

**COPY**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Date: 20110614  
Docket: 1139041  
Registry: Prince George

Between:

**Stephen Thomas Johnson**

Petitioner

And

**British Columbia Society for the Prevention  
of Cruelty to Animals**

Respondent

Before: The Honourable Mr. Justice Butler

**Oral Reasons for Judgment**

The Petitioner:

Appearing in Person

Counsel for the Respondent:

Christopher Rhone  
(Appearing via teleconference)

Place and Date of Judgment:

Prince George, B.C.  
June 14, 2011

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[1] **THE COURT:** On March 15, 2011, the respondent, the B.C. Society for the Prevention of Cruelty to Animals (the "SPCA"), removed 15 horses from the property of the petitioner, Stephen Johnson. The seizure was undertaken pursuant to s. 11 of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 (the "Act"). The Act gives the SPCA the mandate to prevent and relieve animals from situations of cruelty or neglect.

[2] Mr. Johnson's horses were seized pursuant to a search warrant issued on March 14, 2011. The horses are alleged to have been in a state of distress at the time of the seizure. One horse died after the seizure and the SPCA agreed to transfer one of the 14 remaining horses. As a result, there are 13 horses at issue in these proceedings.

[3] Section 18 of the Act permits the SPCA to destroy, sell or otherwise dispose of an animal taken from its owner under s. 11 of the Act. After the seizure and pursuant to s. 18 of the Act, the SPCA delivered a notice of disposition to Mr. Johnson indicating that the SPCA intended to dispose of the horses and that Mr. Johnson had the right to dispute the SPCA's decision. Mr. Johnson notified the SPCA that he disputed the notice of disposition. Accordingly, the SPCA provided relevant material to Mr. Johnson and he made submissions seeking the return of the horses.

[4] On April 14, 2011, Ms. Marcie Moriarty, the General Manager of Cruelty Investigations, rendered a decision in which she refused to return the horses to Mr. Johnson. She concluded that the animals had not been adequately cared for and that if they were returned to him, it was likely he would fail to adequately care for the horses and their condition would deteriorate.

[5] On April 28, 2011, Mr. Johnson filed this petition seeking an injunction restraining disposal of the horses. The petition was prepared by Mr. Johnson and does not specifically seek judicial review of Ms. Moriarty's decision; however, I infer that Mr. Johnson intends to add a claim for relief in the nature of judicial review to

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the petition. No further steps have been taken by Mr. Johnson to set the petition down for hearing.

[6] Since March 15, the SPCA has paid all expenses to provide food, shelter, veterinary, and other care to the horses. The SPCA says the costs of care for the horses are significant and are imposing a burden on the Society's operating expenses. It is a non-profit organization and is funded primarily by donations. Accordingly, it wishes to dispose of the horses by selling or giving them to others. It brought this application to permit it to dispose of the horses, as indicated in the notice of disposition.

[7] Alternatively, it says that if this court issues an injunction to prevent disposition of the horses, the injunction should be on terms that require Mr. Johnson to pay or contribute to the costs of caring for the horses, and that require him to bring the petition on for hearing promptly.

**Position of the SPCA**

[8] The SPCA argues that an injunction should not be issued to restrain it from disposing of the horses. While it concedes that there is a fair question to be tried, it argues that Mr. Johnson will not suffer irreparable harm if the injunction is not granted, and in any event the balance of convenience favours permitting the disposition to take place. With regard to the former issue, it says that Mr. Johnson was raising the horses for sale. His only real interest in the horses is economic, and so he cannot show irreparable harm. It argues that Mr. Johnson has not provided any evidence of an emotional attachment to the horses.

[9] With regard to the balance of convenience, it argues that it has incurred expenses of over \$11,000 up to mid-May 2011 and will continue to pay approximately \$2,900 per month for the care of the animals. It says that its statutory public mandate to relieve animals in distress will be hampered if it has to continue to meet the cost of the ongoing expenses without an end in sight.

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[10] In this case, its goal is to permanently settle the horses with responsible adoptive owners. If it is permitted to pursue the disposition of the animals, it says it could achieve that goal, which would be for the best interests of the horses and would end the prohibitive expenses.

**Position of Mr. Johnson**

[11] Mr. Johnson argues that he has met the test for granting an injunction. He places some emphasis on the strength of his case. He says that the actions of the SPCA show that they approached the seizure of the horses in bad faith. He argues, as well, that he has been defamed. He further says that the SPCA has utilized his case as part of its advertising campaign and so it is disingenuous of the SPCA to allege that it is losing money.

[12] With regard to the harm he will suffer if the horses are disposed of, he says that I can infer from all of his material and his submissions that he does have a deep emotional attachment to the horses. Indeed, he says he is devoted to them. He says he has established that there would be irreparable harm because the failure to grant the injunction would result in him losing his horses and would leave him with no effective recourse.

