SUPREME COURT OF NOVA SCOTIA
Citation: *Nova Scotia (Environment) v. Tynes*, 2020 NSSC 123

Date: 20200403
Docket: 490722
Registry: Halifax

Between:

Nova Scotia (Department of Environment)

Applicant

v.

Joshua Tynes and the Animal Cruelty Appeal Board

Respondent

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	November 26, 2019, in Halifax, Nova Scotia
Counsel:	Adam Norton and Cherise Hart, for the Applicant Joshua Tynes, Self-Representative Respondent Gary Richard, Observing for the Respondent, Animal Cruelty Appeal Board

By the Court:

INTRODUCTION

[1] The Nova Scotia Department of Environment ("NSE") appeals a decision of the Animal Cruelty Appeal Board that ordered the animals seized by NSE on June 19, 2019 be returned to their owner, Joshua Tynes. In total, twelve animals were seized: five llamas or llama/alpaca crosses, two goats, and five sheep. These animals are currently being cared for under the auspices of NSE at a foster farm. This judicial review was heard by me on November 26, 2019.

[2] I find that the Board's decision was unreasonable for the reasons that follow and the Board's order that the animals be returned to Mr. Tynes is quashed. The matter will be sent back to the Board for redetermination which should be carried out in accordance with the directions set out in this decision.

BACKGROUND

Procedural background

[3] On June 19, 2019, Inspectors for NSE attended the property of Joshua Tynes, located at 641 Hwy #1, Lawrencetown, Nova Scotia ("Property"). On this day, Inspectors found five llamas, two goats, and five sheep in distress at the

Property. These animals were seized and transported to a foster farm for care. NSE issued Mr. Tynes his seventh notice under the *Animal Protection Act*, S.N.S. 2008, c. 33 for causing or permitting an animal to be in distress.

[4] Mr. Tynes appealed his seizure to the Animal Cruelty Appeal Board ("Board") on July 3, 2019. The Board provided their written decision on July 16, 2019, holding that the animals should be returned to Mr. Tynes immediately. NSE then appealed that decision and filed its amended Notice for Judicial Review on August 9, 2019.

[5] On August 19, 2019, NSE sought to stay the effect of the Board's decision to immediately return the seized animals to Mr. Tynes. An interim stay order was granted by me on August 20 in chambers. The stay motion was heard by Justice Bodurtha on September 11, 2019. Mr. Tynes consented to the stay and a stay was granted pending the determination of this judicial review.

[6] This judicial review was heard by me on November 26, 2019. Mr. Tynes represented himself as Respondent and there was no representation nor submissions filed on behalf of the other Respondent, the Animal Cruelty Appeal Board.

Factual background

[7] I gather much of the following information from the Record, set out more or less as it is presented in the Record, the contents of which were not contested before me. The Board's reasons do not indicate the following facts were not to be believed for any reason. These opinions set out by the various inspectors and veterinarians were not contradicted by either Mr. Tynes nor the Board in their decision. I provide much of this information not necessarily for the truth of its contents, but rather to show the evidentiary underpinnings of this matter that would have been before the Board.

[8] Joshua Tynes operates a small farm located at 641 Hwy #1, Lawrencetown, Nova Scotia. Mr. Tynes owns and cares for several types of animals at this location. Since his first contact with inspectors from NSE in 2017, these animals have included sheep, goats, horses, llamas, a potbellied pig, and various poultry, including chickens and ducks. Julie Pilling is or was a tenant of Mr. Tynes and also kept some animals at this location.

[9] The first interaction with NSE inspectors was in 2017. On February 27, 2017, NSE received a complaint about dead goats found under a tarp on or near the Tynes Property. On March 1, Inspector Merridy Rankin attended the Property and conducted an investigation. She observed carcasses of four poultry, five llamas,

and one goat on this visit. She determined the remaining animals had adequate food, water, and shelter and were of acceptable body conditions. From the context of the materials in the file, I note "body condition score" or BCS is a means of gauging, by sight or feel, the adequacy of an animal's weight. No violation of the *Animal Protection Act* was noted at this time, however Inspector Rankin verbally informed Mr. Tynes to ensure all animals had a dry, clean place to rest and that he work with the vet to determine the cause of the mortalities. This notice was not reduced to writing per section 18C of the Act.

[10] On March 23, 2017, Inspector Rankin returned to the Property with Inspector Patrick Rushton for a follow-up inspection. Several animals were found in distress at this time. The Inspectors noted one goat had died since the last inspection. A sick goat was shivering in a drafty pen that had an open window. This goat did not have water, hay to eat, or dry bedding. Other goats that were found on the property appeared to be very hungry and fought for hay when it was provided. The horse, two llamas, and several poultry birds were found to be underweight. The water for the horse, llamas, and potbellied pig was frozen. The shelter for the horse and llamas had no dry bedding and there was a buildup of manure. Copies of Codes of Practice for various animals in their care were given to Mr. Tynes and Ms. Pilling.

