

*Case Name:*

**R. v. Brown**

**Between**

**Her Majesty the Queen, and  
Stephen Brown**

[2008] O.J. No. 2263

Toronto Court File No. 07-70003645

Ontario Court of Justice  
Toronto, Ontario

**S.E. Marin J.**

Heard: April 17, 2008.

Judgment: May 9, 2008.

(37 paras.)

*Criminal law -- Criminal Code offences -- Wilful or forbidden acts in respect of certain property -- Cruelty to animals -- Accused convicted of cruelty to an animal, in causing unnecessary pain to a dog by kicking and dragging it -- The court accepted the evidence of the witness security guard, and the defence evidence did not raise a reasonable doubt as to whether the accused kicked and dragged the dog -- His actions were wilful and tend without a legitimate purpose and without legal justification or excuse.*

Accused charged with cruelty to an animal. It was alleged that he wilfully caused unnecessary pain to a dog by kicking and dragging it. The Crown contended that the accused was frustrated and angry at being asked to leave the grounds of an apartment building by a security officer, and that he took out his fury on his girlfriend's dog by forcibly kicking it under the tail and then dragging it by the collar, choking, down the street. The defence argued the guard and other officers in his company made the allegations as an ongoing pattern of harassment.

HELD: Accused convicted. The security guard was an impressive witness, testifying in a clear and straightforward manner. His account of events was logical and had the ring of truth. Conversely, the accused's evidence was unclear, inconsistent and given with a palpable animosity towards the guard. His criminal record contained a number of convictions for offences of dishonesty. The court rejected the defence evidence and found it was incapable of raising a reasonable doubt as to whether the accused kicked and dragged the dog. His actions were wilful and taken without a legitimate purpose and without legal justification or excuse. Based on the facts, unnecessary pain had been caused to the dog.

**Statutes, Regulations and Rules Cited:**

Criminal Code, R.S.C. 1985, c. C-46, s. 446

**Counsel:**

Ms. C. Jenkins: for the Crown.

Ms. A. Bergenstein: for the accused Stephen Brown.

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**1 S.E. MARIN J.:**-- Stephen Brown entered a plea of not guilty to a charge of cruelty to an animal under s. 446 of the Criminal Code. The charge is particularized, alleging that Mr. Brown did "wilfully cause unnecessary pain to a dog by kicking and dragging it".

**2** The dog in question is Princess, a mature female spaniel cross-breed dog weighing approximately 25 pounds. For the past three years, Mr. Brown has been involved in a relationship with Princess' owner, a resident at 155 Sherbourne Street in Toronto.

**3** Mr. Brown lives at 200 Sherbourne Street. By August 2007, he spent virtually all of his time with his girlfriend at either her place or his place. He frequently walked the dog and had assumed responsibility for her discipline. He had trained her to be responsive to his verbal commands and often walked her without a leash. He described the animal as being very friendly and his relationship with her as "fantastic".

**4** The charge arises, out of a mid-afternoon confrontation between Mr. Brown and William Hilton, then a private security officer employed by Intelligarde and patrolling the grounds of the apartment building at 155 Sherbourne Street with his partner.

**5** The Crown contends that Mr. Brown was frustrated and angry at being asked to leave the property and that he took out his fury on his girlfriend's dog by forcibly kicking it under the tail and then dragging it by the collar, choking, down the street.

**6** Mr. Hilton was the sole witness for the crown. He testified that he saw Mr. Brown on the property of 155 Sherbourne, near the front door. Princess was beside Mr. Brown, off-leash. Mr. Hilton testified that he had trespassed Mr. Brown on a number of earlier occasions. He told Mr. Brown to leave. Mr. Brown was intoxicated, angry and aggressive. He invaded Mr. Hilton's space, waved his finger at him and threatened to get him fired for harassing him. He then left the property, calling to his dog to follow him. The dog appeared confused, agitated and reluctant to go with Mr. Brown. After a number of calls, the dog left the property. Once both were on the sidewalk, Mr. Hilton testified that Mr. Brown kicked Princess in her rear quarters, under the tail, with sufficient force to lift her hind legs off the ground. The dog yelped when kicked and limped for a couple of steps until Mr. Brown reached down, grabbed her by the collar and dragged her down the street with her front legs off the ground. While being pulled down the street in this manner, the dog made choking and gagging sounds. The animal dragged her rear feet and tried to shake free of Mr. Brown's hold. Mr. Brown was saying that he was going to kill the dog and then turning back towards Mr. Hilton and saying he was going to kill him as well. Mr. Hilton contacted the Toronto Humane Society and the dog was later apprehended.

