

2015 CarswellNfld 14
Newfoundland and Labrador Provincial Court

R. v. Barrett

2015 CarswellNfld 14, [2015] N.J. No. 25

Her Majesty the Queen and Tony Barrett

H.J. Porter Prov. J.

Heard: July 21, 2014; July 22, 2014; July 23, 2014; December 15, 2014; December 22, 2014; January 5, 2015

Judgment: January 28, 2015

Docket: Grand Bank 0814A00017

Counsel: A. Manning, for Crown

M. Evans, Q.C., for Accused

Subject: Criminal; Evidence; Property

Headnote

Personal property --- Animals — Injury to animals — Miscellaneous

Offences — Accused maintained hobby farm, where he did not reside — Investigators found calves, goats, horses, dogs and sheep in unhealthy condition and starving — Accused was charged under s. 445.1 of Criminal Code with permitting unnecessary suffering and injury to animals, and under Animal Health and Protection Act with permitting unnecessary suffering and injury to animals, failing to provide dogs with clean, fresh, unfrozen drinking water at all times, and failing to provide dogs with adequate shelter — Accused convicted — Accused claimed that he regularly visited and fed animals, but this was unlikely given that accused was disabled and snow was waist deep in relevant places on farm — Even if accused visited farm as often as he claimed, he did not properly provide for daily care of animals — Accused did not set out to starve livestock to death, but evidence showed he did starve them by not giving them enough to eat — All livestock animals were underweight, horses were seriously underweight, sheep and goats were emaciated, and calves were skin over bone — Signs of neglect included that horses were tethered and not properly bedded, there were holes in floor and wall of outbuildings, there was no water for animals, hay for sheep was thrown on bedding, which was contaminated with manure and urine, and horses needed attention of ferrier — Horses were tethered in manner that they could not move and pens of sheep and goats were not cleared of excreta — Accused refused to call veterinarian to treat animals, and attempted medical treatments himself — Wasting due to malnutrition was not sudden but occurred over lengthy period of time — Accused was aware of lack of nutrition for livestock and of the necessity of supplementing feed, but chose not to do so — First charge under Animal Health and Protection Act was stayed due to Kienapple principle — From evidence of accused himself, he did not provide dogs with sufficient water or proper storage.

Table of Authorities

Cases considered by H.J. Porter Prov. J.:

Brampton (City) v. Kanda (2008), 41 M.P.L.R. (4th) 199, (sub nom. *R. v. Kanda*) 233 O.A.C. 118, 53 C.R. (6th) 331, 2008 ONCA 22, 56 M.V.R. (5th) 1, (sub nom. *R. v. Kanda*) 227 C.C.C. (3d) 417, 2008 CarswellOnt 79, (sub nom. *R. v. Kanda*) 88 O.R. (3d) 732, (sub nom. *R. v. Kanda*) 289 D.L.R. (4th) 304 (Ont. C.A.) — followed

R. v. Alexander (1999), 171 Nfld. & P.E.I.R. 74, 525 A.P.R. 74, 28 C.E.L.R. (N.S.) 217, 1999 CarswellNfld 19 (Nfld. C.A.) — considered

R. v. Bailey (2009), 2009 CarswellNS 256, 2009 NSPC 3 (N.S. Prov. Ct.) — referred to

R. v. Bennett (2010), 2010 CarswellNfld 379 (N.L. Prov. Ct.) — followed

R. v. Corliss (1957), 120 C.C.C. 341, 1957 CarswellOnt 157 (Ont. Co. Ct.) — referred to

R. v. Galloro (2006), 2006 ONCJ 263, 2006 CarswellOnt 4315 (Ont. C.J.) — considered

R. v. Kienapple (1974), 1974 CarswellOnt 238F, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 1974 CarswellOnt 8, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.) — referred to

R. v. McHugh (1965), 50 C.R. 263, [1966] 1 C.C.C. 170, 1965 CarswellNS 7, 5 N.S.R. 1965-69 515, 51 M.P.R. 173 (N.S. S.C. [In Banco]) — referred to

R. v. Sault Ste. Marie (City) (1978), 1978 CarswellOnt 24, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 1978 CarswellOnt 594 (S.C.C.) — followed

Statutes considered:

Animal Health and Protection Act, S.N. 2010, c. A-9.1

Generally — referred to

s. 2(1)(g) "distress" — considered

s. 18(2) — considered

s. 27 — considered

s. 76(1) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 2 "cattle" — considered

s. 429(1) — considered

s. 445.1 [en. 2008, c. 12, s. 1] — pursuant to

s. 445.1(1)(a) [en. 2008, c. 12, s. 1] — considered

s. 446(1)(b) — considered

Interpretation Act, R.S.N. 1990, c. I-19

s. 11(2) — considered

Treaties considered:

Hague Convention on the Civil Aspects of International Child Abduction, 1980, C.T.S. 1983/35; 19 I.L.M. 1501
Generally — referred to

Regulations considered:

Animal Health and Protection Act, S.N. 2010, c. A-9.1
Animal Protection Standards Regulations, Nfld. Reg. 36/12

Generally — referred to

s. 13(1) — considered

Sched. B — referred to

Sched. B, s. 4(a) — referred to

TRIAL of accused on charges relating to improper care of animals under Criminal Code and Animal Health and Protection Act.

H.J. Porter Prov. J.:

Introduction

1 These are the reasons why I have concluded that the Crown has proven all of the offences alleged against the accused beyond reasonable doubt. The reasons will address, in order, the charges, the evidence, the positions of the parties, credibility, and a consideration of the applicable law.

The Information

2 There were four offences alleged in the Information, as follows:

Count 1

On or between the 6th day of November in the year 2013 and the 6th day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 445.1 of the Criminal Code.

Count 2

On or between the 6th day of November in the year 2013 and the 6th day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

Count 3

On or about the 6th day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: five dogs, permit those animals to be in distress by failing to

provide clean, fresh, unfrozen drinking water at all times contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

Count 4

On or about the 6th day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: two dogs, permit those animals to be in distress by failing to provide adequate shelter contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

3 Section 2 of the *Criminal Code* provides a broad definition of cattle: it includes "neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes any horse, mule, ass, pig, sheep or goat". As a result, the charges may be summarized as one *Criminal Code* charge about cattle, and three regulatory offences about cattle and dogs.

4 As with all offences, the onus is on the Crown to prove all of the elements of the alleged offences beyond reasonable doubt. Counts 2, 3, and 4 are regulatory offences, and so will follow the rule in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.). Count 1 alleges an offence under the *Criminal Code*, a matter requiring proof beyond reasonable doubt of both *actus reus* and *mens rea*. We will consider the differences later in these reasons. But first let us begin with a review of the evidence.

Evidence

Constable Kennedy

5 Constable Kennedy said that on January 6, 2014, she was dispatched to investigate a report of abandoned dogs at a property in Winterland. She went to 102 Branch Road. The driveway had not been cleared, and was full of snow. She walked in to the property, following tracks which led to the house. There were two dogs tied on in the yard. Neither of them had any food or water.

6 Cst. Kennedy could hear a dog barking from behind one of the outbuildings on the farm. She found a third dog there. It had a gash on its hind quarters, and it too was without food or water. She noted that there were a number of feathers blowing around the yard, and she could hear cattle lowing from a barn. There were 11 sheep outdoors, sheltering in the lee from the wind. There were four dead calves in a barn. One dead calf was frozen to the floor. A live calf was licking snow off of the corpse. She also saw 2 dead sheep and a dead goat. There were live ponies and a goat as well.

7 People who had heard about the situation came to the farm to help feed the livestock, and some of those people told the police officer that the accused, who owned the livestock, was living out in Lewin's Cove. A call was made to him, and another to the provincial veterinary service.

8 About an hour later, the accused arrived, and told Cst. Kennedy that the farm was his, and that he was feeding the livestock "daily, or every other day". The dog with the injury was seized, and the accused said that he would put the other two dogs in the house.

9 Arrangements were made around 11:00 p.m. that night to get a bobcat type tractor to the farm to clear the driveway of snow. Cst. Kennedy said that, in places, the snow was waist high. Once the driveway was cleared, the conservation officers came to help remove the dead livestock. They removed 5 calves, 2 sheep, and a goat. The carcasses had to be moved and loaded using a winch. The conservation officers had to use picks and shovels to get the one frozen calf off of the floor of the barn.

10 The remaining animals, including 2 cows, 11 sheep, 4 goats and 8 ponies, were examined by Dr. Power. She said that the food and water shortage had to be rectified immediately. She recommended euthanizing one pony, named Daisy, but the accused would not agree to that.

11 By January 10, 2014, a detention order had issued by Dr. Whitney, the Chief Veterinary Officer for the province. Daisy had not improved: she was down, and could not get up. She was taken outside, euthanized, and taken away by the conservation officers.

12 On January 15, Dr. Power and Cst. Kennedy returned to the farm. One of the sheep had a highly contagious condition. 11 sheep and 2 calves were euthanized.

13 Autopsies were carried out in relation to the livestock. At the risk of over simplification, the animals had starved to death. After receipt of the autopsy reports, the accused was arrested, on February 11, 2014. The interview of the accused following his arrest was recorded, and the recording played at trial. The recording was entered as exhibit CK 3. A statement which he had given to Cst. Kennedy on January 6, 2014, was entered as exhibit CK 4. The accused waived the necessity of a voir dire in relation to both statements.

14 Under cross-examination, Cst. Kennedy confirmed that the SPCA had made the original complaint to the RCMP, and that it had been about allegedly neglected dogs. The investigation had, in turn, expanded to include the other animals found on the farm. The animals were without drinkable water: however, there were some buckets, containing ice, at various locations around the farm.