[11] The first notice was issued at this March 23 property inspection. It names both Mr. Tynes and Ms. Pilling as all relevant notices in this matter do. According to the Inspectors' notes, the Inspectors went over the notice with Mr. Tynes and Ms. Pilling and they had no questions about its contents. Six directives were issued to Mr. Tynes and Ms. Pilling to alleviate the distress of the animals in their care. I will set out some of these directives. The segregated goat was to be provided a draft-free, heavily bedded pen with room-temperature water and hay at all times of day. Adequate food had to be provided to the goats and llamas to increase their body condition scores. This, the notice indicated, was ongoing, which I take to mean compliance for that directive must happen immediately and going forward. The horse and llamas' shelter needed improvement; dry bedding must be provided and the manure must be cleared out once it thawed. Most of the directives were to be complied with that day or within seven days and a follow-up inspection was to take place on or about April 3, 2017.

[12] A follow-up inspection did take place on April 4, 2017. Inspector Rankin returned to the Property and determined the sick goat that had been identified in March had died. Though the animals appeared to be more content on this visit, five llamas were still found to be in distress. The second notice was given to Ms. Pilling and the contents of the notice were explained to Mr. Tynes over the phone. It had

three directives which instructed the owners to ensure a veterinarian assessed the animals' body conditions, feeding programs, deworming, and overall herd management. Shearing was to take place on May 20 – 22 and if those dates changed, the owners were to contact the Inspectors. A follow-up would take place on or about June 1, 2017.

[13] According to the chronology in the Record, on May 24, Mr. Tynes requested an extension to complete the directives. He also indicated that one llama was downed and that the llama was currently being treated by Mr. Tynes himself and would be seen by a veterinarian on June 5 or 6, 2017.

[14] Inspector Rushton attended the Property on May 31, 2017. He discovered a llama in critical distress (this is a term defined at section 25 of the Act as a condition whereby immediate veterinary treatment cannot prolong the animal's life or prolonging the animal's life would result in it suffering unduly). The llama was described as emaciated, weak, and unable to stand on its own. Dr. Cassandra Brown from Annapolis Animal Hospital arrived to inspect the downed llama. Dr. Brown's veterinary report dated May 31, 2017 indicates the grass was dead or eaten down around the llama and the condition of the fur around its hindquarters suggested it was unable to stand for quite some time. The llama was diagnosed as emaciated due to lack of veterinary intervention and neglect on behalf of the

owner. The necropsy report by Dr. Laura Buckland of the Nova Scotia Department of Agriculture provided a final diagnosis for the downed llama as: severe emaciation, severe dehydration, as well as some abrasions on the llama's limbs and incidental findings of the lung, liver, kidney, and heart. The report noted there was no evidence of any disease or injury that would have predisposed this llama to the emaciated condition it was found in. Dr. Brown determined it was best to humanely euthanize the downed llama, which was done. The llama carcass was transported to a laboratory in Truro for testing.

[15] Dr. Brown's veterinary report also indicated Mr. Tynes had previously contacted the Annapolis Animal Hospital on April 24 for the downed llama. She recommended a veterinary visit, which Mr. Tynes declined. A vet appointment that was scheduled for May 25 was cancelled due to lack of funds and rescheduled for June 7.

[16] Inspector Rushton issued a third written notice to Ms. Pilling on May 31, 2017, which indicated five llamas were in distress, including the downed llama. The notice also indicates the shearing which was supposed to have taken place per the April 4 notice had not taken place. The May 31 notice indicated the owners should follow the directives set out in the previous notice and speak with a vet regarding a plan for the herd. This notice was to be complied with by June 21 and a

follow-up inspection would take place around that date. Inspector Rushton's notes indicates he spoke to Mr. Tynes about the contents of the notice around June 1.

[17] Inspectors Rankin and Rushton attended the Property again on June 27, 2017. Ms. Pilling was at the property while they reached Mr. Tynes by phone. The Inspectors determined one horse, four llamas, nine goats, some chickens, and a potbellied pig were in distress. The horse's hooves were also noted to be overgrown and cracked. At this time, the Record indicates Mr. Tynes owned the horse, the llamas, and the pig and Ms. Pilling owned the goats, while they jointly owned the lambs and poultry that were on the farm.

[18] The fourth notice was issued at this time. The notice indicates the horse's hooves should be seen by a farrier by July 11, 2017. Veterinarians were to assess all animals by July 17 and the owners were to follow all recommendations made during previous veterinarian visits immediately. Ventilation and temperatures in the barn must be monitored and appropriate hay and pasture must be available for the animals. Furthermore, the owners were to keep all receipts for animal supplies purchased, including feed and medicine.

[19] On July 17, Dr. David MacHattie's veterinary report noted the animals at the Property had been treated for parasites and looked better. On August 9, Dr.

MacHattie indicated that Middleton Vet Services would not longer be providing veterinary services to Mr. Tynes and Ms. Pilling due to outstanding invoices.

[20] Inspector Rankin attended the property again on November 22, 2017. One horse, four llamas, and some number of poultry were found to be in distress by the Inspector. The fifth notice was issued on this day with six directives. Food and water must be made readily available for the poultry immediately and dry bedding must be provided to the poultry by November 24. The horse and llamas must be given a constant supply of hay immediately. Mr. Tynes was to contact Inspector Rankin by phone and send scanned copies of receipts for animal supplies by email no later than November 25. Inspector Rankin also noted the horse's hooves were overgrown, though did not include this in a directive.

[21] According to Inspector Rankin's notes, only Ms. Pilling attended the scene as Mr. Tynes could not be reached by telephone, though a message was left. On December 5, 2017, Inspector Rankin emailed the directives to Mr. Tynes and Ms. Pilling.

