IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Van Dongen v. The Society for the Prevention of Cruelty to Animals,*** 2005 BCSC 548

Date: 20050415
Docket: L033701
Registry: Vancouver

Between:

John Van Dongen, Richmond Rodeo Riding Ltd., and Beach Grove Stables Ltd.

Petitioners

And

The Society for the Prevention of Cruelty to Animals

Respondent

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Petitioners	Sandra D. Sutherland, Q.C.
Counsel for the Respondent	Kimberley Robertson
Date and Place of Hearing:	November 12, 2004 and March 22, 2005 Vancouver, B.C.

INTRODUCTION

[1] The Petitioners, John Van Dongen, Richmond Rodeo Riding Ltd. and Beach Grove Stables Ltd., seek judicial review of the decision of the respondent, The Society for the Prevention of Cruelty to Animals ("SPCA"), to seize custody from the petitioners of three young horses on December 2, 2003; a declaration that the petitioners are not liable for the costs to the respondent under section 20 of the ***Prevention of Cruelty to Animals Act*** R.S.B.C. 1996, c.372 (the "***Act***"); and special costs.

[2] For the reasons that follow, I have concluded that the petitioners are entitled to the substantive relief sought, but have declined to make an order for special costs.

FACTS

[3] Mr. Van Dongen and Beach Grove Stables Ltd. are horse breeders and traders who carry on business at 9230 Ladner Trunk Road in Delta, British Columbia, a property owned by Richmond Rodeo Riding Ltd. (the "Property"). Mr. Van Dongen is an elderly gentleman who has been a horse breeder and trader for more than 40 years. I think that it is fair to say that horses have been his life. Mr. Van Dongen specializes in the breeding and trading of warm-blooded show

horses. He deposed that he was the first breeder to introduce these horses into British Columbia.

[4] There are approximately 75 horses on the Property, all owned by either Mr. Van Dongen or by Beach Grove Stables Ltd. Mr. Van Dongen is the principal caregiver for the horses, assisted by Amy Brattebo, who lives in the house on the property, and Dan Anger.

[5] Mr. Nick Henze is a Special Provincial Constable appointed under the ***Police Act,*** R.S.B.C. 1996, c.367 and an authorized agent of the SPCA.

[6] There was a history of strained relations between Mr. Henze and Mr. Van Dongen. Mr. Van Dongen deposed that he does not like strangers approaching his horses, particularly the young horses. He keeps the young horses with their mothers and thereafter as a herd. They are not accustomed to strangers. He deposed that the arrangement that he had with Mr. Henze's predecessor at the SPCA was that if there was a complaint or concern, he would telephone Mr. Van Dongen and they would arrange to meet on the Property to resolve the matter. Mr. Van Dongen deposed that this arrangement worked well.

[7] When Mr. Henze assumed the responsibility for the Delta area, Mr. Van Dongen repeated this request. Mr. Henze however "did not take this request to heart" as it was not his "standard procedure". Accordingly, Mr. Van Dongen deposed, Mr. Henze repeatedly entered the property between mid 2001 and December 2003 without Mr. Van Dongen's permission, and often when he was absent.

[8] In addition, Mr. Henze told Mr. Van Dongen when he commenced his duties in Delta that he had no experience with large animals. Mr. Van Dongen believed that he was being generous to Mr. Henze, providing him with information to assist him in learning about his job. Mr. Van Dongen was not pleased with Mr. Henze appearing with what Mr. Van Dongen considered an unusual number of complaints.

[9] All of these frustrations continued to fester with the result that by late 2003 the relations between Mr. Van Dongen and Mr. Henze could fairly be described as volatile.

[10] On November 27, 2003, acting on a complaint about the condition of several horses received from a confidential informant, Mr. Henze attended at the Property. Mr. Van Dongen ordered Mr. Henze off the Property. There followed a confrontation. The police ultimately attended. Mr. Henze

subsequently applied for and was granted a Warrant to Search the Property on November 28, 2003.

[11] Constable Henze was not able to find a veterinarian to attend on that day. He then applied for and was granted a Warrant to Search the Property (the "Warrant") on December 2, 2003 pursuant to section 13 of the ***Act.*** The application was supported by an Information to Obtain a Search Warrant sworn by Mr. Henze on December 1, 2003 (the "Information").

[12] The animals, which are the subject of the complaint referred to in the Information, are a light chestnut yearling that appeared emaciated to the confidential informant, a black weanling horse which had a growth on its neck and several other horses, some of them young in age which were sneezing, sickly, and had runny noses.

[13] The Warrant authorized peace officers and authorized agents of the SPCA appointed as special constables under the ***Police Act*** to enter the Property between the hours of 8:00 am and 6:00 pm on December 2, 2003 and "to take any action authorized by the ***Act*** to relieve the animal's distress".

