

**File No: 88552-1
Registry: Kamloops**

In the Provincial Court of British Columbia

REGINA

v.

DARREL DRANEY

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

COPY

Crown Counsel:	A. Janse
Defence Counsel:	R. Bruneau
Place of Hearing:	Kamloops, B.C.
Date of Judgment:	May 5, 2011

[1] THE COURT: Mr. Draney is charged with two counts under the *Criminal Code* relating to events arising on April 4, 2009, on Skeetchestn First Nation lands near Savona. The Information reads as follows:

Count 1: Darrel Draney, on or about the 4th of April 4, 2009, at or near Savona, 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 or a bird, to wit: horses, contrary to Section 445.1(1)(a) of the *Criminal Code*.

Count 2: Darrel Draney, on or about the 4th April, 2009, at or near Savona, in the Province of British Columbia, did, being the owner or the person having custody or control of domestic animals, to wit: horses, abandon them in distress or wilfully neglect or fail to provide suitable and adequate food, water, shelter and care for them, contrary to Section 446(1)(b) of the *Criminal Code*.

[2] The essence of the case for the Crown is that Mr. Draney owned, kept, or cared for a number of horses at two locations where the horses were knowingly kept in a malnourished and emaciated state close to starvation by which they suffered unnecessarily. It is alleged that Mr. Draney kept these horses and, in doing so, wilfully failed to provide them with adequate and suitable food and water, veterinary care, hoof care, parasite management, safe shelter, and enclosures.

[3] Mr. Draney answers that there is no doubt that the animals had been in distress not because of his care, but due

to harsh winter conditions in the high country into which they had escaped. Mr. Draney admitted that he owned or had responsibility for some of the horses that were recovered. He played a part in a joint effort by a number of community members to recover these distressed animals and return them to good health. He argues that if his efforts to care for these animals fell short in some respects, it was a good faith effort which does not warrant the stigma of a criminal conviction.

[4] Jamie Wiltse, an employee of the British Columbia Society for the Prevention of Cruelty to Animals is a special provincial constable within the meaning of the *Police Act*, R.S.B.C. 1996, c. 367. Special Constable Wiltse knew Mr. Draney, having previously worked with him in his capacity as a Skeetchestn Band council member.

[5] On February 27, 2009, Special Constable Wiltse was on the Skeetchestn Reserve at a property near the intersection of Highway 1 with Deadman-Vidette Road when she saw two horses, a bay mare with white blaze on her face and a sorrel weanling. The mare was in an obviously emaciated state. She later spoke with Mr. Draney about these horses and underlined their need for food, water, shelter, and possibly veterinary treatment. Mr. Draney said that he would attend the area to see if they

were his horses and, if so, would take them to his property to care for them.

[6] On March 2nd, Special Constable Wiltse went to a property which was, I am satisfied, the residence of Mr. Draney on the Deadman-Vidette Road and there saw the same bay mare and sorrel weanling. There she left a posting requesting contact regarding the care of these horses. These two horses were seen again by Special Constable Wiltse on the same property on March 13, 2009.

[7] On March 6th, Special Constable Wiltse received a complaint regarding thin horses on the Skeetchestn Reserve along Sageland Drive in an area known as the subdivision. There she saw a palomino mare which she described as extremely thin. This mare bore Mr. Draney's brand. Mr. Draney later gave evidence that the brand signifies that the horse is or was at one time owned by him. He said this particular horse was in his care, although it belonged to his daughter, Samantha.

[8] Special Constable Wiltse rated the animal as a two or 2.5 on the nine-point Henneke scale. According to Dr. Falkenberg's evidence, which I accept, the Henneke Body Condition Scoring System in which Special Constable Wiltse had received training is a standardized system of checks developed

to rate equine body condition. The nine-point scale runs from one, poor, and two, very thin, through three, thin, four, moderately thin, five, moderate, six, moderately fleshy, to seven, fleshy, eight, fat, and nine, extremely fat. Five or six is considered ideal.

[9] Special Constable Wiltse returned to the Sageland Drive site the next day, March 7th, where she met Daryl Peters. The horses were rounded up at Barb Larson's property and moved to corrals on the property of Terry Deneault. While at Terry Deneault's corrals that day, Special Constable Wiltse saw the same palomino mare with the Draney brand.

[10] Special Constable Wiltse also spoke that day with Teddy Gordon, Mr. Draney's factotum. She then issued Mr. Gordon a ticket-like document in the name of Darrel Draney entitled, "BCSPCA order."

[11] This document, which indicated a complaint of no feed with respect to four described horses, declared that:

Pursuant to the *Prevention of Cruelty to Animals Act*, you are hereby ordered to ...

There then followed six checked boxes to the following effect:

Provide clean water, provide sufficient suitable food, provide necessary hoof care, provide necessary veterinary care, ensure the animal is free of parasites, and provide appropriate shelter.

[12] Under the rubric, "Comments," Special Constable Wiltse added the following specific directions:

Mare, BCS 2/9, seek vet care within 48 hours. Black gelding, RF lameness, injury to inner thigh, vet care 48 hours, provide adequate food.

