COURT FILE No.: Central West Region
Citation: *R. v. Pauliuk*, 2005 ONCJ 119

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

CINDY PAULIUK

Before Justice Zuraw
Reasons for Judgment released on April 7, 2005

Kathy Manes ..... for the Crown
Beth Bromberg ..... for the accused Cindy Pauliuk

ZURAW, J.:

[1] This is not a case about the horse that lived in a house. Nor is this a case about a private police force, empowered in cases involving animals to lay charges and seize property, using these charges or seizures to campaign for funds for their private coffers. Nor is this a case about that private "police" force having one of its "police commissioners" (board of directors) on a private retainer, called in on this case to help in the investigation, to certify the validity of animal seizures, and then paying that "commissioner" any bills rendered for these services.

[2] What this case is about is the condition of ten horses seized by the Hamilton-Burlington Society for the Prevention of Cruelty to Animals [S.P.C.A.] and whether that condition was inappropriate in fact and law, failing to meet the standard of care, and whether

that condition resulted from neglect by the accused. But, to get to the nub of this case, I must deal with those aforementioned issues, highlighted with what is truly some of the most bizarre evidence I have heard in close to 40 years, in a case that has cast doubt on the integrity of one of society's most respected institutions – the Hamilton-Burlington S.P.C.A.

[3] The case begins on July 30, 2003 with the attendance of then P.C. John Berney of the Hamilton Police Services due to a squabble between the accused, who was in the process of moving, and another female resident at the small farm they had shared. P.C. Berney's concerns moved from the initial dispute to the condition of horses the accused had on the farm. He testified to his belief that the paddock was too small, there was no pasture, he saw only one bale of what he described as mouldy hay, saw no hose leading to the water barrel and saw no barn. He could see the ribs of some of the horses and believed one of the horses seemed web-footed.

His concern was not matched by the accused who seemed more put out that the other lady, with whom she shared the residence, had a horse (albeit a small one) living in the house with her.

Just as Ms. Pauliuk did not share P.C. Berney's concerns, P.C. Berney did not seem to share Ms. Pauliuk's concerns, either about the horse in the house or the ten cats living in the basement. P.C. Berney called the S.P.C.A. only in relation to the horses outside in the paddock areas.

[4] Vivian LaFlamme, an inspector with the S.P.C.A., arrived about one hour after P.C. Berney first attended at the farm. She examined the animals and the paddock area. She took

photos of the horses and the paddock area. She believed the conditions in which the horses were "housed" was not appropriate and that the animals were undernourished. She saw no water and very little food. When she was dissatisfied with Ms. Pauliuk's responses concerning providing sufficient food, she advised she would be asking the veterinarian, who had already been called, to sign a certificate which would allow the S.P.C.A. to remove the horses.

In cross-examination, Ms. LaFlamme agreed that this breed of horse, Peruvian Pasos, were generally thinner than other breeds. She denied that she was the one to call CH-TV to publicize this event. Ms. LaFlamme was unable to recall if there were containers of water for the horses but did recall the only food available was the food that the horses were eating. Ms. LaFlamme testified that this incident had been used to help campaign for donations to the S.P.C.A. and that while the press releases she had approved, including those on the website, stated that the S.P.C.A. would be paying the bills to shelter and feed the horses, she admitted the S.P.C.A. would have sold the horses for more money than the cost of care if the accused had not paid the bill. She testified that her busy schedule prevented her from laying these charges against Ms. Pauliuk until January 16, 2004, almost six months later.

[5] Amanda Barrett, another inspector from the S.P.C.A., also testified, confirming that her observations and opinions coincided with those of Ms. LaFlamme. Ms. Barrett indicated that she had been asked by Ms. LaFlamme to assist in finding transport for the horses some time between 9:45 and 10:19 a.m. but before she could report any success or lack thereof, she discovered in arriving at the scene at 10:25 a.m. that Dr. Mogavero and Ms. LaFlamme were already taking steps to have Dr. Mogavero use his trailer to transport the

horses to his own farm.

[6] The only other witness for the Crown was the aforementioned Michael Mogavero, a Doctor of Veterinary Medicine. While both his integrity and competence were challenged by counsel for the accused, his qualifications to give expert evidence and opinion as to the care and treatment of horses were accepted by the defence. Dr. Mogavero is a duly qualified veterinarian with 25 years practice in that field – much of it dealing with horses, although he had never had any dealings with Peruvian Pasos, the breed in this case.