[22] On December 28, 2017, Inspector Rankin conducted a follow-up inspection of the Property. She found the potbellied pig was in distress. It was shivering and the bedding was not adequate in the unheated barn. The notes indicate Mr. Tynes

agreed to add straw bedding for the pig and if that did not work, then he would get a small pen for the pig inside the barn. The other animals were not found to be in distress on this day. Inspector Rankin appears to have been satisfied that the animals had good body condition scores, dry bedding, and adequate food and water. She noted the horse's hooves had been trimmed.

[23] The Record indicates that on March 14, 2018, Inspector Rankin laid charges against Mr. Tynes and Ms. Pilling under sections 21(1) and 21(2) of the *Animal Protection Act*, which prohibit causing or permitting an animal to be in distress. The pair were also charged under section 445.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, for wilfully causing or permitting an animal to be in unnecessary pain and suffering. This is in relation to the llama that was euthanized by Dr. Brown on May 31, 2017. I rely on the Board's understanding at page 3 of the decision, which notes the charges are still pending.

[24] The file appears to be quiet for nearly a year until February 7, 2019 when Dr. Jennifer Conway from Cornwallis Veterinarians Ltd attended the Property. Her recommendations in the Record advise Mr. Tynes to ensure food is adequate to increase body condition scores of thin animals. A follow-up visit within two months was recommended. Several animals were noted to have low body condition scores at this time.

[25] On March 7, 2019, NSE received a complaint, the nature of which is unclear on the Record, causing Inspector Daoud Dahoudi to attend the Property for an inspection. No animals were found to be in distress at this time and no notice was issued. There are no notes of this inspection in the Record. Inspector Dahoudi attended the Property again on March 21. No violations were noted during this inspection and no notes of the visit are provided in the Record.

[26] On June 1, 2019, the Bridgetown RCMP found a thin goat loose near the Property, causing Inspectors Dahoudi and Donald Cluney to attend the Property for an inspection. Neither Mr. Tynes nor Ms. Pilling was present during this visit. Numerous violations were noted on this day. Many animals presented with low body condition scores. The barn had a buildup of manure, lack of food and water, and there was no dry place to lay. A lamb and its mother were found in a pen on a pile of built up manure and no food or water was in the pen with them. As this visit was late at night, it was June 2 by the time the Inspectors taped a notice to the door of the house and that is the date written on the notice.

[27] This is the sixth notice issued to Mr. Tynes and Ms. Pilling about the state of their animals. Goats, sheep, cattle, pigs, poultry, and a horse were found to be in distress at this time. The notice instructed the owners to contact the Inspectors as soon as possible. It also indicated that pens must be cleaned of manure and all

animals must have a dry place to lay. The body condition of most of the animals was found to be low at this time, so the notice directs Mr. Tynes and Ms. Pilling to ensure food and water is available to the animals at all times to increase their weight.

[28] Ms. Pilling contacted Inspector Cluney per the notice later on June 2. They apparently discussed water and food for the animals.

[29] Inspectors Cluney and Pascal Dietrich attended the property again on June 4, 2019. Both Mr. Tynes and Ms. Pilling were present. Several animals had low body condition scores, and according to the notice left by the Inspectors, some sheep, goats, and cattle were found to be in distress. A notice was issued. Though it was only the second notice issued in 2019, it was the seventh notice issued to Mr. Tynes and Ms. Pilling overall. Once again, adequate food and water as well as ensuring the animals had dry, clean bedding were included in the directives.

[30] A follow-up inspection occurred on June 19, 2019. Inspectors Cluney and Dietrich attended the Property with Dr. Conway and Sergeant Ed Hubbard of Bridgetown RCMP. All animals were assessed for their body condition and other signs of distress. According to her veterinary report, Dr. Conway indicates that of the animals she assessed in February 2019, many showed no or little sign of weight

gain. She wrote, “There was no significant change in the body condition scores of the goats, sheep and llamas over the 4 month period. Remaining in a chronic emaciated and excessively thin state is a huge concern to me as it dramatically affects their health and welfare.”

[31] The Inspection Assistance Report from the Farm Animal Welfare Program Veterinarian, dated June 27, 2019, is also informative. It notes:

> The veterinary advice on diet provided by the private practitioner was either not followed or when it was not achieving the planned results, the practitioner was not engaged to re-assess the animals. If the feeding instructions are followed but weight gain is not achieved, there are additional investigations required to determine and correct either husbandry issues or animal health issues.

[32] Both Mr. Tynes and Ms. Pilling were read their police cautions and several animals were seized (listed above). The sheep and llamas were sheared on June 24, 2019 and there is a comment in the Record’s chronology that a substantial amount of wool was shorn from these animals, suggesting they had not been shorn in the last year. This seizure was the subject of the appeal that is currently under judicial review.

[33] When each of these incidents over the three years is viewed together, a trend appears to emerge. Inspectors visited the Property twelve times between 2017 – 2019 and issued seven notices with directives. At nearly all of these on-site

encounters between the Inspectors and Mr. Tynes or Ms. Pilling, animals were found to be in distress. Common occurrences include animals with low body condition scores, lack of food and drinkable water, lack of dry bedding, structures that were not weather-appropriate for the animals, and lack of certain other maintenance, such as tending to the horse's hooves, the llama's teeth, or the llama and sheep's coats. Though the notes and notices are not always clear whether previous directives had been followed, the chronology as I set out indicates a habit of neglect in these areas. The Inspectors put Mr. Tynes and Ms. Pilling on notice repeatedly over three years that these directives were essential to the proper care of the animals in their possession.