15 In her interview of the accused, he had told Cst. Kennedy that the pasture was in poor condition, and also that the hay was of low quality, but that he had tried to compensate for the low quality of the hay by providing lots of it.

Conservation Officer Myers

16 The second witness was Conservation Officer Daniel Myers. He had been called late in the afternoon on January 6, 2014, and had been tasked with the collection of the dead livestock from the Winterland property. He and Conservation Officer Conrad Smith went to the farm, arriving at around 11:30 p.m.

17 There was a bobcat type mini-excavator clearing the driveway of snow when the Conservation Officers arrived. Once the way was clear, they collected up the carcasses of 5 calves, 2 sheep, and a goat, and got them ready to transport to Clarenville, en route to St. John's for autopsy.

18 Conservation Officer Myers returned to the farm on January 11, and this time took away 11 sheep and 2 cows for autopsy.

Conservation Officer Smith

19 The third witness was Conservation Officer Conrad Smith. He confirmed that he and Daniel Myers had been tasked with removal of the dead animals, and how they had been taken to St. John's, via Clarenville, for autopsy. Both Smith and Myers said that continuity of the exhibits was documented and maintained as they were moved from Winterland to St. John's.

Pauline Beazley

20 The fourth witness was Pauline Beazley. She is the president of the Burin chapter of the SPCA. The SPCA had received an anonymous email on January 5, 2014 which had described dogs howling on the property at Winterland. Following up the complaint, on January 6, 2014, Ms. Beazley and Alfreda Grandy had gone to the place, knocked at the door, and found nobody home.

21 There were dogs visible, and they could also hear a dog barking from inside a building. One dog, referred to as "Angel", had no food, water, or shelter. Another, called "Demon" had no food or water, and his dog house was blocked so full of snow as to be unusable. A third dog, referred to as "Lady" had an injury described as a long and narrow cut. Ms. Beazley opined that it looked as though the dog might have been injured after being tangled in a cable.

22 There were dead animals seen on the premises, and some living animals in clear distress. The members of the SPCA called the RCMP, and Cst. Kennedy responded to their complaint. While the SPCA members were there, two men and a woman came by with bread to feed the animals.

23 Once the accused had arrived, he opened up the buildings, and the floors were noted to be covered in faeces. The dog with the injury was taken to the vet. The two black dogs went with the accused, and he had said that he would put the other two dogs in the house on the property. Ms. Beazley said that there was noncompliance with Schedule B of the *Animal Health Protection Act* in terms of the minimum requirements for shelter for a dog. Ms. Beazley said that only the Labrador husky breed of dog is exempted from compliance with the schedule, and that none of these dogs were Labrador huskies.

Dr. Kellie Libera

24 The fifth witness was Dr. Libera, a regional veterinarian with the province, stationed in Clarendville. She deals primarily with large farm animals, including horses and cattle (beef and dairy), as well as sheep, goat, hogs, and mink farms. On May 17, 2013, she made a visit to the accused's farm property in Winterland. One of his cows had calved, and was down and could not get up. The cow was a first calf heifer, or, as the veterinarian said, "it was her first baby".

25 The cow was bright and alert, but "very, very thin". There were a number of concerns noted about the condition of the cow, including the following:

- 1) Fever,
- 2) Infection in uterus, with pus coming from the vulva,
- 3) Mastitis in the two front quarters of the udder,
- 4) Milk fever, a product of low calcium in the blood, indicative of poor nutrition, and
- 5) Lice: the animal had thickened skin, and was losing her hair, a condition called alopecia.

26 Dr. Libera injected the cow with calcium, and prescribed a course of penicillin to treat the infection. She described the calf as being depressed: it had a temperature, there was pus coming from its eye, and it had a mild pneumonia. The cow was in a place which was filthy, and covered in manure.

27 There were other animals present, she said, including cattle, calves, sheep, goats, dogs and birds. One of the sheep was down, and apparently had not moved in several days. There was a large mound of manure immediately behind the sheep. On examination, the veterinarian found that the animal had a heavy lice infestation, had thickened skin, and was also losing hair.

28 The lambs were bawling very loudly, she said. She attributed this to the fact that they had just been "banded". Lambs are neutered by using rubber bands to cut off the blood flow to the testes. This is usually done in the first ten days of the lamb's life. These lambs were approximately 60 days old, and clearly not tolerating the banding very well.

29 The veterinarian also said that there was a goat there which had also been infested with lice, and which had an injured knee, and also had a contagious disease. She recommended euthanasia for the goat.

30 Overall, she said, the place was dirty, with a lot of mud and manure in situ. A couple of days later, she contacted the accused and the cow had still not gotten up. Dr. Libera followed up with a letter to the accused, explaining how to properly treat the sheep and lambs.

31 Under cross-examination, Dr. Libera said that, in May 2013, the accused had 30 ewes, and, presuming one lamb each, 30 lambs. This was too large a flock for the size of the farm and the available structures. Dr. Libera also confirmed that she reported her concerns about the situation to the Chief Veterinary Officer, Dr. Whitney, pursuant to the requirement to make such a report set out in s. 27 of the *Animal Health and Protection Act*.

Dr. Hugh Whitney

32 The next witness was Dr. Whitney. He is the Chief Veterinary Officer for the province. His office directs the farm animal veterinary service, which includes regional veterinarians across the province, as well as a diagnostics and post mortem facility in the capital city. The post mortem facility is staffed with a Veterinary Pathologist, Dr. Laura Rogers.

33 Dr. Whitney tasked one of the regional veterinarians in Clarenville, Dr. Power, to assist the police with their investigation at the property in Winterland. He also made arrangements for autopsies to be carried out in the post mortem facility by Veterinary Pathologist Dr. Laura Rogers.

34 As part of the investigative support, Dr. Whitney's office arranged to have the place snow cleared, and also had the conservation officers attend at the property to assist the police with removing the carcasses of the dead animals. Detention orders were issued, requiring the accused to seek prior approval before removing any live animals from the property: this reflects a concern about the potential for the spread of contagious diseases.

35 The remaining animals were seized and removed on February 12 and 13, 2014, and placed in temporary arrangements. This was done because the animals were not being properly cared for, in terms of food, water, and shelter.

Dr. Penny Power

36 The next witness was Dr. Penny Power, a regional veterinarian who is stationed in Clarenville. She and Dr. Libera both treat farm livestock, including horses, cattle, sheep, goats, pigs, poultry, and mink. They deal with all aspects of farm animal health, including but not limited to parasites, food, hygiene, and behavioural issues, on a daily basis.

37 Dr. Power was declared an expert witness, specifically in two areas: first, the standards of care for livestock, and, second, the determination of causes of injury or death, including factors contributing to those causes of injury or death.

38 Dr. Power explained that there are recognized minimal standards for food, water, shelter, environment, and socialization of farm animals, as set out in the National Farm Animal Codes of Practice. These are specifically adopted by Schedule A to the *Animal Protection Standards Regulations*, NL Regulation 36/12.

39 On January 9, 2014, Dr. Power went to the property in Winterland. Her purpose was to examine the livestock, and to see whether any treatment was required. She said it was a very cold and windy day. The temperature was -10, and the wind chill -18.

40 In the first shed to the right, which Dr. Power referred to as Shed 1, there was a stack of hay on the right hand side, and a small pile of poor quality hay on the left. While there is a subjective element to the assessment of the quality of the hay, Dr. Power explained that poor quality hay does not have green or yellow leaves, it is coarse, pale, and stalky, like straw. By contrast, good quality hay is green, fine, is not dusty, and it smells sweet and fresh. Good quality hay is also not mouldy. Poor quality hay does not have enough protein to maintain energy levels, and must be supplemented with grain rations.

41 In cold weather, animals need to eat more to maintain their energy levels. The more that an animal eats, the more water it will need.

42 In Shed 1, there was a lot of garbage, including a lot of plastic bread bags. There were 2 miniature horses tethered to the wall of the shed. The shed had no door: there was an open doorway. The floor under the horses had a hole which posed a risk. Both horses were haltered, one too tightly. The first horse, a 4 year old named Butterscotch, was examined, and found to be seriously underweight. Instead of weighing in the area of 350 lbs, at 266 lbs, she was almost a hundred lbs underweight. Dr. Power recommended grain supplementation, because the horse required extra protein and calories. The horse's hooves were overgrown, and required the services of a farrier. Butterscotch was tethered, twice, and as a result could not move. Dr. Power said that horses should not be tethered. Instead, they should be placed in stalls. At a minimum, the stall width should be twice the height of the withers of the horse.

43 The horses were not bedded. Horses require clean and dry bedding. There was no water for the horses.

44 Horses require free access to fresh clean drinking water: a horse will drink, on average, 5 litres of water per 220 lbs of body weight per day. Horses ought to have free choice hay available, because they normally feed 2% of their body weight per day. In the field, horses are grazing almost constantly, up to 12 hours a day.

45 The second horse was referred to as Tiddlywinks. It was in better health in terms of its weight, but had no muscle tone, as a result of lack of exercise, and it also required attention to its hooves.

46 Shed 2 had a large outside door. Inside, it was divided, with tie stalls on both sides. In the back of the shed, there was a high dividing wall and a wind barrier. There were no windows, but there were holes in the walls. The floor was packed down with frozen manure. There was so little ventilation in Shed 2 that, even in the cold, there was a distinct smell of ammonia. Elevated ammonia levels can be harmful, said Dr. Penny. The manure should be cleaned at least once daily, just to prevent the spread of disease.

47 There was no drinking water available for the animals in Shed 2. There were a number of empty buckets, and one bucket had approximately 8 inches of ice in it. As they eat, animals require free access to water. In a cold environment, this can pose a challenge, but there are solutions, including running water, heated buckets, or warm water.

