

Case Name:
R. v. Hunter

Between
Her Majesty the Queen, and
Ralph Hunter

[2011] O.J. No. 2335

Information Nos. 10-157 and 10-158

Ontario Court of Justice
Cornwall, Ontario

B.V. Marchand J.P.

Oral judgment: February 23, 2011.

(134 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Application by accused for exclusion of evidence allowed -- Inspector for Ontario SPCA received complaint of horses being improperly housed and fed -- Inspector attended accused's property, took photographs and conducted search -- Subsequent complaint about worsening conditions led to preauthorized search and charges -- Initial attendance by inspector was undertaken without accused's permission, without corroboration of complaint, without a warrant and in absence of reasonable grounds to believe animals were in immediate distress -- Search was illegal, breach was serious, and public interest warranted exclusion of evidence -- Charges stayed -- Ontario Society for the Prevention of Cruelty to Animals Act, s. 6.

Application by the accused, Hunter, for a Charter remedy based on a violation of his right against unreasonable search and seizure. The accused faced a series of charges under the Ontario Society for the Prevention of Cruelty to Animals Act. The charges dated between July 7th and October 26th of 2009. The accused submitted that a search by inspectors on June 22, 2009 was conducted pursuant to an illegal warrant and breached his rights. On that date, the Society received a complainant concerning animals located at the accused's property. The informant stated that five to six horses were kept in a small pen, fed old hay, and did not have access to water. She stated that horses were also kept on pallets in another handmade shed. A letter from the Crown stated that the informant's observations were conducted from a roadway near the accused's property which she regularly trav-

eled. An inspector attended the accused's property on June 22nd and took photographs from the accused's driveway and conducted a complete and thorough search. The informant made a subsequent complaint on July 2nd, stating that conditions had worsened. On July 7th, inspectors and police conducted a preauthorized search for animals in distress. Several horses were removed. The accused submitted that the initial search by the inspector was unreasonable and argued that the warrant and subsequent search flowed from the initial breach and thus any related evidence should be excluded.

HELD: Application allowed. There were no reasonable grounds to believe that any animals on the accused's property were in immediate distress, thereby justifying a warrantless search. When the inspector entered the accused's driveway, she was not in possession of a warrant and did not obtain the accused's permission to enter his property. The inspector acted solely on the informant's complaint without further investigation to corroborate the complaint. The warrantless search by the inspector was illegal and breached the accused's rights. The inspector's conduct was serious, as the inspector was trained to undertake searches in accordance with the law. The accused's expectation of privacy and the public interest in not condoning illegal searches warranted exclusion of all of the evidence flowing from the breach. All charges were consequently marked as stayed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, s. 6, s. 8, s. 11.4, s. 12(1), s. 12.6

Counsel:

E. Lavictoire, Counsel for the crown.

K. Andrews, Counsel for Ralph Hunter.

RULING

1 B.V. MARCHAND J.P. (orally):-- Mr. Ralph Hunter stands charged of a series of counts under the Ontario Society for the Prevention of Cruelty to Animals Act and these stem from charges dated July 7th, 2009 and the 26th of October 2009. The defendant's primary position states that the search conducted on June 22, 2009 was an illegal warrant for search of the applicants property and thus violated the applicants section 8 Charter of Rights.

2 If the Court rules that the search conducted on June 22nd was illegal then the applicant is asking the Court to rule that, and there's a series of domino effect type of remedy that they will be asking and we'll speak to that at the end if my ruling is in his favor.

3 The will say of Bonnie Bishop of the Ontario Society for the Prevention of Cruelty to Animals which I shall now refer as OSPCA indicates that on June 22, 2009 the OSPCA received a complaint concerning animals located at the property owned by Mr. Hunter across from 5011 County Road 1 in Iroquois.

4 The informant Arla Veinotte stated that she was concerned about the farm property with five to six horses in a pen approximately eight feet by ten feet. The horses are being fed old hay and she was unsure if the horses had access to water. She further stated there was another handmade shed with horses in it and that the horses were on pallets.

5 The will say does not state how the informant arrived at these conclusions and additional information about this informant cannot be found in the information to obtain a search warrant either and a copy of which can be found of the applicants record Tab 4 D.

6 The defendants counsel inquired about how the complainant could arrive at such detailed analyses in conclusion. By a letter of the crown to Mr. Andrews dated January 10th, 2010, a copy of which can be found at Tab B of the applicant Supplemental Application Record states that Ms. Veinotte is a third party who regularly travels the road past Mr. Hunter's property. On the two occasions in question she advised the OSPCA inspector of what she had observed while driving by this property.

