

R. v. Sandra Tomalin and Beverley Tomalin - 2011 NBPC 29

PROVINCE OF NEW BRUNSWICK

Case: 02731908

PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN

- and -

**SANDRA TOMALIN AND BEVERLEY
TOMALIN**

Judgment rendered by the Honorable Paul E. Duffie in the matter of a charge under section 4 (1) of New Brunswick Regulation 2000-4, a regulation made under the *Society for the Prevention of Cruelty to Animals Act*, Chapter S-12 of the statutes of New Brunswick, in violation of section 18 (1) of the said *Act* and contrary to section 18 (2) of the said *Act*.

BEFORE: Judge Paul E. Duffie

DATES OF TRIAL: May 4th, May 5th, May 6th and June 23rd, 2011

PLACE OF TRIAL: Grand Falls, New Brunswick

DATE OF DECISION: September 16th, 2011

APPEARANCES:

Charles Couturier, on behalf of the crown

James H. McCue, on behalf of the defendants

DUFFIE, Prov. Ct. J.

INTRODUCTION

- [1] The Defendants, Sandra Tomalin and Beverley Tomalin, are charged jointly for failing to provide adequate food, water, shelter and care to 38 horses under their care and control as provided for under the *Society for the Prevention of Cruelty to Animals Act*, Chapter S-12 of the Statutes of New Brunswick.
- [2] After receiving a complaint and visiting the premises where the horses were kept, Animal Protection Officer Lindsey Bishop obtained a warrant on July 13th, 2010, to search the premises of the Defendants and in order to seize any of the horses in distress.
- [3] All of the horses were seized and are presently the subject matter of the charge.

THE APPLICABLE GENERAL PRINCIPLES

- [4] In this case, the Tomalins are presumed to be innocent unless and until the Crown has proven each essential element of this offence beyond a reasonable doubt.
- [5] Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence.
- [6] It is not enough for me to believe that the Tomalins are possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty.

EVIDENCE OF THE CROWN

- [7] On May 12th, 2010, Animal Protection Officer Lindsey Bishop, who is an employee for the SPCA, testified that she, along with her colleague, James Parish, responded to a complaint by attending the property of the Tomalins, situated at 640 Lerwick Road, Tilley, New Brunswick.
- [8] The Tomalins were not at home at the time, so the protection officers briefly inspected the pasture land and the horses which were the subject of the complaint.
- [9] Their findings were as follows:
- the pasture land was of poor grazing ground;
 - there was no sign of hay or shelter for the horses;
 - the only sign of water was a small spring located on the pasture land;

- some of the horses seemed ribby;
- large number of foals present;
- some of the hooves were long.

[10] The overall situation and health of the horses were not a major concern for them at the time; however, they did leave a Compliance Order outlining some of their concerns and they wanted to speak to the Defendants.

[11] Compliance Order dated May 14th, 2010, entered into evidence as C-1, can be summarized as follows:

- Be advised that the following animals, namely 39 horses, are the subject matter of an investigation under the *SPCA Act*.
- During the investigation, the following deficiencies were observed: two paint horses had very long hooves; one paint horse had deformed ankles; there was no shelter for all the horses.
- It is demanded that you comply with the following within two days of this notice. Please call 328-7235 to discuss the case.

[12] After receiving a second complaint, Lindsey Bishop returned to the Tomalins' property on May 27th, 2010, with Dr. Thomas Ogilvie, a veterinarian with the Department of Agriculture. They spoke with Sandra Tomalin and she allowed them to visit and inspect the premises.

[13] They outlined the following concerns:

- a large number of horses for the Tomalins to care for;
- the lack of food;
- the lack of shelter, particularly for the winter months;
- the ribbing and swollen bellies on some of the horses;
- the lack of an identifiable water source;
- a few horses with hooves problems.

[14] The Tomalins were advised of these issues and they said they intended to construct a shelter before winter and they would see to the hooves problem. The evidence of Ms. Bishop and Dr. Ogilvie was that it appeared that the Tomalins were of the opinion that the water and food sources were adequate. Lindsey Bishop left another Compliance Order and advised they would return in 30 days.

