



**Authorities Cited:**

**CASES CONSIDERED:** *Baker v. Harmina*, 2018 NLCA 15

**STATUTES CONSIDERED:** *Animal Health and Protection Act*, S.N.L. 2010, c. A-9.1; *Interpretation Act*, R.S.N.L. 1990, c. I-19

**REASONS FOR JUDGMENT****BURRAGE, J.:****INTRODUCTION**

[1] This is the Crown’s appeal of sentence following the conviction of Crystal Smith for violations of the *Animal Health and Protection Act*, S.N.L. 2010, c. A-9.1 (the “Act”).<sup>1</sup>

**BACKGROUND**

[2] On 4 August 2018 Crystal Smith decided to walk two Staffordshire Terriers (commonly known as pit bulls), Luna and Keiko, to a public tennis court on Stamp’s Lane, St. John’s, NL. While in the tennis court she took the dogs off their leash, pulled out her cellphone, and responded to a text message. When she looked up the dogs were no longer present, having escaped through a gap in the chain-link fence. After frantic efforts by Ms. Smith and others, including members of the Royal Newfoundland Constabulary, the dogs were retrieved, but tragically not before they made away with Meshroudi, a cat who lived nearby.

[3] Neither Luna nor Keiko were seized by authorities following the August incident, but instead were returned without conditions to the care of Crystal Smith.

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<sup>1</sup> Hereinafter all section references are to the *Act*, unless otherwise stated.

On 20 May 2019 Crystal Smith's daughter, Danielle Smith, took over care and custody of Keiko, in her own residence, leaving her mother with Luna and two other dogs, who were not involved in the incident.

[4] Eventually, on 4 October 2018 Crystal Smith was charged under the *Act*, and on 29 May 2019, following a trial in the Provincial Court of Newfoundland and Labrador, she was convicted of permitting Luna and Keiko to cause a hazard and of failing to keep the dogs safely tethered, contrary to ss. 31 and 32(1), respectively.

## THE SENTENCE

[5] The sentencing hearing took place over three days in June, July and August 2019, during which time the sentencing judge heard defence evidence from Crystal Smith, Danielle Smith and a certified dog trainer, Rose Browne. Following testimony regarding her qualifications Ms. Browne was qualified by the sentencing judge to provide "expert opinion evidence in the field of dog training"<sup>2</sup>. The Crown did not object<sup>3</sup>.

[6] The Crown called no evidence at the sentencing hearing, but argued that both Luna and Keiko should be surrendered to the Society for the Prevention of Cruelty for Animals (SPCA).

[7] On 16 September 2019, the sentencing judge delivered her ruling. Based largely on the testimony of Ms. Browne, the sentencing judge decided to leave Luna in Crystal Smith's care, albeit on strict conditions<sup>4</sup>:

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<sup>2</sup> Trial Proceedings Transcript, at page 147

<sup>3</sup> *Ibid*, at page 146

<sup>4</sup> *Ibid*, at pages 201-202

But what I do have to look at is whether or not there has been any improvement in the situation, whether or not you have taken the appropriate steps to try and deal with the situation, and whether or not your attitude is such that you're the one who's going to be in control of these dogs and not the other way around. And specifically Luna. If Luna is a dominant female she's going to run the show. She's going to influence all of the other animals. You've been a dog person for a long time, from what I understand. You must know how dogs operate. And you know that there is always a dominant dog in the pack, and it looks like in this particular case it's probably Luna. And if it isn't, then you really have your hands full. But I'm not dealing with the other two dogs right now; I'm dealing with Luna.

Now Rose Browne, she has an extensive experience working with dogs going back to 1995. She's been with Companion dog training and she has been using the clicker method for a number of years and she is a certified dog trainer. Without her testimony I would not even consider leaving Luna in your care. I would have accepted the recommendation of the Crown, and I would have ordered that Luna be surrendered to the SPCA for placement to a suitable owner. However, after hearing from Ms. Browne, after hearing from the commitment that you are trying to make, and after hearing that you have taken steps, such as having a backyard that is fully enclosed, that you are not letting Luna off leash at all when she is outside of the enclosure, and that you are continuing to work diligently with the double leashing and the other recommendation of the clicker training, that as long as you continue doing what you're doing, the risk of Luna being at large and being a danger to the community isn't there.

