IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Picco*, 2023 NLCA 33
Date: October 30, 2023
Docket Number: 202201H0033

BETWEEN:

HIS MAJESTY THE KING — APPELLANT

AND:

ROBERT PICCO — RESPONDENT

Coram: D.E. Fry C.J.N.L., F.J. Knickle and D.M. Boone JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 202101G1669 (2022 NLSC 79)

Appeal Heard: April 11, 2023
Judgment Rendered: October 30, 2023

Reasons for Judgment by: F.J. Knickle J.A.
Concurred in by: D.E. Fry C.J.N.L. and D.M. Boone J.A.

Counsel for the Appellant: Dana E. Sullivan
Counsel for the Respondent: Benjamin P. Curties

Authorities Cited:

CASES CITED: *R. v. Newfoundland Recycling*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (QC CA); *R. v. Higgins (B.)* (1996), 144 Nfld. & P.E.I.R. 295; *R. v. MacKenzie*, 2017 ONCA 638; *R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3; *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432; *R. v. S.D.D.*, 2002 NFCA 18, 211 Nfld. & P.E.I.R. 157; *R. v. Gerling*, 2016 BCCA 72; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; *R. v. Gosset*, [1993] 3 S.C.R. 76; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499; *The Queen v. Proudlock*, [1979] 1 S.C.R. 525; *R. v. Robinson*, 2018 BCSC 1852; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900; *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (ON CA); *R. v. Chen*, 2021 ABCA 382; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Deruelle*, [1992] 2 S.C.R. 663; *R. v. Green*, [1992] 1 S.C.R. 614; *R. v. Galloro*, 2006 ONCJ 263; *R. v. Barrett*, 2012 NLCA 12, 319 Nfld. & P.E.I.R. 287; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

STATUTES CONSIDERED: *Criminal Code*, sections 445.1(1)(a), 445.1(3), 839, 429, 446(1)(b), 436.

TEXTS CONSIDERED: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis Canada, 2022)

ARTICLES CONSIDERED: Peter Sankoff, "The *Mens Rea* for Animal Cruelty Offences after *R. v. Gerling*: A Dog's Breakfast" (2016) 26 C.R. (7th) 267

F.J. Knickle J.A.:

INTRODUCTION

[1] This appeal addresses whether a summary conviction appeal court judge (the appeal judge) correctly upheld the trial judge's acquittal of the respondent, Robert Picco.

[2] Mr. Picco was acquitted after a trial in Provincial Court of committing two separate criminal offences: wilfully causing unnecessary suffering and wilfully neglecting to provide suitable and adequate food, water, shelter and care, against each of four beagles under his care. The trial judge acquitted Mr. Picco after concluding that the Crown had not proven beyond a reasonable doubt that Mr. Picco had the necessary *mens rea* for the offences.

[3] The trial judge also concluded that the Crown had not proven beyond a reasonable doubt that the four beagles were "suffering"; notwithstanding that the trial judge accepted that the dogs were in "deplorable condition", "emaciated", "starving" and "near death".

[4] On appeal to the Newfoundland and Labrador Supreme Court, sitting as a summary conviction appeal court, the appeal judge upheld the acquittals, concluding that the trial judge applied the correct law in determining that Mr. Picco did not possess the necessary *mens rea* (*R. v. Picco*, 2022 NLSC 79, the "Appeal Decision"). With respect to whether the beagles were "suffering", the appeal judge concluded this was a question of fact and the trial judge made no palpable and overriding error in her factual finding that the animals were not suffering.

[5] The Crown now seeks leave to appeal and if leave is granted, to appeal the decision of the appeal judge. The Crown asks this Court to set aside the acquittals and enter convictions or, in the alternative, remit the matter for a new trial.

[6] I am of the view that the appeal judge erred in upholding the acquittals. The trial judge made several errors. The trial judge did not properly apply the law relating to whether Mr. Picco possessed the necessary *mens rea*, in particular whether he was reckless in his conduct.

[7] With respect to whether the animals were "suffering", contrary to the appeal judge's conclusion, the trial judge misapplied the law and failed to give the proper legal effect to the facts she found. Given the evidence the trial judge accepted there was no legal conclusion that could be reached other than the animals were "suffering".

[8] I would grant leave to appeal, allow the appeal, set aside the acquittals and remit the matter to provincial court for a new trial on all counts.

THE ISSUES

[9] The issues can be described as follows:

1) Should leave to appeal be granted?

2) Did the appeal judge err in concluding that whether the animals were suffering under section 445.1(1)(a) was a question of fact?

3) Did the appeal judge err in affirming the trial judge's reasonable doubt that the animals were suffering under section 445.1(1)(a)?

4) Did the appeal judge err in finding that the *mens rea* for the offence under section 445.1(1)(a) was subjective?

5) Did the appeal judge err in affirming the trial judge's interpretation of "evidence to the contrary" for the purpose of rebutting the presumption under section 445.1(3)?

6) Did the appeal judge err in affirming the trial judge's reasonable doubt as to whether or not Mr. Picco's conduct was reckless in relation to either offence?

ISSUE 1: Should leave to appeal be granted?

[10] An appeal by the Crown of acquittals of summary conviction matters from the Supreme Court General Division is governed by section 839 of the *Criminal Code*. Such appeals require leave, and leave may be granted solely on a question of law. Further, leave should be granted only where the appeal has a reasonable possibility of success, or the proposed question of law has significance to the administration of justice: *R. v. Newfoundland Recycling*, 2009 NLCA 28, 284 Nfld. & P.E.I.R 153, at paragraph 9.

[11] The grounds of appeal in these circumstances raise questions of law and overall there is a reasonable possibility of success. In the alternative, the appeal has significance for the proper administration of justice. This appeal provides the first opportunity for this Court to consider the interpretation of both offences and to provide clarity on their constituent elements.

[12] For the above reasons, I would grant leave to appeal.

ISSUES 2 & 3: Did the appeal judge err in concluding that whether the animals were suffering was a question of fact?

Did the appeal judge err in affirming the trial judge's reasonable doubt that the animals were suffering?

