IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *R. v. Picco*, 2022 NLSC 79
Date: May 9, 2022
Docket: 202101G1669

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

ROBERT PICCO

RESPONDENT

Before: Justice Peter A. O'Flaherty

On Appeal From: A Decision of the Provincial Court of Newfoundland and Labrador, dated the 1st day of March, 2021.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: March 7, 2022

Summary:

The Crown appealed from the Respondent's acquittal on eight animal cruelty charges under s. 445.1(a) and s. 446(1)(b) of the *Criminal Code*.

Held: The appeal was dismissed. The trial judge did not err in law on the issue of *mens rea*. The Court refused to interfere with the trial judge's finding that the Crown failed to prove that the animals were "suffering" under s. 445.1(a).

Appearances:

Michael G. Murray	Appearing on behalf of the Appellant
Benjamin P. Curties	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *R. v. Robinson*, 2018 BCSC 1852; *R. v. Giles* (1990), 255 A.P.R. 1, 81 Nfld. & P.E.I.R. 1 (Nfld. C.A.); *R. v. Harper*, [1982] 1 S.C.R. 2; *R. v. Vokurka*, 2013 NLCA 51; *R. v. Clarke*, 2005 SCC 2; *H. L. v. Canada (Attorney General)*, 2005 SCC 25; *Housen v. Nikolaisen*, 2002 SCC 33; *R. v. Gerling*, 2016 BCCA 72; *R. v. Hughes*, 2008 BCSC 676; *R. v. Clarke*, 2001 CarswellNfld 189, [2001] N.J. No. 191 (Prov. Ct.); *Newfoundland Society for the Prevention of Cruelty to Animals v. Higgins* (1996), 144 Nfld. & P.E.I.R. 295, 1996 CarswellNfld 187 (S.C. (T.D.)); *R. v. S.D.D.*, 2002 NFCA 18; *R. v. Menard*, 1978 CarswellQue 25, [1978] C.A. 140; *R. v. Walker*, 2008 SCC 34; *R. v. Blanchard*, 2022 NLCA 15

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46

OTHER: Peter Sankoff, "The Mens Rea for Animal Cruelty after R. v. Gerling: A Dog's Breakfast" (2016) 26 Criminal Reports (7th) 267

REASONS FOR JUDGMENT

O'FLAHERTY, J.:

INTRODUCTION

[1] On March 1, 2021, Mr. Robert Picco (the "Respondent"), was acquitted by a judge of the Provincial Court of Newfoundland and Labrador on four charges of neglecting an animal, and four charges of causing suffering to an animal, under the *Criminal Code*, R.S.C. 1985, c. C-46, (the "*Code*"). The Crown appeals the Respondent's acquittal under s. 813(b)(i) of the *Code*.

[2] The Respondent was the owner of four beagles that were kept in an outdoor enclosure on his mother's property in Portugal Cove-St. Philip's, Newfoundland and

Labrador (“NL”). On September 20, 2018, the Respondent asked a volunteer group that rescues and rehomes beagles, Beagle Paws, if the beagles could be placed in foster care. He surrendered the dogs to Beagle Paws on September 21, 2018, and members of the group went to the property to recover them. The four beagles were found in an emaciated condition and were brought to a veterinarian for treatment.

[3] On September 22, 2018, the police were contacted, it appears by Beagle Paws. On December 20, 2018 the Respondent was charged with four counts of wilfully neglecting or failing to provide suitable and adequate food, water, shelter and care for the dogs on September 20, 2018, contrary to s. 446(1)(b) of the *Code*. He was also charged with four counts of wilfully causing unnecessary pain, suffering or injury to the dogs on September 20, 2018, contrary to s. 445.1(a) of the *Code*.

[4] The Respondent’s trial was held on September 4, 16, and 17, 2020. The offences are hybrid offences, and the Crown proceeded by summary conviction. On March 1, 2021, the trial judge gave a detailed oral decision and acquitted the Respondent, finding the Crown had not proven beyond a reasonable doubt that he was guilty of any of the eight charges under s. 446(1)(b) or s. 445.1(a) of the *Code*.

[5] This appeal is about whether the trial judge misapplied the law on the mental element, or *mens rea*, of the offences leading to the judge’s finding that there was a reasonable doubt whether the Respondent had “wilfully” caused suffering to the dogs and “wilfully” neglected the dogs. It is also about whether the trial judge erred in finding that the Crown did not prove beyond a reasonable doubt that the dogs were “suffering” on the offence date, September 20, 2018. The Crown also argues that the trial judge failed to consider all the evidence bearing on whether the Respondent acted “wilfully”, and that the trial judge’s reasons were legally insufficient in material respects. These grounds were not pressed before me in argument.

[6] The Respondent submits that the trial judge applied the correct legal test on the issue of *mens rea* and she was left with a reasonable doubt as to whether the Respondent acted “wilfully” based largely on the Respondent’s evidence regarding events in the weeks leading up to September 20, 2018, which had affected his supervision of the animals. The Respondent further submits that the question of

whether the dogs were “suffering” was a question of fact and the Crown is in effect asking this court to reassess the evidence and retry the criminal case, which it cannot.

[7] An appeal of an acquittal under s. 813 of the *Code* is not a rehearing of the criminal trial on the record. If the Crown shows the trial judge made a legal error that may have affected the outcome of the trial I have the power to correct the error. If the Crown shows the trial judge made a factual finding without any evidence, or a factual finding which was clearly wrong, or reached an otherwise unreasonable factual finding, I may interfere if it affected the outcome of the case, but otherwise deference is owed to a trial judge’s take on the evidence. This is particularly so where the Respondent’s acquittal was based on the trial judge’s conclusion that the evidence was not sufficient to prove the charges beyond a reasonable doubt, which involved a nuanced weighing of the evidence at trial against the criminal standard.

[8] I find that the trial judge did not commit legal error in her analysis of the issue of *mens rea* under s. 445.1(a) and s. 446(1)(b). The Respondent’s evidence, which the trial judge accepted as true, was properly considered on the question of whether that Crown had proven beyond a reasonable doubt he had acted “wilfully”.

