**COURT FILE NO.:** 131/03
**DATE:** 2004/02/04



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **B E T W E E N:** | ) | |
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| BARRY BEYNON | ) | J. Sharkey, for the Applicant (Appellant) |
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| Applicant (Appellant) | ) | |
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| **- and -** | ) | |
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| ONTARIO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS | ) | K.C. Hill, for the Respondent (Respondent) |
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| Respondent (Respondent) | ) | |
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| | ) | |
| | ) | **HEARD:** January 12, 13, 14, 15, 19, 20, 2004 |

**J.S. O'NEILL**

## A . INTRODUCTION

[1] On March 31st, 2003, representatives of the respondent, the Ontario Society for the Prevention of Cruelty to Animals (the "society"), attended at the appellant's property in Seguin Township, in the District of Parry Sound, and issued the following orders pursuant to the *Ontario Society for the Prevention of Cruelty to Animals Act*:

(i) S. 13(1) – Order to take certain actions with respect to the 36 dogs on the property, as outlined in orders 1 to 12 on complaint number 68294.

(ii) S. 14(1) – Order removing 12 named dogs.

[2] On April 7th, 2003, representatives of the society returned to the appellant's property, and removed 27 additional dogs. One of those dogs was destroyed, with the advice of a veterinarian.

[3] The appellant appealed the society's orders pursuant to s. 17(1) of the Act, to the Animal Care Review Board. At the commencement of the hearing, the appellant advised the board that "the order made on March 31st of this year was not the subject of the appeal, but basically the order made later, of April 7th, was the purpose of bringing this appeal." At the hearing the board made the following findings:

> (i) ...we accept the evidence of Dr. Cornell in regards to her finding as to the distress at not only the time of March the 31st but also at the time of April the 7th when the second group of dogs were taken. ....
>
> (ii) The conditions, which are amplified by photographs taken, certainly justify that there is a problem with the area in which the dogs are kept. We have differing degrees in regards to the bedding but all – taking it all together and looking at all of the evidence, we do not have any difficulty in upholding the Order that was made by the Society.

[4] Schedule A, setting out 14 recommendations and conditions agreed to by both parties (except for number 2) formed part of the board's decision. In addition, the appellant was ordered to pay to the society $44,851.15 of the total costs of $57,611.15 incurred by the society for the costs incurred in providing the animals seized with food, care and veterinary attention.

[5] On July 10th, 2003, the appellant appealed the board's decision pursuant to s. 18(1) of the Act to the Superior Court of Ontario. A supplementary notice of appeal was filed on October 3rd, 2003 and it stated: "The appellant having finally received the written decision dated August 8th, 2003 does not agree with the total costs claimed by the OSPCA for the care of the dogs and does not agree with the reduction given the tribunal's other findings of facts." On October 6th, 2003, Gordon J. granted the following order, on consent, concerning this appeal:

> l. Order to go for this matter to proceed as a viva voce hearing with procedure prior thereto to be governed by the written terms attached hereto and initialed by myself.
>
> l. The issue in this appeal is restricted to the following:
> "The Appellant disputes the costs claimed by the OSPCA for food, care and treatment provided to the dogs removed from him and does not agree with the reductions in such costs, which was granted by the Animal Care Review Board in its decision."
>
> 2. The OSPC shall serve the Appellant's counsel with an updated, itemized summary of the costs of food, care and treatment it is

claiming, on or before October 21, 2003.

3. The Appellant shall serve upon counsel for the OSPCA no later than November 15, 2003, a list of the items in the costs summary which he admits and which he disputes.

4. This matter shall be set down for a viva voce hearing on the list of matters to be heard at the sittings of this Court commencing on Dec. 1, 2003.



[6] As at December 1st, 2003, the parties agree that the costs incurred by the society amounted to $128,169.59. When the appeal commenced on January 12th, 2004, these costs had increased to $148,371.59 and in accordance with Exhibit 24, filed, they have increased $13.00 per day per dog (38) since that date.

## B . THE ISSUES ON APPEAL

[7] S. 18(4) of the Act states:

> The appeal shall be a new hearing and the judge may rescind, alter or confirm the decision of the Board and make such order as to costs as he or she considers appropriate, and the decision of the judge is final.

[8] Accordingly, having to consent order of Gordon J. dated October 6th, 2003, my jurisdiction pursuant to s. 18(4), as well as the agreement by the parties with respect to the costs incurred and being incurred, the narrow issues on this appeal can be stated as follows:

(i) Should the costs order of June 26th, 2003 be rescinded, altered or confirmed?

(ii) To what degree, and in what amount, are the appellant and the respondent responsible for the costs of care incurred from June 26th, 2003 up to the present time?

[9] I will deal with each of these issues in turn.

## C. BACKGROUND INFORMATION

### (i) The March 3lst seizure and orders.

[10] Given that the seizure and orders made on March 31st, 2003 were not the subject of an appeal before the board, or to this court, I find it convenient to reproduce a portion of the board's summary with respect to what occurred on March 31st, 2003, found at page 5 of the board's transcript:

> To clarify the application, on the 31st of March, 2003, the Society attended at the property of the Appellant with a veterinarian, Dr. Mary Virginia Cornell, at which time there were numerous dogs on the property, mostly Husky, but also Alaskan breeds. After examining the animals she came to the conclusion that there were some of these animals in distress, as defined by the *Ontario Society for the Prevention of Cruelty to Animals Act* (the "Act"), and as the result of her findings she issued a Certificate of a Veterinarian under the Act for the seizure of 12 dogs, which at the time were removed, and as well she left an Order, or gave instructions for an Order, in relation to the remaining animals in regards to their care and maintenance, which was given to the owner. This Order was set out on that date, set out numerous conditions that were to be done in regards to the animals that were left on the property.



