

R. v. Cunningham and Whiffin, 2011 BCPC 358 (CanLII)

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Legislation cited

- [Criminal Code](#), RSC 1985, c C-46 — [429](#); [445.1\(1\)](#); [446\(1\)](#)

Decisions cited

- R. v. Hughes, [2008] BCJ No 973 (QL) (not available on CanLII)

Citation: R. v. Cunningham and Whiffin
2011 BCPC 0358

File No:
Registry:

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

CLAYTON FREDERICK CUNNINGHAM and DAVID ELSON WHIFFIN

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE WISHART**

Counsel for the Crown:
Appearing on their own behalf:
Counsel for D. Whiffin:
Place of Hearing:
Date of Hearing:
Date of Judgment:

C. Murray QC
C. Cunningham
W. Hefflin
Victoria, B.C.
July 26,27,28,29 and Septemb
December 13, 2011

Introduction

[1] The charges against Mr. Cunningham and Mr. Whiffin stem from their involvement with a horse named Jalupae. Mr. Whiffin acquired Jalupae in the late fall of 2008. Jalupae was a small horse approximately 27 years old, who was brought to the

Whiffin farm for his children to ride. Mr. Cunningham lived on the Whiffin farm and looked after the horses. In September of 2009 the decision was made in consultation with a veterinarian to euthanize Jalupae because he was not able to eat properly and was extremely thin. Mr. Whiffin euthanized Jalupae by hanging him using an excavator. The issues in this case are whether Mr. Whiffin and Mr. Cunningham failed to provide suitable and adequate food and care for Jalupae, and whether they caused Jalupae unnecessary pain, suffering or injury.

The Charges

[2] Count 2

Clayton Frederick Cunningham and David Elson Whiffin, on or between the 1st day of May 2009 and the 15th day of September 2009, at or near Saanichton, in the Province of British Columbia, did, wilfully cause, or, being the owner, did wilfully permit to be caused, unnecessary pain suffering or injury to an animal, namely, a horse called Jalupae, contrary to [Section 445.1\(1\)\(a\)](#) of the [Criminal Code](#).

[3] Count 3

Clayton Frederick Cunningham and David Elson Whiffin, on or between the 1st day of May 2009 and the 15th day of September 2009, at or near Saanichton, in the Province of British Columbia, did, being the owner or the person having the custody or control of a domestic animal, namely, a horse called Jalupae, wilfully neglect or fail to provide suitable and adequate food and care for him, contrary to [Section 446\(1\)\(b\)](#) of the [Criminal Code](#).

[4] As with any criminal proceeding the Crown is required to prove the elements of the offence beyond a reasonable doubt.

The Evidence

[5] There were eight witnesses who gave testimony in this trial in the Crown's case. Mr. Whiffin and Mr. Cunningham called two witnesses each. Neither Mr. Whiffin nor Mr. Cunningham testified. I will deal with the evidence of the witnesses in chronological order as it relates to the care of Jalupae between the fall of 2008 and September of 2009.

[6] Catherine Mercer testified that in the fall of 2008 she placed an advertisement on the "Island Horse" website for the sale of her horse, Jalupae. She and her husband purchased Jalupae in 2005 and did not know his exact age but he was an older smaller horse. She estimated that Jalupae was 25 years old in the fall of 2008. Mr. Whiffin responded to that ad. He came to see the horse in the company of his family and a woman named "Sherry". Sherry seemed to have more knowledge about horses than the rest of the Whiffin party. Sherry told the Mercers that she would help teach the Whiffins how to care for the horse.

[7] The visit went well and Mrs. Mercer considered the Whiffin family a good home for Jalupae. Mrs. Mercer was questioned at trial about appropriate horse care in general and for Jalupae specifically. She testified that in the fall of 2008 Jalupae was in good shape. There were no photos of Jalupae from this date but Ms. Mercer stated that Jalupae looked the same in the fall of 2008 as he did in photos taken in 2005 or 2006. These are photos 1-3 of Exhibit 1.

[8] She described that Jalupae had received regular veterinary care including having his teeth checked. All horses need to have their teeth checked regularly and older horse in particular as they can wear down leaving sharp points. These sharp points can be

painful and prevent the horse from feeding properly. When this occurs the veterinarian will file them down. This process is called “floating” the teeth.

[9] Ms. Mercer testified that in August of 2008 she noticed that Jalupae had lost some weight and that he was “balling” his food. She explained that this term refers to a horse chewing its food but not being able to break it down small enough to swallow. The food gets balled up and then falls out of the horse’s mouth. Upon noticing the balling, their veterinarian attended and floated Jalupae’s teeth. After this Jalupae still balled his food, but to a much lesser extent, and subsequently put the weight back on.

[10] Mrs. Mercer told Mr. Whiffin when he first came to look at Jalupae that he needed geriatric feeding consisting of fine dry hay and pellets. She told Mr. Whiffin that the pellets were the main feed and Jalupae needed two pounds in the morning and two pounds in the evening. The pellets were made up of very fine food and the horse would be able to break this up even if he was having problems with his teeth. Mrs. Mercer was not sure if she told him which brand of pellets to feed but when the horse was delivered to Mr. Whiffin, the Mercers gave him a bag of the pellets at that time. The Mercers did not have any further contact with Mr. Whiffin and only learned about Jalupae’s fate when they were contacted by the SPCA. At the trial Mrs. Mercer viewed photos of Jalupae taken in August and September of 2009 [photos 4-7 and 9-13 of Exhibit 1] and stated that Jalupae was never that thin while in her care, not even when he had the problem eating in August of 2008.

[11] Sherry Sabourin testified at the trial. She was a friend of Mr. Whiffin’s and helped him find a horse for his children to ride. She confirmed the evidence of Mrs. Mercer that Jalupae was in good condition in the fall of 2008. She described Jalupae at that time as healthy with a good sized belly; his coat was shiny and healthy and he looked happy and energetic. She confirmed that Jalupae looked the same when she saw him at the Mercer’s farm as he did in the photos that were taken of him sometime in 2005 or 2006 [photos 1-3 of Exhibit 1].

