

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Kenny*, 2019 ONCJ 728
DATE: 2019 10 03
COURT FILE No.: Peterborough 15 0239

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

TONY KENNY

Before Justice of the Peace M. Coopersmith

Heard on May 24, 2018, May 31, 2018, June 7, 2018, June 18, 2018, June 28, 2018,
July 26, 2018, December 6, 2018, December 17, 2018, January 10, 2019, February 4,
2019, April 15, 2019, May 6, 2019 and June 3, 2019
Reasons for Judgment released on October 3, 2019

J. McGrath..... counsel for the prosecution
The defendant Tony Kenny on his own behalf

JUSTICE OF THE PEACE COOPERSMITH:

[1] Tony Kenny, being the owner or having custody or care over various animals, has been charged with 16 counts laid under subsection 18.1(1) of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, as amended ["OSPCAA"]. All the charges arise at the property located at 1265 Second Line, Baillieboro, Ontario. The 16 charges are as follows:

1. On or about November 5, 2014, did cause a Long Horned Bovine type animal to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*;
2. On or about November 5, 2014, did fail to comply with the prescribed standards of care for a Long Horned Bovine type animal, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide protection from the elements as required by s.2(6)(e) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;

3. Between October 24, 2014 and November 5, 2014, re: 1 Long Horned Bovine type animal, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*;
4. On or about January 15, 2015, did cause 6 (Ducks) Anseriformes type animals to be in distress, contrary to s.11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s. 18.1(1)(c) of the *Act*;
5. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
6. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate medical attention as required by s.2(2) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
7. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate sanitary conditions as required by s.2(6)(b) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
8. Between January 14, 2015 and January 15, 2015, re: 6 (Ducks) Anseriformes type animals, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*;
9. On or about January 15, 2015, did cause 20 (Chickens) Galliformes type animals to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*;
10. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
11. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate medical attention as required by s.2(2) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
12. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate sanitary conditions as required by s.2(6)(b) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;
13. Between January 14, 2015 and January 15, 2015, re: 20 (Chickens) Galliformes type animals, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*;
14. On or about January 15, 2015, did fail to comply with the prescribed standards of care for 1 Domestic Dog, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide

adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*;

15. Between December 12, 2014 and January 15, 2015, re: 1 Domestic Dog, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*;

16. On or about January 15, 2015, did cause 1 Domestic Dog to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*.

[2] The trial proceedings took place over many days: May 24, 2018, May 31, 2018, June 7, 2018, June 18, 2018, June 28, 2018, July 26, 2018, December 6, 2018, December 17, 2018, January 10, 2019, February 4, 2019, April 15, 2019, May 6, 2019 and June 3, 2019. Mr. Kenny brought several motions before and during the trial proceedings.

[3] For the reasons that follow, I have dismissed all the defendant's outstanding motions. And, further, I find Tony Kenny guilty of each of the sixteen charges laid under subsection 18.1(1) of the *OSPCAA*.

I. EVIDENCE, SUBMISSIONS AND FINDINGS:

[4] Agent Daniel Pazder, Inspector Nicole Fraser, Dr. Greg Aitken and former Agent Joshua Matson testified for the prosecution. The defence presented no evidence.

(a) Evidence of Agent Daniel Pazder:

[5] Agent Daniel Pazder testified that he has been the Ontario Society for the Prevention of Cruelty to Animals Agent for the County of Peterborough for just under six years. Prior to that, he was a registered veterinary technologist, having received an honours degree at Northern College. He then worked as an Agent at the OSPCA in Oakville for two years, prior to coming to Peterborough. He takes part in approximately 450 to 500 animal cruelty investigations a year. He is the lead investigator in the matters that bring this defendant before the courts.

[6] Agent Pazder first became involved with this investigation on September 11, 2014. He was dispatched to Rainbow Drive in the County of Peterborough in the Municipality of South Monaghan (Bailieboro), in response to a complaint regarding three horses in a small round pen with a large amount of mud and without adequate food or water. Animal Control Officer Mike Johnson and his trainee, Agent Miskolczi, accompanied him. After observing the horses, Agent Pazder proceeded up the laneway to the house to inquire if the owner was there. Along the way, he noticed a long-horned bull attached to a truck bed with a tether that was approximately twenty feet long. After getting out of his truck and proceeding to knock on the door, he found a black and tan hound-type dog tied to a tree, on an eight- to ten-foot chain and with a plastic rain barrel as shelter. There was another enclosure, approximately eight feet by four feet, with what looked like two dogs inside, with a plastic rain barrel as a shelter.

[7] There was no response to Agent Pazder's knock on the door of the house. He left a 24-hour contact notice on the door. As he was leaving, he called Debbie Haigh, the animal control person for the area, to see if she knew the owner of the property. Ms. Haigh was around the corner, so she drove to the property where Agent Pazder was. She believed the owner lived across the street at 330 Rainbow Avenue, so they walked over and knocked on the door. A lady came out of the house and, from conversation with her, they determined it was Tony Kenny's property. This lady, however, owned the horses. When they advised her that they had received a complaint regarding the horses, she told them they were trespassing and to leave the property.

[8] Agent Pazder provided an aerial view of the property where the horses and bull were located (Exhibit 1). The round pen housing the horses is on the southern portion of the property, east of the driveway that diagonals across the property. The house is halfway along the driveway.

[9] The long-horned bull was tethered in an area between the horses and the house, in the open, grassy field about sixty feet off the east side of the laneway. Agent Pazder did not see any shelter. He was not comfortable getting close to the bull to confirm whether it had adequate water.

[10] Closer to the house, the dog that was tethered to the tree with a heavy chain had inadequate shelter, in the form of a plastic rain barrel. The lead was short – eight to ten feet. The dog was a hound, about the size of a cocker spaniel, weighing about thirty pounds.

[11] The two dogs in the enclosure had a similar plastic rain barrel as inadequate shelter that appeared not large enough to be able to accommodate both dogs at the same time. The enclosure was made of metal caging material and measured about eight feet by four feet. Agent Pazder was unable to observe whether the dogs had adequate water.

[12] After viewing the dogs, Agent Pazder returned to his office.

[13] On September 15, 2014, the defendant, Tony Kenny, voluntarily attended at the Humane Society office for a meeting he had set up the previous week through the OSPCA Executive Director, Judy O'Brien. He was accompanied by his personal assistant, Mr. Allan Bulmer and they met with Agent Pazder and Executive Director O'Brien. At the request of the defendant, Agent Pazder provided his identification. Mr. Kenny then started questioning him about why he was on the property, how he got on the property, where exactly he was on the property and what he was doing. The defendant claimed that Agent Pazder was trespassing on his property. Agent Pazder stated that he did not see a trespass marker along Rainbow Drive and the defendant was unable or unwilling to advise of the location of any such posting. Agent Pazder made several attempts to talk to Mr. Kenny about his concerns for the animals on his property and whether they were provided with the provisions set out in *Ontario Regulation 60/09: Standards of Care and Administrative Standards* made under the *OSPCAA* ["O. Reg. 60/90"]. He wanted to talk about adequate housing for the dogs, but Mr. Kenny would not hear of it. The defendant did advise that he owned the three dogs and the bull. The defendant continued to repeat his concerns, wanting Agent Pazder to

quote sections of the *Charter of Rights*. He would not listen to anything that had to do with the conditions of his animals. Consequently, near the end of the meeting, things were getting heated between Mr. Kenny and Ms. O'Brien. She informed the defendant that they would be sending him their orders for compliance by registered mail. Agent Pazder wrote up the orders and sent them out by registered mail later that day.

[14] Exhibit 2(a) is a copy of the September 15, 2014 standard short form OSPCA order that was sent. It is addressed to Tony Kenny, at 1265 Second Line in Baillieboro, regarding "3 various coloured and breeds of dogs on property". Pursuant to subsection 13(1) of the *Act*, the defendant was ordered to take the following action to relieve the animals' distress:

1. If the dog is to be kept outside, it must be given a doghouse large enough for the dog to stand up, sit down, turn around and stretch out to the fullest extent of its limbs. The doghouse must be weatherproof with an interior windbreak and/or exterior flap. The doghouse must fact away from the prevailing wind and must be elevated off the ground.
2. The doghouse must be insulated.
3. If the dog is kept tethered, it must be provided with a running line, chain or leash which will permit unrestricted movement into the doghouse and for the distance of not less than 3 meters from the doghouse.
6. Clean, potable water must be provided in a spill proof container at all times.

[15] The date for compliance was noon on Monday, October 6, 2014. It also stated:

If this order is not complied with, the animal(s) may be removed by the Ontario SPCA in order to provide them with care at the expense of the owner/custodian. The animal(s) shall not be removed, sold or otherwise disposed of by the owner/custodian without the consent of the inspector/agent. This order shall remain in force until such time as it is modified or revoked.

[16] The order is signed by Agent Pazder and includes his badge number, phone number, fax number and address. The back of the order provides the guidelines to question the order to the Animal Care Review Board, under s. 17 of the *OSPCAA*.

[17] Exhibit 2(b) consists of the unopened envelope, unclaimed by Mr. Kenny and returned by Canada Post, along with the registered mail tracking number and history.

[18] The compliance date of October 6, 2014 passed without any compliance information received by Agent Pazder. On October 8, 2014, Agent Pazder applied for and was issued an OSPCA Animal in Distress Warrant (Exhibit 3), to attend 1265 Second Line in the Township of Otonabee South Monaghan, to check out the compliance order. He attended at the property at 11:10 that morning, along with OSPCA Agent Nicole Foster from the Northumberland Humane Society and Ontario Provincial Police Constables Morgan and D'Amico.

[19] They entered the property via the driveway off Rainbow Drive. The defendant was with the long-horned bull, in the field along the side of the laneway. Agent Pazder

presented Mr. Kenny with a copy of the OSPCA warrant and informed him that he was there to check on the order for compliance. Agent Pazder asked Mr. Kenny if he would like to accompany the two agents while they looked at the animals, but the defendant chose to stay by the cars with the OPP officers.

[20] Agent Pazder observed the dog that had been tethered now running free, but still without adequate housing – only the plastic rain barrel. A cooler was used for a water source, but the water was very dirty and had not been cleaned out in a while. The enclosure with the two dogs had only one dog in it and it still had the plastic rain barrel as a shelter and very dirty water in a container. There was a leg of an animal with the dog in the enclosure. Agent Pazder had no concern with this animal leg that could have been roadkill or from another carcass, as long as the dog had another source of food to provide vitamins and minerals and was monitored to ensure the bone didn't splinter off to cause gastro-intestinal upset. This appeared to be no more than a treat for the dog. There was another dog house that seemed to be in good shape, but it was off to the side, nowhere near the dogs.

[21] After looking at the dogs, the agents drove their vehicles back down the laneway to look at the bull. The bull was partially hobbled and Mr. Kenny had been trying to fix its tether when they first arrived. The tether consisted of a half inch, round braided rope, like that used to tie off a boat, and was connected to an old pick-up truck bed. There were two buckets in the bed and Mr. Kenny informed the agents that they contained water. Mr. Pazder did not get close, as Mr. Kenny said the bull was a bit on edge that day. There was no shelter provided for the bull.

[22] They then moved further down the laneway to deal with the horses, which were owned by someone else. Agents Pazder and Foster returned to Mr. Kenny's location to ask him questions about the sheltering of the bull at night. The defendant would not answer any of their questions. At the end of the visit, not having noticed any movement towards compliance regarding shelter and water for the dogs and shelter for the bull, Agent Pazder provided Mr. Kenny with a new OSPCA order to provide a shelter for the bull and the previous order regarding the dogs that the defendant had not claimed in the registered mail. (Exhibit 5.)

[23] Several photographs taken by Agent Pazder on October 8, 2014 were entered as Exhibits 4(a) to 4(j). They illustrate the bull, its tethering and surroundings and the dogs and their surroundings, plastic barrel shelters and dirty water. Only the white and brown dog was in the wire enclosure. Agent Pazder advised that it seemed to be panting, but otherwise appeared to be in an acceptable condition, without ribs or hip bones showing. The dog that was previously chained to a tree was running freely. The photograph of the tree and chain shows a tether that was less than three meters long. The plastic barrels used as shelters for the dogs did appear to be large enough to accommodate the dogs standing, sitting, turning or fully stretched out, but they were not insulated with an interior windbreak or exterior flap. Agent Pazder did not check to see if these shelters were facing away from the prevailing winds. However, they were not elevated up off the ground. Consequently, they did not meet the requirements for an approved animal shelter.

[24] Exhibit 5 is the October 8, 2014 order Agent Pazder issued and personally provided to Mr. Kenny during the October 8, 2014 visit to his property. Page 1 references the three dogs on the property and the requirements for proper housing, at least a three-meter-long chain or leash that would permit unrestricted movement into the doghouse and clean water. Page 2 of 2 references the need to provide shelter and/or a windbreak for the long-horned bull. Compliance was to be by October 24, 2014. Agent Pazder included his name, phone number and address. The back of the order provided information that any dispute would be to the Animal Care Review Board

[25] The next visit Agent Pazder made to the property was October 31, 2014. He entered through Rainbow Drive and arrived at 2:14pm in order to recheck the orders he gave the defendant on October 8, 2014. He had obtained an OSPCA Animal in Distress Warrant (Exhibit 6) and was accompanied by OSPCA Agent Marie Doucette and OPP Constable Peckover. When there was no response to his knocking, he posted a copy of the OSPCA warrant on the door of the house.

