IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Holt v. Farm Industry Review Board,* 2014 BCSC 1389

Date: 20140723
Docket: 99192
Registry: Kelowna

Between:

Pirjo Holt dba Serendipity Farms

Appellant

And

Farm Industry Review Board, Nicholas Swart, and Sandra Swart

Respondents

Before: The Honourable Mr. Justice Armstrong

On judicial review from: An order of the Farm Industry Review Board, dated March 4, 2013 (*Swart v. Holt*).

Reasons for Judgment

Counsel for the Appellant:	D. Flannigan
Counsel for the Respondent, Farm Industry Review Board:	F.A.V. Falzon, Q.C. C.J. Elsaesser
Counsel for the Respondents, Nicholas Swart and Sandra Swart:	J.D. Metherell
Place and Date of Hearing:	Kelowna, B.C. July 10-12, 2013
Place and Date of Judgment:	Kelowna, B.C. July 23, 2014

Overview

[1] These reasons for judgment address the appellant's appeal under s. 8(1) of the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 [*FPPA*] of an adverse decision by the Farm Industry Review Board ("FIRB").

[2] In brief, this dispute began in 2009 when Pirjo Holt constructed a new barn on her Kelowna farm property to accommodate an equestrian business. Nicholas and Sandra Swart ("Swarts"), the appellant's southerly neighbours, brought a complaint pursuant to s. 3 of the *FPPA* to the FIRB claiming that they were aggrieved by noise, light, flies and odour emanating from the appellant's farm.

[3] On March 4, 2013, the FIRB found that a section of the appellant's horse farm and equestrian centre (livestock area B) was not a normal farm practice pursuant to s. 1 of the *FPPA* because turning out horses within 15m of the farm's southerly property line was not a normal farm practice based on the City of Kelowna's zoning bylaw ("bylaw") and the Ministry of Agriculture Farm Practice Review Guide ("provincial guidelines").

[4] The FIRB dismissed the noise and light complaints and concluded that the appellant's manure management practices were a normal farm practice. But it found that the location of the livestock area B run outs were not consistent with normal farm practices as defined under the *FPPA* because the livestock area B run outs were not setback from the Swarts' property line.

[5] Accordingly, the FIRB ordered the appellant to set livestock area B run outs back at least 15m from the farm's southerly property line or discontinue using livestock area B for turning out horses.

[6] The appellant raised multiple procedural fairness and substantive issues. I will address each issue individually.

[7] In sum, I find that the FIRB decision was not reasonable, and I remit the matter back to the FIRB for re-hearing.

The Farm Practices Protection (Right to Farm) Act

[8] I will briefly describe the legislative scheme from which this issue arose, including the complaint process, the FIRB's power, the definition of normal farm practice, and the appeal process.

The *FPPA*

[9] In 1995, the BC legislature enacted the *FPPA* to protect farmer's rights in BC. The *FPPA* specifically relates to nuisances such as odour, noise, dust or other disturbances. Under the *FPPA*, if a farmer uses normal farm practices and does not contravene any other legislation, the farmer is not liable to any person for nuisance and cannot be prevented from operating a farm by an injunction or court order.

[10] Section 2 of the *FPPA* contains the framework for protecting farm operations:

> 2(1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,
>
> (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and
>
> (b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.
>
> (2) The requirements referred to in subsection (1) are that the farm operation must
>
> (a) be conducted in accordance with normal farm practices,
>
> (b) be conducted on, in or over land that is in an agricultural land reserve,
>
> (ii) on which, under the *Local Government Act*, farm use is allowed,
>
> (iii) as permitted by a valid and subsisting licence, issued to that person under the *Fisheries Act*, for aquaculture, or
>
> (iv) that is Crown land designated as a farming area under subsection (2.1), and
>
> (c) not be conducted in contravention of the *Public Health Act*, *Integrated Pest Management Act*, *Environmental Management Act*, the regulations under those Acts or any land use regulation.

The Complaint Process

[11] The *FPPA* strikes a balance with those who might be affected by farm operations, and it provides a complaint mechanism for individuals who suffer nuisances created by farms.

[12] If the nuisance results from a normal farm practice, then the FIRB must dismiss the complaint. If the nuisance results from an abnormal farm practice, the FIRB can order that farmer to change the practice causing the nuisance or discontinue the practice.

[13] Section 3 of the *FPPA* prescribes the process for complaints to the FIRB:

> 3(1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.
>
> (2) Every application under subsection (1) must
>
> (a) contain a statement of the nature of the complaint, the name and address of the person making the application, the name and address of the farmer and the location of the farm,
>
> (b) be in a form acceptable to the chair of board, and
>
> (c) be accompanied by the fee prescribed by the Lieutenant Governor in Council.

The FIRB

[14] The FIRB is an independent administrative tribunal that receives power from two statutes.

[15] First, s. 3(1) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 provides:

> 3(1) The British Columbia Farm Industry Review Board is continued consisting of up to 10 individuals appointed as follows by the Lieutenant Governor in Council after a merit based process:
>
> (a) one member designated as the chair:
>
> (b) one or more members designated as vice chairs after consultation with the chair;
>
> (c) other members appointed after consultation with the chair.

[16] Second, the *FPPA* defines “board” as meaning “the Provincial board under the Natural Products Marketing (BC) Act”. The FIRB chair is authorized to establish a panel with the appointment of three members to hear a complaint made under s. 3.

[17] The FIRB may inquire into a complaint at any time before reaching a settlement or making a determination. And s. 4 of *FPPA* authorizes the FIRB chair to address settlement of complaints:

> 4 In the interest of reaching a settlement of a complaint that is the subject of an application under section 3 (1), the chair of the board, at any time before a panel of the board has decided the application, may inquire into matters relevant to the complaint, and, as part of that inquiry, may
>
> (a) obtain the advice of persons who are knowledgeable about normal farm practices, and
>
> (b) consult with the farmer identified in the application and the complainant.

[18] And s. 6 of the *FPPA* sets out how the FIRB adjudicates complaints:

> 6(1) The panel established to hear an application must hold a hearing and must
>
> (a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or
>
> (b) order the farmer to cease the practice that causes the odour, noise, dust or other disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.
>
> (2) The chair of the board, after giving the complainant an opportunity to be heard, may refuse to refer an application to a panel for the purpose of a hearing, or, after a hearing has begun, the panel to which an application has been referred may refuse to continue the hearing or to make a decision if, in the opinion of the chair of the board or the panel, as the case may be,
>
> (a) the subject matter of the application is trivial,
>
> (b) the application is frivolous or vexatious or is not made in good faith, or
>
> (c) the complainant does not have a sufficient personal interest in the subject matter of the application.
>
> (3) The chair of the board must give written reasons for a decision under subsection (2) refusing to refer an application to a panel.

(4) A panel must give written reasons for a decision under subsection (1) or (2).

(5) Written notice of the decision, under this section, of the chair of the board or a panel, accompanied by the written reasons for the decision, must be delivered to the complainant and the farmer affected by the decision.

Normal Farm Practice

[19] Section 1 of the *FPPA* establishes the definition of "normal farm practice":

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

(a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

(b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

Appeal Mechanism

[20] Section 8(1) of the *FPPA* sets out the ground of appeal:

Within 60 days after receiving written notice, in accordance with section 6(5), of a decision of the chair or a panel of the board made under section 6, the complainant or farmer affected by the decision may appeal the decision to the Supreme Court on a question of law or jurisdiction.

[21] In *Lubchynski v. Farm Practices Board*, 2004 BCSC 657 [*Lubchynski*] , one of the few appeals in British Columbia of an FIRB decision, Beames J. said the following about the FIRB's role at para. 10:

The determination of normal farm practice is not, I conclude, a matter of statutory interpretation. The F.P.B. has been constituted by the legislature as a specialized board. Its members include all members of the B.C. Marketing Board. It is empowered by its legislation to use processes not available to the court in the resolution of a complaint. Its initial mandate is to attempt to resolve the dispute through consultation and in that process, it may also obtain advice from persons knowledgeable about normal farm practices. Hearings may be conducted informally and the panel may, in its discretion, receive evidence which would not be admissible in a court of law. Specialists and consultants may be retained directly by the Board. The Board may also be ordered to study any matter related to farm practices and to report findings and recommendations to the Minister. If the Board finds that a farmer's

> practice is not normal farm practice, it may order the farmer to modify his practice in a specified manner, including in manners not available by way of a remedy which could be granted by the court.

The Complaint and the Hearing

[22] The scheme the *FPPA* creates authorizes the FIRB to promote settling complaints before any hearing and to obtain the advice of a person knowledgeable of normal farm practices (often called the "knowledgeable person").

[23] The Swarts made several complaints to City of Kelowna ("Kelowna"), the Agricultural Land Commission and the Property Assessment Review Panel about the appellant's farming operation before making a FIRB complaint.

[24] Kelowna reviewed the issue of setback provisions in its zoning bylaw, and it advised the appellant that her current plans did not meet the bylaw's requirements.

[25] Based on its advice, the appellant made modifications to its barn layout that satisfied Kelowna. Then Kelowna considered the 15m setback and concluded that the modifications the appellant made obviated the need for any setback. Thus her business complied with its bylaw and she was permitted to build in accord with her amended plans.