[12] Ms. Sabourin explained that in the fall of 2008 she lived in a home on Dallas Road that she rented from Mr. Whiffin. Mr. Whiffin also owned property on the Saanich peninsula where he had two horses. Ms. Sabourin had more experience with horses and Mr. Whiffin had asked her to join him when he went to take a look at Jalupae. Mr. Whiffin wanted a steady horse for his young children.

[13] Ms. Sabourin testified that although Jalupae was old and might not live too much longer, he was a good fit with the children. She asked the Mercers if Jalupae needed anything special in terms of food and was told, “no”, he eats what the other horses eat. Approximately 2 weeks later Mr. Whiffin told her that Jalupae had been brought to his farm. She visited the Whiffin farm a few days after that and stated that Jalupae was in the same shape as when she had seen him at the Mercer farm.

[14] Ms. Sabourin described the Whiffin farm as being approximately 20 acres, with waterfront, and a number of buildings and equipment on the property. There were at least three residences that were rented out as well as a living unit attached to the barn. Clayton Cunningham, the other accused in this trial, lived in the unit attached to the barn. Ms. Sabourin knew Mr. Cunningham to be the person responsible for looking after the horses. She met him prior to Jalupae coming to the farm but did not know him very well until she moved onto the farm in June of 2009. Ms. Sabourin did not describe Mr. Cunningham favourably. She described him as a heavy drinker who would disappear for

days at a time. She was also concerned about his general care of horses: he rode them inappropriately and the horses often got loose onto nearby roads because of gates left open or fences in poor repair.

[15] Between the time that Mr. Whiffin acquired Jalupae and when she moved onto the farm, Ms. Sabourin visited the farm every couple of weeks. She testified that she was not responsible for Jalupae's care during this time period. She assumed that Mr. Cunningham was caring for Jalupae along with a young couple who lived in one of the cottages on the property.

[16] Ms. Sabourin moved onto the property on June 7, 2009. This date sticks out in her mind as the next day she was involved in a very serious car accident. She admits that her memory is poor since the accident and that she is not good with dates.

[17] She described Jalupae in that first week of June as being nearly on his death bed, emaciated and that his bones were sticking out. She estimated that he had lost 300 to 400 pounds. The weight loss was easy to see as was the fact that Jalupae was going blind in one eye – it was turning grey. Although no pictures were taken of Jalupae that day, pictures were taken on August 10, 2009. Ms. Sabourin testified that Jalupae looked worse in June than he did in the photos from August [photos 4-7 of Exhibit 1]. She stated that by August Jalupae had filled out somewhat and his coat looked better.

[18] The photos that were taken on August 10, 2009 show a very skinny horse. The ribs are clearly visible and the hip bones are prominent. It is easy to contrast the condition of Jalupae in these photos [#4-7] with the photos that both Mrs. Mercer and Ms. Sabourin say reflect the condition at the time Jalupae came to live on the Whiffin farm [#1-3]. In those photos Jalupae's ribs are not visible and there is considerably more "flesh" in the area of his hips and hind quarters.

[19] In response to seeing Jalupae in this condition Ms. Sabourin spoke to Mr. Cunningham. It was not clear from her testimony whether she saw Jalupae and spoke to Mr. Cunningham on June 7th or earlier that week when she attended the farm to help her roommate move in, but it was sometime during the first week of June 2009. When Ms. Sabourin noted Jalupae's condition Mr. Cunningham was on the property - Mr. Whiffin was not. When she brought Jalupae's weight loss to the attention of Mr. Cunningham he responded that all three horses were eating the same thing – hay. Ms. Sabourin was concerned that there might be something wrong with Jalupae's teeth and that he wasn't able to eat the hay. She told Mr. Cunningham that Jalupae needed to be out in the pasture eating grass right away as he was starving. Mr. Cunningham did not seem to be concerned because the horses were all being fed the same thing, the other two were fine, and there was no hay left in the stall.

[20] Ms. Sabourin could not recall if she discussed the possibility of Jalupae balling his hay with Mr. Cunningham that day but she did recall noticing that all three horses shared the same feeding area. If Jalupae was balling his food and it was falling out of his mouth, it was possible the other horses were then eating it, leaving no trace of the "balls".

[21] In early June 2009 Ms. Sabourin worked as an assistant at a veterinary clinic. The day after she first saw Jalupae in this condition she asked the veterinarian at her work about the appropriate food for him. The veterinarian recommended a diet of beet cubes and crushed barley soaked for several hours before feeding with added oil. Ms. Sabourin told both Mr. Cunningham and Mr. Whiffin about the need for the special diet and that

Jalupae might need to have his teeth floated. Mr. Whiffin said that he did not wish to spend any money on Jalupae.

[22] After the car accident on June 8, 2009 Ms. Sabourin spent a week in the hospital and was then bedridden at her residence on the Whiffin farm for a further two to four days. When she was mobile she noted that Jalupae was in the same condition as he had been in the beginning of June. She watched Jalupae eat his hay and could see that he was in fact balling it up and wasn't swallowing it. She told this to Mr. Cunningham who responded that it was ok because Jalupae was able to suck the nutrients out of the hay. Ms. Sabourin told him that this wasn't ok and that this was why he had lost weight.

[23] When Ms. Sabourin moved to the property she saw Mr. Whiffin there about once a week. Starting in July of 2009 Mr. Whiffin was living on a boat at the property and she saw him on the farm daily. Ms. Sabourin testified that she told Mr. Whiffin 3 or 4 times that Jalupae needed the special food. He said "ok" but he never bought the food.

