that she was in her car helping her daughter complete her paper route. Diesel came "bounding" up to her car, which was stopped on the side of the road. Brittany got out of the car to deliver a paper and Diesel jumped up on her. Diesel then weighed about 95 pounds. Ms. Fedoruk was very concerned for the safety of her daughter because Diesel had approached with his teeth bared, and while she could not recall if he was growling, it was clear to her that his approach was not friendly. The second event occurred when Brittany was walking home after school. She said Diesel ran up to her and "charged" her. She thought

he was going to bite her, so she put her hands inside her heavy coat. She said that but for her heavy coat she thought Diesel would have bitten her. Mr. Smith was watching as this event unfolded. Brittany yelled to him to get his dog off, and Mr. Smith said in a joking manner "don't worry he is just trying to bite you". On both of these occasions, Diesel was not on a leash. On neither occasion did he actually bite Brittany.

- [45] The trial judge said that Diesel "charged" on both of these occasions. The appellant argues that he erred in so characterizing the behaviour. Mr. Smith testified about the second incident and said that Diesel "bounced" up to Brittany with his mouth open. It is not an error to accept the evidence of Brittany Fedoruk as to how the second event unfolded, nor is the description of the first encounter a mischaracterization of the event. It is argued that Brittany's evidence was unreliable because she remembered the dog jumping on her and attempting to bite her but did not remember that when Mr. Smith called Diesel, the dog responded and sat down. This is not a basis to conclude that Brittany's evidence was unreliable. She described that very behaviour in a statement she wrote at the time of the incident and agreed that her statement was accurate. She said that given that the event happened five years earlier, she no longer remembered that aspect of it. Next, the appellant argues that it was significant that Brittany did not believe Diesel would attack her and that the trial judge ignored this evidence. Her evidence was that prior to the April 2007 event, she did not believe that Diesel would attack her. The fact the trial judge did not mention that is of no moment. Her belief before the frightening events of April 3, 2007, is not particularly relevant.
- [46] I am not persuaded the trial judge erred in his assessment of the events involving Brittany Fedoruk.
- [47] Mr. and Mrs. Bandol live down the street from Mr. Smith. They are retired and had recently moved into the neighbourhood. The appellant takes no issue with the trial judge's conclusions regarding the two events they testified about. The first of those occurred in October 2010. On that occasion, Mr. Bandol was walking his deaf 14-year-old English spaniel named Lexi when Diesel and another dog belonging to Mr. Smith ran up to and set upon Lexi. Mr. Bandol picked his dog up and attempted to kick the Smith dogs, who continued to press their attack. When Mr. Smith arrived on the scene, he grabbed Mr. Bandol by the collar and yelled at him to stop kicking his dogs. Mrs. Bandol said that in July 2010, she was walking Lexi when the same two dogs jumped on her causing her to squeal. On this occasion, Lexi was not on a leash but was close by Mrs. Bandol. Mrs. Bandol was able to pick her up and prevent any further damage. She testified, and the trial judge accepted, that Lexi limped as a result of this encounter and was still limping two years later when Mrs. Bandol testified. The Bandols were served with Mr. Smith's notice of civil claim in May 2012, six weeks before they gave their evidence.

[48] I digress to note that Mr. Smith advanced the theory that many if not all of the complaints were the product of a campaign by a disgruntled neighbour who Mr. Smith had complained about to the Regional District. The trial judge rejected that notion and noted that while the Bandols did complain about the events involving their dog, they did so reluctantly not wishing to cause problems with their new neighbours.

[49] Ms. Luscomb and her dog were involved in a second incident with Diesel. This one occurred in February 2010. During this event, Toska's lip was punctured and his ear was chewed. At the time Toska was recovering from surgery she had had on her stomach. Ms. Luscomb said that she was walking Toska in an off-leash area when Diesel first charged and bowled over another little dog and then came for Toska. She said that he "charged" Toska sending him "flying". Ms. Luscomb said that she screamed at Mr. Smith to get his dog, as she was trying to fend him off and protect her dog. The trial judge described these events at para. 7 of his reasons, writing that Ms. Luscomb observed:

...the Smith dog to charge a second little dog that was walking with her and then attack Tosca [sic] again bowling him over...

[50] The appellant argues that the trial judge:

...made a palpable and overriding error by misapprehending the evidence to conclude Diesel attacked the Witness' dog when the evidence was only that Diesel "came for him".

Further, he argues that there was no evidence that it was Diesel that punctured Toska's lip or chewed his ear.

[51] The trial judge did not misapprehend Ms. Luscomb's evidence; in fact, he used the very words she did in describing this incident. While it is true that Ms. Luscomb did not say which dog chewed her dog's ear or punctured her dog's lip, it was a reasonable, in fact almost irresistible, inference that it was Diesel. Ms. Luscomb's veterinary bill for this attack was \$160.