[15] Compliance Order marked C-2 and dated May 27th, 2010, can be summarized as follows:

- During the investigation, the following deficiencies were observed: two to three horses need hooves trimmed.

- It is demanded that you comply with the following within 30 days of this notice: Arrange for hooves to be trimmed.

- [16] On July 6th, 2010, Ms. Bishop returned to the Tomalins' property to carry out an inspection in order to confirm if the last Compliance Order had been observed and acted upon by the Tomalins. She noticed, at that time, that a barn/shelter was being constructed; however, nothing had changed in regards to the horses. She felt that the water supply had become inadequate, small and muddy since the last visit. She added that she found the carcass of a dead horse and a dead newborn in the pasture. Again, she noticed that the pasture was poor for grazing and some of the horses were ribby. She testified that one could easily see on some of the horses their spine and hips which were not noticeable on prior visits. Finally, she noticed several of the new mothers were very thin.
- [17] She also testified that there was no hay in the pasture and that, overall, she felt the condition of the horses had deteriorated because of the lack of food, water and shelter since it was very hot. To confirm her position, photos of the horses, pasture and water supply were tendered into evidence and marked as Exhibit C-3.
- [18] On July 13th, 2010, Ms. Bishop obtained an Entry Warrant pursuant to the *Entry Warrant Act, S.N.B.*, to enter upon the premises of Sandra Tomalin and Beverley Tomalin in order to search the said premises in accordance with the *Society for the Prevention of Cruelty to Animals Act*.
- [19] On July 13th, 2010, the warrant was executed after Dr. Thomas Ogilvie, who was present on the Tomalins' property, made a general inspection of the horses prior to their seizure. Twenty-three adult horses and fifteen foals were seized and transported to the Department of Agriculture facilities in Lincoln, New Brunswick.
- [20] The horses received veterinarian care from Dr. Gregory McDowell and Dr. Michael Rennick as well as several volunteers who assisted in providing care to the horses which were eventually all adopted. Three of the horses had to be laid to rest for various reasons.
- [21] Ms. Bishop testified that some horses were able to go into foster care immediately while others took up to eight weeks to fully recover.
- [22] Dr. Thomas Ogilvie was declared an expert in veterinarian medicine. He is an employee with the Department of Agriculture for the Province of New Brunswick. On May 26th, 2010, when he first visited the Tomalins' property, he had only ten days of work experience with the department, having just graduated that spring.
- [23] Nevertheless, when he first visited the Tomalins' premises and the horses on May 27, 2010, he found the body condition of the horses to be good in general. Most would have an acceptable body score on a scale from 1 to 9. A few were skinny

and had thick fur coats which is not normal at that time of year. However, he did not do a physical examination of the horses during that visit. He also noticed the stallion was among the mares and should have been segregated until breeding. The pasture looked good, but hay would have been required to supplement the feeding demands of the horses. He noticed the water source and recommended to the Tomalins that a second water source would be helpful. He also recommended that a shelter be constructed particularly for the winter months. He did not feel that these recommendations were being readily accepted by Sandra Tomalin.

[24] Dr. Ogilvie returned on July 13th, 2010, along with the SPCA employees who had the warrant in hand. He conducted a quick inspection of the premises and the horses. He then gave the order to seize the horses as they were in need of veterinarian care. He concluded that the horses' lives were in danger. In his opinion, on that day, the issue of starvation was his main concern. His report can be summarized as follows:

- Upon arrival, he noted that the horses were in significantly worse condition compared to his previous visit on May 27th, 2010.
- He estimated that 80% of the horses were now in a malnourished state.
- Many horses were showing signs of emaciation and muscle wasting.
- He observed that, once the horses were fed by the SPCA employees, they gorged themselves with the hay provided, stopping only to drink. In his view, this was not normal horse behavior. Some horses will eat in that manner, but the vast majority will graze, drink, feed and explore the pasture if given the opportunity, only feeding for brief periods at a time, not continuously as these horses were doing.

