NOVA SCOTIA COURT OF APPEAL
Citation: *Brennan v. Nova Scotia (Agriculture)*, 2017 NSCA 3

Date: 20170103
Docket: CA 447379
Registry: Halifax

Between:

Annette Brennan

Appellant

v.

Nova Scotia (Minister of Agriculture)

Respondent

Judges:	Fichaud, Saunders and Bryson, JJ.A.
Appeal Heard:	September 13, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	David A. Grant, for the appellant Sean Foreman, for the respondent

Reasons for judgment:

[1] The appeal in this case also 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 *Nova Scotia (Agriculture) v. Rocky Top Farm, CA 447378*. 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 Michael J. Wood whose decision is now reported at 2015 NSSC 361. This is actually the second judicial review conducted by Wood, J. arising from the same dispute involving the same animals and the same owner.

[3] Justice Wood dismissed the application for judicial review brought by the owner, upheld the Deputy Minister's decision that the five ponies seized by departmental officials should not be returned to their owner, and ordered the owner to pay costs.

[4] Here, the representative of the late owner's Estate has appealed 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 dismiss the appeal and award costs on appeal to the respondent.

[6] While this too is a case of first instance, I have already considered in detail 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, in *Rocky Top Farm, supra,* such that there is no need for me to repeat that lengthy analysis here.

[7] It will be enough to provide a brief summary of the material facts so that the important issues arising in this case may be seen in proper context.

[8] The reader will recognize that in this case the owner launched the appeal. Whereas in the *Rocky Top Farm* case the Minister of Agriculture is the appellant. In this case the appeal will be dismissed. In the *Rocky Top Farm* case the appeal will be allowed. 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.

[9] Before turning to the evidence I will identify one other procedural matter. Sadly, the appellant, Annette Brennan, passed away just days before this appeal. Her sister, as Executor and beneficiary formally expressed her desire to step into the shoes of her late sister and to provide care for the animals, should the appeal be successful. Messrs. Grant and Foreman, counsel for the appellant and respondent respectively, are to be commended for the speed with which they produced and filed all necessary probate documentation so that this appeal could proceed as scheduled.

Background

[10] The record establishes that the late Annette Brennan owned and bred Newfoundland Ponies at her farm in Carroll's Corner, Nova Scotia since 1985. Beginning in 2011 she had a series of encounters with inspectors from the Nova Scotia Department of Agriculture relating to the welfare of her animals.

[11] The situation which led to the seizure that forms the basis of the present appeal was described by Justice Wood in his first judicial review decision, 2015 NSSC 171:

> [2] Between November 2011 and May 2014 inspectors visited Ms. Brennan's farm on 14 occasions. On seven of those visits inspectors formed the opinion that some of Ms. Brennan's Newfoundland Ponies were in distress as that term is defined in the Animal Protection Act, 2008 S.N.S. c.33. On the occasions where the inspectors found animals in distress they provided written directions to Ms. Brennan about steps to be taken to alleviate the problem. In each case Ms. Brennan was able to take the necessary steps to satisfy the inspector's concerns. Generally it took a number of weeks before the condition of the ponies improved to the point where the inspectors were no longer of the opinion that they were exhibiting signs of distress.
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> [3] On December 19, 2014 an inspector again visited Ms. Brennan's farm. She concluded that all seven of the Newfoundland Ponies present were in distress and made the decision to seize five of the ponies pursuant to the authority given in the Animal Protection Act. Two remained in the care of Ms. Brennan and she was given written directions with respect to the steps which she needed to take to alleviate their distress. The inspector made the decision not to return the five seized animals to Ms. Brennan.

> [4] In accordance with the provisions of the Animal Protection Act Ms. Brennan requested that the Minister of Agriculture review the inspector's decision not to return the animals to her. The Minister delegated the authority to conduct that review to the Deputy Minister who issued a decision on March 10, 2015 which did not result in the ponies being returned to Ms. Brennan. Ms. Brennan has sought judicial review of the Deputy Minister's decision.

[12] Further details describing the condition of the ponies when they were seized (following a complaint from Ms. Brennan's own veterinarian), as well as the chronology of 15 separate inspections over a three year period may be gleaned from the Deputy Minister's reconsideration decision (as ordered by Wood, J.) dated June 24, 2015.