[34] At each of these encounters, there was no evidence that Mr. Tynes (or Ms. Pilling for that matter) was anything but accommodating of the inspectors and veterinarians on his property. In fact, the Record shows he assisted the Inspectors and other personnel in gathering and seizing his animals.

Preliminary issue

[35] There is an outstanding preliminary issue regarding what the Applicant characterizes as "fresh evidence". The Applicant submits that certain paragraphs (paragraphs 7, 8, 9, 10, 18, and 19) set out in the Respondent's brief were not the

subject of a motion for fresh evidence. Some of the information, including some of that in paragraphs 18 and 19 of the Respondent's brief, was before the Board via testimony. As the facts asserted in those paragraphs are not located anywhere in the Record, nor are they discussed in the Board's decision, the Applicant says these paragraphs should be struck from the Respondent's brief and should not inform my analysis.

[36] Mr. Tynes, representing himself as the Respondent, provided submissions on this. He agreed paragraphs 7, 8, and 9 were fresh evidence. Presumably this means he also concedes that because an application to admit fresh evidence on the record was not made, these paragraphs should be struck. That is my finding and those paragraphs are struck.

[37] As for paragraph 18, he says some of this is corroborated in Inspectors' notes in the Record. The Inspector's notes for that date indicate "[a]ll pens had fresh shavings put down and everything had hay and water". Paragraph 18, however, goes further, saying "everything from the previous notice had been met. Pens had been cleaned, proper bedding was provided, feed and water was available for all animals." I cannot conclude that when Inspector Cluney attended the Property on June 19, 2019, he found that "everything from the previous notice had been met".

[38] Both paragraphs 18 and 19 also deal with testimony during the hearing. The Record does not include a transcript of the hearing and the Board's decision does not reference that information so any representations of testimony is extraneous to the Record.

[39] In my opinion, these paragraphs dealing with what was said during the hearing may have been the proper subject of a motion for fresh evidence per Rule 7.28. There are a few exceptions to the rule requiring a motion for fresh evidence, such as relevant background information. Paragraphs 18 and 19 do not meet that standard. They therefore constitute fresh evidence for the purposes of this judicial review and shall be struck. Regardless of their admissibility, these paragraphs do not affect my reasoning or findings on this matter. This matter before me is about whether the Board's decision was reasonable in light of the Record. There are reviewable errors in the Board's decision that render it unreasonable regardless of whether these paragraphs are admissible.

ISSUES

[40] Both parties and I, agree, that the appropriate standard of review is reasonableness. The only issues then are whether the Board's decision was reasonable and what remedy, if any, is appropriate.

LAW & ANALYSIS

Standard of review

[41] The Supreme Court of Canada released its trilogy of decisions revising the common law framework for setting the standard of review in judicial reviews. The lead case, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, was released along with *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67. These decisions were released after I heard this matter on November 26, 2019 and prior to this decision being released.

[42] In my opinion, it was not necessary to ask the parties to provide further submissions on these decisions. The parties agreed the appropriate standard of review is reasonableness, which I also agree with, and the result would be the same under either the *Dunsmuir* framework or the new *Vavilov* framework. I follow the decision in *Canada Post*, where Rowe J., writing for the majority, noted at paragraph 24, "No unfairness arises from this as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework."

Vavilov overview

[43] Before getting into the substance of this matter, it is appropriate to discuss the *Vavilov* framework for assessing the reasonableness of an administrative decision.

[44] Though this has been a guiding principle in previous administrative law jurisprudence, the majority in *Vavilov* emphasized the importance of legislative intent in reasonableness review. The reviewing court must ensure it gives effect to the legislative intent "to ensure that exercises of state power are subject to the rule of law" (para 82). Deference must still be shown to the administrative decision maker and the reviewing judge must be careful to avoid overstepping by substituting the decision maker's decision for that of their own. Rowe J. for the majority in *Vavilov* put it this way:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. **The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves.** Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. **Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.**

> [emphasis added; italics original]

[45] Where an administrative decision maker has provided reasons for their decision, these reasons become the starting point for the analysis:

> [81] **Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision**: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that **"the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'**": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. **The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable** — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.
>
> [emphasis added]

[46] Reasons assist the reviewing court assess the internal logic underlying the decision. This is because, as the majority points out, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker" (para 85). When assessed, the reasons should show a decision that is justified, transparent, and intelligible and "falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law" (para 86). Rowe J. went on (para 86):

> In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [italics original]

[47] Therefore, even where the outcome or remedy may be justifiable, if the reasons do not display proper logical grounding for the outcome, the decision cannot be reasonable.

[48] A reasonable decision, then, is one that is properly guided by the various legal and factual constraints that apply in that particular context. These factual and legal constraints include the governing statutory regime, principles of statutory interpretation, existing jurisprudence, the evidence before the decision maker, past practices, and the potential impact of the decision (para 106). The majority noted this is not a closed list and any relevant factual or legal constraint should be considered.

