

In the Provincial Court of Alberta

Citation: **R. v. MacKinnon, 2014 ABPC 150**

Date: 20140710
Docket: 121016174P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Grant MacKinnon

Reasons for Decision of the Honourable Judge P.B. Barley

[1] The accused is charged with causing a horse to be in distress, contrary to Section 2(1) of the *Animal Protection Act* of Alberta.

[2] The *Act* reads:

1(2) For the purposes of this *Act*, an animal is in distress if it is

(a) Deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold,

(b) injured, sick, in pain or suffering, or

(c) abused or subjected to undue hardship, privation or neglect.

R.S.A. 2000, c. A-41

2. Prohibition against causing distress

2(1) No person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress.

2(1.1) No person shall cause an animal to be in distress.

2(2) This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter.

Background

[3] The accused is not a veterinarian. He was trained in equine dentistry by a non-veterinarian in Idaho in February, 1999. In August, 1999 he took three more weeks' training in Idaho. Since then he has received approximately 500 hours of further training. None of the subsequent training was conducted by a veterinarian.

[4] Since 1999 he has been working as an equine dentist. He had balanced the teeth on approximately 10,000 horses by March, 2012, the date of the alleged offence. He is able to do this in Alberta because provincial legislation has allowed non-veterinarians to do dental work on horses. Most other provinces do not allow this.

[5] He believes that 10 other non-veterinarians in Saskatchewan and Alberta perform similar work on horses. No accreditation to any association is required.

[6] Dennis Rach is a practicing veterinarian in Alberta. He graduated from veterinary college in 1970 and has been in practice since. From 2004, approximately 24% of his time is spent on equine dental matters and he treats about 1,200 horses a year in that area.

[7] He is certified by the International College of Equine Veterinary Odontology. He lectures in the field of equine dentistry in various countries on a yearly basis. He has co-authored a book on the subject.

[8] He does not think that non-veterinarians should be allowed to do equine dental work, as they are in Alberta.

[9] It is suggested that this opinion shows a bias in his testimony in this case, since he had a prior opinion that the accused should not be allowed in any case to do the type of work that he has been doing for years.

[10] It is also suggested that Dr. Rach has a built-in-bias against the work done by the accused because Dr. Rach has invented and now produces an item called a power float which reduces horses' teeth in a different manner than the method used by the accused.

[11] I am mindful of these apparent conflicts. However, the evidence given by Dr. Rach is largely factual and based upon his observations. I do not believe that he would fabricate evidence about his findings to eliminate a low cost competitor, or to justify the expensive intervention that he undertook with Big Blue.

[12] I am concerned, however, that much of the evidence and argument on behalf of the Crown is in fact directed to a finding that lay persons such as the accused should not be performing equine dentistry. I will return to this point later.

Facts

[13] The accused is an 'equine dentist'. On March 14, 2012, he 'floated' the teeth of a horse named Big Blue. 'Floating' a horse's teeth refers to reducing the length of the teeth. This is done on a regular basis to counter the growth in the teeth that happens routinely.

[14] The owner of the horse, Heather Brown, noticed Big Blue was acting differently after the date of the procedure. She eventually took the horse to a veterinary clinic, where he was examined by a veterinarian, Dr. Dennis Rach. Dr. Rach was of the opinion that the accused had cut too much of the incisors of Big Blue, and exposed the pulp of these teeth. This, in his opinion, was the cause of Big Blue's distress.

[15] Dr. Rach was qualified as an expert in the field of equine veterinary science and able to give expert opinion evidence as to the proper technique for dealing with horses' teeth generally, and specifically to comment on the work done by the accused on Big Blue.

[16] The Crown called four witnesses, Big Blue's owner, Heather Brown, Leslie Eagleton and Scott Duff, employees of the stables where Big Blue was boarded, and Dr. Rach.

[17] The defence called the accused and Dr. Lorri Taylor. Dr. Taylor is a veterinarian and was qualified as an expert in the treatment of performance horses, and specifically in Equine Gastric Ulcer Syndrome.

