IN THE MATTER OF THE *PREVENTION OF CRUELTY TO ANIMALS ACT*, R.S.B.C. 1996, c. 372
ON APPEAL FROM A REVIEW DECISION OF THE BC SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS CONCERNING THE SEIZURE OF FOUR ANIMALS: ONE DOG, TWO CATS, AND ONE RABBIT

BETWEEN:

SANDRA SIMANS and 1ATATIME RESCUE SOCIETY

APPELLANTS

AND:

BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	John Les, Chair
For the Appellant:	Kimberley Bradley, Counsel
For the Respondent:	Christopher Rhone, Counsel
Date of Hearing:	May 9, 2017
Location of Hearing:	Teleconference

I. Overview

1. This is an appeal pursuant to s. 20.3 of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 (the *PCAA*).

2. The appellants appeal the April 6, 2017 review decision issued under s. 20.2 (4)(b) of the *PCAA* by Marcie Moriarty, Chief Prevention and Enforcement Officer for the British Columbia Society for the Prevention of Cruelty to Animals (the Society).

3. Section 20.6 of the *PCAA* permits the BC Farm Industry Review Board (BCFIRB), on hearing an appeal in respect of an animal, to require the Society to return the animal to its owner with or without conditions or to permit the Society, in its discretion to destroy, sell or otherwise dispose of the animals. I note that an appeal to BCFIRB under the *PCAA* is a broad administrative appeal, the nature of which was set out in detail in *BC Society for the Prevention of Cruelty to Animals v. British Columbia Farm Industry Review Board*, 2013 BCSC 2331.

4. For reasons that will be explained in detail, I have decided, pursuant to s. 20.6(b) of the *PCAA*, to permit the Society, in its discretion, to destroy, sell or otherwise dispose of the animals. I have also decided that the appellants are liable to the Society for the amount of $4,159.84 as the reasonable costs incurred by the Society with respect to the animals.

II. Preliminary matter

5. By email dated April 27, 2017, the appellants requested a summons requiring Society employees Marcie Moriarty and Lorie Chortyk to testify at the May 9, 2017 hearing. The appellants stated that they wished to question these employees on certain media statements that were made by them.

6. On May 1, 2017, I issued a decision to not approve the summons, as the hearing revolves on questions of whether the animals were in distress at the time of seizure, and, if returned, whether they would be put in a state of distress. Examination of the two employees on media matters would not assist in those deliberations.

III. Material admitted on this appeal

7. All witness statements and affidavits, emails, photographs and submitted materials were entered into evidence. The various parties were sworn before giving oral testimony.

8. The following materials were admitted into evidence:

Appellants

a) April 7th, 2017 notice of appeal **(Exhibit 1**)
b) April 24, 2017 binder of documents (Tabs 1-13) **(Exhibit 2)**
c) An electronic file containing media interviews **(Exhibit 3)**
d) An electronic file containing images of the animals **(Exhibit 4)**
e) An electronic file containing BCFIRB and other decisions **(Exhibit 5)**
f) Email dated April 27, 2017 from Dr. Tomar **(Exhibit 6)**
g) Email dated April 27, 2017 from Kimberley Bradley **(Exhibit 7)**

Respondent

a) Respondent's binder of documents, Tabs 1-18 **(Exhibit 8)**
b) Affidavit from Marcie Moriarty regarding costs **(Exhibit 9)**
c) Expert witness contact form, Dr. Adrian Walton **(Exhibit 10)**
d) Witness contact form re: SPC's Thomson and Carey **(Exhibit 11)**
e) Written submissions of the BCSPCA dated May 1, 2017 **(Exhibit 12)**

BCFIRB

a) BCFIRB's May 1, 2017 letter to the parties was admitted as **(Exhibit 13)**

9. The hearing was held, as noted, on May 9, 2017. The teleconference began at 8:30 a.m. with appropriate breaks mid-morning, noon and mid-afternoon. The hearing concluded at approximately 6:00 p.m. I am grateful to the parties and counsel on both sides for the commitment to conclude in one day, even though it was a long one.

IV. The Animals in Dispute

10. The appellants seek the return of four animals that were among 17 animals the Society seized from the residence of Ms. Simans on March 20, 2017. The animals in dispute are:

(a) 1 dog: Hadley, a male greyhound, approximately 2.5 years old
(b) 1 cat: Angel, a female calico cat, approximately 9 years old
(c) 1 cat: Onyx, a female black cat, approximately 15 years old
(d) 1 rabbit, male, unknown age.

