

Citation: R. v. Jan and Craig Huisman
2007 BCPC 0132

Date: 20070424
File No: 49419-1
Registry: Chilliwack

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

Jan and Craig Huisman

**REASONS ON VOIR DIRE
OF THE
HONOURABLE JUDGE B.G. HOY**

Counsel for the Crown:	G. Lindsay
Counsel for the Defendant:	D. Pederson
Place of Hearing:	Chilliwack, B.C.
Dates of Hearing:	February 26, March 12, 13, 14 and April 3, 2007
Date of Judgment:	April 24, 2007

[1] The defendants are charged with causing cows and goats to be in distress, contrary to section 24 (1) of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, Chapter 372 (*PCA Act*). A warrant had been authorized pursuant to section 13 (2)(a) for the purposes of relieving the animals' distress. In this voir dire the defense challenges the reasonableness of the search and says that the defendants' section 8 charter rights have been breached.

The Law

[2] Section 13 of the *PCA Act* contains two types of warrants. The first authorizes access to property for the purposes of determining and then relieving an animal's distress and the second authorizes entry for the purposes of searching for evidence relating to an offense under section 24. The legislation allows for either or both types of warrants to be issued.

[3] In order to understand the distinctions and limitations between these two types of warrants a plain reading of the legislative scheme addresses two different purposes. On the one hand, a section 13 (2)(a) warrant contains remedial considerations which must also be read in conjunction with section 11.

[4] By section 11, if an animal is determined to be in distress and before any remedial action can be taken, there are two preconditions which must be fulfilled. It must be determined that the person responsible for the animals has not taken prompt steps to relieve its distress, or such person cannot immediately be found and informed of the animals' distress.

[5] A section 13 (2)(b) warrant is very specific and is directed solely towards the collection of evidence to support a prosecution against one who causes or permits an animal to be or continue to be in distress.

[6] There is a fine line between addressing the question of relieving distress and collecting evidence. It depends on the facts as to how the officers conducted themselves in the course of the execution of the warrant. There undoubtedly will be situations where the evidence gathered is only incidental to the primary objective of relieving distress. As well, there may be exigent circumstances which militates against obtaining a 13 (2)(b) warrant. However, if the main purpose is to gather evidence then a 13 (2)(b) warrant must be obtained otherwise the legislative scheme of preauthorization would become meaningless. The issue at stake is the individuals right to be free from the states intrusion into ones privacy. Balanced against this is the pursuit of law enforcement as authorized by the appropriate warrant. This is not unlike a search of a residence where evidence might be revealed which is beyond the scope of the original warrant. Depending on the seriousness of the Charter breach and other section 24 (2) considerations, evidence might be excluded. The obligation to obtain a further warrant might well be critical in the admissibility of any evidence gathered.

For convenience, the relevant sections of the *PCA Act* are set out as follows:

Relieving distress in animals

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, or

(b) cannot be immediately found an informed of the animals distress,

the authorized agent may, in accordance with section 13 and 14, take any action that the authorized agent considers necessary to relieve the animals' distress, including, without limitation, taking custody of the animal and arranging for food, water, shelter and veterinary treatment for it.

Authority to enter with a warrant

13 (1) An authorized agent who believes, on reasonable grounds,

(a) that there is an animal in distress in any premises, vehicle, aircraft or vessel, or

(b) that an offense under section 24 has been committed and that there is in any premises, vehicle, aircraft or vessel, any thing that will afford evidence of that offense,

may enter the premises, vehicle, aircraft or vessel with a warrant issued under subsection (2) for the purpose of

(c) determining whether any action authorized by this Act should be taken to relieve the animals distress, or

(d) searching for any thing that will afford evidence of an offense under section 24.

(2) A justice who is satisfied by information on oath in the prescribed form that there are reasonable grounds

(a) under paragraph (1) (a), may issue a warrant in the prescribed form authorizing an agent to enter the premises, vehicle, aircraft or vessel for the purpose of taking any action authorized by this Act to relieve the animals distress, and

(b) under paragraph (1) (b), may issue a warrant in the prescribed form authorizing an authorized agent to enter the premises, vehicle, aircraft or vessel for the purpose of searching for the thing that will afford evidence of an offense under section 24.

(3) A justice may issue a warrant under subsection (2) for either or both of the purposes referred to in that subsection.

(4) A warrant issued under subsection (2) is subject to the conditions specified in the warrant.

Findings of Facts – Re: Distress

[7] The defendants gave evidence on their own behalf in this voir dire. Jan Huisman is the owner of a five acre farm. His son Craig took care of the calves. He was given sick calves from other farmers. His plan was to make them well and sell them later at the auction. The warrant was executed on August 4, 2004 at which time all calves were removed, which totaled 40 in number along with 5 goats.

[8] The Information to Obtain (ITO) contains a multitude of complaints concerning the well-being of the animals. Various officers of the British Columbia Society for the Prevention of Cruelty to Animals attended the farm for inspection purposes. There are two time frames which are examined. October 30, 2003 until March 8, 2004 is the first period with the next spanning from July 30, 2004 until the date of the search on August 4, 2004.

