IDEFENCES TO ANIMAL ABUSE

This paper aims to help stop defence arguments in their tracks by providing guidance on a good drafting of an information, explaining the basic elements of the offences and examining common defences.

ATTACKING THE INFORMATION

While an attack on the information isn't a "defence" it is an avoidable trap and could provide a means for an otherwise successful prosecution to result in an acquittal.

THE BASICS

The basic purpose of an information is to let the Accused know what the charges are. There may be a defect in the information that can derail a prosecution. Thankfully, these defects can be rectified early in the proceedings right up to the time the jurist becomes defunct. A better approach is to have a properly worded information which makes the Crown's work is easier from the start.

In the era prior to full disclosure the information served as the main means of an accused to "know the case" to meet. However, the modern approach is so long as the accused is reasonably informed and can provide full answer and defence than a defect in the information can be rectified.

In deciding whether an amendment should be allowed, the court will consider whether the accused will have a full opportunity to meet all issues raised by the charge and whether the defence would have been conducted differently: *R v McConnell*, [2005] OJ No 1613 at para 11 (CA); *R v Irwin*, [1998] OJ No 627 at para 38 (CA); *R v Masicotte*, [2017] OJ No 5302 at paras 19-20 (Sup Ct).

WRONG CHARGE

While police and Crowns are very comfortable with a number of common offences the animal provisions, aren't used as frequently. There are few Crowns that have done more than a handful of these prosecutions. The wrong charge is often laid. It is not the purpose of this memo to provide advice as to correct charge laying, however, the Crown should review the Criminal Code section that has been charged to determine if is the right one. In particular, the Crown should be alive to the elements of "willful" and "unnecessary" and "kept for a lawful purpose". These elements will be discussed more fully below.

For example, section 445 makes it an offence to unlawfully kill or injure a kept animal. The Crown needs to ensure the animal is, in fact, a kept animal, to charge this section. A 445.1 might be the more appropriate charge. As well, in light of the Ontario Court of Appeal decision in *MacKenzie* 2017 ONCA 638 the Crown should be careful not to particularize the information as an unlawful killing (even though the animal died) when the evidence only supports the accused unlawfully injuring the animal. A better information choice would have been to lay an information alleging "did unlawfully kill or injure an animal."

It is important to ensure the correct charge is laid because this is not an issue that can be easily remedied by an amendment. The laying of a new information will likely be necessary.

OVER-PARTICULARIZATION

It must be remembered the Crown must prove all the elements as laid out in the information (subject of course, to an amendment).

Consider the following example:

> Accused Name, on or about the 1st day of January, 2020 in the City of Ottawa, in the East Region, did, willfully and without lawful excuse, injury a 6 months old puppy named Killer by hitting it repeatedly with a hammer and other instruments, about the head, until it was dead, and kept for a lawful purpose and the property of Accused's Name, contrary to section 445 (1) of the Criminal Code of Canada.

This information is problematic for a number of reasons. It requires the Crown to prove the age of the animal, the name of the animal, that the animal was repeatedly hit, with a hammer and other instruments, the location of the injury, the fact the animal died and the specific owner of the animal.

None of these elements are required under section 445 (1).

A much simpler information would read

> Accused Name, on or about the 1st day of January, 2020 in the City of Ottawa, in the East Region, did injure a dog kept for a lawful purpose, contrary to section 445 (1) of the Criminal Code of Canada.

Now the Crown need only prove the elements of the offence as laid out in the Criminal Code.

ISSUES WITH THE DATE

In neglect cases in particular the abuse may have been going on a long time. It is often difficult to determine when it began. It is common to see an information laid alleging abuse with too narrow of an offence date. Neglect charges can be laid under section 445, 445.1 or 446 of the Criminal Code or under provincial legislation.

Take the example of an animal that has been starved nearly to death. This is the not a situation that arises overnight. Likely the animal being deprived of adequate food over a significant period of time. Often an information will be laid with the date of the offence being a single date, usually the date of the arrest. Some informations will be laid with a start date of the start of the investigation. This is better than a single date but still insufficient. Likely the investigation started as a result of a complaint. The complaint likely didn't happen until the issue was already significant. The offence, however, would have began much earlier. An animal can only survive a few days without any access to any food but can survive months, even years, without *adequate* food. That does not mean an offence hasn't been happening that entire time.

