IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pieper v. Kokoska and BCSPCA,***
2004 BCSC 1547

Date: 20041125
Docket: 36423
Registry: Kamloops

Between:

William Pieper

Petitioner

And

Special Provincial Constable Kent Kokoska and The British Columbia Society for the Prevention of Cruelty to Animals

Respondents

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the petitioner	J.M. Drayton
Counsel for the respondents	D.P. Montrichard
Date and Place of Trial/Hearing:	November 5, 2004 Kamloops, B.C.

INTRODUCTION:

[1] This is a petition under the ***Judicial Review Procedure Act*** (the "***Act***"). Thirty dogs and five cats were seized from the petitioner's possession on July 27, 2004. They were seized pursuant to the ***Protection and Prevention of Cruelty to Animals Act***, s.11. They were subsequently disposed of by the Society pursuant to s.18 which provides:

> 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.

[2] No issue was raised with regard to the cats. The petitioner's primary concern is the dogs which were English Mastiffs and one Pug. The petitioner is a dog breeder specializing in English Mastiffs. The Pug was described as a family pet.

[3] The Mastiffs were disposed of by the British Columbia Society for the Prevention of Cruelty to Animals (the "Society") when they were given to two separate groups involved in finding homes for Mastiffs. Counsel agree it is reasonable to assume that on the disposition of those animals, that there was a requirement that when they are adopted out,

that they would be neutered or spayed. The Pug was adopted by a family.

[4] The petitioner argues that he was not given an opportunity to be heard before the Society exercised its discretion to dispose of the dogs.

[5] The petitioner argues that I should not be concerned about the original seizure. He is abandoning a claim in the petition seeking a declaration regarding the validity of that seizure. The petitioner seeks only a declaration that "the subsequent decision made by the respondent, the B.C. Society for the Prevention of Cruelty to Animals to sell or otherwise dispose of the petitioner's animals in the manner it did was *ultra vires* and void, and costs."

[6] With regard to the disposition, the petition particularly alleges:

> 1. the Society breached the principles of natural justice or the duty to be procedurally fair, and particularly the Society:
>
> a. refused or failed to provide the Petitioner with particulars of the claims made against him;
> b. refused or failed to advise the Petitioner of the evidence in support of the claims;
> c. refused or failed to provide the Petitioner with an opportunity to be heard;

d. refused or failed to consider or adjudicate upon the Petitioner's request to have his animals returned; and
e. refused or failed to give reasons for its decision;

2. the Society ignored relevant evidence, namely the evidence of the registered veterinarian engaged by the Special Constable;

3. in the alternative, the Society exceeded its jurisdiction and fettered its discretion when it spayed or neutered the Petitioner's animals, when it failed to obtain compensation for the Petitioner's animals and when (if it did) it applied certain non-statutory standards in assessing the Petitioner's kennels;

4. by reason of the foregoing, the decision by the Society was void, unauthorized, or otherwise invalid.

MOOTNESS

[7] The petition does not seek any remedy other than a declaration that the decision to dispose of the animals in the manner in which the animals were disposed of was *ultra vires* and void, or alternatively, for an order quashing the decision. There is no claim for damages. The animals have been disposed of, and there is no order sought that they be returned. The petitioner is simply seeking a declaration that the Society did not provide him with procedural fairness. I told counsel I was concerned about dealing with this issue in what amounts to a vacuum in the sense that there appears to be no other issue remaining between the parties. The

petitioner's response is that he was unjustly, or improperly treated, and that he is entitled to a declaration to that effect. The Society says that they would like some direction from the court as to what their obligations are with respect to hearings in these situations, although they do acknowledge they have an obligation of procedural fairness.

[8] Since the original seizure, there have been additional dogs seized as late as November 1, 2004, and counsel believe a decision in this case may provide some guidance for the future case.

[9] There is no assurance or way of knowing what, if anything, would be done with the decision, if I make it, and whether it would be used as a basis for argument in a claim for damages or otherwise, and that gives me some concern.