[13] I digress to point out that there is no authority to issue such orders under the *Prevention of Cruelty to Animals Act* or the Regulations made there under. There is no offence of failing to abide by such an order and no penalty to be paid. To call this document an order is misleading.

[14] The purpose of the document becomes clear as it continues, "Failure to comply with the above-noted order within 48 hours may result in legal action including seizure of your animals and/or charges pursuant to," and there were boxes ticked for, "*Criminal Code, Prevention of Cruelty to Animals Act.*" The notice amounts to a caution before action and must have been considered so by Mr. Draney provided he received it.

[15] Sometime between March 7 and March 13, 2009, Special Constable Wiltse and Mr. Draney arranged to meet at his office in the Skeetchestn Band offices. Mr. Draney acknowledged

receiving the March 7 ticket given to Mr. Gordon. Special Constable Wiltse asked him whether he had arranged vet care for the mare and the gelding referred to in the ticket. Mr. Draney responded that he had not and that they do their own vet care.

[16] He invited Special Constable Wiltse to attend his property at the Deadman-Vidette Road in his absence to re-inspect the horses with Teddy Gordon. Special Constable Wiltse went to the Draney property on March 13 and met with Teddy Gordon, who assisted her inspection. There were 16 horses present.

[17] The mare and gelding which had concerned her on March 7 were in a corral with an Appaloosa stallion and two other horses. The horses had access to food, but not water, and Special Constable Wiltse asked that water be provided.

[18] One of the horses observed in the corral that day was a light sorrel or dun-coloured horse named Suzie. The bay mare seen by Special Constable Wiltse on February 27th and March 2nd was also there and was still emaciated. Special Constable Wiltse ranked the bay mare's Henneke score at 1.5.

[19] In another enclosure, Special Constable Wiltse saw three horses she believed to be weanlings and thought were probably

three out of nine on the Henneke scale. Eight horses with good body condition were in a pasture on the property along with about 40 cattle, but the horses had worn rub marks on their sides suggesting external parasites such as lice or ticks and they needed hoof care. A black filly was limping.

[20] Special Constable Wiltse saw no food in the pasture, but there were round bales of hay in the area and she noted that it was not then feeding time, generally in the morning and in the evening. The bay mare and weanling had access to hay, but it was noted to be of poor quality and dusty.

[21] At this point, Special Constable Wiltse issued another BCSPCA order to Teddy Gordon in the name of Mr. Draney. The ticket referenced horses and cattle with a complaint relating to feed, water, and veterinary care. The ticket purported to order seven actions:

Provide clean water for horses in the corral,
provide suitable food, provide vet care for the
horses in the corral, provide shelter, ensure the
corral is cleaned.

[22] Under the heading, "Comments," Special Constable Wiltse noted:

Vet check for seven horses and three foals in
corral. Follow advice of vet. (Black colt, Suzie,
bay male, three foals, weanlings, cattle adequate).

Compliance was stated to be required within 24 hours or action could result under the *Criminal Code* or the *Prevention of Cruelty to Animals Act*.

[23] On April 1, 2009, Special Constable Wiltse was travelling the Deadman-Vidette Road at Taylor Road near a property known as the Hatchery. She saw a downed horse believed to be deceased. She stopped to investigate and found 11 horses in an overgrazed pasture, 10 in very thin body condition. The exception was a roan stallion in adequate condition.

[24] Special Constable Wiltse observed a small amount of what she considered to be poor quality hay on the ground which the stallion was defending. In the centre of the field was a horse carcass partially eaten by predators. There was a second horse carcass near a barbed wire fence. Special Constable Wiltse posted a notice at the scene requiring contact within 24 hours.

[25] I pause to emphasize that the Crown does not assert that either of the two deceased horses suffered or died as a result of any act or want of care by Mr. Draney. Some light was cast by Mr. Draney on the circumstances of one of the two animals. I will return to this later.

The Hatchery Search

[26] On April 3, 2009, two search warrants were sought by Special Constable Wiltse and issued by a justice. Those warrants were executed the following day at two properties, Mr. Draney's property at the Deadman-Vidette Road and the property known as the Hatchery on Taylor Road. There is no issue as to the granting or execution of the search warrants.

[27] The warrants were executed by Special Constable Wiltse and Special Provincial Constable Kokoska with the assistance of other BCSPCA special provincial constables, BCSPCA staff, livestock haulers and handlers, Dr. Falkenberg, a veterinarian, and a member of the RCMP. There were 11 horses seen at the Hatchery and 16 at Mr. Draney's property.

[28] The horses at the Hatchery were all photographed, ascribed assigned numbers, and examined to the extent possible by Dr. Falkenberg. All of the Hatchery horses were seized.

[29] Of the 11 horses found at the Hatchery on Taylor Road, Special Constable Wiltse recognized three. The first was the palomino mare seen March 7 at the Deneault corrals and March 13 at the Draney property on Deadman-Vidette Road. This horse was photographed and identified as horse number 6.

[30] Special Constable Wiltse also recognized the bay mare with the blaze on its face first seen February 27th at the Deadman-Vidette Road and Highway 1 and later on March 2nd and 13 at the Draney residence. This horse was photographed and identified as number 3.

