IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cited as: R. v. Vaillancourt, 2003 NSPC 59

BETWEEN:

HER MAJESTY THE QUEEN

-and-

CLAUDE VAILLANCOURT AND ANGELA MACKENZIE

D E C I S I O N

BEFORE: The Honourable Judge Jean-Louis Baitot, J.P.C.

HEARD: At Annapolis Royal, Nova Scotia

DATE: November 10th, 2003

CHARGE(S): Section 11(2) of the **Animal Cruelty Prevention Act**.

COUNSEL: Lloyd Lombard, for the Crown

Andrew Ionson, for the Defence

1. As a result of certain investigations the Defendants have each been charged with the same two counts, on two different informations; one, contrary to s. 446(1)(c) of the **Criminal Code of Canada**, R.S.C. 1985, Chap. C-46, *failure to provide suitable and adequate food for animals*; the other, *allowing animals to be or continue to be in distress*, contary to s. 11(2) of the **Animal Cruelty Prevention Act**, S.N.S. 1996, c. 22 (thereafter, the **Act**).

2. The Crown stayed the criminal matters on January 6th, 2003. The common trial has been adjourned from time to time for different reasons, including requests for particulars. The Defendants eventually served a notice, and an amendment thereto, pursuant to the **Constitutional Questions Act,** R.S.N.S.1989, c. 89, contesting, before any evidence is presented, the validity of ss. 11 (1) & (2) and 12(4) of the **Act**. The Crown acknowledges the sufficiency and timeliness of this notice.

ISSUES

3. The charges, as amended, state that the defendants

> *between the 21st of February and the 17th of May 2002, at or near Deep Brook, in the County of Annapolis, being the owner or person in charge of a domestic animal to wit, horses, goats, cows, dogs and sheep, [did allow them] to be or continue to be in distress, as defined in s. 2(a), contrary to Section 11(2) of the* ***Animal Cruelty Prevention Act***

4. Counsel have filed comprehensive briefs. At issue:

   a. whether s. 11 of the **Act** is **ultra vires** the Province as being criminal in nature and thus solely within the Federal jurisdiction, in accordance with the distribution of powers provided by ss. 92 and 91 of the **Constitution Act**, 1867, U.K., 30 and 31 Victoria, c.3;

   b. whether s. 12**,** by permitting a search and seizure in or on premises other than a dwelling house, without two of three legal prerequisites (prior judicial authorization, based on reasonable grounds presented under oath), infringes ss. 7 & 8 of the **Canadian Charter of Rights and Freedoms**, **Part I of the Constitution Act 1982**.

5. I will restrict this decision to the matters properly raised and pertaining to the constitutional challenges, and leave to another day those matters which, to be decided, will require a factual underpinning.

6. The defence challenges s. 11 (1) of the **Act**. Since the defendants do not face such charge, I have no jurisdiction to deal with that matter specifically, although I will have to refer to it in this decision.

7. I propose to deal first with the Constitutional question, and second, with the Charter issue.

THE QUESTION OF ULTRA VIRES

Constitution Act

> **s. 91 (27)** *The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.*
> **s. 92 (13)** *Property and Civil Rights in the Province*
> **(15)** *The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section.*
> **(16)** *Generally all Matters of a merely local or private Nature in the Province.*

Legislative provisions

Criminal Code of Canada

8. Included, for ease of reference, is the entire s. 446 of Criminal Code of Canada, and I emphasize those parts that are particularly relevant to the issue at hand; the other parts deal with prohibited acts toward animals, but in a more defined context, not specifically found in the **Act**:

> *(1) Every one commits an offence who*
> *(a)* ***wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;***
> *(b) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed;*
> ***(c) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it;***
> *(d) in any manner encourages, aids or assists at the fighting or baiting of animals or birds;*
> *(e) wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of*

such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it;
(f) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or
(g) being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (f).
(2) Every one who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.
(3) For the purposes of proceedings under paragraph (1)(a) or (b), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by wilful neglect, as the case may be.
(5) Where an accused is convicted of an offence under subsection (1), the court may, in addition to any other sentence that may be imposed for the offence, make an order prohibiting the accused from owning or having the custody or control of an animal or a bird during any period not exceeding two years
(6) Every one who owns or has the custody or control of an animal or a bird while he is prohibited from doing so by reason of an order made under subsection (5) is guilty of an offence punishable on summary conviction.

