PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Robertson*, 2021 NSPC 21

Date: 20210303
Docket: 8440743-45
Registry: Kentville

Between:

R.

v.

Karin Robertson

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	October 5, November 26, December 2, 23, 31, 2020; January 7, 29, 2021, in Kentville, Nova Scotia
Oral Decision:	March 3, 2021
Written Decision:	April 29, 2021
Charge:	Sections 18D (failing to comply with directions) and 21(1) (cause distress) contrary to the *Animal Protection Act*, SNS 2008, c. 33, and section 26(2) (permit distress) contrary to the *Animal Protection Act*, SNS 2018, c. 21
Counsel:	James Fyfe, for the Crown Brian Casey, Q.C., for the defendant

By the Court:

Overview

[1] In the interest of time, on March 3, 2021 I provided a summary oral decision with written reasons to follow. This is my written decision.

[2] Ms. Robertson operated a dog kennel in the community for ten years. Following a negative review posted to her website in July 2019 by a disgruntled customer who failed to comply with a purchase and sale agreement, collie puppy sales immediately ceased and she was overwhelmed as the population of animals increased beyond her ability to provide her previous level of care.

[3] She contacted the SPCA in early August asking them if she could surrender some dogs. The SPCA was, over a few months, able to accept only six dogs.

[4] While visiting her property over the course of Ms. Robertson's herculean efforts to ultimately reduce the dog and puppy population by half between August 7 and December 9, 2019, SPCA inspectors, based on what they observed, issued to her five *Orders to Comply* containing 44 directions under something called *A Code of Practice for Canadian Kennel Operations* as well as the *Standards of Care of Cats and Dogs Regulations.*

[5] Ms. Robertson's remaining dogs were seized on December 10, 2019 and she is charged with three offences: cause dogs to be in distress between September 16, 2019 and November 11, 2019 (s. 21(1)) and fail to comply with every direction given pursuant to the Act or the regulations (s. 18D) both under the *Animal Protection Act*, SNS 2008, c. 33, and permit dogs to be in distress between November 12, 2019 and December 10, 2019 contrary to s. 26(2) of the *Animal Protection Act* SNS 2018, c. 21.

Issues:

[6] There are four issues: (1) Was Ms. Robertson legally required to comply with the SPCA directions in the *Orders to Comply* that came from *A Code of Practice for Canadian Kennel Operations?* (2) If so, did she establish due diligence to avoid the commission of that offence? (3) Did she fail to comply with

directions in *Orders to Comply* based on the *Animal Protection Act* 2008 and the regulation, and if not, did she establish due diligence? (4) Did Ms. Robertson's actions cause/permit "undue distress" to her dogs and puppies, and if so, was she duly diligent to avoid that outcome?

Decision:

[7] I listened carefully to all the witnesses who testified over five days. I do not plan to delve into the minute details of all that was said, suffice to say much was repetitive. I reviewed my careful notes, listened to portions of the record, and analyzed all the exhibits-videos, photographs, drawings, and reports. As a result, even should I find the dogs and puppies were in distress, a definition that I am asked to accept includes everything from being anxious to having wood shavings in a water dish, I conclude Ms. Robertson has established on the balance of probabilities that she was duly diligent to avoid that result.

[8] I also find many of the *Orders to Comply* contained directions under *A Code of Practice for Canadian Kennel Operations* that were unlawful, ambiguous, and unnecessary. They caused Ms. Robertson to divert precious time to interpretation and taking actions that further reduced her available time to care for and reduce the number of dogs. The Orders that contained lawful directions under the *Standards of Care for Cats and Dogs Regulations* involving shelter, food, and water, I find did not apply to her operation. In any event, she was diligent in her effort to respond to all the directions. These are my reasons for reaching such conclusions but first the law applicable to regulatory offences.

The Law:

[9] The *Animal Protection Act*, S.N.S. 2008 c. 33 [hereinafter "*APA, 2008*"] was repealed and replaced by the *Animal Protection Act*, S.N.S. 2018, c. 21, s.1. [hereinafter "*APA, 2018*"]. Ms. Robertson is charged with two counts under the *APA, 2008* (in force until November 12, 2019) and one count under the subsequently enacted *APA, 2018*.

[10] These are regulatory offence and so the Crown must prove beyond a reasonable doubt that Ms. Robertson committed the prohibited acts. The seminal case setting out the many foundational principles of strict liability offences and the due diligence defence, remains *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1326, 40 C.C.C. (2d) 353. The court described them as "offences in which there is

no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care". (at para 374).

[11] Unlike the Crown's burden, Ms. Robertson is subject to proof on the balance of probabilities. In assessing her evidence, the Court objectively considers whether the steps she took amount to what a reasonable person would have done in the circumstances to avoid the commission of the offences. See also: *R. v. Wholesale Travel Group Inc*., [1991] 3 S.C.R. 154 at 218, 248, 67 C.C.C. (3d) 193 at 237, 259 (per Cory J.); *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, 207 C.C.C. (3d) 1 at para. 15; *R. v. Petro-Canada* (2003), 171 C.C.C. (3d) 354 (Ont. C.A.) at paras. 19, 26-27.

[12] Ms. Robertson does not need to establish precisely what occurred to establish due diligence. However, the more precisely that is known, the narrower the range of preventative steps required to establish that she took all reasonable care. (*R. v. Petro-Canada*, *supra*, at para. 20)

[13] The Court in *Sault St. Marie*, was also clear about why the burden to establish the defence rests on the defendant,

> …he is the only one who will generally have the means of proof… This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. (*supra* at para. 373)

[14] In assessing the evidence related to the defence, the same rules apply when considering all the evidence - the Court can choose to accept some, none, or all of what a witness says. In doing so, I must assess the reliability and credibility of all the witnesses recognizing none come before the Court presumed to be providing an accurate and truthful account. There is a distinction between these two important concepts.

[15] Credibility assessments involve the Court considering the veracity or truth of witness testimony, while reliability assessments consider the accuracy of the testimony. More particularly, accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If witness testimony on an issue is not credible, she cannot provide reliable evidence on the points in issue. However, a credible witness may give evidence that is unreliable, as in the case of mistaken

eye-witness identification observation, where circumstances such as having only a brief opportunity to observe render an honest belief unreliable.

The charges:

[16] One charge under the *APA, 2008* is failing "to comply with every direction given pursuant to this *Act* or the regulations, contrary to s. 18D". The legal authority to give directions under *APA, 2008* is found at s. 18C(1) "An inspector or peace officer may give directions orally or in writing for the carrying out of this Act or the regulations..."

Was Ms. Robertson lawfully required to comply with the SPCA's directions contained in the *Orders to Comply* from *A Code of Practice for Canadian Kennel Operations?*

[17] First, I find Ms. Robertson is legally obliged to comply with the *Animal Protection Act* and the regulations made thereunder. She is not, however, lawfully required to comply with Orders issued under the *Act* that direct her to comply with items in *A Code of Practice for Canadian Kennel Operations* [Hereinafter, the "Code"] where they are inconsistent with the *Act* or the regulations. Allow me to explain.

[18] Neither section 18C(1) of the *APA, 2008* nor any other part of the *APA, 2008* incorporate by reference that Code, nor do the *Act* or the regulation provide direct authority to issue *Orders to Comply* pursuant to it. Instead, the section reads in part, "An inspector may give directions orally or in writing for the carrying out of this Act or the regulations…" Ms. Robertson can certainly be charged with a breach under s. 18D *APA, 2008* as it relates to the *Act* or the regulations but is not properly charged with same as it relates to the Code.

[19] My conclusion regarding incorporation by reference finds support in the Atlantic Provinces and elsewhere. In Newfoundland and Labrador, the legislature saw fit to include the Code by reference at section 16 of the *Animal Protection Regulations* NLR 35/12 made pursuant to their *Animal Protection Act,* SNL 2010 Chapter A-9.1.