**7** The Defence position is one of complete denial. Mr. Brown contends that the charge against him is the result of an ongoing pattern of harassment engaged in by Mr. Hilton and other Intelligarde officers responsible for security at the housing complex where Mr. Brown's girlfriend lives.

**8** Mr. Brown testified that he was neither trespassing nor intoxicated when he met Mr. Hilton, and his partner. Mr. Brown stated that he was walking with Princess on the Dollarama side of the driveway leading to a rear parking lot. He

knew Mr. Hilton because the officer had harassed him in the past, asking him to leave the property. Mr. Brown denied that he had ever been formally trespassed by any of the Intelligarde officers, including Mr. Hilton. Mr. Brown wanted to avoid any further harassment so he immediately moved onto the public sidewalk when Mr. Hilton called to him. Mr. Brown testified that Mr. Hilton put on his black gloves, his face turned beet red and his nostrils flared. He was angry. He testified that Mr. Hilton came close to where he was standing and threatened to beat him up or arrest him if he caught him on the property. Mr. Brown responded by saying that he was going to report him to his supervisor at Intelligarde. Mr. Hilton's partner then tried to entice Mr. Brown back onto the property, whistling to the dog to try to keep her on the apartment grounds. Mr. Brown did not respond to this enticement. He waited on the sidewalk for Princess to answer his calls. When she came to him, he testified that he took her by the collar and walked her away for a short distance. He denies kicking or dragging the dog as Mr. Hilton described.

**9** Beverly Nelson, a close friend of Mr. Brown and a resident of the property, witnessed the interaction between Mr. Brown and the security officer. Her evidence corroborates Mr. Brown's testimony that he did not kick or drag the dog. Although she was in a position to hear the exchange of words between Mr. Hilton and Mr. Brown, she did not hear any threats made by the security officer, as Mr. Brown alleged.

**10** In the days after the event, Mr. Brown went to the police and made two formal complaints to Intelligarde about harassment by security officers, particularly Mr. Hilton. Ms. Nelson went with Mr. Brown to Intelligarde headquarters on the second occasion. She also lodged a complaint about the harassment of visitors by security. In Ms. Nelson's case, her concerns were primarily related to an incident involving her stepson and security officers.

**11** Two days after the event, the dog was examined by a veterinarian. There were no obvious physical findings of trauma see Exhibit 5.

**12** The issues in this case may be simply stated. First, has the Crown proven beyond a reasonable doubt that Mr. Brown kicked and dragged the dog? If the Crown prevails on the first issue, did the acts of Mr. Brown cause "unnecessary pain" to the dog within the meaning of section 446(1)(a) of the Code?

**13** The resolution of the first issue involves an assessment of the credibility and reliability of the evidence. I take guidance from the decisions of the Supreme Court of Canada in *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 and *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 with respect to the meaning of reasonable doubt, the application of the burden of proof and the assessment of credibility. In particular, I am mindful that where an accused person testifies, as Mr. Brown did here, he is entitled to an acquittal if the defence evidence is accepted as credible and reliable or if it raises a reasonable doubt as to his guilt. Even if the defence testimony is rejected as untrustworthy, Mr. Brown is still entitled to an acquittal unless the evidence accepted by the court proves his guilt beyond a reasonable doubt.

**14** The assessment of credibility involves a consideration of the ability of each witness to observe, remember and relate information with sincerity, consistency and accuracy. The passage of time, the state of mind of the witness at the time of the events and the availability of a means of refreshing memory are some factors that may be relevant to this assessment. Partiality, animosity, collusion or other motives to fabricate evidence may also affect the truthfulness of a witness' testimony. The presence or absence of confirmatory evidence may be significant. Ultimately, what the Court assesses is the content of a witness' account, tested by cross-examination and measured against common sense, considered in the context of all of the evidence. The Court may accept all, part or none of a particular witness' testimony. With these principles in mind, I turn to an assessment of the evidence in this case.