[11] It is to be noted that compliance times with respect to the orders and directions issued on March 31st, 2003, relating to the dogs remaining on the appellant's property, were as follows:

> Orders Number 1 and 5 – April 1st, 2003 by 5:00 p.m.
> Orders Number 2, 3, 4, 6, 8, 9 – April 7th, 2003 by 9:00 a.m.
> Orders Number 10, 11, and 12 – April 3rd, 2003 by 12:00 p.m.

**(ii) The April 7th seizure**

[12] The board had the following to say about the subsequent seizure of 27 dogs, which occurred on April 7th, 2003:

> Subsequently, the Society re-attended at the property on April the 7th, 2003, and Dr. Cornell again was present and viewed the state of the remaining animals and their conditions. She set out, in detail, the conditions which the animals were in and has before us given a description of each animal as she examined it and then her observations were taken down by a worker and presented to this hearing in regards to the condition of those animals. She also made observations as to the premises and the conditions in which the animals were living. As a result, she then further issued a Veterinarian Certificate for the seizure of another 27 animals, which was done at that time. The Certificate was issued because of her finding that in her opinion the animals were in distress. As well, it was also stated that some of the conditions that had been given beforehand had not been complied with, which was going again to the well-being of the animals, causing her further concern.

**(iii) The Evidence of the Appellant**

(a) Barry Beynon

[13] The appellant is 58 years of age and he has been in the dog sledding business for approximately seven years. He and his spouse own 23 acres of land in Seguin Falls, east of Orrville, Ontario, in the District of Parry Sound. The appellant operates a dogsled tour 13 weeks

of the year, between January and mid March. He has operated tours at Magnetawan and Killarney, and he has worked with parties at the Tim Horton's Camp on Lorimer Lake, outside of Parry Sound. The appellant's business has become known to various embassies throughout the world. None of the persons which whom he has worked has ever issued a complaint about his dogs or the operation.

[14] The appellant arrives 70% of his yearly income from his dogsled operation (approximately $35,000.00 net).

[15] At the hearing, the appellant described in detail his general day to day care of the dogs including the feeding routines in the winter, and during other times of the year. The appellant confirmed that by the end of the racing season, his dogs were lighter in weight, but that they would regain their weight in two to three weeks.

[16] The appellant also described the types of dewormer medicine that he would give to his dogs at the end of each season and how he would chain them together in order that they might play with one another.

[17] The appellant's season ended on or about March 25th, 2003. On March 21st he had been to Magnetawan and 36 dogs were on a tour near Killarney. The appellant stated that on March 19th, he and his spouse had agreed to put down seven dogs, all of which were named by him. The appellant had 49 dogs on March 17th, 48 of which were tour sled dogs and one of which was a house pet.

[18] Various photos were filed on the hearing depicting the condition of the dogs at various dates. The appellant indicated that when the March 31st order was made, he began to comply with the various directions set out in the order, including the requirement that he take four dogs to his veterinarian. These dogs were seen by Dr. Smith.

[19] The appellant detailed the steps that he had taken between March 31st, 2003 and April 7th, 2003 to comply with the order and directions made. He acknowledged the following, with respect to these complaint numbers:

Complaint Number 1 – Not totally completed – I was working on this.
Complaint Number 2 – There had been a snowstorm on April 5th and "some had been cleaned up – some efforts made".
Complaint Number 3 – I received a report that said "Nothing wrong with feeding program".
Complaint Number 4 – There was no mud on the 7th – we had moved 2 dogs.
Complaint Number 5 – I complied with it – it takes awhile to regain weight.
Complaint Number 6 – I had fixed 4 to 5 of these barrels and skids – we were working on them.
Complaint Number 7 – I had not gone to Huntsville yet, to get straw.
Complaint Number 8 – No changes were made – I have, since the June 26th, 2003 Schedule A order, made these changes.

Complaint Number 9 – We were treating lice with a horse spray – Dr. Cornell did not agree with this – I discussed this with Dr. Smith and he said this was okay.

Complaint Number 10 – I took in the samples on April 3rd and I picked up the deworming medication that had been ordered, on April 18th.



[20] The appellant indicated that he was not informed that his premises would be revisited on April 7th. He indicated that Inspector Martel made notes on March 31st, when Dr. Cornell advised Ben Galley as to the conditions of the animals. The appellant stated that he believed that as long as he followed the March 31st order and directions, all would be okay. He confirmed that he did not appeal the March 31st order to the board.