48 Dr. Power described the condition of a Black Angus calf, which she estimated to be around 6 months old. It was severely emaciated, to the point where its hip bones and vertebrae were prominent and its belly was distended. It had a very thin winter coat, and no muscle mass to help keep it warm. On a subsequent visit, on January 15, 2014, Dr. Power euthanized that calf. That decision was made taking into account that it

- 1) Did not have the ability to thrive;
- 2) Was in distress;
- 3) Was not suitable for consumption; and
- 4) Was about to perish.

49 Dr. Power explained that a healthy calf would not display prominence along the backbone: there should be a smooth muscle mass there. Emaciated animals display the transverse processes of the spine. The pelvic bone hook bones of a healthy calf ought to be smooth, and covered with flesh. By contrast, this calf was literally just skin over bone. The calf tail head bones were prominent, and, while one should be able to feel a calf's ribs, one could see these.

50 When one sees an emaciated animal, said Dr. Power, there may be a number of causes, including

- 1) Poor nutrition;
- 2) Parasites;
- 3) Dentition issues;
- 4) Chronic disease; or
- 5) Some combination of these.

51 There were other animals present. A pony called Sonny was in fairly good condition, although it required attention to its hooves.

52 But then there was Daisy, a horse approximately 3 to 4 years old. Dr. Power said that Daisy was the most emaciated horse that she has ever seen. Daisy had a discharge coming from her eyes, loud lung sounds, and an irregular heartbeat. Dr. Power suspected that the horse had pneumonia. For her height, Daisy should have weighed 500 lbs. She actually weighed 310 lbs.

53 Daisy's hooves were overgrown, causing her to go back on her heels. That is hard on the joints, and can cause discomfort and even permanent damage. Dr. Power offered to euthanize Daisy, but that was declined by the accused. Despite a grave prognosis, Dr. Power did try to treat the pneumonia with antibiotics.

54 On January 10, 2014, Cst. Kennedy called Dr. Power, and advised that Daisy was down, and unable to get up. The veterinarian recommended euthanasia again, and it was subsequently carried out.

55 There was a horse called Oreo on the property. It was very thin. Its hooves were severely overgrown. While it should have been around 500 lbs, it weighed only 357 lbs.

56 There was also a 5 year old pony named Beau, which Dr. Power described as very anxious and appearing distressed.

57 A calf, described as calf number 2, the same size and age as the Black Angus mentioned above, was also examined and found to be emaciated as well. It appeared ill, had a low body condition score, and it had a dull and thin winter coat. Euthanasia was recommended for it as well.

58 There was a 2 to 3 year old pony called Sebastian. While it should have weighed 500 lbs, it was taped at 325 lbs. It was emaciated, with very little flesh over the bony area lank marks.

59 In the rear of Shed 2, there were 4 goats, consisting of three females and one male. They were on a dirt floor, which was completely covered in faeces. There was no bedding for the goats. The goats had no water, although there were empty buckets there. The goats were described as being "thin to emaciated", and scored 2 out of 5 on a body condition score.

60 Dr. Power examined the goats, dewormed them, treated them for lice and mange, and recommended supplements, bedding and free water for them. She also recommended bedding for the horses.

61 There were 11 sheep in Shed 3, including some ewes and some lambs from the previous Spring. There was a barrier, which one had to climb in order to gain access to the pen. This shed had open doors, but it was surrounded by a snow bank. The floor was filthy. It was packed down with manure, and smelled of ammonia. The lambs had loose stools, and were stained with manure. The sheep were covered in thick wool, which was actually coming off. Under the wool, the veterinarian could feel the back bones and hip bones sticking out. The sheep were anaemic and emaciated. Their gums and mucus membranes were white, which can be an indication of parasites. There were a number of empty pans in pen, but no water. Depending on age, size, and reproductive status, an average ewe will consume between 4 to 9 litres of water per day.

62 Dr. Power heard a couple of the sheep cough, and she suspected pneumonia. Given their state of health, these ewes would have had difficulty in a reproductive cycle, including problems with

- 1) Conceiving;
- 2) Carrying lambs to full term;
- 3) Still births; and
- 4) An inability to produce milk.

63 Dr. Power de-wormed the sheep and lambs, treated them for ectoparasites, and recommended free choice hay and water. She was concerned that these animals were not being provided a minimum required standard of care, in terms of water, food, and shelter.

64 There was no water for the animals to drink. Since every cell in the body requires water, dehydration causes the body to shut down. The animals were clearly emaciated, to the point where it was clear that they had to have been malnourished over an extended period of time. The shelter was dirty, without clean and dry bedding, and there was garbage on the floor and nails sticking out of the walls.

65 Dr. Power was so concerned about the situation that she recommended removing every animal from the care of the accused. On January 15, 2014, she euthanized 2 calves and 11 sheep. There were a couple of reasons for this. First, the lab examination of the lung of one of the sheep had identified a contagious and untreatable bacteria [Caseous lymphadenitis] known to infect lymph nodes. Second, given their state of emaciation, these animals were suffering in the cold.

66 On February 11, 2014, Dr. Power returned to the property. That was the day that the accused was arrested. The ponies and the goats were still there. The nice hay was gone. There was a quarter of a bale of hay left for all of the animals. The weather was cold, and the animals' health was at risk.

67 Dr. Power said that the solution to poor quality hay is not to increase the amount of that hay. Instead, she said, one should supplement poor quality hay with grain.

68 As to the packed down manure on the floors of the sheds, she said that anyone who said that one does not shovel out and remove manure in the winter is "misinformed".

69 Daisy was in such hard shape that she would have died on her own had she not been euthanized.

70 Under cross-examination, Dr. Power said that, if it were true that an animal had stopped eating, then the appropriate response to that would have been to seek medical attention to find out the cause of the condition.

71 Dr. Power was asked about the hydration issue, and she conceded that it can be quite challenging to water livestock in the cold weather. However, notwithstanding the challenge, livestock requires constant and consistent supplies of food and water in order to survive the cold winter weather.

72 While the paleness of the gums and conjunctiva indicated parasitic infestation of the sheep, she said that the parasitic infestation was a secondary health risk to that posed by the emaciation of the animals.

73 Healthy and well fed animals, being fed extra food and water in the wintertime, do not require a heated barn.

Dr. Laura Rogers

74 The next witness was Dr. Laura Rogers, the province's veterinary pathologist. A voir dire as to her qualifications was waived, and by consent she was declared an expert witness in animal pathology, including necropsy, causes of death, and factors contributing to death of animals.

75 Dr. Rogers examined the carcasses of 5 calves, 2 sheep, and a goat which had been removed from the Winterland property. All of the carcasses were severely thin, with no palpable fat. Essentially, the animals displayed "skin pulled over bones". The spaces between the ribs of these animals had collapsed, and the marrow in their bones had emaciated. Instead of resembling butter, the bone marrow looked more like jelly. There was no subcutaneous fat, nor was there any fat in the abdominal cavity. In addition to fat loss, these animals also displayed muscle wasting. When confronted with starvation, an animal's body will mobilize tissue to make up the loss, including the relatively protein rich muscle tissue. In that process, the muscles atrophy in order to provide protein. This is not a sudden process: assuming a healthy animal to begin with, said Dr. Rogers, it might take at least a couple of months for this to have taken place.

76 Dr. Rogers said that, while the animals had parasites, including lung worms, those infestations were not the cause of death. These animals had starved to death.

77 Plastic found in the rumen of the cattle during autopsy was consistent with the white plastic wrap used with bales of hay.

78 Dr. Rogers was asked about her findings as a result of examining the carcass of the horse which had been named Daisy. The horse was very thin. The bone prominences, including the pelvic bones, were sticking out. The horse was very underweight. The hooves were overgrown, there was no visceral fat, no subcutaneous fat, the bone marrow was discoloured, and there was

severe muscle atrophy. While the animal had been euthanized, it was so emaciated as to clearly show that it had been starved for some time prior to being shot.

79 The 11 sheep and 2 calves were also examined. They ranged from poor to very poor body condition, all consistent with the animals not having had adequate nutrition.

80 Dr. Rogers described some of her findings in detail. All of the animals which she examined had been emaciated. The scapula was sticking out of a calf. Its neck was so thin that it was almost collapsed. In sheep number 2, the kidney (which should have been wrapped in fat) was devoid of fat. Even though a pony had thick, two inch long hair, the dorsal spine processes were sticking out of its back. Ribs had no fat on them, and there was no fat in the coronary groove of the heart.

81 Dr. Rogers concluded that these animals had been starved, for a lengthy period of time. In terms of the number of the animals involved, this was the worst case she has ever seen. While there were issues of parasitic infestation, she said, there were no intervening diseases or parasitic infestations which could have caused the wasting away of these animals.

82 Under cross-examination, counsel for the accused put to Dr. Rogers the fact that she had found fecal matter in the digestive systems of many of the cattle and sheep. She had, she said. Did that not indicate that the animals had been fed?, she was asked. Dr. Rogers then pointed out that these animals were ruminants. Their rumens, she said, are probably never completely empty. The parasitism present was not life threatening. While parasites can cause diarrhea, which can then cause dehydration, the dry fecal matter was an indication that the animal had taken all of the available moisture out of the food.

83 The matter was then adjourned until August 29. However, an unrelated emergency arose in the interim. There was a matter brought before the court under the *Hague Convention on the Civil Aspects of International Child Abduction*. That treaty requires that matters of trans-national custody disputes which include allegations of child abduction must be processed without delay. In order to give the child abduction allegation priority, the within matter was called earlier than the scheduled continuation date, and the trial was adjourned, at the request of the court, but with the consent of the parties. And so the matter was set over to, continue on December 15, 2014.

84 On December 15, 2014, we heard the remaining witnesses called by the Crown, and the start of the evidence led by the accused. I will here summarize that evidence, in the order heard.