> Prohibition - sale from pet retail stores
>
> 16. (1) An owner or operator of a pet retail store shall not sell a dog unless the dog was bred and raised in an establishment that meets the requirements in *A*

> *Code of Practice for Canadian Kennel Operations* , to the extent that they are adopted in the *Animal Protection Standards Regulations* , or equivalent standards.
>
> (2) An owner or operator of a pet retail store shall not sell a cat unless the cat was bred and raised in an establishment that meets the requirements in *A Code of Practice for Canadian Cattery Operations* , to the extent that they are adopted in the *Animal Protection Standards Regulations* , or equivalent standards.
>
> (3) Subsection (1) does not apply where a pet retail store provides space to an animal shelter that meets the requirements in *A Code of Practice for Canadian Kennel Operations* and the Basic Standards for Dog Care, to the extent that they are adopted and prescribed respectively in the *Animal Protection Standards Regulations* , and the animal shelter arranges an adoption of a dog.

[20] While that provincial legislation explicitly adopts the Code, it also places a limitation on its applicability- "to the extent that they are adopted in the Animal Protection Standards Regulations, or equivalent standards".

[21] *R v Irving,* 2013 SKPC 101, demonstrates an incorporation of the Code in the Saskatchewan provincial legislation at paragraph 120:

> Section 18 of the Act provides that regulations may be made regarding facilities and standards of care for animals kept for sale, hire or exhibition. Regulation 3 accepts two publications as setting out acceptable standards for the purpose of section 2(3)(a) of the Act. The publications are: Mush With P.R.I.D.E. and A Code of Practice for Canadian Kennel Operations, published by the Canadian Veterinary Medical Association, 1994 (the 1994 Code).

[22] The referenced section 2(3)(a) reads as follows:

> (3) An animal is not considered to be in distress if it is handled:
>
> (a) in a manner consistent with a standard or code of conduct, criteria, practice or procedure that is prescribed as acceptable;
>
> …

[23] The legislation before this Court does not incorporate the Code and as a result, directions made under it do not have force of law. In understanding my conclusion, it is important to consider just what the Code is and why it was drafted in the first place.

The nature and purpose of the Code:

[24] The Code was filed as an exhibit at trial, a thorough read discloses that it is a third edition, dated 2018, that took seven years to complete after a small animal subcommittee of the Canadian Veterinarian Medical Association (CVMA) drafted it. Many groups from other countries were consulted and in the preface section it is said to "reflect both new science and our evolving relationship with dogs". In the Introduction: "This Kennel Code *can* apply to various kennel environments in which dogs are kept for breeding purposes ranging from a private home to a large breeding facility". "Existing animal welfare or animal control legislation in each province will govern to what degree this Kennel Code is applicable and enforceable in each kennel environment". The Canadian Veterinarian Medical Association (CVMA) is a national organization for veterinarians and not a legislative body". [emphasis added]

[25] Finally, "this Kennel Code is designed to assist breeders in successfully advancing the health and welfare of the dogs they breed… is also to be used as a reference for kennel operators… is intended as a resource for the public when researching the best breeders for their chosen dogs… will allow prospective dog owners to ask pertinent questions to assess the knowledge of breeders with respect to animal care as well as the health and behaviour traits of the dogs they keep to evaluate in person how dogs are cared for in kennel operations…"

[26] It is clear the drafting body did not anticipate force of law attaching to their regularly updated Code. It is also clear it focussed on a myriad of issues, most well outside the scope of the *APA* and the regulation.

[27] My finding that the Code has not been incorporated by reference into the *APA, 2008* equally applies to the *APA, 2018*, although my comments are *obiter* since the charge Ms. Robertson faces is under *APA, 2008*, and not the subsequent legislation. It was suggested the use of the lower case "order" in s. 20(1) of the *APA, 2018* may support incorporation of the Code in *APA, 2018*, however I do not accept that is the case. Preceding the allowable actions that can be taken by an inspector, s. 20(1) constrains the scope with these words:

> For the purpose of ensuring compliance with this Act, the regulations or any *order* or directions made under this Act or the regulations.

[28] The subsection is followed by ss. 20(5)(b) which requires the owner or person in charge of premises entered by an inspector to "comply with all reasonable directions of the inspector". Contrary to the Crown's submission, I do

not find the foregoing language serves to incorporate the Code. Rather, I find the use of the word "order" in s. 20 *APA, 2018* read as a whole and in context, is merely meant to require compliance with orders generally and specifically issued pursuant to the *Act* and any regulations. Without more, I am not prepared to accept that the language in either iteration of the *APA* supports the statutory interpretation of incorporation by reference of a Code whose purpose was clearly set out above in the various quotations from its preface and introduction and does not envision force of law attaching thereto.

[29] The Crown also argued s. 13C of the *APA, 2008* gives an inspector the authority to impose the Code on Ms. Robertson. It says an inspector,

> May carry on such activities and investigations and exercise such powers as are necessary or conducive to preventing, ending or remediating distress to animals … and, without restricting the generality of the foregoing, may … (c) formulate and co-ordinate the establishment of industry customs and codes of practice supporting the humane treatment of animals other than farm animals.

[30] With respect, the Crown's suggestion that s. 13C provides the authority to adopt and incorporate the Code into the enforcement regime and impose directions based on items listed therein, is simply not supportable based on this language. Formulating and coordinating the establishment of industry customs and codes of practice must surely require doing so in a collaborative fashion and not unilaterally. In fact, "coordinating" suggests some form of public consultation with those impacted by such incorporations. Surely it is untenable to suggest the language supports unilateral adoption of such a Code without a 10 year kennel operator even knowing about it or understanding it will be used to create standards that could result in enforcement action. That other provinces have chosen to adopt that Code by reference in their legislation suggests that is the preferable and lawful manner to gain industry support for same. As "they say", ignorance of the law is no excuse.

[31] On that point, there is no foundation to accept this is what occurred in Nova Scotia. I note Mr. Casey's argument on this issue was provided to the Crown well in advance of the lengthy trial. There was no evidence to refute his position and the Crown's own cannot be accepted without support for proper industry consultation that obviously must extend beyond the enforcement community and include the impacted community of dog breeders in this province. While there are certainly aspects of the Code that are laudable, there are likewise insurmountable obstacles

created by it that could, quite possibly, decimate the industry without proper consultation. That is perhaps why other provinces saw fit to limit its application to "the extent it is adopted in the" regulations.

[32] As a result, I find the statutory interpretation of legislation does not extend to adopting practice recommendations created by the third-party veterinary society. Such recommendations simply do not have force of law, nor should they. The purpose of the *APAs* is not to, for example, require husbandry and temperament records be kept for dogs or to label crates, as Ms. Robertson was directed to do, rather it is aimed at animal welfare and the powers granted inspectors under the *Acts* are expressly directed to "preventing, ending or remediating distress to animals". A review of the specific directions said to arise from the Code, surely cements my conclusion.

The Directions:

[33] The list of 44 directions imposed on Ms. Robertson is lengthy but must be addressed for two reasons: first, to demonstrate the additional burdens imposed on her while she was dealing with a crisis, and second to demonstrate their inapplicability and lack of connection to the Act and the regulation. I ultimately find the *Act* did not grant inspectors the power to direct Ms. Robertson to conduct any of the following actions listed in the *Orders to Comply*: not to stack dog crates; mother dogs must get out to socialize; wire crates cannot be used as primary enclosures; space requirements must be met; isolation requirements must be met; labelling; requirements for caregiver must be met; enrichment requirements must be met; temperament requirements must be met; soundness requirements for breeding must be met; husbandry requirements must be met; requirements for socialization must be met; breeding must be met; each dish sterilized; whelping requirements must be met; all enclosures cleared of feces daily; fire safety requirements must be met; requirements for shelter for dogs outside must be met; standardized primary enclosure requirements met; must meet flooring requirements; must meet requirements for ventilation; each primary enclosure must meet space requirements; must meet requirements for abnormalities; dish must be sterilized; whelping requirements; clean enclosures twice a day; fire safety requirements must be met; shelter for dogs outside; requirements re temperament and genetic abnormalities; and sound less than 83 decibels. [these are the exact words listed in the *Orders*]

[34] While the Code was first provided to Ms. Robertson on September 18, 2019, she had never heard of it and had never before received directions such as these, and certainly none at all on her last inspection a few months earlier in May 2019.

[35] After receiving the first eleven directions on September 16 and 18, 2019, the SPCA did not return to check compliance on either return date listed in the two *Orders to Comply*- September 23 and October 2, 2019.

