

IN THE PROVINCIAL COURT



OF SASKATCHEWAN

Citation: 2017 SKPC 058

Date: June 21, 2017
Information: 90107979
Location: Nipawin

Between:

Her Majesty the Queen

- and -

Harry Ernest Dondale

Appearing:

Tyla Olenchuk
Self Represented

For the Crown
For the Accused

DECISION

I.J. CARDINAL, J

INTRODUCTION

[1] Over the course of two days, a trial was held on the following charges concerning Mr. Dondale:

Count 1: on or between the 15th day of August, 2013 and the 26th day of March, 2015 in the Rural Municipality of Torch River in the Province of Saskatchewan, Harry Dondale being responsible for the animal(s) to wit: chickens, did cause or permit the chickens to be or to continue to

be in distress contrary to section 4 of the Animal Protection Act.

Count 2: on or between the 15th day of August, 2013 and the 10th day of April, 2015 in the Rural Municipality of Torch River in the Province of Saskatchewan, Harry Dondale being responsible for the animal(s) to wit: horses, did cause or permit the horses to be or to continue to be in distress contrary to section 4 of the Animal Protection Act.

Count 3: on or between the 15th day of August, 2013 and the 26th day of March, 2015 in the Rural Municipality of Torch River in the Province of Saskatchewan, Harry Dondale being the owner or the person having custody or control of the bird(s), to wit: chickens, did willfully cause or being the owner, willfully permits to be caused suffering to chickens, contrary to section 445.1(1)(a) of the Criminal Code.

Count 4: on or between the 15th day of August, 2013 and the 10th day of April, 2015 in the Rural Municipality of Torch River in the Province of Saskatchewan, Harry Dondale being the owner or the person having custody or control of the animal(s), to wit: horses, did willfully cause or being the owner, willfully permits to be caused unnecessary pain, or suffering to horses, contrary to section 445.1(1)(a) of the Criminal Code.

[2] Before I address the facts and the law, an issue has arisen concerning the Crown election. The charges were sworn on September 24, 2015. Although the provincial charges under *The Animal Protection Act, 1999*, SS 1999, c A-21.1 [Act] are summarily by law, the Crown did have an election on the two *Criminal Code* charges under s. 445.1 as they are hybrid offences. The Crown chose to proceed by way of summary conviction and made that election on the record on November 4, 2015.

[3] With summary proceedings, all charges must be sworn within six months of the offence unless the governing legislation states otherwise, or there is agreement between the parties to allow the Crown to proceed outside the limitation period. The Act, which does not contain its own time limitation on

prosecutions, falls under the provisions of s. 4 of *The Summary Offences Procedure Act, 1990*, SS 1990-91, c. S-63.1 which governs offences under provincial legislation. Section 4(3) mandates that if the applicable Act in relation to an offence does not specify the time limit for laying an information, the information shall be laid within six months from the time when the matter of the complaint or information arose, unless the prosecutor and defendant agree to waive the six month limitation. No such waiver was ever entered into between the parties nor noted on the record.

[4] The two charges of animal cruelty under the *Criminal Code* are governed by Part XXVII - Summary Convictions, including s. 786(2) which states:

786(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

[5] There is no indication on the record the parties agreed to the proceedings being instituted more than six months after the time when the subject-matter of the proceedings arose.

[6] The effect of the Crown election now raises other issues. First, the applicable time frame within which the alleged offences must be proven. While the charges are valid as they were sworn on September 24, 2015, given the six month limitation period, the offences to be proved must have occurred anytime from March 24, 2015 to March 26, 2015 (Counts 1 and 3) or from March 24, 2015 to April 10, 2015 (Counts 2 and 4).

[7] The Crown can rely upon the evidence adduced throughout the time frame alleged to prove an offence that falls within six months of the date the charges were sworn. In other words, the Crown can rely upon all of the evidence it called to prove that an offence occurred between March 24, 2015 and

March 26, 2015 for Counts 1 and 3, and to prove an offence occurred between March 24, 2015 and April 10, 2015 for Counts 2 and 4. The Saskatchewan Court of Appeal has endorsed this approach for summary conviction offences under the *Criminal Code* in *R v Duzan* (1993), 105 Sask R 295 (SKCA), where it stated:

The conclusion reached in *R. v. Slavic* respects the comment of Culliton J.A. in *Wooster* that “a valid conviction could only be found upon a breach within that period”, but allows evidence of conduct arising prior to the period to establish that a breach within the period had occurred. Surely, this approach cannot be said to offend any principle of justice for it creates a focus on nothing more than whether a summary conviction offence has occurred within the restricted period provided for in the Code. It would take the soundest of reasons, not evident here, to refuse to admit evidence which assists in reaching a rational decision on this central issue.

[8] The same logic applies to offences under the provincial *Act*. I cannot convict Mr. Dondale of any offences, provincial or federal, that may have been proven prior to the date of March 24, 2015 as those offences are statute-barred due to the election of the Crown.

[9] The Crown called two animal protection officers, Ashley Detillieux and Kaley Pugh, and a veterinarian, Dr. Michael Evenson. These individuals attended the Dondale property, conducted inspections and collected evidence. Dr. Evenson was, with the consent of Mr. Dondale, qualified as an expert in the area of veterinary medicine to give opinion evidence as to the care and overall health of horses. However, his observations of the chickens are also relevant. Where the evidence of Dr. Evenson conflicts with that of the officers, I accept his evidence due to his expertise.

