

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panton v. Central Okanagan (Regional District)*,  
2016 BCSC 69

Date: 20160119  
Docket: 81758-1  
Registry: Kelowna

Between:

**Drew Panton**

Appellant

And

**Regional District of Central Okanagan**

Respondent

- and -

Docket: 81758-1  
Registry: Kelowna

Between:

**Regional District of Central Okanagan**

Appellant

And

**Drew Panton**

Respondent

Before: The Honourable Mr. Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia,  
dated July 31, 2015 (*Central Okanagan (Regional District) v. Panton*,  
Kelowna Docket No. 81758)

## Reasons for Judgment

The Appellant, Drew Panton:

In Person

Counsel for the Respondent:

T.J. De Souza

Place and Date of Trial/Hearing:

Kelowna, B.C.  
December 9, 2015

Place and Date of Judgment:

Kelowna, B.C.  
January 19, 2016

**Introduction**

[1] There are two appeals before the court. The first appeal concerns the fate of “Jake”, a seven-year-old Perro de Presa Canario dog, who was found to be a dangerous dog within the meaning of s. 49 of the *Community Charter*, S.B.C. 2003, c. 26 and ordered euthanized by Wallace P.C.J. in a decision issued July 31, 2015.

[2] Jake is owned by the appellant, Mr. Panton. He submits that Judge Wallace erred in failing to consider or impose sanctions short of putting Jake down. In particular, he submits that Jake should be returned to him on strict conditions that will ensure public safety while at the same time permitting Jake to continue living.

[3] The respondent Regional District of Central Okanagan (“RDCO”) submits that Judge Wallace’s decision was well-founded based on the evidence before her and that there is no basis for this court to intervene. In particular response to Mr. Panton’s submission that Judge Wallace should have issued a less drastic order with conditions, RDCO submits that Provincial Court judges have no jurisdiction under s. 49 of the *Community Charter* to make such conditional orders.

[4] In support of its position on this latter point, RDCO asks the court to revisit the previous decision of this court in *Capital Regional District v. Kuo*, 2006 BCSC 1282 [*Kuo*], appeal ref’d *Capital Regional District v. Kuo*, 2008 BCCA 478 [*Kuo C.A.*], where Mr. Justice Johnston held that provincial court judges have the discretionary authority to make orders short of euthanization. RDCO says that decision is now routinely followed in the Provincial Court resulting in lengthy and cumbersome hearings in dangerous dog cases that were never intended by the drafters of the *Community Charter*.

[5] A second related appeal was brought by RDCO in respect of Mr. Panton’s other dog, “Buddy”, which was also involved in the incident that gave rise to the proceeding before Judge Wallace. While the judge found that Buddy was also a dangerous dog, she was of the view that a destruction order was not necessary and that any risks associated with Buddy could be addressed by imposing certain conditions with respect to Buddy’s care and management.

[6] RDCO takes the position in its appeal that Judge Wallace erred in failing to impose certain conditions required by the applicable dog control bylaw. In response, Mr. Panton submits that the conditions imposed by Judge Wallace were within her authority and that, if the additional conditions sought by RDCO are mandatory, the bylaw is *ultra vires*.

### **Background**

[7] The background facts were described by Judge Wallace in her decision as follows:

[2] For many years, Mr. Clark and his wife were the owners of a Llapso Apso/Wheaton cross dog named Charley. At about 8:30 am on January 1, 2015, ironically the first day of Mr. Clark's retirement, he took Charley for a walk. Charley was on-leash and they were walking on Ponderosa Drive in Peachland, where Mr. Clark and his wife live in a 55 years and older community. At that time Charley was 12 years old and weighed approximately 30 pounds.

[3] When Mr. Clark and Charley were about 300 metres down the road from their home, they saw a neighbour, Mr. Schalagen, approaching them with two large, unleashed dogs beside him. Mr. Clark testified he said good morning to his neighbour and then the bigger dog (Jake) came running towards him in the middle of the road. He yelled to his neighbor "What the hell are you doing? Control your dogs", to which the neighbor replied that these were not his dogs.

