

CITATION: Animal Justice v. Minister of Northern Development, 2023 ONSC 1454
DIVISIONAL COURT FILE NO.: 119/22
DATE: 20230403

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

C. HACKLAND, S.A.Q. AKHTAR, & S. O'BRIEN JJ.

BETWEEN:)	
)	
ANIMAL JUSTICE, THE FUR-BEARERS,)	<i>A. Beddoes, K. Mitchell, & S. Tinney, for</i>
AND COYOTE WATCH CANADA)	the Applicants
)	
)	
Applicants/Appellants)	
)	
– and –)	
)	
MINISTER OF NORTHERN)	<i>M. Sims & J. Boyczuk, for the Respondent</i>
DEVELOPMENT, MINES, NATURAL)	
RESOURCES, AND FORESTRY)	
(ONTARIO))	
)	
)	
)	
Defendant/Respondent)	
)	
)	HEARD at Toronto: 14 December 2022

S.A.Q. AKHTAR J.

FACTUAL BACKGROUND AND OVERVIEW

Introduction

[1] Coyotes in Ontario may only be hunted with a licence. There is no “closed” season for coyotes in most of Southern Ontario. Nor are there limits on the number that may be killed in these areas. The provincial government has no sustainability concerns about the coyote population in Southern Ontario.

[2] However, there is a statutory mechanism mandating authorisation before anyone is permitted to hunt for wildlife with the expectation of gain.

[3] The implementation of this mechanism in relation to two coyote hunting contests forms the subject matter of this application for judicial review.

The 2021 Hunting Contest

[4] On 15 January 2021, Chesher's Outdoor Store in Belleville ("the Store") placed an advertisement on Facebook providing details of a coyote hunting contest to take place in February. The respondent became aware of the contest on 21 January 2021 after a public complaint expressed concern about the contest being a form of bounty hunting. The complainant provided a copy of the Facebook post, which set cash prizes for the:

- Three heaviest coyotes,
- Most coyotes,
- Smallest coyote, and
- \$10 per coyote weighed per contestant.

[5] The post noted that the contest was subject to the respondent's hunting regulations.

[6] The respondent received numerous complaints in the following weeks. Its staff engaged in internal discussions about the scope of the contest and whether it was captured by s. 11 of the *Fish and Wildlife Conservation Act*, 1997, S.O. 1997, c. 41 (*FWCA*). The applicant did not become aware of these discussions until it received documents obtained through its freedom of information requests, submitted the following year, on 22 February 2022.

[7] The respondent assigned a conservation officer, Mark Baillie ("CO Baillie"), to investigate the complaint. CO Baillie advised Bill Chesher, the Store's owner, that an investigation was underway specifically informing him that the prize for "most coyotes" and the "\$10 per coyote incentive" were the respondent's main sources of concern because of the s. 11(1)(e) prohibition on bounty hunting. Chesher informed CO Baillie that he had run these contests for 20 years, but promised to amend the rules to address any Ministry concerns.

[8] The respondent's Enforcement Branch ("the Branch") reviewed the 2021 Contest rules and determined the prizes for "most coyotes" and "the \$10 per coyote incentive" constituted bounties contrary to s. 11(1)(e) of the *FWCA*. On 26 January 2021, CO Baillie notified Chesher of the Branch's conclusion. Chesher undertook to remove the offending aspects and to publicly explain the changes were a result of consultation with the respondent. Chesher spoke of the possibility of adding more total weight prizes. There is no evidence that the Branch assured Chesher that the respondent would determine these additions to be legal.

[9] The Branch subsequently confirmed that Chesher had changed the contest rules on Facebook. These changes included the addition of prizes for the fourth to tenth largest coyotes.

[10] It is unclear how many individuals participated in or how many coyotes were hunted during the 2021 contest. No charges were laid against the Store, its owner, or the contest participants.