[10] I advised counsel that I would hear their submissions, but ask them to consider the issue of whether I should proceed, or whether the issue was moot. Petitioner's counsel has provided an argument on mootness filed November 10, 2004. I have not heard from the respondent in reply. I assume that is because they wish to have a decision rendered as well. The petitioner argues that although a claim for damages may be an option, that it is fraught with difficulties and additional issues, such as the measure of those damages in a situation

such as this. The petitioner says that not only was there commercial value to the English Mastiffs, but a personal concern about the house dog, and that damages relating to that pet would be difficult to assess. The petitioner argues that there are ongoing dealings between himself and the Society, and that a damages action would simply place the parties in an adversarial position, which would be detrimental to the ongoing relationship. Both parties recognize the costs and complexities of such an action.

[11] The petitioner also recognizes that now that the animals have been disposed of, that an application to quash the decision to dispose of them would not be appropriate. The petitioner cites **Judicial Review of Administrative Action**, de Smith, third edition at p. 377:

> The courts have a discretion to refuse to issue certiorari to quash a decision which has been executed in such a manner (*e.g.* by the payment of money by or to persons who were not parties to the original proceedings) that the quashing of the decision can have no direct effect in restoring the state of affairs obtaining before it was made.

[12] The petitioner argues that although the issue of whether he was afforded procedural fairness required under the ***Act*** could be resolved as one of the issues in a damage claim, it is preferable to do so in the form in which the petition is

framed under the ***Judicial Review Procedure Act***. He argues that he should be free to select the manner in which he wishes to proceed, and the court should consider the fact that the respondent is not opposed to such a procedure. He argues that in the circumstances of this particular case, that this is a better use of judicial resources than a damages trial.

[13] The ***Judicial Review Procedure Act*** allows an application by petition. The court may grant relief, including:

> **2**(2) …
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
>
> **"statutory power"** means a power or right conferred by an enactment
> …
> (b) to exercise a statutory power of decision
> …
> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, …
>
> "**statutory power of decision**" means a power or right conferred by an enactment to make a decision deciding or prescribing:
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, ...

[14] The ***Prevention of Cruelty to Animals Act,*** which I will refer to later, does confer a statutory power and statutory power of decision on the Society.

[15] The petitioner refers to de Smith at p. 424 as follows:

> But it is sometimes neither necessary nor desirable for a legal dispute to be settled by the threat of coercion. If one has a dispute with a friend and a ruling by a Court of law on the relevant issues is required, it is incongruous for one to be obliged to ask the Court to award sanctions against him. And no matter what may be the personal relationship of the parties, litigation in which sanctions are sought is apt to generate an acerbity which is contrary to the interests of the parties and of the community. Again, it is often unseemly to proceed on the implied assumption that the Defendant will fail to observe the law as declared by the Court unless contingent sanctions exist. Especially is this true where the Defendant is a body invested with public responsibilities … There are also cases where the award of coercive relief would be unfair to the Defendant but where the validity of the Plaintiff's claim against him warrants formal judicial recognition. In all these classes of cases it is highly advantageous for the Courts to have power to make binding declarations of the rights and duties of the parties, without the necessity of decreeing any consequential relief.

[16] The petitioner argues that the matter is not really moot simply because the dogs have been disposed of. He argues that there is still a live issue, or a live controversy between the petitioner and the Society, and points to the fact that fifteen other dogs have recently been removed by the Society from the petitioner. The petitioner further argues that even

if the matter is moot, there is a discretion to hear the issue, and that discretion should be exercised.

[17] The petitioner refers to the decision ***British Columbia Transit v. British Columbia (Council of Human Rights)***, 1991, 0604 CA011439. The issue in that case was whether or not the rules of natural justice had been breached when the ***British Columbia Council of Human Rights*** failed to give ***British Columbia Transit*** an opportunity to be heard when the council decided whether to proceed with an investigation of a complaint by an employee. The complaint dealt with the issue of compulsory retirement at age 65. It was argued that because the Supreme Court of Canada, in a separate case, had decided that a contract of employment could impose a mandatory retirement age, that the issue raised by the employee was moot. The council moved to dismiss ***B.C. Transit's*** appeal from a decision that had dismissed ***Transit's*** petition that sought an order prohibiting the council from proceeding with its hearing into the complaint, and setting aside the council's decision to proceed with the complaint. The council argued that because the law had now been clarified, the complaint was no longer an issue and ***Transit's*** application under the ***Judicial Review Procedure Act***, complaining about the procedures followed, was moot.

