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Friday, November 7, 2014 - Issue 311

Issues added on the 7th and 21st of every month.

**** HIGHLIGHTS ****

- * A Justice of the Ontario Superior Court of Justice has overturned a damage award granted by a Provincial Court against the Ontario Society for the Prevention of Cruelty to Animals, for violating a farmer's right of unreasonable search and seizure under s. 8 of the Charter of Rights and Freedoms. The Court concluded that although an OSPCA inspector had conducted an unlawful search and seizure because he failed to obtain a warrant, his conduct was motivated by a genuine concern for animal welfare and lack of bad faith. Although s. 24(1) of the Charter does afford jurisdiction for a damage award if it is "appropriate and just", the Provincial Court awarded damages without considering the guidelines set out by the Supreme Court of Canada in determining whether the "appropriate and just" standard had been met. (*Ontario Society for the Prevention of Cruelty of Animals v. Hunter*, [CALN/2014-034](#), [\[2014\] O.J. No. 5078](#), Ontario Superior Court of Justice)

**** NEW CASE LAW ****

Ontario Society for the Prevention of Cruelty of Animals v. Hunter; [CALN/2014-034](#), Full text: [\[2014\] O.J. No. 5078](#); [2014 ONSC 6084](#), Ontario Superior Court of Justice, L.T. Ratushny J., October 20, 2014.

Society for the Prevention of Cruelty to Animals -- Charter Breach for Unlawful Search and Seizure -- Damages.

The Ontario Society for the Prevention of Cruelty to Animals (the "OSPCA") appealed to the Ontario Superior Court of Justice from a judgment granted by a Small Claims Court in favour of an Ontario farmer, Kenneth Hunter ("Hunter") and damages in the sum of \$11,926.83 under s. 24(1) of the Canadian Charter of Rights and Freedoms (the "Charter").

Section 24(1) of the Charter states:

"Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to

obtain such remedy as the court considers appropriate and just in the circumstances."

On October 14, 2010, a Municipal Law Enforcement Officer attended to Hunter's property at Hunter's invitation. Hunter was not home. When she heard something that she thought might be Hunter, she entered a barn and found herself standing in wet manure. There were pigs in the barn who were in liquid manure up to their chests. She went to another barn and saw cattle tied up inside. There was water and liquid manure everywhere but no food in front of the cattle.

The Municipal Inspector phoned an OSPCA inspector. She told him what she had seen and that it had been a long time since she had seen something that bad.

The inspector attended the farm with a veterinarian the next day without first obtaining a warrant. He believed he had grounds to conduct a warrantless search because he had reasonable grounds for believing the animals were in "immediate distress".

Although the veterinarian was concerned about the living conditions of the animals on the farm, he found that all of the pigs were in good and healthy condition, and that all of the cattle with the exception of two were in average condition. Based on the veterinarian's recommendation and pursuant to his authority under s. 13(1) of the OSPCA Act, the inspector wrote a number of compliance orders requiring Hunter to improve the living conditions of his animals.

Hunter had the right to appeal the compliance orders, but did not do so.

Hunter was then charged with three offences under the OSPCA Act:

- Failing to comply with prescribed standards of care;
- Permitting an animal to be in distress;
- Failing to comply with compliance orders.

At the Provincial Court trial, Hunter successfully argued that the OSPCA inspector had violated his s. 8 Charter right to be secure against reasonable search and seizure.

The Crown conceded the s. 8 Charter breach and all of the evidence against Hunter was excluded as a result.

The Provincial Court however declined to award costs in favour of Hunter for the \$9,426.00 in legal fees he had incurred to bring his Charter motion, on the grounds that the Court had no jurisdiction to grant such a remedy.

Hunter then brought a civil action for damages against the OSPCA in Small Claims Court alleging the same Charter breach and tort of trespass. The Provincial Court Judge concluded that the OSPCA inspector had not acted in bad faith, but that a "genuine concern and lack of bad faith cannot cure" the Charter breaches. The Provincial Court

Judge accepted Hunter's evidence that he had experienced paranoia and stress and a sense of violation of his property and awarded Hunter \$2,500.00 in damages, as well as legal costs of \$9,426.83 incurred in defending the provincial offences case.

Decision: Ratushny, J. [at para. 58 and 59] allowed the OSPCA's appeal and awarded nominal damages of \$100.00 for trespass.

Ratushny, J. concluded [at para. 36] that the Trial Judge had committed an error of law when he failed to engage in an analysis of the factors in justifying his award of damages under s. 24(1) of the Charter, as required by the decision of the Supreme Court of Canada in *Ward v. Vancouver* [2010 SCC 27](#) (CanLII), [\[2010\] SCJ No. 27](#) (SCC).

Ratushny, J. [at para. 36] agreed with the submissions of the OSPCA that the Trial Judge simply moved from finding a Charter breach to the issue of the quantum of damages without conducting any analysis.

Ratushny, J. described the considerations which must be considered by a Court for an award of damages under s. 24(1) of the Charter as follows, at para. 42:

[42] In *Ward*, the Supreme Court of Canada stated that for damages to be granted under s. 24(1) of the Charter at least one of the related functions of compensation, vindication of the right, and/or deterrence of future breaches must be engaged. If the plaintiff can show that one or more are engaged, the state (here, the appellant) may still defeat those functional considerations supporting the claim of damages by pointing to countervailing factors, including the existence of alternative remedies and concerns for good governance, that render damages inappropriate and unjust (*Ward*, at paras. 3 and 44).

Ratushny, J. observed [at para. 49] that notwithstanding the finding that the OSPCA had breached s. 8 of the Charter, the OSPCA should not have to bear Hunter's legal fees for the Charter motion, when it was the Crown, in exercising its prosecutorial discretion, which influenced the quantum of those fees. Damages should not be awarded when there was an "appropriate exercise prosecutorial discretion, no finding of an abuse of power and no finding of bad faith or other severe misconduct by the OSPCA" [at para. 50 and 51].

Having regard to, among other things, the fact that the charges were as a result of a brief one time occurrence underpinned by a genuine concern for animal welfare and the lack of bad faith, damages were not a "just and appropriate" remedy under s. 24(1).

Ratushny, J. observed that the OSPCA conceded that the inspector had trespassed but accepted the OSPCA's submissions in all of the circumstances, a nominal damage award of \$100.00 for that trespass was appropriate [at para. 57].

**** CREDITS ****

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