[26] The Swarts were dissatisfied with the results of their submissions to Kelowna and the other government bodies. So they lodged a complaint to the FIRB.

[27] On May 3 and 4, 2012, the FIRB conducted a hearing.

[28] The FIRB retained Carl Withler, a professional agrologist employed by the Ministry of Agriculture, as the "knowledgeable person" to assist it and to advise it on normal farm practices.

[29] Mr. Withler's report incorporated his opinions on the complaints regarding noise, light, and odour. His conclusions were:

(a) the noise the appellant's farm generated was a normal farm practice;

(b) the light the appellant's farm generated was a normal farm practice;

(c) the appellant's farm manure storing, spreading and management were a normal farm practice, and some larger manure piles could be alleviated with a minor change; and

(d) the appellant's barn run outs that permit livestock into a confined area within 15m of a lot line did not meet the provincial guidelines. But he did not address the question of "normal farm practice" as defined by the *FPPA* in his written report, and in his oral testimony, he described the appellant's equestrian centre (not referring to run outs) as generally closer to the lot line than most equestrian centres he had seen.

[30] Mr. Withler and the FIRB disagreed with Kelowna's interpretation of its bylaw. And contrary to Kelowna's interpretation, he interpreted Kelowna's zoning bylaw to require that "confined livestock areas" be setback 15m from the property line.

[31] Mr. Withler said that a 15m setback for confined livestock areas was consistent with farm practices in other areas such as the Township of Langley.

[32] Mr. Withler criticized himself, the Ministry of Agriculture, and Kelowna for their failure to address the city's bylaw and its relationship to normal farm practices.

[33] The Swarts entered photographs showing the areas along their common boundary line with the appellant's property. They pointed to livestock area B as the main sources of odor and flies. They complained of extremely bothersome flies that were not a problem before the appellant created livestock area B.

Issues

[34] The appellant advanced seven grounds of appeal:

(a) Whether the FIRB relied on expert evidence that was based on incorrect terms of reference because the terms of reference were made outside of the FIRB's jurisdiction;

(b) Whether the FIRB in its decision infringed the appellant's right to procedural fairness by analyzing the bylaw without giving the appellant adequate notice;

(c) Whether the FIRB order exceeds the FIRB's jurisdiction as the order amounts to a municipal bylaw ruling and purported enforcement;

(d) Whether the FIRB in its decision erred in law by failing to give sufficient weight to Kelowna's interpretation of its own bylaw and by failing to give any weight to the appellant's evidence regarding normal farm practices of similar farm businesses under similar circumstances;

(e) Whether the FIRB erred interpreting the bylaw;

(f) Whether the FIRB erred by concluding that normal farm practices requires a 15m setback and whether that conclusion is supported on the evidence before the FIRB; and,

(g) Whether the FIRB decision is unreasonable and exceeds its jurisdiction under the *FPPA* to protect the right of farmers and whether the FIRB's decision limits the right to farm without adequate reasons for doing so.

Standard of Review

[35] Before turning to the substantive analysis, I will address the applicable standard of review on this appeal.

[36] The appellant summarized the standard of review in an administrative law proceeding as settled in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[37] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 [brief], the Court elaborated on this analysis, and it made the following points:

(a) in matters of true jurisdiction, the standard is correctness. But parties invoking jurisdictional challenges must demonstrate "why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness": at para. 39.

(b) in questions of central importance to the legal system as a whole or that are outside the decision maker's specialized expertise, the standard is correctness: at para. 46.

(c) if an alleged error is within the decision maker's specialized expertise and does not raise issues of general legal importance, the court must give substantial deference to the conclusion and apply the reasonableness standard: at para. 83.

(d) if a decision maker is interpreting its own home statute or a closely connected statute, the standard should be presumed to be reasonableness: at para. 39.

[38] In *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 16, the Court laid out the approach apposite to this appeal:

> *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference 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" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

> [Emphasis added.]

[39] Regarding the standard of review, the respondents contend that this Court's previous decisions have determined the deference to be accorded on questions relating to normal farm practices.

[40] In *Lubchynski*, Beames J. noted that the FIRB is entitled to significant deference when she found the appropriate standard of review was reasonableness at para. 16:

> The Board's decision on such an issue is, because of the Board's expertise, entitled to significant deference. The test on review is not whether this court would have arrived at the same conclusion. I conclude that unless the Board's decision is patently unreasonable, for example if it were completely unsupported by any evidence, this court cannot simply substitute its discretion for the Board's discretion, nor re-weigh and re-evaluate the evidence heard by the Board for the purpose of reaching its own conclusion.
>
> [Emphasis added.]

[41] The respondents submit that the Court does not need to proceed with the second step of a fresh standard of review analysis because of *Lubchynski*. Although *Lubchynski* was decided before *Dunsmuir*, I find that the standard of review has been already established, and I accede to the respondents' argument on this point.

[42] I also note that these standards or review apply to judicial review and statutory appeals from administrative tribunals: *Salway v. Assn of Professional Engineers and Geoscientists of British Columbia,* 2010 BCCA 94 at para. 22.

[43] In *Dunsmuir* the Court addressed the meaning of "reasonableness" at para. 47:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility

> within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[Emphasis added.]

[44] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*] the Court commented on the meaning of "reasonableness." Reasons serve the purpose of showing whether the results "fall within a range of possible outcomes". It said that if a board's reasons are deficient, the reviewing court must seek to supplement those reasons before it seeks to subvert the decision. Indeed, reasons must be read together with the outcome. Finally, at para. 15, the Court warned reviewing courts to be cautious in their analysis:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[45] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, [2013] 2 SCR 458 the Supreme Court of Canada reiterated this point at para. 54:

> The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

[46] Specialized tribunals regularly address complex administrative schemes and bring expertise and sensitivity to the task with an awareness of "imperatives and nuances of the legislative scheme" is most important. The Supreme Court made this exact point at para. 49 of *Dunsmuir*:

> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to

> day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[47] The FIRB is a specialized board with expertise in farm practice and with the necessary sensitivity to the interrelationship between farms, farmers and farm practices. It is entitled to deference in assessing normal farm practice and in the remedies it deems appropriate if a farm practice is not normal: *Lubchynski*; *Ollenberger v. Farm Practices Board*, August 10, 2006, Chilliwack registry No. S16527.

[48] The appellant contends that this case presents true jurisdictional issues concerning the interpretation and use of the bylaw as a measure of normal farm practice. They argued these issues should be analyzed on the correctness standard.

[49] Despite the appellant's helpful submissions, I do not agree.

[50] Administrative tribunal decisions can only be reviewed on the correctness standard in the very limited circumstances described in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 35:

> An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, 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'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, at paras. 58-61; *Smith*, at para. 26; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), 2003 SCC 63, [2003] 3 S.C.R. 77 ("*Toronto (City)*"), at para. 62, *per* LeBel J.).

[51] The Supreme Court of Canada recently reiterated these same points *in McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 20-21

noting that the overwhelming presumption is a standard of review of reasonableness unless one of the limited exceptions where correctness standard applies arises.

[52] This case does not fall within any of those limited circumstances.

[53] Additionally, I do not need to consider other factors including the absence of a privative clause, the nature of the question, or the tribunal's expertise as the standard of review is already resolved.

[54] Thus, I agree with the respondents: the standard of review on this appeal is reasonableness, and the authorities establish that the FIRB is entitled to significant deference in assessing normal farm practice.

[55] I will address any procedural fairness issues on the standard of fairness: *Seaspan Ferries Corp. v British Columbia Ferry Services Inc.,* 2013 BCCA 55 at para. 52 [*Seaspan*].

The Appellant's Arguments

[56] The appellant contends that the FIRB committed seven errors. Items (a) to (c) address substantive and procedural fairness considerations, and items (d) to (g) address substantive review issues, including, alleged errors of law relating to rulings on normal farm practices.

(a) Whether the FIRB relied on expert evidence that was based on incorrect terms of reference because the terms of reference were made outside of the FIRB's jurisdiction?

[57] The appellant argues this issue was a procedural fairness issue - specifically, she asserted that Mr. Withler, the knowledgeable person in this case, had both a personal and professional interest in the FIRB decision.

[58] She raised bias on three grounds. First, Mr. Withler felt that his department, the Ministry of Agriculture, and he, personally, failed in their duty to address reforming Kelowna's bylaw. Second, Mr. Withler had a pre-existing relationship with

the respondents that gave rise to a reasonable apprehension of bias. Third, Mr. Whither was not an independent expert because he was a Ministry employee.

[59] So the appellant argues Mr. Withler's underlying personal agenda, pre-existing relationship, and association with the Ministry tainted the entire process with bias. The appellant argues he was not neutral and rather acted as an advocate, and, by extension, because the FIRB relied on his opinion, the FIRB decision was biased.

[60] The appellant claims that she might have sought to disqualify Mr. Withler if she was informed of his impartial views before the hearing.

[61] The appellant argues that administrative decision makers must be unbiased and independent in exercising their decision-making power. Because of Mr. Withler's admitted impartiality, his bias tainted the FIRB's ultimate decision.