[36] On a subsequent inspection visit on October 7, 2019, Ms. Robertson was not given any directions related to the previous Orders but was given a new direction to take two puppies to the vet. She already had an appointment scheduled and did not fail to comply with that October 7, 2019 direction.

[37] Ms. Robertson testified that she concluded the SPCA was satisfied she complied with the September Orders because they were not reissued, and the topics addressed therein were not raised by the inspector at the October 7, 2019 inspection. I find this was a reasonable conclusion based on the nature of those Orders and the recheck dates having passed.

[38] Five weeks later, on October 23, 2019, Ms. Robertson returned home to find posted at her property, an Order containing the next thirteen directions bearing a recheck date of October 31, 2019.

[39] On October 31, 2019, her property was inspected, and she was handed the last ten directions, for a total of 23 in October 2019. That last Order indicated a recheck would occur on November 8, 2019. It did not. The charge end date is November 11, 2019 and the seizure occurred on December 10, 2019.

Efforts to Clarify Orders:

[40] The Court heard testimony from two SPCA inspectors and Ms. Robertson that she asked for an explanation of the October directions contained in the Orders because she could not understand why the wording in them differed from that of the Code which she had by that time received and read. Insp. Edgars testified that he would not explain the directions and told Ms. Robertson to read the Code. The other inspector who visited in September said in an email to Ms. Robertson that the directions had been explained many times, yet on cross-examination agreed she had not done so except in September when Ms. Robertson did not have a copy of the Code or had just been given it but had not yet read it. That inspector did not return to the property after the September Orders were issued and, as a result,

could not have explained them. I find the first SPCA witness was unsupportive of the objectives of his authority, the other exaggerated her involvement and efforts to obtain compliance by failing to clarify the direction for Ms. Robertson who was rightfully unsure.

[41] I also find, following my own review of the *Orders* and the Code, that the directions were not even consistent with the wording in the Code. As a result, the directions created additional confusion and ambiguity at best, but certainly unnecessary and burdensome obligations for Ms. Robertson at worse.

[42] Allow me to explain. The Code does not require Ms. Robertson to sterilize dishes, but the inspectors directed she do so. Insp. Edgars' implausible testimony that "sterilize" is the same as clean, did not enhance her credibility.

[43] Contrary to the testimony of two SPCA inspectors, the Code likewise does not prohibit stacking dog crates. While it recommends primary enclosures, "where a dog spends the majority of its time in a 24- hour period", not leak into another primary enclosure, the inspectors assumed the Robertson dogs met this description and resided in crates. They did not. In any event the inspectors wholesale direction not to stack occurred without consideration that the crates all had metal liners. While some crated dogs were bouncing around barking at inspectors, on the strength of this observation they directed "no stacking" testifying it was out of concern for the crates tipping, yet the crates were visibly tied together to prevent such an occurrence. Ms. Robertson unstacked the crates.

[44] "Mother dogs must get out for socialization" is not upon review, anywhere in the Code, despite the testimony of the inspectors that it was. No more need be said other than I accept Ms. Robertson's evidence and that of some SPCA inspectors that the few mother dogs on the property socialized away from their puppies and in one case Lily was photographed in a crate on a different floor than her puppies for feeding purposes. Ms. Robertson took the necessary time to socialize all the dogs.

[45] "Wire crates cannot be used as a primary enclosure", is likewise not in the Code. The Code does speak to primary enclosures and Ms. Robertson's operation, I find, complied with the Code. Likewise, space requirements as set out in the Code were met. If the SPCA had observed the property for more than short visits they would have been in position to make findings about what was a primary enclosure. I accept the evidence of Ms. Robertson that the dogs did not live in the crates, but some slept in them, and she fed and watered them in the crates. The

primary enclosure for most of the dogs was her house. This finding is consistent with different dogs going in and out of different crates and different dogs seen in the same crate on different days. It was also clear she put them in crates while the inspectors were present because they were barking at them. Finally, it was also clear that most of the dogs were allowed free roam of the enormous property. The dogs in the kennel building, with outdoor runs attached, also left that location to run and play in the large paddock. I accept Ms. Robertson's unchallenged evidence on these points.

Code focused directions for which there was simply no evidence of a failure to comply:

[46] While the unlawful directions were given, there was frequently no corresponding evidence of a failure to comply. For example, "isolation requirements must be met", which presumably relates to having an area available for sick dogs of which there was no evidence of a failure to comply with the direction.

[47] "Caregiver requirements"- the Code does not require a particular standard of training for dog owners, and in any event, Ms. Robertson has ample formal related education including academic degrees of high standing related specifically to animal care.

[48] "Temperament requirements; soundness requirements for breeding; abnormalities; whelping requirements"- after directions were given there was no evidence of a breach.

[49] "Genetic abnormalities, husbandry requirements", likewise, there was no evidence of a failure to comply with these directions.

[50] "Fire safety, flooring requirements, ventilation, sound less than 83 decibels": Ms. Robertson's kennel was built to the community building code standards and the flooring, I find based on Ms. Robertson's unrefuted testimony, was made of an impermeable material and the walls were made of the plastic found in arenas. The ventilation system was a working Venmar, the building was electrically heated, and there were many doors and windows to allow cross-ventilation. Despite an ability to detect same, the SPCA did not measure ammonia levels or use their sound level device to measure decibels of noise. One SPCA witness testified that the smell was a mild one of urine and the others described it as overwhelming, I find I am unable to conclude the smell in the kennel building breached a

ventilation requirement either under the Code or more importantly under the Act, of which I will say more when I consider the distress charges. As for noise, I find the dogs barked loudly when the inspectors arrived, but I also saw from the video evidence many incidents of them quietening after a time. Ms. Robertson testified that they barked because the inspectors were strangers but did not bark regularly and she had no complaints from her neighbors. Likewise, there was no evidence Ms. Robertson breached any fire codes that the SPCA witnesses simply testified were "her responsibility to look into to ensure compliance". I conclude they issued that last direction but had no idea if it was even required.

[51] "Socialization, breeding requirements, whelping requirements": there was no evidence of Ms. Robertson failing to comply after an Order was issued.

[52] "Carbon monoxide detector and labelling": Ms. Robertson bought and installed labels for the kennel dogs and installed an unnecessary carbon monoxide detector.

[53] "Enrichment"- she continued to provide same and despite criticism about a lack of toys, she testified that she could not leave toys around unsupervised dogs in accordance with warnings on the labels. She was wary some dogs hoarded balls and that could lead to fights. I find all this quite prudent and Ms. Robertson's evidence, that I accept, also spoke of the many activities she engaged in with the dogs- swims in her lake, walks on the large property and ball play and training in the paddock area.

[54] "Enclosures cleared of feces daily": While the presence of feces will also be addressed under the duress charges, I accept her evidence and find Ms. Robertson did her best in the circumstances to regularly remove feces. I accept her evidence that this was an ongoing task and she picked it up every day. With approximately 82 dogs at the high point it is no surprise feces was visible on the property during any SPCA inspection before it was picked up. As I already concluded, a direction from the Code regarding such issues as feces has no force of law, but there are lawful directions available to address this and other topics under the *Act* and the regulation.

Lawful Orders to Comply with the Regulations:

[55] In 2014, Nova Scotia enacted the *Regulations Respecting Standards of Care for Cats and Dogs*, and Ms. Robertson is required to comply with lawful directions in Orders that relate to the regulation. However, even those directions are

problematic on the facts of this case, and I find she did not fail to comply as those directions did not apply to her operation. After setting them out, I will address each item in turn.

[56] The Orders contained the following additional directions purportedly contained in the regulation: dogs must not be kenneled for more than 12 hours a day; dogs must remain in areas free from feces and urine; dogs housed outside must have continuous access to shelter; dogs must have access to clean potable water at all times; access to adequate shelter in the event of inclement weather; must have access to clean water; and access to shelter at all times. [exact words contained in the Orders]

[57] Some relevant sections in the regulations include s. 5(1) and 6(1) which read as follows:

> *Standards of care for animals outdoors*
>
> 5 (1) An animal's owner…must ensure that an area in which the animal is being kept outdoors meets all the following requirements:
>
> (a) the area must provide protection from inclement weather to which the animal could otherwise be exposed and that could cause the animal to be in distress;
>
> (b) shade must be accessible to the animal at all times within the area;
>
> (c) the area must be clean and free from excess excrement.
>
> *Standards of care for shelters*
>
> 6 (1) An animal's owner or caretaker must ensure that the animal has continuous access to shelter if the animal is kept outdoors
>
> (a) for more than 12 hours at a time; or
>
> (b) in any weather conditions that could cause the animal to be in distress.

