IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board),* 2013 BCSC 2331

Date: 20131219
Docket: S136340
Registry: Vancouver

Between:

The British Columbia Society for the Prevention of Cruelty to Animals

Petitioner

And:

British Columbia Farm Industry Review Board

Respondents

Before: The Honourable Mr. Justice Grauer

On judicial review from: an order of the British Columbia Farm Industry Review Board, dated August 9, 2013 (*A.B. v. British Columbia Society for Prevention of Cruelty to Animals*)

Reasons for Judgment

Counsel for the Petitioner:	Christopher Rhone
Counsel for the Respondent British Columbia Farm Industry Review Board:	Frank A. V. Falzon, Q.C.
Place and Date Hearing:	Vancouver, B.C. November 4 and 5, 2013
Place and Date of Judgment:	Vancouver, B.C. December 19, 2013

INTRODUCTION

[1] In April 2012, the legislature passed the *Prevention of Cruelty to Animals Amendment Act, 2012*, SBC 2012, c 15, amending the *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372 (the "*PCAA*"). It thereby enacted a program of administrative reform to decision-making in the area of animal welfare, formerly the exclusive preserve of the petitioner, the British Columbia Society for the Prevention of Cruelty to Animals ("SPCA").

[2] Among the reforms was the introduction of an independent appeals process involving the British Columbia Farm Industry Review Board ("FIRB").

[3] The FIRB held its first appeal hearing under this legislation on July 29, 2013, by telephone, and rendered its decision on August 9, 2013. It allowed the appeal of an animal owner from a review decision of the SPCA that maintained his dogs in the SPCA's custody.

[4] The SPCA now applies for judicial review of that decision. The owner did not participate in this hearing, as it is more about the propriety of the appeal process undertaken by the FIRB than it is about his dogs. As a result, and for privacy reasons that will soon be apparent, I have deleted his name from the style of cause and will refer to him only as the "owner".

[5] The SPCA maintains that the FIRB greatly overstepped its jurisdiction by the manner in which it conducted the appeal, going well beyond a true appeal on the record, and failing to give appropriate deference to the SPCA. The FIRB says that it conducted itself exactly as the legislature intended. This case will therefore set a precedent for their ongoing relationship under the legislation.

THE NEW PROCESS

[6] The heart of the legislative reform was the insertion into the *PCAA* of Part 3.1, headed "Reviews and Appeals":

> **Part 3.1 - Reviews and Appeals**
>
> *Review of decisions*
>
> 20.1 In this Part, "board" means the British Columbia Farm Industry Review Board continued under the *Natural Products Marketing (BC) Act*.
>
> 20.2 (1) The society [the SPCA] may review the decision of an authorized agent to take custody of an animal under section 10.1 or 11
>
> (a) on a request of a person who owns, or if an operator in relation to, the animal,
>
> (b) on request of a person from whom custody of the animal was taken under section 10.1 or 11, or
>
> (c) on its own initiative.
>
> …
>
> (3) If a review is requested in accordance with subsection (2), the society
>
> (a) must review the decision, and
>
> (b) must not destroy, sell or otherwise dispose of the animal, except to return the animal to its owner or to the person from whom custody was taken.
>
> (4) The society, following a review, must
>
> (a) return the animal to its owner or to the person from whom custody was taken, with or without conditions respecting
>
> (i) the food, water, shelter, carer or veterinary treatment to be provided to that animal, and
>
> (ii) any matter that the society considers necessary to maintain the well-being of that animal, or
>
> (b) affirm the notice that the animal will be destroyed, sold or otherwise disposed of.
>
> (5) The society must provide to the person who requested the review
>
> (a) written reasons for an action taken under subsection (4), and
>
> (b) notice that an appeal may be made under section 20.3.

(6) If the society affirms a notice under subsection (4)(b), the society must not destroy, sell or otherwise dispose of the animal for at least 4 days after providing reasons and notice under subsection (5).

(7) A person may not request further review under this section of the same decision.

Appeals

20.3 (1) A person who owns, or is an operator in relation to, an animal, or a person from whom custody of an animal was taken under section 10.1 or 11, may appeal to the board one or more of the following:

(a) if no action has been taken under section 20.2(4) within 28 days after a request for a review was made, the decision to take custody of the animal under section 10.1 or 11;

(b) if action has been taken under section 20.2(4)(b), the decision to affirm a notice under section 19 that the animal will be destroyed, sold or otherwise disposed of;

(c) the amount of costs for which an owner is liable under section 20 (1);

(d) the amount of costs that an owner must pay under section 20(2) before the animal is returned to the owner.

(2) A person referred to in subsection (1) may file a notice of appeal with the board as follows:

(a) in respect of an appeal under subsection (1)(a), no earlier than 28 days after the request for a review is made;

(b) in respect of an appeal under subsection (1)(b), within four days after receiving reasons under section 20.2(5)(a);

(c) in respect of an appeal under subsection (1)(c) or (d), no later than four days following receipt, by the owner, of the demand for payment of costs.