[24] Ms. Sabourin did what she could without the special diet. She ensured that Jalupae spent time in the pasture eating grass and continued to remind Mr. Whiffin about the need for the food. She testified that when the grass dried up as the summer progressed she made arrangements to purchase the food herself. She believed that this was in mid-August. At this point Ms. Sabourin began feeding Jalupae the soaked beet cubes and barley mixture.

[25] According Ms. Sabourin, Jalupae's condition improved when she gave him access to grass and then when she started feeding him the special diet. She testified that the photos taken on August 10, 2009 show Jalupae in better condition than when she first arrived on the farm.

[26] The SPCA first became involved in this matter at the end of July 2009. Special Provincial Constable Bailey ["Cst. Bailey"] testified the SPCA received an anonymous call on July 29, 2009 about an emaciated appaloosa at 739 Mount Newton Cross Road. This is the address for the Whiffin farm and the horse in question turned out to be Jalupae. Cst. Bailey attended the property on July 30th and spoke to Ms. Sabourin about the horse. Ms. Sabourin did not seem surprised to see her and took her to see Jalupae.

[27] Cst. Bailey described Jalupae on this date as being probably the worst she has ever seen in terms of its body weight. The horse was very skinny with its ribs and hips sticking out. It was her opinion that even an untrained person would have concerns about a horse that looked like this. Cst. Bailey also saw the other two horses and noted that they looked fine. Ms. Sabourin advised Cst. Bailey that Mr. Whiffin was the owner of Jalupae, that he lived on a boat at the property, that she had advised him of Jalupae's condition and he did not want to spend the money to have Jalupae's teeth floated.

[28] Cst. Bailey felt that Jalupae was suffering and appeared to be starving. Ms. Sabourin told her that Jalupae was even skinnier a few weeks earlier but had gained some weight since having access to grass. Cst. Bailey completed an Order for compliance [Exhibit 9] in the name of Dave Whiffin and left it with Ms. Sabourin to give to Mr. Whiffin. The Order sets out steps that Mr. Whiffin was required to take within 2 weeks. The following items were "checked": provide necessary dental care; provide necessary foot, nails, or hoof care; and provide necessary veterinary care when the animal exhibits signs of injury, pain, illness or suffering that require medical attention. The box requiring the provision of suitable food to maintain normal body weight was not checked.

[29] By leaving the Order Cst. Bailey expected Mr. Whiffin to get a veterinarian out to see Jalupae and follow any recommendations of the vet to alleviate Jalupae's suffering, including following any dietary recommendations. Cst. Bailey did not hear back from Mr. Whiffin but she did hear from Ms. Sabourin on August 6, 2009. They spoke on the phone and Ms. Sabourin confirmed that she had given Mr. Whiffin the Order and that he was upset and "didn't want to pay".

[30] Ms. Sabourin told Cst. Bailey that she had undertaken to feed the horse properly and that he had already gained some weight. They discussed the new feeding regime and Cst. Bailey confirmed with a vet that this was appropriate. Cst. Bailey attended at the Whiffin farm on August 10, 2009 and took photos of Jalupae (photos 4,5,6,7 and 9 of Exhibit 1). She testified that Jalupae had put on some weight since she had seen him on July 30th but he still had a long way to go. She decided to allow 4 weeks on the new feeding regime before taking any next steps.

[31] Cst. Bailey did not have any dealings with Jalupae again until September 6, 2009. On that date she received a call from Shannon Whittaker about the condition of Jalupae. Cst. Bailey told Ms. Whittaker that she was aware of Jalupae and that Ms. Sabourin was looking after him. Cst. Bailey was upset to learn from Ms. Whittaker that Ms. Sabourin had moved off the farm the previous day. There was a discrepancy in the evidence as to exactly when Ms. Sabourin moved off the property. Ms. Sabourin testified that she left the week before September 6th and left a feeding schedule and feed with Mr. Cunningham. Ms. Whittaker testified that Ms. Sabourin was still on the property and in the process of moving out on September 5, 2009.

[32] Ms. Whittaker sent photos of Jalupae to Cst. Bailey that were taken that day. Cst. Bailey testified that Jalupae had lost weight since she last saw him on August 10th. She called Mr. Whiffin and advised him of her concerns about Jalupae from the photos she had seen and that Jalupae needed to be seen by a veterinarian. Mr. Whiffin told her that he had no interest in putting money into an old horse and the SPCA was essentially ordering the death of his horse.

[33] Cst. Bailey went to the Whiffin farm that same day to give Mr. Whiffin another Order of compliance. She met Mr. Whiffin and Mr. Cunningham for the first time that day. Cst. Bailey told them that Jalupae couldn't be left in that condition. Mr. Whiffin said again that he did not want to put any money into an old horse and that he was left with no choice but to put him down. Cst. Bailey testified that this was an option and she asked Mr. Whiffin if he was going to have a veterinarian come out or shoot Jalupae with a gun. He said he didn't know.

[34] During this time Mr. Cunningham commented to Cst. Bailey that Jalupae was happy and was eating. Cst. Bailey had to explain that Jalupae wasn't able to chew the food and needed a special diet and again stated that the horse couldn't be left in this condition. He was starving and he was in distress. She described the conversation with Mr. Whiffin as polite and that he was cooperative. She was trying to help him decide what to do with the horse. She testified that she would have been satisfied with either outcome: either have a vet treat him and follow the recommended diet or euthanize. It was obvious to her that Jalupae was in distress so if he wasn't going to be fed properly then euthanasia was the humane option.

[35] She provided Mr. Whiffin with an Order [Exhibit 10] requiring Mr. Whiffin to comply with the conditions within 48 hours. Mr. Whiffin did comply with the Order and

made an appointment for Dr. Gaunt to see Jalupae. This occurred on September 10th. Cst. Bailey was aware of this appointment.

[36] Dr. Gaunt testified at this trial. He arrived on the Whiffin farm around 9:00 a.m. on the morning of the 10th and Mr. Cunningham took him to see Jalupae. Dr. Gaunt could tell from a distance that the horse was likely elderly and very thin. When he touched Jalupae there were no fatty deposits over the horse's hips or ribs.

