CANADA File number and neutral citation: 33812/2014NBPC43

PROVINCE OF NEW BRUNSWICK

PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN

Prosecutor

-and-

NORMAND LAVOIE

Defendant

BEFORE: The Honourable Judge Marco R. Cloutier

AT: Edmundston, New Brunswick

DATE OF DECISION: July 24, 2014

APPEARANCES:

Louis G. Plourde for Her Majesty the Queen
Normand Lavoie on his own behalf

[Translation]

I. INTRODUCTION

[1] **M.R. CLOUTIER, P.C.J.N.B.**: This case involves, *inter alia*, two questions that remain unanswered to date in the New Brunswick case law, namely: (1) are peace officers under an obligation to draw up entry warrants in both official languages? and (2) is a court that is asked to rule on a statement's admissibility required to consider s. 20(2) of the *Charter*?

[2] The defendant is facing two counts under the *Society for the Prevention of Cruelty to Animals Act*, c. S-12, R.S.N.B. ("*SPCA Act*").

[3] He is accused of failing to provide 133 dogs of which he had the care and control with adequate food, water, shelter and care as prescribed in s. 4(1) of *Regulation 2000-4* enacted under the *SPCA Act* ("*Regulation 2000-4*"), thereby committing an offence under s. 18(2) of the *SPCA Act*. He is further accused of operating a kennel without a valid licence contrary to s. 4(c) of *Regulation 2010-74* enacted under the *SPCA Act* ("*Regulation 2010-74*"), also contrary to s. 23(1) of the *SPCA Act*.

[4] Both offences were apparently committed between October 25 and 27, 2011, inclusive, at or near Saint-Basile, New Brunswick.

[5] As part of a *voir dire*, the defendant filed a motion under the *Canadian Charter of Rights and Freedoms* ("*Charter*") claiming that his language rights guaranteed by s. 20(2) of the *Charter* were violated. He contends that the appropriate remedy is the exclusion of the evidence obtained as a result of that infringement, pursuant to s. 24(2) of the *Charter*, failing which its admission may bring the administration of justice into disrepute ("the motion").

[6] In view of the motion, the parties agreed that the matter would proceed by way of *voir dire* and that, as a result, the evidence and testimony declared admissible would be applied *mutatis mutandis*.

II. THE FACTS

[7] The prosecution called several witnesses at trial, from which testimony I accept the following basic facts.

[8] On October 25, 2011, two unilingual English-speaking officers of the Society for the Prevention of Cruelty to Animals ("SPCA") went to the Chenil De La Campagne Kennel located at 681 Des Lavoie Road, in Saint-Basile, New Brunswick. They were there to investigate a complaint regarding the dogs' poor accommodations. The defendant owns the kennel.

[9] Officers Parish and Bishop arrived at the defendant's kennel at about 10:00 a.m. Corporal Parish knocked on the door and noticed that the licence to operate had expired on October 1, 2011. As no one answered, he entered and identified himself. The defendant immediately came to greet him. Corporal Parish asked the defendant the language in which he wished to be served. The defendant replied, [TRANSLATION] "In French."

[10] Corporal Parish, being a unilingual English speaker, contacted a bilingual RCMP officer to assist him. Meanwhile, the SPCA officers inspected the kennel. Corporal Parish observed some dogs kept in indoor enclosures without beds, some lying directly on the cement. Others had severely matted fur. On the second floor, the pregnant dogs were kept in an enclosure with a light hanging too close to the floor. He also noticed a strong smell of urine and was concerned about the lack of ventilation. Outside, he observed some 13 dogs, most with matted fur. He also noticed the dilapidated state of the doghouses, which offered only incomplete protection from the elements.

[11] Corporal Parish noticed that one dog in particular had its head tilted. Suspecting an ear infection, he asked the defendant to answer the question as to how long the dog had been like this. The defendant managed to say, in rudimentary English, "about two years" ("the statement by the accused").

[12] Constable Doucet arrived on the scene some 30 to 45 minutes later, where she would act primarily as an interpreter between Corporal Parish and the defendant. A more thorough inspection resumed with her, the two SPCA officers and the defendant in attendance.

[13] Given the circumstances, Corporal Parish served the defendant with a Notice of Seizure for four dogs: two spaniels, a Shih Tzu and a Schnauzer. The Notice was drawn up in both official languages and Constable Doucet explained its content to the defendant. Officer Bishop then transported the four dogs to the Oromocto Veterinary Hospital, where they were examined by Dr. Legge.

[14] On October 27, 2011, the SPCA officers returned to the kennel and presented the defendant with a warrant issued under the *Entry Warrants Act*, R.S.N.B. 2011, c. 150 ("*Entry Warrants Act*"). The warrant was drawn up only in English. However, Constable Saulnier, a bilingual RCMP member, explained its content to the defendant. The dogs' accommodations having hardly changed, Corporal Parish gave the order to seize the other 129 dogs. Constable Saulnier explained the Notice of Seizure, which was in both official languages, to the defendant.

[15] On October 27, 2011, Sergeant Langille of the SPCA also recorded a video depicting, *inter alia*, the accommodations at the kennel. Mathiew Pascalado, another SPCA member, took photos. Corporal Parish then compiled them on a DVD.

[16] The photos depict, *inter alia*, a dog housed in an indoor enclosure with partially bent aluminium walls. It also shows a light hanging at a height that the dog could easily reach. There is no leak-proof material covering the concrete floors, except some newsprint in places.

[17] Food is served in old tomato juice cans attached to the wall with a piece of wire. The small dogs have difficulty accessing them. The cans are too high and, of course, cannot be sterilized. Some are rusty. The food is not stored in a vermin-proof container with a lid. Even more alarming is the fact that a dog can be seen putting its head through a hole in a metal wire fence.

[18] The outdoor doghouses are ramshackle. One dog can be seen very near a rusty nail that is sticking out of the doghouse. There are holes all over the walls, the wood is so rotten that the roof provides only partial cover and there is mould in places.

[19] Dr. Legge was declared a veterinary medicine expert at trial. He began by explaining that it is difficult to identify a dog's specific breed in the absence of birth records. This is due to extensive crossbreeding.

[20] In any event, Dr. Legge examined the four dogs seized on October 25, 2011. He first noticed the severely matted fur, which he attributed to humidity and a lack of grooming. Shaving was in order. He then diagnosed the Schnauzer with a moderate ear infection. The dog's tilted head was a sign of a long-standing infection. He treated the animal with antibiotics. He also diagnosed both spaniels with moderate ear infections, which he treated with antibiotics. He also noticed a slight infection of the left eye of one of the dogs. Dr. Legge then treated the Shih Tzu with antibiotics in response to a moderate ear infection. He did not feel that the four dogs could be returned for fear of aggravating the symptoms; the dogs required immediate care. He does say, however, that he has no concerns with respect to the dogs' weight.

