SUPREME COURT OF NOVA SCOTIA
Citation: ***R. v. Benoit***, 2010 NSSC 97

Date: 20100316
Docket: Dig No. 310791
Registry: Digby

Between:

Gail Benoit and Dana Bailey

Appellants

v.

Her Majesty The Queen

Respondent

D E C I S I O N

Judge: The Honourable Justice Peter Bryson

Heard: February 3, 2010, in Digby, Nova Scotia

Counsel: Michael K. Power, Q.C. , for the Appellant
David E. Acker , for the Respondent (Crown)

By the Court:

Introduction

[1] Dana Bailey and Gail Benoit appeal their conviction for permitting animals to be or continue to be in distress, contrary to Section 11(2) of the *Animal Cruelty Act* ("*Act*").

[2] As well, Gail Benoit appeals her conviction for assaulting a peace officer for the Nova Scotia Society for the Prevention of Cruelty ("SPC") while engaged in the execution of her duty, contrary to s. 270(1) of the *Criminal Code*, ("*Code").* She also appeals her conviction for obstructing a peace officer, being a special constable for the SPC, engaged in the execution of her duty, contrary to s. 129 of the *Code.* The charges arise from the seizure of dogs at the appellants' residence on October 24 and October 26, 2007.

[3] The trial went forward in Digby on June 26, October 24 and November 4, 2008. The court received written submissions following the conclusion of trial and by written decision dated January 29, 2009, the His Honour, Judge Jean-Louis Batiot found the appellant, Ms. Benoit, guilty as charged of the s. 270 and 121 offences. He also found both appellants guilty of breaching s. 11(2) of the *Act.*

Background

[4] Roger Joyce is the chief provincial investigator for the SPC. Nancy Noel is a special constable for the SPC. As a result of a complaint, Mr. Joyce and Ms. Noel attended at the appellants' residence in September of 2007. The complaint was that a puppy purchased from the appellants had died shortly thereafter. The officers wanted to inspect the premises. They were not welcome. Mr. Bailey ordered them off the property. He told them not to come back unless they had a warrant.

[5] The SPC received a subsequent complaint on October 23, 2007 as a result of which warrants were obtained and executed on the 24 of October. The warrants authorized the search of an automobile, the appellants' dwelling house and outbuildings. They related to two puppies, a brindle and white puppy alleged to be

in distress. As a result of the exchange in September, Mr. Joyce and Ms. Noel were accompanied by RCMP Officers.

[6] Upon attendance at the appellants' home, Mr. Bailey was shown the search warrant, in response to which he swore at the officers and told them in colourful language to get off his property, but he did not prevent their entry into the home. He went outside, but then swore and appeared out of control. Ms. Benoit also swore at the officers and told them that they were not coming into her house. The officers entered and the appellants' home was inspected. The dogs located there were in good condition. They were pets of the appellants. The dogs referred to in the warrants were not in the home and the officers went out to the garage. They found one of the dogs described in the warrants. Ms. Benoit picked up and thrust or threw a second black and white puppy at Ms. Noel. Ms. Benoit also stepped on Ms. Noel's feet and walked into, her left shoulder to left shoulder. After having recovered two puppies the SPC and RCMP officers departed to a chorus of profanities from Ms. Benoit and Mr. Bailey.

[7] While in the garage, the SPC officers noted what they considered to be evidence and behaviour of distress from the other dogs located there. Significantly, the bellies of some puppies were so distorted that they could hardly walk or move. Their back legs were splayed and back bones were showing.

[8] Based on their observations of the puppies in the garage the SPC officers obtained a further search warrant which was executed on October 26, 2007. That warrant related to 8 puppies, of which only 7 were ultimately located. The SPC officers were again accompanied by the RCMP to the appellants' residence. Initially no one responded when the SPC officers knocked on the front door. The SPC officers then checked the garage.

[9] Because they did not locate one of the puppies mentioned in the warrant, the officers returned to the house. While Nancy Noel was attempting to enter the home, Ms. Benoit slammed the door in her face. She claimed it was to prevent animals from leaving the house.

