

Case Name:
R. v. Hunter

Between
Her Majesty the Queen, and
Ralph Hunter

[2011] O.J. No. 2335

Information Nos. 10-157 and 10-158

Ontario Court of Justice
Cornwall, Ontario

B.V. Marchand J.P.

Oral judgment: February 23, 2011.

(134 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Application by accused for exclusion of evidence allowed -- Inspector for Ontario SPCA received complaint of horses being improperly housed and fed -- Inspector attended accused's property, took photographs and conducted search -- Subsequent complaint about worsening conditions led to preauthorized search and charges -- Initial attendance by inspector was undertaken without accused's permission, without corroboration of complaint, without a warrant and in absence of reasonable grounds to believe animals were in immediate distress -- Search was illegal, breach was serious, and public interest warranted exclusion of evidence -- Charges stayed -- Ontario Society for the Prevention of Cruelty to Animals Act, s. 6.

Application by the accused, Hunter, for a Charter remedy based on a violation of his right against unreasonable search and seizure. The accused faced a series of charges under the Ontario Society for the Prevention of Cruelty to Animals Act. The charges dated between July 7th and October 26th of 2009. The accused submitted that a search by inspectors on June 22, 2009 was conducted pursuant to an illegal warrant and breached his rights. On that date, the Society received a complainant concerning animals located at the accused's property. The informant stated that five to six horses were kept in a small pen, fed old hay, and did not have access to water. She stated that horses were also kept on pallets in another handmade shed. A letter from the Crown stated that the informant's observations were conducted from a roadway near the accused's property which she regularly trav-

eled. An inspector attended the accused's property on June 22nd and took photographs from the accused's driveway and conducted a complete and thorough search. The informant made a subsequent complaint on July 2nd, stating that conditions had worsened. On July 7th, inspectors and police conducted a preauthorized search for animals in distress. Several horses were removed. The accused submitted that the initial search by the inspector was unreasonable and argued that the warrant and subsequent search flowed from the initial breach and thus any related evidence should be excluded.

HELD: Application allowed. There were no reasonable grounds to believe that any animals on the accused's property were in immediate distress, thereby justifying a warrantless search. When the inspector entered the accused's driveway, she was not in possession of a warrant and did not obtain the accused's permission to enter his property. The inspector acted solely on the informant's complaint without further investigation to corroborate the complaint. The warrantless search by the inspector was illegal and breached the accused's rights. The inspector's conduct was serious, as the inspector was trained to undertake searches in accordance with the law. The accused's expectation of privacy and the public interest in not condoning illegal searches warranted exclusion of all of the evidence flowing from the breach. All charges were consequently marked as stayed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, s. 6, s. 8, s. 11.4, s. 12(1), s. 12.6

Counsel:

E. Lavictoire, Counsel for the crown.

K. Andrews, Counsel for Ralph Hunter.

RULING

1 B.V. MARCHAND J.P. (orally):-- Mr. Ralph Hunter stands charged of a series of counts under the Ontario Society for the Prevention of Cruelty to Animals Act and these stem from charges dated July 7th, 2009 and the 26th of October 2009. The defendant's primary position states that the search conducted on June 22, 2009 was an illegal warrant for search of the applicants property and thus violated the applicants section 8 Charter of Rights.

2 If the Court rules that the search conducted on June 22nd was illegal then the applicant is asking the Court to rule that, and there's a series of domino effect type of remedy that they will be asking and we'll speak to that at the end if my ruling is in his favor.

3 The will say of Bonnie Bishop of the Ontario Society for the Prevention of Cruelty to Animals which I shall now refer as OSPCA indicates that on June 22, 2009 the OSPCA received a complaint concerning animals located at the property owned by Mr. Hunter across from 5011 County Road 1 in Iroquois.

4 The informant Arla Veinotte stated that she was concerned about the farm property with five to six horses in a pen approximately eight feet by ten feet. The horses are being fed old hay and she was unsure if the horses had access to water. She further stated there was another handmade shed with horses in it and that the horses were on pallets.