9. Summary convictions are punished by a fine of two thousand dollars and or six months incarceration (s. 787.1(1)). In addition probation is available (s. 731.(1)); discharge (s. 730.1(1)); restitution (s. 738.1(1)). This may also trigger a conditional sentence (s. 742.1).

The Animal Cruelty Prevention Act

10. Section 11 of the **Act**, **supra**, provides:

(1) no person shall wilfully cause an animal unnecessary pain, suffering or injury.
(2) no owner of an animal or person in charge of an animal shall cause or permit the animal to be or to continue to be in distress.

Animal is defined, in s. 2 (1) (a), as *a non-human vertebrate*;

Distress is defined in s. 2 (2):

An animal is in distress, for the purpose of this Act, where the animal is
(a) in need of adequate care, food, water or shelter; or
(b) injured, sick, in pain, or suffering undue hardship, privation or neglect.

11. The **Act** provide the following penalties:

18 (1) *Any person who contravenes this Act or the regulations is guilty of an offence and liable on summary conviction*
(a) for a first or second offence, to a fine of not more than five thousand dollars and in default of payment to imprisonment for a term not exceeding six months, or to both fine and imprisonment;

(b) for a third or subsequent offence, to a fine of not more than ten thousand dollars and in default of payment to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

(2) *If an owner of an animal is found guilty of an offence under this Act or the regulations, the judge may make an order restraining the owner from continuing to have custody of animals for such period of time as is specified by the court.*

(3) *A person who contravenes an order made by a judge pursuant to subsection (2) is guilty of an offence and liable to the penalties set out in subsection (1).*

12. Section, s. 4 of the **Summary Proceedings Act**, R.S.N.S. 1989, C. 450 states:

> *Every one who, without lawful excuse, contravenes an enactment by* ***wilfully*** *doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an offence punishable on summary conviction and liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.* [my emphasis]

13. But for the difference in the definition of *animal* (Criminal Code, *animal* or *bird*, including cattle (s 2); the **Act**, *non-human vertebrate)*, both provisions create similar offences, wilfully inflicting, or allowing the infliction of pain and suffering on animals, or allowing them to be in distress. The Criminal Code offence is a full **mens rea** offence; only the first provincial offense describes the questionable conduct as **wilful**, implying **mens rea**; the second, it is commonly agreed, is one of strict liability as defined in **R. v. Sault Ste Marie (City of)**, [1978] 2 S.C.R. 1299 (i.e., 3 categories: 1) full **mens rea,** 2) strict liability, and 3) absolute); see also **R. v. Bailey**, 2002 NSSC 212, where emphasized is the distinction between those two sections of the **Act**, and the negligence aspect of s. 11 (2)); see also **R. v. Robar** (1980), 56 C.C.C. (2d) 65 (N.S.S.C. Ap. Div.), (affirmed by the Supreme Court of Canada at 68 C.C.C. (2d) 448; [1982] 2 S.C.R. 532), where a distinction is drawn between *wilful obstruction, a mens rea offence* (s. 205 of the Criminal Code then) and the offence of *"interfere"* with a peace officer, a strict liability offence, in the **Lands and Forest Act** of Nova Scotia**)**

The Act

14. The Nova Scotia Society for the Prevention of Cruelty to Animals was created by an Act of the Legislature (at S.N.S. 1877, c.86), in the 40th year of the reign of Queen Victoria. It is short; it names the original incorporators of the Society, and recognizes its existing constitution and by-laws as well as its power to alter or repeal them. It grants the Society power to own property and that extra constables "*appointed by the Mayor of Halifax*"

> "*shall have all the powers and authority by law conferred upon peace officers and constables to secure compliance with any Act now or hereafter to be enforced for the Prevention of Cruelty to Animals, and to ensure the conviction of persons offending against the same; and*

> *every Mayor, Warden, Custos Rotulorum, and Stipendiary Magistrate in this Province, shall have power to appoint and swear in persons willing to undertake the duty as extra constables for such special purpose, whose appointment, unless revoked by the Magistrate appointing them, or his successor in office, shall continue in force for one year from the date thereof, and be certified in writing under the hand of the Magistrate making the same*" (s. 4).

