

CITATION: *R. v. Bernier*

Citation No. 2012 MBPC 36

Dated: April 4, 2012

**THE PROVINCIAL COURT OF MANITOBA**

BETWEEN

Her Majesty the Queen	)	Shaun R. Sass, for the Crown
	)	
- and -	)	
	)	
Raymond Bernier	)	Zilla Jones, for the Accused
	)	
	)	Judgment delivered:
	)	April 12, 2012

**KELLY K. MOAR, P.J.**

**INTRODUCTION**

[1] Raymond Bernier is charged on a nine (9) count information under *The Animal Care Act*, C.C.S.M. c. A84 , that can be summarized as follows:

Count 1: Contrary to s. 2(1)(b), being the person in possession or control of an animal did fail to provide adequate medical attention when the animal is wounded or ill; to wit one tan cow unable to bear weight on one leg.

Count 2: Contrary to s. 3(1) did inflict acute suffering, serious injury or harm, or extreme anxiety or distress that significantly impairs its health to wit; one tan cow unable to bear weight on one leg.

Count 3: Contrary to s. 2(1)(a) failed to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; one red calf.

Count 4: Contrary to s. 2(1)(a) failing to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; thirteen mature, red or red and white beef cows.

Count 5: Contrary to s. 2(1)(a) did fail to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; a red white faced cow.

Count 6: Contrary to s. 2(1)(a) did fail to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; eight cattle.

Count 7: Contrary to s. 2(1)(a) did fail to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; eleven heifers and twenty cows.

Count 8: Contrary to s. 2(1)(a) did fail to provide an animal an adequate source of food and water so as to significantly impair the animal's health or well-being, to wit; three heifers, eight steers, twenty-one cows, two three year old steers and one bull.

Count 9: Contrary to s. 2(1)(b) did fail to provide an animal adequate medical attention when the animal is wounded or ill, to wit; two red white faced cows.

[2] Each of the offences falls under the general penalty section contained in s. 34(1) of the *Act*.

### **APPLICABLE STATUTORY PROVISIONS**

[3] *The Animal Care Act*, C.C.S.M. c. A84, is a piece of provincial legislation in Manitoba that is geared towards protecting animals by setting out a level of care to be met by the keeper of animals.

[4] Animal is defined in the *Act* as "a non-human living being with a developed nervous system." Cattle, the subject of this prosecution, fall under the definition of a commercial animal in the legislation.

[5] Section 2(1) of the *Act* sets out the duties of an owner as follows:

#### Duties of Owner

- 2(1) A person who has ownership, possession or control of an animal
- (a) shall ensure that the animal has an adequate source of food and water;
  - (b) shall provide the animal with adequate medical attention when the animal is wounded or ill;
  - (c) shall provide the animal with reasonable protection from injurious heat or cold; and

- (d) shall not confine the animal to an enclosure or are
  - (i) with adequate space,
  - (ii) with unsanitary conditions,
  - (iii) with inadequate ventilation
  - (iv) Without providing an opportunity for exercise, so as to significantly impair the animal's health or well-being.

[6] Section 2(2) sets out a statutory due diligence defence as follows:

Standards for essentials

- 2(2) A person shall not be convicted of an offence under subsection (1) for treating an animal in a manner
- (a) consistent with a standard or code of conduct, criteria, practice or procedure specified as acceptable in the regulations;
  - (b) consistent with generally accepted practices or procedures for such activity; or
  - (c) otherwise reasonable in the circumstances.

[7] Section 3(1) prohibits the infliction of suffering and reads as follows:

Infliction of suffering prohibited

- 3(1) No person shall inflict upon an animal acute suffering, serious injury or harm, or extreme anxiety or distress that significantly impairs its health or well-being.

[8] Section 3(1) is somewhat qualified by 3(2) which states the following:

Accepted activity re: suffering

- 3(2) Subsection (1) does not apply where the suffering, injury, harm anxiety or distress is caused by a treatment, process, or condition that occurs in the course of an accepted activity.

## **EVIDENCE**

[9] At the outset of the trial, counsel for the accused conceded the following evidentiary points:

- (i) The identification of the accused
- (ii) The jurisdiction of this court.
- (iii) Accused admits to being in possession, control and ownership of the herd in March 2007.

**A. Crown**

**1. Dr. Lisa Taylor**

[10] Counsel for the accused conceded that Dr. Taylor is an expert in the area of veterinarian medicine.

[11] Dr. Taylor has been a veterinarian for about twenty-three years. She owns two clinics, one being Gimli Veterinary and the other is the Arborg Veterinary Hospital. During this time she has had a mixed practice involving both small and large animals.

[12] Between 2006 – 2010 she held the designation as an animal protection officer charged with inspecting premises when a complaint was filed. She would do about ten inspections a year after which she would generally write up a report and submit it to Dr. Marion.

[13] On March 9, 2007 Dr. Taylor was contacted by the Fisher Branch R.C.M.P. concerning a complaint of thin animals along with dead animals on a local farm property. She travelled to the property by way of snowmobile and proceeded directly to where the animals were located.

[14] She noted that the property contained a house, barn and handling facility. At no time during her time on the property did Dr. Taylor ever attend to that house nor speak with the resident/owner of the property.

[15] Also noted on the property were approximately eighty live cattle and about thirty dead cattle. The majority of the dead cattle were along a pathway, although others were observed within the manure pack and still smaller animals amongst the bush and woods.

[16] A manure or straw pack was defined as an area where the cattle would bed during the winter months and in this case there was no bedding present for the cattle.

[17] With respect to the dead animals, Dr. Taylor suggested that they had probably lain down, were probably too weak to get up and eventually melted into the manure pack and died. The dead animals along the pathway were piled on top of each other and had become snow covered.

[18] In terms of food for the cattle, Dr. Taylor indicated that each round bale of hay would be good for twelve to twenty cattle. On this visit, there were less than two bales of hay noted for the eighty or so live cattle located. The hay itself was described as slough hay and not of high quality.

[19] Dr. Taylor indicated that generally when an animal dies the carcass is removed from the area of the live cattle as it can become a source of contamination. In this case there were skulls and various other body parts spread out amongst the living cattle.

[20] Upon looking at a number of photographs, Dr. Taylor pointed out that the dead cattle were emaciated and thin in appearance. In many of the dead cattle you could see the boney prominences sticking out which would indicate an emaciated carcass. On that point, Dr. Taylor indicated that when an animal dies, it cannot then become emaciated but rather would have been in that condition upon death. Even in cases of ravaging or the evisceration of an animal, those acts will not change the muscle mass or fat cover of that deceased animal.

[21] Dr. Taylor testified to having knowledge of body scoring methods and having done the actual scoring numerous times in the past. She indicated that there two systems in place and generally noted that a cow that is scored between a one and a three would be classified as a thin cow and probably not have any body fat reserves. That cow would be at sub-optimal nutrition and open to more diseases. The immune system itself would be compromised.

[22] Although there was no direct scoring of each cow present on the farm, Dr. Taylor concluded by way of general observation that all of the cattle were thin, emaciated and would have scored a one on a five point scale.

[23] A feed lot was observed across a roadway and it did contain hay. However it appeared that the driveway to the lot was snow blown leading to the conclusion that there had been no feeding in the last day or so.

[24] A report dated March 9, 2007 was completed by Dr. Taylor with a recommendation that all of the animals be seized. A number of further observations were noted by Dr. Taylor as follows:

- The bedding area was the manure pack with little bedding on site.

- There was twine noted in the manure pack. Generally that twine would have been removed from the bales and taken away to prevent the cattle from eating it.
- An animal described as three-legged was noted to have foot rot and upon closer examination there was no evidence that she had received any treatment.
- There was inadequate food (4-5 bales were deemed as adequate) and the animals were in poor shape.
- There were no signs of disease, no signs of pneumonia or Johnes disease noted.

[25] In cross-examination Dr. Taylor acknowledged that *The Animal Care Act* required her to leave notice of an inspection with the owner and she did not do so. In her mind, she was under the guidance of the R.C.M.P. and was following their direction.

[26] As for body scoring it was agreed that body scoring is not an exact science and is somewhat subjective in nature. It was suggested that there are “thin” cows that are relatively healthy even at scores of one to two, which was clarified by Dr. Taylor with the term rare. She pointed out that beef cows are bred to be fat and produce meat.

[27] It was further pointed out by Dr. Taylor during cross-examination that when it gets cold outside you have to increase the amount of feed each day, possibly supplemented with some energy such as grain. If a cow becomes ill, it will probably become undernourished and eventually die.

[28] As for the cow with foot rot, Dr. Taylor acknowledged that there were no x-rays taken. She observed that the foot was swollen three to four times the normal size and suggested that cow would not be able to get enough hay or get to the water in that condition.

[29] The basis of the seizure was clarified as being no shelter, not enough hay bales and a large number of dead animals. The issue of a lack of shelter was further clarified that there is no legal requirement of a shelter per se being present.

[30] As for the animals in the manure pile, Dr. Taylor suggested that they were thin in appearance and had died of starvation. Having said that she did confirm that

disease can make an animal thin but that the odds were starvation was the cause in this case.

[31] Dr. Taylor resisted the suggestion that the fact there two bales of hay present on her visit, that there may have been others which could have already have been eaten.

[32] Finally, the doctor did note cancer eye as being present in a cow and stated that would not stop that cow from eating.

## **2. Dr. Colleen Marion**

[33] At the outset, counsel for the accused agreed that Dr. Marion is an expert in the area of veterinarian medicine.

[34] Dr. Marion indicated by way of background that she is employed by Manitoba Agriculture. She has been designated as an animal protection officer and has had that title since 2004. During the time period of 2007 – 2010 she did work in private practice as well as an animal protection officer.