[31] Special Constable Wiltse also recognized another horse, the light sorrel or dun horse referred to as number 2, also seen at the corrals at the Draney residence on March 13.

[32] Special Constable Wiltse concluded that by virtue of a lack of adequate and suitable feed, want of care, and neglect of the animals, and the need for veterinary treatment, the 11 horses at the hatchery property were in distress and should be taken into custody under the *Prevention of Cruelty to Animals Act*. A notice of disposition was provided to Mr. Draney under s. 18 of that Act.

[33] Dr. Falkenberg was qualified and gave expert evidence in the field of animal health and husbandry. She is a veterinarian who was retained by the BCSPCA to accompany their officers in the execution of the search warrants. Dr. Falkenberg was present at the Hatchery property and said that the environment was a poor one for the horses.

[34] Although the pasture provided adequate shelter for horses in good condition, the barbed wire fences were a hazard. Within the fences, there were boards with nails extruding, also a hazard for punctures and infection. Hatchery equipment remained at the site.

[35] The pasture was severely overgrazed with signs that rose bushes, willows, and bulrushes had also been grazed indicating an absence of suitable food. Hay had been put out, but Dr. Falkenberg said that it was of inferior quality and not suitable at all for horses in this shape. It was mouldy, dusty, and coarse and of low nutritional value. She said the mould can create allergies and infections in horses. The hay, she thought, had not been there long given the narrow dispersal and the small amount of manure on and around it.

[36] Dr. Falkenberg conducted at least a visual inspection of all 11 horses at the Hatchery over a three-hour period. With the exception of the roan stallion who was ranked a body scale of four out of nine or slightly less than ideal weight, all the horses were scored by Dr. Falkenberg at ratings between one out of nine and two and a half out of nine. She described these horses variously as severely, extremely, or very thin and malnourished. Four of the horses were in foal.

[37] Of the horses recognized by Special Constable Wiltse, the bay mare with blaze identified as horse 3, the palomino mare with Mr. Draney's brand and identified as horse 6, and the light sorrel or dun horse described as horse 2, all were scored by Dr. Falkenberg at one out of nine in the Henneke body condition rating. Dr. Falkenberg said that severe malnourishment of this type can lead to organ failure and death. She saw some evidence of both internal and external parasite loads in the horses and had particular concern about the health of the pregnant mares and their foals.

[38] The doctor explained that horses with body condition scores under three out of nine were subject to refeeding syndrome, a process by which emaciated horses can also suffer from organ failure and death if fed too much too soon. Horses in this condition, she said, need to be fed good quality hay in small quantities to give their bodies time to adjust. Dr. Falkenberg gave her opinion that the feeding of these horses had been grossly inadequate for several months or completely absent for about a month.

[39] The photographs taken at the Hatchery on April 4 make it very apparent even to a layperson that save for the stallion, all the horses were very thin and emaciated. Their ribs and bony structures were all prominent.

[40] Special Constable Kokoska served the search warrant on Mr. Draney at the Hatchery. On being advised that the horses were being taken into custody, Mr. Draney said that the stallion was not in distress and said that some of the horses were not his. Mr. Draney was provided with a written notice required under the *Prevention of Cruelty to Animals Act* and was also advised that officers would be attending his residence next to execute the second warrant.

The Draney Property Search

[41] The second warrant was executed at Mr. Draney's Deadman-Vidette Road residence that afternoon. Special Constable Wiltse described the front pasture of the property as barren dirt with wire, twine, and plastic debris and garbage on the driveway. Special Constable Kokoska confirmed the presence of debris on the property. They both felt these items a hazard to the horses. No photographs of these deficiencies were tendered.

[42] There were eight horses and about 40 cattle in the pasture with free access to this area. There were trees providing some shelter. Special Constable Wiltse described the body condition of the eight horses as adequate for the most part. One, described as a black bay filly, had a right-hind fetlock which was swollen and had a discharge. It was

seen by Dr. Falkenberg. Other horses had rub marks suggesting external parasites such as lice or ticks.

[43] There were also two corrals with three horses in one and five in the other. The three horses believed to be geldings by Special Constable Wiltse had thin body conditions. These three horses were judged by Special Constable Wiltse to be 3.5 out of nine, three out of nine, and two out of nine on the Henneke scale.

[44] In the second corral, there were five horses rated between 2.5 and three on the scale. One bay horse had a large swollen ulcer mid-jaw. The area had been shaved and was open and draining. Special Constable Wiltse was concerned that this might be the Strangles, a contagious bacterial infection. Dr. Falkenberg did not give any evidence on this point. The horses had poor coats and Special Constable Wiltse saw ticks and evidence of lice.

[45] Corral fencing in places was in poor condition, in some places broken away leaving sharps protruding. This was acknowledged by Mr. Draney. He described it as winter damage by cattle climbing frozen snowdrifts.

[46] There were foreign materials on the ground including saddle and shoeing materials, a garden hose, children's toys,

and other objects thought by Special Constable Wiltse to be hazardous to the horses. No photographs were provided.

[47] Mr. Draney was asked by Special Constable Wiltse about the black yearling in Terry Deneault's corral on March 7th which was also listed on the BCSPCA order issued on March 13. Mr. Draney said it had been sold for slaughter.

