

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Gerling*,
2013 BCSC 2503

Date: 20131210
Docket: 60138-2
Registry: Chilliwack

Regina

v.

Melvin Leonard Gerling

Before: The Honourable Mr. Justice Truscott

Oral Reasons for Judgment

Counsel for the Crown:

S. Di Curzio
A. Janse

Counsel for the Accused:

D. Petri

Place and Dates of Trial:

Chilliwack, B.C.
April 15-19, 2013
April 22-26; 29, 2013
October 15-17, 2013
December 10, 2013

Place and Date of Judgment:

New Westminster, B.C.
December 10, 2013

[1] **THE COURT:** The accused, Mr. Gerling, is charged with two counts, Count 1 being that between the first day of March, 2006 and the third day of February, 2011, at or near Abbotsford, British Columbia he did wilfully cause unnecessary pain or suffering to dogs, contrary to s. 445.1(1)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46; and Count 2 bearing the same time period and in the same area, being the owner or the person having custody or control of a domestic animal who abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it, contrary to s. 446(1)(b) of the *Criminal Code*. Mr. Gerling has pleaded not guilty to both charges.

[2] A trial took place over 14 days in the months of April and October, 2013.

[3] The evidence for the most part consisted of evidence from authorized agents of the British Columbia Society for the Prevention of Cruelty to Animals (BCSPCA) as well as from a veterinarian, Dr. Steinebach, and the accused Mr. Gerling himself.

[4] The *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 (the *Act*) is the governing statute for the care of animals.

[5] Under subsection (1)(1) and (1)(2) of the *Act*:

“authorized agent” means a person appointed as an authorized agent under s. 10(1).

[6] Section 10(1) states:

10 (1) The society may appoint an officer or employee of the society or any other person as an authorized agent for the purposes of this Act.

[7] Continuing with the Definitions section:

"person responsible", in relation to an animal, includes a person who

- (a) owns an animal,
- (b) has custody or control of an animal, or
- (c) is an operator in relation to an animal;

[8] Subsection (2) says:

- (2) For the purposes of this Act, an animal is in distress if it is
 - (a) deprived of adequate food, water, shelter, ventilation, light, space, exercise, care or veterinary treatment,
 - (a.1) kept in conditions that are unsanitary,
 - (a.2) not protected from excessive heat or cold,
 - (b) injured, sick, in pain or suffering, or
 - (c) abused or neglected.

[9] Section 9.1 states:

- 9.1** (1) A person responsible for an animal must care for the animal, including protecting the animal from circumstances that are likely to cause the animal to be in distress.
- (2) A person responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress.

[10] Section 11 states:

- 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, care and veterinary treatment for it.

[11] Section 13(1) states:

- 13** (1) An authorized agent who believes, on reasonable grounds,
 - (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, and seizing, any thing that will afford evidence of an offence under section 24.

[12] Subsection (2) of s. 13 states:

(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, and seizing, a thing that will afford evidence of an offence under section 24.

[13] Section 15 of the *Act* states:

(15) 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.

[14] Section 15.1 states:

15.1 (1) Subject to subsection (3), an authorized agent may enter any premises or a vehicle where an operator is engaging in a regulated activity for the purpose of determining whether this Act and the regulations made under it are being complied with.

(2) Subject to subsection (3), an authorized agent who believes on reasonable grounds that premises or a vehicle is being used for the purposes of carrying out a regulated activity may enter the premises to determine

(a) whether the premises or vehicle is being used for the purposes of carrying out a regulated activity, and

(b) if so, who the operator is in relation to the regulated activity being carried out.

(3) Entry under subsection (1) or (2) may be without a warrant or the consent of the person responsible for the premises or vehicle only if

(a) the premises or vehicle is not used as a dwelling house, and

(b) entry is during ordinary business hours.

15.2 (1) For the purposes of an inspection under section 15.1, an authorized agent may do one or more of the following:

...

(b) require a person to produce relevant records or things in the person's possession or control;

(c) inspect, copy or remove relevant records or things;

...

e) make records in respect of a person, place or thing;

...

