

Case Name:
R. v. Hunter

Between
Her Majesty the Queen, and
Kenneth Hunter

[2011] O.J. No. 4120

241 C.R.R. (2d) 218

Information No. 100516

Ontario Court of Justice
Perth, Ontario

R.J. Switzer J.P.

Oral judgment: July 29, 2011.

(27 paras.)

Charges: s. 11.2(2) - Ontario Society for the Prevention of Cruelty to Animals Act -- s. 11.1(1) - Ontario Society for the Prevention of Cruelty to Animals Act -- s. 13.(5) - Ontario Society for the Prevention of Cruelty to Animals Act

Counsel:

K. Moore, Ms, Counsel for the Crown.

K. Andrews, Esq., Counsel for the Accused.

REASONS FOR JUDGMENT

1 R.J. SWITZER J.P. (orally):-- In this motion before the court the applicant, Kenneth Hunter, has brought an application requesting (a) all evidence gathered during the October 14th and 15th, 2010 search of his property be excluded; (b) all orders of the OSPCA subsequent to that search be declared null and void; (c) all other evidence gathered during that search be excluded; (d) costs be awarded to him on this matter.

2 During the afternoon of October 14th, 2010, OSPCA Inspector Wilkinson received information advising him that animals were in distress on the property of Kenneth Hunter. Inspector Wilkinson conducted a warrantless search of Mr. Hunter's private property at noon on the following day, October the 15th, 2010, accompanied by a veterinarian. Inspector Wilkinson offered the following reasons for his warrantless search:

- * he expected to be denied access to the barn;
- * he was concerned about the safety of the animals;
- * he was concerned about the destruction of evidence;
- * he was concerned about the safety of his person and anyone accompanying him.

3 Inspector Wilkinson chose to go the following day on October the 15th at noon in order to acquire the services of a veterinarian, who was unavailable both on the previous evening and on the morning of October the 15th. Inspector Wilkinson tells the court that in retrospect he believes he made an error in judgment, but maintains that he was acting in good faith. He admits that he never considered obtaining a judicially authorized warrant.

4 The Supreme Court in *R. v. Evans*, [1996] 1 S.C.R. 8, outlines the importance of the sanctity of one's privacy in their home and on their property, and that this sanctity should not be lightly interfered with. Case law supports that this principle extends to rural property, although there might be some exceptions depending on the circumstances. There were no exceptional circumstances obvious in this case.

5 The usual and expected practice is for inspectors to seek judicial authorization before entering a person's home or property. The inspector may seek a warrant by telephone if it is impractical to appear before a Justice of the Peace or provincial judge. The warrant is issued where the official is satisfied by information on oath that there are reasonable grounds to believe that there is an animal in distress. There is an exception. An inspector may enter a building or place without warrant where there is an animal in "immediate distress." "Immediate distress" requires immediate intervention in order to alleviate suffering or the preservation of life. The OSPCA interprets "immediate distress" as a life threatening situation.

6 There was no evidence before the court that there was a situation of immediate distress. In this court's view, Inspector Wilkinson's decision to postpone the inspection until October the 15th at noon substantially undermines any contention that he believed that the animals were in immediate distress. By all indications Inspector Wilkinson had ample time to obtain a judicially authorized warrant by simply following the usual protocol of practice in the prescribed manner as referred to previously. Although Mr. Hunter never asked Inspector Wilkinson to leave the premises when he encountered him on his property during that initial warrantless search on October the 15th, 2010, that cannot be interpreted nor construed as implied consent for Inspector Wilkinson to conduct the search.

7 The prosecutor believes that Inspector Wilkinson acted in good faith, that he had reasonable grounds to conduct the search based on the information he received, but concedes that the right to conduct a warrantless search the following day, October the 15th, was diminished by the delay in action by the Inspector.

8 The appellant describes the warrantless entry into the barnyard area as a bad decision and states that the entry, "although not profoundly intrusive, it is close." The appellant also concedes that there

were reasonable grounds for the inspector to believe that some animals were in distress based on information he had received.

9 The court believes that there were various options open to Inspector Wilkinson. In his testimony Inspector Wilkinson told the court that in his previous dealings with Mr. Hunter he found him to be approachable, cooperative and had never experienced any difficulties with him. He could simply have asked Mr. Hunter if he could inspect his premises because of his concerns about the welfare of the animals. If he had expected refusal of entry by Mr. Hunter he could have sought to obtain a search warrant either in person or by telephone. There was no testimony given as to why Inspector Wilkinson would have reasonable grounds for concern about his personal safety, nor about the destruction of evidence.

10 It is inappropriate and improper to start an investigation by entering private property in search of an animal that may be in distress without the consent of the owner or without judicial authorization. This also applies to rural calls. One must make a reasonable inquiry at the house. If there is no one home the inspector should leave his card for the owner to call. The court did not hear any testimony that Inspector Wilkinson considered or chose any of these options.