The problem with having too narrow a date is that on any particular day the animal in question might not have been, for example, suffering or neglected. That may be the day the subject

actually feed a sufficient quantity of food. Expansion of the date then leaves the Crown the option of proving the case by arguing the insufficiency of food over the long term.

There is no need to know the specific date the abuse started. Simply start the date of the offence at a date that seems reasonable on the facts of the case, for example a veterinary report can provide a range for how long the animal was deprived of food.

BEST PRACTICE

While the information can be amended at any stage of the proceedings and even on the trial judge's own motion (and sometimes even on appeal), it is clear the further along the proceedings are the more difficult it is to amend.

The Crown should review the information carefully as soon as possible to ensure the correct charge and wording. There is next to zero prejudice that can be alleged at this stage. If a new charge needs to be laid a request can be made from the Crown to the investigative agency to lay different or additional charges. *R.* v. *Rak* [2020] OJ No. 3832 (SCJ).

If trial proceedings have already commenced, the more notice Crown can provide the Accused and the Court of the amendment the better the chances the amendment will be allowed.

Ultimately a determination will need to be made as to whether the accused has suffered prejudice as a result of the proposed amendment.

Informations that are as broad as possible allow for the Crown to prove the offence a multitude of ways. If the information is too broad, the accused can bring a motion for particulars but these motions are increasingly rare.

ELEMENTS OF OFFENCES

While this isn't a memo on the elements of animal abuse offences it is important to have the basics of what the elements are. The usual defences in animal cases are often attacks on whether a particular element has been proved. The burden can shift depending on whether it is an element of the offence or a defence raised. The Crown, of course, bears the burden of proving all the elements of the offence beyond a reasonable doubt. A defence only comes into play once there is an "air of reality" to it. While this distinction is an important one, the realities of a trial Crown are such that if the guilt of the accused rests on whether it is an element or a defence than the prosecution is probably on very wobbly ground.

WILFUL – "I DIDN'T MEAN TO"

The element of "willful" is a complicated one. Section 445, 445.01, 445.1 and 446 have an element of "willful". The definition of willful is different depending on the section.

445 and 445.01 OFFENCES

For the purposes of 445 and 445.01 offences wilfully is defined by the Criminal Code in section 429 (1) as:

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

While "willful" doesn't normally allow for the offence to be proved by way of recklessness, this is specifically allowed in a 445 or 445.01 offence.

445.1 and 446 OFFENCES

Willful is defined differently, however, for 445.1 and 446 offences but is similarly defined between these offences. Wilful for these offences imports a reasonable person test. It also allows for evidence to the contrary.

445.1 (3)

> …evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully,

446 (3)

> …evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it damage or injury is, in the absence of any evidence to the contrary, proof that the damage or injury was caused by wilful neglect.

The British Columbia Court of Appeal in *Gerling* [2016] BCJ No 264 held that determining whether there is an absence of reasonable care of supervision is an objective test. If there is no evidence to the contrary and the care was unreasonable then it was willful. If there is evidence to the contrary (that has an "air of reality") the Crown must then establish the conduct (or lack of conduct) was willful and this can engage the subjective element of recklessness.

UNNECESSARY - "I HAD TO DO IT"

"Unnecessary" is an element of 445.1 offences. This is a very different concept then the "necessity" defence outlined by the Supreme Court in *Perka* [1984] 2 SCR 232.
In order to determine if something is "unnecessary" it is required to look at whether there is legitimate purpose and to examine the means employed. *Menard* (1978) 43 CCC (2d) 458 (QueCA).

Many of the actions that we take with animals would not pass as a "necessity" test under the *Perka* but would be completely permissible under the "unnecessary" test under *Menard*.
We continue to use animals in many ways. We enjoy them as pets. We use them for food. We use them for clothing. We use them for research. We use them for entertainment. Is it really "necessary" for us to use animals in this way? There may be strong arguments that no, we don't, but as a society we have decided that it is still okay to use animals for a multitude of purposes. However, we have also decided that animals shouldn't be used in a way that causes "unnecessary" pain, suffering or injury.

This is best illustrated with an example.

We enjoy animals as household pets, but we don't want our communities overrun with homeless animals. As a result, a responsible pet owner will have a pet spayed or neutered by a veterinary. The surgery undoubtably causes pain, suffering and injury. It is not, however, a criminal offence. There is a legitimate purpose and the means employed are reasonable. Contrast this, however, with an individual electing to do a "home neuter," but tying elastic bands around the animal's testicles. While there may be a legitimate purpose, the means employed were not reasonable.