[15] Section 24 of the *Act* states in subsection (1):

24 (1) A person who contravenes section 9.1, 9.2, 9.3, 23, 23.1, 23.2 or 23.3 commits an offence.

[16] Section 9.1 (1) again is:

9.1 (1) A person responsible for an animal must care for the animal, including protecting the animal from circumstances that are likely to cause the animal to be in distress.

[17] In order to carry out their duties under the *Act*, in the case of the accused Gerling, the authorized agents of the BCSPCA did enter his business premises between the dates set out in the Indictment for the purpose of determining whether he was complying with s. 9.1(1) of the *Act*.

[18] If an authorized agent discovered an animal in distress as defined, then the agent was empowered to act under s. 11 of the *Act* if the person responsible for the animal does not promptly take steps that will relieve its distress.

[19] In the case of the accused Gerling, the BCSPCA authorized agents issued a number of orders to him through the years to relieve what they considered to be signs of distress in dogs found on his premises.

[20] These orders were on pre-printed forms on which were written the names of the persons responsible for the animals, in this case dogs, the address involved, a general description of the animals, the date of the order, and the nature of the complaint if any that brought the agent to the address in the first place.

[21] Different preprinted orders were listed on the form for the agent to tick-off the relevant order(s) they were giving under the heading: "Pursuant to the Provincial *Cruelty to Animals Act* you are hereby ordered to...."

[22] At the bottom of the form was a space set apart for "comments" and a preprinted warning that:

Failure to comply with the above-noted order(s) within _____ may result in legal action including seizure of your animal(s) and/or charges pursuant to: the Criminal Code, the Prevention of Cruelty to Animals Act, a municipal by-law or provincial legislation.

[23] At the very bottom of the form, the agent provided a telephone number where the agent could be reached, and the name of the agent and the date, with finally the signature of the agent at the very bottom.

[24] A number of these orders that were issued to Mr. Gerling through the years were put into evidence and discussed by the different officers who gave evidence at trial. It is axiomatic that if these orders were complied with in the time period authorized by the agent, or as extended, then the BCSPCA must have concluded that the person responsible had promptly taken steps to relieve the distress under s. 11 of the *Act* and no further action was considered necessary because no further action took place.

[25] When the Crown suggested at trial that these incidents of distress of these animals indicated by these orders that were complied with would still support the criminal charges against the accused Gerling, I questioned how this could be when the scheme of the *Act* is to give the person responsible the opportunity to promptly take steps to relieve the animal's distress without facing any further consequences under s. 13.

[26] It appeared to me that to use these incidents as a basis for these charges might amount to an abuse of process.

[27] However, the Crown has suggested that certain particular orders had not been complied with by the accused Gerling and at the very least the distress indicated in these orders could support the charges.

[28] I will review the evidence on these orders.

[29] The first order identified by the Crown and submits that the accused did not comply with was an order of January 17, 2008.

[30] In the series of orders filed as Exhibit 13 at trial, there is no order of that date, although the Crown may be referring to an order of January 20, 2008.

[31] That order consisted of orders to "ensure the animal's coat is free of matting and/or debris" and "provide necessary foot, nails or hoof care".

[32] The comment of the bottom of the form was "groom required dogs" and the accused was given one week to comply with the orders.

[33] In her evidence at trial, Constable McKnight says she did a follow-up on January 27, 2008 and found all dogs clipped and cleaned, all dog areas cleaned and fresh food and water in existence. There was one dog, a Rottweiler, that had puppies and the accused told her he would trim its nails.

[34] The orders of January 20, 2008 appear to me to have been satisfied by the accused and in my view would not support the charges laid against him.

[35] The second date is March 9, 2008, which is indicated on the form as a re-check, and the only order issued was to "provide necessary veterinary care when the animal exhibits signs of injury, pain, illness, or suffering that require medical attention". The comment on the form was "ears dirty/severe scratching/trying to chew at tail". The accused was given 24 hours to comply with this order.