[13] The offence of causing unnecessary pain, injury or suffering to an animal is found in section 445.1(1)(a) of the *Criminal Code*. Section 445.1(1)(a) states:

> **445.1(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;

[14] In her decision, given orally, the trial judge concluded that the condition of the animals was caused by Mr. Picco's failure to provide food and water. The trial judge stated that when seized by volunteers from an animal charity organization "Beagle Paws", the animals were in "very poor condition". The trial judge stated (Oral Decision, Transcript at 282):

> … These animals while under Mr. Picco's care, were not fed or watered properly, and were near death when they were removed from the property on September 21st, 2018. One need only look at the pictures of the animals to see the deplorable condition that they were in. This finding is supported by the evidence of Dr. Ralhan and Dr. Rogers. Mr. Picco said that he cried when he saw the pictures of the animals taken on the day of their removal, and I can understand why. Irrespective of whether they were being let out of their kennel or had worms, the dogs were the accused's responsibility, and they were in grave condition.

[15] The trial judge accepted the witnesses' testimony that the dogs were emaciated (Oral Decision, Transcript at 288). Dr. Rogers, an expert in veterinarian pathology and animal husbandry, described the animals as in distress and starving. She testified that the animals were so deprived of nourishment their bodies had effectively "consumed" their own body tissue to survive (Transcript, at 103-105). It was because of this level of deprivation of nourishment that Dr. Rogers opined the animals would have perished in a matter of days, and were "near death" as reiterated by the trial judge. The trial judge also accepted that two of the dogs, Katie and Bob, exhibited infections.

[16] Notwithstanding the above factual findings, the trial judge concluded that the Crown had not proven beyond a reasonable doubt that the dogs were "suffering" as per section 445.1(1)(a). The trial judge stated (Oral Decision, Transcript at 289):

> While I agree that there is some evidence that the dogs were suffering, there is also evidence that, but for the extreme emaciation, they were otherwise in good health. This is not proof of the standard of beyond a reasonable doubt. …

[17] In other words, although the trial judge accepted that the dogs were emaciated, starving, in "deplorable condition" and "near death", because the dogs were "otherwise in good health", the Crown had not proven the dogs were "suffering".

[18] The appeal judge declined to interfere with the trial judge's conclusion as, in his view, this was a finding of fact by the trial judge, to which, in the absence of palpable and overriding error, she was owed deference. Further, like the trial judge, the appeal judge equated "suffering" under section 445.1(1)(a) with an assessment of the overall health of the dogs. He accepted as correct that because there were no other health issues with the dogs, there was a reasonable doubt that the dogs were "suffering" (Appeal Decision, at para. 85).

[19] With respect, to have accepted that the animals were "extremely" emaciated, starving, in deplorable or grave condition and near death, but not "suffering" is wrong in reason, logic and in law.

[20] Further, the appeal judge erred in showing deference to the trial judge's conclusion that the animals were not suffering on the basis that it involved a factual determination.

[21] Whether the animals were suffering was an essential element of the *actus reus* of the offence under section 445.1(1)(a). The Crown was required to prove beyond a reasonable doubt that Mr. Picco caused the animals to unnecessarily suffer. As a component of section 445.1(1)(a), whether or not the animals were suffering was not a question of fact, but a legal conclusion. This determination required the judge to give the proper legal effect to the facts she found, that is whether the facts constituted "suffering" as per section 445.1(1)(a). Put another way, the trial judge had to apply a legal standard (that of whether the dogs

suffered) to the facts. By either approach, this is a question of law (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 28).

[22] The legal test for whether or not the evidence demonstrates suffering for the purposes of causing unnecessary suffering to animals under one's care was established by Lamer, J., as he then was, in *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (QC CA). At the time *Menard* was decided, the offence was worded slightly differently, but "suffering" was a required element. Although the issue in *Menard* was not whether the animals suffered but whether the animals suffered "unnecessarily", the comments of Lamer, J. are apposite in determining whether or not an animal has suffered for the purposes of establishing the necessary *actus reus* of the offence.

[23] In *Menard*, there was no dispute that the offender was legally entitled to euthanize animals, that is, he was legally entitled to cause suffering. It was the manner in which he accomplished the euthanasia that caused unnecessary suffering. This was so despite that the duration of the suffering lasted a matter of 30 seconds. The evidence from an expert witness was that although the animals would perish within two minutes, there would be a 30 second period in which they would be conscious and experiencing distress. This brief period of suffering experienced by the animals was sufficient for the purposes of proving beyond a reasonable doubt that the animals "suffered" under that section of the *Criminal Code*.

[24] *Menard* stands for the principle that *any* degree of unnecessary suffering by the animal will establish this element of the offence. At page 463, Lamer, J. stated:

> Since the coming into force of the Canadian *Criminal Code* of 1953-54, it is forbidden to cause "… pain, suffering or injury" without its being necessary. Certainly, the legislator did not intend, as in cases of assault among human beings, to forbid through criminalization the causing to an animal of the least physical discomfort and it is to this extent, but no more, that one may speak of quantification. With the exception of these cases, however, the **amount of pain is of no importance** in *itself* from the moment it is inflicted wilfully, within the meaning of s. 386(1) of the *Criminal Code*, if it was done without necessity according to s. 402(1)(*a*) and without justification, legal excuse or colour of right within the meaning of s. 386(2).
>
> (Emphasis added)

[25] As the above excerpt explains, whether an animal has suffered for the purposes of establishing the *actus reus* of the offence is related to whether or not the suffering was necessary. Once it is established that there has been suffering that is unnecessary, it does not matter to what degree. As stated in *Menard*, at pages 463-464:

> Without importance in itself, the extent of the suffering finds its place on the other hand in the appreciation of the "necessity". It is sometimes necessary to make an animal suffer for its own good or again to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of human lives. Section 402(1)(*a*) does not prohibit these incidents, but at the same time condemns the person who, for example, will leave a dog or a horse without water and without food for a few days, through carelessness or negligence or for reasons of profit or again in order to avoid the costs of a temporary board and lodging, notwithstanding that these animals would suffer much less than certain animals used as guinea pigs. Everything is therefore according to the circumstances, the quantification of the suffering being only one of the factors in the appreciation of what is, in the final analysis, necessary.