7 Now, based solely on the first complaint received from Ms. Veinotte, driving by the noted property Ms. Bishop attended at the farm of property across from 5011 Carmen Road in Iroquois. She states that;

"I have been at this farm before and have knowledge of Ralph Hunter as the owner of the farm and the animals. There is no house on this property so I was unable to announce my presence in the usual manner".

8 She further acknowledged that Mr. Hunter's mother lives across the street and that Mr. Hunter lives in a trailer on that property.

9 The will say continues by saying;

"As I pulled in the driveway I observed several small pens constructed of metal fence panels and wooden pallets and tied together with baler twine located on the north side of the barn".

10 She then continued with her examination of the property and took pictures.

11 On July 2nd, 2009 Ms. Veinotte called to say the conditions are even worse. Again the evidence is that Ms. Veinotte claims to travel in front of this property on a regular basis.

12 On July 6th, 2009 Ms. Bishop attended before Justice Leblanc where a warrant to search was granted to allow her search for animals in distress.

13 On July 7th a search was conducted with the assistance of the O.P.P. and accompanied by various officials of the OSPCA as well as Dr. Bruce Robertson. Dr. Robertson decided that several horses need to be removed.

14 Now the Court recognizes that Ms. Bishop is an inspector for the OSPCA and as such has authority to search property provided it is done in accordance with the Charter.

15 The OSPCA Act section 6 states and they talk about immediate distress and it states that;

"if an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter",

and then it continues on.

16 Section eight defines "immediate distress" as;

"that requires immediate intervention in order to alleviate suffering or the preservation of life".

17 There is no suggestion in this case that there was a reasonable ground to believe that there were any animals on the defendant's property which may have been in immediate distress. Therefore Section 6 does not apply.

18 The prosecutor made reference to Section 11.4 but the Court concludes that this section applies only for inspection of places used for animal exhibit, entertainment, boarding, hire or sale and I think there's a consensus here that it is not the case at hand.

19 Now Section 12(1) deals with the entry where animal is in distress. This section deals with process of seeking a warrant from a justice or a judge who must be satisfied on reasonable ground that there is an animal in distress. It is clear from Ms. Bishop's will say that she did not have such a warrant when she entered the premises on the defendant's property on June 22nd, 2009.

20 On that day, based solely on a complaint from an individual who regularly drives by this property, the inspector pulled into the driveway and made observation and proceeded with a complete search. Ms. Bishop acknowledged that the defendant lives in a trailer across the road and made no attempt to speak to him or get his agreement to enter this property.

21 The defendant contends that this is a clear breach of his protection under Section 8 of the charter.

22 I have reviewed all the cases provided by both parties. I have further examined the circumstances surrounding the event of June 22, 2009. It is clear to the Court that on that day an inspector of the OSPCA acting solely on the complaint of a passerby with no further corroborating investigation technique entered the property of the defendant without a warrant and conducted a thorough search of the property. I am also satisfied that the inspector had no grounds to believe that there was any animal in immediate distress.

23 Any independent observation by the inspector occurred upon leaving the property when she assessed the field property as the pasture had been completely eaten off and there was no sign of the owner supplementing hay, this is almost like an afterthought.

24 I am satisfied that the search of the property on this date without a warrant was an illegal search and against the defendant's right under Section 8 of the Charter of Right.

25 Now, I understand that - you may have a seat sir. At this stage we're going to talk about Section 24 and I believe you would proceed first on this matter?

26 MR. ANDREWS: Yes Your Worship.

SUBMISSIONS BY MR. ANDREWS:

27 And yes my supplemental factum - if you pull that out I can go through it and as we go my submissions are going to fall very closely. In my supplemental I go right to part three, the issues and the law and of course we are relying on Section 24(2) of the Canadian Charter of Rights and Freedoms which states that in proceedings under subsection 1, if the Court concludes that evidence was obtained in a manner that infringed or denied any right of freedoms of the charter, the evidence shall be excluded if it is established that having regard to all circumstances the admission of it and the proceedings would bring the administration of justice into disrepute and our submission is of course that indeed admission of the evidence would bring administration of justice into disrepute and the reasons are as follows.

28 I'll begin with the case of *R. v. Collins*, [1987] 1 S.C.R. 265, and that's a Supreme Court case which provided three factors to consider when conducting a section 24(2) analysis and that can be found at paragraph 5 of my supplemental factum. I have a ...