[36] In her evidence, Constable McKnight says it was a tan pup that was trying to chew on his rear end but she did not observe any hair loss.

[37] She says she was unable to determine whether the March 9, 2008 order was complied with before she went on vacation.

[38] In my view, this order cannot support the charges laid against the accused when there is no evidence that it was not complied with.

[39] The third date was June 7, 2009 which is noted as a re-check and orders were issued to:

- provide necessary foot, nails or hoof care,
- provide shelter with sufficient space to allow the animals to turn freely and to easily stand, sit and lie-down (small square wire), and
- ensure the area/pasture is kept free of injurious objects (Chihuahua barn).

[40] The comments at the bottom were “trim nails, remove injurious wire from Chihuahua kennel in barn, replace wire on raised pens to shop”.

[41] The accused was given one week to comply.

[42] In her evidence, Constable McKnight says there were two dogs in wire cages that needed their nails trimmed. Otherwise, she says the dogs had clean water and food and were groomed with good nails.

[43] In a follow-up on June 14, 2009 she says the wire in the Chihuahua kennel had been fixed.

[44] These orders in my view would not support the charges either.

[45] The fourth date was February 16, 2010 when orders were issued to:

- provide necessary foot, nails or hoof care,
- provide shelter that ensures protection from heat, cold and dampness appropriate to the weight and outer coat of animals, (animal bed/bedding) and
- provide shelter with sufficient space to allow the animal to turn freely and to easily stand, sit, and lie down (beds),
- ensure the shelter is cleaned and sanitized regularly-remove feces, and separate animal(s) placed with the inappropriately matched cage/pasture mates (fix wire between pens).

[46] The comment was "provide enough bed/bedding for all animals in kennels, ensure outside runs clear, fix wire, provide gated entry, ensure nails trimmed".

[47] The accused was given one week to comply with the orders.

[48] In her evidence, Constable McKnight says the complaint that brought her there that day was that the accused was dispensing medicine to the dogs, but she found no basis for that complaint.

[49] She confirms the orders she gave that day and says that on a follow-up visit of February 23, 2010 she still found the orders had not been complied with but the accused told her his groomer had not shown up for three days and the orders would be satisfied in another three days. He also told her that three dogs were to attend to the veterinarian for a check-up.

[50] Constable McKnight says she did not issue any orders on February 23, 2010 but she attended again on March 3, 2010 when she says most pens had adequate bedding and gated entry had been provided to most outer pens.

[51] In my view, these orders of February 16, 2010 would not support any charges either.

[52] The fifth and last date was September 7, 2010 when two orders were issued; one for three goats and one for dogs. Both orders were issued to the accused and also to the English's. The orders were to "provide necessary veterinary care, ensure the area was free of injurious objects, separate the animals, and provide warm bedding".

[53] Constable McKnight says she met with the English's that day and the accused was not there. This was at a different address in Maple Ridge.

[54] The accused says he never received these orders. I accept his evidence in this regard. On the accused's evidence it is not clear to me whether he even owned the goats or had any responsibility for them.

[55] On September 10, 2010, another SPCA officer, Constable Carey attended and issued one order to "provide necessary veterinary care when the animal exhibits signs of injury, pain, illness, or suffering that require medical attention".

[56] In all these circumstances with the accused saying he never received the orders of September 7, 2010, and perhaps having no responsibility for the goats, and Constable Carey on September 10, 2010 saying nothing about the other orders of September 7, 2010 other than the need for veterinarian care, this does not support the charges either in my view.

[57] On September 17, 2010, Constable Carey attended again and did not leave any orders for veterinary care.

[58] At trial, the Crown conceded that there might be an issue about the Crown attempting to rely on a series of SPCA orders over many years to support criminal convictions when none of the orders issued were used at the time to support charges.

[59] The Crown suggested the court could consider only the inspection of the dogs at 406 Sumas Way, Abbotsford on September 22, 2010 and the seizure of the dogs from there on September 24, 2010 to support the criminal charges and that is exactly what I am going to do.

