

Citation: ☼ R. v. Marohn
2012 BCPC 0198

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File No: 172409-2
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

MARK ANTHONY MAROHN

**EXCERPTS FROM PROCEEDINGS
ORAL REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE R. P. HARRIS**

Counsel for the Crown:
Counsel for the Defendant:
Place of Hearing:
Date of Judgment:

L. O'Grady
J. Percival
Surrey, B.C, B.C.
March 28, 2012

[1] THE COURT: The accused is charged with the following: Count 1, on or about the 10th day of December 2008, at or near Langley, being the owner or person having custody of horses, wilfully neglected or failed to provide suitable and adequate food and care for them, contrary to s. 446(1)(b) of the *Criminal Code*. Count 2, 10th day of December, being a person responsible for animals, to wit, horses, did cause or permit the animals to be or to continue to be in distress, contrary to s. 24(1) of the *Prevention of Cruelty to Animals Act*.

[2] The accused pleaded not guilty to the allegations and a trial was conducted. During the trial, evidence was heard from officials associated with the SPCA, the RCMP, and neighbours as well as the accused.

[3] The central issues to this case are as follows:

1. Did the accused use due diligence in trying to find solutions to his inability to feed the horse Buddy?
2. Was the accused's acute financial situation and medical situation such that his act in not feeding Buddy was not wilful, or stated, was his acute financial distress a defence to the charge under s. 446 of the Code?

GENERAL OVERVIEW:

[4] On December 10th, 2008, Cst. Dumas responded to the report of a vehicle in a ditch. Cst. Dumas attended at the scene; present was the accused and a horse named Buddy. Buddy had collapsed and could not be raised to his feet. Dr. Cruz, a veterinarian, was called. He attended the scene. He tried to assist Buddy but was

unable to do so. As such, it was determined that the only humane act was to euthanize Buddy. After Buddy had passed, he was transported from the scene and Dr. Raverty eventually performed a necropsy on Buddy. Dr. Raverty's opinion was that Buddy was emaciated, and the only reason for this condition was lack of food and nutrition.

EVIDENCE:

[5] Several witnesses testified during this trial; however, for the purposes of this decision it is not necessary to review the evidence of each and every witness. As such, I will only touch on the evidence that is germane to my decision.

[6] Michael Te Boekhorst testified for the Crown. In the fall of 2008 he was working for the SPCA as an Animal Protection Control Officer. His duties involved cases of abuse or neglect, as well as responding to incidents of animals that were injured or in distress. On September 8th, 2008, Mr. Te Boekhorst received a complaint of a neglected horse at 2063 208th Avenue. This is the accused's property. Mr. Te Boekhorst attended and made observations of a thin, white horse and three chestnut horses. Mr. Te Boekhorst tried to contact the occupants of the property but no one was home. Accordingly, he left a door-hanger, asking that he be contacted.

[7] What followed were visits to and around the property. These visits occurred on September 9th, 23rd and 30th, October 1, 2, 23, 27 and 29, November 4, 12, 25, December 2 and 9. Some of these visits were to the property, or drives past the property. For most of the visits the horses were covered with blankets and he could not see or inspect the animals, with the exception of October 23rd when he was able to pet a horse through the blanket and it was his perception that the horse appeared quite thin.

Over the course of the visits, and while there was discussion regarding the feeding of the horses, some of the horses showed sporadic weight gain, but overall they lost weight.

[8] On October 2nd, 2008, Mr. Te. Boekhorst gave the accused an order directing that the accused provide sufficient quality and suitable food for the animals' normal growth and maintenance and in order to maintain normal body weight. On October 23rd, Mr. Te Boekhorst requested that the accused free-range-feed the horses and he warned the accused that the SPCA would be intervening if the animals did not improve.

[9] On November 12th, Mr. Te Boekhorst realized that the horses were feeding free-range on a neighbour's property. Mr. Te Boekhorst rubbed one of the horses through a blanket and observed that he could feel the horse's ribs. He also noted a horse with a limp. Mr. Te Boekhorst left a door-hanger on the accused's door, directing that the accused contact a veterinarian.

