NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Agriculture) v. Rocky Top Farm*, 2017 NSCA 2

Date: 20170103
Docket: CA 447378
Registry: Halifax

Between:

Nova Scotia (Minister of Agriculture)

Appellant

v.

Nelson E. Millett, carrying on business as Rocky Top Farm

Respondent

Judges:	Fichaud, Saunders and Bryson, JJ.A.
Appeal Heard:	September 13, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, decision and confirmatory order of the reviewing judge set aside, and the matter remitted to the Minister for a proper determination per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Sean Foreman, for the appellant John T. Shanks, for the respondent

Reasons for judgment:

[1] The appeal in this case concerns the interpretation and application of the *Animal Protection Act*, S.N.S. 2008, c. 33, as amended (the *Act*). In that respect it is similar to the case of *Brennan v. Nova Scotia (Agriculture), CA 447379*. Although the two cases were not consolidated on appeal, it was agreed by all parties that they would be heard by the same panel, one after the other. Accordingly, these two cases ought to be treated as companion appeals, and our decision in one, should be read in conjunction with the other.

[2] This is an appeal from a judicial review conducted by Nova Scotia Supreme Court Justice Gerald R.P. Moir whose decision is now reported at 2015 NSSC 21.

[3] Justice Moir allowed the application for judicial review brought by the owner of the animals in question and ordered the Province to pay the owner the proceeds realized upon sale of the cattle, as well as costs.

[4] The Minister appeals that outcome to this Court, claiming a variety of errors on the part of the reviewing judge.

[5] For the reasons that follow I would allow the appeal, quash the decision and confirmatory order of the reviewing judge, and send the matter back to the Minister of Agriculture so that the proper question can be asked and answered.

[6] As this is a case of first instance, giving us the opportunity to consider the proper interpretation and application of s. 23(2) of the *Act* and, in particular, the Minister's role in the seizure of animals deemed to be in need of protection, I will provide a detailed summary of the material facts so that the important issues arising in this case may be seen in proper context.

[7] Before doing so, I wish to add one further comment on disposition. The reader will recognize that in this case the Minister of Agriculture is the appellant. Whereas in the *Brennan* case, the owner launched the appeal. In this case, the appeal will be allowed. In the *Brennan* case the appeal will be dismissed. Even though the cases share similar precipitating features and raise some of the same issues, the results are different. A reading of the two companion judgments will explain why.

Background

[8] Rocky Top Farm has been in business for 50 years. It is located at New Ross, Lunenburg County, Nova Scotia. Its current operators are Nelson Millett, his wife, Isabel Hackney, and his father Lloyd Millett.

[9] In 2013-14 the operations of the Farm included laying hens, beef cattle, fowl, sheep and hogs.

[10] The main operations of the farm are conducted at 150 Will Turner Road where Mr. Millett and his wife's home is located. The farm also leases property at 382 Fraxville Road where a portion of its beef cattle herd is kept.

[11] In January, 2014, during a severe winter, inspectors with the Nova Scotia Department of Agriculture received a complaint that the cattle lacked food, water and shelter. They drove to the farm to investigate, arriving at the Fraxville Road location at approximately 10:25 a.m. The inspectors' report described the day as being sunny, minus eight degrees Celsius with a wind chill of minus 22 degrees Celsius.

[12] Entering the barn they encountered large amounts of garbage heaped at the entry, including piles of junk, tires, rims, a TV set and bags of refuse. All of this is evident in the photographs taken at the scene. In the far corner of the barn they observed a small pen which held two cows and two nursing calves about 1-2 months old. The cows were described as hunched up, and emaciated. One calf was cold and lethargic. There was no hay or dry bedding in the pen itself. The water bucket was empty. The floor had a 10 inch build-up of manure and the cattle were wet and filthy from lying in it. No hay was seen, either in the barn or on the property. One poultry carcass was found inside the barn. It was sent to the NSDA Pathology Lab for a necropsy.

[13] The inspectors walked to the pasture behind the house where the cattle had been seen on their arrival. They noticed a calf down on the ice. They saw another calf, a few months old, lying on the ground with its back legs splayed out. This calf made no attempt to stand up when they moved around it. It was emaciated, with its backbone, hips and ribs clearly visible through its winter coat. As this calf appeared to be in critical distress the inspectors decided to return to their truck where they called the Annapolis Animal Hospital, requesting a large animal veterinarian to assist on a farm animal welfare call. Subsequently, Dr. Mike McGowan arrived. He and the inspectors proceeded to the barn to assess the two

cow-calf pairs. Dr. McGowan reported that the cows were emaciated, and one calf was in distress. He presented two options for the cattle, euthanasia on-site, or immediate removal from the premises.

[14] They then returned to the pasture to assess the downed calf. Dr. McGowan found the calf to be emaciated and without any pain response in its hind feet. The calf was in critical distress and Dr. McGowan recommended immediate euthanasia. That was approved by the inspectors and Dr. McGowan proceeded to euthanize the animal. They loaded the carcass into the inspectors' truck for transport to the NSDA Path Lab for a necropsy.

[15] Dr. McGowan and the inspectors then assessed the main herd. The cattle had no food available. The old hay on the ground was spread out over a large area and was black and mouldy. There was no water source near the cattle. There were two small holes in the shell ice at the entry to the pasture that may have served as drinking holes. But the water had receded and the cattle could not access any water. The only shelter available was a section of a sparsely wooded area. The shelter was inadequate for the condition of the cattle. The emaciated carcass of a mature cow was found along the edge of the pasture. It was frozen to the ground but not scavenged.