[21] Dr. Legge is of the opinion that the conditions observed in the four dogs are avoidable. All that is required, *inter alia*, is to groom the dogs frequently, not to house them under overly humid conditions and, finally, to examine the dogs regularly for any signs of infection, especially discharge from the eyes and ears, inflammation and redness.

[22] Dr. Legge also examined 29 of the 129 dogs seized on October 27, 2011. He diagnosed most with moderate ear infections. He also noted severely matted fur, which is a particularly painful condition for the animal. He also treated severe dental disease. He further detected an infection of the skin under the matted fur of some of the dogs. Finally, he made a diagnosis of KCS, which severely affected the eye of one dog.

[23] Mathiew Pascalado, an SPCA member at the time, states that he checked the SPCA records, as his duties required him to do, and that, in short, the licence to operate issued for the defendant's kennel expired on October 1, 2011.

[24] Tracy Marcotulio also testified for the prosecution. She explained that she inventoried the seized dogs and assigned them to foster homes and other SPCA-approved locations. She also testified about the conditions under which she operates her kennel and, in particular, about the types of bowls used and the fact that her kennel does not smell of urine. I consider her testimony to be quite irrelevant. Although she evidently operates a kennel, the prosecution brought no motion to have her declared an expert on standards of accommodation for a kennel.

[25] The defendant called only one witness: himself.

[26] The defendant grew up on a farm. He has over 30 years of kennel-related experience. At the time of the offences charged, he would open his kennel to the public at 1:00 p.m. He would spend the morning feeding the dogs and performing routine maintenance. He was the only one working at the kennel, although a volunteer would occasionally assist him.

[27] The defendant states that he was feeding the dogs when the SPCA officers arrived on scene on October 27, 2011, which, according to him, explains why the bags were still open.

[28] The defendant submits that there was adequate heating inside his kennel. He also submitted in evidence quite a number of electricity bills to that effect. He further submitted several veterinary clinic bills explaining that he was providing the dogs with adequate care. He explains that he treated the dogs' ear and eye infections himself using a Polysporin ointment. He also contends that had it not been for the seizure on October 27, 2011, he would have groomed the dogs and shaved their fur if necessary. He states that there was no need to do so beforehand, since the dogs had not yet gone back into the kennel for the winter.

[29] The defendant says that Constable Saulnier only very briefly explained the content of the entry warrant to him and translated it into French. He also does not think that the truck the SPCA officers used to transport the dogs to Fredericton was equipped with a ventilation system, which, according to him, either caused or contributed to the medical conditions diagnosed by Dr. Legge. He does admit, however, that he never boarded the truck.

III. ISSUES

[30] In addition to those set out in the introduction, the issues come down to the following:

a) Is the exclusion of evidence necessarily the appropriate remedy for the infringement of the defendant's language rights on October 25, 2011?

b) On October 27, 2011, was it incumbent upon the SPCA officers to present the defendant with an entry warrant written in French?

c) Did the defendant provide the dogs in his possession and control with adequate food, water, shelter and care pursuant to s. 4(1) of *Regulation 2000-4*?

d) Did the defendant operate a kennel without a valid licence contrary to s. 4(c) of *Regulation 2010-74*?

IV. POSITIONS OF THE PARTIES

[31] The defendant contends that the SPCA officers infringed his language rights on October 25, 2011, and I agree. The period that is of concern here is the one lasting some 30 to 45 minutes before the bilingual RCMP member reached the kennel. This was a gross violation of s. 31(1) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5 ("*Official Languages Act*"), in addition to being a violation of s. 20(2) of the *Charter*. As a result, these violations pave the way for a remedy under s. 24(2) of the *Charter*.

[32] The defendant further submits that all evidence obtained by the SPCA officers either before or after the bilingual RCMP member arrived on October 25, 2011, stems from a violation of s. 20(2) of the *Charter* and should, therefore, be excluded.

[33] Likewise, the defendant argues that all evidence obtained subsequently, i.e., on October 27, 2011, should also be excluded. The defendant is referring, in particular, to the officers' observations, the seized dogs, the photos, the video depicting the condition of the kennel and all testimony relying on that evidence. The defendant submits that under the circumstances, it was incumbent upon the SPCA officers to present him with an entry warrant written in French on October 27, 2011.

[34] The defendant further submits that the prosecution did not prove beyond a reasonable doubt that he was the owner of the dogs examined by Dr. Legge. Once again, he thinks that the conditions under which the seized dogs were transported to the Fredericton area either caused or contributed to the medical conditions diagnosed by Dr. Legge.

[35] The prosecution acknowledges that the SPCA officers infringed the defendant's language rights on October 25, 2011, during the period of some 30 to 45 minutes before the bilingual RCMP member arrived. This was, in my opinion, a sensible concession. However, it submits that this was merely a transient and trivial breach that had no impact on the evidence obtained. The prosecution adds that during the period in question, the unilingual English-speaking SPCA officers were making their observations at a place of business, a place where, by its very nature, the expectation of privacy is reduced. It, therefore, contends that the evidence obtained should

not be excluded and that, in short, the interest of justice requires that the case be adjudicated on its merits.

[36] The prosecution denies that the SPCA officers infringed the defendant's language rights in any way on October 27, 2011. It submits that the entry warrant had to be written in English since it was addressed only to the SPCA officers. Otherwise, Corporal Parish, the officer who applied for it, could not have executed it. It remains to be seen whether, under the circumstances, a warrant drawn up in both official languages was required.

[37] Finally, the prosecution considers that it has proved all of the essential elements of the offences charged, including the continuity factor with respect to the seized dogs.

V. ANALYSIS

Is the exclusion of evidence necessarily the appropriate remedy for the infringement of the defendant's language rights on October 25, 2011?

[38] The legislative provisions that fueled the language debate in this case read as follows:

Official Languages Act

31(1) Members of the public have the right, when communicating with a peace officer, to receive service in the official language of their choice and must be informed of that right.

Canadian Charter of Rights and Freedoms

20(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[39] In **R. v. Losier**, 2011 NBCA 102 (CanLII), the Court of Appeal of New Brunswick ruled on the meaning and scope that should be given to s. 20(2) of the *Charter*. Indeed, the Court of Appeal reiterates that it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. I draw additional guidance

from that landmark decision. On the one hand, a peace officer who stops a member of the public in New Brunswick is under a duty to comply with the obligations imposed on institutions of the Government of New Brunswick by s. 20(2) of the *Charter*, in particular as regards the active offer of service in both official languages. On the other hand, while there is no question that language rights under the *Charter* are "infrangible" and that s. 24 must be interpreted in a way that upholds *Charter* rights by providing effective remedies for their breach, it bears underscoring that for the purposes of the analysis required under s. 24(2), the exclusion of evidence is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. This case is striking proof of that.

The criteria for exclusion under s. 24(2) of the *Charter*

[40] In any event, although the prosecution concedes that the language rights guaranteed by s. 20(2) of the *Charter* were infringed, the analysis does not end there. The next question is whether the evidence should be excluded based on the three criteria set out in **R. v. Grant** [2009] 2 S.C.R. 353:

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message that the justice system condones serious state misconduct),
>
> (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
>
> (3) society's interest in the adjudication of the case on its merits.