[10] At some point during his interactions with the accused, Mr. Te Boekhorst became aware of the accused's significant financial difficulties, as well as his health difficulties. At one point, Mr. Te Boekhorst offered to take four of the six horses. He did not offer to take all six because Mr. Te Boekhorst believed that there would be difficulty in placing two of the horses, specifically the white horse and another horse which was described as a cranky horse. When this was offered the accused asked if his daughter would be able to visit with the horses if they were placed with other homes. Mr. Te Boekhorst told the accused that this would not be possible; apparently this policy was in place to avoid any conflicts between the new owners and the old owners. As a result of this

information, the accused declined, indicating that he would find a place for the horses himself. Mr. Te Boekhorst suggested if worse came to worse that the accused could auction the horses, to which the accused made it known that he was not interested in this option.

[11] With respect to the events of December 10th, 2008, Cst. Dumas testified that she received a radio dispatch to a single vehicle in a ditch on 208th Avenue in Langley. She testified when she arrived she saw a vehicle halfway in the ditch. There were two females and a male with a horse that was in the ditch. It was later learned that this was Mr. Marohn, the accused, and the horse Buddy. The horse had a halter around its head, from which there was a tether. This tether led to the front bumper area of the car. The male had a hold of the halter by both sides of the horse's cheeks and he was making clicking noises. The lead would go tight. At no time did Cst. Dumas confirm if the lead was tied to the front of the vehicle or not.

[12] After making these observations, Cst. Dumas then said to the accused, "I don't think your horse is going to be able to pull that car out of the ditch." The accused responded, "Well, he moved it a bit." While Cst. Dumas was talking to the accused, Buddy tried jumping from one side of the ditch to the other. Buddy was unable to make this manoeuvre and as a result he rolled into the ditch, landing on his side. None of the individuals present were able to get Buddy to his feet. Eventually fire personnel, more police officers and the SPCA arrived, as did Dr. Cruz.

[13] With the assistance of a sling and a tow truck, Buddy was lifted from the ditch and placed on the ground adjacent to the ditch. Dr. Cruz tried to assist Buddy. Dr. Cruz

provided evidence with respect to his observations of Buddy. He noted that Buddy had an elevated heart rate, his body temperature was hypothermic, he looked exhausted, he was not very responsive, and he had increased respirations. He also noted Buddy's mucous membranes to be pink and moist and unremarkable.

[14] Dr. Cruz worked with Buddy for approximately two-and-a-half hours. His efforts to treat Buddy had a marginal impact. He felt that he could do no more for Buddy in the field. It was Dr. Cruz' opinion that Buddy had a less than 30 percent survival chance. It was his opinion that Buddy was suffering. Accordingly, at 3:05 p.m. the decision was made to euthanize Buddy.

[15] Dr. Raverty also testified. He was the doctor who performed the necropsy on Buddy. He saw no physiological explanation for the state of emaciation that he noted in Buddy. Thus, his opinion was the emaciation was caused by the lack of food and inappropriate nutrients.

[16] The accused testified in this matter. In this regard he set out his history as a trained veterinarian who specializes in diagnostic imagery. He was married and had two children; they were born in 1989 and 1991. His wife, Carol Schoyen-Marohn, was a veterinarian working in a general practice. They moved to British Columbia in 1993, and from his evidence it appeared that they were enjoying a good life until tragic events in April of 2000. These tragic events involved a broken neck, a severe spinal injury, rendering the accused incapable of returning back to work.

[17] The injury decimated the Marohn family financially. They lost their house to foreclosure in 2004, and at one point they had to place their daughter with friends. The

accused's wife would work occasionally, but she suffered from colitis and Crohn's, having been diagnosed with this disease in 1991. The amount of her ability to work was dropping off, her dependency on medication increased. It eventually reached the point where she became addicted to prescription drugs; this transitioned to an addiction to illicit drugs.

[18] In and around 2005 or 2006, the accused received an insurance settlement for his spinal injuries. This assisted the family in getting by, and to some degree getting back on their feet. However, by December of 2008, the family finances were virtually non-existent. They were about to be evicted from their residence, the accused was suffering depression, his marriage had broken down, they were selling things from the home for food. He had to make arrangements for his daughter when they moved, and at the end of the month he had made arrangements for the two horses to go to individuals he knew by the name of the Vogels.

[19] With respect to the horses and how they came to own them, the accused testified he had horses when he came to British Columbia. He then got an old school pony named Misty in about 2003. His daughter Jessica looked after the daily chores associated with the horses. In around 2005 or 2006, Jessie purchased Jock from money she had. It appears that while living on 24th Avenue in Langley, a landlord had dropped off two more horses, essentially abandoning them. Originally the intention was that the landlord would pay for food and the upkeep for the animals, but this eventually stopped. Buddy came to the family in about 2007. He was a race horse rescue. He had been rescued by Jessica and a friend. According to the accused, he was being an indulgent father by letting his daughter bring Buddy to the home.

