

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Marshall v. British Columbia Society for  
the Prevention of Cruelty to Animals,***  
2007 BCSC 1750

Date: 20071204  
Docket: WL0716213  
Registry: Williams Lake

Between:

**Trevor Marshall and Ruth Walters**

Petitioners

And

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

Respondents

Before: The Honourable Madam Justice Bennett

## **Reasons for Judgment**

The Petitioners

Acted on their own behalf

Counsel for the Respondent

D.P. Montrichard

Date and Place of Hearing:

November 13, 2007  
Vancouver, B.C.

[1] Mr. Marshall and Ms. Walters bring a judicial review of a decision made by Ms. Marcie Moriarty on behalf of the British Columbia Society for the Prevention of Cruelty to Animals ("SPCA"). The facts are taken from the affidavit material filed on the application. During the course of the hearing, the Petitioners were charged with cruelty to animals as well as obstruction of a peace officer and assaulting a peace officer as a result of the events discussed below. Thus, I wish to make clear, that the facts in this case are found for the purpose of this application only. The circumstances are based on affidavits and other material filed. No one testified at the hearing.

[2] This is an application for judicial review. Normally the Attorney-General needs to be notified, according to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c.241 s. 16. He was not. However, as noted, the Petitioners were charged mid-hearing, and I assume, since Crown Counsel were involved, that the Attorney General is aware of the application and the matter need not be adjourned further to confirm service. Counsel for the Respondents advised that in his experience, the Attorney General does not intervene in these types of applications.

[3] Affidavits were filed by Mr. K. Kokoska, Dr. C. Barnim, Ms. Moriarty and Mr. Trevor Marshall.

[4] Mr. Marshall and Ms. Walters live near Alexis Creek, B.C. On April 10, 2007, Mr. Kent Kokoska, who is a special provincial constable and "authorized agent" employed by the SPCA, received an e-mail from a co-worker asking that he contact RCMP Constable Enkirch regarding a complaint that had been received regarding

the Petitioners' horses and cattle. On April 17, 2007, he went to the RCMP station in Alexis Creek and obtained details about the complaint. At around 10:00 a.m., he and a co-worker attended at the Petitioners' residence to speak to them regarding the complaint that had been received. While there, he spoke to both Mr. Marshall and Ms. Walters. He noticed several horses nearby in need of hoof care. Mr. Marshall said that they performed their own farrier work and would be looking after the horses' hooves within the next two months.

[5] Mr. Kokoska observed approximately 14 horses. At least five needed hoof care. There did not appear to be adequate access to water.

[6] Ms. Walters said she had been unemployed for some time and was not in good health. Mr. Marshall acknowledged that they were having financial problems. Mr. Kokoska mentioned that some of the cows looked underweight and Mr. Marshall said he would put them into a different pasture. Mr. Kokoska asked to see one of the horses, and Ms. Walters became very agitated. She told him if he wanted to inspect the animals, he had to come back with the RCMP. Then she told them to leave the premises. On his way out, Mr. Kokoska observed a very thin stallion. He was concerned that the animals were "in distress".

[7] Mr. Kokoska returned to the premises at around 2:00 p.m., with the RCMP, in order to speak to the Petitioners regarding the welfare of their animals. Ms. Walters began yelling at them, so they left. However, as they were leaving, they saw Mr. Marshall. Mr. Kokoska served Mr. Marshall with a "Society Order", which required the Petitioners to take certain actions, including:

- a) provide animals being kept on the premises access to clean, potable drinking water at all times;
- b) provide animals being kept on the premises with sufficient quantity of suitable food for the maintenance of normal body weight;
- c) provide animals being kept on the premises with necessary food, nail, or hoof care;
- d) ensure that animals being kept on the premises are kept free from infestations of fleas, lice, parasites or other insects; and
- e) ensure that areas where animals were being kept on the premises were kept free of injurious objects.

[8] The Order also said that failure to comply with its terms within 60 days could result in legal action by the Society, including seizure of the animals being kept on the premises, and charges being laid pursuant to the ***Prevention of Cruelty to Animals Act***, R.S.B.C. 1996, c. 372 (“***Act***”) and the ***Criminal Code of Canada***, R.S.C. 1985, c. C-46. The order also stated: “Cows, several thin, Horses most require hoof care-very long cracked hooves – Mr. Marshall indicated could be addressed within 60 days”.

[9] Mr. Kokoska also provided a copy of the *Recommended Code of Practice for the Care and Handling of Farm Animals – Horses* and a copy of the *Recommended Code of Practice for the Care and Handling of Beef Cattle*. Both documents were filed in these proceedings by the Petitioners.

