On appeal from a summary conviction in the Provincial Court of Manitoba on April 3, 2012, and sentence on April 20, 2012.

Date: 20130823
Docket: CR 11-01-31345
(Winnipeg Centre)
Indexed as: R. v. Nikkel and Ragnanan
Cited as: 2013 MBQB 207

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
HER MAJESTY THE QUEEN,	)	S.C. Brennan & S.R. Sass
Respondent,	)	for the Crown (Respondent)
- and -	)	
	)	G.G. Zazelenchuk
DAVID JOHN NIKKEL and	)	for the Appellants
PRESILLA RAGNANAN,	)	
	)	Judgment delivered:
(Accused) Appellants.	)	August 23, 2013

BRYK J.

BACKGROUND

[1] On April 3, 2012, both appellants, David John Nikkel (Nikkel) and Presilla Ragnanan (Ragnanan), were convicted on the following counts:

> COUNT 3. NIKKEL, David John and RAGNANAN, Presilla also known as Priscilla on or about the 5th day of December, 2008, in the Rural Municipality of Ritchot, in the Province of Manitoba, being a person who has ownership, possession or control of an animal did unlawfully contravene Section 2(1)(d)(iii) of *The Animal Care Act*, C.C.S.M. cA84 by confining animals to an enclosure with inadequate ventilation so as to significantly impair the animals health or well-being, to wit, ten dogs found in the West Shed and did thereby commit an offence contrary to Section 34(1) of *The Animal Care Act*.

COUNT 4. NIKKEL, David John and RAGNANAN, Presilla also known as Priscilla on or about the 5th day of December, 2008, in the Rural Municipality of Ritchot, in the Province of Manitoba, being a person who has ownership, possession or control of an animal did unlawfully contravene Section 2(1)(d)(iii) of *The Animal Care Act*, C.C.S.M. cA84 by confining animals to an enclosure with inadequate ventilation so as to significantly impair the animals health or well-being, to wit, twenty-two dogs found in the East Shed and did thereby commit an offence contrary to Section 34(1) of *The Animal Care Act*.

COUNT 5. NIKKEL, David John and RAGNANAN, Presilla also known as Priscilla on or about the 5th day of December, 2008, in the Rural Municipality of Ritchot, in the Province of Manitoba, did unlawfully contravene Section 5(d)(iii) of The Animal Care Regulation A84-R.M. 126/98, by the confinement of animals where there is a high risk of injury or distress, by or due to the physical characteristics of the place of confinement specifically inadequate lighting and unsanitary conditions, to wit: five black dogs numbered 0035, 0036, 0037, 0038 and 0039 found in East Barn Pen 6 and did thereby commit an offence contrary to Section 34(1) of *The Animal Care Act*.

COUNT 6. NIKKEL, David John and RAGNANAN, Presilla also known as Priscilla on or about the 5th day of December, 2008, in the Rural Municipality of Ritchot, in the Province of Manitoba, being a person who has ownership, possession or control of an animal did unlawfully contravene Section 5(c)(i) of The Animal Care Regulation A84-R.M. 126/98, by the confinement of an animal in a facility that contains items or debris that constitute a hazard likely to injure the animal to wit: two dogs numbered 0030 and 0031 found in East Barn, Pen 10 and did thereby commit an offence contrary to Section 34(1) of *The Animal Care Act*.

[2] Nikkel was sentenced as follows:

Count 3 - $4,000.00
Count 4 - $4,000.00
Count 5 - $3,000.00
Count 6 - $3,000.00

Costs and surcharges were also imposed.

[3] Ragnanan was sentenced as follows:

Count 3 - $2,000.00
Count 4 - $2,000.00
Count 5 - $1,000.00
Count 6 - $1,000.00

Costs and surcharges were also imposed.

[4] In addition, the trial judge imposed a five-year prohibition against the ownership, possession or control of dogs as against both Nikkel and Ragnanan.

[5] Both Nikkel and Ragnanan appealed their convictions as well as the sentences imposed.

STANDARD OF APPEAL

[6] This is an appeal from a summary conviction by a Provincial Court judge (PCJ). It is governed by s. 686(1)(a)(i) of the ***Criminal Code***, R.S.C. 1985, c. C-46 (the ***Code***).

[7] The approach to such appeals was described by McLachlin J. (as she then was) in ***R. v. Burns***, [1994] 1 S.C.R. 656 (at p. 663):

> In proceeding under s. 686(1)(*a*)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. W. (R.)*, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

[8] The standard of review with respect to an error in law is correctness, meaning that if an error is found, no deference will be owed to the decision of the trial judge.

[9] The standard of review with respect to findings of fact or inferences drawn from a proven fact by a trial judge is that of palpable or overriding error.

[10] In ***Knock v. Dumontier et al.***, 2006 MBCA 99, 208 Man.R. (2d) 121, the Manitoba Court of Appeal considered "inferences of fact" and "palpable and overriding error" (at paras. 21-23):

> More recently, Justices Iacobucci and Major, writing for the majority, in **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, also set out the standard of appellate review for both "findings of fact" and "inferences of fact". Addressing "inferences of fact", the justices commented (at para. 23):
>
> > We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.
>
> What is palpable and overriding error? In **Housen**, the Supreme Court accepted the dictionary definitions of the word "palpable", pointing out that "[t]he common element in each of these definitions is that palpable is plainly seen" (at para. 6). The Ontario Court of Appeal, in **Waxman et al. v. Waxman et al.** (2004), 186 O.A.C. 201; 44 B.L.R. (3d) 165 (C.A.), gave some examples of palpable error (at para. 296):
>
> > Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> Not only must the error be palpable, but it must also be overriding. The court in **Waxman** went on to define an "overriding" error (at para. 297):
>
> > An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely

> stand in the face of that error: **Schwartz v. R.**, [1996] 1 S.C.R. 254 (S.C.C.), at 281.