[37] Dr. Gaunt could tell immediately that Jalupae had a body condition of "1". The body condition scale ranges from 1 to 9 with "1" indicating a very poor body condition as a result of being too thin and "9" indicating a horse that is extremely fat. The ideal body condition score is a "5". Jalupae was one of the thinnest horses that Dr. Gaunt had ever seen. He testified that this was obvious and anyone would be able to tell that the horse was very thin. Jalupae had no fat and also had severe muscle loss.

[38] Dr. Gaunt noted that Jalupae clearly had an appetite as he put his head down to feed at every opportunity. He watched Jalupae eat some hay and it was easy to see that Jalupae would chew it, ball it up and then the hay would fall out of his mouth. This was obvious. Dr. Gaunt assumed that Jalupae had dental problems, as he had an appetite but was unable to swallow the food. Jalupae's coat was also in poor condition. This is another sign that he wasn't getting proper nutrition.

[39] Mr. Whiffin arrived on scene just prior to Dr. Gaunt examining Jalupae's teeth. This examination revealed that of the 24 molars, at least half were worn down to the gum line with sharp edges, the rest weren't worn down quite as far but also had sharp edges. In this condition Jalupae was not able to eat hay or long grass. Dr. Gaunt could have floated the sharp edges but they were too worn out to fix. It was Dr. Gaunt's opinion that the only options for Jalupae were to make a change in his diet to ensure that he got enough calories and nutrients, or euthanize him to end his suffering.

[40] Dr. Gaunt testified that he told Mr. Whiffin about his concerns and recommended a therapeutic diet for Jalupae. He set out in detail what Jalupae would need: a diet of pelleted alfalfa, finely chopped hay – soaked, and added oils. Mr. Whiffin replied that he didn't think he could do this and that he would have to have the horse put down. Dr. Gaunt testified that he agreed that if Jalupae wasn't going to be fed this diet then the only humane thing to do was to euthanize him to end his suffering. It was Dr. Gaunt's opinion that Jalupae was starving and this would cause organs and bodily systems to deteriorate. He suggested to Mr. Whiffin that he euthanize Jalupae right then and there.

[41] Mr. Whiffin wanted to wait a few days. He needed to dig a grave for Jalupae and his back hoe wasn't working. He told Dr. Gaunt that it would be fixed by the 14th and they made an appointment for Dr. Gaunt to return on that date at 9:30 to euthanize Jalupae.

[42] Mr. Cunningham had other plans. When Dr. Gaunt returned on the 14th to euthanize Jalupae, the horse wasn't there. Mr. Cunningham told him that they had moved the horse and they were going to try to save him with a change in diet. Dr. Gaunt called Mr. Whiffin. Mr. Whiffin did not know the horse had been moved and did not authorize Mr. Cunningham to move Jalupae. Dr. Gaunt did not have any further dealings with Mr. Whiffin or Jalupae.

[43] Dr. Gaunt notified Cst. Bailey immediately that Jalupae was not at the farm and that he hadn't been euthanized as planned. Cst. Bailey called Mr. Whiffin who repeated

that he didn't know where the horse was. He sounded irritated and stated that he had done his part by digging a hole and hiring the vet.

[44] Cst. Baily and Cst. Erika Paul went to the Whiffin farm to try to find out what had happened to Jalupae. Mr. Cunningham was there and explained that he had taken Jalupae to his friend's house and that they were going to try to fatten him up on grass. Cst. Bailey advised him that it was not his choice as Mr. Whiffin had decided to euthanize Jalupae. Mr. Cunningham told them where Chris lived and Cst. Bailey and Cst. Paul went to find Jalupae. The farm where Mr. Cunningham took Jalupae belongs to Chris Liedtke and is approximately 9 kms from the Whiffin farm.

[45] Cst. Bailey and Cst. Paul went to Mr. Liedtke's farm and found Jalupae there. He was in the field "eating" grass. Cst. Bailey could see that Jalupae was chewing the grass but then it would just fall out of his mouth.

[46] Mr. Liedtke testified that Mr. Cunningham had shown up 2 nights prior to September the 14th sometime after 10:00 p.m. He was riding one horse and leading 2 others. Mr. Cunningham wanted to leave one horse behind because it was supposed to be put down and he was trying to find a safe haven for it. Mr. Liedtke didn't want the horse and told Mr. Cunningham to have it gone the next day. He did not recall Mr. Cunningham leaving any food for Jalupae. When Cst. Bailey and Cst. Paul arrived they told Mr. Liedtke that if he was going to keep the horse he would have to feed it a special diet and they would come by every week to monitor his weight. Mr. Liedtke did not want to look after Jalupae. Shortly after the SPCA constables left Mr. Cunningham arrived at his farm and left, walking with Jalupae.

[47] Mr. Liedtke called Cst. Bailey and said that Jalupae would be back on the Whiffin farm by the end of the day. Cst. Bailey contacted Mr. Whiffin and asked him what his plans were. He stated that Jalupae would be executed by the end of the day.

[48] Cst. Bailey was off the next day (September 15th) and Cst. Paul followed up with Mr. Whiffin to find out what had happened with Jalupae. Mr. Whiffin told her that Jalupae was dead and buried. He described that he put three ropes around Jalupae's neck, lifted him up with the excavator and snapped his neck – Jalupae died in seconds. He said there were three witnesses if she wanted to confirm this and that she was welcome to attend at the property.

[49] Constables Bailey and Paul returned to the Whiffin farm on September 21st in response to a call that the remaining two horses had been loose on the road. Mr. Whiffin was present and they asked him about witnesses to Jalupae's death. He said it was just him and Mr. Cunningham. Mr. Cunningham put the ropes around Jalupae's neck and he [Mr. Whiffin] worked the excavator. Mr. Whiffin asked if they wanted him to dig up the body but Cst. Bailey told him that wouldn't be necessary.