(3) A person who files a notice of appeal must provide

(a) to the society, immediately on filing the notice of appeal, a copy of the filed notice of appeal, and

(b) to the board, as soon as reasonably practicable, every document in relation to the matter under appeal.

(4) On receiving notice under subsection (3), the society is a party to the appeal and must provide to the board, as soon as reasonably practicable, every bylaw and document in relation to the matter under appeal.

[7] It works like this. Where an authorized agent of the SPCA concludes under section 10.1 or 11 that an animal has been abandoned, or is in distress, he or she

may take custody of the animal. Under section 20.2, that decision *may* be reviewed by the SPCA on its own initiative, and *shall* be reviewed by the SPCA at the request of the animal's owner or custodian. The SPCA must give written reasons for its review decision to the person who requested the review. This is the first level of review.

[8] The animal's owner or custodian can take the matter to the FIRB on appeal under two circumstances: where the SPCA fails to review the decision of the authorized agent within 28 days of the request for review being made, or where the SPCA does review the decision, and upholds it. This is the second level of review. Apart from decisions concerning the fate of the animal, the owner or custodian can also appeal the amount of costs for which the SPCA has held him or her liable arising out of the reasonable costs that the society has incurred in caring for the animal.

[9] Section 20.5 of the *PCAA* gives the FIRB wide powers:

> *Hearings*
>
> 20.5(1) For the purposes of an appeal under this Act,
>
> (a) sections 11 to 20, 22, 26, 31, 32, 34(3) and (4), 35 to 42, 47, 49 to 56 and 60 of the *Administrative Tribunals Act* apply to the board, and
>
> (b) despite section 3.1 of the *Natural Products Marketing (BC) Act*,
>
> (i) section 46.2 of the *Administrative Tribunals Act* does not apply to the board, and
>
> (ii) section 46.3 of the *Administrative Tribunals Act* applies to the board.
>
> (2) For the purposes of making a determination in an appeal, the board may, with consent of the owner or occupier,
>
> (a) enter any premises
>
> (i) from which the animal that is the subject of the appeal has been taken into custody, or
>
> (ii) on which a person intends to keep the animal that is the subject of the appeal if the person regains custody of that animal, and
>
> (b) inspect the premises and any equipment or other thing on the premises that are relevant to the determination of the appeal.

(3) If the owner or occupier does not consent to one or more of the matters referred to in subsection (2), the board may draw an adverse inference from the refusal to consent.

(4) The board, at any time before making a determination in an appeal, may

(a) inquire into matters relevant to the appeal, and, as part of that inquiry, obtain the advice of persons who are knowledgeable about those matters, and

(b) determine, subject to any regulations made under section 26(2)(o), the remuneration of the persons referred to in paragraph (a) of this subsection.

[10] Section 20.6 sets out what the FIRB may do by way of result:

Determination of appeal

20.6 On hearing an appeal in respect of an animal, the board may do one or more of the following:

(a) require the society to return the animal to its owner or to the person from whom custody was taken, with or without conditions respecting

(i) the food, water, shelter, care or veterinary treatment to be provided to that animal, and

(ii) any matter that the board considers necessary to maintain the well-being of that animal;

(b) permit the society, in the society's discretion, to destroy, sell or otherwise dispose of the animal;

(c) confirm or vary the amount of costs for which the owner is liable under section 20(1) or that the owner must pay under section 20(2).

THE APPREHENSION

[11] At the material time, the owner had three dogs: Cabot, Teddy and Woody. He had a history of mental illness consisting of bipolar disorder, and on May 6, 2013, he was involuntarily committed to the Nanaimo Regional General Hospital psychiatric ward. He had been unable to make any provision for the care of his dogs. In these circumstances, an SPCA animal control officer took them into custody as animals that had been abandoned. The owner's treating physicians were unsure about when he would be discharged, and the Nanaimo branch of the SPCA agreed to provide a 14-day compassionate board of the dogs.

[12] As it turned out, the owner was not released until June 12, 2013, and the SPCA maintained the care of his dogs during that five-week period. Marcie Moriarty, the SPCA's Chief Prevention and Enforcement Officer, approved the return of the dogs to the owner upon his release, being under the impression at the time that they were in acceptable health.

[13] Two days later, the owner was again involuntarily committed and the SPCA once again took the dogs into custody. This time, the SPCA was not prepared to return them.

THE SPCA'S REVIEW

[14] The owner sought a review of this decision under section 20.2(a) of the *PCAA*. That review was undertaken by Ms. Moriarty. On July 2, 2013, Ms. Moriarty gave written reasons refusing to return the dogs.

[15] In reaching her decision, Ms. Moriarty considered: (1) the conditions in which the dogs were found when they were originally taken into custody; (2) the medical conditions from which the dogs were found to be suffering; and (3) the condition in which they were found when they were taken into custody the second time.