[26] The brindle-coloured hound known as Diesel was tethered to an abandoned dog house northeast of the wire dog enclosure. There was a household pot contained a little amount of water. This was the dog that had been running freely on the previous visit. A closer look showed the dog appeared quite skinny. The enclosure just south of the house contained the Jack Russell type dog. The leg of an animal was still there, the water appeared very dirty and the same plastic house was used as shelter.

[27] The long-horned bull was moved from the east field to the west side of the laneway, still tied to the truck bed by his horns. There were plastic buckets, but Agent Pazder could not tell if they contained water. The bull still had no access to any manmade or natural shelter. Agent Pazder took photographs that were entered as Exhibits 7(a) to 7(h). The bull was shown standing in the field attached to the truck bed. There were photographs of the brindle-coloured hound known as Diesel, attached on a longer lead than previously and with a partially tipped over pot of water near the doghouse. The opening to the doghouse was large and had no flap and the inside of the doghouse was not insulated. As well, the pot in the Jack Russell terrier-type dog's enclosure contained a small amount of dirty water and the pot was not spill proof. The enclosure now contained a little bit of straw and there were kibbles in the lid of the cooler.

[28] From the previous visit, Agent Pazder had concerns about the shelter for the bull and unknown water source for the bull, as well as shelter and water for the two dogs. Since there was no one home in this follow-up visit, he could not issue any orders. Consequently, he left the property.

[29] Agent Pazder next visited the defendant's property on November 5, 2014, as Mr. Kenny was still under non-compliance orders. Agent Pazder simply wanted to come back to check on compliance. He wanted to give more opportunity to have the issues resolved. Again, he had an OSPCA Animal in Distress Warrant (Exhibit 8). He entered the property by the entrance on Rainbow Drive and was accompanied by Agents Doucette and Matson, OSPCA Senior Inspector Steven Toy, Officer Miskolczi from the Peterborough Humane Society and OPP Officers Peckover, D'Amico and Moran. He and Officer Miskolczi walked up to the house and knocked on the door. There was no

answer and the October 31, 2014 warrant was still on the door. Agent Pazder also attached the warrant that was issued on November 3, 2014.

[30] They looked at the animals and confirmed there still was no compliance, so they called a livestock transport and loaded up the horses and the bull. That was the fourth trip to the property to observe no change in the condition of the bull – no shelter and tied to the truck bed as winter was approaching. There had been two orders issued by this time. The decision to remove the bull from the property was made based on the welfare for the animal and conditions not improving. Agent Pazder completed a “Notice of Removal and/or Destruction of Animals” for “1 Jersey, Longhorned type bovine ster (sic)”, addressed to Tony Kenny at 1265 Second Line, Bailieboro, Ontario (Exhibit 9). The back of the Notice provided information about the Animal Care Review Board and, in particular, section 17 of the *OSPCAA*.

[31] As they were removing the animal, Carlie Gaeco arrived with the police and identified herself as a relative of the defendant. She was Mr. Kenny’s future daughter-in-law and she advised that Mr. Kenny was residing with her. She watched the animal being loaded. Afterwards, Agent Pazder gave her the removal notice form and she advised him that she would provide it to Mr. Kenny.

[32] Next, they checked up on the two dogs. There was a little bit more straw inside the shelters. Since they saw some attempts from the owner at this time, Senior Inspector Steven Toy advised that they should modify the orders and give more time for compliance.

[33] Exhibits 10(a) to 10(g) contain a series of photographs taken by Agent Matson on November 5, 2014, in the presence of Agent Pazder, who printed out the photographs. They show a skinny bull with no shelter, tethered in the west field to a truck bed. As well the bull’s two white buckets contained dirty yellow water. The dog by the house had the water cooler beside him and its shelter was not raised off the ground, had no insulation and no wind flap. The terrier-type dog was inside the blue plastic barrel, which was not raised up off the ground, but did have some straw in it for insulation.

[34] After leaving the property, Agent Pazder wrote two orders and, a couple of days later, sent them to the defendant by registered mail.

[35] Agent Pazder next visited the property on December 18, 2014, to check on compliance with the November 14, 2014 orders. Again, he entered from the south entrance with a Warrant (Animals in Distress), a copy of which was entered as Exhibit 11. He was accompanied by Agents Matson and Doucette and OPP Officer Julia Hagalini. There were no more dogs at the house. There was a black and tan shepherd cross type dog tied up at the entrance to the barn. There was a lot of feces on the ground and an empty frying pan that was believed to be used as the dog’s food bowl. There was a bucket of water that was frozen. Inside the door of the barn was a blue plastic rain barrel with some straw in it, that was not raised up off the ground. The remains of a chicken were near where the dog had been.

[36] Agent Pazder heard the sound of chickens coming from inside the barn. Upon entering, he found two wire cages of chickens in the main area. There was a large

amount of wet feces inside the cages. The chickens did have food, but their water was starting to ice over. Beside the two cages was a door to another room, where there were two quite large enclosures containing a variety of different breeds of chickens. The smell was very strong and there was a six- to eight-inch build up of feces. There was very little food and the water had started to ice over. The birds had a large amount of feces caked to their feet, as there was no dry spot where they could stand. There were decaying pumpkins, pineapples and other vegetation in the cages. Chickens and ducks were separated between the two enclosures, one of which had ten nesting boxes for about nine chickens and one rooster and two domestic geese. The enclosure needed to be cleaned out. The other enclosure contained four domestic geese and around six chickens and two roosters, with only a shelf to get up onto.

[37] Agent Pazder took photographs, entered as Exhibits 13(a) to 13(l). They show the dog chained near the door of the barn, the blue plastic barrel containing straw, the dog's freezing water, the empty frying pan being used as a food dish for the dog, the outside wire cage without a dog in it, the empty outdoor doghouse, the inside of the barn, two chickens in a cage outside the large enclosure, a bucket in the enclosure containing water that is starting to freeze, a gravity-fed hopper containing chicken feed and a large amount of feces. One of the large enclosures held twelve chickens, ducks and a rooster, water containers starting to freeze and a large build up of feces. The other large enclosure contained twelve geese, chickens and roosters with no food, with water beginning to freeze over and a build up of feces.

[38] The birds had intermittent food, water that was freezing over and unsanitary conditions, with feces everywhere. They were given water before Agent Pazder left.

[39] Agent Pazder was concerned that these birds did not have regular care, so a 24-hour contact notice for "ABANDONED ANIMAL(S) CALL WITHIN 24 HOURS" was posted to the door of the house [Exhibit 12]. The back of the notice contained relevant excerpts and explanations of various laws pertaining to animals from the *Criminal Code of Canada* and the *OSPCAA*. Everyone left the property and more orders were written.

[40] Agent Pazder returned to the property on December 22, 2014 to see if the animals were being cared for or if they had been abandoned. Again, he entered the property with a Warrant (Animal in Distress), a copy of which was entered as Exhibit 14. He was accompanied by Agent Matson and OPP Constable Peckover. There was no response to the knock on the door of the house, so he posted the warrant on it.

[41] There were no dogs in the two outdoor areas where they had previously been. The agents and officer entered the barn. The previously posted 24-hour contact notice was no longer there. The water had been emptied and replaced with clean water and food was provided. There had been no clean up of the fecal material inside the enclosures. The dog by the barn had water and seemed happy. Its blue plastic barrel still had no wind flap and was not raised off the ground. Agent Pazder advised his boss, Senior Inspector Steven Toy, that someone was looking after the animals, so he decided to write orders and send them by registered mail once they left the property.

[42] Exhibit 15 is the December 22, 2014 order to Tony Kenny to 1. Provide clean bedding at all times for all poultry breeds for nesting behaviour, 2. Clean up all fecal

matter and 3. Clean up all hazardous debris that could cause injury to animals. Agent Pazder's contact information was included and January 14, 2015 was set as the date for compliance. The registered mail was returned, unopened, to the Humane Society.

[43] Agent Pazder returned to the property again on January 15, 2015, entering from Second Line, as the Rainbow Road entrance was blocked with a chain, a car parked sideways across the entrance and a truck with a snow plough behind the car. He was accompanied by Agents Matson and Doucette and two OPP Officers and, again, had obtained a Warrant (Animal in Distress) prior to entry onto the property (Exhibit 16). Getting no response to his knock on the door of the house, Agent Pazder posted the warrant on the door.

[44] Seeing no dogs up by the house, they proceeded to the barn. The first cage of chickens looked like they had not been cleaned since the last visit and were even worse at this visit. There was no feed and the water was frozen solid. In the area where there were two large enclosures of chickens and ducks, again, they had not been cleaned. The animals' water was frozen and there were frozen blocks of water in the shape of the container where the ice had been dumped out. There still was no nesting box in one pen and no nesting material in either of the very dirty pens. As there had been no compliance regarding the chickens and ducks, Agent Pazder contacted his Senior Inspector, Steven Toy. He then proceeded to remove all the birds to get them out of distress. In doing so, he noticed that they were very skinny.

[45] They then proceeded to check on the dog. It was tied up at the same location as previously and was very happy to see people. Its water was frozen solid, and no other water was available. It was a cold day. There was no food opened for the dog. The doghouse still had no wind flap, was not raised up off the ground and had some straw but was not insulated. Officer Pazder was able to get his hands on the dog. He found her to be extremely skinny and could palpate all her vertebrae. Her hip bones were sticking out.

[46] Officer Pazder body scored the dog at a two out of five. He explained that there was a scale used to judge how skinny or overweight an animal was. A score of three would be ideal, five would be obese and one would be a skeleton. This dog was getting close to being emaciated, very skinny. Officer Pazder had training in evaluating animals. He is a registered veterinary technologist, having attend Northern College for three years as an honours student. As well, he worked in several veterinary hospitals and emergency clinics and had training through the OSPCA to body score different species of animals.

[47] Exhibits 17(a) to 17(l) are photographs taken that day by Agent Pazder. They show the dog and his surroundings and the birds and their enclosures. The blocks of ice in the form of the container can be seen. A lot of chicken feces is plainly visible in the wire cages and the larger enclosures. The water provided to the birds was frozen into ice. There is a picture of a chicken with feces caked to its feet and some of the leg scales lifted up by mites. The body condition of a chicken is gauged by feeling the keel bone. This chicken's keel bone, down the centre of the underside of the bird, is quite prominent, showing muscle loss along the side of the keel bone. There is a photograph of another chicken that has lost its toes.

[48] The dog and all the birds were removed from the property to take them out of distress. There were no animals remaining. Exhibit 18 is a January 15, 2015, short form OSPCA Removal and/or Destruction Order that was posted on the door of the house and listed 32 chickens of various sexes and breeds, 6 domestic ducks and 1 brindle coloured hound dog were removed. Agent Pazder signed this form and provided his contact information. Exhibit 19 is a January 16, 2015, long form OSPCA Notice of Removal and/or Destruction of Animals, again indicating that 1 brindle coloured hound type dog, 6 domestic ducks and 20 various chicken breeds were removed. It is addressed to Tony Kenny and has Agent Pazder's name and contact information. This long form notice was sent to Tony Kenny by registered mail. Exhibit 20 is a January 16, 2015, OSPCA Statement of Accounts – Removed Animals that was sent to Tony Kenny along with the long form notice of removal. It outlines the cost for the removal and care of the animals, payable to The Peterborough Humane Society and, again, provides Agent Pazder's name and contact information.

[49] In cross examination, the defendant asked Agent Pazder where the OSPCAA requires shelter for the horses and other animals. Agent Pazder indicated that it was in the various codes of practice for different species of animals. Nonetheless, the OSPCAA provides that no animal can be permitted to be in distress and farms are not exempt from not causing animals to be in distress.

[50] To accommodate Mr. Kenny further, his support person, Mr. Allan Bulmer, assisted him in cross examination. Mr. Bulmer entered Exhibit 21, a blank Provincial Offences Information. As Exhibit 22, he provided a copy of the Provincial Offences Information number 15-0239, containing the sixteen counts laid against Tony Kenny. On April 21, 2015, Agent Pazder signed as the informant and His Worship Young as the Justice of the Peace. Exhibit 23 is another information, 15-0205, with sixteen counts laid against the defendant on April 1, 2015. It was signed by Agent Pazder as the informant and His Worship Hiscox as the Justice of the Peace. It shows that all the charges were withdrawn at the request of the crown on August 24, 2015. Mr. Kenny and Mr. Bulmer had great difficulty grasping the concept that Information 15-0205 was no longer relevant, nor was any summons that may have issued from it. Exhibit 24 was entered as a blank summons and Exhibits 25(a) and 25(b) illustrate two copies of the summons issued by His Worship Young on April 21, 2015 – one has a blank Affidavit of Service of Summons and the other one has the Affidavit completed, showing that it was served by Derek Robertson of the OPP on May 2, 2015. Again, I advised the defence that this line of questioning may have been within the knowledge of the courts, but not Agent Pazder.

