

**CITATION:** Ontario Society for the Prevention of Cruelty to Animals v. Johnson,  
2013 ONSC 7038

**COURT FILE NO.:** 13-57432

**DATE:** 2013/11/13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Ontario Society for the Prevention of Cruelty to Animals, Appellant

**AND**

Jessica Johnson, Respondent

**BEFORE:** Mr. Justice Timothy Minnema

**COUNSEL:** Clayton Ruby and Gerald Chan, for the Appellant

Respondent not Participating

**HEARD:** November 6, 2013

**REASONS FOR DECISION**

[1] This is an appeal from the decision of the Animal Care Review Board dated January 31, 2013.

**Background**

[2] The appellant Society executed a search warrant at the respondent Ms. Johnson's home on May 18, 2012, and issued a 'compliance order' that required her to take a number of her dogs to a veterinarian to have them examined because of alleged distress related to dental concerns. Ms. Johnson complied with that order and also appealed to the Board which found that the compliance order was invalid regarding three of the four dogs. The Society was therefore ordered to pay Ms. Johnson her costs of the veterinary bill regarding those dogs totaling \$207.47. Ms. Johnson also filed an application pursuant to the *Canadian Charter of Rights and Freedoms*, 1982, R.S.C. 1985, App. II, No. 44, Schedule B. She alleged that her s. 8 right to be secure from unreasonable search and seizure had been violated. She was seeking s. 24 remedies, namely to have the evidence of the Society ruled inadmissible and for payment of her legal costs. At issue was whether the Board was a court of competent jurisdiction that could consider the *Charter* and grant remedies. The Board found that it had jurisdiction under s. 24(1), but that the search of Ms. Johnson's residence did not infringe her s. 8 rights.

**Issues**

[3] The Society seeks an order reversing the Board's award of veterinary costs to Ms. Johnson. It also seeks an order that the Board is not a court of competent jurisdiction under s. 24(1) of the *Charter*. Ms. Johnson has not defended this proceeding and is taking no position.

### **Legal Framework**

[4] I am mindful of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, (2003), 223 D.L.R. (4<sup>th</sup>) 599, where the Supreme Court of Canada examined the legal relationships between administrative bodies and reviewing courts. At paragraphs 20 and 21 it held that in the context of an appeal from an administrative tribunal the matter is to be dealt with by the usual administrative law principles. Thus, if this were a true appeal, I would follow the 'pragmatic and functional approach' to determine the standard of review regarding each issue, apply that standard, and decide accordingly.

[5] The first consideration however, even before we can get to the legal framework above, is whether this is an appeal at all in the usual sense of a review by a superior court of the decision of an inferior court or administrative agency. What, if anything, am I being called upon to review?

### **Test on the Appeal**

[6] The relevant legislation is the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 ("OSPCAA"). Sub-section 18(4) reads as follows:

18.4 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.

[7] The Society in its factum indicated that "new hearing" means that the matter is to be heard "*de novo*". As noted in *Black's Law Dictionary*, 9<sup>th</sup> Edition, Bryan A. Garner ed. (St. Paul, MN: Thomson Reuters, 2009), the nature of a *de novo* hearing is that it is conducted without any reference to the previous one:

*hearing de novo.* 1. A reviewing court's decision of a matter anew, giving no deference to a lower court's findings. 2. A new hearing of a matter, conducted as if the original hearing had not taken place.

*trial de novo.* A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.

[8] The only decision put forward by the Society that deals with the nature of the appeal is *Burns v. Ontario Society for Prevention of Cruelty to Animals*, [2002] O.J. No. 5655 (S.C.J.). That case like here was an appeal from a decision of the Animal Care Review Board, and the court at para. 9 took a view consistent with the above:

I advised [counsel] that I had not read the Board's decision of November 20th, 2001, and did not intend to read it until I had concluded my decision in the new

hearing to ensure impartiality. I have not yet read the decision. Of course I've been informed of the Board's conclusion, but I did not know the reasons therefore, nor was I aware, nor am I aware of any findings of credibility.

[9] There was no suggestion otherwise, and I find that in this new hearing I am not reviewing the decision of the Board.

### **The Charter Issue**

[10] The Society wanted me to deal with the *Charter* issue. However, Ms. Johnson did not raise it in this new hearing. This is not an application for judicial review. As such, no constitutional issue was properly before me.

[11] The Society understood these limitations, but nonetheless urged me to deal with the question of whether the Board has *Charter* jurisdiction. In its factum it stated that this is an issue "on which judicial guidance is sorely needed", that "[i]t is in everyone's best interests to receive a definitive judicial ruling on the issue now before further resources are spent on litigation," and that "it would be far more efficient for this Court to decide the issue on appeal rather than wait for another case to come along."