[41] As for the third inquiry, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels a suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute: **R. v. Grant**, *supra*, para. 81.

[42] In **Grant**, *supra*, Charron J. and McLachlin C.J. analyze how the courts should examine certain types of evidence. They identify (1) statements by the accused, (2) bodily evidence taken from the body of the accused, (3) non-bodily physical evidence, and (4) derivative evidence, i.e., physical evidence discovered as a result of an unlawfully obtained statement.

[43] Charron J. and McLachlin C.J. suggest the following framework for non-bodily physical evidence:

> [112] The three inquiries under s. 24(2) will proceed largely as explained above. Again, under the first inquiry, the seriousness of the *Charter*-infringing conduct will be a fact-specific determination. The degree to which this inquiry militates in favour of excluding the bodily evidence will depend on the extent to which the conduct can be characterized as deliberate or egregious.
>
> [113] With respect to the second inquiry, the *Charter* breach most often associated with non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure: see, e.g., *Buhay*. Privacy is the principal interest involved in such cases. The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.
>
> [114] Other interests, such as human dignity, may also be affected by search and seizure of such evidence. The question is how seriously the *Charter* breach impacted on these interests. For instance, an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account: *R. v. Simmons*, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, at pp. 516-17, *per* Dickson C.J.; *R. v. Golden*, 2001 SCC 83 (CanLII), 2001 SCC 83, [2001] 3 S.C.R. 679. The fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion.
>
> [115] The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the others, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission.
>
> (Emphasis added.)

[44] On the face of it, I must say that in my opinion, there was no infringement of the defendant's language rights on October 25, 2011, from the time Constable Doucet, a bilingual RCMP member, reached the kennel. Indeed, upon her arrival, a thorough inspection resumed at which Constable Doucet, the SPCA officers and the defendant were present.

[45] That being the case, for the purposes of the analysis required under s. 24(2), I will deal first with the so-called "non-bodily physical" evidence obtained during the period of some 30 to 45 minutes before Constable Doucet arrived at the kennel. I will then focus on the evidence consisting of the "statement by the accused" relating to the dog with the tilted head.

The "non-bodily physical" evidence obtained on October 25, 2011

The seriousness of the *Charter*-infringing state conduct

[46] On this topic, **R. v. Grant,** *supra*, teaches us that the more serious or deliberate the breach, the greater the need to exclude the evidence obtained. At the other end of the spectrum, if evidence is obtained through minor or inadvertent violations, which may only minimally undermine public confidence, then the need to exclude that evidence is much less great. The issue at this stage is not determining which evidence was obtained as a result of the breach. Rather, the court must look into how the evidence was obtained.

[47] It is also important to distinguish between police action taken in good faith and conduct that deliberately breaches the rules established by the *Charter*. However, the police officers' good faith must not be tantamount to negligence or willful blindness.

[48] In this case, although the breach was fairly serious, it is not the most serious language rights violation to have occurred in New Brunswick. We are obviously quite a long way from the conduct described in **Losier**, *supra*, wherein the police conduct showed blatant disregard for *Charter*-protected language rights. Indeed, following an infringement of Mr. Losier's language rights, the police officer "elicited" some "bodily" evidence from him using an approved screening device. However, this Court is being asked to consider "non-bodily physical" evidence in a context with a very different set of facts.

[49] Corporal Parish's conduct in this case was not marked by bad faith. Although solicitous about the defendant's language rights, he immediately proceeded with the investigation under circumstances in which, it has to be said, he failed to grasp the meaning and scope of s. 20(2) of the *Charter*. Nevertheless, upon noting that the defendant spoke only rudimentary English and wished to receive services in French, Corporal Parish immediately contacted a bilingual RCMP member, who was dispatched to the scene some 30 to 45 minutes later. The evidence also reveals that a more thorough inspection resumed in the bilingual officer's presence.

[50] Based on a factual assessment, I find that the infringement in this case can only minimally undermine public confidence in the rule of law. Despite the infringement, the admission of the evidence has little adverse effect on the repute of the court process. The analysis of this criterion only minimally militates in favour of excluding the evidence.

B. The impact of the breach on the *Charter*-protected interests of the accused

[51] This second stage requires an inquiry into the degree to which obtaining the evidence intruded upon the defendant's integrity. In **Harrison**, 2009 SCC 34 (CanLII), the Supreme Court explains:

> **28** This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry.
>
> (Emphasis added.)

[52] The Supreme Court adds in ***Grant***, *supra*, at para. 37, that "[t]he greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused."

[53] It should be pointed out, once again, that the SPCA officers did not "discover" or "elicit" the evidence. It stems primarily from observations about the state of the dogs and the conditions under which the defendant was housing them. In other words, the evidence that the defendant is seeking to have excluded consists of material evidence that existed or could have existed notwithstanding and irrespective of the *Charter* violation. Therefore, in my humble opinion, the link between the infringement of the defendant's language rights and the evidence obtained is at best tenuous.

[54] Furthermore, there is nothing to suggest a context demeaning to the defendant's individual dignity or a serious invasion of privacy. The case law also teaches that a place of business, such as the defendant's kennel, attracts a lower expectation of privacy than a dwelling house. This also was not evidence obtained by using the defendant against himself, such as through blood sample collection or another more invasive procedure.

[55] Under the circumstances, and given the fact that the violation was merely transient, although not trivial, I am of the opinion that the analysis of this second criterion is no argument for excluding the evidence.

C. Society's interest in the adjudication of the case on its merits

[56] This case does not involve the most serious charges in the sense that they are not criminal but rather regulatory in nature. However, that does not mean that they are minor. Depriving a large number of dogs of adequate medical attention and breeding them under conditions that are quite likely to compromise their health cannot be taken lightly. Society certainly has a stronger interest in the offence of failing to provide dogs with adequate food, water, shelter and care than in the offence of operating a kennel without a valid licence.

[57] There is no doubt that, given the reliability of the evidence, the search for truth in this case would be better served by including than by excluding the evidence. The seized dogs, the officers' observations about the condition of the dogs and their accommodation, and all of the related testimony, are relevant and reliable evidence the exclusion of which could bring the administration of justice into disrepute.

[58] There is also no doubt about the importance of that evidence. It is, in short, crucial to the prosecution and its exclusion would be virtually fatal to it.

D. Balancing the factors

[59] Ultimately, the exercise of balancing the factors analyzed in light of the circumstances does not militate for exclusion. The admission of this evidence would not, in my opinion, bring the administration of justice into disrepute. Although the infringing conduct of the SPCA officers is serious, the Court has not detected any bad faith in their behaviour. It nevertheless resulted in a *Charter* violation. However, the infringement had virtually no impact on the defendant's rights, since a thorough inspection of the kennel resumed once Constable Doucet arrived. The breach of the defendant's privacy was less serious because the evidence was obtained at a place of business. Society's interest in the case being adjudicated on its merits militates for inclusion of

the evidence given its reliability, its importance to the prosecution and the seriousness of the offences charged. The search for truth would also be better served by including the evidence than by excluding it.