[16] Dr. McGowan recommended the removal of the cattle to alleviate their distress. Most of the herd showed signs of malnutrition, dehydration and internal parasites.

[17] The inspectors returned to their truck, called their supervisor, and arranged for transportation. The inspectors also called the Chester RCMP to attend during the seizure. Dr. McGowan remained to assist as the herd was being moved on to the trucks.

[18] The RCMP officers arrived at the Fraxville Road location at approximately 2:30 p.m. They, together with an inspector, drove to Lloyd Millett's house on the Will Turner Road arriving there at 2:40 p.m. Lloyd Millett came to the door. The inspector asked him if he owned the cattle located at Fraxville Road. Lloyd Millett became very upset, shouted at the inspector and accused him of lying during an earlier encounter. The police officer asked Lloyd Millett to answer the inspector's question to which Lloyd Millett replied "Go ask Nelson, they are mostly his". The inspector and police then went to Nelson Millett and Isabel Hackney's house on Will Turner Road. Ms. Hackney answered their knock on the door. The inspector introduced himself and asked for her husband. Ms. Hackney asked several

questions as to why they wanted to talk to her husband, was there a complaint, and why were the RCMP in attendance. The inspector asked her if she owned the cattle and she said she would not answer his questions. The inspector again asked to speak with her husband. Ms. Hackney shut the door. They could hear footfalls and voices but no one returned to the door. After a few minutes the inspector knocked again. No one answered. The inspector left his business card in the door and they returned to the Fraxville Road location.

[19] The first transport truck arrived and the two cow-calf pairs were loaded first. Then Nelson Millett and his wife arrived at the Fraxville Road location. The inspector asked Ms. Hackney if she owned the cattle and again she refused to answer. The inspector then asked Nelson Millett if he owned the cattle in the barn and on the pasture and he too refused to answer. Ms. Hackney asked several questions about the situation and the inspector told her he could not discuss the cattle with anyone until he first established ownership. He again asked Ms. Hackney if she owned the cattle. She again refused to answer. Nelson Millett then moved to the truck to look at the calf carcass. The inspector closed the body cover of the truck and told Nelson Millett that he could not look at the carcass as they had not yet established ownership of the animal.

[20] Nelson Millett and Isabel Hackney asked several more questions. The inspector refused to answer their questions and repeated his own questions about ownership of the cattle. Late in the afternoon, when asked yet again if he owned the cattle in the barn and on the pasture, Nelson Millett said "Yes, I do". The inspector then "read him his *Charter* rights". Mr. Millett said he understood, and that he did not wish to ask any questions. The inspector told him that he might be facing charges under the *Animal Protection Act*. Hearing that, Mr. Millett walked away. A few minutes later the inspector told Nelson Millett that he had other inquiries he wanted to pursue. His wife asked if the answers could be used in the investigation. The inspector confirmed that they would. The inspector proceeded to ask Mr. Millett questions concerning his practice in feeding the cattle, quantities, frequency, and the last time he fed the cattle. Mr. Millett replied that he fed, watered and cared for his cattle and walked away again.

[21] Later, the inspectors, Dr. McGowan and the transporting crew spread a substantial quantity of hay on the ground to lure the livestock on to the trailer. Several attempts were made to get the animals on board but the cattle refused to load until all of the hay was eaten. Eventually they managed to load 30 live cattle on to the trucks and remove them from the property.

[22] During the loading of the cattle the inspector asked Mr. Millett and his wife to move away, and stay out of sight of the cattle, to avoid frightening them. They refused to co-operate. Twice the inspector asked the RCMP officers to move them out of sight of the cattle. Ms. Hackney took photographs during the seizure.

[23] The livestock trailers left at approximately 9:30 p.m. The inspector provided Mr. Millett with written documentation of the seizure as well as information concerning any possible appeal of that seizure. Mr. Millett said he was aware of those procedures. The inspectors left at approximately 10:15 p.m.

[24] Sometime after the cattle were taken into provincial custody they were examined and tested by veterinarians. The herd was described as quiet, subdued, but responsive. Inspection revealed several thin or very thin cattle of all ages and sexes. Overall, the herd did not show signs of disease or illness. General findings described the herd as underweight and exhibiting significant ill thrift. Certain animals within the herd were clearly at risk of serious illness or death such that they could not withstand significant stress or further malnutrition coupled with harsh winter conditions.

[25] Mr. Nelson Millett was given formal notice that the animals would not be returned to his care and that he could request a review of that decision.

[26] Later Mr. Millett sought such a review. The Minister instructed the Acting Provincial Inspector to provide a response to Mr. Millett's request.

[27] Ultimately the Acting Provincial Inspector affirmed the seizure.

[28] Later, through his counsel, Mr. Millett provided the Minister with a written brief and affidavit in which he offered his side of the story, including his evidence about his interaction with the inspector(s) on the day of the seizure. He described his past care of the herd, and the alternatives he proposed for the immediate future. Mr. Millett made a formal request to the Minister to review the decision of the Provincial Inspector.

[29] The Minister delegated the statutory review to his Deputy who, upon further review, found the decision to seize the animals to have been a reasonable one. In his 17-page decision the Deputy noted Mr. Nelson Millett's lack of co-operation:

> I conclude this lack of co-operation directly contributed to the action taken by the Inspector who had a responsibility to act on the distress of the animals.

