Citation: ☼

Date: ☼
File No: 96357-1
Registry: Kelowna

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Bylaw)

REGIONAL DISTRICT OF CENTRAL OKANAGAN PLAINTIFF

IAN SISETT DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE A. TAM

Counsel for the Plaintiff:	T. DeSouza
Appearing in person:	I. Sisett
Place of Hearing:	Kelowna, B.C.
Dates of Hearing:	January 17, 18, 2023
Date of Judgment:	February 21, 2023

Overview

[1] Mr. Sisett, the owner of a Standard Poodle dog named Charlie, has been charged with a number of offences contrary to the *Regional District of Central Okanagan Responsible Dog Ownership Bylaw No. 1343, 2014*. They are as follows:

Count 2	On March 1, 2021, as the owner of a "Dangerous Dog", failed to obtain a licence, contrary to s. 11 of the Bylaw.
Count 3	On or about July 10-18, 2021, caused or permitted Charlie to be a "Nuisance Dog", contrary to s. 34 of the Bylaw.
Count 4	On or about July 18, 2021, as the owner of a "Dangerous Dog", failed to keep Charlie within a locked Enclosure, contrary to s. 39(2) of the Bylaw.
Count 6	On August 19, 2021, as the owner of a "Dangerous Dog", failed to post the required sign warning that a "Dangerous Dog" resides on the property, contrary to s. 40 of the Bylaw.
Count 7	on or about August 19, 2021, as the owner of a "Dangerous Dog", failed to obtain a microchip within 15 days of the declaration, contrary to s. 41 of the Bylaw.

[2] Previously in these proceedings, I granted a no evidence motion on Counts 1 and 5. They alleged that Mr. Sisett caused or permitted Charlie to become a "Dangerous Dog", contrary to s. 49(1) of the *Community Charter*, SBC 2003, c. 26. I held that that section does not create an offence and Mr. Sisett could not be convicted of it. The Regional District submitted that, on those counts, the prosecution was not seeking a conviction for an offence, but rather a finding that Charlie is a "Dangerous Dog", and a determination as to the appropriate remedy, including whether Charlie ought to be destroyed in accordance with s. 49(10) of the *Community Charter*.

[3] I concluded that the wording of the counts did not sufficiently put Mr. Sisett on notice of the relief the prosecution was seeking. It appeared to have charged Mr. Sisett with offences. Further, at the outset of the trial, I excluded Mr. Sisett's wife, Mrs. Marguerite Sisett, from the courtroom on the basis that she was not named on the information and she was going to be a witness for the defence. Since the relief sought was a declaration that Charlie was "dangerous" and possibly his destruction, Mrs. Sisett should have been a party to the proceedings as a co-owner of the dog. As the trial

unfolded, she was not present to participate in cross-examination of witnesses or to make submissions to the court. For all of the above reasons, I held that it would have been procedurally unfair for Counts 1 and 5 to continue in the manner suggested by the Regional District. See *R. v. Sisett* (citation here).

Background Facts

[4] Mr. and Mrs. Sisett own three dogs, including a Standard Poodle named Charlie. On January 29, 2020, Mr. Sisett was exercising his three dogs on a field at the Okanagan College in Kelowna, BC. Ms. Melanie Michaels was also there with her little dog Spike which weighs less than 10 pounds. At one point, Mr. Sisett's three dogs charged at Ms. Michaels and Spike. When her attention was focussed on the other two dogs, Charlie grabbed Spike into his mouth and shook him violently. When she noticed this, she tried to defend Spike by kicking Charlie. Charlie then released Spike, but the incident resulted in serious injuries to Spike including abrasions and a broken jaw.

[5] Following this incident, Ms. Michaels contacted the Regional District to report the incident. An investigation ensued which resulted in Animal Control Officer McKenney identifying Mr. Sisett as the owner of Charlie. Officer McKenney then declared Charlie to be a "Dangerous Dog" and served the notice of same on Mr. Sisett. Although Mr. Sisett refused to sign for the notice, I am satisfied that he was duly served with the declaration on March 18, 2020.