29 THE COURT: What tab are you talking about?

30 MR. ANDREWS: We're in my supplemental factum and I've incorporated the relevant sections so it might be simpler just to refer to it. Now this, um, summary is - comes from *R. v. Grant*, [2009] 2 S.C.R. 353, which is in this Supplemental Factum at Tab 2 and the summary - the factors as described in *Grant* are described as follows, the first one is whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself, the second factor is the seriousness of the Charter breach; and the third factor is the effect of excluding the evidence on the long-term disrepute of the administration of justice.

31 Now I'm speeding through this just a little bit and the reason for that is and I'm going to get to that is a more recent case called *Grant* and they've tweaked the factors just a little bit although they were careful to state that they are not - that while tweaking the factors the factors as described in *Collins* are still relevant. They've just done what they've described as they're clarifying the matter somewhat and so yes - so in 2009 they revisit the *Collins* factors in *Grant* and they came up with the following three factors and you'll see that some of it is straight out of *Collins*.

32 So I have it in that quote there at paragraph 6. So the first factor is the seriousness of the Charter-infringing state conduct and they summarize that or describe that also as where the admission may send the message that the justice system condones serious state misconduct and that seriousness factor would be found at factor 2 in *Collins*. And the second factor in *Grant* is described as the impact of the breach on the Charter protected interests of the accused and they describe that in other words as the admission may send the message that individual rights count for very little and then lastly, the 3rd factor is society's interest in the adjudication of the case on its merits.

33 And then, the final thing that is done is they take all three factors and they attempt to strike a balance so it's not a situation where like all three factors have to be met or something along those lines. It's a case where they consider all three factors, look at them as a whole and then decide, you know, based on that whether or not it's going to bring the administration of justice into disrepute.

34 Now as far as the seriousness of the Charter-infringing stage of the grand analysis and that at paragraph 8 I have some excerpts from *Grant* and I'm just going to touch on the highlights. Um, so in the first paragraph I had quoted where they talk about the more severe or deliberate the state conduct that led to the Charter violation the greater the need for the Court to disassociate themselves from that conduct by excluding evidence and that is done in order to preserve the public confidence and to ensure state adherence to the rule of law.

35 And so I think that's important here especially since, with some of our submissions earlier there appears to be some, perhaps some pattern where searches are taking place without warrants and so we should consider that this - that the Court should consider excluding the evidence to ensure state adherence to the rule of law.

36 Under the second paragraph it talks about admitting evidence obtained through a willful or reckless disregard of Charter Rights will inevitably have a negative effect on public confidence. And again I think that that's very relevant here because it was always my submissions that it appeared that there was some sort of over zealotness perhaps that took place or perhaps it could be characterized as some recklessness that took place during the initial search on June 22nd.

37 Then with the third factor it talks about the;

"Ignorance of Charter standards must not be rewarded or encouraged and negligence and willful blindness cannot be equated with good faith",

and again I think that some of these words come into play in this particular case.

38 It also talks about deliberate police conduct in violation of established Charter standards, tends to support exclusion of evidence and I think that the actions on June 22nd were certainly deliberate.

39 And I think it's important to state, still in that same paragraph the recognition by the Court that it should be kept in mind that for every Charter breach that comes before the court many others may go unidentified and unredressed (ph)and of course it's because Charter violations can take place where at the end of the day no charges are ever laid and if no charges are ever laid then certainly there'll never be never an opportunity for the violation to come before the Court and I think that's important to recognize that there is a real - there's an importance here for the Court to disassociate itself from this action, keeping in mind that there are countless and we don't, just simply don't know how many times it's happened where no charges have resulted.

40 And then lastly I've emphasized this in that same paragraph at the very end it says "evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion", and again I think that applies here.

41 Moving on to the second factor and I have this at paragraph 9. This factor here is - this is about the impact of the Charter protected interest on the accused and as it's described in Grant, this factor sort of - this goes to, um, you know the - basically the, just, the impact of the breach on his rights and they name a couple of things including, um, including, um, - let me just find it here - like a search of a person's body for example would be serious. We don't have that in this case but they also list, um, you know, entry into a - where a person's individual, ah, where a person's privacy rights have been intruded upon and it's recognized and it's recognized in this case and many other cases that an individual reasonably enjoys a high expectation of privacy and I want to put this just in the farming context for a moment because on a person's farm - the barnyard of a person's farm and this is recognized in the Reimer case that I have in the original book of authorities.