[14] On December 2, 2003 at 10:40 am, Mr. Henze attended at the Property with Helen York, senior Animal Protection Officer with the SPCA, Dr. Mark Steinbach, a veterinarian,

and three officers from the Delta police force. Somewhat later, an independent hauler and his assistant attended with a horse hauler after Ms. York called to request them to attend.

[15] The representatives of the SPCA conducted a search of the Property, which lasted until 2:15 pm culminating in the seizure of three young horses. In addition, Mr. Henze issued an "Order" to Mr. Van Dongen requesting clean up of certain conditions on the Property such as what was described as a rope hazard and some metal hazards near the yellow barn. There is no issue in these proceedings with respect to compliance with this "Order".

[16] The horses seized were:

1. Tinker, a three-month-old black filly with a blaze and two white socks. Tinker had a growth on her neck and likely corresponds to the black weanling referred to in the Information;
2. Star, a five-month-old sorrel filly with a white star on her forehead. Star apparently injured her leg during the course of the search and was not a horse referred to in the Information.

3. Fairfax, a three-month-old chestnut colt. Fairfax's condition did not correspond to any concerns identified in the Information.

Tinker

[17] On December 2, 2003, the young horses that were seized were not halter broken. Tinker was still with her mother.

[18] Tinker had a growth that had first been observed when she was about two weeks old. Mr. Van Dongen had consulted with Dr. Geertsema, his veterinarian, about Tinker's condition. Dr. Geertsema conducted what he described as a thorough physical examination of Tinker twice, in October and November, each time when Tinker was in a stall. Dr. Geertsema and Mr. Van Dongen had discussed Tinker's condition prior to December 2, 2003 and had agreed to euthanize her if her condition did not improve.

[19] In December 2003, at the time she was seized, Mr. Van Dongen was of the view that Tinker was happy and lively, not suffering or in pain. He did not want to take her life precipitously. She was still with her mother. He did not wish to expose her to the stress of invasive procedures and tests.

[20] Mr. Van Dongen was not present on the Property when the representative of the SPCA arrived to execute the Warrant. His employee telephoned him and he attended at the Property, arriving at approximately 11:30 am. When he arrived, he advised Mr. Henze that Tinker was under Dr. Geertsema's care and asked Mr. Henze to telephone Dr. Geertsema. Mr. Henze did so. He was not able to speak with Dr. Geertsema immediately. Dr. Geertsema returned the call at approximately 1:45. However, Mr. Henze and Ms. York had already made the decision to seize Tinker and had loaded her into the truck.

[21] Dr. Geertsema deposed that in the telephone conversation he had with Mr. Henze, Mr. Henze did not indicate to him that the three foals were about to be seized or what his concerns about the three foals were at that time.

[22] Mr. Henze deposed that Mr. Van Dongen told him that Dr. Geertsema had looked at the horse, but had not been able to catch it in order to examine it. Mr. Van Dongen denies making such a statement to Mr. Henze or anyone. It is clear from Dr. Geertsema's evidence that he had thoroughly examined Tinker on two occasions, both times in a stall. Mr. Van Dongen would have no reason to minimize the extent

of Dr. Geertsema's involvement; indeed, he was trying to emphasize to Mr. Henze that Tinker was under Dr. Geertsema's care. I find that he did not make such a statement.

[23] Dr. Steinbach observed Tinker's condition. He was not able to examine her. Dr. Steinbach was under the impression that Dr. Geertsema had not examined Tinker. He was of the opinion that Tinker required an examination in order to determine if she was in pain which, if untreated, could lead to distress.

[24] After Tinker was seized, and while in SPCA custody, she was examined and treated by four veterinarians, had numerous tests, and procedures including surgery. These included:

1. needle aspiration;
2. ultrasound, drainage under sedation;
3. Penrose drains inserted;
4. aspiration and lancing; and
5. endoscopic surgery.