[30] The Deputy rejected much of the content of Mr. Millett's evidence, preferring the evidence of the inspector(s). He found that Mr. Millett and his wife had been given more than enough time to confirm their ownership of the cattle and to present any plans they had to relieve the distress of their animals.

[31] Mr. Millett, through his legal counsel, sought judicial review of the Deputy Minister's decision. The application was opposed by the Minister. Written briefs were filed and the case was heard by Moir, J. in September, 2014. In a written decision dated January 21, 2015, and a confirmatory order issued December 9, 2015, Moir, J. allowed the application for judicial review, and ordered the Minister of Agriculture to pay to Nelson Millett, as owner of the farm and herd, the proceeds obtained following the sale of the cattle, plus costs.

Issues

[32] As I see it, the variety of alleged errors giving rise to a host of arguments on appeal can be most effectively addressed if they are distilled and presented as three simple questions:

1. What are the various standards of review that arise in this case and, in particular, what standard of appellate review does this Court apply when considering the reviewing judge's decision?
2. Did the reviewing judge err in choosing the standard he used to define the scope of the Minister's statutory review?
3. Did the reviewing judge err in the legal reasoning he adopted when quashing the Deputy Minister's decision, and in taking upon himself the inquiry mandated by the statute instead of remitting the proper question to the Minister for determination?

[33] I will turn now to a consideration of each of these issues.

Analysis

1. <u>What are the various standards of review that arise in this case and, in particular, what standard of appellate review does this Court apply when considering the reviewing judge's decision</u>?

[34] I will open the discussion by recalling the various layers or hierarchy of decision-making that arose in this case. It began with the initial investigation and seizure of the cattle by staff in the field. Then came the Provincial Inspector

whose decision approved that seizure. This was followed by a request for ministerial review made to the Minister which he delegated to his Deputy. There then followed judicial review by Justice Moir of the Deputy's decision. Then an appeal was taken to this Court from the decision of the reviewing judge. In this series of decisions we see that the first three were administrative, whereas the last two were judicial.

[35] That distinction is important because it sets the gauge by which the soundness of the decision being challenged will be assessed.

[36] It is easy to confuse and conflate the standards of correctness or palpable and overriding error that are triggered in a judicial context, with the standards of correctness or reasonableness that arise in the administrative law context. It is this "interplay" Justice LeBel sought to clarify in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. Writing for a unanimous Court, he said:

> [45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).

> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?
>
> (Underlining mine)

[37] To recap, the Minister's officials have broad statutory powers to take such action as may be required and authorized under the *Act*. To evaluate the actions of staff in the field, the Provincial Inspector will apply a standard of reasonableness when deciding, on the facts known to that point, whether staff have complied with their statutory obligations and whether, based on those facts, viewed objectively, the action taken was reasonable. Such a standard is evident from the legislative authority and responsibility given to both the Minister and the Provincial Inspector pursuant to the provisions of the *Act*, in particular, ss. 16, 17, 18, 23 and 26. In this way the departmental officials are not obliged to undertake the kind of *Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9) analysis that governs a court's judicial review. Rather, these officials are simply doing "what the statute tells them to do". (See for example, *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corp.*, 2010 NSCA 38; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67; *Egg Films Inc. v. Nova Scotia (Labour Relations Board)*, 2014 NSCA 33, leave to appeal denied [2014] S.C.C.A. No. 242; and *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90).

[38] Later in these reasons I will explain why, if a request is made of the Minister to review the earlier decisions of either his staff in the field, or the Provincial Inspector, the Minister is obliged to conduct a new, fresh and independent assessment of the dispute which will take into account not only whether the initial seizure was reasonable, but consider any additional evidence that comes to the attention of the Minister from whatever source.

[39] Then upon subsequent judicial review of the Minister's decision, the reviewing judge must undertake the requisite legal analysis in order to decide the appropriate standard of review, and having done so, correctly apply that standard when judging either the reasonableness, or the correctness (as the case may be) of that administrative decision. (See for example, *Dunsmuir; McLean; Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 and *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, 2013 SCC 34).

[40] On further appeal to this Court, we are not confined to simply asking whether Moir, J. committed some palpable and overriding error in his application of the standard. The question for us is whether Moir, J. identified the appropriate standard of review and applied it correctly when he considered the administrative decision of the Deputy Minister.

[41] These then are the principles I will invoke when considering whether Moir, J. identified the proper standard, and correctly applied it in his judicial review of the Deputy Minister's decision. That process invites us to "step into the shoes" of Justice Moir such that our focus is directed towards the Deputy's decision approving the seizure and declining to return the cattle to the owner.

2. <u>Did the reviewing judge err in choosing the standard he used to define the scope of the Minister's statutory review</u>?

[42] Here I will deal first with Moir, J.'s articulation of the standard.

[43] The judge had to decide the scope of the statutory review delegated by the Minister to his Deputy. In his 17-page decision the Deputy described the issue before him as:

> …whether the decision by the Provincial Inspector to take custody of the animals was a reasonable one.

He went on to uphold the Inspector's actions:

> …to have been reasonable. I conclude that the removal of the animals from the property to be taken to an indoor environment where they could be monitored, provided care and appropriate food and water was appropriate.

