SUPREME COURT OF NOVA SCOTIA
Citation: Rogier v. Halifax (Regional Municipality), 2009 NSSC 14

Date: 20090116
Docket: Hfx No. 302339
Registry: Halifax

Between:

Francesca Rogier

Applicant

v.

The Halifax Regional Municipality, the Field Operations Supervisor, Animal Services, Halifax Regional Police and an Animal Control Officer for Halifax Regional Municipality

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	January 5, 2009, in Halifax, Nova Scotia
Counsel:	Blair Mitchell, for the applicant Kishan Persaud and Scott Hughes, for the respondent

By the Court:

INTRODUCTION

[1] On July 24, 2008 Animal Control Officer Hamm executed a warrant to seize Brindi, a dog owned by Francesca Rogier. Hamm advised Ms. Rogier that a decision had been made that Brindi would be euthanized. Hamm also provided to Ms. Rogier a letter to the same effect from Lori Scolaro, Field Operation Supervisor of Animal Services for HRM. The letter stated that if she wished to challenge the decision she should contact legal counsel and HRM Legal Department prior to the scheduled date of euthanization of August 7, 2008.

[2] Ms. Rogier now applies to this Court attacking the validity of the by-law relied upon by ACO Hamm as authority for his decision to euthanize Brindi pursuant to s. 189 of the *Municipal Government Act* S.N.S. 1998 c.18, or for declaratory relief. The applicant also seeks an order in the nature of *certiorari* quashing the decision to euthanize on a variety of bases, including lack of procedural fairness.

[3] For the reasons that follow I agree that certain portions of the by-law are invalid; and the statutory decision-maker did not accord to its owner even the most minimal requirements for procedural fairness. The decision to euthanize is quashed.

PRELIMINARY MATTERS

[4] The applicant filed an affidavit sworn October 8, 2008. Amongst other things she suggested that ACO Hamm did not agree with the enforcement actions taken with respect to her dog Brindi. She claimed that she was told by Hamm on July 24,2008 he did not agree with the decision to euthanize Brindi, but he had no choice and had to do what he was told.

[5] The respondent filed an extensive record including documents, statements and information that ACO Hamm had at the time he made various decisions. In addition the respondent filed an affidavit by ACO Hamm sworn November 26, 2008. The applicant raised various objections to the form and content of this affidavit. It was replaced by a subsequent affidavit from ACO Hamm sworn December 10, 2008.

[6] At the outset of the hearing on January 5,2009 the applicant objected to a number of paragraphs in the new affidavit. For the most part, the new affidavit does nothing more than attach or reference the materials that Hamm had access to and sets out the chronology of events leading to his ultimate decision to apply for a warrant to seize the dog and to have it euthanized. Some of the paragraphs that the applicant objects to deal with contradicting some of the assertions by the applicant and providing detail as to decision-making process. The applicant could not identify any prejudice from the content of the affidavit sworn December 10, 2008. The respondent agreed that the last paragraph in the affidavit was objectionable and it was struck. I allowed the remainder to stand.

[7] The applicant filed a supplementary affidavit sworn December 22, 2008. The purpose of the affidavit was to put before the Court a number of exhibits. The exhibits include a transcript of an interview with Andrea MacDonald, Manager of Animal Services for HRM, a consolidation of prosecutions with respect to dogs, taken by HRM from June 2007 to May 2008, and an assessment of Brindi by Sylvia Jay. Ms. Jay is described as an expert in the bahaviour of dogs. The assessment was made possible by an order by LeBlanc, J. dated December 8, 2008. The order issued by LeBlanc, J. specifically stipulated that "the assessments, examinations or inspections and their results should not be used for the purpose of relief in a *certiorari* application filed in this matter." No reason or justification was advanced by the applicant for including the assessment in the supplementary affidavit filed on the application before me. At the outset of the hearing on January 5, 2008 this aspect of the affidavit was struck.

[8] Although I doubted the relevance of the interview with Andrea MacDonald and the compilation of prosecutions and their outcomes, counsel for the applicant asserted that their relevance would become clear by way of a demonstration as to how other decisions were made in juxtaposition to the decision that was made with respect to the applicant's dog. However, the applicant did not make any submissions, either written or oral that in any way demonstrate the claimed relevance of these materials. The applicant has failed to show any relevance of the supplementary affidavit dated December 22, 2008. It is inadmissible.

FACTUAL BACKGROUND

[9] Some of the circumstances surrounded the incidents triggering enforcement action by Animal Control Officers of HRM are uncontested. The applicant seeks to put a different perspective on some of the incidents and how Animal Control Officers came to take certain enforcement actions based on complaints about the applicant's dog Brindi. It is well beyond my role to make findings resolving factual disputes. Nonetheless some reference to the evidence concerning the incidents and the enforcement action taken is necessary.

[10] The applicant does not contest that her dog Brindi has demonstrated behavioural problems. She acquired the dog in June 2007. She took Brindi to obedience school which she says was successfully completed in August 2007. Her home is in a semi-rural setting at 782 East Chezzetcook Road.

[11] The record demonstrates that there were four incidents between August 21, 2007 and July 20, 2008. Three of these involve Brindi attacking dogs that were walking by the applicant's property in East Chezzetcook. In chronological order, the incidents are as follows.

[12] On August 21, 2007 a complaint was made to HRM Animal Control Services. The complainant related to the officer that she was walking her dog on a leash by the applicant's property in East Chezzetcook. Brindi was chained to a pole in the yard. Brindi eventually broke the chain and attacked the complainant's dog. The dogs ended up in the ditch. The attack ended when the applicant took control of Brindi. The complainant told the animal control officer that her dog had puncture wounds around the neck on her legs. The applicant acknowledged to the

officer that this incident happened, but said that at the time she checked the complainant's dog carefully and found no marks whatsoever. She further claimed that Brindi never left the property despite acknowledging being in the ditch. The Animal Control Officer did not charge the applicant with an offence. Instead on September 17, 2007 he opted to issue a notice under then HRM By-Law No. D-100, a "formal warning for owning a dog that without provocation attacked another animal".

[13] In addition the Animal Control Officer learned that Brindi was not registered and issued a notice requiring the applicant to register Brindi. The applicant did so.

[14] In the meantime, on September 13, 2007 a complaint was received by HRM of a dog running at large. Animal Control Officer MacDonald investigated and learned that the dog was Brindi. He met with the applicant who explained to him that Brindi had gotten free from her chain. The officer noted the dog was very well behaved when he was present and was very friendly. He issued a D-100 "formal warning for permitting the dog to run at large".

[15] On April 21, 2008 ACO Hamm received a complaint from Bernie-Joe Veilleux. She provided a statement on April 23, 2008. She related that while walking her dog, Flower, on a leash she saw a dog running from behind the house at 782 East Chezzetcook Road. She tried to pick her dog up as she saw a dog, who later turned out to be Brindi, running very fast toward them. She was unable to get her dog off the ground. Ms. Veilleux was knocked down by Brindi's efforts to get at her dog. The applicant came out and was able to get Brindi off Ms. Veilleux's

dog. Flower was injured. The applicant agreed to pay for the Vet bills. The total Vet bill as a result of Brindi's attack on Flower was $363.62.

[16] The applicant gave a statement to ACO Hamm. She acknowledged that she was in her yard and Brindi ran to the "street edge" when two women walked by with a smaller dog. Despite ordering Brindi to stay, she continued. The applicant insisted that her dog Brindi did not leave the property. She did acknowledge that Brindi had attacked another dog in the past "a few times" but there were no major injuries. She elaborated that there were two attacks by Brindi on other dogs. The applicant was asked by Hamm whether or not she felt Brindi was a "dangerous dog". The applicant insisted that she was not, but was still in the process of socialization after being in a shelter for two years. She described Brindi as being gentle with small children, adults, cats and dogs that belong to her friends.

[17] Counsel for the applicant has laid great stress on the email exchange between ACO Hamm and Ms. Veilleux that led up to a decision by Hamm to issue a "muzzle order" to the applicant.