[18] Dr. Rach testified that he examined Big Blue shortly after March 14, 2012. He also examined X-rays taken by another veterinarian of the teeth.

[19] He testified that on five teeth, all incisors, so much of the teeth had been removed that the pulphorn was exposed. On these teeth, he could insert a needle for a full inch into the pulphorn which is the softer tissue inside the tooth. Normally, the pulp which goes down to the bone is covered by enamel and dentin.

[20] Opening the tooth to expose the pulp leaves the pulphorn open to infection. Dr. Rach found that one of the teeth had an abscess near the root. He attributed that to infection caused by the exposure of the pulphorn.

[21] The defence points out that Dr. Rach, in cross-examination, thought that he only inserted the needle one inch deep on one tooth. He thought that he did not need to do this on other teeth because he saw on the X-ray that they matched.

Issues

[22] The issues are:

1. Was the horse, Big Blue in distress after the accused floated his teeth on March 14, 2012?
2. If he was in distress, was that caused by the work done on his teeth by the accused?
3. If the distress was caused by the work on its teeth, was that work done in accordance with reasonable and generally accepted practices of animal care?

Was Big Blue in distress after March 14, 2012?

[23] I am convinced beyond a reasonable doubt that he was.

[24] Heather Brown rode Big Blue on March 17, 2012 and he was fine. Two days later, he was showing difficulties in eating, by spitting out food. After hearing from Leslie Eagleton that Big Blue was dunking his head in his water, she went to see her horse. She noticed that he was still dunking his nose in water, which was very unusual.

[25] He was also walking with his nose down and looked sad. After a veterinarian came and gave Big Blue painkillers, the horse still dragged his nose through snow. He would not take a bit and could barely walk.

[26] After Dr. Rach treated the horse, it was still very lethargic and lost a lot of weight. It was never the same and was not shown in the ring.

[27] Leslie Eagleton was the barn manager at the equestrian centre where Big Blue was kept. By the time of trial, she had close to 11 years' experience with the same owners of the center.

[28] After the accused dealt with Big Blue's teeth, she noticed that he was splashing his head in the water, and walked with his head down. She had noticed a horse before walking like that and it had an abscessed tooth. She also noted Big Blue eating snow, which was not normal.

[29] She then called a veterinarian to look at the horse. It was later seen by Dr. Rach. When Big Blue returned to the centre, it had lost a lot of weight and it took a year or two before it was being ridden like before.

[30] Scott Duff worked at the equestrian centre. Although without formal training he had been around horses his entire life.

[31] He noted that Big Blue seemed fine on the day of the procedure, but that he was playing in the water a day or two later. He assumed that the horses' teeth hurt. The horse was not himself. When the horse came back from treatment it seemed depressed, although not lethargic. He also noted that the horse, previously a good eater, was soaking his food in water.

[32] Dr. Rach was of the opinion that the dullness and lack of activity of the horse was a sign of low grade, incessant pain. The horse would also be uncomfortable because of the tooth abscess.

[33] This evidence establishes to me satisfaction that Big Blue was in distress after its teeth were floated by the accused.

Was the distress caused by the dental procedure performed by the accused?

[34] Dr. Taylor has been a veterinarian since 1989. Half of her practice involves performance horses, which would include Big Blue. She estimated that 60 to 80 percent of these horses suffer from Equine Gastric Ulcer Syndrome.

[35] She testified that symptoms of this are quite varied and potentially vague. The appetite can be reduced. The horse might dunk their hay in water to soften it. She has seen four horses do that, and they also played with snow and dunked their face in water. In these cases the behaviour stopped when the horse was treated for ulcers.

[36] Dr. Rach agreed that the symptoms of distress shown by Big Blue were consistent with Equine Gastric Ulcer Syndrome. However, he did not test Big Blue for ulcers because he was convinced that the distress was caused by the state of his teeth.

[37] The possibility that Big Blue had a gastric ulcer does not preclude the possibility that distress was also caused by the state of his teeth.