[62] The appellant noted the applicable standard for a court reviewing reasonable apprehension of bias allegations: whether an informed person would conclude that it was more likely than not that the decision-maker would consciously or unconsciously decide the issue unfairly: *Committee for Justice and Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369 at 394.

[63] Therefore, the appellant submits that this Court should find that the FIRB decision is tainted and render it void: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 40 [*Newfoundland Telephone*].

[64] The respondent, FIRB, argues that bias allegations are serious. When a party alleges bias, sufficient evidence must demonstrate that a reasonable person would find that the decision maker's mind was not impartial: *Adams v. British Columbia (Worker's Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 at 231-232.

[65] The respondent argues that the fundamental issue is not whether a witness gave non-neutral evidence; rather the issue is whether the FIRB itself was biased. If

the Court were to find that Mr. Withler was biased, then it should accord less weight to his evidence rather than nullifying the whole proceeding.

[66] The respondent, the Swarts, similarly argue that bias applies to public decision makers and statutory delegates and not a FIRB appointed expert. They also presented a similar legal test and noted that the grounds for bias must be substantial.

[67] I will review this issue on the standard of fairness: *Seaspan* at para. 52. The duty of fairness is flexible and varied, and it can be achieved in many ways: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

[68] I agree with the respondents: the real issue is whether the FIRB was biased in reaching its conclusions based on Mr. Withler's evidence.

[69] Mr. Withler was appointed pursuant to s. 4(1) of the *FPPA*, and s. 4(1) establishes:

> In the interest of reaching a settlement of the complaint … The chair of the board, at any time before a panel of the board has decided the application, may inquire into matters relevant to the complaint, and … may obtain the advice of persons were knowledgeable about normal farm practices.

[70] Thus, Mr. Withler's role was to give advice to the FIRB about normal farm practices, and the FIRB chair was free to consult with the farmer and the respondent identified in the complaint application.

[71] The parties agreed to the terms of reference for Mr. Withler's appointment; they confirmed the parties' right to question his report, and the FIRB said his opinions would not bind it. Indeed, it independently decides how much weight to give the knowledgeable person's opinion.

[72] In other words, the FIRB gave her the requisite notice.

[73] My view on this issue is partially influenced by the appellant not raising the issue of Mr. Withler's bias at the FIRB. If it is a significant issue now, it should have been a significant issue then.

[74] The appellant had the opportunity to cross-examine Mr. Whither and make submissions regarding his evidence. The appellant could have attacked his expertise or partiality during the hearing. But the appellant did not raise those issues. In fact, she did not mention any concern with Mr. Withler's partiality until this appeal.

[75] The Supreme Court of Canada described the test applicable to a complaint of bias in similar situations. In *Newfoundland Telephone* at para. 22, it said: "The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

[76] I am satisfied that a reasonable person looking at all of this case's factors would not conclude that the FIRB was biased.

[77] The suggestion that Mr. Withler's relationship with the respondents coupled with his personal interest in interpreting the bylaw tainted their decision is not disclosed in the evidence.

[78] I cannot find any features of the evidence on this point that would convince a reasonable person that the FIRB was, on the basis of Mr. Withler's evidence, unfairly influenced or biased in concluding that Kelowna misinterpreted its bylaw or in making its normal farm practice determination.

[79] Additionally, as the FIRB argued, the fact that Mr. Withler was also a Ministry employee is insufficient to prove bias. Being a Ministry employee does not preclude also being a knowledgeable person expert in his field.

[80] While I agree with the appellant that it appears Mr. Withler had issues with Kelowna's bylaw interpretation and his Ministry's failure to address the situation, I do not find that his interest in the importance of the provincial guidelines or his contrary view of the proper bylaw interpretation demonstrated any real risk of impartiality. Nor can I conclude that his impartiality - if it existed at all - tainted the FIRB.

[81] The FIRB relied on its independent analysis of the bylaw; Mr. Withler's expert opinion; and other evidence and testimony. Indeed, the FIRB reasons reflect that it formed its own opinion regarding the bylaw:

> We have considered the interpretation given by the City of Kelowna staff to section 11.1.6 (f) of the Zoning By-law referenced above. We do not agree with that interpretation. As we have already noted the definition of" confined livestock area" under the bylaw is the same as that in the guide and makes no reference to the number of livestock permitted in such area. The phrase in section 11.1.6 that is in question reads" confined livestock areas and\or buildings housing more than four animals…". It is clear on a plain reading that the words" housing more than four animals, or used for processing of animal products were for agricultural and garden stands" or modify the terms" buildings" and do not modify (and would render the bylaw provision nonsensical if they were considered to modify) the only clearly defined term "livestock areas".

[82] Nothing in the evidence or reasons suggests that the FIRB adjudicated the issues with a closed mind or impartial attitude. The appellant has not satisfied the requirement that she demonstrate a reasonable apprehension of bias.

[83] I dismiss this ground of appeal.

(b) Whether the FIRB in its decision infringed the appellant's right to procedural fairness by analyzing the bylaw without giving the appellant adequate notice?

[84] The appellant argues that the hearing brief sent to her did not provide adequate notice that bylaw interpretation would be an issue during the FIRB hearing depriving her of a fair opportunity to challenge that issue. That brief described the issues as follows:

> Does the noise, odour, flies, bright lights, and unsightliness from the respondent's equestrian operation result from normal farm practices.

[85] The appellant argues that the FIRB's bylaw analysis and its disagreement with Kelowna's interpretation was unprecedented and unexpected. She claimed to have previously relied on Kelowna's interpretation when she proceeded with constructing her equestrian Center and barn. She was shocked that the FIRB rejected Kelowna's view.

[86] The appellant provides no authority on this issue. But she contends she was unable to address the bylaw interpretation issue because she did not receive advance notice that this issue would influence the FIRB's decision. She argued that

everyone appearing before an administrative board is entitled to fair treatment and she was denied fair treatment and this Court should render the FIRB decision void.

[87] The respondent, FIRB, contends that the bylaw issue was raised and discussed well before the hearing. Indeed the appeal book, the transcript, and the evidence demonstrates this fact, so the appellant should not have been surprised when the FIRB considered this issue.

[88] The respondent, the Swarts, point out that their initial complaint to the FIRB criticized Kelowna's bylaw interpretation. For the appellant to expect or assume that the FIRB would not discuss it at the hearing was incorrect and unreasonable.

[89] The Swarts contend that procedural fairness rights are concerned with participatory rights - i.e., the procedure needs to be fair and open: *Baker* at para. 22. The appellant was not denied the opportunity to present and effectively argue her views.

[90] In sum, both respondents argue that it was plain before the hearing that the Kelowna bylaw (including its interpretation) would be an issue at the FIRB hearing. The appellant's failure to consider the importance of this issue at the hearing was possibly an oversight on her part, but it did not involve a question of procedural fairness issue. No specific notice was required.

[91] I agree with both respondents: the appellant was not denied any participatory or procedural rights.

[92] Further, these issues were not argued before the FIRB and are raised on this appeal for the first time. This fact can create unfairness and prejudice to the respondents who were not able to address the issue during the hearing: *Alberta Teachers* at para. 26.

[93] Similar to the previous issue, I will review this on the standard of fairness and the mentioned principles.

[94] Notice that is too vague violates procedural fairness: *Central Ontario Coalition Concerning Hydro Transmissions Systems et al. and Ontario Hydro et al*. (1984), 46 O.R. (2d) 715 at 740 (H.C.).

[95] The procedure was fair and open, and the notice was not in any way vague - especially when looking at this issue contextually.

[96] The appellant previously relied on Kelowna's bylaw interpretation in locating the barn run outs. The Swarts had advanced several complaints concerning the appellant's farming business, and they had spoken about the setback issue and their concern with Kelowna's interpretation.

[97] The complaints and the appellant's previous exchange of correspondence and ongoing discussions with Kelowna would have alerted any reasonable person that the FIRB would consider the bylaw issue at the FIRB hearing even though the hearing notice did not specifically alert her to that fact.

[98] That the FIRB examined the bylaw without specifically telling the appellant was not unfair, unreasonable or reasonably unexpected, and that the FIRB might examine the bylaw was obvious, and the appellant cannot reasonably have been surprised.

[99] Moreover, Mr. Withler's report was produced well in advance of the FIRB hearing. In that June 2011 report, he clearly opined that the current bylaw does not meet the current 15m setback requirement advocated for by the Ministry of Agriculture:

> Because of the existing reference to animal density there may have been some Ms. guidance (officially induced error) on the part of City staff to Ms. Holt in attempting to resolve the Swarts concerns. <u>This noncompliant activity should be corrected in the bylaw brought up to the Ministry standard</u>. The ministry will take the initiative to enter into negotiations and discussions to a remedy this error.
>
> [Emphasis added.]

[100] The appellant could not reasonably have been surprised or prejudiced when the Withler report commented on the bylaw interpretation before the FIRB hearing even commenced.

[101] I dismiss this ground of appeal.

(c) Whether the order exceeds the FIRB's jurisdiction as the order amounts to a municipal bylaw ruling and purported enforcement?

[102] The appellant centres this argument on the *FPPA*'s purpose: protecting farmers engaged in normal farm practices from nuisance claims and municipal bylaws that restrict normal farm practices. She contends the *FPPA* is a shield - not a sword. Moreover, the FIRB is not intended to serve as a "second avenue to obtain a bylaw enforcement ruling" as the appellant alleges the Swarts are doing in their FIRB complaint.

