



March 31, 2015

File: PCAA/File#15-02

DELIVERED BY EMAIL

Duncan Magnus
Magellan Law Group LLP
225-20316 56 Avenue
Langley BC V3A 3Y7

Chris Rhone
Branch MacMaster LLP
1410 - 777 Hornby Street
Vancouver, BC V6Z 1S4

Dear Sirs:

LYNNETTE KELPIN VS. BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (the “Society”)

The Appellant has applied to adjourn the April 10, 2015 hearing of the above noted appeal.

Overview

BCFIRB’s intent with appeals under the *Prevention of Cruelty to Animals Act, c. 372 (PCAA)* is to have a fair process for all parties, while recognizing that timeliness is important for animal care and animal welfare and health issues. Timely hearings and decisions are in the best interests of the animal(s). Timely hearings and decisions also minimize the costs for caring for animals while in the Society’s custody.

The British Columbia Farm Industry Review Board (BCFIRB) has issued a Practice Directive dated December 11, 2013, [Appeal Process Fact Sheet March 2013](#) and Notice of Appeal Application Form which all set out the time sensitive nature of appeals. The Fact Sheet sets out information that a submission schedule will be provided by BCFIRB within 3 business days; submissions by the Appellant and the Society are due within 13 business days (per the schedule); and a telephone hearing will occur within 3 business days following submissions. Written decisions are released to both parties no later than 10 business days following hearing.

The reality is that from the day an appeal is filed until the day a decision is rendered is less than 30 days, with rare exception.

**British Columbia
Farm Industry Review Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
780 Blanshard St
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Website: www.firb.gov.bc.ca

Chronology of Correspondence Regarding Date of Hearing

- March 13 Appellant filed the appeal of the Society's March 9, 2015 decision not to return the four horses seized on February 10, 2015. The Appellant's cheque arrived March 16, 2015, perfecting her appeal.
- March 16 BCFIRB emails an appeal process letter setting the hearing date of April 8, 2015 and the submission schedule, along with the Preparing for a Hearing Handout. [In order to meet Practice Directive timelines, the available dates for hearing were April 8, 9 or 10, 2015.]
- March 16 BCFIRB received an email from the Society that Counsel, Christopher Rhone was unavailable April 8 as he was in Court but was available April 9, 2015.
- March 17 BCFIRB received an email from the Appellant agreeing to April 9, 2015.
- March 19 BCFIRB sends a letter to parties confirming the hearing on April 9, 2015.
- March 19 BCFIRB receives an email from the Appellant that her representative is not available on April 9, 2015 and additional availability is unknown until March 23, 2015.
- March 20 BCFIRB emails both parties to confirm availability for April 10, 2015.
- March 23 BCFIRB receives email from the Appellant confirming her representative is available on April 10, 2015.
- March 25 BCFIRB receives email from Appellant's counsel requesting adjournment due to unavailability, proposing one of the following dates:
April 15, 16, 20, 23 and 24
May 13, 19, 20, 21 and 22
- March 26 BCFIRB receives submission from Counsel for the Society opposing adjournment and seeking an order for an interim pre-hearing payment of costs of care to the Society.

Society's Submission on Adjournment

Counsel for the Society opposes the adjournment application and seeks an order or direction from BCFIRB that the hearing proceed on April 10, 2015, as scheduled, as the four horses (the Horses) that are the subject of this appeal are using the Society's facilities which could be used by other horses that may be taken into the Society's custody, and because of the ongoing costs incurred by the Society in caring for the Horses. Continuing to hold the Horses for such a lengthy period places undue strain upon the Society in terms of its ability to undertake its statutory

mandate (i.e to seize other horses that may be in distress) and in terms of its finances (which also impacts its ability to undertake the Society's statutory mandate), as costs of care incurred to March 23, 2015 was approximately \$3,014.97 (and it is increasing by \$78.08/day). The Society's finite resources are strained by holding the Horses.