[10] The puppies seized on both occasions were taken by the SPC to a veterinarian who gave opinion evidence. He testified that all puppies were infected with round worms. They were also suffering from giardiasis and coccidiosi caused by very small parasites which can cause diarrhea and straining. He said that all

puppies had grossly protruding bellies, an indication of an advanced wormy state. They were also suffering from poor nutrition. All were treated and provided with food and water. They showed marked improvement within a week.

Grounds of Appeal

[11] By Notice of Appeal dated May 7, 2009, the appellants appeal their convictions on numerous grounds which are all characterized as "errors in law." For convenience, I have summarized and will address the grounds of appeal under the following categories:

(a) The dogs were not in distress;

(b) The appellants were not "in charge" of the animals in question;

(c) Section 11 (3) of the *Act* was not followed;

(d) Reasonable standards of care had not been breached;

(e) Section 12(2) of the *Act* was not applied;

(f) The law in *R. v. W.(D.)* [1991] 1 S.C.R. 742, was not applied with respect to the convictions under ss. 270 and 129 of the *Criminal Code.*

(g) The trial judge failed to address *Charter* arguments advanced by the appellants and in particular:

(i) The right to a livelihood;

(ii) Equality before the law;

(iii) Protection against unreasonable search and seizure.

Standard of Review

[12] Section 686(1) of the *Code* provides as follows with respect to appeals:

An Appeal Court

(a) may allow the appeal where it is of the opinion that

(I) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice.

(b) may dismiss the appeal where

(I) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[13] In *R. v. Nickerson*, [1999] N.S.J. No. 210, the Court of Appeal expressed the Standard of Review in Summary Conviction Appeal cases as follows at ¶ 6:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(I) and R. v. Gillis (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in R. v. Burns, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[14] When entertaining an appeal of a finding of fact under s. 686(a)(i), the court must apply the following principles:

(a) The Court must be satisfied that the verdict is one that a properly instructed jury acting judicially could reasonably have rendered, *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186;

(b) The trial verdict is unreasonable only if it is so illogical and without foundation in the evidence that no reasonable jury, acting judicially, could have reached it, *R. v. Backman* (1983), 53 N.S.R. (2d) 39 at ¶ 16);

(c) The facts including questions of credibility, and the inferences to be drawn from them are particularly the province of the trial judge, (*Ibid*, ¶ 16);

(d) Appeal Courts may not interfere with findings of fact and factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. Moreover the errors must have affected the outcome, (*R. v. Clark*, [2005] 1 S.C.R. 6).

[15] The duty of the appeal court under s. 686 of the *Code* with respect to alleged errors of fact, goes beyond merely finding that there was evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that can be supported by a properly instructed jury, acting judicially and reasonably. This means that the appeal court must, to some extent, weigh the evidence, at least to the point where it can be satisfied the verdict has a judicial and rational foundation.

[16] Keeping in mind the foregoing principles, I now turn to the grounds of appeal.

A. Were the dogs in distress?

[17] The appellants were found guilty of contravening s. 11(2) of the *Act* which provides:

> No owner of an animal or person in charge of an animal shall cause or permit the animal to be or to continue to be in distress.

[18] Subsection 3 of s. 11 provides:

> For the purposes of subsection (2), the owner of an animal or the person in charge of an animal does not permit the animal to be in distress where the owner or person in charge takes appropriate steps to relieve the distress.

[19] Section 2(2) of the *Act* defines distress as follows:

> An animal is in distress, for the purpose of this Act, where the animal is:
>
> (a) in need of adequate care, food, water or shelter; or
>
> (b) injured, sick, in pain or suffering undue hardship, privation or neglect.

[20] Although this ground of appeal is described as an appeal on a point of law, the finding that the puppies were in distress is one of fact. In this regard, Judge Batiot said at ¶ 62 of his decision:

> I find that the puppies were in *distress* as defined in ss. (a) and (b) of s. 2 (2) of the **Act**; *they lacked food and water* and were suffering from *privation and neglect*. [emphasis in the original]

[21] In making the foregoing findings, Judge Batiot rejected the evidence of the appellants that they had provided proper hygiene, food and water to the dogs and that their distended bellies were as a result of overfeeding. The judge accepted the evidence of the SPC officers and the veterinarian, Dr. Carnegy. In particular, the judge relied upon evidence from Dr. Carnegy that the puppies were in distress from a physiological point of view and that this was unnecessary since the cure was simple, inexpensive and effective.

