SUPREME COURT OF NOVA SCOTIA
Citation: *Brennan v. Nova Scotia (Agriculture)*, 2015 NSSC 361

Date: 20151218
Docket: *Hfx* , No. 442775
Registry: Halifax

Between:

Annette Brennan

Applicant

v.

Minister of Agriculture

Respondent

Judge: The Honourable Justice Michael J. Wood

Heard: November 25, 2015 in Halifax, Nova Scotia

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

By the Court:

[1] The saga of Annette Brennan and her Newfoundland ponies started four years ago. Ms. Brennan's dealings with inspectors from the Nova Scotia Department of Agriculture culminated in December 2014 when five of the ponies were seized pursuant to the authority found in the *Animal Protection Act*, 2008 S.N.S., c.33.

[2] The inspector who seized the ponies decided that they should not be returned and Ms. Brennan requested that the Minister of Agriculture review this decision in accordance with the *Animal Protection Act*. That review was delegated to the Deputy Minister who decided not to return the animals to Ms. Brennan. Ms. Brennan was not satisfied with the decision and sought judicial review which I granted in a decision released on June 10, 2015 (*Brennan v. Nova Scotia (Minister of Agriculture)* 2015 NSSC 171)(the "first judicial review").

[3] In the first judicial review I remitted the matter to the Minister for further consideration. Once more it was delegated to the Deputy Minister whose further review decision was issued on June 24, 2015. The Deputy Minister again concluded that the ponies should not be returned to Ms. Brennan. Ms. Brennan has sought judicial review of that decision.

History of the Ministerial Review

[4] On December 19, 2014 Ms. Brennan was given notice that the five ponies seized would not be returned to her as a result of the inspector's opinion that she was not a fit person to care for them. The authority to make this decision is found in s.26(5) of the *Animal Protection Act*. In accordance with s.26(7)(b) of the *Act* Ms. Brennan requested that the Minister review this decision. In her written submissions to the Minister Ms. Brennan disputed that she was not fit to care for the ponies and provided additional evidence in support of that position. She also argued that s.23(2) of the *Act* required the inspectors to give her an opportunity to alleviate the animals' distress prior to any seizure taking place. In support of that position she relied on the decision of this Court in *Rocky Top Farm v. Nova Scotia (Agriculture)* 2015 NSSC 21 in which Moir, J. said:

> The power to seize an animal is in s.23(1) of the *Animal Protection Act*. That power is expressly limited by s. 23(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.
>
> This is prerequisite to seizure.

[5] In the Deputy Minister's review decision issued on March 10, 2015 he concluded that the inspector's seizure of the animals was correct and refused to return the ponies to Ms. Brennan. He said there was no requirement to provide Ms. Brennan with an opportunity to alleviate the distress prior to seizure in the circumstances.

[6] In the first judicial review I concluded the Deputy Minister's decision was not in accord with the requirements of the *Act* as interpreted in *Rocky Top Farms*. Among other things, I found the Deputy Minister was wrong in concluding that the *Act* did not require an inspector to endeavour to obtain the owner's cooperation to relieve distress prior to seizure. In addition, I said his review was too narrow and did not properly consider the issue of whether the animals should be returned to Ms. Brennan. The first judicial review resulted in the Deputy Minister's decision being set aside and the matter returned to the Minister for further consideration under s.26(7) of the *Act*.

[7] On June 24, 2015 the Deputy Minister issued what was described as a "further review" pursuant to the *Act*. In it the Deputy Minister outlined his approach and his interpretation of the first judicial review in the following passage:

> By written decision dated June 10, 2015, the Honourable Justice Wood found that I was wrong in my formulation of the questions to be decided on my review and wrong in my interpretation of Section 23 of the *Act*. In particular, Justice Wood found that my review under subsection 26(7) of the *Act* should not be limited to the correctness of the seizure decision itself and whether Ms. Brennan was fit to care for the five ponies that were seized. It should be described as a fresh and broad consideration of whether the animals should be returned to her. On those findings, Justice Wood allowed the judicial review and returned the matter to the Minister for a further review under subsection 26(7) of the *Act*. This further review does not require me to reconsider the interpretation of Section 23 of the *Act* in accordance with Justice Wood's decision.

> On behalf of the Minister, I am pleased to provide the following further review providing my fresh assessment on the issue of whether the 5 animals that were seized ought to be returned to Ms. Brennan.