Dogs must not be kenneled for more than 12 hours a day:

[58] There was absolutely no evidence that any dog was kenneled for more than 12 hours a day. Instead there was Ms. Robertson's unrefuted evidence they were not.

Dogs must remain in areas kept free from feces and urine:

[59] The standard in s. 5(1)(c) relates to areas where animals are "kept" outdoors. Those areas must be "clean and free from excess excrement". I find that all the

dogs could go outdoors to exercise, none were “kept” outdoors, as I interpret the provision relates to primary enclosures. Outdoor areas available to the dogs included seven outdoor pens, the kennel runs and the large paddock. It should go without saying that dogs defecate and urinate outdoors during the day.

[60] Assessing the language of the section, I find excrement is feces and not urine. While there was evidence of feces and urine in the outdoor areas, there is no definition of “excess” excrement that I am prepared to accept was proven on the evidence. By way of illustration, while the Court was shown some photographs purporting to show “excess excrement”, it was in areas where there were no dogs, in areas after the dogs were overwhelmed by the presence of the SPCA visitors and likely defecated or urinated, or the amount in the pictures was clearly not excessive, but representative of a large number of dogs whose excrement had not yet been picked up. I accept Ms. Robertson’s evidence that doing so was an ongoing task and I do not find the amount ever appeared to the Court to represent an excessive number of days’ build up in any case. I also note on some occasions the feces were seen outdoors in clearly rainy wet areas and after snow had fallen, or in areas without dogs. There was also ample evidence of wood shavings, both packaged and spread, that was clearly meant to soak up water and/or urine in wet outdoor areas.

[61] Also, the photographs taken on December 10, 2019 when the dogs were seized, showed areas attached to the kennel runs, and while there is visible excrement, the previous day was snowy and Ms. Robertson’s testimony, that I accept, was that she cleaned it up as a practice but if it was under snow she may have missed it.

[62] Another set of photographs taken by Insp. Edgar in October showed a penned enclosure without dogs and some feces present. Ms. Robertson’s evidence, that I accept, confirmed she would have picked it up before putting a dog in there. Insp. Edgar also testified about the large paddock area where dogs were standing close to the fence in the muddy part, but he also agreed the majority of the enclosure was grassy and the dogs were in the muddy area closest to where he was standing. I looked closely and could not discern excess excrement in those pictures.

[63] So, I find the Crown has not proven excess excrement and the photographic evidence was, at times, unrepresentative and certainly not, in any event, demonstrative of “excess” feces. Finally, even if I am incorrect and the amount of

feces was excessive, I find Ms. Robertson's evidence of her practice of picking up finds support in the large number of dogs that she had to pick up after and her testimony about picking it up daily. I also note the dogs were fed a few times a day which would lead to the conclusion they each frequently defecated. If she were not picking it up daily, the evidence would have demonstrated much more feces than I saw in the photographs. It did not. Finally, her evidence established on the balance of probabilities that she was duly diligent to avoid the commission of the offence, and more will be said on the issue of cleaning and feces below.

Dogs housed outside must have continuous access to shelter/ access to adequate shelter in the event of inclement weather/ access to shelter at all times:

[64] First, I do not find any of the dogs were "housed outside", but it is clear the SPCA inspectors assumed they were and as a result they concluded sections 5 and 6 of the regulation applied.

[65] Section 5 refers to dogs 'kept" outdoors. I find there was no evidence presented by the Crown that I accept supports a conclusion Ms. Robertson's dogs were "kept" outdoors, as I infer that means for more than exercise and possibly for more than twelve hours, as frequently mentioned in the regulation upon which I will say more.

[66] Ms. Robertson testified that the dogs were not kept outdoors. Even a Crown witness Dr. Ledger testified about dogs and where they were located during her visit, demonstrating dogs were on the move. Photographic evidence presented by the Crown showed the same dogs on different days in different places. For example, the dog Grace was both in the exterior kennel and in the large outdoor fenced paddock. The pictures and videos show Lily in different locations and the terriers were seen in the house, in the kennels, and in the paddock.

Inclement weather and shade:

[67] Pursuant to ss. 5(1)(a) and (b), Ms. Robertson was directed to protect the animals from inclement weather that could cause distress and to provide shade. As previously stated, I do not find the dogs were "kept" outdoors, certainly not for more than 12 hours, and there was no evidence of "weather conditions that could cause the animal to be in distress". The evidence relating to weather consisted of apparent rain in the fall, apparent snow before December 10, 2019 with no evidence of concerning temperature lows, and as I said previously no evidence

dogs were kept outdoors for more than twelve hours. There was however evidence from the SPCA witnesses that the dogs were, on a rainy inspection, either in the house or the twelve-unit kennel. As such, this direction was inapplicable to Ms. Robertson's operation.

[68] This leads me to say, surely there can be no suggestion a dog cannot be out in the rain and/or get wet. Any dog owner recognizes that dogs play and walk in the rain. As for apparent sun damage on the fur of some dogs, I do not conclude this means the dogs were housed outdoors and I cannot conclude there was distress arising from having the choice to shelter from the sun or lay out in it and they chose the latter.

[69] Finally, even if I am incorrect, there was evidence of shelters and resulting shade available on the property - the barn in the paddock with blankets and wood shavings, a rock structure under which dogs were pictured, the easy open access to the basement from the connected outdoor area, and the tree near the house mentioned by Ms. Robertson. The number of dogs in the paddock changed throughout the day and there was no evidence the shelter was inadequate should the dogs choose to use it.

[70] Since s. 5 does not apply because the dogs were not kept outdoors, nor does s. 6 because the dogs were not kept outdoors for more than 12 hours.

Dogs must have access to clean potable water at all times/ must have access to clean water:

[71] Section 4(1)(a) of the regulation under g*eneral standards of care* addresses water. It is said to be "adequate if it meets all of the following criteria: (a) it is clean, fresh, unfrozen water of a drinkable temperature, (b) it is accessible by an animal in sufficient volume, taking into account the weather and temperature, to maintain normal hydration for the age, species, condition, size and type of the animal…"

[72] After assessing Ms. Robertson's evidence, I find she watered the dogs twice a day and the puppies every few hours. I note there were times, such as September 16, 2019, when Insp. Oliver attended the property and did not issue an Order regarding water. Again, on October 7, 2019 Insp. Edgar did not issue an Order regarding water. The SPCA did issue water orders on other days, and I note the standard says, "accessible in sufficient volume taking into account the weather … type and age".

[73] Despite SPCA insistence to the contrary, the standard does not require water be present at all times, and at a certain temperature, instead it must be sufficient to maintain hydration. Also, without more, videos of a few dogs and puppies drinking quickly when given water during an inspection, especially a two-hour visit, does not prove they did not benefit from normal hydration during the day. Dr. Ledger inferred those drinking dogs were thirsty, but the section requires more than that. For example, there was no veterinarian evidence of dehydration of any of the seized dogs. The Crown concedes the water issue did not relate to the puppies in the whelping area, and I find no breach of this standard with respect to any dog or puppy has been proved beyond a reasonable doubt.

[74] Finally, I do not find the presence of an unemptied mop bucket represented water set out for a dog. Instead I accept Ms. Robertson's evidence that a dog would not drink that water given her watering schedule. If a dog was observed putting its head in a mop bucket in the presence of the SPCA inspectors, I find it anomalous and not indicative of a breach of the *regulation*. Anyone experienced with dogs knows they often act differently in the presence of strangers.