[48] When asked about the palomino mare which had also been in Terry Deneault's corral on March 7, Mr. Draney said that it had been moved to make more room at his residence along with the bay mare first seen by Special Constable Wiltse on February 27th. Mr. Draney said with respect to the palomino mare, he thought her in good enough shape to go to the Hatchery.

[49] Mr. Draney was asked by Special Constable Wiltse whether any veterinary care had been provided to the horses and he said:

No, not at all. Vets don't want to deal with our horses. We vet our own.

[50] He acknowledged the horses had lice, but said they had been treated with BOSS and Dry Kill, insecticides for lice and ticks, as well as Ivomec for worms. Mr. Draney said:

We watch our animals. We thought them in decent shape.

[51] Special Constable Kokoska said that there were about six to eight round bales of hay. They were mouldy and, in conversation with Special Constable Kokoska, Mr. Draney said that he did not want to be judged on the quality of the hay. He said he was not happy with the hay purchased from two named hay growers. He advised that the RCMP knew what was going on with the horses. He said:

We can't bring them all in. This winter had been exceptionally bad.

He produced bills for the purchase of large quantities of hay in February.

[52] When Special Constable Kokoska asked Mr. Draney whether he had complied with Special Constable Wiltse' orders and he responded that he had complied "with his knowledge," that there was no way he could afford a vet to come in, he said he could work on them including teeth. He said that First Nations people had healing plants they kept under wraps, but said they had a partnership with the Kamloops Large Animal Clinic.

[53] According to Special Constable Kokoska, Mr. Draney told him of a dead horse at the Hatchery property. He said that

the horse was named Fox. He had been 40 or 50 years old until he had shot it a month before. In his evidence, Mr. Draney explained that Fox had been a pony in his 40s and been with the family over 30 years. He said he denied shooting the pony or telling Special Constable Kokoska that he had. Mr. Draney said he did not even own a gun.

[54] Special Constable Wiltse said the horses on the Deadman-Vidette property were not seized due to concerns about the possibility of Strangles in the bay horse. Special Constable Wiltse instead issued another BCSPCA order with respect to the care of horses and other animals on the property.

[55] Special Constable Wiltse said that Dr. Falkenberg provided advice to Mr. Draney at his property. Dr. Falkenberg did not refer in her evidence to her attendance at the Draney property. Her report on the state of the horses she saw referred only to the horses at the Hatchery. No photographs were entered of horses at the Draney property or the property itself.

The Evidence of Mr. Draney

[56] Mr. Draney gave evidence substantially in accord with the contents of a letter he wrote to the BCSPCA on April 16, 2009, which letter was adduced by the Crown. Mr. Draney's evidence

was to the effect that the horses seized by the BCSPCA were part of a larger number of distressed horses recovered after an unusually long and harsh winter. These horses had been trapped in the high ranges beyond the Skeetchestn boundaries.

[57] Mr. Draney related that the Skeetchestn Band had a responsibility for the animals on its land including horses. He estimated that there were about 150 horses owned by the Band or Band members. There were also a number of feral horses who lived wild in the area. Mr. Draney was one of several Band council members charged with the responsibility of assisting livestock holders.

[58] Mr. Draney explained that the horses owned by the Band and its members were generally kept on 20,000 acres of pasture on the reserve lands consisting mostly of valley bottom and hillsides. These lands are bounded in some areas by fences and in others by steep terrain. Mr. Draney said that the pine forest had been devastated by the Mountain Pine Beetle with the result that many of the fences were damaged by downed trees.

[59] The horses normally confined to Band lands escaped beyond Skeetchestn boundaries into 100,000 acres of Crown range and forested highlands. Access to the high Crown range, he said, was especially difficult in hard winter conditions.

[60] Mr. Draney gave evidence that the winter of 2008/2009 at Skeetchestn was a longer and harsher winter than the Band or animals were accustomed to. There was more snow and wind than usual and the winter was longer. In the higher ranges, snow drifted before turning virtually into ice packs. As winter progressed, getting into the mountains became more difficult and more dangerous for riders.

[61] The harshness of the winter conditions was confirmed by Bruce Perry, the owner of property adjacent to Skeetchestn lands. He was engaged in efforts with Skeetchestn Band members, neighbours, and Ministry of Forest staff to rescue distressed horses. Mr. Perry said the winter cold came early with temperatures of minus 14 Centigrade in November. The winter produced more snow than usual and it stayed longer.

[62] According to Mr. Draney, joint efforts were made to gather the horses. There were a number of community members both Native and non-Native trying to get the horses back or, alternatively, trying to get hay to the horses. As horses came out of the mountains, attempts were made to catch them. Many of them were in poor shape.

[63] Mr. Perry outlined the pains taken by about 15 people including himself, Mr. Draney, and Ministry staff to attract the horses with hay and water and then trap them in temporary

corrals. He said that it was not a small undertaking and described it as an amazing effort. Mr. Perry was aware of about 40 horses recovered in this way.

[64] Mr. Draney said that many of the horses which came down from the mountains were in distress and in poor condition. They were both Band and feral horses. Many of the horses, feral or not, were difficult to handle.