42 There's a high expectation of privacy in a rural setting, in a rural context of the barnyard area and that is certainly true in this case and it's certainly true with the accused that he has high expectation of privacy in his barnyard area.

43 THE COURT: Which you referred to your ... ?

44 MR. ANDREWS: Yes, the Reimer case. Um hum. And I'll give you the specific reference because I refer to it at paragraph 14 a little bit later on in my factum here but in Reimer and keep in mind that Reimer is following the Collins factors and in the Collins factors the expectation of privacy is found under the third factor. In Grant it's the second factor but in Collins it's the third factor so at paragraph 14, and keeping in mind that the context of this case is a search of the barnyard area so they're referring the barnyard area and, um, in that endorsement with Reimer it says:

"On the third Collins factor I fully agree with the Supreme Court's analysis in Evans of the importance of the sanctity of one's privacy on their property and that the sanctity should not be lightly interfered with".

45 It goes on to say;

"the OSPCA investigator decided that she not be bound by this principal not because she needed to defend the rights of animals but because she did not want to take the time to follow any of the constraints that would slow her efforts to protect those rights".

46 So again that's in the context of a barnyard area search and in that endorsement recognizes that the expectation of privacy does go into the barnyard area.

47 And the third factor is, ah, within Grant, is termed as; "Society's interest in the Adjudication of the Merits", and it says that - in my first quote there that;

"The view that reliable evidence is admissible regardless of how it was obtained is inconsistent with the Charter's affirmation of rights".

48 And so, it's recognized that whether or not it's reliable, um, it is not simply to be accepted because - regardless of how it was obtained. It's our position that the reliability here should be even questioned because of that overzealous and what appears to be impulsive nature that took place. I don't think that the inspector was going with a clear mind when she conducted this search otherwise she would have taken the time to do it properly.

49 But nevertheless even if it was considered reliable it would not - it's not to be admitted regardless of how it was obtained.

50 And, on the next page, and this is of the third - this is on page four now at the very, very top, it's the last quote that I have for that third factor, um, it says that;

"While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high".

51 There are, I believe its fourteen counts, charges against Mr. Hunter and each of those counts the legislation provides for a fine of up to sixty thousand dollars and it can include also two years in prison for each count so that is serious and we have to keep that in mind when we're looking at the situation here, what Mr. Hunter is facing here, potentially.

52 And then lastly, ah, at paragraph 11 it talks about the balancing of the Grant factors, um, and it basically says that there is no overarching rule to govern how the balance is struck. It is about determining whether or not - considering all the factors, whether the administration of justice would be put into disrepute by allowing the evidence.

53 Now I refer to, at paragraph 12 I refer to the Reimer case, um, as I did in my, um, submissions previously because the facts are so similar. It's an Ontario case, um, it - the Reimer case you have to keep in mind that it was determined based on the Collins factors but as we know from the Grant case the Collins factors are still relevant. They've been shuffled around a little bit, clarified if you will but they are still relevant.

54 And in that case as I respectfully submitted should be found here also that the attitude of the OSPCA would not be supported by the community in general and that those who support the rights of animals would face with the evidence in this case be appalled to the extent that the OSPCA investigators failure to comply with their own legislation.

55 And I also respectfully submit, as was in the Reimer case that the community as a whole would not tolerate the admission of evidence obtained in such a flagrant matter and as in Reimer the admission should not be saved by section 24(2) of the Charter, it should be excluded.

56 And in Reimer I touched on this already so I'm going to go fairly quickly on it but at paragraph 13 it talks about the seriousness portion of the analysis, this would be step one in Grant and in that case, ah, it was found that the investigator played fast and loose, ah, you know, in attempt to sort of link her walkabout with the implied consent principle. I think that that's similar here where Ms. Bishop stated that because there was no house on the property that she couldn't announce herself despite knowing that Mr. Hunter lived across the road and could be found there and she just the night before had made such an effort so she knew that.

57 And in this case, similar to - in Reimer, similar to this case she just simply did not take the time to deal with the owners, ah, Mr. Hunter - did not take the time to deal with Mr. Hunter and everything that she, that Ms. Bishop did after she pulled in the driveway was a willful effort at conducting an investigation while avoiding the need to secure a warrant or waiting for contact with the owner.

58 Again there's no urgency shown on the facts and, you know, she simply didn't take the steps necessary to do this legally and this increases the flagrancy of her breach. So this speaks to the seriousness of the breach and I would submit to the Court that it's very serious given all the tools at their disposal to enter the property. I don't have this in my factum but it should be noted that the OSPCA act has recently gone through some amendments to increase the OSPCA's powers to conduct searches, even warrantless searches and, um, and even with those increased powers Ms. Bishop was not able to keep herself constrained within her own legislation of what she is allowed to do and again that increases the flagrancy here.