POINTS AT ISSUE

[11] In their factum, appellants cite the following errors which they say were made by the PCJ:

(a) the PCJ erred in law in holding that once the witness Dr. Terry Whiting had waived solicitor/client privilege in another proceeding, he was entitled to claim solicitor/client privilege on the same act in the proceeding at bar;

(b) the PCJ erred in law in holding that the two searches, the one conducted by the witness Steinar Wamnes (Wamnes) on December 3, 2008, and the one conducted by the witness Dr. Terry Whiting on December 5, 2008, were legal searches;

(c) the PCJ erred in not excluding the evidence obtained as a result of not one, but two illegal searches;

(d) the PCJ committed a reversible error which denied the appellants their right of appeal by not giving any reasons as to why he found the witness Dr. Terry Whiting to be a credible witness;

(e) the PCJ erred in allowing the Crown to re-open its case after same had been closed;

(f) the PCJ erred in concluding that the identity of both appellants was proved beyond a reasonable doubt;

(g) the PCJ erred in concluding that there was any evidence of possession against Ragnanan;

(h) the PCJ erred in ruling that the evidence with respect to Counts 3 and 4 was sufficient to prove beyond a reasonable doubt that the animals' health or well-being was "significantly impaired";

(i) the PCJ erred in ruling that the evidence with respect to Count 5 was sufficient to prove beyond a reasonable doubt that the circumstances constituted a "high risk" of injury or distress to the animals in question; and

(j) the PCJ erred in ruling that the evidence with respect to Count 6 was sufficient to prove beyond a reasonable doubt that the conditions constituted a hazard "likely to injure" the animals.

[12] Appellants also argue that the fines imposed were harsh and excessive under the circumstances.

ANALYSIS AND CONCLUSION ON EACH ISSUE

(a) The PCJ erred in law in holding that once the witness Dr. Terry Whiting had waived solicitor/client privilege in another proceeding, he was entitled to claim solicitor/client privilege on the same act in the proceeding at bar.

Position of Appellants

[13] By way of background, Heron Creek Outfitters Inc. (Heron) brought an action against the Government of Manitoba in Queen's Bench Suit No. CI 09-01-60708. Nikkel was a principal of Heron. In the course of that civil action, Dr. Whiting (Whiting) was examined for discovery. During the examination for

discovery he was asked about a conversation he had with Crown Attorney Sean Brennan on the evening of December 4 or the morning of December 5, 2008. In response, Whiting described that conversation.

[14] Whiting was also the Crown's witness in this summary conviction prosecution. In cross-examination, he was asked to describe the aforementioned conversation with Brennan and he refused to do so, claiming solicitor/client privilege. It was agreed that the relationship between Whiting and Brennan at the time was that of solicitor and client.

[15] Appellants' counsel argued that Whiting had previously waived the solicitor/client privilege by answering the same question at his examination for discovery.

[16] After receiving submissions from counsel, the PCJ concluded that Whiting did not have to answer the question.

[17] Appellants' counsel argues that the PCJ committed an error in law by not requiring the question to be answered. As a result, he says that his ability to effectively defend Nikkel and Ragnanan was prejudiced. He says that the evidence would have assisted in proving that Whiting's attendance at the property where the dogs were kept was illegal and that he would have been able to argue that the evidence obtained during that attendance should be suppressed. Acknowledging that whether or not such an order would be forthcoming would be dependent on the nature of the ***Canadian Charter of***

Rights and Freedoms (the ***Charter***) violation, appellants' counsel argued that Whiting's answer would have enhanced the argument for suppression.

[18] Appellants' counsel relied heavily on the Manitoba Court of Appeal decision in ***Bone et al. v. Person et al.*** (2000), 145 Man.R. (2d) 85. Scott C.J.M., in considering the question of waiver of privilege, stated the following (at para. 13):

> Wigmore, **Evidence in Trials at Common Law**, McNaughton rev. (1961), vol. 8, puts the matter even more forcefully at para. 2389(4):
>
> > A waiver at a former trial should bar a claim of the privilege at a later trial, for the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only. (emphasis added)

Also (at para. 16):

> I see no reason why the doctrine of waiver should not apply with equal force to "solicitor's brief" privilege as to the more broad solicitor/client privilege. See Eric A. Dolden, **Waiver of Privilege: The Triumph of Candour over Confidentiality** (1989), 35 C.P.C. (2d) 56 at pp. 77-78. As Huddart, J., as she then was, explained in **Malone v. Malone**, [1986] 1 W.W.R. 185, at p. 187 (B.C.S.C.), "Once it is apparent that the client is not desirous of that secrecy, privilege ceases".

Position of Respondent

[19] The standard of review on a question of law being one of correctness, appellants are required to show that the PCJ erred in his conclusion that Whiting was allowed to claim privilege.