[21] On April 7th, 2003, Agent Chubbs, Dr. Cornell and Inspector Martel came to the appellant's property. The appellant showed Dr. Cornell his lice spray and she did not approve of it. Agent Chubbs took detailed notes on a list and various photographs, entered as exhibits on the hearing, were taken of the 27 dogs seized. The appellant reviewed at the hearing photos of all of the dogs and he identified them by their name, and he detailed their individual condition. The appellant stated that in his view, there were some discrepancies as to the identification of dogs treated, as compared to those dogs seen in the photographs. In my view, while this statement may have been true to a small degree, it was not necessary that this issue be examined in great detail, given the issues on appeal and the position taken by the parties with respect to those issues.

[22] The appellant stated that he understood that most of the dogs were seized on April 7th, 2003 on the basis that they were in distress because they were too thin. The appellant also indicated that on the March 31st list, some of the dogs which were described negatively were never seized and that some of the dogs that might have been positively described were nonetheless seized on the basis of the certificate issued by Dr. Cornell. Finally, the appellant reviewed in detail evidence relating to the dogs which were seized, as compared with subsequent reports outlined in the veterinarian's notes with respect to the condition of the dogs. These notes detailed, in several cases, the weight gain experienced by various of the dogs between April 7th and April 22nd.

[23] The appellant indicated that no negotiations took place between April 17th, the date of the letter from the Ministry of the Attorney General rescheduling the hearing from April 21st, 2003, to May 22nd, 2003, when the hearing before the review board commenced. The appellant further confirmed that except for condition number 2, all of the other terms and conditions attached as Schedule A were agreed to by him and by the respondent.

[24] The appellant detailed the following additional visits made by representatives of the respondent to his property after June 26th:

(i) Agent Galley and Inspector Martel attended on the property on July 23rd, 2003

and a complaint was made with respect to the dog Rooster. The appellant had this dog checked with his vet and testified that the "hot spot" was not a serious concern.

(ii) Another visit took place on December 23rd, 2003 and the final visit took place on December 31st, 2003. The respondent had received information that the appellant had more dogs on his property and he was ordered to follow certain directions which were outlined in the December 31st, 2003 document. In particular, he was ordered to follow Schedule A with respect to the 27 dogs on his property and to comply with it by January 31st, 2004.

[25] The appellant testified that he had taken the following steps by December 31st, 2003 to implement the 14 conditions outlined in Schedule A:

1. Housing secured.
2. Dog chains of appropriate length were utilized.
3. Qualified dog food obtained.
4. Spill proof cans installed.
5. Fecal matter cleaned up around yard.

The appellant testified that on December 20th a loose dog upset a good portion of the yard but this problem was corrected by December 31st.

[26] The appellant further testified that the following conditions in Schedule A were not completed by December 31st:

l. He had not sent in his invoices for dog food purchases.
2. He had not placed a flap over the opening to the kennels.
3. He had not sent a signed direction from Dr. Smith to the society.

[27] The appellant is presently facing criminal charges in relation to the events and circumstances of March 31st and April 7th, 2003. A charge was laid on September 9th, 2003. The appellant also testified at the hearing with respect to earlier Criminal Code charges that had been laid, and the result of those prosecutions. Evidence was also given with respect to by-law charges, and the results of these charges.

[28] The appellant's position on the appeal was that if the 38 dogs had been returned to him, after June 26th, 2003, he would have taken the necessary steps, in short order, (in addition to the steps that he had already taken) to ready the site for the dogs. The appellant testified that as only a complaint was made with respect to Rooster and Zak on July 23rd, 2003, it ought to have been the case that the remainder of his dogs be returned to him at that time.

[29] Evidence was given at the hearing with respect to the costs which the appellant would have incurred had he himself cared for the 38 dogs between March 31st, 2003 and the date of the appeal hearing. The costs summary is broken down as follows:

| | |
|---|---|
| March 31st to April 17th | - $ 820.80 |
| April 18th to April 30th | - $ 592.80 |
| May 1st to July 10th | - $2,347.26 |
| July 10th to September 15th | - $ .87 per day per dog |
| September 15th to present | - $1.20 per day per dog |

[30] The appellant confirmed that after the June 26th board ruling, he required and desired the return of at least 18 of his sled dogs, in order to carry on his touring business. Accordingly, an offer was made on June 27th, 2003 and summarized in the letter filed as Exhibit 33. The respondent replied to this offer, and in the Exhibit 34 letter, it requested "some" down payment and "some" security if payment of the sum of $44,851.15 was to be paid as proposed by the appellant. The appellant indicated that no further offers or counterproposals were made after June 27th, 2003 relating to the costs repayment issue.

[31] At the close of his examination in-chief, the appellant referred to 13 photographs taken on March 23rd, 2003 at the Sportsmen's Inn in Killarney. The appellant stated that these photographs demonstrated that the dogs on that date were "happy-go-lucky" and that they had no injuries.

[32] In cross-examination, the appellant stated that he no longer trusts the respondent. He categorized their actions in March and April of 2003 as harassment. In particular, the appellant indicated that he did not agree that the 27 dogs had to be removed on April 7th, 2003. The appellant confirmed that he could have controlled some of the costs incurred commencing March 31st, 2003 by surrendering the dogs seized on that date. Counsel for the respondent reviewed the history of the society's involvement with the appellant, commencing in the spring of 2001. When asked about the seizures which occurred on April 7th, 2003, the appellant confirmed that not all of the directions issued on March 31st, 2003 had been complied with due to a snowstorm and the loss of another day when the appellant took his dogs to Dr. Smith. He acknowledged that on May 22nd, 2003, he indicated to the Animal Review Board that he did not intend to abide by the order requiring him to separate the dogs from one another. He confirmed that Schedule A had been put into effect, by December 31st, 2003, except for four matters. The appellant confirmed that he had requested a hearing before the Animal Review Board and that he did not wish to surrender any of his dogs. In particular, the appellant gave this answer, when he was asked whether he knew that the respondent would stop the meter running if his dogs were surrendered. "I wanted a hearing to indicate that the dogs were wrongly taken and that's why we are here today." Various photographs were shown to the appellant under cross-examination and he was asked questions with respect to the condition of different dogs.

