COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Gerling,*
2016 BCCA 72

Date: 20160217
Docket: CA41853

Between:

Regina

Respondent

And

Melvin Leonard Gerling

Appellant

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Savage
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated December 10, 2013 (*R. v. Gerling*, 2013 BCSC 2503, Chilliwack Registry 60138).

Counsel for the Appellant:	D. Petri
Counsel for the Respondent:	L. Ruzicka
Place and Date of Hearing:	Vancouver, British Columbia November 5, 2015
Place and Date of Judgment:	Vancouver, British Columbia February 17, 2016

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Mr. Justice Savage
The Honourable Mr. Justice Fitch

Summary:

Mr. Gerling was convicted of one count of wilfully causing unnecessary pain, suffering or injury to an animal contrary to s. 445.1(1)(a) of the Criminal Code and one count of wilfully neglecting or failing to provide suitable and adequate food, water, shelter or care contrary to s. 446(1)(b) of the Criminal Code. The trial judge applied an objective test to the applicable mens rea. He accepted the opinion evidence of an expert witness who testified that the animals were in distress, that their condition would have taken a considerable time to develop and would have been apparent to a reasonable person. Mr. Gerling testified. The judge did not expressly reject his testimony and did not outline the analysis mandated by R. v. W.(D.). Held: appeal dismissed. Pursuant to s. 445.1(3) of the Criminal Code in the absence of any evidence to the contrary, evidence that a person failed to exercise reasonable care is proof of wilfulness for the purposes of s. 445.1(1)(a). The presumption does not apply to s. 446(1)(b). Section 429 defines conduct that is deemed to be wilful. In the absence of evidence to the contrary the mens rea applicable to s. 445.1(1)(a) is objective. Where there is evidence to the contrary, s. 429 applies and a subjective element is engaged. It applies to s. 446(1)(b). It is questionable whether Mr. Gerling's evidence was evidence to the contrary, but assuming it was, the judge erred in applying an objective test to both counts. The error caused no substantial wrong or miscarriage of justice because on Mr. Gerling's own evidence his conduct was wilful. The judge was not obliged to outline the W.(D.) analysis. Acceptance of the expert's evidence necessarily was a rejection of Mr. Gerling's evidence.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] Among other things, this appeal addresses the *mens rea* element of certain animal cruelty provisions of the *Criminal Code,* R.S.C. 1985, c. C-46, the obligation of a trial judge to assess evidence to the contrary adduced by an accused and the appropriateness of the seizure of animals by animal protection authorities without giving the owner of the animals an opportunity to relieve their distress.

Background

[2] Mr. Gerling operated a dog breeding facility in the British Columbia Fraser Valley. Between 2006 and September 2010, representatives of the British Columbia Society for the Prevention of Cruelty to Animals ("BCSPCA") issued 23 orders with respect to animals on Mr. Gerling's properties. The orders sought remedial efforts to

address asserted problems in the care of animals. A significant number of the orders concerned nails, teeth and grooming. Mr. Gerling complied with the orders, although not always in a timely way.

[3] Following a 14-day trial, on December 10, 2013 Mr. Gerling was convicted of one count of wilfully causing unnecessary pain, suffering or injury to an animal contrary to s. 445.1(1)(a) of the *Criminal Code* and one count of wilfully neglecting or failing to provide suitable and adequate food, water, shelter or care contrary to s. 446(1)(b) of the *Criminal Code*.

[4] The convictions arose from the seizure of 14 dogs owned by Mr. Gerling from a property on Sumas Road near Abbotsford, British Columbia, by representatives of the BCSPCA. At the time, the dogs were boarded with Charles McPhate for one or two months after which they were to be given away.

[5] The BCSPCA official in charge of the operation, Constable Carey, testified that she was satisfied that Mr. Gerling could not or would not relieve the distress of the animals.

