COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals,* 2010 BCCA 519

Date: 20101123
Docket: CA037872

Between:

Cary Ulmer

Appellant
(Petitioner)

And

The British Columbia Society for the Prevention of Cruelty to Animals

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Mr. Justice Chiasson

On appeal from: Supreme Court of British Columbia, February 12, 2010, (*Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCSC 199, Vancouver Docket No. S099113)

Counsel for the Appellant:	J. Hanvelt
Counsel for the Respondent:	C. Rhone
Place and Date of Hearing:	Vancouver, British Columbia October 27, 2010
Place and Date of Judgment:	Vancouver, British Columbia November 23, 2010

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

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Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] Among other things, this appeal engages a consideration of s. 11 of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 ("the *Act*") that allows the Society to take custody of animals who are in distress. The section states:

> If an authorized agent is of the opinion that an animal is in distress and the person responsible for the animal
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> (a) does not promptly take steps that will relieve its distress, or
>
> (b) cannot be found immediately and informed of the animal's distress,
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> the authorized agent may, in accordance with sections 13 and 14, take any action that the authorized agent considers necessary to relieve the animal's distress, including, without limitation, taking custody of the animal and arranging for food, water, shelter, care and veterinary treatment for it.

Background

[2] The appellant had a community of feral cats. Some were housed in a garage attached to her home and some were in the home. A complaint was made to the Society by a representative of a veterinary clinic concerning a cat brought to the clinic by the appellant. The cat was in poor health; the clinic recommended euthanasia; the appellant resisted. Another complaint was brought by a former employee of the appellant.

[3] On October 11, 2009 a notice was posted on premises occupied by the appellant and her fiancé requesting a meeting with the Society. Further notices were posted on October 14 and 18, 2009. The requested meeting did not take place. A search warrant was obtained on October 19, 2009 on the basis that Ms. Mead, an Animal Protection Officer employed by the Society and a Special Provincial Constable, believed there were animals in distress in the appellant's premises.

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[4] The warrant was executed on October 20, 2009. Ms. Mead was accompanied by other personnel of the Society and members of the regular police. Ms. Mead deposed that she "determined that it was necessary for the Society to take custody of these animals in order to relieve them from their situation of distress". Seventy cats and a chicken were taken into custody.

[5] Ms. Mead also deposed that while on the premises she asked the appellant "who would assist her tending to the cats" and the appellant named the former employee who had complained. The appellant also asserted that the employee was responsible for the condition of the cats and that she had fired the employee.

[6] Pursuant to s. 18 of the *Act*, on October 22, 2009 the appellant was given a notice of the Society's intention to dispose of the animals. The notice included a process for disputing the proposed disposal. The appellant did so.

[7] Ms. Moriarty, the Society's General Manager, Cruelty Investigations, considered the appellant's submissions, decided that the seizure of the animals was in accordance with the provisions of the *Act* and concluded the animals should not be returned to the appellant. She provided written reasons for her decision on November 30, 2009.

[8] The appellant applied for judicial review of the Society's action taking the animals into custody and its refusal to return them to her. Her petition was heard on January 19 and 20, 2010. The chambers judge dismissed the application on February 12, 2010. The appellant appealed.

[9] For the reasons that follow, I would dismiss this appeal.

The Chambers decision

[10] The chambers judge stated the issues identified by the appellant on the judicial review application as:

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> a. Was the seizure of the Petitioner's animals under s. 11 of the Prevention of Cruelty to Animals Act justified? In particular, was the Petitioner given a reasonable chance to remedy the con[c]erns of the Respondent prior to the pets being seized?
>
> b. Is the Respondent's November 30, 2009 decision not to return the pets to the Petitioner reasonable?

It was agreed that the standard of review was reasonableness.

[11] The issues were reframed by the judge as:

> 1. Was the decision to seize the animals reasonable?
> 2. Was the decision not to return the animals reasonable?

[12] The position of the appellant was that the animals were not in distress and, even if they were, the Society did not give her an opportunity to relieve the distress. As a result, she states that a statutory precondition to taking custody of the animals was not met.