59 Also there was the email from the chief inspector of Ontario basically warning them to respect people's privacy rights in rural settings and that was not too - that was mere months before this happened and it appears that that caution was simply not taken to heart and again that increases the flagrancy of the breach as well.

60 And so at paragraph 14, I mentioned this already about that's where in Reimer it links the privacy to the - the expectation of privacy extends to the barnyard area of the farm. I've included one

other case because I wanted to have at least one SPCA case that comes after Grant. There's one from Nova Scotia and it's called *R. v. Bingley*, again it's a situation where there was a violation of a person's charter rights and again in this case, similar to Mr. Hunter's case there was an investigation conducted and through it a breach of the Charter rights then a warrant was granted and the warrant was eventually quashed.

61 And in this case, um, and I, referring to paragraph 16 and this is, this would be under the second Grant factor. At the very end of that quote it says;

"given the nature of the search, given the importance of the collected evidence arising from the search to the crown's case, leads this court to conclude that the impact upon Ms. Bingley is significant".

62 This refers to the second factor in Grant and again in this case basically everything that was gathered similar to this, you know, basically creates the whole case against Mr. Hunter and so as it was in *Bingley*, um, this fact weighs in favor of excluding the evidence. And in *Bingley* under the third factor at the very end of that quote there it talks about the hierarchy of offences. It says, in the hierarchy of offences the offence involving animal cruelty while certainly serious, does not rank in the same order as an offence involving the infliction of cruelty or deprivation or distress upon a human being. That speaks to I guess, the public's interest in having the - having it tried on its merits when you balance it all out. As it was in *Bingley*, this factor weighs in favor again of excluding the evidence.

63 So, for the reasons in *Reimer*, just a quick summary, the reasons in *Reimer*, *Reimer* speaks to the seriousness and of the breach as well as the impact of the breach with respect to privacy. The facts are almost identical here and as in *Reimer* those facts weigh in favor of excluding the evidence and then in *Bingley* I wish to - post Grant it speaks to the second - third factor of the impact of the breach as well as the impact of the breach as well as the public's interest in having the case, um, decided on its merits.

64 And again as in *Bingley* the facts are very similar and this time it also weighs in favor of excluding the evidence.

65 And finally at paragraph 18 we talk about the balancing of the three factors in *Bingley* and as in *Bingley* we look at the factors, I mean they all weigh in favor of excluding the evidence. What's important here as was described in that case that we need to look at things from a long term perspective and look at what the effect of the reputé of the administration of justice will be and I would suggest that allowing this to happen, especially given that it seems to be happening repeatedly that this is going to have a very negative impact and people are going to lose their confidence in the justice system, they're not going to - they're going to feel that they can't trust officers that are conducting investigations, ah, for fear that their rights are going to be violated.

66 And the very last sentence here in that quote, um, where it's, and it's describing here where all of the evidence subsequent to the violation will be excluded it says the Court will exclude from evidence any material that was seized as a result of that search and would apply also pursuant to *The Queen and Burlingham* case, to any fruit of that poisoned tree and we are making the same submission here that everything flowed from that initial Charter breach from obtaining the warrant to getting to, ah, - orders that were issued after getting on the premises and right on down to the end there, right on down all the way including October 26th.

67 And I have, I have from paragraph 21 on if Your Worship wishes to read it, um, it basically summarizes our submissions with respect to Mr. Hunter but I have, as I've gone through the factors, referred to how the facts in this case specifically relate to Mr. Hunter when applying the factors of the test, um, - does Your Worship have the time? I could go through it. I don't know if you have to be off?

68 THE COURT: Well I certainly don't want to cut you off but I think that I can probably read whatever I think that I can ... MR. ANDREWS: Sure, I don't want to just to read out of my factum and I think I've already spoken to it all anyways, just give me one minute just in case there's something that I haven't spoken to. Yes, I have spoken to all of those points already so I'll leave it at that, um, and just - but my final submission is that in balancing the three factors, ah, that the Supreme Court of Canada has provided us and considering the circumstances the administration of the evidence in this case would bring the - the admission of the evidence in this case would bring the administration of justice into disrepute and should therefore be excluded pursuant to section 24(2) of the Charter and I list the relief that we're asking for as well there. Thank you.