[6] This notice also informed Mr. Sisett that there were certain requirements that come with owning a Dangerous Dog. These include obtaining a Dangerous Dog licence (s. 11); keeping Charlie in an enclosed area as defined in the Bylaw (s. 39(2)); posting a sign warning others (s. 40); and microchipping Charlie within 15 days of the declaration (s. 41). This trial concerns Mr. Sisett's alleged failure to comply with those requirements, along with one other charge.

General position of Mr. Sisett

[7] I will address Mr. Sisett's arguments in relation to the specific counts later on in these reasons. But as an overarching theme, Mr. Sisett takes the position that all of

these charges ought to be dismissed because Charlie does not pose a danger to the public, and that this prosecution is an abuse of the court's process. I turn to these arguments now.

Collateral Attack

[8] Mr. Sisett asked this court to reconsider whether Charlie is actually a Dangerous Dog. However, throughout the proceedings, I informed Mr. Sisett of the rule prohibiting collateral attacks. In *Wilson v. The Queen*, 1983 CanLII 35 (SCC), the Supreme Court of Canada defined a collateral attack as "...an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (p. 599). Put in the context of this case, the present charges deal with whether Mr. Sisett failed to comply with the Bylaw requirements *given that Charlie had been declared a Dangerous Dog*. It is, therefore, not open to this Court to revisit or second-guess the correctness of Officer McKenney's decision. Specifically in the context of a Dangerous Dog declaration under the *Community Charter*, Saunders J. said this in *Victoria (City) v. Evans*, 2023 BCSC 11 at para. 11:

> [11] As I explained to Mr. Evans in the course of the hearing, whether or not the Dog is dangerous is not an issue on this application. The Dog has been designated as dangerous. Mr. Evans has not taken steps to challenge that designation. It is open to him to seek judicial review of that designation, through filing a petition with this Court. Unless that designation is overturned by this Court, or its operation suspended, the designation is presumptively valid and lawful, and Mr. Evans must fulfill the duties of an owner of a dangerous dog as set out in the *Bylaw*.

[9] Mr. Sisett then suggested that an ordinary citizen cannot be expected to have the skill and knowledge to pursue a judicial review to overturn a declaration. Alternatively, it would cost tens of thousands of dollars to retain counsel for that purpose. While I do not wish to be dismissive of the financial or personal cost involved in pursuing a matter at a judicial review, that remains the appropriate mechanism to appeal Officer McKenney's decision. And decades of jurisprudence, by which I am bound, bar me from second-guessing that declaration in the context of this trial. Further, I find it most ironic that Mr. Sisett is making this particular argument in that he himself is a former member of the bar. In fact, he represented himself and his wife at a previous judicial review at which he

was successful. See *Sisett v. Central Okanagan (Regional District)*, 2019 BCSC 2091. Whatever merit there is to his argument, that is completely deflated by the current circumstances in light of his background.

[10] Mr. Sisett then submitted that, even if the Court cannot undo the Dangerous Dog declaration, I need to make a determination for myself as to whether Charlie is dangerous to the public. Only if there is such a danger, would a prosecution for any of these offences be justified. And in the present case, there is simply no public interest in pursuing these infractions.

[11] In my view, whether the charges are laid is a matter of prosecutorial discretion. It is not for this Court to assess whether the public interest warrants the laying of the current charges. Generally speaking, prosecutorial discretion is not reviewable by the court unless there has been an abuse of process. See *R. v. Anderson*, 2014 SCC 41, at paras. 40 and 48.

Charlie is a Dangerous Dog

[12] Although it is not necessary for me to do so, I make the finding that Charlie is in fact a Dangerous Dog. This term is defined in s. 49 of the *Community Charter*:

> "dangerous dog" means a dog that
>
> ...
>
> (2) 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,...