[65] Some of the mares were with weanlings when they came out of the mountains and a number were also believed to be in foal. The weanlings were removed to ease the burden on the mares, he said. There were five weanlings, none of them his horses, but they were kept at his property. He said that by April 4, they had been weaned and were in better health than they had been when they came out of the mountains. He and others tried to care for the horses and to get individual Band members' horses back to their owners.

[66] He said the BCSPCA and neighbours in the community assisted with the supply of hay, portable corrals, and so on. He recalled it was hard to get good hay in February. Some hay had to be purchased from local growers and other hay had been brought in from Alberta and Northern B.C. He gave evidence that the amount of food provided the horses would vary and he agreed with Dr. Falkenberg that overfeeding had to be a

concern given the condition of the horses.

[67] The pasture at his Deadman-Vidette Road property was not, he said, a grazing pasture, but a feeding pasture where animals were provided with hay and, in some cases, oats and grains. The Hatchery property, he said, provided access to water. It was not fully enclosed and there was open access near the waterhole from the property to ranges beyond the Skeetchestn boundary and that animals could come and go. He said work was being done in the spring to repair the downed fences.

[68] He said, on April 4th he had been in the mountains trying to gather horses and fix fences when he was notified of the BCSPCA attendance at the Hatchery. He went there, he said, but the horses had already been loaded into haulers at that point.

[69] He saw that the roan stallion was in a hauler before he was asked to step away by Special Constable Kokoska. Mr. Draney said that he had borrowed the roan stallion some years before from a friend in Lower Nicola for breeding purposes. He acknowledged that he was responsible for the care of the roan stallion along with other persons who had used it.

[70] I will now give my decision based on this evidence.

Count 1

[71] With respect to Count 1, Count 1 charges an offence under s. 445.1(1)(a) of the *Criminal Code*. That section provides that:

Every one commits an offence who

- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal ...

[72] It was argued on behalf of Mr. Draney that to the extent that the Crown is alleging that Mr. Draney wilfully permitted rather than wilfully caused unnecessary pain, suffering, or injury to any of these horses, it must be proved that he is the owner of the horse or horses concerned.

[73] I did not understand the Crown to be asserting at the end of the day that Mr. Draney wilfully caused unnecessary pain, suffering, or injury to the horses. I would not, in any event, have considered that assertion supported by the evidence.

[74] Mr. Bruneau conceded that Mr. Draney's relationship to the roan stallion may be such that he is an owner of that horse even if he is not the legal owner, but asserted that the palomino mare with the Draney brand belonged to his daughter. It is not enough, it was submitted, that this horse was cared

for by him. The presence of his brand on this and other horses may establish ownership by him of the horse at some point, but it was not proof of ownership on the date alleged.

[75] The Crown did not assert otherwise than the ownership is an essential element of their case on this count, but says that the term "owner" is used broadly in the *Criminal Code* and has sufficient elasticity as used in this section to cover far more than strict legal ownership; *R. v. Paish*, [1977] B.C.J. No. 924 (B.C.P.C.); *R. v. D.L.*, 1999 ABPC 41.

[76] I have no difficulty with this proposition, but in this case it seems there is only one proven relationship to a horse which is analogous to ownership and that is Mr. Draney's standing in relation to the roan stallion. That stallion, however, was not at all emaciated and was not, on the evidence, caused any pain, suffering, or injury.

[77] In my view, the ownership by Mr. Draney of any of the distressed horses has not been proven to the high standard required and the analysis need go not further. Mr. Draney is entitled to an acquittal on Count 1.

Count 2

[78] Count 2 charges an offence under s. 445.1(1)(a) [sic] of the *Criminal Code*. The relevant portions of that section

provide that:

Every one commits an offence who ...

- (b) being the owner or the person having the custody or control of a domestic animal ... abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

[79] This offence does not require the Crown to prove that the accused owned the horses concerned. It is sufficient if the Crown proves that the accused had custody and control of them. I am satisfied that the Crown has proven that on April 4th Mr. Draney had custody and control of those horses then on his property on Deadman-Vidette Road.

[80] He also had custody of those horses that had been on his property over the period from the end of February until April 4, 2009, but had been moved to the Hatchery by that date. Mr. Draney's exercise of custody and control over these animals is readily apparent from his statements to the special constables, his evidence in court, and Special Constable Wiltse' evidence relating to the movement of certain horses to and from the Draney property over that period.

[81] The horses in this category include the three mares, among the 11 horses seized, which Special Constable Wiltse had previously seen at Mr. Draney's property. These horses were

described as a bay mare with a blaze on its face, at times found in the company of a sorrel weanling, a palomino mare with Mr. Draney's brand on it, and a horse described as a light sorrel or dun mare. The three mares were photographed on April 4th and given identification numbers, respectively, number 3, number 6, and number 2.

[82] To be clear, there had been no evidence put before me that Mr. Draney was responsible for the state of any of these horses when they came out of the high country. The question for this court, as I see it, is whether the care provided by Mr. Draney once they came under his control amounted to a wilful neglect or failure to provide suitable and adequate food, water, shelter, and care.