[18] The court decided that there was still an issue between the parties, and in any event, the court should exercise its discretion and hear the matter on the basis of full arguments. The court found that ***Transit*** had other employees, and it was not unrealistic to anticipate further complaints under the ***Act.*** The court found that ***Transit*** did have a real and significant interest in having the court decide whether ***Transit*** was entitled to be heard during the investigation of a complaint. In discussing the issue of whether there was a live controversy, and whether the court should exercise its discretion, the court stated at p. 5, referring to "live controversy":

> That was the expression used by Mr. Justice Sopinka in ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. At page 353 he said:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot

cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relation to the exercise of the court's discretion are discussed hereinafter.

Mr. Justice Lambert in giving judgment for the Court in ***Cowling v. Brown*** (1990), 48 B.C.L.R. (2d) 63, referred to that passage and said at pages 66 and 67:

Even if a matter is moot within that general description, there is a power in the court to exercise its discretion in favour of hearing and deciding the appeal. The general rule is that if the matter is moot the court should not deal with it. The exceptions arise in special cases. An example is the case where rights arise and are terminated by the effluxion of time in a brief period, and if the court does not agree to hear a moot case in those circumstances similar rights in the future will never be adjudicated upon.

In the ***Borowski*** case Mr. Justice Sopinka talks about the basis for the exercise of the discretion to hear an appeal that is moot. He talks about three points that affect that decision of policy and practice.

The first point is that the adversary system is the basis on which the courts' confidence in resolving legal disputes rests, and if the matter is not being vigorously contested, the court does not have the benefit of the submissions from counsel which permit sound decision-making. The second point referred to Mr. Justice Sopinka is concern for judicial economy. There are continuing pressures at all levels of court to decide real issues which have important effects on parties who could be very seriously affected by the decision. For that reason the courts should not allow themselves the luxury of pursuing intriguing questions which have no real effects.

The third point referred to by Mr. Justice Sopinka is properly called judicial restraint. It takes heed of the need for the courts to have a sensible understanding of the relationship between

> the functions that are properly to be exercised by the courts and the functions that must be exercised by the legislative branch in Parliament or by the administrative branch of government, and for the court to be wise in making sure that the proper balance prevails.

[19] I am satisfied that there still remains a live issue between the petitioner and the BCSPCA regarding the type of hearing that the petitioner would be entitled to before animals seized are disposed of. The petitioner at present continues to try to breed and care for animals, and additional animals have been removed from his control. I am satisfied that even if there were not a live issue, that I should exercise my discretion to grant a decision in this case. I consider the position of the petitioner and the respondent in seeking such a decision. I also consider that it is a matter which arises on a regular basis.

[20] The relevant legislation is the ***Prevention of Cruelty to Animals Act***, R.S.B.C. 1996, c.372. Section 3 provides for the continuation of the B.C. Society of the Prevention of Cruelty to Animals with perpetual succession and a corporate seal. The Society is given certain powers under the ***Act***, including the powers under s. 11 to take animals into custody, and s. 18 to dispose of animals. Section 20 deals with the costs and proceeds of disposition. They make the owner responsible for

the costs and can require those costs to be paid before the animals are returned to an owner. As well, the Society may pay the costs of seizure, disposition or care etc. from any proceeds they receive when the animals are disposed of. Where there are excess proceeds, the owner may, within six months of the animal being taken, claim the balance from the Society.

[21] Section 26 allows the lieutenant governor in council to make regulations requiring the Society to make bylaws with respect to the policies and operational procedures of the Society for administering the enforcement provisions of this Act (s. 26(2)(a)). I am told that no such regulation has been passed, and there are no bylaws that deal with the procedures that should be followed when the Society proposes to dispose of animals pursuant to s. 18.

[22] It would be useful to the Society and the people they deal with if such regulations and bylaws were passed. This would provide certainty to all parties involved, and assist the Society in carrying out its authority under the ***Act*** and accomplishing the purposes of the ***Act***, the relieving of distress in animals.