5 The will say does not state how the informant arrived at these conclusions and additional information about this informant cannot be found in the information to obtain a search warrant either and a copy of which can be found of the applicants record Tab 4 D.

6 The defendants counsel inquired about how the complainant could arrive at such detailed analyses in conclusion. By a letter of the crown to Mr. Andrews dated January 10th, 2010, a copy of which can be found at Tab B of the applicant Supplemental Application Record states that Ms. Veinotte is a third party who regularly travels the road past Mr. Hunter's property. On the two occasions in question she advised the OSPCA inspector of what she had observed while driving by this property.

7 Now, based solely on the first complaint received from Ms. Veinotte, driving by the noted property Ms. Bishop attended at the farm of property across from 5011 Carmen Road in Iroquois. She states that;

"I have been at this farm before and have knowledge of Ralph Hunter as the owner of the farm and the animals. There is no house on this property so I was unable to announce my presence in the usual manner".

8 She further acknowledged that Mr. Hunter's mother lives across the street and that Mr. Hunter lives in a trailer on that property.

9 The will say continues by saying;

"As I pulled in the driveway I observed several small pens constructed of metal fence panels and wooden pallets and tied together with baler twine located on the north side of the barn".

10 She then continued with her examination of the property and took pictures.

11 On July 2nd, 2009 Ms. Veinotte called to say the conditions are even worse. Again the evidence is that Ms. Veinotte claims to travel in front of this property on a regular basis.

12 On July 6th, 2009 Ms. Bishop attended before Justice Leblanc where a warrant to search was granted to allow her search for animals in distress.

13 On July 7th a search was conducted with the assistance of the O.P.P. and accompanied by various officials of the OSPCA as well as Dr. Bruce Robertson. Dr. Robertson decided that several horses need to be removed.

14 Now the Court recognizes that Ms. Bishop is an inspector for the OSPCA and as such has authority to search property provided it is done in accordance with the Charter.

15 The OSPCA Act section 6 states and they talk about immediate distress and it states that;

"if an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter",

and then it continues on.

16 Section eight defines "immediate distress" as;

"that requires immediate intervention in order to alleviate suffering or the preservation of life".

17 There is no suggestion in this case that there was a reasonable ground to believe that there were any animals on the defendant's property which may have been in immediate distress. Therefore Section 6 does not apply.

18 The prosecutor made reference to Section 11.4 but the Court concludes that this section applies only for inspection of places used for animal exhibit, entertainment, boarding, hire or sale and I think there's a consensus here that it is not the case at hand.

19 Now Section 12(1) deals with the entry where animal is in distress. This section deals with process of seeking a warrant from a justice or a judge who must be satisfied on reasonable ground that there is an animal in distress. It is clear from Ms. Bishop's will say that she did not have such a warrant when she entered the premises on the defendant's property on June 22nd, 2009.

20 On that day, based solely on a complaint from an individual who regularly drives by this property, the inspector pulled into the driveway and made observation and proceeded with a complete search. Ms. Bishop acknowledged that the defendant lives in a trailer across the road and made no attempt to speak to him or get his agreement to enter this property.

21 The defendant contends that this is a clear breach of his protection under Section 8 of the charter.

22 I have reviewed all the cases provided by both parties. I have further examined the circumstances surrounding the event of June 22, 2009. It is clear to the Court that on that day an inspector of the OSPCA acting solely on the complaint of a passerby with no further corroborating investigation technique entered the property of the defendant without a warrant and conducted a thorough search of the property. I am also satisfied that the inspector had no grounds to believe that there was any animal in immediate distress.

23 Any independent observation by the inspector occurred upon leaving the property when she assessed the field property as the pasture had been completely eaten off and there was no sign of the owner supplementing hay, this is almost like an afterthought.

24 I am satisfied that the search of the property on this date without a warrant was an illegal search and against the defendant's right under Section 8 of the Charter of Right.