> **BACKGROUND**
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> On December 19, 2014, acting on a further complaint received from Dr. Trevor Lawson, Ms. Brennan's veterinarian, Inspectors with the Department of Agriculture attended to the premises of Annette Brennan located at 1724 Antrim Road, Carrolls Corner, NS. During an inspection, all seven ponies appeared to the Inspectors to be underweight with five of the seven having a very poor body condition with hips, spine and ribs visible or palpable, despite having a think [sic] winter hair coat. Five of the ponies had no food and the other two had only small scraps of hay.
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> After inspecting the ponies, the inspectors determined five of the ponies that were most in distress should be seized and placed into care and arranged for those ponies to be removed from the property. Dr. Hartnett issued a Seizure of Animal(s) Notice and presented it to Ms. Brennan at the time. She reviewed the Seizure Notice with Ms. Brennan and explained that the decision to remove the animals had been made due to the inspection and the known history of repeated incidents of distress over a three year period.
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> A Notice was issued for the two remaining ponies directing Ms. Brennan to provide sufficient food, have a veterinarian examine the ponies and abide by the veterinarian's advice, maintain regular hoof care and de-worm both ponies. In reviewing the Notices together, Ms. Brennan did suggest options that would prevent the seizure of any of the ponies, but Dr. Hartnett explained that the 5 ponies in the worst condition and most in need would be seized to provide them with proper food and care, and Ms. Brennan agreed that she would properly care for the 2 ponies left in her care.
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> On January 5, 2015, Dr. Vanessa Scanlan, Fundy Veterinarian, conducted a follow-up assessment of the five ponies that were removed from the property. She found that all the ponies were malnourished, with Body Condition Scores ("BCS") ranging from 1.5-2 out of 9, where 5 out of 9 is considered ideal. She

> found in part that some of the ponies had matted hair coats and overgrown hooves and the teeth of all ponies were black.
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> **ANALYSIS**
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> I find Dr. Hartnett's chronology of events to be detailed, professional, reflective of the seriousness of the action taken in this case and respective of the *Animal Protection Act*. Her December 29, 2014 report sets out the concerns respecting lack of food and care. Her chronology and comments provide sufficient evidence to conclude the animals were in distress on December 19, 2014. Furthermore, Dr. Hartnett's letter of December 29th sets out in detail the issues identified in 15 inspections and follow up inspections over a three year period (since 2011), which gave rise to various Notices and written directives to Ms. Brennan …

[13] One of those incidents described in the Deputy's decision was truly horrific:

> … In June of 2012 hydraulic fluid accidently spilled into a pond which was used as a source of drinking water for the ponies. Despite fencing off the pond, the ponies were able to access the pond and, later that summer, drank from it. One horse died in August and two died in September. … Another horse died in December 2012.

[14] Prior to the Deputy Minister taking charge of the task delegated to him by the Minister which was to review the inspector's decision not to return the five ponies to Ms. Brennan, Moir, J. had filed his decision in *Rocky Top Farm, supra*. In an effort to follow the interpretation and directions of Moir, J. in that case, the Deputy Minister in his review evaluated the seizure of Ms. Brennan's ponies from two perspectives: first, whether she was fit to care for them; and second, whether the initial decision to seize the ponies was the "correct one"?

[15] Wood, J. – in the course of his *first* judicial review – allowed the judicial review saying in part:

> [24] … it is not clear whether the Deputy Minister independently considered the broader question of whether the animals should be returned.
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> …
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> [26] What he is required to do is to decide whether the animals ought to be returned and, as part of that, he may assess Ms. Brennan's fitness to care for them.
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> …
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> [28] I believe that the Deputy Minister was wrong in defining the review as limited to the correctness of the seizure decision and whether Ms. Brennan was fit to care for the ponies. It should have been described as a broad consideration of whether the animals should be returned to her.

> [29] I am also not satisfied that the Deputy Minister truly turned his mind to the question of her fitness to care for the animals …

[16] While endorsing the view expressed by Moir, J. in *Rocky Top Farm*, that any review conducted by the Minister (or his Deputy):

> [23] … must be a fresh look at the issue based upon all of the information available to the Minister including supplemental evidence and submissions from the owner…

nevertheless Justice Wood – properly in my view – declined to undertake such an inquiry himself, preferring to send the case back to the Minister for a thorough review. Justice Wood reasoned:

> [39] … However, the appropriate remedy is not to substitute my decision on the merits for that of the Minister. I believe the proper disposition is to return the matter to the Minister for a further review under s.26(7) of the *Animal Protection Act* which is to be carried out in accordance with the principles set out in this decision.

[17] This then explains how the case came back to Justice Wood a second time which led to his judicial review decision now reported at 2015 NSSC 361 where he upheld the Deputy Minister's reconsideration of the case and which affirmed the inspector's seizure of the five Newfoundland Ponies and refusal to return those ponies to the care of Ms. Brennan.