[20] First, respondent argues that Whiting did not expressly waive the solicitor/client privilege at the examination for discovery. That issue was never specifically raised at that time.

[21] Secondly, respondent points out that Queen's Bench Rule 30.1 provides that examinations for discovery are not to be used in another proceeding except for impeachment purposes. At trial, counsel for respondent did not object to Whiting being cross-examined on his testimony from the examination for discovery where that cross-examination was for impeachment purposes. The objection arose when appellants' counsel sought to pierce the protection afforded by solicitor/client privilege on the premise that same had been waived by Whiting at the examination for discovery.

[22] Finally, respondent argues that the facts in ***Bone v. Person***, *supra*, are distinguishable. In that case, the parties in both the criminal and civil proceedings were the same. That is not the case here. Heron is a separate legal entity and if in fact there was a waiver of privilege by Whiting in that proceeding (which the respondent does not admit), that waiver of privilege is not applicable in this case which involved different parties, i.e., the appellants Nikkel and Ragnanan.

[23] At trial, after hearing submissions from counsel, the PCJ expressed his decision on the issue of whether or not Whiting had waived his solicitor/client privilege as follows (transcript of proceedings, volume 3, page 24, lines 8 to 19 and page 25, lines 19 to 34):

> That's as I see it. And so I, I'm sympathetic towards you and I, I, I – as I see it, it certainly would be to the witness's interest, but he would need to have some advice on it to actually make the disclosure to waive that privilege and it is within his right to do so and he does not want to do so. And on the, on the basis that I can't see the relevance in the case before me, and you can just address that briefly, why that is important to you on the, on the basis of the comments that I had made for me to rule

> as to whether the Bone case does apply and the apparent waiver that he gave on the examination for discovery should be applied here.
>
> . . . . .
>
> The issue as to whether there was any contradiction between what this witness has or will testify compared to what he may have testified at the examination for discovery and which you form the basis for any impeachment of his credibility has not arisen. Mr. Sass agrees as he interprets that case that on that issue then, in fairness, that the waiver should be applied.
>
> But on the circumstances before me and on the grounds that I don't see still after respectfully listening to Mr. Zazelenchuk's submission just a few minutes ago, I, I, I do not see the relevance of it and I'm not asking the witness to waive. It seems to me that it would be in his interest to waive that in order – as this is a factor that I obviously will have to take into account at the conclusion of the evidence in deciding on the voir dire issue of admissibility.

Conclusion

[24] The PCJ concluded that a solicitor/client privilege was in effect and that Whiting had not waived it. While he observed that it might have been in Whiting's best interest to answer the question, he was not prepared to compel him to violate the solicitor/client privilege by doing so.

[25] I find that appellants have failed to demonstrate any error in law on the part of the PCJ in reaching that decision.

(b) The PCJ erred in law in holding that the two searches, the one conducted by the witness Steinar Wamnes on December 3, 2008, and the one conducted by the witness Dr. Terry Whiting on December 5, 2008, were legal searches.

and

(c) The PCJ erred in not excluding the evidence obtained as a result of not one, but two illegal searches.

Position of Appellants

[26] ***The Animal Care Act***, S.M. 1996, c. 69 – Cap. A84 (the ***Act***), at the time of the offences in question, included the following provision:

> **Entry and inspection of places and vehicles**
> **8(1)** An animal protection officer may, at any reasonable time and where reasonably required to determine compliance with this Act,
> (a) enter and inspect any place that is not a dwelling place, or stop and inspect any vehicle, in which the animal protection officer believes on reasonable grounds there is a companion animal in distress or a commercial animal;
> ….

[27] An "animal protection officer" (APO) is defined in s. 1(1):

> In this Act, **"animal protection officer"** means a person appointed as an animal protection officer under this Act and any police officer.

[28] Appellants argue that only an APO is authorized under s. 8(1)(a) and that there was no evidence from either Whiting or Wamnes that they were APOs. Specifically, during Wamnes' testimony, he failed to specifically identify himself as an APO (see transcript of proceedings, volume 1, page 25, lines 5 to 18 and page 26, lines 1 to 7). Whiting also failed to identify himself as an APO during his testimony (see transcript of proceedings, volume 2, page 9, lines 6 to 34, page 10, lines 1 to 34 and page 11, lines 1 to 12).

[29] Moreover, s. 8(9) of the ***Act*** requires notice to be left:

> **Duty to notify absent occupant**
> **8(9)** An animal protection officer who enters an unoccupied place under this section shall leave in the place a notice indicating the animal protection officer's name, the time of entry and the reason for entry.

[30] Neither Wamnes (December 3) nor Whiting (December 5) left the required notice. Wamnes stated that he simply forgot, while Whiting explained that he was confused.

[31] The PCJ found that notices were not mandatory.

[32] Appellants rely on the decision of Menzies J. in ***Perchaluk v. Roblin (Town)***, 2010 MBQB 238, 257 Man.R. (2d) 284. In that case, a building inspector employed by the defendant inspected a residence which had been deteriorating with the passage of time. The inspector unsuccessfully attempted to contact the plaintiff by telephone prior to his inspection. The inspector obtained a key to the residence from the local real estate agent and then attended to conduct his inspection. The inspector recommended demolition of the house. Upon receipt of the order of demolition, plaintiff contacted the defendant asking it to reconsider its position. The defendant refused and ultimately the house was demolished.