[9] On the finding that the Crown did not prove beyond a reasonable doubt that the dogs were “suffering” under s. 445.1(a), I cannot substitute my view of the facts for those of the trial judge who heard the case and saw the witnesses according to what I may think their evidence establishes. The trial judge’s factual findings were reasonably supported by evidence in the record, and the trial judge did not reach a clearly wrong or otherwise unreasonable factual finding.

[10] I am not persuaded that the trial judge failed to consider relevant evidence bearing on whether the Respondent had acted “wilfully” under s. 445.1(a) or s. 446(1)(b), and I find that the trial reasons were legally sufficient.

[11] The appeal by the Crown is therefore dismissed.

GROUNDS OF APPEAL

[12] The grounds of appeal as set out in the Notice of Appeal are as follows:

> I. That the Honourable Trial judge erred in law by finding the condition of the four dogs did not amount to "suffering" as per s. 445.1 of the *Criminal Code of Canada*;
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> II. That the Honourable Trial judge erred in law by concluding that the evidence of Mr. Picco was 'evidence to the contrary' so as to rebut the presumption created by s. 446(3) of the *Criminal Code of Canada*;
>
> III. That the Honourable Trial judge erred in law by failing to provide adequate reasons for:
>
> a. Rejecting the evidence of Dr. Laura Rogers despite finding her evidence credible;
> b. Finding the evidence of Mr. Picco raised a reasonable doubt.
>
> IV. That the Honourable Trial Judge erred in law because she failed to consider all the evidence bearing on the ultimate issue of guilt or innocence, that being the determination of whether Mr. Picco's behavior met the standard of 'wilfully causes', pursuant to s. 445.1(1)(a) and/or 'wilfully neglects', pursuant to s. 446(1)(b).

THE TRIAL REASONS

[13] In the reasons for decision provided on March 1, 2021 the trial judge began by reviewing the evidence of the seven witnesses who testified at the trial in detail. In terms of the applicable law, she first addressed the criminal standard of proof and burden of proof, and the test for assessing evidence in the context of the reasonable doubt standard, including where the accused had testified.

[14] The trial judge then turned to a consideration of the specific offences with which the Respondent was charged, starting with s. 446(1)(b), and the statutory definition of "wilfully" causing an event to occur under s. 429(1) of the *Code*.

[15] Adopting a summary of the elements to be proved by the Crown under s. 446(1)(b) which was taken from the judgment in *R. v. Robinson*, 2018 BCSC 1852 the trial judge analyzed the elements of the offence under s. 446(1)(b) in the context of the evidence to decide whether the Crown had proven each of the elements of the offence beyond a reasonable doubt.

[16] On the first element, the trial judge held the Crown had proven beyond a reasonable doubt that the Respondent failed to provide adequate food and water for the dogs. She reached this finding based on the evidence of the emaciated condition of the animals as shown in the photographs, which she described as "deplorable" and "grave". The trial judge was not satisfied that the Crown had proved beyond a reasonable doubt that the Respondent had failed to provide adequate shelter for the dogs. On that point, the trial judge found that the pictures of the outdoor kennel tendered by the Crown witnesses did not establish that the shelter was inadequate, and she accepted the Respondent's evidence, which she found was credible, on the construction, formation, size, contents and usual cleanliness of the kennel.

[17] On the second element, the trial judge concluded that the Respondent's neglect or failure to feed and water the animals was such that it indicated a marked departure from the norm.

[18] On the third element, that the Respondent had acted "wilfully", the trial judge held that "(t)he Crown must also prove that Mr. Picco acted wilfully in his failure to provide adequate food and water to the animals, and it has failed to do so".

[19] In making this finding, the trial judge accepted that the evidence of the Respondent was truthful, describing it as internally consistent and, when tested against the evidence of the other witnesses, externally consistent. The trial judge then made a number of factual findings on the evidence based on which she decided the Crown had failed to prove the Respondent "wilfully" neglected the dogs. She found that the Respondent knew how to care for the animals, a finding consistent with the evidence of other witnesses who testified to his care of the dogs. The trial judge found that a combination of family and legal issues in the time period leading up to the removal of the dogs had led him to overestimate his ability to bring the

dogs back to health. The trial judge found this was a very difficult time in the Respondent's life and that despite his efforts, the dogs were oftentimes being released from the kennels unbeknownst to him. The trial judge found this was occurring as his mother was first hospitalized and then placed in a nursing home, and when he was going back and forth to St. John's to assist her a conflict about his right to reside on the property began, and the Respondent was charged criminally and was not allowed to go back to the property that had been his home since 1993.

[20] Based on the facts she found, the trial judge held she did not believe the Respondent subjectively intended to neglect the dogs. The trial judge concluded that she must still consider whether, under s. 429 of the *Code*, the Respondent "wilfully" failed to provide adequate food and water to the dogs, which she found required that she consider whether the Respondent had acted "recklessly".

[21] The trial judge adopted a definition of recklessness equating it to a "conscious disregard of a substantial and unjustified risk that one's conduct will result in prohibited consequences". She found that the Respondent had owned and cared for beagles for many years, and had sought help to care for the dogs, but the stresses of his life overtook him and he had failed to provide adequate care. Based on the facts, she concluded that the Respondent had overestimated his ability to bring the dogs back to health but his behavior did not amount to "recklessness" within the meaning of s. 429(1) in the sense of a conscious disregard of a substantial and unjustified risk.

[22] In relation to the offences under s. 445.1, the trial judge again referred to the elements of the offence as summarized in the decision in *Robinson*. Turning to the first issue, which was whether the animals were experiencing unnecessary pain, suffering or injury, the trial judge decided that the Crown had not proven beyond a reasonable doubt that the animals were experiencing pain and suffering under s. 445.1. The trial judge found on the evidence that Dr. Rahlan, in his examination, had noted the poor body condition of the four dogs, and the injuries and infections with respect to two of them, but that otherwise, surprisingly, the four animals were in good health. She found that Dr. Rahlan had not testified that the dogs he examined were suffering, and that he concluded their mouths were healthy, their teeth were fine and their blood work was fine.

[23] The trial judge noted the opinion evidence of Dr. Rogers was that the dogs in this emaciated condition were suffering, however she also noted that Dr. Rogers did not herself examine the dogs and had relied upon the photographs and the reports of Dr. Rahlan. Dr. Rogers had also testified that when dogs were suffering from emaciation they would likely be curled up in a ball in an effort to conserve energy. The trial judge found, based on evidence of the Beagle Paws witnesses, that the dogs were active and barking when they were removed from the kennel on September 21, 2018, and that one of the animals was so agitated and active that it took some time for him to be removed from the kennel.