[35] As an officer she would conduct inspections to see if there was compliance with the *Animal Care Act*. In addition to looking for abuse or neglect of animals, Dr. Marion would also determine what corrective action was necessary to bring compliance with the *Act*.

[36] On March 14, 2007 she did attend to the Bernier farm to assist Dr. Terry Whiting assess and seize the cattle as they had been deemed in distress.

[37] Once on location she found a number of dead cattle that were counted to be forty-two along with one-hundred and seventeen live cows. The deceased cattle were noted to be thin and emaciated, with a one on a scale of five, lacking any visible fat reserves on their bodies as well as in their muscle stores.

[38] Some of the dead cattle were located towards the back of the property, some in a row and others in the manure pack still amongst living cattle. Many of them looked well preserved which would indicate that they had died this winter as they had not yet had the chance to decompose.

[39] The inspection was done both visually for some and by hand for others. The scoring attributed to the cattle was generally a one or two. It was noted that it can be difficult in the winter to use visual scoring as the hair on the cows is generally

longer with the onset of winter. However, it was also noted that the tendency in such scenarios is an exaggerated score being given due to the hair.

[40] The living animals were located in two spots. There were five cattle in a corral with the remainder of the herd on the manure pack earlier identified. The five animals in the corral were noted to have access to water and some feed.

[41] As for the animals on the manure pack, Dr. Marion felt those animals did not have access to food as there was none noted on the ground nor any in the feed bank. However, she did go into a shed and located a large number of square bales of good quality hay.

[42] When examining the herd, there were no overt signs of disease noted. Dr. Marion was looking for contagious diseases and found none. There were no signs of diarrhea which could have indicated a disease with intestinal parasites and there were no signs of respiratory disease such as pneumonia. There was no coughing from the cattle and there was no abnormal discharges noted from their eyes.

[43] Within the enclosure there was a watering device observed and a feed container that did have a small amount of feed within it.

[44] There was a calf in the enclosure and when viewing a picture of yet, Dr. Marion commented that it was underweight. She pointed to the hip bones being prominent along with an outline of the spine being visible.

[45] There was another picture taken showing the spine protruding, the transverse processes (bones that project sideways from the spine and the hip area) were prominent and there was a lack of fat coverage.

[46] Two cattle in the next picture were shown to appear underweight with the traverse process being very sharp. The cow was thin as is evident by a triangle portion of the cow that is actually sunk in because there is no fat or muscle left in that area.

[47] There was also a picture identified showing two dead calves laying amongst the living who are walking on top of them and defecating on them.

[48] During the entire time on the farm, Dr. Marion could not recall any one animal being scored as a three or a four on the scale.

[49] One cow was observed to have a swollen right leg and was walking on three legs. Although there was no physical examination done, the cow was observed to be underweight but not to the degree of others located on the farm.



[50] As for the order of seizure, that was served on the accused prior to attending the farm to seize the herd.

[51] In the end, Dr. Marion concluded that both the live and deceased cattle were markedly thin and underweight. There was a lack of feed available for the cattle and as a result they were deemed in distress.

[52] It was noted by Dr. Marion that a cow cannot go from a three to a two in body scoring overnight. Studies have shown that a loss of 1 % a week is the normal range and in order to move from a three to a two it would require a loss of 20 - 30 % of mass.

[53] In cross-examination it was confirmed that Dr. Marion took direction from Dr. Whiting during this seizure.

[54] Dr. Marion confirmed that parasitic intestinal parasites can cause any animal to look bloated as can an infection in the intestine. In the calf that was autopsied there was a mild load detected but according to Dr. Marion that was not a high enough to account for emaciation or the thin bodies noted.

[55] The three legged cow was autopsied and it was determined that the long-term swelling and infection was easily treatable.

[56] Upon observation of the herd, there were no clinical signs evident showing an underlying illness would have caused the cattle not to eat. There were no signs of diarrhea, no signs the animals were depressed, lethargic or had respiratory disease.

[57] In those cattle that were autopsied there was no evidence found of an underlying systematic disease to account for their body condition.

### **3. Dr. Terrence Leslie Whiting**

[58] The Crown called Dr. Terrence Leslie Whiting who at the time of this hearing was employed as the manager of Animal Health and Welfare programs within the Office of the Chief Veterinarian. In that position he was responsible for supervising four other veterinarians, one technician and one PhD student in academe logy.

[59] His primary responsibilities were to provide services to farmers along with doing public health work. His office is responsible for the administration of *The Animal Disease Act* and *The Animal Care Act*, both pieces of Manitoba legislation.

[60] Since 1998 Dr. Whiting has had the designation of an animal protection officer which, according to his testimony, carries with it general police powers to enter, inspect and determine compliance with *The Animal Care Act*.

[61] By way of further background, Dr. Whiting grew up in Ontario on a beef farm and as a result has some first-hand knowledge of the practices in that industry.

[62] Educationally he graduated from the University of Guelph in 1984 and did work in a large animal practice for about two years. For the last twenty years he has been working on livestock disease control programs.

[63] For the purposes of this hearing, counsel for the accused conceded that Dr. Whiting is an expert in veterinarian medicine.

[64] Dr. Whiting testified that he was familiar with body condition scoring of cattle and described it as a common tool used to evaluate the nutritional status of cattle herds. The official system of scoring is the one published by Wagner and it is based on a nine point scale. It was discussed within the Journal of Animal Science where it described how to assign a rating to individual cattle.

[65] Briefly, number one is as thin as a cow can get that is compatible with being alive while number nine is obese. Ideally, cows that are calving should be a four or five on this scale. If they are below three they do not return to estrus as they are too skinny to ovulate at that level. In order to properly assign a number, you have to palpate the animal because the thickness of hair coat can be deceptive to the eye.

[66] The one to five scale is an adaption that people have used. Most cattle are somewhere in the middle, three to seven on the Wagner scale. On the adapted scale they are generally somewhere between two and three through the eye-balling process.

[67] Dr. Whiting suggested that nobody would give a score of one by visual inspection on this scale because that would mean the cow is at risk of death. One means that the cow is too thin and needs to more feed. It would be too thin to breed back in an appropriate time to get pregnant again.

[68] Generally, a cow at a five on the Wagner scale would weigh anywhere between 900 and 1200 pounds depending on the skeleton size. If the animal were

to go from a five to one and a half on the scale, Dr. Whiting testified that there would be a loss of forty-five percent of the body mass.

[69] In the course of being involved in beef management, Dr. Whiting has scored cattle in excess of one hundred times. In his duties, he has done market inspections and can score cattle visually. Currently he is involved in scoring only what are termed skinny animals as they are the ones of concern.

[70] It is the view of Dr. Whiting that if you are going to score an animal below three on the Wagner scale, you have to put them in a head gate and palpate their pelvis. The use of visual inspection on skinny cows is unreliable and one tends to overestimate the body condition score.

[71] In March 2007 there was a public complaint made through the regular channels concerning the cattle at the Bernier farm. Dr. Lisa Taylor was the animal protection officer who attended to the farm and during her visit she identified a serious problem. Dr. Whiting's office was contacted and asked if they could re-inspect the farm. Dr. Taylor's report containing her observations had been forwarded as an aid to Dr. Whiting.

[72] As for the accused, this is not the first time that Dr. Whiting could recall speaking with him but this was the first time he attended to the property. The first contact occurred on the University of Manitoba campus and centered on the accused trying to get compensation from the Department of Conservation as a result of ravens eating his silage bags. Other than that, Dr. Whiting could recall no instances where the accused sought their assistance or submitted an animal for laboratory diagnosis.

[73] Prior to commencing this investigation, Dr. Whiting did not maintain a file concerning the accused but was aware that there had been a prior inspection conducted by Gus Brook in 2003.

[74] Upon attending to the Bernier farmstead, Dr. Whiting was acting as a veterinarian in order to assess the condition of the cows, to make a judgment as to how they came to that condition and to make a judgment call as to whether the owner was able and willing to correct any deficiencies noted. He had the final say as to whether the herd would be removed or not.

[75] On arrival to the farm there were approximately forty dead cattle noted. Some of them appeared to lay where they had fallen and others had been placed into piles. Those piles were now covered by snow and the cattle underneath were frozen together.

[76] The live cattle were separated into two groups, one group containing about 115 in a bush area with another group in a corral near the house.

[77] With respect to the dead cattle, Dr. Whiting did not body score them but based on the observations made of the body parts above the snow suggested that death had come by starvation. Death by starvation in a Manitoba winter occurs when they do not get enough to eat they cannot maintain their core body temperature. Over a period of time their body temperature will drop to twenty-eight degrees at which point they go into cardiac arrest and die.

[78] The animal will then go on to freeze so as to remain in perfect condition with no bloating. In effect there is no autolysis and no rotting of the carcass. That however does not mean that other animals will not ravage the carcass but it does not affect the assessment of the dead cow.

[79] There was one calf that appeared to have just died but had not yet frozen into the ground. That calf was removed from the property and taken for a post-mortem examination. No other dead cattle were taken as the focus was on the live cattle who were “at risk of imminent death” according to Dr. Whiting.

[80] In terms of confirming death by starvation, there are three critical points for pathologists to examine. There is loss of fat at the base of the heart, loss of fat around the kidney and loss of fat at the bone marrow, which is the order animals will lose the fat.

[81] If death occurs from other causes such as disease or infection, the animal will bloat and rot, regardless of the temperature.

[82] Death and spontaneous death of cattle does occur, normally about one cow per two hundred cow years. In a herd of 160, it is suggested that three deaths over a five year period would be reasonable. If more than that die, responsible farmers will bring them to the lab to be examined as there is a subsidized diagnostic service in Manitoba.