Constable Burke

85 Constable Burke was asked to assist with the investigation underway in relation to the accused's farm at Winterland on January 26, 2014. He prepared an Information to obtain a search warrant, and submitted it to the on-call duty judge at 10:20 p.m. He received the warrant at 10:45 p.m., and went to the farm with it.

86 The bobcat tractor was ploughing the snow out of the driveway when he arrived: that was a necessity, because the conservation officers were unable to get in to the place due to the snow.

Corporal Foley

87 On January 10, 2014, Corporal Foley was working the evening shift with constables Nash and Kennedy. They reported to him that there was a small horse at the farm in distress. The veterinarian recommended euthanizing the animal, because it was down, and could not get up. Corporal Foley went to the farm, and the horse was taken outside and put down. The conservation officers took the horse away for autopsy.

88 When the autopsy report was received, on February 11, 2014, Corporal Foley and Constable Kennedy arrested the accused. In the interim, in consultation with the veterinarians in Clarendville and St. John's, the RCMP had been visiting the farm to check that the remaining live stock had food and water.

Gordon Fowler

89 In December 2013, Gordon Fowler bought two cows from the accused. These were a Holstein and a "white headed red cow" (probably a Hereford). He described the cattle as being in poor shape, and that they were thin. Notwithstanding that, he kept them over the winter, put them out to pasture in Victoria for the summer, and then sold them in the auction at Truro in the late Fall of 2014.

90 Gordon Fowler said that the condition of the Winterland community pasture was not good: the grass had all been eaten, and there was no food for the livestock.

91 Under cross-examination, Gordon Fowler said that his practice is to feed his livestock twice a day. He does not tether his horses, and they have free access to running water. In cold weather, if the brook running through his property freezes over, he will break the ice with an axe. Hay is provided for the livestock to eat at will, and he supplements the hay with grain, twice a day, in a trough. He has never had a cow die on him.

92 Under re-direct, he said that he keeps his cows in an insulated barn, but with an open door so that they can move in and out at will. His horses are usually outdoors during the day and in the barn at night.

Gerard Walsh

93 Gerard Walsh keeps a small number of sheep. In 2013, he used the community pasture at Winterland, along with Gary Antle, Raymond Power, and the accused. There was an association which was in charge of the pasture land, but some of the rules were not being enforced. While there are separate pastures for sheep and cattle, the cattle were in the sheep pasture. The reason for this was that the fences in the cattle pasture had not been kept up, and so the cattle could escape from that pasture.

94 In addition to Walsh's sheep, the pasture had on it cattle belonging to Raymond Power, Gary Antle's sheep, and the sheep and cattle belonging to the accused. While his sheep were there, Walsh would regularly visit, and feed them. He was giving them grain, bread, and sometimes grass, in addition to whatever they might have found on the pasture.

95 Gerard Walsh took his sheep off of the Winterland pasture in November, 2013. By then, he said, most of the food on the pasture was gone.

96 At his own place, he has a barn and a corral, so that the sheep can move in and out at will. He feeds his sheep twice a day, morning and evening, and he keeps a rack full of hay. He always keeps water there for the sheep.

97 He said that there are fees for using the pasture and that there is a source of drinking water on the pasture. Before sheep are put on the pasture, they are supposed to be sheared, powdered (de-loused), de-wormed, and have their hooves trimmed.

98 The Winterland pasture is managed by a committee of local farmers. In order to avoid exhausting the resources of any one pasture, the livestock is supposed to be rotated through the different pastures. However, because of the problem with escaping cattle, all of the animals were being kept on one pasture. The soil had been tested, and found deficient. It needed lime and fertilizer to make it more productive. The pasture flourished in the summer of 2014, apparently due to the fertilization from the manure dropped on it during the previous summer.

Raymond Power

99 Raymond Power has kept livestock for fifty years. He kept 2 cows, 2 heifers, and 2 calves on the Winterland pasture in 2013. The animals went on the pasture in the latter part of May, and were sold off the pasture in November, 2013. He said that his cattle were in good shape when they came off the pasture.

100 In the summer of 2013, he said, there were three other people with livestock on the Winterland pasture: Gary Antle, Gerard Walsh, and the accused. The accused had cows and sheep on the pasture.

101 Raymond Power said that he thought that there had been too many animals on the pasture in 2013. He said that there was not enough food for the animals, and so they were breaking out, trying to get food. The accused's livestock were still on the pasture when Mr. Power took his off the land. He thought that the accused had been supplementing the feed for his animals by bringing rolls of hay to the pasture. Mr. Power thought that the accused had the most livestock on the pasture, including a couple of dozen cows (eight of which had their calves with them), and also upwards of 75 sheep.

102 Under cross-examination, Mr. Power confirmed that the fees were not collected for the use of the pasture in 2013. Instead, those using the facility were expected to contribute to the upkeep and maintenance of the place. He opined that the pasture quality was in poor shape, perhaps because the sheep and cattle had been sharing the same pasture, and competing for the same food.

103 In describing his own practice, Raymond Power said that he feeds his livestock twice a day, giving them feed, water, and hay. He has lost a calf, when it had not been weaned off its mother. And he lost one on the pasture, after it had tried to jump the fence, and had gotten its hind legs tangled in the fence.

Gary Antle

104 Gary Antle had 10 sheep in 2013. He put them on the Winterland pasture on June 27, 2013, and took them off at the beginning of August. He also had a cow, a calf, and a bull on the pasture. The calf came off the pasture around the first of October, leaving the bull and the cow there until November. He sold the cow off the pasture because there was nothing to eat on the pasture, and the cow was losing weight as a result. The fences were down, and the animals escaping as well. The animals were getting out in traffic.

105 Mr. Antle makes sure that there is free hay and water always available for his livestock. He does not tether his sheep: they are kept in a pen. He does tether his cattle.

106 Under cross-examination, Mr. Antle said that the Winterland pasture was in hard shape in 2013. The cattle had broken down the fence and gotten out. His own cow was underweight, to the point where he decided to take her off of the pasture. The accused probably had the most animals on the pasture, and he was bringing them hay.

107 Because of the state of the fences, the farmers could not rotate the livestock through the various paddocks and pastures that make up the Winterland pasturelands facility.

108 Gary Antle concluded his evidence by agreeing that, because of the dense wool, it is difficult to tell how healthy a sheep is just by looking at it. Instead, one has to palpate through the wool to feel the back bone of the sheep.

109 That was the end of the Crown case. The accused elected to call evidence. The first witness called by the accused was George Power.

George Power

110 George Power has known the accused for 25 years or more. He used to keep some livestock himself, but had to give it up due to complications arising from his health. While he was keeping livestock, he did not put any animals on the Winterland pasture.

111 After he had to stop working because of his health, he used to go to the accused's farm in Winterland. He could not go every day, he said, but whenever he was feeling up to it, he would visit the farm, and do what he could to help with the livestock, feeding them. He was not strong enough to carry buckets of water, he said, but he fed the animals hay, or feed, or even bread. The hay was in a big roll, right by the barn door. There were shelters for the animals. The accused had a garden hose, and used to fill up 30 or 40 buckets of water for the animals.

112 George Power said that the accused had a mechanical feeder, one that held a big bale of hay. It prevented the sheep from soiling the hay, because it kept the hay up off of the floor. The feeder ensured that hay was available to the sheep whenever they wanted. It was at the back of the barn, and the sheep had free access to it.

113 In his opinion, there was lots of hay there for the livestock. Notwithstanding this, he described the black and white calves as "only a bag of bones". He was at the farm on December 23, 2013, and had helped bring in hay for the animals.

114 He said that on December 27 or 28, 2013, the accused had called him, and told him that he had a cow down, and that there was a heifer with green stuff coming out its nose. The accused had started the heifer on a course of antibiotics.

115 Mr. Power said that he went back out to the farm on January 6, 2014. The police and the SPCA were there. He had brought some bread to feed the animals. After some discussion, he said, they were allowed to roll in a bale of hay to feed the livestock.

116 According to George Power, there were 8 horses there, and, in his opinion, they were in "good shape". I will have more to say about the weight to be given this evidence later in these reasons. Mr. Power was aghast at the treatment of the horse which was euthanized. He said that "they" gave the horse antibiotics one day, and shot it the next, before the antibiotics could have worked to save the animal. He also said that that horse had not been in "good shape" when the accused had gotten it.

117 These opinions must be carefully considered in the context of the evidence from the veterinarian and the veterinarian pathologist. Dr. Penny Power described that horse (named Daisy) as being almost 200 lbs. underweight, and said that Daisy was in such hard shape that she would have died on her own had she not been euthanized. Dr. Laura Rogers, the province's veterinary pathologist, said that while the animal had been euthanized, it was so emaciated as to clearly show that it had been starved for some time prior to being shot.

118 George Power has never kept cattle himself, he said, but his father did. With respect, this limits the weight to be given his opinion on compliance with the standards of farming cattle. It was his father's practice to feed the cattle twice a day, once in the morning, and then again in the evening. He was asked about whether there had been any problem watering the livestock at the accused's farm in cold weather. If there was a hard frost, he said, such that the water was freezing, then the accused used to bring water to the barn in a big "drum".

119 Under cross-examination, George Power agreed that he had not been able to get to the farm very often in the fall of 2013. His health problems had required him to take morphine, which then prevented him from driving. Added to that was the bad weather, which sometimes prevented him from going to the farm. Even when he could go, which was probably once a week, he could not carry water for the animals.

120 He agreed that when the calves had come off the pasture, they had been in "rough shape". He was not sure when that was: he thought it had been before December, but maybe it was as late as December, he did not know for sure.

121 He agreed that there was no running water at the farm, and said that the accused had been bringing water there in a big "drum" in his truck. He said that, if snow was being forecast, the accused used to bring in extra hay for the livestock. While he did not know for sure, he believed, based on his telephone conversations with the accused, that the accused was going to the farm "every second day".