15. It appears that this Society was a local institution at first (the appointment of special constables by the Mayor of Halifax), but its operation and jurisdiction was expanded province-wide. The Statute did not provide for any prohibitions nor create offences, and charges had to be laid under the provisions of the **Criminal Code of Canada**, with its greater burden of proof. As a result it was felt in the late 1990's that a new act was needed; and we presently have the **Animal Cruelty Prevention Act**, **supra**, which received Royal Assent on December 20th, 1996, and came into effect on February 1st, 1997.

16. The **Act** (its full name is ***An Act to prevent cruelty to animals and to aid animals that are in distress***) provides that an animal is any "*non-human vertebrate* (s. 2(1)(a)), and such is in distress when it is "*in need of adequate care, food, water or shelter*; or (b) *injured, sick, in pain or suffering undue hardship, privation or neglect* (s. 2(2)). The **Act** continues the Nova Scotia Society for the Prevention of Cruelty and recognizes that its object is *to provide effective means for the prevention of cruelty to animals* in the Province of Nova Scotia (s. 5). The **Act** creates certain powers for the Society including that of investigation and inspection, as well as education; that of enforcement, even of recommending agents for appointments as special constables under the **Police Act** (s. 7) to enforce its goals.

17. The Society is in effect created as an independent, private, body, to carry out a public duty, with its own membership and governance and the powers to formulate and amend its own constitution and by-laws, exercising control over its own membership (ss. 4-10). Any of its powers may be delegated to its Board of Directors. The **Act** also recognizes that each branch in existence is a body corporate and each new branch created by the Society – and it is encouraged to expand – has all the powers of the Society (s.8), subject to the control and direction of the Society (s. 10).

18. The word "cruelty" is used seven times in the **Act**, in the title as well as in the name of the Society. It is not defined. In light of the usual meaning for the word, *the quality of being cruel: disposition to inflict suffering; delight in or indifference to another's pain; mercilessness, hard-heartedness* (**The Shorter Oxford Dictionary on historical principles,** Clarendon Press, Oxford, 1973, at p.465), I would define it as the infliction, for pleasure or by indifference, of pain to an animal. It implies an intention, a mental element.

19. Section 11 creates the prohibition from wilfully causing animals unnecessary pain, suffering or injury by anyone and prohibits owners or those in charge of animals to cause *"or permit the animal to be or continue to be in distress*". Section 12 enumerates the powers of a peace officer when he or she finds an animal in distress; it includes the power to seize the animal, with or without the consent of the owner, whom she/he should attempt to locate, and to deliver such animal into the custody of the Society or someone appointed by it. Such peace officer may act upon reasonable and probable grounds and enter *in or upon premises, vehicle or things*, with or without a warrant and use, if necessary, force to enter.

20. It is only in the case of a private dwelling house that the officer must obtain a warrant (s. 12 (5)).

21. In all cases the officer must take reasonable steps to ascertain the owner or person in charge and try to obtain his or her cooperation (s. 12 (6)).

22. Section 13 deals with animals in critical distress, i.e. near death or in such condition that its continued life would make the animal suffer "*unduly*". It authorizes the peace officer to *"humanly destroy the animal*", again after having taken all reasonable steps to locate the owner.

23. The **Act** provides that the owner is liable to the Society for the costs incurred in transportation, shelter, food and care, including veterinary care, or destruction of the animal. The **Act** also provides for inspections of different locations where animals are known to be kept such as slaughter houses, exhibitions, boarding kennels, etc. since the application of the

Act is not limited to pets, but includes all animals including livestock, except as such may come within the jurisdiction of other Acts.

