SUPREME COURT OF NOVA SCOTIA

Citation: *Rocky Top Farm v. Nova Scotia (Agriculture)*, 2015 NSSC 21

Date: 20150121
Docket: *Hfx* No. 427930
Registry: Halifax

2015 NSSC 21 (CanLII)

Between:

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

Applicant

v.

Nova Scotia (Minister of Agriculture)

Respondent

Library Heading

Judge: The Honourable Justice Gerald R. P Moir

Heard: September 11, 2014, in Halifax, Nova Scotia

Subject: Judicial Review; Decisions made on administrative review; *Animal Protection Act*, return of seized animals.

Summary: An inspector decided to seize farm animals and determined not to return them. She failed to give the farmers an opportunity to propose an alternative, although the statute required as much. The statute provided for review. The Deputy Minister of Agriculture decided that the inspector had acted reasonably. He did not exercise his own judgment.

Issues: Standard of Review on Reviewing Officer's Role, and on his fact-finding; Application of standard to decision.

Result: The Deputy Minister's role on review had to be determined correctly. His role was to assess new and old evidence and exercise an independent judgment. Also, his finding that the inspector had sought the cooperation of the farmers was unreasonable.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

2015 NSSC 21 (CanLII)

SUPREME COURT OF NOVA SCOTIA

Citation: *Rocky Top Farm v. Nova Scotia (Agriculture)*, 2015 NSSC 21

Date: 20150121
Docket: Hfx No. 427930
Registry: Halifax

Between:

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

Applicant

v.

Nova Scotia (Minister of Agriculture)

Respondent

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: September 11, 2014, in Halifax, Nova Scotia

Counsel: John T. Shanks and Ian J. Breneman, for the Applicant
Sean Foreman, for the Respondent

Moir J.:

Introduction

[1] Last winter, inspectors from the Department of Agriculture seized a herd of cattle from Rocky Top Farm in New Ross. One of the inspectors determined not to return the herd, and gave a notice to that effect under the *Animal Protection Act*. A proprietor of the farm exercised his statutory right to have the Minister of Agriculture review the inspector's decision.

[2] The Minister delegated the review to the Deputy Minister, who stood by the inspector's decision. The herd was sold by the Department. The proprietor applied for judicial review of the Deputy Minister's decision.

[3] This judicial review requires the court to look into a farmer's statutory right to be consulted before seizure and into the role of the Minister on his review. I will summarize the record, focusing especially on information about consultation or lack of consultation. Then, I will discuss a summary written by the Provincial Inspector for the Deputy. Then, I will discuss the Deputy Minister's decision.

2015 NSSC 21 (CanLII)

[4] The next step is to determine the standard of review on the various questions raised by the facts. Finally, I must assess the Deputy Minister's review at the applicable standards.

2015 NSSC 21 (CanLII)

Seizure and Decision to Keep

[5] Rocky Top Farm operates at New Ross in Lunenburg County. It has been in operation for fifty years and the current operators are the applicant, Nelson Millett, his wife, Isabel Hackney, and his father, Lloyd Millett. They also have one employee.

[6] The farm markets eggs, beef cattle, poultry, sheep, and pigs. Most of the operation is on farmland owned by the Millett family. However, the operators also lease lands at Fraxville Road where there is a barn and about twenty acres of pasture. It is used to pasture beef cattle.

[7] We had a severe winter last year. Late in January, inspectors from the provincial Department of Agriculture went to the Fraxville Road pasture. They had received a complaint that the cattle lacked food, water, and shelter.

[8] The inspectors made inquiries at a house on the property. They told a resident "we were on the property to inspect the cattle under the *Animal Protection*

Act." The resident told them that Mr. Lloyd Millett may own the cattle. He had been in the pasture the day before. The inspectors did not, then, seek out any of the Millett family. Rather, they went to the barn.

[9] Inside the barn, the inspectors found a small pen holding two cows and their two calves. They had no hay or water. The cows were either "very thin" or "emaciated". One calf appeared well, the other cold and lethargic.

[10] In the pasture, the inspectors found a herd of about twenty-five cows and a couple bulls. One calf lay splayed on the ground. It was emaciated and unresponsive. A cow lay dead and frozen. The rest were standing further back in the pasture, with no hay or water visible to the inspectors.

[11] The inspectors called in a local veterinarian. On examination of the cows and calves in the barn, he recommended euthanasia or removal. He found the downed calf in the pasture to be in critical distress and recommended euthanasia then and there, which one of the inspectors authorized.

[12] The veterinarian thought that most of the herd showed signs of malnutrition, dehydration, and internal parasites. He saw no fresh hay. The animals appeared not to have sufficient water. A few days later, the veterinarian wrote:

2015 NSSC 21 (CanLII)

> When asked for my opinion of the herd, I considered their future to be no better than those individuals found earlier in the barn. There being the total lack of feed, evidence of infrequent feeding, the total lack of water, the total lack of shelter and the predominately emaciated and weakened state of the herd, it was concluded that they be removed to a situation where they could receive proper care or be euthanized to alleviate any further suffering.

2015 NSSC 21 (CanLII)

[13] The inspectors arranged for transportation. The veterinarian remained to assist when the herd was to be moved onto trucks. The inspectors called in the RCMP "to attend the site during the seizure".

[14] The Deputy Minister's decision includes this finding:

> The inspectors made several attempts over two hours to determine ownership of the herd and obtain his/her cooperation in relieving the distress of this herd, without success.

However, the lead inspector prepared a lengthy and detailed report on the day of the seizure and nowhere suggested the inspectors had any intention to "obtain his/her cooperation in relieving the distress of this herd".

[15] This is important because s. 23(2) of the *Animal Protection Act* provides that, before seizing an animal, an inspector must "take reasonable steps to find the owner" and "endeavour to obtain the owner's co-operation to relieve the animal's distress". We need to look closely at the record of what the inspectors actually did.

[16] As already said, on their arrival the inspectors learned that Mr. Nelson Millett may be the owner of the herd. The lead inspector's report makes it clear that at least one of the inspectors knew the Millett family. No effort was made to contact the Millett family until four hours after the inspectors arrived at Fraxville Road, when the seizure had been decided upon and organized.