[33] In re-examination, the appellant confirmed that he did not want to surrender any of his dogs because dog touring was his business and he needed his dogs to pay his bills, including the bill ordered to be paid by the Animal Review Board.

(b) Dr. Ronald Smith

[34] Dr. Smith gave evidence on behalf of the appellant both at the Animal Review Board hearing, and at the court appeal. He examined the four dogs which Mr. Beynon brought to him on April 3rd, 2003. Dr. Smith gave detailed evidence with respect to Betsy, Mugs, Adidas and Casper. He testified that he did not feel that Adidas was in distress and he questioned why this dog was seized on April 7th. Dr. Smith saw eight additional dogs on April 19th, 2003 in furtherance of an additional order made by the respondent on April 17th, 2003. Dr. Smith also gave evidence with respect to examinations which he has carried out on additional dogs on July 24th, 2003 and January 2nd, 2004.

[35] In cross-examination, Dr. Smith confirmed that Dr. Cornell had seen many more dogs that had he, on March 31st and April 7th, 2003. He confirmed that environmental factors can also determine whether animals are in distress. He further indicated that no further PCV tests were carried out after April 3rd, nor did the appellant follow up with the deworming process after six weeks.

**(iv) Evidence of the Respondent**

(a) Michael Draper

[36] Mr. Draper has been an inspector with the respondent society since February, 1992, and a chief inspector since September of 2001. He testified at the hearing that the society operates 27 animal shelters, two clinics and one wildlife shelter in the Province of Ontario. The respondent society is 99% funded through donations, bequests and fundraisers, and 1% government funded. The respondent carries out investigations with respect to cruelty to, and neglect of animals and it also investigates matters involving Criminal Code charges. Mr. Draper indicated that a disclosure brief was given to the Crown Attorney's office, a charge was laid in early September, but that there was no connection between the appeal process and the Criminal Code process.

[37] Mr. Draper indicated that the society's practice, when a costs award is made against an owner, is to work out, if possible, reasonable terms of repayment. Mr. Draper testified that the respondent offered to the appellant that he could surrender his dogs, both before and after the Animal Review Board hearing, in order to avoid or alleviate a costs repayment order. Mr. Draper further indicated that the respondent was prepared to forego a costs recovery with respect to Dr. Cornell's veterinary bills, and trucking expenses, in order to save further costs for care and shelter of the dogs. As the appellant wished to have a board hearing, this offer or position was not accepted.

[38] Mr. Draper indicated that after the board's order was made, the society requested some down payment and some guarantee of payment as previous invoices or bills had not been paid by the appellant. Mr. Draper indicated that the policy of the society, whether with respect to an appeal to the board, or an appeal to the Superior Court, was the same – that is – animals are not to be disposed of, or sold, as this removes, before the appeal is concluded, an owner's property rights. Mr. Draper testified that efforts were made to expedite the appeal hearing to the Superior Court. In a letter filed as Exhibit 49, dated August 18th, 2003, counsel for the society wrote to counsel for Mr. Beynon and stated:

> As you know, the Society is continuing to care for the dogs at great expense, which is increasing your client's exposure to liability for the costs. It is therefore imperative in the interests of both parties that this matter be resolved as quickly as possible.

[39] On September 15th, 2003, a motion was prepared by the respondent's counsel, returnable on September 19th, 2003. The motion was brought for an order dismissing the appeal for delay, or in the alternative, scheduling the appeal and giving directions regarding the hearing of the appeal. Included in the grounds for that motion was the following statement:

> The respondent continues to provide care and shelter for 38 dogs at great expense pending the appeal. The future of the dogs cannot be determined until the appeal is dealt with.

[40] On October 3rd, 2003 a supplementary notice of appeal was filed and as indicated earlier in these reasons, an order was granted by Gordon J. on October 6th, 2003 delineating the issues on the appeal.

[41] Mr. Draper stated that the respondent continued to feel an obligation to care and shelter the dogs on the following basis:

1. The appeal was still pending.
2. The appellant had not confirmed that he had complied with all of the terms and conditions in Schedule A or that he was able to do so.
3. If the appellant complied with the terms and orders of Schedule A and if he were to pay any amount found due and owing by the appeal court, the society would be required to return the dogs to him at that time.

[42] Mr. Draper indicated that the reports that he had received indicated that all of the terms and provisions of Schedule A had not been carried out, especially the term or condition that provided that food receipts were to be mailed to the society. Mr. Draper indicated that the cost of sheltering and caring for the dogs, including paying for veterinary bills and trucking expenses, had had an economic impact on the society. He indicated that this removal had placed pressure on other shelters and spaces.