[16] As to the first point, Ms. Moriarty noted that the trailer where the dogs were living was extremely dirty, its floor covered with dirt and garbage, and its windows broken. Ms. Moriarty accepted that the owner had been suffering from mental health challenges of the time which could explain the condition of his trailer, but considered it a factor for her decision.

[17] As to the second point, Woody had been found to have bilateral cherry eye, Teddy had chronic bilateral otis externa (ear infection in both ears that had been present for weeks to months), and Cabot had fair to poor body condition, suspected chronic osteoarthritis, bilateral ear infections, dental disease and possibly serious heart condition. They also required significant grooming due to "prolonged neglect". Cabot, I interject, was a Newfoundland who was then 12 or 13 years old, a ripe age

indeed for so large a breed. He has since been euthanized with the owner's consent.

[18] As to the third point, on the day of their second apprehension, the dogs were found on leashes that had been tied together in a knot in the middle of the owner's hotel room, a bowl was found filled with what was apparently cat food and bits of bread instead of the food provided by the SPCA, and the medication provided by the SPCA appeared to have been inappropriately administered.

[19] In these circumstances, Ms. Moriarty, came to the following conclusion:

> This is not the first time that your health has failed you and due to health reasons, the welfare of your dogs have suffered. You note in your email that two years ago you were also hospitalized, but in that instance you were able to first secure boarding for them. While I appreciate that you only had two days to "prove" that you could look after the Dogs and adhere to the conditions of the Agreement before once again you were hospitalized, I have to consider this relapse in the total context of any decision I make. In addition, I have now taken a closer look at the file and it is very apparent that some of the welfare concerns relating to the Dogs were not short term in nature and were the result of a prolonged period of neglect.
>
> I do not make this decision lightly and I am moved by your obviously heartfelt submissions. You clearly have people who care for you and are advocating on your behalf and I hope that you will be able to turn to them for emotional support and that you will have a more permanent return to good health. My role is to advocate for the animals and given all of the above, I cannot in good conscience conclude that it would be in the best interest of the Dogs to be returned to you.

APPEAL TO THE FIRB

[20] Ms. Moriarty advised the owner that her decision could be appealed to the FIRB. It was. The appeal hearing took place on July 29, 2013, by teleconference before Corey Van't Haaff, presiding member of the FIRB. The owner was assisted by his son, who is not a lawyer.

[21] In accordance with section 20.4 of the *PCAA*, the SPCA was a party to the appeal. It participated in the hearing through counsel, who provided the FIRB with extensive submissions and authorities.

[22] At the hearing, counsel for the SPCA submitted that the first two issues to be considered were: whether the appropriate procedure was a true appeal or a hearing *de novo*; and if a true appeal, what standard of review should be applied in reviewing the SPCA's decision, reasonableness or correctness?

[23] Much of the discussion concerned what is principally at issue before me at this third level of review, being what appeal procedure was appropriate, and what standards of review should be applied. All of this completely mystified the owner and his son. In this, I have every sympathy for them.

THE FIRB'S DECISION

1. The Appeal Process

[24] Mr. Van't Haaff issued his reasons for decision on August 9, 2013. In them, he dealt at length with the issue of the nature of an appeal to the FIRB. I set out his discussion of this issue in full because, for reasons I will develop more fully below, I can find no flaw in his reasoning.

> 82. The Society submits that appeals to BCFIRB from review decisions of the Society are required to be conducted as "true appeals", which can only be judged based on the evidence that was before the lower decision-maker unless traditional "new evidence" tests are met. The society refers among other cases two 1992 decision, *McKenzie v Mason*, 1992 CanLII 2291 (BCCA), which interpreted the word "appeal" to mean a "true appeal" in a case involving an appeal from a specialised decision-maker to a court of law. The Society further submits that BCFIRB must uphold the Society's decisions unless they are "unreasonable", applying the test in *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9. The Society argues that BCFIRB should give deference to the Society's decision just as the court stayed on judicial review prior to the reform legislation being enacted.
>
> 83. I do not think that appeals under Part 3.1 of the *PCAA* are required to be conducted as true appeals, and I do not think that the BCFIRB is required to defer to decisions of the Society.
>
> 84. This is not judicial review, and it is not even a right of appeal from a specialized body to court. It is a broad appeal from one specialized body to another - from the Society in the first instance to BCFIRB as a specialized but administrative tribunal in its own right, and which also has specialised animal welfare knowledge in its membership. In my opinion, the creation of a right of appeal to a specialized administrative tribunal means we cannot automatically or blindly apply principles that were developed to govern the relationship between courts or between courts and specialized tribunals. The

important thing is not the word "appeal" by itself. It is what the legislature intended in the larger context.