[103] The respondent, FIRB, argues that the "shield" or "sword" characterization of the *FPPA*'s purpose does not aptly describe the *FPPA* or the FIRB process. The *FPPA*'s purpose is not restricted to common law nuisance claims or municipal bylaws that restrict normal farm practices; rather the FIRB is concerned with farming operations that create disturbances and grievances and whether those disturbances result from normal farm practices. In other words, the FIRB can both protect and regulate farmers.

[104] The appellant argues that the FIRB conflated bylaw standards and normal farm standards as advocated in the provincial guidelines relied upon by Mr. Withler. She contends that the FIRB had no authority to interpret and apply the bylaw in the manner it did. Its jurisdiction regarding bylaws is limited: it can override bylaws that are inconsistent with normal farm practices. By engaging in bylaw interpretation and bylaw compliance, however, the FIRB exceeded its jurisdiction and acted *ultra vires*; in effect, the FIRB acted without legal authority and therefore transgressed the rule of law: *Dunsmuir* at paras. 29 and 59.

[105] The appellant further argues that the FIRB did the opposite of its prescribed role; rather than protecting the appellant, the FIRB overruled Kelowna's bylaw interpretation that supported and protected her farming operations. She submitted that individuals in the appellant's circumstances should be able to rely on Kelowna's interpretation and opinion as evidence of an accepted standard of a normal farm practice to govern their affairs. Presumably, Kelowna's advice to the appellant on its interpretation of its own bylaw represented some evidence of the city's view of farm practice complying with its bylaw.

[106] The appellant contends that this issue should be reviewed on a correctness standard. As I already said, I do not accept this argument.

[107] The respondent, FIRB, argues that it made its decision squarely within its home territory - i.e., determining whether the location of livestock area B directly against the property line with the attendant odours and flies was a normal farm practice and its analysis of the bylaw assisted in making that determination.

[108] The respondent, the Swarts, rely on the fact that the FIRB is not bound by municipal bylaws, and that the FIRB can rely on Ministry of Agriculture approved municipal bylaws in determining local normal farm practices.

[109] They argue this examination included considering the full context and circumstances of the parties - including bylaws and guidelines: *Pyke v. Tri Gro Enterprises*, (2001) 204 D.L.R. (4th) (Ont. C.A.) [*Pyke*].

[110] I agree with the respondents.

[111] The FIRB did not exceed its statutory authority when it examined the bylaw. In fact, The FIRB's bylaw interpretation did not infringe on Kelowna's right to interpret its own bylaw or intrude into the field of municipal governance.

[112] Kelowna does not have the authority to create bylaws that restrict normal farm practices. Nor does it have the authority to insulate farmers whose practices are not normal farm practices from the application of the *FPPA*.

[113] The FIRB retains the sole authority to determine whether a practice is normal or not, and this authority extends to reviewing and interpreting zoning bylaws that may permit or deny an activity in conflict with the *FPPA*. The FIRB has the mandate to determine whether farms adopting normal farm practices are affected by municipal by-laws; to this extent, the FIRB is entitled to its own view about the permitted uses of land.

[114] Under s. 7 of the *FPPA*, the FIRB is entitled to determine the practices and procedures to be followed, and it may conduct hearings in an informal manner. The FIRB is entitled to consider and evaluate any evidence, including evidence that is not normally admissible in formal court proceedings. Although analyzing a normal farm practice may require considering established statutes like bylaws, nothing prohibits the FIRB from adopting a different bylaw interpretation.

[115] The FIRB's role is to achieve a balance in contests concerning land-use on farms in proximity to non-farming properties. Assessing normal farm practices necessarily includes a broad review of all relevant evidence, including city bylaws, to assess whether those bylaws regulate activity that conforms with or offends normal farm practices.

[116] The stated purpose of the provincial guidelines is to inform municipalities on the form of bylaw that achieves the optimum balance between farmers and their neighbours. If a bylaw accords with Kelowna's view of optimum balance but does not accord with normal farm practice, the FIRB can lawfully disregard the bylaw and make appropriate orders. The converse is also true. The FIRB is never confined to an interpretation given by city staff.

[117] The FIRB was entitled to its grammatical assessment of the bylaw to assess how it accorded with the provincial guidelines and as an objective assessment of Kelowna's zoning standard. Its assessment did not "override" Kelowna's bylaw. It opined that the bylaw required a 15m setback for a confined livestock area abutting a neighbouring property. And this conclusion was consistent with the provincial

guidelines. The FIRB used the bylaw and provincial guidelines as evidence of normal farm practices in BC and Kelowna.

[118] I will l address this point later. For now, I will note that evidence of this type on its own is insufficient to establish proof of a normal farm practice; rather, pursuant to the *FPPA* the FIRB must also consider "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances".

[119] The FIRB gave reasons for this disagreement, including this comment from the guidelines:

> Variation between local governments existing bylaws is evident with regard to setback distance from what lines for farm buildings and structures. In order to minimize the creation of uses that do not conform to existing bylaws, a range in certain bylaw standards is indicated. For example, some setback standards are set at 15 – 30 m. establishing a setback anywhere within this range will be considered consistent with the standard…

[120] I understand the appellant's frustration: she proceeded through all the necessary steps to comply with the bylaw; including changes to her farm layout. However, the legislature established this specific scheme empowering the FIRB to evaluate and decide what constituted normal farm practices and, in cases like this, require compliance with its directions concerning normal farm practices.

[121] In my view, the appellant's argument that the bylaw examination and interpretation is *ultra vires* is simply not supported by the scheme of municipal governance and the FIRB's regulatory responsibilities.

[122] The FIRB's bylaw and provincial guidelines interpretation was reasonable because the outcome was with the range of reasonable outcomes arising from an analysis of the by-law and provincial guidelines.

[123] I dismiss this ground of appeal.

(d) Whether the FIRB in its Decision erred in law by failing to give sufficient weight to Kelowna's interpretation of its own bylaw and by failing to give any weight to the appellant's evidence regarding normal farm practices of similar farm businesses under similar circumstances?

[124] The appellant suggests that the FIRB ignored evidence that she presented to them regarding normal farm practices. I have already addressed the zoning bylaw issue, and I will address the appellant's argument regarding the evidence relied upon by the FIRB later.

[125] The appellant argues that the FIRB made a legal error when they did not consider Ms. Holt's witnesses: *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748 [*Southam*] at para. 42. At para. 41, the Supreme Court of Canada said:

> 41. Both positions, so far as they go, are correct. If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. The question, then, becomes whether the Tribunal erred in the way that the respondent says it erred.

[126] The FIRB considered the evidence of the witnesses and evidence the appellant tendered.

[127] At paras. 88-92, the FIRB addressed the appellant's evidence. I have included it in full:

> 88. Mr. MacCormack, a witness for the respondent, owns and operates an equestrian centre in the Kelowna area that is similar to the respondent's in that he boards horses that are in training and competing. He testified that his facility is also private and he therefore does not post hours publicly. The facility is open from 8 a.m. to 8 p.m. for riding with access outside of these hours to tend to horses and for shipping to and from shows. His staff starts early. In the summer they may arrive as early as 6 a.m. Noise from trucks, vehicles and equipment is usual. Horses are loaded and unloaded at the front of the barn because it makes sense. Trucks are not to idle while loading.
>
> 89. As for lighting, Mr. MacCormack stated that he has a number of dusk to dawn yard lights.
>
> 90. Mr. MacCormack described his manure management as similar to the respondent's in that manure is picked out of paddocks daily except

> when it is difficult to do so in winter. In the spring when it thaws the entire paddock is cleaned out if there is residual manure. He composts some manure for use in the paddocks and the rest is removed every month or two. He indicated his facility does not have run-outs similar to the respondent's. Instead horses are lead in and out to the paddocks for turn out. He stated that another equestrian centre in the area turns horses out in paddocks along its property line. He testified that when he went through the planning process to get approval for his facility, no consideration was given to setbacks with respect to paddocks and that his understanding was the setback requirements applied only to buildings. He agreed that he had no neighbours whose residences were nearby his facility.
>
> 91. Mr. MacCormack considered the respondent's farm and its operations to be above standard.
>
> 92. The respondent submitted questionnaires completed by four other Kelowna-area horse farms to support her argument that her farm practices accord with normal farm practices. The responses provided by the owners/operators of these facilities indicate that the nature and hours of their operations, manure management practices and other aspects of their operations were generally consistent with Mr. MacCormack's testimony with respect to his facility.

[128] While I agree with the appellant that the FIRB's treatment of this evidence in its analysis, which I will address below, was opaque, they did mention her evidence in their reasons. Moreover, Mr. MacCormack specifically stated that he had no neighbours near his facility, and he said that the nature of the other comparable Kelowna-area horse farms was consistent with his. I infer from this statement that the other comparable businesses also may not have neighbours directly adjacent to their farms' property lines.