[10] The Crown called Dr. Huang, who is employed by Prairie Diagnostic Services Inc. as a full time pathologist and team leader in the company. With the agreement of Mr. Dondale, he was qualified as

an expert in the area of necropsy in order to give opinion evidence regarding the cause of death in horses, cattle and chickens.

[11] Mr. Dondale testified on his own behalf, and called his common law wife and a friend to testify. Mr. Dondale did not take issue with much of the Crown evidence, but disputed that any of the animals were in distress or that he had committed any offence.

[12] After considering all of the evidence, I find the Crown witnesses were clear and unequivocal in their evidence. The photographs submitted, coupled with the *viva voce* evidence and the reports of Dr. Evenson and Dr. Huang, are compelling evidence in support of the charges. Where the evidence of the Crown witnesses conflicts with Mr. Dondale's evidence or that of his witnesses, I accept the evidence of the Crown witnesses.

[13] I find that the Crown has proven beyond a reasonable doubt the *actus reus* of the offences under the *Act* but Mr. Dondale has not shown on a balance of probabilities that he exercised due diligence. I find him guilty of both counts under the *Act*.

[14] I also find the Crown has satisfied me beyond a reasonable doubt of Mr. Dondale's guilt concerning the *Criminal Code* offences and I find him guilty of both charges.

FACTS

[15] Mr. Dondale has a farm where he raises chickens, cattle and horses. The property is located in the rural municipality of Torch River, near Nipawin, Saskatchewan. There is a main parcel and a second parcel about three miles away. On the main parcel, referred to as the yard, is the family home and the chicken barn. There is also an area where a few horses are kept.

[16] The chicken barn is an A-Frame building with three floors. On the main floor is a hallway that leads to a door behind which is the egg boxes. The second floor, described as a crawl space, is accessed from a ladder that goes through the middle of the building and up to the third floor. A person can stand up on the third floor as it is about five feet high. Birds are on all three floors, and manure drops from the top floors through a hole to the main floor. A small door on the main floor can be opened to remove the manure.

[17] The second parcel, referred to as the pasture, has corrals for cattle and horses, and a fenced pasture area.

[18] Ms. Ashley Detillieux, an animal protection officer with the Animal Protection Service of Saskatchewan, testified that the Saskatchewan Society for the Prevention of Cruelty to Animals (SPCA) received a complaint on August 15, 2013 about Mr. Dondale not adequately caring for animals on his property. Over the course of approximately two years, she and others attended the property on six occasions, made observations, seized items, and issued directions to Mr. Dondale. I will address each visit and direction given to Mr. Dondale.

October 23, 2013

[19] As a result of the complaint, Officer Detillieux attended the Dondale farm on October 23, 2013 to conduct an inspection. She was advised by Mr. Dondale there were approximately 200 chickens, which accorded with her estimate. The chickens could move freely from inside the barn to the outside pen. Some chickens had feather loss and signs of feather pecking. There was a large amount of manure buildup inside of the barn. The water in the containers was very dirty. Mr. Dondale told her that he would hand feed the chickens oats and would provide some lean mash as most of the chickens

were laying hens. This was a simple inspection to gauge the conditions at the Dondale property. Unfortunately, due to other commitments, Officer Detillieux was not able to attend back to the Dondale properties until the following spring.

March 26, 2014

[20] Officer Detillieux next attended on March 26, 2014 with Dr. Mike Evenson, a veterinarian. Inside the chicken barn, there appeared to be about 200 chickens. Dr. Evenson described the ammonia level inside the barn as “almost unbearable” and it was very dusty. The conditions caused the officer and him to experience burning sensations in their eyes and difficulty with their breathing.

[21] There were chickens on the main level, but a person would have to go through a narrow hall to get to them. The main level access doors were blocked by manure on the other side, and they could not inspect it, other than looking through the chicken wire. This blockage would prevent the daily examination of the chickens. There was water, but it was dirty. Dr. Evenson could see a siphon system, but could not inspect it to determine if it was working. There were remnants of oats on the ground, but no food was put out. Manure on the main level had not been cleaned out.

[22] Ventilation consisted of three holes near the peaks on the north and south walls. Dr. Evenson observed the north side had some ventilation, but the south side was clogged with feathers and dust, and no steam was moving out of it. Heat was generated by heat lamps on the main floor, but they were not sufficient to adequately keep a constant temperature in the building.

[23] Dr. Evenson’s report dated March 27, 2014 (Exhibit P-17), outlined his observations in detail. Dr. Evenson advised Mr. Dondale that the barn was unfit to house chickens due to the horrible air quality, inadequate feed, absence of feeders, lack of hygiene, unverified watering system, and poor lighting and ventilation. He noted that all the birds were not being examined by Mr. Dondale on a

regular basis. Further, he noted: “Allowing the birds outside as soon as weather permits needs to be done or butcher the flock. My recommendation is to depopulate the barn and any future wintering of birds in this barn should not be done without multiple upgrades to the facility such as ventilation and feeding systems.”

[24] Nine horses (miniature and pony) were on the yard and approximately 16 were at the pasture. Most were in good condition, but one, a paint mare, had a body condition of 1.5 out of 5. In measuring body score of horses, the ideal body score is 3 out of 5, as 0 is emaciated and 5 is obese.

