

Case Name:

R. v. Freymond

**Between
Her Majesty the Queen, and
David Freymond and Lynn Cheffins**

[2006] O.J. No. 608

139 C.R.R. (2d) 74

70 W.C.B. (2d) 837

Information No. 04-1048

Ontario Court of Justice
Pembroke, Ontario

S.G. Radley-Walters J.

January 27, 2006.

(31 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Where administration of justice brought into disrepute -- Accused's rights to be secure against an unreasonable search and seizure was violated when an agent of the Ontario Society for the Prevention of Cruelty to Animals trespassed on their leased property to investigate a complaint about animals in distress -- Evidence obtained from the search was excluded.

Criminal law -- Powers of search and seizure -- Search -- Warrantless searches -- Warrantless search that was conducted of a gravel pit leased by the accused was invalid -- Evidence obtained from the search was excluded.

Application by the accused Freymond and Cheffins to exclude evidence obtained against them because their rights under the Canadian Charter of Rights and Freedoms were violated -- Accused were charged with failing to provide adequate food and care for dogs that they owned -- An agent of the Ontario Society for the Protection of Cruelty to Animals received a complaint that a large number of dogs were being neglected in a gravel pit -- Gravel pit gate was shut and locked when the

agent arrived -- Agent walked down the road and was able to observe the dogs -- Accused leased the pit from its owner -- Their lease provided that they had permission to enter the property or had to be present when other individuals entered -- Accused claimed that the agent conducted an unreasonable warrantless search to obtain the evidence -- HELD: Application allowed -- Search was not authorized by law -- Ontario Society for the Prevention of Cruelty to Animals Act authorized a warrantless search only when the Society's agent observed an animal in immediate distress -- Agent did not observe the dogs until she trespassed on the property -- Manner in which the search was conducted was not reasonable -- Accused's rights to be secure against an unreasonable search and seizure was violated -- Agent's intrusion was unacceptable and serious -- Agent could have attempted to view the dogs from an adjoining property, she could have asked the landowner for permission to enter or she could have obtained a search warrant -- Accused and their landlord acted to keep the area private -- Privacy interest was also at stake and was violated -- Inclusion of the evidence would adversely affect the administration of justice.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8, s. 24(2)

Criminal Code, s. 446(1)(c)

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O-36, s. 11(1), s. 12, s. 12(2)

Charge: S. 446(1)(c) Criminal Code of Canada

Counsel:

Elizabeth Ives-Ruyter Prosecutor for the Crown

Rod Sellar Counsel for the Accused Persons

REASONS FOR JUDGMENT

S.G. RADLEY-WALTERS J.:--

Overview:

1 David Freymond stands charged that on or about the 13th day of May 2004 at the Township of South Algona being the owner of twenty-nine dogs willfully neglected or failed to provide suitable and adequate food, water, shelter and care for those dogs, contrary to Section 446(1)(c) of the Criminal Code of Canada.

2 Lynn Cheffins stands charged that on or about the 13th day of May 2004 at the Township of South Algona being the owner of forty-five dogs willfully neglected or failed to provide suitable and adequate food, water, shelter and care for those dogs, contrary to Section 446(1)(c) of the Criminal Code of Canada.

3 David Freymond and Lynn Cheffins have brought an application seeking an order to exclude all evidence obtained as a result of a search in the Township of South Algona, Ontario, which was executed on May 13th 2004, in which the accused persons allege that their rights under Sections 7, 8 and 24(2) of the Canadian Charter of Rights and Freedoms were violated

4 The accused persons allege that the Ontario Society for the Prevention of Cruelty to Animals, Renfrew County branch, conducted a warrantless search of their kennel.

5 The accused persons argued that section 12 of the Ontario Society for the Prevention of Cruelty to Animals Act, requires that the society obtain a search warrant unless they can comply with section 12(2) of the Act. The accused persons alleged that the society did not observe any animals until they had trespassed on the subject property without a search warrant.

6 The accused persons argued that the warrantless search by the society is prima facie unreasonable. They further argue that they had a reasonable expectation of privacy with respect to this property.