[24] Overall, the trial judge concluded that while there was some evidence suggesting that the dogs were suffering, there was also evidence that, but for their extreme emaciation, the dogs were otherwise in good health. According to the trial judge, "(t)his is not proof of the standard of beyond a reasonable doubt" that the dogs were "suffering". As the Crown did not prove beyond a reasonable doubt the "pain and suffering" element under s. 445.1(a), one of the essential elements of the *actus reus* of the offence, the trial judge determined that it was unnecessary to determine whether the pain and suffering was caused by the Respondent, and whether the Respondent had acted wilfully, and she acquitted the Respondent on the charges.

[25] The trial judge then held that even if she was wrong in finding that the dogs were not "suffering", for the same reasons she had relied on under s. 446(1)(b), she was satisfied the Respondent had rebutted the evidentiary presumption under s. 445.1(3) and his evidence created a reasonable doubt that he had either subjectively or objectively "wilfully" caused unnecessary pain, suffering or injury to the animals.

ANALYSIS

The Crown's Right of Appeal and the Standard of Review

[26] Part XXVII of the *Code* governs Summary Convictions and s. 813 provides for rights of appeal in proceedings under that Part. The Crown has a right of appeal from the acquittal of the Respondent under s. 813(b)(i) of the *Code*:

> 813. Except where otherwise provided by law,
>
> (b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
>
> (i) from an order that stays proceedings on an information or dismisses an information … [Emphasis added]

[27] Section 822 of the *Code* provides that certain sections of Part XXI – Appeals – Indictable Offences are applicable to an appeal of an acquittal under s. 813. An appeal lies to the appeal court under s. 813 on a wrong decision on a question of law.

[28] The standard of review I must apply on a question of law is correctness. This means that if I am satisfied that the trial judge applied the wrong law, or misapplied the law, I have the power to correct the legal analysis.

[29] In *R. v. Giles* (1990), 255 A.P.R. 1, 81 Nfld. & P.E.I.R. 1 (Nfld. C.A.), a case dealing with the jurisdiction, powers and scope of an appeal judge on a Crown appeal from an acquittal in Provincial Court of a person charged with a summary conviction offence, our Court of Appeal confirmed that, unlike in indictable matters, the Crown's right of appeal is not limited to questions of law alone and the Crown may also appeal on questions of fact.

[30] *Giles* does not address the scope of review for an appeal on a question of fact in detail, as the case was disposed of on what were described as well-established grounds, namely that the appeal judge had retried the case and made his own assessment of the evidence, which by law he was not entitled to do.

[31] In *Giles*, Goodridge, C.J.N. referenced with approval the statement from the judgment of Estey, J. in *R. v. Harper*, [1982] 1 S.C.R. 2, regarding the duty placed on an appellate tribunal with respect to its review of the record at trial:

> [59] …An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate

> tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

[32] The judgment goes on to explain the primary rationale for an appeal court adopting an attitude of deference to the findings of a trial judge on questions of fact:

> [60]…Appeal courts have traditionally been reluctant to disturb findings of fact. The judge who hears and sees the witnesses testify is in a better position to assess their credibility than an appeal tribunal.

[33] In *R. v. Vokurka*, 2013 NLCA 51, at paragraphs 24 and 25, our Court of Appeal discussed the standard of review for factual inferences, and by implication findings of fact, made by trial judges on a criminal proceeding:

> [24] The standard of review for factual inferences made by trial judges is expressed by Fish J. in *R. v. Clarke*, 2005 SCC 2, [2005] 1 S.C.R. 6 (para. 9):
>
> > … Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm …
>
> [25] In *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, the Supreme Court of Canada discussed appellate review of factual inferences where the evidence supports more than one inference (at paragraph 74):
>
> > I would explain the matter this way. Not infrequently, <u>different</u> inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot <u>reweigh the evidence</u> by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen.*

[34] The excerpts cited in *Vokurka* from the decisions in *R. v. Clarke*, 2005 SCC 2, and *H.L. v. Canada (Attorney General)*, 2005 SCC 25 suggest an alignment between the established grounds for criminal appellate review, as they relate to findings of fact and factual inferences, and the civil standard of appellate review of questions of fact and inferences of fact in *Housen v. Nikolaisen*, 2002 SCC 33.

[35] Both the *Housen* "palpable and overriding error" standard of review for factual findings and the established grounds of criminal appellate review for factual findings referenced in *Harper* and *Clarke* are described as applicable standards of review in criminal appeal decisions across Canada. I am satisfied that under both approaches I must review the record to determine whether the trial judge's factual findings can be reasonably supported by the evidence at trial. If I find there was evidence to support the factual findings, and they were not clearly wrong, the law directs that I afford the trial judge a "high degree of deference" on questions of fact.

[36] This is the law I will apply in considering the questions raised by the grounds of appeal.

Relevant Statutory Provisions

[37] The statutory provisions relevant on this appeal are found in Part XI of the *Code* – Wilful and Forbidden Acts in Respect of Certain Property.

[38] Section 445.1(1)(a) of the *Code* provides as follows:

> 445.1 (1) Every one commits an offence who
>
> > (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;

[39] Section 445.1(3) of the *Code* provides as follows:

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

[40] Section 446(1)(b) of the *Code* provides as follows:

> 446 (1) Every one commits an offence who
>
> (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it. [Emphasis added]

[41] Section 446(3) of the *Code* provides as follows:

> (3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it damage or injury is, in the absence of any evidence to the contrary, proof that the damage or injury was caused by wilful neglect. [Emphasis added]

[42] An essential element in many Part XI offences, including ss. 445.1 and 446, is that the accused must have acted "wilfully". Section 429(1) provides a definition of "wilfully causing" an event to occur:

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

Issue 1: Did the Trial Judge Apply the Wrong Test for Determining *Mens Rea*?

[43] The original ground of appeal raised in the Notice of Appeal stated that the trial judge erred in law by concluding that the evidence of Mr. Picco was 'evidence to the contrary' sufficient to rebut the presumption under s. 446(3) of the *Code*. At the hearing the Crown conceded that the presumption in s. 446(3) has no application to the issue of *mens rea* in this appeal. This concession was made because the Respondent was charged under paragraph (1)(b) of s. 446, and the evidentiary presumption only applies to an offence under paragraph (1)(a) of s. 446.