[60] Finally, the factor to which I give the greatest weight, and I take the liberty of repeating it, is that the Court is looking at so-called "non-bodily physical" evidence. The SPCA officers also did not attempt to "discover" or "elicit" that evidence. Apart from the dogs seized under the *SPCA Act*, the evidence stems primarily from observations about the state of the dogs and the conditions under which the defendant was housing them.

[61] Accordingly, while recognizing the infringement of the defendant's language rights guaranteed by s. 20(2) of the *Charter*, which the Court considers to be serious although transient, I find the evidence obtained by the SPCA officers on October 25, 2011, as well as all of the testimony stemming from it, to be admissible.

The "statement by the accused" on October 25, 2011

[62] We will now turn to the evidence consisting of the "statement by the accused" as discussed by Charron J. and McLachlin C.J. in **Grant,** *supra*.

[63] I consider the breach of s. 20(2) of the *Charter* to be serious, although it was merely transient and there was no bad faith in Officer Parish's conduct. There is an inevitable risk of undermining the confidence of the New Brunswick public by including the statement made by the accused under circumstances in which he had already opted to receive services in the official language of his choice. The analysis of the first criterion therefore militates in favour of its exclusion.

[64] The intrusion upon the defendant's integrity is also significant. It is clear that Corporal Parish as good as "elicited" a statement from the accused under circumstances in which there is no doubt that s. 20(2) of the *Charter* was breached. The impact on the defendant's *Charter*-protected rights is obvious. As the Supreme Court indicated at para. 95 of **Grant**, *supra*, a statement made to a peace officer following a breach of the individual's *Charter* rights tends to militate in favour of excluding the evidence.

[65] It also goes without saying that Corporal Parish infringed the defendant's section 7 *Charter* rights given the circumstances under which he obtained the statement. Considering all of the circumstances, and in light of the Supreme Court's comments in **R v. White**, [1999] 2 S.C.R. 417, I find that the defendant had an honest and reasonable belief that he was required by law to answer Corporal Parish's question as to how long a particular dog had had a tilted head. I would go even further. In my view, s. 20(2) of the *Charter* should be considered, where appropriate, when determining whether a statement is admissible in New Brunswick. This is so because, to my mind, the statement's reliability is central to the debate. For example, it would be difficult, or even imprudent, to assess the reliability of a statement made under circumstances in which the defendant had only a rudimentary knowledge of the official language imposed by the peace officer. Of course, there can be no absolute rule as to whether a statement should be excluded owing to a s. 20(2) *Charter* violation. This will always be a question of fact.

[66] It is true that the nature and circumstances of the offence tend to suggest that the case should be adjudicated on its merits. However, the exclusion of the statement by the accused would in no way be fatal to the prosecution considering all of the circumstances.

[67] Thus, on balance, the factors analyzed in light of the circumstances clearly militate in favour of excluding the statement by the accused, failing which its inclusion could bring the administration of justice into disrepute. The statement by the accused is, therefore, excluded from the evidence.

On October 27, 2011, was it incumbent upon the SPCA officers to present the defendant with an entry warrant written in French?

[68] As I have already explained, the defendant is seeking to have excluded all evidence obtained through the execution of the entry warrant presented to him by the SPCA officers on October 27, 2011, namely the officers' observations, the seized dogs, the photos, the video depicting the state of the kennel and all testimony relying on that evidence.

[69] It is noteworthy that neither the prosecution nor the defendant has submitted any case law on the issue of whether the SPCA officers had a duty to draw up the entry warrant either in

French or in both official languages. There is also no denying that the defendant had informed the officers two days earlier, i.e., on October 25, 2011, that he wanted to be served in French. That being the case, I propose a brief overview of the relevant legislative provisions and case law on the issue.

[70] Sections 16 and 17 of the New Brunswick *Official Languages Act* provide that:

> 16 English and French are the official languages of the courts.
>
> 17 Every person has the right to use the official language of his or her choice in any matter before the courts, including all proceedings, or in any pleading or process issuing from a court.

[71] Subsections 19(2) and 20(2) of the *Charter* read as follows:

Proceedings in New Brunswick courts	19(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.
Communications by public with New Brunswick institutions	20(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

[72] Subsection 849(3) of the *Criminal Code* reminds us that:

> (3) Any pre-printed portions of a form set out in this Part, varied to suit the case, or of a form to the like effect shall be printed in both official languages.

[73] Fish J.A. of the Court of Appeal of Quebec, as he then was, indicates in **R. v. Noiseux** [1999] J.Q. No. 507, at paras. 10-14:

> **10** The appellants, both French-speaking, moved in the trial court to quash an information, entirely in French, sworn by an informant who is French-speaking as well.
>
> **11** Each appellant alleged that the information laid against him was null because subs. 841(3) of the Criminal Code requires bilingual forms. Or, more precisely, because subs. 841(3) provides, as I mentioned earlier, that the pre-printed portions of a form set

out in Part XXVIII of the Code, "shall be printed in both official languages".

12 Respondent's position is that the pre-printed portions of each form must instead be printed in one language only, and that these unilingual forms must be made available in separate English and French versions.

13 With respect for the contrary opinion of Justice Otis, I agree with Justice Zerbisias that subs. 841(3) of the Criminal Code requires forms with the pre-printed portions printed in both English and French.

14 It is important to remember that subs. 841(3) applies not only to an information - the form that concerns us here - but also, for example, to summonses, appearance notices and search warrants. The pre-printed portions of these latter forms contain basic and valuable information that can be of immediate and serious consequence to the recipient (or to the person whose home or office is to be searched).

(Emphasis added.)

[74] He adds at paras. 23-25:

23 In my view, subs. 841(3) of the Code does not conflict with section 133 of the Constitution Act, since it imposes an obligation on the state to print bilingual forms, while permitting individuals to choose either language when using them.

24 It does not in any way diminish the right of any person to use either English or French in any process or pleading of any court in Canada or in Quebec.

25 Moreover, the evident objective of subs. 841(3) is to facilitate the comprehension, through bilingual forms, of criminal proceedings by the persons concerned. There is no contradiction between this disposition and section 133 of the Constitution Act. Since section 133 provides that either French or English may be used in the proceedings, subs. 841(3) does not impose any restriction on this constitutionally protected right.

[75] The s. 841(3) to which Fish J.A. refers has obviously now become s. 849(3) of the *Criminal Code*. It also appears that **Noiseux**, *supra*, is still authoritative. I, therefore, find that peace officers in New Brunswick have an obligation to use the pre-printed portions of the forms set out in Part XXVII of the *Criminal Code*, in particular Form 5, Warrant to Search, in both official languages. In my view, s. 849(3) requires it.