[6] The Crown adduced evidence from the persons involved in the seizure and the expert evidence of Dr. Steinebach concerning the condition of the dogs when seized and the time required to develop their conditions. The trial judge summarized Dr. Steinebach's evidence:

> [80] His report of September 27, 2010 was entered into evidence. The report included a summary which indicated that 13 of the 14 dogs had dental pathology requiring veterinary intervention with six of these requiring urgent care including treatment for pain and inflammation due to the severity and chronicity of the pathology.
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> [81] The scope of pathology was stated to include dramatic abscess pockets; loss of bone supporting tooth roots through prolonged chronic decay and infection; fractured teeth, including several teeth on different dogs where the crown was missing and the root fragments were retained with these fractures caused by inappropriate tooth extraction attempts; marked gingival recession which occurs secondary to very chronic infection or inflammation resulting in recession of the gum tissue exposing the underlying tooth roots and surrounding bone, dramatic accumulation of dental tartar, in many cases completely obscuring the underlying tooth structure; and unstable mobile

> teeth with the supporting bone around the roots weakened by infection/decay/inflammation.
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> [82] It was noted that a common denominator in all cases was the exceedingly chronic nature of the dental pathological changes, that degenerative dental pathological changes happen over a long period of time and the severity of the changes can give important clues to the chronicity.
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> [83] In Dr. Steinebach's opinion, in all the cases presented, it was reasonable to date the pathological changes to one year at least and most of the changes required significantly longer to develop than a year.
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> [84] He observed that all dental pathological changes that were noted caused pain very similar to pathology in human beings.
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> [85] In the case of the retained fractured root fragments this circumstance in his opinion was caused directly by whoever was the operator attempting the extraction of these teeth. He says ignoring the presence of root fragments is cruel as these structures cause pain due to exposure of the sensitive neural structures that are usually protected within the pulp cavity of the tooth which is exposed by the fracture.
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> [86] He also observed that most of the examined dogs required bathing due to fecal and urine coat staining and/or treatment for severe matting of the hair coat. He pointed out the lack of grooming and nail trimming leads to discomfort from dermatitis, presence of mats against the skin and the effect that long nails have on how the dog is able to walk on the so-affected feet. Most of the dogs did not have basic nail trimming performed and suffered from nails that were left so long as to cause lateral and medial deviation of the digits.
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> [87] Three of the dogs had chronic, painful, untreated, serious ocular pathology requiring further urgent medical investigation and treatment and on follow-up several of the dogs had ear mite infections. In some of these cases the ear canals were so heavily infested that the canals themselves were completely occluded with infective debris requiring deep video otoscopic flushing under anaesthesia. He noted again that the chronicity of these infestations are slow to develop and spread, taking many months to years to result in ear canal occlusion.
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> [88] Finally, he offered his opinion that the dogs were in pain from a variety of pain-inducing chronic conditions and as such were suffering and it would not be unreasonable for a lay person to be able assess with little experience the affected and to note the readily apparent pathology.

[7] Mr. Gerling testified that his animals were seen regularly by a veterinarian, Dr. Bath. Mr. Gerling attended at Mr. McPhate's property on at least two occasions when the dogs were there. He observed them from afar in order not to excite them. He saw no difficulties although he did upbraid Mr. McPhate for not having the dogs groomed. Mr. Gerling was present when the dogs were seized. He testified that

none of them had difficulty walking and that he did not see them wince in pain. He also stated that he would have taken them immediately to Dr. Bath and that he wanted them returned to him in order to do so.

[8] The trial judge accepted "the opinion of Dr. Steinebach as to how long the distress in these dogs had existed" and found "that Mr. Gerling acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize it was a likely result".

Relevant Legislative Provisions

[9] The following provisions are relevant to this appeal.

> The *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372
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> 11 If an authorized agent is of the opinion that an animal is in distress and the person responsible for the animal
>
> (a) does not promptly take steps that will relieve its distress…
>
> *The Criminal Code of Canada*, R.S.C. 1985, c. C-46
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> 429. (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.
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> …
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> 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;
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> (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.
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> …
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> 446 (1) Every one commits an offence who
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> …
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> (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.