[22] In their defence, Ms. Benoit testified that some of the puppies had been de-wormed by their owner, a Ms. Robar-Harlow. The appellants called her as a witness. She denied that she had told Ms. Benoit that she had de-wormed her puppies. The judge accepted her evidence in preference to Ms. Benoit's.

[23] The evidence of Noel and Joyce of what they observed at the appellants' premises was supported by Dr. Carnegy. He said that all the puppies seized under the warrants were infected with round worms which take 30 days to achieve an adult stage. He also said the puppies were infected with giardiasis and coccidiosis caused by small parasites which are invisible to the naked eye. They cause diarrhea and straining bowel movements.

[24] All puppies had distended bellies, an indication of an advanced wormy state. Although they had bloated abdomens, they were very thin – they lacked muscle mass. After treatment all puppies showed rapid improvement. Their flesh filled out and their bones were less visible; their bellies shrank and they gained weight, and their behaviour became more playful and "puppylike." The trial judge

accepted this evidence. To the extent that he relied on observations and opinions of SPC officers, he was entitled to do so (*R. v. Graat*, [1982] 2 S.C.R. 819).

[25] The evidence strongly supports the judge's conclusion that the puppies were in distress. For this reason, I don't consider it necessary to deal in detail with the other sub-grounds of the first ground of appeal because, with one exception, they all go to the question of distress.

B. Appellants were in charge of the Puppies

[26] This is also a finding of fact.

[27] With respect to the first seizure, the appellants argue that there were three puppies "on consignment" from Ms. Robar-Harlow. Whatever the commercial arrangements between Ms. Robar-Harlow and the appellants is not determinative of whether the appellants were "in charge" of the puppies within the meaning of the *Act.* In fact, ss.11(2) and11(3) expressly distinguish between an owner and a person in charge. In other words, the statute recognizes that a non-owner can be "in charge" under the **Act**. The real question is whether the appellants had *de facto* custody, possession and control of the puppies at the relevant time and place. The evidence is overwhelming that they did.

[28] In the first seizure, one brindle puppy was located in the appellants' garage, on the appellants' property. While they were in the garage, a second puppy was thrust into Ms. Noel's arms by Ms. Benoit. No one else had immediate control of or access to the premises. By their own admission the puppies were in the appellants' care and control. The same applies to the second seizure. The puppies were located in the appellants' garage. The officers had to break a lock on the garage to gain entry. The garage belonged to the appellants. Again, by their own admission the appellants claimed that they were "caring for" and feeding the puppies. The evidence is compelling that the appellants were "in charge" of the puppies within the meaning of the *Act.*

C. Section 11(3) Act - Due Diligence

[29] With respect to the "due diligence" argument relative to the period of time the puppies were in the appellants' charge – s. 11(3) negates an offence under ss. 2 if:

> ... the person in charge ... takes appropriate steps to relieve the distress.

[30] The first problem with this argument for the appellants is that they do not accept that the puppies were in distress in the first place. They asserted that they had provided proper food and water to the puppies. They claimed that their distended bellies resulted from overfeeding. Therefore, there was no "distress" to "relieve." This evidence was rejected by the trial judge.

[31] The judge recognized that the appellants may establish a defence of mistake of fact or due diligence, on a balance of probabilities, with the ultimate burden of proof always resting with the Crown to prove its case beyond a reasonable doubt. The judge rejected the defence of mistake of fact because the puppies' distressed state should have been apparent to any informed observer. This should have been obvious to the appellants who should have treated the puppies, but did not. Moreover, the judge rejected the evidence of Mr. Bailey on the state of the puppy kennels/cages. He found that the photographs introduced into evidence by Mr. Bailey were not the condition of the kennels and cages at the time of the officers' visit to the appellants' property. The judge noted the contrast in care and condition of the appellants' own dogs with the condition of those they were selling. He found that the appellants did not provide the same quality of care. He held that they ignored the "obvious signs," alluding to lack of care.

