SUPREME COURT OF NOVA SCOTIA
Citation: *Brennan v. Nova Scotia (Agriculture)*, 2015 NSSC 171

Date: 2015-06-10
Docket: *Hfx*, No. 437570
Registry: Halifax

Between:

Annette Brennan

Applicant

v.

Nova Scotia (Minister of Agriculture)

Respondent

Judge: The Honourable Justice Michael J. Wood

Heard: May 27, 2015 in Halifax, Nova Scotia

Counsel: Christopher I. Robinson, for the Applicant
Sean Foreman, for the Respondent

By the Court:

[1] Annette Brennan has owned and bred Newfoundland Ponies at her farm in Carroll's Corner, Nova Scotia since 1985. Starting in late 2011 she has had periodic dealings with inspectors from the Nova Scotia Department of Agriculture related to the welfare of her animals.

[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.

[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.

Applicable Legislative Provisions

[5] Section 2(2) of the *Animal Protection Act* provides a description of the circumstances in which an animal is considered to be in distress. It says:

(2) An animal is in distress, for the purpose of this Act, where the animal is

(a) in need of adequate care, food, water or shelter or in need of reasonable protection from injurious heat or cold;

(b) injured, sick, in pain, or suffering undue hardship, privation or neglect;

(c) deprived of adequate ventilation, space, veterinary care or medical treatment; or

(d) abused. 2008, c. 33, s. 2; 2011, c. 50, s. 1.

[6] Section 21 contains a prohibition against causing or permitting an animal to be in distress. It provides.

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.

(3) For the purpose of subsection (2), the owner of an animal or the person in charge of an animal does not permit the animal to be in distress if the owner or person in charge takes immediate appropriate steps to relieve the distress.

(4) Subsections (1) and (2) do not apply if the distress, pain, suffering or injury results from an activity carried on in the practise of veterinary medicine, or in accordance with reasonable and generally accepted practices of animal management, husbandry or slaughter or an activity exempted by the regulations.

(5) Subsection (3) does not apply if the owner of an animal or the person in charge of an animal has demonstrated a pattern of causing or permitting any animal to be in distress.

(6) repealed 2011, c. 50, s. 8.

2008, c. 33, s. 21; 2011, c. 50, s. 8.

[7] When an inspector finds an animal in distress they are permitted to take any necessary action to relieve that distress including taking the animal into custody. This authority is found in s.23(1) which states:

> 23 (1) Where an inspector or peace officer finds an animal in distress and the owner or person in charge of the animal
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> (a) does not immediately take appropriate steps to relieve its distress; or
>
> (b) is not present or cannot be found promptly,
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> 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,
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> (c) taking custody of the animal;
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> (d) arranging for any necessary transportation, food, water, care, shelter and medical treatment, or any one or more of them;
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> (e) delivering the animal into the custody of the Society, the Minister or a suitable caretaker.

[8] An issue which was central to the submissions of Ms. Brennan to the Deputy Minister and on this judicial review was the application of s.23(2) which reads:

> (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 co-operation to relieve the animal's distress.

[9] In this case when the inspector took Ms. Brennan's ponies into custody she decided they would not be returned to her. The authority for this action is found in s.26(5) which provides:

> (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 and
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> (a) where the owner is found, shall notify the owner that the animal will not be returned, of the amount that is owed pursuant to subsection (6) and of the right to request a review; or
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> (b) where the owner is not found within seventy-two hours or, where found, does not request a review pursuant to subsection (7), may sell or give the animal to any person who, in the opinion of the Society or the Minister, as the case may be, will properly care for the animal.

[10] Once Ms. Brennan was notified that her animals would not be returned to her she requested a review by the Minister of Agriculture in accordance with s.26(7)(b) which reads:

> (7) Within seventy-two hours of being notified pursuant to clause (5)(a), the owner of the animal may request in writing that the decision that an animal will not be returned be reviewed by
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> …
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> (b) the Minister if the Provincial Inspector, another inspector or another person has taken the animal into custody for the Minister.

Nature of the Minister's Review

[11] The Minister's review under s.26(7) of the *Animal Protection Act* is with respect to the inspector's decision that the animal will not be returned. Although

the inspector's decision must be based upon an opinion that the owner is not a fit person to care for the animal, the Minister's review does not appear limited to that question.

[12] The Honourable Justice Gerald R. P. Moir of this Court recently had an opportunity to discuss the nature of the Minister's review in *Rocky Top Farm v. Nova Scotia (Agriculture)* 2015 NSSC 21. In that decision Justice Moir acknowledged that the initial decision by the inspector may be made quickly with little opportunity for the owner to provide input. That was certainly the situation with Ms. Brennan on December 19, 2014. According to Justice Moir the Minister's review allows for a more timely reflection with the owner being given a better opportunity to make their case for return of the animal. As in this case, the Minister delegated responsibility for the decision to the Deputy Minister.

[13] In *Rocky Top Farm* Justice Moir allowed judicial review because the Deputy Minister had incorrectly determined that he should only consider whether the inspector's decision was reasonable. Justice Moir's comments on the nature of the ministerial review are set out in the following passage:

> 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.
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> 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.

