

**IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR**

**JUDICIAL DISTRICT OF GRAND BANK**

**Citation: R. v. Barrett, NLPC 0814A 00017**

**Date: 2015-03-25**

**Docket: 0814A00017**

**Between: HER MAJESTY THE QUEEN**

**- and -**

**TONY BARRETT**

Before: THE HONOURABLE JUDGE H.J.PORTER

**Date(s) of hearing: March 4, 2015**

**Appearances:**

**A. MANNING - for THE CROWN**

**M. EVANS, Q.C. - for THE ACCUSED**

**Cases considered: R. v. Barrett, 2015 CanLII 2415 (NL PC), Kienapple v. R., [1975] 1 S.C.R. 729, R. .**

**Legislation Considered: Criminal Code, R.S.C., 1985, c. C-46; Animal Health and Protection Act, SNL 2010 c.A-9.1; Animal Protection Standards Regulations, NL Regulation 36/12; Interpretation Act, RSNL 1990 c. I-19**

**Porter, P.C.J.**

**Introduction**

[1] These are the reasons for sentence for the accused. By way of outline, I will proceed in this order:

- a) The charges;
- b) The presentence report;
- c) The positions of the parties;
- d) The s. 726 allocution;
- e) The comparable jurisprudence;
- f) Restitution and **Spellacy**;
- g) Fines and surcharges;
- h) The prohibition order pursuant to s. 447.1;
- i) Probation; and
- j) The conclusion.

**The Information**

[2] The Information charged the accused with having committed four offences, as follows:

Count 1

On or between the 6<sup>th</sup> day of November in the year 2013 and the 6<sup>th</sup> day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 445.1 of the Criminal Code.

#### Count 2

On or between the 6<sup>th</sup> day of November in the year 2013 and the 6<sup>th</sup> day of January in the year 2014 at the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT being the owner of animals did wilfully permit to be caused unnecessary suffering and injury to those animals, to wit: seven calves, one goat, one pony and thirteen sheep by depriving them of a sufficient quantity and quality of food to allow for normal, healthy growth and maintenance of normal, healthy bodyweight contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

#### Count 3

On or about the 6<sup>th</sup> day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: five dogs, permit those animals to be in distress by failing to provide clean, fresh, unfrozen drinking water at all times contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

#### Count 4

On or about the 6<sup>th</sup> day of January, 2014, at or near the town of Winterland in the Province of Newfoundland and Labrador, Tony BARRETT did being the owner of animals to wit: two dogs, permit those animals to be in distress by failing to provide adequate shelter contrary to section 18(2) of the Animal Health and Protection Act and punishable by section 76(1) of the Animal Health and Protection Act.

[3] The accused was found guilty of all four of the offences charged. The reasons for doing so are reported at **R. v. Barrett**, 2015 CanLII 2415 (NL PC). However, pursuant to **Kienapple v. R.**, [1975] 1 S.C.R. 729, a judicial stay of proceedings was ordered in relation to count 2. These reasons set out the sentences for Counts 1, 3, and 4 of the Information. Let us begin with the presentence report.

### **The Presentence report**

[4] The presentence report is comprehensive and helpful. It sets out his personal circumstances, and makes the attitude of the offender clear. Here let me summarize some of the information found in the presentence report. On page 3 we learn that the accused is 50 years old, and has one sibling. His father has passed, and his mother is 70. His wife died (in 2013) after they had separated (in 2011). On page 4 we learn that the accused has 2 adult sons, neither of which live with him. He had been in a relationship, but it ended in May, 2014. He believes that his new partner was not prepared to subject herself and her family to the media exposure relating to his court proceedings.