[4] Mr. Schalagen testified that he had gone out for a walk on Ponderosa Drive earlier that morning and encountered the two dogs out and off-leash, with no owner in sight. When they came towards him, he froze because he thought they were pit bulls and had been told that with that type of dog he should not show fear or there could be "repercussions".

[5] Mr. Schalagen continued walking and the dogs walked with him. He stopped at the first house he came to and inquired if the dogs belonged there but they did not. He stopped at his neighbor's house to ask them to call the dog pound but they were not home so Mr. Schalagen continued to his house. The dogs followed him. He found a bucket, filled it with water and left it on driveway [sic] so that the dogs would leave his garage. It was at that point that Mr. Schalagen saw Mr. Clark walking Charley on-leash and Jake take off towards them.

[6] Mr. Clark testified that as Jake approached, he put his open hand down towards Jake but the dog ran around him and started to sniff Charley. Then, without warning, Jake bit Charley on his side. Mr. Clark testified he was shocked and kicked Jake in the head so that he backed off. Meanwhile, Charley had slumped to the ground and was whimpering.

[7] At this point Mr. Clark heard growling and looked up and saw the other dog (Buddy) running towards him. Mr. Clark kicked at him but Buddy lunged at Charley and bit him, first in the face and then on Charley's neck. Mr. Clark testified he began "pounding on" Buddy and was screaming and yelling at the dog. Buddy did back off and Mr. Clark threw himself over Charley to protect him.

[8] Mr. Schlagen's [sic] testimony confirmed that Jake sniffed Charley and then unexpectedly bit Charley in his side. Then Buddy attacked at Charley's neck and wouldn't let go. Buddy was wearing a choke chain which Mr. Schalagen pulled on but it came off so Mr. Schalagen hit Buddy with the chain as Mr. Clark was hitting Buddy with his fist. They got Buddy off Charley and Mr. Clark lay on Charley to protect him.

[8] Charley was taken to a veterinarian who found multiple lacerations all over Charley's body, including a large gash by the right ribs where the lungs were exposed and had been punctured. Given the extent of the injuries, Charley was euthanized.

[9] RDCO subsequently applied to the Provincial Court for an order that both Jake and Buddy be euthanized pursuant to s. 49 of the *Community Charter*.

### **Decision Under Appeal**

[10] RDCO's application was heard over four days: May 11-12, June 11 and July 16, 2015. The court heard evidence from Charley's owner, Mr. Clark, two lay witnesses to the incident, the veterinarian who treated Charley, an RDCO bylaw enforcement officer, two witnesses who testified about another incident involving Jake and Buddy, and Mr. Panton. In addition, both Mr. Panton and RDCO called expert evidence from animal behaviourists, both of whom had done an assessment of the two dogs.

[11] Judge Wallace reviewed the evidence in considerable detail in her Reasons for Judgment. She noted that both Jake and Buddy met the "dangerous dog" definition in the *Community Charter*, a fact conceded by Mr. Panton's counsel. She then turned to the options available to her and said at para. 63:

[63] The next issue is whether to grant the application for euthanization. Old case law held there were only two options for the Court, either have the dog destroyed or return it to its owner. (see *R. v. Dempster* [1995] BCJ 151, BCCA). However since the introduction of the *Community Charter* in 2004,

the Courts have exercised discretion with a variety of creative alternatives to euthanization or unconditional return to owner.

[12] Judge Wallace then reviewed a number of Provincial Court decisions in which the courts considered alternatives to euthanization.

[13] Having reviewed the evidence and the case law, Judge Wallace came to a different decision with respect to the two dogs. With respect to Buddy, Judge Wallace said at para. 88:

[88] The assessment of both experts is that Buddy is not generally an aggressive dog and his behaviour is attributable largely to anxiety. On all the evidence, Buddy has only exhibited aggressive behaviour when he has been in the company of Jake. I am satisfied that if he is not with Jake, not at large and off-leash, properly penned so that he is not able to escape and when walked is on-leash, on the balance of probabilities Buddy is not a risk such that he must be destroyed. However the safety precautions recommended by Dr. Ledger for Buddy must be maintained so he does not run at large.

[14] Judge Wallace then imposed a number of conditions for Buddy's return to Mr. Panton.