Now if there is an accident, and that's a legitimate point that Ms. Coates raised, if she should accidentally get off what could happen. Well, that is speculative, to the extent that you could speculate that anything could happen at any time in any particular scenario. All you can do is take the reasonable steps to ensure that she's not going to get loose in the future. And I do take note of the fact that she didn't actually get loose this time; you let her off, and there was an opportunity there and she took it. So on the basis of that, I am satisfied to allow you to keep Luna, but there's going to be strict conditions.

[8] Crystal Smith was prohibited from acquiring any more animals while caring for Luna and was not to have any child under the age of 16 reside with her. Training with Ms. Browne was to continue for one year, unless Ms. Browne provided a letter to the court stating that training was no longer necessary.

[9] The Crown does not quarrel with the sentencing judge's jurisdiction to make such an order and does not appeal this ruling.

[10] It was Crystal Smith's uncontradicted testimony at her trial on 29 May 2019 that, in reality, Keiko was her daughter's dog all along, but at the time of the incident her daughter was under 19, and as Keiko was in her care, she took responsibility.<sup>5</sup>

[11] The sentencing judge declined the Crown's request that Keiko be surrendered to the SPCA, but instead permitted Danielle Smith to retain care of the dog, subject to conditions<sup>6</sup>:

Now without getting too far off--on a tangent on this, Ms. Smith, I did have some concerns about your attitude through this. It's clear that you love the dogs. It's clear that you want to be a dog owner and you want to be a dog master, but unfortunately, you know, through the testimony it seems like the dogs have been running the show. Now since May Danielle has taken Keiko. I heard from Danielle twice. I mean, she's still a very young girl but I was impressed with how seriously she was taking the responsibility. She didn't sugar-coat anything. She didn't make excuses for the dog or for herself or for anything else, she just basically recognized what she was dealing with. She recognized the importance of working with Keiko on a daily basis consistently, doing the clicker training, making sure that she was learning to go to her mat. She didn't expect that there would be an overnight solution to this. She knows that she signed up for the long road, and she knows that this is going to take time and dedication. And I think for somebody of her age who did not have the dog in her care prior to, that she showed real insight. And I think that she showed insight not only into Keiko's behaviour but also into her own behaviour and what was required from her to give Keiko what she needed and for Keiko to no longer pose any kind of a risk to the community.

Now I also heard through the course of the testimony and the documentation that Keiko appears to have some health issues. There seems to be some physical problems, as well as, I guess, emotional issues with stress and anxiety, and it looks like there has been medications prescribed and that those are being administered and have been effective. And it seems that Keiko is doing very well. Ms. Browne talked about the training sessions that she's had. She said that she was very pleased with Keiko's and Danielle's progress and that she has seen improvements, and that gave me a great deal of comfort with respect to where Keiko is right now. I think that Keiko, if she's properly managed and she continues to be in Danielle's care, that the risk to the community is not there. I think that it is a positive situation, and I am satisfied that Keiko can remain with Danielle.

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<sup>5</sup> *Ibid*, at pages 75 – 76

<sup>6</sup> *Ibid*, at pages 197-199

Now there are provisions that will be attached to that. Firstly, the order would state that Keiko is not to be returned to your care, Ms. Smith. If Danielle has care of Keiko, then she is also not to acquire any other animals and there are also to be no children under the age of 16 living in the house. Now if Danielle should decide that she can no longer care for Keiko, then Keiko has to be surrendered to the SPCA and they will be responsible for finding a suitable placement. So that's my order with respect to Keiko.

[12] The sentencing judge ordered that Keiko not be returned to Crystal Smith's care, but that Danielle Smith surrender Keiko to the SPCA in the event she could no longer care for the dog. Finally, Danielle Smith was not to acquire any other animals while caring for Keiko, and children under 16 were not to live in her house.