24. Offences against this **Act** trigger penalties, fines up to ten thousand dollars (for a third offence) and imprisonment in default; otherwise up to six months; together with restraining orders. It provides also for protection of peace officers in the exercise of their duties (s. 18).

25. The **Act** gives the Society the power to make regulations, subject to the approval of the Governor in Council; and provides also for the Governor in Council to make regulations under particular heads, particularly with respect to the enforcement of the **Act**, creating exemptions with respect its application, creating further definitions, all for the more effective carrying out of the intent of the **Act**.

26. When one reads some of the debates in the House, reported in **Hansard**, relating to the second reading of **Bill No. 6** (**Animal Cruelty Prevention Act**) of April 11th, 1996 and December 2nd, 1996 one can conclude that the general sentiment, because the former statute did not create any offence, of the need of the new **Act**, in part to avoid charges under the **Criminal Code,** where convictions were more difficult to obtain, but also as an answer to a very real need: for the Society to have greater powers to protect animals through direct interventions, as well as the desirability of a general deterrence aspect through any convictions the Society may secure by means of its interventions.

27. The search and seizure, the charge, the penalty sections relate directly to the enforcement of the standards the Society applies. It is noteworthy that even though the maximum penalties are high, even for a first offence (five thousand dollars as opposed to two thousand dollars for a summary conviction offence), there are no minimum penalties.

Jurisprudence

28. **R. v. Chiasson** (1982), 66 C.C.C. (2d) 195 (N.B.C.A.), appeal to the Supreme Court of Canada dismissed, [1994] 11 C.C.C. (3d) 385 (S.C.C.) held that the offence of careless

hunting, pursuant to the **Fish and Wildlife Act** of New Brunswick was not **ultra vires** and was not in conflict with similar provisions contained in the **Criminal Code**. It recognized, at p. 4 (Quick Law) that

> *the basic purpose of criminal law .... is to underline fundamental values by prohibiting conduct infringing on these values, including, of course, the sanctity of human life...*

and further at the same page

> *the Province has, in fact, frequently legislated with a view to protecting the safety of persons and property in a wide variety of context, from the regulation of mining and factories, to safety regulations for theatres and other places of public amusement, to highway traffic regulations.*

29. In **O'Grady v. Sparling** (1960), 128 C.C.C. (1); [1960] S.C.R. 804 (S.C.C.), at issue was the constitutional validity of a charge of careless driving (s. 55(1)) under the **Manitoba Highway Traffic Act**. At p. 4 (Quick Law), the Court states:

> *A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition;*

and at p. 5 it holds:

> *... the **Manitoba Highway Traffic Act** has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation.*

and later at the same page,

> *Section 55(1) is highway legislation dealing with regulation and control of traffic highways, and section 221 is criminal law dealing with negligence of the character defined in the section. Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative ... There is no conflict or repugnancy between section 55(1) of the Manitoba Highway Traffic Act and section 221 of the Criminal Code. Both provisions can live together and operate concurrently.*

30. The Court of Appeal of Saskatchewan, in **R. v. Racette** (1988), 39 C.C.C. (3d) 289, declares that provincial legislation similar to the breathalyser offences contained in the **Criminal Code** was valid provincial legislation; however the non-consensual taking of blood samples authorized by the provincial legislation was a violation of s. 8 (*Protection against unreasonable search and seizure*) of the **Charter** and such encroachment was not a reasonable limit pursuant to s. 1 of the **Charter.** At p. 10 (Quick Law), it discusses the difficulties to define criminal law and refers to the definition given by the Supreme Court

in **Reference** re Validity of s. 5(a) of the **Dairy Industry Act** (**Margarine Case**), [1949] 1 D.L.R. 433, at pp. 472-473,

> *a crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some civil or injurious or undesirable effect upon the public against which the law is directed. The effect may be in relation to social, economic or political interest; and the Legislature has had in mind to suppress the evil or to safeguard the interest threatened. Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ...*