[129] The FIRB concluded:

> 147. We consider the setback provisions in the Guide and those in the Zoning Bylaw to be standards in relation to normal farm practice that have been designed to take into account proximity issues such as those raised in this case by the complainants. These standards together with the evidence of the knowledgeable person in our view clearly outweigh the evidence, <u>which we did not find sufficiently detailed in any event brought forward by the respondent as to what others keeping horses in the area may be doing</u>. In this regard, we observe that normal farm practices are not static. While there may be other horse farms in Kelowna with confined livestock areas that run along a property line, we expect farmers to be updating and changing to keep their practices current and observe that they may have to

> change their practices over time to remain consistent with normal farm practices
>
> [Emphasis added.]

[130] In other words, the FIRB examined the evidence. They did not merely dismiss it; rather it concluded that the evidence provided insufficient detail to inform them about the customs and standards of similar farm businesses under similar circumstances. Thus the FIRB found that evidence was not probative to determining whether the appellant's use of livestock area B was a normal farm practice.

[131] Curiously, the FIRB seems to indicate that evidence of practices in other farms with confined livestock areas would not have been helpful because it expected farmers to be "updating and changing to keep their practices current". From this statement, I infer that the FIRB was not prepared to consider, and did not consider, the evidence of the practices of other farm businesses. I will address this point further below.

[132] In any event, I dismiss this ground of appeal.

(e) Whether the FIRB erred interpreting the bylaw?

[133] I have dealt with appellant's claims regarding the Kelowna bylaw interpretation. Interpreting the bylaw was within FIRB's mandate. For this Court to interfere with the FIRB's conclusions would be inappropriate unless the FIRB's interpretation was unreasonable.

[134] I have reviewed the bylaw and the FIRB's explanation for differing in its interpretation from Kelowna's interpretation. After conducting a grammatical interpretation of the meaning of the bylaw's words, the FIRB concluded that limitation regarding the number of animals in a certain place did not apply to confined livestock areas; rather, it applied only to buildings housing more than four animals.

[135] The FIRB was not unreasonable in its analysis and decision on this point. Further, even if this was an issue reviewable on the standard of correctness, I am not satisfied that the FIRB's conclusions regarding the bylaw were incorrect.

[136] I have already dismissed this ground of appeal.

(f) Whether the FIRB erred by concluding that normal farm practices requires a 15m setback and whether that conclusion is supported on the evidence before the FIRB?

(g) Whether the FIRB decision is unreasonable and exceeds its jurisdiction under the *FPPA* to protect the right of farmers and the FIRB's decision limits the right to farm without adequate reasons for doing so?

[137] I will address these two grounds of appeal as framed by the appellant together as each ground deals with similar issues.

Application of the Review Standards

[138] At this juncture, and because I am finding this aspect of the FIRB decision unreasonable, I find it prudent to reiterate the principles to be applied in addressing questions like those raised by the appellant.

[139] I have carried out my analysis on the basis that the reasonableness of the FIRB decision is determinative, and I must give respectful attention to the reasons given. On this point, the Court in *Newfoundland Nurses* at para. 15 said:

> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[140] The FIRB is the "front line adjudicator", and it possessed a unique perspective regarding this farm and its proximity to neighbour. As I have already observed, the FIRB is a very specialized decision maker.

[141] Again in *Newfoundland Nurses* at para. 13, the Court said that reviewing courts should restrain themselves when examining the decisions of specialized decision makers:

> [13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

[142] And in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the Court expounded on what reasonableness means:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[143] In "Adequacy of Reasons - From Procedural Fairness to Substantive Review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*", (2011) 90, The Canadian Bar Review 511 at 516, Neil G. Wilson articulated a helpful description of how these concepts should be applied. To upset a tribunal finding, an appellant must show the reasons are:

> (a) <u>not justified</u>: they were neither well thought out nor reasoned;

(b) not transparent: they neither provided public accountability nor assurance to the parties that their submissions were considered; or

(c) not intelligible: they would neither allow the unsuccessful party to know why their position failed nor assist with review; moreover, they would not give guidance to others subject to the decision-makers jurisdiction.

Whether the FIRB erred by concluding that normal farm practices requires a 15m setback and whether that conclusion is supported on the evidence before the FIRB?

[144] The appellant argued under this heading that the FIRB exceeded its jurisdiction by making an order inconsistent with the *FPPA*.

[145] She argued that the FIRB's powers are limited to requiring modifications to ensure practices were consistent with normal farm practice. She argued that the location of the setback was not a "practice" and that moving the fence could not be construed to be a modification of a farm practice.

[146] In my view, the FIRB did not, on this point, exceed its jurisdiction as the applicant alleged.

[147] Paragraph 153 of the FIRB reasons stipulates alternative measures to obviate an abnormal farm practice. The FIRB's order mandating a 15m setback was an alternative to excluding horses from area B if it remained a confined livestock area.

[148] The abnormal farm practice the FIRB order addressed is that of confining horses within 15m of the property line. The effect of the FIRB's order is that the appellant has a choice of excluding horses from the current run out or moving the run out to comply with the setback order.

[149] The FIRB did not act without jurisdiction in making that order, and, on this point, the conclusion and remedy was reasonable.

Other Errors Relating to Normal Farm Practices

[150] In addition, the appellant contends that the FIRB erred in its conclusion that the respondents were disturbed because of her farm operations (in area B) or that her farming practice was not a normal farm practice.

[151] The FIRB concluded that the appellant's manure management practices were consistent with normal farm practice standard, if not exceeding those standards. The appellant contends that this conclusion should have ended the FIRB inquiry.

[152] By continuing to address the complaints, she argues the FIRB committed the following five distinct errors:

(1) The FIRB failed to consider the threshold issue connecting the cause of the odour with area B;

(2) The FIRB conflated the area B location with the 'farm practice' carried out there;

(3) The FIRB applied its own interpretation of the bylaw and failed to give due weight to Kelowna's more favourable interpretation of its bylaw;

(4) The FIRB incorrectly analyzed the nature and purpose of the bylaw guidelines and considered the incorrect evidence provided by the knowledgeable person; and

(5) The FIRB failed to consider the evidence led by the appellant's witnesses.

[153] The appellant argued that although some these errors are reviewable on the reasonableness standard, some of the findings deal with matters outside the FIRB's mandate and should be decided on the correctness standard.

1. Whether the FIRB failed to consider the threshold issue connecting the cause of the odour with area B

[154] In sum, the appellant contends that no actual evidence was before the FIRB linking the odour complained of to area B. Therefore, the FIRB could not make a finding that the disturbance under s. 6 of the *FPPA* arose from area B.

[155] Pursuant to s. 6(1), the FIRB must:

> (a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust or other disturbance results from a normal farm practice, or
>
> (b) order the farmer to cease the practice that causes the odour, noise, dust or other disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.
>
> [Emphasis added.]

[156] Section 6(1)(b) is primarily at issue here. I replicate the appellant's argument on this point:

> 98. While the Board found, incorrectly that the location of Area B was not consistent with normal farm practices they made no finding that Area B was the cause of the disturbance. As such the ruling of the Board and the order are not consistent with the requirements of the Act.
>
> [Emphasis added.]

[157] In essence, the appellant said that the *FPPA* mandates a two-step process: first, the FIRB was required to consider whether the complaint of odour and flies emanated from her farm operation. Second, if that finding is not made, the FIRB has no need to consider if her farm practices were normal.

[158] The appellant also said:

> 126. The location of the Barn cannot be said to contribute to the flies and odour problem generally. The Barn would create the same odour no matter where its location and the Board proximity argument as it relates to setbacks cannot be sustained as reasonable.
>
> 127. The run-outs could in fact be located much closer to the Swarts' home yet still be set back 15 meters (the distance the Board incorrectly concluded was required) from the property line. This could be accomplished by moving the run-outs to a paddock closer to Stewart road, to a location directly adjacent to the Swarts home. On the Board's reasons this new location would be consistent with 'normal

> farm practices' thus emphasising the failure of the Board to consider the correct factors. Such a location would be detrimental to both parties. To Ms. Holt due to the increase risk placed on her horses and their handlers through the daily need to move the horses, and to the Swarts from the increased noise do to the movement of horses in and out of the new area each day and from an increased concentration of normal farm odours from having the new location directly adjacent to their home.
>
> 128. Thus it is not the location of the run-outs but the practices carried out there which should have been considered. To the extent that there is an increase of flies and odours as a result of the Barn it must be as a result of the manure and urine created by the horses or the horses themselves.
>
> 129. It does not appear that there were any allegations that the horses themselves were a source of odour or flies. To the extent that the manure was the source of the odour and the flies Ms. Holt engaged in the best manure practices possible, daily removal. The Board found this practice met or exceeded normal farm practice

[159] She referred to the FIRB's conclusion at para. 97 that:

> We accept the respondent's argument that given the various farm operations in the area surrounding the complainants property this increase may not be solely due to the equestrian center operations. However, because of the proximity of the equestrian center to the complainants property in the temporal connection between increasing over and flies in the commencement of the equestrian operations, we conclude that some of the increase in over and flies is due to those operations.

[160] While the FIRB found that livestock area B was not a "normal farm practice", it did not say this practice caused odour, noise, dust or other disturbance; indeed, some of the increase in odour was due to general operations.

[161] In other words, while the FIRB said that the setback of the appellant's run out was relevant to the odour and flies complaint, it stopped short of concluding that her abnormal farm practice - i.e. livestock area B's location - caused the odour and flies.