[25] Dr. Ogilvie's report was entered as Exhibit C-9 and his conclusions are as follows:

“It was obvious to me, and anyone with general animal husbandry knowledge, that these animals were not receiving adequate care/nutrition. In my opinion leaving the horses at this location would only further add to the suffering of the animals and likely more animals would die in the upcoming days and weeks. I feel these horses should not be returned to these owners, because they cannot provide adequate care and do not have a grasp of proper animal husbandry.”

[26] Dr. Gregory McDowell was declared an expert in veterinarian medicine and he is also an employee with the Department of Agriculture. His responsibility was to treat the horses upon their arrival at the department stables. He saw the horses on July 14th, 2010, and proceeded to treat and evaluate their condition.

- [27] He used the Henneke scoring scale on 1 (bad) to 9 (good) ratios and found the following: horses found to be in the 5 to 6 range should be the average. However, horses found in the 4 to 7 range are in a more normal range. He found 26 of the horses ranked 3 or less. He says the vast majority of horses were in poor condition.
- [28] He testified that one of the reasons for the poor body condition of the horses may have been that they were infected with parasites. The parasite scale is a ratio of 1(good) to 4 (bad) and his findings were as follows:
- 8 horses were at a + 2;
 - 18 horses were at a + 3;
 - 11 horses were at a + 4.
- [29] He treated the horses for internal parasites. He said it is a common occurrence in horses and, actually, a little presence of parasites is desired to keep up the immune system of the animal. Nevertheless, one who cares for horses should treat for parasites on average every three months, meaning deworming the horses particularly if they start to lose body condition. Dr. McDowell said, in the long term, untreated parasites cause colic and eventual death.
- [30] As to the hydration of the horses, the blood work done was not conclusive. At worst, he found a mild dehydration of the horses. He said that the behavior of the horses is more accurate than any hydration test. He testified that the horses drank and ate very aggressively and constantly for two days and then settled down to a more normal pattern which confirmed to him that they were thirsty and thus dehydrated. His opinion was that it would have taken a prolonged period of neglect for the horses to compete for the food and water and to do so constantly as they did.
- [31] Dr. McDowell never visited the site, but when shown photos of the water supply being a small spring, he felt that would be a very poor water supply.
- [32] In his report dated March 31st, 2010, entered as Exhibit C-13, Dr. McDowell summarized his findings as follows:
- A mare with impaction colic;
 - A gender mixed herd;
 - An age mixed herd;
 - A thirsty and hungry herd;
 - A herd of 38 horses with significant weight loss, having a Henneke body condition score of 3 or less in 26 horses;
 - A herd with a large number of mature horses with poor handling training;
 - A herd with multiple scratches, bites and cuts;
 - A herd with clinically significant intestinal parasitism;
 - A herd with lice infestation;

- A herd with contagious skin infection;
- A foal with carpal valgus (knocked knees) of both front legs;
- A mare with heaves (recurrent airway disease);
- A mare with a ruptured and chronically infected eye ball;
- A lactating mare with severely dropped fetlocks;
- A few horses with overgrown and/or cracked hooves.

[33] At page 2 of Dr. McDowell's report, he says several of these findings are clearly a result of neglect.

[34] Dr. McDowell continues at page 5:

“In this herd with such a large number of horses with obvious poor body condition, the caregiver should have consulted with a veterinarian and then acted on the advice. Not to have done so constitutes neglect by the caregiver.”

At page 4 he adds:

“ Animal abuse can be due not only to willful cruelty but also due to neglect by a caregiver's ignorance or inexperience, delegation of care, or financial hardship, but none of these is justifiable excuse for abuse. The importance of maintaining a normal body condition in a horse should be general knowledge for a horse caregiver.”

[35] He adds at page 6 and I quote:

“Lack of proper deworming in this case with a large number of horses with obvious poor body condition is further evidence of neglect by the caregiver.