85. When we look at the reform legislation as a whole, the clear intent was to give BCFIRB, as the specialized appeal body, full authority to operate in a way that is flexible and accessible to lay persons, and to use its expertise to ensure that decisions are made in the best interests of animals. Engaging in arguments about what is "the record" and how to apply the "*Palmer* principles" to every piece of evidence tendered in situations that are necessarily dynamic and unfolding, would make no sense in this context. Requiring BCFIRB to "defer" to findings and judgments that it believes have been overtaken by circumstances or wrong on the merits does little to enhance the interests of transparency and accountability.

86. Courts of law are focused on the law and legal principles. BCFIRB appeals are broader than that. There are no limits on the grounds of appeal. BCFIRB has been given broad evidentiary and remedial powers on appeal. While the legislature could have created an appeal or review "on the record", it has not done so here. Instead, the legislature has gone the other way in these reforms. It has given BCFIRB extensive evidence-gathering powers, some of them to be used proactively. It has made the Society "party" to appeals, and it requires the Society to provide BCFIRB "every bylaw and document in relation to the matter under-appeal" (s. 20.3(4)), which will in many cases be much broader than the record relied on by the reviewing officer. Included in BCFIRB's powers is s. 40 of the *Administrative Tribunals Act*: "The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." Collectively, these statutory provisions are not consistent with a legislative intent to require BCFIRB to merely undertake "mini" judicial review or a traditional judicial appeal.

87. In this case, the Society did not hold an oral hearing. It made a decision after giving reasons and disclosure after a written submissions process. While the Society is to be encouraged and commended for doing so, it is noted that that process is not mandated in the *PCAA*. Cases could well arise where the Society decides to use a more abbreviated process in its reviews. BCFIRB's appeal mandate cannot depend on the process the Society may choose to adopt and that may vary over time or depending on the case.

88. Related to this is the further point that BCFIRB can hear appeals even where the Society has made no decision within 28 days after the review application was made: *PCAA*, s. 20.3(1)(a). Obviously, in those appeals, there is no review decision, no reasons and usually no prior opportunity for the Appellant to have been heard. It does not make sense that the fundamental nature of BCFIRB's mandate would differ depending on the type of appeal that comes to us when the legislature has applied one set of statutory powers and procedures to <u>all</u> appeals.

89. The reform legislation did not simply change the place where "judicial review" could be held. It did more than that. Its intent was to increase oversight of Society decision-making. This was made clear by the Minister

who introduced the *Prevention of Cruelty to Animals Amendment Act*, 2012 on March 6, 2012 in the Legislative Assembly:

> Today I am pleased to introduce the amendments to the act that will increase transparency and accountability for decisions related to taking animals into custody, with an independent appeals process that will be led by the B.C. Farm Industry Review Board. The board has a successful history as an administrative tribunal, independent of government, in its general supervision of B.C.-regulated marketing boards and commissions. [Emphasis added by FIRB.]

90. At second reading, on April 18, 2012, the Minister said this:

> There are four main parts to this bill. Firstly, to create a statutory appeal mechanism for decisions made by the BCSPCA related to animal seizure and destruction. This appeal function will resolve complaints in a timely manner and reduce costs to the public and to government that are associated with a judicial review, which is currently the only recourse for those wanting to appeal a BCSPCA custody decision....
>
> The body that will be hearing appeals under the *PCAA* is the British Columbia Farm Industry Review Board, known as BCFIRB. We considered the option of creating an entirely new body dedicated to hearing PCAA appeals; however, the cost of this option is prohibitive and unnecessary, considering the wealth of expert experience we have available to us in the BCFIRB.
>
> BCFIRB reports directly to the Minister of Agriculture in matters of administration but is independent of government in its decision-making. As a quasi-judicial administrative tribunal it must adhere to the principles of administrative law. The courts have recognized BCFIRB as an expert tribunal with decisions worthy of considerable judicial deference.

91. There would be little point in creating the appeal rights reflected in the reform legislation here only to prevent BCFIRB from proceeding flexibly and using its knowledge and expertise based on current circumstances in order to bring some finality to a dispute in the best interests of animals. While cases may arise where the parties to an appeal agree to proceed based on "the record" that was before the Society on the review, that is a case management decision. Appeals are not required to be conducted on that basis.

92. Having rejected the "true appeal" approach, I want to add that I do not think BCFIRB is required to go to the other extreme of "ignoring" the Society's actions or its reasons where it has made a decision. While the Society argued this issue as requiring one extreme or the other, administrative law is more flexible than that.

93. In my view, the Appellant in a case like this has the onus to show that, based on the Society's decision or based on new circumstances, the decision

> under appeal should be changed so as to justify a remedy. Where, as here, the Society has made a reasoned review decision, BCFIRB will consider and give respectful regard to those reasons. However, that consideration and respect does not mean the Society has a "right to be wrong" where BCFIRB believes that the decision should be changed because of a material error of fact, law or policy, or where circumstances have materially changed during the appeal period. BCFIRB can give respect to Society decisions without abdicating its statutory role to provide effective appeals.