[13] The Crown does not quarrel with the merits of the sentencing judge's decision, or the order that Keiko not be returned to Crystal Smith. Rather, the Crown argues that the sentencing judge lacked jurisdiction to leave Keiko with Danielle Smith, as Danielle was not convicted of any violation of the *Act*. The Crown submits that for this reason, the conditions governing Danielle's care of Keiko are unenforceable and the sentencing judge had no alternative other than to order the surrender of Keiko to the SPCA. This is the order now sought on this appeal.

[14] For the reasons that follow I would not give effect to the Crown's argument, but would dismiss the appeal and affirm the disposition of the sentencing judge.

## **ANALYSIS**

[15] In my interpretation of the *Act* I am guided, of course, by s. 16 of the *Interpretation Act*, R.S.N.L. 1990, c. I-19.

[16] Section 16 provides:

Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

[17] The Crown's position is based exclusively on its interpretation of s. 76(4) of the *Act*. Section 76 reads:

76. (1) A person who contravenes this Act or the regulations or an order, licence or permit made under this Act or the regulations is guilty of an offence and is liable on summary conviction to a fine not exceeding \$50,000 and, in default of payment, to a term of imprisonment not exceeding 6 months, or to both a fine and imprisonment.

(2) Every director or officer of a corporation who authorized, permitted or participated in the corporation's commission of an offence is also guilty of the offence and on conviction is liable to the same penalty to which a person is liable for the offence, whether or not the corporation has been prosecuted or convicted.

(3) Notwithstanding subsection (1), where, with respect to an offence under this Act or the regulations, a proceeding is commenced by means of a ticket in accordance with the Provincial Offences Act, a person found guilty of that offence is liable on summary conviction to a fine that may be established by the regulations made under section 66.

(4) Where a person is convicted of an offence, a Provincial Court judge may, in addition to another penalty, make an order

(a) prohibiting that convicted person and, if the convicted person is a corporation, the directors and officers of the corporation described in subsection (2), from having the ownership, care or custody of an animal, or of a number or type of animal specified in the order, for a period of time specified in the order, including in the case of an individual, for the remainder of the person's life and, in the case of a corporation, forever; and

(b) directing that an animal in the ownership or care of that convicted person be delivered into the custody of the SPCA or the minister.

- (5) Where a person is convicted of an offence, the court making the conviction may, in addition to another penalty, make an order that the convicted person pay the whole or a part of the cost of providing transportation, food, care, shelter or treatment provided to, and where applicable, management or destruction of, an animal that was the subject of the offence of which the convicted person was convicted.

[emphasis added]

[18] Crystal Smith was convicted of two offences arising from her failure to control Keiko and Luna while in her care. She is therefore a “convicted person” within the meaning of s. 76.

[19] Subsection 76(4)(a) provides that where a person is convicted of an offence, a Provincial Court judge may make an order prohibiting that convicted person “from having the ownership, care or custody of an animal, or of a number or type of animal”, for a specified period of time, or for the remainder of that person’s life.

[20] Based on the plain language of this provision, in making such an order it does not matter where the animal is then situate, or even if there is a specific animal to which the order is directed. It was pursuant to this authority that the sentencing judge ordered that Keiko not be returned to Crystal Smith and that she not have any other animals while Luna is in her care.

[21] Subsection 76(4)(b), on the other hand, is directed to a specific animal, or animals, “in the ownership or care” of the convicted person. In this circumstance, the Provincial Court judge may order that the animal be delivered into the custody of the SPCA, or the Minister.

[22] At the time of sentencing Luna remained “in the ownership or care” of Crystal Smith and was therefore potentially subject to an order under this subsection. However, the sentencing judge declined to order that Luna be delivered into the custody of the SPCA, but instead permitted Luna to remain with Crystal Smith, albeit on strict conditions.

[23] As already observed, immediately following the August 2018 incident both Luna and Keiko were returned to Crystal Smith’s care without restriction. Dogs are personal property (see *Baker v. Harmina*, 2018 NLCA 15), and unless and until otherwise ordered, Luna and Keiko were then hers to sell, or otherwise transfer to a third party. As fate would have it, on 20 May 2019 Danielle Smith stepped up and took Keiko, as she was now 19, had her own residence, and the dog belonged to her.