69 THE COURT: Thank you.

SUBMISSIONS BY MR. LAVICTOIRE:

70 Your Worship, ah, in light of your finding that there was a section 8 Charter breach with regards to the search and subsequent seizure I would submit, Your Worship, that the breach as per section 1 of the Charter was a reasonable one and I will list the factors as my friend has enumerated in Collins obviously the crown having a different take on the three factors as per the Collins test. The first one being the state conduct, um, the crown's position is that the, the breach was not a severe or a deliberate one on the part of the OSPCA inspectors and if, you know, having regard to your finding that there was a breach under section 1 I would submit that it's one that was out of good faith and that there was no malice in that issue.

71 Essentially as indicated in the will say of Ms. Bishop that upon arriving at the property, ah, there was no house on the property, there was no indication that there was anybody there which brings us to the next part of the Collins test being the seriousness of the breach.

72 Your Worship, it is a farm property, it's not a private residence and I would submit that contrary to my friends' submission that there's no real high expectation of privacy in that issue.

73 As for the third part of the Collins test, there is a societal interest on having this matter adjudicated and, as indicated in the Ringler case, [2004] O.J. No. 2864, at paragraph 24

74 THE COURT: Just one moment please. So you're referring now to the ... ?

75 MR. LAVICTOIRE: To the Crown's book of authorities.

76 THE COURT: What tab is that?

77 MR. LAVICTOIRE: Brief indulgence

78 THE COURT: Or just tell me which - you're referring to Ringler I believe?

79 MR. LAVICTOIRE: Ringler tab 7 paragraph 24.

80 THE COURT: Paragraph 24.

81 MR. LAVICTOIRE: Albeit, albeit Your Worship indicated that there is a Charter breach under section 8, um, I would submit that there are circumstances and legitimate state interests as a society to - for the prevention of cruelty to animals and the protection of animals and which brings us - brings me to my next point that any exclusion of that evidence would be in contravention of the societies core values to bring this matter to trial.

82 And having regard to the Collins test - brief indulgence, um, at paragraph 80 in my friend's supplemental factum, that there needs to be a broad enquiry into all the circumstances in the matter and I would submit, Your Worship, that that would come at trial should the matter proceed.

83 Unlike my friend's submissions, the crown's position is that there's no pattern of abuse here. It's in the usual course of an officer's duty to attend the premises to attempt to speak to the individual with regards to a complaint received as was the case here.

84 As indicated in the McAnerin case which I've submitted in the Crown's Book of Authorities - brief indulgence Your Worship - the McAnerin decision at Tab 8, paragraph 16 and 17 that albeit there's a, as indicated there is a violation of Mr. Hunter's privacy rights as you've indicated. Um, the intention in itself was to gather evidence and to exclude such evidence would bring the administration of justice in disrepute (ph) - in disrepute. The crown's position is that the violation here was a reasonable one, one where a chance was given to Mr. Hunter to remedy some of the animals still in his care over the course of over a year's time and that such exclusion, Your Worship, in our respectful submissions would be contrary to the administration of justice. Thank you.

85 MR. ANDREWS: Your Honour, may I just make a very brief reply?

86 THE COURT: You man.

87 REPLY BY MR. ANDREWS: Just with respect to my friend's submissions. My friend's described the, um, the violations not being serious or severe because it was not deliberate and it was in good faith, um In Grant it specifically states and I have this quoted at paragraph 9 in my Supplemental Factum that;

"ignorance of Charter Standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith".

88 So, I mean, if it was a case of Ms. Bishop simply not knowing what she was doing was violating the Charter, it states here that that type of ignorance of the Charter Standards should not be equated with good faith. Um, my friend also mentioned that the expectation of privacy should not be held in this case. Again that would - it would disagree therefore with Reimer and I'd just like to suggest that, um, in the rural context we're dealing with specific culture in the rural areas and I firmly believe that in rural areas people's expectation of privacy will extend beyond the home to their barnyard area.

89 It's a very unique situation when you compare it to other professions. This is not a situation where a person's business is outside of the home. This is not a situation where they're going into his office or something to that effect. This is the barnyard area of the farm and there's a tradition there of being close to your animals, being close to your operations. The profession of farming is closely linked to lifestyle and the life of people in rural areas and as in Reimer it was, it should be found here again that high expectation of privacy should extend to the barnyard area.

90 Given the particular facts of this case, in the cultural considerations as well because at the end of the day it is expectation of privacy and what Mr. Hunter's expecting for privacy and I would suggest that him, like other farmers would expect that to go past that door of the house and on and into the barnyard area.