Trial Reasons

[10] The trial judge rejected the Crown's attempt to rely on the previous orders issued by the BCSPCA representatives to Mr. Gerling to support the present charges. He stated:

> [58] At trial, the Crown conceded that there might be an issue about the Crown attempting to rely on a series of SPCA orders over many years to support criminal convictions when none of the orders issued were used at the time to support charges.
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> [59] The Crown suggested the court could consider only the inspection of the dogs at 406 Sumas Way, Abbotsford on September 22, 2010 and the seizure of the dogs from there on September 24, 2010 to support the criminal charges and that is exactly what I am going to do.

The judge then addressed the circumstances of the seizure.

[11] On September 22, 2010, Constable Carey and another officer went to Mr. McPhate's property. Mr. Gerling was not present. The judge noted:

> [64] She observed the 11 dogs which she described in terms that would indicate they were in distress as defined in the *Act*. They had soiled coats, long nails splayed and curled upwards, foul-smelling mouths, and all needed treatment for their teeth.
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> [65] One dog, Sydney, a black-and-white Shih Tzu, had white colouring in both its eyes, soiled coat, very long nails and stained paws with feces and urine. His eyes were the biggest issue.

[12] Constable Carey then swore an affidavit to obtain a search warrant stating "that there were reasonable grounds to believe there was an animal in distress in the premises" (reasons at para. 67). A warrant was issued authorizing representatives of the BCSPCA to enter the premises on September 24, 2010. Constable Carey with two other constables did so.

[13] After confirming that the dogs were still on the premises and in the same condition, Mr. Gerling was contacted and he came to the property.

[14] No orders were issued to Mr. Gerling that day. Constable Carey testified because she "considered that [Mr. Gerling] was incapable of taking care of these animals on the 22nd and 24th" (reasons at para. 71).

[15] Mr. Gerling contended that the seizure of the dogs under the warrant was illegal. He submitted that he was entitled to a reasonable opportunity to promptly take steps to relieve the animals' distress before the BCSPCA sought a warrant.

[16] The judge referred to this Court's decision in *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519. He stated:

> [106] The chambers judge had reached the conclusion that managing a large number of animals was beyond the ability of the appellant and turning to the second requirement of s. 11 that if the person responsible for the animals does not promptly take steps to relieve their distress, the chambers judge made reference to the decision of Madam Justice L. Smith in *R. v. Sudweeks*, 2003 BCSC 1960 where she said
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> > … to satisfy the test, the constable must form the opinion that "the person apparently responsible for the animals … had not taken and would not be able to take the steps necessary to relieve their distress (emphasis by chambers judge).
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> [107] Reference was also made by the Court of Appeal to the words of the chambers judge where she had said:
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> > Clearly, the Society is not bound by the Act to give a person a chance (time, opportunity) to relieve distress when there is no evidence on which to reasonably conclude that the person will be able to do so.
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> [108] In delivering the judgment of the Court of Appeal, Mr. Justice Chiasson said that the first task in determining whether the requirement for taking custody of the animals is met is to construe the clause "does not promptly take steps that will relieve distress".
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> [109] Reference was made again to the decision of Madam Justice Smith in *R. v. Sudweeks, supra*, where she said at para. 36:
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> > [36] … to satisfy the test, the constable must form the opinion that "the person apparently responsible for the animals … had not taken <u>and would not be able to</u> take the steps necessary to relieve their distress". … (emphasis in original).
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> [110] Mr. Justice Chiasson said that a review of the cases cited by the chambers judge shows that they are very fact specific but they all took a broad approach to the language of s. 11 which in his view was consummate with the scheme of the legislation. He said at para. 37:

> In my view, s. 11(a) must be given a broad purposive interpretation. The words "does not promptly takes steps that will relieve … distress" sometimes will lead to the authorized agent making orders and giving directions, in other circumstances he or she may conclude that the person responsible for the animals is unable to take the necessary steps or it may be apparent that the person is unwilling to take steps to relieve the distress. The cases referred to by the chambers judge illustrate these varied scenarios.
>
> I do not think the cases support the notion, advanced by the appellant, that, as a matter of law, in every case the agent must give the responsible person time in which to relieve the animals' distress. In some cases, as in the present case, it will be reasonable not to do so. The word "promptly" suggests a consideration whether the person can or will take the necessary action.
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> [111] In that case, while the authorized agent of the Society had not specifically said in her evidence that she held the opinion that the appellant could not relieve the animals of their distress, Mr. Justice Chiasson pointed out that the animals were seized and there was no suggestion in her evidence that she did not conclude that the appellant would not promptly take steps to relieve their distress and in the circumstances of the case he said it was reasonable to conclude that she did so conclude.