7 Agent Tracy McElman of the Ontario Society for the Prevention of Cruelty to Animals testified that she is employed by the Renfrew County branch of the Society which has an office in Petawawa. Agent McElman received a telephone intake form at approximately 10:00 a.m. on May the 13th, 2004 whereby a citizen had alleged that a large number of dogs were being neglected in a gravel pit adjacent to a municipal dump in the Township of South Algona.

8 Agent McElman testified that she and a second Agent from the Society drove from Petawawa to South Algona which is approximately a two hour drive.

9 Agent McElman testified that they used their mobile phone to speak to the complainant while en route to the site. The complainant agreed to meet them in the hamlet of Whitney to direct them to the location where he had seen the dogs. Agent McElman testified that the complainant had attended the municipal dump on the previous day and was able to observe from that location a number of dogs in a gravel pit.

10 Agent McElman testified that when they arrived at Whitney, the complainant took them on an unmarked gravel road to a location where there were two metal gates. One gate went to the gravel pit and the second gate farther down went to the municipal dump.

11 I find that the gate to the gravel pit was shut and locked at the time that Agent McElman attended the site. I also find that on either side of the gate there was a build-up of earth, gravel and rocks which would have prevented the vehicles from entering the gravel pit. I also find that there was no fence around the large gravel pit, which was many acres in size.

12 Agent McElman testified that she did not recall whether the gate to the municipal dump was opened or shut at the time that she first arrived at the site.

13 Agent McElman testified that she left her motor vehicle near the gate at the gravel pit and walked around the gate and down a road for approximately 80 metres at which point when she looked to her right, she could see a large number of dogs in a gravel pit. The dogs in question were attached to a series of chains. Three long chains were attached to a flatbed trailer which stretched out in straight lines in a fan shape. A fourth chain was attached to the ends of the first three chains and all of these were affixed to secure objects so that they could not move. Exhibit No. 1 in the Charter Application was a sketch of this structure. The dogs were then attached to these longer

chains by means of short 18-inch chains. The dogs were placed in such a way that they would not have contact with one another presumably to avoid them fighting with one another.

14 Agent McElman testified that there were a total of forty-five husky dogs at the location and that apart from the dogs who were under the flatbed, there was no shade for the dogs in question. She testified that the water bowls for the dogs were empty when she arrived and that the location was foul smelling due to the heat and the large pile of chicken feathers and chicken parts as well as dog feces.

15 Agent McElman testified that there were eight boxes of kennels on the site. There was a sign identifying that the owner was Algonquin Way Kennels.

16 Agent McElman testified that it was an extremely hot day on May the 13th, 2004 and she tested the temperature with a thermometer at 39 degrees centigrade. She further testified that she was able to get some water for the dogs with the assistance of some others and ultimately called a veterinarian to check the dogs and seize them. Agent McElman further testified that during the period of time that she was at the site, Lynn Cheffins attended at the site to check on the dogs, and bring them water.

17 On cross-examination, Agent McElman testified that she had no recollection as to whether or not the lock and chain were on the gravel pit gate but that it would not have affected her decision to enter as she was planning to enter the property in any event. She further testified that it had never crossed her mind or that of the other Agent to seek a search warrant. Agent McElman further testified that she was aware that in the course of an investigation if the property owner refused to allow them to enter onto their property that they could always go to the neighbour's property and look over the fence. She further testified that this was not done in this case by going to the municipal dump, and looking over that property to the gravel pit. Agent McElman and the other Agent simply attended the site and walked directly onto the gravel pit property without a warrant in order to determine for themselves the conditions of the dogs in question. Agent McElman testified that eventually she did go to the municipal dump property but only after she had located the dogs and provided them with water.

ANALYSIS:

The Law:

18 The relevant portions of the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 as amended read as follows:

Section 11-(1) For the purposes of the enforcement of this or any other act or law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals, every inspector and Agent of the Society has and may exercise any of the powers of a police officer.

Section 12-(1) Where a justice of the peace is satisfied by information on oath that there are reasonable grounds for believing that there is in any building or place, other than a public place, an animal that is in distress, he or she may at any time issue a warrant authorizing an inspector or an Agent of the Society named therein to enter therein either alone or accompanied by a veterinarian and inspect

the building or place and all animals found therein for the purpose of ascertaining whether there is therein any animal in distress.