2015 NSSC 21 (CanLII)

[17] I must reproduce substantial parts of the lead inspector's report about contact with the Millett family. The first contact was with Lloyd Millett:

> Constables Fleck and Caldwell arrived at 382 Fraxville Road at approximately 2:30pm. Constable Fleck drove me to Lloyd Millett's house on Will Turner Road arriving at 2:40 pm. Lloyd came to the door, and I reminded Lloyd of my name. I asked if he owned the cattle at 382 Fraxville Road, he became very upset and said I was the one who lied to him before. I asked him again if he owned the cattle at 382 Fraxville Road, he continued shouting at me. Constable Fleck asked Mr. Lloyd Millett to answer my question and Mr. Lloyd Millett said 'go ask Nelson, they are mostly his'.

So, the inspectors had information in mid-morning that "Lloyd Millett might own the cattle", they took no further step to find the owners until mid-afternoon, and they then received information that the herd was owned "mostly" by Nelson Millett. Whether they inquired about "mostly" is not recorded. It could have referred to the number of animals or the proportion of interests in the proprietorship.

[18] The report continues:

> We went to Nelson Millett and Isabel Hackney's house on Will Turner Road. Isabel answered my knock at the door. I introduced myself and asked for Nelson. Isabel asked several questions about why I wanted to talk to him, was there a complaint and why were the RCMP with me. I asked if she owned the cattle at 382 Fraxville Road and she said she would not answer my questions. I asked again to speak to Nelson. Constable Fleck asked Isabel to get Nelson for me. Isabel shut the door. I could hear footsteps and voices but no one returned to the door. After about 3 minutes, I knocked again. No one answered the door. I put a business card in the door and we returned to 382 Fraxville Road.

2015 NSSC 21 (CanLII)

There is no suggestion that the Milletts were told the inspectors were seeking cooperation for relieving the distress of the herd. The presence of police suggests something quite different, a criminal investigation under the *Animal Protection Act*, the *Criminal Code*, or both. As will be seen, that was exactly what was going on and all that was going on.

[19] The seizure began. Mr. Millett and Ms. Hackney came to the site:

> Nelson Millett and Isabel Hackney arrived at 382 Fraxville Road. I asked Isabel if she owned the cattle on the property and she refused to answer me. I asked Nelson if he owned the cattle in the barn and on the pasture and he refused to answer me. Isabel asked several questions about the situation and I told her I could not discuss the cattle with anyone until I established ownership. I asked Isabel again if she owned the cattle. She would not answer. Nelson moved to the truck to look at the calf carcass. I closed the truck body cover and told Nelson that he could not look at the carcass as I had not established ownership of the animal.

[20] The next part of the report makes it obvious that the lead inspector's mind was not on her duty to endeavour to obtain the owner's cooperation to relieve the herd's distress. "Nelson and Isabel asked several questions. I refused to answer

their questions and repeated my question about ownership of the cattle." Why not tell them the inspectors knew they were the owners and were obliged to seek their cooperation for an alternative to seizure? The answer to this question is found in the next passage of the lead inspector's report:

> Late in the afternoon, when asked again if he owned the cattle in the barn and on the pasture, Nelson Millett said 'yes, I do'. I read Nelson the *Charter of Rights* which is taped into my Investigation Notebook. He said he understood the *Charter* and he had no questions. I told him he may be facing charges under the *Animal Protection Act*. At this point, Nelson walked away. William Feltmate and Constable Fleck witnessed this conversation.

The inquiries about ownership were to advance a criminal investigation, not to endeavour to obtain the cooperation of the owner.

[21] Any question of the inspectors' motivation for seeking out the Millett family disappears from rational inquiry when one reads the next passage:

> After a few minutes I told Nelson I had some questions. Isabel asked if the answers would be used in the investigation and I confirmed they would. I asked Nelson if he would tell me his routine for feeding the cattle, how much hay was fed, how often were the cattle fed and when did he last feed the cattle. It was important that I get the information from the owner to understand the full picture. Nelson replied he fed, watered and cared for his cattle and he walked away again.

Note that the questions are all about the past and have nothing to do with prospective relief of distress. Do you have fresh hay on hand? Can you get water

2015 NSSC 21 (CanLII)

delivered? Can you make water sources at the pasture more accessible? Can you give the herd shelter at the main part of the farm?

2015 NSSC 21 (CanLII)

[22] The animals were taken away by 9:30 at night and the inspectors left at 10:15. In the meantime, Mr. Millett was given a formal notice:

> The livestock trailers left at approximately 9:30 pm. I wrote out a Seizure of Animal(s) Notice. I read the Notice to Nelson as best I could in the dim light. I told Nelson the information for an appeal about the seizure and the contact information was on the Seizure of Animal(s) Notice. Nelson said he was aware of that. And I responded that yes, it was the same as in the previous seizure. He had no questions.

Not one word about cooperation to relieve distress.

[23] Veterinarians examined and tested the animals after they were in provincial custody. None showed signs of disease or illness. All were responsive. Several were thin or very thin. On a body condition scale of 1 (emaciated) to 5 (obese), the herd scored 2 against the ideal of 3. Thirteen of the herd were under 2, eight were in acceptable condition. None were obese. The veterinarians concluded "the herd is underweight and exhibit significant ill thrift".

[24] The notice served on him when the seizure was underway told Mr. Millett that the inspector had decided not to return the animals and that he could request a review of that decision. Subsection 26(7)(b) of the *Animal Protection Act* permits

the owner of seized animals to request a review by the Minister of the decision of "the Provincial Inspector, another inspector or another person" deciding "that an animal will not be returned". In that event, the Minister "shall retain custody of the animal until a review decision has been made": s. 26(9). Mr. Millett requested a review, and he supplied an affidavit giving his side of the story and explaining what could be done to feed, water, and shelter the herd if it was returned to Rocky Top Farm.

2015 NSSC 21 (CanLII)

Departmental Summary

[25] The Minister instructed the Acting Provincial Inspector to provide a response to Mr. Millett's request for a review. This official concluded, "The appropriate procedures were followed".