[5] Page 5 describes the accused as a first offender. Due to a back injury, the accused has not been employed since 2010. The injury was not work related and according to the accused he will not be able to return to gainful employment in the foreseeable future. In relation to his farming, he considers this to be only a hobby. The accused, who is physically disabled, reported he has a monthly income from Canada Pension Disability in the amount of \$1007.00 per month. Apart from the expenses of daily living, he declared a monthly mortgage payment of \$387.79; insurance payment of \$114.00 per month; and life insurance policy payment of \$39.00 per month. The accused's mother stated that she helps him out as best she can because he finds it difficult financially.

[6] On page 6 we learn that the accused was taking Percocet for back pain. Counsel for the accused said that he has since successfully weaned himself off the Percocet. But the more important thing disclosed on page 6 is the attitude of the accused, as follows:

Regarding the present matters before the court, **the accused maintains he did the best he could under the circumstances and that he never intentionally did anything to hurt any animal.** In retrospect, he stated, if there was anything he would have done

differently it would have been to remove the animals from the pasture sooner. **The accused believes the full story regarding the animals and how they should be cared for, etc., did not come out in the judicial hearings.** For example, the accused reported his dogs were Maremma Sheep dogs which are capable of killing a coyote. This type of dog he argued doesn't want to be sheltered and stated that when he did attempt to confine them, they tore his porch apart in order to get out. **He stated the law pertaining to the care, i.e., shelter of dogs, needs to be more extensive as to the types of dogs that should be excluded from it.**

The accused alleges he was told something different by the veterinarian than what they acknowledged in the court hearing. **He is adamant that the veterinarians lied** and seems frustrated that they were not held accountable for their lies within the process.

The accused puts forth many arguments to show that he did not intentionally bring any harm to the animals. He stated even though the winter in question was a particularly hard one, and thus presented certain challenges, he stated for the most part he followed past practices and provided the same standard of care. **He stated it was never brought to his attention that such practices were unacceptable.**

[7] On this latter point, it must be said that that is not correct. The evidence from the veterinarian, Dr. Kellie Libera, was that the accused had been cautioned about the state of his farm, and his livestock, during her visit to the farm on May 17, 2013, and that she had reported the state of the farm to Dr. Whitney's office.

[8] The allegation by the accused about the commission of perjury during the trial is also something which must be rejected. There was simply no evidence to support that allegation.

[9] On page 7, we learn that the accused was cooperative with the author of this report. He reported as required and did so in a timely and appropriate manner. He appeared to discuss the

issues in a frank manner and though not accepting of the court's findings of guilt, presented his rationale in a respectful and non-threatening manner. He didn't appear to have any deep rooted anti-authority sentiments nor did he blame authorities for doing what they did but rather disagreed with their conclusions and their actions. The Royal Canadian Mounted Police reported the accused to have been cooperative throughout their investigation.

[10] At the end of page 7, we read the following:

The purpose and procedure relating to supervised probation or other community supervision was discussed with the accused. Though he does not accept the findings of guilt, the accused is prepared to accept any conditions imposed on him by the court except for a fine order. The reason is that given his financial circumstances, he is confident he won't be able to honor such an order.

[11] So there we have it. The accused denies having done anything wrong, and will not pay any fine.

[12] Now let us move on to the positions of the parties on a reasonable disposition for these offences.

### **The position of the Crown**

[13] Counsel for the Crown said that the appropriate sentence should include the following:

- a) 12 months in jail;
- b) An order for the payment for veterinary and foster care accommodation of the livestock taken from the accused, in a total amount of \$43,570.14;
- c) A lifetime ban on possession of any animal;

- d) Fines of \$500.00 each for each of the two Animal Health and protection Act offences; and
- e) Supervised probation for 2 to 3 years, with conditions for reporting and attending counseling for mental health issues.

### **The position of the Accused**

[14] Counsel for the accused said that the appropriate sentence should include the following:

- a) A conditional sentence, of a few months; and
- b) A prohibition from the possession of livestock.