[13] As explained above, Charlie charged at Ms. Michaels and Spike on January 29, 2020 at the Okanagan College. Charlie grabbed Spike into his mouth and shook him violently. This resulted in a broken jaw and abrasions to Spike. This broken jaw required surgical intervention, including that Spike's jaw be wired shut, and a plate be put in. There is no question that that was a serious injury.

[14] Throughout this and previous proceedings, Mr. Sisett claimed that the broken jaw was not caused by Charlie, but rather by Ms. Michaels' kicks. That contention has

absolutely no foundation. Ms. Michaels testified clearly that she was kicking at Charlie for him to release Spike. At no point did she kick Spike. And despite being forcefully challenged on cross-examination, her evidence withstood that challenge and I accept her evidence fully. Mr. Sisett was some 75 metres away at the material time and is in no position to contradict Ms. Michaels' version of events. Spike was previously uninjured before the attack. He had a broken jaw after Charlie attacked him. No expert or veterinary evidence is required here. Logic dictates that there can be no other conclusion other than the fact that Charlie caused the serious injury.

[15] Mr. Sisett relies to a large extent on the decision of *R. v. Sisett*, 2022 BCSC 841. As a result of the attack on Spike, Mr. Sisett was previously issued a violation ticket for "causing or permitting Charlie to become a Dangerous Dog" contrary to s. 36 of the Bylaw. The matter proceeded to trial at which Judicial Justice Burgess found Charlie to be a Dangerous Dog and Mr. Sisett guilty of the infraction (*R. v. Sisett*, Kelowna File 14908, BCPC at para. 40). On appeal, Weatherill J. overturned the conviction, concluding that the element of "causing or permitting" requires some active participation or control in encouraging a dog to be dangerous. The court found that there was no evidence Mr. Sisett previously had the knowledge that Spike had such a propensity. At para. 58 of the appeal judgment, the court said:

> [58] There was no evidence before the Judicial Justice that remotely suggested Mr. Sisett knew that Charlie had any such propensity. Indeed, the evidence is to the contrary, that Charlie was a one-year-old playful puppy that liked to "sniff" other dogs in the same manner most dogs greet each other. There is no evidence that the Incident was anything other than a one-off event.

[16] The above paragraph must, therefore, be read in the context of whether Mr. Sisett should be guilty of the infraction. It was not, as Mr. Sisett suggests, a finding by Weatherill J. that Charlie is not Dangerous. On the contrary, Weatherill J. agreed with both Judicial Justice Burgess and Officer McKenney in coming to the conclusion that Charlie is Dangerous. At para. 41 of the appeal judgment, the court said:

> ***i. Based on the evidence before him, could the Judicial Justice reasonably have reached the conclusion that Charlie was a dangerous dog, as that term is defined in the Bylaw?***
>
> [41] In short, yes.
>
> [42] The Judicial Justice reviewed the evidence and accepted that Charlie caused serious injuries to Spike. He then reviewed the definition of dangerous dog in the Bylaw and concluded, rightfully in my view, that the act of Charlie seriously injuring Spike brought him within that definition. These findings are amply supported by Ms. Michaels' and Ms. Clarkson's evidence which was accepted. The Judicial Justice's assessment of their evidence was reasonable.

[17] And then at para. 47:

> [47] Referring to the definition of "dangerous dog" in the Bylaw, the Judicial Justice then concluded that Charlie was a dangerous dog.
>
> [48] The Judicial Justice was entitled to make that finding based on the evidence before him and that finding is entitled to deference. I conclude that any reasonable jury properly instructed would have come to the same conclusion.

[18] Consequently, neither the trial nor the appeal decision assists Mr. Sisett on this issue. In fact, they support the Regional District's position. But independent of that judicial history, I make a finding of fact based on the evidence before me that Charlie did in fact cause serious injuries to Spike. This makes him a Dangerous Dog pursuant to s. 49(1)(b) of the *Community Charter*. It follows that Officer McKenney's declaration was correct and amply supported by the evidence.