[26] After setting out her understanding of the facts, the Provincial Inspector wrote:

> The inspectors did follow the procedures set out in the Act. Under subsection 23(1) of the Act, Mr. Millett, as the owner of the cattle, was required to take "immediate appropriate steps to relive [*sic*] … distress". Because of Mr. Millett's refusal to verify ownership of the cattle for over 2 hours, he did not immediately take appropriate steps to relieve the distress to the animals and, because of this, as authorized by subsection 23(1), where the 'owner or person in charge of the animal does not immediately take appropriate steps to relieve the distress" the inspectors may "take such action considered necessary to relieve the distress", which included "taking custody of the animal(s)" and "arranging for necessary transportation, food, water, care, shelter and medical treatment" and "delivering the animals to a suitable caretaker". This is what the inspectors did.

Note the absence of any reference to the inspectors' obligations under s. 23(2). No one in the department seems to have paid any attention to the Millett family's right to be consulted for alternatives to seizure until after counsel drew this to the Deputy Minister's attention.

2015 NSSC 21 (CanLII)

Mr. Millett's Evidence

[27] Through counsel, Mr. Millett provided the Minister with a brief in response to the Acting Provincial Inspector's report, and he submitted his affidavit. The brief included:

> Mr. Millett was not provided with any information relating to the specific reason for the seizure or nor was he provided the opportunity to remedy any of the identified defects in the care of the animals.

And:

> When Mr. Millett identified himself as the owner of the cattle after a brief and understandable delay given that he was confronted by Provincial officials and RCMP officers at his residence and he was seeking legal advice on the matter, he was still provided no opportunity to respond to the concerns of the Provincial inspectors and to prevent the seizure of the animals.

[28] As I said, the affidavit provided Mr. Millett's side of the story. His evidence differed, in some respects, from information in the inspector's report about her

interactions with Mr. Millett on the day of the seizure, but it also provided detailed evidence about past care for the herd, sources of water and hay at the pasture, habits of care, and alternatives for the immediate future.

2015 NSSC 21 (CanLII)

Minister's Decision

[29] The Minister delegated the statutory review to the Deputy Minister. The Deputy considered the summary by the Provincial Inspector, which appended the lead inspector's report, reports by veterinarians, the notice to Mr. Millett given by the lead inspector, and photographs and videos. He also considered the brief from Mr. Millett's lawyer "which attached sworn testimony of Mr. Millett and photographs and videos".

[30] The Deputy Minister framed the issue as "whether the decision by the Provincial Inspector [*sic*] to take custody of the animals was a reasonable one." (He means the inspectors who seized the animals and not the person holding the office of Provincial Inspector, who wrote the report.)

[31] The Deputy Minister generally summarized the reported observations at the barn and pasture and the veterinary recommendation of removal "to a situation where they could receive proper care" or mercy killing. He generally summarized

the results of examination and testing and the pathology reports on two calves, the one found dead in the pasture and another put to rest after seizure.

2015 NSSC 21 (CanLII)

[32] The Deputy Minister stated the Department's position as follows:

> The Nova Scotia Department of Agriculture Inspector operated within the law for animals in distress (Section 23(1)(a)-(e) and 23(2), 23(4)). The Inspector took reasonable steps to find the owner. The owner was absent and could not be found promptly; related parties were uncooperative and the owner refused to identify himself for a period of time. The Inspector determined that the animals were in distress and the only way to relieve the distress of the animals was to take custody of the herd.

He stated Mr. Millett's position as being:

> a. He was not provided with any information related to the specific reason for the seizure; and
>
> b. He was not given the opportunity to remedy any of the identified defects in the care of the animals and the decision to seize the cattle was made prior to any discussions with him and prior to any attempt to ascertain the ownership of the cattle.

He preferred the inspectors' version of events over that of Mr. Millett, but made no comment on Mr. Millett's evidence on subjects not known to the inspector.

[33] The Deputy Minister made this finding:

> I accept that Inspector Rankin took reasonable steps, over several attempts and two hours, to find the owner and obtain the owners cooperation in relieving the distress of this herd.

He went so far as to find that the seizure resulted from Mr. Millett's lack of cooperation:

> Consequently, and as a result of the owners' lack of cooperation, I find that the Inspector acted within her responsibilities under the Act. The actions taken by Inspector Rankin are supported by detailed notes taken as the situation was evolving and are corroborated by the report of Dr. McGowan. I find that Inspector Rankin was acting in the best interest of the animals to relieve their distress.

2015 NSSC 21 (CanLII)

And, "I conclude this lack of cooperation directly contributed to the action taken by the inspector who had a responsibility to act on the distress of the animals."

[34] In the course of rejecting much of the content of Mr. Millett's affidavit, the Deputy Minister stated, "Mr. Millett (and his wife) had more than a reasonable amount of time to confirm ownership and discuss a plan to relieve the distress of the animals." He does not explain how they were afforded an opportunity to discuss such a plan, when the inspector had said nothing about the subject.

[35] The Deputy Minister restated his findings about cooperation in the conclusion to his review. The inspector "took reasonable steps to confirm ownership and a plan to relieve the distress of the herd but was unsuccessful". "… Mr. Millett was given sufficient opportunity to participate in the process, but declined to do so."

> After ownership was confirmed, the evidence demonstrates that Mr. Millett refused to answer the inspector's questions regarding the care of the animals. Because of his refusal to verify ownership [of] the animals, I find Mr. Millett failed to take immediate appropriate steps to relieve the distress of the animals. As such, the inspector was authorized to take the actions she considered necessary to remove the distress, which I find to have been reasonable. I conclude that the removal of animals from the property to be taken to an indoor environment where they could be monitored, provided care and appropriate food and water was appropriate.

2015 NSSC 21 (CanLII)

The decision says nothing about Mr. Millett's evidence about care of the herd in future. It focuses entirely on the reasonableness of the decision to keep the herd as made at the time of seizure.