[18] The applicant emailed Ms. Veilleux on April 22, 2008 reporting that she had dislocated her small finger in the incident. This required her attendance at the Dartmouth General Emergency. It was not broken, but still needed to be splinted. She expressed her relief that Flower had been looked after and assured Ms. Veilleux that she would not let this happen again.

[19] On May 1, 2008 Ms. Rogier emailed Ms. Veilleux. She indicated that she was not aware that Ms. Veilleux would be reporting the incident to Animal Control. She advised Ms. Veilleux that the officer that came to her house the previous week and said that Ms. Rogier would probably be fined in the amount of $220.00. Ms. Rogier explained that she would wait the outcome of Hamm's report before doing anything because with the total vet bill of $363.62, she simply could not afford to pay it as she did not have an income at the time.

[20] Ms. Veilleux forwarded the email to ACO Hamm with the message "This is exactly the reason I don't want this woman fined". Officer Hamm replied to Ms. Veilleux's email and asked for her thoughts on a muzzle order. He explained the dog would have to be muzzled anytime it leaves the residence. This would be a final warning and any further instances may allow an officer to seize the dog in the interest of public safety as all other avenues had been exhausted. Ms. Veilleux replied that she hoped it would be a muzzle order instead of a fine. She explained "I am not looking to cause her financial hardship". She nonetheless expressed a concern that a muzzle would not be sufficient to allay her fears and she would not walk that far up the road again. ACO Hamm replied that he would issue the muzzle order instead of a fine. He explained that this order would deem the dog "fierce and dangerous" and the dog could be seized if it leaves the residence without a muzzle on, attack or not.

[21] On May 2, 2008 Hamm served Ms. Rogier with a "Notice to Muzzle" pursuant to By-Law No. A-300. The applicant, in her affidavit of October 8, 2008 deposed that ACO Hamm advised her he did not agree with the muzzle order but

"they" had required it and he had no choice. She further deposed that ACO Hamm advised her she would be required to muzzle her dog and that her dog would be considered a "dangerous dog" under the by-law, but did not tell her about any policy of HRM that euthanasia would automatically follow in the event she should fail to comply with the order. I note that there is no evidence before me of any such policy.

[22] Counsel for the applicant also laid great stress on typed notations made by ACO Hamm following his attendance at Ms. Rogier's residence and service on her of a "Notice to Muzzle" Brandi. Hamm's notes record that Ms. Rogier stated she understood the repercussions of not having her dog muzzled, but felt it was unnecessary due to her belief that her dog is very friendly and the April 20, 2008 incident was an isolated one. His notes are "I informed her that I was not deeming her dog as 'dangerous' as this would include additional safeguards." He wrote that Ms. Rogier was happy to hear this, but felt that Animal Control Services would never take someone's dog because it had bitten another dog. Hamm recorded that he informed her they had done so in the past.

[23] The "Notice to Muzzle" was in the form of a letter, signed by Tim Hamm, "Animal Services Officer" and by Lori Scolaro, Field Operation Supervisor, Animal Services. It provided:

> On April 21, 2008, "Brindi", a German Shepherd mix belonging to you, was involved in an attack on an animal. Halifax Regional Municipality (HRM) Animal Services Investigated this incident and in the interest of public safety, determined your dog requires a muzzle to prevent further incidents.

[24] The whole of s.8(2) of By-Law No. A-300 was set out in the May 2, 2008 letter. The letter explained what constituted a muzzle and emphasized that Brindi is required to be muzzled at all times when outside, and that after service of the Notice, the failure of the owner to comply is an offence under the by-law. A full copy of the by-law was attached. The notice also stated "The Animal Services Officer has made this determination based on their [sic] duty to enforce No. By-Law No. A-300 and for the protection of citizens and their pets.

[25] On the morning of July 20, 2008 HRM Animal Services received two complaints. One was from a resident of East Chezzetcook Road who reported seeing an attack by "the dog across the street" involving a man walking a small and large dog. Shortly thereafter a complaint was lodged by David Shea. He had been walking his dog, and his mother's dog, Java. Java was an 11 year old spayed Lab Collie mix, described as a guide dog for the deaf.

[26] ACO Hamm was assigned to investigate the complaint. He obtained a letter on July 24, 2008 from Mr. Shea describing the events. Mr. Shea indicated that he was walking on East Chezzetcook Road. Both dogs were on a leash. He had picked up his smaller dog and was carrying him. As he neared the paved driveway to 772 East Chezzetcook Road he heard a dog rushing toward them growling. As he turned to face the dog he saw it attack his mother's guide dog. This dog turned out to be Brindi. The dog was not on its property, was not leashed, nor muzzled. As the dog attacked Java he kicked it to break its bite and tried to separate them. He expressed surprise, and I expect relief, that Brindi made no attempts to bite him. Java was unable to flee and Brindi was on her back biting at her.

[27] A lady, who turned out to be Ms. Rogier, approached from 782 East Chezzetcook yelling at Mr. Shea to stop kicking her dog. Mr. Shea continued to try to stop the attack by kicking Brindi. An SUV stopped to help. As the man approached, Brindi released Java, who then ran home. Brindi followed Java for a short distance and then went back behind 782 Chezzetcook Road. Mr. Shea says that the applicant told him that she had taken her dog out and was in the process of putting it on its leash when it bolted free.

[28] The neighbour who made the initial complaint also provided a statement on July 24, 2008. She reported seeing a man walking with two dogs, one in his arms and the other on a leash. She could hear the bigger dog on a leash crying as it was being attacked and the man trying to protect his dog, but the attacking dog would not back off. As the neighbour's husband left to try to help, a man from down the road stopped and blew his horn to try to stop the attack.

[29] It does not appear that ACO Hamm, or any other officer from HRM Animal Control Services ever contacted or interviewed the applicant.

[30] Although not particularly relevant to the outcome of this application, Ms. Rogier did provide a cryptic explanation in her affidavit of October 8, 2008 as to what happened on July 20. She does not deny that Brindi attacked the dog being walked by Mr. Shea. All she could say was that she was preparing Brindi to go out and while putting her muzzle, on she got away and out the back door. Brindi ran

around to the front of the house and when Ms. Rogier caught up she saw a man kicking at Brandi.

[31] ACO Hamm swore an Information to Obtain a Warrant to enter 782 East Chezzetcook Road and to search for and seize Brindi. The warrant was issued by a Justice of the Peace pursuant to s. 176(1) of the *MGA*. Hamm set out in the ITO the grounds for his belief that Brindi posed a threat to the community and therefore should be removed from the owner's custody in order to protect public safety.

[32] A warrant was issued on the basis that the Justice of the Peace was satisfied that there are reasonable and probable grounds for believing that Francesca Rogier owns a dangerous dog "Brindi" and is to be found at 782 East Chezzetcook Road. The warrant authorized peace officers to enter 782 East Chezzetcook Road between 9:00 a.m .and 9:00 p.m. between July 24, 2008 and July 31, 2008 to search for and seize the dog and deliver it to the Pound Keeper for the Halifax Regional Municipality, and should he be unable to seize the dog in safety, authorized the peace officer to destroy Brindi. The warrant also directed the Pound Keeper to receive the dog into his custody to be dealt with in accordance with HRM By-Law No. A-300.

[33] As noted earlier, ACO Hamm executed the warrant on July 24, 2008 and gave to Ms. Rogier a letter dated July 24, 2008. It provided as follows:

> Dear Ms. Rogier:
>
> On July 24th, Brindi a Rottweiler/Labrador Retriever owned by you, was seized by Halifax Regional Municipality (HRM) Animal Services.

HRM Animal Services has determined that “Brindi” has demonstrated a propensity to attack other dogs without provocation. This determination was made upon receiving a complaint pertaining to your dog from the public and a subsequent and complete investigation conducted by Officer Tim Hamm. In accordance with HRM Bylaw A-300, and in the interest of public safety, “Brindi” is scheduled for euthanization.