[17] The judge noted that Constable Carey testified that she believed Mr. Gerling was incapable of taking care of the animals and continued:

> [118] It is obvious from her description of the condition of the dogs when she saw them on September 22nd that they were in serious distress. Her comments about the incapacity of Mr. Gerling to care for these dogs would apply equally to Mr. McPhate.
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> [119] In my view, she was completely justified in her conclusion that these dogs could not have their distress relieved promptly by Mr. Gerling, nor in my view by Mr. McPhate, and had every right and duty to seize these dogs pursuant to the warrant on September 24th without having to give Mr. Gerling nor Mr. McPhate the opportunity to promptly relieve the distress.

[18] The judge rejected Mr. Gerling's allegations of breach of ss. 7 and 8 of the *Charter*.

[19] I referred previously to the judge's comments on the evidence of Dr. Steinebach. The judge also stated:

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

[20] Turning to a consideration of proof of the offences, the judge commented:

> [125] Mr. Gerling's counsel submits that on the evidence of the accused that he had no intention of harming these dogs and that it cannot be concluded that he wilfully caused unnecessary pain or suffering to the dogs or wilfully neglected or failed to provide suitable and adequate food, water, shelter and care for the dogs as the two charges against him allege.
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> [126] The Crown submits that by law, it is not necessary for the Crown to prove the accused subjectively wilfully caused unnecessary pain or suffering, or subjectively wilfully neglected or failed to provide suitable and adequate food, water, shelter and care for the dogs.

[21] He then referred to *R. v. Hughes*, 2008 BCSC 676 (when *Hughes* was decided s. 445.1(1)(a) of the current *Code* was s. 446(1)(a), and s. 446(1)(b) of the current *Code* was s. 446(1)(c)) stating:

> [127] It *is submitte*d that the decision of Mr. Justice Cole of this Court in *R. v. Hughes*, [2008] B.C.J. No. 973 makes it clear that it is not necessary for the Crown to prove subjective foreseeability of unnecessary pain or suffering or failure to provide suitable and adequate food, water and shelter, in order to support these charges.
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> [128] In that case, Mr. Justice Cole cited with approval the Newfoundland Provincial Court decision of *R. v. Clarke,* [2001] N.J. No. 191 where the Provincial Court judge had said that it was unnecessary for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under s. 446 of the *Code.*
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> [129] In that decision, the trial judge said the following:
>
> > It is not necessary therefore, for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under s. 446 of the *Code.* However, objective foreseeability of the consequences of the *actus reus* of s. 446 is constitutionally required. The definition of the word wilfully in s. 429 of the *Code* is, in my view, sufficient to comply with this constitutional requirement.
> >
> > The Crown does not have to prove any ulterior motive nor does the Crown have to prove that the accused knew that the animal was suffering or that he or she intended for the animal to suffer. The Crown must prove that the accused acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize that this was a likely result. In other words, objective foreseeability

> of the consequences of his or her act is sufficient. The accused's moral blameworthiness lies in causing the suffering by a wilful act…
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> This *mens rea* element can be proven by reasonable inferences from the accused's actions or through the doctrines of wilful blindness or recklessness see *R. v. Sansegret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at pp. 223-237 and *R. v. McHugh,* [1966] 1 C.C.C. 170 (N.S.C.A.).
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> As a result, section 446(1)(a) of the *Code* does not require proof that the accused intended to act cruelly or that he or she knew that their acts would have this result. Cruelty is a consequence, as is bodily harm under s. 267 of the *Code* (see *R. v. Dewey* (1999), 132 C.C.C. (3d) 348 (Alta. C.A.).
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> The objective foreseeability requirement must be tailored to the specific offence (see *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); *R. v. Swenson* (1994), 91 C.C.C. (3d) 541 (Sask. C.A.); and *R. v. Vang* (1999), 132 C.C.C. (3d) 32 (Ont. C.A.). Under s. 446(1)(a) of the *Code* the Crown must prove that "pain, suffering or injury" was a reasonably foreseeable consequence. Under s. 446(1)(c) of the *Code* the reasonably foreseeable consequence relates to the provision of inadequate "food, water, shelter and care" for the animal. The Crown does not have to prove that the accused intended this consequence.
>
> The *actus reus* of this definition of the offence requires proof that the accused caused unnecessary pain, suffering or injury to the animal. The *mens rea* requirement requires the Crown to prove that the accused did so "wilfully". In the context of s. 446(1)(a) of the *Code* this requires proof that the accused intended such a consequence or that a reasonable person would realize that his or her acts would subject an animal to the risk of unnecessary pain, suffering, or injury.