If the herd was not now under the control of the N.B.S.P.C.A., neglect by the caregiver would have contributed to the potential spread of the lice infestation in the herd and added further complications to the already existing problems of weight loss and internal parasitism.”

[36] Dr. McDowell took photos, entered as Exhibit C-16, of some of the horses after they had been treated and properly fed for some time. He pointed out that the horses had improved so much that they were no longer recognizable from the first time he saw them.

[37] Dr. Michael Rennick was also declared an expert in veterinarian medicine. He was called in to assist with the treatment of some of the horses. Dr. Rennick did not observe the horses on the site of origin, but dealt with them from July 22nd, 2010, to September 9th, 2010, in the stables at the Agricultural Research Station.

His report dated March 30th, 2011 was entered into evidence as Exhibit C-18 and he concludes in the last two paragraphs that:

“All horses present were observed to have below normal body condition scores. Lactating and geriatric individuals appeared to be more severely affected. Several individuals grossly demonstrated clinical evidence of ectoparasites. All individuals were observed to have elevated appetites. Individual behavior and response to handling was deemed to be very poor and greatly increased the difficulty of performing an examination and delivery therapeutic treatment to these horses.”

“The overall clinical picture of the herd observed indicated that insufficient nutrition and substandard animal husbandry was available to these horses at the premises or origin. The appearance of the herd was consistent with poor general husbandry deemed to be below standard of care. Given the poor clinical condition observed in the horses observed at the Agricultural Research Station facilities factored with the number of mixed gender horses and prevalence of foals at the foot present on the premises of origin, the conclusion of this clinician is that these horses were subjected to abuse by neglect similar to that observed in documented cases of animal hoarding.”

- [38] In his testimony, Dr. Rennick concluded that there had to have been weeks, even months, of insufficient nutrition and proper care as all the horses had improved after treatment, except for one. In his opinion, the required time for the proper care of 38 horses would be very intense, such as supplying 30 to 40 round bales of hay per day, 20 to 40 litres of water (more in the summer, less in the winter) and requiring 2 acres of grazing pasture per horse. He did say you may get away with one acre if the pasture is a really good grazing area. Regular veterinarian care would be required, particularly when problems arise such as weight loss and the horse not acting normally.
- [39] The evidence showed that some 75 volunteers, along with the SPCA staff and veterinarians, were required to care for the horses and this for at least a month. It took between 8 to 10 volunteers in the morning, 3 to 4 in the afternoon and 8 to 10 at night.

EVIDENCE OF THE DEFENCE

- [40] The Tomalins called two witnesses, namely: Alvin Watson and his brother, Alfred Watson. The Tomalins moved to the Tilley area in April 2010 and Mr. Alvin Watson, being a neighbor, visited them to welcome them to the region. Their relationship developed from that point on and he eventually provided various services to the Tomalins. To do so, he requested the assistance of his