[162] She contends that the FIRB's conclusion was based on circumstantial evidence, at best, and it related to the equestrian center generally without concrete evidence that the odour came from area B. And she contends that the odor that was the subject of the complaint is related to the equestrian center generally and not with the specific practices occurring in area B.

[163] She claims that no “actual evidence before the FIRB linked the odour complained to area B”. Thus, the FIRB had no evidence of a disturbance caused by using area B as a run out for horses.

[164] In the absence of evidence that the source of odour resulted from her farm practices, she claims that the FIRB erred in considering whether the complaint of odour and flies emanating from her property was a normal farm practice. So this threshold issue should not have been decided against the appellant.

[165] Therefore, she argues that the FIRB conclusion was not supported by evidence, is unreasonable and is a violation of essential justice: *Children’s Aid Society of the Catholic diocese of Vancouver v. Salmon Arm*, [1941] 1 D.L.R. 532 at para 9.

[166] I agree that the FIRB did not make a finding that livestock area B caused the disturbance that spurred the initial complaint. There is a troubling gap in the FIRB analysis.

[167] The question the FIRB needed to answer was two-fold: first, did the appellant's practice of placing horses within 15m of the property line cause the odour, flies or other disturbance aggrieving the complainant; if so, then the second question is trigged: was this practice a normal farm practice?

[168] In my view, the FIRB did not answer this question directly in making its overall findings.

[169] In fact, the FIRB never actually addressed the question of how the setback affected the presence of odour and flies other than at para. 120 of its reasons where it said that the appellant’s manure management potentially “exceeds usual standards”.

[170] The FIRB did not find that the run outs location alone caused or invited more flies and smell. Rather, it is what is in the run out or how the run out is managed that causes odour and flies.

[171] In other words, their reasoning suggests that moving livestock area B back 15m would not change the disturbance since livestock area B was relevant to the complaint but not causing the disturbance in its current location.

[172] The FIRB said that the manure management was adequate and at times actually exceeding normal standards. While Mr. Withler did say that setbacks are necessary to prevent manure runoff, neither Mr. Withler nor the FIRB made the finding that runoff caused the offending odour nor was it occurring because of an inadequate setback.

[173] To reiterate, the FIRB did not determine that the odour and flies resulted from manure deposited within 15m of the property line.

[174] Notwithstanding my views about the shortcomings in the FIRB's conclusions, I disagree with the appellant's argument on this point.

[175] The FIRB considered that setbacks were relevant considerations to the complaint about odour and flies "on the basis of proximity".

[176] The FIRB also considered the runoff of nutrients from manure as a reason to impose livestock setback areas. Although the FIRB did not expressly state that the odour and flies were caused by the manure deposited on the appellant's property in area B, that conclusion it is a reasonable inference and within one of the range of possible outcomes on this point.

[177] In my view, the FIRB should have said that the practice of placing horses in area B less than 15m from the property line, and the resulting manure deposits, caused or contributed to the odour and flies affecting the respondents. But the FIRB framed its decision on the basis that "the question of setbacks is clearly relevant to the complaint respecting odour and flies on the basis of proximity."

[178] In my view, it was reasonable for the FIRB to conclude manure deposited by horses in area B was a cause of the odour. Indeed, the FIRB reasons infer the

causal relationship, and that conclusion is within the range of possible outcomes based on all of the evidence.

[179] On this point, the FIRB articulated its views in such a way as to require this Court's respect of the process used to address the complaint and the result. And this Court must seek to supplement reasons before rejecting the FIRB's conclusions.

[180] For the Court to substitute its reasons and analysis when the result is within the possible range of outcomes would be incorrect: *Newfoundland Nurses Union* at paras 12-15. Therefore, I reject this argument.

2. Whether the FIRB conflated the area B location with the 'farm practice' carried out there

[181] The appellant contends that the location of her barn cannot be said to contribute to the respondents' concerns about odor and flies. She alleged that the run outs could be located closer to the respondents' house and yet be less than the 15m setback from the property line.

[182] She argues that the FIRB failed to consider that no evidence connected the run outs' location to the odour problem. She suggests that the odour is not connected to the run outs, but rather it is connected to the practices carried out in the run outs. Because of her manure management practices exceed normal farm practice, it was unreasonable to impose a 15m setback.

[183] This submission is an extension of the point raised above.

[184] The appellant argued that the odour or flies were not caused by the horses themselves; rather it was the manure the horses produced. Because she engaged in better than normal farm practices regarding manure management, the imposition of the 15m setback was unwarranted on the evidence.

[185] This Court can not engage in reconsidering the evidence or the use of evidence in forming the FIRB's conclusions.

[186] On this point, the Court must defer to the FIRB's specialized skill and experience, and its analysis of the impact of the manure generated by the appellant's horses. The FIRB is well qualified to craft remedial measures that could be adopted to address the complaint. This practice is within its mandate to protect farming businesses and promote shared use of land in farming areas.

[187] My conclusions on this point are similar to those above. The FIRB has considered the entire context of this dispute and formed opinions that were based on Mr. Withler's evidence and its consideration of the temporal connections and proximity factors.

[188] The FIRB's conclusions on this point are within the range of possible outcomes. I reject this argument.

3. Whether the FIRB applied its own interpretation of the bylaw and failed to give due weight to Kelowna's more favourable interpretation of its bylaw

[189] In summary, the appellant contends that the FIRB deviated from its authorized inquiry by focusing on the question of whether area B was compliant with the bylaw or the bylaw guidelines.

[190] She argued that Mr. Withler's focus on the city bylaw and bylaws in Delta and Langley was irrelevant to the issue before the FIRB. Rather, the issue in this case was whether a confined livestock area used for horses and within 15m of an adjoining property line was a normal farm practice.

[191] She submits that the FIRB should have accepted Kelowna's interpretation of the bylaw, and when it chose Mr. Withler's interpretation, it erred.

[192] The appellant relied on *Associated Provincial Pictures v. Wednesbury Corporation,* [1948] 1 K.B. 223 (C.A.) for the proposition that decision makers must exclude irrelevant considerations from their analysis of an issue, and when a decision maker considers information irrelevant to the issue, that conduct is unreasonable.

[193] Earlier in these reasons, I expressed my conclusion that it was not unreasonable for the FIRB to adopt a different bylaw interpretation.

[194] Sections 2 (2.1) and (3) of the *FPPA* illustrate circumstances in which farmers are exempted from municipal bylaws when conducting farm operations. However, nothing in those sections or the *FPPA* definitions restrict or prohibit the FIRB from considering and interpreting bylaws covering land-use to assist in determining whether a farm practice is normal.

[195] Therefore, the FIRB did not take into consideration any “irrelevant" or “extraneous" evidence. And its conclusions on the bylaw were not unreasonable.

[196] I reject this argument.

4. Whether the FIRB incorrectly analyzed the nature and purpose of the bylaw guidelines and considered the incorrect evidence provided by the knowledgeable person

[197] The appellant contends that the FIRB’s consideration of the bylaw was directly tied to the provincial guidelines.

[198] The provincial guidelines are a nonbinding informational document for the purposes of informing municipal corporations dealing with farm practices. It is an aid to local governments in developing bylaws, and it says:

> information contained in this guide, and all materials that is referenced, is intended to serve as a guideline for considering farm practices in British Columbia's agriculture industry. Reference material may provide suggestions for" beneficial management practices" to mitigate the impact of certain farm practices in specifics situations and conditions. However it should not be inferred that these" best management practices" should be implemented on an industry wide basis. <u>These guidelines are also not intended to serve as formal standards but rather serve to describe current practices used by farmers throughout British Columbia.</u>
>
> [Emphasis added.]

[199] The appellant suggests that Mr. Withler's evidence concerning normal farm practices was focused on the guidelines and the bylaw itself to the exclusion of evidence about equestrian practices followed by similar agricultural operations in the Okanagan.

[200] The only evidence on this question was provided by local farmers called to testify by the appellant.

[201] The appellant challenges the conclusion at para. 147 that says:

> We consider the setback provisions in the[By-Law} Guide and those in the Zoning Bylaw to be standards in relation to normal farm practice that have been designed to take into account proximity issues such as those raised in this by the complainants.

[202] The appellant argues that the bylaw guide does not purport to be “standards in relation to normal farm practice". The guide specifically says that it contains information and “does not set standards, but may be useful in the development of zoning or farming bylaws”.

[203] Section 12 of the *FPPA* authorizes the Lieutenant Governor in Council to make regulations respecting standards for the purposes of the definition “normal farm practice". But no standards have been set by regulation.

[204] The appellant contends that the FIRB acted unreasonably when considering the bylaw guide standards as an indication of normal farm practices.

[205] The appellant also argues that the FIRB failed to recognize that the bylaw guide sets maximum and not minimum setbacks.

[206] The appellant submits that the bylaw guide did not prohibit smaller setbacks, and the FIRB’s reliance on the provincial guidelines and the bylaw was incorrect and clearly unreasonable.

[207] I will address this submission together with the next point advanced at by the appellant below. In the result I effectively agree with most of the appellant’s submissions on these points.