[18] That brief but necessary summary sets the stage for the current appeal to this Court from the second judicial review decision of Justice Wood.

[19] I will turn now to a consideration of the issues that are peculiar to this case. As noted, Wood, J. had the benefit of Moir, J.'s reasons in *Rocky Top Farm* when he conducted his second judicial review of the Deputy's decision to seize Ms. Brennan's ponies. Accordingly, the issues here are similar but not exactly the same.

[20] In my view there are three principal questions to be addressed:

1. Did the reviewing judge err in choosing the standard he used to define the scope of the Minister's statutory review?
2. Did the reviewing judge err in dismissing the owner's request that the Minister's decision refusing to return the ponies to her, be overturned?

3. Did the reviewing judge err in first having referred the matter back to the Minister for a thorough reconsideration, rather than decide the matter himself?

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

Analysis

Issue #1 <u>Did the reviewing judge err in choosing the standard he used to define the scope of the Minister's statutory review</u>?

[22] I will not repeat the lengthy analysis of the varying standards of review that are invoked, depending upon the level of decision-maker, or type of decision being impugned. Suffice it to say that in this case the question for us is whether Wood, J. identified the appropriate standard of review and applied it correctly when he considered the Deputy's decision. I find that he did. But I want to be precise in my endorsement.

[23] In my reasons in *Rocky Top Farm* I explained why I approved Justice Moir's formulation of the scope of the Minister's statutory review – which is to apply fresh and independent judgment in reviewing not only the circumstances leading to enforcement action taken by his officials in the field, but a consideration of all of the evidence, from whatever source, in order to decide whether the owner is fit to resume care for the animals.

[24] And so while I approved the formulation of the ministerial review by Moir, J., I rejected his reasons and went on to explain how such a ministerial review was to be properly interpreted and applied.

[25] Further, Wood, J. and the Deputy in this case both seemed to have read Justice Moir's decision in *Rocky Top Farm* as importing a "correctness" standard to the Minister's assessment of the actions taken by departmental officials during their investigation of a complaint. Respectfully, such an approach is wrong.

[26] As I explained in *Rocky Top Farm*, "reasonableness" is the lens through which the Minister (or his Deputy) examines any field inspector's decision to seize and take into custody animals found to be in distress under the *Act*. In other words, the Minister does not ask himself or herself whether the decision made in the field was "correct". On the contrary, such decisions are gauged at no greater level then

the "reasonable steps" expressly mandated throughout the *Act* (see for example s. 23(2) and s. 26(1)).

[27] Then, as I have explained in both of these appeals, a finding of reasonableness, or otherwise, by the Minister is but one factor to be taken into account during the much broader consideration of the owner's fitness to resume care and custody of the animals.

[28] And so, to conclude on this point, I have stepped into the shoes of Justice Wood, focused on the effect of the Deputy's decision, and I am satisfied that the reviewing judge chose the correct standard of review and applied it properly when he considered the Deputy's reconsideration as embodied in his second decision dated June 24, 2015.

Issue #2 **Did the reviewing judge err in dismissing the owner's request that the Minister's decision refusing to return the ponies to her, be overturned?**

[29] I have already explained that Wood, J. did not err in adopting Moir, J.'s expression of the "independent, fresh assessment of whether to keep the seized animals" test or in his application of that standard to the Deputy's reconsideration.

[30] At the judicial review hearing and again on appeal to this Court, counsel for the appellant complained that in his decision the Deputy had failed to address the appellant's submission that she had not been given an opportunity to alleviate the animals' distress prior to their seizure, and that therefore (echoes of Mr. Millett's complaint in *Rocky Top Farm*) the seizure was "illegal" with the result (so the appellant argued) that the Minister lost all jurisdiction to deal with the matter. The appellant's counsel put it this way in their factum:

> …The Deputy Minister did not take into account the validity of the seizure … which effectively is a validation of the seizure without reasons. There is evidence in the inspectors report that Ms. Brennan put forward several workable plans to relieve the distress, to the inspector, to avoid the seizure with no result… Justice Wood … refers to the opportunity to relieve distress and states "This is a prerequisite to seizure" … The position put forward by the Appellant is that for the Minister to have any jurisdiction whatsoever to come to a review decision the animals must have been properly seized in the first place. … The Appellant asserts … that clearly the deputy minister did not have the jurisdiction or authority to review because the seizure was not in accordance with the statute. …

[31] Here, while the reviewing judge expressed surprise that the Deputy had not addressed the "seizure issue", he was not persuaded that his affirmation that the five ponies would not be returned to Ms. Brennan was unreasonable. Wood, J. said:

