

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ulmer v. British Columbia Society for the
Prevention of Cruelty to Animals*,
2010 BCSC 199

Date: 20100212
Docket: S099113
Registry: Vancouver

Between:

Cary Ulmer

Petitioner

And:

The British Columbia Society for the Prevention of Cruelty to Animals

Respondent

Before: The Honourable Madam Justice Dorgan

On Judicial Review of Seizures under s. 11 of the
Prevention of Cruelty to Animals Act

Reasons for Judgment

Counsel for Petitioner:

R. D. Bajer

Counsel for Respondent:

C. A. Rhone

Place and Date of Hearing:

Nanaimo, B.C.
January 19 - 20, 2010

Place and Date of Judgment:

Vancouver, B.C.
February 12, 2010

[1] The petitioner, Ms. Ulmer, is a pet owner. She seeks judicial review of the October 20, 2009 decision of the respondent Society to take custody of 70 cats and one hen, and judicial review of the November 30, 2009 decision of the Society to refuse to return the pets to her.

[2] In her argument, Ms. Ulmer submits that the following issues arise in this proceeding:

- 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 concerns 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?

[3] She also raises the issue of procedural fairness in regard to the November 30, 2009 decision.

Introduction

[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:

[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.

[5] Under the Act, the Society has a statutory mandate to take custody of animals which are in "distress". Relevant to this proceeding, ss. 1(2) and 11 of the Act read:

Definitions

- 1 (2) For the purposes of this Act, an animal is in distress if it is
- (a) deprived of adequate food, water, shelter, ventilation, space, care or veterinary treatment,
 - (b) injured, sick, in pain or suffering, or
 - (c) abused or neglected.

...

Relieving distress in animals

11 If an authorized agent is of the opinion that an animal is in distress and the person responsible for the animal

(a) does not promptly take steps that will relieve its distress, or

(b) cannot be found immediately and informed of the animal's distress,

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.

[6] Once animals are taken into the Society's custody pursuant to s. 11 of the Act, s. 18 of the Act gives the Society a discretionary right to dispose of the animals.

Section 18 reads:

18 If an animal is removed from the custody of its owner under section 11 and taken into the custody of the society, the society may destroy, sell or otherwise dispose of the animal 14 days after the society has given notice to the owner in accordance with section 19.

[7] In this case, on October 20, 2009, an authorized agent of the Society, Special Provincial Constable ("SPC") Mead executed a warrant lawfully obtained under the Act. In the result, the Society took custody of 70 of Ms. Ulmer's cats and one hen. On October 22, 2009, the Society served an Amended Notice of Disposition upon Ms. Ulmer pursuant to s. 18. That notice informed Ms. Ulmer she had a right to dispute the Society's decision to dispose of the animals. By email dated October 29, 2009, Ms. Ulmer, through her counsel, disputed the Notice of Disposition and asked for the animals to be returned to her care.

[8] On November 2, 2009, Ms. Moriarty, the General Manager of Cruelty Investigations for the Society, delivered to Ms. Ulmer's counsel all materials she relied on in relation to the preliminary decision to dispose of the animals. That material included photographs taken during the October 20, 2009, search and seizure, relevant veterinary reports, the Information to Obtain, and reports of police and SPCs present on October 20, 2009. Ms. Ulmer's response was a written submission to the Society prepared by her counsel and dated November 22, 2009.

[9] By letter dated November 30, 2009, Ms. Moriarty rendered her decision with reasons. She refused to return the seized animals to Ms. Ulmer.

Test on Judicial Review

[10] Both parties agree that the standard of review regarding the decision to seize the animals is reasonableness. Regarding the decision to not return the animals, the parties agree that Ms. Moriarty was required to consider whether she had jurisdiction to make the determination. If she did not, her decision to keep the animals cannot stand. However, if the decision was within her jurisdiction, then the standard for her conclusion not to return the animals is reasonableness.