[25] The FIRB thus rejected the "true appeal" model – favouring not a hearing *de novo,* but rather a more flexible approach that maintained the onus on the appellant to justify overturning the Society's decision, but did not necessarily defer to that decision through application of a "reasonableness" standard. A "correctness" standard would be applied, 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.

[26] The SPCA submits that this was incorrect. The FIRB, it asserts, ought to have limited its jurisdiction to conducting a "true appeal"; that is, an appeal on the record that was before the SPCA, employing the deferential reasonableness standard to the findings of Ms. Moriarty as the specialized decision-maker charged with reviewing the decision of the SPCA's enforcement officer. Otherwise, argues the SPCA, relying particularly on *Newton v Criminal Trial Lawyers' Assn*, 2010 ABCA 399, 493 AR 89, the SPCA's review process would be redundant, which could not possibly have been the intention of the legislature. There was full 'due process' in the original hearing, so that there was no need to proceed *de novo*. Moreover, the standard of review of the FIRB's decision concerning its jurisdiction, the SPCA asserts in reliance on *Newton*, is correctness.

[27] As it did before the FIRB, the SPCA relied upon the *McKenzie* case, which Mr. Van't Haaff discussed in para 82 of his reasons, *supra*. In *McKenzie*, our Court of Appeal considered section 35(10) of the *Mineral Tenure Act*, which provided that a complainant "may…appeal the decision of the Chief Gold Commissioner to a judge or a local judge of the Supreme Court". The court held that where statute granting a right of appeal used only the words "…may…appeal…", such an appeal does not

envisage a trial *de novo*. It follows, submits the SPCA, that the FIRB's decision concerning its appellate jurisdiction was incorrect.

[28] The context of that decision was a review of a trial judge's order that the appeal from the Gold Commissioner proceed by way of a trial *de novo*. Such a procedure, it must be noted, is not the only possible alternative to a "true appeal". It is just the only alternative that was open to consideration by the Court of Appeal in that case.

[29] With respect, I find neither the *Newton* nor the *McKenzie* cases to be of assistance in the unique circumstances of this case.

[30] *Newton* concerned the basic structure and interrelationship of the tribunals in Alberta that review the conduct of police officers when that conduct is called into question in disciplinary proceedings under the *Police Act*, RSA 2000, c P-17. The specific issue was the extent to which the Law Enforcement Review Board may conduct a hearing *de novo* when an appeal is launched from the decision of a presiding officer in a disciplinary matter.

[31] The problem with *Newton*, as I see it (apart from the fact that it appears never to have been followed outside of Alberta), is that it turns on the interpretation of a very different statute regarding an appeal process that may appear, superficially, similar to the one here, but is in fact quite different — involving, as it does, professional discipline. Like *McKenzie*, *Newton* considered only the alternatives of a "true appeal" and a "*de novo* hearing", a dichotomy to which we are not limited. I also consider, with respect, that the Alberta Court of Appeal's reasoning on the standard of review of a tribunal's decisions is inconsistent with subsequent pronouncements of the Supreme Court of Canada, discussed below.

[32] As Mr. Van't Haaff observed, the key is the statute. It does not use *only* the words "…may…appeal…", as contemplated by *McKenzie*. Those words cannot be read in isolation. As our Court of Appeal observed much more recently in *British*

Columbia (Chicken Marketing Board) v British Columbia (Marketing Board), 2002 BCCA 473, 216 DLR (4th) 587:

> [15] In my respectful view, the learned chambers judge erred in his interpretation of s.8 by reading the words "may appeal" in isolation from the other words of s. 8 and from the rest of the statute. Those words do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.

[33] That, it seems to me, is precisely what Mr. Van't Haaff did: he interpreted the meaning of the words "may appeal" in s. 20.3(1) of the *PCAA* in the context of the other words in that section, and the rest of the statute. In doing so, he had regard for the legislative scheme and for the purposes of the Act. He concluded that in creating the appeal rights reflected in the reform legislation, the legislature intended that the FIRB should be in a position to proceed flexibly, using its knowledge and expertise based on current circumstances "in order to bring some finality to a dispute in the best interests of animals". He was thus engaged in the process of interpreting his "home statute", which would presumptively be reviewed on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 51 and 53-54; *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 at paras 35-36; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 34; and *McLean v British Columbia (Securities Commission),* 2013 SCC 67 at paras 19ff.

[34] As those cases point out, the presumption can be rebutted where the review entails questions of law of central importance to the legal system as a whole that are outside the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing tribunals, or true questions of jurisdiction or *vires*. In such cases, the standard of review is correctness; see also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at para 18.

[35] The FIRB'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 FIRB's jurisdiction, or *vires*, to hear the appeal was not in doubt. The question was one of process under the statute.

[36] As Justice Moldaver put it in the *McLean* case at para 31:

> The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, *per* Wilson J.); see also *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 92; *Mowat*, at para. 25.

[37] I conclude that the proper standard I should employ in reviewing the FIRB's decision concerning the scope of its appellate review is the standard of reasonableness. But even if the proper standard is that of correctness, I am not persuaded that the FIRB erred in any way. As I indicated above, I can find no flaw in Mr. Van't Haaff's reasoning.