Should you wish to challenge this decision I would encourage you to seek legal counsel and to contact the HRM Legal Department at (902) 490-40226, prior to 07 August 2008. Alternatively, should you agree with this decision you also have the option of relinquishing the dog to HRM Animal Services expediting the euthanization.

HRM Animal Services has made this determination because it has a duty to enforce the A-300 By-law, Respecting Animals and Responsible Pet Ownership, in order to protect the citizens of HRM. The authority to destroy a dog is provided in s. 176(1)(a), (b), (c) and 176 (2) of the Municipal Government Act (attached) and 8(2)(d) of By-Law A-300 (attached).

It is my duty to formally notify you that “Brindi” will be humanely euthanized on 07 August 2008.

Sincerely,

Lori Scolaro

Field Operation Supervisor

Animal Services

ISSUES

[34] As I observed earlier, the applicant has launched a considerable array of arguments in her attempt to set aside the decision to euthanize her dog. For convenience they can be grouped into the following issues:

> (1) Is the by-law under which the Animal Control Officers purported to act valid?;
>
> (2) It is unclear who made the decision to euthanize; if it was Lori Scolaro she was not in fact a duly appointed official designated authorized by law and hence the order to euthanize was not lawful;
>
> (3) The statutory decision-maker owed to the applicant a duty of procedural fairness, which it did not provide;
>
> (4) The decision by the statutory decision-maker cannot be sustained either on a standard of correctness or reasonableness.

[35] Not all of the issues raised by the applicant need to be addressed. I will deal only with those matters that I consider necessary.

VALIDITY OF THE BY-LAW

[36] In order to put into proper perspective the applicant's contentions that the by-law is *ultra vires* and its related argument that the actions taken pursuant to the by-law were not appropriately authorized by the legislative scheme, it is necessary to set out the relevant statutory provisions.

[37] The respondent contends that HRM's authority to enact legislation regarding the control of dangerous dogs is found within ss. 172 and 175-179 of the *Municipal Government Act* (*MGA*). In particular it relies upon the following:

Power to make by-laws

172 (1) A council may make by-laws, for municipal purposes, respecting

(a) the health, well being, safety and protection of persons;

(b) the safety and protection of property;

(c) persons, activities and things in, on or near a public place or place that is open to the public;

....

(l) the enforcement of by-laws made under the authority of a statute, including

> (i) procedures to determine if by-laws are being complied with, including entering upon or into private property for the purposes of inspection, maintenance and enforcement,
>
> (ii) remedies for the contravention of by-laws, including undertaking or directing the remedying of a contravention, apprehending, removing, impounding or disposing, including the sale or destruction, of plants, animals, vehicles, improvements or other things and charging and collecting the costs thereof as a first lien on the property affected,

[38] The respondent submits that the authority to make by-laws respecting dangerous dogs can be implied from s.172 since such by-laws would promote the well-being, safety and protection of persons and property. It further submits that the legislature has gone further by explicitly giving municipalities the authority to regulate dogs in ss. 175-179 of the *MGA*, including the specific power in s.175(1)(h)(iii) empowering a municipality to enact by-laws authorizing the dog control officer to kill or otherwise dispose of dogs that are fierce or dangerous. These provisions are as follows:

Dog by-law

175 (1) Without limiting the generality of Section 172, a council may make by-laws

(a) regulating the running at large of dogs, including permitting the running at large of dogs in certain places or at certain times;

(b) imposing a registration fee upon the owner of every dog, the amount to be set by policy, for such length of time as is specified in the by-law with the power to impose a larger fee for female dogs than for male dogs, or for unspayed or unneutered dogs than for spayed or neutered dogs;

(c) requiring tags for the identification of dogs registered under the by-law;

(d) exempting from any registration fee a dog that is a stray dog and is harboured for up to the maximum period of time set by by-law;

(e) defining fierce or dangerous dogs, including defining them by breed, cross-breed, partial breed or type;

(f) regulating the keeping of fierce or dangerous dogs;

(g) prohibiting the keeping of a dog that persistently disturbs the quiet of the neighbourhood by barking, howling, or otherwise;

(h) authorizing the dog control officer to impound, sell, kill or otherwise dispose of dogs

(i) that run at large contrary to the by-law,

(ii) in respect of which the fee or tax imposed by a by-law is not paid,

(iii) that are fierce or dangerous,

(iv) that are rabid or appear to be rabid or exhibiting symptoms of canine madness,

(v) that persistently disturb the quiet of a neighbourhood by barking, howling or otherwise;

(i) requiring the owner of a dog, other than a dog that is trained to assist and is assisting a person with a disability, to remove the dog's feces from public property and from private property other than the owner's;

(j) requiring the owner of a dog to provide a written statement of the number of dogs owned, harboured or that are habitually kept upon the premises occupied by the owner.

[39] In addition the *MGA* provides:

Dangerous dogs

176 (1) Where a peace officer believes, on reasonable grounds, that a person is harbouring, keeping or has under care, control or direction a dog that is fierce or dangerous, rabid or appears to be rabid, that exhibits symptoms of canine madness or that persistently disturbs the quiet of a neighbourhood by barking, howling or otherwise contrary to a by-law, a justice of the peace may, by warrant, authorize and empower the person named in the warrant to

(a) enter and search the place where the dog is, at any time;

(b) open or remove any obstacle preventing access to the dog; and

(c) seize and deliver the dog to the pound and for such purpose, break, remove or undo any fastening of the dog to the premises.

(2) Where the person named in the warrant is unable to seize the dog in safety, the person may destroy the dog.

(3) repealed 2004, c. 7, s. 11.

1998, c. 18, s. 176; 2003, c. 9, s. 56; 2004, c. 7, s. 11.

Additional penalty

177 At the trial of a charge laid against the owner of a dog that is fierce or dangerous, that persistently disturbs the quiet of a neighbourhood by barking, howling or otherwise or that runs at large, contrary to a by-law, in addition to the penalty, the judge may order that the

> (a) dog be destroyed or otherwise dealt with; and
>
> (b) owner pay any costs incurred by the municipality related to the dog, including costs related to the seizure, impounding, or destruction of the dog, and it is not necessary to prove that the
>
> (c) dog previously attacked or injured a domestic animal, person or property;
>
> (d) dog had a propensity to injure or to damage a domestic animal, person or property; or
>
> (e) defendant knew that the dog had such propensity or was, or is, accustomed to doing acts causing injury or damage. 1998, c. 18, s. 177; 2000, c. 9, s. 42.

[40] The Council of HRM enacted By-Law No. A-300, to be cited as the "Animal By-Law" on October 23, 2007. The by-law came into effect April 1, 2008. This by-law contained provisions dealing not just with dogs, but also with animals. It called for the licensing and registration of dogs and cats.

[41] This by-law was replaced by a new version of By-Law No. A-300, the "Animal By-Law", effective June 28, 2008. It appears the provisions with respect to licensing of cats and other powers with respect felines were deleted. In any event, the relevant provisions with respect to the powers of an animal control officer with respect to dogs were the same. They are:

> **Interpretation**
>
> 2 (1) In this By-Law,
>
> ...
>
> (c) "Animal Control Officer" means a police officer, by-law enforcement officer or a special constable appointed pursuant to the *Police Act*;

> (d) "attack" means to injure or bite, or to threaten or give the impression of threatening;
>
> ...
>
> (g) "dangerous dog" means any dog which:
>
> (i) attacks or demonstrates a propensity, tendency or disposition to attack a human being or animal either on public or private property;
>
> (ii) has caused injury to or otherwise endangered the safety of a human being or animal;
>
> (iii) threatens any human being or animal;
>
> (iv) is owned or harboured primarily or in part for the purpose of dog fighting;
>
> (v) is trained for dog fighting; or
>
> (vi) is a dog for which a muzzle order has been made;
>
> provided that no dog shall be deemed a "dangerous dog" solely because it attacks or threatens a trespasser on the property of its owner, harms or menaces anyone who has tormented or abused it, was at the time of its aggressive behaviour acting in defence to an attack from a person or animal, acting in defence of it's young or is a professionally trained guard dog for law enforcement or guard duties;

[42] The powers of an animal control officer are set out in ss. 8 and 14 of By-Law No. A-300. They are as follows:

> **Dog Attacks**
>
> 8 (1) The owner of any dog that attacks any person or another animal is guilty of an offence under this By-Law.