> 13] Ms. Brennan argues that if a seizure takes place without the prerequisite required by s.23(2) it is illegal and the animals must therefore be returned without consideration of any other issues, including the fitness of the owner to care for them. I disagree with this suggestion. The *Animal Protection Act* is directed to animal welfare and the authority to seize and detain animals is governed by their wellbeing and the fitness of owners to care for them. It would be unreasonable and incorrect to interpret that legislation as dictating that the failure to follow the statutory procedure for seizure must override the best interests and welfare of the animals.
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> …
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> [18] Although I am surprised by the Deputy Minister's decision to ignore the seizure issue, I cannot say that his emphasis on the fitness of Ms. Brennan to care for the ponies and his conclusion not to return them is unreasonable in all of the circumstances. The interests of animals and their wellbeing are appropriate matters for the Deputy Minister to prioritize in deciding how to deal with seized animals.
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> [19] For the above reasons I have concluded that Ms. Brennan's judicial review of the Deputy Minister's decision of June 24, 2015 must be dismissed.

[32] From my reading of the Deputy's decision as a whole, I am not inclined to accept the proposition that he "ignored the seizure issue" which (from the appellant's point of view) centered on her complaint that she had not been given a chance to cooperate by offering new proposals for the ponies' care. In fact, in his decision, the Deputy specifically notes (after citing the formal notices served upon Ms. Brennan concerning the treatment and seizure of the ponies):

> In reviewing the Notices together, Ms. Brennan did suggest options that would prevent the seizure of any of the ponies, but Dr. Hartnett explained that the 5 ponies in the worst condition and most in need would be seized to provide them with proper food and care, and Ms. Brennan agreed that she would properly care for the 2 ponies left in her care.

[33] In any event, I agree with Wood, J. that Ms. Brennan's fitness as an owner was the critical issue and on this record it cannot be seriously suggested that the Deputy erred in affirming the refusal to return the five ponies to Ms. Brennan's care. For convenience I will refer again to s. 26(5) which says:

> **26(5)** Where an animal comes into the custody of the Society or 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 Society or the Minister, as the case may be, shall take reasonable steps to find the owner …
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> (Underlining mine)

[34] Based on the record in this case, the "previous actions of the owner" were clearly an important consideration, in light of the fact that departmental officials had occasion to investigate Ms. Brennan's care and treatment of her animals no less than 15 times over a three year period.

[35] Before leaving this issue I wish to address one other point raised by the appellant which seems to have emanated from Justice Moir's reasoning in *Rocky Top Farm* and was again repeated by Wood, J. in this case. That is the suggestion by the appellant, Ms. Brennan, that securing the cooperation of the owner to relieve the animal's distress operates as a kind of "condition precedent" without which inspectors acting on a complaint have no authority to do anything, let alone rescue a suffering animal from neglect or abuse. They base this assertion upon their reading of s. 23(2) which says:

> Before taking action pursuant to subsection (1) an inspector or peace officer … shall endeavour to obtain the owner's co-operation to relieve the animal's distress.

[36] Such an assertion was also made by the appellant in the *Rocky Top Farm* case and appears to be a reason why Moir, J. focused on the "owner's rights" and felt obliged to "balance" those "rights" against the animal's health and well being. Respectfully, such a proposition misconstrues the clear meaning of s. 23(2) and should be summarily rejected. There is no obligation upon an inspector or peace officer to "obtain" or "secure" an owner's cooperation before taking steps to immediately relieve the animal's distress as contemplated in the *Act*.

[37] On the contrary, the obligation is to attempt, to "endeavour" to obtain such cooperation. Put simply, all that is required of an inspector is to take "reasonable steps to find the owner" and "where the owner is found" to "endeavour" to obtain that owner's cooperation in relieving the animal's distress. A reasonable effort is all that is required. A subsequent assessment as to whether it was, or was not, will of course depend upon the unique circumstances of any particular case.

Issue #3 - <u>Did the reviewing judge err in first having referred the matter back to the Minister for a thorough reconsideration, rather than decide the matter himself</u>?

In this case, Wood, J. was right to refer the dispute back to the Deputy Minister for a reconsideration. That was the proper approach to take rather than "substitute …(his) … decision on the merits for that of the Minister." See for example the authorities cited in *Rocky Top Farm, supra* at ¶96.

Conclusion

[38] For all of these reasons the appeal is dismissed and the decision and confirmatory order of the reviewing judge are affirmed with costs on appeal to the respondent in the amount of $3,000 all inclusive, as agreed by counsel at the hearing.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.