[76] I have also noticed that there is a whole range of decisions in the Canadian jurisprudence interpreting s. 849(3) of the *Criminal Code*. Some suggest that failure to use the pre-printed

portions of the forms in both official languages is merely a formal defect. The fact remains that this argument, although undoubtedly attractive, is not entirely convincing in that it fails to acknowledge the uniqueness of the province of New Brunswick as laid down in ss. 16(2) and 20(2) of the *Charter*. We have to remember that peace officers in that province have a duty to comply with the language requirements that s. 20(2) of the *Charter* imposes on New Brunswick institutions. This is also the principle that emerges from **Losier**, *supra*, a landmark decision on language rights in New Brunswick. As Bastarache J. stated unequivocally in **Beaulac**, [1999] S.C.J. No. 25, language rights must be given a large and liberal interpretation by the courts.

[77] Given the requirement that the form used be bilingual, it remains to be seen whether peace officers who use it are authorized to fill it out only in the official language of their choice.

[78] In **Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch**, [1986] S.C.J. No. 26, Beetz J. of the Supreme Court of Canada indicates at paras. 52 and 53:

> **52** Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.
>
> **53** It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his

choice.

[79] It seems to me, however, that the jurisprudence has evolved a great deal since then on the issue of language rights. Notably, Bastarache J. of the Supreme Court states at para. 25 of **R. v. Beaulac**, *supra*, that to the extent that **Société des Acadiens du Nouveau-Brunswick**, *supra*, "stands for a restrictive interpretation of language rights, it is to be rejected." The Court of Appeal of New Brunswick says much the same thing in **Losier**, *supra*, in terms of s. 20(2) of the *Charter*.

[80] Notwithstanding these observations, there is an important distinction in this case: the SPCA officers did not obtain a search warrant issued under the provisions of the *Criminal Code*. They obtained an entry warrant under the *Entry Warrants Act* instead. Nevertheless, section 4 of the *Forms Regulation, 88-218,* enacted under the *Entry Warrants Act*, provides that an entry warrant shall be in Form 2. It is also not surprising to note that the pre-printed portions of the form are written in both official languages.

[81] I am therefore of the opinion that peace officers in New Brunswick, including those from the SPCA, are required to use Form 2, Entry Warrant, pursuant to the *Forms Regulation*, *88-218,* i.e., with the pre-printed portions in both official languages. In fact, Form 2 itself is untouchable. Moreover, those pre-printed portions contain basic and valuable information that can be of immediate and serious consequence to any member of the public affected, as well as to the owner of the premises.

[82] In this case, it is clear that the SPCA officers infringed the defendant's language rights by presenting him with an entry warrant written only in English. I repeat: it was incumbent upon the SPCA officers to present him with an entry warrant in Form 2 with the pre-printed portions in both official languages, in accordance with the *Forms Regulation*, *88-218*. All the more reason, then, that the failure to do so resulted in the infringement of the defendant's language rights guaranteed under both s. 31(1) of the *Official Languages Act* and s. 20(2) of the *Charter*. Likewise, considering the obligations incumbent upon New Brunswick peace officers under s. 20(2) of the *Charter,* this was, to my mind, much more than a simple formal defect.

[83] In light of all of the circumstances, I am of the opinion that the SPCA officers also had an obligation to fill out the entry warrant form in both official languages, especially since the defendant had informed them two days earlier that he wanted to receive services in French. Incidentally, the Notice of Seizure that the officers served on the defendant on October 25, 2011, had been prepared in both official languages. In short, there is no expiry date on the language rights guaranteed by s. 20(2) of the *Charter*. Any other interpretation, in addition to being an aberration, would, to my mind, stand for a restrictive interpretation of language rights and, more specifically, of s. 20(2) of the *Charter*.

[84] However, there was nothing onerous for the SPCA officers in the obligation to fill out the entry warrant form in this way. Indeed, s. 31(3) of the New Brunswick *Official Languages Act* expressly provides that a police force or agency shall ensure the availability of the means necessary to respond to the choice made by a member of the public as to the official language in which he or she wishes to receive services. Of course, this in no way limited Corporal Parish's right to fill out Form 1, Application for Entry Warrant, in the official language of his choice. Unlike Form 2 (Entry Warrant), Form 1 (Application for Entry Warrant) was clearly not intended for the defendant; moreover, it cannot be likened to a "service" that a "member of the public" "receives" within the meaning of s. 31(1) of the New Brunswick *Official Languages Act* and s. 20(2) of the *Charter*.

[85] The prosecution contends that since the entry warrant was addressed only to the peace officers, they had no obligation to fill it out either in French or in both official languages. I consider that argument to be without merit. It bears repeating, once again, that the defendant was, in fact, the recipient of the entry warrant. He was also the owner of the premises mentioned in the warrant and, ultimately, the "member of the public" who was "receiving" the "services" of the peace officers. It also comes as no surprise that the defendant is identified in the entry warrant. Even more importantly, the defendant had advised the SPCA officers two days earlier that he wished to receive the services in French. It goes without saying that serving an entry warrant on a "member of the public" is a "service" falling within s. 31(1) of the New Brunswick *Official Languages Act* and s. 20(2) of the *Charter*.

[86] Now, as will be seen in the analysis required under s. 24(2), the impact of this infringement on the defendant's rights was greatly reduced, or even mitigated, since Constable Saulnier helped the SPCA officers to explain and translate the content of the entry warrant for the defendant.

[87] I would also like to point out that the warrant issued under the *Entry Warrants Act* seems to me to be rather preventive in nature. This is also what appears from the wording of the relevant legislative provisions:

Society for the Prevention of Cruelty to Animals Act:

14(1) An animal protection officer may at any reasonable time enter and inspect

a) a licensed pet establishment, or
b) any building, place or premises, except a dwelling house, that the animal protection officer has reason to believe is being used for or in connection with a pet establishment.

14(2) **Before** or **after** attempting to enter any place for the purposes of subsection (1), an animal protection officer may apply to a judge for an entry warrant under the *Entry Warrants Act*.

27(1) Where an animal protection officer has, on reasonable and probable grounds, reason to believe that an animal is confined, impounded or yarded without adequate food, water, shelter or care for more than twenty-four consecutive hours, an animal protection officer or a person authorized by an animal protection officer may enter the place or break and enter any enclosure, erection or building where the animal is confined, impounded or yarded, except a dwelling house, to provide the animal with food, water, shelter or care.

27(2) An animal protection officer may seize an animal referred to in subsection (1) if the seizure is necessary to attend to the immediate needs of the animal.

27(3) **Before** or **after** attempting to enter any place for the purpose of subsection (1), an animal protection officer may apply to a judge for an entry warrant under the *Entry Warrants Act*.
1997, c.27, s.5.

Entry Warrants Act:

Powers of judge to issue entry warrant

3(1) The judge shall issue an entry warrant in the prescribed form if the judge is satisfied

that

a) the applicant is a person authorized under the originating Act to discharge the statutory functions identified in the application, and
b) the place to be entered is
(i) a regulated place,
(ii) a place that there are reasonable grounds to believe is a non-conforming place, or
(iii) any other place which the applicant has some *bona fide* reason for requiring to enter for the purposes of the originating Act.