[50] There was another person on the farm that day, a Matt Christie, who told Cst. Bailey that Jalupae had been hung and that there were three witnesses.

[51] Dr. Gaunt was asked in his testimony about the accepted methods of euthanizing a horse. He stated that there are three recommended methods; lethal injection, shooting, and captive bolt. With lethal injection the sodium barbital takes about 4 to 5 seconds to reach the brain and then death ensues. With both shooting and captive bolt methods, the brain is "killed" immediately and death is instant.

[52] In direct examination Dr. Gaunt was asked his opinion with respect to suffering if a rope was placed around Jalupae's neck and he was lifted up by an excavator. Dr. Gaunt

opined that this would cause death by strangulation and it would take approximately 60 seconds. He stated that it would be extremely stressful for the horse – including the noise from the machine – and that it would start to struggle as it was lifted up. In this scenario he said that a horse’s neck would not “snap” within seconds because there was no rapid elevation.

[53] In cross-examination he agreed that his opinion about how Jalupae died was speculation as he was not there. It was his opinion that the horse’s neck would not snap because it would take a lot of force, although he could not say exactly how much force. Dr. Gaunt testified that in his opinion the three recommended methods of killing a horse were the only humane ones. He declined to speculate about the humanity of other possible methods where death might be instant.

[54] The final witness for the Crown was Amber Wenstob. She testified about a conversation she had with Mr. Whiffin shortly after Jalupae’s death. She was a friend of Sherry Sabourin and knew Mr. Whiffin through her. Mr. Whiffin called her and asked to come to her home. He had never done that before. The point of the visit according to her, was to tell her what happened with Jalupae because he was upset about it. She testified that Mr. Whiffin was visibly upset. He said that he and Mr. Cunningham hung the horse with an excavator and that it was one of the most horrible things he had ever witnessed.

[55] Ms. Wenstob testified that Mr. Whiffin told her the horse was “heavier than he thought” and although he didn’t say how long it took, he said it was “longer than they wanted it to take”. He also told her that it was “more of an ordeal than they expected it to be”. Although not stated by Mr. Whiffin, Ms. Wenstob assumed from the conversation that Jalupae did struggle.

[56] Mr. Whiffin called two witnesses, the first was Stephen Oulette. Mr. Oulette testified that he was present when Jalupae died. He was a friend of Mr. Whiffin’s and one of the other two horses on the farm actually belonged to him. He called Mr. Whiffin on the morning that Jalupae died for another reason and Mr. Whiffin told him that they had to euthanize Jalupae by 9:00 a.m.. Mr. Whiffin was upset and Mr. Oulette went to the farm to be a support.

[57] Mr. Oulette testified that Mr. Whiffin was frustrated and unsure of what to do. They discussed what would be quick with no suffering for Jalupae. Mr. Whiffin mentioned using the back hoe to snap his neck. Mr. Oulette responded that this was barbaric but would be effective. Mr. Oulette then saw Jalupae and was shocked at how he looked – he was emaciated.

[58] Mr. Oulette comforted Jalupae, speaking soothingly to him and then Mr. Cunningham walked him down to the excavator. Mr. Cunningham put a rope around Jalupae’s neck and tied it onto the excavator. Mr. Cunningham then said he couldn’t do this, and he left. Mr. Whiffin started the excavator and Jalupae just stood there. Mr. Oulette testified that Mr. Whiffin quickly jerked the bucket of the excavator “where the horse was immediately off the ground, snapped and I saw the horses limbs go slack and I knew just off the first jerk that the horse had been killed and that he wasn’t going to suffer”. Jalupae did not fight or kick. Mr. Oulette described death as being instantaneous and that he firmly believed that Jalupae was dead after the first jerk and that Jalupae didn’t even know what had happened – it was that quick. He estimated it took half a second for

Jalupae to die. Mr. Whiffin specifically told Mr. Oulette that he wanted Jalupae's death to be quick and in Mr. Oulette's opinion, it was.

[59] Mr. Oulette testified that after the first jerk of the excavator bucket he knew Jalupae was dead. Mr. Whiffin jerked the bucket a few more times and then lowered Jalupae into the grave site. The whole process from the first jerk to Jalupae being placed in the hole lasted ten seconds. Mr. Oulette looked in the hole and noted that Jalupae's eyes were open and fixed. Jalupae was not breathing and his neck was elongated. To Mr. Oulette it looked like the spinal cord had been severed.

[60] In cross examination Mr. Oulette agreed that the method was barbaric, graphic, and violent but he maintained that it was effective and that Jalupae did not suffer. Mr. Oulette was asked whether he thought this was the best method for euthanizing a horse and he stated that at the time, he thought it was given that Jalupae had to be euthanized by 9:00 a.m. Mr. Oulette testified that in hindsight he would have postponed it and waited for a veterinarian to attend and euthanize with a needle. He agreed that a needle would be more humane. However, Mr. Oulette did not waiver on his view that Jalupae died instantly and did not suffer.

[61] Mr. Oulette was also asked about Mr. Cunningham's care of the horses in general. As one of the horses belonged to Mr. Oulette he had occasion to visit it and see the care that it was receiving. Mr. Oulette knew Mr. Cunningham to be the person on the farm in charge of looking after the horses. He said that Mr. Cunningham did the best he could and agreed that there were times when Mr. Cunningham disappeared for days at a time.

[62] Mr. Whiffin called another witness, his 19 year old step-daughter Sarah Lovan. She testified that it was Sherry Sabourin's decision to get the horse and that Sherry was going to take care of it. Ms. Lovan agreed that she was not living on the farm and only visited approximately every second weekend. She identified photos of Jalupae that were taken by her on April 18, 2009 [Exhibit 8]. The photos show her mother and siblings riding Jalupae. It is difficult to precisely state the body condition of Jalupae in those photos as Jalupae has his thicker winter coat and someone on his back, but he is definitely fatter and more muscled than in the photos taken in July or September 2009.