[15] With respect to Jake, Judge Wallace was not satisfied that measures could be put in place to mitigate the risk presented by Jake. She said at para. 87:

[87] Balancing the great risks to members of the public and their pets against the tremendous efforts that would have to be taken and maintained by Mr. Panton to keep Jake away from them, I am not satisfied that the burden has been met to make a conditional order that Jake be returned to Mr. Panton.

[16] This led to her conclusion at para. 90:

[90] I find that Jake is a grave danger to other dogs and will seriously injure or kill them if he is loose around them. As was the decision of Judge Rounthwaite in the ***Randay*** case, history speaks for itself and Jake will be attacked without provocation. While Mr. Panton has done what he can to get Jake back, as in the *Randay* case there can never be a risk again of Jake escaping and there is only one [way] of doing that. Although I am sad to do so, I order that Jake be humanely euthanized.

[17] Following the release of Judge Wallace's reasons for judgment on July 31, 2015, the parties had a further hearing on August 31, 2015 to address certain of the conditions imposed concerning Buddy's release.

[18] Judge Wallace subsequently issued her formal order on September 3, 2015, which contained the following conditions regarding Buddy:

1. Mr. Panton, his agents, friends, family or any other person who Mr. Panton delegates for the care and control over Buddy shall by September 14, 2015:

- (a) obtain and implant microchip identification for Buddy and Mr. Panton shall provide the Regional District of Central Okanagan ("RDCO") with proof that the microchip has been implanted in Buddy;
- (b) shall enroll Buddy in a training program conducted by an experienced certified dog trainer, with special expertise in addressing animal aggression. The trainer and curriculum will, prior to enrollment, be reviewed and approved of by Dr. Rebecca Ledger and Dr. Ledger shall submit a written report to the Regional District at the conclusion of the training as to Buddy's response to, and behavior after, the training;
- (c) when Buddy is not on Mr. Panton's property and not within a closed vehicle, keep Buddy controlled on a leash securely held and within a tightly fastened muzzle;
- (d) not permit Buddy to be at any sports field, playground, public beach, swimming area, off-leash park or school grounds at any time.

2. Mr. Panton shall ensure that when Buddy is in Mr. Panton's dwelling house, the doors to the dwelling house are locked and no person can inadvertently enter the dwelling which might permit Buddy to escape;

3. When Buddy is not confined within Mr. Panton's house but is on his property, Mr. Panton shall ensure that:

- (a) Buddy is confined in an area in the rear yard ("the yard") on Mr. Panton's property suitable for Buddy's size and within a secure fence of a minimum of 5' in height with secure sides and strength to prevent Buddy from escaping;
- (b) the bottom of the yard shall be kept clear and sanitary and shall be surfaced such that it is impervious to digging or any other means by which Buddy might escape;
- (c) the yard is kept locked at all times to prevent entry of young children or other unauthorized persons;
- (d) a sign (conforming with Schedule "F" of the RDCO bylaw #1343) is posted visible to the public at the front and back of his property warning that a dangerous dog resides on the property;
- (e) there is shelter for Buddy in the secure yard which provides shade for him from the sun and protection from varying weather conditions. Such shelter is not to be used more than 12 hours in every 24 hours;
- (f) the yard is kept clean and sanitary;

(g) he regularly checks the yard to ensure it is secure, clean and that signage is properly posted, visible and readable.

4. If Mr. Panton moves with Buddy from his current residence to any other location he shall notify the BC Animal Control Office for RDCO of his move and his new contact information. If the move is to a location within BC, he will provide the BC Animal Control Office in the region where he re-locates with a copy of this order.

5. If Mr. Panton finds he can no longer care for Buddy, he shall notify BC Animal Control and together they will seek an alternative care arrangement for Buddy. If no reasonable alternative can be found, Mr. Panton will surrender Buddy to BC Animal Control.

6. If Buddy goes missing or dies, Mr. Panton will notify BC Animal Control as soon as reasonably possible after he discovers such event.

7. If Mr. Panton fails to abide by the terms of this Order as determined by an Animal control Officer, then the Animal control Officer (accompanied by the RCMP or other peace officer) may take custody of Buddy. BC Animal Control will notify Mr. Panton in writing that they have Buddy, within 48 hours of taking control of Buddy and Mr. Panton will have 14 days from receiving that notice to file with the Court a request for a hearing into whether or not Buddy should be euthanized.