Positions of the Parties

[36] Mr. Millett says that:

> (a) the Deputy Minister applied a reasonableness standard of review, where he should have considered the matter *de novo*;
>
> (b) in ignoring the evidence of the Inspector and Mr. Millett, the Deputy Minister failed to recognize that the Applicant has not been afforded the opportunity to alleviate the alleged distress, thereby breaching both the Applicant's statutory rights and his rights to procedural fairness; and
>
> (c) the Deputy Minister's decision is substantively unreasonable, in that it addresses the reasonableness of the seizure, not Rocky Top Farm's fitness to care of the cattle, and in any event, is unreasonable in concluding that all of the cattle were under distress.

It is argued that the first and second of these subjects must be reviewed by this court without deference, at the standard of correctness. The standard of reasonableness applies on the third.

[37] The province argues that the standard of reasonableness applies to all subjects under review in this case. The province characterizes Mr. Millett's position on procedural fairness as requiring "exacting steps" for "timeliness and identification" before seizure. It says that the statutory requirement is for reasonable steps, which "should not require the parsing of timelines and proactive opportunities to now provide adequate shelter, food and medical care".

[38] The province says that the Deputy Minister's decision was reasonable on the merits. It says that he did not focus exclusively on the initial decision to seize the animals. He was conscious of "the dual nature of the review process", which is "to determine the reasonableness [of] the seizure of the animals and the decision to not return them to the owner." He considered "the prospective evidence provided by the Applicant, and rejected it."

[39] Mr. Millett characterizes the obligation to endeavour to obtain cooperation as going to both the substance of the Deputy's decision and procedural fairness. I propose to confront this question in the review of the decision. As will be seen, my review of the decision makes it unnecessary to determine the question about procedural fairness.

2015 NSSC 21 (CanLII)

Standard of Review on the Question of the Minister's Role on His Review

[40] Mr. Millett refers to *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 in support of his argument that the deputy's choice of a reasonableness standard for the review he conducted of the inspectors' decision is subject itself to review without deference, review at the standard of correctness.

2015 NSSC 21 (CanLII)

[41] *Alliance Pipeline Ltd.* reiterates that a full application of the *Dunsmuir* standard of review analysis is not necessary for certain categories of decision: para. 25. Justice Fish, with whom seven other members of the court concurred, described the categories this way at para. 26:

> Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

Mr. Millett says that the present question falls within the second correctness category, a question of general law that is both important to the legal system as a whole and outside the decision makers' special expertise.

[42] The government, on the other hand, relies on *British Columbia Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331, which applied the presumption favouring reasonableness when a tribunal interprets its home statute.

[43] *BCSPCA* involved an animal protection statute and a question similar to ours. The Farm Industry Review Board had determined what kind of appeal it was required to provide under the British Columbia *Prevention of Cruelty to Animals Act* on an appeal to that board from a decision of the SPCA to take custody of animals. As I said, the British Columbia Supreme Court applied the presumption for the reasonableness standard applicable to interpretation of a home statute. Alternatively, it held that the board's decision about its role on the appeal was correct.

2015 NSSC 21 (CanLII)

Presumptive Determination of Standard

[44] I have to take a close look at the categories and at the relationship between the categories and the "full" standard of review analysis. A recent series of Supreme Court of Canada decisions touches on these subjects.

[45] The series starts in 2011 with *Smith v. Alliance Pipeline Ltd*., the decision relied on by Mr. Millett, but the subjects of *Alliance Pipeline* received attention from the Court several times since then. The series includes *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, here referred to as *Canadian Human Rights Commission*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, here the *Alberta Teachers' Association* case; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, here *Rogers Communications*; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, here *McLean v. B.C. Securities Commission*, and; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, here *CNR v. Canada*.

[46] As I said, *Alliance Pipeline Ltd*. reiterated that the standard of review analysis is not necessary in certain categories of cases.

2015 NSSC 21 (CanLII)

[47] In *Canadian Human Rights Commission*, the federal Human Rights Commission had interpreted its home statute as giving the Commission power to award costs. Justices LeBel and Cromwell wrote for the Court. They said, at para. 22:

> [O]ur Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country.

However:

> … if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference. (para. 24)

The Court held that whether the Commission had power to award costs was not "a question of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*": *Canadian Human Rights Commission*, para. 27. The decision on the power to award costs was reviewed for its reasonableness.

[48] The *Alberta Teachers' Association* case saw Justice Rothstein writing for a majority of six. Justice Binnie, with whom Justice Deschamps concurred, and

2015 NSSC 21 (CanLII)

Justice Cromwell agreed with Justice Rothstein in the result. However, they disagreed with Justice Rothstein's proposal to establish a presumption in favour of the reasonableness standard for all cases involving a decision maker's interpretation of its home statute.

2015 NSSC 21 (CanLII)

[49] Several people complained that the Teachers' Association had published personal information about them in its newspaper. The Information and Privacy Commissioner delegated the inquiry to an arbitrator. The *Personal Information Protection Act* required that the inquiry be completed within ninety days unless the arbitrator gave notice otherwise. The arbitrator did not give notice within the ninety days. An order unfavourable to the Teachers' Association was issued two years after the complaint.

[50] The Teachers' Association successfully pursued judicial review before the Alberta Queen's Bench and the Alberta Court of Appeal on the basis "that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days": para. 3.

[51] According to Justice Rothstein, timeliness was "not a question of central importance to the legal system as a whole": para. 32. Rather, it was "specific to the administrative regime for the protection of personal information": also para.

32. He criticized the category of true jurisdictional issues and proposed restrictions on it. He then formulated a presumption for all cases in which a decision maker interprets its home statute: para. 39.

[52] The majority decision in *Alberta Teachers' Association* could be understood to apply the presumption about interpretation of the home statute to provisions in the statute defining the extent of, and limits on, the essential powers given by the legislature to the decision maker. Later decisions of the Supreme Court of Canada, and of the Nova Scotia Court of Appeal, show that there is still room for a full standard of review analysis when a decision maker interprets a provision in a home statute about the essential power, or task, given by the legislature to the decision maker.

[53] In *Coates v. Nova Scotia (Review Officer of Labour Board)*, 2013 NSCA 52 at para. 43, Justice Fichaud wrote "In *Dunsmuir* (para 59) and *Alberta Teachers' Association*, the Supreme Court of Canada rejected decisional jurisdiction - *i.e.* the notion that a judicially perceived 'incorrect' ruling early in the chain of reasoning necessarily deprives the tribunal of 'jurisdiction' to move to the next analytical link." This is repeated at para. 20 of *Delport Realty Ltd. v. Nova Scotia (Service and Municipal Relations)*, 2014 NSCA 35. These decisions suggest a distinction

2015 NSSC 21 (CanLII)

between the false notion of "decisional jurisdiction" and other questions of jurisdiction.