[38] In my view, given the comprehensive nature of the scheme of review and appeals that the legislature inserted into the *PCAA*, the goal of transparency, the aim of providing a review process at arm's-length from the SPCA, the wide powers given the FIRB, and the dual role of the SPCA in not only conducting the first review of its own decision, but also then participating as a party in the review before the FIRB, the FIRB's interpretation is not only well within the range of reasonable results, but is the only reasonable interpretation.

[39] The SPCA nevertheless submitted that the FIRB ought to have considered previous judicial review decisions of this court that treated decisions of the SPCA

under the earlier legislation with deference. For this, the SPCA relies upon the remarks of the Supreme Court of Canada concerning arbitral *stare decisis* in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paras 74-80. That case, however, dealt specifically with arbitral decisions of the Labour Board, and recognized the general rule that *stare decisis* does not normally apply to administrative tribunals: see *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at paras 65, 71 and 91.

[40] Logically, if the legislature had intended the deferential sort of review for which the SPCA contends, it would have amended nothing and left the whole matter to the process of judicial review. That, however, was what the legislature hoped to avoid. To do so, it created a brand-new appeal process to the FIRB. The result, surely, was not meant to be just a different venue for the same process as before.

[41] I accordingly affirm the FIRB's decision concerning the scope of the appeal process, and turn to consider its decision about what to do with the dogs.

2. The Dogs

[42] Turning to the question of whether the dogs should be returned to their owner, Mr. Van't Haaff said this:

> 98. There is no disagreement at all that the Appellant loves and cares for his dogs and that the dogs mean a lot to him. I accept that he cares deeply for his dogs and has for the entire time he has owned them: Cabot since birth and for almost 13 years, Teddy for about four years, and Woody since birth eight months ago. The fact that the Appellant has been able to raise Cabot from birth, and care for all three animals, shows his ability and willingness to care for the dogs.
>
> 99. It is clear that a key factor in the Society's July 2, 2013 decision refusing to return the animals was its assessment that the condition of the dogs and resulting welfare concerns were not short-term in nature and were the result of a more prolonged period of neglect. The Society concluded that the Appellant's health has failed him and as a result the welfare of his dogs have suffered and that it would not be in the dogs' best interests to be returned to the Appellant.
>
> 100. Animals get sick and injured even when they are receiving the best of care. When the Society is seeking to retain an animal, it must consider not

> only the animal's condition, but must consider what acts or omissions of the owner caused or contributed to that condition.

[43] After reviewing the evidence, Mr. Van't Haaff noted a lack of evidence that the youngest dog, Woody, had any health concerns; there was no evidence that the eye issues were caused by anything done or not done by the owner. The same could be said with Teddy's knee issue and Cabot's age-related conditions. He was also unable to accept that ear infections were evidence of long-term neglect or a lack of care, given how common they are. The causative connection was missing, and Mr. Van't Haaff found that the appellant was now in a position, and had the supports, to look after these issues as part of his care of the dogs.

[44] In a passage to which the SPCA takes particular exception, Mr. Van't Haaff said this:

> 110. The Society's decision did acknowledge how much the Appellant cares for his dogs, but did not specifically address the potential adverse emotional impact on the dogs of not returning them to the Appellant. The emotional health of the dogs is a factor the Society itself emphasizes in its publications, as reflected on its website: "An animal's welfare is synonymous with its quality of life, and that animal's health and emotions both contribute to their welfare period" [footnote reference to the website]. This is in my view a relevant factor in this case which was not expressly referenced in the decision under appeal. It is readily apparent that the dogs would have bonded with the Appellant over the time he has owned them, especially Teddy at four years, and Cabot at 13 years, who the Appellant described as his "best friend". This emotional impact should have been weighed in all the circumstances. I am satisfied that the dogs would be emotionally better off with the appellant.

[45] Mr. Van't Haaff concluded:

> 111. I do not see any significant physical risk to these dogs. I do not agree that the Society was correct or reasonable in concluding that the dogs should not be returned to the Appellant.

[46] He then went on to review the owner's proposed care plans and expressed satisfaction that if the dogs were returned to him, they would remain in good condition without recurrence of the situation that led to the appeal. He ordered that the dogs be returned to the owner forthwith upon certain conditions relating to the

administration of medications, and attendance upon and obtaining recommendations from a veterinarian.

[47] Mr. Van't Haaff dealt with a further submission of the SPCA this way:

> 121. The Society submitted that if I find the decision to be unreasonable, or if I disagree with its "true appeal" arguments, I should hold a further hearing to allow the Society to adduce further evidence as to remedy or conditions. It seeks a new hearing on the basis that an unreasonable decision does not necessarily mean that the dogs should be returned to the owner, a point on which I agree.
>
> 122. Where I disagree is on the question whether a further hearing is necessary to provide me with the information I require to make a proper disposition in this case under s. 20.6 of the *PCAA*. In my view, for the reasons given, I am satisfied that I have sufficient evidence to make a proper decision in the best interest of these animals, which evidence includes the cross-examination of the Appellant and his son by the Society's Counsel. There is no need to prolong this dispute.