[19] Judge Wallace dismissed RDCO's application for costs, noting that the issue of costs was not raised until the August 31, 2015 hearing.

**Legal Framework**

[20] Judge Wallace's orders with respect to both Buddy and Jake were issued pursuant to s. 49 of the *Community Charter*, the relevant provisions of which provide:

**49** (1) In this section:

...

**"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.

(11) A dog that has been seized under this section may not be impounded and detained for more than 21 days unless court proceedings for a destruction order are commenced within that time.

[21] In addition, it is useful to note the general authority conferred on local governments to regulate in relation to dangerous dogs and other animals. This authority is found in s. 8:

**8** (1) A municipality has the capacity, rights, powers and privileges of a natural person of full capacity.

...

(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

...

(k) animals.

[22] Pursuant to this authority, RDCO enacted Regional District of Central Okanagan, Bylaw No. 1343, *Regional District of Central Okanagan Responsible Dog Ownership Bylaw No. 1343, 2014* (26 February 2014) [*Bylaw*], which deals with “the regulation, licensing and control of dogs in the Regional District of Central Okanagan”. As noted, in RDCO’s appeal, it submits that Judge Wallace’s order did not include certain mandatory provisions of this Bylaw.

[23] As Judge Wallace observed in her reasons, there has been an issue in the case law as to whether a Provincial Court judge has a discretion under s. 49(10) of the *Community Charter* to do anything other than approve or reject an application for a euthanization order.

[24] That issue was address in *Kuo* where Mr. Justice Johnston said the following with respect to a Provincial Court judge’s jurisdiction under s. 49:

[27] Once the jurisdiction has been properly and lawfully conferred, it does not seem to me that the jurisdiction is limited in the way suggested by the CRD. If it were so, the judge hearing the application, and who found that an animal control officer believed on reasonable grounds that a dog was dangerous would have no discretion to refuse a destruction order that, for example, proposed to destroy a dog by inhumane means.

[28] Section 49 is silent as to the orders that a judge might grant on a finding that an animal control officer believed a dog to be dangerous, and that belief was reasonably based. The silence might be taken to mean the judge has a wide discretion to fashion an order that met the evidence led, or it might be taken to mean that the judge has no discretion at all, as is argued here.

...

[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.

[31] Such wide discretion is reasonable, in my view, to permit the balance of public protection from dangerous dogs against the property rights of owners of those dogs.

[25] Mr. Justice Johnston when on to say the following at para. 33 with respect to the local government's argument that the provincial court judge has no discretion:

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

[26] In coming to this conclusion, Mr. Justice Johnston considered an earlier Court of Appeal decision in *R. v. Dempster* (1995), 68 B.C.A.C. 151, 112 W.A.C. 151 (C.A.) [*Dempster*], where the court held that there was no discretion under s. 8(1) of the former *Livestock Protection Act*, R.S.B.C. 1979, c. 245 to issue a conditional order. Mr. Justice Johnston accepted the decision of the Provincial Court judge in the case under appeal finding that *Dempster* was no longer binding given that the relevant provision of the *Livestock Protection Act* had been repealed and replaced by s. 49 of the *Community Charter*.

[27] The Capital Regional District appealed Mr. Justice Johnston's decision: *Kuo C.A.*. By the time the appeal was heard, the dog in issue had been destroyed and the respondent owner did not appear. The Court of Appeal recognized that the issue of a Provincial Court judge's authority under s. 49 of the *Community Charter* was important to local governments, but given that the specific case was moot and in the absence of an opposing party, the court declined to decide the matter. Madam Justice Newbury said at paras. 18-19:

[18] I agree with counsel that the appeal engages the proper interpretive function of this court. I also appreciate it raises a legal issue of some importance to local governments and that the CRD has gone to some trouble and expense to have it resolved by this court. In my view, however, the lack of "adversarial context" – i.e., argument from someone representing the interests of dog-owners who would be affected – makes it inappropriate for us to embark on the merits of this appeal. The situation would have been different had an intervenor appeared to serve that function, but no one did so. We are left with a one-sided argument and would have to try to imagine what issues counsel opposed to the CRD's position would raise and what cases he or she would cite in support.