The decision to take the animals into custody

[13] The judge reviewed the history of complaints and the efforts made by both sides to confer. She had this to say about the situation at the appellant's premises when the warrant was executed:

> [20] SPC Mead was at the Delta property for over eight hours that day. Upon arriving at the property, SPC Mead introduced herself to Ms. Ulmer and told her she was proceeding with a search of the premises pursuant to the terms of the warrant. She explained to Ms. Ulmer that any determination she made regarding the seizure of animals would be based on the health and living conditions of all the animals. She subsequently seized 70 cats and one chicken, leaving 12 cats in Ms. Ulmer's custody.
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> [21] SPC Mead's Inspection Report details the conditions of the animals she seized. She noted that the downstairs garage housed approximately 73 cats and one chicken. According to her Report, there was no ventilation or daylight available, as the windows were closed and blocked. There was a foul odour and severe ammonia smell upon entry in the garage, which burned her eyes and throat. She wore a face mask throughout much of the inspection. She found some cats housed in overcrowded wire kennels, and others housed together in small plastic travelling crates. In some instances, cats were lying on top of one another. Many of the kennels had a combination of no food, no clean water, no litter and no bedding. The floors

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> of many of the kennels were covered in feces and urine. Some of the food containers in the kennels contained feces and some had cats lying in them. Multiple cats in multiple cages were lying in their own feces and urine. Many of the cats appeared skinny, distressed, lethargic, and filthy, with urine and feces stained coats. Many were infested with fleas, had eye or ear infections, and severe dental issues. There was one deceased cat in a garbage bag.
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> [22] Regarding the chicken, in her statement, SPC Carey states that it was in a small kennel, was not able to stand up comfortably, and did not have any available food or water.

[14] The judge then turned specifically to whether the animals were in distress. She stated:

> [28] I am satisfied that SPC Mead reasonably came to the conclusion that the animals were in distress. SPC Mead found many of the indicia of distress referred to in s.1(2) of the Act in the living area of the animals at the time the warrant was executed. For example, regarding ventilation, the garage windows were closed and blocked and there was a foul odour. Regarding space, there were multiple cats in the same cage. Many of the cages did not contain food or clean water. Cats were lying in their own feces. Many were filthy, with urine stained coats, fleas, infections, and dental issues. There were ample signs of neglect.
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> [29] SPC Carey's statement corroborates SPC Mead's. Constables Bouchard and McLaughlin of the Delta Police Department, who assisted in the execution of the search warrant, also provided statements that correspond to SPC Mead's account of events. They reported a strong foul smell and many sick looking cats in cages in the garage.
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> [30] The animals were examined by veterinarians shortly after seizure. Their reports were before Ms. Moriarty. Dr. Steinebach's report in particular details the many significant abnormalities in the health of the cats. He states in his conclusion that all cats examined had at least one distress and suffering-inducing issue and most had several. In his opinion, these conditions were treatable, but had not been treated. A reasonable conclusion to draw was that managing such a large number of animals was beyond the ability of Ms. Ulmer.
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> [31] Ms. Ulmer's affidavit evidence does not dispute many of the facts relating to the physical condition of the cats. She does not dispute that there were many cats in each kennel. She admits that the food and water in the kennels was fouled by feces, but blames this on the shoddy work of Ms. Padua. Most of her evidence goes to an explanation of why the cats were in the condition they were, rather than disputing that they were in distress. There is no basis upon which to conclude SPC Mead's opinion that the animals were in distress was unreasonable.

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[15] The judge then turned to the second component of the prerequisites for taking custody: the person responsible for the animals does not promptly take steps to relieve their distress. She began by referring to the observation of L. C. Smith J. in *R. v. Sudweeks*, 2003 BCSC 1960, para. 107 and stated in para. 36:

> … to satisfy the test, the constable must form the opinion that 'the person apparently responsible for the animals…had not taken and would not be able to take the steps necessary to relieve their distress (emphasis by chambers judge).