[83] In terms of a cow going from a five to a two on the scale, Dr. Whiting suggested that three hundred pounds of body fat would have to be lost. Assuming they were getting water, it would take somewhere between forty-five and sixty days to lose that much weight. A cow would have to be starved all winter to reach that level.

[84] The group of animals held in a pen near the house had access to water but Dr. Whiting could not recall if they had access to food. Visually they were given a body condition score of one but Dr. Whiting indicated that they were not really thin.

[85] A second group of cattle were located about seventy-five yards west of the house in an open area of the bush. Visually he described them as thin and at that time did not note any food being present for those cattle. In addition he noted almost no fresh manure being present which was odd as a cow normally defecates five to ten times a day. In his view this meant that the cows had not eaten in the last week.

[86] During this observation period, Dr. Whiting did not note any overt physical signs of infection or disease. The two most prominent diseases for cattle are pneumonia, diseases of the lung and gastroenteritis, diseases of the intestine. In essence one would look for coughing or diarrhea.

[87] There is no known disease that would cause a whole herd of cows to be thin other than starvation according to Dr. Whiting.

[88] There was one observation made by Dr. Whiting of a tan cow that appeared to have arthritis on its right front leg and was unable to bear any weight. This cow was videotaped by Dr. Whiting showing her inability to keep up with the herd.

[89] It was his view that given the swollen nature of the leg, the cow had chronic arthritis that was of a long standing nature. The cow would have been in pain and on that basis alone would have been in distress. He has suggested that the cow had been lame for some thirty days. In terms of body scoring, the cow was in better condition than others noted and it was suggested that she must have been really fat when the fall started to be in the condition she was on the date noted.

[90] After shooting the video, Dr. Whiting had the R.C.M.P. officer shoot the cow on site and take her for a post mortem examination.

[91] In terms of feed, he did notice some hay bales buried in the snow, with no activity or tractor marks evident. Along the fence near the house there were some bales stored and in the barn there were lots of square bales of good quality hay observed. There was also a wagon load of round bales up near the house that was not accessible to the cattle.

[92] Based on the general observations of the farm, Dr. Whiting believed that if he did not get the cattle protection from the wind, some grain and quality feed, that more would die. In his view the cattle were in distress.

[93] He also offered that the facility was not capable of responding to the needs of the cows and he had concerns with the capacity of the accused to continue as an animal care giver.

[94] All of the cattle were loaded and taken to the Inwood Auction Mart where they would have access to good watering facilities and lots of feed. Dr. Whiting indicated he was legally required to have an inventory of what he seized and each cow also had to be ear tagged in order to move within Canada.

[95] Dr. Whiting prepared a Notice of Seizure and noted the following:

- A violation of s. 2(1)(a) of the *Act* being lack of adequate food or water for animals. Thirty dead carcasses found on property that appear emaciated. Feed yard is blown in and no access to feed for animals. Live animals are in poor body condition, score of 1.5
- All animals deemed to be in distress per s. 6(1)(c) and will be seized pursuant to s. 9(1) of the *Act*. Lack of adequate feed for cattle. Large number of dead emaciated carcasses and poor body condition of live ones support starvation.

[96] He concluded that there was not one normal animal in terms of body condition score otherwise he would have considered not seizing the herd.

[97] As for diseases, Dr. Whiting indicated that it is usually individual animals that are infected and there is no case where diseases kill off a large number of cows such as forty percent of this herd.

[98] With respect to listeriosis, Dr. Whiting testified he is aware that it has been known to cause disease in ruminants. It is very rare and during his five years in veterinarian school he did not see one case. It is understood that goats are most

susceptible with sheep twice as resistant as goats and cows are at a minimum ten times more resistant than sheep.

[99] Listeriosis has been reported in cattle but it has been found that those infected generally die. There are symptoms such as trouble swallowing, paralysis of the face and at times they will circle and salivate. They either recover fully or die within seven to ten days.

[100] It is important to note that between ten to thirty percent of cattle will be shedding listeria in their feces. It is so common that Health Canada allows one hundred infectious particles per gram of processed ready to eat sliced meat.

[101] The only risk factor for cattle is through feeding rotten silage and there was no silage found on this farm at the time of seizure.

[102] Given the lack of indicia present for disease, only the two dead cows were brought back for testing.

[103] Given the totality of his observations, Dr. Whiting concluded that the animals died from starvation such that the health and well-being of the herd had been impaired.

[104] The cows were transported to the Inwood Auction Mart where they were fed and watered. In the facility, one cow was unable to get up and remain up on his own and a decision was made to euthanize that cow at the Market.

[105] On March 16, 2007 a body scoring of all the animals was conducted in the company of Dean Stoyanowski, who is a beef farmer himself and a teacher of body condition scoring.

[106] The Wagner scale was utilized in which a score of one indicated no palpable fat posterior to the hip bone, no fat cover over the transverse processes. A score of 1.5 is a suggestion of fat under the skin posterior to the hip bone but no fat cover over the transverse process.

[107] For those animals rated a two, there was definite fat under the skin posterior to the hip bone but no fat over the transverse processes. A 2.5 has fat inside the pelvic inlet and maybe there was fat over the transverse processes. A score of 3 meant that Dr. Whiting was sure there was fat under the transverse processes.

[108] The fact the testing did not occur for two days allowed the cattle rehydrate and get their rumen full of feed. This, it was suggested, would not cause any change to the cow's fat stores.

[109] Any loss of fat is entirely predictable in cattle to as they lose the fat in the brisket first, then they lose fat under the skin over the rib case, then fat over the pelvic inlet and the last fat lost is inside their abdomen around the kidneys and the fat inside the bone marrow.

[110] Dr. Whiting noted that no cattle in the Bernier herd were observed to have brisket fat and all had their ribs visible.

[111] The body scoring took about three to four minutes per cow. If there was any doubt in Mr. Whiting's mind as to the score to attribute, he would consult with Dean Stoyanowski for his opinion. If they could not come to some agreement, Dr. Whiting used the higher of the two scores for that animal.

[112] The scores recorded were as follows:

- There were two bulls, one scored as a 1 the other as a two
- There were two calves and both scored as two's.
- Fifty-six cows were scored and the average score was 1.8 with the maximum score being a three.
- There were forty-six feeder calves that had an average score of 2.1, and once again the top score was three.
- Of the eleven steers, they scored between two and three.

[113] Those numbers were further broken down by Dr. Whiting as follows:

- One calf, a bull and six cows received a score of 1
- Eleven calves and twenty-one cows were assigned a 1.5.
- Thirteen calves, twenty-one cows, two steers and a bull were assigned a score of 2.
- Twenty calves, four cows and six steers were assigned a score of 2.5.
- Three calves, four cows and three steers were assigned a body score of 3.

[114] There were a total of 117 live cattle seized and in the opinion of Dr. Whiting, even if the cows survived and were put out to pasture, none would have obtained a body score suitable to start ovulating until the following fall.



[115] Two cattle were identified as having cancer eye which is caused by sunlight. If the cancer is able to spread it could cause condemnation at slaughter. It is a treatable disease if it is caught early enough. It is unknown if it is a painful condition for the animal but it does cause blindness.

[116] The cows found with cancer eye were body scored at 1 and 1.5 and as such they were given their condition it was deemed inhumane to maintain them alive and as such they were euthanized.

[117] Dr. Whiting was unable to say how long they had been suffering from the cancer eye. Normal farming practices involve the farmer going through the herd at pregnancy testing time and any cow with cancer eye is identified and sent to the auction market.

[118] One animal successfully went through the shoot, was body scored as a 1.5 and then walked across the pen, laid down and was thereafter unable to walk any great distance from that spot.

[119] As for the red calf found at the farm, a post-mortem was conducted. It was noted during the course of the post-mortem that there was an absence of fat on the animal or on any of the organs. Dr. Whiting indicated that was a classic case of death by starvation.

[120] After the body scoring was done, there were ten days of feeding ordered with cattle fit for travel to be auctioned.

[121] Dr. Whiting concluded that the low body scores and the emaciation that the animals were suffering did impair the animal's health and well-being.

[122] Although Dr. Whiting testified to a further April 2007 visit to the Bernier farm, in a previous ruling I found a breach of the accused's Charter rights and ruled that anything found at that time was inadmissible. Therefore no observations or findings from that visit have been considered.

[123] During the course of cross-examination it was suggested by counsel that the first time the accused ever came to the office of Mr. Whiting was one week after seizure of his cattle. That was denied by the witness as he recalled the raven issue but had not documented that visit.

[124] A letter date stamped April 19, 2004 was shown to Dr. Whiting and he acknowledged the hand-writing on it was his. Although it was not addressed

specifically to him he recalled receiving it and commenting that the statements made therein were in fact correct. The letter did discuss the issue of listeria and ruminants. He did confirm that the only time cows ever have clinical listeriosis is from eating rotten silage. In those cases, the clinical case rate is five percent, meaning five in a hundred would get sick and maybe one would die.

[125] If infected, a cow will be observed to have halopathy, that is, they will walk in circles, have inflammation of the brain and they tend to have facial paralysis causing them to salivate a lot. It takes about a week for the cow to either die or get better and if they do get better they are no longer susceptible to listeriosis.

[126] As for transferability, Dr. Whiting confirmed that a female cow infected with listeriosis can transmit that to a newborn and those are the cases where week old calves die of septicemia. The calves can die from listeriosis as well. Listeriosis can cause late term abortion although that is primarily in dairy cows.