[19] In my respectful opinion, the issue raised by the CRD is sufficiently important that it demands full argument between two adversaries. We should not, in the absence of such argument, try to determine the merits of this appeal.

[28] More recently, in *Smith v. Central Okanagan (Regional District)*, 2013 BCSC 228 [*Smith #1*], this issue arose again. There, Mr. Justice Barrow heard an appeal from a Provincial Court decision in which the judge, in very thorough reasons, determined that he had no jurisdiction to make a conditional order under s. 49 of the *Community Charter* and that his authority was limited to either ordering the dog destroyed or returning it to its owner. The judge considered *Kuo* but declined to follow it on the basis that, in the judge's view, it was inconsistent with the plain wording of s. 49 and with the decision of the Court of Appeal in *Dempster*.

[29] Mr. Justice Barrow allowed the appeal and held that *Kuo* was good law. He said at para. 71:

[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.

**The Parties' Positions**

[30] The question of Jake's fate and the issue of the judge's authority under s. 49 was the main focus of Mr. Panton's appeal. Mr. Panton submits that the judge erred as follows:

- a) in failing to identify which part of the definition of "dangerous dog" set out in s. 49 Jake met and in failing to properly assess the evidence in light of that definition to determine whether Jake should be destroyed;
- b) in failing to properly apply the case law which supported an alternative to destruction; and
- c) in failing to consider re-homing Jake as an alternative to destruction.

[31] RDCO submits that there was ample evidence to support Judge Wallace's decision to order the euthanization of Jake and that her decision is entitled to considerable deference.

[32] In addition, as noted at the outset of these Reasons, RDCO submits that, properly construed, s. 49 of the *Community Charter* does not in fact confer discretion on a Provincial Court judge to issue a conditional order. It submits that *Kuo* was wrongly decided and should not be followed.

[33] The principal points made in support of this position are:

- a) Mr. Justice Johnston found that the discretion to issue a conditional order was ancillary to the substantive power conferred by the legislature to order or reject euthanization. RDCO submits that the discretion found by Mr. Justice Johnston is not in fact ancillary but amounts to an additional substantive power that is not found in the legislation. As such, it is an excess of jurisdiction for a judge to make a conditional order;

- b) Local governments have authority under the *Community Charter* to regulate dangerous dogs, and many local governments do so by way of dangerous dog bylaws. While allowing local governments to do so, the legislature decided that the ultimate sanction of euthanization should require the approval of the court. To permit the court to go beyond simply approving or rejecting euthanization undermines the regulatory authority of the local governments;
- c) The plain wording of s. 49 does not contemplate the wide ranging discretion found by Mr. Justice Johnston unlike, for example, s. 129(5)(b) which authorizes the court to make orders concerning the required quorum for council meetings “subject to any conditions and directions the court considers appropriate” and
- d) The interpretation adopted by Mr. Justice Johnston results in a protracted and complicated process, as evidenced by the four days of trial in this case, and potential further proceedings with the court acting as the supervisory authority over its conditional orders. RDCO submits that this is not what was intended by s. 49 and is again inconsistent with the regulatory authority conferred on local governments.

[34] With respect to its appeal concerning the conditions for Buddy’s return to Mr. Panton, RDCO submits that Judge Wallace failed to include certain mandatory conditions set out in the Bylaw.

[35] Mr. Panton again submits that Judge Wallace did not err or, in the alternative, the applicable provisions of the Bylaw are *ultra vires*.

### **Discussion**

#### **Is *Kuo* Binding?**

[36] I propose to deal first with RDCO’s submission that I should revisit and reject the law as stated in *Kuo*.

[37] It is well established that a judge of this court will disregard or go against a decision of another judge of the court in very limited circumstances, which were set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 592 (B.C.S.C.)