[33] ***The Municipal Act***, S.M. 1996, c. 58 – Cap. M225, established authority for the defendant to inspect and demolish buildings within its municipal jurisdiction. Specifically, ss. 239(1) and (3) provide:

> **Municipal inspections and enforcement**
> **239(1)** If this or any other Act or a by-law authorizes or requires anything to be inspected, remedied, enforced or done by a municipality, a designated officer of the municipality may, after giving reasonable notice to the owner or occupier of land or the building or other structure to be entered to carry out the inspection, remedy, enforcement or action,
>
> ….
>
> **Emergencies**
> **239(3)** In an emergency, or in extraordinary circumstances, the designated officer need not give reasonable notice or enter at a

> reasonable hour and may do the things referred to in clauses (1)(a) and (c) without the consent of the owner or occupant.

[34] In considering the issue of notice, Menzies J. concluded (at paras. 27-29):

> Having considered all of the evidence and reviewing the **Act**, I have concluded that the municipality failed to give reasonable notice to the Plaintiff as required before conducting the inspection of June 6th, 2006. I also conclude there were no health or safety concerns, or extraordinary circumstances which would have justified conducting the inspection without notice.
>
> The requirement to give notice to the property notice [sic] is not a mere technicality. Reasonable notice is a mandatory prerequisite to the authority of municipal officials entering the premises to conduct an inspection. The right of individual landowners to be informed of municipal officials entering onto their land is not a trivial right. It goes to the heart of ownership. Breaching that right cannot be described as trivial.
>
> At the time of the inspection of June 6th, 2006, the municipality had not complied with s. 239(1) by giving notice and therefore lacked the legal jurisdiction to enter onto the Plaintiff's property. The act of entering onto the land by the inspector constituted an unlawful trespass. As such, I find the municipality cannot rely on the inspection report to issue the order of demolition. Without the report, I am unaware of any evidence before council which would have justified the order of demolition. Having no factual foundation to issue the order, the municipality was acting outside of its jurisdiction.

[35] Appellants submit that the searches conducted by Wamnes and Whiting were both illegal as they had failed to provide the notification required under s. 8(9) of the ***Act***.

[36] Finally, appellants argue that because Whiting had determined on either December 3 or 4 that there was non-compliance by Nikkel and Ragnanan, he would then have needed a warrant to enter the premises on December 5 as he would have already had knowledge of the non-compliance. In those circumstances, a search without a warrant was an illegal search.

Position of Respondent

[37] Respondent submits that both Whiting and Wamnes provided evidence of their status as APOs at trial. Specifically, the information to obtain a search warrant was filed at the trial as Exhibit 5 and, as such, became evidence in the trial. It identifies Whiting as an APO. It also refers to "[p]hotographs and reports of APO Steinar Wamnes inspection of Dec 3, 2008."

[38] Respondent argues that the failure to leave notices of inspection following the inspections of December 3 and 5 do not render the searches illegal. Respondent submits that the notice requirement is a procedural courtesy rather than a procedural prerequisite. Respondent points out that written arguments were submitted on this point to the PCJ and that on the basis of those written arguments, he determined that the searches conducted by Wamnes on December 3, 2008, and by Whiting on December 5, 2008, were legal searches.

[39] On February 15, 2011, the PCJ delivered his decision on the issue of the legality of the searches following a lengthy *voir dire* during which evidence was heard on that issue. Appellants had argued that the searches of the premises and the seizure of the dogs were both unlawful and in violation of s. 8 of the ***Charter***. The PCJ's decision on this issue is as follows (transcript of proceedings, volume 6, page 2, lines 25 to 34 and page 3, lines 1 to 7):

> I agree with the submissions of the prosecution that the regulatory inspection – inspections carried out at the property of the accused other than at the dwellinghouse was proper and lawfully permitted and authorized under the authority of Section 8(1)(a) of the Animal Care Act and, further, that any evidence gathered during the inspection that was carried out on December 5th, 2008, was lawfully collected and is admissible evidence even in the absence of the

> mandatory statutory notice that was to be given after the inspection that was already carried out.
>
> I also agree with the prosecution's submission that the issue of disclosure is separate and apart from the issue of exclusion of evidence, and that any remedy called for can and should be addressed under Section 24 of the Charter, and not under Section 24(2), after all the evidence has been adduced.

Conclusion

[40] The PCJ's decision is based on an acceptance of the submissions from counsel for the respondent. However, he does not identify those portions of the respondent's submissions with which he agreed. Therefore, it becomes necessary to review the written submissions that were presented. They are found in volume 1 of the respondent's Appeal Book under Tab I.

[41] Respondent outlines the following "points at issue" in its written argument:

i) That the regulatory inspection carried out by Whiting at the property of the accused on December 5, 2008, was proper and lawfully permitted and authorized under the authority of s. 8(1)(a) of the ***Act***;

ii) That the seizure which was carried out following the inspection of December 5, 2008, was proper and lawfully permitted and authorized under the authority of s. 9(1) of the ***Act***;

iii) That any evidence gathered during the December 5, 2008 inspection was lawfully collected and should be admitted;

iv) In the alternative, if the inspection was not authorized by the ***Act***, it was not a breach of s. 8 of the ***Charter***. Therefore, the search and

subsequent seizure of animals and evidence gathered during the search of the premises were legally justified and should not be excluded at the trial; and

v) In the further alternative, if there was found to be a breach of s. 8 of the ***Charter***, and if the breach was not justified, the evidence should not be excluded under s. 24(2) of the ***Charter***.