[10] Mr. Kokoska told Mr. Marshall that he would be back in 60 days to check on the animals. Mr. Marshall said he was expecting hay to be delivered and that he would look after the horses' hooves.

[11] Ms. Walters called Mr. Kokoska a number of times between April and July, 2007. An example of some of the messages include: Ms. Walters advised that she had complained to the Police Complaints Commission; two of her three cows were dead; her stallion had a front leg "almost broke"; her stallion's testicles were bruised and its legs were scratched from someone breeding her stallion over the fence; her stallion was not medicated and she could not afford medication and her stallion did not need medical treatment.

[12] On July 10, 2007, Mr. Kokoska contacted the RCMP and sought their assistance so he could re-attend at the Petitioner's home to perform the re-check on the animals. On July 24, 2007, Mr. Kokoska, two other SPCA special constables and RCMP Constable Foreman attended the Petitioners' premises. The driveway was gated and locked. The RCMP radioed the detachment and asked a staff member to call the Marshall/Walters residence. There was no answer. With field glasses, Mr. Kokoska observed a horse limping in a corral. The ribs on the animal were protruding and predominant. He left a notice on the gate advising the Petitioners to contact him within 24 hours. As he was leaving, he saw five horses and two cars near the edge of the premises. The horses' hooves were long and there did not appear to be access to clean drinking water.

[13] On July 25, 2007, Mr. Kokoska received four messages from Ms. Walters. She said someone had done a “number to her stallion”, and that he was in dire need of a vet and it was not her fault. Then she left a message saying the injured animal had been “vetted” and wanted to know where she should sent the vet bill, amongst other things.

[14] On July 25, 2007, Mr. Kokoska spoke with Ms. Walters who said that her horse had a leg injury, but she was treating the wound. She also told him that she had taken care of the hooves. Mr. Kokoska sought permission to return to the property to ensure that the animals were not in distress. This permission was refused.

[15] As a result of suspicions that animals were in distress, Mr. Kokoska sought and was granted a search warrant on July 31, 2007 which allowed him to enter the Petitioners’ premises between the hours of 9:00 a.m. and 8:00 p.m. on August 1, 2007 and to take any action authorized by the **Act** to relieve distress in animals located on the premises.

[16] On August 1, 2007, Mr. Kokoska attended at the premises with Special Constable Goodine, Ms. Jackson who is the manager of the SPCA shelter in Williams Lake, B.C., Dr. C. Barnim (a veterinarian), Constable Stevenson (RCMP) and Constable Pauls (RCMP). When they arrived at the Petitioners’ residence, the gate was locked and there was a “No Trespass” sign posted on the gate. Mr. Kokoska telephoned the Petitioners, but there was no answer. One of the RCMP

officers contacted the detachment and had a staff person call the residence. Again, there was no answer.

[17] At approximately 11:00 a.m., Mr. Kokoska used a bolt cutter and cut the chain and everyone entered the premises. Mr. Kokoska saw Ms. Walters in the window of the dwelling house. He went up to the door, knocked and told her they were there with a Search Warrant. Mr. Marshall was seen entering the residence and Constable Stevenson took the warrant to serve it on the Petitioners. Mr. Kokoska and Dr. Barnim began examining the animals. Ms. Walters came out of the house and began to throw rocks at them. Constable Pauls warned her to stop interfering with a police investigation and Mr. Marshall told her to go into the house as “the pigs” could not get her there.

[18] Dr. Barnim examined the horses for hydration levels and body condition. The body condition of a horse is marked from “1-9”. A healthy horse is a “4-5”. Less is underweight and more is overweight.

[19] A bay coloured stallion with white patches on both his front legs was being kept in a corral on the premises (the “First Stallion”). There was some hay in the corral, but no water. The animal’s ribs and backbone were protruding, and the bones of his shoulders were also visible. There was moderate body fat covering his spine. The horse also needed its hooves trimmed. There was no shelter or shade in the corral. Dr. Barnim concluded his body condition was a level 2.5.

[20] Another bay coloured stallion, with a white star on his forehead, was kept in a separate corral on the premises (the “Second Stallion”). There was a large tub in the corral, but it did not contain any water, only, what is referred to as “moist grunge”. There was no food in the corral, but there was a large pile of hay outside of the corral, beyond his reach. The corral had some small shade, but nothing to protect him from the weather. This horse had visible ribs, little body fat and his backbone was visible. His hooves needed trimming, and the right front was long enough to cause him suffering and damage to his foot and leg if not corrected. The horse was mildly to moderately dehydrated. Dr. Barnim rated his body condition at level 2 to 2.5.