There is an interplay between reasonableness and legitimate purpose and the degree of pain, suffering or injury. A high degree of suffering is not reasonable when the legitimate purpose is low.

There is a strong argument that something cannot be illegal and necessary at the same time. It would not, therefore, be a defence to a 445.1 charge that a dog was injured in an illegal animal fighting right.

An animal injured because of animal discipline or training would fit under unnecessary so long as the means employed were excessive in the circumstances.

KEPT FOR A LAWFUL PURPOSE – "BUT IT IS ONLY A STRAY"

The Criminal Code continues to distinguish between animals that are "kept for a lawful purpose" and animals that are not. The legal question is whether the animal is "lawfully kept." However, when dealing with an animal victim that is a stray, feral or wild it is unlikely these animals would fit into the definition of a "kept" and, would, therefore, not be afforded the protection of 445.

A stray animal is usually a lost or abandoned animal and might still be a "kept" animal under 445. If the person abusing the animal knew or should have known the animal was a lost "kept" animal liability can still attach. The person who caused the abandonment might still be liable if the abandonment was willful and resulted in the animal being killed or injured.

A feral animal is a domestic animal that was likely born wild and has not been socialized. It is unlikely a feral would be a "kept" animal.

A wild animal is not a domesticated animal and would not be a "kept" animal. (an exception would be, for example, a tiger in a zoo.)

Leaving aside whether there are good policy reasons to continue to have this legal distinction between "kept" and unkept animals, it remains a distinction that must be considered when determining whether the correct charge has been laid.

An animal's status can change. For example, an animal can start out as a feral but become a pet. There is no defining moment when this occurs but requires a review of the constellation of facts.

Non-exhaustive factors to consider would include:

- Is the animal provided shelter (does it now live indoors or have access to indoors or have an outdoor protective shelter)?
- Is the animal provided food or water and how frequently?
- Does the animal receive medical attention?
- Can the animal be handled by people?
- Does anyone interact with the animal?
- To what extent are there controls on the animal's movements?
- Does someone groom the animal?
- Does the animal appear in family photos?
- Does the animal have a name?
- Does the animal have identification, like a microchip or a tattoo?

R. v. *Paish* [1977] B.C.J. No. 924 (B.C.Prov.Ct)
R. v. *D. L.* [1999] A.J. No. 539 (Alb.Pro.Ct.)
R. v. *Sunduk* [1999] S.J. No. 185 (Sask.Ct.Q.B.)

It is important to note it doesn't matter who "keeps" the animal. So long as the animal is "kept" then a conviction can register under section 445. (see *R.* v. *Powers* [2003] O.J. No. 2414 for a similar analogy)

What is the correct course when an animal is a true stray, feral or wild? Don't charge 445. When unnecessary pain, suffering or injury occurred the correct charge should be under 445.1.

DEFENCES

CIRCUMSTANTIAL EVIDENCE AND EXCLUSIVE OPPORTUNITY – "SOMEONE ELSE COULD HAVE DONE IT"

This is not a true defence as it is the Crown's burden to establish the identity of the offender. This will only arise when there are no eye witnesses to the events.

Firstly, the type of injury needs to be considered. Is this an injury that could be caused by the animal or is the only reasonable inference that could be drawn was that it was caused by a

human. (eg. A dislocated tail vs a stab wound). In cases of potential of self injury an expert would be necessary.

For example, while uncommon it is not unheard of for an animal somehow manage to disclocate his or her own a tail. An expert opinion would be necessary to show this disclocation was the result of, for example, a person swinging a cat by the tail. Without being able to establish this the prosecution would likely not have a reasonable prospect of conviction.

These are circumstantial cases. Circumstantial evidence refers to any evidence from which one or more inferences are to be drawn to establish material facts. While there is no burden to prove every piece of evidence on a standard of beyond a reasonable doubt, in order to convict on a circumstantial case, a judge must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt. The rule of circumstantial evidence does not apply to each piece of evidence but rather only the totality of the evidence. A conclusion cannot be found without evidence, which is to say that it cannot be speculation. In other words, the whole of all the evidence may be more compelling than the sum of its parts.