[42] In its written argument, respondent makes reference to the authorization under the ***Act*** for APOs to enter and inspect any place that is not a dwelling place. Neither Wamnes nor Whiting entered or inspected any dwelling places. Whiting had reasonable grounds to believe there were commercial animals on the property based on information provided by Wamnes. The magistrate from whom the search warrant was sought did not believe Whiting to have reasonable and probable grounds to believe that an unlicensed kennel was being operated. That precluded Whiting from applying for a search warrant under s. 8(5) of the ***Act*** to enter and search the premises. His attendance at the property on December 5, 2008, was therefore under s. 8(1) of the ***Act*** and accordingly was statutorily authorized.

[43] As well, the seizure of the animals on December 5, 2008, was authorized under s. 9 of the ***Act*** as they were deemed to be in distress.

[44] Respondent argued that an inspection such as contemplated under s. 8 of the ***Act*** falls under s. 8 of the ***Charter***. Respondent points out however that various cases, including ***R. v. Huttman (O.)*** (1996), 191 A.R. 184 (Prov. Ct.),

and ***R. v. McKinlay Transport Ltd.***, [1990] 1 S.C.R. 627, concluded that powers of inspection with respect to a provincial statute carry a lower standard of reasonableness than does a search under a criminal statute.

[45] Respondent's argument also included a review of the criteria in ***R. v. Grant***, 2009 SCC 32, [2009] 2 S.C.R. 353, and urged the court to conclude, on the basis of all three criteria, that the evidence should not be excluded.

[46] I am required to review the evidence that was before the PCJ to see whether or not his application of the law was correct. Based on the written arguments provided to him and his reference to same in his decision, I find that he correctly applied the law when he concluded that the search on December 3, 2008, and the search and seizure of the dogs on December 5, 2008, were both legal.

[47] I am also satisfied that the PCJ was correct in concluding there to have been sufficient evidence to have established both Whiting and Wamnes as APOs.

[48] Considering the ***Perchaluk*** decision on the question of the legality of the December 3 and 5, 2008 searches, I find that case to be distinguishable on its facts. In ***Perchaluk***, a dwelling house was entered by an inspector without providing notice. Here, buildings other than dwelling houses were entered. Section 8 of the ***Act*** recognizes the distinction between entering a dwelling place or any other building where it authorizes entry and inspection. In my view, the failure to provide notice of entry into a building other than a dwelling house

would not have rendered the searches and/or seizure illegal. I may not have reached the same conclusion had the entry been into a dwelling house.

(d) The PCJ committed a reversible error which denied the appellants their right of appeal by not giving any reasons as to why he found the witness Dr. Terry Whiting to be a credible witness.

Position of Appellants

[49] Appellants argue that the PCJ dealt with the issue of Whiting's credibility in one sentence as follows (April 3, 2012 reasons, page 3, lines 16 to 19):

> I find the testimony of Dr. Whiting trustworthy, reliable, and credible, and reject the challenges to his credibility as a reliable witness raised by the defence.

[50] A careful review of the reasons reveals that the PCJ said much more than that relative to the issue of Whiting's credibility. He made the following comments regarding Whiting's testimony (April 3, 2012 reasons, page 2, lines 23 to 34 and page 3, lines 1 to 19):

> The main witness in support of the charges called by the prosecution is Terrence Leslie Whiting, qualified as a veterinarian doctor, veterinary doctor and expert in animal health, welfare and behaviour. He is currently employed by the Manitoba Agriculture, Food and Rural Initiatives as the manager of animal health and welfare section in the Office of the Chief Veterinarian.
>
> He testified that he was familiar with the code of practice regarding kennel operations. He testified that a licence is required to ensure the minimum standard of care according to a code of practice, and that he has the experience associated with primary practice, treating dogs for sickness and normal health maintenance.
>
> Dr. Whiting was the chair of the Canadian Veterinary Medical Association, Animal Welfare Committee, for six years. During that time, approved were the amendments to the second edition of the Canadian Kennel Club, Code of Practice in a publication of the Canadian Veterinary Medical Association and the Canadian Federation of Humane Societies.

> He testified that he is very familiar with both that standard and the method in which it was developed; that the standard specifically deals with the standard for commercial production of dogs and housing of dogs in kennel situations; that it is identified as the standard of care under The Animal Care Act of Manitoba. He testified that he is familiar with the code of practice regarding kennel operations. I find the testimony of Dr. Whiting trustworthy, reliable, and credible, and reject the challenges to his credibility as a reliable witness raised by the defence.

[51] Appellants point to various portions of Whiting's testimony where he admitted to an oversight or an inability to recall as challenges to his credibility. It is apparent that those challenges were considered by the PCJ and he rejected them.

Position of Respondent

[52] It is a well-established legal principle that when credibility is in issue, an appellate court is required to show a high degree of deference to the trial judge's assessment of the evidence and that assessment should not be interfered with unless a palpable and overriding error can be shown. (***R. v. Gagnon***, 2006 SCC 17, [2006] 1 S.C.R. 621.)