The judge observed that this approach was consistent with a number of other cases, including the decision of Madam Justice Huddart in *British Columbia Society for the Prevention of Cruelty v. Sudweeks*, 2002 BCCA 493 (in Chambers). This decision had been referred to specifically by Ms. Moriarty in her written decision not to return the animals wherein she stated, "[w]here animals show indicia of long-term distress, it is appropriate to seize them even if previous orders for care have not been issued".

[16] The chambers judge stated in paras. 37 and 38:

> In the case at bar, the Society was in touch with Ms. Ulmer several times in the week prior to the seizure. The Society received no reasonable response from her. And when the Society's representatives arrived, they were confronted with deplorable conditions of apparent long standing. Ms. Ulmer, with notice that the Society was concerned, either did nothing, or was unable to do what was required to alleviate the animals' distress.
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> Clearly, the Society is not bound by the Act to give a person a chance (time, opportunity) to relieve distress when there is no evidence on which to reasonably conclude that the person will be able to do so. Applying the correct test, I am satisfied that SPC Mead's opinion regarding Ms. Ulmer's ability to relieve the animals' distress was reasonable. In the result, I find the decision to seize the animals was reasonable.

The refusal to return the animals

[17] The judge observed that "for Ms. Moriarty's decision to stand, it must be within her jurisdiction … and the decision not to return must be a reasonable one". The so-called jurisdictional question was based on whether the animals were taken

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into custody properly. The appellant contended they were not because she had not been given an opportunity to take steps to relieve the distress.

[18] The chambers judge concluded that Ms. Moriarty had correctly applied the law in concluding the animals had been apprehended lawfully. She said that "Ms. Moriarty turned her mind to whether she had jurisdiction and correctly came to the conclusion that she did".

[19] Turning to the determination whether to return the animals, the judge stated:

> [45] Ms. Moriarty then addressed the question of whether the animals should be returned. She applied the correct test in making the determination. The test is stated in *Brown v. British Columbia Society for the Prevention of Cruelty to Animals*, [1999] B.C.J. No. 464 (S.C.) at para. 22. It requires that the Society or the court, as the case may be, must be satisfied the animal will remain in its present satisfactory condition if returned to its owner.

[20] Following a detailed review of the material before Ms. Moriarty and her consideration of it, the judge concluded that the Society's refusal to return the animals was reasonable.

Positions of the parties

[21] The appellant advances three errors by the chambers judge:

1. inferring a belief by Ms. Mead that the appellant could not relieve the distress of the animals when there was no evidence to support the inference;
2. failing to consider whether the seizure of the animals was arbitrary;
3. finding that Ms. Moriarty had jurisdiction to decide whether to return the animals to the appellant.

[22] The Society states that the issue on appeal is whether the chambers judge was correct in her determination that the Society acted reasonably in taking custody of the animals.

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Discussion

Mootness

[23] By the time this appeal was heard all the animals had been disposed of either by euthanasia or adoption. The Society questioned whether the appeal was moot. As noted in *Evers v. British Columbia (Adult Forensic Psychiatric Services*, 2009 BCCA 560, para. 27, the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358 - 363 stated the factors to be considered when determining whether to exercise discretion to hear a moot appeal:

> (a) there is an appropriate adversarial context;
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> (b) the case is an appropriate use of judicial resources; and
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> (c) the court would be acting within its proper adjudicative role and not intruding on the legislative branch.

[24] An action is pending in the Supreme Court seeking recovery from the appellant of the Society's costs of seizing and disposing of the animals. There is some need for guidance on the approach to be taken when reviewing the Society's exercise of its authority to seize and dispose of animals. There is no suggestion this Court would be intruding on the legislative branch by hearing this appeal. The suggested considerations are present in this case. After a short deliberation, we informed the parties that we would hear the appeal.

New argument

[25] On this appeal, in support of her contention that the seizure was arbitrary, the appellant asks this Court to consider an argument not made before the chambers judge, based on notes Ms. Mead made at the time of the seizure. These notes were appended to an affidavit filed late in the day on the judicial review application. Curiously, they were not part of the information considered by Ms. Moriarty in her determination whether the seizure was in accordance with the *Act*, but the appellant takes no issue with that fact.