11 The court concludes that a breach occurred.

12 The court must now consider whether to exclude evidence gathered from that initial warrantless search and subsequent visits arising from that search. In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court provides three factors or criteria for the courts to consider when conducting a Section 24(2) analysis.

- (A) Whether the evidence will undermine the fairness of the trial by effectively conscripting the accused or defendant against himself;
- (B) The seriousness of the Charter breach;
- (C) The effect of excluding the evidence on the long term repute of the administration of justice.

13 In *Collins* the Supreme Court instructed that the court's role is to balance the assessments under each of these lines of inquiry to determine whether considering all of the circumstances admission of the evidence would bring the administration of Justice into disrepute.

14 The evidence gathered is not conscriptive. With respect to factor (B) charter violations vary in seriousness. It is not unusual that there are minor Charter breaches in some cases and some technical breaches which do not involve the exclusion of major parts of evidence. At one end of the spectrum admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in rule of law. At the other end of the spectrum admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on public confidence in the role of law. In risk of bringing the administration of justice into disrepute ignorance of Charter standards must not be rewarded nor encouraged and negligence cannot be equated with good faith.

15 Obviously the public have a serious interest involved in cases of animal welfare. Although the charges which resulted from this investigation are not criminal, but regulatory in nature, the charges are serious and can result in large monetary fines and imprisonment. It is also true that the public in a free and democratic society regard personal privacy as an important part of the Charter of Rights. This court must consider what a reasonable and informed public, knowing the relevant facts of this

case, would conclude when faced with both of these legitimate and important concerns, namely: the prosecution of animal welfare cases and the reasonable expectation of the privacy of one's home and property.

16 I have reviewed all of the cases provided by both parties. I have summarized the evidence arising from the warrantless search of October the 15th, 2010. I have considered the various options available to Inspector Wilkinson at that time. I have assessed and balanced the evidence based on the three factors or lines of inquiry outlined in *Grant*. I have considered what a reasonable and informed public might conclude with respect to the facts of this particular case.

17 In consideration of all the circumstances of the case I have determined on balance that the breach is serious and significant and that the admission of evidence obtained by the breach would bring the administration of justice into disrepute. For the reasons stated I thereby order that all evidence be excluded, that all orders issued arising from this search be declared null and void, that all other evidence arising from the search be excluded.

18 The court will now seek submissions regarding the possible awarding of costs in this matter.
... COUNSEL SUBMISSIONS ON COSTS

RECESS

UPON RESUMING:

REASONS FOR JUDGMENT ON COSTS

19 R.J. SWITZER J.P. (orally):-- Mr. Andrews is asking the court that costs be awarded to him not by the Crown, but by the OSPCA. He would admit that the request is a novel approach, but he argued that although there is no case law to specifically substantiate such an award, that the discretion given to a judge by the language and wording of the law is broad enough to allow such an award. The Crown states categorically that the court has no such jurisdiction to award costs and argues that any award should be in civil court.

20 The defendant has not sufficiently persuaded me that I do have the jurisdiction. I believe the appropriate place to argue this would be in a civil court for costs.

21 We know that case law supports that there must be unusual circumstances involved and extreme hardship on the defendant to award costs.

22 I have considered what would happen if Mr. Hunter had come before the P.O.A. court to defend the charges as an unrepresented defendant. Justices who preside at regulatory trials where there are unrepresented defendants cannot act as their advocates, but they can and should offer instruction where appropriate. It is certainly true that justices must walk a fine line between advocacy and instruction. Justices are instructed to be alert and vigilant for possible Charter violations when unrepresented defendants come before them. I cannot state with certainty that such would be the case if Mr. Hunter came before the court defending these charges on his own and without the assistance of defence counsel. However, in my opinion, the nature of the evidence presented by the Crown in a case such as this would easily trigger a question by the presiding judge as to how the evidence was obtained.

23 Under the guidelines for judges the presiding justice should then conduct some basic inquiries that would probably lead to finding a result similar to the one I just gave. This is not to depreciate your fine efforts in what you did in your presentation, but quite frankly, I believe if Mr. Hunter had come before a P.O.A. court I think that the same result would have been achieved.

24 Now, Mr. Andrews has argued that the OSPCA will pay no penalty, incur no costs, that they will not be damaged by this. My understanding is that the OSPCA is somewhat dependent on the charitable contributions of generous supporters. I believe it is true that the OSPCA's reputation is generally tarnished and damaged by cases such as this because these same donors are also supporters of the sanctity of one's privacy on their own property. So it can impact, in my opinion, and will impact. One case in and of itself will not, I believe, impact. However, if there is a series of similar cases and if their inspectors do not take care they will feel a major impact on their fund raising efforts.

25 Everyone is a loser in a case such as this. We could argue who is the biggest loser, I do not know. I am not prepared to award any costs.

26 MS MOORE: Thank you. Based on your ruling on the Section 8 and 24 argument the Crown has no further evidence to tender on the substantive charges and I am therefore withdrawing the charges.

27 THE COURT: Okay, that is fine.

---- End of Request ----

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