[25] During the time that Tinker was in the custody of the SPCA, Mr. Van Dongen requested numerous times that he and Dr. Geertsema be permitted to examine her and consult with

respect to her treatment. This was refused until the Order of Martinson J. of February 2, 2004, which provided *inter alia*:

> 1. Until the Petition is heard, the Petitioner, John Van Dongen, accompanied by his solicitor, be permitted to visit weekly the young horse, Tinker (who is the in the possession of the Respondent);
>
> 2. Until the Petition is heard, Dr. Hermen Geertsema, DVM, be permitted to examine Tinker every two weeks, commencing immediately, and at the times of such examinations Dr. Geertsema also be permitted to review the veterinarian records and reports for Tinker from the date of her seizure by the Respondent to the times of such examinations;
>
> 3. Until the Petition is heard, the Respondent provide to the Petitioners copies of the veterinarian records and reports for Tinker since the date of her seizure by the Respondent, updated every two weeks;

[26] Donna Hulls is a farmer and horse breeder. She picked Tinker up on February 11, 2004 when the SPCA released her at Mr. Van Dongen’s request because he was out of town. She deposed:

> When my daughter and I picked up Tinker on February 11, 2004 I was able to talk to Dr. Kleider and, while he provided explanations, I reviewed his CD of Tinker’s surgery on his laptop computer.
>
> Dr. Kleider told me that he was the fourth veterinarian to see Tinker and that her condition was very unusual and in all his career he had never seen nor heard of anything like her condition. He

> told me that he had researched the literature and found nothing similar. He told me that Tinker was born with only two chest muscles instead of three and that the cavity left by the missing muscle had been gradually filled by fluid and strange tissue.
>
> Dr. Kleider told me that his surgery on Tinker had been very difficult and it was a radical type of treatment. He told us that the strange tissue in the cavity in Tinker's chest had been very tough, like that found one the surface of a bursa. He told me that he had never seen tissue like what he removed. He told me that to remove that tough tissue in surgery he had used a tool normally used on bone to smooth rough bone surfaces. In response to a question, he confirmed that the surgery on Tinker was so unusual that if he wanted he could play the CD and lecture on the surgery to veterinarians at universities or seminars.
>
> When I brought Tinker to my farm on February 11, 2004, she was debilitated, thin, and had a bloated belly. Her appetite was poor and she was lethargic. In my opinion she had worms at that time and so John and I de-wormed Tinker. The de-worming treatment was successful. Tinker subsequently began to eat with good appetite and had a spurt of growth in both height and weight. She also became energetic.
>
> Tinker is still at my farm and is still recovering from her experiences, but I am uncertain what her future as a breeder or show horse might be in light of her birth defect and the slackness of the tissue in her neck.

Star

[27] Ms. Brattebo deposed that she had checked the horses on the morning of December 2, 2003 and Star was neither injured nor limping. She was not suffering from a respiratory infection.

[28] Star was in an enclosure on the Property, which is about 120 feet by 30 feet. Mr. Van Dongen and Mr. Anger deposed that the truck driver and his assistant went into the enclosure and pursued some foals. The foals were running back and forth in the enclosure to avoid the driver and his assistant. Star jumped out of the way of some of the foals, hitting the wall as she did so. Mr. Anger believed her injury was not serious. He asked to examine Star, but Mr. Henze refused to allow him to do so.

[29] Ms. York deposed that Star was injured while Mr. Anger and Mr. Van Dongen were in the enclosure and that it was their activities that appeared to be spooking the horses. Mr. Henze's evidence is to the same effect.

[30] On balance, I am of the view that it is more likely that it was the actions of the driver and assistant and not those of Mr. Van Dongen and Anger that produced the agitation that resulted in the injury. The young horses were more likely to be upset by the actions of strangers. Mr. Van Dongen and Mr. Anger were familiar with the horses and less likely to act in a way that would result in the behaviour described. However, in any event what is clear from the evidence is that Star suffered some injury in the course of the search and seizure and not before. The extent

of the injury suffered in the enclosure is not clear because she was not examined at the time.

[31] It is also clear from the evidence, including a photograph taken at the scene, that the young horses were dragged into the truck by the driver and his assistant. Mr. Anger deposed that the proper way to load any horse, and in particular, a young horse, onto a horse trailer without injury is to hold its halter, walk by its head and gently lead the horse on to the trailer. Mr. Van Dongen's evidence was to the same effect; in particular, that such treatment can result in injury to the horse's neck or leg.

[32] Based on this evidence, it is possible that the injuries later observed in Star and Fairfax were caused or exacerbated by the methods used in the seizure. In addition, the seizure must have been traumatic for these young animals.

[33] Mr. Anger deposed that the trailer was in a filthy condition, with several inches of feces on the floor. He also noted that there were portable gates hanging inside the trailer that were a hazard and could result in injury to the horses.

[34] Dr. Steinbach examined Star after she was seized and formed the opinion that she had sustained blunt trauma injury to the forelimbs resulting in inflammation and pain. He prescribed rest and medication.

[35] On December 9, 2003, she appeared to be 90% recovered from her injury. However, she was now found to be suffering from a respiratory infection. It was his opinion that this infection was extant while she was on the Property and was then exacerbated by stress. She was also found at that time to have intestinal parasites. Dr. Steinbach prescribed treatment for both conditions.