91 And my friend he mentioned Ringler, the Ringler case again where we're talking the state interest involved and that would - goes to, that goes to the third Grant factor, we're talking about, you know, adjudicating on the merits of case. I want to point out again that in the Ringler case we had circumstances where the investigator was invited into the house so he was there without a violation of the Charter and once inside he witnessed several dismembered kittens, they were cut up, they were killed and he witnessed this gruesome scene and proceeded accordingly. In that circumstance we're talking about the immediate distress scenario and so the, that would certainly come into play I would suggest if that, in that case.

92 And so when we're talking the state interest we are not talking about a situation where someone has come upon a bunch of cut up animals or where other animals may end up being similarly cut up and killed. Ah, there was, as Your Worship found, no sign - no evidence of immediate distress and so I don't - I submit that we don't put - the facts in this case do not meet even close to what is in Ringler and so my friend's submission I would suggest should not apply here given these facts. Thank you Your Worship that's all my submissions.

93 THE COURT: Thank you.

RULING

94 B. MARCHAND J.P. (orally):-- The Court has had the benefit now of reviewing certain cases that were put before it and I am satisfied that the factors in Grant and Collins are factors that the Court should follow in the absence of having any newer cases that would suggest that the factors have been somewhat revisited. The Court has also examined the facts with this particular case and I agree with certain things that the defense has put forward in terms of the case provided in Ontario. It is very similar to what has occurred here and I believe that is the Reimer case?

95 MR. ANDERSON: Yes.

96 THE COURT: I will first address the matter of whether or not high expectation of privacy in a barnyard situation is an appropriate conclusion. I don't necessarily share with this particular view. In this particular case, we have a situation where there's a barnyard with no residence on the same property and therefore to suggest that Mr. Hunter would have been very close to the animals in terms of taking care of them and expecting very high privacy has not been proven in my opinion. But it's none the less a privacy issue as defined under the Charter and I have ruled to that effect.

97 The state conduct which is one of the factors I have to look at, well the Court has to take under consideration that Ms. Bishop is an officer and an inspector of the OSPCA and by such, is expected to have been trained and be aware of how to conduct herself in this particular situation. And you add to that an email from the Chief Inspector which is dated November 26th, 2009 so we are now talking about seven or eight months prior to the incident.

98 It is clear that the OSPCA as a whole has recognized the need to protect individual's right to privacy. I would not, in any moment think that Ms. Bishop was ignorant of the fact. I don't buy that.

99 The thing happened so fast. One complaint, immediately on the site, she indicated that she had dealt with this individual before and probably expected to have some problems with this individual

but proceeded immediately despite the fact that she has had training and recommendation from the Chief Inspector that certain rules have to be followed.

100 In this particular case there was nothing suggested that would imply directly or indirectly that there were animals in immediate distress, we dealt with that.

101 So the state conduct in this particular case is serious. I accept that an inspector should have taken the time to think about it, go through the proper process under section 12 - I believe it's 12.6, and arranged for obtaining a search warrant and properly conduct a search of the property.

102 I am not suggesting at all that it was not done in good faith and I am not suggesting that it was done with malice but it's none the less, we're not talking about an individual who is not familiar with certain processes, we are talking about an inspector who is trained and should have been trained to conduct inspections in accordance with the law.

103 The seriousness of the breach obviously at the expectation of privacy whether high or low is still none the less basic principle of the Charter right. The search itself, the expectancy of privacy itself in a barnyard situation although not being necessarily that high in this Court's determination none the less can result to some very serious consequences as pointed out by the defense counsel in this matter. Under the worst case scenario it would be extremely, extremely high in terms of the consequences of this search.

104 The society as a whole holds the privacy concerns to its highest regards. There's no question about that. Just about every case law that was provided to me would not deny that the public in general would hold that the privacy is an important part of the Charter of Rights and to allow an illegal search to be conducted and to proceed with not throwing out the evidence collected in my view would result to the public being very concerned about the effectiveness of section 8 of the Charter of Right. It is not enough to say that we are free, it is not enough to say that we are protected from unlawful search if the effect of an illegal search would prompt the public to be scared of being illegally searched.

105 In this particular case it is important to remember that we were talking about animals, animals' welfare which is in the opinion of the public, very high. It's important that we protect children, persons, and animals from certain things that are to happen. In this particular case there were some animals who after being checked over by a doctor were ordered removed and I'll come back to that situation later. So between the illegal search and the time for which there was an application for a search warrant, I can't remember exactly the amount of time but I think we're talking about three weeks or so. The public would recognize that these animals were not in immediate distress and the findings of the search confirms that there were some animals that needed treatment and were removed but the balance there were orders made to rectify such situation.