[22] The judge quoted s. 429(1) of the *Criminal Code* and concluded:

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

Positions of the Parties

[23] The appellant asserts that:

A. the judge erred in law in finding no subjective element in the *mens rea* requirement set out in s. 429(1) of the *Code*;

B. the verdict is unsupported and unreasonable because it does not assess the credibility of the appellant's testimony and other key evidence presented at trial;

C. the judge erred in fact and law in failing to find an abuse of process by the BCSPCA when they failed to comply with s. 11 of the *Act*:

D. the judge erred in fact and law in the weight he attributed to the evidence given by Dr. Steinebach in that he was not qualified to provide that evidence to the court;

E. the judge erred in law in failing to distinguish between a custodian and an owner under the *Code*.

[24] The Crown contends the judge did not err.

Discussion

Mens rea

[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.

Mr. Gerling's Evidence

[30] Mr. Gerling's second ground of appeal essentially is based on the judge's failure to undertake the analysis mandated by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In his reasons, the judge did not outline the *W.(D.)* analysis, but he was not required to do so (*R. v. Vuradin*, 2013 SCC 38 at para. 26).

[31] Mr. Gerling asserts that he adduced significant evidence to the contrary in accordance with s. 445.1(3) and that he was not reckless in his care of the dogs, but the judge did not address this evidence. He merely accepted the evidence of Dr. Steinebach. It is clear that the judge did not deal directly with the evidence of Mr. Gerling, but it is important to look at that evidence and the evidence overall.

[32] Mr. Gerling was convicted based on the condition of the 14 dogs that were apprehended. There was ample evidence that those dogs were in distress. Mr. Gerling appeared to suggest that the dogs were not in distress. In his evidence in-chief he stated that he did not see any of the dogs limping or having difficulty walking and did not notice any of them wince in pain. He did not address the specific concerns expressed by Dr. Steinebach and Constable Carey.

[33] He did not state that he did not know the dogs had the problems identified by Dr. Steinebach and Constable Carey. Indeed he appeared to have recognized some of the issues because he upbraided Mr. McPhate for not cleaning up the dogs. He also suggested that he would have taken the dogs immediately to Dr. Bath when they were seized although he testified that he was content to have Mr. McPhate wait until October to do so.

[34] Mr. Gerling gave no evidence of care that would have obviated the problems: serious dental issues; severe matting; overgrown nails; mite infections; eye infection. He testified to his general approach to his animals and to a February 2010 dental

inspection by Dr. Bath, which was approximately eight months before the apprehension of the dogs. I question whether this was evidence to the contrary relevant to the reasonable care or supervision of the apprehended animals.

[35] It is clear that the judge accepted the evidence of Dr. Steinebach. That evidence established the deplorable state of the dogs. It also established the fact that any reasonable person would have noted their condition. Other evidence supported both that fact and the condition of the dogs. Dr. Steinebach's evidence also established that the condition of the dogs when seized would have developed over an extended period of time; an extended period of neglect.

[36] If Mr. Gerling's evidence was not evidence to the contrary, there was ample evidence to establish that the neglect of the dogs was wilful.

[37] Insofar as it may be considered that Mr. Gerling did adduce evidence to rebut evidence of the absence of reasonable care and supervision, the acceptance of Dr. Steinebach's evidence was a clear rejection of Mr. Gerling's evidence insofar as it was relevant to the condition of the seized dogs and the care provided to them. No further explanation is required (*Vuradin*, at para. 13).

