ONTARIO COURT OF JUSTICE
(West Region, at St Thomas, Ontario)

BETWEEN:

HER MAJESTY, THE QUEEN

-and -

RICHARD REIMER
HELEN REIMER

ENDORSEMENT

At the close of submissions on October 1, 2007, I advised the parties that I intended to allow the Charter motion and dismiss the action. I promised written reasons and the following are my reasons.

Richard and Helen Reimer are charged that on May 17, 2006, they did jointly:

1. wilfully neglect to provide suitable and adequate care for a pony contrary to s. 446(1)(c) of the Criminal Code; and,
2. wilfully cause unnecessary pain to a pony by failing to trim its hooves to an adequate length contrary to s 446(1)(a) of the Criminal Code; and,
3. wilfully cause unnecessary suffering to a pony by failing to trim its hooves to an adequate length contrary to s. 446(1)(a) of the Criminal Code.

The Reimer's apply pursuant to sections 7, 8, 9, 10 and 12 of the Charter asking for a finding that their rights under these sections were infringed in consequence of a search for and seizure of a pony pursuant to the provisions of the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, Ch. O.36; and, an order pursuant to s. 24(2) that all evidence gathered as a result be excluded.

The Reimer's also submit that the evidence falls short of meeting the onus respecting the charges laid.

I will address the Charter issues first. The only provision argued after the evidence was heard was section 8.

Rebecca Tanti is a regional inspector with the Ontario Society for the Prevention of Cruelty to Animals (Society) On May 17, 2006, she received an anonymous report from the London Humane Society. There is no evidence of the content of the report except that it directed her to 56078 Chute Line, Vienna, Ontario. She would later determine this property was owned by the defendants.

Tanti arrived at this property at 2:42 P.M. on May 17th. She was uniformed and driving a marked O.S.P.C.A. vehicle. The property is described as five to seven acres in size. The house is about 500 feet from the road and there are two outbuildings. From the photographs filed by the defendants, the land slopes upwards from the road restricting one's view of the outbuildings.

Tanti stated she proceeded directly onto the property as an incident of "my right of inquiry". She went first to the house. She knocked on two exterior doors visible to her and there was no answer. Immediately behind the house was a workshop. She walked to it and yelled hello and there was no answer.

About 200 feet from the workshop was a barn. She walked toward the barn and yelled hello. As she did so, she testified that she saw a pony in an enclosed pasture next to the barn about 50 feet from her "in immediate distress". She looked at it and noted its hooves were long and its coat was rough looking for that time of year. It is not clear from her evidence, but I infer that she alleges she came no closer than the 50 feet at this time.

She testified that she then returned to her vehicle and made notes while she waited for someone to come home. At 3:09 P.M., she drove to a neighbour's and questioned him about the identity of the owners of the property but he could not help her.
She then left the area to call for a Vet. She returned to the property at 4:25 P.M. and as she arrived, Helen Reimer pulled into the driveway. She spoke to Mrs. Reimer and secured admissions that she and her husband owned both the property and the pony. Tanti explained her concerns to Mrs. Reimer and told her she had called a Vet. She asked Mrs. Reimer if they had a Vet and farrier. Mrs. Reimer said they did, but she did not know their names off-hand and would have to look for them in the house. At 4:29 P.M., Tanti read to Mrs. Reimer the primary and secondary cautions from her notebook.

The Vet arrived and all three went to look at the pony. Mr. Reimer then arrived. He and the Vet had discussions about what was needed to deal with the pony and the cost. Mr. Reimer decided they could not afford the cost as a result of which the Vet issued a certificate for the seizure of the pony.

On the submissions, the Charter issues broadly focus on Ms. Tanti's rights as an authorized inspector with the Society, the plain view principle, the implied license to approach a dwelling and knock and the extension of that license in rural areas to approach outbuildings. Factually, the focus is Ms. Tanti's intent on entering the property.

Ms. Tanti is governed by the provisions of the Ontario Society for the Prevention of Cruelty to Animals Act. The entire Act was provided in the briefs and I have reviewed it. I do not intend to set out the exact wording of each provision that affect this decision but I will synopsise them.

Section 1 defines an animal in distress being one in need of proper care, water, food, shelter or being one that is sick, injured, in pain or suffering, one being abused and one subject to undue or unnecessary hardship, privation or neglect.
Section 11(1) gives an inspector the right to exercise "any of the power's of a police officer" for the purposes of enforcement.
Section 12(1) defines the perimeters of securing a search warrant as reasonable grounds to believe.
Section 12(2) defines the perimeters for entry onto property without a warrant as where an inspector "observes an animal in immediate distress", she is permitted to enter onto "any premises, building or place", but not a dwelling house.
Section 12(3) allows a Veterinarian to accompany an inspector using a warrant or that has entered without a warrant "for the purpose of ascertaining whether the animal is in distress".
Section 13(1) makes provision for service on an owner of an order requiring the owner to take the necessary steps to relieve the animal of its distress or to have it treated by a Veterinarian at the owner's expense.
Section 14 generally allows the inspector to take possession of the animal if the Veterinarian advises that the animal's condition necessitates its removal and the owner is not present or cannot be promptly found or the owner does not comply with an section 13 order.