122 The Crown attorney showed George Power photographs 7 & 8. They show a large snow bank running along the back of the barn. He said that that was where the feeder had been. He did not know whether it was still there, buried in the snow, or not. But, he agreed, it was not accessible to feed the sheep.

123 And so, he agreed, the sheep had had no access to the feeder, and there was no running water. He did not know whether the accused had contacted the veterinarian about the state of the calves when they had come off the pasture. When the opinion of the pathologist was put to him, i.e., that these animals had starved to death, he said that it must have been "because the hay must have been bad".

William Kelly

124 William Kelly used to keep horses, but he gave it up "about 30 years ago". He used to go with George Power to visit the accused's farm in Winterland. He never went there without George, he said, because they used to go there in George's car. Sometimes they were on the farm 5 days a week, and sometimes less often.

125 Mr. Kelly said that they went to the farm on December 23, 2013, and rolled 4 rolls of hay over to the barn for the animals to eat. They unwrapped one roll, and threw hay in for the horses, sheep and cattle. The accused had a hose hooked up, he said, and they made sure that all of the animals had water to drink.

126 According to Mr. Kelly, the animals were "in good shape" on December 23, 2013, and, he said there was "nothing wrong with them". But then, when he was asked whether any of the animals were in "poor shape", he said "I wouldn't know anyway". As far as he was concerned, they weren't "falling down"; the horses were in "great" shape, and the sheep in "good shape". Again, given his limited experience, there is little weight to be given his opinion, especially in the face of the contradictory evidence from the expert witnesses.

127 On the topic of the mechanical feeder for the sheep, he said that the sheep used to eat out of the feeder outdoors, but, when they were in the barn, the hay was just thrown in the pen, on the floor, for the sheep.

128 William Kelly said that he did not know how to tell the difference between good hay and bad hay.

129 Under cross-examination, Mr. Kelly agreed that, while he had said that the animals were in good condition, he had told the police that the Holsteins had been in rough shape when they had come off the pasture.

130 Like George Power, William Kelly was shown photographs 7 & 8, and asked to point out the mechanical feeder. He was unable to see it. He was asked whether it might have been buried by the snow bank, and said no, he did not think so. However, he said, since they had rolled 4 rolls of hay over to the barn on December 23, and there was only half a roll left there in January, the animals must have eaten that hay.

131 As far as William Kelly was concerned, the animals had been given "lots to eat", and he offered the opinion that the animals had looked "fine" to him.

132 He was asked about cleaning the place, and said that he had helped shovel out the horses' stalls. When asked about the sheep, he said that "we don't clean out the sheep pen until the spring". He said the same thing about the goats: their pounds were not cleaned out until after the winter was over.

133 Here it is useful to keep in mind the opinion of Dr. Power, to the effect that anyone who does not clean up their livestock pens during the winter is "misinformed".

134 The practical result of the description of the feeding and care of the sheep as given by William Kelly is that, when the sheep were being fed, the hay was thrown in their pound, on top of their bedding, which had already been contaminated by urine and feces.

135 We adjourned the matter to December 22, 2014, to hear the evidence of the accused.

The Accused, Tony Barrett

136 Tony Barrett testified on December 22, 2014. He testified with the aid of notes which he had made. His family had moved to Winterland when he was 16 years old, and his father had kept cattle and hogs. After high school, the accused had worked in fish processing plants in Burin and in Marystown. In 2006-07, he completed an industrial instrumentation program, and worked from 2007 to 2010 at Albion Sands in Alberta.

137 The accused had an accident on a dirt bike in 2010, seriously damaging discs in his back in the process. As a result, he was unable to continue working, and is in receipt of a Canada pension disability. He also said that his only income is from the \$989.00 per month which he receives from the Canada Pension. He said that, after the dirt bike accident, he stopped working, and then he "got back into hobby farming".

138 The accused did not explain what he meant by the term "hobby farming". The legislation makes no distinction between farming for profit or otherwise: the standards of care are universal.

139 In 2011, the accused said that he bought "2 or 3" cows from Raymond Power. Then, in 2012, he brought in some 20 sheep from New Brunswick, and some others from Bill Cooper in Harbour Grace. He bought more in 2012, he said, so that he thought that he had 33 sheep, 2 cows and a heifer by then. He also had egg-laying hens, and, by the fall of 2012, he had three horses, named Tiddlywinks, Oreo, and Butterscotch. He also had goats. He said "I think I had 5 goats". He was unsure when he had gotten them, either late in 2012, or early in 2013.

140 The farm continued to grow: by 2013, he thought that he had a couple more goats, and by now 8 horses. He traded a foal for a mature horse, and he traded a couple of calves to get a horse named Daisy from Lloyd Easton in C.B.S. in December 2013.

141 Daisy was definitely underweight when he got her, he said. And her hooves were too long. But, he said, with all of the hay that he had cut, he did not think that it would be a problem.

142 The accused said that he had gotten the calves from a dairy farm in Lethbridge, and then explained how he had had a cow deliver one calf, and that he had bought the others. He said "I think that I had ten calves from Dairy farms in 2013".

143 The accused was asked to describe the property in Winterland. The original building there dated from 1980, but it has been extended since then. It was originally 16 ft. by 16 ft., but is now 28ft. by 32ft. That is where the goats were. The horses were in a 12ft. by 16ft. addition, and the sheep were in an open sided shelter at the back. The sheep (and the calves, which were also in that shelter) could go outside whenever they wanted.

144 There was another building, adjacent to the first, which is "probably" 5 or 6 years old, and which is 14ft. by 32ft. That was for the sheep when they were ready to lamb. There was another shelter for the sheep, below the hill, about 10 ft. by 20 ft. and 4 ft. high, for them to get in out of the weather.

145 The accused said that he tethered the horses and cattle. Calves which were to be slaughtered were kept with the sheep, and were not tethered. The goats were not tethered.

146 The accused explained that the horses and cattle were tethered because it made it easier to clean up after them. He added that tethering the horses and cattle avoided having them fight over food and water. The fact that he was concerned about the livestock fighting over food and water is an indication that the accused was aware of a shortage of food for the livestock.

147 The accused said that none of the buildings were heated, and then said "I don't think you could heat a building for a hobby farm". He explained that the holes in the walls "gave good ventilation". He said that the ventilation helped remove the ammonia which came from the feces and the urine from the animals. The accused said, referring to his livestock "they don't need insulated buildings".

148 The accused was asked about the Winterland community pasturelands. He said that he had bought cows off the pasture in 2011. The pasturelands were managed by an association, which included farmers as directors on the board of directors, and also as officers of the association.

149 The association charged fees to allow farmers to keep their livestock on the pastures in 2012, he said, but not in 2013. According to the accused, the association was not functioning properly. In particular, he said that Gerard Walsh had erected a fence on the pasture, and had made a separate place for his own sheep to graze.

150 While the total pastureland area is 500 acres, said the accused, most of it is not fenced, and much of it is not cleared. Added to that, he said, the pasture was in poor shape, in that it needed to be limed and fertilized. Making that problem worse was the use of the same pasture for both cattle and sheep, which had the effect of depleting the pasture even more.

151 The accused said that he brought his livestock home in stages in the fall of 2013. The goats came home in late November, before it had snowed. Then the cows and calves came home. Then, there was a fairly heavy snowfall, following which the sheep were brought home. Following that, the horses were brought down from the pasture.

152 There was a problem bringing Tiddlywinks and Butterscotch out: those two horses had turned around part way out the road, and had headed back towards the pasture, and so it was not until a day later that the accused went in to the pasture and brought them out to his farm.

153 The accused was asked to describe the condition of the horses when they came off the pasture in December 2013. He described both Sebastian and Daisy, in that order.

154 Sebastian was "probably" a bit smaller than he should have been, said the accused. But Sebastian had been breeding the mares, so some weight loss was to be expected.

155 Daisy was no better than she had been when he had obtained her from Lloyd Easton. She was thin.

156 When he was asked about his plans to remedy Daisy's condition, the accused said that you would give the thin ones more food, both in grain and in hay.

157 "What about veterinary care?" Asked his counsel. The accused said no, none of the horses needed it. I have my own penicillin, he said, and, over the years, having been places where he had seen vets in operation, he knew how to give the animals a needle, and start them on penicillin. He specifically recalled giving penicillin to a heifer. It had had a green nasal discharge, which he diagnosed as pneumonia.

158 The accused said that the vets had given him penicillin. Then he said "I shouldn't say they gave it to me: I bought it from them, and then later I had some shipped in from Nova Scotia".

159 The accused was asked about what he had been feeding his livestock. Up on the pasture, they had grass. And then he would get out of date bread, and give that to the animals, to supplement the grass. He would "probably" throw 10 loaves of bread on the pasture at a time. You didn't want to give them too much bread, he said, because "too much would give them the runs".

160 The accused was asked whether he had ever brought grain to the pasture, to supplement the grass. He said "I think we brought grain up there, in the early part of the summer, for the lambs". Once the animals came off the pasture, he said, then they got hay and grain.

161 The accused had cut his own hay, and baled it in 800 pound rolls. It varied as to quality, he said. Some was fine, and some was coarse. Some of it had clover in it, and some of it was like straw. He had brought some hay to the pasture, he said, in November and in December.

162 The accused was asked about mechanical feeding devices. He had bought two, he said, but had sold one in the fall of 2013 to a farmer in the Goulds. The remaining feeder was about 50 ft. behind the building, he said, although he subsequently moved it closer to the building. He could not use the mechanical feeder while the calves were in with the sheep, because the calves would butt the sheep away from their feed. Instead, said the accused, before the snow came, he was feeding the sheep behind the shed, and also behind the shelter.