Some factors to consider (some of these consideration may require a similar fact application)

- The attitude or animus of the accused towards the subject animal
- Any apparent motive for the actions (i.e. an animal killed because it required expensive medical care that the accused was unwilling to provide)
- No other plausible explanation (it must be remembered that absene of evidence is not the same thing)
- The state of mind of the accused
- Evidence the accused was in possession of the necessary skill or implement to commit the offence
- Evidence of the accused at the location of the events at the appropriate time
- Evidence the accused was the last person with the animal before the injury occurred

None of these factors alone will be sufficient to establish guilt.

Exclusive Opportunity

Evidence that establishes only a single person was present at the time of the offence and was otherwise capable of committing the offence, then it will be sufficient to prove the identity of the culprit and may prove guilt beyond a reasonable doubt, *R v Doodnaught*, 2017 ONCA 781.The issue is whether the opportunity is truly "exclusive" and not simply is it likely among several potential persons. This will often address factors such as who had access to the location of the offence as well as the timing of events and each person's location during or near that time.

Evidence of opportunity that is not exclusive is akin to evidence of motive. It cannot be used as a form of corroboration. However, where opportunity is coupled with some other form of inculpatory evidence, then it may be sufficient. *R v Ferianz* (1962), 37 C.R. 37 (Ont. C.A.), *R v*

Yebes, 1987 CanLII 17, [1987] 2 SCR 168.

DUE DILLIGENCE "I TRIED EVERYTHING AND IT HAPPENED ANYWAY"

The defence of due diligence is only available when an accused is charged under a provincial offence as animal abuse charges are strict liability offences. The Crown does not have to prove the state of the mind of the accused (mens rea). So long as the actus reus is established the offence is made out. The accused can only defend the charge by showing s/he took reasonable steps to avoid the outcome charged. The burden is on the balance of probabilities.

> "… involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."
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> "It is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. …The defendant must only establish on the balance of probabilities that he has a defence of reasonable care."
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> *R.* v. *Sault Ste. Marie* [1978] 2 S.C.R. 1299 (S.C.C.)

COLOUR OF RIGHT – "I THOUGHT I WAS ALLOWED"

Section 429 (2) allows for the defence of colour of right for 445, 445.1, 445.01 and 446 offences.

Colour of right is an *honest* belief in a state of facts *or* civil law which, if it existed, would negate the *mens rea* of an offence. If upon all the evidence it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence committed because there is colour of right.

In *Pena*, the court set out three conditions to the application of the defence:

(i) The accused must be mistaken about a state of facts or law. It is not sufficient that s/he had a moral belief in a colour of right.
(ii) That state of facts or law, if it existed, would provide a legal justification or excuse.
(iii) The mistaken belief must be honestly held.

The accused bear the onus of showing that there is an "air of reality" then it moves to the Crown to prove beyond a reasonable doubt the absence of justification or excuse:

Case law for colour of right generally:

R. v. Howson, [1966] 3 C.C.C. 348 (Ont. C.A)
R. v. De Marco (1974), 13 C.C.C. (2d) 369 (Ont. C.A.)

R. v. Pena (1997) 148 D.L.R. (4th) 372 (B.C.S.C.)
R. v. Creaghan (1982), 1 C.C.C. (3d) 449 (Ont. C.A.).
R v. Watson (1999), 137 C.C.C. (3d) 422 (Nfld. C.A.)
R. v. *Simpson,* [2015] S.C.J. No. 40
R. v. Hudson, 2014 BCCA 87

EUTHANASIA – "I WAS TRYING TO END MY ANIMAL'S SUFFERING"

The Criminal Code allows for owners to make the decision to end the life of their animal. Animals are property and we continue to have the right to destroy our own property. The decision when to euthanize a beloved pet is one of the most difficult decisions to make.

What the Criminal Code does not allow is for an individual to case unnecessary pain, suffering or injury. In these cases death would be considered the ultimate injury. As indicated above there is a balancing between legitimate purpose and means employed. This balancing test was set out by the Quebec Court of Appeal in *Menard* (1978) 43 CCC (2d) 458. The facts of *Menard* are helpful. A City dog catcher collected animals and instead of a humane veterinary euthanasia, he would asphyxiate the animals with the exhaust from a car engine. The Appeals Court accepted there was a legitimate purpose (ridding the City of surplus unwanted animals) but the means employed (gassing) was excessive.