[24] As of that date Danielle Smith was clearly the owner of Keiko, as “owner” is defined in the *Act*.<sup>7</sup> Keiko lived with her and she had custody of the animal in her residence. As the owner of Keiko, in caring for the animal, Danielle Smith is thus required to abide by the *Act*. For example, were Keiko now permitted to roam free, it is Danielle Smith, as the owner, who would face possible charges, not her mother.

[25] As at the time of sentencing Keiko was not “in the ownership or care” of the convicted person, s. 76(4)(b) could not be relied upon to order that Keiko be surrendered to the SPCA. Furthermore, I see nothing in the plain language of s. 76(4) to prevent the sentencing judge from leaving Keiko in the ownership and care of Danielle Smith.

[26] What, then, of the conditions imposed by the sentencing judge on Danielle’s continued care of Keiko?

[27] The answer to this question is more nuanced requiring a deeper dive into the *Act* and the mischief the legislature sought to address in the control of animals. As we shall see, the sentencing judge’s jurisdiction to impose conditions on Keiko’s ownership arises from Danielle Smith’s willingness to accept Keiko into her care and the dog’s dubious status as a “nuisance animal”. Keiko does not “get out of jail free” by virtue of the change in residence.

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<sup>7</sup> When in reference to an animal “owner” is defined in s. 2(1)(f) of the Act as including a person who has custody, charge or possession of that animal or who is the owner of property, a house, premises or part of a premises where an animal is kept or permitted to live or remain.”

[28] Crystal Smith was convicted of violating ss. 31 and 32 of the *Act*. These provisions read:

31. The owner of a companion animal<sup>8</sup> or livestock shall not permit the animal or livestock to cause a hazard to people, livestock operations, other animals, goods, property or the safe operation of motor vehicles.
- 32.(1) An owner of a dog shall keep it safely tethered or penned up at all times.
- (2) Notwithstanding subsection (1), a dog need not be tethered or penned up, where
- (a) it is held on a leash by a person capable of restraining its movements;
- (b) it is being used by a person for the purpose of lawful hunting;
- (c) it is being used by a person to work in a lawful manner with sheep; or
- (d) it is kept or used for a purpose and under the conditions prescribed by regulation.

[29] Both ss. 31 and 32 fall under PART III of the *Act*, which has the heading “Nuisance Animals”. Indeed, the language of s. 31 mirrors the definition of “nuisance”, as applied to animals in s. 2(s)(ii). This subsection reads:

2. ...
- (s) "nuisance" as applied to animals means an animal which has
- ...
- (ii) caused a hazard to people, other animals, livestock operations, property or to the safe operation of motor vehicles;

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<sup>8</sup> A “companion animal”, as referenced in s. 31, is defined in s. 2(1)(e) as including a dog.

[30] Crystal Smith was thus convicted under s. 31 of, in effect, permitting the dogs to be a nuisance.

[31] However, while there are consequences for the owner, as Crystal Smith found out, there are other tools under PART III in the arsenal of both the authorities and Provincial Court judge for the control of nuisance animals.

[32] Pursuant to s. 38 an inspector<sup>9</sup> is authorized to take and retain custody of an animal found at large. In addition, in accordance with s. 43, an inspector may, pursuant to a warrant (or in exigent circumstances, without a warrant) issued by a Provincial Court judge enter a place and, *inter alia*, “take custody of an animal that the inspector reasonably believes is a nuisance.”

[33] It is common ground that neither Luna nor Keiko were removed from Crystal Smith’s care and custody following the incident on 4 August 2018. Were the situation otherwise, following an application by an inspector, s. 44 authorizes a Provincial Court judge to order the keeping in care of an animal that is in custody.

