

## In the Provincial Court of Alberta

**Citation: R. v. Wicker, 2007 ABPC 129**

**Date:** 20070514

**Docket:** 060333168P1, 060345014P1, 060345014P1

**Registry:** Calgary

Between:

**Her Majesty the Queen**

- and -

**Duston Joseph Wicker**

<p><b>Corrected judgment:</b> A corrigendum was issued on May 15, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.</p>
--

### **Reasons for Sentence of the Honourable Judge G.S. Dunnigan**

#### **Introduction**

[1] Duston Wicker pleads guilty to a charge of wilfully causing unnecessary pain, suffering or injury to an animal, contrary to ss. 446 (1) a of the *Criminal Code of Canada*.

[2] This court is charged with the task of determining a fit sentence for the acts committed by Mr. Wicker on January 23, 2006.

[3] I have had the benefit of both a Pre-Sentence Report and an Assessment Report from the Forensic Assessment and Outpatient Services ( FAOS) at the Peter Lougheed Centre of the Calgary General Hospital.

[4] In addition, photographs of the injuries inflicted by Mr. Wicker upon his cat “Tigger” were marked as an exhibit in these sentencing proceedings.

[5] For the reasons set forth below, I am of the view that the appropriate sentence is 4 months incarceration but I reduce that sentence to 90 days to credit Mr. Wicker for his timely guilty plea, acceptance of responsibility and expressions of remorse. The sentence may be served

intermittently, following which Mr. Wicker will be on probation for 2 years. I impose the maximum 2 year ban upon Mr. Wicker's ownership, custody or control of animals.

**Circumstances of the Offence**

[6] Crown and Defence have filed with the Court an Agreed Statement of Facts as follows:

- a. On January 23, 2006, the accused was owner of a domestic shorthaired tabby cat named "Tigger". The accused and Tigger resided at an apartment in Calgary, Alberta.
- b. On January 23, 2006, the accused's fiancée RLM visited the accused's apartment at approximately 10:30 p.m. She let herself into the apartment using the key given to her by the accused. RLM walked into the bathroom and observed Tigger lying in scalding hot water in the bathtub and not moving to get out. The accused was standing over the cat holding a cat carrier, making no attempt to remove the cat from the bathtub.
- c. RLM removed the cat from the tub and towelled him off. Tigger had a bleeding nose, a cut on his right ear, a scrape over his right eye and a cut over the left side of his mouth. The cat also had obvious injuries to his paws, and his right eye was reddened to the extent that the pupil was not visible. Tigger was unable to stand without falling over. RLM advised the accused to take Tigger to a veterinarian.
- d. The following day, January 24, 2006, RLM asked the accused about Tigger's welfare. The accused claimed the cat was fine.
- e. On January 27, 2006 RLM attended the accused's apartment to check on Tigger's welfare. She found the cat lying under a chair unable to walk. RLM told the accused to take the cat to a veterinarian or she would do it herself.
- f. The accused took Tigger to the Forest Lawn Veterinary Clinic on January 28, 2006, however he left before a veterinarian was available to see the cat. An appointment was made for January 29, 2006, which was subsequently cancelled by the accused. Another appointment was scheduled for January 31, 2006, however that also was cancelled by the accused.
- g. At approximately 9:30 a.m. on January 31, 2006 Tigger was removed from the accused's apartment by RLM and taken to the

Calgary Humane Society where the cat was examined by a veterinarian, Dr. Wendy Schmaltz. Dr. Schmaltz diagnosed first and second degree burns to both back paws and one of the front paws of the cat. These burns were caused by the cat being held in contact with very hot water for an extended period of time. During the initial period of time, the cat would have been struggling to get away from the heat source. Because the cat was found lying in scalding hot water and not moving, this would indicate that the cat was in a state of shock. It would have taken at least two minutes of the cat being in contact with the hot water for it to reach that state. Dr. Schmaltz also noted that the cat had a swollen and very painful tail and a quarter inch laceration to its lip.

h. Although Tigger was sent to a foster home on February 8, 2006, his condition deteriorated and he was returned to the Humane Society on February 24, 2006 where he was examined by veterinarian, Dr. Karen Moser. Dr. Moser noted that the cat had gangrene on almost the entire length of his tail, and that there was hair loss on all legs up to the elbows. The skin and nails had sloughed from the right front paw, and there were heavy scabs over both hocks and on the toes of the left front paw. An appointment to amputate the tail was made for February 27, 2006.

i. Dr. Moser examined Tigger again on February 27, 2006, and found the cat's condition to have further deteriorated. The scabs on the hocks were lifting, exposing underlying tissue. There was tissue damage to the left hock, which included a severing of the achilles tendon. The right achilles tendon was coated by severely infected tissue and exposed for 1.5 centimeters. All toes on the left front paw were severely infected and sloughing. One of the toes on the right rear paw was also sloughing. Due to the deterioration of the cat's general condition and to relive further suffering the cat was humanely euthanized on February 27, 2006.

j. The accused is the individual responsible for inflicting all injuries to Tigger which were noted by Dr. Schmalz and Dr. Moser, and which ultimately led to the cat having to be euthanized.