Food:

[75] Section 4(1)(b) of the *regulation* addresses food. Food is adequate if it meets certain criteria. It is "accessible to an animal in sufficient quantities and nutritive value to enable the animal to maintain healthy growth and a healthy body weight for the age, breed, condition and size for the animal…"

[76] I find on the evidence of Ms. Robertson that she purchased a large amount of food, that she fed each dog, depending on breed, a number of times each day and in a cage to better monitor the eating and drinking patterns. The food observed in the kennel outbuilding located in a plastic wheel barrel-like device was not accessible by rodents because it was without a lid. As described by Ms. Robertson it was made of durable plastic and designed with a slope that would prevent access by rodents. The photographic evidence supports her description and there was no evidence of rodent incursion in the food. Likewise, there was no evidence countering her purpose-built design testimony. I also note the veterinarian who assessed the dogs following the December 10, 2019 seizure found the terriers in ideal body condition and the collies slightly below but warranting only monitoring of how much they were eating. Ms. Robertson was doing so as she fed and watered them separately.

[77] Finally, I accept the evidence of Ms. Robertson that she was overwhelmed with all the tasks that she was either directed to do, or needed to do to: feed, water, exercise, re-home and generally care for her dogs and growing puppies. I find her efforts, even if not perfect, did not result in failing to comply with the Orders whether lawful or not.

Directions generally:

[78] While Ms. Robertson asked for clarification of the many directions, she still had to undertake actions to comply. Any person subject to a regulatory regime does not generally have the luxury to challenge directions when they are given, but can certainly seek clarification and maintain an expectation that the inspector will follow up on directions when a recheck date is set in the Order.

[79] I am reminded that Ms. Robertson had never heard of the Code mentioned in the directions and was given it only on the second visit on September 18, 2019 when she already had two Orders containing directions relating to it in her hands. I find, based on her testimony, that she did not read the lengthy document until after the SPCA inspectors left on September 18, 2019. As previously stated, the *Orders* contained scheduled recheck dates of September 23, 2019 and October 2, 2019, but the SPCA did not come on those dates. Section 18C(1) *APA, 2018* says an inspector "may require that such directions be carried out within such time as is specified". One might query, if they do not come to check on the specified date, is it fair to charge a person with not complying?

[80] Section 18C *APA, 2008* also permits an inspector to give their directions both orally and in writing. Those given orally "must be confirmed in writing as soon as practicable" (s. 18C(2)). I find noncompliance with directions given orally that were not reduced to writing cannot be subject to offence in light of the wording in the *Act*.

[81] For example, Insp. Landsburg testified that early on she directed Ms. Robertson to groom the dogs and clean the kennels (the walls in particular). There were no written directions given following the oral directions. While Insp. Landsburg testified that she was surprised these were not addressed by other inspectors, I find that is representative of the SPCA actions as regards Ms. Robertson and her operation, a lack of clarity, authority and follow through coloured their involvement.

[82] While it is the responsibility of the operator to meet the requirements of any governing statute or regulation, it is fair comment that the actions of the SPCA may be relevant in assessing whether Ms. Robertson exercised reasonable care. Thus, if an Order says the SPCA will return to check compliance on a date certain, their actions, or lack thereof, are factors to be considered in assessing Ms. Robertson's knowledge of the problems and the solutions. I find it was reasonable for her to assume the issues raised in the first two Orders were resolved and that neither grooming nor washing plastic kennel walls, mentioned orally, remained issues. I say this in light of the knowledge shared by all, that these were trying times for an overwhelmed Ms. Robertson who was regularly requesting help from the SPCA to reduce her numbers so that she could return to her previous high level of care.

[83] I will also say that the SPCA inspectors should have taken the time either off the property or in their vehicles to carefully explain in detail what the directions meant. If they had done so, they could have in turn gained a better understanding of the nature of her operation and not contributed to the problems Ms. Robertson faced as a result of the increasing population caused by the negative review viewed over 1,500 times. For example, directing her to purchase and install a carbon monoxide detector in a kennel that was electrically heated and could not generate carbon monoxide is unsupportable. Or, requiring her to comply with husbandry standards and not explaining what that meant or why they had concluded she was not doing so. I also note, despite the *APA* providing authority to do so, no inspector sought and reviewed her business and care records related to the dogs.

Conclusion:

[84] The Crown has not proven the charge. Even if there was evidence of a failure to comply with a lawful direction contained in an Order, I find Ms. Robertson has established on the balance of probabilities that she was duly diligent to avoid the commission of the offence. She did all that a reasonable person in her circumstances could do. It is extremely disappointing that the issuance of these directions meant she had to divide her finite time and attention addressing so many unlawful and inapplicable directions while at the same time providing care for the dogs and growing puppies. In assessing that level of care under the duress charges, I cannot ignore the distraction of these directions.

Permit and cause distress:

The Law:

[85] Ms. Robertson is also charged with *causing* dogs to be in distress between September 16 and November 11, 2019. Distress is defined at section 2(2) of the *APA, 2008* as follows:

> 2(2) An animal is in distress, for the purpose of this Act, where the animal is
>
> (a) in need of adequate care, food, water or shelter or in need of reasonable protection from injurious heat or cold;
>
> (b) injured, sick, in pain, or suffering undue hardship, anxiety, privation or neglect;
>
> (c) deprived of adequate ventilation, space, veterinary care or medical treatment;
>
> (d) abused;
>
> (e) kept in conditions that are unsanitary or that will significantly impair the animal's health or well-being over time;
>
> (f) kept in conditions that contravene the standards of care prescribed by the regulations.

[86] Following the enactment of the new iteration of the *APA, 2008*, Ms. Robertson is charged with *permitting* dogs to be in distress between November 11 and December 10, 2019. Distress is defined in the *APA, 2018* at s. 2(2) as:

> 2 (2) An animal is in distress if the animal is
>
> (a) in need of adequate care, food, water or shelter or in need of reasonable protection from heat or cold appropriate to the animal;
>
> (b) injured, sick, in pain or suffering undue hardship, anxiety, privation or neglect;
>
> (c) deprived of adequate ventilation, space, veterinary care or medical treatment;
>
> (d) abused; …
>
> (f) kept in conditions that are unsanitary or unsafe so as to impair the animal's health, safety or well-being;
>
> (g) kept in conditions that contravene the standards of care prescribed by the regulations; …
>
> (i) subjected to circumstances prescribed by the regulations.

[87] The description of what constitutes distress is fairly similar as between the *Acts*. The difference between causing and permitting is not so similar.

[88] It is now well-established that the core principle of statutory interpretation is taken from Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[89] In commenting on this approach to statutory interpretation, Iacobucci J. said in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, "Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings".

[90] There is no real suggestion the words "permit" and "cause" are ambiguous. Their meanings are different and distinct. "Permit" supports an understanding that something is amiss and requires a lack of action on one's part to address same. "Cause" on the other hand requires a positive action taken to create the situation. Tax J. in *R. v. MacDonald*, 2020 NSPC 32 recently described the difference. (paras. 150-154). See also *R. v. Hurley*, 2017 ONCJ 263.

[91] In *Sault Ste Marie*, *supra*, the Court confirmed "cause" and "permit" are troublesome terms that have generated much case law. The court went on to provide valuable insight into the differences between the terms, at page 1329:

> The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[92] McMahon P.J. rejected a Crown argument in *Hurley*, *supra*, that in the case of domestic animals which are dependent on humans for their care "cause" could arise from an omission or failure to act.

[93] Before addressing the evidence led to prove 'cause' and 'permit' in the instant case, I will set out the general positions of the parties.

Position of the Parties:

[94] The defence is correct, the burden is on the Crown to prove the offences. He submits that burden has not been met. Should I find it has been, he says Ms. Robertson established, on the balance of probabilities, that she was duly diligent to avoid the commission of the offences.

[95] Defence counsel points to her extensive animal care training and the benefit of ten years of successful inspections, despite never being given any version of the Code and never having heard of it. Her physical facility was exactly the same in May 2019 when she passed her last inspection with 62 dogs. As early as September 2019, she was willing to have the SPCA take all the collies, but on September 18 they were only prepared to take four. Defence says, everyone agrees the problem was Ms. Robertson had too many dogs and if she was diligent in reducing the numbers, she has established the defence. In aid, he says the evidence established she placed 47 dogs in nine weeks (43 workdays). In support of the due diligence defence, he asks the Court to consider a number of metrics.

[96] Metric one: Insp. Landsburg testified the SPCA could not place that many dogs; they only accepted six between August and October.

[97] Metric two: Asked what else she could do, Insp. Landsburg testified she could call animal rescue groups. Ms. Robertson did this and more.