Abuse of Process

[19] Mr. Sisett also claims that this entire proceeding is an abuse of the court's process in that it was commenced for ulterior motives, specifically to financially ruin the Sisetts and to cause psychological harm. This contention can be summarily dismissed in that I find absolutely no factual foundation for such a claim. Officer McKenney acted well within his power and discretion to issue the Dangerous Dog declaration. Indeed, some would have criticized him had he not. And charging Mr. Sisett with the index offences are well justified, as one will see later on in these reasons. In short, there is simply no ulterior motive or nothing inappropriate in the prosecution of this matter.

[20] Mr. Sisett also attacked Mr. DeSouza personally for being biased, impartial, and unprofessional. Again, I see absolutely no foundation for such a contention. From my observations, Mr. DeSouza's conduct of this matter has been nothing but professional. Any tension between the parties was well within the appropriate bounds of our adversarial system and Mr. DeSouza's ethical obligation to advocate on behalf of his client. Mr. Sisett said that it evidences unprofessionalism or bias for Mr. DeSouza to have provided him with a significant amount of disclosure, including witness statements, some of which the prosecution did not end up tendering at trial. In my view, there is a constitutional requirement that the prosecution disclose to the defendant all material that may be relevant. And the prosecution is not obliged to call every witness that may have something relevant to say. Accordingly, the amount of disclosure provided to Mr. Sisett suggests that Mr. DeSouza was acting ethically, and not the contrary. And if Mr. Sisett wished for Officer McKenney to testify, then he should have subpoenaed him for his case. Surely as a former lawyer, he would have been familiar with the procedure. Further, there is nothing untoward about Mr. DeSouza or his law firm putting on an educational seminar for bylaw officers. It does not create a conflict of interest nor does it undermine his ability to act within ethical guidelines.

[21] For the above reasons, I reject all of Mr. Sisett's arguments as they relate to a general defence to all of the charges. I now turn to the specific allegations.

Count 2 – failure to obtain a Dangerous Dog licence

[22] On behalf of the Regional District, Animal Control Officer Nolan testified that Mr. Sisett, as of March 1, 2021 did not have a proper Dangerous Dog licence for Charlie as required by s. 11 of the Bylaw. Mr. Sisett testified and he agreed with this. However, he says that he was, at the time, appealing the violation ticket for causing or permitting Charlie to become Dangerous. When Officer Nolan contacted him to remind him that Charlie did not have the proper licence, he paid the required fee, albeit under protest. Mr. Sisett says that under the circumstances, the infraction was so technical and so minor, that a conviction should not be entered. In other words, Mr. Sisett relies on the principle of *de minimus non curat lex*, meaning that the law does not concern itself with trifling things.

[23] Although I could imagine some merit to the argument if Mr. Sisett were late in obtaining the licence by a very brief period of time, especially if the matter were under appeal, such is not the case here. Charlie was designated a Dangerous Dog in March 2020. Pursuant to the Bylaw, he would have needed the proper licence by March 1, 2021. It was not until April 12, 2022 that Mr. Sisett paid the required fee and obtained the proper licence. This was late by well over a year. I cannot accede to Mr. Sisett's argument that this was minor. Accordingly, I find beyond a reasonable doubt that Mr. Sisett failed to obtain the proper licence from the Regional District as required.

Count 3 – Causing or Permitting Charlie to become a Nuisance Dog

[24] Between July 10 - 18, 2021, Ms. Danielle Dorosh and her extended family rented the house next to the Sisett property as a vacation home. While there, the extended family had with them a little Yorkshire Terrier named Nahla. During this week, Ms. Dorosh testified that she saw the Sisett dogs charge to the fence in a manner that was not particularly friendly and did not cause Ms. Dorosh's family to want to say hello to the dogs. At the end of their trip when the family was packing up to leave on July 18, 2021, Ms. Dorosh's attention was drawn to the dogs when she saw Charlie having Nahla in his mouth and shaking her violently. This happened on the Sisett property. Ms. Dorosh then jumped over the fence to Nahla's rescue, in which she succeeded. But in the process, Ms. Dorosh suffered abrasions and cuts. Nahla also bit Ms. Dorosh on the face. Nahla herself suffered some serious lacerations in her abdomen.