### **The s. 726 Allocution**

[15] According to the accused, he is impecunious, and therefore cannot pay fines, or anything towards the costs of caring for the animals which were taken from his farm. When the suggestion that he might be able to liquidate the farm in order to pay the fines and the restitution order, the accused said that he does not actually own the farm, other than the piece that his dwelling is on, and that piece is mortgaged.

[16] The accused maintains that he did not intentionally hurt any animal, and that he is not guilty of having committed any offence.

### **The jurisprudence**

[17] In **R. v. Oake**, [2010] N.J. No. 94, the Court of Appeal indicated that a judge has a duty "to impose sentences in line with precedent, noting always that for each offence and each offender some elements are unique."

[18] Causing unnecessary suffering to livestock, as set out in s. 445.1 of the Criminal Code, is not a prevalent offence in this jurisdiction. As a result, all of the decisions referred to by counsel during their respective submissions were decisions from other jurisdictions. None of those cases involved the imposition of a period of incarceration for any longer than six months. The cases referenced by counsel during their submissions include the following:

- a) **R. v. Materi**, 2005 BCPC 0085, emaciated horses and a puppy mill, 6 months conditional sentence, lifetime ban on owning animals;
- b) **R. v. Galloro**, 2006 ONCJ 264, geriatric couple failing to provide adequate care for livestock, suspended sentence and probation;
- c) **R. v. Viera**, unreported, April 10, 2006, BCPC, Kamloops, emaciated horses and dogs, 4 months, served as house arrest, with a restitution order of \$5,000.00, and a prohibition from owning or having the custody of an animal for 2 years;
- d) **R. v. Pryor**, 2007 ONCJ 649, 2007 CarswellOnt 8792, emaciated and dead horses, suspended sentence and probation for 3 years, restitution of \$25,511.56;
- e) **R. v. Pryor**, 2008 CarswellOnt 8602(Ont SCJ), on appeal, the restitution order was struck out, but the suspended sentence and probation were not disturbed;

- f) **R. v. Viera**, (Number 2), unreported, November 28, 2008, BCPC, Kamloops, neglected dogs, sheep, hogs and horses, including euthanasia required for a dog and a horse, repeat offender, guilty pleas, joint submission of 6 months endorsed;
- g) **R. v. McAnerin**, unreported, July 16, 2009, BCPC, Rossland, geriatric with psychiatric issues pleaded guilty to breach of provincial **Prevention of Cruelty to Animals Act** (neglecting dogs and cats in her care) and also a breach of undertaking, joint submission, sentenced to time served of 15 days, and probation;
- h) **R. v. Powell**, unreported, January 24, 2011, BCPC, Nelson, death, by starvation, of a single Apaloosa horse. 90 days, intermittent, and probation;
- i) **R. v. Connors**, 2011 BCPC 24, causing unnecessary pain and suffering to a dog, by beating it to death. Sentenced to five months' imprisonment, including 30 days concurrent for breach of recognizance, after factoring in one month of pre-trial custody. The Accused was also sentenced to two years of probation and was prohibited from owning or living with animal or bird for 10 years;
- j) **R. v. Harfman**, unreported February 3, 2011, BCPC, Penticton, starved cattle, donkey, and sheep either dying or being euthanized. Sentence of 6 months, to be served in the community as a conditional sentence;
- k) **R. v. McKay**, unreported, BCPC, January 27, 2012, Kamloops, the owner of a dog let it starve to death. He was sentenced to 90 days, to be served intermittently, as well as a 10 year prohibition order;

- l) **R. v. Chrysler**, 2013 BCPC 0241, the disabled first offender had horses in her care which were being both starved and neglected. The passing of sentence was suspended, the accused was ordered to serve probation for two years, and there was a ban on residing on any property where any domestic animal was present. The accused was also required to complete 30 hours of community service, within one year;
- m) **R. v. McLean**, unreported, January 31, 2014, MANPC, the accused pleaded guilty to 13 breaches of the provincial **Animal Care Act** in relation to neglecting cattle. 67 cattle had perished, and some other cattle had to be euthanized. A sentence of 45 days was ordered;
- n) **R. v. Gerling**, 2014 BCSC 2203, 69 year old man, in failing health, was convicted of neglect of dogs, resulting in their developing chronic and painful conditions. A 6 month community sentence order was made, with 50 hours of community service. No restitution was ordered.