[21] Another bay stallion (the “Third Stallion”) was kept in another corral. He was very thin and his ribs and spinal column were visible. His water source was empty. Dr. Barnim found him to be in the same condition as the second Stallion and rated his body condition at level 2 to 2.5 as well.

[22] Another bay stallion (the “Lame stallion”) was kept alone in another corral. He had no water or shelter. He could bear little weight on his left leg. It was swollen near the top of the hoof to the knee. There was a mud-covered bandage on the leg. The wound had discharge and a foul odour coming from it. It was also very thin. This horse was moderately to severely dehydrated. Dr. Barnim was concerned that this horse was in critical distress and she believed he had to be removed immediately.



[23] Mr. Kokoska concluded that the Second and Third Stallion, as well as the Lame Stallion were in distress and that the Petitioners had not or could not promptly take the necessary steps to relieve the distress. His concerns included the lack of proper diet, water, food, shelter and the obvious poor body condition of these animals, as noted above.

[24] Mr. Marshall was advised that the animals were to be seized and he responded by telling them to get off his property. Mr. Kokoska attempted to serve documents on Mr. Marshall, including the Notice of Disposition which sets out the time in which to challenge the decision to seize animals, the Search Warrant and the Information to Obtain the Search Warrant. However, he refused to accept them. Mr. Kokoska left them with the RCMP to serve the Petitioners later.

[25] The Lame Stallion was transported to the Animal Care Hospital (which is the same veterinarian services that the Petitioners used). The horse was examined by Dr. Magnowski in the presence of Dr. Barnim. She saw that the flexor tendons were visible and damaged. The tendon sheath was open and draining fluid. This wound required daily bandaging and prompt and aggressive veterinary care. The injury was at point where both veterinarians concluded that euthanasia was required due to the extent of the wound and the suffering experienced by the horse. Euthanasia was performed that day.

[26] The Petitioners submitted that the reason for the critical distress was the way the SPCA transported the horse to Williams Lake. However, the evidence is clear that the critical distress was caused by the inadequately treated wound to the

horse's leg and had nothing to do with the transportation from Alexis Creek to Williams Lake.

[27] Dr. Barnim concluded that the Second and Third stallion were also not receiving a minimum acceptable level of care. These horses were also seized and transported to SPCA facilities. These two stallions remain in the care of the SPCA.

[28] The remaining animals did not appear to be in distress. There was a herd of horses with access to ground water and grass, as well as trees for shade and shelter. There was a concern over hoof care. They all required hoof trimming. The cattle were in good condition. The dogs were not examined but did not appear to be in distress.

[29] Ms. Moriarty is a lawyer and General Manager of Cruelty Investigations for the SPCA. On August 3, 2007, Ms. Moriarty received a call from Ms. Walters. Ms. Walters was advised that the SPCA could not act on the Notice of Disposition until August 15, 2007 and that Ms. Walters had until then to deliver a written objection to the intended disposition of the seized animals. Ms. Walters hung-up the telephone. About an hour later, Mr. Marshall called Ms. Moriarty and she explained the same procedure to him. She told him that one animal had been euthanized and that she would not disclose the location of the other two horses. Other calls ensued.

[30] On August 13, 2007, Ms. Moriarty again spoke to Ms. Walters. She gave her a fax number so she could fax her written objection to the seizure of the horses.

She also asked for the name of Ms. Walters' veterinarian so she could arrange for an independent examination, but Ms. Walters refused.

[31] The Petitioners filed an objection to the Notice of Disposition. After considering their submission, Ms. Moriarty rendered a decision that found that it was not appropriate to return the animals to the Petitioners. It is from this decision that this judicial review is brought.

[32] Mr. Marshall has filed an affidavit setting out the circumstances on the ranch. The Petitioners have been ranching in the area for about twelve years. They wish to breed horses for show and jumping competitions. They bought the horse I have referred to as the Lane Stallion from the United States. The other horses they had from foals. They keep the stallions for breeding. Unfortunately, due to an injury suffered by Ms. Walters, their breeding plan has not come to fruition. She is unable to care for the horses as she initially hoped and she is on income assistance as a result of her inability to work. They seem hopeful that someday they will be able to pursue this plan.

[33] Mr. Marshall deposes that this is his only encounter with the SPCA. He says that the Lane Stallion got a wire cut on July 21, 2007. Dr. Barnim opined that the injury was likely more than one or two weeks old. Mr. Marshall deposes that the bandage was changed daily, however, according to Dr. Barnim, the condition of the injury and the bandage suggests that he is incorrect. As noted above, Ms. Walters was aware that the horse's injury required the treatment of a veterinarian, yet they did nothing in this regard. He deposed that the tubs for water were being washed

out that day to get rid of the grunge. However, that does not explain why there were empty tubs and grunge in the tubs in the first place.