Care should be taken in these cases to ensure the charge laid is 445.1 which has the element of unnecessary. A section 445 charge would require the Crown to show these actions were without a 'lawful excuse." It is unclear whether inhumane euthanize would fall as an "unlawful excuse."

The circumstances of each individual case needs to be carefully examined. Was the means used reasonable? There are a number of unreported cases of individuals arguing this as a defence when the means used included things such as: euthanasia by microwave, repeatedly shot or stabbed.

This argument may be more successful if the individual was attempting to put an end to an animal's suffering (e.g. an animal hit by a car and the individual uses a rock to kill it).
It is also important to note that no one has a responsible for a wild or feral animal under section 445.1 but an owner could still be held liable if an animal is critically injured and simply stood back and allowed nature to take its course if the inaction caused unnecessary pain, suffering or injury.

LACK OF RESSOURCES - "BUT I CAN'T AFFORD PROPER CARE"

No one is forced to own an animal. A person needs to make a conscious decision to have an animal. There are countless community services throughout the country that can provide aid to animals and to animal owners in need. Individuals are able to surrender animals to humane societies and other rescues when care of the animal because too burdensome. There are often community supports that can provide free or discounted vet care to people in difficult financial situations. Crowd funding can be done. Individuals can lean on the support of family or friends. The possibilities are endless.

What is not acceptable is to allow an animal to be injured because of lack of proper medical care. This would be a 445 offence. The inability to afford appropriate care is not a lawful excuse. It can be a 445.1 offence because the owner permits the animal to continue to be in pain, suffer or be injured unnecessarily. It can be a 446 offence to willfully neglect the animal.

When dealing with this defence it is important to cross examine the accused on all the options available and why the accused failed to act on any of those options. While a judge may be sympathetic, it should not be a defence for an accused to argue the humane society would have euthanasised the animal if it has been surrended. This is speculative at best, and, regardless, it is irrelevant what the next custodian does. The question is what did the custodian do while in control of the animal.

> "You, by taking and owning these horses, have an obligation to look after them, to feed them, to see that they're appropriately cared for when they're sick, to groom them properly, to have them wormed, to have them properly bedded, to clean out their stalls. Failure to do that because you can't afford it is no excuse, and he knew it. He knew that he required professional help, and because he couldn't afford it, he decided not to ask for it. That's not an excuse." *R.* v. *Ryder* [1997] O.J. No. 6361 (Ont.Ct.Jus) – distinguishes *R.* v. *Heynan* [1992] A.J. No. 1181 (Alb.Prov.Ct.)

OWNERSHIP, CUSTODY AND CONTROL – "IT'S NOT MY ANIMAL"

Depending on the section charged it may become very important to establish the ownership, custodianship or whom is in control of the animal.

As indicated above section 445 requires the animal to be a "kept" animal. It is, however, irrelevant who "keeps" the animal. A complete stranger to the animal can be criminally liable under this section.

Section 445.1 prohibits anyone from causing unnecessary pain, suffering or injury to any animal. There is no requirement the animal belong or be kept by anyone.

Section 445.1 also creates an offence of an "owner" permitting unnecessary pain, suffering or injury. In other words, an owner can not sit back and allow someone else to hurt the owner's animal.

Section 446 (a) creates an offence if a person willfully neglects an animal during conveyance or being driven. This implies the offender would have a degree of control over the animal. It does not import an element of ownership.

Section 446 (b) prohibits the "owner" or a "person having the custody and control" of the animal from neglecting or abandoning the animal and requires the individual to provide appropriate care to the animal.

Different provincial legislation across Canada can also provide different elements of control over the animal to engage liability. For example, in Ontario, under the Provincial Animal Welfare Services Act, section 15 (2) , the offence of distress is made out of the "owner or custodian" permits the animal to be in distress.

The following is an non-exhaustive list to aid in determining who is responsible for the animal. Not one factor is going to be determinative.

- Is the animal licensed / registered with a local municipality or tattoo or by microchip?
- Does the animal have a vet, who is on the vet documents?
- Who attends at the vet office?
- Who pays the bills for the animal?
- Who feeds / waters the animal?
- Who cleans up after the animal?
- Who exercises the animal?
- Who provides medical care or medication to the animal?
- Who is the owner of the home the animal resides in?
- Who grooms the animal?
- Who does the animal respond to?
- Who resides in the same dwelling as the animal?
- Where does the animal sleep? (e.g. in bed with the accused?)