Intra vires

31. Section 446 of the **Criminal Code** (entitled **Causing Unnecessary Suffering** under the subheading **Cruelty to Animals**), found in PART XI - WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY, covers a broader spectrum of offences that may be committed against animals, and include the same as those defined in s. 11(1) of the **Act** (*wilfully cause an animal unnecessary pain, suffering or injury*); it draws a distinction between an animal and a bird; it addresses the causing of distress through neglectful care or lack of it; it also encompasses animal fighting and betting, administering poisonous drugs or substances, pass time or competitive shooting of liberated animals for that purpose.

32. Given its location in the **Code**, any prosecution is subject to qualification of the expression *wilfully* found in s. 429, including the defence of *legal justification or excuse and with colour of right*.

33. It must be noted that, partly because of this provision, and partly because of the evolution in Canadians' view of animals, there is a proposal to change how the **Criminal Code** treats offenses against animals which *have the capacity to feel pain*, by not considering them simply property, and expanding the protection, and maximum penalties. However, at this stage, it is not yet law (see **BILL C-10B**, 51-52 Elizabeth II, 2002-2003), and need not be considered.

34. The only conclusion one can reach from reading this **Act,** is that its *pith and substance*, its

matter, is to protect animals from unnecessary pain, suffering or distress; its object is to secure, through a private Society, a timely intervention, wherever an animal may be found in need of protection, to terminate and/or prevent cruel or negligent treatment of animals owned by, or in the possession of persons, except as such jurisdiction may be pre-empted by other Acts, such as the **Agriculture and Marketing Act** or the **Sheep Protection Act**, or those in research laboratories which meet certain standards, referred to in the **Act**.

35. In accordance with the relevant jurisprudence (see for instance **R. v. Sobey's Inc** [1998] N.S.J. 467 (N.S.C.A.)), having determined the *matter* of this legislation as the protection of animals in Nova Scotia, the next step is to assign it to one of the constitutional powers under s. 91 (Federal) or s. 92 (Provincial). The Crown argues that it comes within s. 92(13) of the **Constitution Act** 1867 since animals are property, which can be sold and bought. I would think, either under s. 92(13) (*Property and Civil Rights*) or 92(16) (*local matters)*; it is well within the competence of the Province to deal generally with the welfare of domestic animals, be they livestock or pets. And the Province may create offences, pursuant to s. 92 (15) of the **Constitution**, to enforce its legislation.

36. Indeed it appears every Province and Territory in Canada has similar legislation, including the **Dog Act** (R.S.N.W.T.. 1988, c. D-7), enacted to prevent a cruelty to, or neglect of, animals.

37. Both statutes deal in part with the same subject matter, and the **Criminal Code** section is broader in coverage. There is thus duplication. Has the Province usurped the federal parliaments jurisdiction with respect to criminal law, found in s. 91(27) of the **Constitution Act**, 1867? If not, is there a conflict between the two to bring to the fore the doctrine of paramountcy. I must conclude the Province has not: both have the same aim. Indeed they use the same wording so that here duplication is, in Professor Lederman's phrase, approved by the Supreme Court of Canada in **Multiple Access Limited v. McCutcheon**, [1982] 2 S.C.R. 161, at pg. 190, *the ultimate in harmony*. There is no conflict since a person need not breach one law to comply with the other; the doctrine of paramountcy, therefore, has no application.

38. The charge contrary to s. 11(2) complies with the requirement of the **Act** and does not allege the adverb *wilfully*, as would otherwise be required if a charge was brought under s. 4 of the **Summary Proceedings Act**. It is clear at the very least that this charge is one of strict liability under the **Sault Ste. Marie** ruling, **supra**: it is open to the Defendant to show due care or diligence, or mistake of fact.

39. In light of the distinction drawn in **R. v. Robar**, **supra**, and the use of the adverb *wilfully* in s. 11(1) of the **Act**, there remains an issue as to whether this wording amounts to a criminal charge. However, it needs not be decided presently.