3(2) An entry warrant shall name the person who is authorized to execute it and shall identify the place to be entered.
1986, c.E-9.2, s.3.

Obligations of person executing entry warrant

5(1) An entry warrant shall be executed on any day except a Saturday or a Sunday or other holiday, between 8 a.m. and 6 p.m., unless the judge, in the light of the nature of the place to be entered and the purposes of the entry, authorizes its execution on a Saturday or a Sunday or other holiday or at some other hour.

5(2) A person executing an entry warrant shall,
a) if so requested by a person in the place to be entered, show that person a copy of the warrant, and
b) if nobody is in the place entered when the warrant is executed, leave a copy of the warrant there in a prominent location.
1986, c.E-9.2, s.5.

(Emphasis added.)

[88] Indeed, under ss. 14(1) and 14(2) of the *SCPA Act*, an officer may enter and inspect a kennel at any reasonable time. Similarly, the officer may enter the kennel and seize the dogs under ss. 27(1) and 27(2). An officer is also at liberty to seize an animal that is being kept in a kennel if the animal requires immediate attention owing to its condition, and no warrant is required for that purpose, unless the person occupying the premises denies the officer entry.

[89] An officer may apply to a judge for an entry warrant under the *Entry Warrants Act* either before or after attempting to enter. That Act goes even further: if nobody is in the place entered by the SPCA officer when the warrant is executed, the officer may simply leave a copy of the warrant there in a prominent location. In my opinion, the SPCA officers were therefore not required to obtain a warrant on October 27, 2011. They could have simply exercised the powers

extended to them by ss. 14(1), 14(2), 27(1) and 27(2) of the *SPCA Act*. If the defendant had denied them access, they could have obtained an entry warrant at that point.

[90] I would like to make one preliminary observation before proceeding with the analysis required under s. 24(2) of the *Charter*. The defendant does not dispute the fact that the SPCA officers had the reasonable and probable grounds required to enter the kennel and seize the dogs on October 27, 2011. Rather, he argues that because the entry warrant was not in French, and therefore was in breach of s. 20(2) of the *Charter*, it must inevitably fail. That, in my view, is a purely academic issue. I will explain.

[91] The SPCA officers draw their authority to enter the kennel and seize the dogs from ss. 27(1) and 27(2) of the *SPCA Act*, notwithstanding and irrespective of the entry warrant. I note that this was also not a dwelling house. I would go even further. The entry warrant issued under the *Entry Warrants Act* becomes relevant only provided that the person named in the warrant, in this case the owner or the individual occupying the premises, denies the SPCA officers access. I note that, in this case, the defendant never did deny them access to the kennel.

[92] It is also important to note that the statutory framework may be relevant to the issue of whether there is a reasonable expectation of privacy, like in this case. That, incidentally, is what the Supreme Court of Canada says in its recent decision in **R. v. Spencer**, 2014 SCC 43 (CanLII).

The criteria for exclusion under s. 24(2) of the *Charter*

A. **The seriousness of the *Charter*-infringing state conduct**

[93] The first inquiry being the seriousness of the *Charter*-infringing state conduct, there is no indication of bad faith or obstinacy on the part of the SPCA officers as to the *Charter*-protected language rights. Although the entry warrant was neither in Form 2 nor filled out in both official languages, the fact remains that Corporal Parish requested Constable Saulnier's assistance to translate and explain its content to the defendant.

B. The impact of the breach on the *Charter*-protected interests of the accused

[94] As for the impact of the breach on the defendant's language rights, to quote the Supreme Court in **Harrison**, *supra*, I consider the infringement to be "merely transient" given Constable

Saulnier's assistance.

[95] The evidence that the defendant is seeking to have excluded consists of so-called "non-bodily physical" evidence that existed notwithstanding and irrespective of the *Charter* violation, namely the officers' observations, the seized dogs, the photos as well as the video depicting the condition of the kennel. In other words, nothing was "discovered" as a result of the language rights violation. This evidence was clearly visible to anyone who cared to look, with or without an entry warrant. Likewise, there is nothing to suggest a context demeaning to the defendant's individual dignity or a serious invasion of privacy. A place of business, such as the defendant's kennel, attracts a lower expectation of privacy than a dwelling house.

C. Society's interest in the adjudication of the case on its merits

[96] I note once again that the charges in this case are not among the most trivial. Depriving a large number of dogs of adequate medical attention and breeding them under conditions that are quite likely to compromise their health cannot be taken lightly. Given its reliability, the search for truth in this case would be better served by including the evidence than by excluding it. The evidence obtained upon executing the entry warrant is also crucial to the prosecution and its exclusion would be virtually fatal to it. In my view, the exclusion of this evidence may bring the administration of justice into disrepute. The interest of society, therefore, requires that the case be adjudicated on its merits.

D. Balancing the various factors

[97] All things considered, wanting in the long term to maintain the integrity of public confidence in the judicial system leads me to conclude that admitting the evidence would not bring the administration of justice into disrepute. Conversely, its exclusion would, in my opinion, tend to bring the administration of justice into disrepute. I therefore find that the evidence obtained on October 27, 2011, and all testimony stemming from it, is admissible.

Did the defendant provide the dogs in his possession and control with adequate food, water, shelter and care pursuant to s. 4(1) of *Regulation 2000-4*?

[98] I cannot agree with the defendant's contention suggesting that the prosecution failed to prove the required continuity. Indeed, I find that the evidence on both sides proves beyond a reasonable doubt that the dogs examined by Dr. Legge were those seized at the defendant's kennel on October 25 and 27, 2011. I also accept Dr. Legge's testimony explaining that it is sometimes difficult or even impossible to determine a dog's breed in the absence of birth records, especially owing to extensive crossbreeding.

[99] To complicate matters, there appear to be some errors in the translation of the disclosure. Although this is an unfortunate situation, it has to be said that the documentation was extensive. Furthermore, I am satisfied that some of the errors raised by the defendant are due to the fact that the files sometimes include newborn puppies in the headcount, while others are quite simply trivial and insignificant. I am also of the opinion that these errors did not interfere with the defendant's ability to make full answer and defense to the offences charged. In fact, he raised the errors himself, after which he corrected them one by one for the record.

[100] The defendant also contends that the conditions under which the seized dogs were transported to the Fredericton area either caused or contributed to the medical conditions diagnosed by Dr. Legge. Transporting 129 dogs from Saint-Basile to Fredericton is obviously an enormous challenge. Nevertheless, to the extent that the dogs were transported under less-than-ideal circumstances, I find that this was necessary in order to prevent their already precarious health from deteriorating. In particular, I accept Dr. Legge's testimony that the many ear infections identified dated back more than one day. I therefore consider the defendant's claim to be unjustified and unsupported by the evidence.

[101] Subsection 18(1) of the *SPCA Act* provides that a person who has ownership, possession or the care and control of an animal shall provide the animal with food, water, shelter and care in accordance with the regulations.