[26] While both the trial judge and appeal judge referred to *Menard*, the test was not properly applied. Applying the reasoning in *Menard*, once the trial judge was satisfied that there was some evidence of "suffering", as she concluded in her judgment, this was adequate to meet the legal standard of suffering as established in *Menard*. Having found as a fact that the animals were emaciated, in deplorable and grave condition and near death, there is no other conclusion than the animals were suffering. There was no dispute that the emaciation of the animals was unnecessary.

[27] Further, the trial judge's consideration that the animals were found to be experiencing no other ailments, that is, they were "otherwise in good health", was not only irrelevant but contrary to the approach in *Menard* and the words of the offence. The offence is not that the animals were caused to or permitted to be in poor health. The offence is that the animals were permitted or caused unnecessary pain, injury or suffering.

[28] For example, a cat who experiences a broken leg at the hands of its owner will have suffered; notwithstanding that the animal was otherwise in good health (*R. v. Higgins (B.)* (1996), 144 Nfld. & P.E.I.R. 295). A dog that strangles itself because its owner leaves it tied to a tree with a choke chain and duct tapes the mouth shut will have suffered, notwithstanding that the dog may have been otherwise in good health (*R. v. MacKenzie*, 2017 ONCA 638).

[29] The trial judge incorrectly concluded that the Crown had not proven the *actus reus* of the offence under section 445.1(1)(a) beyond a reasonable doubt. Based on the facts as found by the trial judge, because of the state of their emaciation and being near death at the time they were seized by Beagle Paws, the dogs were suffering as per section 445.1(1)(a), and as understood in *Menard*. The trial judge was owed no deference on this question and the appeal judge erred in affirming the trial judge's erroneous conclusion.

ISSUE 4: Did the appeal judge err in finding that the *mens rea* for the offence under section 445.1(1)(a) was subjective?

[30] After reviewing the wording of section 445.1(1)(a), as well as jurisprudence, the appeal judge concluded, as did the trial judge, that the *mens rea* for an offence under section 445.1(1)(a) was subjective. At paragraph 64 of his decision, the appeal judge stated:

> Based on these authorities I conclude that the *mens rea* of the offences under s. 445.1(a) [sic] and s. 446(1)(b) of the Code is subjective, and requires that the Crown prove that the accused intended the consequences of his acts, or that knowing of the probable consequences of those acts, the accused proceeded recklessly in the face of the risk. With great respect, I find based on the same authorities that the proposition in that objective foreseeability of the consequences is sufficient to prove the *mens rea* of the offence under s. 445.1(a) [sic] of the *Code* (and the offence under s. 446(1)(b) of the *Code*) is not a correct statement of the law in this province.

[31] I agree with the appeal judge that the *mens rea* for this offence is subjective.

[32] There is a presumption that criminal offences have a subjective fault element: *R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3, at paragraph 32, *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pages 1303 and 1309-10. In the absence of clear language stating otherwise, the *mens rea* of an offence will be subjective.

[33] The *mens rea* for both offences requires a state of mind that is "wilful". Both are subject to section 429 of the *Criminal Code*. Section 429 states:

> **429(1)** Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be

> deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.
>
> **(2)** A person shall not be convicted of an offence under sections 430 to 446 if they act with legal justification or excuse or colour of right.

[34] The presence of the term "wilfully" in section 429 and section 445.1(1)(a) suggests a subjective *mens rea*. In *A.D.H.*, in assessing how the word "wilful" influenced the *mens rea* for the offence of child abandonment under section 218 of the *Criminal Code*, the Supreme Court stated that the inclusion of the word wilful, is "although not always, a strong indication" that the *mens rea* is subjective (*A.D.H.*, at para. 42). The Court continued in paragraph 49:

> … While the word is used here only in the non-exhaustive definition of the words "abandon" and "expose" and only in relation to omissions, I agree with Richards J.A. that a wilful omission is the antithesis of a crime involving a mere failure to act in accordance with some minimum level of behaviour. If Parliament had meant to include in the terms "abandon" and "expose" situations in which there is no more than a failure to meet a standard of reasonable conduct, it would not make sense to require that omissions to observe that standard would have to be "wilful". …

[35] Even if the word "wilful" standing alone does not establish that the *mens rea* is subjective, the overall wording in section 429 removes any doubt. "Wilfully" is defined in section 429 to include that a person must "know", and be "reckless" as to whether their conduct "will probably cause" the events to occur. This is classic language of a subjective *mens rea*.

[36] The meaning of recklessness as a component of *mens rea* has been well established as stated in *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at page 582:

> … [Recklessness] is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "**recklessness**" is used in the criminal law and it is clearly distinct from the concept of civil negligence.
>
> (Emphasis added)

[37] In *R. v. Creighton*, [1993] 3 S.C.R. 3, McLachlin, J. further explained that "recklessness" was clearly a form of subjective *mens rea*. At page 58, McLachlin, J. stated:

> Subjective *mens rea* requires that the accused have intended the consequences of his or her acts, or that **knowing of the probable consequences of those acts, the accused have proceeded recklessly in the face of the risk**.

(Emphasis added)

[38] In *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at paragraphs 27-29, recklessness was also described as a "conscious disregard of [a] substantial and unjustified risk" of the harm that may result from the conduct that constitutes the *actus reus* of an offence.

[39] If Parliament had intended that the failure to care for an animal or cause it unnecessary suffering could be met on an objective basis, the definition of wilfully in section 429 would not have included recklessness. The language in section 429 follows closely the language in *Creighton* (see also from this Court, *R. v. S.D.D.*, 2002 NFCA 18, 211 Nfld. & P.E.I.R. 157, see also the decision from the Supreme Court General Division, *Higgins*).