[49] Reasons should not be held to an unreasonable standard but nor should they be upheld as untouchable. Showing deference means understanding that reasons are drafted within a particular institutional context and procedural history; not all arguments or legal parameters will be expressly referenced (para 91). Reasons may

fail to expressly reference some arguments or law and yet still demonstrate coherent logic and consideration of the contextual constraints that apply. However, where reasons do omit certain considerations, the reviewing judge should be careful not to insert their own analysis to fill the gaps in reasoning. The majority wrote:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. …

Factual and legal constraints

[50] This matter falls under a relatively discrete statutory regime: *Animal Protection Act*. The Act was amended in 2018, however this matter was set down and heard by the Board before the new Act came into force on November 12, 2019. The 2008 version of the Act is what applies. There are no regulations enacted pursuant to the Act and no other statutory regimes are relevant to this matter.

[51] Like many other administrative decision makers, the Board is created and governed by the Act. Decision makers are presumed to have some expertise in the area covered by their "home" statute. However, the majority in *Vavilov* was careful

to note that “any exercise of discretion must also accord with the purposes for which it was given” (para 108).

[52] The dispute in this matter is not whether Mr. Tynes’s animals were in distress at any material time. The issue the Board focused on was whether there was a pattern of causing or permitting animals to be in distress such that the Inspectors did not need to give Mr. Tynes further opportunity to rectify the distress. In its decision, the Board concluded that the Inspectors did not comply with a NSE policy and therefore the seizure was not reasonable and not justified. The Board ordered the animals be immediately returned to Mr. Tynes.

[53] The Act does not define “pattern”. It was open to the legislature to do so, but it did not. Presumably, it was the legislature’s intention to leave this term open to be interpreted, for example, by the Minister in regulations or the Animal Cruelty Appeal Board. When a piece of statute is interpreted by a decision maker, “[w]hat matters,” writes Rowe J. in *Vavilov*, “is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting” (para 110). As the legislature left the term undefined, it is open to the Board to engage in statutory interpretation analysis to determine an appropriate

definition in accordance with the governing laws. It is also open to the Board to rely on a department policy's definition so long as that interpretation is legally sound (*Vavilov*, para 94). The job of the reviewing court is to determine whether the interpretation expressed in the reasons properly considers the various legal and factual constraints on it.

[54] Although the Act does not define a "pattern", it refers to a "pattern of distress" at section 21(5). The full section is reproduced here:

> 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.
>
> (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) Subject to the regulations, no person shall sell to a purchaser any cat or dog that has not been certified to be in good health by a veterinarian, in the form prescribed by the regulations, whether or not the purchaser has waived the requirement for a certificate.

[55] Therefore, according to the Act, unless there is a pattern of distress, a person has not permitted or caused distress if they immediately attempt to relieve the distress. "Distress" is broadly defined in the Act at section 2(2) as:

> 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 heat or cold;
>
> (b) injured, sick, in pain, or suffering undue hardship, anxiety[,] privation or neglect;
>
> (c) deprived of adequate ventilation, space, veterinary care or medical treatment;
>
> (d) abused;
>
> (e) kept in conditions that are unsanitary or that will significantly impair the animal's health or well-being over time;
>
> (f) kept in conditions that contravene the standards of care prescribed by the regulations; or
>
> (g) abandoned by its owner or by a person in charge of the animal in a manner that causes, or is likely to cause, distress resulting from any or all of the factors listed in this subsection.

[56] Turning to section 23, this section enables inspectors to seize animals found in distress if the owner is not present or does not immediately take steps to relieve the distress. As shown above in section 21, the inspectors do not need to provide the opportunity to relieve the distress if there has been a pattern of such behaviour. There are several examples of other broad and permissive powers delegated to

inspectors under the Act, such as section 18A, which allows inspectors to inspect any premises where animals are kept at any reasonable time, other than a private dwelling. Section 18B also makes it an offence to interfere or obstruct a person exercising their powers under the Act.

[57] There are two Nova Scotia Court of Appeal cases that provide substantive discussion of the purpose of the Act and the decision maker's role in interpreting it. These cases are *Nova Scotia (Minister of Agriculture) v Millet*, 2017 NSCA 2 (also known as *Rocky Top Farm*) and *Brennan v Nova Scotia (Minister of Agriculture)*, 2017 NSCA 3. These cases were not consolidated, however they were heard by the same panel, one after the other (*Brennan*, para 1). These cases act as legal constraints on the Board's decision-making process (*Vavilov*, para 112):

> Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context[.]

[58] In *Rocky Top Farm*, inspectors from the Nova Scotia Department of Agriculture received a complaint about animals on a farm that had been operating in the province for fifty years. Inspectors attended the farm and found several animals in various states of distress, including emaciated animals, lack of food or

sources of water, improper buildup of manure, lack of dry, clean bedding, and a shelter that was inadequate for winter months. Inspectors found a few carcasses of animals on the property and found one calf that was downed. The attending veterinarian determined the calf was in critical distress and it was euthanized. As most of the herd "showed signs of malnutrition, dehydration and internal parasites," the decision was made to seize several animals (paras 16-17). Mr. and Mrs. Millet, the owners of the farm, generally refused to cooperate with investigators throughout the seizure process. Only one notice is referenced in this case – the notice given to Mr. Millet that the animals would not be returned to him. On review, the Supreme Court ordered the animals be returned to the Millets and the Court of Appeal overturned that decision, ordering the matter be reconsidered by the Minister.