[44] The *Act* is silent as to the scope of the Minister's statutory review, or offering any description of the process to follow in completing such a review. Section 26(9) simply reads:

> Where the owner requests a review pursuant to this Section, the Society or the Minister shall retain custody of the animal until a review decision has been made.

The subsections that follow merely provide how costs, expenses and surpluses are to be handled in the event that the decision under review is reversed, or upheld.

Here, the Minister delegated the review process to his Deputy, who established a paper-based process to complete the review.

[45] Not surprisingly, when the parties appeared before Justice Moir, they took different positions on what statutory standard the Minister (or his Deputy) was to apply when reviewing the Provincial Inspector's decision approving the seizure.

[46] Mr. Millett said the Deputy had erred by applying a reasonableness standard, complaining that he should have considered the matter *de novo*. He argued that the Deputy's decision to apply a reasonableness standard was not owed any deference on judicial review and that Moir, J. ought to apply a standard of correctness to the Deputy's formulation of the scope of his own statutory review.

[47] This contrasted with the Province's position that the Deputy was right to employ a reasonableness standard in his assessment of staff actions, especially having regard to the presumption favouring reasonableness whenever a tribunal interprets its home statute.

[48] Justice Moir conducted a comprehensive review of the leading authorities. He then completed a detailed analysis of the nature and scope of the Minister's statutory review, by applying the well-known tools of statutory interpretation which included such factors as the nature of the question, the expertise of the tribunal, the absence of a privative clause or right of appeal, and what he described as "the purposes of the statute under which the decision to be reviewed was made".

[49] Moir, J. concluded that he should apply a correctness standard to what he termed "the Minister's role on statutory review of the inspector's decision". He went on to find that the Minister (through his Deputy) had erred by only evaluating the Inspector's decision through the lens of reasonableness when – in Justice Moir's view – he ought to have conducted "an independent, fresh assessment of whether to keep the seized animals".

[50] Moir, J. held:

> [114] I conclude that the Deputy Minster was required by the legislature to consider the inspector's decision, the information before the inspector, and new information given to the Deputy Minister. His obligation was to decide, on old and new evidence, whether Rocky Top Farm is a fit person to care for the cattle.

> [115] The Deputy Minister decided only that the inspector's decision was reasonable. He was entitled to take that into consideration, but limiting his review to that subject misinterpreted what the legislation required him to do. Rocky Top Farm was entitled to the Minister's independent judgment about whether it was fit to care for the cattle. Instead, it only got the Deputy Minister's appraisal of the lead inspector's judgment.
>
> [116] The Deputy Minister misconstrued his statutory role. His decision must be set aside. …

[51] Insofar as Moir, J. determined that the scope of the Minister's statutory review was not confined to an evaluation of whether seizing the animals was reasonable, but rather required the Minister to take all of the evidence into account before deciding whether the owner was fit to care for the cattle, I agree. To that extent the judge correctly held that the Deputy had misconstrued his statutory role by failing to exercise his own fresh and independent judgment on the action taken by staff in the field.

[52] However, for reasons I will now explain, while Moir, J. came to the right conclusion in defining the scope of the Minister's review, he erred in law in expressing the legal reasons for that conclusion, and then erred both in applying that standard to the case before him, and taking upon himself an inquiry that ought to have been remitted back to the Minister.

3. **Did the reviewing judge err in the legal reasoning he adopted when quashing the Deputy Minister's decision, and in taking upon himself the inquiry mandated by the statute instead of remitting the proper question to the Minister for determination**?

[53] As part of his analysis the judge considered "the purposes of the statute and found that there were two. He reasoned:

> [98] The long title of the statute states its two general purpose: "An Act to Protect Animals and to Aid Animals that are in Distress". The first purpose is primarily achieved through the SPCA, whose purpose is "to provide effective means for the prevention of cruelty to animals": s. 5. Sections 4 to 20 cover that subject.
>
> [99] Sections 21 to 33A concern distress. The legislative scheme is to find animals who are in distress and to relieve them by one of three means:

- mercy killing, immediately or later

- securing the cooperation of the owner to relieve the distress

- seizing the animal, and selling it or giving it away.

> In the requirement for endeavouring to secure the owner's cooperation and in the various review provisions, including the provisions for an appeal board that are not yet proclaimed, one sees another important legislative purpose: balancing the interests of the owner and the need to overcome distress.
>
> [100] The scheme for achieving these purposes has inspectors in the field making on-the-spot decisions, no doubt often in difficult and pressing circumstances. However, the scheme includes, as I have already mentioned, an obligation to seek the owner's cooperation at first instance.
>
> [101] In conclusion, the statute has two general purposes: prevention of cruelty to animals and relief of distress. Within the latter is another purpose: to balance the interests of the owner with the relief of distress.

(Underlining mine)

[54] Respectfully, the judge has mischaracterized the object of the *Act*. Its only purpose is to provide for the protection and aid of animals who have been neglected by those who are charged with their proper care. Whether that is achieved through the actions of the SPCA, or the interventions of the Minister, does not detract from that single objective. The statute has little or nothing to do with the "interests of the owner" and the judge's finding that it did skewed his evaluation of the Deputy's responsibilities generally, and his decision approving the seizure by staff, in particular. Further, it colored the judge's impression of the interaction between the owner, the inspector(s) and the police on the day of the seizure.

[55] I will start with a consideration of the statutory provisions that are relevant in this case. In doing so I will pass over ss. 1-10 which have to do with the composition, organization, administration and authority of the Nova Scotia Society

for the Prevention of Cruelty as concerns the prevention of cruelty to animals in the Province, since that has nothing to do with this case.