[51] Mr. Kenny continued his cross examination with Exhibit 26, a photograph he took on September 11, 2014 at 2:34pm. It was a picture of the OSPCA trailer in Peterborough and had a logo on it "Ontario Investigations SPCA" and another sticker reading "County of Peterborough". These logos have since been removed. Exhibit 27 is a close up of the licence plate of the "Animal Services – Peterborough City & County" vehicle that is in Exhibit 26. Agent Pazder drove this vehicle in 2014. The plate's validation tag is dated "Dec 13". Agent Pazder advised that he did not know if the subsequent validation tag had fallen off, but the paper work would have been available.

Again, I had to advise Mr. Kenny that I would give no weight to his statement that attempted to connect a dated validation tag with a “rinky-dink” organization.

[52] Next, Mr. Kenny provided an aerial view of the property on Second Line Road and Rainbow Drive (Exhibit 28). It was downloaded from Google Maps, but did not contain any directional reference points. Across the road from the property, next to Rainbow Drive, is the Otonabee River, not Rice Lake, as Agent Pazder had thought.

[53] Exhibit 29 is a photograph taken by Mr. Kenny on March 11, 2014. There are snow banks, a dead-end sign, a sign for Kenny Drive and a Private Drive sign. Agent Pazder confirmed that he did not see the Private Drive sign and first entered the property from Rainbow Drive to initially respond to a call about the three horses on the property. He drove along the laneway of the property, past the farmhouse and barn, to a chain across the end of the laneway onto Second Line Drive. Seeing no other house on the property, he turned around and returned to the farmhouse and called Debbie Haigh. He waited for her at the bottom of the laneway at Rainbow Drive.

[54] Exhibit 30 is a photograph taken September 11, 2014 at 12:55pm, approximately two hours after Agent Pazder left the property. It shows a tire tread mark on a laneway, which Agent Pazder could not know to be from his vehicle. Agent Pazder indicated that he did not see a sign that says “Tallgrass Prairie Restoration Project by the Kenny Family” posted at the entrance to 1265 Second Line, nor was a photograph of this sign and its location provided to the court. Nor had he seen a red belly snake illustrated in the middle of the tire track in the photograph, which could have been either alive or run over by the tire of a vehicle.

[55] At the next court date, Mr. Kenny was provided with an opportunity to continue cross examination of Agent Pazder, but declined to do so.

(b) Evidence of Inspector Nicole Foster:

[56] Nicole Foster has been employed as a zoo inspector with the Ontario SPCA for three years. Prior to that, she was an SPCA Officer with the Northumberland Humane Society for twelve years.

[57] On October 8, 2014, she attended the property at 1265 Second Line with Agent Dan Pazder, who had contacted her at approximately 9:56am. At 10:56am, she met Agent Pazder and two OPP Officers close to 1265 Second Line in Baillieboro. They entered Mr. Kenny’s property from Rainbow Drive at 11:11am. There were three horses in a small, round paddock and further along the driveway was a bull and a man sitting up on what appeared to be a four-by-four off-road vehicle.

[58] Agent Pazder served the warrant on the man Inspector Foster believed to be Tony Kenny. Mr. Kenny requested to see their badges, which were produced. They then proceeded to see the dogs up by the house. The house had boarded up windows and it did not appear that anybody was residing there at that time. A red brindle hound-type dog was running freely on the property. Another dog, a black and white beagle or Jack Russell-type dog, was in a wire enclosure. The dogs appeared to be in okay

condition, with no signs of thinness or immediate injury to them. Inspector Foster identified photographs Agent Pazder had taken and entered as Exhibits 4(a) to 4(j).

[59] Inside the wire enclosure was a blue barrel lying on its side, with a rectangle cut out of the front panel. Inside the barrel was standing water, leaves and dirt. There was no straw or bedding. The water in the bowl was green in colour and had lots of leaves and dirt inside. There was a tissue and bloody object, with some sort of meat on a bone, which was unidentifiable.

[60] There was a second area with a barrel and a big thick silver chain wrapped around a tree, without an enclosure or wire caging. It had a lunch cooler or bucket with dirty black or brown standing water with lots of leaves in it. It was not known if the freely running dog may have been tied there and Mr. Kenny refused to answer any questions about the animals. There were car parts or other mechanical objects in the grass around the dogs.

[61] Inspector Foster identified the bull that was partially hobbled. She explained that hobbling is done to secure an animal to one space, so that it does not move around, by connecting the feet and head by a rope or chain to limit movement or the ability to charge. Hobbling usually occurs in a large paddock where the animal would be tied to a fence or a post to keep it still. It is usually used to maintain an animal in a space in order to check its body condition for any injury or if any maintenance is needed. Mr. Kenny advised that the bull was not secure. The rope had been thrown over him a couple of times across the horns and the head, wrapped loosely around the neck and pooled at the bull's feet. It was attached by about ten feet of rope to a truck bed which did not appear to be secure. There were a lot of weeds and minimal grass and pasture for grazing and there did not appear to be water or shelter. The bull did not have access to move around the property. Inspector Foster stated that if one is hobbling a bull, it should be moved three to four times a day, to provide proper pasture area and to give the animal movement.

(c) Evidence of Dr. Greg Aitken:

[62] Dr. Greg Aitken has been a veterinarian since 2012 and is qualified to treat domestic animals. Dr. Aitken has experience working with the OSPCA and the Humane Society, conducting general health assessments of animals, making treatment recommendations and ensuring the treatment is being followed. Usually, the animals he examines for the OSPCA are in worse condition than the typical animals he would be dealing with, so there is more emphasis on treatment to improve their welfare or euthanasia if they are beyond the point of being able to preserve good welfare. Dr. Aitken would provide his recommendations to the OSPCA and they would decide the course of action to be taken.

[63] Specific to these proceedings, Dr. Aitken examined the chickens and ducks, but not the dogs or the bull. The examination or assessment of chickens and ducks is the same. It starts with a visual appraisal, which takes into account their level of consciousness, their attitude and mentation, in other words, how bright and aware they are of what is going on, whether they are ambulatory and sound on their feet and assessing lameness. This is followed by a more hands-on assessment, assessing

things like their body condition and their hydration. Then, Dr. Aitken assesses their vital physical parameters, which involves listening to their heart rate and respiratory rate. He then moves to a more detailed examination, to look at skin, feathers, feet, eyes, nostrils, mouth, tongue and any further closer examination of a specific system as may be indicated.

[64] Dr. Aitken has experience with what is necessary for the proper care of ducks and chickens. There should always be unrestricted access to feed and water, shelter from wind, rain and harsh temperatures, roosts available and sanitary conditions where they can stand out of the mud in a dry place.

[65] I am satisfied that Dr. Greg Aitken's education, licencing and experiences qualify him to give evidence as an expert in the field of veterinary medicine and specifically with respect to assessment of an animal's health and proper conditions for animal care.

[66] On January 16, 2015, Dr. Aitken was called to the offices of the Peterborough Humane Society to do general health assessments on six ducks and two groups of chickens totalling approximately twenty birds. Agent Pazder identified the birds as coming from Mr. Kenny's property.

[67] There was a group of smaller, miniature-sized chickens - silkies and banties. The other group consisted of a regular-sized mix of common backyard chicken breeds. The assessment of the group of silkies and banties was that they were too thin and had an inadequate body condition score. On a scale of one to five, with three being normal, two being under conditioned and one being emaciated, they were all greater than one, but less than two and a half. All these chickens had frost bite on their combs, on the top of their heads and on their feet. Many of them had fairly advanced mite infestation on their legs and feet. The other group of chickens was the same in terms of mite infestation and frost bite. They were better conditioned, all ranging between two and three. Two would be acceptable, but not ideal.

[68] The ducks had body condition ratings between two and three and they, too, had evidence of frost bite on their feet. Other than these observations, the physical condition of the birds was overall acceptable, with none of them showing signs of dehydration. The feathering was acceptable and there was no sign of other systemic illness, such as gastrointestinal or respiratory disease. The main concerns were the poor condition of the silkies and banties and the frost bite and mite infestations.

[69] Dr. Aitken was shown photographs previously entered as Exhibits 17(j), (k) and (l). They were taken on January 15, 2015, the day before he examined the birds. Photograph 17(j) appeared to be one of the banties and it appeared to have poor body condition based on the prominence of the keel bone. The darker colour on the underside of the feet suggested frost bite, although Dr. Aitken could not make that diagnosis based on the picture alone. The deformities on the feet, the scales on the top and underside are typical for a scaly leg mite infestation. Judging by how severe it was, the mite infestation appeared to be chronic and probably had been going on for over two months.

[70] Photograph 17(k) was a picture of one of the banty chickens, with some very severe deformities of its feet. It looked like a fairly severe case of frost bite that likely made this chicken lose its toes. There also appeared to be an active mite infestation on the scales of its legs and the injuries were chronic because the loss of the toes appeared to have healed.

[71] Photograph 17(l) showed a chicken that had lost some of its toes and the injury, having happened sometime in the past but not as long ago as in photograph 17(k), appeared to be partially healed.

[72] Dr; Aitken explained that the mites burrow under the scales of the feet and cause inflammation, which can cause swelling and deformities, as seen in the first picture. It is painful, such that eventually the chickens are reluctant to walk, do not eat as much as they should and, if untreated, over the course of several months it can cause death, usually from starvation. Usually within a month or two after first exposure to the mites, the infestation would have progressed to the point where it would be obvious on casual examination by the caretaker of the birds. From the photographs, there would have been at least two months of mite infestation to see the chronic changes that were apparent.

[73] With respect to treatment, the frost bite that resulted in the loss of the toes did not appear to be active, so there would be no treatment at this point. To treat the mite infestation, there are a variety of different liquid or powdered medications that can be applied directly onto the feet to kill the mites and then the feet would heal over time. These treatments are generally successful in resolving the visible lesions. Often it can be a recurrent problem because of the mites left in the environment.

[74] Dr. Aitken also looked at photographs from December 18, 2014, previously entered as Exhibits 13 (i), (j), (k) and (l). Photograph 13(i) appeared to be a fairly typical wire poultry cage that was a bit dirty inside. There appeared to be a dead bird in the cage, although Dr. Aitken could not tell for certain from the photograph. Also, from the photograph, he could not tell if there was liquid water in the container. In photograph 13 (j), it was hard to tell if there was liquid in the containers or whether it was water or ice in the water buckets. The bird enclosure was quite unsanitary. There did not appear to be any bedding provided and the picture did not show if there was a supplemental source of heat. In photograph 13(k), there was nothing useful to comment on and, although there was no bedding apparent, Dr. Aitken could not see enough of the enclosure to know if there was any bedding in the entire enclosure or where the feed or waters were. In 13(l), again, there was no bedding. There appeared to be some standing muddy water or very liquid manure in the bottom right corner of the photograph, which would be an unacceptable source of drinking water and which would then contribute to the poor hygiene.

[75] Without bedding, the birds do not have the same tolerance for cold, their feet are wet and they have no shelter, so that they are more prone to frost bite. It is also less sanitary, so that the birds are more susceptible to a variety of diseases.

[76] The ducks that Dr. Aitken examined appeared to be a mix of common backyard breeds. They were in thin body condition, between two and three. There was some

evidence of frost bite. Dr. Aitken did not note any other conditions. The frost bite appeared to be chronic, no longer active, having occurred at least three weeks prior to Dr. Aitken's examination.

[77] Both chickens and ducks have approximately the same care requirements. In the pictures Dr. Aitken viewed, there appeared to be insufficient bedding and poor hygiene based on the level of liquid manure. Fecal contamination predisposes the birds to many diseases. The lack of bedding means their feet are constantly exposed to wet manure. Photograph 13(l) shows nine birds and, assuming the pen is at least eight feet by eight feet, a deep layer of bedding once or twice a month probably would be adequate. In the winter, the standing water should not be there, as it is not doing any good for the animals and is unsanitary. If there is no way to get rid of that water, the area would have to be cleaned more frequently to keep the water from building up. Typical bedding would be straw, wood chips or shavings, saw dust, old leaves or anything that is clean and absorbent of moisture.

[78] In the exhibits shown to Dr. Aitken, the deformities, loss of toes and missing bones in the birds are serious injury. In some of the cases, there was very little bone left to lose, so that if the bird had another case of frost bite, it probably would have ceased to be able to walk at all.

[79] Dr. Aitken's concern was to make sure that none of the frost bite was active, so that there were no open wounds that would lead to infection that could kill the animals. His main concern was assessing their body condition, that none of the animals were so far emaciated that recovery was unlikely.