2015 NSSC 21 (CanLII)

[54] Supreme Court of Canada decisions after *Alberta Teachers' Association* also suggest distinctions between the kind of question in that case and other kinds of questions that could be described as jurisdictional.

[55] In *Rogers Communications*, Justice Rothstein had the opportunity to restate the core reasons of *Alberta Teachers' Association*:

> … the Court held that "[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness." By setting up a specialized tribunal to determine certain issues the legislature is presumed to have recognized superior expertise in that body in respect of issues arising under its home statute or a closely related statute, warranting judicial review for reasonableness. (para. 11)

[56] A circumstance that rebuts the presumption is that in which the tribunal and courts have to decide the same questions of law under the same statute, both having first instance jurisdiction under the statute. The *Copyright Act* was the statute at issue in *Rogers Communications*.

[57] Constitutional questions and questions of general law that are of central importance to the legal system and are outside the decision maker's expertise are also excepted: para. 16. *Dunsmuir* itself supplies those exceptions. Indeed,

Alberta Teachers' Association "simply reinforced the direction in *Dunsmuir* that issues that fall under the category of interpretation of the home statute … normally attract a deferential standard of review": para. 16 of *Rogers*.

2015 NSSC 21 (CanLII)

[58] The presumption was considered in *McLean v. B.C. Securities Commission*. The Commission had to determine the meaning of a time limit on quasi-criminal proceedings under the *Securities Act* of British Columbia. Its determination went on review and appeal. Writing for the majority, Justice Moldaver said at para. 22:

> The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions -- even when they involve the interpretation of a home statute -- warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications*… at para. 16).

[59] On true jurisdictional questions, Justice Moldaver referred to *Alberta Teachers' Association* and said "… the Court expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility" (para. 25). On general questions of law that are of central importance to the legal system and outside the decision maker's expertise, he said at para. 27:

> The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the

> administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

2015 NSSC 21 (CanLII)

[60] Last May, the Court published the decision in *CNR v. Canada*. Once again, Justice Rothstein wrote for the majority. He summarized the law on the presumption this way at para. 55 (citations omitted):

> It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction.

[61] I do not think that the categorical imposition of a correctness standard for "questions of general law" statutory interpretation about the role of the Minister on review of an inspector's decision to keep seized animals. Like the power to award costs in *Canadian Human Rights Commission*, the interpretation of the Minister's review or appeal power under the *Animal Protection Act* is not of central importance to the legal system as a whole. Like the question about loss of jurisdiction in the *Alberta Teachers' Association* case, the Minister's role on his review of an inspector's decision is specific to the administrative regime created by

the statute. Answering this question will not have an impact on the administration of justice as a whole (*McLean v. B.C. Securities Commission* and *Dunsmuir*) or on basic consistency in the fundamental legal order of our country (*McLean v. B.C. Securities Commission* and *Canadian Human Rights Commission*). Provisions for administrative appeal or review in other statutes will receive their own specific interpretations in the context of their specific appeal or review regime.

2015 NSSC 21 (CanLII)

[62] On the contrary, the question the Deputy Minister had to decide is within the category relied upon by the province. The kind of review or appeal the legislature required from the Minister or, on delegation, the Deputy Minister, is determined by interpretation of the home statute.

[63] That was the situation in *BCSPCA*, the decision relied on by the province. The legislation in that case allowed the SPCA to take custody of abandoned or distressed animals. It was required to review its decision on demand by the owner.

[64] The British Columbia legislation also set up an independent board to hear appeals by an owner from a review conducted by the SPCA. (Our statute has similar provisions for review by an independent board, but they have not yet been proclaimed.) In *BCSPCA*, such a board had determined to conduct the appeal other than as a "true appeal", not as a *de novo* proceeding, but in a way "not limited to

the record before the Society, but taking into account all relevant factors including any material changes that occurred during the appeal period": para. 25.

2015 NSSC 21 (CanLII)

[65] Justice Grauer referred to the presumption for a reasonableness standard when the home statute is being interpreted: para. 33. He said that "the presumption can be rebutted", but he seems to have confined rebuttal to cases in which a presumption favouring correctness applies: para. 34. He ruled them out:

> The [board's] decision concerning the nature of the appeal process under the PCAA did not entail questions of law of central importance to the legal system as a whole. What questions of law it considered were of importance only to it and the SPCA, in terms of defining their ongoing relationship. The decision did not concern jurisdictional lines between competing tribunals. The SPCA is not a competing tribunal, but is rather a subordinate decision-maker. And finally, the decision did not determine true questions of jurisdiction or vires. The [board's] jurisdiction, or vires, to hear the appeal was not in doubt. The question was one of process under the statute. (para. 35)

He concluded that the standard of reasonableness applies: para. 37.

[66] The statement at para. 35 of *BCSPCA*, "The [board's] jurisdiction … to hear the appeal was not in doubt", could be applied to the review presently at issue. Respectfully, that statement says little, unless "appeal", in our case "review", is given content.

[67] There are many kinds of appeal or review mandated by legislation. Some are restricted to a record, and the decision under appeal is reviewed on its own at a

standard expressly or impliedly prescribed. Others are *de novo*, and the initial decision is usually ignored. Some give weight to both the initial decision and new evidence. In those reviews, the status of the initial decision and the role of the reviewing court or tribunal is found, expressly or impliedly, in the statute.

[68] Respectfully, when the appellate tribunal decides what kind of review the legislature set for it, it does much more than to decide a question "of process under the statute" (para. 35). It decides on the core of the powers given to it by the statute.

[69] The question of deference to the Deputy Minister's interpretation of his "review" power forces us to ask about the strength or weakness of the presumption when a decision maker interprets the home statute and about the relationship between the presumption and the second step under *Dunsmuir*.