[14] This passage could be interpreted to suggest that the issue on review is limited to whether the owner is fit to care for the animals. In my view that would be too restrictive an interpretation to place on the very broad language used in s.26(7). Obviously, an owner's fitness to care for the animal will be a significant (and in some cases determinative) issue, but it is not the only circumstance which the Minister may consider.

[15] As an example of the scope of the ministerial review, the Deputy Minister in this case considered the appropriateness of the inspector's initial decision to seize the ponies. This issue was raised by Ms. Brennan and I see nothing wrong with the Deputy Minister considering this in the context of deciding whether to return the animals to her.

Standard of Review

[16] The Court on judicial review must determine the standard to be applied on that review. The two options are correctness and reasonableness with the latter being more deferential. In this case I have the benefit of an extensive standard of review analysis carried out by Justice Moir in *Rocky Top Farm*. He concluded that the decision with respect to the nature of the review is to be assessed based upon correctness. I adopt this standard for purposes of evaluating the Deputy Minister's determination of that issue in this case. In *Rocky Top Farm* Justice Moir concluded the Deputy Minister was wrong in deciding that the review was limited to an evaluation of the reasonableness of the inspector's decision rather than the more comprehensive assessment called for by the legislation.

[17] A great deal of counsel's submissions at the judicial review hearing, and a significant portion of the Deputy Minister's review decision, focussed on the inspector's decision to seize the animals under s.23(1). The specific issue was whether s.23(2) created a prerequisite to the inspector's authority to seize. I believe the interpretation of the *Animal Protection Act,* and in particular s.23(2), is subject to review on a standard of correctness. I come to this conclusion based upon the factors and analysis applied by Justice Moir in *Rocky Top Farm*. Even though he was considering the authority of the Deputy Minister to determine the review process I think the same principles also apply to his interpretation of the inspector's legislative authority to seize animals.

The Deputy Minister's Review Decision

[18] The Deputy Minister's written decision was issued on March 10, 2015. It set out the background of the Department's dealings with Ms. Brennan and the events surrounding the seizure on December 19, 2014. The decision listed the materials considered during the review which included a report prepared by the inspector attaching documentation related to prior dealings with Ms. Brennan. The Deputy Minister considered written submissions from Ms. Brennan's solicitor as

well as evidence submitted by her in the form of affidavits of herself and Brenda Smith, and a statutory declaration of Fraser Hebb, Jr.

[19] In his decision the Deputy Minister described what he called the standard of review as follows:

> In the recent case of *Rocky top Farm v. Nova Scotia (Agriculture),* 2015 NSSC 21, the Supreme Court of Nova Scotia held that the standard of review under the Act is one of correctness.

[20] The review decision described the issues as follows:

> The issues to be considered in this Review are as follows:
>
> 1. Is Annette Brenan fit to care for the seized animals?
> 2. Was the decision to seize the correct one?

[21] In considering the correctness of the decision to seize the ponies, the Deputy Minister undertook an interpretation of ss. 21and 23 of the *Act*. His analysis was as follows:

> Once the inspectors find an animal in distress, the owner is to be given an opportunity to relieve the distress. If he or she complies, then the animal is no longer in distress as set out in s.21(2)). However, if a pattern of causing or permitting an animal to be in distress is found, s.23(1) does not apply. I find Mr. Robinson's argument a fair one that under Subsection 23, the Inspectors were required to afford the opportunity for Ms. Brennan to relieve the distress and obtain her cooperation to do so. However, the section cannot be read in isolation. It does not create a separate right. Under Subsection 21, a person is not afforded the opportunity to relieve the distress if there is "a demonstrated pattern" of causing distress. 26(5) allows for seizure based on "…previous actions of the owner…" While this appears to create an inconsistency in the legislation, it requires the two sections to be read together in a manner that reflects the spirit and intent of the law as evidenced by its full title, '*An Act to Provide Animals and to Aid Animals that are in Distress'.* I believe the legislation provides both a definition of distress and a procedure to follow if it is found. I interpret s.23 as the procedure to follow when the criteria for distress exist. Read together, s.21(3) creates an exception to the requirement of s.23(1).

> With all due respect, if taken to its logical conclusion, Mr. Robinson's position that an opportunity to relieve the distress must be provided to an owner each time before s.21(5) can be applied, would be inconsistent. An inspector would observe distress, the owner would relieve it and then return subsequently the next time distress is observed. This would defeat the purpose of this section.
>
> I find the actions of the inspectors which led to the seizure of the ponies was correct. In particular, they were correct in deciding not to provide Ms. Brennan any further opportunities to relieve the distress.

[22] The Deputy Minister's review decision concluded with the following:

> **CONCLUSIONS**
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> Based on the evidence provided, I have concluded that the decision to seize was correct for the following reasons:
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> - The five seized Newfoundland ponies were in distress when the Inspectors visited Ms. Brennan's premises on December 19, 2014. They had reasonable and probable grounds to enter the premises without a warrant and did so.
> - Subsection 21 of the Act does not require the inspector to provide the owner with the opportunity to relieve distress if there is a demonstrated pattern of causing distress. The evidence certainly indicates this pattern. Dr. Hartnett and Inspector Trowell were correct in their decision to not provide her with that opportunity.
> - The evidence shows Ms. Brennan was given multiple opportunities to address the situation but her efforts were never sustained. The Inspectors were correct in seizing the horses and placing them in the custody of the Department.
> - As required under the Act, unfortunately, I must find that Annette Brennan is not "a fit person to care for" the seized animals as defined in s.26 of the Act. Accordingly, the seized horses will not be returned.