[25] Dr. Evenson advised Mr. Dondale to monitor the paint mare and if she did not start gaining weight he should have her teeth done by a veterinarian. Specifically, he was advised that she needed to have a body condition score of 3 out of 5 by the fall of 2014. Mr. Dondale was also advised to provide salt at both locations, and feed at all times, and water when the snow was crusted over.

[26] On this occasion the officer seized a dead chicken found in the barn and provided Mr. Dondale a notice of seizure (Exhibit P-3), and a follow-up report (Exhibit P-2) that included a recommendation that he must follow the veterinarian's recommendations. This bird was sent to Dr. Huang who completed a necropsy upon it on March 28, 2014, and his report, D1409733 (Exhibit P-13), contains his findings. I accept his evidence that this bird weighed 0.8 kg, and was severely emaciated, with no observable body fat storage in the abdomen. It had inflamed tissue in its hind end around the anus. This inflamed tissue caused fibrosis, which is the hardening of the tissue. As a result, the anus was blocked, the bird could not defecate, did not eat and died from chronic starvation. Marks on the chicken were likely due to other chickens pecking it.

[27] Dr. Huang explained that the pecking by other chickens caused damage to the tissues and in turn caused inflammation and trauma. The fibrosis was in the chronic stage, which in addition to the severe emaciation, indicated it occurred after a number of days. He observed that all of the chest muscle of

the chicken was gone, otherwise known as muscle wasting. There was also inflammation in the eyelid and cornea. However, while he did note lesions, they were different than what he would expect ammonia to cause. He did not believe the chicken was completely blind and it was his opinion that this lesion to the eye did not contribute to the cause of death. In cross-examination he said he could not give an age for the chicken but neither age nor breed of the chicken had any relevance to his analysis. He did not check the bird bones for fat content as that applied only to mammalian bones.

[28] There was evidence regarding a yellow cow and its condition, but as this animal was not the subject of the charges I need not address it further. I also heard evidence of the results of the testing of a bovine femur found in the yard, but I find it is not helpful in determining in determining the issues before the court concerning the chickens and horses.

July 16, 2014

[29] The next follow up inspection was on July 16, 2014, by Officer Detillieux. Photographs were taken of the chicken barn and outside pen (Exhibit P-4(a)). On that day Mr. Dondale was given a copy of Dr. Evenson's report dated March 27, 2014, (Exhibit P-17) and the follow-up report of March 26, 2014, as he had not picked those copies up from regular mail.

[30] In the barn were approximately 200 chickens, including new chicks. There was no access for the chickens on the second and third floor to move outside. In a separate pen there were three or four chickens that appeared to be blind. In the chicken barn, the manure was the same as previously noted and had not been cleaned out. The ammonia level was still high but the back door of the barn was open and that helped to alleviate some of the smell. There were remnants of oats on the ground, both inside the barn and outside in the pen, and the water in the pen appeared dirty (Photo 3).

[31] With respect to the chickens' health, she noticed some were missing feathers, and their feather quality was poor (Photos 7, 8). Officer Detillieux saw two chicken carcasses, but one was covered by manure and looked like it had been there a long time (Photo 6) . She seized the other dead chicken (Photo 5) and provided a notice of seizure (Exhibit P-5). The follow -up report (Exhibit P-4) advised Mr. Dondale to follow the recommendations of the veterinarian. This chicken was submitted to Dr. Huang on July 16, 2014 for analysis, but I find this evidence does not support the charges related to the chickens.

February 12, 2015

[32] On February 12, 2015, Officer Detillieux and Dr. Evenson inspected the Dondale property. A number of photographs taken this date were tendered as Exhibit P-6(a). Due to extremely high ammonia levels in the chicken barn, they wore protective gear, including respirators. Using an ammonia reader, they determined that the levels were 50 to 100 parts per million. Any readings over 25 parts per million are considered unacceptable for humans.

[33] Inside the barn were 350 laying hens. The barn was dusty (Photo 18), manure had not been removed (Photo 24, 25, 26), and the water on every floor was very dirty, which was amply illustrated by photographs 9, 11, 14, 22, and 27. There were remnants of oats on the ground but there were no feeders or feed put out. A bag of chicken feed, called crumble, (Photo 31) was present with a warning that it was not to be fed as a replacement to laying or breeding poultry. The heating had not changed (Photo19) and was inadequate. The ventilation had not been improved nor was there proper air flow or exchange. Several chickens were noted to have poor feather quality and were missing feathers. When attempting to observe the chickens on the second floor, there was insufficient lighting, and investigators had to crawl around to make observations.

[34] Horses in the yard were found to be in adequate condition, however, continued care instructions were given to Mr. Dondale. The officer found a dead horse on the south side of the yard behind an old structure and seized a humerus bone. (Exhibit P-7: Seizure receipt; Photos 32 and 33 in Exhibit P-6(a)). This bone was submitted to Dr. Huang, and his analysis is outlined in PDS1504612 dated February 13, 2015 (Exhibit P-15). While I accept his analysis that the animal suffered from malnutrition, this evidence is not helpful in determining whether an offence occurred concerning horses from March 24, 2015 to April 10, 2015 and I will not discuss it further. Any offence concerning this animal is statute-barred as it is outside the six month limitation period.