[23] Both counsel agree that in circumstances where a statute authorizes the taking of a person’s property, in this case animals, and there is no provision for a form of hearing, that

a person is entitled to be heard. (***Painter v. Liverpool Gas Company*** (1836), 3 AD. & E. 433. ***Cooper v.The Wandsworth Board of Works*** (1963), 14 C.B. (N.S.) 180, 143 E.R. 414).

[24] Counsel agree that where the process has not been determined by the statute, that the Society then should determine its own procedure, but there is still a requirement of procedural fairness. The extent of the procedural obligations may be determined by the nature of the decision, the relationship between the decision maker and the person asserting a claim to procedural fairness and the affect of the decision on that person's rights. ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653. The obligation may also be affected by the finality of the decision. In this case there is no right of appeal from a decision of the Society. The petitioner also argues that where, as in this case, the Society is involved in the investigation, as well as the decision making role, that the requirements for procedural fairness are even greater (***Irvine v. Canada (Restrictive Practices Commission)*** 1987 1 S.C.R. 181).

[25] Counsel both agree that the "hearing" may take different forms. The form of hearing could range from a simple exchange of correspondence, to a right to make submissions, and to a complete oral hearing with the ability to call witnesses and

to examine or cross-examine. The type of hearing that meets the requirements of natural justice varies from case to case.

[26] Some of the factors that might be considered in determining the nature of the hearing under this Act would include the following:

1. Prior dealings between the Society and the person from whom the animals are seized;

2. Communications between the Society and the person from whom the animals are seized;

3. Responses to seizures and communications, and the ability or willingness of the individual to respond or remedy the concerns;

4. The circumstances leading to the seizure itself;

5. The number and value of the animal seized;

6. The type of animals, whether they are livestock or commercial property, or whether they are personal pets;

7. The cost of retaining the animals, and the need to dispose of them quickly;

8. The ability to dispose of them in a reasonable time.

[27] The respondents argue that despite the fact there is an obligation for procedural fairness, that the petitioner had any hearing he was entitled to, because throughout the investigation starting in January of 2004, he was aware of the concerns of the Society.

[28] The circumstances and the background of this case must be looked at to determine what form of hearing was required. The respondent, Kokoska, has filed an affidavit #1, sworn October 22, 2004, in which he relates his dealings with the petitioner. He has been an employee of the Society for fourteen years as an animal cruelty investigator, and is a special provincial constable.

[29] Mr. Kokoska attended at the petitioner's premises on January 5, 2004, and explained that he was investigating complaints received from the public about several cats, and approximately fifty English Mastiffs on the property. Mr. Kokoska explained to the petitioner about the complaints and asked if he could see the dogs and view the premises. The petitioner consented. Mr. Kokoska viewed sixteen kennels in a building referred to as the first out building. He noted an overpowering smell of urine, and the fact that there were no outside runs available. He also viewed a second out building which was smaller. He saw a total of forty English Mastiffs;

several that appeared to be thin and emaciated. The petitioner became agitated when Mr. Kokoska expressed his concerns. The petitioner confirmed there were seven or eight dogs and several cats in the house, but due to his wife's illness, did not wish Mr. Kokoska to examine the residence. Mr. Kokoska told the petitioner that improvements had to be made to the ventilation of the out buildings and that they required cleaning.

[30] The Society again received complaints from the public on June 8, 2004 of starving dogs and filthy kennels, and cats in the house with diarrhoea. Mr. Kokoska attended the premises on June 23, 2004, but no one was home. He left a note, but also noticed a "rank stench of feces in the air." Mr. Kokoska again attended on June 28, 2004, by arrangement, but due to an emergency at his place of employment, the petitioner could not be there. Mr. Kokoska noticed three dogs in the yard, and two penned in the area. One female had predominant ribs and the other tumours on her body.

[31] Mr. Kokoska attended, by arrangement, on July 5, 2004. He provided the petitioner with a "Code of Practice for Canadian Kennel Operations" published by the Canadian Veterinarian Medical Association, and showed the petitioner a copy of an inspection sheet used by the Society with respect

to kennels. Photographs were taken and are attached to Mr. Kokoska's affidavit. Mr. Kokoska's evidence is that the petitioner acknowledged the kennels were in need of repair, but complained that the Society had earlier offered to help him, but had failed to do so. Mr. Kokoska made suggestions to the petitioner as to where he may obtain free materials for repairs to the kennels.