Dr. Mogavero testified that he was a member of the Board of Directors of the Hamilton-Burlington S.P.C.A., involved as a result in fund raising for them, had referrals from the S.P.C.A. on a daily basis, but that this request to come to a farm and certify removal of horses was a first for him.

[7] Dr. Mogavero testified that the following observations he made formed the basis for his opinion that the horses were neglected by reason of a lack of suitable and adequate food, water, shelter and care:

(i) The paddock area for the ten horses comprised less than a half acre. He testified five to seven acres was needed for each horse. Further, nothing green could be seen on any area accessible to the horses.

(ii) The fencing for the paddock was electric fencing – with the stallions located, albeit separate from one another, next to the mares. This was inappropriate.

(iii) No salt block was seen to be available.

(iv) No hay or other food was available and the hay he did see – possibly one or two bales at the side, appeared mouldy. He testified each horse needed 25 to 40 pounds of hay per day.

(v) Water tubs were available but not in overabundance – not for ten horses in midsummer.

Dr. Mogavero examined each horse and his report on each animal was filed. His course of treatment for each animal, including vaccinations, dental floating, hoof trimming, etc., was also placed into evidence. Referring to his examination of each horse and to pictures taken (also filed as exhibits) and to his medical records, Dr. Mogavero stated, in summary, as follows:

(i) One young horse, a weanling, was an animal in distress – hungry, uncomfortable in moving his feet.

(ii) Every horse had some problems – it was a matter of degree for each horse. Generally all the horses were unkempt excepting perhaps the stallions.

(iii) Some of the horses had ribs showing – proof of starvation or disease, in Dr. Mogavero's opinion.

(iv) Horses' hooves needed trimming – he believed they had not been attended to for six months.

(v) Although Dr. Robinson had, in fact, vaccinated two of the horses, Dr. Mogavero believed that none of the horses had been vaccinated.

(vi) Once the animals were boarded at his farm, they "never raised their heads from the pasture for three days" and all gained weight they needed to gain.

[8] Dr. Mogavero agreed that he took no objective measurements of the horses. He did not weigh them, either when seized, or when returned to Ms. Pauliuk. He took no measurements as to height, girth, body fat or anything else.

[9] Entered in as exhibits were pictures of the horses in question. Some of those pictures, especially 10'A', 10'C', 10'N', 10'O', 10'Q', (some of the pictures are of the same horse) confirm Dr. Mogavero's observations about the thinness of these horses in the pictures – and indeed the rib cage is noticeable through the coat in the case of two horses. Exhibits #2, 10'B', 10'D', 10'F', 10'H', 10'J', taken as part of the Crown's case, do show hay spread out for the horses at the accused's farm. Exhibit #4 shows at least one large water barrel with a horse apparently drinking from it. That same exhibit shows a lean-to of some size which could accommodate a number of horses. Shade trees are dotted throughout the paddock areas.

[10] Dr. Mogavero testified that while he normally gave a deep discount to the S.P.C.A., he did not in this case. His bill for attending at the farm in Ancaster on Book Road, his "professional service on site", his transportation of the ten horses to his farm in Copetown, examinations, vaccines, dental flotation, hoof trimming, de-worming, and board @ $15. a day per horse for 14 days, totalled $6,039.08. The S.P.C.A. paid this bill in full and were refunded in return in full by Ms. Pauliuk. He testified that although the horses were returned within two weeks to Ms. Pauliuk, they could have been returned sooner.

[11] Dr. Mogavero took the horses into his care on July 30, 2003, de-wormed them the same day and vaccinated them for rabies and tetanus on August 1, 2003. He agreed that horses that were sick or malnourished should await vaccinations.

[12] Cross-examination of the Crown witnesses made it clear that the defence believed the Crown case to be a litany of half-truths and exaggerations, publicity driven, financially motivated, and reliant on witnesses with obvious financial interests. Thus, the defence cross-examined this witness and led exhibits through this witness to show bias. This concluded the Crown case and the Defence elected to call evidence.

[13] James Silva, a professional farrier (or blacksmith) testified that he regularly attended to the accused's horses – trimming their hooves on average every three or three and a half months. His bill for the ten horses would be $200., unlike the $480 charged by Dr. Mogavero. His last trim of the horses would not have been as long as four months prior to their seizure. He stated that he had been asked to attend to the horses in their new abode, with their scheduled move being July 30, 2003, but had declined due to the distance he would have had to travel.