[9] I do not intend to give a detailed recital of the officer's interaction with the defendants, but the following is a summary of the first time period. During this time frame three complaints were made by the public concerning lack of food, water and shelter for goats and calves. These complaints were spread out over a 4 1/2 month. Two occurred early in the time period, with the last on January 5, 2004. From October 30, 2003 until January 2, 2004 the officers had attended the farm on eight occasions. Concerns were expressed about the calves appearing skinny, were without food, appropriate shelter or bedding. Some of their stalls were overcrowded and required disinfection. A few of the calves were described as having diarrhea or were coughing. On occasion, the officers also noted dead calves. For the chickens, food and water was lacking as well as appropriate accommodations. They had poor body weight. Three dogs were carefully scrutinize and were described as being thin with their pens having an excess buildup of feces along with a lack of appropriate food, water and bedding. It is of note that the goats were of good body weight.

[10] As they conducted their investigation, various orders were made to remediate the health and well-being of these animals. Part of this included examination and consultation by the defendants' veterinarian. The veterinarian also reported to the officers as to the animals' progress. On November 26, 2003, the veterinarian advised the officer that one calf had died but the rest of the cattle were doing better. By December 1, 2003 there were significant improvements for the living habitat of all animals although the stalls for three field cows remained deep with manure. On December 2, the officer received a call from the veterinarian who described overall improvement in the condition and well-being of the calves and chickens although the dogs appeared thin, but their condition was being monitored. By January 2, 2004 the only order issued for remediation involved one dog named Sage.

[11] It is quite clear from the evidence that the defendants were cooperative and successfully met the demands of the officers. They had substantially improved the well-being of the animals over a two-month period.

[12] On January 5, 2004 another complaint was filed concerning dead/frozen calf parts found in her yard. This person was concerned about the goats and calves in the cold weather and access to unfrozen water. Other than the observation of three dead calves seen lying in the driveway on January 29, 2004, a review of the evidence does not establish any legitimacy to this complaint. Indeed the officer's subsequent investigation related only to the dog Sage.

[13] As I review the evidence it is fair to say that the defendants were feeling frustrated with the ongoing investigation by the officers. Phone calls were not being returned nor were they responding to notices to contact the officers, which had been left at their residence. After six attempts arrangements were finally made to examine the dog. On March 8, 2004, the dog Sage, which was the subject of the last order,

appeared in good condition and had suitable water and bedding. An examination of all other animals was also conducted and revealed they were in good condition, with the appropriate bedding, water and feed. It is evident that the officers were satisfied with the improvements and advised that they would re-check the animals in approximately 6 months.

[14] July 30, 2004 marks the commencement of the second time period under review which spans five days. On July 30, a complaint was made that a calf was observed not moving for over five hours. An officer attended the farm on that date, but no one was home. A notice was left at the door and mailbox to contact the officer. Later that day, telephone contact was established with Craig, who advised that one of the calves had pneumonia and was being treated with advice from his veterinarian. The officer told Craig that she would be at the farm the next morning for a visit but on her arrival on July 31, no one was home. She observed four calves in a trailer, which was set at an angle with the hitch on the ground. They appeared to be alert animals. Next to the trailer was a dead calf. Another notice was left at the door requesting the owner to contact the officer as soon as possible. Five hours later, the officer re attended the property and observed that these calves remained in the trailer. No one was home. A further notice to contact was left at the door of the residence. No one responded. On August 4, 2004, a section 13 (2)(a) warrant was issued.

[15] Special Provincial Constable Drever (SPC Drever) is a senior officer. She prepared the ITO and was the lead investigator. She attended the farm at 6:45 pm with two other officers of the SPCA, a member of the RCMP and Dr. Steinebach, a veterinarian. Upon their arrival, no one was at the residence. SPC Drever directed one of the SPCA officers to take photographs as the site was examined. She explained that this was for the purpose of assisting their memories of the scene. A cattle hauler arrived at 8:45pm and the officer's involvement concluded at 9:30 p.m.

[16] It is clear from the evidence that SPC Drever carefully examined all the animals throughout the farm. She did so by asking questions and listening to Dr. Steineback as he assessed each animal and based on his opinion she would make a decision as to whether or not the animal would be seized. The opinions he gave included advising that bedding was not acceptable or that the body condition of the animals was low. He would also point out the absence of water or hay. In one instance, he noted a calf had respiratory problems. While SPC Drever made some of her own observations such as excessive manure build up, she essentially relied on the opinions of Dr. Steineback in coming to the decision that the animals were in distress.

[17] I agree with the conclusions which she reached. Dr. Steineback was very thorough in his assessment of each animal and given the scours, or diarrhea, which was prevalent for all animals, generally poor body condition, crowded stalls, absence of dry bedding and lack of appropriate food or water, I conclude that a finding of distress is reasonable in all the circumstances.