[70] The commentary in *Dunsmuir* on the categories suggests that those favouring a reasonableness standard are weaker than the others. On the presumption about the home statute, note the word "usually" in "Deference will usually result …": para. 54. See also, on questions of fact, discretion, policy, or intertwined questions of law and fact not readily separated "deference will usually

2015 NSSC 21 (CanLII)

apply automatically": para. 53, and; with expertise in the application of general law, "Deference may also be warranted": para. 54.

2015 NSSC 21 (CanLII)

[71] This compares with constitutional questions "are necessarily subject to correctness review": para. 58; true questions of jurisdiction "must also be correct": para. 59; on questions of general law that are both central to the legal system and outside expertise, the court "must also continue to substitute" its opinion: para. 60, and; cases determining jurisdictional lines between decision makers "have also been subject to review on a correctness basis", para. 61.

[72] Justice Rothstein did not intend in the *Alberta Teachers' Association* case to create an irrefutable presumption for cases of home statute interpretation. For him, the first phase of the *Dunsmuir* approach "provided guidance as to how a standard of review might be determined summarily": para. 44. "I would not wish to retreat to the application of a full standard of review analysis where it can be determined summarily": also para. 44. The notion that these are summary determinations is consistent with Justice Rothstein's reasons in *Rogers Communications* where the presumption in favour of reasonableness on questions of interpretation of the home statute was rebutted: para. 16.

[73] Thus, the presumption "is not carved in stone": *McLean v. B.C. Securities Commission*, para. 22. The presumptions favouring correctness prevail over it: para. 22, see also para. 55 of *CNR v. Canada*. Also, the standard of review analysis may itself be used to rebut the presumption: also para. 22.

[74] In light of these recent developments about the first step under *Dunsmuir*, it is helpful to reiterate what *Dunsmuir* said about its two steps at para. 62:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[75] In my opinion, the presumptions cannot determine the standard of review to be applied on judicial review of a ministerial review of an inspector's decision to keep custody of seized animals. As I said, the presumption about general questions of law does not apply. The present state of jurisprudence on true questions of jurisdiction makes that category unfruitful for use at the first step. However, the question, What kind of review or appeal is the (Deputy) Minister required to conduct?, comes close to what we usually consider jurisdictional.

[76] It is said that judicial review, and our approach to standard of review, follow from a polarity or tension between two constitutional principles, the principles of

2015 NSSC 21 (CanLII)

democracy and rule of law. See for example, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 40. It seems to me inconsistent with both principles to hold that a person who has been given statutory power can expand or restrict the power by reasonable misinterpretation.

2015 NSSC 21 (CanLII)

[77] I see the blandness of "true question of jurisdiction" and the danger of a categorical determination of the standard of review when the category is poorly defined. It is not for me to delineate the principle that distinguishes them, but there is a real difference between reviewing "What essentially does the legislature authorize, or require, me to do?" and "Have I lost jurisdiction because of a procedural misstep?" of the kind in the *Alberta Teachers' Association* case.

[78] In my opinion, the presumption favouring the reasonableness standard for interpretation of the home statute does not necessarily prevail when a decision maker interprets a provision defining the core power given to the decision maker. The standard remains to be set on the second step in *Dunsmuir*, the standard of review analysis.

Analytical Determination of Standard

[79] Mr. Millett's argument that correctness governs the Minister's approach to his role on his review relies on *Newton v. Criminal Trial Lawyers' Assn.*, 2010 ABCA 399. The Alberta Court of Appeal, with Justice Slatter providing the reasons, considered the judicial standard of review of an appellate tribunal's decision on its own standard of review in a scheme for police discipline and oversight.

2015 NSSC 21 (CanLII)

[80] Mr. Millett emphasizes one of the factors in para. 39 of *Newton*:

> However, the appropriate standard of review is a question of general interest to the legal system, and is therefore a question on which *Dunsmuir* would suggest a correctness standard.

Other factors considered by Justice Slatter were a statutory right of appeal to the courts, the absence of expertise in "setting of standards of review, a technical legal point in which courts have a considerable amount of experience", interpretation of the home statute, the decision maker's superior appreciation of its role in the administrative scheme, and "Setting the standard of review is a legitimate aspect of the superior court's supervisory role": para. 39. He also said, at para. 38:

> The standard of review that should be applied by an appellate administrative tribunal to the decisions of a tribunal of first instance should be categorized as a

> question of law. The correct answer depends in large part on the exact wording of the statute.

[81] Justice Slatter concluded that an appellate tribunal under the Alberta *Police Act* must be correct in the standard of review it applies "[w]hen all of these factors are considered": para. 39.

[82] The reasoning in *Newton* applied to the administrative appeal provisions of the Alberta *Police Act*. It cannot readily be transposed to other administrative appeal schemes. At para. 40, Justice Slatter summarized what we can take from *Newton* for cases like the one at hand:

> To summarize, the proper approach is as follows:
>
> > (a) the superior court should use the *Dunsmuir/Pushpanathan* analysis in determining what standard of review it will apply to the legal question of the appropriate standard of review to be used by the appellate tribunal. …
> >
> > (b) applying the four *Dunsmuir/Pushpanathan* factors will often result in the superior court applying a correctness standard of review to the selection by the appellate tribunal of the standard of review it will apply to the tribunal of first instance. Subject to the specific provisions of the statute, this is a part of the legitimate supervisory role of the superior court.

[83] Our Court of Appeal established a correctness standard for appeals of Utility and Review Board reviews of decisions on planning by municipal councils and planning officers: *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review*

2015 NSSC 21 (CanLII)

Board), 2006 NSCA 115. That case came before *Dunsmuir*, but it applied the four factor analysis as then prescribed by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. 46 and it has been followed consistently by the Court of Appeal since: *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corp.*, 2010 NSCA 38.

2015 NSSC 21 (CanLII)

[84] Chief Justice MacDonald provided the reasons in *Midtown Tavern & Grill Ltd.*, and they bear similarities to Justice Slatter's reasons in *Newton*. The Chief Justice recognized the nature of the question as one of law: para. 27. There was a right of appeal as to jurisdiction and questions of law (para. 29) and a privative clause on findings of fact (para. 30). The board had "expertise in various areas" (para. 31) but "questions involving standards of review are regular fare for this court" (para. 32). The purpose of the board's legislation was discussed at paras. 33 to 35.