[56] Rather, our consideration here is restricted to the Minister's role. The statute could not be more clear. Secton 16(1) states:

> **16(1)** The Minister is responsible for all investigations of farm animals in distress.

[57] Pursuant to s. 17 the Minister may appoint a Provincial Inspector and inspectors for the purpose of inspecting farm animals.

[58] The powers of the Minister or his designate to investigate, enter, inspect and take into custody (among other things) are explicit and far-ranging. For example, s. 18 provides:

> **18.** The Minister, or an inspector appointed under Section 17, may carry on such activities and exercise such powers as are necessary or conducive to preventing, ending or remediating distress to farm animals and, without restricting the generality of the foregoing, may
>
> (a) investigate cases of farm animals in distress;
>
> (b) inspect and monitor on an ongoing basis, facilities where farm animals are housed or handled including stables, kennels, agricultural shows, research laboratories, farms, fur ranches, abattoirs and other agricultural operations;
>
> …
>
> (d) seek any necessary aid of, and co-operate with, municipal police forces, the Royal Canadian Mounted Police, agricultural representatives, veterinarians and other experts;
>
> …

[59] The Minister had broad powers to enter and inspect. For example, s. 18AA provides:

> **18AA** (1) For the purpose of ensuring compliance with this Act or the regulations, or any direction made pursuant to this Act or the regulations, an inspector or peace officer may, at any reasonable hour of the day or night, enter and inspect any remises, conduct any test, seize any animal or carcass to conduct tests, take samples and make any investigations considered necessary or advisable.
>
> (2) Upon the request of an inspector or peace officer, the owner or a representative appointed by the owner shall accompany the inspector or peace officer during an inspection or investigation pursuant to subsection (1).

> (3) An inspector or peace officer may
>
> (a) require the production of any records relating to the animal care and remove them temporarily for the purpose of making copies;
>
> (b) take photographs or recordings of the premises, including animals, or any activity taking place around the premises;
>
> (c) make an inspection, investigation or inquiry considered necessary to ascertain whether this Act or the regulations, or any direction made pursuant to this Act or the regulations, are being complied with;
>
> (d) exercise such other powers as may be necessary or incidental to the carrying out of the functions of the inspector or peace officer pursuant to this Act or the regulations.

[60] Everyone (including the owner) is prohibited from interfering with the actions taken by the Minister or his designate. The *Act* provides:

> **18B** (1) No person shall interfere with or obstruct a person in the exercise of the powers given to the person by this Act or the regulations.
>
> …

[61] The Minister and his designate may give directions, and compliance with those directions is required by the force of law. For example, ss. 18C and 18D provide:

> **18C** (1) An inspector or peace officer may give directions orally or in writing for the carrying out of this Act or the regulations and may require that such directions be carried out within such time as is specified.
>
> (2) Directions given orally pursuant to subsection (1) must be confirmed in writing as soon as practicable.
>
> **18D** A person shall comply with every direction given pursuant to this Act or the regulations and shall furnish any assistance required for the purpose of entering, inspecting or examining any premises or making an inquiry concerning any premises.

[62] Finally, in the combined operation of ss. 21 and 2 we see that those in charge of animals, which of course includes farm animals, owe a statutory obligation to provide for their care. Section 21 provides:

> **PREVENTION OF CRUELTY TO ANIMALS**
>
> **Prohibitions**
>
> 21 (1) No person shall cause an animal to be in distress.

(2) No owner of an animal or person in charge of an animal shall permit the animal to be in distress.

…

Section 2 provides:

Interpretation

…

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 … cold;

(b) …or suffering undue hardship, privation or neglect;

…

[63] This then is the legislative context and factual matrix in which a seizure, in this case or any other, should be evaluated. I will turn now to a consideration of s. 23, parts of which have become the focus of the parties' dispute in this case. Leaving out the immaterial sections, s. 23 provides:

When animal is found in distress

23 (1) Where an inspector or peace officer finds an animal in distress and the owner or person in charge of the animal

(a) does not immediately take appropriate steps to relieve its distress; or

(b) is not present or cannot be found promptly,

the inspector or peace officer may, subject to this Act, take such action as the inspector or peace officer considers necessary to relieve the distress including, without restricting the generality of the foregoing,

(c) taking custody of the animal;

(d) arranging for any necessary transportation, food, water, care, shelter and medical treatment, or any one or more of them;

(e) delivering the animal into the custody of the Society, the Minister or a suitable caretaker.

(2) Before taking action pursuant to subsection (1), an inspector or peace officer shall take reasonable steps to find the owner or person in charge of the animal and, where the owner is found, shall endeavour to obtain the owner's cooperation to relieve the animal's distress.

(3) Where the owner of the animal is not present or not found and informed of the animal's distress, the inspector, the peace officer, the Society or the Minister in

> whose custody the animal is delivered, shall take reasonable steps to find the owner and inform the owner of the action taken.
>
> …

[64] In this case both the appellant and the reviewing judge placed great emphasis on s. 23(2). For convenience I will reproduce that subsection here:

> (2) Before taking action pursuant to subsection (1), an inspector or peace officer shall take reasonable steps to find the owner or person in charge of the animal and, where the owner is found, shall endeavour to obtain the owner's cooperation to relieve the animal's distress.