- brother, Alfred Watson, particularly in constructing a fence to extend the grazing pasture for the Tomalins' horses.
- [41] Mr. Alvin Watson, a farmer in his own right, having grown several varieties of crops and raised all sorts of animals, was well acquainted with the Tomalins' property as he had rented the land for farming purposes for several years. He claimed that the land was difficult to work with as all the fields were extremely wet. Surface water was easily obtained no more than six inches in the underground. He testified that there were several springs on the property. In his view, these various water sources would have been available to the horses.
- [42] The Tomalins hired Mr. Watson to extend their pasture land by some 8 to 10 acres, which he did with the assistance of his brother. They also requested him to construct a shelter/barn for the horses, which he started in late June and in fact was working on the barn when the horses were seized on July 13th, 2010.
- [43] As for the horses, he confirms that the Tomalins were breeding the horses for resale as he had bargained himself with the Tomalins to purchase two yearlings; however, the transaction was not completed before the seizure. As well, another individual had purchased a horse from the Tomalins prior to the seizure.
- [44] Mr. Watson is experienced with farm animals and horses and said that some of the Tomalins' horses were in good shape and others he would have liked to have seen more flesh on them. He testified that he delivered his surplus hay to them on a regular basis and the total area fenced in for pasture land was approximately 30 acres. He felt more pasture land would have been beneficial as some of the current pasture land was not the very best for grazing. The Tomalins had asked him to develop more pasture land after the construction of the barn. The total pasture land stood at 20 plus acres after the last extension and there was a requirement for approximately 12 to 15 more acres which was planned.
- [45] In his view, there were enough signs of concerns with regards to the health condition of the horses that he would have called a veterinarian to inspect and treat them for parasites if warranted.
- [46] He testified that when the SPCA seized the horses, some 25 horses would have been in need of attention such as feed and veterinarian care. He thought and suggested to them that some of the horses should remain on site.
- [47] Mr. Alfred Watson confirmed that the Tomalins were raising the horses for resale. He testified that eight of the horses were to be sold, namely: two to his brother and six to other potential clients. He was aware that they had already sold one horse.
- [48] With respect to the health and condition of the horses, he confirmed his brother's testimony that some were in poor shape and one mare was in distress. He did feel that the ribbing showing on some of the horses may have been normal this time of

year. During his time on the premises, he also observed that the horses were feeding normally.

THE ISSUE

[49] Did the Tomalins provide adequate food, water, shelter and care in conformity with section 4 (1) of Regulation 2000-04, a regulation made under the *Society for the Prevention of Cruelty to Animals Act*?

POSITION OF THE PARTIES

[50] The parties submitted briefs on their respective positions as follows:

CROWN:

- The Crown submits that it has proven all of the essential elements of the offence and that the defendants have not demonstrated that they took all reasonable steps to avoid the particular situation with the horses.
- That it is clear from the expert evidence that the horses were in need of veterinarian care and that they were neglected according to the standards required when caring for horses.
- It is therefore the submission of the Crown that both Sandra Tomalin and Beverley Tomalin should be found guilty of the offence for which they stand charged.

DEFENCE:

As in every quasi-criminal case before the court, it is incumbent on the Crown to prove beyond a reasonable doubt all aspects of the charges before the Court.

Under the Regulations, standard for animal care, regulation 4(1) (a), the Crown must prove beyond a reasonable doubt that the animal has an adequate source of food and water.

1. No evidence was offered to the Court as to quality of the water;
2. No evidence was offered as to the quantity of water at the source, other than Alban Watson stating the water table was 5 inches below the surface and from his actual experience of farming the ground it was very wet and further there was sufficient water;
3. No expert opinion was offered as to quality or quantity of water;

4. Dr. McDowell stated that only a very few horses experience minor dehydration which could have been caused by the trauma of loading and not being watered for 11 hours while being loaded and transported;
5. The only witness who actually watered the horses on July 13, 2010, was APO Lynch, who stated only a few horses came to him when he offered water. He could only state he watered the three horses that were in the small trailer. No evidence was offered as to watering the remaining 35 horses, all loaded in the stock trailer;
6. As Dr. McDowell stated, he could not give any opinion as to quality or quantity of water from pictures. He had to be on the farm, the Court is faced with the same problem;
7. No results of the hay or pasture grass was offered by the Crown as to quality;
8. Exhibit D-2, Tab 6, one of the bills for hay from Parker Potatoes Ltd., bill from Hazel Bragdon and Allan Watson, totaling \$535.00 for hay purchased from June 5, 2010 to July 8, 2010;
9. There were 22 adult horses feeding off of 40 acres of pasture, not 38 horses as 12 were foals and 4 were yearlings;
10. No evidence was offered as to the monitoring of the Tomalin Farm as to lack of hay provided to the horses. However, evidence was offered as to numerous bundles being present on the Tomalin Farm on July 13, 2010, along with Alban Watson's testimony and invoice (see D-2, Tab 6, page 3) for hay delivered from June 5, 2010 to July 8, 2010.