[26] The chambers judge did refer to Ms. Mead's notes and concluded they and the balance of the relevant evidence supported the conclusion the animals were in distress. The appellant asserts that the notes support her contention that not all of the seized animals were in distress or that some were less so than others. This is because there are notations of distress beside the entries relating to some animals' entries and not to others. The difficulty is not just that the issue was not raised with the chambers judge, but Ms. Mead was given no opportunity to explain her notes either in cross-examination on her affidavit or in a supplemental affidavit.

[27] It is well recognized that an appellate court must be cautious in permitting arguments to be advanced that were not addressed in the court below. In *R. v. Winfield*, 2009 YKCA 9, the Court stated:

> [18] Although appellate courts have discretion to permit a new issue to be raised, that discretion is one to be exercised sparingly. To take a less stringent approach would allow an appellant to transform an appeal into a new, and entirely different, proceeding, one divorced from how the trial was conducted. This is particularly so when the new issue is one that cannot be finally resolved without another trial. Apposite is the following from the judgment of Madam Justice Weiler in *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130:
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> > [18] The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal: *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350, at para. 3. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial": *Ross. v. Ross* (1999), 181 N.S.R. (2d) 22, at para. 34 (C.A.), per Cromwell J.A.; *Ontario Energy Savings* at para. 3. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law: see e.g. *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (C.A.); *R. v. Brown*, [1993] 2 S.C.R. 918, per L'Heureux-Dubé J., dissenting. In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties: *R. v. Warsing*, [1998] 3 S.C.R. 579, per L'Heureux-Dubé J., dissenting; *R. v. Sweeney* (2000), 50 O.R. (3d) 321 (C.A.); *Vidulich* at 398-99.
> >
> > [Emphasis added by the Court.]

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[28] In my view, it would not be appropriate to consider the new argument the appellant seeks to advance. Although it is clear that some entries do not have notations of specific indicia of distress, we do not know why. The appellant's argument would be speculative at best.

General comments

[29] As noted by the chambers judge, the standard of review is reasonableness because the *Administrative Tribunals Act*, S.B.C. 2003, c. 47 does not apply. For the *Act* to apply the *Prevention of Cruelty to Animals Act* must so specify and it does not. The questions for determination on the judicial review were whether objectively the Society acted reasonably in taking custody of the animals and in refusing to return them to the appellant. The Society did not have to be correct.

[30] This Court can interfere with the decision of the chambers judge only if she erred in law or made overriding and palpable error in her findings of fact or inferences of fact (*Amyotte v. 469238 B.C. Ltd.*, 2006 BCCA 414).

[31] In this case, there are two discrete, but interrelated matters to be considered: the reasonableness of taking custody of the animals and the decision not to return them.

Reasonableness of taking custody of the animals

[32] To take custody of the animals, s. 11 of the *Act* requires Ms. Mead to have formed the opinion that they were in distress and to have been satisfied the appellant did not take steps promptly to relieve the distress. The task of the chambers judge was to determine objectively whether the Society acted reasonably taking custody of the animals. That is, in the circumstances confronting the authorized agent, would a reasonable person conclude the Society acted reasonably in seizing the animals?

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[33] It is clear that Ms. Mead had the opinion the animals were in distress. She repeatedly stated this in her affidavit. She deposed that it was necessary to take the animals into custody "to relieve them from their situation of distress". There was ample evidence to support the conclusion of the chambers judge that Ms. Mead was of the opinion that the animals were in distress and that it was reasonable for her to have so concluded.

[34] The first task in considering whether the second requirement for taking custody of the animals was met is to construe the clause "does not promptly take steps that will relieve [the] distress".

[35] As noted, the chambers judge referred to the decision of L.C. Smith J. in *R. v. Sudweeks* and stated:

> [36] ... to satisfy the test, the constable must form the opinion that "the person apparently responsible for the animals … had not taken and would not be able to take the steps necessary to relieve their distress" (emphasis added). This statement of the test is preferable, and has been applied in other cases, such as *Baker v. British Columbia Society for the Prevention of Cruelty to Animals,* 2006 BCSC 1982, at para. 22, *Van Dongen v. British Columbia Society for the Prevention of Cruelty to Animals,* 2005 BCSC 548, at para. 71, and by Madam Justice Huddart in *British Columbia Society for the Prevention of Cruelty to Animals v. Sudweeks,* 2002 BCCA 493.
>
> [Emphasis in original.]