The 2022 Hunting Contest

[11] In January 2022, the Store announced a new coyote hunting contest to run throughout the month of February. The same rules were posted on its Facebook site announcing prizes to be awarded on a weight basis for the five “largest” coyotes along with five “additional hidden weight prizes” awarded on a random basis to secret weights chosen by the Store.

[12] The respondent had no prior discussion with the Store and the contest proceeded without intervention by the authorities.

[13] The respondent became aware of the Store’s plans after receiving a further series of public complaints. Once again, the contest proceeded without any charges being laid.

The Application for Judicial Review

[14] The applicants seek judicial review of what they argue is the respondent’s decision to allow unlawful coyote hunting contests to proceed without written authorisation, in contravention of the *FWCA*.

SHOULD JUDICIAL REVIEW BE GRANTED?

Preliminary Issues

[15] At the outset of the hearing, there were two preliminary questions to be decided: first, whether the applicants have standing to bring the application, and second, whether the issues to be decided are moot.

[16] The respondent took no position on these issues and was content to proceed with the hearing.

[17] Assuming, without deciding, that the applicants have standing and there is no issue of mootness, this court would dismiss the application for the following reasons.

The Statutory Sections

[18] The applicants seek to review what they describe as the respondent’s “unlawful act” of allowing the contests to proceed without receiving the required written authorisations mandated by statute.

[19] Section 11 of the *FWCA* reads as follows:

- 11 (1) Except with the authorization of the Minister, a person shall not,
 - (a) hunt for hire, gain or the expectation of gain;
 - (b) hire, employ or induce another person to hunt for gain; [...]
 - (c) trap for hire, gain or the expectation of gain;
 - (d) hire, employ or induce another person to trap for gain; or
 - (e) pay or accept a bounty.

[20] In addition, s. 65 of the *FWCA* provides that every authorization “given under this Act shall be in writing”.

[21] The statute does not require the respondent to issue an authorisation for each application. That decision lies within the Minister’s discretion.

Did the Respondent Grant Authorisation?

[22] The central question in this case is whether the respondent authorised the contests held in 2021 and/or 2022.

[23] The applicants claim that the respondent’s actions in 2021 and 2022 amounted to an authorisation. Since no written authorisation was provided, the respondent’s decision was unlawful and accordingly subject to review.

[24] The respondent seeks dismissal of the application arguing that the Minister did not grant permission for the contest to take place. The respondent submits that the applicants’ complaint is, in reality, one that constitutes an attack on the decision by the respondent’s Enforcement Branch not to prosecute the Store for proceeding without authorisation. This, says the respondent, is a discretionary decision immune from review absent a showing of bad faith.

[25] The applicants’ argument rests on the interactions between CO Baillie and Chesher in relation to the 2021 contest which the applicants submit led to “prospective permission” being given to the Store to hold the contests without obtaining the written authorisations mandated by s. 11.

[26] There is no dispute that written authorisations were not sought or provided in 2021 or 2022.

[27] The Store may well have acted in violation of the *FWCA*. However, the question of whether the Store acted unlawfully is not one for this court to decide: the applicant’s application is for the judicial review of the respondent’s conduct.

[28] For the following reasons, I find that that the respondent did not authorise either contest.

[29] The exchange between CO Baillie and Chesher took place in an advisory context. CO Baillie was telling the Store that the contest it proposed ran afoul of s. 11. That is not to say the contest could not take place: what was necessary was that the Store had to apply for the required written authorisation which the respondent could provide at its discretion.

[30] As noted, the Store informed CO Baillie that it would make the necessary modifications to ensure compliance with s. 11. Contrary to the applicants’ claims, there is no evidence that when the Store expressed its intention to add other weight prizes, CO Baillie advised that this would be permissible or immune from prosecution.

[31] The purpose of requiring a written authorisation (as set out in s. 65) under s.11 is to ensure the avoidance of disputes regarding the validity of a contest if its legitimacy is questioned. Neither section imposes an obligation on the Minister to act in any particular fashion. The obligation to secure written authorisations lies with the Store.