[98] Metric three: Consider the time available to act. Ms. Robertson was the sole caregiver of all the dogs and started work at 7 am ending after 11 pm, yet she managed in 63 days to place dogs at a rate of one a workday.

[99] Metric four: On the May inspection she passed with 62 dogs so could reasonably assume if she got the numbers down, she would be in compliance. There were only 35 remaining on seizure day.

[100] Metric five: The emails between Ms. Robertson and the SPCA inspectors suggested if she could reduce the number to 40, they would be content. She relied on that and reduced the number to 35 dogs.

[101] Following many days of evidence that included comments on such things as “looking scared” and cobwebs in the basement, the Court asked the Crown to specify the exact foundation on which I was asked to conclude Ms. Robertson caused or permitted, as the case may be, distress.

Crown Position:

[102] The Crown directed the Court to focus on the following, addressed in the testimony of the SPCA inspectors and Drs. Ledger, Gadbois and others: (1) unsanitary property- cages in the house were dirty, as were the kennels, and area in general, (2) inadequate water, but not with respect to the puppies in whelping areas, (3) areas crowded with dogs, (4) open food containment unit that was at risk of contamination, (5) a lack of toys and bedding, (6) damp floors in the kennels with raised drain holes, (6) dogs exhibiting fear of the SPCA inspectors, (7) ventilation issues in the humid kennel, (8) Dr. Ledger's opinion, per s. 2(b) APA definition of distress, that all of the approximately 82 dogs she observed on October 7, 2019 were suffering undue anxiety based on behaviours and the conditions where they were kept, including that dogs were dirty, had no food, water or toys, and the mild odor of urine in the house. With respect to the dogs she observed outdoors- she concluded they were fearful, barking, exhibiting running back and forth behaviours, which she and Dr. Gadbois concluded are demonstrations of negative affective states that lead to suffering and as a result represent distress.

[103] The Crown says Ms. Robertson caused the dogs to be in distress due to overcrowding, the presence of injuries on some dogs, sickness because some had worms, and a lack of grooming. The Crown says there was strong evidence of permitting distress until December 10, 2019 for the foregoing reasons.

[104] It is useful to consider the testimony of the witnesses.

The Evidence:

The Testimony of Dr. Ledger who attended the property on October 7, 2019:

[105] The Crown called SPCA inspectors and Dr. Rebecca Ledger who was in the province presenting at a conference. Chief Inspector Landsburg invited her to the Robertson property on October 7, 2019 to prepare a report on the dogs. They also showed her two dogs Ms. Robertson had earlier surrendered in August.

[106] Dr. Ledger was qualified as an expert in animal behaviour and animal welfare. She was asked to provide an opinion on the living conditions and observed behaviour of the dogs she observed during a two-hour visit with the SPCA inspectors. The SPCA asked her to provide a written report on the severity of suffering, if any. While I am aware that an expert witness can assist the court in reaching conclusions, I must also assess the evidence of expert witnesses in the

same manner as other witnesses. I can accept some, none, or all, of the witness testimony.

[107] While defence counsel accepted her qualifications, he was concerned about her ability to provide an expert opinion on suffering given her past supervision of a graduate student who studied the presence of stress chemicals in dog urine, and no such sampling was done at the Robertson property. He was also concerned about her connection to the SPCA, her ability to keep an open mind, and her lack of awareness as to what led to the overcrowding at the kennel.

[108] Concerns about partiality or bias that may impact the testimony of an otherwise qualified witness testifying as an expert tend to center upon whether such a witness can keep an open mind. Same was addressed by Paciocco in "*Taking a 'Goudge' out of Bluster and Blame: An Evidence Based approach to Expert Testimony"* June 2009 Crim. L. R. 135.

[109] The concerns expressed by then J.A. Professor Paciocco were summarized by Molloy J. in *R. v. France*, 2017 ONSC 2040 at para. 17 as follows:

> … Professor Paciocco stresses the importance of the expert maintaining an "open mind to a broad range of possibilities" and notes that bias can often be unconscious. He refers to a number of forms of bias: lack of independence (because of a connection to the party calling the expert); "adversarial" or "selection" bias (where the witness has been selected to fit the needs of the litigant); "association bias" (the natural bias to do something serviceable for those who employ or remunerate you); professional credibility bias (where an expert has a professional interest in maintaining their own credibility after having taken a position); "noble cause distortion" (the belief that a particular outcome is the right one to achieve); and, a related form of bias, "confirmation bias" (the phenomenon that when a person is attracted to a particular outcome, there is a tendency to search for evidence that supports the desired conclusion or to interpret the evidence in a way that supports it). Confirmation bias was a particular problem identified in the Goudge Report as Dr. Smith and other pathologists and coroners at the time approached their investigations with a "think dirty" policy, an approach "inspired by the noble cause of redressing the long history of inaction in protecting abused children," and designed to "help ferret it out and address it." Unfortunately, as commented on by the Goudge Report and by Professor Paciocco, such an approach raises a serious risk of confirmation bias.

[110] Before assessing how similar concerns impact my assessment of the evidence, I will set it out. For two hours on October 7, 2019, Dr. Ledger and four

SPCA inspectors inspected the property and observed the 80 or so dogs living there. Fifty-three days later Dr. Ledger produced a report dated November 29, 2019 that was provided to the SPCA. While it contained advice for Ms. Robertson, she was not given the report until after her dogs were seized on December 10, 2019.

[111] Not surprisingly, and in accordance with Ms. Robertson's own position, Dr. Ledger recommended reducing the number of dogs. She went on to identify each dog, categorize her observations, and conclude all were experiencing "negative affective states" for various reasons.

[112] Dr. Ledger's conclusions are summarized as follows: (1) Suffering cannot be measured directly. Instead, it is inferred based on conditions a dog is experiencing and its response. It is generally accepted dogs are capable of suffering from a multitude of conditions. (2) All the dogs were experiencing negative affective states which refer to their feelings. She explained that a feeling is a sensation that is unpleasant and creates an unpleasant state of mind. (3) The scientific equivalent to distress is equal to suffering. (4) Part of the *APA* definitions of distress refer to a state of mind; there is a mismatch between the definition in the legislation and the scientific definition. (5) In her opinion all the dogs were distressed.

[113] Of course, Dr. Ledger did not have the benefit of any information about why the population increased when puppy sales fell through or information about changes on the property between her visit on October 7 and November 29, 2019. Nor was she aware of Ms. Robertson's ongoing unsuccessful efforts to surrender many dogs to the SPCA, including the two that were accepted on August 29, 2019 and the four that were accepted on September 18, 2019. Of those dogs, she was also unaware an inspector had described them as "regressing" in SPCA care.

[114] After considering both her testimony and report, I found in both concerning inaccuracies and conclusions unsupported by the evidence. I intend to address only a few of my concerns since they relate to the overall SPCA conclusion of distress. Together they impacted her reliability and, to some extent, credibility, but they also impact to some degree the credibility of the inspectors.

[115] First, the report purports to detail the location of dogs observed, but in doing so incorrectly described the whelping area locations in the house and the number of puppies in each. For example, the report placed three whelping areas on the main floor of the house when, based on the evidence of the other witnesses and Dr. Ledger's own drawings of the property, three whelping areas were located on the

second floor and only one on the main floor. But it did not end here, the report also erred in describing what was in each whelping area: the species- terrier or collie; the ages of the puppies; and the number of puppies in each. On those points the report itself is internally inconsistent and, ultimately, misnumbered the static number of puppies in each enclosed whelping area.

[116] I recognize that the purpose of the report was not to simply look in whelping boxes and count puppies, but also to comment on the state of the animals. At page 4, three litters of puppies in separate whelping areas are noted to be variously between 3-8 weeks and described as "isolated from regular interactions with people and adult dogs", and "likely to suffer from the following negative affective states: long term: these puppies are likely to anxiety when encountering situations they were not socialized with or accustomed to as puppies. E.g. cars, vacuum cleaners, televisions, the outdoors, other dogs, people other than K. Robertson."