[43] He stated that the dogs were not returned after March 31st, 2003 because:

(i) Many of the dogs were emaciated when they were seized.

(ii) Seven dogs had been euthanized.

(iii) The dogs had to be held pending the release of the board's decision on June 26th.

(iv) After June 26th, the appellant was not in full compliance with Schedule A.

[44] In cross-examination, Mr. Draper confirmed that he recommended that the Crown Attorney review the brief, to determine whether criminal charges were warranted. He advised Inspector Martel to speak to the Crown Attorney in this regard. Mr. Draper was asked why the respondent did not dispose of 20 of the dogs, after receipt of the correspondence from Mr. Ward dated June 27th, 2003. He indicated that while theoretically this could have occurred, once the notice of appeal was filed on July 10th, 2003, in accordance with policy, continued care and shelter was provided to the dogs pending the appeal. Mr. Draper was cross-examined with respect to the letters exchanged between Mr. Ward and Mr. Hill dated July 4th and July 10th, 2003. Although the respondent's position on July 10th, 2003 was to dispose of the animals, in accordance with s. 15 of the Act, this decision was changed once the notice of appeal was filed later that day. Mr. Draper indicated that because an appeal was in effect a new hearing, the respondent would be acting in bad faith if it sold the dogs prior to a decision being rendered.

[45] He further indicated that even after October 6th, 2003, when the appeal was narrowed to the issue of costs only, the dogs could not be disposed of, as Mr. Beynon was still disputing the costs order made by the board on June 26th.

(b) Ms. Jodie Chubbs

[46] Jodie Chubbs worked as an agent with the respondent at the relevant times. She attended at the appellant's property on April 7th, 2003. She testified that she had spoken earlier with Dr. Cornell and that Dr. Cornell had asked her to prepare for any scenario that might unfold on that date. Agent Chubbs testified that no decision had been taken ahead of time to remove the dogs but that preparations were made for a possible removal.

[47] On April 7th, 2003, agent Chubbs assisted Dr. Cornell and took notes while she carried out her examinations. Dogs were tagged, and duplicate numbers on April 7th, 2003, compared to March 31st, 2003 were preceded by the letter B. Agent Chubbs confirmed that there was a discrepancy between dog 0182 and dog 0182B. Agent Chubbs described the dogs general condition, on April 7th as follows:

l. Foul smelling.
2. Pelvic girdles could be felt.

3. Ribs visible or could be felt.
4. Spinal areas could be felt.
5. The condition of the dogs were similar to that of the dogs removed on March 31st.

[48] Agent Chubbs confirmed that the disclosure brief which she prepared was forwarded to Mr. Beynon's counsel shortly after the request was made to have records sent to Dr. Smith. She confirmed that any dog removed was done so under the strength of a veterinarian's certificate. She understood that in general, the results of blood tests, for the dogs removed on March 31st and April 7th, was abnormal. After several weeks, the condition of the dogs showed a vast improvement.

[49] In cross-examination, agent Chubbs indicated that she did not make the decision to rent a cube van for the April 7th removal. She confirmed that the respondent was not well organized on March 31st and that it took several hours to remove 12 dogs. She indicated that there was no more room in the cube van on April 7th, when the 27 dogs were removed. She stated that "We were not asking him to love or hug his dogs – but to feed, water and shelter his dogs". Agent Chubbs indicated on April 7th , agents were returning to follow up on the March 31st orders and to see if the appellant was fulfilling the basic necessities of care.

[50] She confirmed on that on April 22nd, 2003, Dr. Cornell reported that certain dogs were "alright" to be returned. She further confirmed that there was a loose dog on the premises, when she attended on December 23rd, 2003.

[51] In re-examination, agent Chubbs stated that on April 7th, 2003, the environment at the appellant's property had not changed very much from March 31st, and that some of the orders made on March 31st, 2003 had not been complied with. In addition, she had had conversations with Dr. Cornell, with respect to the results of blood tests taken of nine dogs seized on March 31st, and that based on these combination of factors, an evaluation of the dogs, and the condition of the site on April 7th, 2003, a decision was taken to remove additional dogs.

(c) Robert Martel

[52] Mr. Robert Martel gave evidence on behalf of the respondent. He has been an inspector for eight years. Dr. Cornell accompanied him when he attended on the property on March 31st, 2003. He had earlier been on the property on March 25th and he had found two dead puppies. Mr. Martel was also with Dr. Cornell on April 7th.

[53] Inspector Martel gave evidence with respect to his further attendances on July 9th, July 23rd, and December 31st, 2003. He confirmed that on December 31st, 2003, there were more dogs on the property, but that they all appeared healthy and that their living conditions and feeding and watering conditions were appropriate (with the exception of the dog Chase). Mr. Martel indicated that on December 31st, 2003, he asked Mr. Beynon whether he would be applying the terms and conditions of Schedule A to the new dogs that he had since acquired. Mr.

Beynon responded that he had been instructed not to comply with these Schedule A terms until the appeal was heard and concluded.

[54] In cross-examination, Mr. Martel indicated that he did not know who faxed the original complaint that led to the March 31st seizures. The complaint emanated from the Barrie OSPCA. Mr. Martel indicated that Dr. Cornell instructed him to remove certain dogs on March 31st, 2003 and that this was her decision to make. He confirmed that on April 7th, 2003, extra arrangements had been made to prepare for the possibility of further seizures.