[40] The Crown argued that the decision of *R. v. Gerling*, 2016 BCCA 72 supports that because proof of the *mens rea* for an offence under section 445.1(1)(a) is aided by the presumption under section 445.1(3), the *mens rea* for the offence, in the absence of evidence to the contrary, is the equivalent of an objective *mens rea*. Section 445.1(3) states:

> **Failure to exercise reasonable care as evidence**
>
> **(3)** For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal … thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

[41] The Crown submits that all that is required to trigger the presumption of wilfulness is a failure in reasonable care, (which is a marked departure from the standard of care the reasonable person would have exercised in the same circumstances). This is the equivalent of an objective *mens rea*. While I agree

that the level of conduct that must be established in order to trigger the presumption under section 445.1(3) is the equivalent of an objective *mens rea*, as stated by the appeal judge, this does not mean that the *mens rea* is objective. It only means that in the absence of evidence to the contrary, establishing a failure in reasonable care (a marked departure), will trigger the presumption of proof of the *mens rea* of wilfulness, which is still a subjective standard.

[42] Section 445.1(3) is an evidentiary "shortcut" (*R. v. St. Pierre*, [1995] 1 S.C.R. 791, at para. 23) for proving the *mens rea* of the offence under section 445.1(1)(a). Evidence of a failure in reasonable care can be relied upon to prove the more morally culpable level of intent, that of a subjective *mens rea* (see *Creighton*, *Sault Ste. Marie*, and *R. v. Gosset*, [1993] 3 S.C.R. 76, at 93-94). This is an evidentiary shortcut because, in the absence of the presumption under section 445.1(3), evidence of a failure in reasonable care would be insufficient to prove that the accused acted *wilfully* as defined by section 429, the necessary *mens rea* of the offence. As stated in *Sault Ste. Marie*, at page 1309-10:

> The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. **Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law**.
>
> (Emphasis added)

[43] The Crown points to paragraph 27 of *Gerling*, where Chiasson, J.A. stated that where there is no evidence to the contrary, "the test under section 445.1(1)(a) is objective".

[44] Respectfully, that statement cannot be read in isolation from other statements by the court in *Gerling*. At paragraph 25, the court stated explicitly that the "Crown must prove that the accused acted *wilfully*". The court then noted in paragraph 26 that the presumption under section 445.1(3) permits the Crown, in the absence of evidence to the contrary, to establish the wilfulness of the conduct by evidence that is established on an objective basis. The Court then referred to the words of the presumption, that is, by "evidence that a person failed

to exercise reasonable care or supervision causing pain, suffering or injury is proof that the pain, suffering or injury was caused or permitted wilfully".

[45] When the statement relied on by the Crown in paragraph 27 is read with paragraphs 25 and 26, I take the court in *Gerling* to mean no more than the level of evidence required to trigger the presumption under section 445.1(3), is the equivalent of an objective *mens rea*. But the *mens rea* for the offence is still subjective, as defined in section 429. It is just that proof of that subjective *mens rea* is assisted by the presumption under section 445.1(3).

[46] The appeal judge did not err in concluding that the *mens rea* for the offence under section 445.1(1)(a) of causing unnecessary suffering or injury to an animal under one's care is subjective.

[47] I would dismiss this ground of appeal.

ISSUE 5: Did the appeal judge err in affirming the trial judge's interpretation of "evidence to the contrary" for the purpose of rebutting the presumption under section 445.1(3)?

[48] As stated, under section 445.1(3), in the absence of evidence to the contrary, proof of a failure in reasonable care will be proof that the accused acted wilfully; that is with the necessary subjective *mens rea*.

[49] The presumption applies only, as the words of the section state, "in the absence of any evidence to the contrary". If there is evidence to the contrary, whether from an accused or in the Crown's evidence, that tends to raise a reasonable doubt that the presumed fact exists, the presumption does not apply (*R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at paras. 19, 21; *St. Pierre*, at para. 23).

[50] The trial judge was satisfied there *was* "evidence to the contrary" that rebutted the presumption that Mr. Picco acted with the necessary *mens rea*. The trial judge reasoned that for evidence to be "evidence to the contrary", it was sufficient for Mr. Picco to raise a reasonable doubt that he possessed the necessary *mens rea* of wilfulness, or in these circumstances, recklessness. She did not explain of what this evidence consisted, except to state that she relied on the same evidence she accepted in acquitting Mr. Picco of the section 446(1)(b) offence as

discussed later in this judgment. The trial judge stated (Oral Decision, Transcript at 290):

> … However, if I am wrong in finding that the dogs were not suffering, because I accept that the accused is of a credible – is a credible witness for reasons as outlined earlier in my analysis under 446, I am also satisfied that he has rebutted the presumption under section 445.1(3). As acknowledged in the case law dating back to the 1979 decision of **Proudlock** from the Supreme Court of Canada, the accused need only raise evidence to the contrary that creates a reasonable doubt to rebut the presumption, and he has done so.

[51] The appeal judge agreed with the trial judge that "evidence to the contrary" was evidence that tended to raise reasonable doubt that Mr. Picco acted wilfully, which included a reasonable doubt that he was reckless (Appeal Decision, at para. 71).

[52] The Crown submits that the appeal judge erred in the interpretation of the meaning of evidence to the contrary, and that evidence to the contrary is only evidence that rebuts a failure of reasonable care and supervision of the animal. However, I agree with the appeal judge that given the presumption is that an accused acted wilfully, which is at a minimum recklessly, evidence to the contrary is *any* evidence that tends to raise a reasonable doubt about that presumption.

[53] I agree with the Crown that evidence that an accused exercised "reasonable care and supervision of the animals" is relevant to the application of the presumption. However, it is relevant only as evidence that undermines that the evidentiary threshold necessary to trigger the presumption has not been met. It would not be evidence to the contrary, (that is, evidence that tends to undermine proof of the presumed fact of wilfulness).

[54] From a practical standpoint, the result is the same - a trial judge may conclude that the presumption should not apply. But it does not mean that evidence that tends to undermine that an accused was wilful could not also constitute evidence to the contrary.

[55] The Crown submits that if the interpretation of evidence to the contrary is not limited to evidence that rebuts that there was a failure in reasonable care, the application of the presumption is rendered meaningless. I disagree. While from a practical perspective, evidence to the contrary that raises a reasonable doubt that an accused was reckless might ultimately result in an acquittal, whether or not

there is evidence to the contrary and whether the presumption should apply does not decide the ultimate question of whether or not an accused is guilty. It only determines whether or not the Crown should be afforded the evidentiary shortcut under section 445.1(3). If the evidence to the contrary is accepted to the extent that the trial judge is not satisfied to apply the presumption, this does not necessarily mean that the accused will be acquitted.