[36] Dr. Geertsema was of the opinion that the respiratory infection could well have been the result of the seizure in that such infections are common after shipping and moving animals to a new environment. He deposed that he did not observe any sign of respiratory infection in any of the three seized foals when he examined prior to the seizure.

[37] Dr. Steinbach agreed that stress is a contributing factor to respiratory disease; however, it was his opinion that the respiratory pathogen existed sub-clinically at the time of the seizure, becoming manifest as a result of the stressors.

Fairfax

[38] Ms. Brattebo deposed that Fairfax was not injured, limping, or suffering from a respiratory infection on the morning of December 2, 2003 when she checked the horses. Dr. Geertsema had observed no symptoms of respiratory infection when he visited the stables in November.

[39] Dr. Steinbach observed Fairfax in a barn on the Property in an open bedded area. He observed that the foal was moving with some reluctance, and that he was demonstrating lameness in the left hind limb. It was his opinion that Fairfax required a complete examination to determine the full nature of his injury.

[40] Fairfax was seized under the conditions described earlier. Dr. Steinbach examined him on December 3, 2003 and formed the opinion that he was suffering from tendonitis. He prescribed rest and anti-inflammatory therapy. On December 9, 2003, he was contacted to re-asses Fairfax because of concerns with respect to respiratory symptoms. He made a diagnosis of respiratory infection. He also detected the presence of intestinal parasites and prescribed medication for both conditions.

[41] The young horses were eventually released to Mr. Van Dongen. Star and Fairfax were returned on December 24, 2003, Tinker on February 11, 2004. The respondent society claims $14,332.92 for the boarding, feeding, care and veterinarian treatment of the horses of which $12,171.30 relates to veterinarian expenses for Tinker.

ANALYSIS

[42] The first issue is the standard of review. The petitioners submit that the standard of review should be correctness. The petitioners rely in support of this contention on the powers being exercised; the fact that this is not an administrative tribunal and that there is no privative clause. The petitioners submit that the respondent society is exercising very significant powers and judicial review is the only remedy available.

[43] The respondent society submits that because of the discretion given in the ***Act*** to the authorized agents of the Society, the legislature intended that a high degree of deference be given to the decisions taken by representatives. In particular, it is submitted that the court should intervene only if satisfied that the decision taken was patently unreasonable, or was made without

authority, in bad faith, contrary to the rules of natural justice or for an improper purpose.

[44] The conduct at issue in the case at bar is a search and seizure. Accordingly, in my view, the applicable principles to be applied are those in relation to the reasonableness of any search or seizure as set out in ***R. v. Collins***, [1987] 1 S.C.R. 265, 33 CCC (3d) 1; namely that a search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which it was carried out was reasonable; see ***R. v. Nickason*** 2004 BCPC 316 [***Nickason***]; ***R. v. Brown*** (25 May 2000), Surrey 104289 (B.C. Prov. Ct.); ***McAnerin v. British Columbia Society for the Prevention of Cruelty to Animals*** 2004 BCSC 1430.

[45] The search and seizure were conducted pursuant to a search warrant issued pursuant to the ***Act***. The petitioners do not take issue with the reasonableness of the legislation itself. They do submit that the search and seizure were fatally flawed so that they could not be said to be authorized by the ***Act***. They submit further that the search and seizure were conducted in an unreasonable fashion.

[46] The first objection is that the seizure of two of the three animals was invalid because the animals that were

seized were not the animals identified as being in possible distress in the Information. The petitioners submit that if in the course of an inspection or search, an animal of concern is identified that had not been identified in the Information or that is suffering from a form of distress not identified in the Information, the agent is obliged to swear a new Information in support of a new Warrant before seizing the animal.

[47] The Information to obtain a search warrant states that the informant has reasonable ground to believe that "an animal is in distress" at the premises. The informant asks that a warrant be issued authorizing a peace officer... "to enter the Premises and to take any action authorized by the ***Act*** to relieve the animal's distress." The animals identified in the Appendix to the Information were a light chestnut yearling that appeared to be emaciated, a black weanling that had a growth upon its neck and several horses that were sneezing, sickly and with runny noses.

[48] As noted earlier in these reasons of the young horses that were seized, only Tinker was enumerated in the Information.

[49] The Search Warrant was obtained because of the position Mr. Van Dongen had taken on November 27, 2003. I find that it was appropriate to grant the Warrant on the basis of the Information. In addition, Mr. Van Dongen is in the business of breeding and trading horses at the Property. The search was conducted during ordinary business hours.

[50] Section 15 of the ***Act*** provides:

> An authorized agent may, without a warrant, during ordinary business hours enter any premises, other than a dwelling house, where animals are kept for sale, hire or exhibition for the purpose of determining whether any animal is in distress in the premises.