(d) Evidence of Former Agent Joshua Matson:

[80] At the time he provided his evidence, By-law Officer Joshua Matson was with the Town of Napanee. Just three weeks prior to that, he was an inspector with the OSPCA for eight years, conducting an average of about three hundred investigations a year. His Senior Inspector asked him to assist Agent Pazder with the investigation with respect to the defendant and the animals found on Mr. Kenny's property. They entered the defendant's property at the back off Rainbow Line, which was the easiest access to the property. He assisted with taking photographs and animal handling and took the photographs on November 5, 2014, which had been entered as Exhibits 10(a) to 10(g).

[81] On the days Officer Matson was at the defendant's property, he observed the bull located in the middle of a field, tethered to a truck bed with a rope approximately fifteen feet long. Photograph 10(d) shows two buckets of what appears to be very dirty water in the truck box. Officer Matson approached the bull that appeared a little leery of his presence but seemed fairly friendly and his body condition appeared to be okay.

[82] Officer Matson was at the property on December 18, 2014. Pictures entered previously as Exhibits 13(a) to 13(l) were consistent with what Officer Matson saw that day. His first concern was with the dog that had bedding but did not have appropriate shelter. The ducks and chickens had a large amount of accumulated wet feces, there was some garbage and debris in with the ducks and chickens and their water was starting to freeze.

[83] Officer Matson entered the property again on January 15, 2015. The bull no longer was there. There was a dog, as illustrated in Exhibit 17(a). The living conditions of the birds were much the same as the previous visit, with a large accumulation of feces and garbage. The water was frozen and the birds were exhibiting cold stress, shivering and lifting their feet. Toes were frozen off and one bird had no toes left, just a nub at the end of the animal's leg. The birds were thin, as Officer Matson could feel their breast bones and everything was very prominent.

[84] In consultation with Agent Pazder, they deemed that the orders that had been issued were not complied with and the animals were in distress. They removed the animals to relieve the distress. Officer Matson had no further involvement with this case after that.

(e) Submissions:

[85] The prosecution submits that the defendant, Tony Kenny, was either the owner or the custodian of the animals at issue and the matters occurred on Mr. Kenny's land at 1265 Second Line, Baillieboro, Ontario, K0L 1B0. On several occasions during these proceedings, Mr. Kenny argued that the animals were his and should be returned to him. When the agents were on the property at the same time as Mr. Kenny, he indicated that he was the person in charge.

[86] The evidence from November 5, 2014 shows that the bull was in distress, tethered to a pick-up truck box in the middle of the field. Its water was filthy and the bull had no ability to move beyond the length of its tether. On many visits to the property by the agents, Mr. Kenny was not around and there was indication that the animals had been left for days, based on the condition of their water, feces surrounding them and the condition of their food.

[87] Mr. Kenny was served with a notice of care under subsection 11.2(1) and subsection 11.2(2) of the regulations, requiring that "No person shall cause an animal to be in distress", and "No owner or custodian of an animal shall permit the animal to be in distress". Section 11.1(1) reads, "Every person who owns or who has custody or care of an animal shall comply with the prescribed standards of care, and the prescribed administrative requirements, with respect to every animal that the person owns or has custody or care of."

[88] Regarding the bull, *O. Reg. 60/09*, section 2(6)(e) reads, "Every animal must be provided with adequate and appropriate, ... (e) protection from the elements, including harmful temperatures." The bull was kept outside on a tether, had no shelter and could not possibly reach any shelter. It was in the middle of a field, with no protection from the elements and every indication was that it was left there for long periods of time.

[89] Section 13(1) of the *OSPCAA* provides that where an inspector or agent of the Society has reasonable grounds for believing that an animal is in distress, the inspector or agent may make an order that the owner or custodian take action necessary to relieve the animal of its distress. Mr. Kenny was given such an order on October 8, 2014, and nothing was done.

[90] The prosecutor's earlier submissions also apply to the ducks. Again, the charge under s.11.2(2) is allowing the animals to be in distress on January 5, 2015. The evidence of Agent Pazder relates to non-compliance under s.2 with the standard of care of the regulations, non-compliance with the standard of medical attention and non-compliance with the sanitary conditions. There were reasonable and probable grounds that the animals were in distress and an order was made on December 22, 2014, for Mr. Kenny to comply with the requirements to relieve the distress of the animals. The photographs showed the conditions the birds were in and Agent Pazder provided evidence that they were in their own feces several inches deep with no dry area to go to, they were not being checked on, their food was not cared for or clean, they were not given clean bedding. They did not have enough room to exercise and were not cared for, with no attention given to their cleanliness. They were in deplorable conditions and were not being given medical attention. Mr. Kenny was given an order under section 13(1) to relieve the conditions of the animals and he took no steps to do so.

[91] The chickens were much like the ducks. On January 15, 2015, Agent Pazder observed that they were left in distress, not having care, food and water and being neglected. The food, what there was of it, was not clean and was not being replaced regularly. The water was filthy. The privation and neglect were clear – they were not being kept clean and not being given reasonable bedding. Nothing was being done to relieve their distress. Mr. Kenny did not comply with the standard of care and the regulations. Mr. Kenny was not complying with the standard of care to provide medical attention. These animals had toes missing and, in one case, the entire foot was missing. They were losing feathers. They were thin and not eating properly. They were put in conditions where they would fight with each other, putting roosters in with other roosters. Frankly, the photographs of these chickens were difficult to look at. The condition of their feet was simply abominable. Their cages were filthy and not cleaned, they had no warm water or bedding and no place where they could get their feet out of the wet. Mr. Kenny was served with an order under section 13(1), asking him to comply with the order to relieve the animals' distress.

[92] The dogs had the best of what the animals were put through. However, there was a failure to comply with the standard of care under the regulations, regarding a solid, weather-proofed structure of appropriate size and an appropriate tether length. The barrel structures appeared to be sufficiently sound, but they were not well secured and needed to be cleaned regularly. Without a proper door covering, they were not weather-proofed. Mr. Kenny was given an order on September 15, 2014 and October 8, 2014 to relieve the animals' distress. He took one or two steps, but did not follow through and the animals remained in distress when the officers returned. Their water was unclean and their food questionable at the very least. The photographs clearly demonstrate the conditions of these animals.

[93] Dr. Aitken provided very professional and objective evidence, hesitating to make any judgments in these matters. However, his evidence was clear. There was a problem with hydration, that is, with the water of the animals, with their ability to walk about or get up and move. He found frost bite on the chickens and some on the ducks. There was mite infestation on the birds. The deformities on the feet of the chickens

were from both frost bite and mite infestation and this condition had lasted more than two months.

[94] Nothing being done to improve the lot of the animals, they were seized. Mr. Kenny could have brought any objection to this before a review board. The prosecution submits that the evidence is overwhelming – each of these animals suffered neglect, were not properly cared for, did not have water, did not have food, were not cleaned, were not given a liveable place to be and, in the case of the bull and the dogs, were not able to get proper shelter. When they became unhealthy, diseased and/or deformed, particularly in the case of the birds, they were simply left and nothing was done to help them.

[95] The defence provided no submissions.

(f) Findings:

[96] I accept the evidence provided by the prosecution witnesses, as it is coherent, rational and consistent and I have not been provided with any evidence to the contrary.

II. RULINGS ON DEFENCE MOTIONS:

[97] The defendant has brought numerous motions before the court. They were so numerous that they were interfering with the progress towards resolution of the charges Mr. Kenny was facing. Consequently, at one point, the defendant was advised that he could bring no further motions without first obtaining permission to do so from the court.

[98] On February 6, 2017, Her Worship J. Moffatt, Justice of the Peace, signed the following endorsement:

- 11b motion heard and dismissed
- S.7 + s.8 motion deferred until trial in order to have evidentiary foundation.

[99] I advised the parties that I would provide my rulings on outstanding motions when my judgment was rendered.

[100] At the closing of the court proceedings, I provided both parties with the opportunity to present any further written materials they would like me to consider regarding the outstanding motions. On July 9, 2019, I received materials from the defendant. I have reviewed these submissions, in addition to all the transcripts and written materials I previously received relating to the trial and the outstanding defence motions.

[101] Below are my rulings on the defendant's motions.

(a) Defence Application to Stay Proceedings due to Medical Condition:

[102] On October 12, 2017, I determined that a stay of the proceedings on account of the defendant's medical condition (congestive heart failure) was not in order. The defendant had not satisfied his onus of providing medical evidence that clearly showed, on a balance of probabilities, he was not able to defend himself or that the trial process

would cause risk to his health. In the absence of objective medical evidence, a note from a doctor to the effect that a trial would affect Mr. Kenny's health is insufficient.

[103] I relied, in part, on *R. v. J.-G.R.*, 2006 CanLII 21072 (Ont. S.C.J.) in which Justice Wein writes at para. 24:

Even where an accused with congestive heart disease was said to have a likelihood of dying within a year, the Manitoba Queen's Bench denied an application for a stay, in *R. v. J.N.T.*, [1995] M.J. No. 475. In that case, despite the increased risk of the criminal trial process, none of the experts could say with any degree of certainty that the accused would die or become further incapacitated. The court determined that the appropriate accommodations in terms of physical presence and medical assistance in court would be adequate to minimize the risk.

[104] The defendant continued to ask for a stay of proceedings as the trial unfolded. On January 10, 2019, Mr. Kenny did provide a specialist report, but did not make his specialist available to testify in order to quantify the risk to his health. On January 4, 2019, Dr. Adriana C. Luk, from the Heart Function Clinic wrote:

Lastly, from a medical point of view, he does have advanced heart failure. It would be difficult for him, given his symptoms and his reaction to highly stressful situation to continue pursuing his legal battles in court. I think, at a minimum, if he does have worsening symptoms, he should be transported to hospital for assessment.

[105] Although it may be difficult for him, the court provided Mr. Kenny with accommodations for his medical condition, to include abridged court appearances and transcripts to alleviate stress of note taking. Furthermore, when he indicated that he was not feeling well, out of an abundance of caution, an ambulance was called and he was "transported to hospital for assessment", which accords with the medical specialist's report. When Mr. Kenny did not feel well enough to attend court, transcripts were provided in a timely fashion and a later date was set to allow him to cross-examine the prosecution's witnesses.

[106] A stay should be granted only in the clearest of cases, when compelling a defendant to stand trial would violate the fundamental principles of justice underlying the community's sense of fair play and decency, or where the proceedings are oppressive or vexatious. There is no evidence that these trial proceedings are oppressive or vexatious. Most of the medical notes lacked clear, adequate and objective findings and restriction. Mr. Kenny has not met his burden to show that the trial process poses a risk of serious impairment to his health. Nor has he shown that he was unable to fully participate in his defence, especially given the accommodations provided to him. As well, the public interest in these matters require that the trial proceed.

[107] Therefore, the defendant's application to stay the proceedings on account of his medical condition is dismissed.

(b) Defendant's November 14, 2016 Notice of Motion:

[108] The grounds for Mr. Kenny's November 14, 2016 motion are as follows:

1. For an order to return as per OSPCA Act subsection 14(1.4), all animals and fowl seized/removed at 1265 Second Line, South Monaghan, on November 5, 2014 and on or around January 15, 2015.

The seized/removed and detained animals are subject to s.s. 14(1.4).

The animals and fowl are subject to an order made under ss 14(1.1) as required by the mandatory ss 22(2)(d) OSPCA Act.

2. On failure of OSPCA to return property forthwith, for an order to permit Tony Kenny to inspect all Kenny property as per criminal code 490, and/or POA 159.

3. For an order to dismiss all POA charges against Tony Kenny, relative to 1 and 2 above and other.

[109] I have read the documents the defence attached to these motion materials.

[110] Beginning with the first ground, subsection 14(1.1) of the *OSPCAA* states:

Order for Society to keep animal

(1.1) A justice of the peace or provincial judge may make an order authorizing the Society to keep in its care an animal that was removed under subsection (1) if,

(a) the owner or custodian of the animal has been charged, in connection with the same fact situation that gave rise to the removal of the animal under subsection (1), with an offence under this Act or any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals; and

(b) the justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that the animal may be harmed if returned to its owner or custodian. 2008, c. 16, s. 11 (1).

[111] Subsection 14(1.4) of the *OSPACA* reads:

Order to return animal

The Society or the owner or custodian may apply to a justice of the peace or provincial judge to order the return of an animal that is the subject of an order made under subsection (1.1) and, if satisfied that there are no longer reasonable grounds to believe that the animal may be harmed if returned to its owner or custodian, the justice of the peace or provincial judge may order the return of the animal to its owner or custodian, subject to any conditions that the justice of the peace or provincial judge considers appropriate.

[112] I have reviewed Exhibit 9, the OSPCA Notice of Removal and/or Destruction of Animals. It is addressed to Tony Kenny and notifies him that the “Jersey, Longhorned type bovine ster(sic)” was removed under section 14(1) of the *OSPCAA*, and not under subsection 14(1.1). Likewise, Exhibit 19 is addressed to Tony Kenny and is an OSPCA Notice of Removal and/or destruction of Animals for “1 brindle coloured hound type dog, 6 domestic ducks and 20 various chicken breeds. It, too, notifies the defendant that these animals were removed under section 14(1) of the *OSPCAA*, not subsection 14(1.1).