[32] The evidence accepted by the judge of the unsanitary conditions in which the puppies were kept, clearly could have and should have been addressed immediately by the appellants. Moreover, the distressed state of the puppies was not a sudden occurrence. It developed over time. Even if the appellants' control of the puppies had been brief – a matter of days – there was ample time and opportunity to relieve their then obvious distress, or to begin doing so. By their own admission, the appellants did nothing about the puppies' worm infestation. In

light of the findings that the infestation was extreme and should have been manifest to the appellants, their inaction defeats a defence of due diligence.

[33] The judge listed in his decision steps that the appellants could and should have taken to assess and provide for the puppies in their care. Each puppy should have been examined, weighed, sized, aged, photographed and health status determined. Records of all these things should have been maintained. The judge found that the evidence was overwhelming that the puppies were in need of food, water, care and veterinary attention. There was ample evidence for those findings. The appellants exercised no due diligence to avoid the commission of the *actus reus* of the offence.

D. Reasonable Standards

[34] Although this is raised as a separate ground of appeal, it is really related to the due diligence defence.

[35] The appellants argue that there are no "published" or "objective" standards of care with respect to the breach of s. 11 of the *Act*. The trial judge found that the puppies were in a state of neglect and distress. He found that they lacked food and water. He accepted the evidence of the SPC officers and Dr. Carnegy with respect to all of these conditions. He also took into account the appellants' claim that they were experienced in the purchase, sale and care of puppies. Therefore the distress should have been evident to the appellants. Indeed, the evidence of the deplorable conditions in which the puppies were found would have alerted even a casual observer to their plight.

[36] It would be impractical for the Society to set out detailed standards of care for all animals that enjoy the protection of the *Act*. Moreover, in the circumstances of this particular case, whatever standards of care one chose to adopt, the judge found that it should have been obvious to anyone with any knowledge of the care of puppies (like the appellants) that they were in a state of neglect. In this regard he accepted the evidence of the SPC officers and Dr. Carnegy. He rejected the evidence of the appellants. He was entitled to do that and there was more than enough evidence to justify his conclusion. This ground of appeal is without merit.

E. Section 12(2) of the Act

[37] The appellants argue that s. 12(2) of the *Act* must be read in conjunction with s.11. If that is done, the appellants say that they should have been afforded an opportunity to correct any shortcomings in their care of the puppies, before they were charged with an offence. They say that they were not given that opportunity. The first proposition is a legal argument with a review standard of correctness. The second entails a finding of fact.

[38] In order to place the appellants' argument in context, it is necessary to reproduce s.12 of the *Act*:

> **Powers of peace officer**
>
> 12 (1) Where a peace officer finds an animal in distress and the owner or person in charge of the animal
>
> (a) does not immediately take appropriate steps to relieve its distress; or
>
> (b) is not present or cannot be found promptly,
>
> the peace officer may, subject to this Act, take such action as the peace officer considers necessary to relieve the distress including, without restricting the generality of the foregoing,
>
> (c) taking custody of the animal;
>
> (d) arranging for any necessary transportation, food, water, care, shelter and medical treatment, or any one or more of them;
>
> (e) delivering the animal into the custody of the Society or a suitable caretaker.

(2) Before taking action pursuant to subsection (1), a peace officer shall take reasonable steps to find the owner or person in charge of the animal and, if the owner is found, shall endeavour to obtain the owner's co-operation to relieve the animal's distress.

(3) Where the owner of the animal is not present or not found and informed of the animal's distress, the peace officer, or the Society in whose custody the animal is delivered, shall take reasonable steps to find the owner and inform the owner of the action taken.

(4) Where the peace officer has reasonable and probable grounds for believing that an animal is in distress

(a) in or upon any premises other than a private dwelling place; or

(b) in any vehicle or thing,

the peace officer may, with or without a warrant, and by force, if necessary, enter the premises, vehicle or thing and search for the animal and exercise the powers conferred on the peace officer by this Section with respect to any animal in distress found therein.