[8] The Deputy Minister made no further comment concerning the inspector's decision to seize the ponies and whether it was in contravention of s.23(2) of the *Act* as argued by Ms. Brennan. He summarized the evidence with respect to Ms. Brennan's history with the department and her ability to care for the animals. He also reviewed and commented on the evidence filed by Ms. Brennan in support of her review request. The Deputy Minister's conclusion is found in the following extract from his decision:

> On December 19, 2014, Provincial Inspectors conducted a thorough investigation of Ms. Brennan's premises and the herd of ponies that were onsite and determined the ponies were underweight and malnourished and therefore in distress. The conclusions made in Dr. Scanlan's subsequent report supports the Inspectors' plan to relieve the distress by seizing 5 of the ponies in the most need.
>
> Based upon my fresh and independent review of the evidence, I am satisfied that these 5 ponies should not be returned to Ms. Brennan. My opinion, as outlined above, is based upon the evidence that clearly demonstrates that despite many opportunities to improve the care of her larger herd of animals, Ms. Brennan failed to make any sustained long-term improvements. She was given multiple written directives over a three year period, was provided with Codes of Practice on how to care for her ponies, as well as advice on nutrition and general management from inspectors and her own private veterinary practitioner. Ms. Brennan's actions have clearly demonstrated to me that she does not have the ability to act on the information and directives she has been provided with to provide proper long-term care and avoid distress to this larger group of animals. All of the evidence taken together satisfies me that these 5 ponies should not be returned to Ms. Brennan.

The Current Judicial Review

[9] The thrust of Ms. Brennan's argument on this judicial review was the failure of the Deputy Minister to address the seizure decision. She said the validity of the initial decision to seize the ponies was a relevant consideration that should have been taken into account. She also argued that the seizure was illegal and therefore the decision not to return the animals cannot stand.

[10] In response the Deputy Minister argues that the decision not to return the ponies was reasonable, particularly given the broad purpose and scope of animal protection statutes. He rejects the suggestion that the validity of the seizure should dominate the review and override a consideration of the fitness of Ms. Brennan to care for the animals.

[11] The standard of review which I must apply to the Deputy Minister's decision is reasonableness. Clearly a decision of the Minister of Agriculture (or their delegate) about whether to return animals seized from an owner must be given deference. In the first judicial review a standard of correctness was applied to the Deputy Minister's interpretation of the *Act*. That does not apply here because the Deputy Minister did not purport to interpret or reinterpret the legislation in the decision under review.

[12] As discussed in *Rocky Top,* and the first judicial review decision, a Ministerial review under s.26(7) of the *Act* is intended to be a broad consideration about whether to return the seized animals. It should take into account all of the circumstances as well as any new information provided by the owner which was not available to the inspectors. The legislation does not limit the factors which may be considered which could include the appropriateness of the initial seizure by inspectors.

[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.

[14] Clearly the process used on seizure is part of what the Minister can consider on a review, particularly if it is raised by the owner as part of their submissions concerning why the animals should be returned. That was certainly the view of Justice Moir in *Rocky Top* when he made the following comments at para. 126:

> The seizure was unlawful. The finding to the contrary is untenable. While the obligation belonged to the inspector, not the Minister, what was the Minister to do when confronted with a review of a decision not to return animals

> illegally seized? At least, he might have given explicit consideration to Mr. Millett's evidence about how Rocky Top Farm could improve conditions.

[15] In that case the Deputy Minister never considered the owner's evidence about his ability to care for the animals. The result of the unlawful seizure was not that the animals should be automatically returned, but rather the Minister should have explicitly considered the owner's fitness.

[16] In this case we have the opposite situation; the Deputy Minister considered only Ms. Brennan's ability to care for the ponies and ignored the initial seizure. This is surprising since the lawfulness of the inspector's actions was one of the primary issues raised by Ms. Brennan in her request for review. It was also the focus of the Deputy Minister's first review. Despite this, I am not prepared to set aside the Deputy Minister's decision.

[17] An administrative decision maker is not required to deal with every argument raised before them and failure to do so does not automatically mean that the decision will be set aside. This should only take place where the decision is unreasonable because it falls outside the range of acceptable outcomes taking the entire circumstances into account (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62* at para. 16-17).

[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.

[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.

Wood, J.