[14] Another horse owner, Henrica Forli, a friend of the accused, testified that she visited the accused at her farm anywhere from once to three times per week. She described a diligent feeding schedule for the horses, with a large water tub in a paddock with trees. A large covered lean-to was available for further shelter. She advised that on July 30, she was there to assist in the move that day of the horses from Ancaster to Cookstown and that some of the fencing, which created a paddock for the two foals, had already been removed, limiting the paddock size. An argument developed between the accused and the other

resident of the farm, who objected to the removal of the temporary fencing. The accused called the police.

This witness also testified that smaller water buckets had been put out for the horses and hay spread in the paddock for them. She said the foals were thin due to stress of recent separation from their mares but were neither starved nor neglected. She was surprised that, during the move, the vet put two stallions in his trailer with one of the mares. She said the hay was good hay, purchased from a local farmer, Marshall Thomas.

This witness could not believe that neither the police or S.P.C.A. were concerned that the other resident kept a horse on the main floor of the shared house with shavings on the floor between the kitchen and her bedroom, permitting the horse to defecate and urinate thereupon. It was her belief that the S.P.C.A. had already decided to seize Ms. Pauliuk's horses prior to the veterinarian attending.

[15] Marshall Thomas, a local dairy farmer, also testified. He advised the Court he knew the accused as a customer who bought hay from him. He was able to set out the amount of hay sold by him to Ms. Pauliuk in the three months leading up to July 29, as being close to 15,000 pounds. He testified there may have been some mould in the outer layer of the 280 pound bales but that the horses would pick through it – a common practice.

[16] Luis Fiallos, who has been involved in horses all his life, including Peruvian horses, wanted to purchase a Peruvian stallion (available for $7,000.) for his uncle in Nicarauga. His uncle owned Peruvian Pasos and the expressed reason for purchasing a horse from Ms. Pauliuk was to have outside blood for breeding. He focused, therefore, only on the stallions and saw nothing amiss in his visit to the farm in May of 2003.

These discussions led to an agreement to move the horses to a 25 acre farm, owned by this witness and his brother, in Cookstown which had pasture, a well for water but no hydro. Shelter was to be built within the week of arrival. The move eventually took place but only after the Barrie S.P.C.A. approved the farm location. Ms. Pauliuk sold nine of the horses to this witness and his brother for $20,000., which sum was inclusive of S.P.C.A. and boarding bills already paid by them.

[17] The last witness for the defence was Dr. Bruce Robinson, who testified that he graduated from the University of Guelph in 1976 as a Doctor of Veterinarian Medicine and has been in practice since then with his practice restricted basically to horses and cows. He is called on daily to deal with horses – in fact, he testified he has four or five horse calls every day in his practice. He, too, was qualified as an expert in the condition and care of horses, again with consent of both counsel.

[18] While Dr. Robinson did not see the horses on July 30, 2003, the date that they were seized, he had attended at the accused's farm on July 3 (27 days prior) at the request of the accused. He carefully examined and vaccinated the two foals. He saw the other horses in the paddock but did not examine them. He felt the younger animals were thin but seemed okay – they were growing in height and had not inappropriate weight. His perusal of the photos of the two younger horses, taken on July 30, did not change his professional opinion that the horses were adequately cared for. He testified he would have scored these two animals a "2" on a body score where "1" is poor, "2" adequate, "3" ideal, "4" overweight and "5" is "too fat".

[19] As to the other horses, he testified his study of texts on Peruvian Pasos indicated they were thinner than most breeds. He did not feel the pictures put to him from a copy of

the magazine Horse and Rider, entered as an exhibit, detracted from this opinion. He would have rated all the adult horses as above "2" on the body score scale. In his opinion, it would take two or three months for an undernourished horse to reach an appropriate weight – it could not be done in a few days or two weeks.

[20] He testified he saw no burrs, no bites, no thrush or dermatitis, no limping, no evidence of disease or injury. He said that a horse needed to be able to move around three hours a day to avoid colic and the paddock was satisfactory for that. If the horses were not being fed hay, and other food, a minimum of one acre of high quality pasture would have been needed for each horse.

He discussed the care of the horses with the accused and when advised that the horses were being moved at the end of the month to a twenty-five acre pasture, he approved. He felt the horses seemed adequately provided for in nutrition but not ideally, and was satisfied that pending the move to the large pasture, the horses were receiving and would continue to receive a grain supplement. He felt the presence of the large number of shade trees and the three-sided lean-to provided more than adequate shelter for the time of year. Like Dr. Mogavero, he felt the horses' hooves needed trimming but that there was no urgency to do so.