If Ms. Tanti saw an animal in immediate distress before she entered onto the property or having entered with the owner's express or implied consent, she would be entitled to deal with the animal without a warrant under s. 12(2).

If Ms. Tanti had a "right of inquiry", it will exist by operation of the common law. It is not provided for within the Act. The Act does not even authorize her to enter occupied lands to question owners about anonymous calls.

The Applicants do not dispute that Ms. Tanti was entitled by common law to approach the dwelling and knock on the door to make inquiries about the content of the anonymous call. Their position is that when there was no answer, Ms. Tanti ought to have left the property and dealt with the complaint by warrant. They also argue that there is no extension of the implied right to knock to outbuildings on rural properties and if the extended right does exist, it must be supported by reasonable grounds to move beyond the dwelling.

The Crown argues that the extension of the implied right in rural areas exists independent of an analysis of intent and is solely reliant on the bona fides of the anonymous information and Ms. Tanti's statutory obligation to investigate such complaints.

On the facts as presented, I agree with the position advanced by the defendants.

The "implied invitation to knock" is exhaustively reviewed by the Supreme Court in R. v, Evans, 104 C.C.C. (3d) 23. The principle premises that the sanctity of an owner's reasonable expectation of privacy in his/her own home is not breached by a member of the public, including police, approaching the home to knock and make inquiries *provided*

that the implied invitation is extended no further than what is required to permit convenient communication with the occupant. Whether the conduct of the person approaching the door fits the implied invitation or at a point becomes a search within the meaning of s. 8 of the Charter is a factual issue depending on the intent of the person before arriving and while on the property. …/2
In my view, there is no specifically defined extension of the implied invitation to knock beyond a dwelling in regard to rural properties. The case submitted that applied such an extension was fact driven and appears to depend on the continued intent of the invitee to facilitate convenient communication as defined in Evans, See: R v. Maher. London, March 26. 2001 (Transcribed ruling).

The evidence did not divulge the content of the anonymous call. In the result, there is nothing against which to assess Ms. Tanti's intent in context of her duties under the Act or her need or rationale to meet with the owners.

The Crown does not dispute that the search for and/or seizure of the pony was warrantless and as such, it bears the onus of proving the search and/or seizure was reasonable. R. v. Haas, [2005] O.J. No. 3160. In my mind, the inability to assess Ms. Tanti's intent is fatal to its ability to prove reasonableness. I will nevertheless review the evidence in case I am wrong and the essence of the call can be inferred from the evidence as a whole.

Ms. Tanti clearly testified that if an owner was home, she would have asked for permission to walk the property and if permission was refused, she would have to leave and get a warrant. She testified that since no one was at the house, she believed it necessary to see if anyone was in the outbuildings and that it was in the course of seeking out an owner that she inadvertently saw the pony.

The Crown's position is that the pony was in plain view and the evidence of the initial observation is admissible as a result.

To apply the plain view doctrine, the court must be satisfied that the officer was legally entitled to be at the vantage point from which the item was seen; the nature of the item must be immediately apparent as connected to a criminal offense; and, the discovery of the evidence must have been inadvertent. R v. Fawthrop. 166 C.C.C.(3d) 97 at 112-114, O.C.A.

Independent of the issue of entitlement to be at a particular vantage point, there is no evidence that the pony was apparently connected to a criminal offense. Ms. Tanti said she saw the pony from a distance of 50 feet and it was in "immediate distress". She saw overgrown hooves and a rough coat but did not say what it was about these factors that led her *at that point* to conclude it was in immediate distress. She did not say how she was able to draw this conclusion from 50 feet away. No evidence was led to tie what she personally saw to the definition of distress in s. 1 of the Act. Without something further, overgrown hooves and a rough coat is not enough to objectively support her conclusion made at the time.

In regard to inadvertence, I believe it would require a very special set of facts to justify a finding of inadvertence when one enters property knowing (from a call) that evidence exists and is located there. Considering the photographs of the property, it is clear the paddock was mainly on the opposite side of the barn on the path Ms. Tanti would use to approach from the house and I believe the evidence of Dr. McDonald located the pony about ten feet from an entrance that would not be in Ms. Tanti's line of sight as she approached. I firmly suspect Ms. Tanti detoured to gain a fuller or better view of this area and there was nothing inadvertent about her discovery.