5. Whether the FIRB failed to consider the evidence led by the appellant’s witnesses

[208] The appellant argues that FIRB ignored the evidence of the proper and accepted customs and standards established and followed by similar farm

businesses under similar circumstances tendered by her. She submits that the FIRB erred in failing to consider this evidence: *Southam* at para. 41.

[209] The appellant contends that evidence of other horse operations in Kelowna demonstrates that those farms used run outs along property lines where these locations were permitted by local authorities.

[210] Moreover, the appellant argued that Mr. Withler did not give evidence about the prevailing practice on other farm businesses in similar circumstances; the proper and accepted practices of businesses with livestock in the Kelowna area was limited in his report to an analysis of the bylaw and the provincial guide.

[211] The lack of specificity in the evidence tendered in support of the appellant's position was not against the proposition that other confined livestock areas abutting property lines were in similar circumstances to the Swart/Holt property line.

[212] Without the appellant's evidence on this point, the FIRB had a paucity of evidence on customs and standards as established and followed by similar farm businesses under similar circumstances.

[213] While I have rejected the appellant’s argument above that the FIRB failed to consider her evidence, I agree that the FIRB on the whole failed to consider evidence pertaining to similar farm business in similar circumstances and I find their decision was not justified or transparent and unreasonable on that basis.

[214] I will now turn to that analysis.

Why the FIRB decision was unreasonable

[215] I have found that: 1) the FIRB made its finding without the statutorily required evidence mandated by the *FPPA*, and 2) the FIRB applied its home statute in an unreasonable manner.

[216] I will address each in turn. But first, I will lay out the framework the FIRB applies in making its decisions.

[217] The FIRB seems to address the questions using the framework that *Pyke* set out. I will lay out the salient portions at paras. 71, 72, 78-81, and 87:

> [71] It appears to be common ground that the inquiry into whether a farming operation qualifies as a "normal farm practice" is both fact and site-specific. I agree with Charron J.A. at para. 42 that "the determination of what constitutes a 'normal farm practice' must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands."
>
> [72] There appear to be no judicial decisions, apart from that under appeal in this case, interpreting these provisions of either of the statutes. In some cases, the Farm Practices Protection Board under the 1988 Act appears to have taken a broadly contextual, site-specific, and evaluative approach. In Bader v. Dionis (September 2, 1992), 92-01 (F.P.P.B.), the Board found that the use of acoustical bird scaring devices was a normal farm practice, but warned at p. 6 that "this does not mean that in all situations where it is in close proximity to residential dwellings that the use of a bird banger will be a normal farm practice." In Thuss v. Shirley (December 27, 1990), 90-2 (F.P.P.B.), the Board dealt with a red ginseng operation that required sandy soil with little or no organic material. The soil was susceptible to wind erosion, and blowing sand seriously disrupted the activities on, and enjoyment of, neighbouring non-agricultural properties. There was no evidence of similar operations in Ontario, but there was evidence that the farm had followed the practices of its Korean advisers. The Board concluded at p. 4 that the farm practice for this crop "will, by necessity, have to be innovative" and that "[i]nnovative management practices . . . cannot be deemed normal if they result in severe erosion. Consequently, in this case, the blowing soil and related sand storms, do not result from a normal farm practice." The underlying premise of this conclusion is that even though a practice may be appropriate from the perspective of the farming operation that seeks to defend it, it will not be acceptable if it causes disproportionate harm to neighbouring non-agricultural users.
>
> …
>
> [78] In my opinion, a broad approach, relating the inquiry to the specific circumstances pertaining to the site with a view to striking an appropriate balance between the rights of affected property owners and nuisance creating farming operations, is borne out by the language of the statute. I agree with the trial judge that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". As I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards

[79] First, both statutes require that the "circumstances" be taken into consideration. This means that the same practice may qualify as a normal farm practice in one situation, but not in another where the circumstances are different. The definition of "normal farm practice" requires that the operation at issue be assessed with regard to the "customs and standards as established and followed by similar agricultural operations under similar circumstances" (emphasis added). Section 6 of the 1998 Act, exempting a "normal farm practice" from the application of municipal ordinance, sheds some light on the question. Section 6(1) provides that "[n]o municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation", and s. 6(2) allows the Normal Farm Practices Protection Board to determine whether the practice at issue is a normal farm practice for the purposes of non-application of a municipal by-law. Section s. 6(15) directs the Board to consider, among other factors, "[t]he specific circumstances pertaining to the site". Although these provisions do not apply directly to the circumstances of the present case, the phrase "normal farm practice" should be given a consistent interpretation and, if "the specific circumstances pertaining to the site" bear upon the definition of "normal farm practice" in one context, it would be anomalous to exclude site-specific considerations from the definition in another context. As Cory J. stated in Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385 at p. 400, 89 D.L.R. (4th) 218: "Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act": see also P.-A. Côté, [supra], at p. 332. In my opinion, the same holds equally true for phrases recurring throughout a statute.

[80] Second, the farming operation must also satisfy the tribunal hearing the case that, in the circumstances, the customs and standard are, in the words of the 1988 statute, "proper and accepted" and in the words of the 1998 statute, "proper and acceptable". The words "proper and acceptable" connote a qualitative, evaluative inquiry. The Shorter Oxford English Dictionary (Oxford: Clarendon Press, 1993) defines "proper" as (inter alia) "of requisite standard or type; fit, suitable, appropriate; fitting, right" and "acceptable" as "worth accepting; likely to be accepted; pleasing, welcome, tolerable". These words qualify and limit the phrase "customs and standards as established and followed by similar agricultural operations under similar circumstances". I read this qualification as adding another important dimension to the inquiry.

[81] In my respectful view, this statutory language indicates that the farming industry does not have carte blanche to establish its own standards without independent scrutiny. Not all industry standards prevail -- only those that are judged to be "proper and acceptable". In my view, this statutory language requires the adjudicative body to consider a wide range of factors that bear upon the nature of the practice at issue and its impact or effect upon the parties who complain of the disturbance, with a view to determining whether the standard is "proper and acceptable". An analogy may be drawn from

> the law of negligence, where reliance on custom and established practice is relevant but not decisive on the requisite standard of care. In Waldick v. Malcolm, [1991] 2 S.C.R. 456 at p. 474, 83 D.L.R. (4th) 114, Iacobucci J. dealt with this issue in the context of an occupier's liability case: ". . . the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers under s. 3(1) of the [Occupier's Liability] Act."
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> …
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> [87] The second and related factor was the serious nature of the disturbance suffered by the respondents. Again, it seems to me that this was an important aspect of the site-specific circumstances the trial judge was entitled to take into account in determining whether the appellant's operation constituted a "normal farm operation" within the meaning of the Act.
>
> [Emphasis added].

[218] The FIRB argued that its jurisprudence has considered the proper understanding and application of the term “normal farm practice” in several decisions.

[219] First, the FIRB referred to *Westcreek Citizens’ Society v. Vane Investments Ltd.*, (August 25, 2003) at paras. 22-29, 65, 80, and 83-85. This decision relies on the principles from *Pyke*, including the admonition to closely examine and weigh industry practice in light of the words “proper” and “circumstances”; it must also necessarily exercise an “evaluative function”.

[220] Second, the FIRB refers to other FIRB jurisprudence where *Pyke* was adopted in addressing both of the appellant’s arguments regarding the applicability of bylaws and proximity.

[221] In *Baran v. Roberts*, the FIRB held that compliance with local government bylaws is not determinative of normal farm practice: *Baran v*. *Roberts* (September 30, 2005) at para. 49. But the FIRB does examine and rely on them as interpretive tools.

[222] The *FIRB* has also repeatedly noted that normal farm practices must include and consider the effects and impacts of farm operations on neighbours, and farmers must take reasonable steps to mitigate disturbances resulting from farm operations:

see, e.g., *Ollenburger v Breukelman*, (November 18, 2005) at paras. 61-62; *Harrison v. Mykalb*, (January 30, 2012) at para. 68.

[223] Finally, in *Jory v*. *Beacham*, (April 4, 2013), the FIRB said that it can consider bylaws and provincial guidelines in assessing proper and accepted customs and standards.

[224] In my view, the FIRB comments in these cases do not eschew the principle that the decision makers are limited in their reviews by the obligation to consider the legislated definitions prescribed in the *FPPA*.

[225] Although it is important to conduct an evaluative function that addresses the "good neighbour" principle, etc., the BC legislature chose clear and specific features of normal farm practices, including "accepted", "established", and "followed" practices. This language is a clear and specific direction from the legislature that instructs the FIRB that it can supplement but not substitute certain evidence - e.g., provincial guidelines or the "good neighbour" principle - in place of evidence that demonstrates "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". Indeed, the *FPPA* circumscribes the evidence the FIRB must consider in making its final determination of normal farm practice.

[226] In sum, while I accept the FIRB's arguments about the principles discussed in their previous jurisprudence, the *FPPA* words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the BC legislature so that all farmers are able to anticipate the implications of their own farm practices.

1. The FIRB made its finding without the statutorily required evidence.

[227] The FIRB concluded that provincial guidelines and local bylaws are informative and instructive on the question of proper and accepted customs and standards because they indicate what government believes to be appropriate

practice in different settings. And the FIRB disagreed with Kelowna's interpretation of its bylaw that permitted the appellant to locate the run outs to the property line.