[65] This provision was seen by the appellant and the reviewing judge as constituting a fatal blow to the actions taken by the Minister's inspectors in the field because (so they argued), the inspector(s) had not taken "reasonable steps to find the owner" and thereafter failed to "endeavour to obtain the owner's co-operation to relieve the animals distress".

[66] Respectfully, such an assertion is wrong, both on the facts and the law.

[67] Here, the inspector made repeated inquiries of those persons thought to be the owners, or in charge of the herd, to see if they were. Those inquiries were dodged or ignored. The inspector was already satisfied from his own visual inspection that the animals were in distress. Thus the provisions of s. 23(1)(b) were triggered in that there were animals "in distress" and "the owner or person in charge … cannot be found promptly". The inspector was then in a position to "…take such action as (he) considers necessary to relieve the distress including … (c) taking custody of the animal … (and) delivering the animal into the custody of the … Minister".

[68] While it is true that before taking such "action pursuant to subsection (1), the inspector "shall take reasonable steps to find the owner or person in charge" and "endeavour to obtain the owner's co-operation …" this inspector had already satisfied those statutory obligations. He was not obliged to stand at the doorway, knock again at the door to attempt to inveigle the occupants to answer his questions as to ownership, or later in the barn or pasture embark upon a further series of questions to "satisfy" some sort of artificial and unrealistic "additional" or "elevated" duty to keep trying to identify the owner and/or "endeavour to obtain" that owner's co-operation in the relief of the animals' distress. Such a deemed obligation would seem ridiculous to any objective observer. In all cases the

inspector is only required to "take reasonable steps" in that regard. Whether such an objective standard is met in any case will of course depend upon the unique circumstances of that particular case.

[69] Here, I have no hesitation in concluding that the inspector did all that was required. In the face of this owner's refusal to co-operate, it can hardly be suggested that the inspector was in any way remiss in his actions.

[70] Respectfully, the judge misconstrued the application of the statutory provisions as somehow enhancing the owner's "rights" or "interests" to a level matching the health and safety of the herd, such that the inspector was obliged to "balance the interests of the owner with the relief of distress" (see again, for example, ¶99, 100, 101 and 112 of the reviewing judge's decision).

[71] This error coloured the judge's view of the interaction between the inspector, the owner, and the police on the day of the seizure. As far as the judge was concerned, the whole affair had become akin to a criminal prosecution. Suddenly the "rights" of the owner were in play. One begins to question why the police were there in the first place. Notions of "right to silence" emerged, leading the judge to posit:

> …What was the Minister to do when confronted with a review of a decision not to return animals illegally seized?

(Underlining mine)

[72] Respectfully, while such descriptive modifiers may be apt in a criminal context, it is neither helpful nor accurate when addressing the safety of animals found to be in distress under this provincial legislation.

[73] First, there was nothing sinister or untoward about the presence of RCMP officers during the seizure. Such an occurrence is permitted by statute. A police presence was an obvious and prudent precaution to take so that order could be maintained while the cattle were being loaded onto trucks, perhaps sparking a hostile confrontation. However, the mere presence of police did not somehow elevate the situation to a criminal investigation.

[74] Further, while Mr. Millett (or his wife and relatives) may have had good reason not to promptly (or at all) respond to the inspector's questions (perhaps choosing for example to seek legal advice before doing so) that does not then

saddle the field inspector with the same degree of *Charter* and common law duties as would obtain in a criminal prosecution.

[75] This was not a case where a bloodied shirt, or a cache of weapons, or a container filled with cocaine was discovered and seized, leading to hard questioning of the suspected owner. In such circumstances the securing and preserving of the physical evidence is in no way jeopardized by any recalcitrance which may be encountered during subsequent police interrogation.

[76] Rather, here we are concerned with living, breathing "non-human vertebrates" (s. 2(1)(a) of the *Act*) whose very health and existence is in peril. Saving them is the immediate concern. Time is of the essence. Reasonable steps in the field to identify the owner and obtain that owner's co-operation is all that is required. The niceties of an owner's responses, or proposals to provide for the future relief of the animals, when given too late, can be sorted out later.

[77] To summarize, as the title and substance of the *Act* make clear, its singular purpose is to protect animals from cruelty or neglect. There is no countervailing or parallel objective of protecting owners' rights. Had that been the legislative intent, it would have been very easy for this Province's lawmakers to have said so.

[78] The statute has little if anything to do with "owners' rights". Those words do not appear in the statute. To the extent that the judge felt there was some kind of "equality" between the animals' health and the owner's interests, he erred. That fundamental error amounted to a fatal flaw in his appreciation of the operation of the *Act* to the circumstances before him.

[79] The judge imported criminal law concepts into a forum where they do not belong. Inspectors whose responsibility it is to save defenceless animals from distress and neglect cannot be expected to concern themselves with issues surrounding *mens rea*, motive, or such fundamental protections as presumption of innocence, or proof beyond a reasonable doubt. To characterize what happened here as an "illegal" or "unlawful" seizure is not helpful. Better to say – if such a finding were warranted on the facts of a particular case – that the legislative provisions had been "breached" or that there "had been a failure to comply" with the statutory requirements.

[80] Were such a conclusion to arise in a particular case, that determination would be one factor for the Minister to consider when deciding the ultimate question as to whether the animals should be returned to the owner. That inquiry

will focus on the fitness of the owner based on all facts known to the Minister at that time.