(2) Where an Animal Control Officer has reason to believe that a dog has attacked a person or another animal, and the owner of the dog has been identified, the Animal Control Officer may do any one or combination of the following enforcement actions:

(a) issue the owner a notice to muzzle the dog;

(b) issue the owner a notice to microchip the dog;

(c) classify the dog as a 'dangerous dog' in the municipal registry; or

(d) destroy the dog without permitting the owner to claim it and issue the owner a notice informing that the dog has been destroyed.

...

Powers of Animal Control Officer

14 (1) An Animal Control Officer, while pursuing any animal in enforcing this By-Law, may pass over the land of any person, but this section shall not be so construed as to provide immunity against an action for damage suffered.

(2) If any animal is at large and cannot be seized safely, an Animal Control Officer, who believes on reasonable grounds that the animal poses a danger to a person or another animal and the owner is not readily able to be found, may immediately, without notice to the owner, destroy the animal, in a humane manner.

[43] The applicant argues that s.8(2)(d) of the by-law is *ultra vires* since it purports to authorize the exercise of discretion by an animal control officer without affording natural justice or procedural fairness to the owner of the animal. In addition she contends that the by-law is outside the scope of the powers conferred by the *MGA* on the basis that the by-law merely requires the animal control officer to have "reason to believe" that a dog has attacked a person or another animal

before exercising a discretion to destroy the dog. She submits the by-law is "arbitrary, unreasonable and discriminatory".

[44] Lastly, the applicant contends that the relevant provisions of the by-law are *ultra vires* on the basis that the *MGA* authorizes a dog control officer to do certain things and that an "animal control officer" is not a dog control officer. In a related point, the applicant suggests that Lori Scolaro, Field Operations Supervisor of Animal Services was the decision-maker and that her decision was unlawful as she had not been properly appointed as a special constable and was therefore not an "animal control officer".

[45] With all due respect to the applicant, I am unable to accept either of these latter complaints. Although the letter to the applicant on July 24, 2008 from Ms. Scolaro was far from a model of clarity, taking into account the totality of the record produced by HRM, and the affidavit of Animal Control Officer Hamm dated December 10, 2008 it is abundantly clear that Hamm was the decision-maker. He clearly indicated that it was he who had earlier decided to issue the muzzle order. The order was signed by both he and his Field Supervisor, Lori Scolaro, to whom he informally reported his findings "throughout this matter". There is no support for the contention that Hamm delegated his decision-making authority to anyone. There is no complaint by the applicant that Hamm's appointment as an Animal Control Officer was in anyway defective.

[46] I can appreciate that there appears to be a disquieting lack of precision in the nomenclature used in the record produced by HRM. Hamm deposes in his

affidavit that he is employed as an “Animal Control Officer’ with Halifax Regional Municipality. Documents from HRM describe his position as that of “Animal Enforcement Officer”. The letter from Ms. Scolaro advising the applicant that “Brindi” would be humanely euthanized refers to a determination decision having been made by “HRM Animal Services”.

[47] Based on the principles that I will subsequently set out, HRM had the necessary legislative authority to enact a by-law authorizing an “Animal Control Officer” to carry out the functions contemplated by s.175(1)(h). To conclude that ss. 172 and 175 does not permit a municipality to use some other label such as “Animal Control Officer” would be to give the legislation a strict and literal construction rather than a broad and purposive one.

Jurisdiction to Determine Validity

[48] As noted earlier the applicant seeks an order quashing, at least in part, By-Law No. A-300 either pursuant to s.189 or the jurisdiction of this Court to provide declaratory relief. Section 189 of the *MGA* provides:

> **Procedure for quashing by-law**
>
> 189 (1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.
>
> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.

> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.
>
> (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be. 1998, c. 18, s. 189.

[49] The respondent does not dispute that the limitation period set out in s.189(4) has no application, nor that this Court has the jurisdiction to provide the requested declaratory relief. Both of these concessions are well founded (see *Weilgart v. Halifax (Regional Municipality)* 2008 NSSC 130, [2008] N.S.J. No. 168, para 27-35; *Fortis Benefits Insurance Co. v. Nova Scotia (Registrar of Cemetery and Funeral Services)* 2005 NSSC 125, [2005] N.S.J. No. 204, para 11).

Statutory Interpretation

[50] The appropriate analytical approach where the validity of a by-law is challenged was described by Cromwell J.A., as he then was, in *Halifax (Regional Municipality) v. Ed Dewolfe Trucking Limited*, 2007 NSCA 89, [2007] N.S.J. No. 333, as follows:

> [47] When, as in this case, a by-law is challenged as being beyond a municipality's powers, two matters must be considered: the scope and purpose of the provision and the power given to the municipality to adopt it: Montréal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141; 2005 SCC 62; [2005] S.C.J. No. 63 (Q.L.) at para. 7.
>
> [48] The focus of the first step will vary according to the nature of the challenge. When the debate is about the scope of the by-law -- that is, about what conduct it regulates -- the focus will be on the interpretation of its provisions. This was the case in the Montréal decision I have just cited. Alternatively, when the debate is about whether the by-law is enacted for a valid municipal purpose,

> the by-law's purpose will be the focus of the analysis at step one. That was the case in Shell, supra.
>
> [49] The second step requires of interpretation the statute(s) granting municipal powers in order to determine the ambit of those powers intended by the Legislature. This is a matter of applying the principles of statutory interpretation to the relevant provisions.

[51] The validity of the questioned sections of By-Law No. 300 depends to a large extent on the proper construction of the bylaw and the provisions of the *MGA*. The only authority explicitly relied upon by either party on this issue is that of *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] S.C.J. No. 19. The City of Calgary passed a by-law freezing the number of taxi plate licenses that could be issued in the city. The by-law was passed pursuant to the *MGA*, R.S.A. 1980 c. M-26. This Act specifically authorized Council to pass by-laws licensing, regulating and controlling the taxi and limousine business including the power to pass by-laws limiting the number of taxi and limousine licenses that might be issued in the Municipality. A new *MGA* was passed (S.A. 1994, c. M-26.1). This *Act* contained a provision deeming existing by-laws to have the same effect as if it had been passed under the new *Act*. The new *Act* set out broad powers for the Municipalities to pass by-laws for municipal purposes in broad terms, including “transport and transportation systems” and to provide for systems of licenses, permits or approvals. There was no specific mention of taxi licenses or a power to limit their number. The unanimous decision by the Supreme Court of Canada was delivered by Bastarache, J. He observed that Municipalities do not possess any greater institutional competence or expertise than the Courts in delineating their jurisdiction and hence

whether a by-law was *ultra vires* is a question that will always be reviewed by the courts on a standard of correctness.

[52] With respect to the correct approach to the interpretation of statutes empowering Municipalities to pass by-laws, he observed that the historical dichotomy between benevolent and strict construction had been set aside and replaced by a broad purposive approach to the interpretation of Municipal powers. Bastarache J. concluded there was no indication in the new *MGA* that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. In the course of arriving at this conclusion he wrote:

> [7] Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.
>
> [8] A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act ... to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's Interpretation Act, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[53] The Supreme Court of Canada has also had occasion to consider and set out the applicable principles to be applied interpreting delegated legislation such as

regulations and municipal by-laws. With respect to municipal by-laws, in *R. v. Greenbaum*, [1993] 1 S.C.R. 674, Iacobucci wrote:

> [22] Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute. The Ontario *Interpretation Act*, R.S.O. 1990, c. I.11, states:
>
> > 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> [23] As Davies J. wrote in his reasons in City of Hamilton v. Hamilton Distillery Co. (1907), 38 S.C.R. 239, at p. 249, with respect to construing provincial legislation enabling municipal by-laws:
>
> > In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse v. Johnson* [[1898] 2 Q.B. 91], at p. 99, a "benevolent construction," and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.
>
> Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law. As Ian Rogers has noted in *The Law of Canadian Municipal Corporations* (2nd ed. 1971), at p. 388, a somewhat stricter rule of construction than that suggested above by Davies J. is in order where the municipality is attempting to use a power which restricts common law or civil rights.
>
> [24] There is also the question of how the by-law itself should be interpreted when determining whether or not the by-law finds authority within a provincial statute. In *City of Verdun v. Sun Oil Co*., [1952] 1 S.C.R. 222, Fauteux J. wrote

for the Court that "municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature" (p. 228). This is a statement of principle that a by-law which exceeds a municipality's jurisdiction ever so slightly will be declared *ultra vires*. As Stanley Makuch states in his *Canadian Municipal and Planning Law*, at p. 115:

> The courts, as a result of this inferior legal position [of municipalities], have traditionally interpreted narrowly statutes respecting grants of powers to municipalities. This approach may be described as "Dillon's rule", which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and [page689] not merely convenient to the effectuation of the purposes of the corporation.