**15** I found Mr. Hilton to be an impressive witness. He gave his testimony in a clear and straightforward manner. He was responsive to all questions and able to refresh his recollection of the events by reference to a written report he had prepared at the time of the incident. His account was not shaken during an intensive cross-examination. His testimony that he did not threaten Mr. Brown is corroborated by the evidence of Ms. Nelson. His testimony that the dog appeared fine when he saw it being taken into the custody of the Humane Society a couple of days later is supported by the observations of the veterinarian who examined the dog. In my view, his account of events is logical and has the ring of

truth.

**16** When Mr. Hilton did not recall something, he answered to that effect. I did not find this a matter of evasion but rather of truthfulness. Considering that he was responsible for the supervision of "thousands of residents" and that it was not his mandate to ticket persons whose animals were off-leash, it makes sense that Mr. Hilton could not recall with specificity the actions of the dog or those of Mr. Brown with the dog in the months, days and moments before he approached Mr. Brown and asked him to leave the property.

**17** Mr. Hilton could not remember whether Mr. Brown was standing or sitting when he first saw him nor could he remember where precisely Mr. Brown was, apart from the fact he was on the property. In my view this does not detract from his credibility, given the context of his initial contact with Mr. Brown. At that time, the important facts from Mr. Hilton's perspective were whether or not Mr. Brown was on the property, not where on the property he was, and whether or not he left the property when directed to do so. Despite what he described as Mr. Brown's aggressive and threatening behaviour, Mr. Brown did move to the public sidewalk. Mr. Hilton did not issue a trespass notice to Mr. Brown or call the police about his actions. He called the authorities as a result of his concern for the dog. Mr. Hilton's recollections were reasonably focused on this latter aspect of the confrontation rather than on his earlier interaction with Mr. Brown.

**18** Mr. Hilton described the dog's hesitation in following Mr. Brown off the property. It is evident that Mr. Hilton thought the reason the dog was hesitant to go with Mr. Brown was due to Mr. Brown's angry and aggressive demeanor. Mr. Hilton's attention was concentrated on Mr. Brown, to ensure he didn't try to re-enter the property. Mr. Hilton could not recall his partner whistling or calling to the dog. When the suggestion was put to him that the reason the dog was hesitant and confused was because his partner and Mr. Brown were competing for the animal's attention, Mr. Hilton responded that he would recall this if it happened. I do not view this as a devious or cagey answer that undermines the reliability of Mr. Hilton's evidence.

**19** Mr. Hilton testified that he neglected to include in his report that he saw the dog limp after being kicked. It is always a matter for close scrutiny when a witness offers evidence of an important fact for the first time at trial. In this case, the evidence of the limp was provided in examination in chief, in response to a series of questions by the Crown designed to elicit every detail of the kick and the animal's reaction to it. In this context, the evidence did not strike me as unreliable or untruthful embellishment. Moreover, the limp was detectable for only a very brief period of time, as a momentary reaction at most. While in my view it does not undermine Mr. Hilton's credibility, I also place little reliance on this evidence in reaching my conclusions in this case.

**20** I turn now to a consideration of the defence evidence.

**21** Mr. Brown was not an impressive witness. His evidence was unclear, inconsistent and given with a palpable animosity towards Mr. Hilton. In cross-examination, Mr. Brown was evasive and combative, particularly when questioned about his belief as to the ownership of the property where he testified he was standing when Mr. Hilton first called to him. He answered questions with questions, on the issues of trespass and whether he believed certain actions would be painful to an animal. Mr. Brown provided contradictory evidence on several matters, including his response to the threats that he testified were made by Mr. Hilton and the position of the dog when the second guard whistled at her. I find he minimized the nature of his criminal record and I note that it contains a number of convictions for offences of dishonesty.

**22** Mr. Brown testified that Mr. Hilton threatened him. Although Ms. Nelson testified that she was in a position to hear what was said and would remember any threats, she could not corroborate Mr. Brown's evidence on this important point. In my view, Mr. Brown was either confusing what was said to him due to his own intoxication and anger at the situation or he was deliberately embellishing his account to cast disfavour on Mr. Hilton. I do not accept Mr. Brown's evidence that Mr. Hilton threatened him nor do I accept his exaggerated evidence that Mr. Hilton donned gloves, turned red and flared his nostrils in anger, ready to fight.