PROTECTION OF LIVESTOCK – "THERE WAS A FOX IN THE HEN HOUSE"

At common law, for this defence to be successful, the animal should be caught in the act of aggravating livestock and is killed (or injured) while still a threat to the livestock.

R. v. Etherington [1963] O.J. No. 876 (Mag. Ct.)

R. v. Klijn [1991] O.J. No. 3415 (Prov. Ct.)
Yuke (Private Prosecutor) v. Angus [1995] O.J. No. 575 (Prov.Ct.)

In other words it is important to establish what the victim animal was doing at the time of action taken. For example, if the fox has already retreated from the hen house this defence would not be successful.

While a farmer has the ability to protect livestock (and this can include injuring or killing a wild animal) the farmer cannot do so in a way that causes unnecessary pain, suffering or injury. Again, there may be a legitimate purpose, but the means employed must be reasonable. For example, leg hold traps (the use of which is strictly legislated by the *Fish and Wildlife Conversation Act*) to capture the fox is not reasonable nor is attending a neighbouring property to shoot a dog because of fears the dog *might* attend a neighbouring property and *might* bother the livestock.

However, in Ontario (some other provinces have similar legislation) the *Livestock, Poultry and Honey Bee Protection Act* allows for an expansion of this defence and allows a dog to be killed if it " is found straying at any time, and not under proper control, upon premises where livestock or poultry are habitually kept." The *Dog Owners Liability Act* also provides for situations when a dog can be injured or killed.

R v. Robinson, [2014] B.C.J. No. 2016 (B.C.S.C.)
R. v. Comber (1975), 28 C.C.C. (2d) 444 (Ont.Co.Ct.)

SELF DEFENCE / DEFENCE OF OTHERS – "THE DOG WAS SCARING ME"

Self-defence under section 34 of the Criminal Code is not a defence to an animal abuse charge. The section specifically requires it to be applied to people. However, individuals can still protect themselves and others from animal attacks. Section 445 allows for the defence of lawful excuse. Section 445.1 requires the force used not to be unnecessary. The argument might be nuanced depending on the charge laid.

While section 34 isn't applicable, it can provide some guidance and helpful lanaguge when determining if the force used was reasonable or exceeded the bounds of necessary. For example:

- What was the nature of the force or threat from the animal
- Was the attack imminent
- Was there other means available to respond to the potential use of force
- The physical attributes of the aggressive animal
- The history of interaction between the animal and the accused
- The proportionality between the aggression and the animal

When 445.1, "unnecessary" charge is laid the legitimate purpose would be self protection or protection of others (high legitimate purpose) the means employed can be high and the result can

be serious (even causing death of the animal) but they must still be proportional. It would not, for example, be proportional to stomp a kitten to death because it bit someone.

R. v. *Greeley* [2001] N.J. No. 207 (Nfld. Prov. Ct)
R. v. *Delong* [2008] O.J. No. 2566 (Ont.C.A.)
R. v. *Rabeau* [2010] A.J. No. 567 (Alb.Prov.Ct.)

UNLAWFUL ARREST – "THE POLICE SHOULD'T HAVE RELEASED THEIR DOG"

Section 445.01 was created in 2015 and made it an offence to "willfully and without lawful excuse, main, wound, poison or injury a law enforcement animal while it is aiding a law enforcement officer in carrying out that officer's duties." A law enforcement animal can be a dog or a horse.

While it is largely un-litigated it seems likely the law on resisting unlawful arrest would be applicable to this offence as well. Sections 270(1)(a), and 270(1)(b) require that the officer be acting in the lawful execution of his or her duties, and by extension, the police animal. When an arrest is unlawful and the officer is not acting in the lawful execution of duties, the detainee is entitled to resist arrest. R. *v. Plummer,* 2006 CanLII 38165 (ONCA)

Prior to the enactment of this specific section injury to a law enforcement animal was dealt with by a more generic animal offences. Resisting an unlawful arrest or resisting excessive use of police force by a law enforcement animal was examined in the following cases:

R. v. *Barr* [1982] A.J. No. 1021 (Alb.Prov.Ct.)
R. v. *Delong* [2008] O. J. No. 2566 (OCA)

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