[25] With respect to the interpretation of by-laws in determining whether or not they are *intra vires*, this Court held in *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803, that two rules of construction are of assistance. The first rule is that in interpreting general words and phrases, the meaning should be given to them which best suits the particular subject matter with reference to which the words are used. Cartwright J. stated for the Court (at pp. 803-4):

> The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted.

[26] Therefore, municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws (see, e.g., *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, at p. 207).

[54] With respect to regulations Binnie J., writing for the majority in *Glykis v. Hydro-Quebec* 2004 SCC 60, [2004] S.C.J. No. 56 wrote:

> [5] The approach to statutory interpretation is well-known (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42). A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

[55] Binnie J. later elaborated on this approach in *Bristol-Myers Squibb Co. v. Canada (Attorney General)* 2005 SCC 26, [2005] S.C.J. No. 26 where he stated:

> [37] BMS argues that once it is established that *paclitaxel* is present in the Biolyse product, s. 5(1.1) bars the issuance of a NOC. Biolyse responds that the BMS approach is too simplistic. Biolyse invokes the modern approach to statutory interpretation, which it says is equally applicable to regulations, as set out in *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1 S.C.R. 27. In that case, the *Ontario Employment Standards Act* provided for termination pay and severance pay for workers where their employment was terminated by an employer. Rizzo Shoes went bankrupt. The trustee disallowed the workers' claims because their jobs had been terminated by the bankruptcy, not by the employer. The Ontario courts agreed with the trustee. This Court reversed, Iacobucci J. observing as follows:
>
> > At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
> >
> > ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

...

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues. [Emphasis added; paras. 20, 21 and 23.]

[38] The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of the enabling statute:

> **It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.**
>
> (Elmer A. Driedger, Construction of Statutes (2nd ed.1983), at p. 247)

This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision. In this case, the distinction is crucial, for when viewed in that light the impugned regulation cannot take on the meaning suggested by BMS. Moreover, while the respondents' argument draws some support from the language of s. 5(1.1) isolated from its context, it overlooks a number of significant aspects of the "modern approach".

[Emphasis Added]

[56] In *Montreal (City) v. 2952-1366 Quebec Inc.* 2005 SCC 62, [2005] S.C.J. No. 63 again addressed the correct approach in interpreting municipal by-laws. The city adopted a noise by-law pursuant to its power to define and regulate nuisances pursuant to the Charter of the City of Montreal. The by-law defined background noise, disruptive noise, environmental noise, intermittent noise, amongst others. Article 8 of the by-law prohibited disruptive noise whose sound

pressure level is greater than the maximum standardized noise level determined by ordinance. The by-law under attack was Article 9. It was as follows:

> 9. In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:
>
> > (1) noise produced by sound equipment, whether it is inside a building or installed or used outside;
> >
> > (2) noise produced by a siren or other alarm device, except in accordance with a permit issued for that purpose or except in case of need;
> >
> > (3) noise produced by a strolling musician with musical instruments or objects used as such, at all times where percussion or electrically powered instruments are used, and at night in other cases;
> >
> > (4) noise resulting from cries, clamors, singing, altercations or cursing and any other form of uproar.

[57] The respondent operated a club featuring female dancers in a commercial zone of downtown Montreal. To attract customers and compete with a similar establishment nearby, the respondent set up a loud speaker that amplified the music and commentary accompanying the show inside so that passers-by would hear them. Around midnight a police heard the music from a nearby intersection. This led to a charge against the respondent with producing noise that could be heard outside using sound equipment in violation of Article 9(1) of the by-law. The respondent argued at trial that the provisions of the by-law were invalid because they defined activities as a nuisance in Article 9(1) that were not a nuisance. The respondent also alleged that the provision infringed his freedom of expression and that the infringement could not be justified.

[58] The trial judge ruled that the noise emitted by the respondent's establishment did constitute a nuisance and that the City Council had the power to define and prohibit nuisances under the City Charter. On appeal, Boilard J. quashed the conviction on the basis the impugned provision infringed the respondent's freedom of expression, which could not be justified. The majority of the Quebec Court of Appeal upheld the decision to quash on the basis that the City did not have the authority to adopt the provision pursuant to its provisions to ensure peace and public order within its jurisdiction nor to define an activity as a nuisance if it was not in fact a nuisance, and the prohibition constituted an unjustified violation of the right to freedom of expression.

[59] The majority judgment was written by McLachlin C.J. and Deschamps J. They concluded that despite the grammatical breadth of the prohibition, properly interpreted, Article 9(1) was to control noises that interfere with the peaceful enjoyment of the urban environment and did not include noise resulting from human activity that is peaceable and respectful of the community. They suggested a two-stage analysis must be carried out. The first, to determine the scope of the provision being scrutinized. Second, whether the City's power included the authority to adopt such a provision. With respect to determining the scope of the by-law provision, they wrote:

> [9] As this Court has reiterated on numerous occasions, "Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26). This means

> that, as recognized in *Rizzo & Rizzo Shoes* "statutory interpretation cannot be founded on the wording of the legislation alone" (at para. 21).
>
> [10] Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation. The fact that a municipal by-law is in issue rather than a statute does not alter the approach to be followed in applying the modern principles of interpretation: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 24.
>
> ...
>
> [12] In our view, although it appears to be clear, the provision is in fact ambiguous. In interpreting legislation, the guiding principle is the need to determine the lawmakers' intention. To do this, it is not enough to look at the words of the legislation. Its context must also be considered.

[60] As I understand the submissions of the applicant, she does not take issue that By-Law No. A-300 was enacted for anything other than a valid municipal purpose. She contends that there are two aspects of s. 8(2)(d) of the by-law that are objectionable as being beyond the express or implied powers granted to the municipality by the *MGA*. Specifically that the by-law purports to authorize an animal control officer, not to make a determination or finding that a dog is dangerous or even that a dog has attacked a person or other animal, but only requires the animal control officer to have “reason to believe” that a dog has attacked a person or other animal before destroying a dog. Furthermore, she submits that the *MGA* does not expressly or by necessary implication authorize an animal control officer to do so without providing notice to an owner in non-emergency situations. As noted earlier, the applicant contends this provision is unreasonable and hence *ultra vires*.

[61] The applicant provided no authorities in support of the proposition that a by-law can be struck down for being unreasonable. The quashing of delegated legislation, based on unreasonableness has been a subject of some debate (For example see Holland and McGowan, Delegated Legislation in Canada (Carswell 1989) p.223 *et seq*; Keyes, Executive Legislation (Butterworths Canada (1992) p.229 *et seq*.)