[44] The Crown raised essentially the same ground of appeal in respect of the acquittal of the Respondent under s. 445.1(a) on the basis that the evidentiary presumption in s. s. 445.1(3) does apply to that offence and because, in her reasons, the trial judge held that the Respondent's evidence rebutted the evidentiary presumption in s. 445.1(3) and raised a reasonable doubt that the Respondent "wilfully" caused unnecessary pain, suffering or injury to the dogs. Substituting s. 445.1(3) for s. 446(3), the restated ground of appeal is therefore whether the trial judge erred in law by concluding that the evidence of Mr. Picco was 'evidence to the contrary' sufficient to rebut the presumption under s. 445.1(3) of the *Code*.

[45] The Crown's argument is that by finding that the evidence of Mr. Picco was 'evidence to the contrary' sufficient to rebut the presumption under s. 445.1(3) of the *Code* the trial judge applied the wrong test for the *mens rea* element of the offence under s. 445.1(1)(a) because she applied a subjective intent test and not an objective intent test. A question about whether the trial judge applied the correct legal test is a question of law and is reviewable on the standard of correctness.

[46] The Crown submits that the correct test to be applied for determining the *mens rea* element in s. 445.1(a) is found in the decision of the B.C. Court of Appeal in *R. v. Gerling*, 2016 BCCA 72. In that case, Chiasson, J. relied on the evidentiary presumption in s. 445.1(3) to elucidate an objective intent test for the mental element of the offence in s. 445.1(1)(a), where there is no evidence to the contrary under s. 445.1(3). As this ground of appeal largely turns on the correctness of the legal test in *Gerling*, it is helpful to consider both that decision and the decision on appeal.

[47] Mr. Gerling had operated a dog breeding facility which was the subject of 23 prior orders by the BC SPCA in relation to animals in his custody between 2006 and 2010. In September 2010 the BC SPCA seized 14 animals from Mr. Gerling which were found to be suffering from a variety of chronic dental, skin and nail conditions resulting in pain and distress over many months or years. At trial he was convicted of one count under s. 445.1(1)(a) and one count of s. 446(1)(b) of the *Code*.

[48] The trial judge relied on *R. v. Hughes*, 2008 BCSC 676, in which a decision of the Provincial Court of Newfoundland and Labrador, *R. v. Clarke*, 2001 CarswellNfld 189, [2001] N.J. No. 191 (Prov. Ct.), was cited for the proposition that objective foreseeability of the consequences of Mr. Gerling's acts was sufficient, and the Crown was not required to prove subjective foreseeability for a conviction to be entered under s. 445.1(1)(a). In convicting Mr. Gerling, the trial judge found that Mr. Gerling had "acted wilfully and caused the *actus reus* knowing that suffering was the likely result or that a reasonable person would realize it was a likely result". Mr. Gerling then appealed on the ground that the trial judge erred in finding there was no subjective element in the *mens rea* requirement.

[49] The B.C. Court of Appeal agreed that the trial judge erred in his consideration of the *mens rea* issue, and applied what it held was the correct test to the evidence and findings of fact of the trial judge. The analysis in *Gerling* of the *mens rea* of the offences under ss. 445.1(1)(a) and 446(1)(b), is found at paras. 25-29:

> [25] Under both ss. 445.1(1)(a) and 446(1)(b) of the *Criminal Code*, the Crown must prove that the accused acted wilfully.
>
> [26] For the purposes of s. 445.1(1)(a), "in the absence of any evidence to the contrary", evidence that a person failed to exercise reasonable care or supervision causing pain, suffering or injury, is proof that the pain, suffering or injury was caused or permitted wilfully (s. 445.1(3)).
>
> [27] In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct and s. 429(1) of the *Criminal Code* applies. It engages a subjective element: "knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not".

> [28] Section 429(1) also applies to s. 446(1)(b).
>
> [29] This approach was neither advanced by the Crown at trial nor followed by the trial judge. In my view, that was an error. The issue becomes whether the conviction can be sustained in light of Mr. Gerling's testimony.

[50] In applying this approach to the issue of *mens rea*, Chiasson, J. held that insofar as the trial judge had applied an objective test, there was ample evidence of reasonable foreseeability of harm and that a reasonable person would have taken steps to avoid the harm. Chiasson, J. held that the accused's failure to take reasonable steps to avoid harm to the dogs was a marked departure from the norm, and he therefore acted wilfully. Insofar as the test was subjective, Chiasson, J. found that the accused's evidence did not affect the result because he offered no explanation for the condition of the dogs and showed that he was aware of their condition. Chiasson, J. doubted whether Mr. Gerling's evidence that he believed the animals were not suffering constituted "evidence to the contrary" under s. 445.1(3), but concluded that whether or not the evidence of the accused was "evidence to the contrary", the evidence established wilful neglect.

[51] Chiasson, J. clearly appreciated the potential complexity of the interpretative approach adopted in *Gerling* in determining the mental element of the offence in s. 445.1(a), as may be seen in the comments in paragraphs 50-51:

> [50] It is not clear to me why the presumption of proof provision, which applies to ss. 446(1)(a) and 445.1(1)(a) does not apply to s. 445(1)(b). This creates the need for a somewhat complex analysis of the test for mens rea which could be avoided.
>
> [51] …Insofar as it might be necessary to do so, I would exercise my discretion in accordance with s. 686(1)(b)(iii) of the *Criminal Code*, on the basis that even if the trial judge erred in applying an objective test, in the circumstances of this case, no substantial wrong or miscarriage of justice has occurred by reason of Mr. Gerling's conviction.

[52] The Crown submits that *Gerling* was correctly decided and that the trial judge fell into legal error by accepting that the Respondent's evidence of his lack of subjective intent or lack of subjective recklessness was "evidence to the contrary". The Crown argues that because the Respondent did not offer any evidence of

reasonable care or supervision of the dogs which could, at law, have amounted to "evidence to the contrary" and rebutted the presumption in s. 445.1(3), then the presumption applied, and the Respondent's actions were therefore "willful".