[113] Subsection 14(1) reads:

Taking possession of animal

(1) An inspector or an agent of the Society may remove an animal from the building or place where it is and take possession thereof on behalf of the Society for the purpose of providing it with food, care or treatment to relieve its distress where,

(a) a veterinarian has examined the animal and has advised the inspector or agent in writing that the health and well-being of the animal necessitates its removal;

(b) the inspector or agent has inspected the animal and has reasonable grounds for believing that the animal is in distress and the owner or custodian of the animal is not present and cannot be found promptly; or

(c) an order respecting the animal has been made under section 13 and the order has not been complied with.

[114] Section 17 of the *OSPCAA* provides the mechanism by which Mr. Kenny may exercise his right to appeal the removal of his animals and request that they be returned to him. These provisions are clearly laid out on the back of both Notices of Removal and/or Destruction of Animals. This section provides:

Appeal to Board

(1) The owner or custodian of any animal who considers themselves aggrieved by an order made under subsection 13 (1) or by the removal of an animal under subsection 14 (1) may, within five business days of receiving notice of the order or removal, appeal against the order or request the return of the animal by notice in writing to the chair of the Board.

Same

(1.1) The notice shall set out the remedy or action sought and the reasons for the appeal or request.

No appeal if there is order for Society to keep animal

(1.2) Subsection (1) does not apply if an order in respect of the animal under subsection 14 (1.1) is in force.

Application for revocation of order

(2) Where, in the opinion of the owner or custodian of an animal in respect of which an order under subsection 13 (1) has been made, the animal has ceased to be in distress, the owner or custodian may apply to the Board to have the order revoked by notice in writing to the chair of the Board.

[115] Therefore, since the removal of Mr. Kenny's animals was not pursuant to subsection 14(1.1), this court does not have jurisdiction to order that the animals be returned. The animals were removed pursuant to subsection 14(1) of the *OSPCAA* and, consequently, the Animal Care Review Board was the appropriate venue for Mr. Kenny to seek such an order.

[116] I move now, to the second ground. Given that the *OSPCAA*, itself, specifically deals with the return of animals that have been seized, I will not apply the more general provisions relating to the return or detention of items seized under the *Provincial Offences Act*, R.S.O. 1990, c. P. 33, as amended ["*POA*"]. Furthermore, these

proceedings are regulatory proceedings and are not criminal in nature. Hence, I will not apply the provisions of the Canadian *Criminal Code*.

[117] On the defendant's third ground, my judgment below, not a ruling on a motion brought by the defendant, will determine whether to dismiss all *POA* charges against Tony Kenny.

(c) Defendant's January 5, 2017 Notice of Constitutional Question:

[118] The defendant is seeking a remedy under subsection 24(1) of the *Charter* on the following four grounds:

1. *Charter* subsection 7 – peaceful enjoyment of property.
2. *Charter* subsection 8 – An unwarranted search of defendants (sic) property, leading to search and seizure by warrants obtained, with evidence obtained, by an illegal trespass onto (sic) property without permission of the owner or legal authorization.
3. *Charter* subsection 11(b) – The defendant claims an unreasonable time to conclusion of proceedings in a civil matter, with over 19 months having passed as of writing, with no no (sic) time frame for the end of proceedings. At the time of writing, full disclosure has not been received, with resistance to provide disclosure as required.
4. *Charter* subsection 24(2) – An unwarranted search of defendants (sic) property.

[119] For the reasons that follow, I find that the defendant's rights under the *Canadian Charter of Rights and Freedoms* have not been infringed and, hence, there will be no remedy granted under subsection 24(1).

1. *Charter* Section 7:

[120] Section 7 of the *Charter* reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[121] The defendant claims “peaceful enjoyment of property”. There is no mention of property rights in section 7 of the *Charter*. Hence, the defendant's property rights have not been infringed. Moreover, any entry onto Mr. Kenny's property by OSPCA agents, etc., was in accordance with the legislation, in particular, lawfully obtained warrants (see *Charter* Section 8 below).

[122] Nonetheless, security of the person may be interfered with when state action intrudes in a defendant's personal life in a profound way, such as imposing serious psychological stress. However, security of the person does not protect an individual from the ordinary stress and anxiety a reasonable person would experience as a result of government action or regulation: *R. v. Transport Robert (1973) Ltee.* (2003), 180 C.C.C. 3d 254 (Ont. C.A.); *New Brunswick v. G. (J.)*, [1999] 3. S.C.R. 46 (S.C.C.). Mr. Kenny has provided no evidence to substantiate that serious psychological stress was

imposed upon him. At all times, the agents of the OSPCA were carrying out their responsibilities under the *OSPCAA*. On more than one occasion, they provided Mr. Kenny with the opportunity to bring the conditions and care of his animals within legislative and regulatory requirements and standards. This was not done. Mr. Kenny has only himself to blame for ongoing visits to his property and this prosecution of the charges against him. Moreover, the prosecutor was patient, as these proceedings were protracted by the defendant's motions and the accommodation of Mr. Kenny's medical condition. The prosecutor's conduct throughout these proceedings has been without reproach. Mr. Kenny was granted a significant number of adjournments and accommodations for his medical condition beyond what was indicated in his Specialist's report. Court proceedings were abridged in order to provide him with the opportunity to obtain medical attention and have his pre-existing condition medically assessed, timely transcripts were provided to alleviate the stress of note taking and the duration of the trial proceedings on any particular day was originally set at half days and later shortened to one and a half hours to further accommodate his endurance.

[123] Under section 7, the defendant has the right to make full answer and defence as part of the concept of fundamental justice. Mr. Kenny was afforded every accommodation and opportunity to do this. Furthermore, this right imposes a duty on the prosecution to disclose all relevant information in its possession to the defendant: *R. v. Stinchcombe* (1998), 68 C.C.C. 3d 1 (S.C.C.). On a few occasions, Mr. Kenny argued that he had not been provided with full disclosure. Of note was information he requested regarding the identity of the individual who first complained to the OSPCA about the horses on his property. He remained most calcitrant that he was entitled to know the identity of the complainant. This information is irrelevant: *North Perth (Town) v. Scott*, 2006 ONCJ 238, [2006] O.J. No. 2723 (Ont. C.J.). As with other arguments, Mr. Kenny's requests for further information were denied as the information he sought was not relevant. Furthermore, having heard all of the trial proper, I can find no evidentiary foundation that would substantiate the prosecution having withheld any relevant disclosure that would have prejudiced or reasonably prevented the defendant from making full answer and defence. There is a societal interest in having these matters adjudicated in a fair hearing. Having regard to the circumstances and based on the satisfactory efforts made to provide the defendant with disclosure, there is no basis upon which the administration of justice would be brought into disrepute.

[124] I can find nothing that would constitute a breach of the defendant's rights under section 7 of the *Charter*. This ground of his Notice of Constitutional Question is dismissed.

2. Charter Section 8:

[125] Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.

[126] The defendant is claiming an "unwarranted search of defendants (sic) property, leading to search and seizure by warrants obtained, with evidence obtained, by an illegal trespass unto property without permission of the owner or legal authorization."

[127] On September 11, 2014, Agent Pazder, along with Animal Control Officer Mike Johnson and his trainee, Agent Miskolzi, first entered onto the defendant's property, located at 1265 Second Line, Bailieboro, Ontario. This entry onto the defendant's property was in response to a complaint regarding the condition of three horses on the property. On his way up the laneway to the house, Agent Pazder observed the long-horned bull and three dogs.

[128] I find that this entry onto Mr. Kenny's property without a warrant was in accordance with Agent Pazder's OSPCA duties to immediately look into complaints that animals may not be cared for properly and may be in immediate distress. Subsection 12(6) of the *OSPCAA* provides for just such an entry. It reads:

Immediate distress – entry without warrant

If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress.

[129] Subsection 12(1) of the *OSPCAA* provides for a warrant to be obtained from a justice of the peace, for OSPCA inspectors, agents, etc. to enter any building or place where there are reasonable grounds to believe an animal is in distress. It reads:

If a justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that there is in any building or place an animal that is in distress, he or she may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress.

[130] The following outlines subsequent entries onto Mr. Kenny's property:

- The second time Agent Pazder entered onto Mr. Kenny's property was on October 6, 2014. On that day, he had applied for and was granted a Warrant (Animal in Distress) by Justice of the Peace P. Hiscox [Exhibit 3]. Agent Pazder was accompanied by OSPCA Agent Nicole Fraser and OPP Officers Morgan and D'Amico.
- On October 31, 2014, Agent Pazder again obtained a Warrant (Animal in Distress) from Justice of the Peace P. Hiscox [Exhibit 6]. OSPCA Agent Doucette and OPP Officer Peckover accompanied Agent Pazder onto the defendant's property.
- On November 3, 2015, Agent Pazder obtained a Warrant (Animal in Distress) from Justice of the Peace J. Mariasine [Exhibit 8]. The warrant expired November 6, 2014. On November 5, 2014, Agent Doucette, OSPCA Senior Inspector Toy, Officer Miskolczi and OPP Officers Peckover, D'Amico and Moran accompanied Agent Pazder onto the defendant's property.
- On December 17, 2014, Agent Pazder obtained a Warrant (Animal in Distress) from Justice of the Peace P. Hiscox [Exhibit 11]. The warrant expired December 24, 2014. On

December 18, 2014, Agent Pazder, along with Agents Matson and Doucette and OPP Officer Hagalini, entered onto the defendant's property.

- On December 22, 2014, Agent Pazder obtained a Warrant (Animal in Distress) from Justice of the Peace C. Young [Exhibit 14]. He entered the defendant's property that day, accompanied by Agent Matson and OPP Officer Peckover.
- On January 14, 2015, Agent Pazder obtained a Warrant (Animal in Distress) from Justice of the Peace P. Hiscox [Exhibit 16]. The warrant expired January 16, 2015. On January 15, 2015, Agent Pazder made his last visit onto the defendant's property. He was accompanied by Agents Matson and Doucette and two OPP Officers.

[131] Each time any person authorized under subsection 12(1) of the *OSPCAA* entered onto Mr. Kenny's property, it was in accordance with a warrant issued by a justice of the peace pursuant to that subsection of the *Act*. The defendant has not provided me with any evidence to substantiate that these warrants should not have been issued.

[132] In summary, the first entry onto the defendant's property was in accordance with subsection 12(6) of the *OSPCAA* and each subsequent entry was pursuant to subsection 12(1) of the *Act*. Consequently, these entries were not without legal authorization. There was no illegal trespass, as claimed by Mr. Kenny, and the applicable provisions of the *OSPCAA* do not require permission of the owner. There is no evidence to suggest that Mr. Kenny's rights under section 8 of the *Charter* have been infringed and this ground of his Notice of Constitutional Question is dismissed.

3. *Charter* Subsection 11(b):

[133] Subsection 11(b) of the *Charter* states:

Any person charged with an offence has the right to be tried within a reasonable time.

[134] I am dismissing Mr. Kenny's challenge that his rights under subsection 11(b) of the *Charter* was infringed. He has not provided me with transcripts from proceedings before I became seized in these proceedings, that would assist in determining whether the overall timelines in this matter were in compliance with the jurisprudence established in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

[135] The information was sworn on April 21, 2015. The trial proper concluded June 3, 2019 – just over 49 months later, well beyond the presumptive threshold set out in *Jordan*, *supra*. Nonetheless, I am unable to determine all the causes of delay and, hence, cannot conduct a comprehensive analysis within the *Jordan* framework.

[136] Having said that, on February 6, 2017, Her Worship Moffatt heard and dismissed Mr. Kenny's section 11(b) motion. Moreover, the crown's factum, dated October 11, 2017, provides me with some insights into what had transpired just prior to my involvement in these proceedings. The factum is in response to the defendant's request to have the charges against him stayed because of his poor health. It illustrates the defendant's repeated requests for adjournments and the prosecution's desire to move forward without further delay. It contains the following:

PART I

THE MOTION

1. The Defendant has made repeated requested adjournments of set trial dates claiming poor health. It is the Crown's position that these adjournments should not be granted. This factum is intended to give the Defendant fair notice that the Crown intends to contest any further requests for adjournment rigorously and based on the principle of law.

PART II

SUMMARY OF THE FACTS

2. There have been multiple dates set for commencement of trial of this matter. All dates and the facts referred to below are part of the court record.
3. The original trial date was set on December 14, 2015 for June 16, 2016. That date was adjourned as the Defendant's representative was removed from the record. The Defendant retained other counsel and new pretrials were set.
4. On October 17, 2016 the Defendant's new counsel was also removed from the record.
5. The matter was adjourned a number of times subsequent to the above date. On January 5, 2017 appearance the Defendant commenced a series of Charter and disclosure Motions. All of these motions have now been dealt with clearing the way to reschedule trial dates.
6. Throughout the proceedings the Defendant complained of poor health interfering with his ability to conduct a trial. To accommodate the Defendant a series of half days were set to conduct the trial. Dates chosen were May 25, July 27, September 14 and October 12, all in 2017. On each of these dates except one the Defendant advised the court he was unable to continue due to the condition of his health. On August 24, 2017 the matter was brought forward to vacate the September date due to a shortage of judicial resources. The matter is today before the court to be spoken to on what was originally scheduled to be a trial date.
7. The Defendant has provided cursory medical documentation to support his claim of disability to continue. The material does not include a doctor's report or opinion and is not capable of interpretation by a non-medical person. This material has not been provided to the Crown. No further support for the Defendant's position has been provided.

