

Citation: McAnerin v. BC SPCA et al
2004 BCSC 1430

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Docket: 65157
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Brooke
In Chambers
September 28, 2004

2004 BCSC 1430 (CanLII)

BETWEEN:

LOUISE McANERIN

PETITIONER

AND:

**BRITISH COLUMBIA SOCIETY FOR
THE PREVENTION OF CRUELTY TO ANIMALS (BC SPCA)
SPECIAL PROVINCIAL CONSTABLE BRADLEY KUICH,
ATTORNEY GENERAL OF BRITISH COLUMBIA**

RESPONDENTS

Counsel for the Petitioner: E. Gilmour and
N. Schabus (articling student)

Counsel for the Respondents: D.P. Montrichard

Place and Date of Hearing: Kelowna, B.C.
September 28, 2004

[1] **THE COURT:** This is a petition under s. 2(2)(a) of the
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 and
s. 24(1) of the *Charter of Rights and Freedoms*.

[2] With respect to the seizure and detention of the petitioner's animals on June 29th of this year, pursuant to a warrant issued on June 28th, the petitioner seeks an order quashing the notice of seizure and quashing the notice of disposition and an order in the nature of *mandamus* compelling the return of what amounts to in the order of 100 animals and for damages.

[3] The respondents say that the acts complained of were authorized and indeed mandated by the ***Prevention of Cruelty to Animals Act***, R.S.B.C. 1996, c. 372 and that the warrant to search and to take any action authorized by that ***Act*** to relieve the animals' distress was supported by the evidence and the law.

[4] The facts are that on June 18, 2004, Constable Kuich, a special constable under the ***Police Act***, R.S.B.C. 1996, c. 367, attended at the petitioner's lands and premises in a rural area near Grand Forks. He attended as a result of the concerns of an employee of the Society for the Prevention of Cruelty to Animals shelter at Grand Forks, that animals owned by the petitioner could be in distress.

[5] "Distress" is described in s. 1(2) of the ***Prevention of Cruelty to Animals Act*** in this way.

(2) For the purposes of this Act, an animal is in distress if it is

- (a) deprived of adequate food, water or shelter,
- (b) injured, sick, in pain or suffering, or
- (c) abused or neglected.

[6] Constable Kuich says that he was in the area of Grand Forks on an unrelated matter and attended at the petitioner's lands with the other special constable engaged by the British Columbia Society, as well as another employee of the Society, a Mr. Alberta. He says that the petitioner did not have a telephone, which is why he attended to speak with her in person.

[7] He and his colleagues arrived during the daylight hours at approximately 3:40 p.m. on June 17th and called out from outside the gate, which he noted was not locked. He called "Hello, is anyone there?" When he heard no answer, he and his associates entered through the unlocked gate, calling out again, but believing that the dwelling house, which was down the driveway, was too far away for a person there to hear.

[8] Accordingly, he approached it by walking down the driveway with his colleagues. He noted a dog chained to the bumper of a derelict truck, with no apparent food or water. He observed the dog to be dirty and thin, with matted hair.

He called out again, continuing to walk towards the dwelling house. He noted three other dogs that he observed to be dirty, thin and chained to derelict vehicles, with no food or water in evidence.

[9] As he got closer to the house, he saw a horse in a field filled with debris, including wires, which he saw to be limping, and he did not notice any food, water or shelter available to the horse.

[10] On arriving at the dwelling house, he called out again. He noted that the door was open. He knocked. A dog and a cat ran out. He noted a large amount of feces on the ground.

[11] At that juncture, Constable Kuich and his colleagues left. On the return to the point of entry at the gate, he noted a goat that he saw to be tethered with no food or water in evidence.

[12] He left the property and formed the opinion that the animals were in distress, and he endeavoured to find the petitioner. In doing so, he relied upon the information given to him by the employee of the shelter at Grand Forks, who had expressed her concern to him earlier regarding the animals. In addition, he spoke to the neighbours on either side of the petitioner's lands. He then went to Grand Forks where he

looked on the streets to try to find the petitioner, who he knew from a previous acquaintance, and he spent approximately 30 minutes doing this.

[13] Eleven days later, an Information to Obtain was sworn and a warrant obtained, largely as a result of the observations made on June 17th. Constable Kuich explained the delay on the basis of the logistic difficulties he would face in executing the warrant that he was seeking, which gave him not only the authority to search but also the authority to take such action as might be lawful under the **Act**. Because of the number of animals and the difficulties of finding persons to assist him and vehicles to move them, as well as the press of other work, eleven days passed.

[14] The petitioner says that the fulcrum of her case is that the Information to Obtain the warrant was grounded upon a warrantless and, hence, illegal search on June 17th. She says that her s. 8 rights were infringed and the warrant cannot stand with the inevitable result that the entry upon her property and the seizure of her animals are unlawful.