[83] Wilfulness, the law is clear, may be found whether the failure or neglect results from intentional acts or omissions or whether it results from recklessness or wilful blindness.

[84] I will examine the evidence as it relates to these three mares.

The Palomino Mare

[85] Special Constable Wiltse first saw the palomino mare at the subdivision on March 6. She rated the mare's body condition score at that time as a two or two and a half out of

nine. On March 7, she said this horse and others were rounded up at Barb Larson's property and moved to the corrals on the property of Terry Deneault. The BCSPCA order she issued that day, and acknowledged by Mr. Draney, directed Mr. Draney in respect of this horse, "Mare BCS 2/9, to seek vet care within 48 hours."

[86] The same horse, number 6, was also seen by Special Constable Wiltse at the Draney property on Deadman-Vidette Road on March 13. By April 4, it had been moved to the Hatchery along with the bay mare, Mr. Draney said, to make more room at his residence. In looking at photographs of the 11 horses removed from the Hatchery, Mr. Draney identified number 6, the palomino mare. This horse, he said, carried his brand and was in his care, though he said it belonged to his daughter.

[87] Mr. Draney recalled that this horse had come out of the mountains, had been fed by Barb Larson near her property in the subdivision. He said it had been gathered there on February 24th by the BCSPCA and Daryl Peters. It was then taken to the Deneault property and onto Mr. Draney's residence with a number of other horses, he thought, on February 24th or 25th.

[88] In evidence, Mr. Draney said this horse was moved to his residence for the provision of food and water and to be evaluated to see whether it needed doctoring or other care. Mr. Draney did not elaborate on the result of that evaluation nor on whether any particular care was provided to that horse.

[89] Mr. Draney told Special Constable Wiltse at his residence on April 4 that he thought the palomino mare was in good shape to go to the Hatchery. It had been in his care from February 24th or 25th, if his evidence is correct, or at least from March 7 if Special Constable Wiltse' evidence is accepted.

[90] In either event, after almost a month in the care of Mr. Draney the condition of the palomino had not observably improved having been rated a body condition score of two or two and a half out of nine on March 7 by Special Constable Wiltse. It was still only rated at two out of nine by Dr. Falkenberg on April 4th when it was seized as an animal in distress. In the course of almost a month in Mr. Draney's care, the emaciated and malnourished condition of the horse was unimproved.

[91] To be clear, I understand the evidence of Dr. Falkenberg that starving horses cannot be restored to full rations immediately due to the risks of refeeding syndrome, but I cannot accept that a month of appropriate rehabilitation

should result in no appreciable improvement to emaciated and malnourished horses.

[92] I am satisfied that the only reasonable explanation for the continued distress of the palomino mare was Mr. Draney's neglect or failure to provide suitable and adequate food, water, shelter, and care for it, a state which persisted on April 4th.

The Bay Mare

[93] Special Constable Wiltse first noted the bay mare, number 3, in an emaciated condition in the company of the sorrel weanling at Deadman-Vidette Road near Highway 1 on February 27, 2009. She posted a notice and spoke to Mr. Draney regarding the care and feeding of these animals. He said he would look into it and call her back if they were his.

[94] Special Constable Wiltse saw the bay mare on March 7 and again by invitation March 13 at the Draney residence. On the latter date, Special Constable Wiltse rated the bay mare's Henneke score at 1.5 out of nine and described it as extremely emaciated. The bay mare was one of several horses directed for vet care in the March 13 ticket which Special Constable Wiltse left with Teddy Gordon. It was in respect of this direction that Mr. Draney told Special Constable Kokoska on

April 4th that there was no way he could afford a vet to come in.

[95] On April 4, 2009, the same mare was among the horses at the Hatchery seen by Dr. Falkenberg. She rated the mare with a body score of one out of nine and described it as extremely thin and malnourished. It was taken into custody by the BCSPCA. Mr. Draney did not recognize this horse from the photographs taken at the Hatchery that day.

[96] However, I am satisfied that this horse was in his care at least from March 7th until April 4th. Again, at the end of the period, the condition of the horse had not observably improved and was likely worse than it had been at the start of that period. The only reasonable explanation for the continued distress of the palomino mare [sic] on April 4th was Mr. Draney's neglect or failure to provide suitable and adequate food, water, shelter, and care.

The Light Sorrel or Dun Mare

[97] The number two horse, known as Suzie, was first observed by Special Constable Wiltse at the Draney property on March 13 when she met with Teddy Gordon at Mr. Draney's invitation. Suzie was one of the horses specifically directed for vet care in the ticket issued that day and left with Teddy Gordon. Mr.

Draney explained to Special Constable Kokoska on April 4th there was no way he could afford a vet to come in.

[98] This mare was seen by Dr. Falkenberg on April 4th at the Hatchery and was said to be extremely thin and malnourished with patches of hair loss due to extreme lice and tick infestation. The mare warranted a Henneke score of one out of nine. Again, the only reasonable explanation for the continued distress of this mare on April 4th was Mr. Draney's neglect or failure to provide suitable and adequate food, water, shelter, and care.