**23** The most implausible aspect of Mr. Brown's account is his own response to Mr. Hilton calling out to him. He immediately went to the public sidewalk, allegedly to avoid further harassment. However, on Mr. Brown's own account, he was not under any trespass notice relating to the property at 155 Sherbourne Street. He testified that before this incident, Mr. Hilton had asked him to leave the property two times. Neither of those occasions was marked by physical force or threats on Mr. Hilton's part. Mr. Brown did not testify to any personal malice on the part of Mr. Hilton towards himself. I find that there is nothing in Mr. Brown's account that could explain his reaction to being called or the conduct he attributes to Mr. Hilton.

**24** I did not find the evidence of Ms. Nelson to be particularly helpful to the defence. Apart from contradicting Mr. Brown on the matter of the threat, she conceded that there was a point when Mr. Brown was out of her view when he crossed in front of the security guards and that although she saw that he had the dog by the collar, she didn't watch him continue up the street with it. Her evidence contradicted Mr. Brown's in several other less important respects including whether they conversed before Mr. Hilton called out to Mr. Brown, whether she remained seated or got up and stood behind Mr. Hilton, whether Mr. Brown walked south or north on Sherbourne after the incident and whether Mr. Brown had entered the apartment using the front door earlier in the afternoon. Mr. Brown testified that Mr. Hilton's partner whistled to the dog; Ms. Nelson testified that one guard whistled and the other called to the dog. Considered cumulatively, the number of inconsistencies undermines the credibility and reliability of Mr. Brown's testimony.

**25** Ms. Nelson had an evident animosity towards the Intelligarde officers patrolling her building despite her refusal to admit that she did not like them. She referred to the incident involving her step-son and that she had made a formal complaint about Mr. Hilton but "they didn't do a thing about it". She was a friend of Mr. Brown and his girlfriend. She had a motive to support Mr. Brown in his denial that he kicked or dragged the dog. In her evidence in chief, she testified that Mr. Hilton threatened Mr. Brown. It was only in cross-examination, when her evidence was directly challenged, that she clarified that the threat she heard was made days later, when Mr. Brown was arrested. In my view, Ms. Nelson was attempting to be less than candid with the court on this matter and also with respect to the extent of her prior criminal record. I accept that she did not hear Mr. Hilton threaten Mr. Brown on the afternoon of this incident. Apart from that point, I do not find her evidence either credible or reliable.

**26** In terms of the facts, I reject the Defence evidence and I do not find that it is capable of raising a reasonable doubt as to whether Mr. Brown kicked and dragged his dog. Where is any dispute in the evidence, I find the facts to be those contained in the evidence of Mr. Hilton.

**27** On those facts, I am satisfied beyond a reasonable doubt that Mr. Brown kicked the dog and dragged her by her collar some distance along Sherbourne Street. I am satisfied that his actions were wilful and that they were taken without a legitimate purpose and without legal justification or excuse.

**28** The only remaining issue to be determined is whether the acts of kicking and dragging the dog caused unnecessary pain to the animal sufficient to criminalize his conduct.

**29** Mr. Justice Lamer, then of the Quebec Court of Appeal, considered the meaning of "unnecessary pain, suffering or injury" in the case of *R. v. Menard* (1978), 43 C.C.C. (2d) 458. In that case, Justice Lamer spoke of the hierarchy on the planet and noted that the animal is subordinate to man. Mankind may cause pain or suffering to subjugate animals or even kill and mutilate animals in the pursuit of legitimate societal purposes for food, labour, sport or other valid objectives. In the result, society does not seek to criminalize all behaviour that results in the infliction of any pain and suffering to an animal. It is only when a person wilfully causes "unnecessary" pain to an animal that criminal sanctions are engaged.

**30** Justice Lamer held that the meaning of unnecessary pain must be determined by taking into consideration all of the circumstances of the particular case including first the purpose itself, the social priorities, the means available to effect that purpose and the accessibility of those means. At page 464, he stated that "the quantification of the suffering ... [is] only one of the factors in the appreciation of what is, in the final analysis, necessary." He concluded at page 466

that "[s]uffering which one may reasonably avoid for an animal is not necessary".