[11] The parties' position is consistent with the current law regarding the standard of review of decisions made by the Society as stated in cases such as *Baker v. British Columbia Society for the Prevention of Cruelty to Animals*, 2006 BCSC 1982, at paras. 22 and 23. There was some question as to whether the *Administrative Tribunals Act*, SBC 2003 c. 47 ("ATA") applies to decisions made under the *Prevention of Cruelty to Animals Act*, as was found in *Marshall v. British Columbia Society for the Prevention of Cruelty to Animals*, 2007 BCSC 1750, and *Haughton v. British Columbia Society for the Prevention of Cruelty to Animals*, 2009 BCSC 1773. In order for a decision maker to be considered a 'tribunal' that is governed by the ATA, its enabling legislation must specify that the ATA applies. No such specification exists in the *Prevention of Cruelty to Animals Act*. As a result, the common law regarding the appropriate standard of review and level of procedural fairness prevails.

Background

[12] The events leading up to the Society's execution of the search warrant on October 20, 2009, and the subsequent steps taken, are set out in the affidavits of Ms. Ulmer, Mr. Willis, Mr. Lu, Ms. Moriarty and Special Provincial Constables Mead and Thomson.

[13] On October 11, 2009, the Society received a complaint from an employee of a veterinary clinic regarding Ms. Ulmer. The complainant stated that Ms. Ulmer had brought in a cat that was almost too weak to walk, had bed sores, was urine scaled, and had matted fur. The complainant said Ms. Ulmer was advised that the cat should be euthanized, but that she refused to do so. The complainant stated that Ms. Ulmer had brought in over 35 animals in similar condition at various times. As a result of the complaint, SPC Mead attended Ms. Ulmer's residence in Delta. Since no one was home, SPC Mead left a notice on the front door instructing Ms. Ulmer to contact the Society within 24 hours regarding the complaint.

[14] On October 14, 2009, the Society received another complaint regarding Ms. Ulmer, this time from an employee of Ms. Ulmer who was later identified as Jocelyn Padua. She stated there were multiple cats living in Ms. Ulmer's home in Langley. She said she had helped Ms. Ulmer remove barrels of feces and cat litter from the house. She said she had not seen the living conditions of the cats but that the house had a strong, foul odour.

[15] Ms. Padua also said Ms. Ulmer contacted her to ask for help transporting the cats from the Langley property to a Delta property in order to help her avoid contact with the Society. In response to the Padua complaint, SPC Mead attended the Delta property again, and when no one responded to her knocking, she left notices warning Ms. Ulmer to contact the Society or face possible legal action. SPC Mead also left a voice mail for Ms. Ulmer.

[16] SPC Mead received an email from Ms. Ulmer's fiancé, Mr. Willis, who said the clinic's complaint was an attempt at reprisal because of Ms. Ulmer's reluctance to put a cat down. He also said that he and Ms. Ulmer were planning to leave on a vacation the following day for two or three weeks and they would contact the Society upon their return. He followed up his email by voice mail. In response, SPC Mead left a voice mail requesting a meeting. She also asked for information about who would care for the cats during the planned vacation.

[17] On October 16, 2009, Ms. Padua phoned the Society again saying that almost all the cats had been moved to the Delta property. When moving the cats she noticed that they were dirty and scruffy, and that many had fleas and urine stains on their abdomens. In response, SPC Mead left a final warning notice at the Delta property, saying that Ms. Ulmer must contact the Society by 10:00 a.m. the next day to avoid legal action.

[18] Early the next morning and before business hours, Mr. Willis left a phone message for SPC Mead saying the cats were all well cared for and that he and Ms. Ulmer were no longer planning to go away because of health issues. He also said they were not “up for” an inspection right now. SPC Mead called back but received no answer. She left a message saying if she could not do an immediate inspection, she would have to apply for a search warrant. No contact was forthcoming, and SPC Mead applied for and obtained a warrant to search the Delta property under s. 13 of the Act.