Conclusion

[53] In ***R. v. Dinardo***, 2008 SCC 24, [2008] 1 S.C.R. 788, the Supreme Court of Canada stated (at para. 30):

> … [T]here is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel ….

[54] It is obvious from his reasons that the PCJ was alive to the specific challenges raised by the appellants to Whiting's credibility and that he rejected those challenges. The appellants have failed to establish that the PCJ committed

any overriding or palpable error in so doing. Moreover, the reasons provided by the PCJ are, in my view, sufficient to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal.

(e) The PCJ erred in allowing the Crown to re-open its case after same had been closed.

Position of Appellants

[55] At the trial, appellants made a motion of no evidence immediately after the respondent had closed its case on the basis of the respondent's failure to prove identity. Respondent asked for an adjournment and the next day moved to re-open its case. The PCJ exercised his discretion and allowed the respondent to re-open its case.

[56] Appellants argue that the day before, they had arranged for several people of similar skin colouring to that of Ragnanan to be present in the courtroom. Appellants' counsel stated those people were unavailable the next day when the respondent was permitted to re-open its case to prove identity. However, appellants' counsel admits he did not ask for an adjournment in order to bring those people back into the courtroom. He also admits the adjournment, had it been requested, would most likely have been granted.

[57] The next day when Whiting was asked to identify the appellants, he identified Ragnanan. At the time, there were only two females in the courtroom, including Ragnanan. The other female was white-skinned.

Position of Respondent

[58] Respondent points out that the PCJ's decision to permit the respondent to re-open its case was discretionary and is therefore entitled to significant deference unless the appellants can demonstrate that an injustice occurred as a result of the PCJ misapprehending the law or the facts.

[59] The test is set out in the Supreme Court decision of ***R. v. P. (M.B.)***, [1994] 1 S.C.R. 555 (at pp. 569-70):

> Once the Crown actually closes its case and the second phase in the proceeding is reached, the trial judge's discretion to allow a reopening will narrow and the corresponding burden on the Crown to satisfy the court that there are no unfair consequences will heighten. The test to be applied by the trial judge is generally understood to be that reopening is to be permitted to correct some oversight or inadvertent omission by the Crown in the presentation of its case, provided of course that justice requires it and there will be no prejudice to the defence.

Conclusion

[60] The Manitoba Court of Appeal recently considered the law regarding the re-opening of the Crown's case in ***R. v. O'Kane (P.J.) et al.***, 2012 MBCA 82, 284 Man.R. (2d) 72, where the trial judge's decision to refuse to allow the Crown to re-open its case with respect to the issue of identity was overturned.

[61] Appellants were not denied the opportunity of bringing back into the courtroom the same persons who had been there on the last day of trial. They chose not to request an adjournment for that purpose and therefore cannot now claim that they were prejudiced as a result of the PCJ's decision permitting the respondent to re-open its case. As the appellants have not demonstrated any

injustice which could be attributable to the PCJ's discretionary decision, I am required to give it the significant deference to which it is entitled.

(f) The PCJ erred in concluding that the identity of both appellants was proved beyond a reasonable doubt.

Position of Appellants

[62] On the issue of the appellants' identity, the PCJ stated the following (April 3, 2012 reasons, page 3, lines 33 to 34, page 4, lines 1 to 34 and page 5, lines 1 to 11):

> On the issue of identity of each accused, the Crown submits that the standard the court should apply on this issue is not proof beyond a reasonable doubt but that a prima facie case is sufficient. Neither accused testified on any issue at this trial, nor is there any statement by either accused as part of the evidence before the court. On consideration of all the evidence and circumstances, a prima facie case may be accepted as proof beyond a reasonable doubt, per se, which is the standard governing this decision on every issue before the court, that is, proof beyond a reasonable doubt.
>
> On the identity issue, Exhibit S1, the certified copy of certificate of title, names Presilla Ragnanan as the owner of the property on which the animals were located and from which they were seized.
>
> Dr. Terry Whiting testified he met the accused Ragnanan on this property following the seizure and removal of the animals. He testified she identified herself to him as Presilla Ragnanan and accepted service of the summons issued to her on the charges before the court. This encounter lasted about 10 minutes. Dr. Whiting testified that he recognized and identified the accused Ragnanan in court as that person.
>
> As to the identity concerning David John Nikkel, Dr. Whiting testified that he met Mr. Nikkel at an examination for discovery in May of 2010 on a related matter arising out of the seizure of the dogs when Mr. Nikkel identified himself as David Nikkel. Dr. Whiting, in court, identified the accused Nikkel as that person, whatever his actual name was. Other than that person identifying himself as David Nikkel in these proceedings, Dr. Whiting had no other independent evidence that he was in fact David Nikkel as claimed.
>
> As to that civil proceedings, during the cross-examination of Dr. Whiting in the instant case, it was indicated by defence counsel, that

> that earlier civil proceedings involves [*sic*] a corporation which is owned by one accused and which employs the other accused as against the Government of Manitoba arising out of the incidents before the court in this case, and that the party formally is Heron, H-E-R-O-N, Creek Outfitters Incorporated v. Province of Manitoba. This was in May of 2010.
>
> The evidence, in the absence of any other evidence to the contrary, satisfies me beyond a reasonable doubt that both accused in the court are the persons charged. I accept the submissions of the prosecutor in this issue in his submission on pages 7 and 8.