Wilfulness

[99] I had explained that with respect to these three horses, at least, I am satisfied that Mr. Draney failed or neglected to provide suitable food and care for these animals. Was that failure wilful in the sense that it was caused intentionally, recklessly, or with wilful blindness?

[100] Once causation is established, the cases draw a distinction as one might expect between those circumstances where the suffering caused to animals arises from a deliberate infliction of harm and those where people out of good motives, however ineffectually, attempt to better the circumstances of animals, but thereby prolong or compound the suffering of the

animals. There is some merit in the argument that if the aid efforts of a Good Samaritan falls short, the criminal law should not be too quick to find that wilfulness has been made out.

[101] The difficulty in this argument is that Special Constable Wiltse had drawn to Mr. Draney's attention on a number of occasions and in a variety of ways the inadequacy of his efforts to care for the horses starting with the discussion she had with him on February 27th with respect to the care for the bay mare and continuing through March 7 and March 13 when she communicated to him again that the veterinarian needed to be brought in. She underlined for him the problems she saw and the steps he needed to take to remedy the situation. She cautioned him that his failure to resolve these issues could result in legal action. It is hard to imagine what more Special Constable Wiltse might have done to draw these shortcomings to his attention.

[102] The outcome of his actions were objectively foreseeable and must have been apparent to Mr. Draney. It is difficult to find in these circumstances that Mr. Draney was anything less than reckless or wilfully blind to his neglect or failure to provide suitable and adequate food, water, shelter, and care to these animals.

[103] It is not a defence to a charge of neglect or failure to provide suitable food or necessary veterinary care that the accused could not afford to provide it or preferred not to; *R. v. Ryder*, [1997] O.J. No. 6361 (Ont.C.J.), and *R. v. Wayne Taylor*, unreported, April 11, 2011, Clearwater 4085 (B.C.P.C.).

[104] In the result, I am satisfied to the high degree required that Count 2 has been made out against Mr. Draney at least in respect to the three mares referred to. A finding of guilty will be recorded on Count 2.

[REASONS FOR JUDGMENT CONCLUDED]

**File No: 88552-1
Registry: Kamloops**

In the Provincial Court of British Columbia

REGINA

v.

DARREL DRANEY

**REASONS FOR SENTENCE
OF
THE HONOURABLE JUDGE HARRISON**

COPY

Crown Counsel:	A. Janse
Defence Counsel:	R. Bruneau
Place of Hearing:	Kamloops, B.C.
Date of Judgment:	May 5, 2011

[1] THE COURT: Mr. Draney is before me having been convicted of an offence pursuant to s. 446(1)(b) of the *Criminal Code* that he, being a person having custody or control of domestic animals, to wit, horses, abandoned them in distress or wilfully neglected or failed to provide suitable and adequate food, water, shelter, and care for them. In the reasons this morning, I outlined the facts in some detail and I will not review those now.

[2] The Crown takes the position that this is a matter which raises primarily the principles of denunciation and deterrence in sentencing and that there should be a jail sentence somewhere in the range of four to six months for Mr. Draney, although the Crown is not opposed to a conditional sentence order. Crown has no record to allege against Mr. Draney.

[3] They rely on two cases in particular, *R. v. Harfman and Harfman*, a decision of the Honourable Judge Sinclair of this court given February 3, 2011, in Penticton under number 35084. That is a case in which Judge Sinclair sentenced Mr. Harfman to a six-month conditional sentence order with respect to his mistreatment of animals in his care. The six-month sentence was followed by 30 months of probation, and as Judge Sinclair said, "so that we have you tied up for three years total." It was a term of the probation order that the accused was not to

reside with or have custody or control of any animal or bird during that period.

[4] The *Viara* case was also cited, a decision of Judge Pendleton of this court, an unreported decision given April 10, 2006, in Kamloops under number 75337, and in that case a conditional sentence order was given for four months after a review of the number of sentence cases. The facts in this case related to the accused's guilty plea to causing unnecessary pain or suffering or injury to 29 dogs and failing to provide suitable and adequate food, water, or care for six dogs and eight turtles.

[5] The Crown is also seeking a five-year ban on having the care or custody of animals.

[6] Counsel for Mr. Draney points out that Mr. Draney is 49 years of age. He is married with children. He has lived on the Skeetchestn Reserve all his life. He has reduced the number of animals that he now has. He is down to two horses. He has got no cattle, although his children who live with him have horses. He makes his living as a Band councillor. He is in his third two-year term and makes up to \$3,000 per month. It is a full-time job and he expects to run again.

[7] Counsel pointed out that there have been consequences to Mr. Draney already. He has paid restitution to the BCSPCA, although I note he said he did that under duress.

Nonetheless, the monies expended by the SPCA in respect of this case have been paid by Mr. Draney.

[8] Counsel made reference to the fact that he has found these proceedings to be expensive with a two-day trial. I do not take this as a mitigation, but it is a reflection of some of the financial reality that Mr. Draney has faced. The amounts paid in that regard are not specified, but counsel assures me they are significant.

[9] To that extent, it is suggested that he has already faced some punitive elements, and that in mitigation it should be considered that the accused was making effort, albeit not sufficient to relieve the suffering of animals, some his own and some belonging to his community, and that that should be taken into account and should not result in a jail sentence whether a conditional sentence or otherwise.