Section 12(1.1) Where an inspector or an Agent of the Society believes that it would be impracticable to appear personally before a justice of the peace to make application for a warrant under subsection (1), he or she may, in accordance with the regulations, seek the warrant by telephone or other means of telecommunication, and the justice of the peace may, in accordance with the regulations, issue the warrant by the same means.

Section 12(2) Where an inspector or Agent of the Society observes an animal in immediate distress, he or she may enter, without warrant, any premises, building or place other than a dwelling place either alone or accompanied by a veterinarian for the purposes of subsections (3) and (5) and sections 13 and 14.

19 In the case of *Regina v. Kokesch* 61 C.C.C. (3d) p. 207 (S.C.C.), Chief Justice Dickson discussed the issue of warrantless searches. He stated,

"In *R. v. Collins*, [1987] 1 S.C.R. 265, *supra*, this court reiterated the presumption against warrantless searches and described the burden that rests on a party attempting to establish reasonableness. (at p. 14):

.... once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."

20 In the case at bar, I find that the search conducted by Agent McElman was not authorized by law. Section 12(2) of the Ontario Society for the Prevention of Cruelty to Animals Act, authorizes a warrantless search in a situation where an Agent of the Society observes an animal in immediate distress. I find on the facts of this case that Agent McElman did not observe the dogs in question until such time as she had trespassed on private property and walked past a locked gate. It was open to Agent McElman to walk on the municipal dump property in order to gain access to a vantage point where she could observe the gravel pit and determine whether or not the animals in question were in immediate distress. If Agent McElman had gone to the municipal dump property and observed the dogs in question and come to the subjective and objective view that the animals were in immediate distress, then she would have had authority to conduct a warrantless search. Since she failed to follow this course of conduct, I find that the search was not authorized by law. Based on the same reasoning I find that the manner in which the search was carried out was not reasonable. I find that the Crown has not shown on the balance of probabilities that the search in this case was reasonable. In the circumstances. I find that there was a breach of the accused persons' rights under s. 8 of the Canadian Charter of Rights and Freedoms.

21 Justice Sopinka discussed in the case of *Regina v. Kokesch*, *supra*, the question of the admissibility under s. 24(2) of the Canadian Charter of Rights and Freedoms of the evidence obtained as a

consequence of a search which has been found to be unlawful and unreasonable within the meaning of s. 8 of the Charter. Justice Sopinka stated at page 225,

"The factors to be considered in assessing the admissibility of evidence under s. 24(2) fall into three broad categories: (1) factors concerning the effect of admission on the fairness of the trial; (2) factors concerning the seriousness of the violation, and (3) factors concerning the effect of exclusion on the reputation of the administration of justice."

22 In the case at bar, it is acknowledged that the evidence which the Crown wishes to introduce is the evidence of the dogs themselves. This is real evidence or non-conscripted evidence. The Collins decision, *supra* stands for the proposition that real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. In the case at hand, I find that the nature of this real evidence is not such that exclusion is required in accordance with the trial fairness rational for exclusion.

23 With respect to the issue of the seriousness of the Charter of violation, Justice Sopinka in the case of *Regina v. Kokesch*, *supra*, said as follows, at p. 226.

"The purpose of considering factors relating to the seriousness of the Charter violation is to assess the disrepute that the administration of justice would suffer as a consequence of judicial acceptance of evidence obtained through a serious Charter breach. The court must refuse to condone, and must dissociate itself from, egregious police conduct: see, e.g., Collins, *supra*, at pp. 20 and 22-3; and *R. v. Greffe* (1990), 55 C.C.C. (3d) 161, [1990] 1 S.C.R. 755, 75 C.R. (3d) 257, per Lamer J. (as he then was), at pp. 183 and 192. Relevant factors in this portion of the s. 24(2) inquiry include such questions as: Was the violation deliberate, wilful or flagrant, or was it committed in good faith? Was the violation motivated by urgency or necessity to preserve evidence? Were other investigative techniques available? (See Collins, *supra*, at p. 20)."