[19] On October 20, 2009, SPC Mead executed the warrant, assisted by SPC Leanne Thomas, SPC Christine Carey, and three members of the Delta Police Department. Not all of these persons attended at the same time, but SPC Mead was there throughout the execution of the warrant. Photographs taken and notes made by officers and constables are in evidence.

[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.

[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 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.

[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.

[23] Ms. Ulmer, in her affidavit, disputes some aspects of the Mead Report.

Relief Claimed

[24] Ms. Ulmer applies for judicial review of both the initial seizure and the decision to not return the animals. She seeks a declaration that the decision to seize was unauthorized and invalid, an order quashing Ms. Moriarty's decision, an order that the animals be returned to her and a declaration that she is not liable for the expenses incurred by the Society in keeping the animals (s. 20 of the Act).

[25] The Society opposes all claimed relief.

Issues:

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

3. Does procedural fairness require the applicant receive an oral hearing?

1. Was the decision to seize the animals reasonable?

Positions of the Parties

[26] Ms. Ulmer says that the animals were not in distress, and even if they were, the Society did not give her the opportunity to relieve that distress. As a result, the Society did not meet the statutory preconditions to seizure, making its decision to seize unreasonable.

[27] The Society says that SPC Mead was reasonable in concluding that the animals were in distress given the evidence she was confronted with in the garage. Regarding whether SPC Mead was of the opinion that Ms. Ulmer could not promptly take steps to relieve the distress, the Society notes that there are no written reasons for the decision to seize. As a result, the Society says, the rationale for SPC Mead's decision must be found by looking at the context in which she made the decision. This context includes the number of animals and their condition when viewed at the premises. Given the severity of the problem, SPC Mead was logically concerned with Ms. Ulmer's ability to alleviate the distress and she asked Ms. Ulmer if anyone could assist her with the animals. After determining that she did not have anyone to assist her, SPC Mead came to the conclusion that Ms. Ulmer was not able to promptly relieve the animals' distress. The Society argues that, accordingly, the second of the statutory requirements was met and as a result, the decision to seize was reasonable.

1. (a) Were the animals in distress?

[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.

[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.

[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.

[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.

1. (b) Was SPC Mead reasonably of the opinion that Ms. Ulmer could not take steps to relieve the distress?

[32] SPC Mead's decision that Ms. Ulmer could not take steps to relieve the distress was also reasonable. As the Society argues, her decision must be considered in the context of the species of animal at issue, the number of animals, and their condition at the premises. Considering that Ms. Ulmer had taken responsibility for over 70 feral cats and one chicken and that they were in a

deplorable state, if SPC Mead came to the conclusion that there was no possible way in which Ms. Ulmer could promptly relieve the distress, then it was reasonable for her to seize the animals.

[33] There is evidence that SPC Mead questioned Ms. Ulmer as to whether she had any help in caring for the animals. Ms. Ulmer agrees that this conversation took place. Ms. Ulmer could provide the name of only one person who would be able to help: Ms. Padua, the person who SPC Mead knew was no longer in the employ of Ms. Ulmer, who had complained to the Society about the animals and who Ms. Ulmer claimed did not provide adequate care for the animals when they were in her care.

[34] Furthermore, Ms. Ulmer knew the Society had concerns about her animals for approximately a week prior to the execution of the warrant. In that week, Ms. Ulmer was unable to relieve the animals' distress. I am satisfied it was reasonable for SPC Mead to conclude, given the number and condition of the animals, as well as the time that had passed since Ms. Ulmer first became aware of the Society's concerns, that there was no possible way in which Ms. Ulmer could promptly relieve the animals' distress.