[81] The owner of any animal seen to be in distress may, for good reason, wish to remain mute in the face of questioning, or delay any thoughts of responding until legal advice is obtained. But that cannot and does not mean that the inspector in the field is obliged to wait around until that legal advice is received and the owner then agrees to answer the inspector's questions. Time is of the essence. Providing for the health and safety of the animals is the priority. Any slower calibrated inquiry into statutory compliance can and should wait until later.

[82] These then are my reasons for concluding that the judge erred both in fact and in law in holding that the Deputy's decision approving the seizure of the herd was unreasonable and ought to be set aside. Respectfully, the reviewing judge erred in his interpretation of the *Act* and in his application of its provisions to the ministerial outcome he was asked to review.

[83] Before leaving this subject I wish to point out that an owner whose animals are taken in violation of the *Act* is not without a remedy. If it were subsequently determined that staff in the field had not complied with their legislative authority under the *Act*, such that the animals were not at risk, or the owner is shown to be fully capable of caring for the animals, then one would expect a swift decision from the Provincial Inspector or the Minister to return the animals to the owner's care with such additional reparations as may be required in that particular case.

[84] Further, if a situation ever arose where a "rogue" inspector went off on a frolic of his own that was obviously not supported by the facts and was in clear violation of the statute, then the aggrieved owner would be free to claim damages and other relief against the Crown, whether vicariously for the improper actions of its employee, or directly against the Crown for such independent torts as might arise in the circumstances of that particular case.

[85] I will turn now to a consideration of the judge's further error in failing to remit the question of fitness to the Minister.

[86] Whether animals taken into custody by the Minister's officials will be returned to the owner will depend upon the condition of the animals, their survival, and an assessment of whether the owner is fit to care for the animal. The operative parts of the *Act* say:

Payment of expenses and power to sell or give animal

26 (1) Where an animal is delivered or taken into the custody of the Society or the Minister pursuant to this Act, the Society or the Minister, as the case may be, shall take reasonable steps to find the owner and inform the owner that the animal is in custody.

…

(5) Where an animal comes into the custody of the … Minister pursuant to this Act and the inspector or other person who has taken or accepted custody of the animal is of the opinion, due to the animal's state or situation or previous actions of the owner, that the owner is not a fit person to care for the animal, … the Minister, as the case may be, shall take reasonable steps to find the owner and

(a) where the owner is found, shall notify the owner that the animal will not be returned, …

(Underlining mine)

[87] As we have seen, the owner is then free to ask for a review of that decision. If no request for a review is made, subsection (6) will oblige the owner to pay all of the expenses incurred in taking the animal(s) into custody. Should the owner request a review, subsection (9) provides:

(9) Where the owner requests a review pursuant to this Section, … the Minister shall retain custody of the animal until a review decision has been made.

[88] From all of this we can see that it is the Minister's ultimate responsibility to decide whether the owner is a fit person capable of caring for the animals, before the Minister will relinquish custody and return the animals to the owner from whom they were seized. Subsequent provisions in the *Act* explain how expenses related to the taking into care, eventual sale, or euthanasia are to be paid or recovered.

[89] Section 30A provides for custody of the animal pending judicial review or in circumstances where there has not been any application for judicial review. The relevant provisions for the purposes of this case are:

30A(1) Where an application is made for judicial review of the actions taken by the inspector … under Section 23 … the Minister may

(a) retain custody of the animal; or

(b) sell the animal.

> **(2)** Where the animal is sold pursuant to clause (1)(b), the Minister shall hold the money received in the sale in trust pending the conclusion of the application for judicial review.
>
> **(3)** Upon the conclusion of the application for judicial review, the Minister shall pay to the applicant
>
> > **(a)** where the application is successful, the money received in the sale; or
> >
> > **(b)** where the application is dismissed, the money received in the sale less any amount to cover expenses properly incurred by the Minister with respect to the animal …

[90] Here, the Minister was never given the opportunity to fulfill his statutory responsibility by deciding whether the appellant was a fit person to whom the cattle should be returned. The reviewing judge should have remitted that question to the Minister to be answered. Instead, the judge found the Deputy's decision supporting the reasonableness of the seizure to have been "factually flawed", "unreasonable", and "untenable". On that basis the judge set aside the Deputy's decision. The judge then embarked upon his own analysis of the facts, determined that the cattle had been "illegally seized" and because – in the judge's view – the Deputy had not applied a "fresh and independent judgment" to the dispute, there was no alternative but to declare that the proceeds of the sale of the animals be paid to the owners, plus costs.

[91] I do not see Section 30A or *Civil Procedure Rule* 7.11 as limiting the judge to what he described as the "only available remedy", that being turning over the proceeds of sale to the respondent.

[92] There is nothing in *CPR* 7.11 which would suggest departing from the standard practice which is to frame and remit the question that the administrative decision-maker failed to ask or answer, for a proper determination.

[93] The provisions of *CPR* 7.11 do not purport to present an exhaustive list of judicial relief. Rather, the Rule introduces a list of five possibilities by saying:

> **Order following Review**
>
> **7.11** The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, <u>including any of the following orders</u>:

(Underlining mine)

[94] I have already explained why the judge's decision was flawed and will be set aside. In that sense there was never any "decision" to "give effect to" as contemplated by the Rule.