[63] Appellants challenged Whiting's identification of Ragnanan. He admitted to having seen her on only one occasion previously, that being for a period of approximately 10 minutes when he was serving her with a summons. At that time, she admitted to being Presilla Ragnanan. When asked whether he could identify Ragnanan in court, Whiting requested the opportunity to approach the person whom he believed to be Ragnanan so as to have a closer look. After doing so, Whiting commented "I believe she is in court today" (transcript of proceedings, volume 9, page 15, line 33) and "I believe … she's sitting in the corner in the back, it would be stage right corner of the room" (transcript of proceedings, volume 9, page 16, lines 1 to 4). Whiting also identified her as wearing a brownish top and having her hair worn in a ponytail. Appellants point out that in cross-examination, Whiting stated the person he identified as Ragnanan in court "is similar to the woman I saw at the … door" (transcript of proceedings, volume 9, page 18, lines 8 to 10).

[64] Whiting also admitted in cross-examination that when he identified Ragnanan in the courtroom, she was one of the only two women in the

courtroom at the time. Ragnanan is dark-skinned and the other woman was Caucasian.

[65] As to the identity of Nikkel, Whiting testified that he had been with a person "who claimed to be David Nikkel" (transcript of proceedings, volume 9, page 17, line 5) at a proceeding in a civil case. Whiting pointed to Nikkel in the courtroom as being that same person whom he had met during the civil proceedings.

[66] Appellants argue that Whiting's identification of both appellants was insufficient and did not meet the standard of proof beyond a reasonable doubt.

Position of Respondent

[67] Respondent submits that the PCJ's decision regarding identity must be given a high level of deference unless the appellants are able to demonstrate palpable and overriding error.

Conclusion

[68] In concluding that the identity of the appellants had been proved beyond a reasonable doubt, the PCJ considered not only Whiting's evidence in court, but also the evidence establishing Ragnanan as the certified owner of the property on certificate of title filed as an exhibit, as well as the fact that Nikkel was the principal of the corporation involved in the civil proceeding. That, together with the absence of any other evidence to the contrary, satisfied the PCJ beyond a reasonable doubt of the identity of the appellants. Appellants have failed to

demonstrate that the PCJ committed any palpable and overriding error in so finding.

(g) The PCJ erred in concluding that there was any evidence of possession against Ragnanan.

Position of Appellants

[69] Appellants argued that there was no evidence linking Ragnanan to the animals referred to in Counts 3, 4, 5 and 6. Counts 3, 4 and 6 allege she had "ownership, possession or control" of the dogs in question. Count 5 alleges that she exercised some control over the animals in question by virtue of their place of confinement on her property.

[70] Appellants submitted that the mere fact of Ragnanan being the owner of the property in question does not entitle the PCJ to infer that she had any ownership, possession or control of any animals thereon in the absence of any evidence that she was aware of their presence.

Position of Respondent

[71] Respondent argued that the PCJ drew a permissible and correct inference from the facts and that it should not be disturbed unless appellants can demonstrate an overriding and palpable error.

Conclusion

[72] Both respondent and appellants addressed the issue of control, ownership or possession in written submissions. The PCJ devoted approximately three pages to this issue in his judgment delivered April 3, 2012 (pages 10 to 13).

[73] The ***Act*** does not provide a definition of possession, ownership or control. However, it provides the following definition of owner:

> **"owner"** includes a person
> (a) having the possession or control of an animal, or
> (b) occupying premises containing the animal,
> immediately prior to the seizure of the animal under this Act.

[74] There is no dispute over the fact that Ragnanan was the registered owner of the property in question and that she occupied that property. The property also contains the buildings where the dogs were kept.

[75] The PCJ inferred from Ragnanan's occupying the premises and the existence of a significant number of dogs housed in buildings in the immediate vicinity that she was aware of their presence and therefore exercised a degree of control over the animals.

[76] I find that appellants have failed to demonstrate that the PCJ made an overriding and palpable error in drawing that inference from the facts before him.

(h) The PCJ erred in ruling that the evidence with respect to Counts 3 and 4 was sufficient to prove beyond a reasonable doubt that the animals' health or well-being was "significantly impaired";

and

(i) The PCJ erred in ruling that the evidence with respect to Count 5 was sufficient to prove beyond a reasonable doubt that the circumstances constituted a "high risk" of injury or distress to the animals in question;

and

(j) The PCJ erred in ruling that the evidence with respect to Count 6 was sufficient to prove beyond a reasonable doubt that the conditions constituted a hazard "likely to injure" the animals.

Position of Appellants

[77] The last three grounds of appeal raised by the appellants all deal with the adequacy of proof of the physical condition of the animals or the physical environment in which they were being kept. It makes sense to deal with all three grounds of appeal under one category. This was the approach followed by counsel at the hearing of this appeal.

[78] Whiting agreed that the animals all fell under s. 6(1)(f) of the ***Act***, which, at the time of the offences, provided:

> **Animal in distress**
> **6(1)** Subject to subsection (2), for the purposes of this Act, an animal is in distress if it is
> …
> (f) subjected to conditions that will, over time, significantly impair the animal's health or well-being, including
> (i) confinement in an area of insufficient space,
> (ii) confinement in unsanitary conditions,
> (iii) confinement without adequate ventilation,
> (iv) not being allowed an opportunity for adequate exercise, and
> (v) conditions that cause the animal extreme anxiety or distress.