[19] Those cases set out a range of sentence from a conditional sentence to periods of incarceration, of up to 6 months in the case of a repeat offender, **Vieira**. None of the cases referenced by counsel support the sentence sought by the Crown in this case, i.e., 12 months in jail.

[20] There is one case in which a sentence as long as 12 months had been imposed at trial, but was reduced to six months on appeal. In **R. v. Munroe**, 2012 CarswellOnt 11816

2012 ONSC 4768, 104 W.C.B. (2d) 600, the accused had killed one dog, and seriously injured another. He was sentenced to 12 months in jail, and appealed. At paragraph 96, Code J. said this:

I am satisfied that a sentence of six months imprisonment, for this offence and this offender, achieves the proper balance of denunciation, deterrence and rehabilitation. The sentence is in addition to thirteen days of pre-trial detention, spent in protective custody, making it effectively a seven month sentence. There are few precedents to guide the appropriate range of sentence in a case like this, given the recent legislative change in the available penalties. However, two cases are helpful. In *R. v. Power* (2003), 176 C.C.C. (3d) 209 (Ont. C.A.), the Court upheld a ninety day sentence under the old legislation for the torture and killing of a cat. It was described as "within the category of worst offence" and as a case of "torture for torture's sake", albeit committed by a first offender who had pleaded guilty and expressed remorse. An effective sentence of seven months in the case at bar is more than double the sentence in *Power*. In *R. v. Connors*, [2011] B.C.J. No. 168 (B.C. Prov. Ct.), Quantz J. imposed an effective sentence of six months imprisonment, under the new legislation, for the violent killing of a dog by blunt force trauma. The dog suffered many similar injuries to Abby in the case at bar. The accused was not a first offender and he lacked Munroe's other positive antecedents. Quantz J. exhaustively reviewed the case law under the old legislation, where discharges, conditional sentences, and short intermittent sentences had routinely been imposed for the cruel and sadistic killing or injuring of cats and dogs. **An effective sentence of seven months imprisonment in the present case, for a first offender with Munroe's otherwise impeccable antecedents, recognizes the change in the appropriate range of sentence brought about by the April 17, 2008 legislative reforms.**

[21] The sentence was reduced from 12 to 6 months, but, with the time spent on remand, Code J. said that was an effective sentence of seven months.

[22] In *R. v. Connors*, 2011 BCPC 24, referenced above, from paragraphs 22 to 35, there is a very helpful review of sentencing jurisprudence in cases predating the amendments to the Criminal Code provisions of cruelty to animals. The range of sentence there spans 30 days to five months, although, in the case with the five month sentence, *R. v. Piasentin*, 2008 CarswellAlta 765 (Alta. Prov. Ct.), the sentence was allowed to be served as a conditional sentence.

[23] To paraphrase the Court of Appeal in **R. v. Oake**, cited above, every case is unique, and must find its place in the spectrum of precedent decisions. It is therefore important to keep in mind the extent of the offences committed by the accused. He had left two dogs tied in the yard without food or water. A third dog, which was injured, was found in an outbuilding without food or water. Sheep, ponies and a goat were also found in the barn. They were all emaciated and covered in lice. Four dead calves, two dead sheep and a dead goat were also found. They had starved to death. The barn was dirty and filled with feces. Buckets of frozen water were found around the property. The accused, who owned the livestock, lived out of town. When he arrived at the property, he told police that the farm was his and he was feeding the animals every day or every other day. The injured dog was seized. Within a few days, a donkey, 11 sheep and two calves were euthanized.