[53] The position of the Respondent is that the trial judge did not err in her application of the s. 445.1(3) presumption. The Respondent submits that in rebutting the evidentiary presumption in s. 445.1(3) the purpose of which is to establish proof that he acted "wilfully", the Respondent must logically have been able to tender evidence tending to show that he did not act "wilfully", and he is not limited to evidence tending to show he acted reasonably. The Respondent submits that the Crown's argument that only evidence showing that a person did exercise reasonable care or supervision can amount to "evidence to the contrary" is clearly wrong in principle and in law. The Respondent further submits that, in so far as *Gerling* provides support for such an argument, the case should not be followed on that point.

[54] The Respondent submits that the trial judge arrived at the correct result on the question of *mens rea* by following the approach in *Robinson*, despite not being provided with additional authorities provided to this court which outline that the *mens rea* in animal cruelty cases is determined on a subjective analysis. The Respondent provided me with the decision of this Court in *Newfoundland Society for the Prevention of Cruelty to Animals v. Higgins* (1996), 144 Nfld. & P.E.I.R. 295, 1996 CarswellNfld 187 (S.C. (T.D.) which decided that the offence of wilfully causing unnecessary pain, suffering or injury to an animal under s. 446(1)(a) (now s. 445.1(1)(a)) requires proof of subjective foresight of suffering or injury.

[55] The Respondent also provided the court with Professor Peter Sankoff's article "The Mens Rea for Animal Cruelty after R. v. Gerling: A Dog's Breakfast", Criminal Reports, 26 C.R. (7th) 267, which argues that the reliance by the *Gerling* court on the evidentiary presumption in s. 445.1(3) is misplaced. Professor Sankoff further argues that the proposition in *R. v. Clarke*, that objective foreseeability of the consequences is sufficient to prove the *mens rea* of the offence of wilfully causing unnecessary pain, suffering or injury to an animal under s. 446(1)(a) (now s. 445.1(1)(a)), is completely unsupportable. I note that this proposition has been followed in other cases in this province.

[56] While this ground of appeal can be disposed of on the narrow point of whether the *Gerling* approach to the issue of *mens rea* is correct and should be followed, I will first address the broader question of whether the offences under ss. 445.1(1)(a) and 446(1)(b) have a subjective or an objective *mens rea* requirement.

[57] In considering this question, I would first note that the *mens rea* requirement for certain offences under Part XI of the *Code* was addressed by our Court of Appeal in *R. v. S.D.D.*, 2002 NFCA 18. In that case, the issue was the nature of the *mens rea* that is necessary to support a conviction on a charge of arson under s. 433(a) or s. 434, and the Court of Appeal also decided whether S.D.D. should have been convicted of a charge of mischief under s. 430(1)(a) or s. 430(5.1)(a).

[58] In *S.D.D.*, the Court of Appeal adopted the following statement of the law as explaining the distinction between the subjective and objective *mens rea* standards:

> [22] In writing for the majority in R. v. Creighton 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3, McLachlin J. restated her views as to the distinction between the two standards. They are clearly expressed, at p. 58, as follows:
>
> By way of background, it may be useful to restate what I understand the jurisprudence to date to have established regarding crimes of negligence and the objective test. The *mens rea* of a criminal offence may be either subjective or objective, subject to the principle of fundamental justice that the moral fault of the offence must be proportionate to its gravity and penalty. Subjective *mens rea* requires that the accused have intended the consequences of his or her acts, or that knowing of the probable consequence of those acts, the accused have proceeded recklessly in the face of the risk. The requisite intent or knowledge may be inferred directly from what the accused said or says about his or her mental state, or indirectly from the act and its circumstances. Even in the latter case, however, it is concerned with "what was actually going on in the mind of this particular accused at the time in question": L'Heureux-Dubé J. in *R. v. Martineau, supra* at p. 655, quoting Stuart, *Canadian Criminal Law*, (2nd ed. 1987), at p.121.
>
> Objective *mens rea*, on the other hand, is not concerned with what the accused intended or knew. Rather, the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated. Objective *mens rea* is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably.

[59] The wording of the statutory provisions at issue in this appeal require that the Respondent must have "wilfully" caused unnecessary pain or suffering, and "wilfully" neglected or failed to provide food, water and shelter:

> 445.1 (1) Every one commits an offence who
>
> > (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird; [Emphasis added]
>
> 446 (1) Every one commits an offence who
>
> > (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it. [Emphasis added]

[60] In such circumstances, s. 429(1) of the *Code* is applicable, and provides:

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

[61] Case law establishes that where a provision of the *Code* uses the term "wilfully" in referencing the mental element of an offence, Parliament is generally referring to a subjective *mens rea* requirement. In relation to the specific offences under Part XI of the *Code*, including s. 445.1(a) and s. 446(1)(b), s. 429(1) extends the meaning of "wilfully" to deem it to also include circumstances where the accused commits the act or omission with subjective knowledge of the probable consequences, and is reckless as to whether an event or injury will occur. As *S.D.D.* provides, "recklessness" under s. 429 is still concerned with "what was actually going on in the mind of this particular accused at the time in question".

[62] In *Newfoundland Society for the Prevention of Cruelty to Animals v. Higgins* (1996), *supra*, a case on appeal under s. 813 of the *Code* from the acquittal of the Respondent Higgins, Green, J. considered the *mens rea* of the offence under s.

446(1)(a) of the *Code* (now s. 445.1(1)(a)). The *mens rea* issue raised on that appeal was whether the trial judge had erred in his interpretation of "wilfully" and failed to recognize that the term included "recklessness".

[63] Green, J. found that the *mens rea* of the offence under s. 446(1)(a) of the *Code* was determined on the standard of subjective foreseeability, not on the objective standard of reasonableness. He also concluded that the language of s. 429(1) reinforced the subjective element of the mens rea analysis by use of the word "knowing". At paragraph 12, Green, J. concluded that the trial judge correctly applied a subjective test to determine the *mens rea* of the offence:

> [12] In this case, the trial judge expressly addressed whether Mr. Higgins had the requisite awareness of consequences and concluded on the evidence that he did not. He rightly applied a subjective test and did not judge Mr. Higgins against an objective standard of reasonableness. He committed no error of law. This ground of appeal fails.