[36] A review of the cases cited by the judge shows that they are very fact specific, but they all take a broad approach to the language of s. 11(a) of the *Act*. In my view that is consonant with the scheme of the legislation as stated by the chambers judge.

> [4] In *Eliason v. British Columbia Society for the Prevention of Cruelty to Animals*, 2004 BCSC 1773, Groberman J. summarized the scheme of the *Prevention of Cruelty to Animals Act,* R.S.B.C. 1996, c. 372, ("the Act*")* as follows:
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> > [3] The scheme of the Act clearly is designed to allow the Society to take steps to prevent suffering of animals, and also to allow owners of animals to retrieve them, or have the animals returned to them, if they are able to satisfy the Society that the animals will be taken care of.

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[37] In my view, s. 11(a) must be given a broad purposive interpretation. The words "does not promptly takes steps that will relieve … distress" sometimes will lead to the authorized agent making orders and giving directions, in other circumstances he or she may conclude that the person responsible for the animals is unable to take the necessary steps or it may be apparent that the person is unwilling to take steps to relieve the distress. The cases referred to by the chambers judge illustrate these varied scenarios.

[38] I do not think the cases support the notion, advanced by the appellant, that, as a matter of law, in every case the agent must give the responsible person time in which to relieve the animals' distress. In some cases, as in the present case, it will be reasonable not to do so. The word "promptly" suggests a consideration whether the person can or will take the necessary action.

[39] The appellant contends that the Society must prove that Ms. Mead had determined that the appellant could not relieve the animals of their distress. She asserts that there was no evidence Ms. Mead ever held that opinion as inferred by the chambers judge.

[40] The animals were seized. There was no suggestion in the evidence that Ms. Mead did not conclude that the appellant would not promptly take steps to relieve their distress. In the circumstances of this case it was reasonable to conclude that she did so conclude.

[41] It is clear that Ms. Mead was well aware of the need to consider whether the appellant would takes steps promptly to relieve the distress. She deposed:

> The Society's policy and our training requires that we execute search warrants without pre-conceived notions concerning the potential outcome of the process. It may be that animals are not found in distress, or that their distress may be relieved without the need to seize the animals.

Ms. Mead asked the appellant who would assist tending to the animals with the appellant, but was not satisfied by her answer. Ms. Mead deposed, "I determined

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that it was necessary for the Society to take custody of these animals in order to relieve them from their situation of distress".

[42] While it is helpful to have direct evidence that the authorized agent was satisfied that the person responsible did not or would not take steps promptly to relieve distress, whether he or she provides such evidence is not determinative. The task remains for the reviewing judge to decide on all the evidence whether objectively it was reasonable to conclude that the person responsible for the animals did not promptly take steps to relieve the distress.

[43] There was ample evidence to support the finding of fact of the chambers judge that it was reasonable to conclude that the appellant had not and would not be able to relieve the distress.

[44] The judge referred to the evidence of a discussion between Ms. Mead and the appellant in which, when asked whether she had help caring for the animals, the appellant identified the former, dismissed employee. The judge also alluded to the time between the initial notices identifying the Society's concerns and the fact the distress had not been relieved. She concluded "there was no possible way in which [the appellant] could promptly relieve the animals' distress". In my view, it was not necessary for the judge to go this far, but it certainly supports her finding that it was reasonable to conclude that the appellant was not able to relieve the distress of the animals.

[45] In my view, it is clear on the evidence that Ms. Mead put her mind to the question whether the appellant could or would take steps promptly to relieve the distress of the animals and the judge was entitled to infer that Ms. Mead held the opinion the appellant could or would not do so. That inference, coupled with the evidence as a whole supports the judge's conclusion that it was reasonable for the Society to take custody of the animals.