[32] Mr. Kokoska reported that the first and second kennels had fresh water and the floors were clean of feces, but the walls were filthy. A third out building held eight Mastiff dogs, one with an open wound. The petitioner said he had not noticed the wound before, and immediately treated it with a veterinary spray.

[33] Two of the dogs in the first building had "cherry eye" condition that causes discomfort to the animals and requires veterinarian attention. Another dog appeared to be very thin with ribs showing.

[34] Mr. Kokoska discussed his concerns with the petitioner, and discussed the need for veterinarian attention. He issued an order to the petitioner, requiring that five dogs receive veterinarian examination and treatment within ten days, and that a vet attend the premises to examine the animals located

on the premises. The petitioner became upset, asked Mr. Kokoska to leave and said he would no longer deal with him.

[35] Mr. Kokoska met with the petitioner on July 15, 2004. The petitioner told Mr. Kokoska he was having trouble finding a veterinarian who would be prepared to attend. He also indicated he was concerned that the dogs would be at risk if they were put under anaesthetic to deal with the “cherry eye”.

[36] The petitioner said he wanted to reduce the number of dogs to 20, and was placing them in homes as fast as he could. He indicated he had done nothing else, nor did he intend to do anything else with respect to the concerns Mr. Kokoska had discussed with him about the condition of the dogs. Mr. Kokoska advised him he could surrender the dogs to the Society if he wished at no cost. The petitioner indicated that he would lose his credibility as a breeder, and would never surrender them.

[37] Mr. Kokoska advised the petitioner that he would have to have a vet attend, and if he did not do so, then the Society would have no choice but to attend with a vet. The petitioner agreed to have a vet attend as soon as possible. It appeared the petitioner was unwilling or unable to obtain the assistance of a vet, and Mr. Kokoska was concerned that the animals were in distress.

[38] Ultimately, a search warrant was obtained under the ***Act***. The warrant was executed on July 27, 2004. A veterinarian attended as well as others.

[39] Again, Mr. Kokoska found that there was an overpowering smell of urine in the residence, and the floors were extremely dirty. The crates on the residence in which some of the dogs were kept and were dirty as well, and several cats were in bad condition. Photographs were again taken. There were thirteen dogs and several cats in the residence. Seven of the dogs had ear infections, but the dogs were in generally good body condition.

[40] The second out building was in poor condition, with feces being evident on the floor and walls. The first out building reeked of urine. The kennels had holes in the floors and walls, and some of them had been chewed apart, and there were nails protruding in places. The veterinarian considered the conditions to be unhygienic, and the dogs had hard, wet surfaces to lie on. There were a total of forty-eight dogs, and the vet was of the opinion that the number of dogs and the housing conditions would put them in distress. Only nine of the Mastiffs, the Pug and five cats were taken by the Society. The petitioner complained that he had not been given enough time to repair the kennels.

[41] Mr. Kokoska said he would follow up with the petitioner to see that the standard of care for the remaining animals was acceptable, and the petitioner advised that communication should be through his lawyer.

[42] The large number of animals and their size created problems for the Society in providing for the animals. On July 30, 2004 a notice of seizure and notice of disposition was served by registered mail on the petitioner. The notices were pursuant to s. 11 and s. 19 of the ***Act***. The notice indicated that the Society intended to dispose of the animals within 14 days after mailing the notice.

[43] The petitioner did write to the Society on July 29, 2004 objecting to the seizure, and stating that the animals were not to be sold or altered in any way until the court proceedings had been concluded. He was not seeking to be heard by the Society at that time.

[44] In response to the notice of disposition, the petitioner wrote a letter on August 9, 2004 asking for an extension of time to retrofit his kennels to the standards set out in the Canadian Standards of Kennel Operations.

[45] The petitioner’s counsel wrote to the Society on August 11, 2004 asking for the return of the animals, and asking the

Society what its intentions were, and seeking copies of all particulars, including a copy of the warrant. The Society confirmed by letter dated August 12, 2004 that its intention was to dispose of the animals.