V. Procedural history

11. On February 15, 2017, the Society received an anonymous complaint regarding Ms. Simans purchasing a duck at an auction, and having an underweight dog at her address. SPCs Thomson and Steele attended the same day. As Ms. Simans refused to answer the door, SPC Thomson phoned her while she was on the property. Ms. Simans agreed to meet the SPC the following day.

12. On February 16, 2017, SPCs Lavigne and Steele attended Ms. Simans' property. Ms. Simans allowed them to enter the garage, where SPC Lavigne was able to examine

the dog Hadley, along with a pot bellied pig and a duck. Hadley appeared lean but had good muscle tone. However, he also appeared to have a skin condition with hair loss and some scabs evident. The Information to Obtain (ITO) states that Ms. Simans "would not say if the dog had been to a Veterinarian", she did not allow the SPCs to view the dwelling and she declined to answer whether she had any more animals.

13. As a result, with respect to Hadley, a Notice was issued to Ms. Simans to have Hadley examined by a veterinarian within 48 hours.

14. On February 19, 2017, Hadley was examined by Dr. Tomar of the Metrotown Animal Hospital. Dr. Tomar's Treatment Record from that visit states that: "Hadley is a healthy dog, no concern health wise", but identified "mild dandruff, flake on dorsal lumbar area" as well as an area of alopecia on the dorsal thigh. He prescribed Omega 3 fatty acids and shampoo to treat the skin issues.

15. Following the receipt of a text from Ms. Simans on February 21, 2017, SPC Lavigne telephoned the Metrotown Animal Hospital, and was advised by the receptionist: "We were told not to speak to you".

16. On March 15, 2017, the Society's call centre received a complaint regarding a dog residing at Ms. Simans' address. The complaint alleged that "the dog appeared to have mastitis – the nipples appeared to be the size of baseballs".

17. On March 18, 2017, Senior Animal Protection Officer Drever received a telephone call from a complainant who alleged that Ms. Simans purchased a rabbit from the auction a few days earlier, and had overheard Ms. Simans' partner/roommate DH tell a third party that Ms. Simans had friends adopt most of the animals the Society had previously removed, which animals were now on her property.

18. On March 19, 2017, SPC Thomson telephoned the individual who made the March 15, 2017 complaint. The complainant stated that she had a good view of the property, was particularly concerned about the red coloured dog that appeared to have painful mastitis ("the nipples looked similar to cow udders"), and expressed concern about whether the dog's puppies were getting appropriate nutrition. The complainant also referenced seeing a female walking a greyhound in the fields next to the property.

19. On March 20, 2017, the complainant followed up the telephone call with an email. The email stated, among other things:

> …I am an Air Traffic Controller…. From my vantage point in the control tower I am privy to a unique 360 degree view….
>
> I work directly across the street from a home where approximately 80+ animals were seized last Fall. This broke my heart because in the 6 years I have worked in the tower, I

had only EVER seen 2 goats and maybe one or two dogs in the yard. In SIX years of working full time!

After having read about the above mentioned animals being seized, I was both appalled and heartbroken to see the same lady "walking" a dog around her front yard recently. A dog that appears to be similar to a Greyhound in build, or perhaps it's just very skinny. Given the history, it could well be the latter. If that wasn't enough, I have also seen another dog in her back yard … who appears to be in state of acute physical suffering…. I asked another air traffic controller in the cab to pick up some binoculars and have a look. Prior to this gal becoming a controller, she was studying to become a veterinarian. She took one look and told me the dog appears to have a severe case of mastitis. So much so that her teats appear more like udders on a cow! Obviously, two very valid concerns come to mind. One being the deplorable condition on of the poor dog, and the other being if there are puppies around – what state they are in, and what conditions are they subject to?? This poor dog stumbled around the yard and drank some water from what appeared to be an old plastic swimming pool. Needless to say the water in there was likely less than clean….

20. On March 20, 2017, a Judicial Justice denied the Society's application for a warrant to enter the property on the basis that the ITO contained no evidence of what steps had been taken since receiving the complaint to contact the owner and verify the concern, or request the owner to take action to address the concern.