[127] Having said that, Dr. Whiting commented that within a laboratory setting, they have had great difficulty in causing listeriosis in cattle as they seem to have built a resistance to it.

[128] Dr. Whiting was familiar with toxins such as T2, zearalenon and vomitoxin. It is his understanding that cattle are resistant to these toxins and he has never read of a reported case where a cow has become sick from these toxins.

[129] In addition, Dr. Whiting did acknowledge that the accused had asked him to be an expert witness in another matter which he declined as he was not interested in testifying against another department of the government.

[130] Prior to attending to the Bernier farm, Dr. Whiting testified that he was aware of a 2003 inspection that was mentioned in the report of Dr. Taylor. He was able to access that report and did read it prior to attending to the farm. When asked why he did not include that report in his court package, Dr. Whiting offered that it had occurred four years prior to the event now before the court and he did not feel it was relevant.

[131] Although he acknowledged reading the report Dr. Whiting could not recall if Mr. Bernier had self-reported the death of a cow and was seeking the assistance of his office. He did offer the opinion that if he was seeking the assistance of the office, he would have been bringing the carcass to the laboratory for analysis.

[132] Once on the farm, Dr. Whiting acknowledged speaking very briefly with Mr. Bernier and told him that the case would be prosecuted, therefore, he should get a lawyer if he wished to discuss the matter further.

[133] The issue of pregnancy testing was raised and Dr. Whiting stated that about fifty percent of the farmers do pregnancy test their cattle, depending on the market price of cattle. It is primarily veterinarians that do the testing although there is nothing that prevents a farmer from doing it if they have the necessary skill.

[134] When it was suggested that Mr. Bernier did not pregnancy test in the fall, Dr. Whiting made the comment "It would not surprise me if Mr. Bernier never had a veterinarian on his farm in five years."

[135] As for records of prior intervention, Dr. Whiting felt that any records of veterinarian attention would have been relevant to this case but he has seen none.

[136] During the inspection, Dr. Whiting confirmed that both the live and dead cattle located on the farm were abnormally thin. He opined that the cause was starvation due to a lack of feed provided.

[137] The possibility of a medical condition being responsible for the death of the cattle was canvassed and once again Dr. Whiting stated that there was no published information anywhere supporting the suggestion of forty percent of a herd dying from a disease.

[138] That being said, Dr. Whiting did confirm that cows can have problems with their teeth such that they could experience problems eating, resulting in them getting thin. If it does occur it is in older cows but they would have been culled during the fall inspection and then sold. In this case, the teeth were not examined or checked by Dr. Whiting.

[139] He was further asked about eating patterns and indicated that cows are highly motivated to eat more when it is cold. If there was a notation that cows were huddled together in the cold and ignoring food, Dr. Whiting felt he would have to look at the food. In that regard he was unfamiliar with Dr. Taylor having made that type of observation on her visit.

[140] With respect to the three legged cow, Dr. Whiting stated that although he offered the opinion the cow suffered from arthritis, he conceded that there could have been other causes for the swollen leg.

[141] Cows carry about sixty percent of their mass on their front legs. Front leg lameness is a very serious problem as it relates to pain and in his view the cow referenced was in extreme pain. The swelling noted could not have been present for only a week or two as was suggested by counsel. Although it was suggested that Dr. Swendrowski could better comment, Dr. Whiting offered that the injury was in existence for a minimum of a month.

[142] As for the cancer eye, Dr. Whiting confirmed that you have to be fairly close to the cow in order for it to be detected. He suggested that most farmers handle their cows once a year in a handling facility and that is when they identify things such as a cancer eye in addition to doing pregnancy testing and vaccinations.

[143] While at the auction market, Dr. Whiting confirmed that there were five calves born, which showed that there were some cows healthy enough to go through pregnancy and deliver.

[144] At the auction market, Dr. Whiting confirmed that the main reason for body scoring the animals was to collect evidence for the court case. As for the thinness of the cow, Dr. Whiting confirmed that he could not really indicate why it is thin, just that it is thin.

#### **4. Dean Stoyanowski**

[145] Mr. Stoyanowski is a self-employed cattle and grain producer in the Arborg area, having farmed since 1988. He is also employed as a farm production advisor for Manitoba Agriculture, Food and Rural Initiatives and has been since 2006.

[146] As an advisor he assists producers with production practices concerning grain production, hay production, pasture management practices, farm management practices as well as working with beef producers on feeding regimes and graze management.

[147] In the fall the department will assist farmers with testing their feed for nutrient value and assisting the farmers with making their feed do the best economically for them.

[148] As for his own farm, he had about seventy head of cattle prior to the BSE breakout in 2003 which then increased to about one hundred cattle because of the

lack of marketability of some of the cows. That level has been maintained and even increased a bit to one hundred and twenty cattle as of this date.

[149] As a beef farmer, the witness suggests that the farmer should be providing a reasonable amount of care to the animals and adequate feed for the time of year. He suggested that there are in fact, different feed requirements for different times of the year for cows.

[150] In the summer they are given unlimited access to green lush grass while out grazing. Going into the winter season, the cattle need to be in above average condition as they go into the colder months. They need to have good hair coats and they want them to calf in the spring.

[151] When managing a herd you are responsible for sheltering and watering. Scientifically a beef herd can make it through a winter without fresh water by using snow. The snow used must be fresh, not compacted or hard packed.

[152] An issue identified in cows eating snow in minus thirty to forty temperatures is that they have been seen to lose body condition rather quickly as there may be a reluctance to eat enough food when they lack water in their system.

[153] If the cattle are in excellent condition pre-winter and there is consumable snow, it is possible to successfully winter a cow only on snow. While doing this, it is important to monitor the herd's condition regularly and remove those cattle that are not doing well with snow alone.

[154] At times food for cattle will need to be obtained off site and Manitoba Agriculture has a link with available hay both in the province and outside the province.

[155] Feeding is dependent on the individual producers. There are producers who feed daily while feed lot operators will feed in the morning and in the evening. Whatever method is chosen, you need to make sure that enough food has been provided for the week.

[156] If lower quality feed is being used, there is a need to ensure the cows have access to protein as it feeds the rumen in microbes to help with digestion. Science has indicated protein can be provided once every three days to assist with this process.

[157] During the winter there is an increase in the plan of nutrition as calving season approaches.

[158] Feeding is done once per week by this witness and once the better feed is eaten the cows are given a lower quality to last out the week. If it gets cold then he may provide some better quality feed on those days to assist the cattle with the weather change.

[159] Calving is a personal choice for the farmers and once in that process the herd's food requirements increase. As a rule, a cow should gain about one hundred pounds in the month prior to calving.

[160] Animals will compete for food and if their body condition drops to a dangerous level, those animals should be removed and put into separation where they have access to more feed and adequate feed.

[161] As for monitoring the herd, it is checked on daily and perhaps several times a day. Walking amongst the cattle occurs twice a week as they are moved to the fresh feed. In the summer they are seen daily as they are moved daily onto pasture. This gives Mr. Stoyanowski a chance to look at the herd and notice troubles such as foot injuries or the like.

[162] The walk amongst them is used to get a good look and see if there are any problem areas as in foot troubles or eye issues. Sometimes you will see excessive tearing and will need to administer antibiotics.

[163] Foot problems are prevalent in the winter as cows will slip on ice, trip over manure and twist their ankles. If no open wounds are noted, he will monitor the animal as the need requires.

[164] From time to time cattle will die for various reasons. Mr. Stoyanowski indicated that if he comes across a dead cow it will be removed from the feeding area so the other cattle are not tripping over it or eating around it.

[165] The regulations state that for operations of less than three hundred animal units, dead animals should be confined in a closed room and kept frozen until proper disposal can occur. Disposal can occur by burial, incineration by a regulated incinerator or composting.

[166] In a normal year the industry expectation is two percent of the cows. If two died on this farm he indicated he would be alarmed and if it increased to three to five he would seek assistance from veterinary or external experts.

[167] As for medical treatment, it is known that producers do not invite a veterinarian in annually as producers will generally do their own self-assessment.

[168] Once a year the cattle are brought through a handling facility to administer the vaccines that are necessary. This is also a good time to examine the eyes as although cancerous eyes are not common they do occur from time to time.

[169] On March 16, 2007 the witness testified that he did assist Dr. Whiting in scoring a group of cattle. That was the first time he actually did hands on body condition scoring.

[170] Upon examining the herd he classified the cattle as being very thin which would need to be addressed through proper ration balancing. There were some weak animals noted although he was not sure if they were weak from nutrition or weak from a lack of minerals.

[171] As for the inspection, he indicated that if the majority of the herd fell into a body score of two to two and a half range, that would be classified a thin herd. That would also concern him particularly as to how it relates to their reproductive health.

[172] During his time with the Bernier herd, Mr. Stoyanowski he did not notice any diarrhea, coughing or excess production of mucus.

[173] In cross-examination he did acknowledge that there is no education or training required for someone to raise cows. People can learn through participating with a farm production advisor.

[174] He confirmed that he does feed once per week in which he puts out enough feed for the week. He will then go out in the middle of the week to ensure that the proper amount of feed has been put out. It would be possible for someone to come out to the farm during the week and potentially see no evidence of feeding as the food is all gone.

[175] There is no requirement to feed at any specific interval, just to provide adequate daily nutrition on an ongoing basis. Feeding once a week is becoming more common as more farmers have to work off site.

[176] During the course of farming, there is a great deal of self-assessment occurring as veterinarians are now rarely called. In terms of cancer eye, if a discharge is noted from the eye that should raise a flag to take a look and keep monitoring. It takes about a month for some of the tumors to develop in the cow affected.