[79] In cross-examination, Whiting agreed it was not uncommon for dogs to have intestinal parasites, and that none of the dogs had respiratory problems, notwithstanding their exposure to ammonia in the compounds where they were kept. As well, Whiting agreed that none of the dogs had to be euthanized. As well, in terms of cleanliness on a five-point sanitation scale, most of the dogs rated mid-level or better.

[80] Finally, there was no evidence adduced as to how long the dogs had been kept at the farm at the conditions under which they were found.

[81] Appellants argue that the lack of symptoms observed in the animals should have raised a reasonable doubt in the mind of the PCJ that the animals' health or well-being was significantly impaired, that the circumstances in which they were found constituted a high risk of injury or distress to them, or that the circumstances in which they were found constituted a hazard likely to cause them injury.

[82] Finally, even if some of the conditions described by Whiting existed, they could not have been so significant given the relatively good condition of the dogs.

Position of Respondent

[83] Respondent submits that determination of the allegations relating to the condition of the dogs and the circumstances in which they were found all involve questions of fact. The PCJ's determination of those questions of fact is to be reviewed on the standard of palpable and overriding error.

[84] Respondent points out that the ***Act*** does not define "significant impairment of health," "high risk of injury or distress," or "likely to injure." Therefore, those determinations are necessarily fact-based.

[85] At trial, both Wamnes and Whiting described the conditions in which the dogs were found. Several hundred photographs were taken at the buildings

where the animals had been housed and those photographs were filed as exhibits at the trial.

[86] Whiting's testimony included the effects the conditions of the buildings would have on the dogs, which conditions included environment, ventilation, lighting, pen construction, debris, and materials in the dogs' pens. He also testified as to the risk of injury created by that environment.

[87] At trial, Dr. Colleen Marion also provided expert testimony relative to the conditions of the animals and how those conditions could potentially impair their health. Witnesses Karen Elaine Smith and Susan Marie Williams also testified as to the condition of the dogs after they had been seized.

Conclusion

[88] The PCJ's judgment makes it clear that he considered the evidence of the witnesses both in direct and cross-examination. The PCJ considered each count separately and applied the evidence which he accepted to Counts 3 to 6 in finding the appellants guilty. He acquitted the appellants under Counts 1, 2, 7 and 8.

[89] Appellate courts should not interfere with findings of facts of the trial judge provided those findings of facts are supported by the evidence. Here, it is clear there was sufficient evidence for the PCJ to have made the findings of facts that he did. The appellants have failed to identify any palpable or overriding errors made by the PCJ in his assessment of the evidence.

ARE THE SENTENCES IMPOSED ON THE APPELLANTS HARSH AND EXCESSIVE UNDER THE CIRCUMSTANCES?

Position of Appellants

[90] Appellants submit that maximum sanction should be reserved for the most serious of offences. The maximum fine for each of the counts is $5,000. The fines received by Nikkel on two of the counts represent 80% of the maximum and on two of the counts represent 60% of the maximum. In Ragnanan's case, appellants say that the four counts under which she was convicted arise from one incident and that the evidence against her was sparse.

[91] Finally, appellants point out that neither has a record for previous convictions under the ***Act***.

[92] Appellate courts are required to show great deference when reviewing sentences imposed by trial judges. In order to interfere with a sentence, it must be shown to have been demonstrably unfit or to have been arrived at as a result of an error in principle.

Position of Respondent

[93] Respondent provided the PCJ with authorities to consider, which included ***R. v. Hiebert (M.)*** (2003), 172 Man.R. (2d) 73 (Prov. Ct.), ***R. v. Hiebert*** sentencing (unreported), October 23, 2003 (Man. Prov. Ct.), ***R. v. McCurry*** (unreported) May 4, 2010 (Man. Prov. Ct.), ***R. v. Talaga***, [2006] M.J. No. 145 (QL) (Prov. Ct.), and ***R. v. Lukasik***, [2006] M.J. No. 179 (QL) (Prov. Ct.).

[94] Respondent submits that the sentences imposed on both appellants were appropriate in the circumstances and were in line with current Manitoba case law.

Conclusion

[95] In his sentence delivered April 20, 2012, the PCJ made the following observations (sentencing reasons – April 20, 2012, page 2, lines 3 to 8):

> The findings that I made on a consideration of all the evidence show that the situation was highly deplorable in the way the dogs were left to fend for themselves during the day, including winter months, without proper care, in breach of The Animal Care Act and regulations.

[96] The PCJ was aware of the maximum fine for first offences and of the fact that neither of the appellants had any previous offences. (Sentencing reasons – April 20, 2012, page 3, lines 1 to 5.)

[97] The PCJ also considered both the aggravating factors as well as the mitigating factors brought to his attention and chose to impose the fine recommended by the Crown. The PCJ also provided a reasonable opportunity for the appellants to pay their fines.

[98] While the sentence imposed on Nikkel may have been at the higher end of the range with respect to two counts, I am not convinced they were excessive or harsh under the circumstances. The sentences imposed with respect to the remaining two counts against Nikkel are slightly above the mid-point of the maximum and those imposed against Ragnanan are slightly below the mid-point of the maximum. I have been given no reason to interfere with same.

DISPOSITION

[99] The appellants' appeals with respect to convictions and sentence are dismissed.

_____J.