(5) A peace officer who, on reasonable and probable grounds, believes that there is an animal in distress in a private dwelling house, shall obtain a warrant to enter the private dwelling house for the purpose of carrying out duties pursuant to this Section.

(6) Before entering any premises, vehicle or thing pursuant to this Section, a peace officer shall take reasonable steps to find the owner or person in charge and endeavour to obtain the co-operation of the owner or the person in charge.

(7) Where a peace officer uses force in entering premises, a vehicle or thing, the peace officer shall use no more force than is reasonably required under the circumstances.

> (8) Where a person other than a peace officer finds an animal in distress, that person may, upon signing a release in the form prescribed by the regulations, turn the animal over to the custody of the Society. 1996, c. 22, s. 12.

[39] The trial judge appeared to accept the appellants' argument with respect to ss. 11 and 12, but found that cooperation with the appellants would have been futile, based on the September 2007 visit when their inquiries were met with a demand that the officers should not return without a warrant. The judge also relied on the conduct of both appellants during the warrant-authorized searches of October 24 and 26. The judge held that their abusive attitude preempted any useful dialogue or conciliation.

[40] Certainly there was overwhelming evidence for the trial judge to draw the factual conclusions that he did. I would not disturb those findings. However, it was probably unnecessary because, in my view, as a matter of law, s. 11 and s. 12 are discrete sections, and are not inter-related or inter-dependent. Section 11 is prefaced with the heading "Prohibitions." Section 11 (2) sets out the prohibited conduct. Neither an owner nor person in charge shall permit an animal to be or continue to be in distress. Subsection 3 of s. 11 says that there is no contravention of the *Act* under subsection (2) if appropriate steps are taken to relieve that distress. These are the only subsections that need to be read together for the purposes of determining whether the *Act* has been contravened in this respect.

[41] Section 12 is quite different and addresses relief of distress by others. It describes when a peace officer can act, seize and provide care to an animal in distress. The cooperation referred to in ss. (2) of s. 12 is in the context of a peace officer taking steps to relieve distress. It reasonably provides that, if possible, the cooperation of an owner should be enlisted before the peace officer acts on his or her own initiative. It really has nothing to do with whether someone has contravened s. 11 of the *Act.* With respect, it seems to me that the appellants are simply misreading s. 12 of the *Act.*

F. The ss. 129 & 270 Convictions

[42] The appellants here argue that the trial judge erred in law in convicting Ms. Benoit by failing to apply the law as laid down in *R. v. W (D.)* [1991] 1 S.C.R. 742, 1991 CarswellOnt80. Particular reliance is placed on the following quotation where Justice Cory said at ¶ 11:

> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilty of the accused.

[43] The complaint of the appellant, Benoit is that there was evidence of other explanations which did not receive any "analysis" as outlined in *W.(D.).* Ms. Benoit said she was not obstructing Officer Noel when she "closed" the door in Officer Noel's face, but was simply trying to prevent dogs escaping. Regarding the "assault" she says that when she "handed over" one of the dogs she "accidentally" stepped on Officer Noel's foot in close quarters. With respect, these characterizations of Ms. Benoit's conduct lack any air of reality in light of all the other evidence before the trial judge.

[44] As a matter of law it is not necessary for the judge to recite the *W.(D.)* test to himself. In *R. v. Lake,* 2005 NSCA 162 the Court said this about the *W.(D.)* test at ¶ 15:

> . . . A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her

> decision may operate within a flexible ambit. She need not quote phraseology from W.(D.), follow the W.(D.) chronology or even cite W.(D.). The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the W.(D.) instruction.

[45] The trial judge rejected the evidence of the appellants. He accepted that of the SPC officers. With respect to both offences he found that Ms. Benoit knew that Ms. Noel was a peace officer, in the execution of her duties, under the *Act.* With respect to the obstruction offence, the judge found that in an emotional outburst Ms. Benoit barred Ms. Noel from coming into her home, even though Ms. Noel had a legal right to enter. He accepted Ms. Noel's evidence and rejected Ms. Benoit's evidence as too emotional either at the time or at trial for a trier of fact to rely on the accuracy of her recall. He rejected Ms. Benoit's explanation for slamming the door in Ms. Noel's face. This was supported by Mr. Joyce's testimony that there were no dogs in the immediate vicinity at risk of leaving the house.