[51] It appears that the ***Act*** clearly contemplates that an authorized agent is entitled to enter a commercial premises such as the Property without warrant and that the agent is empowered to determine if any animal is in distress on the premises. Accordingly, the authorized agents of the society were entitled to be on the Property on the basis of the Warrant or by virtue of section 15 of the ***Act***.

[52] In my view, once an agent is on the Property, either pursuant to a Search Warrant, or pursuant to section 15, and observes an animal that is believed to be in distress, the governing section becomes section 11. The ***Act*** does not, in my view, require that the representative leave the property

and obtain a warrant before taking action under section 11. Such a requirement would not be consistent with the purpose of the ***Act*** in relation to the objects of the ***Act***.

[53] As stated by Clare Prov. Ct. J. in ***R. v. Roos & Stevens*** (22 October 1999), Port Coquitlam 57274-01 (B.C. Prov. Ct.), the intent of the ***Act*** is to allow investigations, particularly to relieve distress in animals that are really unable to look after, to fend for, or to feed themselves." Finally, as noted in ***R. v. Baker***, 2004 O.J., No. 525 [***Baker***], to require such a process would permit ill-motivated individuals to remove or conceal animals, thereby frustrating the purpose of the ***Act***.

[54] Therefore, I conclude that the search and subsequent seizure were not unauthorized or unlawful because they resulted in the seizure of animals that were on the Property, but not identified in the Information or in relation to aspects of distress that were identified in animals on the Property, but which were not specified in the Information.

[55] The petitioners next asserted that the search and subsequent seizure were unauthorized or unlawful because of the presence of unauthorized persons, specifically the

veterinarian, and the hauler and assistant and because of the number of police officers who participated. It is the petitioner's position that the Warrant only authorized peace officers and authorized agents of the SPCA to enter the Property and accordingly the haulers and veterinarian were present without authorization.

[56] This issue was addressed in ***Nickason***. After reviewing that decision and the authorities relied upon by Blake Prov. Ct. J., I am satisfied that unnamed persons who are neither peace officers or authorized agents of the SPCA are permitted to assist in a search and seizure, so long as any such persons are in attendance for a purpose directly authorized by the warrant and operate under the direction of the person or persons named in the warrant as authorized to search.

[57] I am satisfied that those conditions are satisfied in the case at bar. Accordingly, the search and seizure are not unlawful or unauthorized as a consequence of the presence of the additional persons at the Property.

[58] ***Baker*** dealt with the question of the total number of persons involved. O'Connor J. concluded that the number of agents involved must be reasonable based upon the number of

animals involved, the nature of the animals, the size of the location to be searched and any other relevant factors. In this case, there was a substantial property to be searched and a significant number of animals to be inspected. Moreover, the prior history of dealing, including Mr. Van Dongen's conduct on November 27, 2003, made the presence of the police officers to preserve the peace not unreasonable in the circumstances. I find that the total number of persons involved was not unreasonable in the circumstances.

[59] The next issue is whether requirements of section 11 of the ***Act*** were met in the seizure of the animals. Section 11 provides:

> **Relieving distress in animals**
>
> 11 If an authorized agent is of the opinion that an animal is in distress and the person responsible for the animal
>
> (a) does not promptly take steps that will relieve its distress, or
> (b) cannot be found immediately and informed of the animal's distress,
>
> the authorized agent may, in accordance with sections 13 and 14, take any action that the authorized agent considers necessary to relieve the animal's distress, including, without limitation, taking custody of the animal and arranging for food, water, shelter and veterinary treatment for it.

[60] Section 11 must be read in the context of section 12 to 14 which provide:

> **Relieving critical distress in animals**
>
> 12(1) In this section, **"critical distress"** means distress in an animal of such a nature that
>
> (a) immediate veterinary treatment cannot prolong the animal's life, or
>
> (b) prolonging the animal's life would result in the animal suffering unduly.
>
> (2) If, in the opinion of
>
> (a) a registered veterinarian, or
>
> (b) an authorized agent, if a registered veterinarian is not readily available,
>
> an animal is in critical distress, the authorized agent may destroy the animal or have the animal destroyed.
>
> **Authority to enter with a warrant**
>
> 13(1) An authorized agent who believes, on reasonable grounds,
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> (a) that there is an animal in distress in any premises, vehicle, aircraft or vessel, or
>
> (b) that an offence under section 24 has been committed and that there is in any premises, vehicle, aircraft or vessel, any thing that will afford evidence of that offence,
>
> may enter the premises, vehicle, aircraft or vessel with a warrant issued under subsection (2) for the purpose of

(c) determining whether any action authorized by this ***Act*** should be taken to relieve the animal's distress, or

(d) searching for any thing that will afford evidence of an offence under section 24.