WHETHER S. 12 OF THE ACT IS IN BREACH OF S. 7 & 8 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

40. The applicants/defendants, in their notice challenge s. 12(4) of the **Act** is in violation of ss. 7 and 8 of the **Charter of Rights and Freedoms** as it authorizes a warrantless search and seizure. They rely on **Hunter v. Southam Inc.** [1984] 2 S.C.R. 145, as well as prior and subsequent jurisprudence.

The Act

41. For convenience, I will reproduce the entire section.

> ***Powers of peace officer***
>
> ***12 (1)*** *Where a peace officer finds an animal in distress and the owner or person in charge of the animal*
>
> *(a) does not immediately take appropriate steps to relieve its distress; or*
> *(b) is not present or cannot be found promptly,*
> *the peace officer may, subject to this Act, take such action as the peace officer considers necessary to relieve the distress including, without restricting the generality of the foregoing,*
> *(c) taking custody of the animal;*
>
> *(d) arranging for any necessary transportation, food, water, care, shelter and medical treatment, or any one or more of them;*
> *(e) delivering the animal into the custody of the Society or a suitable caretaker.*
>
> ***(2)*** *Before taking action pursuant to subsection (1), a peace officer shall take reasonable steps to find the owner or person in charge of the animal and, if the owner is found, shall endeavour to obtain the owner's co-operation to relieve the animal's distress.*
>
> ***(3)*** *Where the owner of the animal is not present or not found and informed of the animal's distress,*

> *the peace officer, or the Society in whose custody the animal is delivered, shall take reasonable steps to find the owner and inform the owner of the action taken.*
>
> ***(4)*** *Where the peace officer has reasonable and probable grounds for believing that an animal is in distress*
> *(a) in or upon any premises* ***other than a private dwelling place****; or*
> *b) in any vehicle or thing,*
> *the peace officer may, with or* ***without a warrant****, and by force, if necessary, enter the premises, vehicle or thing and search for the animal and exercise the powers conferred on the peace officer by this Section with respect to any animal in distress found therein.*
>
> ***(5)*** *A peace officer who, on reasonable and probable grounds, believes that there is an animal in distress in a private dwelling house, shall obtain a warrant to enter the private dwelling house for the purpose of carrying out duties pursuant to this Section.*
>
> ***(6)*** *Before entering any premises, vehicle or thing pursuant to this Section, a peace officer shall take reasonable steps to find the owner or person in charge and endeavour to obtain the co-operation of the owner or the person in charge.*
>
> ***(7)*** *Where a peace officer uses force in entering premises, a vehicle or thing, the peace officer shall use no more force than is reasonably required under the circumstances.*
>
> ***(8)*** *Where a person other than a peace officer finds an animal in distress, that person may, upon signing a release in the form prescribed by the regulations, turn the animal over to the custody of the Society. 1996, c. 22, s. 12.*

42. Section 12(1) empowers a peace officer who *finds an animal in distress* to take any action to relieve such distress, including taking custody of the animal, transporting it and delivering it to the Society. The peace officer, to effect this purpose under subsection (4) may *with or without a warrant, and by force, if necessary, enter the premises, vehicle or thing* and search for the animal and exercise the powers conferred on the peace officer by this section with respect to any animal in distress found therein. This is subject to finding the owner and endeavoring to obtain the owner's cooperation to relieve the animal's distress. A peace officer may not enter a *private dwelling place* unless he has a warrant to do so (s. 12(4) and 12(5). The Defence argues that authorization to enter premises without a warrant is in breach of ss. 7 and 8 of the **Charter**; the Crown argues that it is a codification of exigent circumstances, an exception to the general rule.