[25] As a result of the dogs charging to the fence, Mr. Sisett has been charged with "causing or permitting Charlie to become a Nuisance Dog" contrary to s. 34 of the Bylaw. And a Nuisance Dog is defined in s. 6 of the Bylaw as follows:

> Nuisance Dog means any dog that has been At Large or impounded three times in the last 12 months or whose Owner has been issued a Bylaw Offence Notice or Municipal Ticket three times in the last 12 months, or a dog that is menacing by repeatedly charging or lunging at a fence.

[26] Counsel for the Regional District specified that they are relying on the last part of the definition, namely that Charlie was "repeatedly charging or lunging at a fence".

[27] On this count, I am not satisfied beyond a reasonable doubt that Mr. Sisett committed the offence for three reasons. Firstly, while Ms. Dorosh testified that the dogs charged at the fence in an unfriendly manner, it is not clear whether she was referring to all three dogs. She did not specifically identify Charlie as one of the dogs charging. As such, I am left with a reasonable doubt with respect to Charlie being involved with this behaviour. While the context of the evidence leads me to conclude that Charlie was probably one of the dogs charging, the prosecution bears the onus of proving that fact beyond a reasonable doubt. And the Regional District has not met that onus.

[28] Secondly, the definition of a Nuisance Dog requires that charging or lunging be *repeated*. While Ms. Dorosh testified that the dogs had a loud presence and that her family saw the dogs at least once or twice a day, I do not understand from her evidence that the dogs *repeatedly* charged at the fence. The best I can tell, she described one incident. Accordingly, the prosecution has not proven that the dogs were in fact Nuisance Dogs.

[29] Thirdly, the Regional District has not established that Mr. Sisett "caused or permitted" Charlie to become a Nuisance Dog. "Cause or permit" is an essential element of this offence. In fact, oddly enough, Mr. Sisett had previously on two occasions been charged and convicted of a "cause or permit" offence at an adjudication or trial, only to have that conviction overturned on a judicial review or appeal. In 2018, Mr. Sisett was charged with "causing or permitting" a previous dog, Oso Grande, to be at large. His conviction at an adjudication was overturned by Weatherill J. who concluded that, at para. 39 of the 2019 BCSC 2091 decision:

> [39] While the terms "cause or commit" [sic] are not defined in the Bylaw, I conclude that they connote a degree of active participation or control over the offences or a state of indifference, acquiescence or permitting the offences to occur, as in the failure to prevent the dogs from escaping when such an escape ought to have been reasonably foreseen.

[30] The conviction was overturned on the basis that the Sisetts played no active role in the dog escaping. In fact, the dog was kept in a completely fenced-in backyard.

[31] Similarly, in relation to the Spike incident, Mr. Sisett was charged with "causing or permitting" Charlie to become a Dangerous Dog. Again, that conviction was overturned by Weatherill J. who said at para. 57 of the 2022 BCSC 841 decision:

> [57] Before one can "cause or permit" a dog to become a dangerous dog, there must be a degree of active participation or control in encouraging a dog to be *dangerous* (as for example, actively training or encouraging a dog to attack animals or persons and/or seriously injure them), or a state of indifference or acquiescence in knowing a dog has a propensity towards violence and doing nothing about it.

[32] I think the same thing can be said here. Assuming that it was Charlie who was charging at the fence and that he did it repeatedly, there is no evidence that Mr. Sisett actively participated in encouraging this behaviour, or that he knew Charlie had such a propensity and did nothing about it. Consequently, that element of the offence has not been made out beyond a reasonable doubt. For any or all of the above three reasons, Mr. Sisett ought to be acquitted of Count 3.