(2) A justice who is satisfied by information on oath in the prescribed form that there are reasonable grounds

(a) under paragraph (1)(a), may issue a warrant in the prescribed form authorizing an authorized agent to enter the premises, vehicle, aircraft or vessel for the purpose of taking any action authorized by this ***Act*** to relieve the animal's distress, and

(b) under paragraph (1)(b), may issue a warrant in the prescribed form authorizing an authorized agent to enter the premises, vehicle, aircraft or vessel for the purpose of searching for the thing that will afford evidence of an offence under section 24.

(3) A justice may issue a warrant under subsection (2) for either or both of the purposes referred to in that subsection.

(4) A warrant issued under subsection (2) is subject to the conditions specified in the warrant.

Authority to enter without a warrant

14(1) In this section, "critical distress" means distress in an animal of such a nature that

(a) immediate veterinary treatment cannot prolong the animal's life,

(b) prolonging the animal's life would result in the animal suffering unduly, or

> (c) immediate veterinary intervention is necessary to prevent the imminent death of the animal.
>
> (2) An authorized agent who believes on reasonable grounds that there is an animal in critical distress in any premises, other than a dwelling house, or in any vehicle, aircraft or vessel, may enter the premises, vehicle, aircraft or vessel without a warrant for the purpose of taking any action authorized by this ***Act*** to relieve that critical distress.

[61] There is no suggestion in this case that any of the animals were in critical distress. Therefore, it is clear that the authorized agent is only entitled to take action in circumstances in which the owner can be found immediately where the agent is of the opinion that the animal is in distress and where the owner does not promptly take steps to relieve its distress.

[62] Helen York deposed that she had several conversations with Mr. Van Dongen in which she requested that he have a veterinarian examine the horses and follow the recommended course of treatment and that he refused each time. In particular, she deposed:

> I asked Mr. Van Dongen if he would have a registered veterinarian examine the horses and follow the vet's recommended course of treatment, and he again yelled that he was "the vet" and that he knew "a hell of a lot more than those idiots". I again advised Mr. Van Dongen that two of his horses had been determined to be in distress by a registered

veterinarian and that they required veterinarian attention. Again, I asked Mr. Van Dongen if he would contact his, or any other veterinarian, and have those two horses examined by a veterinarian within the next twenty-four hours, and whether or not he would follow the recommendations of that veterinarian. Mr. Van Dongen replied “No”, and again advised me that he was “the vet” and knew “what is best” for his horses.

I then advised Mr. Van Dongen that because two of his horses had been determined to be in distress by an independent veterinarian, and because they required veterinary attention that he was not willing to provide to them, the Chestnut Weanling and the Black and White Weanling would be taken into the custody of the Society pursuant to the provisions of the ***Act***.

...

I approached Mr. Van Dongen and pointed towards the Chestnut Weanling. I asked him if the Chestnut Weanling had received any veterinary care for its apparent lameness, and point out that there was a scar on its rear leg. Mr. Van Dongen replied that the Chestnut Weanling was “fine”, and that we were “crazy”. I asked Mr. Van Dongen how long he had owned the Chestnut Weanling, to which he replied that he had owned it since it had been born.

I asked Mr. Van Dongen if he would have his vet, or another registered veterinarian, examine the Chestnut Weanling within twenty-four hours, and follow the recommendations of that veterinarian. Mr. Van Dongen replied “No, you people do not know what you are doing”. I re-advised Mr. Van Dongen that, under the circumstances, the Chestnut Weanling would be taken into the custody of the Society pursuant to the ***Act***.

At 1:30 p.m., I saw that the Sorrel Weanling was still favouring its right front leg, and not wishing to put any weight on it. I approached Mr. Van Dongen and advised him that while he had been chasing the weanlings in the Red Barn, the Sorrel Weanling hd become injured, and that, half an hour

> later, she was still favouring one of her legs. I again asked MR. Van Dongen if he would have his vet, or another registered veterinarian, examine the Sorrel Weanling within twenty-four hours and follow the recommendations of the veterinarian. Mr. Van Dongen replied, “No”, and stated that the Sorrel Weanling was “Just bruised”. I again advised Mr. Van Dongen that, under the circumstances, the Sorrel Weanling needed veterinary attention and that it would be taken into the custody of the Society pursuant to the ***Act***. Mr. Van Dongen stated that he would sue the Society and Mr. Buhler. Mr. Van Dongen stated that he “was the vet” and that the Sorrel Weanling’s condition “was similar to a person stubbing her toe”.