[32] Even if the conversation between CO Baillie and Chesher could be construed as an informal granting of permission to run the contest, it was the Store's obligation to seek and obtain authorisation before doing so.

[33] There could be no "implied permission". There could be no prospective authorisation. The required statutory mandate could not be granted by a lack of prosecution or enforcement. Nor could any "non" decision be "rolled over" to approve the 2022 contest.

[34] In other words, there was no conduct on the part of the respondent that constitutes a violation of the *FWCA*.

[35] What happened here was that the Store proceeded with its contests without written authorisations and accordingly, it became the party in potential violation of the *FWCA*, not the respondent.

[36] It was then for the Branch to decide whether it would prosecute the Store for violating the *FWCA*. It chose not to do so.

[37] Rick Watchorn, Director of the Branch, explained that in making its decision, Branch officials took into account the difficulties of proving that the 2021 contest fell within the essential elements of s. 11 and the stability of the coyote population across the province of Ontario. Since the 2022 contest rules were effectively the same as those in 2021, the Branch's decision to act consistently makes sense.

[38] Deciding whether to prosecute properly lies with the Branch's discretion. The exercise of that discretion is immune from judicial review absent bad faith or an abuse of process: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 at paras. 29-32; *R. v. Power* [1994], 1 S.C.R. 601, at para. 48; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 at paras. 166-168;

[39] Deference to the discretion held by law enforcement officers was discussed in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190 at para. 37: "[t]he ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion". The Court also approved its earlier comments in *R. v. Beare*, [1988] 2 S.C.R. 387, at para. 54 which affirm that "[d]iscretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid."

[40] In *Krieger*, at para. 49, citing *Nelles v. Ontario*, [1989] 2 S.C.R. 170, the Supreme Court of Canada remarked that "[w]ithin the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for 'malicious prosecution'". See also: *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 at para. 52; *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, 2016 ONSC 2806, 131 O.R. (3d) 223; *CUPE, Air Canada Component v. Canada (Minister of Labour)*, 2012 FC 1484, at para. 43.

[41] No such conduct is alleged here.

[42] In *Canadian Horse Defence Coalition v. Canada (Food Inspection Agency)*, 2019 FC 1559, the applicants applied for judicial review of the practices of the Canadian Food Inspection Agency concerning the live shipment of horses by air to Japan for slaughter. The applicants also sought mandamus to compel the Agency to apply two specific regulations relating to the transportation of horses by air. The court refused the application, finding there was no public duty to act in a set or particular manner. The court concluded that the Agency had discretion to choose how to enforce animal welfare statutes.

[43] The applicants seek to distinguish these cases, relying on *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (CA), to argue that the respondent turned its back on its duties and gave “the green light for an unlawful hunting contest to proceed”.

[44] I disagree. I have already indicated that there is no evidence that any such permission was granted or that it could be so.

[45] I would also add that this was not a case where the Branch sat back and did nothing. It took steps to investigate, but determined there were difficulties in launching a viable prosecution whilst also doubting its necessity.

[46] The Branch exercised its discretion to take no further action. In this regard, the following comments, at para. 30 of the *Distribution Canada* case, undermine the applicants’ position:

This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated. It is a case where the Minister has established difficulties in implementation and where he enjoys a discretion with which the law will not interfere.

[47] The same applies to the case at hand.

[48] For these reasons, the application is dismissed.

COSTS

[49] At the conclusion of the hearing, the respondent indicated that it would be content with each party bearing its own costs if it was successful. Accordingly, there will be no order for costs.



S.A.Q. AKHTAR J.

I agree



C. HACKLAND J.

I agree



S. O'BRIEN J.

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AND COYOTE WATCH CANADA

Applicants/Appellants

– and –

MINISTER OF NORTHERN
DEVELOPMENT, MINES, NATURAL
RESOURCES, AND FORESTRY
(ONTARIO)

Defendant/Respondent

REASONS FOR JUDGMENT

S.A.Q. AKHTAR J.

Date of Release: April 3, 2023