163 After the snow came, he fed the sheep indoors, by throwing their feed on the floor.

164 The accused was not living in the house on the farm. Instead, he was living in Lewin's Cove. He went to the farm whenever he could, he said. But sometimes his girlfriend's children needed to be picked up from day care, and sometimes the weather was bad. And one time, he had gone to St. John's, Christmas shopping, for a couple of days. The longest time that he was not on the farm was two days. He was there most days, and would spend 2 or 3 hours a day there. If bad weather was forecast, he said, he would give the animals extra food, to hold them over in the event that he was delayed getting back to the farm.

165 The accused did not snow clear. There were times when you could drive in to the farm in a car, and most of the time, he was able to get in there in his 4x4 pickup truck. After the snow became too much for the truck, he used to park at the roadside and walk into the farm.

166 There was no running water in any of the out buildings on the farm. The accused ran a hose out of the old house, and watered the livestock with it. Then, the plumbing froze up in the unheated and unoccupied house. This meant that the accused had to deliver water to the farm. He did this by carrying water in a "drum" and in buckets in his truck. When the snow blocked the driveway, he was reduced to parking at the road side, and physically carrying buckets of water in to the farm for the livestock.

167 This meant that a man who could not work because he had dislocated discs in his back was now carrying buckets of water through the snow to water horses, cattle, calves, sheep and goats. Here it is useful to keep in mind that Cst. Kennedy had said that, in places, the snow was waist high. It must also be kept in mind that the carcasses of the dead animals had been left in situ, because they were too heavy for the accused to remove them.

168 Contrary to the evidence from the veterinarian, the accused said that the animals did not need a lot of water. Sometimes, he said, the horses would only drink a quarter of a five gallon bucket of water a day. Here, it is worth noting that Dr. Power had said that horses require free access to fresh clean drinking water, and that a horse will drink, on average, 5 litres of water per 220 lbs of body weight per day.

169 Then, said the accused, the electricity went out on the Burin Peninsula. This was either January 3 or 4, 2014. His truck was out of gas, and, because the gas station had no electricity, it could not pump gas. Then, the pipes froze in the house in Lewin's Cove. So, he had no water. And, even if he did have water, he had no means of getting it to the animals on the farm. As a result, he was unable to get to the farms, or water his livestock, for two days.

170 Counsel for the accused moved on to the topic of the dogs. The accused had five dogs, which he described as follows:

- | | |
|-----------|-----------------------------|
| 1) Angel | part Pyrénées, part Maremma |
| 2) Demon | pure bred Maremma |
| 3) Lady | pure bred Maremma |
| 4) Daisy | pure bred Cocker Spaniel |
| 5) Sheraa | pure bred Labrador |

171 The accused explained that he has been breeding dogs since 1994, and is a registered CKC dog breeder. Angel was tied to the rail of the front step of the house on the farm. It would come in to the porch for food and water. Demon had a bucket by the side of its house. The dog house was "probably" 3ft. by 4 ft., "or something like that. It might have been 5ft. long." The dog house did not have a door. Lady was on a long lead, and could go into the 16ft. by 20 ft. shed with the horses to get shelter from the weather.

172 Mortality was the next topic. The coyotes had killed some goats on the pasture. A goat had died on December 15, 2013, on the farm. A calf had gotten stuck in the snow, out behind the barn, and it had been "a day or so" before the accused had noticed that it was missing. The accused got the calf into the barn, and tried to get it to eat, but it died a couple of days later. The heifer had pneumonia, and would not eat. It had a discharge from the eyes and nose, which the accused was treating with penicillin, but then it stopped eating, and died. That was around December 28th, 2013. The mostly white calf died after that, but before

the power outage. Two calves died around January 3 or 4, 2014. A lamb died during the power outage. The carcasses were too heavy to move, said the accused, and so all of the dead animals were still in situ when the police arrived on January 6, 2014.

173 Counsel for the accused put to him the evidence from Dr. Power, to the effect that a farmer should consult the veterinarian whenever an animal stops eating. Well, he said, he had called "Kelly" about one calf the year before, and it had cost him "close on \$300.00." Then he said that it had cost him "between \$200 and \$300", and that the visit by the veterinarian had involved a calf named Charlotte and also a sheep with toxemia.

174 The accused was asked about the advice which the veterinarian had given him in January 9, 2014. He said that she had advised him to give them water "24/7", and that he should use heating elements to keep the water from freezing. He said that he did not follow that advice, because the cost would have been "astronomical". And then he said that it was "too expensive for a hobby farm".

175 The accused was asked whether the veterinarian had recommended euthanizing the horse named Daisy. She had mentioned it, he said, and they had discussed it. But he wanted to give her penicillin, and try to make the horse better.

176 The accused was asked whether he had been giving the animals grain. Some of the animals were fed grain, but not all. It depended on their condition, he said.

177 He was asked about his hay. He had shown the hay to the veterinarian, and she had said that it was coarse, and like straw. But, he said, you cannot judge a bale of hay just from the outer part of it. He said that the quality of the hay varied through the bale.

178 Notwithstanding that, he said, the veterinarian recommended not feeding it to the animals. The accused had already made arrangements to get hay from Austin Nolan, in Frenchman's Cove, he said, and brought 37 square bales of hay to the farm on either January 7 or 8, 2014. The animals ate all of that, he said, and then he had to get more. It had lasted "probably a couple of weeks", he said, and then he had had to go get more hay.

179 The direct examination concluded with the accused being asked about the condition of the sheep which were eventually euthanized. He said that the sheep weren't up to their weight, and weren't in premium shape, but they had been difficult to hold on to during the de-worming and de-lousing, so he thought that they were strong.

180 The cross-examination started with the dogs. Angel was chained to the front step of the house. Demon was tied as well, but he could range a fair distance from the dog house. The accused was referred to the photographs. The underside of the step was blocked with snow. The accused said that Demon could get into the dog house, because he had shovelled out the dog house entrance. Crown counsel returned to the picture, and put to the accused that there was no way for the dog to have gotten in under the step to shelter from the weather. The accused said that if the dog had wanted to get in under the step, it would have found a way to do so.

181 The accused was reminded that there was no drinking water for the dogs. He said that he had given them water, but that, if there was no water, the dogs could eat snow. He was reminded that the legislation requires that dogs be provided with clean fresh drinking water, to which he replied that the Maremma dogs are used to herd all kinds of animals, in all kinds of environments, including herding "penguin colonies" (sic).

182 When he was asked about compliance with the requirement that a dog house must have a porch, he replied that he doubted that very many did.

183 Crown counsel changed tack, and embarked on the physical ability of the accused to operate a farm. Wasn't he on a disability pension? He is allowed to earn \$5,000.00 a year, he said. And his back problem is bending over, not lifting. And, he added, he could limit the amount of water that he carried in the buckets.

184 He went through his livestock holdings. In October he had had 25 sheep on the pasture, of which he brought home 13. He butchered some, and sold some live. When he only had one left, he brought home the remaining dozen. He had, he thought, 5 goats. He had 4 cows with calves and 5 yearling bulls. He had sold two cows to Fowler, and had left 7 calves on the pasture.

185 While Dr. Power had said that there was no place for the cattle to go outside from the barn, he said, he had an acre fenced in where they could go. And, he said, while she had told him that his animal shelters were fine, she expressed a different opinion in court.

186 The fact that the floor was covered in feces and urine was put to the accused. You do not clean out feces for animals which are not tethered in the winter, he said. This is contradicted by the evidence of Dr. Power. More will be said about this later.

187 Crown counsel put to the accused that the veterinarian had said that a ewe will drink 9 litres of water a day. The accused responded by asking a question of his own: "well, you'd fill it up whenever you went there, so why wouldn't it be enough?"

188 Then, the accused volunteered his opinion, to the effect that the veterinarian had testified in the way that she had because she was "trying to justify putting the sheep down".

189 Crown counsel reminded the accused that Dr. Power had examined the sheep, and found that they were emaciated, had white gums, and were losing wool. The accused replied that the sheep were not sick, because they had been hard to hold on to during the de-worming and de-lousing. And, then he asked another question: If the sheep were in that bad a shape, why did the veterinarian bother to de-worm and de-louse them?

190 The accused referred to the autopsy report, and said that none of the sheep which were eventually euthanized had been found to have had any disease. He said that he disagreed with euthanizing the sheep, and he claimed that the veterinarian had told him that he would see an improvement in the sheep within two weeks.

191 The prosecutor pointed out the fact that the sheep had been found to have a highly contagious disease [Caseous lymphadenitis], that the state of emaciation alone had justified euthanizing the sheep, and put to him the grim reality that he had not been providing the sheep with the bare necessities of life. His reply was to the effect that, by the time the veterinarian had returned to the farm, he had the feeder full of hay. This was after the police and the veterinarians had been involved.

192 The accused then claimed that he had already made arrangements to get the "good hay" from Frenchman's Cove before the police had become involved. He said that he was not giving the "good hay" to all of the livestock. For example, he said, the horses, Tiddlywink and Butterscotch, were not being fed the good hay, because they were in "great shape". This is important evidence for two reasons. First, it demonstrates knowledge on the part of the accused of different qualities of hay. Second, it also demonstrates a consciousness on the part of the accused in feeding the livestock differently.

193 The accused was asked about the sheep which were pregnant. They had been healthy enough to conceive, but were unable to bring their lambs to term? The accused replied that it is only the last six weeks which "count the most", and offered the opinion that the lambs "could have made it".

194 The Crown attorney said to the accused that he must have been aware of a serious problem on the farm. Not really, he said, he had had a goat, a sheep, and 2 calves die. One calf had died after spending a couple of days and nights caught in a snowbank, and another had had pneumonia, so he had not suspected that it was a feeding problem.