[85] The Chief Justice concluded "… the Board had to be correct about the standard of review which it applied to Council's decision" (para. 36). Justice Fichaud put it pointedly in *Anglican Diocesan Centre* case at para. 23. The board should not engage in a standard of review analysis. "The Board should just do what the statute tells it to do."

[86] I think we can take from the Court of Appeal's treatment of the standard for Utility and Review Board reviews of municipal planning decisions something similar to the statement of the Alberta Court of Appeal at para. 40 of *Newton*: "the four … factors will often result in … a correctness standard of review to the selection by the appellate tribunal of the standard of review it will apply …".

2015 NSSC 21 (CanLII)

[87] With that background in mind, we must undertake the standard of review analysis freshly because no authority guides us on the standard for reviewing a Minister's review under the *Animal Protection Act*.

[88] We are required to consider the nature of the question under review.

[89] As in *Midtown Tavern & Grill Ltd.*, the question of the Minister's role is one of law. The *Animal Protection Act* does not expressly prescribe the relationship between the inspector's first instance decision and the Minister's review. Whether the Minister pays any attention to the inspector's decision, whether he owes deference to her reasons, or whether he is in one of the various middle grounds that may constitute an appeal or a review, is to be resolved on the statute and the principles of statutory interpretation. This tends towards a correctness standard.

[90] We are also required to consider the extent to which the legislature excludes or invites review, such as by privative or appeal provisions.

[91] The *Act* contains no privative clause and no right of appeal to the courts. However, judicial review under this statute is not entirely an uninvited intrusion justified only on constitutional grounds.

[92] Section 30A(1) allows the Minister to retain custody of a seized animal, or to sell the animal, "[w]here an application is made for judicial review of the actions taken by the inspector". If the Minister chooses to sell the animal, he must hold the proceeds in trust pending the outcome of the judicial review: s. 30A(2) and (3).

[93] Subsection 30A(4) also recognizes judicial review. It provides:

> The Minister may sell, give away or euthanize an animal that has been taken into custody under Section 23 if no application has been filed for judicial review by the required deadline.

This provision is not expressly limited to inspector's decisions. There is no express deadline in the statute for starting a judicial review application. "[T]he required deadline" could be a reference to the deadlines in s. 26 and 27 for requesting a review by the Minister or it could be a reference to Rule 7.05(1). In either case, s. 30A recognizes that judicial review may intrude into the statutory scheme for protecting animals, and it imposes a trust that aids the judicial review.

[94] A right of appeal would tend towards a correctness standard for judicial review on a question of law. Although this statute does not go that far, its express

2015 NSSC 21 (CanLII)

recognition of judicial review and its providing aids to such a review also tends towards a correctness standard.

[95] We are required to consider the expertise of the board.

[96] It may well be that the Minister has expertise in questions of animal welfare, but determining his role on review of the inspector's decision does not require much of that kind of expertise. As in *Midtown Tavern & Grill Ltd.*, questions involving standards of review are regular for this court. This tends towards the correctness standard.

[97] We must also consider the purposes of the statute under which the decision to be reviewed was made.

[98] The long title of the statute states its two general purpose: "An Act to Protect Animals and to Aid Animals that are in Distress". The first purpose is primarily achieved through the SPCA, whose purpose is "to provide effective means for the prevention of cruelty to animals": s. 5. Sections 4 to 20 cover that subject.

[99] Sections 21 to 33A concern distress. The legislative scheme is to find animals who are in distress and to relieve them by one of three means:

2015 NSSC 21 (CanLII)

- mercy killing, immediately or later
- securing the cooperation of the owner to relieve the distress
- seizing the animal, and selling it or giving it away.

In the requirement for endeavouring to secure the owner's cooperation and in the various review provisions, including the provisions for an appeal board that are not yet proclaimed, one sees another important legislative purpose: balancing the interests of the owner and the need to overcome distress.

[100] The scheme for achieving these purposes has inspectors in the field making on-the-spot decisions, no doubt often in difficult and pressing circumstances. However, the scheme includes, as I have already mentioned, an obligation to seek the owner's cooperation at first instance.

[101] In conclusion, the statute has two general purposes: prevention of cruelty to animals and relief of distress. Within the latter is another purpose: to balance the interests of the owner with the relief of distress.

[102] The prevention of cruelty and alleviation of distress purposes tend towards a reasonableness standard of review. Let the legislated system freely run its course

2015 NSSC 21 (CanLII)

so that animals do not suffer. However, the apparent purposes of also protecting the owner's interests and of balancing the two may tend towards correctness.

[103] In my opinion, the four considerations lead to a correctness standard for the Minister's determination of what may be called the standard for the Minister's review of the inspector's decision, but what I would prefer to call the Minister's role on statutory review of the inspector's decision.

2015 NSSC 21 (CanLII)

What to Call What the Minister Does

[104] Names are important. So, *Dunsmuir*, at para. 63, traded in the label derived from the writings of Professor John Willis, pragmatic and functional approach, for standard of review analysis. Seeing as the Minister's review of the inspector's decision does not engage the standard of review analysis, seeing as he must do just what the statute tells him to do (*Anglican Diocesan Centre*, para. 23) it may be misleading to say that the Deputy Minister decided what standard of review governed him.

[105] So, I characterize what the Deputy Minster decided as determining his role, i.e. answering the statutory interpretation question 'What role did the legislature give to me?'. I am, respectfully, of the view that the Deputy Minister answered that question wrongly.

Incorrect Determination

[106] The Deputy Minister explicitly determined that the legislation required him to decide whether the inspector's decision was reasonable. Implicitly but clearly, he decided that he was to make that decision based on the inspector's reasons, information available to the inspector at the time, but also information produced after that time. However, he implicitly decided he was not to provide an independent, fresh assessment of whether to keep the seized animals. For example, he gives reasons for accepting the inspector's evidence of events at the time of seizure but pays no attention to Mr. Millett's evidence of the farm's ability to care for the herd, of which the inspector knew nothing.