[228] The FIRB discussion concerning the guidelines and the bylaw defaulted to the view of government as a guiding principle in its analysis. It said:

> Provincial guidelines such as those in the guide are not binding on the BCFIRB in its determination of normal farm practice and the present case concerns a complaint and not a bylaw prosecution. However, provincial guidelines and local government bylaws are informative and instructive on the question of" proper and accepted customs and standards in that they indicate what government believe to be appropriate practice in different settings and with respect to various uses.

[229] It was appropriate for the FIRB considered provincial guidelines and local bylaws, and on this point I accept the respondent's argument: *JJ v. Coquitlam School District No. 43*, 2013 BCCA 67.

[230] Nonetheless, in my view, the FIRB erred when resting its decision on the conclusion that provincial guidelines and zoning bylaws constitute the standards regarding normal farm practices designed to account for proximity issues with consideration of the statutory definition.

[231] The FIRB reasons do not address the question of the specific circumstances of the appellant's farm business in the context of the "proper and accepted standards as established and followed by similar farm businesses under similar circumstances".

[232] In fact, other than to reject the appellant's evidence because it lacked detail, the FIRB **never** considered the practices of other farm businesses in similar circumstances in reaching its conclusions. As Beames J. specifically said in *Lubchynski* at para. 16, FIRB decisions that are "completely unsupported by any evidence" are patently unreasonable.

[233] While the Supreme Court of Canada replaced the patently unreasonable standard with just a reasonable or unreasonable finding, the principle remains that decisions unsupported by evidence are unreasonable.

[234] I would extend the principle: where the FIRB does not require evidence of what "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances" are, it abandons the statutory definition of normal farm practices and falls into error by making *ultra vires* decisions.

[235] In *Dunsmuir*, the courts addressed a similar situation, and it held at para. 74t:

> The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.
>
> [Emphasis added.]

[236] In my view, the FIRB's decision making process was fundamentally flawed because it did not apply the statutory definition of normal farm practice and therefore was unreasonable.

[237] The FIRB is entitled to great deference when interpreting its own statute. However, in this case it did not address the home statute when considering the standards mandated in the definition of normal farm practice. And it made the decision without any applicable evidence.

[238] This case is not a circumstance where the FIRB considered all relevant factors including the defined term "normal farm practice" as required under the *Act*; rather, in this case, the FIRB ignored *FPPA* mandate.

[239] The FIRB adopted the provincial guidelines and ignored the statutory obligation to evaluate “accepted customs and standards” as established by similar farm businesses. It chose to apply an analysis that relies solely on the provincial government’s views in a document designed to assist municipalities in regulating farming business.

[240] The *FPPA*’s very purpose by its title alone is clear: protect farming and the right to farm. Accordingly, the normal farm practice definition cannot prefer provincial guidelines and zoning bylaws over “standards as established and followed by similar farm businesses under similar circumstances”.

[241] In fact, on a plan textual reading, the *FPPA* does not instruct the FIRB to consider provincial guidelines and zoning bylaws.

[242] While I accept that provincial guidelines and zoning bylaws are acceptable considerations when assessing normal farm practice, neither provincial guidelines nor zoning bylaws on their own or together are sufficient to make a normal farm practice finding. The obligation to consider a wide range of factors was underscored in *Pyke* at para. 71. Indeed, the FIRB must consider standards as established and followed by similar farm businesses under similar circumstances. It failed to do so.

[243] The FIRB’s departure from the factors that are a required consideration under *FPPA* deprives the decision of the “justification” and “transparency” that are the underpinnings of a reasonable decision.

[244] As evident in reviewing the FIRB transcript, Mr. Withler said that certain BC townships do not have required setbacks. Mr. Withler also said that certain BC townships choose not to follow the provincial guidelines. And he was quite clear: not every BC farm has a 15m setback nor does is every BC farm required to have a 15m setback.

[245] The legislature was clear when it defined the normal farm practice as a practice consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”; the FIRB was

required to determine whether practices and by laws comport with those established practices.

[246] When a municipal bylaw applies to a farm business, the FIRB is required to consider what a particular township has decided is an appropriate farm practice or not based on what similar farmers are doing in similar circumstances. While I have said the FIRB is not constrained by particular city or township's interpretation, the FIRB must make its normal farm practice determination by examining the broad context with specific emphasis on what farmers in similar farm businesses in similar circumstances are doing or what similar farms in similar areas are doing.

[247] I recognize the Lieutenant Governor in Council may create regulations to further define normal farm practices. But, on the facts of this case, the Lieutenant Governor in Council has not created those regulations. In effect, what the FIRB has done is enforce the provincial guidelines as regulations, and in doing so, their decision was unreasonable because it failed to apply the statute.

[248] The result cannot be considered within the range of reasonably possible outcomes.

[249] Therefore, I cannot conclude that the FIRB conclusion was within the range of possible outcomes after considering the justification, transparency and intelligibility necessary to ensure that the appellant is able to understand how the statute was applied, how her submissions were considered and why she failed at the hearing.

2. The FIRB applied its home statute in an unreasonable manner

[250] The FIRB also applied a static definition of normal farm practice that changes to keep practices current over time to remain consistent with normal farm practices.

[251] The BC legislature clearly defined "normal farm practice" to mean:

(a) "a practice"

(b) "conducted by a farm business"

(c) “in a manner consistent with"

(d) “proper and **accepted**” “customs and standards”

(e) “as **established** and **followed** by similar farm businesses under similar circumstances".

[252] The FIRB accepted that other horse farms in the area with confined livestock areas along property lines may exist, but it concluded that farmers are expected to update and change their practices over time.

[253] This assertion, however, is clearly against the *FPPA* definition. The *FPPA* unequivocally refers to **accepted** customs and standards **as established** and followed by similar farm businesses.

[254] Clearly, the *FPPA* definition used past tense language: it does not permit assessing normal farm practice with a prospective lens.

[255] The evaluative function described in *Pyke* turned on the words “proper and acceptable”.

[256] In Ontario, the legislation invited the board to consider what is acceptable in all of the circumstances because it does not use past tense language. The Ontario board was allowed to conduct a broad inquiry in examining the qualitative or evaluative analysis of the balance between property uses. I conclude that the BC legislation clearly uses more restrictive language, and the FIRB must assess customs and standards against what is proper and accepted as established and followed by other similar farm businesses rather than what might be acceptable.

[257] This analysis may include considering municipal bylaws and ministry guidelines, but, similar to my conclusion above, it could not have been the legislature’s intention to permit decisions to be made without regard to accepted and established customs and standards followed by similar farm businesses.

[258] As the BC Court of Appeal said in *Western Forest Products Inc. v. Hayes Forest Services Ltd*., 2009 BCCA 316 at para. 59 regarding a judicial review of an arbitrator's ruling:

> I am persuaded the arbitrator's reasoning process was so flawed as to take his interpretation of s. 33.22(h) of the *Regulation* beyond the range of reasonableness. Although he stated the test for fairness correctly at para. 49 of his reasons for the award, he then followed a path of reasoning that led him to import a criterion not included in the provision he was applying, thereby unreasonably taking it upon himself to depart from the legislated factors to be considered when resolving a fairness objection under the *Regulation.*
>
> [Emphasis added.]

[259] The Court of Appeal was clear: if a decision maker follows a path of reasoning without regard to an important feature of the empowering statute, the decision is unreasonable.

[260] The *FPPA* confirms that the FIRB was to consider past and present customs. It cannot subject farmers to future changes in practices - anticipated or otherwise - that were not "**established and followed**" at the time of the hearing.

[261] In this case, the FIRB decision did not apply past or present customs, and it subjected the appellant to a standard of government mandated norms at the time of the hearing.

[262] I observe that s. 12(2)(b) of the *FPPA* empowers the Lieutenant Governor in Council to make regulations setting standards for the purpose of the definition of "normal farm practice"; British Columbia has no regulations the defining those standards.

[263] As the Supreme Court of Canada said in *Dunsmuir* at para. 48:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make

> a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[264] I do not find the FIRB determination to be an acceptable outcome based on the facts and the law in part because the FIRB did follow the statutory direction when considering whether the appellant's practice was not a normal farm practice.

[265] The respondent, FIRB, argued that it is not the court's role to disturb the FIRB finding based on arguments about the sufficiency of evidence. Rather, the question for the court "is whether any available evidence is capable of supporting the express finding of fact made by the Panel on this issue."

[266] I agree.

[267] But as I have said, I grant the appeal because the FIRB made its finding without any reference to statutorily required evidence; so it was not capable of making an express finding of fact that livestock area B was not a normal farm practice.

[268] As the Supreme Court of Canada noted and as the respondent FIRB noted, the reasons and the outcome must be read together: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 14-15:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[269] Upon reading the reasons and evaluating the outcome - particularly, that the FIRB applied its home statute in an unreasonable manner - I do not find the final determination reasonable.

Conclusion

[270] I would direct that the order be set aside and the complaint remitted to the FIRB.

[271] The parties may apply for directions on the use of the current record if there is to be a reconsideration of the questions before the FIRB.

"The Honourable Mr. Justice Armstrong"