[62] The basic principle is set out in *Kruse v. Johnson*, [1898] 2 Q.B. 91. A by-law made it an offence to sing in any public place or highway within 50 yards of any dwelling house after being required by any constable to desist. The Divisional Court explained the principle as follows:

> I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson*, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operations between different classes; if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as to find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by qualification or an exception which some judges may think ought to be there.
>
> pp 99-100

[63] This approach was adopted by the Supreme Court of Canada in *R. v. Bell*, [1979] 2 S.C.R. 212. The appellant was charged with violating a by-law of a

borough of North York by using a part of a building for the use by other than one family alone. The by-law provided that, within a certain district, dwelling units could only be occupied by an individual or one family alone. Family was defined as being a group of two or more persons living together and interrelated by bonds of consanguinity, marriage or legal adoption. The by-law was passed pursuant to the *Planning Act* which provided that the municipality could enact by-laws prohibiting the use of land, for or except for such purposes as may be set out in a by-law within the municipality or within any defined area.

[64] The appellant was convicted at trial. The conviction was quashed on appeal to the County Court. The Crown appealed unsuccessfully to the Divisional Court but was successful in reinstating the conviction in the Ontario Court of Appeal. On further appeal to the Supreme Court of Canada the conviction was quashed. Spence J. wrote the majority reasons for judgment. He referred to, with approval, the reasons of Estey C.J.H.C. of the Divisional Court where he wrote:

> Both counsel admitted before this court that the effect of such provision of the By-law is to preclude the sharing of rented accommodations by two adult persons unrelated by blood or marriage, whether or not that accommodation be an apartment. For example, students attending a college in the Borough of North York, could not as tenants share apartment accommodation in or outside the college. There are endless examples, all of which inexorably lead this court to the conclusion that there are consequences which cannot be reasonably be considered to have been in the mind of the enacting legislature, and which certainly were not within the contemplation of the provincial legislature when it enacted s.35 of The Planning Act. Such possible consequences required the clearest possible language in the ensuing legislation.

[65] Spence J. accepted that the doctrine of unreasonableness exists, as defined and limited by the Divisional Court in *Kruse v. Johnson*. (See also *C.N.R. v. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23 (B.C.C.A.))

[66] The respondent took the position that the animal control officer had made a determination that the dog Brindi was a dangerous dog and could therefore take the action that he did. The respondent acknowledges that the decision to euthanize is based solely on the provision set out in s.8(2)(d) of By-Law No. A-300. It concedes that the animal control officer did owe a duty of procedural fairness to the applicant, but that this duty was satisfied by giving the applicant notice that a decision had been made to euthanize the dog and inviting her to challenge the decision by way of an application for judicial review pursuant to C.P.R. 56.01, that is, an application for an order in the nature of *certiorari* to quash. Nonetheless, it takes the view that a decision by an animal control officer is subject to review only on a standard of reasonableness on the *Dunsmuir* analysis. In other words it submits that this Court would only have the power to determine whether or not Animal Control Officer Hamm reasonably concluded that he had "reason to believe" that Brindi had attacked a person or another animal. No other interpretation was suggested by the respondent.

[67] In my opinion, the intent of By-Law No. A-300 is to establish a comprehensive scheme with respect to animals, exclusive of livestock, which may be kept by a resident of the Municipality. As originally drafted, it included provisions with respect to the licensing and registration of cats and dogs. The Municipality removed the requirement for the licensing and registration of cats.

Although the by-law refers to “prohibited animal” the by-law essentially deals with dogs.

[68] Apart from the requirement for an annual licensing and affixing of identification tags for dogs, the by-law also specifies the duties of an owner with respect to his or dog (s.7). Any owner of a dog which engages in any of the prohibitive activities or fails to comply with the duties set out in s.7 is guilty of an offence under the by-law.

[69] Section 8(1) of the by-law specifically provides that any dog that attacks any person or another animal is guilty of an offence under the by-law. Section 8(2) provides that when an animal control officer has reason to believe that a dog has attacked a person or another animal the officer may take a number of enforcement actions. He may issue to the owner a “Notice to Muzzle” the dog, to microchip the dog or to classify the dog as a dangerous dog in what is described as the Municipal Registry.

[70] If classified as a dangerous dog the owner then must keep the dog securely restrained either indoors or outside in an escape-proof enclosure; when off the property, the owner must muzzle and securely leash and ensure the dog is under the control of a person 18 years of age or older. The failure of the owner to comply with the “Notice to Muzzle” or microchip or comply with the additional obligations where a dog is classified as dangerous is also made an offence under the by-law.

[71] An animal control officer is also empowered to trespass while pursuing an animal in enforcing the by-law, but is not immune from civil liability for damage suffered (s.14(1)). Further, the animal control officer is authorized, if any animal is at large and cannot be seized safely and where the officer believes on reasonable grounds the animal poses a danger to a person or another animal, and the owner is not readily able to be found, to immediately and without notice to the owner destroy the animal in a humane manner.

[72] None of these provisions seem at all unusual. However, s.8(2)(d) is of a different character. First of all, this provision, read literally, only appears to give to an animal control officer the power to destroy a dog where the owner of the dog has been identified. While, the actions set out in paragraphs (a), (b), and (c) can be quite properly construed as enforcement actions, the destruction of a dog and later issuance of a notice to the owner is the summary imposition of what most would consider the ultimate punishment with respect to conduct related to the ownership of a dog. An animal control officer also has the option to lay a charge against an owner of dog that has attacked a person or another animal and seek an order that the dog be destroyed as part of the penalty pursuant to s.177 of the *MGA*.

[73] Legislative provisions should not be interpreted in a vacuum. In addition to reading the words in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the enactment, its object and intention, where the enactment is a by-law, it should be interpreted in view of its enabling legislation.

[74] As noted earlier, the respondent relies on sections 2, 172 and 175 of the *MGA*. Some of these provisions bear repeating. Section 2 provides:

> 2 The purpose of this Act is to
>
> (a) give broad authority to councils, including broad authority to pass by-laws, and to respect their right to govern municipalities in whatever ways the councils consider appropriate within the jurisdiction given to them;
>
> (b) enhance the ability of councils to respond to present and future issues in their municipalities; and
>
> (c) recognize that the functions of the municipality are to
>
> (i) provide good government,
>
> (ii) provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality, and
>
> (iii) develop and maintain safe and viable communities. 1998, c. 18, s. 2.

[75] The relevant portions of s. 172 are:

> 172 (1) A council may make by-laws, for municipal purposes, respecting
>
> (a) the health, well being, safety and protection of persons;
>
> (b) the safety and protection of property;

[76] In my opinion, there is nothing in either s.2 or s.172 of the *MGA* that could be interpreted to provide to a municipality the power to enact a by-law permitting a dog or animal control officer, who only has reasonable grounds, to summarily, and without notice to the owner of the dog, destroy a dog in a non emergency situation. Although s. 2 refers to the purpose of the *MGA* as being to give broad authority, to Councils, including the broad authority to pass by-laws and to respect Councils'

right to govern municipalities in whatever ways Councils consider appropriate, the authority is specifically limited as being within the jurisdiction given to the Municipal Councils. Section 2(c) also refers to a purpose of the *MGA* is to recognize that the functions of a municipality are to provide good government.

[77] The Animal Control By-Law No. A-300 is certainly one that could be considered as falling within a by-law for the health, well being, safety and protection of persons and property within the meaning of s.172 of the *MGA*. Quite apart from this general power, s.175 of the *MGA* specifically authorizes a Council to enact a by-law in the nature of the Animal Control By-Law No. A-300. But in my opinion, nowhere in the *MGA* does it authorize expressly, or by necessary implication a by-law, that would permit a dog or animal control officer to seize and destroy the property of a citizen of the municipality merely on the basis of "reason to believe".

[78] Section 175(h) of the *MGA* presupposes that someone, presumably a dog control officer, will make a determination under a by-law otherwise a dog in question fits one of the enumerated categories before a dog control officer can sell, kill or otherwise dispose of a dog.

[79] Reason to believe may well constitute a sufficient legal threshold for any enforcement officer to lay a charge or take steps to ensure the safety and protection of persons and property. That is a far cry from an enactment that purports to authorize an enforcement officer to destroy a dog and issue the owner a notice

informing him or her that the dog has been destroyed simply on the basis that the officer had reason to believe that the dog had attacked a person or another animal.