[*Hansard Spruce Mills*]:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) It is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) The judgement was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[38] RDCO has advanced forceful arguments about the difficulties that flow from the decision in *Kuo*. One of the most obvious difficulties is that it puts the Provincial Court in the position of supervising the management and control of dangerous dogs. One need only look at the extensive conditions imposed by Judge Wallace on Buddy's release, which include in para. 7 of the order the right of Mr. Panton to come back to court in the event that the terms of the order are breached and Buddy is seized, to appreciate how much judicial time and effort is likely to be spent in connection with just this one dog. It is reasonable to question whether that was the intent of the legislature when enacting s. 49 of the *Community Charter*.

[39] That said, none of the conditions set out in *Hansard Spruce Mills* have been met in this case. *Kuo* is a considered decision and no binding authority has been identified that would call it into question. While RDCO points to *Dempster* as an appellate authority that it says is inconsistent with *Kuo*, that decision was before Mr. Justice Johnston and was distinguished on the basis of the different legislation.

[40] Further, the authority of *Kuo* was affirmed by Mr. Justice Barrow in *Smith #1* as recently as 2013.

[41] In the circumstances, it is not open to me to depart from *Kuo* and I decline to do so.

### **Jake's Appeal**

[42] In light of this conclusion, I approach the appeal concerning Jake from the perspective that Judge Wallace had the discretion to issue an order returning Jake to Mr. Panton on certain conditions, or to make a different order, for example that he go to a new home.

[43] While Mr. Panton raised three grounds of appeal, as set out above at para. 30, all three are simply different formulations of his central submission that Judge Wallace erred in failing to impose a sanction short of destruction for Jake.

[44] In *Housen v. Nikolaisen*, 2002 SCC 33, the Supreme Court of Canada emphasized that an appellate court should not interfere with a trial judge's decision absent "palpable and overriding error" (at para. 1). The Court cited the decision of the B.C. Court of Appeal in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 at 204 (C.A.), as follows:

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

[45] The Supreme Court has also underscored the degree of deference owed by an appellate court to a trial judge's exercise of discretion. In *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, the Court said at 1374-1375:

Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge's discretion. It is he who has the advantage of hearing the parties and is in the best position to weigh the equities of a case.

[46] In the case at bar, Judge Wallace had before her considerable evidence about the incident that led to Charley being put down. That evidence included expert opinion evidence concerning Jake's tendencies and the risk that he posed to people and to other animals.

[47] On the strength of that evidence, Judge Wallace made a number of findings of fact. Most notably, she found that Jake is a “grave danger” to other dogs and will seriously injure or kill them if he is loose around them. She found further that there is no way of managing or eliminating that risk short of putting Jake down.

[48] Mr. Panton submits that Judge Wallace did not properly consider whether the risk could be addressed by sending Jake to live with someone who could properly train and manage him. During the August 31, 2015 hearing to clarify Buddy’s conditions, Mr. Panton sought to introduce letters from a woman named Maryann Ouellet, who is the manager of the Kitimat Humane Society, and who, according to Mr. Panton, was prepared to take in both Buddy and Jake.

[49] Judge Wallace declined to consider the letters as they were not brought up at trial and because the clarification hearing was limited to dealing with Buddy.

[50] Mr. Panton sought to rely on these letters at the hearing of the appeal. He did not apply to introduce new evidence and, in any event, the letters would not have met the admission of such evidence in that they contain information that was clearly available at the time of the trial (see *Jens v. Jens*, 2008 BCCA 392 at para. 29).

[51] Nonetheless, I agreed to receive and consider the letters. Having done so, I find that they do not serve to undermine Judge Wallace’s opinion or to impact the appeal in Mr. Panton’s favour.

[52] First, the letters are not in a form that the court would normally accept as evidence in a trial or on appeal. They are unsworn, hearsay statements which RDCO has had no opportunity to test or challenge.

[53] Second, and more importantly, while I have no doubt about Ms. Ouellet’s good faith intentions in offering to take in Jake, there is insufficient detail provided about any plan to manage the risks identified by Judge Wallace in her decision. In short, even taken at face value, the letters do not present a viable alternative for addressing the “grave danger” presented by Jake.

[54] In the circumstances, despite Mr. Panton's heartfelt and thoughtful submissions in support of saving Jake, I am not satisfied that Judge Wallace erred in ordering his destruction. Mr. Panton's appeal is therefore dismissed.