[177] His own herd goes through a handling facility twice a year, once in mid-summer and then again just before the calves are weaned. It is known that some people do it once a year and others may not do it at all. The latter is dangerous as there are diseases, viruses and bacteria in the area of herds that may go undetected.

[178] Body scores of three out of nine are quite rare unless there is a concern with certain diseases and certain afflictions. If after separating an animal who falls within this range and there is no recovery noted, you would confer with a veterinarian is what was suggested.

[179] As for BSE, it had a definite economic impact on the beef industry. Producers found themselves at a hardship to meet their financial commitments because of the lower prices and lack of markets for their production. With the BSE crisis, animals that would have been normally culled and those past their prime were difficult to sell or had to be sold at a significantly reduced price.

[180] In re-examination, Mr. Stoyanowski confirmed that it was very uncommon for the entire herd to score a three out of nine on the Wagner body scoring.

## **5. Mark Swendrowski**

[181] Counsel for the accused conceded that Dr. Swendrowski is an expert in veterinarian medicine as well as a diagnostic pathologist.

[182] Since 1982 Dr. Swendrowski has been employed with Veterinary Diagnostic Services where his job is to test animal samples sent to him to determine the nature and cause of disease processes.

[183] In the case at bar, he did receive a cow from Dr. Whiting and did an extensive examination. A number of notations were made during this examination including that the animal had been suffering from chronic pedal arthritis with bone necrosis.



[184] Chronic arthritis is difficult to treat as it needs to be caught early on in the infection and treatment must be started early. For a farmer, the sign that would have been apparent was the animal being lame.

[185] In addition there was an issue of overgrown hooves noted which is something to monitor given that hoof health is important.

[186] In this case, given where the process was at, the digit would have had to be amputated had there been no decision to kill the cow.

[187] In the wound there was the presence of streptococcus bolvis noted and comes about as a result of the wound, but it was of no significance in this case.

[188] A dead calf that had been located on the Bernier farm was brought in by Dr. Whiting for a post-mortem examination.

[189] On initial examination the animal appeared to be in poor body condition with some of the bony prominences prominent. Dr. Swendrowski viewed the animal as emaciated. Internally he noted an absence of body fat such that the muscles have shrunk and they were more concave than they should be.

[190] The animal was found to have lost its heart fat which is associated with varying degrees of starvation or inadequate nutrition. The loss of fat around the kidneys and heart indicated a prolonged period of protein energy malnutrition.

[191] There were a number of organisms noted but Dr. Swendrowski was clear that, by themselves, they were not enough to cause the thin body on the calf. In the end he noted no significant infectious or parasitic disease which would suggest that the starvation was due to inadequate or poor quality feed. The calf died of malnutrition.

[192] A test on both animals was done for bovine virus diarrhoea which can cause chronic disease in cattle resulting in poor body condition. On both animals the tests were negative for the virus.

[193] In cross-examination it was pointed out to Dr. Swendrowski that the name on the report he prepared was Robert Bernier, who is not the accused. It was suggested that perhaps the cattle referenced belonged to someone other than the accused which was denied by the witness.

[194] At the outset of the examination the doctor indicated that he was aware the specimens were in relation to a case where charges were pending.

[195] In the lame cow there was mention of a moderate amount of feed in the rumen which would come about as a result of the animals being fed poor quality roughage. In that case they have to eat larger quantities resulting in it accumulating and causing stress on the liver.

[196] As for the chronic foot infection, the doctor could not state for certainty how long the infection had been present. Although acknowledging that it could possibly have been present for two weeks, he did offer the opinion that it was probably longer than that.

[197] As for pain, it is something that is difficult to measure. If the cattle are not putting weight on the foot, the assumption is that the animal would be in pain.

[198] It was agreed that animals will refuse food if they have an infectious disease process but in this case there were no signs of such a disease.

## **B. Defence Case**

### **1. Raymond Joseph Bercier**

[199] The accused is a sixty-three year old male who at the time of the incident was resident in the Fisher Branch area of Manitoba. He now resides in Winnipeg where he acts as the caretaker of an apartment block.

[200] In 1994 the accused changed over from being a grain farmer to that of a beef farmer. Before doing so he did some research into the industry, met with other beef farmers and also met with the agricultural representative responsible for the area he resided. Prior to this decision to change over the only experience he had with cattle was as a youth on the family dairy farm.

[201] His first beef purchases were made in 1994 when he bought 35 heifer calves. At the time he had not yet changed his farm operations and did not have his own facilities to winter the calves. As a result he arranged for a local farmer to winter his calves.

[202] The next spring a bull was purchased and the calves were now big enough to be brought home for breeding purposes. The operation was set up on his own property along with an additional half section of scrub land that was bought for summer pasture.

[203] For the first couple of years, the accused followed the normal practice of calving in the winter and selling in the fall. However he began to experience a number of difficulties with winter calving and made a decision to switch to summer calving.

[204] In terms of the farmstead there was a trail that was used to haul hay from the hay yard. That trail went through the bush and in fact on the date of the seizure, that trail was lined with cattle carcasses. That trail did not lead to any water source that was being used for the herd.

[205] There was an alleyway by the barn that was used by the cattle to go to the water source. There were no carcasses that lined this alley way as was suggested by the Crown witnesses who had investigated this matter.

[206] Initially when the switch was made to winter calving, pregnancy testing was done in the fall and at that time Mr. Bernier indicated that a veterinarian was brought into assist with that as well as to scrutinize the herd.

[207] When the breeding was switched to a summer calving season, pregnancy testing was now being done in the spring and a veterinarian was still brought in whenever needed as Mr. Bernier had assumed some of these tasks on his own.

[208] The troubles, according to the accused, in the farming operation began back in 2001. Specifically in October 2001 there was damage found to the hay bales where the plastic cover had been picked open. When looking at those damaged bales, Mr. Bernier saw a two inch layer that was noted to be off-colored but there was no mold observed.

[209] At that time Mr. Bernier said he spoke to people, including his agriculture representative, about this issue and was told to feed it to the cattle and see what happens. That was done and according to Mr. Bernier the cattle consumed it and there did not appear to be any issues with its use.

[210] One week later he discovered a cow that was dead and bloated. Accepting that cattle do die, he made a decision not to call in the veterinarian. However, one week later another cow had died and this time the veterinarian was called. A post-mortem was apparently done by the veterinarian but no cause of death was found. The veterinarian did indicate that he suspected that the hay being used had something to do with the death of the cow.

[211] At that time Mr. Bernier stated that he stopped using his supply of on-hand hay and the cows were switched over to dry hay. The following week two more cows died within a day of one another and again the veterinarian was called. During their discussion the veterinarian suggested that it may be just a carryover effect from the previous feed.

[212] In February 2002 Mr. Bernier noted a number of his cattle were “riding” which should not have been occurring as they had been exposed to the bull since the past September. Again the veterinarian was called and this time the entire herd was subjected to pregnancy testing. The results were that two thirds of the herd were found to be open and that could not be explained by the veterinarian.

[213] That summer the cows were released into the pasture along with the bulls and they started breeding. Calves were born but within a month he could detect something wrong those calves as they did not appear to be thriving. That problem of calves not thriving continued right up to 2006.

[214] During this period of time a number of requests for assistance were made by Mr. Bernier that he detailed during his testimony. In November 2001 contact was made with the crop insurance office concerning the ravens damaging his bales. He was advised that ravens were not covered by the program and as such no compensation was available.

[215] He continued on with this concern and this time wrote a letter to Minister Roseanne Wowchuk about his claim that had been denied.

[216] He also contacted a lawyer as he had now lost his hay, lost cows and lost pregnancies. The lawyer indicated to him that he needed to establish a link between the raven events and subsequent losses before he could seek compensation.

[217] An article located by the lawyer was passed onto Mr. Bernier that talked about preventing rook damage to bales by raven like birds. This article out of Ireland indicated that once air ingresses a silage bale, there has been listeria monocytogenes that have been found growing inside.

[218] In order to fully explore this, Mr. Bernier indicated that he contacted a number of veterinarians across Canada in an effort to learn more about this issue.

Another article discovered seemed to indicate that listeria manifests itself in ruminants.

[219] During this time the herd had seemed to correct itself and recovered from whatever it was that had affected them in the past.

[220] In 2003 the BSE crisis occurred and the conditions were drought like meaning the pastures did not grown well. As a result he opted to avail himself of a government loan in order to buy feed and did so from a farmer in Altona. The herd did okay on this green feed and only one cow died that fall.

[221] Although he can no longer recall who he called about the dead cow, someone did come out to his farm and pointed out that the animals were in less than optimum condition. He was told to make sure he had a water supply along with mineral and salt. That winter there were no further losses of cattle.

[222] In 2004 Mr. Bernier sent a fax addressed “to whom it may concern” outlining his issues with silage and listeria amongst others. It was eventually sent to Dr. Whiting although Mr. Bernier cannot recall where he got that name as the person to send the document.

[223] The purpose in contacting him had to do with pursuing his case in the courts with the aid of an expert, to which Mr. Whiting declined to become involved. Based on this, Mr. Bernier came to the conclusion that he was on his own to find out what had happened to his herd as he was not getting any answers from anywhere he looked or inquired.

[224] Between 2004 – 2006, Mr. Bernier testified that he had no feed issues and the health of his herd was good during this time period. That being said he did indicate that his calves continued to have issues with thriving.

[225] As for fertility issues, those seemed to correct itself in 2003 but it did result in two calving seasons which was described by the accused as erratic.

[226] In 2003 he had intentions to get rid of his herd but the BSE crisis delayed that from happening and he continued in the beef industry with cows that were now a little older than the norm.