106 So I am satisfied that the informed public, the society as a whole in this particular matter would conclude that to allow the evidence collected

107 through this illegal search would bring the administration of justice into disrepute.

108 As indicated before I tend to look at the legitimate interest of the states in this particular case and the legitimate interest even after the fact was that certain horses were removed otherwise the situation could have been handled in a much different way.

109 It is not the usual course for an inspector and it is not the duty of - it is a duty of the inspector to follow up on a complaint but follow up in the context of a proper plan, a plan of action that

would be supportive by the Charter and the rules of, in this particular case we are talking about a search.

110 I agree that the Ringler case is not applicable in this case. The situation was way different. We are talking about a situation where an inspector would have been invited in.

111 The section 24 usually speaks about alternative to throwing out the evidence collected. In this case I do not see what balance could be made in terms of a different remedy than to exclude the evidence.

112 We talk about balance between all the factors but we also have to talk about is there a less intrusive, a more appropriate way of remedying the section 8 with something else? The Court cannot see any alternative but to come to the conclusion that the evidence collected on the search of June 22nd, I believe it's June 22nd, the evidence collected through that search is not going to be allowed in this particular case.

113 The defense counsel indicated first of all that the warrant obtained to search the applicant's property on July 7th was acquired by way of information obtained through a warrantless search conducted on June 22nd. As indicated I am satisfied that the evidence collected on June 22nd, cannot be used and I looked at the application to obtain the search warrant and if you are to exclude the information you would be basically be left with one individual on one occasion, well, one complaint, maybe more than one occasion drives by this property and comes to the conclusion that we have now discussed.

114 The specific information provided to the OSPCA could not have been supported by a drive by and therefore I am satisfied that had the evidence collected through the June 22nd search been excluded from the search warrant application it would not have been granted.

115 The defense is also looking at the surrender of animal documentation dated July 6th, 2009, it is signed by the applicant or was it July 6th? Yes, okay. He indicated that they were signed by the applicant, was executed under coercion and misinformation provided by the OSPCA investigators involved.

116 There were many witnesses to discuss the leading to the signing of this document. The Court is satisfied that the discussions were held in good faith. The witnesses all heard that they were, they described it as;

"a promise of no charges to be laid if the defendant was to sign the surrender of animal documents".

117 The OSPCA in contrast, investigator, on the other hand indicated that the reference of no charge was in the context of no financial consequences for the removal and disposition of the animals being surrendered.

118 The Court is satisfied there is no evidence that would satisfy me that the applicant signed the document under undue coercion and misinformation. I am satisfied that this document would not conclude that there was, I'm concluding that there was no breach under the section 8 on this particular file.

119 The search, both searches were as a result as I indicated of an illegal search and therefore the defense is looking that the orders and subsequent charges laid on October 26th was a domino effect of the continuing Charter breach and I agree with that as well.

120 Is there any point that I have not addressed that the parties would like me to address? If not, that is my conclusion. Now having said that and having no further comments from anyone, we will need to address whether or not the crown will pursue this matter in the absence of the evidence that was collected.

121 MR. LAVICTOIRE: If I could just have a brief indulgence?

122 THE COURT: Um, hum.

123 MR. LAVICTOIRE: Perhaps Your Worship, if I could have a five minute break?

124 THE COURT: Very well.

125 CLERK OF THE COURT: Please rise. Court is in recess.

126 MR. LAVICTOIRE: Your Worship, thank you for that indulgence. Um, if the charges could be marked as stayed?

127 THE COURT: All charges are marked stayed.

128 MR. LAVICTOIRE: Yes.

129 THE COURT: Are you satisfied with that?

130 MR. ANDREWS: Yes, I just want to be clear that it's all charges including the ones stemming from the July 7th and the October 26th dates?

131 THE COURT: I think that's what I heard. All charges are stayed. So I guess we'll cancel all future dates for trial. Thank you.

132 MR. LAVICTOIRE: Thank you Your Worship.

133 THE COURT: And thank you both for your comprehensive presentation before this Court.

134 MR. ANDREWS: Thank you Your Worship.

B.V. MARCHAND J.P.

qp/s/qlcct/qlvxw/qlced/qlbdp

---- End of Request ----

Download Request: Current Document: 6

Time Of Request: Friday, April 10, 2015 12:56:30