[56] At the stage that a judge concludes that the presumption should not apply, the immediate effect is that the Crown cannot rely solely on evidence of a failure in reasonable care (negligence) to prove the *mens rea* of wilfulness (*The Queen v. Proudlock*, [1979] 1 S.C.R. 525, at 542).

[57] It will always be open to the Crown to look to other evidence to establish that the accused acted with the necessary *mens rea*, notwithstanding that the accused may have rebutted the presumption.

[58] The Crown submits that paragraphs 33-37 in *Gerling*, and paragraph 43 in *MacKenzie*, support that evidence to the contrary is solely evidence that tends to rebut that there was a failure in reasonable care. I do not agree that those passages stand for that proposition. Neither of these decisions conclude that "evidence to the contrary" under section 445.1(3) must be confined to evidence that tends to rebut that there was a failure in reasonable care.

[59] In *Gerling*, the statements in paragraphs 33-37 must be read with the whole of the judgment and, in particular, with the whole of the court's discussion on evidence to the contrary between paragraphs 31-40. Paragraphs 33-37 cannot be taken in isolation. The court merely distinguished between convictions based on the application of the presumption and those based on being satisfied that the accused acted wilfully without the aid of the presumption.

[60] In *MacKenzie*, whether there was evidence to the contrary was not before the court. When the court, at paragraph 43, referenced the fact that the accused had not tendered evidence that he had taken reasonable care, the court was not articulating the test for evidence to the contrary or the level of evidence required to rebut the presumption. The court was considering whether there had been an error committed at trial because neither the Crown in their submissions, nor the trial judge, in the decision, articulated whether or not the presumption under section 445.1(3) was relied upon to ground the conviction.

[61] For the above reasons, the appeal judge did not err in his conclusion that evidence to the contrary is evidence that tends to raise a reasonable doubt that the accused acted wilfully, which was evidence that, at a minimum, tended to raise a reasonable doubt that he acted recklessly.

ISSUE 6: Did the appeal judge err in affirming the trial judge's reasonable doubt as to whether or not Mr. Picco's conduct was reckless in relation to either offence?

[62] The trial judge was not satisfied beyond a reasonable doubt that Mr. Picco possessed the necessary *mens rea* for either offence. The appeal judge agreed with the trial judge's conclusions.

[63] The trial judge first determined whether Mr. Picco possessed the necessary *mens rea* for the section 446(1)(b) offence:

> **446 (1)** Every one commits an offence who.
>
> …
>
> **(b)** 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.

[64] Relying on the decision in *R. v. Robinson*, 2018 BCSC 1852, the trial judge approached the analysis of the elements of section 446(1)(b) in three steps: 1) whether there had been a failure in providing suitable and adequate food, water, shelter and care, 2) whether this failure constituted a marked departure from the conduct of the reasonable person and, finally 3) whether or not the accused, at a minimum, was reckless towards the risk posed to the animals by that conduct (Oral Decision, Transcript at 281).

[65] Although not raised by the parties, before addressing the trial judge's conclusions on *mens rea* there are two aspects of the trial judge's approach to the *actus reus* that require comment.

The failure to provide suitable and adequate food, water, shelter and care

[66] Firstly, the trial judge was satisfied that the *actus reus* had been established by the evidence that Mr. Picco had neglected or failed to provide "suitable and adequate food and water" (Oral Decision, Transcript at 282); notwithstanding the

trial judge had a reasonable doubt that there had been a failure to provide "suitable and adequate shelter" (Oral Decision, Transcript at 282-283). It is clear from this conclusion that the trial judge read the phrase "food, water, shelter and care" disjunctively.

[67] It was open to the trial judge to interpret the items food, water, shelter and care disjunctively, that is, as things that could be proven in the alternative. As Ruth Sullivan, in *The Construction of Statutes,* 7th ed. (Toronto, ON: LexisNexis Canada, 2022, at 98-99 points out, it may be "grammatically correct" to construe the word "and" in "a joint and several sense"; depending on context (see also *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 49).

[68] This interpretive approach to the word "and" has been applied in the criminal context where necessary in order to avoid an absurdity or correct what is clearly an error in the particular phrase at issue. For example, in *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (ONCA), Martin, J.A., speaking for the Ontario Court of Appeal interpreted the "and" in the former version of section 429(2), as it then read (formerly section 386(2)), the section that provides for the available defences to an offence to which section 429 applied. Originally, the word "and", not "or" preceded the phrase "colour of right". At that time, the subsection stated:

> (2) No person shall be convicted of an offence under sections 387 to 402 where he proves that he acted with legal justification or excuse **and** with colour of right.
>
> (Emphasis added)

[69] Martin, J.A. reasoned that to interpret the "and" in the section as requiring there be both legal justification or excuse "and" colour of right would be nonsensical. At page 453, he stated:

> We are all of the view that the word "and" which precedes the words "with color of right" in s. 386(2) should be read as "or". Manifestly, it would not be sensible to require the accused to prove not only that he acted with legal justification or excuse, but also with colour of right. If the accused acted with legal justification or excuse he is not criminally liable, and that is the end of the matter and there is no need to resort to colour of right. We think that "colour of right" in this context means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse: see *R. v. Johnson* (1904), 7 O.L.R. 525.

[70] Similarly, interpreting the "and" in food, water, shelter and care as conjunctive would not only be nonsensical, it would defeat the purpose of the offence. The mischief the offence of section 446(1)(b) seeks to prevent is cruelty to an animal under one's care by wilfully failing to provide for its basic needs. Animals under human control are at the mercy of their caretakers. The offence prevents a person from, at a minimum, recklessly failing in their duty as caretaker to provide what animals cannot do for themselves because of their circumstances.