Regulation 4(1) (c), shall provide the animal with reasonable protection from injurious heat or cold, which the Crown must prove beyond a reasonable doubt:

1. In Exhibit D-2, Tab 1, the 12 photos provided by the defense of the horses in the pasture, shows a treeline, which Dr. Olgivie testified was enough shelter for the summer;
2. The same treeline is depicted in Exhibit C-21, photos 2c, 4c, 5c, 6c, 7c and 11c along with Exhibit C-3, photos 1, 2, 3, 4, 2a, 3a, 4a, 11a, 15a, 16a, 43a and Exhibit C-7,, photos 1d, 6d, 10d, 11d, 12d, 13d, 14d, 21d, 23d, 25d, 26d and 29d; all of which show woods that were not merely brush but trees of middle or mature growth, which offered shelter for the horses;
3. All the witnesses for the Crown that had been present on the Tomalin Farm supported the testimony of Alban and Alfred Watson that they were building a pole barn for shelter, which was started prior to July 6 and was 70% completed by July 13, 2010;

4. Dr. Olgivie stated he advised the Tomalins that they needed a shelter constructed by winter along with an alternate water source as he was content with the trees being used as shelter for the summer months;

Regulation 4(1) (b), shall provide the animal with adequate medical attention where animal is wounded or ill, which the Crown must prove beyond a reasonable doubt:

1. APO Lynch testified that none of the horses were sick or injured, that he seized on July 13, 2010 and delivered to the barns in Fredericton and further advised the veterinarian on-call not to attend until the following day;
2. Dr. McDowell testified that the horses thin body condition was due to parasites which he called a disease but went on to testify that all horses have parasites and that some amount of parasites are required on every horse;
3. The Tomalins arrived with their horses at Lerwick Road the last of April, 2010 and were confronted by the SPCA within 2 weeks of arrival. On May 27, 2010, the veterinarian, Dr. Olgivie, in his invoice, stated "*horses appear to be in good health, pasture adequate and so is water source, wood shelter is fine for summer*". Dr. Olgvie promised to return within 30 days but did not return until 40 days after, being appraisal of supposed problems by APO Bishop. It is admitted that the Tomalin could have used some assistance from the SPCA officer Lindsay Bishop, if she would have utilized the educational approach, not the confrontational approach.

The only horses that were disposed of by the SPCA were not due to malnutrition or dehydration or lack of shelter but due solely to the SPCA not wanting to spend money to have the stallion geld or the young foal's knees repaired.

All the horses were released to new owners within 60 days of seizure to owners as selected by the SPCA.

Regulations 4(1) (a) and (b) use the word adequate, which the Black Laws' Dictionary defines at page 36:

"sufficient; commensurate; equally efficient; equal to what is required; suitable to the case or occasion; satisfactory; equal to some given occasion or work."

The Tomalins arrived in a new location and were instructed by the SPCA officer and veterinarian to build a shelter, increase the pasture size and use hay while increasing pasture size.

The Tomalins complied and proceeded to build a shelter, increase the pasture size and use hay in the alternative.

None of the animals were wounded or ill, their body condition was due to intestinal parasitism, which is present in all horses.

Considering all the evidence before the Court, the Crown has failed to prove that the Tomalins breached the Sections under 18(1) of the Society of the prevention of Cruelty to Animals Act, reference to Section 4(1) (a) (b) and (c), the regulations.

What the Crown has established, is that 12 of the 38 horses were thin due to having intestinal parasites, which from May to August of every year is common in all horses. Therefore, the Tomalins should be found Not Guilty.