[117] When a Court receives a report such as this, it must ask just how fair and neutral the writer was in reaching conclusions. Dr. Ledger obtained no information during her two-hour visit about what Ms. Robertson was doing to socialize her puppies. It is unfair to conclude she was doing nothing simply because she did not do something while hosting the inspection visit. Ms. Robertson was in business to sell puppies when they reached sellable age, not to keep them in whelping boxes. Later in the report she would be criticized for allowing older unsold puppies to socialize with her older dogs.

[118] Defence counsel pointed out, and it is not disputed by the Crown or Dr. Ledger, the report at times inaccurately described the same dogs in completely opposite language and incorrect locations- at once friendly and aggressive, caged and uncaged.

[119] It is clear the visit interrupted the Robertson daily operation of feeding, watering, etc., and the report notes when Ms. Robertson was directed to provide water to a few dogs and puppies, they "drank frantically". On this basis, a conclusion was reached by both Dr. Ledger and the inspectors that those animals were suffering a "negative affective state" due to thirst and as a result were in distress.

[120] Ms. Robertson testified that she watered and fed the animals on a schedule, and the two-hour visit disrupted same. She watched the videos of the animals drinking and pointed out that they drank for a few seconds and concluded they were not dehydrated.

[121] Continuing with water, page 3 of the report notes an area with, “no clean water only soiled”. Dr. Ledger agreed on cross-examination that she had no knowledge of how long the water was “soiled” and also agreed it could be in that condition due to the active dogs and puppies who were near it. She accepted the suggestion finding wood shavings in a water bowl could be normal over the course of the day when wood shavings are on the floor below a bowl.

[122] Ultimately, Dr. Ledger concluded at page 4 of the report that thirst is a “negative affective state”, and she reached that conclusion because some dogs had soiled water, and some drank frantically when offered water. Under cross-examination she accepted having no knowledge of how long the dogs had been without water.

[123] Also, at page 3, the report notes a “mild odour of urine and feces in the well-ventilated basement”, but Dr. Ledger concluded there was “olfactory suffering to some degree” because the visitors could smell it. Asked if this is not uncommon in a kennel, she expressed concern that there was urine and feces throughout the property and some of the feces she observed was “stale”. She says, “there were no clean areas and dogs were suffering because they were smelling their own urine”. That is quite frankly incorrect. The video and photographic evidence clearly showed areas, such as the large paddock, without either substance.

[124] Dr. Ledger believes it is unusual to smell same in a house but did not mention the available litter boxes on the main floor and note whether they needed emptying. She believes kennel dogs tend to keep indoor areas clean but believes the Robertson dogs may have learned to habituate to feces and urine in their resting areas. She had no information that the property had been inspected in May 2019 with no identified concerns. I mention this point here because due diligence is of course available to Ms. Robertson, but not the role of Dr. Ledger to consider in her report.

[125] At page 14 of the report, Dr. Ledger noted the location of the dogs varied throughout the day. This is consistent with Ms. Robertson’s evidence that the cages and kennels were not primary enclosures, but contrary to the conclusion reached by the SPCA inspectors. While Dr. Ledger was on the property for only two hours, she must have observed enough to reach that conclusion. Unfortunately, these differing views/opinions serve to establish the difficulty of reaching conclusions in the absence of evidence. I remind myself that conclusions such as those made by the inspectors, are not simply unfortunate if incorrect, but in this case resulted in

the issuance of *Orders to Comply* and resulting action by an already overstretched Ms. Robertson.

[126] Overall, the numerous examples of inaccuracies and unsupported conclusions in the report, also inconsistent with the evidence of SPCA witnesses and the videos and pictures placed in evidence, cause me to conclude the report is not reliable. The number of assumptions made without support during a brief two-hour visit when Ms. Robertson was unable to tend to the dogs while she escorted five SPCA visitors around the property must also be considered.

[127] That said, I ultimately conclude Dr. Ledger is correct that Ms. Robertson needed to surrender a large number of dogs. Not surprisingly things were not perfect at her operation. Of course, Dr. Ledger had no context for how that situation had arisen, however her recommendation was sound and in keeping with Ms. Robertson's great hope- the SPCA taking as many of her collies as possible.

[128] That topic was also raised at the inspection and I recognize and sympathize that the SPCA was only able to take a few. While concerning, it is certainly not their fault because they did not, at the time, have a facility large enough to accommodate the dogs. Eventually they did locate a warehouse in Halifax to accommodate the remaining 35 dogs that were seized on December 10, 2019.

[129] That Ms. Robertson was doing exactly what Dr. Ledger suggested in the report without benefit of it, also lends credence to her diligence defence. It is not necessary to continue to address the contents of the report, as I find Ms. Robertson did not "cause" her dogs to be in distress. Instead, she was doing everything she could reasonably do in the circumstances to care for them while reducing their numbers to recreate the situation of the years prior, and more recently May 2019, when she did not run afoul of any issues during SPCA inspections

Requirements of the Act:

[130] The *Act* requires evidence an animal is in need of adequate care, food, water or shelter; injured or suffering undue hardship, anxiety, deprived of adequate ventilation, space, veterinary care or medical treatment, kept in conditions that are unsanitary, kept in conditions that contravene the standards of care prescribed in the *regulations*.

[131] If I am prepared to accept that the dogs were in distress as testified to by Dr. Ledger and as set out in her report, and the testimony of Dr. Gadbois who watched

the SPCA videos of the dogs jumping around and appearing fearful of the inspectors, I am not prepared to conclude this occurred by design. Ms. Robertson's evidence, I find was credible and sincere, she had never faced such circumstances as she did when the litters of puppies were not sold, and they started to grow up thereby increasing her workload. While it is not necessary that she intend the result of a regulatory offence, I find she did not cause the dogs and puppies in her care to experience distress. Instead, as she testified, she was doing everything she could to avoid that situation. It makes sense to consider her evidence of due diligence.

Due Diligence:

[132] I found Ms. Robertson to be both credible and reliable. She testified that she worked from 7 am until 11 pm each day caring for all the dogs and the growing puppies. She fed, watered, cleaned, and placed the animals at an impressive speed and with caring deliberation. There are only so many hours in a day and, among other things, she also had to obtain dog food, launder bedding, mop floors, pick up excrement, play with and socialize the dogs, monitor their eating and drinking many times a day for each animal, administer heart medication to one, and maintain the deworming schedule.

[133] During all of this Ms. Robertson also dealt with a recurrent cancer diagnosis and an ailing mother, and all while in constant communication with people who could take dogs, including readying and taking dogs to the airport to return to breeders and placing puppies.

[134] I also find Ms. Robertson brought a great deal of skill to the task. She recognized the priorities such as hand feeding puppies on a grueling schedule, so it is no surprise dogs who were in the rainy outdoors were not always bathed and brushed everyday. As she said, grooming was certainly an item that had to be pushed to the bottom of the list. Doing so does not represent a lack of diligence, it demonstrates due diligence in caring for the important needs- food, water, exercise, socialization, deworming and maintaining the records of her operation (that incidentally the SPCA never asked to see despite authority to do so pursuant to section 18AA(3)(a) *APA, 2008*) and thus not causing them distress.

[135] I find Ms. Robertson was diligent in recognizing her problem, taking proactive steps to address it, at the same time reviewing the directions in the Orders and seeking clarification. Where her evidence differs from that of the SPCA

witnesses, I prefer hers. The reason I do so relates to the reliability issues with the crown witnesses.

[136] In the case of Insp. Oliver, her reliability suffered when she spoke of clarifying orders but agreed Ms. Robertson did not have the Code at the time they were issued.

[137] Insp. McRae, and Dr. Ledger in her report, both describe the dog Grace biting Insp. McRae "while she was distracted with a puppy". That incident was video recorded, and I could clearly see Insp. McRae holding a puppy described variously and "scared" and the "scaredest little dog" in her arms while standing near an impressive fence around the paddock area. She stuck her fingers through the chain link where Grace was running back and forth. Grace jumped up and bit her through the fencing, while nearby inspectors were feeding other dogs treats through the fence. This behaviour, I find, was reckless while holding a scared puppy. If I had not seen the video myself, I would have been left with a completely different conclusion. Dr. Ledger described the incident incorrectly in her report saying the dog bit the inspector while she was distracted with a puppy. I prefer the evidence of my own eyes- a demonstration of poor judgement on the part of the inspector.