[63] Mr. Cunningham called two witnesses: Bruce Rosenthal and Anthony Schneider. Mr. Rosenthal testified that he owns the farm next door to Mr. Whiffin. The first time he saw Jalupae he asked Mr. Whiffin why he'd bought a "bag of bones" and that it was obvious the horse wasn't well. When he first saw Jalupae he looked as he did in the photos taken on August 10, 2009. He did not know the date when he saw Jalupae for the first time and said that he went onto the Whiffin farm every couple of months. Mr. Rosenthal testified that there was always lots of food for the horses on the Whiffin farm and that he himself took feed there. The other two horses were a proper weight. He agreed in cross-examination that horses need to eat constantly and that if they have bad teeth they are not able to eat. He agreed that hanging a horse was not a humane way to euthanize it and that he wouldn't do it that way.

[64] Mr. Schneider is a friend of Mr. Whiffin's. He was present on the farm when a ferrier attended to care for the horses' feet. He described the horses as being well looked after. He agreed in cross-examination that the needs of a senior horse are different in terms of diet and that you have to pay attention to a horse's weight.

Analysis

Count 3

[65] A conviction on this count requires the Crown to prove beyond a reasonable doubt that the accused was either the owner or a person having custody or control of Jalupae, and did wilfully neglect or fail to provide suitable and adequate food or care for him. Based on the evidence I have no doubt that Mr. Whiffin was the owner of Jalupae and that Mr. Cunningham was a person having “custody or control” of Jalupae, at least from May 1st to the end of July 2009.

[66] “Wilfully” describes the level of intent that the Crown is required to prove. This term as it applies to [sections 445.1\(1\)\(a\) and 446\(1\)\(b\)](#) of the [Criminal Code](#) is defined in [section 429](#):

Everyone who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed for the purposes of this Part, wilfully to have caused the occurrence of the event.

[67] The Crown is not required to prove that Mr. Cunningham or Mr. Whiffin intended to act cruelly. It is sufficient for the Crown to prove beyond a reasonable doubt that Jalupae was not provided with suitable and adequate food and care, and that a reasonable person would realize that this was the case. This mental element can be proven by reasonable inferences from the accused’s actions or through the doctrines of wilful blindness or recklessness [*R. v. Hughes* 2008 BCJ No. 973 at paragraph 8].

[68] The timing of events is important. Ms. Sabourin testified that her memory for some details and dates was affected by the motor vehicle accident on June 8, 2009. For this reason I assessed her evidence with caution particularly where it was contradicted by other evidence. Specifically, I do not accept the evidence of Ms. Sabourin that the Mercers told her Julapae did not require any special food. Mrs. Mercer was very specific that she advised Mr. Whiffin that Jalupae did need special feed including pellets and that a bag of this feed was delivered along with the horse. I accept the evidence of Mrs. Mercer on this point. Mrs. Mercer and Ms. Sabourin both stated that Jalupae was in good condition for an older horse on the date of the visit to the Mercer farm and I find as a fact that this was the case.

[69] There is no doubt that in photos taken on August 10, 2009 by Cst. Bailey, Jalupae is significantly thinner than in the photos taken in 2005 and 2006, and if the photos taken by Sarah Lovan in April of 2009. I accept the evidence of Ms. Mercer and Ms. Sabourin that those photos from 2005 or 2006 reflect the condition of Jalupae in the fall of 2008. I therefore conclude that Jalupae lost a significant amount of weight between the fall of 2008 and the summer of 2009. I also accept the evidence of Ms. Sabourin that Jalupae was at least as thin as he appeared on August 10, 2009, if not thinner, when she moved onto the farm the first week of June 2009. I am unable to determine exactly how much weight Julapae lost or exactly when the weight loss occurred other than to say that it was between the time that Jalupae came to the Whiffin farm in the late fall of 2008 and June of 2009.

[70] There was evidence from Sarah Lovan to the effect that Ms. Sabourin was in charge of the care of Jalupae from the time that he arrived on the farm. I do not accept that evidence. Ms. Lovan was not living on the farm at that time and only visited every two weeks. Ms. Sabourin was not living on the farm during that time either and testified that she visited every few weeks. When she moved onto the farm in June Mr. Whiffin

was not living there yet. Mr. Cunningham was the one feeding Jalupae. The only reasonable conclusion from the evidence that I do accept is that Mr. Cunningham was living on the farm and he was in charge of caring for all three horses, including Jalupae.

[71] It was evident to anyone who spent a few moments watching Jalupae eat that he was not able to chew and swallow hay or long grass. This was noted by Ms. Sabourin, Cst. Bailey, Cst. Paul and Dr. Gaunt. I accept that this was in fact the case and that it was the result of Jalupae's teeth being too worn down to properly chew the food. Ms. Sabourin first noticed this while recovering from her car accident in June of 2009. I also accept her evidence that she told Mr. Cunningham about this and that she told Mr. Whiffin that Jalupae needed a special diet. Her evidence that Mr. Whiffin moved onto a boat at the farm in the beginning of July 2009 was not contradicted. Nor was there any evidence to contradict that Ms. Sabourin told Mr. Whiffin 3 or 4 times between the beginning of June and the end of July that Jalupae couldn't eat properly and needed a special diet.

[72] I find as a fact that Mr. Cunningham was made aware of the problem Jalupae had eating hay by mid-June 2009 at the latest. I further find as a fact that Mr. Whiffin was also made aware of the problem Jalupae had eating hay by the beginning of July 2009 at the latest.