[55] Mr. Martel confirmed that he spoke to the office of the Crown Attorney before the tribunal hearing commenced on May 22nd, 2003. He confirmed that between December 23rd and December 31st, problems on the site had been corrected. The December 31st order was made to ensure that the 27 dogs on site would be subject to the Schedule A order.

[56] Inspector Martel indicated that the following provisions of Schedule A were not complied with by December 31st:

l. The cradles had not been faced away from the prevailing winds.
2. Exterior flaps had not been applied.

(d) Ben Galley

[57] Ben Galley is an agent with the society and has been employed since February of 2002. He attended on the site on March 31st, 2003 and found approximately ten dead dogs, including some pups. Efforts had been made to retain a veterinarian who had experience with sled dogs and Dr. Cornell was subsequently retained.. He stated that Dr. Cornell had indicated that April 7th was a sufficient period to permit compliance with the March 31st orders and directions. He stated that there was no predetermination made to seize additional dogs on April 7th but that the respondent came prepared for this possibility. In cross-examination, Mr. Galley confirmed that a stray dog was found on the property on December 23rd.

## D. ANALYSIS

### (i) Should the costs order of June 26, 2003 be rescinded, altered or confirmed?

[58] Although the appellant is not appealing the orders made on March 31st and April 7th, 2003, or the Schedule A terms and conditions attached to the board's order of June 26th, 2003, he nonetheless takes the position that:

(i) All of the information needed by the respondent to seize all of the dogs on March 31st, 2003 was available and that the return to the property on April 7th, 2003 was a pretext, or predetermined, in order to complete the seizure process.

(ii) In any event, the return to the property on April 7th, 2003 was too short a time limit to enable the appellant to effectively comply with the conditions of March 31st, 2003, thereby setting him up, as it were, for failure.

[59] Accordingly, the appellant argues that had all of the dogs been seized on March 31st, 2003, the board's hearing could have been completed by April 17th, 2003, and the account for expenses for care and treatment of the dogs to June 26th, 2003, in the sum of $57,611.15, could have been greatly reduced. The appellant therefore argues that his share of this costs total could also have been greatly reduced under the circumstances. Total costs incurred to April 17th, 2003, inclusive of veterinarian bills, amounted to $13,175.44.

[60] I am unable to accept the appellant's view that the costs incurred between March 17th, 2003 and April 17th, 2003, as well as the ongoing costs between April 17th, 2003 and June 26th, 2003 be shifted to any greater degree onto the shoulders of the respondent than was ordered by the board. Firstly, primary liability for expenses incurred for provision of food, care or treatment on account of animals seized by the society rests with the owner, in accordance with s. 15(1) of the Act. In my view, the onus is upon an animal owner, and in this case, the appellant, to establish that grounds exist to shift all or a portion of the costs incurred from the owner back to the society. The grounds to justify the shifting of such expenses back to the society could include, for example, a finding that the society has:

(i) Acted in bad faith or abused its authority.

(ii) Acted negligently in its decision to seize animals, and subsequently incurred costs for their food, care or treatment.

(iii) Failed to return the animals to the owner at the earliest reasonable opportunity.

[61] I am not able to agree with the appellant's position, with respect to this portion of the costs incurred, due to the following:

(i) The appellant did not appeal the orders made, and the directions given, on March 31st, 2003.

(ii) By virtue of the order of October 6th, 2003, the appellant chose not to appeal the order of the board dated June 26th, 2003, (except the costs portion) or the terms and provisions of Schedule A.

(iii) The appellant did not appear interested in negotiating a resolution with respect to the April 7th seizure, before the board hearing commenced on May 22nd, 2003. Indeed, in evidence given to this court, the appellant stated: "I wanted a hearing to indicate that the dogs were wrongfully taken..."

(iv) The dogs removed on March 31st and April 7th, 2003 were removed following

an examination and inspection by an independent veterinarian having experience with sled dogs. Although Dr. Smith did examine four dogs that were also seen by Dr. Cornell, to a large degree, the findings which she made on March 31st and April 7th, 2003, were not challenged by other experts or veterinarians.

(v) Conditions with respect to the site, and many of the dogs, had not improved significantly, between March 31st and April 7th, 2003.

[62] I am not convinced that there is any reason to alter or rescind the order made by the board on June 26th, 2003. The board carefully reviewed the facts and circumstances relating to the events of March 31st and April 7th, 2003. The board also analyzed some of the delays which resulted in the hearing being shifted back to May 22nd, 2003. In addition, but for a failure to resolve the down payment and security issues, which I will address later, the appellant and the society largely accepted the board's apportionment of costs in its June 26th, 2003 ruling.

[63] In argument, the appellant seemed to suggest that he might be held responsible for costs incurred between March 31st and April 17th, 2003, and that the board be held 100% responsible for costs incurred between April 17th, 2003 and June 26th, 2003. Even if I were to accept that position, the appellant would therefore be responsible for costs incurred in the approximate sum of $13,175.44, a figure very close to the amount which the board ordered the appellant to repay on June 26th, 2003.