[35] Ms. Ulmer's assertion that in order to satisfy the second part of the test, the Society must always give the person responsible for the animals an opportunity to relieve the distress, regardless of the conditions of the animals, is not supported by the case law. Ms. Ulmer relies on *R v. Sudweeks*, 2003 BCSC1960, where Madam Justice Smith states at para. 103:

... an authorized agent may, under s. 11, take any action considered necessary to relieve the animal's distress, including taking custody of the animal, so long as the person responsible for the animal does not promptly take steps to relieve its distress or the person responsible for the animal cannot be found immediately and informed of the animal's distress.

[36] However, later in the judgment, at para. 107, Smith J. says that 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.

[37] 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.

[38] 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.

2. Was the decision not to return the animals reasonable?

[39] In order for Ms. Moriarty’s decision to stand, it must be within her jurisdiction to make the decision, and her decision not to return must be a reasonable one.

[40] Ms. Ulmer says Ms. Moriarty’s decision not to return the animals was not reasonable because Ms. Moriarty’s findings of fact were not supported by the evidence before her.

[41] The Society says that Ms. Moriarty properly concluded that she had the jurisdiction to make the determination, properly informed herself of the test to

determine whether the animals should be returned and came to the reasonable conclusion not to return the animals.

[42] In order for the decision to be within her jurisdiction, Ms. Moriarty must have turned her mind to whether SPC Mead's decision to seize was reasonable. I have already discussed the reasonableness of SPC Mead's decision above. Ms. Moriarty clearly turned her mind to whether she had jurisdiction. At p. 2 of her decision she states:

I am satisfied that SPC Mead reasonably formed the opinion that the Animals were in distress, as defined by section 1(2) of the Act.

[43] She also discusses the second step in the determination process:

Where animals show indicia of long-term distress, it is appropriate to seize them even if previous orders for care have not been issued.

[44] For the last proposition she cites Huddart J.A.'s decision in *Sudweeks*. Ms. Ulmer argues that *Sudweeks* does not stand for this proposition. However, I find Ms. Moriarty's interpretation of *Sudweeks* to be reasonable, especially given the facts before her, which involved a large number of animals with long-term illnesses and an owner who provided no reasonable assurance to the seizing officer that she would have help in relieving the animals' distress. Ms. Moriarty turned her mind to whether she had jurisdiction and correctly came to the conclusion that she did.

[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.

[46] After weighing all the evidence before her, Ms. Moriarty concluded that the animals should not be returned. It is clear from her decision that she carefully

reviewed all the materials, including Ms. Ulmer's numerous veterinary records. After reviewing the materials she noted:

- Ms. Ulmer sometimes refused to euthanize animals, contrary to the advice of her veterinarians that it was cruel not to do so;
- Ms. Ulmer spent thousands of dollars on the care of some of her animals, while leaving most to live with a variety of painful conditions; and
- The condition of Ms. Ulmer's property in the context of providing appropriate housing conditions for numerous animals was deplorable, a finding that is substantiated by the evidence obtained during the seizure.

[47] Ms. Ulmer submitted that the animals' condition upon seizure was due to the shoddy care of Ms. Padua, rather than herself. Ms. Moriarty noted that Ms. Padua states she was not hired to take care of the animals and did not care for the animals, save to move some barrels of feces and help transport them to Delta. Ms. Moriarty did not state who she believes between the two, but said that the evidence of the cats' condition indicates long-term neglect and distress and could not be explained by a short-term lack of care.

[48] Ms. Ulmer submitted that she only assumed responsibility of the animals in April 2008, and that their condition was partly due to her sister's shoddy care of the animals previous to this date. In contrast to this submission, Ms. Moriarty noted that the veterinary records indicate Ms. Ulmer asked for her sister to be removed from the veterinary file in 2003, and that all veterinary records after this date are addressed solely to Ms. Ulmer. This indicates that Ms. Ulmer had responsibility for the animals at a much earlier date. Even if she assumed control in April 2008, Ms. Ulmer had 18 months to rectify the condition of the animals but had not.