[20] By October 2008, there was extreme financial hardship. The accused did not want six horses and he was trying to find a place for them. Exhibit 6 is an e-mail by the Marohn family, and within that e-mail it indicates a search for food or placement for the horses. It also appears that the accused took steps to slow down the horses' food consumption. In this regard he used supplements, beet pulp, and would cover the animals with blankets to conserve the energy that they used. He also spoke to a neighbour about using the pasture so the horses could free-feed. In his evidence he confirmed that he did not want the four horses to go to the SPCA.

[21] I spoke about the e-mails, and with respect to these e-mails there was an e-mail to a Marlene Roman from the Pony Club seeking some help with some hay. There is a December 2008 e-mail to New Ride offering three of the horses. The reply came back to try Circle F Horse Rescue. According to the accused's evidence, by late November, early December, the pasture hay was gone, there was only supplements and some cube beet pulp.

[22] On cross-examination the accused agreed he took on the financial responsibility for the horses. He acknowledged by October 21 that they were just about out of hay, and that the neighbour's pasture had assisted in slowing the emaciation of the horses. He was aware that they were becoming emaciated, he was aware that something had to be done, but he did not want the SPCA to take the four horses. By early December the accused was aware that Buddy's body index was a one-to-two. He was aware that Buddy was suffering consequences of emaciation, and that he was in distress.

[23] With respect to the events of December 10th, 2008, the accused testified he got in his vehicle, there was no insurance on the vehicle, it was his purpose to drive the vehicle to a nearby mailbox in order to get mail and that he was hoping that his parents would send money for Christmas. Upon returning from the mailbox he saw Buddy running up the centre of the road. He said he pulled over to the side, stopping his vehicle on the edge of the ditch and the ditch gave away, causing the vehicle to slide into the ditch. He said he climbed out of the window and chased Buddy through a gate. Apparently Buddy settled near the tack room, at which point the accused got a halter, a six-and-a-half-foot lead, and took Buddy back out to the road to check on the accused's wife who was still in the car.

[24] The accused testified that he did not put Buddy in the yard because he did not know how he escaped. The accused, once at the car, asked his wife to call BCAA. He took Buddy to the side of the ditch and allowed Buddy to graze while being ground-tied. Jessica came from the house. The accused told Jessica to take the lead rope, and as he passed it, Buddy bolted, attempting to cross the ditch. Buddy failed to cross the ditch and he rolled down into the ditch. The accused denied that he was using Buddy to pull the vehicle.

[25] With respect to the accused's evidence about the events of December 10th, 2008, I have extreme difficulty with it. I say this because:

1. It is not consistent. It is not consistent with the photographs that have been filed here. The photographs do not support the story of a vehicle sliding down into a ditch; it supports a story of a vehicle travelling for some distance along

the ditch. That story is supported by virtue of the tire tracks that proceed along the ditch for some distance, stopping directly at the vehicle in issue.

2. I do not accept the accused's story because it makes no sense. He has Buddy safely in a yard, he has Buddy on a lead and he does not tether Buddy to anything, he does not put Buddy in a stall; rather, he takes Buddy out to the street area where, according to the accused, cars race up and down the street all the time. Moreover, these are actions by an individual who is significantly physically compromised. It makes no sense that he would not use the safer route of placing him within a stall that was near the tack room.

[26] The last portion of the December 2008 events which I find difficult to accept is that he takes Buddy all the way back to the car to check on his wife. This was not a major motor-vehicle accident, on the accused's evidence, this was a vehicle parked at the side of the road, sliding one or two feet down towards the ditch. He climbed out of the window. There was no damage to the vehicle. What could have possibly occurred that would make him think that his wife needed checking on?

[27] With respect to Cst. Dumas' evidence, I found that her evidence was clear, consistent, and straightforward. Her observations were made at a time of clarity, of vision, and without emotion. I accept her evidence regarding what she observed the accused doing with Buddy, and I am satisfied beyond a reasonable doubt that the accused was using Buddy to attempt to free the vehicle from the ditch.

THE RELEVANT LAW:

[28] With respect to the charges that the accused faces, I am required to consider the relevant law. In this regard, the *Prevention of Cruelty to Animals Act*, Part 1, the interpretation and application. Part 2 defines an animal is in distress if it is

(a) deprived of adequate food, water, shelter, ventilation, space, care or veterinarian treatment.