[71] The Alberta Court of Appeal in *R. v. Chen*, 2021 ABCA 382, described the purposes of offences relating to cruelty to animals. Although the court's comments were in the context of the principle of deterrence in sentencing for the offence of causing unnecessary pain, suffering or injury, the comments illustrate why the "and" in this section should be interpreted disjunctively. At paragraph 39, the Court stated:

> ... Animals feel pain and suffer; they are not merely property and deserve protection under the criminal law. All animals not living in the wild, including companion animals, livestock, and animals in industrialized production settings, are under the complete dominion of human caretakers and are highly vulnerable to mistreatment and exploitation at the hands of those caretakers. They are at the mercy of those who are expected to care for them and, unlike some other victims of crime, are incapable of communicating their suffering. Sentences for animal cruelty must reflect these realities, and the primary focus must be on deterrence and denunciation.

[72] As animals under the care of humans have no control over whether they have adequate food or water or shelter or care, it follows that failing to provide any one of the four listed needs would constitute a failure in a person's duty to adequately and suitably provide for the animal.

[73] This interpretation also does not offend the principle that ambiguity in penal legislation should be interpreted in the manner that is more favourable to the accused (*R. v. McIntosh*, [1995] 1 S.C.R. 686). For example, in *R. v. Deruelle*, [1992] 2 S.C.R. 663, the Supreme Court of Canada interpreted the two-hour limit in the breathalyzer demand section in a manner that favoured the police. The Court made clear that the fact that the interpretation of penal legislation may not be the most favourable to an accused does not mean that that is not the proper interpretation of the legislation. It is only when there is ambiguity as to how legislation should be interpreted that the principle should apply (see also *R. v. Green*, [1992] 1 S.C.R. 614).

[74] The proper interpretation of section 446(1)(b) is not a question of resolving ambiguity. Rather, it involves arriving at an interpretation that is harmonious with the language of the section and gives proper effect to the purpose of the legislation.

[75] Given the above, the trial judge's interpretation of the phrase in section 446(1)(b) of "food, water, shelter and care" as disjunctive was in accordance with the rules of statutory interpretation. Proof of a failure to suitably and adequately provide any one of the four listed items was sufficient to prove the *actus reus*.

Whether the failure in care under 446(1)(b) constituted a "marked departure" from the standard of care that a reasonable person would have administered

[76] The second and more problematic aspect of the trial judge's assessment of the *actus reus* of section 446(1)(b) is the consideration of whether the failure to provide suitable and adequate food and water constituted a marked departure from the standard of care of a reasonable person in similar circumstances. As stated, the trial judge relied on *Robinson*, which, in turn, seems to have adopted this approach from *R. v. Galloro*, 2006 ONCJ 263.

[77] It was unnecessary for the trial judge to require proof that the failure of the provision of adequate or suitable food and water constituted a "marked departure of the standard of care that would have been expected by the reasonable person". This is not an aspect of an offence under section 446(1)(b) (unlike section 445.1(1)(a)), and the standard of a marked departure forms no part of the definition of the offence. In contrast, see for example, an offence under section 436 of the *Criminal Code*, causing arson by negligence which states:

> **436 (1)** Every person who owns, in whole or in part, or controls property and who, as a result **of a marked departure from the standard of care that a reasonably prudent** person would use to prevent or control the spread of fires or to prevent explosions, is a cause of a fire or explosion in that property that causes bodily harm to another person or damage to property is guilty of. …
>
> (Emphasis added)

[78] Professor Sankoff in his article "The *Mens Rea* for Animal Cruelty Offences after *R. v. Gerling*: A Dog's Breakfast", (2016) 26 C.R. (7th) 267, voiced concern with requiring proof of a marked departure as part of the *actus reus* of section 446(1)(b). At footnote 16, he stated:

> This mirrors a troubling line of jurisprudence in relation to section 446(1)(b), the wilful neglect provision. A number of cases have somewhat controversially suggested that a conviction for wilful neglect should only occur where: (a) the accused knew of his or her failure to provide suitable food, etc; and (b) the failure amounted to a marked departure from the reasonable standard of care… This approach is unnecessary. Unlike other negligence provisions of the *Code*, which impose criminal liability in cases where the accused does not have to subjectively intend the unlawful conduct, section 446(1)(b) already has a subjective *mens rea* standard. It is completely unnecessary to layer on an additional mental standard – the marked departure component – in these circumstances. Doing so makes it more difficult to convict persons who possess the necessary level of moral culpability.

[79] I agree with Professor Sankoff's concern. The failure that must be proven under section 446(1)(b) is in providing food, water, shelter or care that is suitable and adequate. Conduct that constitutes a marked departure is not a measure of whether the *actus reus* of the offence has been established. While such conduct could be relevant to whether the accused possessed the necessary *mens rea*, as discussed, the offence already requires a higher *mens rea*: that an offender is, at a minimum, reckless towards the failure to provide suitable and adequate food, water, shelter and care. It is irrelevant if the conduct is also a marked departure from the conduct of the reasonable person.

[80] Put another way, if a trial judge is satisfied that there has been a failure in providing either suitable and adequate food, water, shelter and care, however the evidence establishes this, that is the end of the inquiry. It does not matter whether such failure constitutes a marked departure from what the reasonable person would have done. Any degree less than suitable and adequate will prove the failure. However, criminal liability will follow only if the failure was intentional which, as discussed, at a minimum, is recklessness. As pointed out in *A.D.H.* at paragraph 49, if Parliament had intended an offence to be established on the basis of an objective *mens rea*, it would "not make sense" to require that those omissions or conduct be "wilful".

[81] In these circumstances, once the trial judge was satisfied that there was failure in the provision of suitable and adequate food and water, the question then was whether that failure was wilful, not whether the conduct was a marked departure from what the reasonable person would have done.

[82] It was unnecessary and an error to import the establishment of whether the failure constituted a "marked departure" as an element of the offence under section 446(1)(b). However, this was an error that did not prejudice the accused

as it meant that the judge imposed a more onerous evidentiary burden on the Crown. Further, as this issue was not raised by the parties, I have addressed it solely to clarify that an offence under section 446(1)(b) does not require that the failure to provide suitable and adequate food, water, shelter and care constitute a marked departure from the standard of care of the reasonable person.

The trial judge's assessment of the mens rea of the section 446(1)(b) offence

[83] As noted by the appeal judge, the trial judge properly reiterated that the *mens rea* of the offence was informed by section 429 (Oral Decision, Transcript at 279-280), and that Mr. Picco must have acted wilfully in his neglect of the animals (Oral Decision, Transcript at 285).