**31** In the case of *R. v. McRae*, [2002] O.J. No. 4987, Justice McDermid of the Ontario Superior Court of Justice amplified the principles stated in *Menard*. At paragraph 11, beginning at clause (d), Justice McDermid notes

- \* With respect to the degree of pain or suffering caused to an animal by an accused, the Crown need prove beyond a reasonable doubt only that it caused the animal something more than "the least physical discomfort".
- \* Once that threshold has been met, then one must consider the means by which and the purpose for which the pain, suffering or injury was caused to decide whether it was caused "unnecessarily".
- \* In determining whether or not pain, suffering or injury was caused to an animal "unnecessarily", it is appropriate to consider both the means employed and the purpose for which the pain, suffering, or injury was caused, and also the relation between the purpose and the means.
- \* In some cases, the purpose may be legitimate, but the means employed may not be.
- \* This determination should involve a consideration of all the surrounding circumstances.

**32** At paragraph 14, Justice McDermid comments further on the quantification of pain, stating that the Crown had to prove beyond a reasonable doubt that the accused caused pain to the dog "that rose above the minimal level of 'the least physical discomfort' and attained a level or degree of physical hurt of some greater significance, although it need not be severe. In fact, as noted, once the Crown has established this rather minimal threshold, it need go no further to prove any higher level or degree of pain or suffering."

**33** In the *McRae* case, Justice McDermid affirmed the acquittal of a man who had kicked his dog, struck her with a tree branch, thrown her on two occasions and struck her with it plastic pipe. The issue at trial was whether the accused caused any pain to the dog that rose above the minimal or threshold level, namely something in excess of the least physical discomfort.

**34** On facts similar to those before this Court, Justice McDermid held that there was evidence reasonably capable of supporting the inference that the dog suffered some pain in excess of "the least physical discomfort". That evidence consisted of an angry kick to the rear of a 35 pound dog with sufficient force to move the animal a couple of feet and cause her to yelp, coupled with the admission of the accused that if he kicked the dog in this manner it would cause her pain. However, as in the instant case, there was also evidence that the veterinarian found no visible sign of physical injury. Justice McDermid recognized that while the evidence of injury is not necessary to prove that pain was caused unnecessarily to the animal, it is a relevant factor to consider. He also found that there was a basis in the evidence for the trial judge's conclusion that the dog's yelping noise when she was kicked did not support the inference that the kick caused her unnecessary pain.

**35** It must be remembered that Justice McDermid was exercising the jurisdiction of a summary conviction appeal court in *McRae* and that he was bound by the principle of appellate deference, absent demonstrable error. Indeed, he concluded his reasons by noting that "[t]he fact that the trial judge failed to draw the inferences the appellant says she should have drawn does not constitute all error in law in the circumstances of this case." I do not interpret *McRae* as standing for the principle that similar conduct can not support a finding that unnecessary pain was caused to an animal. Each case will turn on its own particular facts and will involve a consideration of all surrounding case-specific circumstances.

**36** In this case, I am satisfied beyond a reasonable doubt that Mr. Brown caused unnecessary pain to the dog Princess by kicking her and dragging her. I rely on the following circumstances in evidence to reach this conclusion:

- \* At the time the kick to the dog was administered, Mr. Brown was intoxicated, angry and

- \* frustrated at being asked to leave the property by Mr. Hilton;
- \* Immediately prior to the kick, the dog was hesitant to follow Mr. Brown and was slow to respond to his verbal commands, supporting the inferences that she was apprehensive of his aggressive behaviour and he was frustrated that she did not obey him;
- \* The kick was administered with sufficient force to lift the dog's hindquarters off the pavement;
- \* The kick was not administered for any legitimate purpose, such as for discipline;
- \* The dog yelped as Mr. Brown's foot made contact with her rear haunches;
- \* Mr. Brown agreed that if the dog was kicked with sufficient force to lift her off her rear paws and cause her to yelp, she would be experiencing pain;
- \* Mr. Brown took the dog by the collar and dragged her 100 metres down the street with her front paws off the ground;
- \* The dog was making choking sounds as she was being dragged;
- \* Mr. Brown knew that the dog would cough or make choking sounds when she was pulled by her collar;
- \* The dog was shaking her head, dragging her rear paws and struggling to get away;
- \* As he was dragging the dog, Mr. Brown threatened to kill the dog and Mr. Hilton.

**37** In my opinion, these factors considered cumulatively, prove that Mr. Brown's actions went beyond the non-criminal standard of unnecessarily harsh behaviour discussed in *McRae* and there will be a finding of guilt on the charge of causing the dog unnecessary pain.

S.E. MARIN J.

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