[52] There were other events testified to by various witnesses, but the foregoing were the most significant.

[53] There was, as noted above, expert evidence called by both the appellant and the respondent. In her report, Ms. Eklund wrote:

It is my opinion that this dog exhibits extreme dominance which will result in a bite or attack when cornered, confined, at large, or just simply not given his way. His age, temperament and learned behaviors pose very serious risk (sic) and given opportunity he will likely inflict injuries and potentially death to a member of the public or another animal that is in his way.

She further expressed the view that there was almost no hope that any training or remedial work would reduce the risk to public safety that Diesel poses.

- [54] Gary Gibson gave expert evidence on behalf of Mr. Smith. In his opinion, Diesel is not an aggressive dog. He said that while Diesel may behave in ways that people interpret as aggressive, in fact his behaviours are only a means of getting attention. He described Diesel as having a "brat" personality, by which he meant he had never grown out of puppyhood. Further, he testified that Diesel would not hurt anything and would not fight unless challenged first. Finally, he said that Diesel is capable of being trained so that even his "bratty" or "rude" behaviours would diminish.
- [55] The trial judge found Mr. Gibson's opinions to be at odds with the evidence given at trial, and in particular the "very vicious attack" to which Ms. Luscomb's dog had been subjected.
- [56] The appellant argues that the trial judge erred in rejecting Mr. Gibson's evidence, but this argument rests on the proposition that the trial judge erred in the conclusions he reached about the events to which the various civilian witnesses testified. Given that I am not persuaded that the trial judge erred in reaching those conclusions, there is no basis to conclude that he erred in rejecting the opinions of Mr. Gibson.
- [57] In general, the appellant argues that none of the individual events, examined separately, could provide a reasonable basis for Ms. Giesbrecht's opinion that Diesel is dangerous to people within the meaning s. 49 of the Community Charter, and that therefore the trial judge erred in concluding he was. Whether any of the individual events are capable of grounding a reasonable belief that Diesel is dangerous or not, the trial judge's task was not to examine each event in isolation from the others. To do so would have been to do that which the Supreme Court of Canada eschewed in *R v. Stewart*, [1977] 2 S.C.R. 748. There the court said that each piece of evidence is not to be analyzed separately and divorced from the context with the whole of the evidence (at p. 759). The court relied on *Côté v. The King* (1941), 77 C.C.C. 75 (S.C.C.), where Taschereau J. wrote at p. 76:

It may be, and such is often the case, that the facts proven by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for conviction.

- [58] This approach was recently endorsed by Bennett J.A. in *R. v. Carpio*, 2012 BCCA 484. In all three of these cases, the court was concerned with inferences to be drawn from circumstantial evidence. Although these cases arose in the criminal context, the approach applies with equal force to the matter at hand. A reasonable opinion may be formed on the basis of an array of events, no one of which may be sufficient to ground a conclusion. An individual event may admit of a reasonable explanation inconsistent with the conclusion that Diesel was dangerous. A series of such events, viewed together and in context, may properly form the basis of a reasonable opinion that Diesel is dangerous. It is not an error to approach the evidence in that way; in fact, to do otherwise would be to err.

- [59] In my view, the trial judge did not err in finding that the animal control officer had reasonable grounds to believe that Diesel was likely to kill or seriously injure a person. In reaching this conclusion, I recognize that with the possible exception of the first event involving Ms. Luscomb, none of the events involved Diesel causing injury to a person. It does not follow that it was unreasonable for the animal control officer to reach the opinion she did. The events involving Ms. Luscomb and Mr. Bandol illustrate this point. In both cases, these people were walking their dogs on a leash. In both cases, their dogs were attacked by Diesel. In both cases, they reacted as would many dog owners - they attempted to protect their dog. Mr. Bandol picked his dog up and Diesel continued to press the issue. Ms. Luscomb had to physically restrain Diesel. In both cases, the animal control officer may reasonably have concluded that they were at risk of serious injury.
- [60] The second variable in the equation that an animal control officer must consider is the degree of responsibility of the dog owner. As noted, a conclusion that a dog is aggressive towards people or other dogs is generally not sufficient to ground a reasonable belief that the dog is likely to seriously injure a person. Whether that is so or not will depend on whether the animal's owner is likely to take the steps necessary to control the animal and thus contain the risk.
- [61] The trial judge concluded at para. 48 that:
- [48] ...Mr. Smith has proven himself to be both unreliable and profoundly irresponsible about the care and control of his animal. He has shown a wanton indifference to the serious distress his failure to control this animal has caused to his neighbours...
- [62] The appellant argues that the trial judge ignored evidence which was inconsistent with this conclusion or in fact supported a contrary conclusion and, in doing so, made a palpable and overriding error. Counsel points to several aspects of the evidence in support of this proposition. The first is that Mr. Smith is a law abiding citizen who worked for many years as a paramedic and often volunteered his time in the community. The trial judge did not find that Mr. Smith was generally irresponsible or generally unreliable but rather that, in relation to controlling his dog, he was. The evidence of how he conducted himself at work or in other areas of his life is not particularly relevant to the narrow issue the court was concerned with. To not take it into account, assuming that the failure to mention it implies that the trial judge did not take it into account, is not an error, or at least not an overriding error. Second, the appellant argues that what may have outwardly appeared to be "indifference" was not indicative of Mr. Smith's true feelings; rather, it was a product of his long exposure to traumatic events through his employment. I take the trial judge's conclusion about wanton indifference to rest not on how Mr. Smith may have reacted to specific events, but rather to rest on the fact that over the course of several years, his dog had caused serious distress to his neighbours and yet Mr. Smith repeatedly failed to take the steps necessary to prevent further occurrences. The evidence overwhelmingly supports that conclusion. Finally, the appellant argues that he promised that if Diesel were to be returned to him, he would fence his yard. As to this proposition, two things are of note. First, the