[10] The accused is, of course, an aboriginal and it is suggested that there are features that need to be taken into account both in terms of sentencing principles under the *Criminal Code* and in accordance with the *Gladue* decision out of the Supreme Court of Canada, and these are cultural factors

that should be taken into account.

[11] Mr. Draney is a leader in his community. He is not someone who has apparently suffered or felt the need to discuss any difficulties that he has suffered from systemic difficulties in that community. Rather, the *Gladue* factors for consideration in this case are put in terms of the ban sought by the Crown for five years with respect to the possession of animals. Mr. Bruneau for Mr. Draney suggests that in this Band, in particular, they have a close relationship with their animals and it will be a greater hardship for Mr. Draney if he is not able to live in and around and with animals in that community.

[12] I am satisfied that the principles of deterrence and denunciation are near the top of the list for consideration in cases such as this. It is important that people understand that they must look after their animals or, if they take charge of animals who need assistance, they must deliver that assistance or abandon the attempt. That did not happen here and it must be understood to members of Mr. Draney's community and in the wider community that there will be consequences for people who cause suffering by way of neglect of animals.

[13] I do not ignore the question of rehabilitation and I take to heart Mr. Bruneau's assertion that his client will be

approaching these things differently in the future if he has the opportunity than he has in the past and that this has been a learning experience. I also must take into account cultural factors as required by the *Gladue* decision.

[14] In the result, I am satisfied that a short term of jail to be served in the community, so not jail at all really, will be sufficient.

[15] Would you stand up, Mr. Draney.

[16] Mr. Draney, I am going to sentence you to a conditional sentence order for a term of 60 days. You are going to be required to be under the terms of an order which is considered to be a term of jail served in the community. During that time, I will not place you on house arrest, but I will give you a curfew for 30 days out of that 60, and the terms of the order will be as follows.

[17] You are to keep the peace and be of good behaviour.

[18] You are to appear before the court when required to do so by the court and you are to report in person to a conditional sentence supervisor forthwith at the probation office on the ground floor of this building and afterwards as and when directed by the supervisor and in the manner directed by the supervisor.

[19] You are to remain within the jurisdiction of the court unless written permission to go outside the jurisdiction is obtained from the court or the supervisor. The jurisdiction of the court is the Province of British Columbia.

[20] You shall notify the court or the supervisor in advance of any change of name or address and promptly notify the court or the supervisor of any change of employment or occupation.

[21] Under 302, when first reporting to the supervisor, you are to inform him or her of your present residential address and telephone number and you shall not change your address or telephone number without first obtaining the written consent of the supervisor.

[22] Under 303, you shall obey a curfew by being inside your residence between the hours of 8:00 p.m. and 6:00 a.m. each day except as follows: with the written consent of the probation officer, such consent is to be given only for compelling personal, family, or employment reasons, or in the event of a medical emergency and then only when travelling directly to or returning directly from a hospital emergency ward.

[23] There will be check provisions in this under 306 and 306A. You shall present yourself at the door to your

residence when any peace officer or supervisor attends there for the purpose of determining your compliance with the curfew condition of this order. You shall respond personally and immediately to the telephone when a peace officer or supervisor makes a telephone call to your residence for the purpose of determining your compliance with the curfew condition of this order.

[24] Now, these three conditions, the curfew and the two curfew check provisions, will apply for 30 days. The conditional sentence order itself, as I say, will last for 60.

[25] Under 315A, you are not to possess or consume any alcohol or drugs except as prescribed for you by a physician; and under 316, you are not to enter any liquor store, beer and wine store, bar, pub, lounge, or other business premise where the primary commodity sold is liquor; and under 333, under the direction and supervision of the supervisor you shall successfully complete 25 hours of community service work during the course of the conditional sentence order.

[26] There is a \$50 victim fine surcharge. Will your client need time to pay that, Mr. Bruneau?

[27] MR. BRUNEAU: Just a couple of weeks, I am sure, for a cheque to clear.

[28] THE COURT: All right. You will need to pay the \$50 victim fine surcharge to the clerk of the court here in Kamloops and that will be on or before the 20th of May, 2011.

[29] When you leave here, you will go to the registry for your conditional sentence order, which will be provided to you. You can then report downstairs to probation. You will also be provided with a form that will explain to you how much you have to pay, when you have to pay it by, and how you can go about paying it to the clerk of the court. That is your victim fine surcharge.

[30] Now, there is also the matter of an order of prohibition requested by the Crown under s. 447.1(1)(a) and, in my view, that is appropriate. It is appropriate for animals who would otherwise be around you. It is also appropriate to help you understand what you need to do when you come back into the custody or control of animals upon the expiry of this.

[31] I am not going to make the order for five years. I will make it for three years. So in addition to the sentence that I have imposed, under 447.1(1)(a) of the *Criminal Code*, I am making an order prohibiting you from owning, having the custody or control of, or residing on the same premises as an animal or a bird during any period the court considers appropriate, in this case three years.

[32] All right. So you are not to breach the terms of that order or you will be committing a separate criminal offence.

[REASONS FOR SENTENCE CONCLUDED]