[60] On September 22, 2010, Constable Carey with an officer-in-training, Officer Tanguay, attended to inspect 11 dogs that were in the backyard of the home at 406 Sumas Way.

[61] The evidence of the accused is that they were his dogs and that they were at the residence of Mr. McPhate, an acquaintance of his to whom he had delivered the dogs for one month with \$750 to house them, wash and groom them.

[62] The accused's evidence is that he was at the property only once or twice in that time period and while he looked in on the dogs he left their care to Mr. McPhate.

[63] Constable Carey says she and Officer Tanguay were only there for 15 or 20 minutes that day and the accused was not there at the time.

[64] She observed the 11 dogs which she described in terms that would indicate they were in distress as defined in the *Act*. They had soiled coats, long nails splayed and curled upwards, foul-smelling mouths, and all needed treatment for their teeth.

[65] One dog, Sydney, a black-and-white Shih Tzu, had white colouring in both its eyes, soiled coat, very long nails and stained paws with feces and urine. His eyes were the biggest issue.

[66] On September 22, 2010, Constable Carey did not issue any orders but the next day, September 23, 2010, she swore the Affidavit to Obtain a Search Warrant. The warrant was issued by a Judicial Justice of the Peace (JJP) on September 23, 2010.

[67] The warrant stated that the JJP was satisfied on the basis of the sworn/affirmed information of Constable Carey that there were reasonable grounds to believe there was an animal in distress in the premises at 406 Sumas Way and that an offence under s. 24 of the *Act* had been committed, namely, causing or permitting an animal to be in distress.

[68] The warrant authorized an agent of the BCSPCA to enter the premises on September 24, 2010 between 9:00 a.m. and 9:00 p.m. to determine whether any action authorized by the *Act* should be taken to relieve the animal's distress and to "take such action" and "to search for and seize the things described, being deceased animals and veterinary records."

[69] On September 24, 2010, Constable Carey attended the premises just before 10:00 a.m. with Constable Hammel and Constable Drever.

[70] Constable Carey's evidence is that the same 11 dogs were in the backyard in the same condition as on September 22. The accused was contacted by telephone

and he came to the premises where he remained until Constable Carey left around 1:00 p.m.

[71] Constable Carey says she issued no orders to the accused that day to take steps to relieve the dogs of their distress. She says that she considered that the accused was incapable of taking care of these animals on the 22nd and 24th. She gave the accused a copy of the warrant and the affidavit as well as a Notice of Disposition after she had decided to seize 14 dogs, 11 from the backyard and three from the residence.

[72] The Notice of Disposition notified the accused that the animals had been taken into custody on September 24th pursuant to s. 11 of the *Act* and would be disposed of as provided for in the *Act*. It was pointed out that s. 18 of the *Act* authorized the Society to destroy, sell, or otherwise dispose of the animals 14 days after notifying the owner which the Society intended to do.

[73] It also notified him that if he wished to dispute the disposal, he must do so in writing before the time limit expired and deliver his Notice of Dispute to the attention of Ms. Moriarty.

[74] Further, it was pointed out that s. 20 of the *Act* provided that costs incurred by the Society with respect to these animals must be paid prior to returning the animals.

[75] Constable Hammel attended to take photographs. Constable Drever says it was she who contacted the accused on the telephone to come over on the 24th as he was the owner of the dogs.

[76] Mr. McPhate confirmed to the officers that he was caring for the dogs for the accused.

[77] Constable Drever also expresses the opinion that the dogs seized met the standard of distress under the *Act*.

[78] Subsequently, on September 27, 2010 a veterinarian, Dr. Steinebach, examined the 14 dogs and commenced writing up his report. At trial, he was

qualified as an expert to give veterinary opinions. This ruling was made over the objection of accused's counsel that Dr. Steinebach did a lot of work for the SPCA and should be disqualified as being biased or having the appearance of bias.

[79] I ruled that this was a matter for consideration of the weight of Dr. Steinebach's evidence and not its admissibility.