[102] Subsection 4(1) of *Regulation 2000-4* provides, *inter alia*, as follows:

> Standards for animal care

4(1) For the purpose of subsection 18(1) of the Act, a person who has ownership, possession or care and control of an animal

a) shall ensure that the animal has an adequate source of food and water;
b) shall provide the animal with adequate medical attention when the animal is wounded or ill;
c) shall provide the animal with reasonable protection from injurious heat or cold; and
d) shall not confine the animal to an enclosure, area or motor vehicle

(i) with inadequate space,
(ii) with unsanitary conditions,
(iii) with inadequate ventilation,
(iv) with inappropriate other occupants,
(v) without providing an opportunity for exercise, or
(vi) that is in a state of disrepair,

so as to significantly impair the animal's health or well-being.

4(1.1) For the purposes of subsection 18(1) of the Act, a person who has ownership, possession or care and control of more than 5 dogs over the age of 6 months shall provide the animals with food, water, shelter and care in accordance with *A Code of Practice for Canadian Kennel Operations published in 2007 by the Canadian Veterinary Medical Association*.

4(2) A person shall not be convicted of an offence under subsection 18(2) of the Act for treating an animal in a manner

a) consistent with a standard or code of conduct, practice or procedure specified in Schedule A,
b) consistent with generally accepted practices or procedures for such an activity, or
c) otherwise reasonable in the circumstances.
2008-83; 2010-75

(Emphasis added.)

[103] Firstly, to be clear, there is no reason to proceed with the so-called **W.D.** analysis in this case. This is because the evidence does not include any contradictory evidence on either side. I am satisfied that neither party attempted to manufacture the evidence. The defendant is of the view that the truck used to transport the seized dogs was not equipped with a ventilation system. However, he was never aboard the truck. I am not questioning his credibility, but rather the reliability of his observations. As for the circumstances under which Constable Saulnier explained the entry warrant and translated it into French for the defendant, there is a consensus

on this point: it was done succinctly.

Adequate medical attention

[104] *A priori*, I note that Dr. Legge examined four dogs on October 25, 2011, and 29 more on October 27, 2011, for a total of 33. He identified a number of diagnoses and clinical conditions, namely eye and ear infections; severely matted fur, which is a particularly painful condition for the animal; severe dental disease; an infection of the skin under the matted fur; and one diagnosis of KCS, which severely affected the eye of one dog. I also find that Dr. Legge's evidence establishes a close causal connection between the lack of adequate medical attention and the diagnosed medical conditions.

[105] Dr. Legge did not examine the other 100 dogs that were seized. He also did not testify to the medical condition of those dogs. I therefore cannot conclude that those other dogs also suffered from the same conditions. That may very well be the case, but there is nothing in the evidence to support such conjecture. It fell to the prosecution to prove it beyond a reasonable doubt, and it simply did not do so. Of course, the evidence of the other SPCA members and of Tracy Marcotulio is insufficient.

Shelters and enclosures

[106] In my view, the prosecution presented overwhelming evidence in relation to the allegation of non-regulation shelters and enclosures for the 133 dogs seized. The shelters and enclosures were clearly in very poor condition. The photos and video attest to this. The outdoor doghouses offered no protection from the elements and had nails sticking out of them here and there. Holes could be seen all over the walls, and the wood was so rotten that the roof provided only partial cover. There were even signs of mould on the wood. Indoors, the dogs were housed in enclosures with partially bent aluminium walls and a light hanging at such a height that the dog could easily burn itself. There was also no leak-proof material covering the concrete floors, except for some newsprint in places. Even more alarming is the fact that the photos depict one dog putting its head through a hole in a metal wire fence, placing it at imminent risk of serious injuries.

Food and water

[107] There is nothing in the evidence to suggest that the defendant failed to provide the dogs with an "adequate source of food and water." Dr. Legge also indicates that he had no concerns with respect to the dogs' weight.

[108] There is no doubt, however, that the defendant did not comply with every provision of *A Code of Practice for Canadian Kennel Operations*, although, at first glance, some seem trivial. For example, he did not store the dogs' food in containers with a lid, although a bag barely lasts two days. However, other violations are more serious. Food was served in old tomato juice cans. Some were rusty. Given the depth of the cans, the prosecution contends that the dogs only had access when the cans were full. I recall the defendant's testimony on this point. He maintains that he was preparing to pour more food when the SPCA members took the photos. There is an element of consistency to confirm the defendant's argument: the bags of food were open at the time. Finally, because the cans were attached to the wall with a piece of wire, I find, based on the totality of the evidence, that the defendant washed them only very infrequently.

Humidity and temperature

[109] *A Code of Practice for Canadian Kennel Operations* provides that the humidity level inside a kennel should be less than 70% and preferably between 45 and 55%. The *Code* also sets out a specific temperature for each dog breed, which should not exceed 27ºC under any circumstances. Simple estimates by the witnesses for the prosecution as to the temperature inside the kennel are not sufficient evidence to prove this *Code* violation. The same applies for the witnesses' statements suggesting that the air was too humid.

Did the defendant prove, on a balance of probabilities, that he behaved reasonably?

[110] It is clear that, despite his best intentions, the defendant was unable to perform the difficult task of looking after 133 dogs. More specifically, he was unable to examine the dogs often enough to detect the early signs of eye and ear infections, such as discharge, inflammation and redness. Because he had been working at the kennel alone for a number of years, with the exception of occasional assistance from a volunteer, he could not focus enough of his energy on the grooming and care that the dogs so badly needed.

[111] The defendant also failed to take any preventive measures to avoid the very things with which he is charged. For example, he had not set up any inspection system to identify and treat various conditions requiring veterinary care. Based on the totality of the evidence, it is also clear that he was only randomly examining and grooming the dogs. He engaged the veterinarian's services primarily for vaccinations and deworming. Even more worrisome is the fact that the defendant would treat infections himself using Polysporin ointment under circumstances where, given the severity, everything pointed to the need for veterinary treatment. He maintains that grooming would have been done only when the dogs were moved back into the kennel for the winter.

[112] Remarkably, the evidence unfortunately reveals that the defendant was unfamiliar with *A Code of Practice for Canadian Kennel Operations published in 2007 by the Canadian Veterinary Medical Association*. In fact, he did not even know it existed when the dogs were seized.

[113] Like most regulatory offences, those against the defendant are strict liability offences. As a result, the prosecution is required to prove the *actus reus* but not *mens rea*. Once the prosecution has proved beyond a reasonable doubt that the defendant committed the offences, the defendant may prove, on a balance of probabilities, that he behaved reasonably. He may, for example, show that he took a certain number of preventive measures to avoid the very things with which he is charged. Supposing hypothetically that my finding as to the type of offence proves to be wrong, I find that, in light of all of the circumstances, the evidence also proves the *mens rea* for both offences charged.