[84] After properly referring to section 429, the trial judge then stated, twice, that the assessment under section 429 was made "objectively" (Oral Decision, Transcript at 286-87):

> However, I must also decide in the context of section 429 whether he wilfully failed to provide reasonable care to the animals. I accept that Mr. Picco owed a duty of care to the dogs and that they were his responsibility. However in order for me to find that he failed to care for the dogs **on an objective basis**, I must rule that he acted recklessly. Recklessness has a legal meaning. At paragraph 129 of Robinson, Marchand, J. stated:
>
> > Recklessness is made out when an individual who is aware that her conduct could bring about criminal consequences nevertheless persists in that conduct despite the risk. It has also been described as a conscious disregard of a substantial and unjustified risk that one's conduct will result in prohibited consequences
>
> While Mr. Picco may have overestimated his ability to bring the dogs back to health, I do not accept that his behavior amounts to recklessness **in the context of the objective standard required under section 429**.
>
> (Emphasis Added)

[85] It is unclear what the trial judge meant by the statement that in order to "find that the accused failed to care for the dogs on an objective basis" she had to find the accused was reckless. Whether Mr. Picco was reckless in caring for the dogs was not determined on an "objective basis" or "objective standard", as stated by the trial judge, but by applying the meaning of wilful as defined by section 429.

[86] The starting point under section 429 was whether the evidence established that Mr. Picco failed to fulfil his duty to provide for the animals by ensuring they had suitable and adequate food, water, shelter and care. The trial judge then had to be satisfied at a minimum, that Mr. Picco knew of this duty, but knowingly chose to pursue a course of conduct of which he was aware created the substantial risk that he would fail to adequately and suitably provide for the animals.

[87] However, this was not the approach taken by the trial judge. The trial judge did not assess the evidence with a view to determining whether Mr. Picco knew of his duty to the animals, but knowingly chose to pursue a course of conduct that created the substantial risk he would fail to provide for the animals.

[88] At paragraph 19 of his decision, the appeal judge summarized the particular factual findings that the trial judge relied upon to support her conclusion that there was a reasonable doubt that Mr. Picco was reckless:

> … The trial judge … found that the Respondent knew how to care for the animals, a finding consistent with the evidence of other witnesses who testified to his care of the dogs. The trial judge found that a combination of family and legal issues in the time period leading up to the removal of the dogs had led him to overestimate his ability to bring the dogs back to health. The trial judge found this was a very difficult time in the Respondent's life and that despite his efforts, the dogs were oftentimes being released from the kennels unbeknownst to him. The trial judge found this was occurring as his mother was first hospitalized and then placed in a nursing home, and when he was going back and forth to St. John's to assist her a conflict about his right to reside on the property began, and the Respondent was charged criminally and was not allowed to go back to the property that had been his home since 1993.

[89] The evidence relied upon by the trial judge as summarized by the appeal judge illustrates that she failed to properly apply whether Mr. Picco knowingly engaged in a course of conduct that put the animals at substantial risk of the harm of not being fed or watered suitably and adequately.

[90] For example, the trial judge erroneously relied on (and the appeal judge affirmed) the fact that Mr. Picco was an experienced dog owner as evidence that supported that he was not reckless. However, Mr. Picco's experience in caring for beagles was not evidence that raised a reasonable doubt as to whether he was reckless. To the contrary, this evidence supported that Mr. Picco was reckless because it confirmed that he had knowledge of the content of his duty to ensure the animals had suitable and adequate food and water, yet continued with a course of conduct of which he knew would probably result in the dogs having neither

suitable nor adequate food and water. It was undisputed that the failure to provide suitable and adequate food and water occurred over a prolonged period. Yet, knowing what the dogs required, Mr. Picco let the circumstances continue for that prolonged period, which resulted in the deprivation of their needs.

[91] During this period Mr. Picco also maintained care of a fifth beagle, who lived in the house and by all accounts was well fed. Mr. Picco was aware of the difference the level of care the dog in the house received in comparison to the beagles who were caged outside the house. The fact that Mr. Picco continued to care for the beagle that was permitted to stay in the house reinforces that he knew that, with regards to the four beagles he kept confined to the pen, he was not ensuring they were provided suitable and adequate food and water.

[92] Likewise, Mr. Picco's assertion that the reason the dogs were not adequately or suitably fed and watered was because of someone else, who was letting the dogs free and they would then be missing for days, was not evidence that undermined that Mr. Picco was reckless. Knowing that this was happening, Mr. Picco did nothing to ameliorate the situation, that is, he still knowingly failed to fulfill his duty to the dogs. He did not move the dogs inside with the other beagle, or reinforce the pen such that the dogs could not escape. To the contrary, knowing that these escapes were happening, Mr. Picco continued to spend extended periods of time away from the house with his mother who was in hospital, permitting the circumstances to continue that he asserted was the cause of their emaciation.

[93] Similarly, the trial judge's reliance on her finding that Mr. Picco was going through a "difficult period" in his life, was not relevant to whether he was reckless towards his animals. It might explain why he engaged in conduct that he knew was putting the animals at risk, but it did not ameliorate his conscious decision to engage in conduct that resulted in the animals not having suitable and adequate food and water. Mr. Picco knew his duty to care for the animals continued regardless of his difficult personal circumstances.

[94] Likewise, the trial judge's consideration that Mr. Picco telephoned Beagle Paws to adopt the animals just days before the animals were seized was not evidence that had any bearing on whether Mr. Picco was reckless in his failure to provide suitable and adequate food and water for the dogs. The evidence was undisputed that at the point he telephoned Beagle Paws, the animals had already been denied suitable and adequate food and water for a prolonged period of time.

By the time he telephoned Beagle Paws, the *actus reus* of the offence had already occurred.

[95] The same can be said for Mr. Picco's explanation that he could not feed the animals because he was in custody for three days. This occurred after the prolonged neglect. The *actus reus* was already occurring by that point.