[227] As the seasons progressed, Mr. Bernier testified that he changed his feeding systems and eventually started to grow barley to be used as silage in conjunction

with dry hay. He then switched to bale silage and that is when troubles started again.

[228] He would feed his cattle the barley silage everyday along with hay. In the winter the feeding was switched to every other day.

[229] In 2006, Mr. Bernier again came to the decision that he was going to sell of the herd in the coming fall. As a result he put up a minimal amount of hay that year, enough to carry him until November or so. In September 2006 he sold a trailer load of calves and steers as he continued on to getting out of the beef industry.

[230] As he was preparing to sell the remainder of the herd, the corn market went out of balance in the United States that led directly to cattle prices dropping in October 2006.

[231] As a result he made a decision to wait until that market straightened itself, so feed had to be located for his herd. A deal was reached with a neighbor that permitted him to buy hay as he needed it and he had permission to attend that farm and pick it up on his own.

[232] At the outset, feeding was done daily and the herd was consuming three and a half to four bales daily. At some point the feeding switched to every other day and Mr. Bernier said he simply doubled what he provided to the cattle.

[233] As for the square bales in the barn, those were reserved for issues involving single cows having to be separated from the herd.

[234] Going into winter he felt the animals were in not too bad shape given their age. He suggested that on a scale of one to five, they were a two to two and a half, maybe some even a three. For the early part of the winter they seemed to be holding their own and appeared to be maintaining their body condition score.

[235] In January 2007 Mr. Bernier described a period of time where the weather turned really cold and it was during that time period he began to lose animals. He continued the every other day feeding but noted that the animals had for an unknown reason cut down on their eating. He was finding left over hay when he went to feed and began to observe his animals huddling and not eating.

[236] During this time period he began to find an animal or two dead each time he went out to feed over a two week period of time. He would use the front end loader

to pick up the bigger cattle that died but left the smaller ones essentially where they had died. Once it warmed up, the animals stopped dying and there were no further deaths until the seizure occurred in March 2007.

[237] According to Mr. Bernier, he continued to feed the animals good hay, gave them shelter and access to water and cannot understand how the animals came to the condition that they were found when the herd was seized.

[238] At no time did he ever notice the lame cow that is the subject of the video that was shot. When he would take the hay to the feeding area he would observe the cattle standing and chewing and he was not present at the times they would walk to get water. All of his viewing of the herd was from the seat of the tractor during feeding times.

[239] As for the cows with cancer eye, it is something that he did not note. He testified that a person would have to be very close to the animal to spot it in the early stages.

[240] An actual inspection of animals would be done during the spring or the fall depending on when the animals were being processed. In this case that would have been in April or May just prior to going out to the pasture at which time issues such as cancer eye could be detected.

[241] Mr. Bernier indicated that his animals died as a result of a number of factors, with the main factor, according to Mr. Bernier, being the extraordinary period of below average cold weather. This is in conjunction with the animals being in less than ideal condition at the onset of winter. He also felt that the cattle had been compromised back in 2001 as a result of the silage issue.

[242] To this day he has continued to look for answers as to what happened with his herd and is now satisfied that they had been subjected to a combination of disease and poisoning.

[243] In cross-examination Mr. Bernier confirmed that he had no prior experience as a beef farmer prior to switching over from a grain farmer.

[244] When he started out as a beef farmer he was initially using a winter calving season and then intentionally switched over to summer calving in 1998 or so. Although he indicated that he did not intentionally switch back, Mr. Bernier did

acknowledge that after the silage issue he found himself with two calving seasons that continued right up to his herd being seized.

[245] As a result of this double calving, Mr. Bernier admitted that he did not have any set times that pregnancy testing would be performed. As a result he would not know how many cows were pregnant at any point in time.

[246] When the feed was identified as the potential issue in the first two deaths, the accused said he wrote a letter to Minister Wowchuk seeking compensation for the raven damage. As for the actual feed, he stopped using it and switched to dry hay.

[247] In 2003 a sample of the feed was sent for testing and it tested positive for the presence of T2 and zearalenone and negative for fusarium or aflatoxin.

[248] Six more cattle were lost during the winter of 2002 and the cause of death was never explored.

[249] As a result of the 2003 inspection of his farm there was a set of recommendations including one that he turn in any other cows that die for a post-mortem. That document was signed by the accused.

### **THE LEGAL TEST**

[250] The offence before this court is a public welfare offence and is referenced legally as a strict liability offence.

[251] The Supreme Court of Canada in the case of *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 articulated that the applicable test for a strict liability offence requires the Crown to prove that the defendant committed the prohibited act on a standard of proof beyond a reasonable doubt. There is no onus to prove the accused had the requisite mens rea but rather an accused as the defence of due diligence available.

[252] There are two means to advance a defence of due diligence. One way is for an accused to show a belief in a mistaken set of facts that, if true, would result in an innocent act being committed. A second way is by showing that all reasonable steps were taken to avoid the incident, in which case a defence of due diligence may exist. Whatever way the defence of due diligence is advanced, it must be shown on a balance of probabilities.



[253] In all of this a court must ask consider what a reasonable person would have done in the circumstances.

## **ANALYSIS**

### **(i) Count 1 & 2**

[254] The accused is charged in relation to a tan cow that was unable to bear any weight on its right front foot.

[255] Dr. Taylor is a veterinarian and her expertise was conceded by counsel for the accused.

[256] On March 9, 2007 she attended to the Bernier farm at the request of the Fisher Branch R.C.M.P. to investigate a complaint of thin animals. During the course of her investigation she noted what she described to be a cow with foot-rot.

[257] Upon closer examination, she described the leg as being swollen about three to four times the normal size. It was apparent to her that the condition would prevent the cow from being able to get enough hay or water. It was also evident to her that no treatment had been administered to the animal.

[258] Dr. Colleen Marion, also an expert in veterinarian medicine, attended onto the property to assist in the seizure of the cattle. During this process, Dr. Marion noted the same tan cow with a swollen right leg that was trying to move on the other three legs. She participated in a video that was produced to show the extent of the injury and the difficulty the cow had in moving.

[259] Dr. Terrence Whiting was the lead veterinarian and ultimately responsible for the decision to seize the Bernier herd of cattle. During the course of conducting his investigation a tan cow came to his attention. The cow was observed to be unable to bear any weight on the right front leg and could not keep up with the herd that was being moved.

[260] It was his opinion that the cow had chronic arthritis of a long standing nature. He opined the cow had been lame for about thirty days and that the injury itself would have been painful and placed the cow in distress as that term is used in *The Animal Care Act*.

[261] According to Dr. Whiting, cows carry about sixty percent of their mass on their front legs. Front leg lameness is a serious problem as it relates to pain and in his view this animal would have been in extreme pain.

[262] A video showing the difficulty the cow was having with simply moving was filed with the court. After that video was produced from the Bernier farm, Dr. Whiting determined that the suffering being experienced by the cow was too much and instructed the R.C.M.P. officer on scene to shoot the animal.

[263] Dean Stoyanowski is a self-employed beef farmer and also an employee with Manitoba Agriculture with duties to assist producers, including beef farmers, with production practices.

[264] Although he did not see the tan cow in question, Mr. Stoyanowski did speak generally about beef farming practices. He indicated that part of his responsibility as a beef farmer is to monitor the herd by not only checking or observing the herd but also by walking amongst the animals, in his case twice a week.

[265] He identified a purpose in walking amongst them is to be able to detect and monitor any troubles such as foot injuries. In the winter period, cows have been known to slip on ice, trip over manure and twist their ankles. If no open injury is noted, the animal will be monitored to ensure it recovers.

[266] Dr. Mark Swendrowski was accepted as an expert in diagnostic pathology and performed a post-mortem examination of the tan cow in question. He found that the animal had been suffering from chronic pedal arthritis with bone necrosis.

[267] That type of injury was described as being a difficult one to treat and needed to be caught early on in order to have any chance at a successful treatment. In the opinion of Dr. Swendrowski, the fact the animal was lame would have been a sign to the farmer that there was an issue that needed to be addressed.

[268] Although he could not state for a certainty the length of time the cow would have been injured, he felt that it would have been in excess of the 14 days suggested by counsel for the accused.

[269] Had the animal presented alive, the digit would have had to been amputated given the stage the injury had got to. Finally, the animals refusal to place any weight on the foot would seem to permit the assumption that the animal was in pain.

[270] Raymond Bernier testified in his own defence and indicated that he did not see this lame cow at anytime. He advised the court that he was feeding the herd every other day and during that process he would take that opportunity to observe

the herd from the seat of the tractor. Generally he would see the herd huddled, chewing and in a stationary mode.

[271] There was no indication that he ever walked amongst his herd cattle in an effort to examine the cows in any manner. In fact, the impression left is that his interaction with the herd was as brief as dropping the feed and leaving.

[272] He advised the court that he never took the opportunity to watch the cattle attend to the water hole where he may have observed this cow much earlier.

[273] Based on the testimony of the Crown witnesses, I find that it would seem to be a reasonable practice on a commercial beef farm for the caregiver to actively monitor the herd to ensure that injury does not befall the cattle. Even if injury were to occur, an actively monitored herd will permit treatment to be available early on so as to limit the potential for long-term or chronic injury. The benefit of walking amongst the herd is exemplified by the fact that this cow was quickly detected by Dr. Taylor who was only on the farm once.

[274] In this case, Mr. Bernier made no efforts to actively monitor his cattle during his every second day visit to drop off feed. It would seem the requirement of walking amongst the herd is a accepted practice and a reasonable expectation.

[275] Walking on three legs is not a natural activity for cattle and the assessment of the injury as being painful is well supported by the testimony of Dr. Swendrowski and Dr. Whiting.