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[46] The appellant filed the affidavit of Mr. Luke Lu to support her contention he was retained to assist her in caring for the animals. The appellant made no mention of Mr. Lu to Ms. Mead. In the circumstances of this case, his affidavit was of no assistance to the chambers judge in determining whether it was reasonable to conclude the appellant could not relieve the distress promptly.

[47] The appellant contends the seizure was arbitrary. As noted, she sought to rely on the Ms. Mead's notes to support this contention. Regardless of the notes, it is apparent that some cats that had indicia of stress were left with the appellant and some cats with such indicia were taken away.

[48] The issue before the chambers judge was whether it was reasonable to take into custody the cats that were seized. The judge's decision was informed by the condition of the animals, the reasonableness of Ms. Mead's opinion they were in distress and the reasonableness of the conclusion they had to be apprehended to relieve their distress. I see no basis for disturbing the judge's conclusion on the basis the Society chose to take into custody some cats and not others.

Reasonableness of the refusal to return the animals

[49] It is apparent the chambers judge did not apply a standard of review of correctness to Ms. Moriarty's conclusion she had jurisdiction; nor should she have done so (*Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, para. 32 and following).

[50] Courts must be cautious in categorizing issues as jurisdictional (*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227). The Court had this to say in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.R. 190, para. 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued

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> the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

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[51] The question whether Ms. Mead acted reasonably taking the animals into custody was not jurisdictional. Ms. Moriarty reviewed at length the circumstances of the apprehension of the animals and considered the medical evidence provided by two veterinarians. They found the distress to be long-term, that is, the causes of the distress had been present for a long time.

[52] Ms. Moriarty relied on the decision of Madam Justice Huddart in *BCSPCA v. Sudweeks* for the proposition that "[w]here animals show indicia of long-term distress, it is appropriate to seize them even if previous orders for care have not been issued". The chambers judge found "Ms. Moriarty's interpretation of *Sudweeks* to be reasonable, especially given the facts before her …". In my view the judge was entitled to reach that conclusion which led to her finding that Ms. Moriarty had acted reasonably in concluding the animals had been seized in accordance with the *Act.*

[53] The chambers judge then reviewed details of the lengthy assessment of the evidence undertaken by Ms. Moriarty and concluded that her determination she was not satisfied the animals would remain in their presently satisfactory condition if returned to the appellant was reasonable given the evidence before Ms. Moriarty. I see no error in this conclusion.

[54] While recognizing that it is not essential, I found it curious that Ms. Moriarty did not include either a statement by or the notes of Ms. Mead in the material she reviewed to determine whether the animals should be returned to the appellant. Ms. Moriarty did have the Information to Obtain ("ITO") sworn by Ms. Mead that was prepared to support the application for a search warrant. In my view, it would have been preferable also to have had a statement from and the notes of Ms. Mead.

[55] In addition, I am troubled by the references in Ms. Moriarty's decision to the use of information apparently obtained from Ms. Mead and Ms. Thomson, who also is an Animal Protection Officer of the Society and a Special Provincial Constable. Neither was listed in her reasons as a source relied on by Ms. Moriarty. Ms. Moriarty describes the information as "the evidence of Ms. Mead and Ms. Thomson" and stated she had been informed by them.

[56] The information included the conduct of the officers at the time the search warrant was executed, the identity of the former employee, who was identified in the ITO only as "Sandra" and the fact the employee was willing to testify in court. On the judicial review nothing turned on the dispute between the parties concerning the method of execution of the search warrant and Ms. Moriarty expressly declined to base her decision on the different stories of the former employee and the appellant, but Ms. Moriarty should not have relied on information apparently not made available to the appellant and not listed as material to which she referred in making her decision.

Conclusion

[57] In my view, there was ample evidence to support the finding of the chambers judge that it was reasonable for Ms. Mead to conclude that the animals were in distress and that the appellant was unable promptly to relieve the distress.

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[58] The chambers judge made no error of law or palpable and overriding error of fact. There is no basis for this Court to interfere with her decision that the Society acted reasonably taking the animals into custody and in refusing to return them to the appellant.

[59] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Levine"

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