[95] *Civil Procedure Rule* 7.11 does not lessen, modify or abrogate the Supreme Court's inherent jurisdiction, as expressly provided for in s. 41(g) of the *Judicature Act*, RS c.240, s.1 which states:

> Rules of law
>
> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ...
>
> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[96] It is settled law that the Court's inherent jurisdiction includes the authority to refer a matter back to the administrative decision-maker to be reconsidered. (See for example Sara Blake, *Administrative Law in Canada*, 4th ed. (Toronto: LexisNexis, 2006) at pp. 226-228; *Walker v. Keating* (1973), 6 N.S.R. (2d) 1 (S.C.(A.D.)); *Chandler et al. v. Alberta Association of Architects, et al.*, [1989] 2 S.C.R 848; *MacEachern v. Workers' Compensation Board (N.S.),* 2003 NSCA 45; *Nova Scotia (Community Services) v. Brenna*, 2006 NSCA 8; and *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80.

[97] Neither is there anything in s. 30A which would have obliged Moir, J. to turn over the proceeds of the sale to the respondent.

[98] Reading the debates in *Hansard* at the time that a series of amendments were made to the *Act* (in particular the remarks of the Minister of Agriculture, The Hon. Leo Glavine, 61 Leg., 3rd Sess., 11-44, November 14, 2011) it becomes clear that the amendments to s. 30A were intended to fill a gap that existed. The changes would permit the province to recover its costs associated with the seizure and care

of farm animals taken from the owner, while at the same time giving the owner a chance to apply for judicial review and:

> If the animal is seized by authorities without having good cause, then the farmer is going to get the full value of the animal that he has been raising for some time.

[99] My interpretation of Section 30 adds further support to my view. Section 30A(3) states:

> …
>
> **(3)** Upon the conclusion of the application for judicial review, the Minister shall pay to the applicant …

(Underlining mine)

That consequence does not arise until the judicial review has concluded. Here it had not. There had not been a proper "conclusion of the application for judicial review". The Minister had not been given a chance to answer the fundamental question that plainly fell within his statutory authority and responsibility. The Legislature could not have intended that the Minister would be obliged to pay the owner the value of the animals seized and sold, plus costs, without the Minister first having had the opportunity to decide whether the owner was fit to be entrusted with their care.

[100] The judge's failure to have sent that question back to the Minister for determination has obliged us to intervene.

[101] In summary, when completing such a review the Minister would be bound to apply fresh eyes to the entire case, taking into account all of the evidence, which would of course relate to the facts that existed at the time of the seizure as well as any new evidence that came to the attention of the Minister, from the owner, from staff, or from any other source.

[102] As part of that inquiry, and as explained earlier, the Minister would be entitled to take into account the reasonableness, or otherwise, of the inspector's initial decision to seize in the first place. That would be a legitimate factor to consider. However, such a criterion would not be dispositive, nor is the Minister limited to such an evaluation. Rather, the Minister's assessment is far broader and carries an obligation to thoroughly consider all of the facts, through fresh eyes, in

order to bring a new, objective and independent judgment to the task. Once that decision was made, it could then be made the subject of a judicial review.

[103] Two brief examples will serve to illustrate my point. There may be a case that comes to the Minister's attention where the decision to seize and take the animals into custody is unassailable. Nonetheless the Minister may decide, upon review, that even though the enforcement action by departmental officials was perfectly reasonable, the animals should still be returned to the owner who is seen to be capable of caring for them. In that case, exigent, or completely unexpected circumstances may have accounted for the condition in which the animals were found. Or, in another case, the owner may be able to satisfy the Minister that new plans have been put in place to ensure that the animals' safety and well being will not be jeopardized. These are but two examples to illustrate a situation where a perfectly laudable decision to take the distressed animals into care may not necessarily mean that the animals will not be returned to the owner following the Minister's fresh, independent assessment of all of the evidence.

[104] In this case, the reviewing judge erred by stepping into the Minister's shoes, applying his own evaluation and judgment (flawed as it turned out) to his apprehension of the facts and the law, and taking upon himself an inquiry that falls within the Minister's statutory authority.

[105] Before concluding these reasons, it is worth noting that while s. 30A existed at the time this dispute arose and was considered at its various stages, the provision ceased to exist as of February 24, 2015. This is because it was an interim provision that was put in place temporarily until the new regime establishing an Animal Cruelty Appeal Board came into effect pursuant to an Order-in-Council (OIC 2015-42).

[106] At the appeal hearing in this case, as well as in *Brennan v. Nova Scotia (Minister of Agriculture)*, *supra*, counsel invited us to consider these matters in light of the new legislation. I would decline to do so. They should be decided in accordance with the legislation that prevailed when these two disputes arose. I will leave the interpretation and application of the new legislation to another case, for another day.

Conclusion

[107] For all of these reasons the appeal is allowed, the decision and confirmatory order of the reviewing judge are set aside, and the case is remitted to the Minister

for a fresh and independent assessment of all of the circumstances so as to decide whether the respondent is fit to resume responsibility for the care and custody of his cattle (assuming the animals still survive). If the cattle have died or have been passed on to others, then the question to be answered is whether the respondent is entitled to retain the proceeds obtained from their sale.

[108] Should the Minister find against the respondent, I would order that the proceeds and costs paid to the respondent as a result of the reviewing judge's decision and order be paid back to the Minister forthwith.

[109] Finally, I would order costs on appeal to the appellant in the amount of $4,500 all inclusive, as agreed by counsel at the hearing.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.