[80] His report of September 27, 2010 was entered into evidence. The report included a summary which indicated that 13 of the 14 dogs had dental pathology requiring veterinary intervention with six of these requiring urgent care including treatment for pain and inflammation due to the severity and chronicity of the pathology.

[81] The scope of pathology was stated to include dramatic abscess pockets; loss of bone supporting tooth roots through prolonged chronic decay and infection; fractured teeth, including several teeth on different dogs where the crown was missing and the root fragments were retained with these fractures caused by inappropriate tooth extraction attempts; marked gingival recession which occurs secondary to very chronic infection or inflammation resulting in recession of the gum tissue exposing the underlying tooth roots and surrounding bone, dramatic accumulation of dental tartar, in many cases completely obscuring the underlying tooth structure; and unstable mobile teeth with the supporting bone around the roots weakened by infection/decay/inflammation.

[82] It was noted that a common denominator in all cases was the exceedingly chronic nature of the dental pathological changes, that degenerative dental pathological changes happen over a long period of time and the severity of the changes can give important clues to the chronicity.

[83] In Dr. Steinebach's opinion, in all the cases presented, it was reasonable to date the pathological changes to one year at least and most of the changes required significantly longer to develop than a year.

[84] He observed that all dental pathological changes that were noted caused pain very similar to pathology in human beings.

[85] In the case of the retained fractured root fragments this circumstance in his opinion was caused directly by whoever was the operator attempting the extraction of these teeth. He says ignoring the presence of root fragments is cruel as these structures cause pain due to exposure of the sensitive neural structures that are usually protected within the pulp cavity of the tooth which is exposed by the fracture.

[86] He also observed that most of the examined dogs required bathing due to fecal and urine coat staining and/or treatment for severe matting of the hair coat. He pointed out the lack of grooming and nail trimming leads to discomfort from dermatitis, presence of mats against the skin and the effect that long nails have on how the dog is able to walk on the so-affected feet. Most of the dogs did not have basic nail trimming performed and suffered from nails that were left so long as to cause lateral and medial deviation of the digits.

[87] Three of the dogs had chronic, painful, untreated, serious ocular pathology requiring further urgent medical investigation and treatment and on follow-up several of the dogs had ear mite infections. In some of these cases the ear canals were so heavily infested that the canals themselves were completely occluded with infective debris requiring deep video otoscopic flushing under anaesthesia. He noted again that the chronicity of these infestations are slow to develop and spread, taking many months to years to result in ear canal occlusion.

[88] Finally, he offered his opinion that the dogs were in pain from a variety of pain-inducing chronic conditions and as such were suffering and it would not be unreasonable for a lay person to be able assess with little experience the affected and to note the readily apparent pathology.

[89] Ms. Moriarty is another employee of the SPCA who until six months ago was the General Manager of the Cruelty Investigation Department and had been so since

January 2005. She is presently the Chief Prevention and Enforcement Officer for the BCSPCA.

[90] She dealt with the accused on the Notice of Disposition that he had received and his rights and obligations thereunder.

[91] She says it was her decision on whether the animals should be returned to the accused and if so on what conditions.

[92] On September 27, 2010, Ms. Moriarty spoke to the accused and went over with him the procedures for disposition under the *Act* and his rights under the *Act*. She told him she would send him a letter on this and he could explain why his animals should be returned to him.

[93] She also told him that under s. 20 of the *Act*, as the owner, he was responsible for the reasonable costs incurred by the Society under the *Act* for the care of the animals.

[94] On October 1, 2010, she received a letter or email from the accused in which he set-out his position. He acknowledged that he was the owner of the animals seized.

[95] On October 5, 2010, she told the accused that some of the dogs needed immediate dental work and he would have to pay for it. She gave him an estimate of the cost.

[96] She told him that she had not received any veterinary records from him indicating any appointments that he had made for his dogs. His reply was he did not have to make appointments.

[97] The dental surgeries were performed by Dr. Steinebach. Ms. Moriarty says she was not prepared to have the accused's veterinarian, Dr. Bath, do the surgeries because one of the dogs had surgery in the past by Dr. Bath that had not worked out.