[137] My first involvement with these matters was on October 12, 2017. We then adjourned to October 30, 2017 so that trial dates could be set. The trial proper commenced on May 24, 2018 and final submissions were heard on June 3, 2019 – over a year later.

[138] Much of this protracted time period can be attributed to the accommodations made as a result of Mr. Kenny's medical condition. The first accommodation was to set half days of trial time, so that Mr. Kenny would not have to endure the stress of full days in the courtroom. After a few appearances, the trial time was cut to one and a half hours at a time, again to accommodate the defendant. And these shortened appearances were further reduced at each court appearance when the defendant

indicated he was not feeling well enough to proceed any longer. Whenever Mr. Kenny required a recess, it was provided.

[139] As well, Mr. Kenny was provided with other accommodations, such as timely transcripts, so that the stress of taking notes in court was eliminated. I advised Mr. Kenny that no disrespect was shown when he remained seated throughout the proceedings, in order to accommodate his medical condition. Mr. Bulmer, the defendant's personal assistant, was also available to assist at each court appearance.

[140] The following chronology of the trial proceedings before me would be useful in putting things into perspective:

- On May 24, 2018, Tony Kenny was arraigned on the sixteen charges. Ontario Society for the Prevention of Cruelty to Animals Agent Daniel Pazder, began his testimony.
- Examination-in-chief continued on May 31, 2018 and June 7, 2018.
- On June 18, 2018, due to an erroneous trial time being provided to Mr. Kenny, the matter was adjourned to June 28, 2018.
- On June 28, 2018, the prosecution completed its questioning of Agent Pazder and Mr. Kenny commenced his cross examination. Part way through the time set aside for this matter, Mr. Kenny was not feeling well and, out of an abundance of caution and to provide for an assessment of his medical condition at the hospital, the Court called an ambulance and the proceedings were halted for the day.
- Cross examination continued on July 27, 2018 and, as Mr. Kenny was not feeling well, the short amount of time for this proceeding was further truncated.
- On December 6, 2018, Mr. McGrath's office notified the court that he would not be in attendance, as he had mis-diarized this court date. As a result, the matters were adjourned to December 17, 2018.
- On December 17, 2018, the prosecution questioned Agent Nicole Foster. When Mr. Kenny commenced arguments akin to those often brought by 'freemen of the land', I refused to address his issues. Further, this was not a court of competent jurisdiction for damages the defendant was claiming. Consequently, Mr. Kenny indicated he was not feeling well and left the courtroom, but was quite willing to remain had I been willing to discuss his arguments that he had been robbed and wronged and was entitled to damages. Inspector Nicole Fraser then testified.
- On January 10, 2019, Mr. Kenny did not attend, but his personal assistant, Mr. Bulmer, was present. Since two of the prosecution's witnesses were present, it was determined that, in order to manage the court resources, to move these trial proceedings forward expeditiously and not lose any further court time, the trial would continue with examination-in chief of Dr. Greg Aitken and Agent Joshua Matson. Transcripts of the proceedings were provided to Mr. Kenny prior to the next court date, to enable him to prepare any cross examination he wished to bring.
- On February 4, 2019, Mr. Bulmer attended, but Mr. Kenny did not. Mr. Bulmer brought information that indicated the defendant did not wish to take part in cross-examination. The prosecution closed its case.
- On April 15, 2019, again, Mr. Kenny did not attend, but Mr. Bulmer did. The proceedings were adjourned to May 6, 2019, to give Mr. Kenny the opportunity to call witnesses.

- On May 6, 2019, Mr. Bulmer attended, but Mr. Kenny did not. He brought a witness, Shelley Gozzard-Gilbert, and questioned her about the May 12, 2018 expiry date on her Commissioner stamp. The matter was sorted out, as I determined that Ms. Gozzard-Gilbert was a *bona fides* commissioner for taking affidavits on the impugned date of May 4, 2015. I then issued a bench summons as a courtesy to Mr. Kenny, for him to appear in court on June 3, 2019.
- On June 3, 2019, Mr. Kenny did not attend court, but Mr. Bulmer did. Despite eight attempts by the OPP to serve the bench summons, it was not served. On most of these eight attempts, there was a truck at the residence and the police officers could hear noises inside, but no one answered the door. Consequently, I was satisfied with the attempts made to serve Mr. Kenny with the bench summons and the proceedings continued. Mr. Bulmer brought to my attention three prior defence motions from November 14, 2016, January 5, 2017 and April 24, 2018. I advised him that I would deal with them when I rendered my judgment. Mr. McGrath provided the prosecution's submissions and the matter was adjourned for me to render my judgment on September 26, 2019.
- Due to a judicial scheduling conflict, my rulings on the motions and judgment in the trial proper were subsequently re-scheduled for October 3, 2019.

[141] Other than ten days, from June 18, 2018 to June 28, 2018, and eleven days from December 6, 2018 to December 17, 2018, the trial was brought in as expeditious a manner as possible. Short amounts of time were set aside each court date to accommodate the defendant's medical condition. The defendant further truncated the shortened amount of time on several court appearances to accommodate his medical condition. Proceedings were adjourned on more than one occasion to give opportunities to the defendant to present his case. These delays lay squarely with the defendant.

[142] The defendant has not provided me with all the transcripts upon which I would like to rely to determine this issue. Nonetheless, from the information I do have, it would appear that the defendant is responsible for nearly all the delay he has experienced in reaching final resolution of these matters. He cannot then come before this Court, claiming his *Charter* rights to a trial within a reasonable time have been violated. Therefore, based on the information available to me, this ground of the defendant's Notice of Constitutional Question is dismissed.

4. Charter subsection 24(2):

[143] Section 24 of the *Charter* deals with "Enforcement". It reads:

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[144] Mr. Kenny's materials provide as follows:

4. – Re: Charter 24(2). In ITO for a search warrant the agent admits that he was on the property without permission of the owner and without legal authorization prior to applying for a search warrant. This admission is contained in disclosure.

[145] I have addressed the issue of the warrants in the section on '*Charter* Section 8' above. There was no illegal search or entry onto the defendant's property and, other than the first visit to Mr. Kenny's property, which was a lawful warrantless entry as a result of a claim of immediate distress, a lawful warrant for entry onto the property was obtained prior to each subsequent visit. Under these circumstances, the owner's permission is not required.

[146] The defendant has failed to illustrate that his rights under the *Charter* have been violated and, therefore, no evidence will be excluded pursuant to subsection 24(2) of the *Charter*. This part of the defendant's Notice of Constitutional Question, therefore, is dismissed.

Ruling re: January 5, 2017 Notice of Constitutional Question:

[147] In summation, for the reasons I have provided, all of Mr. Kenny's issues outlined in his January 5, 2017 Notice of Constitutional Question have been dismissed. Hence, no remedy can be provided under subsection 24(1) of the *Charter*. Additionally, my reasons for not providing any relief under subsection 24(2) are stated above.

(d) Defendant's April 24, 2018 Notice of Motion:

[148] In the April 24, 2018 Notice of Motion, the defendant is asking for the following Order:

1. An order identifying Count number 3, related to a long horned bovine type animal in 15-0239 and 15-0205 as being an Absolute liability Offence.
2. The count 3 has a financial penal penalty of up to \$1000.00 fine and/or up to 30 days in jail, under Ospca (sic) Act sec. 18.1(1)(d).
3. Mr. Nathan Baker a lawyer retained by Kenny in the past has stated that there is no defence to disobeying an order. There is no due diligence defence. There is a Penal penalty.
4. An order withdrawing count 3 under s. 7, Life and Freedom of the Person, Charter of Rights and Freedom.

[149] I have read the materials attached to this Notice of Motion.

[150] With respect to the first issue, it is not appropriate to comment within the confines of a Notice of Motion on whether a particular count is an absolute liability offence, a strict liability offence or a *mens rea* offence.

[151] In the second issue identified by Mr. Kenny, he is paraphrasing his interpretation of a provision of the *OSPCAA*. I see no order that can flow from this submission.

[152] Likewise, in the third issue, Mr. Kenny is stating what he understands his former counsel told him about there being no due diligence defence and that there is a penal

penalty. It is inappropriate for me to comment on any information shared by Mr. Kenny and his legal representative.

[153] In the final item, Mr. Kenny is asking for an order withdrawing count 3, pursuant to section 7 of the *Charter*. I previously addressed Mr. Kenny's concerns regarding section 7 of the *Charter* in my ruling on his January 5, 2017 Notice of Constitutional Question. No order will be forthcoming from this issue.

[154] For these reasons, I am dismissing all four grounds of Mr. Kenny's April 24, 2018 Notice of Motion. No Order will be issued.

III. JUDGMENT IN THE TRIAL PROPER:

[155] The trial proper relates to the sixteen charges, from November 5, 2014 to January 15, 2015, which have been laid against Mr. Kenny under section 18.1 of the *OSPCAA*.

[156] I will be addressing a couple of trial issues:

- (a) Can the continuing trial be conducted in an *ex parte* fashion as contemplated by section 54 of the *POA*?
- (b) Did the defendant commit any of the sixteen charges that bring him before the court?

(a) *Can the continuing trial be conducted in an ex parte fashion as contemplated by section 54 of the POA?*

i. Background:

[157] The chronology of the trial proceedings is outlined above. The trial commenced on May 24, 2018. The trial continued on subsequent days and both parties attended the continuing trial proceedings on May 31, 2018, June 7, 2018, June 28, 2018 and July 27, 2018. On December 17, 2018, Mr. Kenny left the courtroom part way through the proceedings. He did not attend on January 10, 2019. Again, on February 4, 2019, Mr. Kenny did not attend the trial proceedings. His assistant, Mr. Bulmer, advised that the defendant did not wish to take part in cross-examination. The prosecution closed its case. When Mr. Kenny did not attend on April 15, 2019, I adjourned the proceedings to May 6, 2019, in order to provide Mr. Kenny with the opportunity to present his defence. When Mr. Kenny did not attend again on May 6, 2019, I issued a bench summons for him to attend court on June 3, 2019. Eight attempts to serve the summons were unsuccessful, despite the OPP officers seeing a truck in the driveway and hearing noise inside the residence. Consequently, on June 3, 2019, the trial continued in the absence of Mr. Kenny, when I heard submissions from the prosecution and assured Mr. Bulmer that I would deal with Mr. Kenny's outstanding motions when I rendered my judgment.

ii. Relevant POA Legislation re: Ex Parte Proceedings:

[158] The court may exercise its jurisdiction under subclause 54(1)(a) of the POA and may proceed to hear the matter in the absence of the defence. Subsection 54(1) of the POA reads:

Conviction in the absence of the defendant

54 (1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given under Part I or II, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court may,

- (a) proceed to hear and determine the proceeding in the absence of the defendant; or
- (b) adjourn the hearing and, if it thinks fit, issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant.

iii. Findings and Analysis re: Ex Parte Proceedings:

[159] The trial commenced on May 24, 2018 and continued on several subsequent dates with both parties present. However, the proceedings continued after Mr. Kenny left the courtroom on December 17, 2018. Additionally, the defendant did not appear in court during the proceedings on January 10, 2019 and June 3, 2019. I must be careful not to deprive the defendant of the right to be present at trial. I do not accept that I have affected any such deprivation for the reasons that follow.

[160] On December 17, 2018, the following unfolded. Mr. Kenny “filed with the clerk a claim, that, that man robbed me, he’s done me wrong, he has taken my property and I’m claiming Common-Law jurisdiction.” Regarding the prosecutor, the defendant stated “Does this man have any first-hand knowledge of this, of this theft? He has no standing within the Court.” When Mr. Kenny asked me if I was willing to follow through with “Common-Law jurisdiction”, I explained that this was not a common law court, but rather a ‘Statutory Court that’s bound by statutes and jurisprudence.’ When he asked where I derive my “authority over man”, I advised that my authority is derived from statute and to file any common law concerns with the Superior Court of Justice. When I refused his demand to get him a Superior Court judge, Mr. Kenny advised he was not feeling well. The prosecutor referred to “Freeman of the land issues” in describing Mr. Kenny’s behaviour. Mr. Kenny re-enforced this description when he made the following comments to me, “I am the superior administer of this court, as a Common-Law Court, not yourself. You’d know this if you’ve got the training, or do you feel you’re qualified to operate a Common-Law Court or not.” After a short recess, Mr. Kenny, again, insisted on being heard in the Common-law court. Again, I refused to indulge his demands. And, again, Mr. Kenny responded by advising that he was not feeling well, to which I stated “Well you know what, you’re willing to stay here and be heard in a Common-Law Court but you’re not willing to be heard in a Statutory Court. So, which is it Mr. Kenny? I’m getting mixed messages from you.” Mr. Kenny continued to rant in a ‘Freeman on the land’ fashion and, after I gave him every opportunity to continue his cross-examination, he left the courtroom, following which I stated,

“Okay. I just want it noted on the record that Mr. Kenny has left the courtroom. I will also note on the record that he was quite willing to stay here had I had common law jurisdiction, but seemed to find himself unwell when it came to this statutory part three, these matters that are before us. So, we’ll continue. It’s his choice to leave. I did not dismiss him, I did not ask him to leave, he chose to leave. So, under section 54 of the Ontario *Provincial Offences Act* ... I can, upon resumption of a hearing that’s been adjourned, I will proceed to hear and determine the proceedings in the absence of the defendant.”.