[46] On September 1, 2004, petitioner's counsel again faxed a letter to the Society opposing the disposition of the animals. The Society, through its counsel, responded on the same date. The letter of September 1, 2004 from counsel to the Society, referred to the rules of natural justice, including an opportunity to know the claim made and the evidence in support of that claim and an opportunity to be heard. Among other things, the letter demanded:

- the Society advise counsel of the justification for the seizure of the animals, and the evidence in support of that;

- an opportunity for the petitioner to be heard, including a full hearing with witnesses to determine if the animals should be returned or disposed of.

[47] A letter from the Society's counsel in response confirms that the animals were taken pursuant to a search warrant and the authority of the ***Act***, because they were in distress. The

letter confirms that the notice of disposition had been mailed, and that the Society was proceeding with the disposition of the animals.

[48] The letter stated that the petitioner had an opportunity to know the claims and evidence against him, because of the information to obtain a warrant was on file in the Kamloops Court Registry of the Provincial Court and could be viewed there.

[49] Further correspondence was exchanged between counsel on September 2, 2004. On September 9, 2004, the Society's counsel advised the petitioner's counsel that the dogs had been disposed of, and two of the cats had be euthanized because they were in critical distress.

[50] It cannot be reasonably said that the petitioner was not aware of the concerns of the Society, or the reasons for the animals being removed from his care. The photographs of the state of the premise at the time of inspections and the apprehension clearly demonstrate that the petitioner was unable to adequately care for the animals.

[51] It would appear that the Society had concluded the petitioner was unwilling or simply unable to remedy the concerns that had been raised. The Society did receive

correspondence from the petitioner and his counsel, some of which was confrontational, some of which offered to remedy the concerns about the kennels and the care of the animals to the extent he was able to end a given time.

[52] The petitioner's and counsel's letters indicate that the petitioner believed that the vet in attendance had not authorized the taking of the animals. The affidavit of the veterinarian sworn October 22, 2004 makes it clear that the veterinarian's position that it was not his decision as to whether the animals should be apprehended and, therefore, he does not authorize the apprehension of animals. However, it is also clear from his affidavit and his description of the premises, that he recommended certain animals be removed "on the basis that the conditions were such that those animals would inevitably be deprived of an acceptable minimal standard of care and at least some of these animals were injured, sick, in pain or suffering." The veterinarian's opinion that the removal was justified was "based on the minimal space allotment for those dogs, and the poor housing and animal husbandry afforded to these animals." The vet also recommended the removal of the cats and the Pug. The Pug had chronic ear infection and untreated bilateral ear mite infection.

[53] The vet recommend to the petitioner that he seek immediate veterinarian advice and treatment for the dogs which were not taken in to custody, and advised him that the cherry eye condition of at least some of the animals could be treated surgically. The vet concluded that the animals showed indicia of “long-term neglect.”

[54] It is unfortunate that the Society did not correct the petitioner’s misapprehension about the opinion of the veterinarian that was raised by the petitioner’s counsel.

[55] There was a history of dealing and communication between the Society and the petitioner. The petitioner’s responses to the concerns raised by the Society had clearly been inadequate up to the time the animals were seized.

[56] A large number of animals were seized. The value is difficult to determine. The petitioner told Mr. Kokoska he sells the animals for $1,500.00 for a home quality animal, and $2,500.00 for a show quality animal. Obviously, he was having trouble disposing of the animals himself. I agree with the Society that it does not have a duty to obtain the “best price” for the animals. It is not a commercial organization and it cannot operate as a pet store. It must act reasonably in the exercise of its discretion of disposing of the animals and the way in which it does so (***Weir v. Ontario Society for***

the Prevention of Cruelty to Animals, [1999] O.J. No. 3516 (Ont. Ct. J.).

[57] The respondent's decision or policy to require that the animals be neutered when they are adopted out is not an unreasonable fettering of their discretion when they dispose of animals. They are not required to obtain the best commercial value or price for animals. In fact, they have difficulty disposing of such a large number of animals at any one time, the same way that the petitioner himself did. It is consistent with the purposes of the ***Act*** to relieve the suffering of animals, to try to prevent the over-population of animals. One way to do this is by having the animals which they adopt out neutered.