**(ii) To what degree, and in what amount, are the appellant and the respondent responsible for the costs of care incurred from June 26th, 2003 up to the present time?**

(a) June 26 to July 10, 2003

[64] Firstly, for the period June 26th to July 10th, 2003, I would assess responsibility for costs incurred equally as between the appellant and the respondent. During this period of time, both parties were, in good faith, trying to resolve the terms and conditions for repayment of the costs ordered to be paid by the board. It is clear that negotiations broke down when the appellant indicated that he was in no position to provide the society with a down payment and when no resolution could be reached with respect to the request for some security. In short, the costs which were incurred during this 14 day period were largely attributable to efforts made by both parties to achieve a payment agreement arising out of the boards costs order. The costs incurred for care, during this 14 day period were: 14 x $13.00 per dog x 38 dogs = $6,916.00. In accordance with the provisions of the Act, I would order that for this period, the appellant is responsible for costs incurred in the sum of $3,458.00.

(b) July 10 to October 6, 2003

[65] The period between July 10th and October 6th, 2003 raises different considerations. On July 10th, 2003, (Exhibit 54) the respondent's counsel wrote to the appellant's counsel and stated: "The Society intends to dispose of the animals in accordance with Section 15 of the OSPCA Act." Had this letter not been responded to, and had nothing further taken place, the 38 dogs would have been disposed, in some fashion, and the costs incurred after July 10th, 2003 would not have continued to mount and climb. However, in response to this letter, the appellant filed a notice of appeal on July 10th, 2003 which of course, was his legal right to do. Since receiving the notice of appeal, the respondent has continued to care for all 38 dogs.

[66] Earlier on June 27th, 2003 (Exhibit 33) the appellant's counsel wrote to the society's counsel and stated:

> ...Mr. Beynon needs the following 18 dogs returned as soon as possible in order to get them in shape for next winter so that he can continue to operate a viable business ... If for some reason the society wishes to hold the remaining 20 dogs as security Mr. Beynon has absolutely no intention of being responsible for any further costs that the Society might incur.
> In fact Mr. Beynon would refer that all of his dogs be returned to him immediately.
> I am advised that Mr. Beynon will have Dr. Smith in attendance to examine the dogs and the dog yard at some point during the last two weeks of July. Therefore, the Society should not have any concern about returning all of the dogs immediately.
> ... Insofar as Mr. Beynon has now done everything within his power to comply with the wishes of the Society he may instruct me to pursue an appeal if we can't reach an agreement.

[67] In response to this letter, on June 27th, 2003 (Exhibit 34) Mr. Hill wrote to Mr. Ward and stated:

> In response to your letter of June 27th, I can advise that your client's proposal is not acceptable to the OSPCA. If they are to agree to a payment schedule they would require some "downpayment" in view of the substantial bills they have to pay for the care and treatment provided to your client's dogs and some security for the outstanding balance. For example, could you client provide a mortgage as security?
> If he cannot make a proposal addressing these issues, there is little possibility of settlement. ..."

[68] In addition to the issues of a down payment and the provision of security, it is clear from the exchange of letters that the appellant felt that no harm would come if at least 18, and indeed all of the 38 dogs were returned to him after June 26th, 2003. The appellant indicated that he was prepared to have Dr. Smith on site in July to examine the dogs and the dog yard in order to address any remaining issues of concern. From the respondent's perspective, it is clear that until an agreement could be reached with respect to repayment of the costs, and until the Schedule A terms and provisions could be deemed to be addressed, it would not agree to the return of the dogs as proposed.

[69] Whatever the merits of both parties' positions up to July 10th, 2003, it is clear that by the act of filing a notice of appeal, the appellant demonstrated that he wanted to have a new hearing and that initially, he was requesting "the judge to rescind or alter the decision of the board." I am not able to accept the appellant's position that by filing the notice of appeal, his position remained the same as set out in the June 27th letter – namely – that he in effect wanted 18 dogs returned but that he would not be responsible for the costs for the remaining 20. Indeed, I believe that the appellant determined that the only way to prevent the society from disposing of the dogs, as outlined in the correspondence dated July 10th, 2003, was to file a notice of appeal so as to keep the process alive, and at the same time, prevent the society from disposing of or selling any of the dogs. Even if this were not the appellant's views, he had to know or suspect that when he filed the notice of appeal, the dogs might not be disposed of pending the appeal. If he was not aware of this fact on July 10th, 2003, he must have considered it when the notice of motion was filed on September 15th, 2003, and when the appeal order was made on October 6th, 2003.

[70] I am not able to conclude that between July 10th, when the notice of appeal was filed, and October 6th, 2003, when the order outlining the issues for the appeal hearing was finalized, that it would have been wise for the respondent to dispose of the animals. Up until October 6th, 2003, all issues were outstanding, and the appeal was to be a new hearing, unrestricted in accordance with s. 18(4) of the Act. I agree with the respondent that in spite of the fact that the care costs were mounting, it would not have been appropriate to dispose of the dogs during this time period. As the notice of appeal had been structured, the court would have had the discretion to rescind or alter any portion of the board's June 26th, 2003 order including shifting back to the society all or any portion of the costs which it had occurred. If such an order reduced substantially the costs which the appellant would be required to repay, and if these costs were paid by the appellant, he would then have been in a position to request the return of the dogs

[71] Accordingly, for the period July 10th, 2003 to October 6th, 2003, I would assign liability and responsibility for the costs incurred 100% to the appellant.