[12] The difficulty is that I would be deciding the *Charter* issue hearing only the Society's side of the case. There was no evidence of notice to an Attorney General along the lines set out in s. 109 of the *Court of Justice Act*, R.S.O. 1990, c. C.43, as amended. Further, as this is a new hearing, I would not even have the benefit of reviewing the ruling made by the Board after it heard full argument on this issue over many days. Given its expert knowledge of the regulated field, the Board's review of the constitutional arguments would likely be helpful to a court determining the issue. In summary, I find that I am not in a position to assess of the strength of the constitutional arguments in a fair and considered way.

[13] Regardless, I also find that it would be inappropriate for me to deal with the constitutional issue on what would essentially be my own initiative. I adopt the following passage by Prof. Peter W. Hogg in his authoritative text *Constitutional Law of Canada*, Fifth Edition (Toronto: Thomson Carswell, 2007) at page 751:

It must be remembered that judicial review is always hedged by procedural rules: a proper proceeding must be brought within the proper time by a proper party before a proper court. The raising of a constitutional issue, however plausible, will not cure a procedural infirmity, even though the infirmity will (unless corrected) preclude judicial review.

[14] Given the above, I decline the Society's request to make a constitutional ruling.

### **New Hearing on the Compliance Order**

[15] The Society called its two workers who had attended the home with the warrant and who were involved in the issuing of the compliance order, and a veterinarian who was qualified to give expert evidence about when a dog requires veterinarian care concerning dental issues. As

this new hearing was unopposed, they were not cross-examined or contradicted by other testimony.

[16] The veterinarian Dr. Gaelin O'Grady indicated that the signs of dental problems in dogs are red and bleeding gums, tartar build-up that is allowed to develop to the point where teeth appear brown, bad breath, and signs of pain where the dog does not want its mouth touched as seen by its flinching or withdrawing. She said that if any two of these symptoms are present, the dog is in distress and in need of dental care. If no care is provided, the dog's condition can get significantly worse. If not attended to these conditions can lead to the bone becoming infected, a loss of teeth, and when the infected matter is swallowed by the dog and ingested, it can lead to internal infections and ultimately death.

[17] The respondent Ms. Johnson had difficulties with the Society in the past. In February of 2011 other dogs she had were found in distress with dental and other issues, and removed from her care. The two Society workers indicated that they were aware of that previous involvement when they attended Ms. Johnson's house. Both workers had experience and training in how to identify animals in distress. Upon gaining entry they found empty water bowls for the dogs, very strong animal odours, and dog feces and urine both over the floors and in the dog cages. The workers testified that they looked into the mouths of each dog. They said that because of the unwillingness of the animals to have their mouths handled, and because of the intrusiveness of being in Ms. Johnson's home, they decided to only take pictures of the mouth of one dog. They testified however that all the dogs had various stages of dental disease, namely they all had notable redness in the gums, brown teeth, and they winced at their mouths being handled. While the conditions of some dogs were worse than others, the workers said none of the issues were minor. In those circumstances and in that context, they issued a compliance order that all the dogs be seen by a veterinarian within a specified time.

[18] The legal question is whether pursuant to sections 1(1) and 13(1) of the *OSPCAA* the Society workers had reasonable grounds to believe that the three dogs in question were in distress at the time they issued the compliance order. Given the home conditions, the past issues with this pet owner, and specifically the observations both workers made about the state of each dog's mouth in light of Dr. O'Grady's evidence, I find that they did. As such, it follows from s. 13(1)(b) that the treatment by the veterinarian for these three dogs is to be at the expense of the owner.

### **Decision**

[19] Given the above, I rescind the order of the Board requiring the Society to pay Ms. Johnson \$207.47 for veterinarian fees. The Society advised that it had an agreement with Ms. Johnson to the effect that it would not be seeking costs.

---

Mr. Justice Timothy Minnema

**Date:** November 13, 2013

**CITATION:** Ontario Society for the Prevention of Cruelty to Animals v. Johnson,  
2013 ONSC 7038

**COURT FILE NO.:** 13-57432

**DATE:** 2013/11/13

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**RE:** Ontario Society for the Prevention of  
Cruelty to Animals, Appellant

**AND**

Jessica Johnson, Respondent

**BEFORE:** Mr. Justice Timothy Minnema

**COUNSEL:** Clayton Ruby and Gerald Chan, for the  
Appellant

Respondent not Participating

---

**REASONS FOR DECISION**

---

Mr. Justice Timothy Minnema

**Released:** November 13, 2013