[48] Once again, I am satisfied that the appropriate standard to be applied to the review of this decision is reasonableness. Mr. Van't Haaff's reasons provide ample justification for the outcome he reached, and it is obviously within the range of possible outcomes. I am unable to accept the SPCA's position that the decision was unreasonable on its merits because, for instance, the FIRB took a "fault-based" (I would call it "causation-based") approach in reviewing the evidence in contrast to Ms. Moriarty's approach of simply looking at whether the dogs had been "neglected". I consider that the approach taken by Mr. Van't Haaff was well within the scope of his authority and expertise, and that his analysis more than justified his conclusion. It satisfies the goal of "justification, transparency and intelligibility in the decision-making progress" promoted by the Supreme Court of Canada in *Dunsmuir* at para 47 and in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 1, 11, 14 and 18.

[49] As the Supreme Court of Canada warned, it is neither necessary nor helpful (and in this case unproductive), to review a tribunal's decision line by line engaging

in a "treasure hunt for error": *Communications, Energy and Paperworkers Union* at para 54.

[50] The SPCA raises, however, two procedural objections that, it says, resulted in procedural unfairness.

[51] The first is that the FIRB, having (allegedly incorrectly) chosen to proceed by way of a hearing *de novo*, ignored evidentiary rules, in particular the *Palmer* principles, concerning the admission of fresh evidence: see *R v Palmer*, [1980] 1 SCR 759 at 775.

[52] What the FIRB said was this:

> 85. When we look at the reform legislation as a whole, the clear intent was to give BCFIRB, as the specialized appeal body, full authority to operate in a way that is flexible and accessible to lay persons, and to use its expertise to ensure that decisions are made in the best interests of animals. Engaging in arguments about what is "the record" and how to apply the "*Palmer* principles" to every piece of evidence tendered in situations that are necessarily dynamic and unfolding, would make no sense in this context. Requiring BCFIRB to "defer" to findings and judgments that it believes have been overtaken by circumstances or wrong on the merits does little to enhance the interests of transparency and accountability.

[53] I agree with this analysis. As I have already observed, the procedure followed by the FIRB was not a hearing *de novo* as the petitioner maintains, but a flexible approach specifically crafted to accomplish the intent of the legislation in the context of animal welfare and lay participation. This included taking into account developments occurring since the SPCA's decision was made. As I see it, this was entirely in accord with the inevitably fluid nature of the situation, and well within the powers granted by section 20.5 of the *PCAA*. Nothing in the materials before me supports the contention that this process resulted in any unfairness to the SPCA. A failure to have followed it, however, might well have resulted in unfairness to the owner and unkindness to the dogs.

[54] The second procedural objection is that in referring to the SPCA's website (see para 110 of the FIRB decision, quoted above), the FIRB relied on material or

evidence that was not before it at the time of the hearing, and on which the parties had no opportunity to make submissions.

[55] The SPCA submits that the FIRB thus relied on its own post-hearing Internet research to support its assertion that the emotional impact of separation on the dogs should have been weighed in all the circumstances, and its finding that the dogs would be emotionally better off with their owner.

[56] As a matter of principle, the objection is sound. No amount of flexibility can justify an appeal tribunal basing its decision on evidence that it developed on its own after the hearing, without permitting the parties an opportunity to address it: *Napoli v British Columbia (Workers' Compensation Board)* (1981),126 DLR (3d) 179 (BCCA); *Kane v Board of Governors of University of British Columbia*, [1980] 1 SCR 1105.

[57] In the circumstances of this case, however, the objection lacks merit. The question Mr. Van't Haaff was considering was the desirability of taking into account the potential adverse emotional impact on the dogs of not returning them to their owner. In my view, it was open to Mr. Van't Haaff to conclude that this was a relevant factor, and to take it into account. The website reference, while perhaps ill-advised, was not the basis for his conclusion on that issue. The evidence that supported his conclusion was the bond between the dogs and their owner formed over the time he had owned them, "especially Teddy at 4 years and Cabot at 13 years".

[58] Moreover, even if this was territory into which Mr. Van't Haaff ought not to have ventured, any such deviation from the path does not detract from the reasonableness of the result he reached, which, in my view, was amply justified by his findings and reasons quite apart from what is stated in this paragraph of his reasons.

[59] Once again, I see no evidence of actual procedural unfairness. The SPCA had a full opportunity to put forward all factors it considered relevant, both in its own reasons and in its submissions before the FIRB. I cannot see that it required a

further opportunity. I am satisfied that the SPCA was given a meaningful opportunity in this context to present its case fully and fairly, which is the objective of procedural fairness: *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398, [2007] 4 FCR 101, at paras 7ff.