[64] Based on these authorities I conclude that the *mens rea* of the offences under s. 445.1(a) and s. 446(1)(b) of the Code is subjective, and requires that the Crown prove that the accused intended the consequences of his acts, or that knowing of the probable consequences of those acts, the accused proceeded recklessly in the face of the risk. With great respect, I find based on the same authorities that the proposition in *R. v. Clarke* that objective foreseeability of the consequences is sufficient to prove the *mens rea* of the offence under s. 445.1(a) of the *Code* (and the offence under s. 446(1)(b) of the *Code*) is not a correct statement of the law in this province.

[65] The Crown does not argue that a full objective fault *mens rea* analysis is required for the offences under ss. 445.1(1)(a) and 446(1)(b). Rather it argues that where there is no evidence to the contrary then the *Gerling* approach applies, which relies upon the text of the evidentiary presumption in s. 445.1(3) to elucidate an objective mental element of the offence in s. 445.1(a). The Crown further argues that in this case there was no "evidence to the contrary" for the trial judge to consider.

[66] The reasoning in *Gerling* that s. 445.1(1)(a) requires an objective *mens rea* where there is no evidence to the contrary is not lengthy. Having referred to the wording of s. 445.1(3) Chiasson, J. then states, at paragraph 27:

> [27] In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct and s. 429(1) of the *Criminal Code* applies. It engages a subjective element: "knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not". [Emphasis added]

[67] In my view, reliance upon the wording in s. 445.1(3) to find an objective *mens rea* requirement in s. 445.1(1)(a) without reference to the wording of the section is misplaced. I agree with Professor Sankoff that s. 445.1(3) is designed to make it easier for the Crown to prove wilfulness "*for the purpose of proceedings under paragraph (1)(a)*", but the evidentiary presumption is not intended to be a provision that determines, or alters, the required mental element of the offence in s. 445.1(a). I take the same view of the purpose of s. 446(3) as it relates to s. 446(a).

[68] Evidentiary presumptions such as these two clauses are found in different places in the *Code*. For example, s. 348(2)(a) of the *Code* provides that proof that a person broke into and entered a place is, in the absence of evidence to the contrary, evidence sufficient to establish that the person intended to commit an indictable offence in the place. Proving that the person broke into and entered a place, absent evidence to the contrary, establishes the *mens rea* for the offence under s. 348(1)(a). The presumption makes it easier to prove the *mens rea*, but the absence or presence of evidence to the contrary does not change the required *mens rea* of the offence of break and enter with intent under s. 348(1)(a). The same situation pertains with respect to the *mens rea* requirement in offences under Part XI of the *Code*. As Professor Sankoff argues, if the presumption operated in the manner argued for by the Crown it could potentially make it more difficult to convict a person under s. 445.1(1)(a), not less difficult, which is the clear intention of Parliament.

[69] With great respect, I am unable to agree that the correct approach to be applied for determining the *mens rea* element in s. 445.1(1)(a) and s. 446(1)(b), when there is no evidence to the contrary, is set out in *Gerling*. I therefore decline to follow the approach to the question of *mens rea* under s. 445.1(1)(a) that was adopted by Chiasson, J. in that decision.

[70] The Crown argues that there was no “evidence to the contrary” placed before the trial judge by the Respondent. Again, I disagree. When the evidentiary presumption in s. 446(3) was considered in *Newfoundland Society for the Prevention of Cruelty to Animals v. Higgins*, Green, J. found that the evidence of subjective motivations of the accused, which was considered by the trial judge, was “evidence to the contrary” which rendered the application of s. 446(3) unnecessary:

> [18] No cases were cited as to the meaning and scope of s. 446(3). While I am inclined to the view, espoused by counsel for the respondent, that this subsection applies normally to a situation where there is a pattern of general conduct indicative of lack of reasonable care which results in injury or suffering and not to a situation where the only evidence relates to the specific act which forms the basis of the charge, it is not necessary to determine this issue here. Section 446(3) only applies "in the absence of any evidence to the contrary". Here, the trial judge considered the evidence of the accused, including his explanation of his motivation for his actions and concluded that he did not intend to injure the cat and that he did not have an awareness that his actions might have injurious consequences. On that basis he concluded that any injury was not caused "wilfully" within the meaning of s. 429(1). That was evidence to the contrary rendering the application of s. 446(3) otiose.

[71] I conclude that “evidence to the contrary” under s. 445.1(3) includes any properly admissible evidence that tends to show that the Respondent did not “wilfully” cause unnecessary pain, suffering or injury to the dogs and “evidence to the contrary” is not limited to evidence tending to show the Respondent acted reasonably. In the context of s. 429(1), which extends “wilfulness” to include “recklessness”, I conclude that “evidence to the contrary” includes evidence that the Respondent did not act recklessly, but was merely careless. As evidence tending to show that the Respondent was merely careless would not amount to evidence of his reasonable care and supervision of the animals it follows that I also reject the argument of the Crown that only evidence of reasonable care or supervision of an animal can amount to “evidence to the contrary” under s. 445.1(3) and rebut the presumption.

[72] I am unable to discern any legal error in the approach adopted by the trial judge to the determination of the *mens rea* necessary to support a conviction under s. 445.1(a) and s. 446(1)(b). In my view she applied the correct approach despite having not had access to the additional authorities provided to this court which discuss the *mens rea* in animal cruelty cases.

[73] In her reasons in relation to the mental element of s. 446(1)(b), which the trial judge correctly addressed without reference to the evidentiary presumption, the trial judge found the Crown was required to prove that the Respondent had acted "wilfully" in his failure to provide the beagles with adequate food and water, which she equated to the Respondent having a subjective intention to cause the prohibited consequences, and she further found that as a result of s. 429(1) she was also required to consider whether the conduct of the Respondent amounted to "recklessness". The trial judge then adopted a definition of recklessness from *Robinson* which held it is made out "when an individual who is aware that her conduct could bring about criminal consequences nevertheless persists in that conduct despite the risk" and described recklessness as a "conscious disregard of a substantial and unjustified risk that one's conduct will result in prohibited consequences".

[74] The trial judge in my view properly considered the evidence of the Respondent, as summarized by me in paragraphs 18 and 20 above, on the issue of whether he had acted "wilfully", which under the extended meaning of that term as set out in s. 429(1) includes "recklessly". Based on this evidence which she accepted was truthful, the trial judge held that the Crown had not proved the mental element of s. 446(1)(b) beyond a reasonable doubt.