[21] The Crown now cross-examined the defence veterinarian – attacking his competence, his ability to give an opinion when not present on the actual day the horses were seized and, ultimately, suggesting he was biased. Why was he biased? Because he had seen the horses on July 3, 2003 and had done nothing – he needed to assert the animals were fine on that date or be seen to be incompetent or uncaring. Dr. Robinson agreed he had only seen the accused's farm once and treated the horses only once. He testified he would not have

vaccinated the two young horses, or any other horse, if they were sick or malnourished – this would have been poor medicine. He testified he had only appeared as a witness in court once before – in a case for the S.P.C.A. where he gave evidence on behalf of the Crown. In the final analysis, he saw no reason to seize the animals, and felt the medical procedures were either totally unjustified, premature, or needed only as a preventive measure when introducing strange horses to Dr. Mogavero's horse farm.

[22] When all is said and done, we have a conflict on the evidence as well as conflicting expert evidence interpreting the evidence – even that evidence which is not in dispute. It is for those reasons that the defence has aggressively pursued a line of questioning and a series of submissions attacking the neutrality/fair-mindedness of the Crown witnesses and putting its own witnesses on the stand.

[23] It is important to remember that I, as the trier of fact, am completely reliant on the observations of the witnesses who testified, the documents and exhibits filed and the opinions of those qualified by the court to give opinion evidence. And as I weigh that evidence, my role is to determine not what the situation might have been on the day in question but, rather, what the Crown, upon whom the burden of persuasion lies, has proven beyond a reasonable doubt. In weighing the evidence, I look at the ability of the witness to observe, recollect and articulate. I look at any oblique motive that may be present. I look at other evidence which confirms or belies the evidence or opinion of each witness.

[24] Let me address the factual submissions first, without any reference to bias or credibility. A number of specific points were raised, as I have set out above, which the Crown relies on to prove inadequate and unsuitable food, water, shelter and care:

I. **Shelter:** The Crown alleges that the paddocks provided were too small, improperly fenced and, instead of any greenery, were covered in manure. It is alleged also that no proper shelter from the elements was available.

The defence counters that the paddock was a holding area – not a pasture. The feeding of the animals was not dependent on greenery in the paddock and the horses had sufficient room to move about as their health required. Further, the electric fencing was in common usage on many horse farms and quite acceptable. The paddocks had treed areas, providing shade, and a large covered three-sided lean-to was available and accessible from the larger paddock area.

II. **Water:** The Crown alleges that while there may have been a large tub(s), there was no hose seen to permit the tub to be filled. No Crown witness checked the tub.

The defence witnesses testified that the tub had water and that there was a regular routine to water the horses. One of the witnesses testified that smaller water buckets were also placed around the paddocks for the horses.

III. **Food:** At least one witness for the Crown swore that there was no hay to be seen in the paddocks. Others testified there was only a little and it was mouldy. The expert evidence of the Crown was that the weanling had a body score of one out of five – indicating a lack of nourishment. The defence expert demurred – since the colt was recently weaned, some issues were to be expected – the colt however was nonetheless in adequate, if not ideal, condition. Other horses with higher body scores, two out of five or three out of five, were individually rated as well by the defence expert who, in each case, gave a more generous body score to the horses in question – albeit relying on the photographic exhibits of the horses, filed by the Crown.

Further, defence witnesses point to the hay which can clearly be seen in the photographic exhibits. This hay, according to the evidence, was of good quality and came from Marshall Thomas, a respected hay dealer. While there may have been an outer covering of mould, the horses would normally pick through this.

On this same issue, the Crown alleged that the amount of hay invoiced for by Marshall Thomas was insufficient – some 15,000 pounds over three months for eight adult horses and two foals. The defence submits that other feed was also given to the horses to supplement the hay.

Finally, the defence says that since the Crown expert testified it would be inappropriate to vaccinate a horse that was sick or undernourished, the fact that the Crown expert DID vaccinate all the horses within 48 hours of seizure should lead to the inference that the expert veterinarian did NOT believe the horses to be malnourished or sick.

IV. **Care:** The Crown alleges that the horses required attention to their teeth and hooves. Further, vaccinations and other medical procedures were required but not effected. I will not detail all the defence rebuttal but it is clear that two of the horses had been vaccinated and there was no veterinarian standard requiring other vaccinations of the adult horses at that point in time.

Further, the defence witnesses testified that there was no evidence of mouth sores that might indicate a need for the dental flotation (filing of the horses' teeth). As to the hooves, the farrier who testified said he attended to the foot care of the horses regularly and the veterinarian for the defence said that the hooves would soon need attention but there was no urgency.

The de-worming, fecal flotation and Coggins Tests were also the subject of some dispute. In the final analysis, the de-worming and fecal flotation were seen to be standard care but no symptoms indicating urgency were present. The Coggins Test was more for the protection of other horses who might later come into contact with the subject horses – including perhaps the horses on the farm of the Crown expert.