[98] On October 12, 2010, Ms. Moriarty says the accused told her he was ending his dispute and choosing to surrender the dogs to the BCSPCA.

Charter issues

[99] Counsel for the accused submits the accused's rights under s. 7 of the *Charter* were breached in depriving him of his right to life, liberty and security of the person except in accordance with the principles of fundamental justice.

[100] The submission made is that the seizure of these dogs under the warrant was an illegal seizure.

[101] As I understand the submission, under the warrant issued it is stated to be an illegal seizure or an over-seizure to seize the dogs because the warrant only allowed the seizure of things described as deceased animals and veterinary records and not of the dogs.

[102] The submission is that as far as the dogs were concerned, the warrant only authorized entry into the premises to determine whether action authorized by the *Act* should be taken to relieve the animals' distress and to take such actions.

[103] The submission is that the initial action required by the *Act* to relieve the animals' distress, is to give the person responsible for the animal the opportunity to promptly take steps to relieve the animals' distress under s. 11 before the authorized agent has the right to seek a warrant under s. 13 of the *Act*.

[104] In *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, [2010] B.C.J. No. 2277 our Court of Appeal dealt with the proper interpretation to be given to s. 11 of the *Act* in the case of seizure by the Society of a number of animals in distress at the appellant's premises.

[105] The issue in that case is whether the appellant was given a reasonable chance to remedy the concerns of the Society prior to the animals being seized.

[106] The chambers judge had reached the conclusion that managing a large number of animals was beyond the ability of the appellant and turning to the second requirement of s. 11 that if the person responsible for the animals does not promptly take steps to relieve their distress, the chambers judge made reference to the decision of Madam Justice L. Smith in *R. v. Sudweeks*, 2003 BCSC 1960 where she said

... to satisfy the test, the constable must form the opinion that 'the person apparently responsible for the animals ... had not taken and would not be able to take the steps necessary to relieve their distress (emphasis by chambers judge).

[107] Reference was also made by the Court of Appeal to the words of the chambers judge where she had said:

Clearly, the Society is not bound by the Act to give a person a chance (time, opportunity) to relieve distress when there is no evidence on which to reasonably conclude that the person will be able to do so.

[108] In delivering the judgment of the Court of Appeal, Mr. Justice Chiasson said that the first task in determining whether the requirement for taking custody of the animals is met is to construe the clause "does not promptly take steps that will relieve distress".

[109] Reference was made again to the decision of Madam Justice Smith in *R. v. Sudweeks*, *supra*, where she said at para. 36:

[36] ... to satisfy the test, the constable must form the opinion that "the person apparently responsible for the animals ... had not taken and would not be able to take the steps necessary to relieve their distress". ... (emphasis in original).

[110] Mr. Justice Chiasson said that a review of the cases cited by the chambers judge shows that they are very fact specific but they all took a broad approach to the language of s. 11 which in his view was consummate with the scheme of the legislation. He said at para.37:

In my view, s. 11(a) must be given a broad purposive interpretation. The words "does not promptly takes steps that will relieve ... distress" sometimes

will lead to the authorized agent making orders and giving directions, in other circumstances he or she may conclude that the person responsible for the animals is unable to take the necessary steps or it may be apparent that the person is unwilling to take steps to relieve the distress. The cases referred to by the chambers judge illustrate these varied scenarios

I do not think the cases support the notion, advanced by the appellant, that, as a matter of law, in every case the agent must give the responsible person time in which to relieve the animals' distress. In some cases, as in the present case, it will be reasonable not to do so. The word "promptly" suggests a consideration whether the person can or will take the necessary action.

[111] In that case, while the authorized agent of the Society had not specifically said in her evidence that she held the opinion that the appellant could not relieve the animals of their distress, Mr. Justice Chiasson pointed out that the animals were seized and there was no suggestion in her evidence that she did not conclude that the appellant would not promptly take steps to relieve their distress and in the circumstances of the case he said it was reasonable to conclude that she did so conclude.