[34] Mr. Marshall opined, as did Ms. Walters during the hearing, that the only reason the horses were in distress was because of the manner in which they were transported on August 1, 2007.

[35] In rendering her opinion, Ms. Moriarty considered the following: the Information to Obtain a Warrant to Search, letters from the Petitioners dated August 13 & 14, 2007, conversations with the constable involved and multiple phone conversations with the Petitioners, pictures taken during the warrant, [meaning, I assume during the execution of the warrant], the veterinarian report of Dr. Christine Barnim dated August 2, 2007, the Critical Distress Assessment Form dated August 1, 2007 and the veterinarian report of Dr. D.C. Magnowski dated August 16, 2007.

[36] In rendering her decision, Ms. Moriarty considered the fact that the Petitioners were warned about concerns that the SPCA had concerning the animals and that they refused to permit the SPCA on their property to inspect the animals, thus requiring them to obtain a search warrant. She points to the submissions in the Petitioners' letters where they claimed that the animals had sufficient food and water, had normal bodyweight and necessary hoof care. Further, she notes that the Petitioners initially denied that the Lane Stallion had a foot injury when seized and the injury occurred during transportation, however in the same letter, the Petitioners note that they were treating the injury themselves and it was improving. In response, Ms. Moriarty points out that the reports of the two veterinarians contradict

the allegations made in the letters. She points specifically to Dr. Barnim's report regarding the Lame Stallion as noted above.

[37] Further, Ms. Moriarty relied on the following excerpt from Dr. Barnim's report:

The three above described horses in my opinion were in distress. There was little to no shelter in the hot weather. There was no water available to the horses. The horses were thin to very thin. The nutritional needs of the horses were not being met, as they were underweight. This could be either due to lack of food alone or coupled with intestinal parasites or bad teeth which could be determined on further examination. There were also remaining concerns on the hoof care, despite recommendations to trim the horses' feet at an earlier date by the BCSPCA.

[38] Ms. Moriarty's decision is set out below:

In my opinion, the expert veterinary evidence clearly demonstrates that the Animals were in distress as a direct result of lack of veterinary care and neglect. What is most troubling to me is that you continue to not acknowledge any responsibility for the condition of the horses, and in fact, completely deny that there was anything wrong with them. This is of great concern especially with the horse that was in critical distress as a result of an untreated/poorly treated injury, which was obvious to any observer, yet you continue to deny existed. This demonstrates either an inability to recognize the true condition of your animals or a deliberate decision to ignore distress in your animals. As a result, I am not convinced that you will ensure the health of the Animals in the future if they are returned. Based on all of the above, I have no reason to believe that if you were to regain custody of the Animals that a return to a similar situation will not occur.

#### Scheme of the Legislation

[39] The SPCA has the authority under the **Act** to relieve distress of animals, except non-captive wild animals. The society appoints authorized agents, who then may take certain actions under the **Act**. Mr. Kokoska is an authorized agent. The

authorized agent is entitled to take custody of an animal and arrange for food, water, shelter and veterinary care if the animal is under distress. See s. 11 of the **Act**. If the animal is in critical distress, the authorized agent may destroy the animal or have it destroyed. An opinion of a veterinarian is needed before destruction, if one is readily available. See s. 12 of the **Act**.

[40] Section 13 of the **Act** permits the authorized agent to obtain a warrant to search premises.

[41] The SPCA may destroy, sell or otherwise dispose of an animal, (I am told this means finding the animal a home), within 14 days after the SPCA has given Notice to the owner of the animal.

[42] The goal of the **Act** is stated in the title – the Prevention of Cruelty to Animals. The Court must be satisfied before it will return an animal to its owner that the animal will remain in good condition. See ***Brown v. British Columbia Society for the Prevention of Cruelty to Animals***, [1999] B.C.J. No. 1464 (B.C.S.C.) (Q.L.) at para. 22.

#### Judicial Review

The ***Administrative Tribunals Act***, S.B.C. 2004, c.45 applies to this application.

The **Act** does not have a privative clause; therefore the standard of review of the decision of Ms. Moriarty is governed by s. 59 of the ***Administrative Tribunals Act***, which I set out below:

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[43] Thus, the standard of review is correctness for all questions except the exercise of discretion, findings of fact and the application of common law rules of natural justice and procedural fairness. A discretionary decision must be patently unreasonable before this Court can interfere with the decision. A discretionary finding is patently unreasonable when it is arbitrary or in bad faith, made for an improper purpose, based on irrelevant factors or fails to take statutory requirements into account. Further, the tribunal (that is Ms. Moriarty), must act fairly.