[161] On the trial dates that followed, Mr. Kenny did not attend court. On January 10, 2019, the veterinarian, Dr. Greg Aitken was present to testify. As well, By-law Officer Joshua Matson (formerly OSPCA Agent Matson) had travelled from the Napanee area, where he was then employed, in order to give evidence. Previously, the already truncated trial times given to these matters were further shortened to accommodate Mr. Kenny’s medical condition. The time to get through these trial proceedings had been protracted.

[162] The provincial offences courts are very busy and there are limited time and resources. In exercising my judicial responsibilities to manage the efficiency of the proceedings in my court, I determined that it would be significantly more resourceful to proceed with examination-in-chief of these witnesses and provide the defence with timely transcripts, for cross-examination to be conducted at the next court date. Although the order of the proceedings was re-arranged, at no time was the defendant deprived of his right to bring full answer and defence. In no way was his right to a fair trial put in jeopardy. Upon resumption of trial proceedings on February 4, 2019, Mr. Bulmer advised that Mr. Kenny did not wish to cross-examine the prosecution’s witnesses. The prosecution closed its case. No further substantive matters were heard that day in the absence of the defendant and April 15, 2019 was set aside to provide Mr. Kenny the opportunity to bring his defence.

[163] When the defendant did not attend court on April 15, 2019, again, no substantive proceedings unfolded. I provided Mr. Kenny with another opportunity to bring his defence on May 6, 2019. On that date, again, Mr. Kenny did not attend and, again, I heard no substantive proceedings. Instead, I again adjourned the trial proceedings to June 3, 2019 and, as a courtesy, issued a bench summons for the defendant to attend court on that date. Although the summons returned unserved, I am satisfied that adequate efforts had been made to provide Mr. Kenny with this bench summons. More over, Mr. Kenny’s assistant, Mr. Bulmer, graciously attended each of these court dates, was well aware as the court dates unfolded over time and was having sufficient communications with Mr. Kenny as to what was transpiring in this court case.

[164] On June 3, 2019, Mr. Kenny, again, did not attend court. Substantive proceedings took place as the prosecution provided submissions and I reserved my rulings on the motions and my judgment on the trial proper.

[165] Subsection 54(1)(a) provides me with jurisdiction to adjourn the continuing trial to another date, with or without the court issuing a summons to appear or warrant, or else to proceed to hear and determine the proceeding in the absence of the defendant. The history of these proceedings since the time the charges were laid is very troubling.

There is not question that the defendant's medical condition needed to be accommodated and the accommodation would result in stretching the trial proceedings over more trial dates. I would not think to proceed in any other fashion. However, the defendant's many motions, to the point that he needed to get court approval to bring any further motions, is of concern. Along with his many absences from court.

[166] The Court has provided the defendant with a lot of latitude and court time in which to bring his case. I had denied the defendant's motion to stay the charges on account of his medical condition and advised Mr. Kenny of my reasons for doing so. Moreover, I provided somewhat more fulsome reasons above. On February 4, 2019, April 15, 2019, May 6, 2019 and June 3, 2019, for one reason or another, the defendant was not prepared to attend to proceed with his defence or complete the trial proceedings.

[167] In the appeal decision in *R. v. Wei*, 2017 ONCJ 878, [2017] O.J. No. 6785, the Justice of the Peace granted the defendant's request for an adjournment of the first trial date. Subsequent requests to adjourn the second trial date were denied. The trial then proceeded in an *ex parte* manner, as provided under s. 54 of the *POA*. The defence unsuccessfully appealed the Justice of the Peace's decision to proceed in this fashion. In his appeal decision, Justice Ghosh writes at para. 33:

Section 54 affords the absent defendant an appropriate measure of procedural fairness. The prosecution is required to prove the defendant was notified or compelled to attend trial. Evidence must be led to satisfy the standard of proof. The procedure employed was fair and consistent with the due administration of justice. This ground fails.

[168] I am satisfied, in the circumstances before me and based on Mr. Bulmer's appearances and comments to the court, that the defendant was well aware of the court dates, but did not attend. Extraordinary measures were made in attempts to notify the defendant of the June 3, 2019 court date. I may exercise my discretion to "proceed to hear and determine the proceedings in the absence of the defendant", as contemplated under subsection 54(1)(a) of the *POA*. As the statute provides, the decision to grant or deny an adjournment is a discretionary exercise. I have considered the potential consequences to and rights of the defendant and the opportunities provided to him to bring his case before me. I am satisfied that, in these circumstances, I am exercising my discretion judicially and in a manner so as not to result in a miscarriage of justice.

[169] This legislation is clear and provides me with a mechanism that may be employed, that is, to resume the trial that had been adjourned to June 3, 2019 in an *ex parte* manner, in other words a trial *in absentia*, if the defendant does not avail himself of his right to appear at his continuing trial. The defence's attendance record leading up to June 3, 2019 has been inconsistent. In addition to advising Mr. Bulmer of the next court date, I issued a bench summons as a courtesy to the defendant. And, just as the OSPCA's registered letters to the defendant went claimed and unopened with no rationale given, the efforts to serve this bench summons went unanswered.

[170] On June 3, 2019, Mr. Bulmer was in the courtroom to advise the court that Mr. Kenny would not be attending. I was satisfied with the efforts to serve the bench summons which Mr. Kenny appeared to have been evading, and I was satisfied that the

Court had jurisdiction to proceed that day. The prosecution had been patient as this matter had been adjourned many times to provide Mr. Kenny with the opportunity to bring his defence. I was satisfied with the prosecution's desire to bring these protracted trial proceedings to an end and continued the proceedings in an *ex parte* manner.

iv. Ruling re: Ex Parte Proceedings as Contemplated by Section 54 of the POA:

[171] In these circumstances, I have weighed the right of the defendant to be present at his trial proceedings against the imperative of a timely trial and the effective use of court resources. The defendant has been provided with numerous opportunities to bring his defence and, time after time after time, the defendant failed to do so. On June 3, 2019, I was not willing, under these circumstances, to adjourn the hearing again, to provide yet another such opportunity. In the circumstances before me, procedural fairness was not compromised. Trial courts must have the procedural tools available to ensure the court process is effective, to make sure that matters proceed to completion expeditiously and to safeguard concerns about the proper administration of justice.

[172] For the reasons I have provided, I exercised my jurisdiction to proceed to hear and determine these proceedings in the absence of the defendant, that is, these trial proceedings continued in an *ex parte* manner, as contemplated by section 54 of the POA.

(b) Did the defendant commit any of the sixteen charges that bring him before the court?

[173] I move, now, to my analysis and judgment on each of the sixteen counts against Tony Kenny.

i. Relevant Legislation:

[174] The following are relevant legislative provisions under the OSPCAA:

Standards of care and administrative requirements for animals

11.1 (1) Every person who owns or has custody or care of an animal shall comply with the prescribed standards of care, and the prescribed administrative requirements, with respect to every animal that the person owns or has custody or care of.

Prohibitions re distress, harm to an animal

Causing distress

11.2 (1) No person shall cause an animal to be in distress.

Permitting distress

(2) No owner or custodian of an animal shall permit the animal to be in distress.

Order to owner of animals, etc.

13 (1) Where an inspector or an agent of the Society has reasonable grounds for believing that an animal is in distress and the owner or custodian of the animal is present or may be found promptly, the inspector or agent may order the owner or custodian to,

(a) take such action as may, in the opinion of the inspector or agent, be necessary to relieve the animal of its distress; or

(b) have the animal examined and treated by a veterinarian at the expense of the owner or custodian.

Order to be in writing

(2) Every order under subsection (1) shall be in writing and shall have printed or written thereon the provisions of subsections 17 (1) and (2).

Time for compliance with order

(4) An inspector or an agent of the Society who makes an order under subsection (1) shall specify in the order the time within which any action required by the order shall be performed.

Idem

(5) Every person who is served with an order under subsection (1) shall comply with the order in accordance with its terms until such time as it may be modified, confirmed or revoked and shall thereafter comply with the order as modified or confirmed.

Authority to determine compliance with order

(6) If an order made under subsection (1) remains in force, an inspector or an agent of the Society may enter without a warrant any building or place where the animal that is the subject of the order is located, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the animal and the building or place for the purpose of determining whether the order has been complied with.

Offences

18.1 (1) Every person is guilty of an offence who,

...

(b) contravenes or fails to comply with section 11.1;

(c) contravenes subsection 11.2 (1), (2), (3), (4) or (5);

...

(d) contravenes subsection 13 (5);

...

[175] The following are relevant regulations under *O. Reg. 60/09 – Standards of Care and Administrative Standards*, made under the *OSPCAA*:

General Standards of Care for Animals

Basic standards of care for all animals

2. (1) Every animal must be provided with adequate and appropriate food and water.

(2) Every animal must be provided with adequate and appropriate medical attention.

...

ii. *Analysis and Findings in Each of the Sixteen Counts:*

[176] I am satisfied that Tony Kenny is the owner of the animals in question. On more than one occasion during the proceedings, he claimed trespass onto *his* property or demanded an order be made to return *his* animals or pay compensation for them. Moreover, I am satisfied that the address of his property where the animals were located is 1265 Second Line, Bailieboro, Ontario.

[177] Count 1 reads: On or about November 5, 2014, did cause a Long Horned Bovine type animal to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*.

[178] On November 5, 2014, Agent Pazder returned to Mr. Kenny's property to determine whether Mr. Kenny had complied with the previous orders he had issued under section 13 of the *OSPCAA*. There had been no change in the condition of the long-horned bull. It remained tethered to a truck bed in the middle of the field, without shelter available. As well, Inspector Fraser had noted on October 8, 2014, in addition to no shelter and questionable water, there were a lot of weeds and minimal grass and pasture for grazing and the bull was hobbled, thereby restricting its ability to move. On November 5, 2014, both Agents Pazder and Matson observed that the bull was thin. (Photographs – Exhibits 10(a) and 10 (b).) The photograph entered as Exhibit 10(d) illustrates two buckets of dirty water in the back of the truck bed. I am satisfied that these conditions in which the long-horned bovine was found would have caused it to be in distress. I am satisfied that all the elements of subsection 11.2(2) of the *OSPCAA* have been proven beyond a reasonable doubt and, hence, with respect to the long-horned bovine type animal (bull), Mr. Kenny is guilty of having committed an offence contrary to subsection 11.1(1)(c) of the *Act*.

[179] Count 2 reads: On or about November 5, 2014, did fail to comply with the prescribed standards of care for a Long Horned Bovine type animal, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide protection from the elements as required by s.2(6)(e) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[180] Subsection 2(6)(e) of *O. Reg. 60/09* requires every animal to be provided with adequate and appropriate “protection from the elements, including harmful temperatures”. As noted above, over several visits to Mr. Kenny's property, Agent Pazder saw no improvement in the conditions of the bull. At every visit it was tethered to the truck bed in the open field and sometimes hobbled. There was no shelter from the elements available to it. Agents Foster and Matson both testified about the lack of shelter for the bull. Several of the photographs illustrate this lack of shelter. I am satisfied beyond a reasonable doubt that Mr. Kenny did not comply with subsection 2(6)(e) of *O. Reg.60/09*. Hence, he contravened subsection 11.1(1) of the *OSPCAA*. Consequently, with respect to the long-horned bovine type animal (bull), I find the defendant guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[181] Count 3 reads: Between October 24, 2014 and November 5, 2014, re: 1 Long Horned Bovine type animal, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*.

[182] Exhibit 4(a) is as photograph of the bull in the open field on October 8, 2014. On that day, pursuant to section 13 of the *OSPCAA*, Agent Pazder issued an order to Tony Kenny to “provide shelter and or a wind break for the long horned bull type cattle”. The order was to be complied with by October 24, 2014. Agent Pazder returned to Mr. Kenny's property on October 31, 2014 to find that the bull had been moved from the east field to the west side of the laneway, still tied to the truck bed by his horns and still without shelter and no wind break in sight. (Exhibits 7(a) and 7(b).) On Agent Pazder's

November 5, 2014 visit to the property, the bull continued to be tethered to the truck bed in the middle of the field, as conditions had not improved. Again, photographs entered as Exhibits 10(a) and 10(b) clearly show this state of affairs. I am satisfied beyond a reasonable doubt, that Mr. Kenny failed to comply with the October 8, 2014 order made under the *OSPCAA*, thereby contravening subsection 13(5) of the *Act*. Consequently, with respect to the long-horned bovine type animal (bull), I find Mr. Kenny guilty of an offence under subsection 18.1(1) (d) of the *Act*.