195 Crown counsel reminded the accused that the autopsy had found that pneumonia was not a significant cause of the death of the calf. The accused replied that the calf had stopped eating. No, he had not called the veterinarian, he said, because there was no point in calling. He figured that the calf needed penicillin, and he could inject the calf himself.

196 The accused was asked whether he had called the veterinarian when the goat died in October. No, he had not. There was no reason to call the veterinarian: the goat could have recovered. He also did not call the veterinarian about the calf which

had been caught in the snow. After the power outage, there were more dead animals, but by then there was no point in calling the veterinarian.

197 We returned to the topic of using heated water buckets for the livestock. It would have been "impossible" to put in a heated bucket for every animal. The accused was asked whether it was more a matter of being too expensive, to which he replied that it was a hobby farm.

198 During his direct examination, the accused had said that the emaciation of his livestock was due to the poor condition of the community pasture. Now, however, when Crown counsel put to him that his animals were the last to come off the pasture, in December, and that the other farmers had said that there was no food left on the pasture, he insisted that there was food left on the pasture, on the part away from the road, and then said that the other farmers did not know about it, because they had not bothered to walk across the pasture. Later he said that there had been good feed for the livestock, by the tree line of the pasture.

199 The accused maintained that out dated bread was a satisfactory supplement for cattle and sheep. He said that lots of farmers give it to their stock. The accused also said that he had not expected the calves to put on a lot of weight, because they were Holsteins, he said, and they are a breed which does not put on a lot of weight. When he realized that the livestock had a nutritional issue, he said, there was no point in calling the veterinarian: instead, he made arrangements to get some good hay.

200 Crown counsel pointed out the fact that the pathology had revealed that the animals had no subcutaneous fat, no visceral fat, and no marrow fat. The accused replied by saying "they looked fine to me". Keeping in mind the universal description of the livestock by the veterinarians as emaciated, thin, or skin over bone, it is difficult to accept the evidence of the accused that the livestock looked "fine" to him.

201 The Crown attorney put it to the accused that his livestock had starved to death. He disagreed. He said that the animals had stopped eating, and then had died. That, he said, is not the same as starving to death. He disagreed with the suggestion that the animals had starved. There were multiple contributing factors to the deaths, including pneumonia, the calf that had been stuck in the snow, and the fact that the animals had stopped eating.

202 The fact that it took weeks, or even months, for the animals to starve from malnutrition was brought up to the accused. Well, he said, they weren't in great shape when they came off the pasture. If the pasture was in such terrible shape, why had he put his livestock on the pasture to begin with? It would have been too expensive to keep the animals on the farm and feed them all summer. The cost of feeding the animals was a repeated issue during the evidence of the accused.

203 The accused had not asked the veterinarians about the quality of his hay. Instead, he had asked a man, who had had sheep "all his life", who had advised him that one could make up for low quality hay by increasing the quantity of it. Here it is to be noted that Dr. Power had said that the solution to poor quality hay is not to increase the amount of that hay. Instead, she said, one should supplement poor quality hay with grain.

204 The accused said that he knew that the pasture was not in great shape. As a result, he expected that the livestock would not be in great shape when they came home in December. But, he said, that had happened the year before, and the livestock had rebounded.

205 The accused then added that, knowing that the pasture was not in great shape, he had been bringing bales of hay to the pasture for the livestock to eat. This directly contradicted his earlier remarks, to the effect that there had been plenty of food for the animals on the back of the pasture, at the treeline.

206 Crown counsel took the accused through some individual animals. Calf number 1, an Angus (not a Holstein) had prominent hip bones and "hay belly" (a product of low quality hay). Oreo, a pony, was more than a hundred pounds underweight. Sebastian, a pony, emaciated and seriously underweight. The accused agreed that the animals were underweight. He said that Sebastian had been breeding the mares, and so one would expect that he would have lost some weight. But, said the accused, there were no bones protruding.

207 And then he said that he "had no idea what weight they should have been". This was a major point in his evidence, one to which I will return later, while discussing credibility.

208 The accused concluded his cross-examination by saying that he had expected the goats to recover, but that that process takes time. And, he said, he had not been alarmed by the sight of bald patches on his sheep: that, he said, is not unusual.

209 That was the end of the evidence. We adjourned for submissions to January 5, 2015.

The position of the Accused

210 The accused had originally pleaded "not guilty" to all four charges in the Information. However, during his submissions, counsel for the accused conceded that the accused had failed to meet the legislated standard required in relation to dogs. As a result, he said, while the accused did not believe that he had done anything wrong, he should be found guilty of count 3 and 4.

Credibility of the accused

211 The accused testified with the assistance of notes. Despite that, he equivocated many times during his evidence. For example, he was unsure of the number and types of livestock that he had on his farm at various times. He also contradicted himself. He said that he was unable to work because he had ruptured two discs in his back, but then said that he had been carrying buckets of water to water the livestock on the farm. He said that his injured back meant that his back problem is bending over, not lifting.

212 The accused said that the pasture did not have enough food for the livestock, and then said that there was food available, at the tree line, which the other farmers did not know about, because they had not walked down through the pasture land. He denied that cost was a factor which prevented him from consulting the veterinarian, and then complained about the cost of having consulted the veterinarian on an earlier occasion.

213 The accused said that he knew how to inject the livestock with penicillin, and so there was no point in calling the veterinarian. Such an attitude diminishes the role of the veterinarian, and limits all animal health issues on a farm of mixed livestock to the panacea of penicillin. It also limits the weight to be given the opinion of the accused.

214 The accused took the position that it was unreasonable to expect a hobby farm to have heated buckets or running water. And he said that one does not shovel out the excreta from the sheep and goats during the winter. The veterinarian had already described such a position as "misinformed".

215 The accused said that the electrical power outage had prevented him from watering the livestock. To put this in context, farmers were keeping livestock long before electricity was discovered. And the electrical power outage in this time frame was of less than 3 days' duration.

216 Overall, the accused was not a strong witness. He contradicted himself on significant issues. He said that there was ample feed on the pasture, at the tree line, and then said that he knew that there was not sufficient feed on the pastureland, and supplemented the feed by bringing hay and bread to the pastureland. While he was supposedly raising horses, when he was questioned about the horses being seriously underweight, he maintained that he "had no idea what weight they should have been".

217 Throughout his testimony, the accused referred to the costs of keeping the livestock fed and watered. At one point he described the cost as "astronomical". He complained about the cost of having the veterinarian attend, and he said that he could not afford to spend the required money on his hobby farm.

The Law

218 There are two classes of offences alleged in this matter. Count 1 alleges a breach of s. 445.1 of the *Criminal Code*, while the remaining counts allege offences under the provincial *Animal Health and Protection Act*. We will begin with the charge under the *Criminal Code*.

219 Count 1 alleges the following offence:

On or between the 6th day of November in the year 2013 and the 6th day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 445.1 of the Criminal Code.

220 S. 445.1(a) of the *Criminal Code* provides as follows:

445.1 (1) Every one commits an offence who

(a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;

221 The word "wilfully" engages s. 429(1) of the *Criminal Code*, which provides 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.

222 "Wilfully" in this context therefore includes reckless acts as well as acts done with a bad motive or evil intent or acts done by anyone who knows what he is doing and intends to do it: see, for example, and *R. v. Corliss* (1957), 120 C.C.C. 341 (Ont. Co. Ct.) and *R. v. McHugh*, [1965] N.S.J. No. 3 (N.S. S.C. [In Banco]).

223 In *R. v. Galloro*, 2006 ONCJ 263 (Ont. C.J.), Kenkel J. said as follows at paragraphs 7 & 8:

7 Section 446 imposes upon animal owners various legal duties with respect to care. Wilfully neglecting or failing to comply with those duties is a criminal offence. In assessing whether the provision of food and care was "suitable and adequate" on a criminal standard under s. 446, in my view the Crown must prove more than a slight deviation from reasonable care. Evidence of a substantial or marked departure from reasonable care is required to prove the actus reus of the offence in s. 446(1)(c) beyond a reasonable doubt.

8 If the alleged failure to provide adequate care is proved, the court must then assess whether the failure was "wilful". "Wilfully" is defined in s. 429 of the Criminal Code as causing the occurrence of an event by doing or omitting to do an act pursuant to a legal duty, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not. The requirement that the accused's failure be "wilful" involves a subjective test. See: Kent Roach, *Criminal Law* 3ed. Irwin (2004) at p. 157. The reference to recklessness in s. 429 also indicates a subjective standard as recklessness requires subjective advertence to the prohibited risk (as described in that section) and can be distinguished from negligence, which requires only that a reasonable person in the accused's circumstances would have recognized the risk. Roach, *Criminal Law* 3ed. at p. 162.

224 Like the matter at Bar, the *Galloro* case arose from a hobby farm. A dog on the farm was found to be extremely malnourished. The court found in that case that the food and care provided to the dog were neither suitable nor adequate and amounted to a marked departure from the standard of care a reasonable person would provide. The court also found that a failure to seek veterinary attention was also a wilful offence.