25 Now, I understand that - you may have a seat sir. At this stage we're going to talk about Section 24 and I believe you would proceed first on this matter?

26 MR. ANDREWS: Yes Your Worship.

RULING

94 B. MARCHAND J.P. (orally):-- The Court has had the benefit now of reviewing certain cases that were put before it and I am satisfied that the factors in Grant and Collins are factors that the Court should follow in the absence of having any newer cases that would suggest that the factors have been somewhat revisited. The Court has also examined the facts with this particular case and I agree with certain things that the defense has put forward in terms of the case provided in Ontario. It is very similar to what has occurred here and I believe that is the Reimer case?

95 MR. ANDERSON: Yes.

96 THE COURT: I will first address the matter of whether or not high expectation of privacy in a barnyard situation is an appropriate conclusion. I don't necessarily share with this particular view. In this particular case, we have a situation where there's a barnyard with no residence on the same property and therefore to suggest that Mr. Hunter would have been very close to the animals in terms of taking care of them and expecting very high privacy has not been proven in my opinion. But it's none the less a privacy issue as defined under the Charter and I have ruled to that effect.

97 The state conduct which is one of the factors I have to look at, well the Court has to take under consideration that Ms. Bishop is an officer and an inspector of the OSPCA and by such, is expected to have been trained and be aware of how to conduct herself in this particular situation. And you add to that an email from the Chief Inspector which is dated November 26th, 2009 so we are now talking about seven or eight months prior to the incident.

98 It is clear that the OSPCA as a whole has recognized the need to protect individual's right to privacy. I would not, in any moment think that Ms. Bishop was ignorant of the fact. I don't buy that.

99 The thing happened so fast. One complaint, immediately on the site, she indicated that she had dealt with this individual before and probably expected to have some problems with this individual but proceeded immediately despite the fact that she has had training and recommendation from the Chief Inspector that certain rules have to be followed.

100 In this particular case there was nothing suggested that would imply directly or indirectly that there were animals in immediate distress, we dealt with that.

101 So the state conduct in this particular case is serious. I accept that an inspector should have taken the time to think about it, go through the proper process under section 12 - I believe it's 12.6, and arranged for obtaining a search warrant and properly conduct a search of the property.

102 I am not suggesting at all that it was not done in good faith and I am not suggesting that it was done with malice but it's none the less, we're not talking about an individual who is not familiar with certain processes, we are talking about an inspector who is trained and should have been trained to conduct inspections in accordance with the law.

103 The seriousness of the breach obviously at the expectation of privacy whether high or low is still none the less basic principle of the Charter right. The search itself, the expectancy of privacy itself in a barnyard situation although not being necessarily that high in this Court's determination none the less can result to some very serious consequences as pointed out by the defense counsel in this matter. Under the worst case scenario it would be extremely, extremely high in terms of the consequences of this search.

104 The society as a whole holds the privacy concerns to its highest regards. There's no question about that. Just about every case law that was provided to me would not deny that the public in general would hold that the privacy is an important part of the Charter of Rights and to allow an illegal

search to be conducted and to proceed with not throwing out the evidence collected in my view would result to the public being very concerned about the effectiveness of section 8 of the Charter of Right. It is not enough to say that we are free, it is not enough to say that we are protected from unlawful search if the effect of an illegal search would prompt the public to be scared of being illegally searched.

105 In this particular case it is important to remember that we were talking about animals, animals' welfare which is in the opinion of the public, very high. It's important that we protect children, persons, and animals from certain things that are to happen. In this particular case there were some animals who after being checked over by a doctor were ordered removed and I'll come back to that situation later. So between the illegal search and the time for which there was an application for a search warrant, I can't remember exactly the amount of time but I think we're talking about three weeks or so. The public would recognize that these animals were not in immediate distress and the findings of the search confirms that there were some animals that needed treatment and were removed but the balance there were orders made to rectify such situation.

106 So I am satisfied that the informed public, the society as a whole in this particular matter would conclude that to allow the evidence collected

107 through this illegal search would bring the administration of justice into disrepute.