Counsel for the Society also seeks an order that the Appellant make an interim pre-hearing payment of costs of care to the Society, pursuant to s. 20.4(2)(b), which section provides that "the board, on application by the society and at any time after the society receives the copy of the filed notice of appeal, may require the owner of the animal to pay all or part of those costs." Counsel says the Appellant ought to pay the Society's costs incurred in caring for the Horses prior to the hearing. The Society seeks an order for interim payment plus an entitlement to dispose of the Horses failing compliance with the payment order relying on several Supreme Court of British Columbia decisions (made prior to the present statutory authority found in s. 20.4(2)(b)) where interim orders requiring animal owners to pay at least a portion of the costs of care in advance of the hearing were made. The Society says such an order is reasonable given that the owner would have been required to fund the animal's care if the animal had been left with the owner.

Appellant's Submission on Adjournment

Counsel for the Appellant says that he is unavailable on April 10, 2015 due to a scheduling conflict. He agrees he mistakenly advised he was available on April 10, 2015. He also says that given his recent engagement (March 24, 2015), he has not had the opportunity to gather all the necessary information and documents necessary to advance the Appellant's case.

With respect to the interim pre-hearing payment of costs, he says such an order would essentially prejudice the issues on appeal and should not be done. He specifically notes his client's concerns in this matter (in her Notice of Appeal, the Appellant disputes the SPCA's findings with respect to the condition and distress of the Horses, as well as the costs claimed). He says the Appellant is disputing costs and the issue of costs can be dealt with when the merits of this matter are being dealt with, and that the Society issued the invoice after the time that they were required to provide documents based on estimates, without proper supporting documentation. He further says the issue of costs of care is being rushed without proper disclosure and adequate time to address the issues. He says that an order of payment of costs in these circumstances is in effect granting the Society judgment without an opportunity to respond, which is a denial of natural justice. He says that BCFIRB has authority to release the animals without ordering payment of costs.

If BCFIRB does order the payment of costs in order to get an adjournment, then he argues that costs should be half of the amount claimed by the Society and should be made without prejudice to the Appellant's right to challenge any such payment at the hearing.

Counsel for the Appellant also says that the Appellant is concerned about "the perceived communication relating to the adjournment process itself; that FIRB did not respond and instead

indicated that they were awaiting a response (apparently submissions) from the SPCA, which resulted in further delay”.¹

Analysis and Decision

Section 39 of the *Administrative Tribunals Act* c. 45 requires tribunals such as BCFIRB to consider the following factors on an application for adjournment:

- (a) the reason for the adjournment;
- (b) whether the adjournment would cause unreasonable delay;
- (c) the impact of refusing the adjournment on the parties;
- (d) the impact of granting the adjournment on the parties;
- (e) the impact of the adjournment on the public interest.

I have proceeded from the starting point that the decision whether to grant an adjournment is discretionary, but the discretion must not be exercised in a fashion that would create procedural unfairness to the party seeking the adjournment. However, I am mindful that it is not only in the public interest to resolve animal seizure disputes as quickly as is practicable while ensuring that both parties have a reasonable opportunity to prepare for the hearing and to present their respective cases; it is also in the best interests of the animals involved which await a final disposition and which require costs of care to be incurred while awaiting the outcome of an appeal, paid, at least initially, by the Society in most cases.

None of the participants involved have the luxury of time in *PCAA* appeals; not the Appellant, not the Society, and not BCFIRB. Even the animals which have been seized suffer under time constraints. The human participants in the appeal process are all labouring under strict timelines in order to ensure that the best interests of the animals are paramount, which is the intent of the legislation and is in the public interest.

To meet timelines in the best interests of the animals and in the public interest, BCFIRB offered the parties three possible dates for a hearing: April 8, 9, and 10, 2015. The 8th did not work for the Society. The 9th was acceptable to the Appellant but not her counsel. The 10th was initially acceptable to all parties and a hearing was scheduled and a submission process established.

The Appellant now requests an adjournment to permit her counsel to represent her at the hearing. However, there is no absolute right in administrative law to an adjournment based on the desire to retain legal counsel: *Macdonald v. Institute of Chartered Accountants of British Columbia*, [2010] B.C.J. No. 2151. Even in discipline proceedings, where procedural protections are typically highest, the issue is not about the “right to counsel” *per se*, but whether, in the particular circumstances, a fair hearing can be held without legal representation.