Jurisprudence

43. In **R v. Rao** (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), a warrantless search provisions authorized by s. 10(1)(a) of the **Narcotic Control Act** as it then existed was questioned. Justin Martin, for the Court, at p. 19 (Quick Law) stated;

> *... the warrantless search of a person's office requires justification in order to meet the constitutional standard of reasonableness secured under s. 8 of*

> *the **Charter**, and statutory provisions authorizing such warrantless search are subject to challenge under the **Charter**. The justification for a warrantless search may be found in the existence of circumstances which make it impracticable to obtain a warrant ... the individual's reasonable expectation of privacy must, of course, be balanced against the public interest in effective law enforcement. However where no circumstances exist which make the obtaining of the warrant impracticable and when the obtaining of a warrant would not impede effective law enforcement, a warrantless search of an office of fixed location (except as an incident of a lawful arrest) cannot be justified and does not meet the constitutional standard of reasonableness prescribed by section 8 of the **Charter**.*

44. In **Canada** (**Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.**, commonly referred to as **Hunter v. Southam**, **supra**, at issue was the conflict between s. 10(1) of the **Combines Investigation Act** which authorize officers to enter and examine documents in business premises and s. 8 of the **Charter Of Rights**. The **Combines Investigation Act** permitted the Director, upon having received a certificate from a member of the restrictive trade practice to enter or nominate a representative to enter any premises for the purposes of search and seizure of matters relevant to the Act itself. A search and seizure was effected in accordance with the Act. The **Charter of Rights and Freedom** had just proclaimed on April 17th, 1982, about a month and a half before the authorization to search was granted. The task was to define the constitutional validity of the statute authorizing a search and seizure as opposed to the reasonableness of its execution. The Court notes, at p. 8 (Quick Law) that, historically, the protection from governmental searches and seizures was based on the right to enjoy private property and thus on the law of trespass.

45. It held that s. 8 of the **Charter –** *Everyone has the right to be secure against unreasonable search or seizure* – is an entrenched constitutional provision and is not *vulnerable to encroachment by legislative enactments in the same way as common law protections*, and said at p.9,

> *the guarantee of security from unreasonable search and seizure only protects a reasonable expectation*;

it means

> *an assessment must be made as to whether in a particular situation the*

> *public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance it's goals, notably those of law enforcement.*

It concluded that, at p. 10,

> *in the absence of a valid procedure for prior authorization searches conducted under the* Act *would be unreasonable.*

Prior authorization, at p. 13,

> *must be based on reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search,*

and the person authorizing it may not be the administrator in charge of the investigation (at p. 11) as provided by the **Combines Investigation Act**, but a person acting judicially, without an interest in the outcome.

46. In **R. v. Grant** [1993], 3 S.C.R. 223, s. 10 of the **Narcotic Control Act** authorizing warrantless search was again in issue. There had been two warrantless searches of the perimeter of a residence; they yielded sufficient grounds for the officers to make then an application for a search warrant, under s. 487 of the **Criminal Code**; it, upon execution, produced evidence of unlawful cultivation of marihuana and possession of marihuana for the purposes of trafficking. The trial judge acquitted the accused under s. 8 and the Appeal Court upheld such acquittal. The Supreme Court of Canada allowed the appeal.

47. The issue was whether s. 10 should be read down to allow warrantless searches in case of, at para. 37,

> *exigent circumstances, where evidence is likely to be lost, destroyed, removed or hidden, warrantless searches of property other than dwelling houses remain a law enforcement option...Reading down... is within constitutional parameters.*

48. At para. 47 the Court repeated what it had said in **R. v. Collins**, [1987] 1 S.C.R. 265, that *a warrantless search, to be reasonable, must satisfy three criteria: (i) it must be authorized by law (ii) the law must be reasonable (iii) the manner of the search must be reasonable.* Since the warrantless perimeter searches were conducted in the absence of exigent circumstances, they were unreasonable. There was otherwise sufficient evidence, independent of that obtained through these illegal searches, to justify the warrant sought. In

light of the circumstances, and the absence of **malafides** on the part of the officer, and the importance of the real evidence seized, (para. 54), there was no order for exclusion under s. 24(2) of the **Charter.**

49. In **R. v. Inco Ltd.** [2001] O.J. (2098); 54 O.R. (3d) 495 (Ont. C.A.), (leave to appeal to the Supreme Court of Canada dismissed on March 7th 2002, S.C.C. file no. 28778, S.C.C. Bulletin, 2002, p. 371), the Court held that once inspectors have reasonable and probable ground to believe that an offence has been committed under the provincial statute, the **Ontario Water Resources Act** in that case, then they cannot rely on inspection powers to enter premises and interview employees, and must obtain a prior judicial authorization to search and seize (see paras. 36 to 38).