[38] In *R. v. Smithers*, [1978] 1 S.C.R. 506 (S.C.C.), it was held that causation could be proven by evidence that the complained of act was 'a contributing cause of death outside the *de minimis* range.

[39] In *R. v. Maybin*, 2012 S.C.C. 24 (S.C.C.), the court considered causation to be proven by a significant contributory cause.

[40] Accordingly, the fact that Big Blue might have had an ulcer, which caused distress, does not mean that he might also suffer distress from having his pulphorns exposed. To determine if that was the case, I will refer to the evidence about the state of Big Blue's teeth after they were treated by the accused.

[41] Dr. Rach testified that a number of Big Blue's teeth had exposed pulphorns when he examined the horse in March, 2012. He testified in chief that he could insert a needle into the pulphorn on teeth 101, 102, 301, 401 and 402. He found tooth 403 to be exposed, but a dental bridge had formed in it which was the result of the pulphorn being exposed on an earlier occasion.

[42] In cross-examination, he testified that he only inserted the needle into one tooth. In his report of May 2, 2013, he said that he inserted the needle into several of the exposed pulphorns.

[43] This inconsistency has to be carefully considered. However, the consideration of the number of teeth that were tested by the needle is not as important as the number of teeth that had pulphorn exposed.

[44] The report of Dr. Rach dated November 22, 2013 states that he found draining tracts on teeth 101, 102, 201, 202, 401 and 402, when he examined Big Blue on September 3, 2013. These tracts were in his opinion because the teeth had become infected from being over floated.

[45] The fact that four of the teeth that Dr. Rach felt had the pulphorn exposed later developed draining tracts is powerful evidence. It establishes, in my view, that too much had been taken off these teeth, and that infection arose as a result. There was no other explanation given to me that would explain why these teeth would become infected.

[46] I am convinced beyond a reasonable doubt that the cutting of the teeth by the complainant led to infection of the teeth root, and that this contributed to the distress suffered by Big Blue.

Analysis

[47] As mentioned earlier, this prosecution of Grant MacKinnon is in a sense an attack on the suitability of non-veterinarians doing equine dental work at all. For instance, questions were asked of the accused as to the propriety of his administering the sedation to the horse. Argument is made in the Crown factum that this is significant. I do not think that it is. There is absolutely

no evidence to suggest that the fact that the sedative was administered by the accused, and not a veterinarian, in any way contributed to any distress of Big Blue. That is the charge before me, not performing equine dentistry without being a veterinarian which is legal in Alberta.

[48] The issue is emphasized in the Crown factum when it is argued. ‘The Crown respectfully submits that even if this Honourable court were to find that equine dentistry performed by non-veterinarians is a generally accepted practice, the methods employed by the accused are not reasonable’.

[49] The suggestion that I might find that equine dentistry performed by non-veterinarians is not generally accepted practice, flies in the face of the specific decision of the Government of Alberta to allow it. The refusal of other jurisdictions to not allow it, is of no importance to me. The acts complained of were performed in Alberta and were only improper if not performed to an accepted level of care. The acts themselves are all that is relevant in that regard, not the professional standing of the person who performed them.

[50] The Crown refers to cases from Saskatchewan, British Columbia and Nebraska to bolster the argument that non-veterinarians such as the accused should not be performing equine dentistry. I do not find that the cases make that point. Those cases dealt with who was entitled to perform equine dentistry under the relevant legislation.

[51] In *R. v. Ryan*, 2006 SKPC 80, Judge Whelan convicted a person of engaging in the practice of veterinary medicine by performing certain dental procedures and administering medication in contravention of The *Veterinarians Act*. The court pointed out ‘while the *Pequin* decision found that the Alberta legislation should specifically include dentistry if it was intended to be practiced only by veterinarians, the background and the legislation are different than the case before me’.

[52] The court found that the acts performed by Ms. Ryan fell within the definition of the practice of veterinary medicine in the *Veterinarians Act*, and that she was therefore guilty of an offence by doing so without being a veterinarian. At no time was the court asked to find that lay persons could never properly perform equine dentistry. It was held to properly be a consideration of the provincial legislation.