Findings of Fact – Re: Section 11(a) and (b)

[18] The next step in assessing the evidence is whether or not section 11(a) and (b) of the PCA Act has been fulfilled.

[19] Craig Huisman was at work when he received a call from a neighbor at 6:45 p.m. that the SPCA were at his residence. He arrived at 7 p.m. There was little discussion between Craig and SPC Drever. He was advised that there was a warrant and to stay out of all areas that were being searched. After reading the warrant, Craig called his veterinarian who arrived within a half hour. He wanted his veterinarian to examine the animals, but SPC Drever refused his access stating that it was too late to call a vet. He also

asked to speak to Dr. Steineback, but was told not to interfere. It was described as an ongoing investigation.

[20] On the date of the search Jan Huisman was vacationing in Whistler. He received a call from his son and on speaking to SPC Drever; there was no discussion about relieving the animals' distress.

[21] From SPC Drever's evidence she noted that in spite of Craig's presence, this did not affect her decision to seize the animals. She did not consider any options other than removal. She explained the foundation for this position was based on his past conduct and his failure to remedy the problems as directed by the Orders.

[22] This is completely contrary to the evidence. The historical interaction confirms the Huismans had indeed complied with the Orders issued by the officers and did so within 2 months which is a reasonable length of time in the circumstances. The only outstanding issue focused on the dog Sage. While there was a period of inordinate delay in arranging a meeting to examine the dog, when it finally occurred all animals were healthy. As I earlier noted the Huismans explained they were frustrated with the numerous contacts made by the officers and their view they had done all that was necessary to address and ensure the well being of the animals.

[23] As I examine what occurred in the 5 days preceding the execution of the warrant, it is probably fair to say that Craig's lack of prompt response to the requests and notices to contact the officer aggravated the situation. His agreement to meet the officers and then failure to attend was a poor choice of judgment.

[24] The statutory requirements by section 11(a) and (b) places the onus on the officer to find the defendant and ensure he is given the opportunity to promptly take steps to relieve the animals' distress. In each instance reasonableness is the standard of review. See **Baker v British Columbia Society for the Prevention of Cruelty to Animals** (2006) B.C.J. No. 3414.

[25] I find that reasonable efforts were in fact made to contact the owner. However, SPC Drever failed to allow the defendant any opportunity to relieve the animals' distress. Her refusal to discuss any possible solutions to relieve distress, her refusal to allow the defendants veterinarian to examine the animals and her refusal to allow some discussion with Dr. Steinebach was unreasonable. This is especially so in light of their past interaction which, albeit with some difficulty in establishing contact, nonetheless confirms that the defendants were amenable and complied with the directions of the officers with the result that the animals distress was relieved. There is no factual foundation to say that the defendants would not promptly relieve the animals' distress.

Analysis

[26] The effect of SPC Drever's failure to address section 11(a), results in an unlawful search. As I examine the evidence it is very plain that the manner in which the search was conducted was in the nature of collecting evidence. While the officers stated that photographs were taken for the purposes of assisting their recollection, I find that given the manner of the search it was used as a method of recording evidence. Furthermore, SPC Drever relied primarily on Dr. Steinebach's expertise in his assessment of each animals physical condition and animal husbandry deficiencies which evidence gave the foundation for her conclusion of distress. What occurred exceeded the statutory limits of section 13(2)(a). Its effect was the improper collection of evidence in order to establish an offence under section 24.

[27] As this is essentially a warrantless search the burden is on the Crown to establish whether the officer's conduct is reasonable in the circumstances. There are a number of exceptions both statutory and at common law. By statute, section 14 of the PCA Act permits entry without a warrant if the animal is determined to be in "critical distress". Dr. Steinbach stated these animals' condition were not so critical that they were without hope. Examining the common law exception of exigent circumstances this is not a situation where there was an imminent, urgent or critical situation. Destruction of evidence or hot pursuit is not at issue. The site was secure given the presence of a number of SPCA officers including the RCMP. SPC Drever should have obtained a section 13(2)(b) warrant.

Charter – Section 24(2)

[28] The evidence seized is real evidence. It exists regardless of the charter breach. However, given the temporal link between the breach and the offence, trial fairness remains a live issue.

[29] Bad faith has been demonstrated as SPC Drever refused to address any prospect of relieving distress. The only option she had in mind was to seize the animals. Her comments in reference to the presence of the defendant's veterinarian as being "too little too late" is demonstrative of her rigid point of view in spite of remedial options offered by the defendant. This is not a situation where inexperience might explain the officer's conduct.

[30] Furthermore, bad faith is also seen in the misuse of the section 13(2)(a) warrant. If the evidence collected was only incidental to the primary objective of relieving an animal's distress, then the question of bad faith becomes tenuous. However, in this instance the evidence collected was only for the purposes of a section 24 prosecution. This amounts to an abuse of the warrant provisions of the PCA Act.

[31] This was an egregious breach of the defendant's Charter rights. In these circumstances there would be a serious impact on the reputation of the administration of justice if the evidence were admitted. All evidence shall be excluded.

B.G. HOY, PCJ