Analysis of the Deputy Minister's Review Decision

[23] Section 26(7) of the Act requires the Minister (or in this case the Deputy Minister) to review the decision not to return the animals to Ms. Brennan. We know from *Rocky Top Farms* that this review 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. The inspector's decision is simply one factor to be considered along with all of the other circumstances.

[24] The Deputy Minister's decision says that he asked himself two questions, whether Ms. Brennan was fit to care for the seized animals and whether the inspector's initial decision to seize the ponies was correct. While both of these issues may be relevant to the decision whether the animals should be returned to Ms. Brennan, by limiting his review to these specific questions it is not clear whether the Deputy Minister independently considered the broader question of whether the animals should be returned.

[25] The conclusions of the Deputy Minister seem to suggest the only decision he made was that the initial seizure of the ponies was correct. In listing the reasons for reaching that outcome he includes the following item:

> - As required under the Act, unfortunately, I must find that Annette Brennan is not "a fit person to care for" the seized animals as defined in s.26 of the Act. Accordingly, the seized horses will not be returned.

[26] The *Act* does not "require" the Deputy Minister to make any such finding. 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.

[27] Mr. Robinson, on behalf of Ms. Brennan, argues that the Deputy Minister's reasons suggest that the only issue actually decided was the correctness of the seizure and he never turned his mind to her fitness or whether the animals ought to be returned. I agree with his assessment of the decision. It appears to be limited to the seizure issue with virtually no discussion of the inspector's decision to retain the ponies which was the subject of the review.

[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 since the only comment on that issue is listed as one of the reasons supporting his conclusion that the seizure decision was correct.

[30] In addition to his failure to properly determine the scope of review, I believe the Deputy Minister was wrong in his interpretation of s.23 of the *Animal Protection Act*. In his decision he found that prior instances where an owner allowed or permitted an animal to be in distress resulted in s.23(2) being inapplicable. His rationale is based upon his view that there is an apparent inconsistency between ss.21 and 23 of the legislation.

[31] Section 21 is a prohibition against causing or permitting an animal to be in distress. Breach could result in a prosecution under section 35 of the *Act*. The combined effect of subsections 21(3) and (5) is that a person is not in violation of the *Act* where they take immediate steps to relieve an animal's distress unless there is a pattern of causing or permitting distress. There is no mention of an inspector's authority to seize animals in this section.

[32] Section 23 defines the authority of an inspector when they find an animal in distress. Where the owner does not immediately take measures to relieve the distress the inspector may take any necessary steps including seizure of the animal. Section 23(2) says an inspector must endeavour to obtain the owner's cooperation to relieve distress before taking any of the permitted actions.

[33] The Deputy Minister is incorrect when he concludes that s.21(5) is intended to override the application of s.23(2). The provisions apply in completely different circumstances and are unrelated.

[34] In his submissions, counsel for the Minister relied on the British Columbia Court of Appeal decision in *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals* 2010 BCCA 519. In that case the Court was considering a legislative provision similar to s.23(1) of the *Animal Protection Act*. The British Columbia statute had no equivalent to s.23(2).

[35] In *Ulmer* the owner had been given prior notice of concerns with respect to the well-being of her animals, but did nothing. The Court said the evidence supported the trial judge's conclusion that the owner was unable or unwilling to take steps to relieve the distress even though they had not been given a specific opportunity to do so.

[36] I agree the decision in *Ulmer* may be of assistance in interpreting s.23(1) and determining whether that provision creates a specific right for an owner to have an opportunity to alleviate distress prior to seizure. I do not believe those principles

assist in deciding the application of ss.2 which clearly creates a precondition to seizure which is absent from the legislation under consideration in *Ulmer*.

[37] In *Rocky Top Farms* Justice Moir described s. 23(2) as being a prerequisite to seizure (see paragraph 123). I agree with his interpretation of this provision.

[38] What is sufficient to satisfy the s. 23(2) obligation to endeavour to obtain the owner's cooperation will vary from case to case. I make no comment on how it applies to the facts here. My conclusion is simply that the Deputy Minister was wrong in his decision that it was excluded by operation of the provisions of the *Animal Protection Act*.

Conclusion and Disposition

[39] For the reasons outlined above, I am satisfied that the Deputy Minister was wrong in his formulation of the question to be decided on his review. He was also wrong in his interpretation of s.23 and in particular his conclusion that s.23(2) had no application where an owner had previously demonstrated a pattern of causing or permitting an animal to be in distress. As a result of these findings, I must allow the judicial review. 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.

[40] In the event that the parties cannot agree on the question of costs, they may make written submissions to me by no later than July 10, 2015.

Wood, J.