In considering the particular circumstances here, I observe that a primary objective of the recent reforms to the *PCAA* was to ensure appeals proceed in a flexible fashion that is accessible to lay

¹ On this point, I would observe that it is the practice of BCFIRB to give a party the opportunity to be heard on adjournment applications. It would be highly unusual to reschedule a hearing without consulting the parties.

people as opposed to a more formal judicial review or judicial appeal. Consistent with the legislative purpose of ensuring that decisions reflect the best interests of animals, the reforms gave BCFIRB broad evidentiary hearing, investigation, and inquiry powers which create an accessible, timely, and informal appeal process to allow lay people an opportunity to challenge decisions of the Society in relation to seizure of animals.

I have presided over every hearing that has proceeded since the inception of the *PCAA* amendments establishing BCFIRB as the tribunal to hear appeals. To date, eight appeals have proceeded to hearing, and of those, only two have had appellants who are represented by counsel (one of the appellants represented by counsel ran a cattle operation business). I understand that BCFIRB's tight timeline of less than 30 days from filing an appeal to issuing a written decision may be highly unusual to most counsel, it is nevertheless how BCFIRB proceeds in these hearings in the best interests of the animals, in the public interest, and to minimize costs of care of the animals involved.

I have reviewed the Society's disclosure made to date with respect to the Appeal and am of the view that this appeal is fairly typical of appeals before BCFIRB. It is not unduly complicated nor has the Appellant identified any unusual or unique issues which would require additional preparation time or expert evidence. I would observe here that the costs of caring for horses is greater than for companion animals and thusly increases the financial burden on the Society at this stage of the appeal.

I have considered the issue of unreasonable delay. An adjournment, in my view, would cause an unreasonable delay. Finding a date acceptable to both counsels as well as meeting the operational needs of BCFIRB will take some time, and this is not acceptable in this case, with live animals awaiting final disposition and incurring considerable costs of care.

I turn now to consider the impact of granting versus not granting the adjournment on the parties.

The impact of granting an adjournment would certainly meet the wishes of the Appellant and allow her to be represented by this particular counsel, but would seriously and significantly impact the Society. The Society's facilities would be used for a longer period than necessary, impacting its ability to care for other animals in need, as well as spending the Society's financial resources that could also be otherwise used for other animals in need. Looked at in this light, the potential harm to the Society is of far greater significance than counsel's scheduling conflict and that conflict's impact on the Appellant.

Further, the Appellant is not prevented from finding alternate counsel to assist her, albeit this may be difficult given the late date. However, I observe that the underlying seizure here took place on February 9, 2015 and the Appellant undertook the Society's review process and her appeal without counsel. She appealed the review decision on March 13 and, by March 16, she knew the submission schedule. Throughout this process, she was made aware of the time-sensitive nature of appeal proceedings and yet did not retain counsel until March 24, 2015.

Further, if the adjournment is granted, the impact on the public mirrors that of the impact on the Society. The Society, as stated in Chief Prevention and Enforcement Officer Marcie Moriarty's affidavit accompanying the Society's adjournment submission, is a non-profit organization almost exclusively funded by means of donation from private individuals, and that operations such as relieving animal distress by taking animals into the custody of the Society are part of the Society's statutory mandate. The public is not served by ordering the Society to hold the animals for longer than needed solely to accommodate the Appellant's counsel's scheduling conflict. If an adjournment were granted in these circumstances, it runs the risk of undermining the public's trust by having private donations underwrite, if you will, unnecessary delays to the hearing process, which I see as fundamentally different than delays of an exceptional, urgent, or unforeseen nature.

For all the above reasons and in the circumstances of this appeal, I do not find counsel's scheduling conflict to be an adequate reason to grant an adjournment. Therefore it is my order that the hearing proceed as scheduled and the Appellant is encouraged to attend the hearing either with counsel (alternate) or without.

I also order that the original submissions schedule as set out is confirmed, and that late submissions may be accepted based on individual merit.

Given my decision to refuse to adjourn the hearing, I am not prepared to order interim payment of costs of care or some lesser amount as security. The issue of the reasonableness of the Society's costs of care will be determined at the hearing. I advise both parties to come to the hearing ready to address this issue, as I will need to hear from both parties on the reasonableness of the costs of care, including veterinary care and boarding.

I further encourage the Society to provide, at its earliest opportunity, an estimate of costs projected forward until the final day a decision will be delivered, as is normal practise in *PCAA* appeals. Requesting such a projection in no way indicates any decision regarding the payment of costs but instead produces a statement of full and final costs, which are being appealed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Corey Van't Haaff
Presiding Member