[75] Under s. 445.1(a), to which the evidentiary presumption in s. 445.1(3) was applicable, the trial judge found that she was satisfied the Respondent had rebutted the evidentiary presumption under s. 445.1(3) and that his evidence created a reasonable doubt that the Respondent had either subjectively or objectively "wilfully" caused unnecessary pain, suffering or injury to the animals.

[76] I find that the trial judge did not err in applying the law in determining the question of the *mens rea* element of the offence under s. 445.1 (1)(a) or in relation to s. 446(1)(b).

[77] The first ground of appeal is therefore dismissed.

Issue 2: Did the Trial Judge Err in Failing to Find the Dogs were "Suffering"

[78] The second ground of appeal in the Notice of Appeal states that the trial judge erred in law by finding the condition of the four dogs did not amount to "suffering" under s. 445.1 of the *Code*.

[79] The Respondent submits that this ground of appeal mischaracterizes the finding of the trial judge, which was that the Crown had not proven beyond a reasonable doubt that the animals were "suffering."

[80] The Crown submitted that because the erroneous finding was made on an essential element of the offence under s. 445.1 it amounts to a legal error. The Crown did not provide the court with any authority in support of this submission. The Respondent submits that whether "suffering" was caused to an animal under s. 445.1 of the *Code* is always a question of fact, citing *R. v. Menard*, 1978 CarswellQue 25, [1978] C.A. 140 at para. 43.

[81] The trial judge concluded that the Crown had not proven beyond a reasonable doubt that the animals were in fact experiencing pain and suffering, which the trial judge found was an essential element of the offence under s. 445.1(1)(a). I find that this ground of appeal involves a question of fact.

[82] The standard of review is clear. To warrant appellate interference with a factual finding made by the trial judge the Crown must demonstrate it was clearly wrong, unsupported by the evidence or otherwise unreasonable, and it affected the outcome of the case.

[83] The Crown submits that a review of the evidence in the record, including the photographs showing the distressing condition of the animals, demonstrates that the trial judge's finding that the dogs were not suffering was perverse. The Respondent submits that the trial judge was best placed to weigh all the evidence, including the photographs, and that her conclusion on the factual question of pain and suffering

should not be disturbed unless there is a showing of a "palpable and overriding error" which the Respondent characterizes as a clear, obvious error that goes to the heart of the case.

[84] In reaching the conclusion that the Crown had not proven beyond a reasonable doubt that the animals were "suffering", the trial judge referred in the trial reasons to the evidence in support of the Crown's position that the dogs were suffering, including the photographs of the animals, and to other evidence suggesting that, but for their extreme emaciation, the dogs were otherwise in good health on the date of the offence and were not "suffering".

[85] A review of the record shows there was evidence in the record before the trial judge to support the factual finding that the Crown had not proven that the dogs were in fact "suffering". In particular the record included the evidence of Dr. Rahlan who testified that when he examined the dogs their mouths were healthy, their teeth were fine and their blood work was fine and, but for their emaciation, they were in surprisingly good health. There was also evidence about the active and excited behavior of the dogs which was inconsistent with what the Crown's expert testified would be expected if an animal was suffering. I therefore find that there was evidence in the record to support the trial judge's factual finding, and there was some evidence which could reasonably have supported the trial judge's factual inference on the question of pain and suffering.

[86] As to whether the factual finding or factual inference was clearly wrong, or otherwise unreasonable, the thrust of the Crown's argument is based on the photographs of the dogs. The trial reasons make clear that the trial judge was aware of the impact of the photographs and acknowledged that it was very difficult not to be emotionally affected by the pictures of the dogs. The trial judge correctly held however that pieces of evidence are not to be evaluated in isolation from each other, it is the totality of the evidence that the trial judge must consider to determine whether an offence is made out on the criminal standard of proof.

[87] It is well-established that the factual findings and inferences of trial judges are entitled to significant deference. That principle has added force where the Crown

appeals an acquittal resting upon a trial judge's conclusion that the evidence is not sufficient to prove the case beyond a reasonable doubt. This follows from the very nature of the concept of reasonable doubt, which rests upon a nuanced judgment about the sufficiency of the evidence, rather than on the foundation of factual findings that is required to support a conviction: see *R. v. Walker*, 2008 SCC 34 at para. 26.

[88] Another judge might well have come to a different conclusion on this evidence. However, it was the trial judge who heard the evidence and saw the witnesses and it was for her to make the decision on whether the evidence on this element of the offence met the criminal standard of proof. The trial judge held that the Crown bears a significant burden when it seeks to have an individual convicted of a criminal offence, and that emotions can play no part in that analysis. I would not gainsay either her approach or her conclusion on this difficult question.

[89] In summary, the Crown has not shown there was no evidence to support the trial judge's factual finding, or that the trial judge was clearly wrong, or reached an otherwise unreasonable finding, on the question of pain and suffering. Put another way, the Crown has not established that the trial judge committed palpable and overriding error in finding that the Crown did not prove the animals were "suffering." The second ground of appeal is therefore dismissed.

Issue 3: Did the Trial Judge Fail to consider all the Evidence on "Wilfulness"

[90] The third ground of appeal is that the trial judge failed to consider all the evidence in determining whether the Respondent's conduct met the standard of "wilfully causes" under s. 445.1(1)(a), or "wilfully neglects" under s. 446(1)(b). As I noted above, this argument was not pressed by the Crown before me.

[91] The Court of Appeal has confirmed that it is an error of law for a trial judge to fail to consider relevant evidence when deciding a material point, or when deciding the ultimate issue (See: *R. v. Blanchard*, 2022 NLCA 15 at para 47).

[92] The Crown did not however provide any specific examples of evidence which were not considered by the trial judge. The argument as presented appeared to be that the trial judge disregarded the totality of the evidence in reaching the conclusion that the Crown did not prove beyond a reasonable doubt that the Respondent "wilfully caused" suffering to the animals or "wilfully neglected" the animals. The Crown appeared to argue that this Court should undertake a review of the trial judge's conclusion on the issue of "wilfulness" in the context of the totality of the evidence.