[35] At the pasture location, horses and cattle were present. Some horses had no water or salt and limited shelter. In the main feeding area, the hay bales were of poor quality, containing weeds, thistles, and sticks (Photos 37 and 38). Dr. Evenson testified that some of the horses had dropped down in their body condition score and were at a 1.5 out of 5, but noted this was not so extreme that it could not be turned around.

[36] The paint mare was of concern as she was very thin (Photos 43 and 44), had lost condition and was worse than when he had last observed her. I accept Dr. Evenson's evidence that he did a thorough examination and found she had a poor coat, and was a 1.0 out of 5 on the body condition score, having dropped half a point since his last visit. He explained that this drop equated to a loss of about 150 to 200 pounds. To get the mare back up to 1.5, she would have to gain 75 pounds.

[37] Her incisors were worn down, indicating she was an old horse. In addition to her weight loss, the mare also had a very bad case of "shear mouth". Points form on the molars, causing pain in the cheeks and sores. To avoid the pain, the horse chews in a certain manner, wearing the teeth, and resulting in shear mouth. It is treated by filing off the horse's molars so any points that form do not irritate its cheeks.

[38] Mr. Dondale was directed to separate the paint mare and place her with two other horses and a foal. He was given detailed instructions as to their feed and care. The veterinarian also gave Mr. Dondale a copy of his report (Exhibit P-18) which stated: "The older tan paint mare needs a complete dental exam and dental work. She has extreme shear mouth indicating she has dental disease in the back of mouth."

[39] Dr. Evenson directed Mr. Dondale to follow up with requirements for the chickens, being: to increase the ventilation immediately without harming birds from the cold air, feed birds on raised troughs so they were not eating directly off the manure, provide one nesting box per 20 laying hens, provide low level lighting to all levels of the barn, provide vitamins and minerals to birds daily, provide clean, fresh water daily so they never run out, clean out the barn and provide fresh litter. The bottom of the report notes: "If you have any trouble understanding these requirements contact the SSPCA, your veterinarian or a nutritionist." Dr. Evenson's phone number also appears at the bottom.

[40] Officer Detillieux's follow-up report (Exhibit P-6) advised Mr. Dondale to follow the veterinarian's recommendations. The officer highly recommended Mr. Dondale drastically reduce the number of chickens and warned it was an offence under the *Act* to cause his animals to be in distress.

February 26, 2015

[41] On February 26, 2015, Dr. Evenson, Officer Detillieux, and Kaley Pugh, the Executive Director of Animal Protection Services Saskatchewan, attended and conducted an inspection. Ms. Pugh's main role was to determine if the chickens could be removed from the barn. All three made similar observations. Photographs were taken of the chicken barn and chickens (Exhibit P -8(a)).

[42] Chickens were present on all three levels of the barn. The barn was dusty, with cob webs and

dust hanging from the ceiling (Photos 49,56), but the second floor was extremely dusty and they had to use headlamps for better vision. Protective gear, including respirators, was worn due to the condition of the barn and ammonia levels being in the range of 25 to 50 parts per million.

Nothing had changed in the ventilation system (Photo 96) or the lighting (Photo 50).

[43] On the main or bottom floor, two containers held dirty water or sludge (Photos 65, 66, 67, and 70, 71, 72, 74). There were no feeders or feed set out. On floors two and three, there was no water in the containers (Photos 80, 81, and 88, 89), nor was there any significant feed remnants on the ground.

[44] The manure build up was still very high (Photos 57, 69, 76, 77,78). Ms. Pugh testified, and I accept, that this was an accumulation of chicken manure, waste, and bedding which was striking, and unusual in her experience. Due to this accumulation of manure, and the general build of the structure, they had to crawl to access some areas of the barn (Photos 76, 77, 78). From her observations, Ms. Pugh was concerned as to how Mr. Dondale would get feed or water to any chickens that were injured or sick and needed treatment. In her opinion, the building was not suitable.

[45] On all levels of the barn, they noticed chickens with poor feather quality or missing feathers (Photos 60, 68, 74, 82, 84, 85, 86, 90-95). One chicken had blood on her flesh from other chickens pecking at her (Photo 82, 83). Three chickens were found that were either missing an eye, or appeared to have bad eyes (Photos 46, 47, 48). Dr. Evenson noted in his report, Exhibit P-19, that many of the hens were very old.

[46] With respect to the approximately 350 laying hens in the chicken barn, body condition scores were conducted. The score for chickens is measured on a scale from 0 to 3 with 0 to 1 being emaciated to thin and 2 being adequate. Dr. Evenson conducted the scoring, by measuring the sharpness of the breast bone. A random group of chickens on each floor was assessed to obtain an

average. The majority of the chickens scored 0 to 1, which is emaciated to thin. Some scored as a 2, being adequate. Dr. Evenson noted that the chickens were not as energetic this time as they had been at the March 2014 inspection.

[47] Ms. Pugh determined it would be extremely difficult to seize the birds from this structure. The air quality was a hazard, as was crawling around in the manure and the cramped head space. She felt it was not a safe situation for staff or the birds as it could cause injury.

[48] With respect to the horses in the yard, they had no water and were scored as thin to adequate. They also drove by the pasture and observed the paint mare from a distance. All the horses appeared the same as they did during the previous inspection.