[13] A judicial review would be ineffective if the SPCA is permitted to dispose of the horses prior to the hearing of the review. Further, he argues that the balance of convenience favours maintaining the status quo until he has had the opportunity to establish that the seizure was wrongful and to show that the SPCA proceeded in bad faith.

[14] Finally, he says he has offered to contribute to the cost of the care of the horses, but has been turned down. He says he offered \$5,000 some time ago. He concedes that some amount should be payable by him for the care of the horses, but says that any order for expenses should not exceed that amount.

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**Ruling**

[15] The test for the granting of an interlocutory injunction is well known. The three-fold test is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[16] STEPHEN JOHNSON: Your Honour, with – in hearing one thing, and I may not affect – but in everything that you said, when you stated my position, in maintaining status quo, I was seeking the return of all of the horses.

[17] THE COURT: Mr. Johnson, I am giving my reasons for judgment.

[18] STEPHEN JOHNSON: Okay, I'm sorry. I'm sorry.

[19] THE COURT: Could you please not interrupt.

[20] STEPHEN JOHNSON: Yes, sir.

[21] THE COURT: As I indicated, the test for the granting of an interlocutory injunction is well known. An applicant for an injunction must show:

- (a) a serious question to be tried between the parties;
- (b) he would suffer irreparable harm if the injunction is not granted; and
- (c) the balance of convenience favours the grant of the injunction.

[22] The test has been applied by this court to circumstances very similar to the present situation; that is to applications to restrain the SPCA from disposing of animals: *Christman v. SPCA*, 2009 BCSC 1788, and *Chrysler v. BCSPCA* (26 June 2009), New Westminster S119212 (S.C.).

[23] When I consider the three prongs of the test and the circumstances of this case, I conclude that Mr. Johnson has satisfied the test for granting an interlocutory injunction. My conclusions on the three tests can be stated succinctly.

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**Fair Question to be Tried**

[24] As the SPCA has conceded that the affidavit of Mr. Johnson provides sufficient evidence to raise a serious question to be tried between the parties, I need not consider this issue in any detail. I have reviewed Mr. Johnson's affidavit as well as the material put forward by the SPCA, and agree that there is a serious issue to be tried.

[25] It is always better for the court, on an interlocutory injunction application, to refrain from commenting on the relative merits of the cases of the two parties. It is even more important in this case that I make no such comments, given the serious allegations of bad faith that Mr. Johnson has made against the SPCA.

[26] Consideration of the substantive issues regarding seizure of the horses will have to await the hearing of the petition in this matter.

**Irreparable harm**

[27] I conclude that Mr. Johnson has also satisfied the second branch of the test. He has showed that he may suffer irreparable harm if the injunction is not granted. I have arrived at this conclusion for two reasons.

[28] First, I can infer from the evidence of Mr. Johnson and from his submissions that he does have a strong emotional attachment to the horses. If the injunction is not granted, the horses would be disposed of and he would lose all opportunity to recover his animals. Damages may not provide an adequate remedy for this loss.

[29] Second, and more importantly, it is very likely that damages would not be an adequate remedy in this case. This is because there is a real possibility that Mr. Johnson could establish that the removal of the horses was wrongful, but have no right to damages. This is because s. 25.1 of the *Act* severely limits the SPCA's liability for damages. It provides as follows:

(1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against the society, an authorized agent or a

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member, officer, agent or employee of the society because of anything done or omitted

(a) in the performance or intended performance, by an authorized agent, of any duty under this Act, or

(b) in the exercise or intended exercise, by an authorized agent, of any power under this Act.

(2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted in bad faith.

[30] I would paraphrase the comments of Rogers J. in *Christman* at paragraph 27, as they are apposite here. Assuming that "bad faith", as used in the *Act*, carries its usual meaning, that is something done for an improper purpose or arbitrarily, it may be difficult for Mr. Johnson to succeed in an action for damages, even if he succeeds on a judicial review. Accordingly, I conclude that he has satisfied the test in relation to irreparable harm.

**Balance of Convenience**

[31] The proper approach to balancing convenience was explained by Lambert J.A. in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.) at 102:

I would summarize that approach in this way: in assessing the balance of convenience, a judge should consider these points: the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

[32] Here the factors which are relevant include:

(1) First, as I have indicated above, damages would likely not be an adequate remedy if the injunction is not granted.

(2) Second, the issue here is indeed a dispute over contested property, the 13 horses. Where possible, it is desirable to preserve the contested

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property if that can be accomplished in a manner which is fair to both parties. Here that can be done if the injunction has appropriate conditions attached to it.

(3) Third, while the SPCA has raised a question that involves public interest, that is its statutory mandate to relieve animals in distress, I do not think that the SPCA has put forth sufficient evidence to show that the continued maintenance of the horses will be such a burden on it that the horses need be disposed of immediately. Further, and as indicated above, an order that requires Mr. Johnson to pay a portion of those costs will ameliorate that situation.