[183] Count 4 reads: On or about January 15, 2015, did cause 6 (Ducks) Anseriformes type animals to be in distress, contrary to s.11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*.

[184] On January 15, 2015, six ducks were removed from Mr. Kenny's property. On their December 18, 2014 visit to the property, Agents Pazder and Matson found the birds with little to no food and water that was starting to ice over. Six to eight inches of feces had built up and the birds had a large amount of feces caked to their feet, with no dry spot available to them. Hazardous debris was scattered within the cages and enclosures. When Agent Pazder returned on December 22, 2014, the fecal matter in the birds' cages and enclosures had not been removed, so he issued an order to the defendant for compliance by January 14, 2015. On Agent Pazder's and Agent Matson's January 15, 2015 inspection of the birds, the enclosures had not been cleaned and the unsanitary conditions were even worse than before. There was no food and the water had frozen solid. On that day, Agent Matson observed that the birds were exhibiting cold stress, shivering and lifting their feet. The numerous photographs of the birds and their surroundings clearly show the state of affairs. Six ducks were removed from the property. Dr. Aitken's inspection of the ducks on January 16, 2015 found evidence of frost bite on their feet and with body condition ratings between two and three. I am satisfied beyond a reasonable doubt, that the unsanitary conditions in which Mr. Kenny left these ducks, with little to no food or water and their exhibited behaviour of cold stress, shivering and lifting their feet which showed signs of frost bite would indicate Mr. Kenny caused the ducks to be in distress, contrary to subsection 11.2(2) of the *OSPCCA*. Consequently, with respect to six ducks, I find Mr. Kenny guilty of an offence under subsection 18.1(1)(c) of the *Act*.

[185] Count 5 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[186] As stated in count 4 above, I am satisfied beyond a reasonable doubt, that Mr. Kenny failed to provide adequate and appropriate food and water for the six ducks, as required by subsection 2(1) of the regulation. Consequently, with respect to six ducks, I find Tony Kenny guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[187] Count 6 reads: On or about January 15, 2015 did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate medical

attention as required by s.2(2) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[188] On January 16, 2015, Dr. Aitken found the six ducks suffering from frost bite on their feet. There was no evidence of medical attention for this condition. I am satisfied that Mr. Kenny contravened this prescribed standard of care under subsection 2(2) of the regulation. Consequently, with respect to six ducks, I find the defendant guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[189] Count 7 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 6 (Ducks) Anseriformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate sanitary conditions as required by s.2(6)(b) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[190] Agent Pazder's evidence is clear. The ducks' enclosures contained six to eight inches of built up feces. The photographs are clear, as well. Furthermore, Dr. Aitken reviewed the photographs taken on December 18, 2014 and advised that the conditions were quite unsanitary, with no bedding and muddy water or liquid manure contributing to poor hygiene. Without bedding, the birds had less tolerance to cold and were more prone to frost bite. In these unsanitary conditions, the birds were more susceptible to a variety of diseases. I am satisfied beyond a reasonable doubt that Mr. Kenny failed to provide adequate and appropriate sanitary conditions for the six ducks as required by subsection 2(6)(b) of the regulation. Consequently, with respect to six ducks, I find the defendant guilty of committing an offence contrary to subsection 18.1(1)(b) of the *Act*.

[191] Count 8 reads: Between January 14, 2015 and January 15, 2015, re: 6 (Ducks) Anseriformes type animals, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*.

[192] On December 22, 2014, pursuant to section 13 of the *OSPCAA*, Agent Pazder issued an order to Tony Kenny to provide clean dry bedding at all times for all poultry breeds for nesting behaviour, clean up all fecal matter and clean up all hazardous debris that could cause injury to animals. January 14, 2015 was the date for compliance. (Exhibit 15.) On January 15, 2015, Agent Pazder was at the defendant's property and found, rather than compliance, the conditions of the birds had worsened. I am satisfied beyond a reasonable doubt that Mr. Kenny failed to comply with the December 22, 2014 order as required by subsection 13(5) of the *OSPCAA*. Consequently, with respect to six ducks, I find the defendant guilty of committing an offence contrary to subsection 18.1(1) (d) of the *Act*.

[193] Count 9 reads: On or about January 15, 2015, did cause 20 (Chickens) Galliformes type animals to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*.

[194] Exhibits 18 and 19 indicate that at least twenty chickens of various breeds were removed from Mr. Kenny's property. They had been left in conditions similar to the ducks, as described in count 4 above. Dr. Aitken testified that they all had frost bite on their combs, top of their heads and feet. Many of the chickens were missing toes. He

assessed the silkies and banties to be too thin, with an inadequate body condition score. Many of the chickens had fairly advanced, painful mite infestations on their legs, which Dr. Aitken assessed to be chronic and, if left untreated, could cause death from starvation. The frost bite on their feet was fairly severe and likely made them lose their toes. Dr. Aitken described the deformities, loss of toes and missing bone as serious injury. In some birds, there was little bone left to lose and Dr. Aitken opined that another case of frost bite probably would have prevented the birds from being able to walk at all. I am satisfied beyond a reasonable doubt that Mr. Kenny caused the chickens to be in distress, contrary to subsection 11.2(2) of the *OSPCAA*. Consequently, with respect to twenty chickens, I find him guilty of committing an offence contrary to subsection 18.1(1)(c) of the *Act*.

[195] Count 10 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[196] As with the ducks, the evidence clearly shows that Mr. Kenny left the chickens with little to no food and water that had frozen solid. I am satisfied beyond a reasonable doubt the he failed to provide twenty chickens with adequate and appropriate food and with water as required by subsection 2(1) of *O. Reg. 60/09*. Consequently, with respect to twenty chickens, I find Mr. Kenny guilty of committing an offence contrary to subsection 18.1(1)(b) of the *Act*.

[197] Count 11 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate medical attention as required by s.2(2) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[198] Dr. Aitken identified a painful, chronic mite infestation on the legs of the chickens. Furthermore, they had experienced sufficiently severe frost bite to the point that toes were missing and any further bout of frost bite would have rendered the birds unable to walk. Hence, I am satisfied that Mr. Kenny failed to provide adequate and appropriate medical attention to the chickens' significant deformities, as required by subsection 2(2) of *O. Reg 60/09*. Consequently, with respect to twenty chickens, I find the defendant guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[199] Count 12 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 20 (Chickens) Galliformes type animals, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate sanitary conditions as required by s.2(6)(b) of *O. Reg 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[200] As with the ducks in count 7 above, Agents Pazder and Matson and Dr. Aitken described the unsanitary conditions in which Mr. Kenny housed the chickens. I am satisfied beyond a reasonable doubt that he failed to provide adequate and appropriate sanitary conditions for twenty chickens as required by subsection 2(6)(b) of the

regulation. Consequently, with respect to twenty chickens, I find Mr. Kenny guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[201] Count 13 reads: Between January 14, 2015 and January 15, 2015, re: 20 (Chickens) Galliformes type animals, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*.

[202] As with my findings in count 8 above, Mr. Kenny failed to comply with the December 22, 2014 order which references “all poultry breeds”, as required by subsection 13(5) of the *OSPCAA*. Consequently, with respect to twenty chickens, I find the defendant guilty of committing an offence contrary to subsection 18.1(1) (d) of the *Act*.

[203] Count 14 reads: On or about January 15, 2015, did fail to comply with the prescribed standards of care for 1 Domestic Dog, contrary to s.11.1(1) of the *OSPCAA*, to wit, fail to provide adequate and appropriate food and water as required by s.2(1) of *O. Reg. 60/09*, and thereby did commit an offence contrary to s.18.1(1)(b) of the *Act*.

[204] On September 11, 2014, Agent Pazder first visited Mr. Kenny’s property. Having observed the condition in which the animals were kept, he issued an order to Mr. Kenny on September 15, 2014 regarding three dogs, stating, “Clean, potable water must be provided in a spill proof container at all times.” (Exhibit 2(a).) On October 8, 2014, Agent Pazder returned to the property to find a cooler containing very dirty water that had not been changed in a while. Agent Foster described a lunch cooler or bucket with dirty black or brown standing water with lots of leaves in it. The water in the dog enclosure was also very dirty and she described it as green in colour with lots of leaves and dirt in it. Again, on October 8, 2014, Agent Pazder issued another order relating to the dogs and the need for Mr. Kenny to provide clean, potable water in a spill proof container. On October 31, 2014, Agent Pazder was on the defendant’s property and observed very dirty water in the dog’s enclosure. On December 18, 2014, the dog tied at the entrance to the barn had water that was freezing and an empty pan believed to be used for food. On January 15, 2015, Agent Pazder observed no opened food for this dog and water that had frozen solid. The dog was extremely thin and Agent Pazder could palpate all her vertebrae. Her hip bones were sticking out and she was getting close to emaciated, with a body score of two out of five. I am satisfied beyond a reasonable doubt that Mr. Kenny failed to provide adequate food and water for the dog as required by subsection 2(1) of the regulation. Consequently, with respect to the dogs, especially the hound type dog by the entrance to the barn, I find the defendant guilty of committing an offence under subsection 18.1(1)(b) of the *Act*.

[205] Count 15 reads: Between December 12, 2014 and January 15, 2015, re: 1 Domestic Dog, did fail to comply with an order under s.13(5) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(d) of the *Act*.

[206] On September 15, 2014, Agent Pazder issued an order to Mr. Kenny with respect to “3 various coloured and breeds of dog on property”. The concerns were with the inadequate shelter, short chain tether and dirty water not in a spill proof container. The date for compliance was set at October 6, 2014. (Exhibit 2(a).) When there was no compliance, on October 8, 2014, he issued another order, with October 24, 2014 set as

the date for compliance. (Exhibit 5.) Again, there was no compliance. On January 15, 2015, the brindle coloured hound dog by the entrance to the barn was removed. It had no opened food and its water was frozen solid. I am satisfied beyond a reasonable doubt that Mr. Kenny failed to comply with an order made pursuant to subsection 13(5) of the *OSPCAA*. Consequently, with respect to the dogs, especially the hound type dog by the entrance to the barn, I find the defendant guilty of committing an offence under subsection 18.1(1)(d) of the *Act*.

[207] Count 16 reads: On or about January 15, 2015, did cause 1 Domestic Dog to be in distress, contrary to Section 11.2(2) of the *OSPCAA*, and thereby did commit an offence contrary to s.18.1(1)(c) of the *Act*.

[208] On numerous visits to Mr. Kenny's property, Agent Pazder observed the dogs with dirty water, inadequate food and a shelter that was neither insulated nor raised off the ground. Nor did the shelters had proper windbreaks and/or exterior flaps. On December 28, 2014, Agent Matson also was concerned that the dogs did not have appropriate shelter. The dog that was seen tethered to the tree was connect with a short chain. The dog tethered to the abandoned dog house appeared skinny. The dog by the barn was skinny and had a body condition rated below average. As winter approached, there was little improvement to these conditions. Agent Pazder observed that the dog by the barn had its water freezing over on one occasion and frozen solid at the next visit. Under these conditions, I am satisfied beyond a reasonable doubt that Mr. Kenny caused the dogs, especially the hound type dog by the entrance to the barn, to be in distress, contrary to subsection 11.2(2) of the *OSPCAA*. Consequently, with respect to the dogs, in particular, the hound type dog by the entrance to the barn, I find the defendant guilty of committing an offence under subsection 18.1(1)(c) of the *Act*.

IV. CONCLUSION

[209] I have provided my reasons for dismissing all of Mr. Kenny's motions.

[210] Presumptively, regulatory offences are strict liability offences. I find no language in the applicable legislation provisions that would lead me to believe the charges against the defendant are *mens rea* offences or absolute liability offences. Rather, the sixteen counts against Mr. Kenny are strict liability offences. Once the offences have been proven, it is open to the defendant to show he took all reasonable care, in other words, to provide his defence of due diligence on a balance of probabilities: *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. There is no evidence upon which I can find that Mr. Kenny satisfied any due diligence defence. To the contrary, the evidence clearly illustrates that he was defiant and took little to no action towards compliance when ordered to do so, leaving his animals on his property in unacceptable conditions.

[211] With respect to the sixteen charges laid against Mr. Kenny, I am not left in reasonable doubt. Based on all the evidence before me, I find the defendant guilty beyond a reasonable doubt of each of the sixteen charges laid against him under subsection 18.1(1) of the *OSPCAA*. There will be convictions entered with respect to all sixteen counts.

Released: October 3, 2019

Signed: Justice of the Peace M. Coopersmith