[59] The facts in *Brennan* are similar to the facts in the present case. Ms. Brennan owned and bred Newfoundland ponies on her farm. Over three years, inspectors visited her farm fourteen times and on seven of those occasions determined some of her ponies were in distress. Written notices were provided to Ms. Brennan on these occasions. Ms. Brennan generally followed the directions and rectified the distress caused over the following weeks. On the final visit, inspectors determined the herd of seven ponies was in distress and five ponies were seized. The

inspectors decided not to return the five ponies to Ms. Brennan, a decision that was upheld by the Deputy Minister, who was the administrative decision maker in that case. Both the Supreme Court and Court of Appeal upheld the Deputy Minister's decision under judicial review and the ponies were not returned.

[60] Though Nova Scotian courts have not previously considered the definition of "pattern" in the *Animal Protection Act*, the existing jurisprudence is still relevant and helpful in my analysis. The Nova Scotia Court of Appeal in *Rocky Top Farm* was clear that the *Animal Protection Act* has a single purpose: "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" (para 54). The Court continued:

> 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.

[61] There is no alternative purpose that requires balancing the property-ownership rights of the person who owns the animals. This single statutory purpose guides the Minister, the Minister's delegates, and the Board which all act pursuant to the *Animal Protection Act*.

[62] The Court in *Rocky Top Farm* also cautioned against turning a matter such as this into a quasi-criminal prosecution. Focusing the question on whether the animals were “illegally seized” is “neither helpful nor accurate when addressing the safety of animals found to be in distress under this provincial legislation” (para 72). The Court went on to properly frame such a question: “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” (para 79). A failure to comply with statutory provisions then becomes one factor among many that the Minister or the Board will consider when deciding “the ultimate question as to whether the animals should be returned to their owner” (para 80). Therefore, according to the Court of Appeal, a seizure is unreasonable if it does not comply with the statutory provisions enabling it and the owner is fit to care for the animals based on all the evidence provided.

[63] This is justified, according to the Court of Appeal, because the Act is only concerned with “living, breathing "non-human vertebrates" (s. 2(1)(a) of the *Act*) whose very health and existence is in peril” (para 76). When the Minister’s delegate forms the opinion that an animal is in distress, time is of the essence to end the distress. “Any slower calibrated inquiry into statutory compliance can and should wait until later,” the Court added (para 81).

[64] The N.S.C.A. in *Rocky Top Farm* confirms my assessment above that the Act grants broad powers to the Minister's delegates "to take such action as may be required and authorized by the Act" (para 37). The question left for the reviewing Minister, or in this case the Animal Cruelty Appeal Board, is to determine "whether staff have complied with their statutory obligations and whether… the action was reasonable." That question necessarily includes an assessment of whether the owner is a fit person to care for the animals. Even where a statutory provision has not been complied with in the seizure of animals under the Act, that does not necessarily mean the decision to seize the animal was unreasonable such that the animal should be returned to the owner. To find otherwise is to ignore the binding precedent set by our Court of Appeal. It would similarly be an error not to remit such a question back to the Board for proper assessment (para 100).

[65] The Court in that case also provided guidance on how the decision maker is to review the actions of inspectors and other individuals working under the Act. Summarizing this point in *Brennan*, Saunders J.A. wrote:

> [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)).

[66] The NSE issued the Seizure of Farm Animals Policy ("Policy") setting out what, in its opinion, may constitute a pattern. It became effective June 12, 2017. This is the Policy that the Board relied on in finding the seizure was unreasonable. Turning to the Policy, the relevant part is as follows:

> A pattern can be demonstrated in a variety of ways. Any of the following are considered to be patterns when referring to causing or permitting an animal to be in distress:
>
> 1. A history of 2, or more, prior convictions under the *Animal Protection Act* and/or convictions under the *Criminal Code* of Canada related to animal cruelty where the offences are so similar that a pattern can be found in only two prior convictions.
>
> 2. A documented history of 3 or more confirmed occurrences of animal cruelty, distress, or critical distress documented with Nova Scotia Environment (or previously the Department of Agriculture). These occurrences must include the issuance of written warnings and/or directives (notices) to the owner or person in charge of the animal.
>
> 3. A documented history of 3 or more warnings and/or notices related to inspections from an initial complaint, regardless of the species involved at each follow up inspection.
>
> 4. One individual is found to have caused or permitted the distress to different groups of animals, or to animals at a different location, at least 3 or more times.
>
> If a pattern of permitting or causing distress to an animal exists, the inspector is not obligated to provide an opportunity for the owner to alleviate the animal's distress. The inspector may then take such action as necessary to relieve the distress. If no pattern exists, the owner or person in charge of the animal must be afforded the opportunity to take immediate and appropriate steps to relieve the distress.

[67] The NSE is free to enact department policies to assist its staff in performing their duties under the Act. A policy is not the same as a regulation, which the Act

expressly provides for at section 39. There are no regulations enacted pursuant to the *Animal Protection Act* at this time. Policies are not legislative enactments and there is no provision in the Act to authorize policies as having binding legal effect. I agree with Fichaud J.A.'s characterization of non-binding policies in *Jivalian v Nova Scotia (Department of Community Services)*, 2013 NSCA 2 at para 31, where he said for the Court:

> It may be administratively convenient that the Department of Community Services operate with consistent standards, termed "policies". But those Policies are not legislative instruments, and have no legal effect, either before the Board or in court. The legal issues on this appeal should be determined based on the interpretation of the Act and Regulations, not the Policies.