225 In *R. v. Bennett*, [2010] N.J. No. 230 (N.L. Prov. Ct.), Judge Gorman had occasion to consider the elements of the offence under s. 446(1)(b) of the Criminal Code, in a case in which it had been alleged that a dog had been mistreated. S. 446(1)(b) provided as follows:

Every one commits an offence who being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

226 At paragraph 21 of the *Bennett* decision, Judge Gorman said as follows:

21 As can be seen, this provision creates a standard of care for certain types of animals and it is a negligence-based offence. In *R. v. Beatty*, [2008] 1 S.C.R. 49, it was held that the *actus reus* for negligence-based offences is defined solely by the words of the applicable statutory provision. Thus, a failure to provide adequate care will constitute an offence if the necessary *mens rea* is present. The *mens rea* for this offence must be interpreted in accordance with constitutional fault requirements and with Parliaments' "extended" definition (see *R. v. Toma* (2000), 147 C.C.C. (3d) 252 (B.C.C.A.), at paragraph 15) of the word "wilfully." **Because the provision creates a duty of care, a purely subjective *mens rea* is not a required element of proof.** As pointed out in *R. v. Naglik*, [1993] 3 S.C.R. 122, at paragraph 33, the "concept of a duty indicates a societal minimum which has been established for conduct." In *R. v. J.F.*, [2008] 3 S.C.R. 215, in considering the offences of criminal negligence and failure to provide the necessities of life, the Court indicated that neither of these offences "requires proof of intention or actual foresight of a prohibited consequence." **The trier of fact must "determine not what the [accused] knew or intended, but what he ought to have foreseen"** (at paragraph 7).

[Emphasis added]

227 There is no evidence to the effect that the accused at Bar set out to deliberately starve his livestock to death. There is, however, strong evidence to the effect that he did starve them, and that he starved them by simply not giving them enough to eat. All of the livestock animals were underweight: the horses were seriously underweight, the sheep & goats were emaciated, and the calves were described as "skin over bone".

228 The starvation was not the only evidence of neglect: it was clear that

- 1) the horses were not bedded;
- 2) the horses were tethered;
- 3) there was a hole in the floor, and holes in the walls;
- 4) there was no water for any of the animals;
- 5) the horses needed the attention of a farrier; and
- 6) the hay for the sheep was being thrown in on the bedding, which was contaminated with manure and urine.

229 The accused himself said that he was aware of the poor quality of the hay and of the pastureland grazing, and that he made up for it by feeding some animals grain supplement. He also said that it was too expensive to send for the veterinarian when the stock were ill, and that it was too expensive to heat water or to provide heated water buckets to keep the stock hydrated.

230 The concern about the cost of feeding the livestock was also clear in the statement given to the police by the accused. At line 1260 of the transcript of the statement, the accused said as follows:

"they're goin' anyway I don't one way or the other I mean I can't...I can't keep buyin' hay I mean I had no plans for buyin' hay I mean the last lot of hay I bought was on my credit care (sic)"

231 At lines 1430 to 1436 of the statement of the accused to the police, the accused referred to the cost of the veterinarian, as follows:

1430 the accused: I called about a cow

1431 Cst. Kennedy: yeah

1432 the accused: that got down the year before

1433 Cst. Kennedy: yeah

1434 the accused: and I spent over \$200

1435 Cst. Kennedy: yeah

1436 the accused: in vet bills

232 Despite his own physical limitations, he said, he had been bringing water to the livestock by hand, even during times when the farm was inaccessible by vehicle due to accumulated snow fall. Crown counsel took the position that this was an unlikely scenario. However, even if it was true, the reality was that the accused was not constant in his attention to the daily maintenance of his livestock. He and his friends were there sporadically, and, as a result, the animals were not fed or watered regularly. It is also clear that the livestock was not fed enough to maintain a healthy bodyweight.

233 These are elements of neglect. But there was also evidence of mistreatment of the livestock as well. The horses were tethered, in such a way that they could not move. The pens of the sheep and the goats were not cleared of excreta. The hay for the sheep was thrown in on top of the mixture of excreta and bedding. The accused refused to call the veterinarian when his animals were sick, insisting that he could treat the animals as well as the veterinarian could. It is clear that the accused failed to provide the minimum required for the livestock to survive, much less thrive.

234 The wasting of the animals, as described by the veterinarian and the pathologist, was not a sudden thing. I accept the evidence of the pathologist that it took an extended period of time for these animals to lose all of their subcutaneous body fat and to lose the consistency of their bone marrow. I am satisfied beyond reasonable doubt that that wasting was the product of malnutrition.

235 The extended failure of the accused to properly feed his livestock amounts to a marked departure from the norm. The accused was aware of the lack of nutrition for the livestock on the pastureland, and of the necessity of supplementing the feed, but chose not to do so. I am satisfied beyond reasonable doubt that the accused wilfully neglected or failed to provide suitable and adequate food and water for his livestock. Accordingly, a conviction is entered for the *Criminal Code* charge of wilfully permitting unnecessary pain or suffering to his livestock.

236 We will move now to consider the charges under the *Animal Health and Protection Act*, SNL 2010 c.A-9.1.

237 The charges in Counts 1,2, and 3 of the Information each allege breaches of sections 18(2) and 76(1) of the *Animal Health and Protection Act*, as follows:

Count 2

On or between the 6th day of November in the year 2013 and the 6th day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance

of normal, healthy bodyweight contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

Count 3

On or about the 6th day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: five dogs, permit those animals to be in distress by failing to provide clean, fresh, unfrozen drinking water at all times contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

Count 4

On or about the 6th day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: two dogs, permit those animals to be in distress by failing to provide adequate shelter contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

238 The relevant sections of the *Animal Health and Protection Act* provide as follows:

2(g) "distress" means the state of being in need of proper care, water, food or shelter, being sick, injured, abused or in pain or of suffering undue or unnecessary hardship, privation or neglect

18 (2) An owner of an animal shall not permit the animal to be in distress.

76. (1) A person who contravenes this Act or the regulations or an order, licence or permit made under this Act or the regulations is guilty of an offence and is liable on summary conviction to a fine not exceeding \$50,000 and, in default of payment, to a term of imprisonment not exceeding 6 months, or to both a fine and imprisonment.

239 There is no element of *mens rea* in the three counts under the provincial legislation. In *Brampton (City) v. Kanda*, [2008] O.J. No. 80 (Ont. C.A.), at paragraph 19, MacPherson J.A. referred to the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.), and said that there is a presumption at law that public welfare matters will be strict liability offences. It follows that the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act in relation to these Counts, and that the defendant need only establish on the balance of probabilities a defence of due diligence.

240 In *R. v. Alexander*, [1999] N.J. No. 19 (Nfld. C.A.), Green J.A. (as he then was), writing for a unanimous court, said, at paragraph 18 as follows:

The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense.

241 With that general introduction, let us consider each of the alleged offences in turn.

242 In Count 2, it is alleged that the accused "did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 18(2) of the *Animal Health and Protection Act* and punishable by section 76(1) of the *Animal Health and Protection Act*."

243 Notwithstanding the inclusion of the word "wilfully", as indicated above, these are regulatory offences, and do not include any element of *mens rea*. I have already found as a fact that the animals were under-fed, and malnourished as a result. The wasting of the livestock took a considerable time. The accused did not feed the livestock sufficient quality or quantity of food to enable them to survive. As such, it is clear that he permitted the livestock to be in distress.

244 Count 2 is proven beyond reasonable doubt. However, because it is eclipsed by Count 1, a judicial stay of proceedings is ordered: see *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729 (S.C.C.), and *R. v. Bailey*, 2009 NSPC 3 (N.S. Prov. Ct.).

245 Count 3 alleges that the accused permitted his dogs to be in distress by failing to provide the dogs with clean, fresh, unfrozen drinking water at all times. When the dogs were examined on January 6, 2014, none of them had access to clean, fresh, unfrozen drinking water.

246 The *Animal Protection Standards Regulations* made under the authority of the *Animal Health and Protection Act* are set out in NL Regulation 36/12. Section 13(1) of the Regulations provides that:

An owner of a dog shall comply with the basic standards for dog care that are prescribed in Schedule B.

247 Schedule B to the *Animal Protection Standards Regulations* sets out the basic standards of dog care. Section 4(a) of Schedule B provides as follows:

4. A dog shall be provided with the following:

(a) clean, fresh, unfrozen drinking water, at all times;

248 Section 11(2) of the *Interpretation Act*, RSNL 1990 c. I-19, provides that the use of the word "shall" in provincial legislation makes compliance with the legislation mandatory:

The word "shall" shall be construed as imperative and the word "may" as permissive and empowering.

249 The accused testified that he regularly provided the dogs with drinking water, but that he would take the water containers away from the dogs because the dogs might tip the water containers over, or the water might freeze. The accused admitted that the dogs did not have "clean, fresh, unfrozen drinking water, at all times". Accordingly, he must be found guilty of Count 3.

250 Count 4 alleged that the accused permitted two of his dogs to be in distress by failing to provide adequate shelter for the dogs. Schedule B to the *Animal Protection Standards Regulations* contains very specific requirements for shelter of a dog. In brief, a dog shelter must

- 1) be weather-proof, water-proof and insulated,
- 2) be sufficiently ventilated in a manner that prevents the accumulation of moisture and odours,
- 3) be adequate and appropriate for the size of the dog,
- 4) contain an entrance and a hallway that are separate from a sleeping area,
- 5) have a canvas or rubber flap attached at the entrance,
- 6) comprise 232 square centimetres for each 2.5 centimetres of the height of the dog in a standing position,
- 7) have a minimum ceiling height in the sleeping area at least 5 centimetres greater than the height of the dog in a sitting position,
- 8) be sufficiently elevated off the ground to ensure that the floor is kept dry, and
- 9) contain in the sleeping area bedding of sufficient depth to provide insulation from cold weather conditions.

251 While counsel for the accused described these legislated requirements as "aspirational" legislation, he also conceded that the accused was required to meet the legislative standard for shelter for the dogs. It was clear from his own evidence that

the accused was not in compliance with the standard: one dog had a house, which did not provide shelter envisioned by the legislation, and the other dog was tied to the front step of the farm house, with no dog shelter at all.

252 By his own evidence, the accused must be found guilty of Count 4.

Conclusion

253 Convictions are entered on all four Counts in the Information. A stay of proceedings is ordered on Count 2. I will hear from counsel their respective positions on sentence on Counts 1, 3 and 4.

Accused convicted.