**Buddy's Appeal**

[55] As noted, RDCO appeals with respect to the conditions imposed by Judge Wallace for Buddy's release. RDCO relies on the following provisions of the bylaw:

Dangerous Dogs

39. When a Dangerous Dog is outside its Owner's House or Dwelling Unit and not kept within a closed vehicle, the Owner shall:

...

(2) keep the Dangerous Dog within a locked Enclosure incapable of being accessed by the public or children and in accordance with Schedule 'C'.

...

**PART 12 - RECLAMATION, ADOPTION OR HUMANE EUTHANIZATION**

60. An Owner may reclaim his or her impounded dog on proof of ownership and upon payment of all applicable fines, fees, and other charges outlined in this Bylaw:

- (1) Payment may include impoundment and prosecution costs associated with applications under section 49 of the *Community Charter* if a dog has been determined in Court to be a dangerous dog.

[56] Schedule 'C' to the Bylaw, referred to above in s. 39, sets out certain required specifications for enclosures, fences and pens.

[57] RDCO submits that if a Provincial Court judge makes a conditional order under s. 49 of the *Community Charter* instead of ordering the destruction of a dog, the conditions imposed must, at a minimum, include those terms and conditions set out in the Bylaw. To do otherwise would undermine the legislative intent of giving local governments broad regulatory authority over dangerous dogs.

[58] In her order, Judge Wallace required that when Buddy is not within Mr. Panton's house, he must be confined in an area in the backyard with a secure, locked fence and an impervious surface to prevent Buddy from escaping. RDCO however, submits that Judge Wallace erred by not also requiring Buddy to be kept in

an enclosure in the backyard that meets the specifications set out in Schedule 'C' to the Bylaw, as required by s. 39(2). One of the specifications set out in Schedule 'C' is that the enclosure have a roof to prevent escape.

[59] In other words, it is RDCO's position that when Buddy is outside, he must be kept in a secure pen or enclosure within the secure yard.

[60] It is apparent that Judge Wallace had difficulty with RDCO's position. In the transcript of proceedings from the August 31, 2015 hearing, she said the following at p. 35:

...the case law that I read and all the cases that were submitted to me were that we had--that I have a balancing responsibility between, first of all, protecting the public. That's the number one and I get that, and that's what I was trying to do in my order.

But, number 2, we don't necessarily --there are ways to protect people from any harm without only euthanizing these animals, and that's the balancing act. So when I look at it, if in effect what I'm doing is making it impossible for a dog owner to comply with all of these, I'm in effect requiring that the dog be euthanized which I'm not supposed to do if there's a way of protecting the public.

So in clarifying my order, I'm definitely going to take that into account, that the restrictions should not be such that it is overwhelmingly onerous for Mr. Panton to have this dog.

[61] It is also apparent that Judge Wallace in her order sought to strike the balance that she refers to. She imposed stringent conditions for the management of Buddy so as to ensure public safety, but she stopped short of requiring that he remain penned up whenever he is outside of Mr. Panton's house.

[62] In my respectful view, it was within Judge Wallace's discretion to make the order that she did. Accepting as I must that *Kuo* is good law, pursuant to that decision the trial judge has a "wide discretion ... to deal with the facts revealed by the evidence" (at para. 30) and to fashion appropriate conditions.

[63] As discussed above in connection with Jake's appeal, the exercise of that discretion is entitled to considerable deference. I am not satisfied that Judge Wallace

erred in imposing the conditions that she did, and I would dismiss this aspect of RDCO's appeal.

[64] In light of this conclusion, I need not deal with Mr. Panton's alternative submission that s. 39(2) of the Bylaw is *ultra vires*.

[65] RDCO also submits that Judge Wallace erred in not ordering that Mr. Panton pay costs in accordance with s. 60 of the Bylaw. At the clarification hearing on August 31, 2015, counsel for RDCO advised Judge Wallace that RDCO was not seeking to recover the costs of prosecuting the dangerous dog application nor was it seeking costs in connection with impounding Jake. RDCO did however ask Judge Wallace for an order that Mr. Panton pay the impound costs for Buddy which amounted to \$4,820.00 as of August 31, 2015. Counsel advised Judge Wallace that RDCO would accept 50% of that amount up front to release Buddy with the rest to be paid off by way of monthly instalments.