[15] Both counsel rely upon the decision of the Supreme Court of Canada in **R. v. Evans** (1996), 104 C.C.C. (3d) 23, as well as other authorities, but for the purposes of this application I find **Evans** to be the most helpful authority. There, as

here, the core issue was whether what occurred was a search within the meaning of s. 8 of the **Charter**. Mr. Justice Sopinka, in paras. 11, 12 and 13, which I paraphrase, says this:

The fundamental objective of Section 8 is to preserve the privacy interests of individuals. The objective of Section 8 of the *Charter* is, "To protect individuals from unjustified state intrusions upon their privacy." As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes.

If the conduct in question did intrude upon the appellants' "reasonable expectations of privacy", then the conduct is a search within the meaning of Section 8, and is subject to the requirements of that section. In assessing the appellants' expectation of privacy, I agree with my colleague Mr. Justice Major that it is necessary to consider the "invitation to knock" that individuals are deemed to extend to members of the public, including police.

I agree with Major J. that the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock.

And Justice Sopinka then refers to the Ontario Court of Appeal decision in **R. v. Tricker**, where he quotes this at para. 12:

The law is clear that the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property. The implied licence ends at the door of the dwelling.

[16] Where the police approach a dwelling house with the intention of gathering evidence, they exceed the authority extended by the implied licence or the implied invitation to knock. Hence, the purpose of the invitee is of critical importance. The petitioner has the burden of proving on the balance of probabilities that the entry was not simply for the purposes of communication, but rather to gather evidence.

[17] If I find for the petitioner on this point, then the warrant must be quashed and the animals returned. In my opinion, the dominant purpose for the attendance on June 17th was to enable Constable Kuich to speak to the petitioner and not to gather evidence to support the warrant which was ultimately obtained. My reasons are these.

[18] The petitioner had no phone and communication by telephone was not feasible, making the face-to-face contact necessary.

[19] Secondly, the attendance was brief. It lasted no more than seven minutes, and Constable Kuich did not bring with him a video for the purpose of recording his attendance and observations, nor did he photograph the observations that he made.

[20] This is in contradistinction from his conduct in executing the warrant on the 28th of June, when a video was made of the proceedings at the petitioner's property. Thirdly, Constable Kuich tried to alert the petitioner, moreover, by repeatedly calling out "Hello" and asking if anyone was there. Fourthly, Constable Kuich did not enter the dwelling house, despite the door being open and access unimpeded. I mention again that the gate, while closed, was not locked.

[21] Finally, Constable Kuich was not surreptitious in his attendance with his colleagues on the afternoon of June 17th. He parked visibly on the road, attended for approximately seven minutes on the petitioner's property, and then spoke to the neighbours on either side. He also attempted to locate the petitioner in Grand Forks, although without success.

[22] I find that the observations made by Constable Kuich were incidental to his primary purpose of speaking with the petitioner and that purpose is not diluted because of his investigative role. The petitioner also submitted that Constable Kuich failed to comply with s. 11 of the **Act**. That says:

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 and veterinary treatment for it.

[23] Sections 13 and 14 of the *Prevention of Cruelty to Animals Act* address both the authority to enter premises, with a warrant and without a warrant, where there is a finding of animals in critical distress.

[24] The petitioner says that no real effort was made to find her on June 17th; that Constable Kuich did not look at the Mental Health Centre, where she customarily was during the day; nor did he leave a note on the fence or on the door to advise her of his attendance and of his concerns. Nor did he leave a message with either neighbour, and he then waited eleven days to seek the warrant which is broadly cast to then enable Constable Kuich to do anything authorized under the *Act*.

[25] Once again, I am convinced there was evidence available to reasonably support the opinion that an animal or animals were in distress within the meaning of s. 1(2) of the *Act*.

Moreover, the petitioner was the person responsible for the animals and she was not found, despite some effort being made to locate her. I find that s. 11 authorizes action to relieve distress if the person responsible cannot be found immediately and that in this context "immediately" means "as soon as reasonably practicable in all of the circumstances". The observations of distress, noted by Constable Kuich, were not of apparent recent origin but rather were longstanding indicia of neglect. In the result the petition is dismissed.

[26] I am indebted to counsel for their assistance in this not uncomplicated and, certainly for the parties, difficult matter, and you, Mr. Gilmour and Ms. Schabus, could not have said more on behalf of your client.

[27] With respect to the question of costs, if that cannot be sorted out, counsel may file written submissions, Mr. Gilmour, within 14 days; Mr. Montrichard, within 21 days; and I will either give you oral reasons by telephone or provide you with a written decision with respect to costs. Thank you.

"T.R. Brooke, J."
The Honourable Mr. Justice T.R. Brooke