[80] This conclusion is re-enforced by the fact that s. 2(d) of the By-Law No. A-300 defines "attack" as meaning "to injure or bite, or to threaten or to give the impression of threatening.

[81] The *Interpretation Act*, R.S.N.S. 1989 c. 235 provides that, except where a contrary intention appears, every provision of the *Act* applies to every enactment made at the time, before or after the *Act* comes into force (s.6(1)). "Enactment" is defined by s.7 of the *Interpretation Act* as meaning an act or regulation or any portion of an Act or regulation (s. 7(1)(e)). Section 7 (3) of the *Interpretation Act* provides that "regulation" includes, amongst other things, any rule, rule of court or by-law made in the execution of a power given by an enactment.

[82] Section 19 (j) of the *Interpretation Act* stipulates that "where a word is defined, the definition applies to other parts of speech and tenses of that word". As a consequence, the municipality appears to have enacted a by-law that permits an animal control officer to destroy a dog and issue the owner a notice informing him or her that the dog has been destroyed on the basis the dog threatened or gave the impression of threatening.

[83] In addition the animal control officer is said to be able to act when he has reasonable belief that a dog has attacked a person or another "animal". Section 2(b) of By-Law No. A-300 defines animal as follows:

> 2(b) "animal"includes any living mammal, bird, reptile, amphibian, insect or arachnid, and excludes livestock as defined in the *Fences and Detention of Stray Livestock Act* and wildlife as defined by the *Wildlife Act*, humans and cats;

[84] The by-law therefore purportedly seeks to give to an animal control officer the power to summarily destroy a dog if he has reason to believe it attacked not just another dog or a person, but any mammal, bird, reptile, amphibian, insect or arachnid. Even if "attacked" could be interpreted as requiring an actual physical attack and "animal" as being another dog or something similar, in my opinion, the power given in s. 8(2)(d) is still unsupported by even the most broad and purposive interpretation of the *MGA* that it would authorize an animal control officer to take such a drastic step on the basis of having "reason to believe".

[85] It is interesting to observe that although the respondent contends that s.8(2)(d) is the sole authority under which the Animal Control Officer purported to act, the officer did not do the things that s.8(2)(d) purportedly authorized him to do. Hamm did not destroy the dog Brindi and issue to the applicant a notice informing her that the dog had been destroyed. Instead Hamm applied for a search warrant pursuant to s.176 of the *MGA*. No suggestion has been made by the applicant that Hamm did not have the requisite reasonable grounds to obtain the warrant nor that the warrant was in any way invalid.

[86] The respondent suggests that the power to destroy a dog set out in s.8(2)(d) is not to be read literally in the sense that the animal control officer him or herself actually carry out the destruction, but that he or she may make a decision that the

dog ought to be destroyed and the actual destruction will be carried out by the Shelter Keeper.

[87] The difficulty with this suggested construction is that it ignores the context in which the power is given to the Animal Control Officer to destroy the dog, in particular the phrase “and issue the owner a notice informing that the dog has been destroyed”. In essence the respondent would have this Court rewrite para. (d) to be “issue a notice to the owner that a decision has been made that the dog is to be destroyed, without permitting the owner to claim it.” No other representations were made to interpret any other aspect of the wording of s.8(d). While there is a recognized scope for a court to read in or read down legislative provisions, the respondent did not request the Court to carry out this exercise. In any event, in my opinion, to embark on such an exercise would amount to rewriting the by-law and I decline to do so.

[88] In summary, I find that the scope of s.8(2)(d) is not authorized expressly or by necessary implication by the *MGA*. I conclude that the legislature never intended to give the authority to a municipality to enact a by-law permitting a dog or animal control officer to summarily destroy a dog in non-emergency situations without notice to the owner and solely on the basis of the officer having “reason to believe” that a dog has “attacked” a person or another “animal”. A declaration will issue to the effect that 8(2)(d) is *ultra vires*. Since s.8(2)(d) was the sole basis relied upon by the respondent for the decision purportedly made by Animal Control Officer Hamm on July 24, 2008 that Brindi be euthanized, that decision is without lawful authority and is quashed.

JUDICIAL REVIEW

[89] The parties fully argued the issue of judicial review based on the jurisdiction of this Court to quash a decision by a statutory decision-maker based on an allegation of breach of the rules of natural justice and a review of the decision on a standard of correctness or reasonableness. In the event that I am wrong in my conclusion that s. 8(2)(d) is *ultra vires* and that this section did in fact authorize Animal Control Officer Hamm to make a decision that Brindi ought to be euthanized after he had already seized the dog pursuant to a search warrant, I will consider the application for an order in the nature of *certiorari.*

[90] I find it unnecessary to conclusively decide the issue of the appropriate standard of review based on the criteria set out in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 8 S.C.J. No. 9. I will deal only with the issue of the allegation of breach of natural justice or procedural fairness.

Procedural Fairness

[91] This issue requires me to consider whether the statutory decision-maker, Animal Control Officer Hamm, owed a duty of procedural fairness; if so, what was the content of that duty; and lastly, whether he breached that duty.

[92] Generally speaking, issues of procedural fairness do not involve any deferential standard of review. As Arbour J. expressed in *Moreau-Bérubé v. New Brunswick (Judicial Council)* 2002 SCC 11, [2002] S.C.J. No. 9:

> [74] The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division* No. 19, [1990] 1 S.C.R. 653, and *Baker*, supra.)
>
> [75] The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, supra, at para. 20; *Therrien*, supra, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the audi alteram partem rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as per L'Heureux-Dubé J. in Baker, supra, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, supra, at p. 683); there is no appeal from the Council's decision (see D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).

[93] The law on this issue was reviewed in *Creager v. Provincial Dental Board* 2005 NSCA 9, [2005] N.S.J. No. 32. Fichaud J.A., writing for the court, stated:

> [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour*), [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5 per Bastarache, J. dissenting. As stated by Justice Binnie in C.U.P.E, at para. 102:
>
> > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: e.g. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[94] Not all decisions by a statutory decision-maker attract a requirement for procedural fairness. Here the respondent specifically conceded that the statutory decision-maker owed a duty of procedural fairness to the applicant. Included in the record produced by the respondents was a copy of HRM"s Animal Services Investigation Policy. After acknowledging and addressing how discretionary decisions should be made, it provides as follows:

> Procedural Fairness
>
> With respect to dogs, HRM animal control services is obligated to ensure that decisions are made with procedural fairness:
>
> The dog owner should have an adequate opportunity to make adequate representations before the final decision is made; and
>
> The decision-maker must be unbiased.

[95] With respect to procedures, the policy also stipulates that the officer is to contact the owner when feasible prior to making a determination "relative to the action taken".

[96] In *Knight v. Indian Head School Division*, [1990] 1 S.C.R. 653 the Supreme Court of Canada considered the existence and scope of a general duty of fairness

on a public body in the context of an employer-employee relationship. The court concluded that even though the respondent's employment could be legally terminated without a showing of just cause, this did not necessarily mean that the procedure used could disregard procedural fairness. The majority judgment was delivered by L'Heureux-Dubé J. She wrote:

> [24] The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution, supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

[97] As noted earlier, not all administrative decisions attract a duty of procedural fairness. A decision of a preliminary nature will not in general trigger the duty to act fairly, but a decision of a more final nature may have such an effect. (See *Knight*, supra para 26).

[98] A good example of this can be found in *Lee v. Vancouver (City)* 2002 BCSC 240, [2002] B.C.J. No. 303. The applicant Lee, owned two dogs. While out for a walk her dogs attacked another dog. The owner of the other dog was knocked to the ground and was also bitten. The animal control officer conducted an investigation. He concluded that the applicant's dogs were vicious and provided the applicant with a notice to that effect. The impact of the notice was similar to the impact of a notice under s. 8(2)(c) of HRM By-Law No. A-300 in that it imposed upon the owner the requirement to keep the dogs kept securely confined either indoors or in an enclosed pen and muzzled when off the owner's property.