[93] This amounts to an invitation to either reassess the evidence at trial for the purpose of determining guilt or innocence, which I have a duty not to do, or to reweigh the evidence and substitute my view for that of the trial judge on the question of "wilfulness", which on the most liberal view of the issue raises a question of mixed law and fact that would require a showing of palpable and overriding error.

[94] I have been shown no basis on which the trial judge committed a reversible error under this ground of appeal. The Crown did not provide any examples of evidence which was not considered by the trial judge on the question of "wilfulness" or demonstrate how the trial judge committed a palpable and overriding error. The trial judge accepted the evidence of the Respondent, including the evidence that despite his efforts someone was letting the dogs out of their kennels impacting the Respondent's ability to adequately feed them. The trial reasons indicate that when the evidence was considered in its totality, the trial judge found that the burden of proof was not met by the Crown and it did not sustain a criminal conviction.

[95] In my view the argument the Crown made before me simply brought home that there were good points to be raised on both sides of this difficult case. The trial judge was in a privileged position, by virtue of hearing the evidence, to assess the credibility of the witnesses, and to decide whether, on all the evidence, the Crown had proven the "wilfulness" element of the offences on the criminal burden of proof. I have been shown no basis on which an appeal court with limited latitude to reweigh such an issue should interfere with the conclusion of the trial judge.

[96] I have concluded that the third ground of appeal must be dismissed.

Issue 4: The Sufficiency of the Trial Judge's Reasons

[97] The fourth ground of appeal is that the trial judge failed to give sufficient reasons for rejecting the evidence of the expert witness, and for finding that the evidence of the Respondent raised a reasonable doubt. Again, this argument was not pressed by the Crown before me.

[98] This ground of appeal involves an analysis of the trial reasons in accordance with the law on the sufficiency of reasons. The law with respect to the sufficiency of a trial judge's reasons is concisely summarized in *Vokurka* at paragraphs 26-27:

> [26] In *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, McLachlin C.J. explains that a trial judge's reasons are sufficient if they "fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review" (paragraph 15). She elaborates at paragraph 18 that the degree of sufficiency required for this test to be met "does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict". In so doing, she adopts Doherty J.A.'s statement in *Morrissey*, found at page 525:
>
> [18] A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. <u>They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.</u> [Emphasis added].
>
> [27] The Chief Justice further explains that a judge is not required to "expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned" (paragraph 20).

[99] The trial judge gave detailed oral reasons for her acquittal of the Respondent, amounting in total to 32 pages in the transcript placed before me. There is no doubt from my review of the trial reasons that they generally provide the reader with a clear road map showing what was decided and why, and that they permitted effective appellate review.

[100] The Crown argues that the trial judge failed to provide adequate reasons for finding that the evidence of the Respondent raised a reasonable doubt. In making this argument, the Crown must overcome the trial judge's express acceptance of the Respondent's evidence as truthful, describing it as internally consistent and, when tested against the evidence of the other witnesses, externally consistent.

[101] A review of the record, and in particular the evidence of the Crown witnesses, Leslie Squires, and the Defence witness, Elizabeth Churchill, confirms there was an objective basis for this credibility finding. Having set out the evidence in detail, including the finding that someone was letting the dogs out of their kennels impacting the Respondent's ability to adequately feed them, the trial judge concluded that the Respondent did not subjectively intend to neglect the dogs, and that while the Respondent had overestimated his ability to bring the dogs back to health, his behavior did not amount to "recklessness".

[102] In my view, the trial judge provided sufficient reasons regarding the finding that the Respondent was credible, considering that assessing credibility is not a science and the factors which make an impression on a trial judge may be difficult to express. The basis for the trial judge's credibility finding with respect to the Respondent, and her conclusion on the sufficiency of the evidence, is evident in the record and the trial reasons. This part of the Crown's argument must be dismissed.

[103] Finally, I will address the argument that the trial judge failed to explain why she rejected some of the evidence of the expert that the dogs were suffering, having found her evidence to be credible. This argument may also be dealt with summarily.

[104] The law is that as the trier of fact the trial judge can accept none, some, or all of the evidence of any witness, including the evidence of an expert witness. There is no requirement that having accepted some of the opinion evidence of an expert that the trial judge must accept all of it. In this case, the trial judge qualified Dr. Rogers as an expert to provide opinion evidence. The trial judge then accepted some of the opinion evidence of the expert in concluding that the animals had not been adequately fed or watered, and in concluding that the failure to feed and water them was a marked departure from the norm.

[105] The trial judge did not accept the expert's opinion that the animals were "suffering" and stated her reasons for this conclusion. The reasons included that Dr. Rogers, unlike Dr. Rahlan who did not say the dogs were suffering, did not herself examine the dogs and had relied upon the photographs and the reports of Dr. Rahlan. The trial judge further noted that Dr. Rogers had testified that when dogs were suffering from emaciation they would likely be curled up in a ball in an effort to conserve energy. The trial judge found, based on evidence of the Beagle Paws witnesses, that the dogs were active and barking when they were removed from the kennel on September 21, 2018, and that one of the animals was so agitated and active that it took some time for him to be removed from the kennel.

[106] The trial judge's ultimate conclusion was that the totality of the evidence was legally insufficient to sustain a criminal conviction. The trial judge found that while there was some evidence suggesting that the dogs were suffering, there was also evidence that, but for their extreme emaciation, the dogs were otherwise in good health. According to the trial judge, "(t)his is not proof of the standard of beyond a reasonable doubt" that the dogs were "suffering". The trial reasons explain why the Respondent was acquitted and provide public accountability.

[107] The fourth ground of appeal must be dismissed.

SUMMARY AND DISPOSITION

[108] For the reasons outlined above, I find that:

1) the trial judge did not commit a reviewable legal error in her analysis of the issue of *mens rea* under s. 445.1(a) and s. 446(1)(b);

2) the trial judge did not commit a reviewable factual error in finding that the Crown did not prove beyond a reasonable doubt that the dogs were "suffering" under s. 445.1(a);

3) the trial judge did not fail to consider relevant evidence bearing on whether the Respondent had acted “wilfully” under s. 445.1(a) or s. 446(1)(b); and,

4) the trial reasons were legally sufficient.

[109] I would like to thank counsel for their comprehensive briefs which were of great assistance.

PETER A. O'FLAHERTY
Justice