[114] All things considered, although the accused's statement has been excluded, I find that the prosecution has proved the *actus reus* of both offences, subject to the following comments. On the other hand, the defendant has not proved, on a balance of probabilities, that he behaved reasonably in order to prevent the offences charged. I therefore find that the prosecution has proved beyond a reasonable doubt that the defendant failed to provide adequate care pursuant to s. 4(1) of *Regulation 2000-4* to 33 dogs of which he had the care and control, but not to 133

dogs as alleged. I also find that the defendant failed to provide adequate shelter to the 133 dogs and that, for the purposes of s. 4(2) of *Regulation 2000-4*, he failed to treat the dogs in a manner that was "otherwise reasonable in the circumstances."

[115] Having said that, nothing in the evidence leads me to find that the defendant failed to provide the dogs with an "adequate source of food and water" contrary to s. 4(1)(a) of *Regulation 2000-4*. It must be said, however, that the defendant did not comply with certain food-related provisions of *A Code of Practice for Canadian Kennel Operations*. In so doing, the defendant breached both s. 4(1.1) of *Regulation 2000-4* and s. 18(1) of the *SPCA Act*, more specifically with respect to the storage containers and bowls he was supposed to use to serve food to all of his dogs.

Did the defendant operate a kennel without a valid licence contrary to s. 4(c) of *Regulation 2010-74*, also in violation of s. 23(1) of the *SPCA Act*?

[116] I find that the evidence adduced by the prosecution proves beyond a reasonable doubt that the defendant operated a kennel without a valid licence, contrary to s. 4(c) of *Regulation 2010-74*, also in violation of ss. 23(1) and 23(2) of the *SPCA Act*. Indeed, Mathiew Pascalado, an SPCA member at the time, checked the SPCA records, as his duties required him to do, and the licence to operate issued for the defendant's kennel expired on October 1, 2011. That is also what Corporal Parish noticed as he knocked on the kennel door on October 25, 2011. The defendant does not dispute this fact. He simply states that he was waiting for either a renewal notice or an upcoming visit from the SPCA in order to renew the licence. I am of the opinion that this approach does not meet the reasonable standard of care expected of a licence holder. In my view, he has failed to demonstrate, on a balance of probabilities, that he behaved reasonably under the circumstances. I therefore find that the defendant committed the offence charged.

VI. CONCLUSION

[117] First, to answer the questions asked in the introduction, I am of the view that New Brunswick peace officers, including those from the SPCA, are required to use Form 2, Entry

Warrant, as prescribed in the *Forms Regulation*, *88-218*, i.e., with the pre-printed portions in both official languages. In fact, Form 2 itself is untouchable. Moreover, those pre-printed portions contain basic and valuable information that may have immediate and serious consequences for any member of the public affected, as well as for the owner of the premises. In my view, the failure to meet this requirement gives rise to much more than a simple formal defect given the constitutional nature of s. 20(2) of the *Charter* and the ensuing obligations of peace officers. In light of all of the circumstances in this case, the SPCA officers also had an obligation to fill out the entry warrant form in both official languages, especially since the defendant had informed them two days earlier that he wanted to receive services in French. Any other interpretation, in addition to being an aberration, would, to my mind, stand for a restrictive interpretation of language rights and, more specifically, of s. 31(1) of the New Brunswick *Official Languages Act* and s. 20(2) of the *Charter*.

[118] It is also not surprising to note that s. 31(3) of the New Brunswick *Official Languages Act* expressly provides that a police force or agency shall ensure the availability of the means necessary to respond to the choice made by a member of the public as to the official language in which he or she has wishes to receive services. Of course, this in no way limits a peace officer's right to fill out the Application for Entry Warrant in the official language of his or her choice. Unlike Form 2 (Entry Warrant), Form 1 (Application for Entry Warrant) is clearly not intended for the defendant; moreover, it cannot be likened to a "service" that "the public receives" within the meaning of s. 31(1) of the New Brunswick *Official Languages Act* and s. 20(2) of the *Charter*.

[119] I also find that, where appropriate, a court asked to rule on the admissibility of an accused's statement to a peace officer in New Brunswick must consider s. 20(2) of the *Charter*.

[120] I am of the opinion that in this case, the SPCA officers breached the defendant's language rights on October 25 and 27, 2011, infringing the guarantees set out in s. 31(1) of the *Official Languages Act* and s. 20(2) of the *Charter*. In light of the very specific circumstances of this case, and with the exception of the statement by the accused, I am of the view that these breaches do not justify the exclusion of evidence under s. 24(2) of the *Charter*.

[121] I am, in short, dismissing the motion. Accordingly, the evidence adduced by the prosecution is admitted at the *voir dire*, except the statement by the accused. Thus, all exhibits marked for identification purposes are now admitted in evidence. The same applies to the different testimony for the prosecution. As agreed, the evidence admitted at the *voir dire* is entered at trial.

[122] However, the infringement of the defendant's language rights should be considered at the sentencing hearing as a mitigating circumstance justifying a reduced sentence for the offence under s. 18(2) of the *SPCA Act*. I am of the view that, pursuant to s. 24(1) of the *Charter*, and having regard to the principles that emerge from **R. v. Nasogaluak,** [2010] 1 S.C.R. 206, this would be an appropriate and just remedy for the infringement of the defendant's language rights as guaranteed under s. 20(2) of the *Charter*. This issue was also raised during the parties' closing arguments. I further note that the Court of Queen's Bench of New Brunswick recently applied those principles in **R. v. Martin** 2013 NBQB 322 (CanLII) at para. 39.

[123] For the reasons already discussed, I find the defendant guilty of both offences charged.

[124] I would, however, like to make a few clarifications as to the first count. I find that the prosecution has failed, for lack of evidence, to prove beyond a reasonable doubt that the defendant neglected to provide adequate care to 133 dogs of which he had the care and control pursuant to s. 4(1) of *Regulation 2000-4* and s. 18(1) of the *SPCA Act*. It proved this for only 33 of the dogs. Moreover, nothing in the evidence leads me to find that the defendant failed to

provide the dogs with an "adequate source of food and water" as alleged. However, I do find that the defendant was not complying with the food-related provisions of *A Code of Practice for Canadian Kennel Operations* and, more specifically, those relating to the storage containers and bowls he ought to have used to serve food to all of the dogs. In so doing, he breached both s. 4(1.1) of *Regulation 2000-4* and s. 18(1) of the *SPCA Act*. Apart from these comments, I am of the view that the prosecution has proved the other charges under the first count beyond a reasonable doubt, including the failure to provide shelter for the 133 dogs in accordance with s. 4(1) of *Regulation 2000-4* and s. 18(1) of the *SPCA Act*.

[125] As for the second count, I find that the evidence proves beyond a reasonable doubt that the defendant operated a kennel without a valid licence, contrary to s. 4(c) of *Regulation 2010-74,* also in breach of ss. 23(1) and 23(2) of the *SPCA Act*.

Dated at Edmundston, New Brunswick, this 24th day of July 2014.

Marco R. Cloutier
Judge of the Provincial Court of New Brunswick