[112] Further, at para. 42 he said:

While it is helpful to have direct evidence that the authorized agent was satisfied that the person responsible did not or would not take steps promptly to relieve distress, whether he or she provides such evidence is not determinative. The task remains for the reviewing judge to decide on all the evidence whether objectively it was reasonable to conclude that the person responsible for the animals did not promptly take steps to relieve the distress.

[113] In *British Columbia Society for the Prevention of Cruelty to Animals v. Baker*, 2007 BCSC 1717, Mr. Justice Preston in chambers made reference to *R. v. Elder-Nilson*, 2006 ONCJ 408, 71 W.C.B. (2d) 678 where the defendant had been charged under sections of the *Dog Owners' Liability Act*, R.S.O. 1990, c. D-16.

[114] There, the trial judge had observed at para. 228:

Based on the evidence of the defendant given at the interim hearing regarding the seizure of the dog, it appears that there is a pattern of moving dogs from place to place or transferring legal ownership of them so that the concept of ownership in the technical legal sense of registered title, has been reduced to simply a more practical matter, of having possession of, and responsibility for the animal with the consent of the owner. The issue seems to be more one of who has possession and control of the dog at any

particular time. This somewhat free ranging, common law concept of ownership actually works quite well for interpretation purposes, given the structure and the intent of the statute as well as the bylaws as these are both directed towards legislating effective control over the animals, to promote the safety of the public and ensure the proper treatment of the animals themselves. In this sense, the person with possession of the dog is the one exercising control with the permission of the actual registered owner and thereby takes on the duties and responsibilities of the dog, and has all of the rights of the owner short of selling the dog and keeping the consideration for their own use. On this basis, this person together with the registered owner who delegates those duties to the person with actual possession and immediate control, must both be liable, if the legislation is to properly function in an environment where possession and control is passed to persons who look after dogs for the legal owners, and legal ownership changes rather freely.

[115] The decision of Mr. Justice Preston was considered by the Provincial Court in the case of *R. v. Chrysler*, [2013] B.C.J. No. 1871 where reference was made again to this quote in *R. v. Elder-Nilson*, *supra*, and the conclusion reached that:

I find that the broader interpretation of owner/person responsible in the *Elder-Nilson* case, as quoted by Mr. Justice Preston, is applicable to the interpretation of the more broadly cast definition of a person responsible in s. 1(3) of the *Prevention of Cruelty to Animals Act*.

[116] Mr. Gerling is an owner under s. 1(3) of the *Act* and is therefore a “person responsible”.

[117] The evidence of Constable Carey was that she had the belief that Mr. Gerling was incapable of taking care of these animals, both on the 22nd of September and on the 24th of September.

[118] It is obvious from her description of the condition of the dogs when she saw them on September 22nd that they were in serious distress. Her comments about the incapacity of Mr. Gerling to care for these dogs would apply equally to Mr. McPhate.

[119] In my view, she was completely justified in her conclusion that these dogs could not have their distress relieved promptly by Mr. Gerling, nor in my view by Mr. McPhate, and had every right and duty to seize these dogs pursuant to the

warrant on September 24th without having to give Mr. Gerling nor Mr. McPhate the opportunity to promptly relieve the distress.

[120] It is my conclusion that there was no breach of s. 7 of the *Charter* in the seizure of these dogs.

[121] Turning to the argument on s. 8 of the *Charter* that everyone has the right to be secure against unreasonable seizure, the accused makes much the same argument that there was an over-seizure because these animals were not specifically covered by the search warrant procedure.

[122] Essentially, I have dealt with this argument under s. 7 and my conclusion is there was no breach of s. 8 of the *Charter* either.

[123] The evidence of Dr. Steinebach will form part of the evidence in this case.

[124] I found Dr. Steinebach to be a very good witness who was completely thorough in his examination of these dogs and whose opinion carried a lot of weight with me.