(c) October 6, 2003 to January 30, 2004

[72] The period from October 6, 2003 to January 30, 2004, raises different considerations. On October 6, 2003, the respondent knew that only the costs issue was being questioned and appealed, not the propriety or findings of the board in relation to the orders made on March 31 and April 7, 2003. The respondent might have concluded that even if the appeal court were to alter or change the costs order, it would be quite unlikely, given how the appeal process was now structured, that at the end of the day, the appellant would not have been required to pay a portion of the costs, which would ultimately increase almost threefold from June 26, 2003. Indeed, when one examines the correspondence exchanged on June 27, 2003 (Exhibits 33 and 34), it is clear that the respondent's concern was not really the condition of the dog yard or the appellant's ability to meet the Schedule A terms and conditions, but rather, the ability of the appellant to repay the costs order without security or a down payment. In other words, as I analyze this exchange of correspondence with the benefit of hindsight, what ultimately led to the breakdown

in negotiations between the parties (other than of course the long history of mistrust between the parties) was their inability to resolve the costs repayment issue.

[73] In evidence, the appellant did indicate that he and his spouse owned property valued at approximately $29,000.00 with a mortgage of less than $10,000.00 registered against title. The appellant clearly had sufficient equity to offer the respondent some security for the return of 18, if not 38 dogs.

[74] For the society's part, the respondent was effectively left with three choices on and after October 6, 2003:

l. Continue to care for and treat the dogs pending the outcome of the appeal.

2. Dispose of the animals in accordance with s. 15 of the Act, as suggested in the letter dated July 10th, 2003 (Exhibit 54).

3. Dispose of 20 dogs, and hold 18 dogs pending the outcome of the appeal.

[75] Only the respondent was in a position to control or mitigate the growing costs liability. While theoretically its position to continue to hold 38 dogs between October 6 and the conclusion of the appeal protected against any potential order the appeal court might have made, in my view steps ought to have been taken to alleviate such a growing expense problem. The middle ground, between choices one and two above, was to hold 18 dogs, which the appellant had shown an interest in on June 27th, and dispose of the other 20 dogs. This would have reduced, by more than 50%, the costs being incurred between October 6 and the conclusion of the appeal hearing. Accordingly, for this period, I would assess responsibility for the costs of care as follows:

Appellant $\frac{18}{38} \times 100 = 47\%$

Respondent $\frac{20}{38} \times 100 = 53\%$

[76] This apportionment is close to 50%, and it also recognizes the failure by both parties to resolve, by agreement between them, the mounting costs problem. For the appellant, it addresses the result of his failure to offer reasonable security, and for the respondent, it addresses its failure to take concrete steps on and after October 6 to alleviate the growing costs account.

[77] Accordingly, for these reasons, for the period June 26 to January 31, 2003, I would order that the appellant be responsible for, and pay the following costs incurred for care and treatment of the 38 dogs:

| | | | |
|---|---|---|---|
| (a) | June 26 – July 10 | - | $ 3,458.00 |
| (b) | July 10 – October 6 (88 days x 38 dogs x 13/day/dog | - | $43,472.00 |
| (c) | October 6 – January 31 (117 days x 38 dogs x 13/day/dog x.47) | - | $27,165.00 |



## E. CONCLUSION

[78] Accordingly, for the reasons herein given, an order is herein made as follows:

(i) The order of the Animal Care Review Board dated June 26th, 2003 (Schedule A – paragraphs 1-10) remains in full force and effect.

(ii) Of the costs incurred by the respondent society in the sum of $157,757.59, for food, care and treatment provided calculated to January 31st, 2004, the appellant is hereby liable for, and shall pay the respondent the sum of $119,046.21 calculated as follows:

| | | |
|---|---|---|
| (a) For the period March 31st, 2003 to June 26th, 2003 | - $ | 44,951.15 |
| (b) For the period June 26th, 2003 to July 10th, 2003 | - $ | 3,458.00 |
| (c) For the period July 10th, 2003 to October 6, 2003 | - $ | 43,472.00 |
| (d) For the period October 6, 2003 to January 31, 2004 | - $ | 27,165.02 |
| Total | | $ 119,046.21 |

(iii) The respondent shall have such rights as are set out in the *Ontario Society for the Prevention of Cruelty to Animals Act*, in the event that the monies required to be paid by the appellant are not paid within the time period outlined in s. 15(2) therein.

[79] The parties may make submissions with respect to legal costs, by forwarding to the trial co-ordinator's office at Parry Sound, by facsimile, submissions with respect to costs, including a bill of costs, not to exceed 15 typewritten pages in length. Submissions from the appellant shall be faxed on or before February 18, 2004. The respondent shall be entitled to reply on or before February 25, 2004. Order accordingly.

J.S. O'NEILL

**Released:** February 4, 2004

**COURT FILE NO.:** 131/03
**DATE:** 2004/02/04



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

BARRY BEYNON

Applicant (Appellant)

**- and –**

ONTARIO SOCIETY FOR THE PREVENTIOIN OF CRUELTY TO ANIMALS

Respondent (Respondent)

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**REASONS FOR JUDGMENT**

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J.S. O'NEILL

**Released:** February 4, 2004