[63] Mr. Henze deposed as follows:

> At approximately 12:15 p.m., I approached Mr. Van Dongen, who was then standing next to several of the Delta Police Officers on the driveway near the Red Barn. I then ***Charter***-warned Mr. Van Dongen... I asked if Mr. Van Dongen understood the ***Charter***-warning and he said “Yeah, yeah, I don’t have no use for that”.
>
> I advised Mr. Van Dongen that I was concerned for the welfare of two of the horses found on the Property, namely the Black and White Weanling and the Chestnut Weanling. Mr. Van Dongen stated that Dr. Geertsema had looked at the lump on the Black and White Weanling’s neck and that he had told him that it was cancerous. Mr. Van Dongen informed me that Dr. Geertsema had said that he could remove the lump at a cost of about $1,000.00, but that the lump would grow back. Mr. Van Dongen further stated that a lady friend of his had recommended that he try “Tea of Izeak” to treat the Black and White Weanling, and that he was going to pick up some at a pharmacy later that day. Mr. Van Dongen stated that this lady friend was in the horse business but refused to supply me with her name. He also informed me that he had had three veterinarians at the Property when I had last attended with Ms. McConnell on November 27, 2003, and that all three

> of those vets had advised him that his animals were healthy. He stated that the vets were from a veterinarian school somewhere in Canada. However, he told me that he did not know the names of the veterinarians or the name of the school they had come from.
>
> With respect to the Chestnut Weanling I was advised by Mr. Van Dongen that he knew the horse I was referring to, and that the Chestnut Weanling had been stepped on by its mare when it was born. Mr. Van Dongen stated that he had set and splinted this horse's leg himself, and that he had never called in a veterinarian in order to help with the Chestnut Weanling.
>
> I also informed Mr. Van Dongen that I had concerns for specific hazards that I had seen upon earlier inspection of the Property. I advised Mr. Van Dongen that I noted several piles of discarded metal debris on the west side of the field on the Property, which in my opinion posed a risk of injury to the horses. Mr. Van Dongen stated "None of my horses in the fields have leg injuries. Do you see any injuries on their legs?"
>
> I advised Mr. Van Dongen that the ropes strung up by the yellow Barn posed a tangling risk to horses kept in that area. Mr. Van Dongen stated "That's Amy's deal. – she set that up". I asked who Amy was. Mr. Van Dongen replied "I don't know her last name".
>
> I overheard Constable York advise Mr. Van Dongen that the hay silage was poor quality food to feed to the horses. Mr. Van Dongen replied, "You've got no business here. You people need to come in out of the rain. This is my property!". Van Dongen then stated that he was going to check on the Chestnut Weanling, and he walked away from us.

[64] He agreed in cross-examination that he never advised Mr. Van Dongen that the horses would not be taken into custody if he agreed to have them seen by a veterinarian.

[65] Mr. Von Dongen's evidence was that no one advised him of what animal was believed to be in distress or what the distress might be at any time during the period that the respondent's agents were on the property. With respect to Tinker, it was his evidence that he advised:

> Mr. Henze on December 2, 2003 before the SPCA took Tinker into custody that:
>
> a) Dr. Herman Geertsema, veterinarian to my horses for approximately ten years, had examined Tinker on several recent occasions;
>
> b) Dr. Geertsema and I had discussed Tinker's tumour and agreed to euthanize Tinker if the condition of her tumour did not improve;
>
> c) I considered that Tinker was happy and lively with her mother and I did not wish to take her life precipitously.
>
> In my opinion on and before December 2, 2003 Tinker was not suffering or in pain and, as she was lively and happy, I considered that where there is life there is hope.
>
> I was reluctant to put Tinker down so long as she might improve and so long as she was happy with her mother and lively.
>
> Neither Mr. Henze or any of those with him at any time indicated to me that Tinker was "*in distress*" or requested that I take any steps to relieve any "*distress*" before he removed her from the property.

[66] With respect to Tinker and Fairfax, it was his evidence that:

> Neither Mr. Henze nor any of those with him at any time indicated to me that Star was "*in distress*" or requested that I take any steps to relieve any "*distress*" before he removed Star from the Property...
> Neither Mr. Henze nor any of those with him on December 2, 2003 indicated to me that Fairfax was "*in distress*" or requested that I take any steps to relieve any "*distress*" before he removed Fairfax from the Property.
>
> Neither Mr. Henze nor any of those with him on December 2, 2003 suggested that I get a veterinarian to look at Star.
>
> Neither Mr. Henze nor any of those with him on December 2, 2003 suggested that I get a veterinarian to look at Fairfax.

[67] In cross-examination on his affidavit he denied emphatically that Ms. York or anyone else on the day in question told him that any of the three horses needed to see a vet within 24 hours and asked him to agree to do that.