[25] Both counsel submit that I must be aware of possible "colouring" of the evidence by reason of bias or inability to observe on the date in question. The Crown alleges that the defence witnesses, such as the vet and the farrier, did not see the horses in their circumstances on the day of seizure nor in the days immediately leading up to that date. Further, Dr. Robinson would be on the defensive in his professional opinions as he had seen two of the horses considered most in distress and had taken no action. Other defence witnesses had commercial dealings with the accused (the hay dealer, the farrier, the purchaser of the horses) or was a friend (Ms. Forli).

[26] The defence characterizes the seizure as a "rush to judgement" by an overzealous S.P.C.A. seeking publicity to aid in its canvassing for funds. In this regard, the flowery public releases, which included requests for money, the instant interviews with local media, the claim that the S.P.C.A. would be required to pay all the expenses for the seizure and future care of the horses, were referred to. That the certifying expert was on the Board of Directors of the S.P.C.A., that he was also on a financial retainer, that he tendered a bill for over $6,000. and received payment in full, particularly irked the defence.

[27] Since the defence has raised the issue of the neutrality and fair-mindedness of the investigators, it would be appropriate to look at the role of the Ontario S.P.C.A. and its affiliates in cruelty to animal cases and, in particular, this case. The Ontario S.P.C.A. is a

privately incorporated company with shareholders. Those shareholders may purchase various classes of shares and vote for a board of directors. Neither the province nor municipality has a right of board membership. That board directs company policy and passes by-laws consistent with its aims. The company is exempt from taxation, permitted to raise funds and to use those funds as it deems fit, presumably as long as it is law abiding. The employees of this company have been granted unusual powers, powers which devolve to the local police agencies only if no local S.P.C.A. exists. Those powers which it holds are pursuant to the Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990 c.o. 36 as amended. These include the policing powers of investigation, right of entry onto private property without warrant [s. 12(2) of the Act], direct the removal of animals without judicial intervention, billing the owner for their costs, selling animals seized or destroying them. Any appeal lies initially to the Board of Directors of the S.P.C.A. Bearing the foregoing in mind, it would be more than appropriate to have transparent policies and procedures that prohibit bias and conflict, indeed it would appear to be imperative.

[28] It is well known that the local affiliate, the Hamilton-Burlington S.P.C.A., has surrendered its animal control programme and its funding to the City of Hamilton and now acts primarily in the field of investigating possible charges, [*Criminal Code* or *Provincial Offences Act*], pursuant to the *Ontario Society for the Prevention of Cruelty to Animals Act*. It hires its own agents and inspectors, determines the parameters of their employment, and using aforementioned police powers, enters property, seizes animals as in this case (without warrant or judicial intervention) and lays charges – all the while attending to its own need to fund raise. In order to do the latter, it relies heavily on the publicity it can glean from high profile seizures and charges. Indeed, there is a communications branch tasked with this. It is

a not-for-profit organization and a registered charity. Without publicity and high profile charges, the funds the S.P.C.A. needs to operate would no doubt dry up.

[29] It goes without saying that a strong and active enforcement of animal cruelty laws must be maintained. But I would be naïve to suggest that the current set-up could not foster the perception in reasonable, open-minded people, that bias may exist and that conflicts will result. However trite it may be, it is still true that 'Justice must not only be done, it must be seen to be done'. It is unfortunate, for example, that Dr. Mogavero, a highly qualified and well-respected professional, was placed in the position he was in this case. He directed the operation of the Society, he earned money from the Society, he helped fund-raise for the Society, he was concerned for the budgetary needs of the Society, he took part in the investigation, made the decision to seize the horses, made the decision to board and care for the horses, and profited from so doing.

[30] In the context of conflicting sworn testimony from witnesses of unblemished character, the addition of this perception to the Crown case is more than troubling. Since the Crown must prove its case beyond a reasonable doubt, a difficult task at the best of times, any issue of perception of bias or conflict strikes at the heart of a Crown's case. And it does so here.

[31] The evidence in this case, taken at its highest for the Crown even without being put through the filter of credibility assessment, does not meet the standard of proof required. The perception of bias that looms over all the Crown evidence of this case is like a stake to the heart – totally damaging the Crown's ability to prove its case.

[32] It would be unreasonable and dangerous to convict on this evidence and I refuse to do so. The charge is dismissed.

Released: **April 7, 2005**

Signed: The Honourable Mr. Justice A. Zuraw