[276] In my view the accused in this matter did not fulfill his duty as a commercial beef farmer by actively monitoring his herd. Had he done so the cow in question would have been detected earlier. Instead the animal was left to suffer for at least fourteen days and thereby was placed in distress by this accused's inaction.

[277] I accept the evidence of the four Crown expert witnesses as it relates to their observations and the fact that this was a readably identifiable condition that progressed to the degree it did through inaction by the accused. There were no reasonable steps taken to identify and treat this condition nor can it be said that the inaction by the accused was due to a mistaken belief of fact. As a result I find that the Crown has proven the requisite elements of the offences outlined in counts 1 and 2 and there being no due diligence, convictions will be entered.

[278]

**(ii) Count 3**

[279] This count deal with a red calf that was found deceased during the seizure of the Bernier herd.

[280] Dr. Taylor was the first official on scene charged with investigating a complaint of thin cows. Upon attending to the homestead, she was able to estimate that there were eight-five live cattle and thirty dead cattle.

[281] Generally, all of the cattle looked emaciated and that was a consistent observation even amongst the dead cattle noted. There was a lack of feed noted and even that which was located on site was found to be of a low grade.

[282] Dr. Marion attended the farm and was part of the team that would ultimately seize the herd. An actual count of the deceased cattle resulted in forty-two cows being identified by Dr. Marion.

[283] Dr. Whiting was the lead investigator who was acting on the information that had been provided by Dr. Taylor from her earlier visit to the Bernier farm. Upon attending onto the property Dr. Whiting was acting in his capacity as a veterinarian, an area it was conceded that he is an expert.

[284] During the course of his investigation, Dr. Whiting came upon a red calf that appeared to have died recently and had not yet frozen onto or into the ground. A decision was made to remove that carcass from the property and submit it for a post-mortem examination.

[285] Dr. Whiting did acknowledge that death and spontaneous death do occur at a pace of one per hundred. However, in relation to the Bernier herd, he suggested that there was not one normal animal, by way of body condition, on this farm.

[286] During the course of his investigation, Dr. Whiting paid attention to and was prepared to note any overt physical signs of infection or disease in this herd. Consideration was given to the issue of listeriosis and other diseases but it was made clear that there is no known disease that would kill off forty percent of a herd.

[287] Based on the entirety of his observations while on the Bernier farm, a decision was made to remove the herd as Dr. Whiting concluded that if they were not removed and protected from the wind, given some grain and quality feed that more would die.

[288] Arrangements were made to transport the animals to the Inwood Auction Mart where they would have access to good watering facilities and lots of feed. Once there the animals were permitted to hydrate prior to the body condition scoring being conducted.

[289] Body scoring was completed on the cattle that survived and not one of the cows was assigned a score over three on the Wagner scale.

[290] During the course of his testimony, Dr. Whiting identified three critical points that need to be addressed in order to confirm death by starvation. Those are a loss of fat at the base of the heart, loss of fat around the kidney and loss of fat at the bone marrow which is the order animals will lose fat.

[291] Based on the results of the post-mortem conducted on the red calf, Dr. Whiting concluded that the animal's death was a textbook teaching example of death by starvation for a pathology class.

[292] Dr. Swendrowski's initial visual examination of the calf during the course of the post-mortem examination was that it appeared to be in poor body condition with some boney prominences prominent.

[293] Internally, it was noted that there was an absence of body fat to the degree that the muscles had shrunk and become more concave than they should be.

[294] The heart fat was noted to be absent which is associated with varying degrees of starvation or inadequate nutrition. The loss of fat around the kidneys and heart indicate a prolonged period of protein energy malnutrition.

[295] As a result of eliminating any significant infectious or prion disease from being a factor, it was suggested that the starvation was due to inadequate or poor quality feed.

[296] Dean Stoyanowski spoke of the need for the farmer to provide a reasonable amount of care to the animals along with adequate feed for the time of year. In other words he suggested that there are different feed requirements for different times of the year.

[297] The accused takes the position that the onus is on the Crown to prove that the accused failed to provide an adequate source of food and water. In this case the accused suggests that it has not been proven that the cause of death was through the failure to provide food. Moreover, there was no evidence showing an absence

or lack of water being available, therefore, the Crown has failed to prove an essential element.

[298] It must be remembered at the outset that this case is being prosecuted under what is termed public welfare legislation. There are duties imposed on individuals to ensure the well-being and protection of the group being sought to be protected.

[299] In the particular circumstances of this offence there is a duty to provide adequate food and water and the failure to do either is a breach of the section. In other words the mere fact an individual were to provide water and no food to a herd would not meet the requirement of the section and exonerate a person from prosecution. It would fly in the face of the intent of the legislation to permit a farmer to only provide one or the other and be able to stand and say that basic care has been provided.

[300] The onus is on the farmer to provide both adequate water and adequate food. The use of the term adequate, imports, that there must be some standard for that being provided. In my view adequate food means that it must be sufficient or fit food to provide for the animal's health and well-being.

[301] Right from the outset it was suggested that the feed being used was described as being of a low grade which in and of itself is not problematic. Dean Stoyanowski spoke of using lower grade hay that is then supplemented so as to provide the nutrient value that is necessary for the animals. The mere fact low grade feed is observed is not the end of the inquiry to the offence before the court.

[302] The observation and suggestion that the calf looked emaciated was not disputed by the accused and in fact that seems to be a consistent finding throughout the entirety of the herd. The abnormal thinness should have raised the alarm for Mr. Bernier to ensure the emaciation was not as a result of low nutrient levels being provided.

[303] Even with the onset of what was described by the accused to be an unusually lengthy cold spell, there was no evidence proffered by him that he changed the feeding pattern, the quantity of feed provided or the provision of extra nutrients to ensure the herd was able to survive this drastic weather.

[304] At the end of the day, it is clinically clear that the calf had used up its fat stores by way of burning energy. The post-mortem conducted confirmed the lack

of fat and the overt appearance of the calf supported the suggestion that this was an emaciated animal.

[305] The post-mortem concluded the absence of heart fat which is a sign of starvation or inadequate nutrition. Couple that with the loss of fat around the kidneys and heart that indicate a prolonged period of protein energy malnutrition. In essence, this calf was found to have been, at a minimum, receiving an inadequate source of nutrition and the lack of fat around the heart and kidney suggests that has been a long standing pattern.

[306] Whatever food was being provided to the calf was obviously deficient of the necessary nutrition and in my view it was therefore inadequate food that was being provided to the calf.

[307] I am satisfied that the Crown has proven the essential elements of the offence beyond a reasonable doubt and there is nothing before this court that would show that the accused acted reasonably under the circumstances.

[308] A conviction will be entered.

**(iii) Count 4**

[309] This count of the Information dealt with thirteen cows.

[310] During the course of the trial, a voir dire was held in relation to a second visit to the Bernier farm by Dr. Whiting. One of the purposes of that visit was to collect femur samples in an effort to support the allegations contained in count 4 of the Information.

[311] I found that there was no statutory authority to permit entry onto the property and therefore a breach of Mr. Bernier's Charter right to be secure from an unreasonable search. I concluded that the admission of the evidence would bring the administration of justice into disrepute and ruled it inadmissible.

[312] The evidence clearly showed that the cows referenced in this count were in fact dead and piled along a pathway. They were noted to be frozen together and covered in snow resulting in the carcasses not being fully visible. There was no hands on examination of these cattle carried out at the time of the seizure. The court is being asked to make the assumption or inference that based solely on the observations made by the three veterinarians that the court can conclude that these cows died for the same reason as the others that were fully examined.

[313] The evidence shows that the cows referenced were in fact dead and piled along the pathway. They were observed to be frozen together and covered in snow resulting in the carcasses being only partially visible.

[314] In my view that would be a dangerous assumption for the court to make and I find that the Crown has provided insufficient evidence to prove the offence beyond a reasonable doubt. The accused will be acquitted of that count.

**(iv) Count 5**

[315] Once the cattle had been seized and removed from the Bernier farm, they were taken to the Inwood Auction Market to be further examined and treated. The cow referenced in the charge had gone through the shoot and was body condition scored as a one and a half on the Wagner scale.

[316] After being examined, the cow walked across the pen and laid down. Efforts were made to get the cow back up and once that occurred the cow walked a few more steps and again laid down. This time efforts to have the cow get back up were unsuccessful and a decision was made to euthanize the cow.

[317] Dr. Whiting offered an opinion that the cause was physical weakness due to emaciation.

[318] It is the position of Mr. Bernier that although the animals were emaciated and died of starvation as is being suggested by Crown counsel that death was not as a result of being denied food and water. The death was as a result of a combination of factors including the age of the animals, the extreme cold, listeriosis, toxins and poor dentition which as a combination was lethal.

[319] As can be noted there is really no dispute that the animal was emaciated. It is rather ironic that the animal was removed from the farm as Dr. Whiting felt that if left as found, it would die.

[320] The cow is brought into a facility that offers protection from the elements, is provided with water and food and permitted a couple of days to rehydrate prior to being examined. It was after this short recovery period that the animal walks thorough the shoot and essentially collapses unable to regain its feet.

[321] A body score of one and a half indicated that the animal had some fat under the skin posterior to the hip bone but no cover over the transverse process. Scoring, as was suggested by Dr. Whiting, is a common tool used to evaluate the nutritional



status of cattle herds. Ideally they should be in the four to five range and anything below a three suggests that they are too skinny to ovulate.

[322] Dean Stoyanowski shared that the majority of the Bernier herd fell into a body score of two to two and one half range, which according to him is a thin herd. That type of scoring would raise concerns with him as it relates to reproductive health.