[24] This is not a case where the accused lost his temper, and killed hit a dog by striking it with a shovel, as was the case in **R. v. Zeller**, [\[1998\] A.J. No. 351](#) (Alta. Prov. Ct.). That man was sentenced to 60 days, followed by probation for two years. This is a much more serious offence. The starvation of these animals was a slow, drawn-out, painful process. The pathologist said that these animals were in the worst shape that she has experienced, and that their starvation took weeks, if not months.

[25] At paragraph 41 of **R. v. Connors**, above, Quantz P.C.J. said that “The objectives of sentence to be emphasized in this case are denunciation and deterrence without losing sight of the offender's prospects for rehabilitation.”

[26] Given the lack of insight, the prospects for rehabilitation do not appear bright. In sentencing the accused, the court must endeavour to balance rehabilitation with the requirement

for denunciation and deterrence, in the context of the accused maintaining that he did nothing wrong while his livestock withered, starved, and died. Such a balance helps place the accused on the spectrum of sentence set out in the jurisprudence referenced earlier.

[27] The facts in this case are at least as serious as those in the cases of **Harfman** and **Monroe**. Sentences of six months were ordered in those cases, and a similar period of incarceration is reasonable in this case.

### **Where should the sentence be served?**

[28] In **R. v. Webster**, 2014 NLTD(G) 135, Mr. Justice Handrigan, in imposing sentence upon a wildlife officer who had been convicted of the offences of perjury and fabricating evidence, stated at paragraph 59:

A conditional sentence of imprisonment will not achieve that result. Imprisonment has both deterrent and condemnatory effects that would be lost if I allowed Mr. Webster to serve his sentences at home, however strict the conditions I might impose on him. If rehabilitating Mr. Webster or promoting other restorative measures took precedence here, a conditional sentence might be more appropriate; but not when general deterrence is the primary goal. Thus, I refuse Mr. Webster's request for conditional sentences and I order him to serve them in a penitentiary.

[29] In **R. v. McCarthy**, 2015 NLTD(G) 24, the accused committed fraud in relation to her duties as a town clerk. In imposing a conditional sentence, Justice Handrigan indicated that a “conditional sentence can provide significant denunciation and deterrence, but there are some cases in which the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way to condemn the offender’s conduct or to deter similar conduct in the future.”

[30] The gross neglect, suffering, and starvation of the animals in this case are so serious that resort to a conditional sentence is inappropriate. A conditional sentence would fail to sufficiently denounce the actions of the accused. It follows that the sentence for the Criminal Code s. 445.1 offence must be served in an institution.

### **Restitution**

[31] When the issue of restitution came up during the sentencing submissions, the possibility of paying for the veterinarian bills and foster homes for the surviving livestock by selling off the farm was raised. The accused now said that the farm was not his, and that the title to the farm was in his father's estate. This is a different position than what he told the police when the investigation first began. At that time, he said the farm was his. During the trial, he spoke in the first person, saying that he had "a couple of acres" available to exercise the horses. Now he is taking the position that all he has is a mortgaged home on a small lot of land, and that his income is limited to his disability pension.

[32] In **R. v. Spellacy**, [1995] N.J. No. 215 (C.A.), the appellant had been convicted of six counts of theft, one count of fraud and one count of possession of property obtained by crime. Evidence given at the trial by a forensic accountant showed the amount stolen by the appellant from the corporate complainant to be \$1,086,000. At the sentencing hearing, that complainant made an application for a restitution order against the appellant. The trial judge, after reviewing the factors of proportionality, totality and disparity as they applied in the imposition of sentences, sentenced the appellant to a total of eight years imprisonment and ordered that he make complete restitution to the complainant. The 51-year-old appellant was a discharged bankrupt who had been out of the work force throughout the duration of his trial and who was certain to remain out

of work for a substantial period of time. The main issues on appeal were whether the term of imprisonment imposed was excessive and whether the trial judge erred in making an order of restitution.