24 One of the other factors to be considered under the heading of the seriousness of the breach under section 8 is the nature of the intrusion and the privacy interest at stake. I acknowledge that the existence of exigent circumstances can render the Charter violation less serious. In the case at hand I find that there were no exigent circumstances justifying the violation. Agent McElman chose to trespass on private property to observe the dogs in question rather than electing to attempt to view the dogs from the adjoining property or asking permission of the landowner to enter the property or seeking a search warrant. Under the circumstances I find that the nature of the intrusion was unacceptable and serious.

25 With respect to the issue of the privacy interest at stake, I note that in the case of *R. v. Lauda*, (1999), 45 O.R. (3d), 51 the Ontario Court of Appeal wrote at p. 78:

"The level of privacy attaching to the cornfield does not approach that of a private dwelling. A field is obviously more exposed to public intrusion than a home; steps taken by property holders to exclude the public from open fields will not always be successful."

26 In the case before the Court, I acknowledge that the trespass to property by Agent McElman was on a gravel pit but I also find that the owners of the land had taken steps to exclude members of the public. This was done by means of a locked gate which had a stop sign attached to it. In addition the owners had built up gravel and soil on either side of the gate to prevent vehicular travel to the gravel pit. I have noted as well that the lease between the accused persons and the landowner which was an exhibit in the trial stipulated that,

"Dave Freymond and Lynn Cheffins have keys to enter the property at any time. Other persons tending the dogs must be accompanied by either Dave Freymond or Lynn Cheffins. No person is to go near the working area of gravel pit. Gate is to be kept locked at all times."

27 I find that both the landlord and the accused persons took steps to keep this area private and that there was a privacy interest at stake.

28 In the case at bar, I have concluded that the Charter violation committed by Agent McElman was serious from a number of perspectives. Firstly, Agent McElman did not consider whether a search warrant would be appropriate in the case or not prior to trespassing on private property. Secondly, as indicated above, Agent McElman did not attend on the adjacent property to see if she could see the animals to determine whether or not they were in immediate distress. This was a course of action which she acknowledged in cross-examination was available to her in this case as well as any case where the owner refused permission for the Agent to attend on private property. Finally, Agent McElman acknowledged that whether the gate was locked or not would play no role in her decision to attend on the property for the purposes of viewing the animals in question.

29 With respect to the heading dealing with the effect of exclusion on the reputation of the administration of justice, Justice Sopinka in the *Regina v. Kokesch* case, *supra*, stated, at p. 231.

"The final category of factors to be considered under s. 24(2) concerns the effect that judicial exclusion of relevant and probative evidence could have on the reputation of the administration of justice. If exclusion would occasion greater disrepute than admission, then the impugned evidence ought to be admitted: see *Collins*, *supra*, at pp. 20-1."

"This court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy. As Chief Justice Dickson stated in *Genest*, *supra*, at p. 410: "... the breach was not merely technical or minor". The violation of s. 8 of the Charter that occurred in this case must be regarded as flagrant, and the disrepute to the justice system that would necessarily result from the admission of the impugned evidence cannot be counterbalanced by speculation about the disrepute that might flow from its exclusion."

30 In the case at bar, that is little doubt that the evidence of the actual dogs themselves is the crux of the Crown's case against the two accused persons. Exclusion of this evidence will substantially diminish, if not eliminate all together, the Crown's case against the two accused persons. Cruelty to animals is a serious offence. Notwithstanding this, evidence which is non-conscriptive and essential to the Crown's case is not always necessarily admitted. The focus of the inquiry under this head of

analysis is to balance the interest of truth with the integrity of the justice system. The nature of the fundamental rights at issue, and the lack of a reasonable foundation for the search suggest that the inclusion of the evidence would adversely effect the administration of justice.

31 Taking into consideration the seriousness of the Charter of violation and the factors concerning the effect of exclusion of the evidence on the reputation of the administration of justice, I have determined that the evidence obtained by Agent McElman is inadmissible and I will exclude it from the trial.

S.G. RADLEY-WALTERS J.

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