[73] During this time Ms. Sabourin did what she could to ensure that Jalupae had access to grass instead of hay. When Mr. Whiffin didn't do anything about the situation she purchased the required food herself. I find as a fact that this occurred at the beginning of August as Jalupae was eating this food when Cst. Bailey attended the farm on August 10, 2009. I accept that Ms. Sabourin took over the care and feeding of Jalupae at the beginning of August. However, the evidence establishes that Mr. Cunningham was aware of the problem as early as the beginning of June and did nothing about it. Similarly, Mr. Whiffin was aware that Jalupae was not getting adequate food by July of 2009 and again did nothing about it. While it is true that an older horse may lose weight for other reasons, once Jalupae's problem with eating his food was brought to their attention, Mr. Cunningham and Mr. Whiffin were under an obligation to do something about it. That didn't necessarily mean providing a special diet. Mr. Whiffin always had the option to euthanize Jalupae, but he did not have the option to starve him.

[74] Even if Jalupae had another medical issue that caused him to lose weight, I am satisfied beyond a reasonable doubt that both Mr. Whiffin and Mr. Cunningham failed to provide suitable and adequate food to Jalupae after they had been told that Jalupae couldn't eat the food he was getting. This knowledge satisfies the intent requirement for [section 446\(1\)\(b\)](#) in that the Crown has proven beyond a reasonable doubt that both wilfully neglected to get Jalupae the proper food. They knew Jalupae couldn't eat and did nothing about it.

[75] There was a discrepancy in the evidence over when Ms. Sabourin left the farm and whether Jalupae continued to lose weight even when fed the special food that Ms. Sabourin gave him. Having found that Mr. Cunningham and Mr. Whiffin failed to provide suitable and adequate food for Jalupae during the months of June and July 2009, I do not need to resolve this difference. Again, the fact that there may have been another reason that Jalupae was losing weight does not affect the obligation of Mr. Cunningham and Mr. Whiffin to ensure that Jalupae was getting adequate food.

[76] The time frame during which I find that Mr. Cunningham and Mr. Whiffin wilfully neglected to provide Jalupae with adequate food pre dates of the first Order of compliance issued by the SPCA. This does not affect my decision as I am satisfied beyond a reasonable doubt that both Mr. Whiffin and Mr. Cunningham were already aware that Jalupae could not eat properly. Not only should they have known this from how Jalupae looked at the beginning of June, they were specifically told of the problem.

[77] I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Cunningham as the person having custody and control over Jalupae, and Mr. Whiffin as the owner of Jalupae, wilfully neglected or failed to provide suitable and adequate food to Jalupae.

Count 2

[78] With respect to count two the Crown is required to prove beyond a reasonable doubt, the following: that the actions of the accused caused Jalupae unnecessary pain, suffering or injury; and that the accused caused the pain, suffering or injury wilfully. The same definition applies to “wilfully” as set out under count three. Again, the Crown does not need to prove a cruel intent. It is sufficient for the Crown to prove beyond a reasonable doubt that unnecessary pain, suffering or injury occurred and that a reasonable person would realize that treating Jalupae as they did would subject Jalupae to this risk.

[79] This count as charged encompasses the time period between May 1, 2009 and September 15, 2009. The wording of the charge does not limit the conduct of the accused to the method by which Jalupae was euthanized. I will therefore first consider whether the actions of Mr. Cunningham and Mr. Whiffin in failing to provide adequate food and care to Jalupae caused him unnecessary pain, suffering or injury.

[80] The evidence is overwhelming that Jalupae was not able to eat hay or long grass and that he suffered a dramatic weight loss over a period of a few months. Dr. Gaunt testified that Jalupae was hungry but was not able to process his food. It was his opinion that this lack of food caused suffering to Jalupae. It resulted in loss of fat and muscle tissue and would have affected his organs as well.

[81] Mr. Cunningham and Mr. Whiffin argued that because Jalupae was old, he may have had some other ailment that caused him to lose weight. This is irrelevant. The fact is that he was starving and I am satisfied beyond a reasonable doubt that the failure to provide adequate food and care for Jalupae caused unnecessary suffering to him. Both accused were aware of the problem and at a minimum they were reckless as to whether or not Jalupae suffered.

[82] Although I have already concluded that the Crown has proven the offence in count 2 beyond a reasonable doubt based on the failure to provide adequate food, I will give my reasons with respect to the actions of Mr. Cunningham and Mr. Whiffin when Jalupae was euthanized.

[83] As the owner of Jalupae, Mr. Whiffin was entitled to decide when to end Jalupae's life. Every owner of an animal has this right. Our laws do not stipulate that only certain methods of euthanizing an animal are approved while others are criminal. Such conduct is however subject to criminal sanctions where it results in unnecessary pain, suffering or injury to the animal. What is “necessary” will depend on the circumstances of each case and the purpose behind the actions in question.

[84] One of the leading cases on this issue is *R. v. Menard* (1978), CCC (3d) 458, a decision of the Quebec Court of Appeal. The Court described ‘unnecessary’ in the

context of this section of the criminal code as meaning pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the particular case. For example, some suffering is permissible on animals used in medical research for the benefit humans, but the suffering must be no more than is necessary to achieve that purpose.

[85] Here the purpose was to end the life of Jalupae. It is with this purpose in mind that I must analyse the evidence. There is no doubt that people were shocked and horrified to learn how Jalupae died. The term “barbaric” was used several times in this trial to describe the method used. While this reaction is not surprising, I must consider only the evidence that was presented in this trial.

[86] The relevant evidence is that of Dr. Gaunt, Ms. Wenstob, and Mr. Oulette. Dr. Gaunt testified about the “approved” methods for euthanizing an animal: lethal injection; shooting the animal with a gun; and captive bolt. The criminal code does not refer to these methods as being the only means of euthanizing a horse. As long as the means employed results in no more pain suffering or injury than is necessary in the circumstances, it will not attract criminal sanctions.

[87] It is not sufficient for the Crown to show only that Jalupae was hung. The fact that Jalupae was hung is not disputed. While this method may result in public outrage, it is the specific mechanism of death that it is important and whether that caused pain suffering or injury to Jalupae that was unnecessary.