[68] I have concluded that the representatives of the Society did not inform Mr. Van Dongen of their specific concerns with respect to the seized animals. I find further that they did not request him to take steps in response to those concerns; specifically, to have the animals examined by a veterinarian and to provide treatment in accordance with the recommendations.

[69] Mr. Van Dongen was angry and difficult. He was, however, responsive to the concerns that were identified to

him. He complied with the requests made to him with respect to the Property that were specified in the "Order". He indicated to Mr. Henze that Tinker was under the care of Dr. Geertsema and requested that Mr. Henze speak with Dr. Geertsema. He was clearly upset at the seizure of his animals. It is my view, that if he had been asked to consult with Dr. Geertsema, he would have agreed.

[70] In addition, Ms. York testified that Mr. Henze was present during the conversation she had at 12:15 with Mr. Van Dongen during which she states she advised Mr. Van Dongen of their concerns, and requested that he agree to have the horses examined by a veterinarian. Mr. Henze's affidavit with respect to that conversation is extremely detailed. However, the only conversation between Ms. York and Mr. Van Dongen that he describes is in relation to the hay silage after which he deposed Mr. Van Dongen walked away from them. If there had been such a conversation as described by Ms. York, Mr. Henze would have heard it and, given the importance of the issue, would have referred to it in his evidence.

[71] I conclude that representatives of the respondent Society did not ask Mr. Van Dongen to agree to consult with a veterinarian within 24 hours and agree to follow his

recommendations for treatment. It follows that there was no basis upon which they could conclude that Mr. Van Dongen had not or would not act promptly to relieve the distress. The precondition to seizure specified by section 11(a) of the ***Act*** was not satisfied and accordingly, the seizure was not authorized and was unlawful.

[72] I find further that it was unreasonable in the circumstances to proceed with a seizure of the animals without making such a request. The animals were clearly not in critical distress. Dr. Steinbach had not been able to examine Tinker, but had only observed her condition from a distance. He was of the opinion that she required an examination to determine if she was in pain which if untreated would lead to distress. He had formed no opinion about Star's condition because she was injured after he left the Property. The agents were aware that Dr. Geertsema was involved in the animal's care. It was unreasonable to subject these young animals to the stress of the seizure without making an attempt to have the concerns about their evaluation resolved through recourse to Dr. Geertsema.

CONCLUSION

[73] The petitioners have established that they are entitled to the declaratory relief sought. I grant:

(a) a declaration that the decision of the respondent to seize custody from the petitioners of the three young horses on December 2, 2003 was unauthorized and invalid;

(b) a declaration that the petitioners are not liable for costs to the respondent pursuant to section 20 of the ***Act***.

COSTS

[74] The final matter is costs. The petitioners sought an order for special costs based on what was submitted to have been reprehensible conduct by the respondent amounting to an abuse of authority:

(a) in relation to the seizure of the animals;

(b) thereafter in maintaining custody of the animals while attempting to extract conditions in circumstances in which the Society should have applied to the court for directions;

(c) in the case of Tinker, proceeding unilaterally, and without a court order, undertaking invasive procedures and

> treatment while refusing consultation with Dr. Geertsema.

[75] The respondent Society submits that the conduct of the agents of the Society has not been reprehensible, scandalous or outrageous. At all times, they acted in good faith, in the best interests of the horses and in what they believed to be their authority. Counsel submits that, as in ***Stiles v. Workers' Compensation Board of British Columbia*** (1989), 38 B.C.L.R. (2d) 307, 39 C.P.C. (2d) 74 (BCCA) per Lambert J.A., "at most, one could suggest that there might have been better communication between the parties and a little more give and take...".

[76] In this case, I have found that the failure of the respondent's agents to communicate with Mr. Van Dongen amounted to a fatal defect in their authority to seize the animals. I find a great deal that is troubling with respect to the conduct of agents of the respondent in relation to this matter. For example, I find it troubling that the agents would proceed with a seizure, in the absence of critical distress, in circumstances in which the owner advised that the animal is under the care of a veterinarian, prior to any discussion with the veterinarian. However, I do not find that the conduct has been reprehensible.

[77] In addition, Mr. Van Dongen's conduct also contributed to the unsatisfactory state of affairs. There has been, in my view, unfortunate conduct on the part of both petitioner and agents of the respondent. I accept that all the participants were motivated by what they believed were the best interests of these young animals. What is most unfortunate, in my view, is that their collective actions and reactions caused unnecessary stress and injury to the very animals they were attempting to protect.

[78] In the circumstances, I decline to award special costs. The petitioners are entitled to their costs of the proceedings.

"Ross J."

The Honourable Madam Justice Ross