[49] Dr. Evenson gave Mr. Dondale a copy of his report of February 26, 2015, (Exhibit P-19) and instructed him to follow previous instructions from February 12, 2015. Mr. Dondale was also directed with respect to the chickens that, “The level of feed must be increased to improve body condition”. These instructions need to be carried out within the near future.” Dr. Evenson again noted that Mr. Dondale could consult a specialist such as a nutritionist and could try the Saskatchewan Agriculture Knowledge Centre.

[50] In her follow-up report, (Exhibit P-8) Officer Detillieux directed Mr. Dondale to follow the previous recommendations and the veterinarian's recommendations. As well, the paint mare had to be seen by a veterinarian by March 5, 2015, and that he was to call Officer Detillieux to confirm that this had been done. Further, he was instructed that he “must show significant improvements to the chickens and the barn by March 16, 2015, or depopulate or surrender the chickens”. He was again warned that it was an offence to cause animals to be in distress.

March 26, 2015

[51] On March 26, 2015, Dr. Evenson, Officer Detillieux, and another animal protection officer, Stacey Greke (who did not testify) conducted an inspection. Photographs were taken (Exhibit P-9(a)).

[52] They inspected the chicken barn and observed there were 150 laying hens. The ammonia level was still at 25 to 50 parts per million. The body score of the chickens had improved as most were 1 or 2 out of 3. Dr. Evenson observed the chickens' energy levels were up as they were more difficult to catch than they had been in February.

[53] However, water continued to be a problem. The main floor had water but it was very dirty (Photos 100,101; 103,104) as was the water at the entrance to the barn (Photos 110, 116) and the water on the third floor (Photo 118). Ventilation had not been changed, but insulation and dust had been removed which allowed for better air flow and light. As a result, the second floor was no longer in complete darkness.

[54] Some of the manure had been removed but most of it remained (Photos 112 -115). Mr. Dondale advised he continued to throw feed directly onto the floor. There was no feed out, but there was feed in the barn, the label indicating it was not to be fed to laying hens.

[55] Dr. Evenson noted the horses in the yard had improved and he was not concerned with them. They attended to the pasture to assess the livestock. According to Officer Detillieux, there was adequate shelter and for the most part the hay appeared to be fine, although they did note some was of extremely poor quality (See photo 121). There was very little water and no salt or minerals. I accept Dr. Evenson's evidence that the animals had improved, other than the paint mare. She had an open wound and had deteriorated since his last visit. (Photos 124 - 129, 132-135).

[56] The follow-up report by Officer Detillieux dated March 26, 2015, (Exhibit P-9) was provided to Mr. Dondale. He was again advised to follow the veterinarian's instructions. He was directed to clean out the barn entirely, decrease ammonia levels, and ensure the chickens had water at all times. They recommended he feed crumble to laying hens and depopulate the chickens. With respect to the paint mare, the report noted: "The very thin brown/white paint must see a veterinarian by April 15, 2015, or recommend euthanasia."

April 10, 2015

[57] On April 10, 2015, Dr. Evenson and Officer Detillieux conducted the final inspection. On this day the chicken barn was locked and they did not inspect it. Officer Detillieux testified the horses in the yard appeared to be in thin to adequate condition, with no access to water, just snow. They did have access to feed and shelter, but there were no salt blocks.

[58] Dr. Evenson testified he attended to the farm briefly to look at the paint mare. He did not provide any information as to the condition of the other horses or cattle. It was clear to both him and Officer Detillieux that the mare had deteriorated significantly since their attendance about two weeks earlier. Dr. Evenson observed she had a hole in her spine over the tail head and birds had picked the area. Her energy level was low, and given her condition, she was seized by the animal protection officer on Dr. Evenson's recommendation. He testified he made that recommendation because the mare's condition had not improved, there had been no treatment, and she had deteriorated. Exhibit P-20 is a certificate of veterinary removal of animals dated April 10, 2015, and Exhibit P-11 is the notice of seizure for the paint mare.

[59] The paint mare was hauled to a livestock centre. Dr. Evenson treated her wounds and the mare was held for 72 hours. The SPCA determined that the horse was unfit to be re-homed or sold and Dr.

Evenson was instructed to euthanise the animal. He did so on April 15, 2015.

[60] In cross-examination Mr. Dondale suggested that the paint mare had simply grown old, but Dr. Evenson advised him that they were concerned with the proper welfare of the animal regardless of its age. This meant the animal must have proper food and water, comfort, freedom from pain, injury and disease, freedom or ability to exhibit the most normal behaviour, and freedom from fear.

Defence Evidence

[61] Mr. Dondale called evidence in his own defence. His first witness was Catherine Manshande, his common law wife. Her evidence was that she was not involved with Mr. Dondale between August 15, 2013 and March 26, 2015, which is most of the time in question. She moved to the farm in May 2016 and has been there since. I find her evidence was not helpful as she offered no evidence as to the state of the chickens or horses during the relevant time frames.

[62] The second witness was David McCulloch, who maintained the paint mare was not thin but old, and that her teeth were getting worn out which was normal. I do not accept Mr. McCulloch's evidence as he did not give any detail concerning his beliefs, nor did he have the experience or qualifications that the Crown witnesses had concerning animal health and welfare.