[68] It is important to remember that a non-binding policy should not fetter the authority granted in the Act itself. Similarly, it would be an error to interpret a policy in a way that results in fettered discretion (*Maple Lodge Farms Ltd v Government of Canada*, [1982] 2 SCR 2, para 6; see also *Vavilov* at para 130).

The Board's decision

[69] I have set out a few of the relevant paragraphs of the Board's decision as follows:

> The Board heard no evidence that any animals were in such a state that they needed to be seized immediately. Rather, the Board understands that the Department believes Mr. Tynes and Ms. Piling had a pattern of permitting or causing distress to animals.

> The Department has a Policy on the Seizure of Farm animals. It is set out at pages 294 – 300 of Exhibit 1. The section on what constitutes a pattern of permitting or causing distress to animals indicates that there must be a documented history of three or more warnings and/or notices related to inspections from an initial complaint, regardless of the species involved at each follow-up inspection.
>
> In the case at hand, the Board believes that the Department has not complied with its own Policy. Specifically, it did not provide three warnings or notices. At best, it had provided one notice dated June 4, 2019. However, that notice was not actually delivered until June 6, 2019, and Mr. Tynes understood he had until June 21st to address the notice. The Department, however, arrived on June 19th and made the decision to seize the animals. Clearly, the Department did not give three notices to Mr. Tynes or Ms. Piling.
>
> …
>
> As the Department is not in compliance with its own policy, the seizure was not reasonable and was not justified.

[70] The decision goes on to say it was not necessary to determine whether it was appropriate that NSE elected to permanently seize the animals, given its finding on the first question. The Board's decision does not assess whether Mr. Tynes is a fit owner, although the final paragraph of the decision notes that once the animals are returned to Mr. Tynes, "it might be in the best interests of the animals, and perhaps Mr. Tynes as well" if they are rehomed.

[71] The Board considered various documents which were reproduced for this judicial review in the Record. The Board also considered two audio recordings that were not reproduced in the Record. The reasons refer to the fact that NSE attended the Property in February 2017 after receiving a complaint about "dead goats under

a tarp". Curiously, the reasons then go on to state, "The matter was then quiet from 2017 to 2018." The reasons do not refer to any other interaction between Mr. Tynes and NSE in 2017. The reasons do not refer to the fact that a llama was found in critical distress and had to be euthanized in May of that year, nor do they refer to the five notices Mr. Tynes received in 2017. The reasons do refer to the charges laid in March 2018 and also detail the various interactions between NSE and Mr. Tynes in 2019. The reasons indicate NSE issued notices to Mr. Tynes and Ms. Pilling both on June 2 and June 4.

[72] The Board found only one notice had been delivered to Mr. Tynes. That notice was dated June 4, which was the date of the visit to the Property. The Record indicates that on June 4, the Inspectors gave Mr. Tynes a verbal notice, which was then reduced to writing and hand delivered on June 6 (albeit to Ms. Pilling). This is acceptable pursuant to section 18C of the Act, which provides verbal notices constitute notices if they are provided in writing as soon as possible. The decision does not state why the Board did not consider either the five notices from 2017 nor the June 2, 2019 notice. There is nothing in the Record, the decision, or the submissions before me to indicate Mr. Tynes did not receive all seven notices.

[73] The Board found Mr. Tynes believed he had until June 21 to rectify the issues flagged in the June 4 notice. Neither the reasons nor the Record indicate why this was his belief or whether it was a reasonably-held belief. The June 4 notice indicates that maintaining adequate food and water for all animals was ongoing. All the other directives were to be complied with by June 17 and a follow-up inspection would occur on or about June 18. The follow-up inspection did occur on June 19. There is nothing in the Inspectors notes or elsewhere in the Record to indicate Mr. Tynes had until June 21 to address the notice.

[74] Having reviewed the totality of the notices issued to Mr. Tynes, certain trends of behaviour appear to emerge. In nearly every notice issued, Mr. Tynes was directed to ensure adequate food was provided. On numerous occasions, animals were found on his Property with low body condition scores, which is to say they were too thin. Adequate food, water, and dry bedding were also repeat problems for Mr. Tynes. Since his first encounter with NSE in 2017, Mr. Tynes had every opportunity to ensure his animals were adequately fed and well taken care of.

[75] I find the Board's claim that it heard "no evidence that any animals were in such a state that they needed to be seized immediately" troubling. This misconstrues the broad and permissive powers delegated to inspectors seizing animals. The threshold for triggering section 23 is whether an animal is found in

distress according to the Act; it is not necessary to assess the degree of distress. There is nothing in the decision or the Record to indicate that animals were not found in distress on June 19; in fact, twelve animals were found to be in distress by the Inspectors and veterinarian that day, mainly due to their low body condition scores. If the Inspector determines that a pattern of causing or permitting distress has occurred, then there is no need to allow the owner to relieve the distress immediately. There is no further threshold necessary to meet to enable the seizure powers under section 23.

[76] As noted in *Vavilov*, the facts themselves can also act as a constraint on the decision maker's authority. Based on the uncontroverted facts before me in the Record, and the facts that the Board apparently relied on, the decision reached by the Board is not a reasonable one. Moreover, based on my review of the reasons provided by the Board in this case and the statutory and common law context, I believe the Board interpreted the Policy in a way that fetters the Minister's discretion (or in this case, the authority delegated to the Inspectors and other individuals acting pursuant to the Act).