[33] In the circumstances of this case, I am satisfied that the balance of convenience favours granting the injunction.

[34] The final question is what terms of the injunction are appropriate. I have been guided in arriving at the terms to a large extent by the terms imposed in the *Christman* case, as modified for the circumstances of this case. Accordingly, the injunction will be granted on the following terms:

(1) Unless it is extended by further court order, the injunction will lapse and no longer have effect on the earlier of August 5, 2011 or the date of judgment in the proceeding the petitioner will commence for judicial review of the SPCA's search and seizure and/or decision to dispose of the petitioner's horses.

(2) The petitioner will pay to the SPCA by way of money order, certified cheque or bank draft the sum of \$4,500 before 1:00 p.m., June 24, 2011, by way of partial indemnity for the cost of maintaining the petitioner's horses from the date of seizure to May 31, 2011.

(3) While the injunction is in effect, the petitioner will pay to the SPCA, by way of money order, certified cheque or bank draft the further sum of \$2,200

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on or before 4:00 p.m. on June 30, 2011, and \$2,200 on or before the last business day of each and every month thereafter. Such payments to be by way of partial indemnity for the cost of maintaining the petitioner's horses from the date of seizure to June 30, 2011, and the last day of each month thereafter.

(4) In the event that the petitioner does not pay any or pays only a portion of the monies to the SPCA as stipulated in the preceding paragraphs, the injunction will lapse immediately and the SPCA will be at liberty to dispose of the horses in accordance with the notice of disposition.

(5) Receipt by the SPCA of any monies from the petitioner will be without prejudice to the SPCA's right to pursue the petitioner for any sums that the SPCA may claim to be its actual cost of maintaining the horses since the date on which they were seized.

[35] In setting these terms, I have taken into account the evidence presented by the SPCA of expenditures to date, and that includes their receipts showing that they were paying \$15 per horse per day to maintain the horses up to sometime in the last couple of weeks. I understand, as well, that as of the present date they are now paying \$8 per horse per day for the horses. It strikes me that if they were paying \$15 a day but now have reduced that to \$8 a day, the larger payment may have been somewhat improvident. Accordingly, the figures I have used are based on the daily boarding rate of \$7.50 per horse per day, as suggested in the *Christman* case.

[36] What my order effectively does is require payment of 75% of \$7.50 per day per horse. That 75% figure is somewhat arbitrary, but is intended to take into account three factors. First of all, the payment is intended only as partial indemnity and is without prejudice to the SPCA's ability to claim the full amount of its costs at the end of the day. Second, it is likely that the SPCA will be able to enforce further payment if that is so ordered. And third, there is some merit to Mr. Johnson's argument that prior to determination of the substantive issues he should not be required to pay the full amount of the cost of maintaining the horses.

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[37] That concludes my reasons. The last matter is costs, and I will hear submissions on costs, although I will tell Mr. Johnson and Mr. Rhone that it is my inclination to order quite simply that costs be in the cause. In other words, that the costs will be determined by the judge hearing the substantive petition.

[38] MR. RHONE: My Lord, it's Chris Rhone here. Costs in the cause is what we would be seeking.

[39] THE COURT: All right. Mr. Johnson, then that will be the order, unless you have submissions to make on that issue.

[40] STEPHEN JOHNSON: In regards to costs, what are you guys agreeing to? We both bear our own costs, is that what you're doing?

[41] THE COURT: What I am saying is that the costs of this application will be determined by the judge who hears your petition at the end of the day.

[42] STEPHEN JOHNSON: A judicial review?

[43] THE COURT: That is correct.

[44] STEPHEN JOHNSON: I don't understand why you wouldn't give me custody of the horses to care for. What harm is going to come to them in my pasture?

[45] THE COURT: That concludes my reasons for today, Mr. Johnson.

[46] STEPHEN JOHNSON: Sad.

[47] MR. RHONE: My Lord, I just have one question. I didn't hear the date for – for the second paragraph of your order respecting the petitioner will pay to the BCSPCA by way of money order, etc., \$4,500 on or before –

[48] THE COURT: That is June 24th. It was longer than you requested because I felt that one day would be an unreasonable timeframe for Mr. Johnson to raise that sum.

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[49] STEPHEN JOHNSON: I mean, in ten days you get rid of my horses, so if I don't come up with the money, so you're a lucky you. You all got what you wanted. In ten days they get what they want, ten days. I can donate with this, right? We can use this to seek donations. Ten days you gave me to dispose the right of things I love [indiscernible] –

[50] MR. RHONE: I also ask for an order that we dispense with the signature of the –

[51] THE COURT: Yes, there will be an order dispensing with Mr. Johnson's signature on the order.



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The Honourable Mr. Justice Butler