3. The SPCA's Care Costs

[60] By section 20(1) of the *PCAA*, the owner of an animal taken into custody under the act is liable to the SPCA for the reasonable costs it incurs with respect to the animal. By section 20(2), the SPCA may require the owner to pay all or part of the costs for which he or she is liable under subsection (1) *before* returning the animal. These provisions were not part of the reform legislation.

[61] As a result of the FIRB's decision, the SPCA was deprived of the opportunity to require payment of its costs before returning the dogs as permitted by subsection 20(2):

> 124. I am not making my Order for return of the dogs conditional on the Appellant's payment of outstanding costs. That is partly because the Appellant appears to have agreed to pay the costs he understood to be owing, partly because further unexpected delay or conflict regarding the amount of costs (of which there was limited discussion at the hearing) will only increase the costs and partly because if a dispute regarding the amount of costs does arise, that issue can be resolved in a further appeal under s. 20.3(1)(c) of the *PCAA*.
>
> 125. To put it more clearly and directly for the Appellant, the fact that I am ordering the dogs returned to him now does not relieve the Appellant of his liability for costs under s. 20(1) of the *PCAA*. The Appellant will in all likelihood be receiving a final bill from the Society, which he is liable to pay in full subject to any appeal he may file to the BCFIRB if there is a dispute as to the amount. If the Appellant chooses to appeal the amount owing it will not put him at risk of losing the dogs for that reason.

[62] This ruling, argues the SPCA, deprived it of its right to natural justice because the matter was never the subject of discussion before the FIRB, and improperly fettered the SPCA's statutory discretion under section 20(2) of the *PCAA*.

[63] The SPCA asserts that the powers of the FIRB as set out in section 20.6 in relation to costs are limited to dealing with disputes concerning the amount of the

costs, and do not extend to the question of whether the return of the animals should be conditional upon payment of the costs; the statute reserves the latter question exclusively for determination by the SPCA.

[64] The FIRB argues that as the SPCA did not raise this objection before the board, it cannot properly raise it for the first time on judicial review.

[65] The FIRB then argues that even if the issue can properly be raised on judicial review, its decision was reasonable in view of its remedial authority to order the SPCA to return an animal to its owner under section 20.6(a).

[66] I am not satisfied that the circumstances were such as to put an obligation on the SPCA to raise this objection at the hearing before the FIRB.

[67] By section 20.3(1)(d), one of the matters which an owner may appeal to the FIRB is "the amount of costs that an owner must pay under section 20(2) before the animal is returned to the owner". By section 20.6(c), the board may confirm or vary the amount that "the owner must pay under section 20(2)". Clearly, then, the FIRB has jurisdiction to deal with that issue. With respect to the amount that must be paid before the animals are returned, that would presumably include varying the number to zero. But equally clearly, no such order was under appeal in this case because the SPCA was not intending to return the dogs, and so the question had not arisen. In these circumstances, it is not surprising that argument on the issue was not fully canvassed.

[68] Given the statutory provisions, I am satisfied that it was reasonable for the FIRB to conclude that it had the jurisdiction to make an order returning the dogs that was not conditional upon the owner first paying the costs for which he remained liable. It was, I find, open to the FIRB to conclude that such jurisdiction is not dependent upon an existing order of the SPCA under section 20(2) being the subject of the appeal, but is included in the FIRB's remedial authority under section 20.6(a) to order the return of an animal contrary to the SPCA's disposition.

[69] It appears, however, that the SPCA did not have an opportunity to persuade the FIRB that such an order was inadvisable in the circumstances of this case, and that its discretion to demand payment of costs before returning the dogs pursuant to the FIRB's order should be left undisturbed. Ideally, the issue would have been canvassed as a matter of course, given that an order for the dogs' return was one of only two possible outcomes, but this was the first hearing before the board, the issue was not itself under appeal, and the much of the focus was procedural.

[70] Nevertheless, in the peculiar circumstances of this case, I am not prepared to order that the matter be remitted to the FIRB for reconsideration upon further argument. The question is now essentially moot. Since the FIRB's decision, Cabot, the eldest, has been euthanized. Woody, the youngest, has been adopted out with the owner's agreement. At the time of the hearing before me, the SPCA was continuing to care for Teddy at the owner's request pending his ability to find suitable accommodation, presumably on further terms as to costs. In short, the order envisaged by the FIRB has been overtaken by events. Given that the matter of jurisdiction has been resolved, remitting the question below back to the FIRB for further argument on its advisability would achieve nothing but the expenditure of more time and money. I expect that in the future, the parties will be able to deal with the issue during the hearing, without having to prolong proceedings by deferring argument until after the outcome is known, or commencing a further appeal.

CONCLUSION

[71] The SPCA's petition is dismissed. The FIRB seeks no costs in the event of success, given the need for its participation in what would otherwise have been a dispute between the SPCA and the owner. Accordingly, I make no order for costs.

"GRAUER, J."