*[names & addresses edited ]*

[7] In addition, one other important fact is admitted by this offender. Mr. Wicker acknowledges having been involved in a previous incident he characterized as a "turf war" with Tigger in 2005, resulting in his cat sustaining a bloody nose. This is significant having regard to his more recent and more violent infliction of gratuitous cruelty on the same helpless animal.

### **Purpose and Principles of Sentencing**

[8] In 1996, Parliament enacted amendments to the *Criminal Code* to codify certain guidelines for sentencing. The objectives of sentencing, as codified in s. 718 of the *Criminal Code*, are:

- a. denunciation;
- b. deterrence (both individual and general);
- c. separation of the offender from society where necessary;
- d. rehabilitation;
- e. reparation; and
- f. promotion of responsibility in the offender and acknowledgement of harm done.

[9] The sentencing amendments also established principles of sentencing, including:

- (a) a sentence must be proportional to the seriousness of the offence and the level of responsibility of the offender; in other words, the punishment must fit both the crime and the criminal;
- (b) a sentence should be increased or decreased to reflect aggravating or mitigating factors;
- (c) similar offences, offenders and circumstances should attract similar sentences; and
- (d) jail should be used as a last resort.

[10] The Crown submits that the primary objectives of sentencing on these facts are denunciation and deterrence. Mr. Haight refers the court to the significant expressions of public outrage at the actions of Mr. Wicker toward his cat. I wish to address the matter of public sentiment specifically, having regard to the barrage of materials which have inundated the Calgary Provincial Courthouse in an effort to influence my sentencing of Mr. Wicker.

### **PETA Coordination of Public Lobbying On Sentencing**

[11] At some point, following the Crown and Defence submissions to the court in this matter, the U.S. based organization **People For The Ethical Treatment of Animals ( PETA)** posted on their website internal contact information for the court as well as the Crown's office under the heading "Action Alert". **PETA** urged its members to write directly and personally to the court and the Crown in an effort to influence the sentence to be imposed upon Mr. Wicker.

[12] Leading up to the delivery of this decision, court staff and communication equipment have been subjected to a relentless flow of letters, postcards, children's notes and faxes variously

expressing outrage at Mr. Wicker's actions, calling upon the court to enforce the applicable law with due regard to public concern about the treatment of animals and pointing out the seriousness of the issue of animal cruelty in our society. Those concerns are appropriate and understandable.

[13] This court has always taken into account the effect of offences upon the community in determining appropriate sentences for illegal acts. Indeed, Victim Impact Statements are specifically mandated by the *Criminal Code* to be received and considered in imposing a sentence. The court also takes into account the prevalence of offences in the community in fixing a sentence. It is part of the judicial deliberation process to have regard to public concern, quite independent of improper lobbying efforts.

[14] However, only did this torrent of communications impede the work of the courthouse in handling its daunting and growing caseload of serious criminal matters, many of the missives in the deluge bordered on inappropriate and even hysterical. Emanating mostly from the United States, those highly improper dispatches contained demands for illegal sentences and harsh indictments of Canada's parliament, justice system, judiciary, enforcement officers and citizenry in general.

[15] What this court is not and must never be is the pawn of a pressure group, no matter how serious the facts upon which a sentence is being considered. The laws of this land are enacted by a Parliament elected by its citizens. Judges must apply the law in accordance with the guidelines set out by those elected legislators, having due regard to judicial precedent and the specific circumstances of both the offence and the offender.

[16] Those decisions must be free of political, financial or popular influence. Justice which is biased, inappropriately influenced or responsive to intimidation is no justice at all. Any person appearing before this court, whether victim, witness, accused or offender is entitled to the assurance that their case is being heard fairly and decided upon the evidence presented to the court, not upon external pressures or improper influence.

[17] I give Mr. Wicker and other parties of interest before this court that assurance.