[46] With respect to the assault, the judge found that Ms. Benoit virtually acknowledged that it occurred. She said "if she had tackled Ms. Noel she would have felt it. If she did step on Ms. Noel's foot, it was no where near what they put us through." Accepting Ms. Noel's evidence, the judge said: "On the whole of the evidence I find that Ms. Benoit, in anger, stepped on Ms. Noel's foot and pushed her with her left shoulder." (¶ 75)

[47] He went on to find at ¶ 79:

> The Crown has also established, beyond a reasonable doubt, that Ms. Benoit has committed the offences, as charged, contrary to ss. 270, 129 of the *Criminal Code of Canada*.

The judge recited the evidence – including the defence evidence – at some length. It is clear that the judge believed Ms. Noel and not Ms. Benoit, but he did not confine himself solely to the "credibility battle." He took into account the evidence as a whole. That would include the evidence of Roger Joyce, who

witnessed the assault and said that there was ample room for Ms. Benoit to walk around Ms. Noel. The trial judge did not misapply *W.(D.)*.

G. Charter/Abuse of Process

[48] Although abuse of process/*Charter* arguments were to be advanced at trial, there was no *voir dire* prior to trial, nor were there any arguments made during the trial directly on point. It was agreed that the Crown and defence would make post-trial submissions on these issues. Moreover, it was clear from the position taken by the defence that the *Charter* and abuse of process arguments were advanced together and to some extent, overlapped. Certainly, this is how the trial judge considered them and under the circumstances, he was entitled to do so.

[49] When one examines the post-hearing submissions of the appellants, *Charter* arguments were not advanced in detail. Other than naming the specific sections at play, they were all really treated together. The substantive arguments raised by the appellants after trial were that the Information on which the first warrants were granted was flawed; that therefore the first warrants were unlawful; that this "tainted" the Information sworn as a result of the first search so that there were no reasonable and probable grounds for the second search warrant and subsequent seizure of puppies. The trial judge dealt with all of these arguments.

[50] The first warrants were issued on the strength of an Information from Donna Nugent. Ms. Nugent had tried to purchase some puppies from Ms. Benoit. She met with Ms. Benoit and looked at some puppies. They were in poor condition and she did not buy any of them. She made a complaint to the SPC. Ms. Nugent provided a very specific description of two puppies in "a dirty state, with protruding bellies, evidence of mites in their ears and bite marks on their bellies." The judge found that Mr. Joyce believed Ms. Nugent and started the proceeding.

[51] It came out in evidence at trial that Ms. Nugent had been campaigning against Ms. Benoit for some time and had some personal animosity against Ms. Benoit. The judge found that there was no evidence that this was known to Mr. Joyce who acted "in good faith, in accordance with his duties." The judge found

that there were reasonable grounds for Mr. Joyce to investigate. He did so, in accordance with the *Act.*

[52] The appellants' argument that somehow the Information sworn by Ms. Nugent was tainted because of a personal agenda or animosity towards the appellants, ignores the fact that the most important facts in the Information were confirmed on investigation and subsequent seizure of the puppies. Moreover, the judge found that the SPC was not aware of, or party to, Ms. Nugent's campaign (¶ 44 and 49).

[53] The judge went on to find that in executing the first search warrants, the SPC officers discovered further evidence of animals in distress. This led to their obtaining a subsequent warrant. From ¶ 42-50 of his decision, the judge addressed the appellants' concerns that the process pursued was improper. He considered whether the warrants were inappropriately issued owing to Ms. Nugent's apparent bias against Ms. Benoit. He also addressed the argument that the SPC was effectively retaliating for having been civilly sued by Ms. Benoit and Ms. Bailey. The judge found that there was no evidence to sustain this allegation. The officers involved in investigating the complaints against Ms. Benoit and Mr. Bailey were not involved in the civil proceedings and only very superficially acquainted with the history of dealings between the Society and the appellants. The judge properly found that the Society had a duty and powers to prevent cruelty to animals, which they were discharging and exercising in this case.