[34] Section 44 reads, as follows:

44.(1) A Provincial Court judge may, upon an application by an inspector, make an order authorizing the keeping in care of an animal that is in custody under this Part where,

(a) the owner of the animal has been charged, in connection with the same fact situation that gave rise to the removal of the animal under this Part, with an offence under this Act or the regulations; and

(b) the Provincial Court judge is satisfied by information on oath or affirmation that there are reasonable grounds to believe that the animal

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<sup>9</sup> “Inspector” is defined in s. 2(1) as “an inspector appointed or designated under s. 68.” Pursuant to s. 68 “inspectors” are designated by the Minister, but under s. 68(2)(b) members of the Royal Newfoundland Constabulary and the RCMP are deemed inspectors.

may be a nuisance or its owner may not be able to keep the animal under proper control.

- (2) The order made under subsection (1) may be made on such conditions as the Provincial Court judge considers appropriate, including providing for the return of the animal to its owner where
- (a) the inspector is satisfied that there are no longer reasonable grounds to believe that the animal may be a nuisance or its owner may not be able to keep the animal under proper control and, where applicable, the owner has complied with an order issued under this section respecting the payment of expenses; or
- (b) when the charge is disposed of, the owner of the animal is acquitted or the charge is dismissed or withdrawn.
- (3) Where a Provincial Court judge makes an order under subsection (1), he or she may also order that the whole or a part of the cost of providing transportation, food, care, shelter or treatment to the animal be paid by the owner to the person who is authorized by the order to keep the animal in his or her care.
- (4) A person who is authorized to keep an animal in his or her care or the owner of the animal may apply to a Provincial Court judge to vary an order made under subsection (3) and the Provincial Court judge may make such order as he or she considers appropriate.
- (5) The owner of the animal may apply to a Provincial Court judge to order the return of an animal that is the subject of an order made under subsection (1) and, where satisfied that there are no longer reasonable grounds to believe that the animal may be a nuisance or the owner may not be able to keep the animal under proper control, the Provincial Court judge may order the return of the animal to its owner, subject to conditions that the Provincial Court judge considers appropriate

[emphasis added]

[35] An order under s. 44 may be made on “such conditions as the Provincial Court judge considers appropriate.” Where the animal is not returned to the owner, the Provincial Court judge may also order that the expenses attendant on caring for the animal be paid by the owner “to the person who is authorized by the order to keep the animal in his or her care.” An application to vary an expense order may be made by either a person who is authorized to keep an animal in his or her care, or the

owner, and the Provincial Court judge “may make such order as he or she considers appropriate.”

[36] Where an animal is taken into custody, and a return to the owner is not appropriate, I see nothing in the language of s. 44 limiting into whose care the animal may be placed. The section does not mention the SPCA, but speaks simply of “a person” authorized by order of the Provincial Court judge to keep the animal “in his or her care,” and “on such conditions as the Provincial Court judge considers appropriate.”

[37] Thus, had Keiko been taken into custody, a Provincial Court judge would at the very least have the jurisdiction under s. 44 to authorize Danielle Smith to care for Keiko, and on such conditions as the judge considered appropriate.

[38] However, the jurisdiction of the Provincial Court judge to craft an order respecting nuisance animals is not limited to those animals taken into custody, nor circumstances where there is a charge laid for violating the *Act*. Sections 35 and 36 are directed toward “complaints” regarding such animals.

[39] Pursuant to s. 35, persons finding a dog that is killing, maiming or pursuing a natural person, or livestock, may shoot or otherwise destroy the dog or lay a complaint before a Provincial Court judge. Upon giving the owner of the dog reasonable notice, following a hearing, the Provincial Court judge “in addition to another available penalty” may order the owner to destroy the animal or “take such action that the Provincial Court judge considers necessary in the circumstances.”

[40] Of greater relevance to the within circumstance, section 36 provides that a person may lay a complaint before a Provincial Court judge that a companion animal is a “nuisance”, or has injured other animals. If, following a hearing, the judge is satisfied that the complaint has been made out, the judge may order the owner to destroy the animal “or take such action that the Provincial Court judge considers necessary in the circumstances.” Such an order is “in addition to another available penalty.”