ANALYSIS

THE PERTINENT SECTIONS OF THE REGULATION AND ACT:

REGULATION

[51] **s. 4 (1) of the Regulation 2000-04** reads as follows: For the purpose of subsection **18 (1) of the Act**, a person who has ownership, possession or care and 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, area or motor vehicle**
 - (i) with inadequate space,**
 - (ii) with unsanitary conditions,**
 - (iii) with inadequate ventilation**
 - (iv) with inappropriate other occupants,**
 - (v) without providing an opportunity for exercise, or**
 - (vi) that is in a state of disrepair, so as to significantly impair the animal's health or well-being.**

4(2) A person shall not be convicted of an offence under subsection 18(2) of the Act for treating an animal in a manner

- (a) consistent with a standard or code of conduct, practice or procedure specified in Schedule A,**

- (b) consistent with generally accepted practices or procedures for such an activity, or
 (c) otherwise reasonable in the circumstances.

[52] The **Regulation 2000-4** makes reference to the following Guide of Practice of the Canadian Agri-Food Research Council:

Schedule A
 STANDARDS FOR ANIMAL CARE
*Recommended Code of Practice for the Care and
 Handling of Farm Animals: Horses*, published by
 the Canadian Agri-Food Research Council, 1998

THE ACT: Society for the Prevention of Cruelty to Animals Act

s. 18(1) of the Act reads as follows: A person who has ownership, possession or the care and control of an animal shall provide the animal with food, water, shelter and care in accordance with the regulations.

s. 18(2) of the Act reads as follows: A person who violates or fails to comply with subsection (1) commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category C offence.

[53] The definition of “adequate” for our purpose can be found in Black’s Law Dictionary, Revised Fourth Edition, as:

“Sufficient; proportionate, equally efficient; equal to what is required; suitable to the case or occasion; satisfactory.”

[54] In this case, I find that the Tomalins have not met the standard of care required in the circumstances. I conclude that the Crown has established a very strong *prima facie* case which was not adequately answered by the Tomalins. I do so, first of all, because of the overwhelming expert evidence which leads to only one conclusion: that the horses seized were not cared for properly and were neglected.

[55] It would be fair to say that the Tomalins were making some efforts to rectify the situation but it was too little too late. They simply ignored the several signs that pointed to a herd of horses in distress. By their lack of care and actions, they had already put in danger the health and lives of the horses.

[56] The Code of Practice for horses, which was entered as Exhibit C-19, is a work prepared by the Canadian Agri-Food Research Council and will assist in explaining my decision. The code itself is not law and thus it is not binding as it is only a code of recommended practices, the highlights of which can be outlined as follows:

[57] **Code of Practice - Shelter and horse facilities:**

- **The design and use of shelter facilities should promote the health, well-being and good performance of horses throughout all stages of their lives.**

The evidence in this case identified that these horses were free range horses and that the position of the Tomalins was that, first of all, there was enough wooded area for their use and protection. Secondly, they were in the process of constructing a shelter for the winter months as recommended by Dr. Ogilvie and the SPCA.

In this regard, I give the Tomalins the benefit of the doubt. I am not quite sure that the wood cover was enough on extremely hot days, but the evidence was not conclusive and a reasonable doubt does exist in regards to the inadequacy of the shelter provided. I also note that they were in the process of building a shelter for the winter months.

[58] **Code of Practice - Feed and water:**

- **Horses should receive a daily diet that is adequate for maintaining health. Horses should be fed on a regular schedule.**
- **When horses are fed in groups, enough manger space or feeding points should be available to minimize competition for feed.**
- **Every horse must have access to sufficient supply of potable water to meet its individual maintenance and activity needs. A horse's daily water requirements range from 20 litres to more than 36 litres.**

The evidence in regards to the water issue: This issue certainly was not clear. The photographs introduced did not show a plentiful water source. In addition, evidence by the defence states that this property was very wet land and the water supply should have been adequate. No evidence was introduced as to the potability of the water supply.

Certainly, Dr. Ogilvie said that a secondary water supply such as a water bin would be required for the winter months. Ms. Bishop for the SPCA witnessed the water supply depleting and becoming muddy overtime.

Secondly, the food supply: The food supply was inexistent on the two first visits by the SPCA. When they arrived to seize the horses, some hay of questionable quality was available. No testing or evaluation of the hay was produced.

In addition, the fact that the horses gorged themselves for two days with the water and food provided to them at the Department of Agriculture stables is revealing.