[54] As is evident from the foregoing, the judge considered:

(a) the validity of the first warrants emanating from the Information provided by Ms. Nugent;

(b) whether there were reasonable and probable grounds to issue the first warrants;

(c) whether there were reasonable and probable grounds to issue the second warrant;

(d) by implication from the foregoing, whether or not s. 8 of the *Charter* had been transgressed.

[55] While the judge does not refer in his decision to specific sections of the *Charter*, he certainly dealt with the substance of the appellants' arguments.

[56] In *R. v. Caslake* (1998) 121 C.C.C. (3d) 97 (S.C.C.) the Supreme Court held that a reasonable search under s. 8 of the *Charter* must be authorized by law. The law itself must be reasonable and the search must be conducted in a reasonable manner. It is apparent that Judge Batiot was satisfied that s. 8 was not breached. I agree.

[57] In their post-trial submissions, the appellants did not cite any case law dealing with s. 6(2) of the *Charter* (right to move and gain livelihood). The jurisprudence makes it clear that there is no "stand alone" right to gain a livelihood. Rather, any such "right" is linked to mobility rights. There is no suggestion here that any mobility rights have been violated.

[58] Nor do the appellants cite any law regarding the alleged violations of their equality rights under s. 15(1) of the *Charter*. But they do argue that they were treated differently than a case involving "Celtic Pets." There was evidence before the trial judge that the owners/operators of the pet facility in that instance had been given an opportunity to correct deficiencies and work together with the SPC to remedy same, without being charged. However, there was no detailed evidence regarding exactly what Celtic Pets was doing incorrectly or allegedly in contravention of the *Act.* There was no evidentiary foundation upon which one could readily compare that case with this. Even so, the judge found – as indeed the evidence overwhelmingly showed – that Ms. Benoit and Mr. Bailey had no interest in cooperating with the SPC in any respect. They would not permit the SPC on their property without a warrant and when they did return with a warrant the appellants were abusive, hostile and obstructive. If Benoit and Bailey were treated differently than Celtic Pets – and assuming there were sufficient foundation to actually compare the two cases – any difference in treatment arose solely from the

Benoit/Bailey behaviour and had nothing to do with discriminatory conduct by the SPC.

[59] In *R. v. Power*, [1994] 1 S.C.R. 601, Justice L'Heureux-Dubé, writing for the majority, discussed abuse of process. She noted at ¶ 16 that there was a:

> ... residual discretion to remedy an abuse of the court's process [which] should be exercised only in the 'clearest of cases' which amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

[60] A finding of abuse of process requires overwhelming *evidence* that the proceedings are unfair to the point where they are contrary to the interests of justice. An attack on the Crown of improper motives or bad faith requires conspicuous evidence of same, such that it would be unfair and indecent to proceed. Absent abuse of process or unconstitutional delay, the court will not interfere with prosecutorial discretion, (*Power,* ¶ 33 and following; *R. v. West*, 2010 NSCA 16, at 230).

[61] Although the trial judge did not expressly refer to *Power*, he did refer to the earlier decision of *R. v. Conway*, [1989] 1 S.C.R. 1659, where abuse of process is discussed in the context of prosecutorial misconduct. But he clearly applied the principles in *Power* and *Conway* in coming to the conclusions that he did. In particular, he found that there was no evidence that whatever motives Ms. Nugent may have had, were shared by the SPC officers or the Crown. Accordingly, there was no basis on which to make adverse findings against them. Therefore there was no basis on which to challenge the propriety of the process in this case. In sum, the trial judge dealt with the substance of the appellants' arguments under the *Charter* and with respect to abuse of process. He made no errors of fact or law in doing so.

Conclusion

[62] The trial judge made no error of law, except possibly by accepting the appellants' interpretation of s. 12 of the *Act.* But this favoured the appellants and did not affect the outcome. Nor did the trial judge make any error of fact within

the applicable standards of review. The verdicts here were ones that a properly instructed jury acting judicially, could reasonably have rendered.

[63] The appeals are dismissed.

Bryson, J.