[49] Ms. Ulmer's submissions included a detailed "Pet Care Management Plan". Ms. Moriarty expressed doubt that Ms. Ulmer could follow through with the plan, given her past insufficient care of the animals. Ms. Moriarty states she has no

reason to believe that Ms. Ulmer would be able to provide the proposed care for all the animals she was responsible for.

[50] Ms. Moriarty also reviewed the findings of the veterinarians who examined the animals after seizure, and found the conditions the animals had were treatable and preventable. This indicated to her that the animals' caretaker had been neglectful.

[51] Ms. Ulmer says Ms. Moriarty's conclusions ignore the evidence in the records that she has in the past allowed her pets to be euthanized when recommended by an attending veterinarian. This is not the case. Ms. Moriarty did not state that Ms. Ulmer never euthanizes her cats. She only stated that Ms. Ulmer "seems unable to recognize in some circumstances when the quality of life of an animal is so poor that the most humane thing to do is say goodbye". Ms. Moriarty did not say this was a determinative factor in her analysis. She based her decision on multiple concerns she had with releasing the animals back to Ms. Ulmer.

[52] Based on the above findings, Ms. Moriarty concluded that she was not satisfied the animals would remain in their present satisfactory condition if returned to Ms. Ulmer. I find this conclusion is reasonable given the evidence before her.

3. Does procedural fairness require the applicant receive an oral hearing?

[53] Ms. Ulmer states that the Society's denial of her request for an oral hearing was a breach of the principles of procedural fairness. Ms. Ulmer argues that an oral hearing was required in the case at bar because of the number of animals involved, the complexity of their medical history and the Society's failure to ascertain Ms. Ulmer's ability to remedy their concerns at the time of seizure. She also says an oral hearing would have led to Ms. Moriarty avoiding the alleged factual error regarding Ms. Ulmer's willingness to euthanize her animals, as discussed above.

[54] The Society says that Ms. Ulmer was not entitled to a full oral hearing, and cites *Pieper v. British Columbia Society for the Prevention of Cruelty to Animals*, 2004 BCSC 1547, in support. The Society says that an oral hearing would not have

assisted in resolving the issues in any event because the matter could be and was appropriately dealt with by way of a comprehensive evidentiary record, written argument, and a detailed written decision.

[55] *Pieper* is the leading case in determining the type of hearing a petitioner is entitled to under the Act. In *Pieper*, the court states that a hearing under the Act can take many forms, ranging from correspondence between the parties, to a right to make submissions, to a complete oral hearing [para. 25]. In *Pieper*, the petitioner was not given the opportunity to make written submissions. Powers J. determined that in the circumstances of the case before him, written submissions were necessary for procedural fairness. However, Powers J. found that an oral hearing was unnecessary.

[56] The facts in the situation at bar bear many resemblances to the facts in *Pieper*. In both cases the petitioner knew or must have known the concerns the Society had regarding the animals. In both cases a large number of animals were seized, leading to a high cost of retaining the animals on the part of the Society. There is nothing in the facts of this case that would lead to the conclusion that a higher level of procedural fairness than that given in *Pieper* was necessary. An oral hearing would have made no difference regarding the ability of Ms. Moriarty to assess whether individual animals should be returned to Ms. Ulmer, as Ms. Moriarty had fulsome and relevant written material before her. I find that an oral hearing was not necessary in these circumstances. No breach of the principles of procedural fairness occurred.

4. Section 20 Costs

[57] Regarding the issue of costs of care under s. 20 of the Act, the Society argues that Ms. Ulmer's claim is premature since the Society has not yet presented Ms. Ulmer with an invoice. I agree.

Conclusion

[58] Both the initial decision to seize, and the decision not to return the animals were reasonable. No breach of the principles of procedural fairness arose from the lack of an oral hearing. The application for an order declaring Ms. Ulmer is not obligated to pay the Society's costs of care is premature.

[59] Liberty to apply regarding costs of this proceeding.

"J. L. Dorgan, J."

The Honourable Madam Justice Dorgan