[107] The principle in *Rizzo v. Rizzo Shoes Ltd.*, [1998] S.C.J. 2 applies. This is a situation where the person reading the statute has to find the content of the role on review by considering the immediate text in light of the surrounding text, the legislative scheme, and the legislative purposes to which it relates.

[108] The owner's right to a review is provided by s. 26(7). The subject of the review is "the decision that an animal will not be returned". That decision is made under s. 26(5) after seizure. It can only be made when the inspector "is of the opinion, due to the animal's state or situation or previous actions of the owner, that

2015 NSSC 21 (CanLII)

the owner is not a fit person to care for the animal". Subsection 26(9) requires the Minister to "retain custody of the animal until a review decision has been made".

[109] The initial decision is made quickly. The subject, distress of an animal, demands this. And, the legislation recognizes it. It allows for immediate seizure when the owner "does not immediately take appropriate steps to relieve [the] distress" or when the owner "cannot be found promptly": s. 23(1)(a) and (b).

[110] The review decision is less hurried. Reasonable steps must be taken to find the owner: s. 26(5). If found, the owner must be notified of the inspector's decision and of the right to a review: s. 26(5)(a). The right of review may be exercised by the owner within three days of the notice. The statute sets no time limit for conducting or determining the review.

[111] The legislative review allows for timely reflection, after a decision necessarily made in haste.

[112] I have written of the statutory purposes in connection with the standard of review analysis. The purpose of balancing the need to relieve distress with the owner's interest, suggests a review in which the owner would have a better opportunity to make its case and in which the owner's present ability to provide an alternative to continued seizure would receive consideration.

2015 NSSC 21 (CanLII)

[113] The first, in light of the scheme and purpose, calls for the kind of review actually undertaken in *British Columbia SPCA*. The British Columbia Supreme Court held, alternatively, that the Farm Industry Review Board had correctly interpreted the *Prevention of Cruelty to Animals Act* when it decided that the appeal provisions allowed for a hybrid between pure appeal and *de novo*.

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

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

[116] The Deputy Minister misconstrued his statutory role. His decision must be set aside. In light of the sale, the only remedy available under Rule 7.11 is an order to turn over the sale proceeds to the owner of the sold animals.

2015 NSSC 21 (CanLII)

Review of the Findings of Fact

[117] In addition to being erroneously restricted, the Deputy Minister's review was factually flawed.

[118] We have no trouble with the standard of review here. The Deputy Minister's findings are owed deference. They are reviewed for their reasonableness, as that concept has been defined by the courts in relation to judicial review. See, *Jivalian v. Nova Scotia (Department of Community Services)*, 2013 NSJ 2 at para. 15 and *Newfoundland and Labrador Nurses' Union* as cited there.

[119] The Deputy Minister's finding that the inspectors attempted to obtain the owner's cooperation to relieve the distress of the animals is unreasonable. It is contrary to the evidence that was before the deputy. My critical evaluation of that finding begins at para. 14 above and ends with para. 21. A summary is all that is needed now.

[120] The lead inspector's evidence of what happened that day and night a year ago consists of the detailed record she prepared soon after the events. The record contains no evidence that the inspector asked for the cooperation of the Millett family, or even told them about her obligation to seek their cooperation. There is

2015 NSSC 21 (CanLII)

not even subjective evidence suggesting that the inspector was conscientious of her obligation.

[121] On the contrary, the record shows unequivocally that the inspector never sought cooperation of the owners to relieve the distress of the animals.

- From the beginning, the inspectors had information that the herd belonged to a member of the Millett family. Yet, the inspectors made the decision to effect a seizure long before any family member was sought out.
- Some four hours later, the lead inspector, supported by an RCMP officer, confronted one member of the Millett family and learned that the herd belonged "mostly" to Nelson Millett.
- At the home of Nelson Millett and his spouse, the lead inspector and the RCMP officer demanded to know whether Nelson Millett was the owner. There was no mention of cooperation to relieve distress. Reasonable questions about whether there was a complaint and why the police were present went unanswered.

2015 NSSC 21 (CanLII)

- When Mr. Millett approached the lead inspector at the pasture she "refused to answer their questions and repeated my questions about ownership".

- When the lead inspector finally got the admission she wanted, that Mr. Millett owned the herd, she said nothing about relieving distress. Instead, she gave Mr. Millett a warning designed to make his statements admissible in a criminal proceeding and launched into what was clearly a criminal inquiry.

[122] In light of those undeniable facts, the Deputy Minister's findings to the effect that the lead inspector sought confirmation of ownership to secure cooperation in the relief of distress, and that Mr. Millett is to blame for not admitting ownership sooner, are untenable.

[123] 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 a prerequisite to seizure.

2015 NSSC 21 (CanLII)

[124] The Deputy Minister could have decided that the lead inspector had found the owner before seizure, when she spoke to the people in the house at the pasture, in the beginning of the seizure, when she was told who "mostly" owned the herd, or in the middle of the seizure when Mr. Nelson Millett finally gave her the admission she wanted for the criminal investigation. No other finding is possible. In any of these three cases, the obligation to "endeavour to obtain the owner's cooperation to relieve the animals' distress" arose.

[125] The province takes issue with "endeavour" in s. 23(2), saying that its meaning is not precise. It does not mean doing nothing.

[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.

[127] In my opinion, the erroneous findings were essential to the deputy's decision. The unreasonable findings of fact afford alternate grounds for setting aside the decision.

2015 NSSC 21 (CanLII)

Conclusion

[128] The Deputy Minister was required to correctly interpret the *Animal Protection Act* on the role played by the (Deputy) Minister on a review of an animal seizure under s. 26. In this case, the Deputy Minister erroneously interpreted the role as being restricted to assessing the reasonableness of the seizing officials' actions. The owner was entitled to a fresh and independent judgment.

[129] The Deputy Minister also engaged in unreasonable fact-finding when he found that the seizing official sought the cooperation of the owners. Seeking that cooperation was prerequisite to seizure. Thus, the finding was fundamental to the result.

[130] The only available remedy under Rule 7.11 is a declaration that the proceeds of the sale of the animals belong to the owners, not the government. Counsel may address costs in writing.

Moir J.

2015 NSSC 21 (CanLII)