[96] On the other hand, Mr. Picco's evidence that he tried to feed the dogs might be evidence that he was attempting to fulfil his duty to the animals. The problem however, is that this evidence cannot be reconciled with the trial judge's conclusion that the *actus reus* had been proven. Mr. Picco could not have been both feeding the dogs and not feeding the dogs at the same time. Put another way, the trial judge could not both accept that Mr. Picco did not provide the dogs suitable and adequate food and water over a prolonged period and accept that he did provide the dogs suitable and adequate food and water, but the dogs were not able to avail of it because someone was letting the dogs escape.

[97] In summary, the trial judge erred in her approach to determining that Mr. Picco did not possess the necessary *mens rea* for the offence under section 446(1)(b). The trial judge failed to properly analyze the evidence that had a bearing on whether Mr. Picco was reckless. The trial judge's acceptance of Mr. Picco's testimony also cannot be reconciled with her conclusion that the *actus reus* for the offence had been proven. Given the errors, the appeal judge erred in affirming the trial judge's analysis of the evidence and her incorrect conclusion that there was a reasonable doubt that Mr. Picco was reckless (Appeal Decision, at para. 74).

The trial judge's assessment of the mens rea of the section 445.1(1)(a) offence

[98] In relation to the section 445.1(1)(a) offence, the trial judge applied her reasons for reasonable doubt on the *mens rea* for the section 446(1)(b) offence, to why she had reasonable doubt with respect to the section 445.1(1)(a) offence. The trial judge stated:

> And for the same reasons as I outlined in my decision under section 446, I do not accept that the accused, either subjectively or objectively wilfully caused the unnecessary pain, suffering or injury to the dogs.

[99] The appeal judge found no fault in the reasoning of the trial judge and accepted the trial judge's conclusion. At paragraphs 75-76 of his decision, the appeal judge stated:

> Under s. 445.1(1)(a), to which the evidentiary presumption in s. 445.1(1)(a) was applicable, the trial judge found that she was satisfied the Respondent had rebutted the evidentiary presumption under s. 445.1(1)(a) and that his evidence created a reasonable doubt that the Respondent had either subjectively or objectively "wilfully" caused unnecessary pain, suffering or injury to the animals.
>
> I find that the trial judge did not err in applying the law in determining the question of the *mens rea* element of the offence under s. 445.1 (1)(a) or in relation to s. 446(1)(b).

[100] Respectfully, it was an error for the trial judge to simply apply the reasoning as it related to the offence under section 446(1)(b) to the offence under section 445.1(1)(a) without explanation as to how that evidence rebutted the presumption and raised a reasonable doubt on the ultimate question of guilt. While both offences are subject to the meaning of wilfully under section 429, and there may be overlap in the evidence that establishes their constituent elements, the elements of each offence are different. The analysis with respect to each offence is different (see *R. v. Barrett*, 2012 NLCA 12, 319 Nfld. & P.E.I.R. 287, at paras. 37-42).

[101] The recklessness at issue with respect to the section 446(1)(b) offence was with respect to Mr. Picco's knowledge that his conduct put the dogs at substantial risk of not having suitable and adequate food and water, and he nonetheless persisted in this conduct in the face of this risk.

[102] The recklessness at issue with respect to the section 445.1(1)(a) offence was not whether Mr. Picco knew that his conduct resulted in the animals not having suitable and adequate food or water, but whether Mr. Picco knew that the dogs were put at risk of unnecessary suffering because of his failure to provide the food and water.

[103] Given Mr. Picco's testimony that he was experienced in caring for beagles, there was evidence from which the trial judge could have concluded that Mr. Picco knew that by engaging in conduct that permitted the dogs to become emaciated, starving and near death, the dogs would suffer. This could have supported recklessness on the section 445.1(1)(a) offence.

[104] The trial judge was obliged to explain why she had a reasonable doubt on the section 445.1(1)(a) offence, or how her reasonable doubt on the 446(1)(b) offence applied to section 445.1(1)(a). This, she did not do and, failing to so do, committed error. Further, I agree with the Crown that her reasons as to why there was a reasonable doubt with respect to the section 445.1(1)(a) offence insofar as the *mens rea* is concerned, was inadequate and insufficient for meaningful review by an appeal court. There is no way to assess whether the trial judge actually differentiated the *mens rea* between the two offences. The inadequate reasons constituted further legal error.

[105] The appeal judge erred in concluding that the trial judge committed no legal error acquitting the accused of the section 445.1(1)(a) offence.

CONCLUSION

[106] For the above reasons, I am satisfied that the trial judge made several legal errors in acquitting Mr. Picco of both offences. The trial judge erred in applying the wrong legal principles to the determination of the *actus reus* and *mens rea* of both offences.

[107] In respect of the section 445.1(1)(a) offence, the trial judge erred in concluding that the animals were not suffering by applying an incorrect analysis and failing to give proper legal effect to the facts she accepted. On the facts as found by the trial judge, there was no other conclusion than that the dogs were suffering. The appeal judge erred by refusing to interfere with the trial judge's conclusion that the dogs were not suffering and concluding that this was a question of fact. As a legal conclusion, whether the dogs were suffering was a question of law.

[108] The trial judge also erred in her determination that there was a reasonable doubt that Mr. Picco possessed the necessary *mens rea* for the offence under section 445.1(1)(a). The trial judge's reasons were deficient as to how there was a reasonable doubt. Reasonable doubt on the section 446(1)(b) offence did not explain why there was a reasonable doubt on the section 445.1(1)(a) offence. These were different offences and required separate analysis. The appeal judge erred in concluding that the trial judge committed no error in acquitting Mr. Picco of this offence.

[109] With respect to the section 446(1)(b) offence, the trial judge erred in her application of the principles governing whether the accused was reckless. The trial judge failed to properly apply the test for recklessness to the evidence she accepted. Further, the trial judge's acceptance of both the accused's testimony and that the *actus reus* of the offence had been established, also cannot be reconciled and are contradictory findings. The appeal judge erred in affirming the trial judge's analysis.

[110] I am also satisfied the above errors had a material bearing on the acquittals (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609). If the law had been properly applied, the result may have been reasonably expected to have been different.

DISPOSITION

[111] I would allow the appeal and remit the matter to provincial court for a new trial.

_____

F.J. Knickle J.A.

I Concur: _____

D.E. Fry C.J.N.L.

I Concur: _____

D.M. Boone J.A.