[88] Dr. Gaunt testified that if Jalupae had a rope around his neck and was lifted up by an excavator that he likely died of strangulation. He did not think that Jalupae would have died in less than sixty seconds. He did not think that Jalupae’s neck would snap in this circumstance and testified that it would take a lot of force to snap a horse’s neck. He specifically stated that the horse’s neck would not snap because there was no sudden elevation in the scenario described to him by Ms. Murray. He was not asked if Jalupae’s neck could snap if the bucket of the excavator was suddenly jerked. There was no evidence as to how much force it would take to break a horse’s neck, other than a lot, and no evidence as to the amount of force that the jerking of the excavator could generate. There was no autopsy performed on Jalupae, so there is no physical evidence as to the cause of death. Mr. Whiffin offered to exhume Jalupae’s body but Csts. Bailey and Paul declined the offer.

[89] Dr. Gaunt obviously wasn’t present when Jalupae died and his opinion with respect to the cause of death and the time that it would have taken is speculation. He agreed with this. The weight that I place on his opinion is dependent on my findings with respect to the mechanism of Jalupae’s death based on the balance on the evidence. The mechanism of death is important as it is directly related to whether Jalupae suffered unnecessary pain, suffering or injury.

[90] Ms. Wenstob’s evidence is relevant in terms of what she says was told to her by Mr. Whiffin about Jalupae’s death. The statement of Mr. Whiffin that it was one of the most horrible things he had ever witnessed does not assist me in determining the mechanism of Jalupae’s death. This statement could just refer to having to witness Jalupae die, regardless of the method. The same can be said of the statement that it was more of an ordeal than he expected it to be. The statement attributable to Mr. Whiffin that it took longer than they wanted it to take is *some* evidence of the amount of time that it took Jalupae to die. The comment that Jalupae was heavier than he thought he would

be, could be an indication that things did not happen as quickly as he thought they would or it may have just been a comment about his weight. Her testimony that it was her assumption from the conversation that Jalupae struggled is just that, her assumption, and it is not evidence upon which I rely in determining the mechanism of Jalupae's death.

[91] The only witness to Jalupae's death who testified in these proceedings, is Mr. Oulette. I have no doubt that he was present when Jalupae was euthanized. While it may seem unthinkable that these men chose hanging as the means to euthanize Jalupae, I accept the evidence of Mr. Oulette that they all wanted death to be immediate and did not want Jalupae to suffer.

[92] Testifying was not easy for Mr. Oulette. I have no doubt that he was upset by having to see Jalupae die but this was not necessarily connected to the means used. It was the death itself that was upsetting. He was certain that Jalupae died immediately – within half a second. Jalupae did not struggle. He was satisfied that the method used was effective in that Jalupae did not suffer. Ms. Murray is very skilled at cross-examination. During questioning by Ms. Murray, Mr. Oulette agreed that the method used was violent and barbaric but he did not waiver in his testimony that Jalupae died immediately.

[93] Whether or not the method used to euthanize a horse is termed violent or barbaric does not factor into my deliberations. The offence under the criminal code is only concerned with whether there is unnecessary pain, suffering or injury, not the level of violence. Shooting a horse in the head with a bullet must certainly be considered violent, yet this method would not result in a criminal charge as long as death was immediate.

[94] I find Mr. Oulette to be an honest, credible and reliable witness. There was some inconsistency in his evidence about how often he was at the Whiffin farm but I find this to be a result of a difference in interpretation with respect to words such as “regularly” rather than an attempt by Mr. Oulette to be evasive or misleading. This does not detract from my findings with respect to his evidence.

[95] My sense is that Mr. Oulette did not testify to help out his friend, Mr. Whiffin. I am confident that if Jalupae's death was other than as he described it, he would have said so. I accept Mr. Oulette's evidence as to the mechanism of Jalupae's death. I am satisfied that Jalupae died as a result of his neck breaking and that death was immediate. Given my finding I place no weight on the evidence of Dr. Gaunt that Jalupae suffered, as his opinion was based on the assumption that Jalupae died of strangulation. There is no evidence of this and no autopsy was performed to contradict the evidence of Mr. Oulette as to the cause of death.

[96] The evidence of Ms. Wenstob regarding the statements made to her by Mr. Whiffin does not change my finding that Jalupae died immediately. When all of those statements are considered together, it is possible that they could support the inference that Jalupae struggled. However, when I consider these somewhat vague statements in the face of the evidence of Mr. Oulette, which I accept, I remain satisfied that Jalupae died immediately.

[97] The law recognizes that in euthanizing an animal some pain or suffering may be necessary. The evidence here, which I have accepted, is that Jalupae died within half a second. Some amount of pain or suffering was inevitable given that the purpose was to end his life. Given that death was immediate, the Crown has failed to adduce evidence in

this case to prove beyond a reasonable doubt that either Mr. Whiffin or Mr. Cunningham caused unnecessary pain, suffering or injury to Jalupae when he was hung.

[98] The application of this section of the criminal code is not dependent on the level of public outrage - where death is immediate the law does not require the use of the most dignified means. My decision should not be seen as endorsing or condoning this method of euthanizing an animal. Whether or not criminal sanctions are imposed will always depend on the particular circumstances of any given case including the intent of the accused, and the specifics of the mechanism involved. If there was sufficient evidence here to satisfy me that Jalupae died other than immediately my decision would likely be different. That evidence was not present in this case.

Conclusion

[99] As stated earlier in these reasons I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Cunningham and Mr. Whiffin wilfully caused unnecessary suffering to Jalupae by failing to provide him with proper food. This is count 2. I am also satisfied the Crown has proven beyond a reasonable doubt that Mr. Whiffin and Mr. Cunningham failed or wilfully neglected to provide suitable and adequate food and care to Jalupae. This is count 3.

[100] As the same facts form the basis for my findings on both counts 2 and 3, by operation of law, the accused can only be convicted of one of these counts. I find both Mr. Cunningham and Mr. Whiffin guilty on count 2 of the information. There will be judicial stay of proceedings on count 3.