It says at 3:

For the purposes of this Act, a person responsible for an animal includes a person who (a) owns an animal, or (b) has custody or control of an animal.

As well, within the Act the definition of "distress" is provided.

[29] Section 446(1)(b) of the *Criminal Code* reads as follows:

Everyone commits an offence who

(b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

I point out that Dr. Marohn though said his daughter looked after the animals, he acknowledged that he had care, financial responsibility, and measure of control over the animal.

[30] With respect to s. 446 of the *Criminal Code*, this section is discussed in **R. v. Galloro** 2006 ONCJ 263, paragraphs 7 and 8.

Section 446 imposes upon animal owners various legal duties with respect to care. Wilfully neglecting or failing to comply with those duties is a criminal offence. In assessing whether the provision of food and care was "suitable and adequate" on a criminal standard under s.446, in my view the Crown must prove more than a slight deviation from reasonable care. Evidence of a substantial or marked departure from reasonable care is required to prove the *actus reus* of the offence in s.446 (1)(c) beyond a reasonable doubt.

If the alleged failure to provide adequate care is proved, the court must then assess whether the failure was “wilful”. “Wilfully” is defined in s.429 of the *Criminal Code* as causing the occurrence of an event by doing or omitting to do an act pursuant to a legal duty, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not. The requirement that the accused's failure be “wilful” involves a subjective test. See: Kent Roach, *Criminal Law 3ed.* Irwin (2004) at p.157. The reference to recklessness in s.429 also indicates a subjective standard as recklessness requires subjective advertence to the prohibited risk (as described in that section) and can be distinguished from negligence, which requires only that a reasonable person in the accused’s circumstances would have recognized the risk.

APPLYING THE LEGAL PRINCIPLES TO THE FACTS:

[31] It is clear the accused was a kind-hearted, professional man who wanted to give, when he could, to his family. This desire, and his ability to provide, was destroyed by his catastrophic injuries in 2000. Despite these injuries, the accused continued to struggle on as best as he could, and at times securing a modest living for his family. Most of the time he was unable to do so. Despite being unable to do so, he allowed horses to be collected on his property. He did so, knowing the cost and expense associated with the requirements of proper feed and maintenance of the horses. By the fall of 2008 it is clear that it was a desperate situation that had been stretched out for a few weeks by the neighbour's pasture. It was also clear that this was not sufficient, and the accused was aware that Buddy was becoming emaciated and distressed and not receiving sufficient food.

[32] The accused in this situation declined an offer from the SPCA to take four horses. Obviously this would have eased the load and provided more food and helped the other horses. The accused did not accept this offer of relief; he did not do so because of visitation issues. He made some efforts to find alternative locations for the horses; these efforts were not commensurate, in my view, with the seriousness of the

situation. I say this, recognizing and saying that they were not commensurate both in terms of expressing how serious the situation was and the breadth of his search was shallow. The options that were available to him included numerous horse clubs, the resource of the internet, accepting the SPCA offer, and auctions.

[33] He continued along his path, knowing that the horses were becoming emaciated, and knowing that Buddy was emaciated in December of 2008, he then attempted to use Buddy to pull a car from the ditch, resulting in her collapse. It is clear the accused's heart and good intentions interfered with his good judgment. It interfered with him using due diligence in finding alternative solutions.

[34] I am satisfied beyond a reasonable doubt that the Crown has proven the elements as required in s. 24(1), that is, Count 2 of the Information.

[35] With respect to Count 1, the evidence proves beyond a reasonable doubt that there was a marked departure from the reasonable care in these circumstances. I find that the accused, though suffering financial consequences, made decisions and omitted to accept assistance and omitted to search in order to provide food for these animals. These omissions were wilful and resulted in him failing to provide or obtaining adequate food for Buddy. He did this, knowing that failure to provide adequate food would likely lead to distress or emaciation of Buddy.

[36] Accordingly, I am satisfied beyond a reasonable doubt that the Crown has proven all the elements as contained in Count 1.

[37] In closing, I recognize the very difficult situation and circumstances that were facing the accused at the time. However, the accused allowed his heart to take priority over his better sound judgment. He did this in the face of a very bleak situation without any prospects, at least within his own home, for a change of circumstances, and that is what has resulted in these two offences, and I find him guilty of both Counts 1 and 2.

(REASONS FOR JUDGMENT CONCLUDED)