Was the Board's decision reasonable?

[77] In my view, the Board's decision is not reasonable for three main reasons.

[78] First, it was incumbent on the Board to determine whether Mr. Tynes was a fit owner before ordering the animals be returned to him. The Court of Appeal in *Rocky Top Farms* made it clear that (a) the Act is not concerned with the owner's rights; (b) whether the seizure breached statutory limits is one factor in determining whether the seizure was reasonable; and (c) the fitness of the owner must be determined before deciding the ultimate question of whether the animals should be returned. Though it was not necessary for the Board's decision to expressly reference this jurisprudence, the reasons should show that these principles were followed. Having assessed the Board's reasons and the Record, I cannot conclude that the Board properly followed the binding case law from the Nova Scotia Court of Appeal as I have discussed above. The Board did not determine Mr. Tynes's fitness before ordering the animals be returned to him.

[79] Second, though it was proper to consider the Policy, the Policy should not be elevated to binding legal status and it should not be interpreted in a way that fetters Ministerial discretion. The Board concluded that because NSE did not comply with the Policy, then the subsequent seizure was unreasonable. However, the starting position should be the Act itself. The Act enables inspectors to seize animals that are found in distress. The inspectors must give the owner the opportunity to rectify the distress as long as there has not been a pattern of such behaviour. I am not

certain it is appropriate to interpret the examples of "pattern" in the Policy as being a closed list without a more fulsome statutory interpretation analysis. More importantly, failing to adhere to the Policy is one factor to be considered when deciding whether the seizure was reasonable.

[80] Third, I do not wade into the Board's findings of fact lightly but there are certain evidentiary concerns that are raised by the Board's decision. The Board's reasons do not indicate why the previous five notices from 2017 were not considered a part of a pattern, under the Policy or otherwise. There is no indication in the Act or the Policy of what might wipe the slate clean. Maybe in some cases it will be appropriate to say a period of no animals being found in distress can end a pattern of mistreatment. I make no findings as to whether and when it would be appropriate. That may be a question the Board will seek to decide when this matter is remitted for redetermination. It is possible that the Board did not give weight to the number of notices because they defined pattern more narrowly or because they had credibility concerns. However, this is a gap in the reasoning that I am not permitted to fill with my own speculation.

[81] I am not satisfied the Board's decision demonstrates a coherent line of reasoning that is absent any fatal flaws (*Vavilov*, para 102). I am not satisfied the Board gave proper consideration to the various factual and legal constraints

relevant in this matter. Specifically, the Board's reasons are not in keeping with the binding Court of Appeal decisions in *Rocky Top Farm* and *Brennan*. The Board also mischaracterizes the NSE Policy, resulting in improperly fettered discretion. Based on the uncontroverted evidence in the Record, seven notices were issued to Mr. Tynes over a three-year period, yet the Board only finds one notice was issued. The Board's conclusion, relying on the Policy as it did, cannot be supported by this evidence.

CONCLUSION

[82] In conclusion, I grant the judicial review. I find the Board's decision was unreasonable and the order to return the seized animals to Mr. Tynes is quashed. This matter will be remitted back to the Animal Cruelty Appeal Board for redetermination, considering the following directions:

- The Board must answer the question of Mr. Tynes's overall fitness to own the animals before it decides the ultimate issue of whether the animals should be returned. The Board must also follow *Rocky Top Farm* and *Brennan* and assess whether the seizure breached statutory requirements as one factor in determining whether the animals should be returned.

- Whether or not the Policy is relied on, it should not be interpreted in a way that fetters Ministerial discretion.

- The Board must consider the whole chronology of evidence in the Record, specifically incidents between NSE and Mr. Tynes in 2017. If the Board concludes the incidents in 2017 do not create or contribute to a pattern, these findings should be express.

[83] I reiterate what our Court of Appeal held in *Rocky Top Farm* - the *Animal Protection Act* has a single purpose: "to provide for the protection and aid of animals who have been neglected by those who are charged with their proper care" (para 54). While animals, such as pets and livestock, are owned by humans as property, and are thus subject to certain property rights regimes, we as a society recognize that this type of property is not the same as a table or chair. Animals are living, breathing beings. They can feel pain, fear, cold, and hunger. If the animals that we care for are neglected, such as by inadequate food or shelter, they are likely to get sick or even perish. There is a reason we do not have statutes that aim to protect tables and chairs from being harmed by their owners.

[84] Overseeing a farm with so many animals of varying breeds requires constant effort. Food, water, and bedding must be monitored daily. Manure must be cleaned out regularly, even in the winter. Animals continually grow fur and hooves and teeth and because they are domesticated, they are not able to moderate these things easily on their own. The seasonal swing in Nova Scotia is drastic and housing for animals must account for both extreme cold and extreme heat. Sometimes more advanced care is required and medicine must be administered. Maintaining strong relationships with veterinarians is essential which, in part, requires paying vet bills when they become due. Animal ownership is often time consuming, difficult, and

expensive. These are among the responsibilities one volunteers to uphold when one decides to own animals in Nova Scotia.

[85] I will leave the matter of costs to the parties to decide between themselves. Failing that, they may provide me with written submissions within 60 days of the date this decision is released.

Glen G. McDougall, J.