[33] The appeal was allowed. The term of imprisonment was reduced to a total of five years and the order for restitution was reduced to the sum of \$200,000. The Court of Appeal held that the total term of imprisonment which had been imposed by the trial judge was excessive. In fixing the amount of the restitution in an amount where compliance was certain to be particularly onerous if not impossible, the Court of Appeal found that the trial judge had been in error.

[34] O'Neill J.A. wrote for a unanimous Court of Appeal in **Spellacy**. At paragraph 82, he said as follows:

It is a basic principle in sentencing that the ability of an accused to pay must be considered before a fine is imposed and it is an error to impose a fine greater than that which a person can pay or may reasonably be able to pay at some future time. The same considerations apply to the making of a restitution order which, as already indicated, is in the nature of a fine and part of the whole sentence.

[35] The accused at Bar is of limited means, with an income from a disability pension of \$1,007.00 per month, according to page 5 of the presentence report. He told the author of the presentence report (at page 7) that he could not pay a fine order. It is therefore highly unlikely that he would ever be in a position to satisfy any restitution order, especially of the magnitude claimed in this matter, of \$43,570.14.

[36] Let me hasten to add here that there is no evidence before this Court as to the title of the farm where these animals were neglected and starved to death. And there is no reason why the Minister of Natural Resources might not proceed with civil litigation in an effort to liquidate the

farm holding to satisfy the cost of euthanizing the animals which could not be saved, and also the costs of foster care for the animals which survived their ordeal at the hands of the accused.

[37] Following **Spellacy**, it would be an error in law to order the accused to make the restitution order (of \$43,570.14) sought by the Crown as part of the sentencing process. Such an order is therefore not made.

### **Fines and surcharges**

[38] The provincial offences, counts 3 and 4, are dealt with by way of fines, of \$500.00 each. Given the sentence for the Criminal Code offence, the accused has 12 months to pay the total of \$1,000.00 in fines. Section 11.1 of the **Victims of Crime Services Act**, RSNL1990 CHAPTER V-5, provides for the collection of victim fine surcharges on fines imposed for provincial offences. The provincial fine surcharges, of 15%, are ordered in relation to the fines imposed for counts 3 and 4, and must be paid within 12 months.

[39] There is a mandatory victim surcharge for the s. 445.1 offence, of \$100.00: S. 737 of the [Criminal Code](#) mandates victim surcharges of \$100.00 each for matters prosecuted summarily. The [Victim Surcharge Order](#), (O.C. 99-611), provides that where a court does not impose a fine for an offence, a victim surcharge arising under the [Criminal Code](#) shall be paid within 30 days of the date of conviction or discharge of the offence. The court has no authority to reduce the amount of the surcharges, or to extend the time within which the surcharges must be paid.

### **The prohibition order pursuant to s. 447.1**

[40] Section 447.1 of the Criminal Code provides the authority to make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate. Counsel for the accused conceded that such an order is appropriate in this case. Given the extent of the offence in this case, the prohibition is for life.

### **Probation**

[41] The accused denies having committed any offence. Absent some insight into the commission of these offences, it is highly unlikely that he would benefit from probation. No probation order is made.

### **Conclusion**

[42] The accused is sentenced to six months in custody, and a fine surcharge of \$100.00 for count number 1. The surcharge is due within 30 days. Count number 2 was stayed because of **Kienapple**. Counts 3 and 4 each have a fine of \$500.00, for a total of \$1,000.00, and those fines must be paid within 12 months. The provincial victim fine surcharge, of 15%, applies to the fines imposed for the two breaches of the **Animal Health and Protection Act**, and must be paid within 12 months. No restitution order is made. No probation order is made.

[43] The accused is prohibited, pursuant to s. 447.1 of the Criminal Code, from owning, having the custody or control of or residing in the same premises as an animal or a bird for the rest of his life.

Porter, P.C.J.