### **Circumstances of the Offender**

[18] Mr. Wicker is the product of a very dysfunctional and unhappy childhood. His mother, with whom he has virtually no contact, misled Mr. Wicker on the identity of his biological father, a fact he learned later, as a youth. The family moved often, with Mr. Wicker's mother having a host of romantic relationships, the most damaging of which resulted in the mental, physical and sexual abuse of Mr. Wicker and his half-sister. In fact, Mr. Wicker's half-sister was impregnated at age 14 by this stepfather, an act for which the child-molester was gaoled for two years less a day.

[19] Nothing was done with respect to the assaults on Mr. Wicker, his mother each time brushing off this offender's efforts to seek help and redress. The actions of Mr. Wicker's mother

in ignoring the assaults visited upon her son resulted in his running away and affiliating with a negative peer group. Mr. Wicker was expelled from school and has achieved only a Grade 8 education.

[20] In seeming repetition of his own past, Mr. Wicker has a number of estranged children by different mothers whom he no longer sees. His family support network has eroded almost entirely, save a relationship with his sister with whom he has only recently reconciled.

[21] Mr. Wicker's younger years were characterized by angry outbursts and fighting at school, significant financial struggles in the family, low self-esteem, development of an addictive personality and a prevailing bad temper. Not surprisingly, he also became involved with alcohol and marihuana and he continues to struggle with the latter to this day.

[22] A detailed psychiatric report was prepared by Dr. Baillie of the Forensic and Outpatient Services Unit ( FAOS ) of the Peter Lougheed Hospital based upon two clinical interviews with Mr. Wicker and a review of the Agreed Statement of Facts, Complaint Report and Occurrence Report.

[23] It appears from the FAOS report that Mr. Wicker harbours some considerable resentment toward his mother for her failing to pursue the matter of the sexual attacks upon him and for choosing simply to focus on the emotional and physical injuries to her daughter.

[24] Mr. Wicker himself has had great difficulties establishing proper emotional relationships, having children with a number of women whom he never sees. His most recent significant relationship, with the complainant RLM in this matter, he described as "more than turbulent". It involved physical conflict, necessitating involvement of the Calgary Police Service.

[25] Mr. Wicker has attempted suicide 6 times, most recently in 2005. He reports he has recently been screened for bi-polar disorder and treated for depressive disorder, for which he is prescribed the anti-depressant Effexor. He is prone to insomnia, anger and an inability to relax.

[26] His underlying resentment, anger control issues and self-defeating personality traits have also resulted in a checkered work history, although he is currently employed.

[27] Dr. Baillie's psychological testing disclosed an individual with elevated scales of volatility, anxiety, impulsivity as well as a skewed self-image which inclines him to complaining and self-pity. Mr. Wicker tests as having poor control over the internal and external manifestations of his anger. He presents as chronically angry, with poor self-control when he experiences real or imagined criticism.

[28] On the night of the offence, Mr. Wicker states he was depressed over his abiding sense of personal failure, the recent death of his grandmother, losing a job which necessitated a holiday cancellation, having been thrown out of his girlfriend's apartment while she awaited the return of her live-in partner, and Tigger having defecated throughout his living-room.

[29] Dr. Baillie regards Mr. Wicker as being at high risk for future violent offending due to his early maladjustment, history of physical and sexual abuse, lack of personal support, impulsivity, relationship instability, borderline and antisocial personality traits, anger management difficulties, depression and substance abuse.

### **Aggravating Factors**

[30] On behalf of the Crown, Mr. Haight points out a number of aggravating factors in this case, including:

- 1) The attack was visited upon an innocent animal owned by Mr. Wicker. Tigger was totally reliant on Mr. Wicker for its care and feeding;
- 2) Mr. Wicker's behaviour went beyond a momentary lapse. The veterinarian advises that the cat had to be in the scalding water for two minutes to arrive at a state of shock which would preclude it from leaping out of the bathtub. While Mr. Wicker's rage may have started spontaneously, but it was not momentary, continuing well after Tigger suffered obvious harm,;
- 3) Mr. Wicker failed to seek timely veterinary care, despite the clearly visible injuries caused by his egregious acts;
- 4) Mr. Wicker seemed to minimize his responsibility, claiming not to remember his actions. Further, expressions of remorse seem incongruous with his repeated failures to seek medical attention for his pet.

### **Mitigating Factors**

[31] Defence counsel, Mr. van Harten, submits, and the Crown agrees, that the guilty plea was always intended to be timely. Mr. Wicker demonstrated his clear intention to plead guilty and to accept responsibility for his actions, even before counsel was appointed.

[32] Despite having consumed no alcohol or drugs that night, Mr. Wicker's recollection of the events is fractured. He cannot recall putting Tigger in the tub or explain why he did so. Mr. Wicker nevertheless acknowledges what he did and expresses remorse to the Court. He has expressed such remorse ever since the incident. Indeed, when RLM came across the two in the bathroom, Mr. Wicker broke down uncontrollably when he finally realized what he had done to Tigger.