[125] Mr. Gerling's counsel submits that on the evidence of the accused that he had no intention of harming these dogs and that it cannot be concluded that he wilfully caused unnecessary pain or suffering to the dogs or wilfully neglected or failed to provide suitable and adequate food, water, shelter and care for the dogs as the two charges against him allege.

[126] The Crown submits that by law, it is not necessary for the Crown to prove the accused subjectively wilfully caused unnecessary pain or suffering, or subjectively wilfully neglected or failed to provide suitable and adequate food, water, shelter and care for the dogs.

[127] It is submitted that the decision of Mr. Justice Cole of this Court in *R. v. Hughes*, [2008] B.C.J. No. 973 makes it clear that it is not necessary for the Crown to prove subjective foreseeability of unnecessary pain or suffering or failure to

provide suitable and adequate food, water and shelter, in order to support these charges.

[128] In that case, Mr. Justice Cole cited with approval the Newfoundland Provincial Court decision of *R. v. Clarke*, [2001] N.J. No. 191 where the Provincial Court judge had said that it was unnecessary for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under s. 446 of the *Code*.

[129] In that decision, the trial judge said the following:

It is not necessary therefore, for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under s. 446 of the *Code*. However, objective foreseeability of the consequences of the *actus reus* of s. 446 is constitutionally required. The definition of the word wilfully in s. 429 of the *Code* is, in my view, sufficient to comply with this constitutional requirement.

The Crown does not have to prove any ulterior motive nor does the Crown have to prove that the accused knew that the animal was suffering or that he or she intended for the animal to suffer. The Crown must prove that the accused acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize that this was a likely result. In other words, objective foreseeability of the consequences of his or her act is sufficient. The accused's moral blameworthiness lies in causing the suffering by a wilful act. ...

This *mens rea* element can be proven by reasonable inferences from the accused's actions or through the doctrines of wilful blindness or recklessness see *R. v. Sansegret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at pp. 223-237 and *R. v. McHugh*, [1966] 1 C.C.C. 170 (N.S.C.A.).

As a result, section 446(1)(a) of the *Code* does not require proof that the accused intended to act cruelly or that he or she knew that their acts would have this result. Cruelty is a consequence, as is bodily harm under s. 267 of the *Code* (see *R. v. Dewey* (1999), 132 C.C.C. (3d) 348 (Alta. C.A.).

The objective foreseeability requirement must be tailored to the specific offence (see *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); *R. v. Swenson* (1994), 91 C.C.C. (3d) 541 (Sask. C.A.); and *R. v. Vang* (1999), 132 C.C.C. (3d) 32 (Ont. C.A.). Under s. 446(1)(a) of the *Code* the Crown must prove that "pain, suffering or injury" was a reasonably foreseeable consequence. Under s. 446(1)(c) of the *Code* the reasonably foreseeable consequence relates to the provision of inadequate "food, water, shelter and care" for the animal. The Crown does not have to prove that the accused intended this consequence.

The *actus reus* of this definition of the offence requires proof that the accused caused unnecessary pain, suffering or injury to the animal. The *mens rea* requirement requires the Crown to prove that the accused did so "wilfully". In the context of s. 446(1)(a) of the *Code* this requires proof that the accused

intended such a consequence or that a reasonable person would realize that his or her acts would subject an animal to the risk of unnecessary pain, suffering, or injury.

[130] Section 429 of the *Criminal Code* defines what it means to “wilfully cause an event to occur” as follows:

429. (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[131] At the time of the *R. v. Clarke, supra*, decision, s. 445.1(1)(a) of the present Indictment against Mr. Gerling was s. 446(1)(a) of the *Code* and s. 446(1)(b) of the present Indictment was s. 446(1)(c) of the *Code*.

[132] Applying this description to the word “wilfully” as set out in s. 429 of the *Code* and as further explained in the judgment of *R. v. Clarke, supra*, and accepting the opinion of Dr. Steinebach as to how long the distress in these dogs had existed, I find that Mr. Gerling acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize it was a likely result.

[133] I find the two charges proven beyond a reasonable doubt and Mr. Gerling therefore stands convicted of the charges.

“Truscott J.”