Discussion

50. In the case at bar, s. 12(4) authorizes the officer, who has reasonable and probable grounds to believe that an animal is in distress, to, *with or without a warrant*, enter and seize such animal. If she/he has such a reasonable ground, then he or she would be able to obtain a prior judicial authorization.

51. Animals within the purview of this **Act** may be found in many different places or premises, moving or non-moving; such as a truck, a train, a bus or a car, a boat, or on land, on public property as well as private.

52. The word *premises* is defined as *a house or building with its grounds or other appurtenances* (the **Shorter Oxford**, **supra**, at p. 1656, def. 4). It implies a private building or yard. A distinction between a house and a *private dwelling place* must then be made, but it is not clear upon what terms, or by what definition, since, for most Nova Scotians, I would venture to say, both expressions may means the same thing, a home, and would include the yard appertaining thereto.

53. If there are grounds to act quickly, prior to the issuance of a warrant – and such can be obtain by telephone now (see 2B(4) of the **Summary Proceedings Act**)– then the existence of such

exigencies will dispense from an application, as provided s. 2D(3) of the **Summary Proceedings Act** (as amended by the **Justice Administration Amendment (fall 2002) Act**, S.N.S. 2002, c-30):

> *(3) Although a warrant issued under subsection (1) of section 2(b) would otherwise be required, a peace officer may exercise any of the powers described in those subsections without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would be impracticable to obtain the warrant.*
> *(4) For the purpose of subsection (3), exigent circumstances include circumstances in which the delay necessary to obtain a warrant will result in danger to human life or the loss or destruction of evidence*

This amendment came into force on November 28th, 2002, several months after the matters complained of arose. Nevertheless, the **Charter**, and the jurisprudence, pre-existed this charge.

54. In light of the **Charter**, and the relevant jurisprudence, the statutory authorization to enter premises without a warrant is over broad and in breach of s. 8 of the **Charter**: in the majority of circumstances, there is no need to infringe a person's right for the Society to fulfill its mandate, even though the cooperation of the owner may be obtained. A warrant is the best guarantee that a person's right is safeguarded, through the prior assessment of the reasonableness of the peace officer's ground to enter and seize an animal he or she believes is in distress.

55. The Applicant further argues that such provision is in breach of s. 7of the **Charter.** It reads

> *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

Given the above, I will not address this issue, particularly as there is no evidence at this stage to show a *deprivation of the claimants life, liberty or security of the person*, **R. v. K.B.**, [2002] A.J. 1570 (Alta. Q.B.).

56. I am satisfied that there is no justification under s. 1 of the **Charter** for the over reaching of s. 12(4). Indeed, in light of the present amendments to the **Summary Proceedings Act**, there

is no necessity for it.

57. Pursuant to s. 24 (1), I must declare, as inconsistent with s. 8 of the **Charter**, the following underlined words in the phrase *the peace officer may, with <u>or without</u> a warrant, and by force...* of s. 12 (4) of the **Act**. As a result the section will then comply with both the **Charter** and the jurisprudence; at the same time, a peace officer may still act without a warrant in exigent circumstances, the proof of which is on the Crown. In light of **Rao** and **Grant**, **supra**, that a *vehicle* or *thing* – if that is the case – is not *fixed* would be very relevant. At the same time, in most cases, a prior judicial authorization, which, in light of the recent amendments to the **Summary Proceedings Act**, can conveniently and quickly be obtained by telephone, will allow a more objective balance between the duties of the Society, and the rights of the individual.

Dated at Annapolis Royal, this 22nd day of December, 2003.

Jean-Louis Batiot, J.P.C.