Count 4 – kept in a locked Enclosure

[33] Because Charlie was declared a Dangerous Dog, Mr. Sisett was required to keep him within a locked Enclosure in accordance with s. 39(2) and Schedule C of the Bylaw. On July 18, 2021, Ms. Dorosh saw Charlie outside any such Enclosure. Mr. Sisett testified and agreed that that was so. Mr. Sisett's only comment was that it would be cruel to lock his dog up in such an Enclosure all the time. I do not see that to amount to a defence, nor do I necessarily agree with that assertion, given the need to protect the public. In any event, it is not for this Court to re-write the Bylaw. Accordingly, I find beyond a reasonable doubt that Charlie was not kept in an Enclosure in accordance with the Bylaw requirement.

Count 6 – failure to post a sign

[34] Section 40 of the Bylaw requires the owner of a Dangerous Dog to post a sign at the front and backyard in accordance with Schedule F of the Bylaw. This sign depicts a vicious looking dog and warns people that there is a Dangerous Dog on the premises. It also bears the logo of the Regional District and cites the Bylaw pursuant to which the

sign was posted. Instead of posting the prescribed sign, the Sisetts opted to use a novelty sign which says "Beware! Vicious Beast!" and contains what appears to be some caricature or a cartoon depiction of an animal.

[35] It is quite clear that the sign the Sisetts used is completely inadequate to achieve the legislative purpose of warning the public. Their sign is mundane if not humorous. It does not convey the serious message that it is meant to. It also lacks official character in that it does not bear the Regional District logo nor does it cite the appropriate bylaw. In any event, the Sisetts clearly did not post the required sign. To this, Mr. Sisett offered no defence other than that his family is not prepared to portray their Charlie as a Dangerous Dog to the public. This count has been made out beyond a reasonable doubt.

Count 7 – failure to microchip

[36] Section 41 of the Bylaw requires Mr. Sisett to microchip Charlie within 15 days of the Dangerous Dog declaration. Mr. Sisett agrees that he failed to do so and offered no defence. This count has also been made out beyond a reasonable doubt.

Strict Liability Offences

[37] All of the above offences are strict liability offences. This means that, once the underlying acts have been established beyond a reasonable doubt, a conviction will follow unless the accused can establish that they took all reasonable care to avoid the event. See *R. v. Sault St. Marie*, 1978 CanLII 11 (SCC). With respect to counts 2, 4, 6, and 7, this Court finds that the acts or omissions occurred beyond a reasonable doubt. Mr. Sisett offered no argument or evidence that he exercised any due diligence. Consequently, a conviction will be registered on those counts.

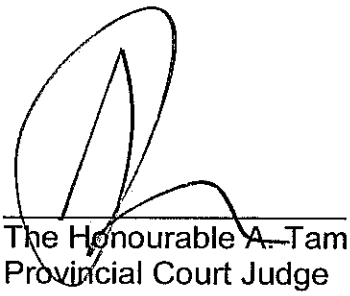
Conclusion and Summary

[38] Charlie attacked Spike on January 29, 2020. This makes Charlie a Dangerous Dog under the *Community Charter*. Officer McKenney made this declaration and served the notice of same on Mr. Sisett on March 20, 2020. It is not open to this Court to revisit that declaration. And even if called on to do so, this Court has come to the same

conclusion. There has also been no abuse of process in this case. The proceeding was not commenced for improper motive, nor was the prosecutor biased or unprofessional.

[39] Given that Charlie is a Dangerous Dog, Mr. Sisett was required to comply with additional sections under the Bylaw. He did not obtain the proper licence, keep Charlie in the prescribed Enclosure, post the required signage or microchip Charlie within 21 days of the declaration. Mr. Sisett offers no defence to those and I find his guilt beyond a reasonable doubt. However, the Court is not satisfied beyond a reasonable doubt that Charlie is a Nuisance Dog or that Mr. Sisett caused or permitted him to be one.

[40] Accordingly, I find Mr. Sisett guilty of Counts 2, 4, 6, and 7. I acquit Mr. Sisett of Count 3.



The Honourable A. Tam
Provincial Court Judge