[44] I will now turn to the arguments, keeping in mind the standard of review that is applicable.

Lawfulness of the Search

[45] The Petitioners claim that the search was unlawful. They claim that the search warrant was obtained from information from an unknown complainant. The investigation was initially started by an unknown complainant; however, the information to obtain the search warrant clearly sets out the basis from personal observations of Mr. Kokoska. The warrant was issued by a Provincial Court Judge. The Petitioners also complained about an inconsistency between logos worn or displayed by the police and the SPCA special constables. I suggested perhaps that was because the RCMP is under Federal jurisdiction and the SPCA is under provincial jurisdiction. They also argued that the constables were not in full uniform. It is clear that the Petitioners knew who they were and why they were there. The Petitioners also complain that the police threatened Ms. Walters with a taser gun. Ms. Walters threw rocks at the police. I do not find as a fact that she was threatened, but frankly, even if she was, given the rock throwing, a threat of a taser would not lead me to conclude that the manner of search was unreasonable.

[46] There is nothing before me that would suggest that the search was unlawful. The constables were present with a lawfully obtained search warrant and the manner of the search was reasonable. See ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145.



Main Argument

[47] The Petitioners assert in their affidavit and argument that they were taking care of the horses. They dispute the findings of fact of Ms. Moriarty.

[48] I have reviewed Mr. Marshall's affidavit evidence above, and it was repeated in submissions by Ms. Walters. I have been given quite a bit of material from the Petitioners on the proper care of horses, as well as a quantity of photographs they took. I will not review this evidence further, except to say that from the evidence of Dr. Barnim, along with the photographs appended to her affidavit, it is clear that the Petitioners were not looking after the horses. Given the pending charges, I will not speculate on why this occurred, other than to say that the horses were in distress at the time they were seized. I emphasize this aspect, as the Petitioners strongly argued that the horses were fine when they were seized, but that the SPCA improperly transported the horses, and that is what caused distress. The evidence is overwhelmingly clear that the horses that were seized were in distress at the time of seizure. Further, the Petitioners were warned of the concern of the SPCA some months earlier. The horses were in worse condition in August than as was observed in April.

[49] The Petitioners obviously know how to care for animals, as the majority of their animals were not in distress. However, the stallions that were seized were not being cared for properly.

[50] The Petitioners also argued that the horse that was euthanized was not their horse as the tattoo number recorded on the critical distress assessment form did not match the tattoo number they attributed to this horse. The evidence of Dr. Barnim establishes that the horse that was seized was the Lamé Stallion and that the same horse was euthanized.

[51] The findings of fact by Ms. Moriarty are reasonable and supported by the evidence.

[52] The next question is whether the Petitioners had a reasonable opportunity to be heard, that there was no denial of natural justice and the procedure was fair. The Petitioners do not believe they were treated fairly. They believe they have been harassed and that the SPCA has abused their power when they seized the Petitioners' horses.

[53] However, as stated above, the SPCA has acted in accordance with their legislative authority. I have some sympathy for the Petitioners. Few people would be happy if their animals were seized. However, the evidence is clear, that the Petitioners, perhaps due to injury or health, poverty or inability, were unable to care for these three horses.

[54] The Petitioners had an opportunity to make written submissions and telephone submissions, which were considered by Ms. Moriarty.

[55] On August 1, 2007, Mr. Kokoska attempted to give Mr. Marshall a copy of the Notice of Disposition, a copy of the Warrant and a copy of the Information to Obtain

the Warrant with the attachments, except the voicemails left by Ms. Walters. Mr. Marshall refused to accept the documents. During the course of this hearing, it became apparent that the Petitioners had refused to accept documents that were sent to them by the Respondent for this application. If the Petitioners did not have material (which they do not argue), it was because they refused to accept it when it was delivered to them.

[56] The Petitioners had an opportunity to be heard. Their requests to have the animals returned were adjudicated upon and reasons were given.

[57] I find that the rules of natural justice were followed and that the procedures followed were fair.

[58] I conclude that the Second and Third Stallions that were seized were in distress and that there is nothing in the evidence that leads to the finding that the Petitioners will look after the horses if they are returned to them. The condition of the horses deteriorated after the Petitioners were warned that they needed to take steps to ensure the animals' good health. Nothing has changed for the Petitioners that indicates that they will be in a position to care for the horses properly.

[59] The application for judicial review is dismissed. The SPCA may dispose of the animals, which I understand means that they will find them appropriate homes.

[60] The SPCA will have its costs on Scale “B”.

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The Honourable Madam Justice Bennett