[99] The applicant sought a declaration that the animal control by-law was void for uncertainty and for judicial review of the decision of the animal control officer. The applications were dismissed. Goepel J. heard the application. He concluded that the animal control officer did not have the power to determine that the applicant's dogs were "vicious" within the meaning of the by-law, but that it would be ultimately up to a court to decide that issue, if charges were laid under the by-law against an owner. In other words, there was no decision to quash since the determination by the animal control officer did not affect the rights, privileges or interests of the applicants.

[100] In my opinion this situation is markedly different in the case at bar. The decision by Animal Control Officer Hamm was a significant one with an important impact on the applicant. It purported to take away her property. The common law has long recognized the principle that no man is to be deprived of his property without having an opportunity to be heard (see *Durayappah v. Fernando et al.* [1967] 2 All E.R. 152 (J.C.P.C.).

[101] What then is the content of Animal Control Officer Hamm's duty to act fairly. L'Heureux-Dubé J. in *Knight v. Indian District School*, *supra*. wrote:

> [46] Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. In *Nicholson, supra*, at pp. 326-27, Laskin C.J. adopts the following passage from the decision of the Privy Council in *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660, a New Zealand appeal where Lord Morris of Borth-y-Gest, writing for the majority, held at p. 679:
>
> Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or

> quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russel v. Duke of Norfolk* [1949] 1 All. E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration. [Emphasis added.]
>
> This was underlined again very recently by this Court in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), supra*, where Sopinka J. was writing for the majority at pp. 895-96:
>
> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provision and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [Emphasis added.]
>
> The approach to be adopted by a court in deciding if the duty to act fairly was complied with is thus close to empiric. Pépin and Ouellette, *Principes de contentieux administratif*, at p. 249, quote the following colourful comment of an English judge to the effect that "from time to time ... lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize" (*Maxwell v. Department of Trade and Industry*, [1974] Q.B. 523, at p. 539)...

[102] L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 further developed the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. The criteria to be considered are: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of

procedure made of the agency itself, particularly where the statute leaves to the decision-maker the ability to choose its own procedures or where the agency has an expertise in determining what procedures are appropriate in the circumstances.

[103] I need not address all of these factors. I have already referred to the importance of the decision to the individual or individuals affected. The law recognizes a dog as property. In today's society a dog is usually a pet and as such can have considerable importance to the owner or other members of the family unit. In either event some procedural protections are required.

[104] With respect to the fourth factor, there is no direct evidence that the applicant had a legitimate expectation that she would be contacted, given notice of the nature and extent of the allegations concerning the conduct of her and her dog and an opportunity to make submissions. Nonetheless, there is ample evidence permitting me to draw the inference based on, not only the content of the affidavit filed by the applicant, but the previous history of the dealings between animal control officers and the applicant. On each occasion she was informed and given an opportunity to make submissions after being told of the allegations. I conclude that she had at least a legitimate expectation that she would have a meaningful opportunity for input as to how the discretion would be exercised by the animal control officer.

[105] The nature of the decision-making body and the discretion to be exercised by the officer appears to be far removed from judicial decision-making. Hence, procedural fairness will not likely require procedural protections close to a trial

model. On the other hand, there is no appeal procedure provided by the by-law and the purported decision by animal control officer was a final decision determining the issue.

[106] These principles concerning the context of procedural fairness were revisited by the Supreme Court of Canada in its seminal decision of *Dunsmuir v. New Brunswick*, supra. The majority judgment written by Bastarache and LeBel JJ. affirmed the general principles expressed in *Knight*, supra in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals, but limited the application of those principles where there is a contract of employment (para 114). However, the essential principles of the constitutional right of courts to review administrative action were affirmed. Of significance to this case are the following expressions of principle:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> ...
>
> [79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; Baker, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council*), [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

...

> [90] From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3).

[107] What then is required. Sara Blake, in her text Administrative Law in Canada 4th Edition (LexisNexis 2006) accurately sets out what the minimum duty is. She writes:

> At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interest is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is two-fold. First, the person to be affected is given an opportunity to influence the decision. Second, the information received from that person, should assist the decision-maker to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair.
>
> p. 11

[108] It is uncontested that animal control officer Hamm at no time, before purporting to exercise the discretion set out in 8(2) of By-Law No. A-300 ever contacted the applicant. She therefore had no opportunity to know what was being contemplated and why and perhaps more importantly, an opportunity to influence the exercise of discretion by Hamm. Animal Control Officer Hamm had absolutely no information from the applicant as to how and under what circumstances Brindi had gotten loose. According to the provisions of s.8 of By-Law No. A-300 Hamm could make any number of discretionary decisions. He could classify the dog as a "dangerous dog" pursuant to s.8(2)(c). In addition he could lay a charge under

s.8(1) against the applicant relying on the deterrent value that such a process can bring, quite apart from the penalty that could be imposed upon conviction. If he was concerned about safety of the public and other dogs, he could make an application for a warrant to seize the dog pursuant to s.176 of the *MGA* and seek an order of destruction from the court if a conviction was entered.

[109] The applicant may ultimately have not been successful in influencing the discretionary decision of Hamm, but that is not the issue. The issue is she had no opportunity to have any input, let alone a meaningful one.

[110] Even though s.8(2)(d) purports to provide statutory authorization for Hamm to destroy the dog and simply issue the owner a notice informing her that the dog had been destroyed, this is not what he did. Assuming that s.8(2)(d) could be interpreted in such a fashion as to give Hamm the authority to make a decision that a dog who has been seized is to be euthanized, the respondent could offer no justification for a failure to provide to the applicant an opportunity to influence the discretionary decision by Hamm.

[111] The attack of July 20, 2008, as described, was a serious one. However, once Brindi was seized pursuant to the search warrant there was no longer a pressing concern over public safety and hence no reason not to accord to the applicant procedural fairness. HRM officials failed to adhere to their own policies with respect to procedural fairness.

[112] The respondent argues that procedural fairness was afforded to the applicant by virtue of the invitation set out in a letter of July 24, 2008 “Should you wish to challenge this decision I would encourage you to seek legal counsel, and to contact the HRM Legal Department at 902-490-4226 prior to 07 August 2008.” The Report to a Justice filed by Animal Control Officer Hamm on July 25, 2008 sets out that Brindi is being “detained to be dealt with according to Halifax Regional Municipality By-Law No. A-300 respecting the animals and responsible pet ownership, s. 8(2)(d) and that a Notice of Intent to Euthanize the dog has been issued to the dog owner, affording the owner 14 days to challenge this decision (attached).”

[113] However, the respondent acknowledges that there is in fact no appeal procedure available to the applicant. It points out that the applicant did send correspondence and materials to Lori Scolaro, Animal Services Field Operations Supervisor on July 30, 2008. There is a complete absence of evidence in the record that these materials were ever reviewed and considered by the statutory decision-maker, Animal Control Officer Hamm.

[114] The respondent further suggests that procedural fairness is afforded to the applicant by virtue of her ability to apply to this Court for judicial review. This suggestion is completely without merit. The duty of procedural fairness is owed to an individual prior to the decision being made and is a duty owed by the statutory decision-maker. While the availability of a subsequent review or appeal process if an individual is later accorded a full and fair hearing, can cure earlier procedural

irregularities in the proceedings, this can have no application here, since there was no further hearing or reconsideration.

SUMMARY AND CONCLUSION

[115] As previously set out, I am prepared to issue a declaration that s. 8(2)(d) of the HRM By-Law No. A-300 is *ultra vires* and that any decision purportedly made by Animal Control Officer Hamm in reliance on s.8 (2)(d) is quashed on that basis.

[116] Furthermore, even if Hamm could make a decision under s.8(2)(d) to destroy the applicant's dog, he owed a duty of procedural fairness to the applicant which required him to provide to her a meaningful opportunity to make representations before a decision was made and he failed in that duty. The application for an order in the nature of *certiorari*, if necessary, is also allowed.

[117] The respondent shall pay the costs of the applicant. If the parties are unable to agree on quantum they are invited to make the necessary arrangements for a hearing on this issue.

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Beveridge, J.