[33] There is no question, having regard to Mr. Wicker's statements to the probation officer, to

the psychiatrist and to this Court, that he feels embarrassed, ashamed and distraught at his actions. Mr. Wicker specifically addressed me, stating that no gaol term could suffice to compensate for his actions, that he has raised animals his entire life and that he cannot figure out why he did what he did that day.

### **Case Law and Analysis**

[34] The Crown referred me to the following decisions in support of their submission that a fit sentence is 3-4 months incarceration and the maximum 2 year ban on pet ownership, custody or control:

*R. v. Presnail* 264 A.R. 258

*R. v. Leeham*, (Unreported - January 13, 2000) (Alta. Prov. Ct.)

*R. v. MacKinnon*, (Unreported - September 26, 2000) (Alta. Prov. Ct.)

*R. v. Zeller* 1998 ABPC 19

*R. v. Charette*, (Unreported October 20, 1998) (Alta.Prov.Ct.)

[35] Counsel for Mr. Wicker acknowledges that these cases provide guidance to the court but submits that the appropriate period of incarceration in these circumstances would be 2-3 months.

[36] The decisions vary in terms of the relative culpability of the offenders, and the extent of the injuries suffered by the animals subjected to abuse.

[37] The cases, however, appear to have at least one of 2 common threads. First, the attack on the animal is often connected to a domestic relationship incident, invariably involving the offender exacting revenge on the other member of the relationship by injuring the pet. Second, the cases often disclose offenders attacking the animals in a blind rage, followed by an inability to comprehend or even recollect their actions.

[38] Mr. Wicker similarly had relationship difficulties with his common-law partner, which, coupled with other recent setbacks, were exacerbated by coming upon a living room riddled with cat faeces. This “final straw” led him to exact retribution upon his helpless cat. Guilt-ridden, doubtless ashamed and afraid of the consequences of his acts, Mr. Wicker has only a scattered or obscured recollection of the bathroom episode.

[39] It is apparent from the decisions referred to me by the Crown that sentences for violence to animals have increased over the past 20 years. The cases take into account the viciousness of the attack and the callousness of the offender’s behaviour in visiting the injuries upon the animal. They also emphasize that denunciation and deterrence are the primary objectives to consider when imposing a fit sentence.

[40] Tigger was not killed during the incident, distinguishing this from cases where the violence against the animal was more pronounced and final. However, Mr. Wicker’s actions in



failing or refusing to pursue timely treatment worsened the suffering of his powerless, injured pet.

[41] Mr. Wicker abused his cat in a particularly protracted and painful manner and compounded this abuse by callously failing or refusing to seek obviously needed veterinary treatment. Worse, this was not the first time Tigger had suffered at the hands of Mr. Wicker.

[42] In the circumstances, notwithstanding his challenged background and clear need for psychological intervention, it is of paramount importance that this court condemn the actions of Mr. Wicker that night and send a strong message to the public that the abuse of defenseless animals will not be tolerated in a civilized society.

[43] The remorse expressed by Mr. Wicker and the submissions of his able counsel make it clear that he understands the seriousness of his acts and the requirement that he pay a penalty for his conduct. One hopes that through the rehabilitative elements of this sentence Mr. Wicker will glean some insight into his actions which will redound to his and the community's benefit in the future.

[44] In my view, the fit sentence for Mr. Wicker, having regard to all the circumstances, is 4 months incarceration, but I credit him 1 month for the mitigating factors of his timely guilty plea and remorseful acknowledgement of responsibility. The net sentence is therefore 90 days, which may be served intermittently to ensure Mr. Wicker continues his employment.

[45] Mr. Wicker is prohibited from owning or having custody or control of any animal for a period of 2 years. Upon completion of his incarceration, he will be subject to probation for a period of 2 years. I will hear from counsel regarding the conditions of that probation but intend to impose requirements that he attend psychological/psychiatric as well as anger management counselling and that pet ownership be prohibited for 2 years.

Dated at the City of Calgary, Alberta this 14<sup>th</sup> day of May, 2007.

---

G.S. Dunnigan  
A Judge of The Provincial Court of Alberta

G. Haight, Esq.  
For the Crown

H.M. van Harten, Esq.  
For the Accused

---

**Corrigendum of the Reasons for Sentence  
of  
The Honourable Judge G.S. Dunnigan**

---

1. Page 2, Paragraph 5 - 3 months changed to 90 days
2. Page 10, Paragraph 44 - 3 months changed to 90 days