In my mind, the Crown has failed to support application of the plain view doctrine on these facts and the assessment falls to Ms. Tanti's intent once she moved away from the house.

There is no evidence of urgency bringing her to the property. Without a sense of urgency, I question why she did not leave a card at the dwelling and ask the owners to call her. Without a sense of urgency, looking for people elsewhere on the property lacks merit.

There is no evidence that Ms. Tanti reasonably expected she might find someone in an outbuilding. There were no vehicles in the vicinity of the dwelling or the outbuildings. She heard no noise from elsewhere on the property to suggest someone might be in an outbuilding. This, together with the lack of a sense of urgency and the anonymous call, causes me to believe she was looking for something specific, not attempting to communicate with an owner.

Had she truly been looking for someone to communicate with and seen the pony by accident, I would expect her to make note of what she saw and either take other measures to make contact with the owners or apply for a warrant. These options, however, never crossed her mind. She only remained on the property long enough to take pictures

and make notes. When the neighbour could not help her, she immediately took the next step necessary to seize the animal but only a half hour had elapsed since she first arrived. This adds to my suspicion that she was looking for something, not someone after she left the vicinity of the house.

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She took photographs of the pony. Given that no one else saw her do so, I infer the photos were taken upon her initial observation. If she was just looking for someone to communicate with, I question the need to bring her camera with her.

That she called a Vet before making contact with an owner suggests she had already decided to take enforcement, not remedial steps.

When she first met Mrs. Reimer, Tanti was quick to caution her. That occurred without any discussion of the problem other than - I assume - telling her what the anonymous caller had reported. She asked about a Vet and farrier but did not give Mrs. Reimer an opportunity to get their names from the house before cautioning her. She did not testify about anything to suggest she considered an s. 13 order. Everything Ms. Tanti did suggests she concluded charges were possible before she arrived at the property and necessary as soon as she saw the pony. Nothing suggests she ever considered remedial steps and, in my mind, this seriously taints her contention she was only looking for someone to communicate with.

There is absolutely no evidence to support that Ms. Tanti attended at the property for a reason other than looking for this particular animal. There were no other animals on this farm. The only fenced area where an animal might be located was next to the barn and was partially visible from the house. In my mind, her evidence she was looking for an owner is a convenient excuse, not reality. She came to the Reimer farm to investigate, not communicate.

In consequence, I find the implied invitation to knock did not extend beyond the doors to the dwelling and once she moved away from the house, she was conducting a search within the meaning of s. 8 of the Charter. The Crown has failed to prove the search was reasonable. In the result, I find Ms. Tanti's walkabout on the Reimer farm violated their rights under s. 8 against unreasonable search and as a logical extension, I find the medical inspection and seizure of the pony violated s. 8 as well.

The determination now is whether the evidence of the discovery of the pony and all that ensued should be excluded under s. 24(2).

There are three factors a trial Judge must consider in determining whether evidence should be excluded under s. 24(2): the impact of admitting the evidence on the fairness of the trial, the seriousness of the Charter breach and the impact of exclusion of the evidence on the administration of justice. *R. v. Collins*, 33C.C.C. (3d) 1 (S.C C.).

In assessing fairness, the Court must first determine whether the evidence is conscriptive or non-conscriptive. Non-conscriptive evidence is that which did not result from the participation of the accused in its creation or discovery. Alternatively, evidence is conscriptive if it resulted from the participation of the accused in its creation or discovery. Non-conscriptive evidence will rarely render the trial unfair and its exclusion will normally depend on an analysis of the second and third factors in *Collins. R. v, Stillman*, 113 C.C.C. (3d) 321 (S.C.C.).

In assessing seriousness, the Court should consider whether the breach was in good faith, whether it was technical or inadvertent or willful and flagrant, urgency of the circumstances and whether police would have eventually discovered the evidence such that their refusal to wait makes the breach more flagrant. *R. v.Heslop*, [2005] O.J. No. 2072 (S.C.J.).

Lastly, it must be determined whether the reputation of the administration of justice will be better served by the exclusion or admission of the evidence. First, the Court must assess the impact if the evidence were to be admitted. This requires an analysis of fairness, the seriousness of the offense, the seriousness of the breach and the importance of the evidence to the case for the Crown. See; *R. v. Collins, supra.*

Since the focus of the third factor is the effect of the admission of the evidence into the trial, evidence should not be excluded simply because of the risk that a conviction might result, but because of the greater risk that the conviction will be unfairly obtained and unjust. *R. v. Hodgson*. 147 C.C.C. (3d) 449 at 460 (S.C.C.). How evidence was obtained and its impact on trial fairness is the benchmark in the analysis of the third factor in *Collins.*

The evidence of Ms. Tanti's observations of the pony is non-conscriptive and would not affect trial fairness. In the

result, its inclusion or exclusion as evidence will be determined on an analysis of the seriousness of the Charter breach and the impact of exclusion of the evidence on the administration of justice. Again, my ability to assess these factors is limited without the evidence of the content of the anonymous call.