[63] Mr. Dondale testified in his own behalf. He described himself as a hobby farmer and that he designed and built the chicken barn. He only put five feet between the various floors because that was ample space for him to operate and the barn worked well. On the top two levels, the manure fell through a hole down to the lower level. He then shovelled it out by hand through a window to the outside. He cleaned the barn regularly in the summer but might only clean it once or twice in the winter due to cold weather. He disagreed that the access door to the egg room was blocked by manure as

described by Dr. Evenson. He commented that Dr. Evenson is a big man, was not a farmer, and thus could not open the access door. He himself could, however, because as a farmer he did not mind doing difficult things.

[64] He understood the behaviour of the chickens, not from attending university, but from watching, being with them, and listening to them. Mr. Dondale could tell if a chicken was in distress because he would hear it from the barn to the house, as the chickens would cackle if they ran out of water, or feed, or if there was a predator in the barn. If a chicken was not responding to food and water he would hand feed it and babysit it until it became better or died. He would not sleep or eat if he had to do so. He kept the animals because he loved them.

[65] Mr. Dondale said he had never seen a chicken in distress from walking in manure or eating off of it. In his opinion, feeding the chickens by throwing the food on the manure was fine as they were scavengers. He did not use feeders as in his experience the chickens would pile up at feeding time and some would be killed.

[66] He acknowledged that the ammonia levels may have been high and might have caused a person's eyes to sting, but said there was ammonia in every hog and poultry barn. He testified the ventilation was good.

[67] With respect to water and feed for the chickens, he said the pictures of the sludge water verified they were not out of water. If they were thirsty they would have drunk whatever was in the pail and drank the pail clean. He said if you put out fresh water and dirty water, the chickens will drink the dirty water first. He admitted the feed he had was not for laying hens, but justified it by saying it was a finer grind which was easier for the chickens to eat. If he had used the laying hen feed, which was larger pellets, the chickens could choke to death if they ate it too fast.

[68] Mr. Dondale testified he force-fed the chickens because Dr. Evenson had told him to open all windows and keep the chickens eating 24 hours a day 7 days a week. He poured feed in as fast as the chickens could eat it and opened the windows as much as he could. In two days he had 50 dead chickens. He said the veterinarian came back in a couple of weeks and when he told him what had happened, the veterinarian simply said that they are laying more eggs, so what did it matter. The veterinarian then told him they were going to be back in two weeks and that he better “smarten up” or they would put him out of the egg business.

[69] With respect to the “Code of Practice for the Care and Handling of Layers”, (Exhibit P-12) he testified he read it, and while about 15 percent of it was fairly accurate, 85 percent was probably written by people who did not know anything about chickens. With respect to the chicken that starved because it could not defecate, he said that could happen in hours or over a couple of days. It may make sounds or it may not and its death could also have been caused by old age, or a heart attack. He visually checked the chickens every hour of every day and relied on the sounds of his chickens. He further said that if he missed one out of two hundred chickens that was not a bad record.

[70] Mr. Dondale accused the SPCA staff of breaking down the locked door on the chicken barn. He testified that after the SPCA came out, he had lost dozens of chickens because they piled up when they were being inspected and they did not unpile. With respect to the chickens’ body scores, he said he did not want his laying hens too fat or it would kill them when they laid their eggs. He believed that according to the authorities, most of his chickens were of adequate body weight. In his opinion, the chickens who suffered from malnutrition did so due to old age.

[71] He testified he had owned the paint mare for three winters. She was skinny when he bought her and she did not gain any weight until the grass turned green in the spring. He was aware of her mouth condition, but at that time of the year the condition of her teeth did not matter as she would simply be

able to swallow the green grass without having to chew it. She would fatten up from eating the grass, then would lose weight over the winter. He did not believe there was anything wrong with this as he had done it for two winters and she ate sufficiently to make it through the winter. When asked why he did not get the mare checked in the winter months, he said “why stress the horse to fix it if it’s going to die anyway?” He said if you put the animal in a trailer and transport it, it would lead to shock and could kill the animal. He dismissed the evidence and concern of the SPCA officer and the veterinarian, as it was his opinion the paint mare was simply old.

[72] He said that the paint mare was in the pasture with other horses when the SPCA told him she was too thin and needed water, and instructed him to put her in the corral where the water trough was located. He did so, and saw the stallion attack the mare and put the hoof marks on her back, resulting in the injury to her tail head. He put the paint mare in the bale yard alone, with bales piled high so the stallion could no longer get at her. He carried water for her, even though it was an inconvenience. It is apparent that Mr. Dondale blames the SPCA for the injury to the paint mare.

[73] Further, he said he spoke to the son of an old man who knew about horses and arranged for the old man to come and look at the paint mare’s teeth. Before he could do so, the SPCA seized the mare.

[74] On August 1, 2016, he sold all of the cattle, horses, and chickens to his common law wife, Ms. Manshande, but he is still their caregiver.

ISSUES

1. Did Mr. Dondale, cause or permit chickens or horses to be in distress within the meaning of *The Animal Protection Act, 1999*, SS 1999, c A-21.1 during the time frames alleged ?

2. Did Mr. Dondale wilfully cause or being the owner, wilfully permit to be caused unnecessary pain, suffering or injury to an animal or a bird within the meaning of s. 445.1 (a) of the *Criminal Code*?