[38] The judge applied the definition of "wilfully" as set out in s. 429(1) of the *Criminal Code*. He specifically accepted the evidence of Dr. Steinebach "as to how long the distress in these dogs had existed". He concluded that Mr. Gerling knew that suffering was a likely result "or that a reasonable person would realize it was a likely result".

[39] Insofar as the judge applied an objective test, as he was entitled to do under s. 445.1 if there was no evidence to the contrary, there was ample evidence to support a conclusion that a reasonable person would have foreseen the risk and taken steps to avoid it and that Mr. Gerling's failure to do so was a marked departure from that standard of care; that is, that he acted wilfully.

[40] Insofar as the applicable test was subjective, Mr. Gerling's evidence offered no explanation for the condition of the dogs and showed that he was aware of their condition. His evidence does not affect the result.

Seizure of dogs – s. 11 *Prevention of Cruelty to Animals Act*

[41] Mr. Gerling contends that the judge erred in concluding that Constable Carey was justified in not giving him an opportunity to relieve the dogs' distress.

[42] The judge applied this Court's decision in *Ulmer.* It is not necessary in every case to give an owner the opportunity to relieve the stress of animals before they are seized. The Court will consider the evidence to determine whether it was reasonable to conclude that the owner was not capable of relieving the distress.

[43] The judge accepted the evidence of Constable Carey that she believed Mr. Gerling was not capable of caring for the dogs. In my view, there was ample evidence to do so. Although not relevant to prove the charges relating to the seized dogs, the long history of the BCSPCA's concerns with Mr. Gerling's operations informed Constable Carey's judgment. There is no evidence Mr. Gerling had a plan to relieve the distress. Indeed, his evidence was that he saw no distress, although that seems to be inconsistent with his evidence that he wanted to take them immediately to Dr. Bath.

Dr. Steinebach's Evidence

[44] Mr. Gerling asserts that Dr. Steinebach gave evidence outside the area of expertise for which he was qualified to testify. In particular he:

> … gave evidence on the pain experienced by animals in relation to humans, speculative evidence on the length of time the examined dogs' dental pathology had existed, and normative value judgments as to general concerns and knowledge of dog owners.

Dr. Steinebach's opinions on these matters were contained in his report and amplified in his testimony.

[45] The Crown tendered Dr. Steinebach as an expert in veterinary medicine “to give opinion evidence in the areas of animal health and husbandry”. Mr. Gerling unsuccessfully challenged Dr. Steinebach on the ground of bias. He did not deal with the scope of his expertise. Mr. Gerling did not object to the opinions expressed by Dr. Steinebach as being outside his area of expertise.

[46] In Dr. Steinebach’s testimony, comparison with humans was part of his description of how teeth function and the effect of infection. I consider this and his opinion on how long the dental pathology had existed to be well within the doctor’s expertise. The same can be said of his comments on the concerns and knowledge of dog owners.

[47] I see no merit in Mr. Gerling’s contention that the judge erred in accepting Dr. Steinebach’s opinions.

Custodian and Owner

[48] In the context of s. 446(1)(b) of the *Criminal Code*, Mr. Gerling submits that the judge erred in failing to distinguish between him and Mr. McPhate because the dogs were under Mr. McPhate’s care for 24 days. The simple answer to this contention is that the conviction of Mr. Gerling was based on the evidence of Dr. Steinebach as to the length of time the dogs had been in distress. It was much beyond the 24 days the dogs were under the control of Mr. McPhate.

Conclusion

[49] To some extent the focus of the parties at trial was diverted by the Crown’s reliance on the issuance of previous orders to support the charges before the Court. Mr. Gerling of necessity led much evidence showing that he complied with those orders and general evidence of his concern and care for his animals. This evidence had only tangential relevance as recognized by the trial judge.

[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] In my view, the grounds of appeal, apart from the *mens rea* issue, are without merit. Although the judge erred in his consideration of this issue, applying the correct test to the evidence and findings of fact of the trial judge, the conviction is unassailable. 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 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] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Fitch"