issue was whether the animal control officer had reasonable grounds for her belief. No offer to properly contain Diesel was made to her or to anyone else from her office. In fact, notwithstanding repeated warnings, the issuance of multiple tickets, and the obvious distress that his dog's behaviour had caused to his neighbours, by February 2011 he had not taken the rather basic step of keeping his dog on a leash or ensuring his dog would not get out of his yard.

- [63] In summary, I am not persuaded the trial judge erred in concluding that the animal control officer had reasonable grounds to believe that Diesel was likely to kill or seriously injure a person.
- c) Did the trial judge err in concluding there was no statutory basis for making a conditional order?
- [64] What have come to be known as "conditional orders" are orders made following a finding that a dog is dangerous within the meaning of s. 49 but when the court is satisfied that it not necessary to order the dog destroyed. The trial judge held that he had no jurisdiction to make such an order. He concluded that if the court determines that a dog is dangerous, it has but two choices: order the dog destroyed or order that it be returned to its owner (para. 40 of the reasons for judgment).
- [65] There are conflicting authorities on whether s. 49 confers jurisdiction to make conditional orders. The courts in *R. v. Kucera*, 2001 BCPC 360; *Burnaby (City) v. Nagra*, 2010 BCPC 34; *Prince George (City) v. MacLeod*, 2004 BCPC 8; *New Westminster (City) v. Letendre*, 2010 BCPC 38; and *Capital Regional District v. Kuo*, 2006 BCSC 1282, found that conditional orders (or similar orders) were authorized or at least permitted by the statute. In *R. v. Dempster*, [1995] B.C.J. No. 2264 (C.A.), a case decided under s. 8 of the *Livestock Protection Act*, R.S.B.C. 1996, c. 273, the court found that there was no jurisdiction to make such orders.
- [66] These cases were all brought to the attention of the trial judge. He considered that he was at liberty to not follow *Capital Regional District v. Kuo* because, in his view, it was inconsistent with the earlier Court of Appeal's decision in *R. v. Dempster*. While it is not accurate to say that I am bound by the decision in *Kuo*, the longstanding rule of discretionary practice set out by Wilson J. in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) suggests that I should follow it unless it falls within one of the exceptions listed at paragraph 4.
- [67] The dog in issue in *Kuo* was an 11-year-old Belgian Malinois "attack dog" named Aba. At trial, Aba's owners did not contest the issue of whether she was dangerous within the meaning of s. 49 of the *Community Charter*. All they sought was to save her from being euthanized. To that end, they identified a person willing to adopt her. They retained a veterinarian to assess the dog and the dog's prospective new owners. The veterinarian supported the proposed adoption. The Regional District argued that the court did not have the authority to implement the adoption plan citing *Dempster*. Palmer P.C.J. disagreed. His decision which was released on July 20, 2005, is not reported or indexed. He noted that s. 49(10) provides for an application to be made for a destruction order but provides no direction as to the form

such an order might take. He concluded that, in view of the absence of any limitation in the section on the form a destruction order might take, the court had the discretion to make any order provided that it was consistent with the protection of the public. At paras. 37 and 38, he wrote:

- [37] 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.
- [38] 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.
- [68] He ordered that the dog be delivered to the person who had expressed a willingness to accept it. He imposed a variety of conditions which included the ability of the Regional District to apply without notice for an order for the immediate destruction of the dog should any of the conditions be breached or if, for other reasons, the animal control officer felt that such an order should be made.
- [69] The Regional District appealed and Johnston J. dismissed the appeal. In doing so, he considered *R. v. Dempster* and distinguished it on the basis that it was decided under the Livestock Protection Act. He concluded that a court hearing an application under s. 49 of the Community Charter has the jurisdiction to make orders other than for the destruction of the dog or its return to its owner. At para. 30, he wrote:
- [30] I read the Community Charter as giving wide discretion to the judge to deal with the facts revealed by the evidence on an application under s. 49(10). I say that because, where the statute elsewhere gives this court jurisdiction to make certain decisions, it sets out with some precision limits within which this court might act. By contrast, s. 49(10) permits an animal control officer to apply to the Provincial Court for a destruction order, but, as I have said earlier, states no limits on what the Provincial Court judge hearing the matter might order.
- [70] The Regional District appealed this decision, but by the time the case reached the Court of Appeal, Aba had been destroyed. While Newbury J.A. acknowledged the divergent trial court decisions and the importance of resolving the issue, she declined to do so because the case was not only moot but lacked the adversarial context which was necessary to a proper consideration of the issue.
- [71] Johnston J.'s decision was a considered one. I am not aware of any subsequent decisions which have affected its validity, nor am I aware of any binding authority which was not considered by him. In short, his decision does not fall within any of the exceptions noted by Wilson J. in *Re Hansard Spruce Mills*. As a matter of comity, I should follow it and I do.

- [72] The issue that remains, therefore, is whether some form of conditional order should be made, and whether that is a matter that I should decide as opposed to remitting the case to the trial judge for his consideration.
- [73] The appellant argues that a conditional order by which Diesel would be returned to Mr. Smith is appropriate. The respondent suggests that an adoption order presumably similar to the order made in Kuo is the preferred course.
- [74] It does not follow that simply because a conditional order is available that one should be made. Whether one should be made will depend, as Palmer P.C.J. pointed out in Kuo, on whether such an order would "ensure the protection of the public". That question turns on the danger the dog poses and whether the proposed plan adequately constrains that danger. There are two options in the matter at hand. One is to order the dog returned to Mr. Smith under various conditions, such as fencing his yard and never permitting the dog to be at large otherwise than on a leash. I am not persuaded that making such an order would adequately protect the public. I agree with the trial judge's conclusion that Mr. Smith has shown himself to be both unreliable and profoundly irresponsible in his care and control of Diesel. His assurances that he will now do that which any reasonable person would have done long ago are an insufficient basis on which to rest the public's safety. Further, a conditional order that involved Diesel being returned to Mr. Smith would require the Regional District to continue to deal with Mr. Smith in relation to Diesel. He has shown himself to be singularly uncooperative and unreasonable in his dealings with the Regional District's staff to this point, and there is no reason to think that will change.
- [75] The remaining option is adoption. I am satisfied that given sufficient safeguards that adoption is a viable option. I reach that conclusion in part because while I am satisfied that Diesel is dangerous within the meaning of s. 49, and while he may be beyond corrective training, he is not so dangerous as to be beyond the ability of a responsible owner to control.

Disposition

- [76] The appeal is allowed to the extent that the destruction order is conditionally set aside.
- [77] It is not clear to me whether the Regional District wishes to find a placement for Diesel or whether it expects Mr. Smith to do that. Given this uncertainty, I will stay the destruction order pending the parties speaking to the question. They should arrange a hearing through the Supreme Court scheduler's office. The hearing is to be held within the next seven days. I will hear the matter at 9 a.m. or 4:15 p.m. All parties are permitted to appear by telephone. If the Regional District wishes that Mr. Smith assume responsibility for the placement of his dog, I envision an order that requires him to find a replacement and have the proposed new owner assessed by a veterinarian or similar professional. That person would then have to provide an opinion to the effect that, with specific conditions, the danger that Diesel poses can be constrained within acceptable limits. All of this would need to be done within 60 days. The person with whom Diesel is placed would have to abide by conditions likely

similar to those imposed in Kuo. If, on the other hand, the Regional District wishes to seek a placement for Diesel, I would accede to that request and impose conditions on the placement. What those conditions will include will depend in part on the proposed placement.

[78] The final question is as to costs. When this matter was argued, both counsel took the position that it was an appeal under the Small Claims Act. For the reasons given above, I consider that it is an appeal under the Offence Act. Different considerations apply to the issue of costs under that statute. I will hear from the parties on the question of costs given this statutory context when I deal with the issue of who is to propose the adoption.

"G.M. Barrow, J."

The Honourable Mr. Justice Barrow

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