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In any event and in my mind, Ms. Tanti played fast and loose with her attempt to link her walkabout to the implied consent principle. She was there to investigate a possible offence and considering her conduct as a whole, she did not intend to take the time to deal with the owners as prescribed in the statute. Everything she did after she walked away from the dwelling evidences a wilful effort at finding what she knew existed, avoiding the need to secure a warrant or waiting for contact with an owner before dealing with this animal.

There was no urgency shown on the facts. That she could have eventually secured a warrant to permit her walkabout was never considered and a warrant would have allowed the eventual discovery of the evidence. This increases the flagrancy of her breach.

On the third *Collins* factor. I fully agree with the Supreme Court's analysis in *Evans* of the importance of the sanctity of one's privacy on their property and that this sanctity should not be lightly interfered with. Ms. Tanti decided that she should not be bound by this principle - not because she needed to defend the rights of an animal - but because she did not want to take the time to follow any constraints that would slow her efforts to protect those rights.

In my mind, this attitude would not be supported by the community in general. More specifically, I suspect that even those who support the rights of animals would, faced with the evidence in this case, be appalled at the extent of her failure to comply with her own legislation.

I believe the community as a whole would not tolerate the admission of evidence obtained in such a flagrant manner. Its admission is not saved by s. 24(2) of the Charter.

In the event l am wrong in regard to the Charter findings, I will briefly address the substantive charges.

Each of the three counts has alleged wilfulness. By virtue of s. 429(1) of the Criminal Code, proof of wilfulness requires the identification of an act or omission resulting in an event. In my mind, to convict on more than one count as charged given the requirements necessary to prove wilfulness would result in a violation of the *Kineapple* principle. In each count, the omission is the failure to provide suitable and adequate care (trimming of the hooves) and the event is that either pain or suffering has resulted. The Crown must prove, beyond a reasonable doubt, that the Reimers knew the failure to trim the hooves would cause either result.

Mr. and Mrs. Reirner testified that they bought the pony for their children and it had difficulty walking from the date they bought it. They both acknowledged that its hooves were getting long but neither sensed this fact was causing either pain or suffering. They had an uncertified farrier who trimmed its hooves once and they anticipated he would attend for further trimmings since he did not want to try and remove the overgrowth all at once.

I found their evidence to be somewhat self-serving and lacking in detail. Both were very poor historians as was their farrier. There is no doubt in my mind that they sensed the growing hooves were problematic for the animal. While I accept that the farrier attended once to trim the hooves, I have no idea when that occurred. Depending on who was relating the event, it could have been within months of Tanti's visit or a year earlier. The farrier tried to pin down the date using an accident as a guide but he could not make up his mind when the accident occurred or when he recovered and returned to full-time work.

Notwithstanding the problems with their evidence, the issue is what the Reimer's knew would be the result of allowing the hooves to grow as they did.

No one denied that the pony's hooves were abnormally long. The Crown's experts testified to what each believed the animal experienced as a result.

Doctor Karen McDonald-Phillips attended the Reimer farm. She testified that the pony did not exhibit tendencies that are consistent with it being in pain. She did, however, note a tendency to shift its weight from hoof to hoof and this indicated to her it was experiencing suffering at the time. She said that the pony suffered most if it walked and the suffering if it stood still would be merely aggravating. She said that as the hooves grow, their length puts undue pressure on the tendons in the leg and that this eventually affects the animal's joints since it will walk less or walk

abnormally.

Dr. Norman Hamack is the Vet who treated the pony after it was removed. He said the pony was a bit aggressive but he was not sure if the pony visibly showed distress. He postulated that hooves as long as he noted would hurt and cause distress when the pony moved.

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On the evidence, I am of the view Mr. and Mrs. Reimer were negligent in not having a farrier back in a more timely fashion to finish the job they started. They knew the length of the hooves was abnormal and, by their own admission, agreed they ought to have been more attentive to the pony's needs. Further, the hooves were long when the farrier first trimmed them and the Reimers allowed them to grow again and it is self-serving of them to blame their negligence on the farrier's failing to come back.

However, I am left with a doubt that they knew the failure to trim would actually result in pain or suffering. There is no evidence the pony reacted in a way that would alert a medically uninformed person that it was in distress. At its worse, it moved little and shifted from foot to foot and I simply cannot demand of the Reimers what only a trained veterinarian would see in such conduct.

In my mind, the Crown has failed to prove the required cause and effect necessary for any of the three counts and they should be dismissed.

Hearing Dates: September 12 and October 1, 2007

Justice M.P. O'Dea

Counsel: W. Tymchyshyn for the Crown
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