LAW AND ANALYSIS

[75] Whether assessing the credibility of witnesses with respect to evidence proffered under provincial or federal legislation, I am bound to apply the test enunciated by the Supreme Court of Canada in *R v W.(D.)*, [1991] 1 SCR 742, 63 CCC (3d) 397 [*W.D.*]:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[76] Generally speaking, I find most of Mr. Dondale's evidence fanciful, and completely unbelievable.

I do not accept his evidence that the SPCA or Dr. Evenson behaved in the manner he attributed to them. Mr. Dondale tried to cast himself in the best light possible, but it only served to highlight his inadequacies in the care and management of chickens and horses, notably the paint mare.

[77] It is common ground that at the time of the alleged offences Mr. Dondale was the owner of the chickens and paint mare. Given there are different elements with respect to the provincial offences as compared to the *Criminal Code* offences, I will deal with each separately.

The Animal Protection Act, 1999, SS 1999, c A-21.1

[78] Section 4 of the *Act* states:

No person responsible for an animal shall cause or permit the animal to be or to continue to be in distress.

[79] The following portions of section 2 of the *Act* are applicable:

2 (2) Subject to subsection (3), for the purposes of this Part, an animal is in distress if it is:

- (a) deprived of adequate food, water, care or shelter;
- (b) injured, sick, in pain or suffering; or
- (c) abused or neglected.

(3) An animal is not considered to be in distress if it is handled:

- (a) in a manner consistent with a standard or code of conduct, criteria, practice or procedure that is prescribed as acceptable; or
- (b) in accordance with generally accepted practices of animal management.

(4) For the purposes of this Part and Part III.1, a person responsible for an animal includes a person who:

- (a) owns an animal;
- (b) has custody or control of an animal; or
- (c) has custody or charge of a minor and the minor is the owner of the animal.

[80] *The Animal Protection Regulations, 2000*, RSS, c A-21.1 Reg 1, provides in section 3:

The standards or codes of conduct, criteria, practices or procedures set out in Part II of the Appendix are prescribed as acceptable for the purposes of clause 2(3)(a) of the *Act*.

[81] The code of practice found in the Appendix, which is applicable to this case, is identified as:

11. Recommended code of practice for the care and handling of pullets, layers and spent fowl: Poultry - Layers (2003), published by the Canadian Agri-Food Research Council.

This code was tendered into evidence as Exhibit P-12.

[82] It is well settled that the offence created by s. 4 of the *Act* is one of strict liability, and does not require proof of *mens rea*. Once the Crown has proven the *actus reus* beyond a reasonable doubt, the onus shifts to the accused to show, on a balance of probabilities that he took all reasonable steps to avoid the offending behaviour. This is commonly referred to as the defence of due diligence. (See *R v Loerzel*, 2007 SKCA 107, 304 Sask R 141.

Chickens

[83] I have no hesitation in finding the Crown has proven beyond a reasonable doubt that between March 24, 2015 and March 26, 2015, the chickens were in distress within the meaning of the *Act*. Mr. Dondale was not providing adequate feed, water or shelter. The barn was not properly designed or built with appropriate ventilation, heating, lighting, and ease of cleaning. It was extremely dusty and was rarely, if ever cleaned by Mr. Dondale. The high ammonia levels were concerning for both the chickens and humans.

[84] Mr. Dondale did not adequately supervise the chickens and I do not accept his evidence that he was out in the barn every hour of every day. I also do not believe his evidence that he could tell if the chickens were in distress from the sound of their clucking. His inability to supervise the chickens was hampered by the design of the building and the manure pile.

[85] Mr. Dondale did not maintain proper feed or water for the chickens. The water pails were either filled with sludge, dirty water, or were completely empty. The siphoning system did not work.

There were no feeders and simply throwing the feed on the manure was not healthy for the chickens. As well, the feed was not adequate and it is clear the chickens had dangerously low body weight, with at least one chicken suffering from muscle waste.

[86] Believing he knew better, Mr. Dondale continually disregarded the direction of Dr. Evenson and the SPCA. He tried to throw the blame on them, unabashedly but unsuccessfully, with wild accusations that they were to blame for the death of a number of his chickens because he followed their directions. His accusations are completely unfounded.

[87] I note that on February 26, 2015 there were approximately 350 chickens in the barn. On March 26, 2015, there were only 150 chickens. I accept Mr. Dondale's evidence that he lost at least 50 chickens as he was feeding them constantly and had left the doors open. I find that he did this, not at the direction of Dr. Evenson, but out of spite. He took Dr. Evenson's directions to the extreme simply so he could somehow prove Dr. Evenson wrong. It was a callous and cruel act.

[88] He also said the chickens would pile up when they were being inspected by the authorities and this resulted in losses. I reject this evidence. If the chickens died, it was because Mr. Dondale did not provide adequate feed or water for them, nor did he sufficiently monitor them.

[89] I find that Mr. Dondale has not proven on a balance of probabilities that he took all reasonable steps to avoid causing distress to the chickens. The overwhelming evidence is that Mr. Dondale took no steps to ensure the chickens were not in distress, despite repeated direction and assistance from the SPCA and Dr. Evenson. He did not provide adequate feed, water or shelter for the birds. Mr. Dondale did not follow up on the recommendations of the SPCA or the veterinarians, nor did he seek clarification of their directions. He did not follow the Code of Practice. As a result, the chickens on his property were in distress. He is guilty of count 1.