[53] There is no doubt though that Alberta’s legislation does allow a non-veterinarian to perform equine dentistry.

[54] In *Veterinary Medical Association (British Columbia v. Bishop)*, 2006 BCSC 556, the British Columbia Supreme Court ruled that the procedures performed by an equine dentist were the practice of veterinary medicine as regulated by the *Veterinarian’s Act* RSBC 1996 c476. An injunction was granted to prevent Bishop from continuing such practice. It was a matter of statutory interpretation, and not a blanket condemnation of the practice of equine dentistry by non-veterinarians.

[55] Similarly, the Supreme Court of Nebraska, in the case of *State of Nebraska ex rel. Department of Health of the State of Nebraska v. Dale Jeffrey* 247 Neb. 100, 525. N.W. 2d 193, approved of an injunction preventing a non-veterinarian from practicing equine dentistry. The court held that ‘licensing regulations are in place to protect the public from persons who do not have the minimum standards of proficiency or are unqualified to practice veterinary medicine.’ [Para. 13]. However, the court specifically stated ‘that Jeffrey’s proficiency of

practicing equine dentistry is irrelevant. This court is only concerned with whether Jeffrey violated 71-1-155 by practicing dentistry without a licence, and we find that he has'.

[56] These cases do not assist the Crown. They deal with a different statutory framework. Alberta legislation does not forbid the practice of equine dentistry by a person with the accused's training, and so the fact that he does so is not evidence of a lack of care.

Was the treatment in accordance with reasonable and generally accepted practices?

[57] The accused has been doing equine dental work for years upon thousands of horses. He has many repeat customers, including the owner of Big Blue. No evidence was called to suggest that the problems suffered by Big Blue were anything but an extremely rare miscalculation.

[58] The accused testified that he took 5/32 of an inch off tooth 202. This was not one that Dr. Rach put a needle into because he thought the pulphorn was exposed.

[59] This suggests that the removal of that amount was not wrong. The next greatest amount removed was 3/32 of an inch, or 2.38 millimetre.

[60] This may have led to infection. However, that by itself does not mean that this was a violation of generally accepted practice. Dr. Rach testified that he would have approved of the removal of two millimetres from an incisor five years ago. At the time of the work by the accused, Dr. Rach would have waffled between accepting the removal of one millimetre and of two millimetres.

[61] It was also noted that a text book, *Equine Dentistry*, edited by Gordon J. Baker and Jack Easley, approves the removal of 5 to 10 millimetres from an incisor. Dr. Rach pointed out that the text was 12 to 13 years old and that viewpoints change.

[62] That same text supports the use of diamond cut-off wheels when a large amount of incisor must be removed, and when it is easy to determine how much incisor is to be removed.

[63] Dr. Rach also testified that teeth should not be cut by a cutting wheel, as they were by the accused. He felt that this committed the accused to removing a certain portion of the tooth without knowing how deep the enamel was. However, the textbook approved of such a procedure.

[64] I do not find that the removal of 3/32 of an inch from Big Blue's incisor was a deviation from a reasonable and generally accepted practice. The accused himself had been doing that for years without incident. Dr. Rach himself would have agreed to the removal of approximately that amount five years ago, and was close to accepting that amount of removal at the time the accused worked on Big Blue. There was no study mentioned in evidence that would explain why the opinion changed, or what percentage of persons performing equine dentistry accepted the change.

Summary

[65] Big Blue was in distress. This distress was caused by the actions of the accused in removing too much from some of the incisor teeth of the horse. However, this action was carried

on in accordance with reasonable and generally accepted practices of animal care, viewed objectively.

[66] Accordingly, I find the accused not guilty.

Dated at the City of Cochrane, Alberta this 10th day of July, 2014.

P.B. Barley
A Judge of the Provincial Court of Alberta

Appearances:

Lori Chambers
for the Crown

Pawel Milczarek
for the Defence