[323] Both Terrence Whiting and Dean Stoyanowski did not notice any signs that would indicate an illness or disease as being present in the herd. Given the overall observations of the herd, the medical findings from the post-mortems that were conducted and the lack of any overt signs of disease and the like, there is nothing else before the court that would explain a cow just collapsing and being unable to continue on.

[324] I accept the evidence that the animal was weak and that weakness came from an inadequate source of food that was being provided. That condition may have been heightened by the extreme cold patterns described that would have resulted in the need for an increase in the level of food or supplements and when not provided would lead to an increase in fat burning in order to survive.

[325] There is nothing before the court in terms of actions by the accused that would show on a balance of probabilities that he acted reasonably during this period of time or was led astray because of a mistaken belief in a set of facts.

[326] I say that recognizing his comments as to the reason for the deaths of his animals but in my view that is a man who has become infatuated with information that has been unsupported during the course of two post-mortem examinations that have been conducted.

[327] Although I acknowledge his belief as to the cause of the deaths I find that they are not sufficient to satisfy on a balance of probability that he acted in a reasonable manner to ensure the cows survived.

[328] I find that the Crown has proven the offence beyond a reasonable doubt and a conviction will be entered.

**(v) Counts 6, 7 and 8**

[329] I have chosen to group these counts together as they deal with groups of cattle that find commonality by way of their body condition scoring.

[330] All of the expert witnesses who had a part to play in this investigation are consistent in their view that the Bernier herd was emaciated, or in other words was abnormally thin. That is an observation that counsel for the accused has acknowledged in her submissions before the court and something that the accused has accepted in his own testimony.

[331] The Wagner scale is a scientifically accepted scale that is used to body score cattle. It appears to be a standard that has been accepted industry wide given the comments of all the witnesses called in these proceedings. It is a scale that is designed as a tool to evaluate the nutritional status of cattle herds.

[332] According to the evidence given by Dr. Whiting, a score of one is as thin as a cow can get that is compatible with being alive. Ideally cows that are calving should be a four or five otherwise they do not return to estrus as they are too skinny to ovulate.

[333] The cattle that are the subject of these charges are those that body scored as a one, one and one half and a two. Those animals that scored a one were at risk of imminent death, those at a one and a half were said to be at some risk of imminent death.

[334] The evidence of Dr. Whiting is very clear that the root cause of herd's condition is the lack of adequate food. The animals themselves were emaciated and the real question is whether that was due to malnutrition or disease. With that it is important to recognize that beef cows are bred to be fat and produce meat.

[335] The scientific evidence before the court obtained through the post-mortems conducted clearly indicates that the two animals in question died because of malnutrition. Internal examinations showed what was described as a textbook case of starvation based on the way its fat sources were depleted or being depleted. That evidence was uncontradicted.

[336] Dr. Lisa Taylor offered the opinion that based on her observations from her one visit, the food present was inadequate for the size of the herd and the hay being used was not of a high quality. Those cattle on scene were noted to be emaciated and she suggested that animals that scored between a one and a three would be sub-optimal nutritionally and open to more diseases. In fact the immune system would be compromised.

[337] Dr. Taylor was sensitive to the issue of alternative causes for the emaciation and did consider the issue of disease as a potential cause. She indicated that she did not note any signs of disease, signs of pneumonia or Johnes disease during her time on the farm.

[338] Dr. Marion was also cognitive of the issue of diseases and indicated that she also did not observe any overt signs. She noted that there were no signs of diarrhea and there were no signs of respiratory disease.

[339] In the post-mortems that were conducted there was no evidence of any systematic disease being found that could account for the body conditions of the animals.

[340] Dr. Whiting was even more definitive in his assertion that he was unaware of any disease that would kill off forty percent of a herd.

[341] In his short time with the herd, Dean Stoyanowski did not note any diarrhea, coughing or excess production of mucus, all signs of something more than starvation.

[342] It is noteworthy that there were multiple dead animals located on the farm and some of those were left where they had fallen. This, in my view, shows a complete lack of concern for the well-being of the live animals as the common practice is to remove the dead animals so as to prevent the spread of any disease and the like.

[343] Mr. Bernier was definitive that the cause of his herd being emaciated was not as a result of inadequate food but rather went back to the ravens attacking his silage in 2001. It is his view that was the beginning of his difficulties and is the root cause of the death of the cattle. Throughout the past few years he has attempted to seek support for his position but has run into various roadblocks along the way.

[344] Dr. Whiting did acknowledge the presence of listeria but based on the clinical analysis he concluded its presence would have been resolved within seven to ten days by either the death of the animal or full recovery and subsequent immunity from that disease.

[345] What is also clear is the infatuation with other potential causes for the deaths in his herd led to the accused being somewhat neglectful with the day to day

functioning of the herd. It goes from leaving dead animals strewn along the property and amongst the live animals to not recognizing the potential issues with the cold weather and altering the feeding pattern to address this change.

[346] Mr. Bernier acknowledged that going into his last winter, his herd did not look as well as it should. He recognized the change in the weather, yet did nothing more to ensure that his cattle were receiving the nutrition level they required in order to survive. As was mentioned by Mr. Stoyanowski, a farmer must adjust his feeding to that of the conditions.

[347] Given the poor condition of his herd, the times where he claims to have found uneaten feed present and the animals huddled, Mr. Bernier did nothing with these tell tale signs being present. Even as his cattle were dying, he at no time contacted or sought the assistance of a veterinarian to ascertain the cause of death.

[348] It is my view that the accused believed he knew the cause of his difficulties and allowed that to consume his time.

[349] It would appear that the accused believed he knew the cause of the difficulties and believed in a set of circumstances that he felt provided the answer as to why his cattle were dying. Yet he presented no evidence to support those conclusions that he now advocated at trial.

[350] It is worth noting that the accused is not scientifically trained, nor does he hold the designation of a veterinarian or any training in pathology. Even where he continued to gather various pieces of information to support his belief that the damage of the silage may have caused his cattle to die, he presented nothing to scientifically confirm that belief.

[351] By all appearances the accused accepted the animals dying and even when that increased to the alarming rate it did, he did nothing to address the safety of his remaining herd. Having spoken to his agriculture representative numerous times in the past, and given the 2003 report, he knew of the post-mortem services available. He chose not to avail himself of a first-hand examination in order to try and determine why so many of the cattle were dying. Instead he just accepted the deaths and did nothing more.

[352] His decision not to take any reasonable steps to address the fact his cattle were dying at such a pace can be described as nothing but negligent on his part. There has been no evidence that would support a finding of due diligence being exercised by this accused. He should have acted much sooner to try and alleviate the distress imposed on these animals.

[353] As a result I find that the Crown has proven the elements necessary and a conviction will be entered on each of the noted counts.

[354] I note that I must have cut this out by mistake. It can be added after the above

**(vi) Count 9**

[355] Dr. Whiting testified that during the body condition scoring of the cattle he observed two cows with what is termed to be cancer eye. He was not able to indicate with any degree of specificity how long the cows had been suffering from this treatable disease. He suggested that normal farming practices would involve a farmer examining the herd during pregnancy testing for any issues, including cancer eye.

[356] Dean Stoyanowski indicated that he would walk amongst his herd at least twice a week as a form of monitoring the health of the cattle. During this time he would be looking for any issues, including cancer eye amongst his herd. However he also indicated that once a year he would bring the herd through a handling facility to administer vaccines. It was during this time that he would also examine the eyes of the cows as cancerous eyes are not common.

[357] Mr. Bernier testified that he knew of cancer eye as a disease but in this case did not know that two of his cattle were infected with this disease.

[358] This is a difficult count to assess given what I find to be a general lack of care that Mr. Bernier took with respect to health and welfare of this herd of cattle. That being said, cancer eye does not appear to be an overly prevalent disease and is

one where the general practice seems to be discovery through the examination of the herd when it is brought in on a yearly basis to a handling facility.

[359] I accept the evidence of Dr, Whiting in terms of the two cows having cancer eye. Having proven that the cattle were infected, the difficulty is that even though this was not known to Mr. Bernier, it would seem that even in the general practice of farming, this may not have been discovered by a prudent farmer until the cattle were brought into a handling facility.

[360] The inability of Dr. Whiting to assign a time span the cows had been infected makes it difficult for this court to conclude that Mr. Bernier ought to have known of the disease or was negligent in looking for such during his last examination of the cattle. Even if I accept the Crown has proven the offence, I cannot conclude that Mr. Bernier did not act reasonably in this matter.

### **SUMMARY**

[361] Convictions will be entered to counts 1, 2, 3, 5, 6, 7 & 8. The charges at counts 4 and 9 are dismissed.

[362] Counsel can contact the trial coordinator to arrange a date for sentencing.

**Original signed by:**  
**KELLY K. MOAR, P.J.**

**Cases filed by counsel for the accused and considered:**

*R. v. Muhbach*, [2011] A.J. No. 17 (Q.B.)  
*R. v. Pappajohn*, [1980] 2 S.C.R. 120  
*R. v. Sansregret*, [1985] 1 S.C.R. 570  
*R. v. Benjamin*, [2010] O.J. No. 4516 (S.C.J.)  
*R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299  
*R. v. Swietorzecki*, [1995] O.J. No. 816 (C.A.)

**Additional cases considered by the court:**

*R. v. MacIsaac*, (2008) NSPC 81  
*R. v. Loerzel et al* (2007) SKCA 107  
*R. v. Carter*, 2006 ABPC 341  
*R. v. Jackson*, 2011 NSPC 108  
*R. v. Lamb*, 2010 SKPC 106  
*R. v. Kowalik*, 2010 SKPC 58