[58] These are large animals which require a great deal of food and room. The petitioner was having difficulty in providing for them, and they created stress on the Society's resources as well. The Society could not keep the animals indefinitely.

[59] The Society had already arranged for the disposition of the Mastiffs to two separate rescue societies by September 1, 2004. The Society informed the petitioner of this on September 9, 2004, but the evidence does not suggest that

there was any problem in delaying the disposition for a short period of time to receive the petitioner's position.

[60] Despite the number and potential value of the animals in this case, I find that an oral hearing was not necessary. However, I do find that the Society should have received the written position of the petitioner and considered it before disposing of the animals. It was not necessary for the Society to spell out its concerns or evidence in any more detail than had already been done, nor was it necessary to give the petitioner more than a brief period of time to provide his position, and his plan to remedy the concerns of the Society. He already had one month to do so before the animals were disposed of.

[61] I do not wish to be critical of the Society and consider the difficult situation they were faced with. It is understandable that the Society would have concluded that the petitioner, despite his best intentions, would simply be unable to remedy the problems. He had not done so from January to July, and there was no reason to expect that he would be able to on short notice. Had the Society given the petitioner a fuller hearing, the results may have been no different.

[62] I accept that the petitioner was concerned about his animals, but it is apparent that he was simply incapable of providing them with the minimal care they required. This inability, whether it was physical, financial or both, is apparent from the affidavits of Mr. Kokoska, the veterinarian, the other constables who attended at the residence and the photographs of the kennels.

[63] If the animals had been disposed of before the September 1, 2004 letter from petitioner's counsel, or if the evidence suggested it was not possible for the Society to delay the disposition one or two days after receipt of the letter, I would have found that the petitioner had not taken the opportunity he had to present his position to the Society. However, when the Society received the letter of September 1, it should have given the petitioner a short period of time to explain how he proposed to properly care for the animals and to demonstrate that he was capable of doing so.

[64] The petitioner is entitled to a declaration that he did not receive the type of hearing that he should have before the Society disposed of the animals. However, he is not entitled to a declaration that the decision was void, or any order setting aside that decision in that the animals have already been disposed of and cannot be returned.

[65] I have some sympathy with the respondents' position. Based on what was communicated to the petitioner and the physical condition of the kennels, and the animals that are obvious in the photographs attached to the affidavit, it should have been quite obvious to the petitioner what the concerns were. Despite the numerous attempts by the Society's officers to have these problems remedied, it would appear the petitioner was simply unable, whatever his intentions may have been, to deal with the problems. This could have been through lack of money or simply lack of ability. That being the case, the respondents may have believed there was no need for any further hearing. They may have believed the petitioner must have known what the problems were and had been given opportunities to address them and simply been unable to. They may have believed that there was nothing in any of his communications that indicated any change in his ability to do so, despite his professed intent to do so.

[66] The petitioner's position in response would be that may apply to the original seizure of the animals, but subsequently, he and his counsel both wrote letters objecting to the disposition of the animals, and requesting particulars of the complaints. He also argues that his second letter to the Society, that he wrote on his own, indicates his

willingness to comply with whatever requirements they had to improve his kennels, and seeks particulars. He would also argue that he did take some steps to improve the kennels and was prepared to take others.

[67] The matter was further complicated by the fact that the petitioner did not make it clear that he wished to have a hearing of some sort until his counsel's letter of September 1, 2004.

[68] The petitioner has obtained the declaration he sought, but only after abandoning the other claims he made in the petition dealing with the initial taking of the animals. It is clear, based on the evidence before me, that the petitioner had little, if any, chance of success on the issue of the taking of the animals. In addition, the petitioner did not really seek any form of hearing until the date the animals were about to be disposed of. I have also concluded that the petitioner was not entitled to the type of hearing which he was claiming, or one that included the opportunity to examine and cross-examine witnesses.

[69] In the circumstances, I find that the petitioner has only been partially successful in this application. Therefore, I find that each party should bear their own costs.

"R.E. Powers, J."
The Honourable Mr. Justice R.E. Powers

November 26, 2004 – ***Revised Judgment***

Corrigendum issued advising that on page 8, paragraph 15, it should read "binding" and not "binging".

On page 23, paragraph 49, it should read "euthanized" and not "euphonized".