108 As indicated before I tend to look at the legitimate interest of the states in this particular case and the legitimate interest even after the fact was that certain horses were removed otherwise the situation could have been handled in a much different way.

109 It is not the usual course for an inspector and it is not the duty of - it is a duty of the inspector to follow up on a complaint but follow up in the context of a proper plan, a plan of action that would be supportive by the Charter and the rules of, in this particular case we are talking about a search.

110 I agree that the Ringler case is not applicable in this case. The situation was way different. We are talking about a situation where an inspector would have been invited in.

111 The section 24 usually speaks about alternative to throwing out the evidence collected. In this case I do not see what balance could be made in terms of a different remedy than to exclude the evidence.

112 We talk about balance between all the factors but we also have to talk about is there a less intrusive, a more appropriate way of remedying the section 8 with something else? The Court cannot see any alternative but to come to the conclusion that the evidence collected on the search of June 22nd, I believe it's June 22nd, the evidence collected through that search is not going to be allowed in this particular case.

113 The defense counsel indicated first of all that the warrant obtained to search the applicant's property on July 7th was acquired by way of information obtained through a warrantless search conducted on June 22nd. As indicated I am satisfied that the evidence collected on June 22nd, cannot be used and I looked at the application to obtain the search warrant and if you are to exclude the information you would be basically be left with one individual on one occasion, well, one complaint, maybe more than one occasion drives by this property and comes to the conclusion that we have now discussed.

114 The specific information provided to the OSPCA could not have been supported by a drive by and therefore I am satisfied that had the evidence collected through the June 22nd search been excluded from the search warrant application it would not have been granted.

115 The defense is also looking at the surrender of animal documentation dated July 6th, 2009, it is signed by the applicant or was it July 6th? Yes, okay. He indicated that they were signed by the applicant, was executed under coercion and misinformation provided by the OSPCA investigators involved.

116 There were many witnesses to discuss the leading to the signing of this document. The Court is satisfied that the discussions were held in good faith. The witnesses all heard that they were, they described it as;

"a promise of no charges to be laid if the defendant was to sign the surrender of animal documents".

117 The OSPCA in contrast, investigator, on the other hand indicated that the reference of no charge was in the context of no financial consequences for the removal and disposition of the animals being surrendered.

118 The Court is satisfied there is no evidence that would satisfy me that the applicant signed the document under undue coercion and misinformation. I am satisfied that this document would not conclude that there was, I'm concluding that there was no breach under the section 8 on this particular file.

119 The search, both searches were as a result as I indicated of an illegal search and therefore the defense is looking that the orders and subsequent charges laid on October 26th was a domino effect of the continuing Charter breach and I agree with that as well.

120 Is there any point that I have not addressed that the parties would like me to address? If not, that is my conclusion. Now having said that and having no further comments from anyone, we will need to address whether or not the crown will pursue this matter in the absence of the evidence that was collected.

121 MR. LAVICTOIRE: If I could just have a brief indulgence?

122 THE COURT: Um, hum.

123 MR. LAVICTOIRE: Perhaps Your Worship, if I could have a five minute break?

124 THE COURT: Very well.

125 CLERK OF THE COURT: Please rise. Court is in recess.

126 MR. LAVICTOIRE: Your Worship, thank you for that indulgence. Um, if the charges could be marked as stayed?

127 THE COURT: All charges are marked stayed.

128 MR. LAVICTOIRE: Yes.

129 THE COURT: Are you satisfied with that?

130 MR. ANDREWS: Yes, I just want to be clear that it's all charges including the ones stemming from the July 7th and the October 26th dates?

131 THE COURT: I think that's what I heard. All charges are stayed. So I guess we'll cancel all future dates for trial. Thank you.

132 MR. LAVICTOIRE: Thank you Your Worship.

133 THE COURT: And thank you both for your comprehensive presentation before this Court.

134 MR. ANDREWS: Thank you Your Worship.

B.V. MARCHAND J.P.

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