[66] Mr. Panton submits that s. 60(1) of the Bylaw dealing with impoundment and prosecution costs is contrary to the decision of Mr. Justice Barrow in *Smith v. Central Okanagan (Regional District)*, 2013 BCSC 1063 [*Smith #2*], in which Mr. Justice Barrow addressed costs issues arising out of *Smith #1*.

[67] The regional district sought its costs of the appeal before Mr. Justice Barrow as well as the costs incurred in impounding the dog pending the conclusion of the proceeding, which totalled \$22,216. Mr. Justice Barrow declined to award those costs. He said at para. 25:

... I would not consider including any portion of the pound costs for the period prior to the hearing in the Provincial Court. Those are costs the local government necessarily incurs on behalf of the citizens in discharging its obligations towards their safety. ...

[68] Section 60(1) of the Bylaw was enacted after *Smith #2* was decided. Mr. Panton acknowledges that RDCO has the authority under the *Community Charter* to regulate fees and fines but he submits that s. 60(1) fails to recognize the limitation created by *Smith #2*.

[69] Mr. Panton also points to an apparent inconsistency in the Bylaw. As set out above, s. 60(1) provides that an owner may be required to pay impoundment and prosecution costs associated with applications under s. 49 of the *Community Charter* “if a dog has been determined in Court to be a dangerous dog”. In contrast, s. 53 of the Bylaw provides that RDCO “may seize a Dangerous Dog for up to 21 days in order for the Owner to build a required Enclosure” and require the owner to “pay the prescribed daily pound maintenance fees prescribed in Schedule ‘E’”, or the RDCO may proceed with an application under s. 49 of the *Community Charter*.

[70] Mr. Panton submits that ss. 53 and 60(1) of the Bylaw are in conflict in that s. 53 suggests an owner must pay the impound fees unless a s. 49 application is brought, whereas s. 60(1) suggests the fees are payable only if a dog is declared dangerous pursuant to s. 49.

[71] I do not agree that the provisions conflict. Rather, they deal with different situations. Section 53 deals with cases in which the RDCO decides to manage a dangerous dog short of seeking its destruction whereas s. 60(1) deals with applications under s. 49.

[72] I am also of the view that *Smith #2* is not an answer to RDCO’s claim. In that case, it does not appear that the regional district provided Mr. Justice Barrow with any authority for its claim to recover the impound fees. Here, RDCO relies on s. 60(1) of the Bylaw. While the legislative history of that provision was not before the court, it may well be that it was put in place to address the very issue that emerged in *Smith #2*, namely the absence of any authority to recover the impound costs.

[73] However, as I read s. 60(1), the triggering event for the recovery of impound fees is the determination by the court that a dog is dangerous. In this case, that determination occurred with the issuance of Judge Wallace’s order on September 3, 2015. Put another way, on the plain wording of the section, the impound fees only become payable once the court has made its determination.

[74] I do not however read s. 60(1) to mean that once the determination is made, RDCO can then charge the owner with impound fees dating back to the date on which the dog was seized. Much clearer language would be needed in order to give s. 60(1) such a retroactive effect.

[75] Further, this interpretation provides some symmetry with s. 53 of the Bylaw which again allows RDCO to charge impound fees while the owner takes steps to comply with the Bylaw. Similarly, under s. 60(1), RDCO may charge impound fees for the period in which a dog is held while the owner takes steps to comply with the conditions imposed by the court.

[76] I would add that to permit the retroactive imposition of impound fees would give rise to the situation that so concerned Judge Wallace, that an owner would not be able to meet the onerous conditions imposed for the return of the dog which would lead to the destruction of the dog, the very thing sought to be avoided by the court.

[77] In sum, RDCO is entitled to seek recovery of impound costs from the date of Judge Wallace's order to the date of the appeal. I leave it to the parties to calculate those costs and to agree on an appropriate payment schedule.

### **Summary and Conclusion**

[78] In summary, Mr. Panton's appeal with respect to Jake is dismissed. RDCO's appeal is allowed in part in respect of the impound fees as set out above.

[79] Success on the appeal has been largely divided and accordingly, the parties will bear their own costs.

“Skolrood J.”