[41] Section 36 reads:

- 36.(1) A person may lay a complaint before a Provincial Court judge that a companion animal or livestock is a nuisance and not kept under proper control or has bitten or attempted to bite a person or has injured, worried or pursued livestock or has injured other animals.
- (2) A Provincial Court judge before whom a complaint is laid under subsection (1) shall proceed promptly to hear the matter of the complaint, but shall first give the owner of the animal reasonable notice of the hearing.
- (3) Upon hearing a complaint laid under subsection (1), a Provincial Court judge may, where satisfied that a companion animal or livestock is a nuisance and not kept under proper control or has bitten or attempted to bite a person or has injured, worried or pursued livestock or has injured other animals, make an order that the owner of the animal destroy the animal or take such action that the Provincial Court judge considers necessary in the circumstances.
- (4) An order made under this section is in addition to another available penalty.  
[emphasis added]

[42] In the event of a complaint regarding nuisance animals under ss. 35–36 the legislature has seen fit to provide the Provincial Court judge with broad authority “to take such action” as the judge “considers necessary under the circumstances”. Such an order is not limited to the person having care of the animal when it became a “nuisance.”

[43] A complaint under s. 36 does not amount to a charge of violating the *Act*, but neither does it preclude the laying of a charge. For an order under s. 36 is “in addition to another available penalty.”

[44] On a complaint under s. 36 the sentencing judge would thus have ample jurisdiction to permit Keiko to remain in the care of Danielle Smith and to impose conditions on that arrangement. A breach of those conditions would render Danielle Smith liable for an offence punishable on summary conviction.

[45] Applying a liberal interpretation to the *Act* in keeping with s. 16 of the *Interpretation Act*, and PART III, in particular, I am satisfied that the legislature saw fit to afford Provincial Court judges with broad discretion in the control of nuisance animals. Language authorizing judges to take such action as the judge “considers necessary under the circumstances” is a common feature throughout PART III.

[46] That said, while a Provincial Court judge may order the removal of a nuisance animal, as a practical matter, the judge can hardly order a person to take care and custody of any animal, much less a nuisance animal, without the corresponding agreement to do so by that person. Such an agreement carries with it both a responsibility to the animal, as well as to the public. The acceptance of such heavy responsibility cannot be imposed by judicial edict.

[47] What the Provincial Court judge can do, however, is place conditions on that acceptance where it is offered, the breach of which would then constitute a breach of the judge’s order. That is precisely what happened in this instance. By agreeing to care for Keiko, Danielle Smith accepted the judge’s terms of that arrangement.

[48] Section 76(1) provides that “a person” who contravenes an “order” made under the *Act* is guilty of an offence and liable on summary conviction to a fine or imprisonment. It reads:

76. (1) A person who contravenes this Act or the regulations or an order, licence or permit made under this Act or the regulations is guilty of an offence and is liable on summary conviction to a fine not exceeding \$50,000 and, in default of payment, to a term of imprisonment not exceeding 6 months, or to both a fine and imprisonment.

[emphasis added]

[49] It is true that the sentencing judge’s decision respecting Keiko came at the sentencing hearing for Crystal Smith, but as Crystal Smith was no longer the owner, it would be incorrect, as the Crown has done, to treat the judge’s ruling as pursuant to s. 76(4). The decision to leave Keiko in the care of Danielle Smith was in itself not part of her mother’s sentencing, although the decision that the dog not be

returned to Crystal Smith was. Keiko's fate, on the other hand, fell squarely within the sentencing judge's broad jurisdiction over nuisance animals.

[50] Finally, the Crown argued that the SPCA has the necessary expertise and experience to best decide Keiko's fate. For this reason the legislature saw fit to afford the SPCA a key role in the *Act*.

[51] With respect, and without discounting the important role of the SPCA, this argument ignores the fact that it is the Provincial Court judge under s. 76 who determines in the first instance whether the animal may remain with the owner and, if so, on what conditions. In doing so, the sentencing judge is called upon to assess, amongst other considerations, the risk to the community. The sentencing judge did precisely that after hearing evidence from Crystal and Danielle Smith, as well as the dog trainer. Moreover, it is the Provincial Court judge, not the SPCA, that decides the fate of nuisance animals.

## **DISPOSITION**

[52] For the foregoing reasons the Crown's appeal of sentence is dismissed and the sentencing judge's decision is affirmed.

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**DONALD H. BURRAGE**

Justice