In my view, it confirms the evidence of the SPCA inspectors, the evidence of Dr. Ogilvie, Dr. McDowell and Dr. Rennick, that there were serious issues with this herd of horses. The photographs of the horses introduced into evidence are also very conclusive in determining that the Tomalins' lack of care for the horses, whether it be adequate food, water or veterinarian care, was all too evident.

There is no doubt that these horses were in very poor health, dehydrated and infected with parasites and had other health issues as well.

[59] **Code of Practice - Pastures/yards:**

- **Properly maintained pastures may provide all or most of the nutrient needs of horses. Supplements should be provided, when necessary, to offset in pasture quality and quantity.**
- **To prevent digestive and health problems, horses should be gradually introduced to pasture, especially in springtime.**
- **Horses on pasture should have access to well-drained resting area and to a natural or constructed shelter to protect them from adverse weather conditions.**

I find the evidence conclusive that this property was not adequately prepared or ready to handle the 38 horses occupying the pasture land. On this issue, even the defence witnesses agreed that more land was required and that the present grazing area was not up to par. Granted, the Tomalins had plans to increase the pasture acreage, but in my view again this was too little too late.

[60] **Code of Practice - Health management:**

- **Horses should be inspected frequently to ensure that they are healthy.**
- **A parasite control program should be established in consultation with a veterinarian. This will include the administration of anthelmintics (dewormers) and manure and pasture management.**

I find that no such control or inspections were in place. It was clear that these horses were failing and failing fast before they were seized. There was some evidence by the defence that the Tomalins were concerned and had spoken to a veterinarian about deworming. However, the Tomalins' attitude with the SPCA, and particularly Dr. Ogilvie, was that they did not seem interested in receiving much professional advice in raising these horses. I must add that even one of the defence witnesses, who spent several hours on the property either constructing pasture area or building the barn, testified that he never saw a vet on the premises and he believed one should have been called.

From Dr. McDowell's evidence and expert report, the only conclusion that the Court can arrive to is that the Tomalins should have recognized the failing health of the horses and, if they did not believe it to be lack of food or water, they had to have parasites in mind. At the very least, they should have sought professional advice, which they failed to do. Therefore, they failed to provide adequate care as foreseen under this heading.

I repeat, as Dr. Ogilvie pointed out in his report, "It was obvious to me, and anyone with general animal husbandry knowledge, that these animals were not receiving adequate care/nutrition".

- [61] The defence raised several issues in regards to when and how the horses were seized and transported to Fredericton. They raised the issue of the lack of water for the horses during the seizure and transportation process. There was the issue of the fact that the horses were not segregated and an electric prod was used on one horse all against practice found in the Code of Practice. These are legitimate concerns and they may have contributed somewhat to the ongoing deterioration of the horse; however, the poor condition of the herd was readily prevalent prior to their seizure. I find the seizure and transportation of this large number of horses would have been difficult and was a necessary step in ensuring the long term well-being of the horses.
- [62] Finally, the failure of the SPCA to test the water, fecal samples, grass or hay is in my view irrelevant. This evidence would not have greatly assisted the Court in its evaluation of the overall evidence. The evidence before the court surrounded the adequacy of the water supply and the grassing area, and not so much the quality.
- [63] In summary, it is clear that the Tomalins were not prepared to care for the number of horses they had in their possession. I find the grassing area was inadequate, the water supply was inadequate and veterinary care was non-existent. It is clear that the food supply was not adequate. One may argue that they were making progress but, unfortunately, the horses could no longer wait. The evidence clearly establishes that the well-being and maybe the survival of the horses were only secured once they were seized and cared for by the SPCA.

CONCLUSION

- [64] I find beyond a reasonable doubt that the Tomalins did not meet their obligation to provide adequate food, water and care under the *Act* and Regulations and I find them both guilty as charged.

Dated at Grand Falls, New Brunswick, on September 16th, 2011.

Paul E. Duffie
Judge of the Provincial Court