[138] Returning to the defence, a hallmark of reasonable care is the opportunity to take reasonable steps to prevent or avoid committing the offence. This involves comparing what a defendant did to the available alternatives. As Chief Judge Stuart said in *Gonder*:

> Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were available is a primary measure of due diligence. To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities there were no reasonable feasible alternatives that might have avoided or minimized injury to others. (*R. v. Gonder* (1981), 62 C.C.C. 326 (YK.T.C.) at 333

[139] The reasonable alternative may include avoiding the activity or ceasing it until it can be performed properly. (*R. v. Fibreco Pulp Inc*. (1997), 88 B.C.A.C. 258 (B.C.C.A.) at paras. 17-20)

[140] Ms. Robertson's reasonable alternative was to stop breeding her dogs so that she had time to address the needs of the ones she had; she placed over half in a short time period and all while feeding, watering etc. I appreciate the logic in the

metrics offered by defence counsel. Even the SPCA could think of nothing else Ms. Robertson could have done to reduce the population. It would be wise for them to consider the issue of due diligence during their investigations instead of ignoring it until a trial.

[141] The defence of due diligence requires the act of diligence to relate to the external elements of the specific offences charged. While I do not accept that the reduction efforts alone signify due diligence, I find Ms. Robertson has established on a balance of probabilities that she took reasonable steps to avoid committing the statutorily barred activity. While it is not sufficient to simply act reasonably in the abstract or to take care in a general sense, she did much more and directed her actions at avoiding "the commission of the prohibited act, not some broader notion of acting reasonably". (*R. v. Kurtzman* (1999), 4 O.R. (3d) 417 (Ont. C.A.) Tarnopolsky J.A. observed at page 429)

[142] While the two offences are separated by date, I find, if the animals were in distress, which I am not convinced they were, it was during the first offence date range at the height of Ms. Robertson's crisis, and she has established due diligence on the balance of probabilities.

[143] During the second offence timeframe I take Mr. Casey's point that the only time the SPCA observed the dogs was on December 10, 2019 when they seized the remaining 35. Only the SPCA witnesses were in the presence of the dogs on that last day, and I find the evidence of the witnesses did not establish Ms. Robertson permitted distress.

[144] The dogs were in the house or the kennel when the SPCA inspectors arrived on a rainy day. Their master was not at home. The inspectors executed the warrant by entering through the basement door and alarmed the dogs as they called out. They slip-lined their necks in the presence of the other dogs while taking them away. They did not put them out to urinate and defecate as one does when one comes home to dogs, and it is not surprising this traumatic experience caused some defecation, urination, and hostile behaviours.

[145] Insp. Landsburg testified it was raining and the property was muddy. She observed feces under wood shavings outdoors, feces and urine on the kitchen floor and a mop bucket with dirty water. She says eight to nine dogs were loose in the house and one was acting aggressively toward them. There was a whelping box upstairs containing terriers. There was a smell of ammonia in the house and the kennel, causing her concern the areas were not sanitary. Outside the kennel

building she observed feces and found the kennel unclean. Each kennel contained one or two dogs and she believed the flaps to the outdoor runs were closed. There were, she believed, between 12-24 dogs in the kennel with some terriers in crates described as grimy. I am not sure how this adds up to 35 animals seized.

[146] Accepting all these conditions existed on that rainy muddy day, did Ms. Robertson permit the dogs to be in distress?

[147] A reminder of the definition of distress in s. 2(2) *APA, 2018*: (a) in need of adequate care, food, water or shelter or in need of reasonable protection from heat or cold appropriate to the animal; (b) injured, sick, in pain or suffering undue hardship, anxiety, privation or neglect; (c) deprived of adequate ventilation, space, veterinary care or medical treatment; (d) abused; …(f) kept in conditions that are unsanitary or unsafe so as to impair the animal's health, safety or well-being; (g) kept in conditions that contravene the standards of care prescribed by the regulations; …; or (i) subjected to circumstances prescribed by the regulations.

[148] There is no evidence the dogs were without adequate food, water, or shelter during the December 10, 2019 inspection and seizure. They were all indoors and the feeding and watering is done on a schedule. No seized dog was determined to be dehydrated.

[149] There is no evidence the 35 dogs were injured, sick, in pain or suffering undue hardship, anxiety, privation or neglect as permitted by Ms. Robertson. While a few dogs were determined to have worms, I accept Ms. Robertson's evidence of the deworming schedule. I also accept that one dog medicated for a heart condition, came to her that way, and Ms. Robertson brought the medication to the SPCA after his seizure. Two dogs had a chipped tooth but that did not overly worry the veterinarian. Some dogs had mats on their fur and burrs. If I conclude this represented neglect in grooming, I also find she was duly diligent to avoid causing the animals distress while working to address the panoply of their needs and this one had to go to the bottom of the list. It is also not clear how long the grooming had been put off given the dogs go outdoors everyday and it is common knowledge that the burrs come from plants that complete their growth cycle in the summer. In any event, should this represent neglect, I find she has satisfied the Court that she was diligent in her efforts not to commit the offence of permitting distress given her personal circumstances and her unceasing efforts to care for all the dogs.

[150] There was no evidence the dogs were kept in conditions that are unsanitary or unsafe *so as to impair the animal's health, safety or well-being*. That dogs are wet on a rainy day is logical, but the flaps leading to the outdoors appeared to the inspector to be closed, thus keeping them inside the heated building. There was no evidence that the unclean conditions rose to a level so as to impair the animals' health, safety or well being. I accept that they were dirty, and it is difficult to imagine how they would not be if they run around outdoors in rainy weather and walk in the mud. That they track mud into their living areas is also not surprising. That it would present a feat to keep every area they jump on, walk on, or touch clean and sanitary in Ms. Robertson's circumstances, is not surprising. I find she was duly diligent in her daily efforts to keep the place clean for the dogs. That said, I do not find the conditions impaired their health or safety.

[151] There was no evidence the dogs were abused. Despite the photographic evidence, it is fair to say anyone looking at a damp or unclean dog would think it looks sad, that does not equal permitting a dog to be in distress.

[152] The evidence of dogs experiencing anxiety, I find, arose due to the presence of the strangers and the neck capture techniques used by them.

[153] That the inspectors found the kennel and house were not adequately ventilated is a subjective opinion. I am not convinced I can rely on that evidence, given the exaggeration and less than reliable reporting previously noted. Once again there was no evidence the SPCA employed their available technology to measure air quality.

[154] That dogs were inside on a rainy day, following receipt of the 44 directions since September is not surprising. I find even if they were outdoors that would have been fine, given there was no evidence of injurious weather conditions, only rain. That they were dirty and smelled of being outdoors likely contributed to the noted odour indoors. As defence counsel pointed out, all the dogs had continuous access to the outdoors 365 days a year.

[155] After considering all the evidence, I find Ms. Robertson did not *permit* the dogs to be in distress between November 12 and December 10, based on the evidence on seizure day. As previously stated, she was still working to decrease her numbers and had asked the SPCA to come a few days after they did so to inspect. She still had one dog left to take to the airport.

[156] Ms. Robertson has established due diligence to avoid the commission of both the cause and permit distress charges. While I have not addressed every single issue, including for example the presence of a caterpillar, vermin, on the ground outside the kennel, it should be known that I have considered them all and find Ms. Robertson has more than established to my satisfaction, and on the balance of probabilities, that she worked very hard and was duly diligent to avoid the commission of all three offences. No reasonable person could have done more.

[157] In *R. v. Fountain*, 2013 BCPC 193, a case involving an emaciated rescue horse, an issue arose as to whether or not it might be a defence to a lack of care on the part of an owner for him to say, for example, he could not afford to get a vet to come and examine a sick animal. Frame PCJ, relying on *R. v. Ryder*, [1997] O.J. No. 6361 (O.N.C.J.) observed, in that case, the Court held that if a person is unable to look after their horses from a grooming, health and eating standpoint, then the owner had an obligation to give them up. Ms. Robertson continuously begged the SPCA to take dogs, she eventually and diligently placed over half her dogs; tragically her remaining dogs were taken on a wet and rainy day when she was not at home and, as she testified, her heart was broken.

[158] She is not guilty of any of the offences charged.

Judgment accordingly

van der Hoek J.