Horses

[90] I find the Crown has proven beyond a reasonable doubt that between March 24, 2015 and April 10, 2015, Mr. Dondale caused or permitted horses specifically the paint mare to be in distress within the meaning of the *Act*.

[91] There is no evidence the other horses were in distress during the noted time frame, other than the paint mare. Mr. Dondale had made improvements in the care of the horses generally, but completely disregarded the advice and direction given by Officer Detilleux and Dr. Evenson concerning the paint mare.

[92] I accept that a lack of quality feed and water impacted the health of the paint mare. The mare was obviously in distress because she could not eat, especially during the winter. Her weight dropped significantly over the course of a short period of time and she did not rebound.

[93] Despite numerous directives provided to Mr. Dondale as to the care required for the paint mare's condition to improve, he disregarded it. He did not address the shear mouth, or adequately attend to the injury on the mare's tail head. Mr. Dondale did little, if anything, to address these concerns, despite being aware that the horse would be euthanised if her condition did not improve.

[94] Further, I do not believe his evidence that he was going to have someone look at the horse but the SPCA seized the animal before that could be done. Even if this were true, it is clear this person was not a veterinarian, and Mr. Dondale was specifically told to have a veterinarian see the horse.

[95] Mr. Dondale deliberately let the paint mare starve during the winter when she could not chew properly. It is clear Mr. Dondale felt the paint mare was old, would eventually die, and was not worthy

of the expense of having a veterinarian fix her teeth. I find the evidence overwhelmingly proves that the paint mare was in distress within the meaning of the *Act*, and that the Crown has proven the *actus reus* beyond a reasonable doubt. I find Mr. Dondale has not proven the defence of due diligence on a balance of probabilities and find him guilty of Count 2.

The Criminal Code

[96] Section 445.1 of the *Code* states:

- (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;
- (3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of the evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

[97] Section 429(1) of the *Criminal Code* is applicable:

- (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 the Part, wilfully to have caused the occurrence of the event.

[98] The proper test to be applied in assessing the evidence was outlined in *R v Gerling*, 2016 BCCA 72 at para 27:

- [27] In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful

conduct and s. 429(1) of the *Criminal Code* applies. It engages a subjective element: “knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not”.

[99] Mr. Dondale testified and called evidence on his own behalf. Applying the test as outlined in *W.(D.)*, *infra*, I find I do not believe his evidence nor does his evidence leave me with a reasonable doubt.

[100] I find that there is no evidence to the contrary in this case and the Crown can rely upon the presumption in s. 445.1(3).

Chickens

[101] Although Mr. Dondale made small changes to the barn housing the chickens, he did not address the main issues which were feed, water, the level of manure and the overall structure of the barn.

[102] Furthermore, even if there was evidence capable of constituting evidence to the contrary, I find the Crown has proven that Mr. Dondale acted wilfully within the meaning of s. 429(1). I find he deliberately disregarded the recommendations of the SPCA officers and Dr. Evenson when it came to feeding the birds and providing ventilation. Mr. Dondale said he was feeding the chickens the recommended feed 24 hours a day, seven days a week and had the doors wide open in the winter as Dr. Evenson advised. Clearly, this was not what Dr. Evenson told him to do. Accepting what Mr. Dondale said to be true, I find that he deliberately caused the death of 50 of his chickens because he chose to distort and take to the extreme the advice that Dr. Evenson had given him. This indicates that Mr. Dondale was vindictive, cruel and cared nothing for the welfare of the chickens.

[103] Mr. Dondale could not inspect the chickens properly given the design and structure of the barn, and the large accumulation of manure. The evidence established this manure accumulated over many years, resulting in the SPCA personnel and Dr. Evenson having to crawl around in hazmat suits and respirators. Even then they were not able to fully inspect the barn.

[104] The evidence of the SPCA witnesses and that of Dr. Evenson, coupled with the photographs tendered, showed a pattern of non-compliance and a lack of concern on the part of Mr. Dondale to take any significant steps to alleviate the pain and suffering of the chickens. Any reasonable person could have seen the chickens were not faring well and would have required immediate attention in order to address the situation. Despite their best efforts, the advice of the SPCA and Dr. Evenson fell on deaf ears. Mr. Dondale felt he knew more than them and he chose to not follow their

recommendations nor seek help from any other agency suggested by them. I find him guilty of Count 3.

Horses

[105] Mr. Dondale declined to accept what was plain to see by anyone who saw the paint mare and the pain she was enduring. Through his evidence, it is clear he felt that because the mare was old she was not worthy of efforts to address her shear mouth. Her body condition continued to deteriorate despite the directions he had been given to alleviate her unnecessary pain and suffering.

[106] Mr. Dondale's lack of care for this mare ultimately lead Dr. Evenson to euthanise her. Mr. Dondale offered no reason why he did not have a veterinarian come out and file her teeth. He offered that he had tied her to a post for a man to come and take a look at her; not a veterinarian, just some

man. Mr. Dondale said the horse could not be transported because it would have caused too much stress and she would die, which I presume he offered as a reason why he did not transport her to a veterinarian.

[107] On all of the evidence that I do accept, I find Mr. Dondale guilty of Count 4: that he did wilfully cause or being the owner, wilfully permitted to be caused unnecessary pain or suffering to horses contrary to s. 445.1(1)(a) of the *Criminal Code*.

I.J. Cardinal. J