21. At approximately noon on the same day, SPC Carey attended the property. What transpired next is recorded in the ITO as follows:

> … While walking to the door, CAREY heard barking. CAREY knocked on the door and heard multiple dogs barking (over 2). A female yelled through the closed door "Who is it". CAREY identified herself and advised an animal cruelty complaint was received and requested to view the animals. CAREY confirmed the female was SIMANS. SIMANS responded "There is nothing fucking wrong with the dogs". CAREY again requested to come in and view the animals. SIMANS responded "No, I am fucking done with this. I am fucking sick of this". CAREY left back to her vehicle.
>
> While in her vehicle SIMANS exited the house and approached CAREY with a newspaper article from when the SPCA executed the Warrant and yelled "If any of you step foot on my Property again I will fucking sue you".

22. Later on March 20, 2017, based on an updated ITO, a Justice of the Peace issued the Society a warrant to enter Ms. Simans' premises.

23. SPC Thomson, SPC Carey and several others, including an RCMP officer, attended the premises to execute the warrant. They identified and assessed 27 animals. Of those animals, the determination was made that 17 should be removed from the property - one rabbit, four cats, one greyhound dog (Hadley), and one Rhodesian Ridgeback female dog (Rhea) with ten pups. A pig, duck, two dogs, a rabbit and five birds were not removed.

24. The Society's "Cruelty Investigation Information Form" recorded the observations made with regard to the animals that were removed:

> Front foyer:
> "Hadley" Grey hound, brindle – Dog was in a wire crate. Broken wires sticking into crate. W avail. Blanket avail. Abnormal urination – Dog urinated 3 times on blanket in crate during warrant. Dog kept chewing at its right hind leg. Skin irritation – red. Hair has and thinning. POI said dog belongs to her. Had for ~6 months. During warrant POI phoned Metrotown vet on speakerphone. Spoke with Recpt … Vet not in. Recpt read file. Dog was in Feb 19 – Vet wrote "healthy dog". Inquired about the skin. Recpt said "mild dandruff". Advised POI the dog has more than dandruff and appears to have a skin condition. POI said "dog is fine" and she is treating him with "flax and oil"…
>
> Living room attached to kitchen:
> "Rhea" Ridge Back – POI said she had since Feb 15 and keeping until mid April. Would not provide owner info. Mastitis. Nipples enlarged. Dermatitis on mammary tissue. Abnormal hair loss patches on back. Ring worm? POI said she is aware the dog has mastitis and is "watching" OBSD drops of blood when pups feeding….
> 10 x 37 day old puppies – 2 underweight. Pups contained in the kitchen. Bedding and pee pads avail….
>
> Cat room:
> Very strong ammonia smell. Ammonia reading done at 2:57 pm by C. Carey. Reads 10-20 PPM. No ventilation in room. Window avail but closed and no screen on it. 2 litter boxes avail – fairly clean. Some urine. F/W avail. Open very-kennels avail.
> Cats:
> 1. DMH Blk – Felt underweight. Easily felt spine and pelvis. Ears dirty.
> 2. Showshoe-Could not easily examine. Appeared in good body cond.
> 3. Hairless Sphynx – R Eye discharge (pus). Ear debris.
> 4. DSH wht/calico – L ear debris. Appeared in good body weight. Could not fully examine…
>
> Master bedroom:
> Grey/why rabbit – R hind abnormal. Hip sticks out and leg/foot abnormally sideways. POI said rabbit seen at Metrotown vet. Said leg injury is long term and will heal itself. Said at vet a week ago. Had for 1 week.
> Called vet – spoke to receptionist … Vet not in. POI asked recept to find file from a few Sundays ago. Recpt said file was "incomplete". Writer questioned recpt what was written in the file – recpt said there were no records at all.
> Rabbit cage had sparse hay, pellets, water avail. No bedding. No hiding area.

25. Pursuant to s. 18 of the *PCAA*, the Society issued a Notice of Disposition notifying Ms. Simans that these animals "have been removed pursuant to section 11 of the *Prevention of Cruelty to Animals Act* … as they were found to be in distress".

26. It was subsequently determined that two of the cats, and the dog Rhea with the pups, were not owned by the appellants, and they were returned to their owners.

27. I pause here to note that what I have set out above is the immediate procedural history that gave rise to the current appeal. As noted by both parties, however, the history between the appellants and Society goes back several years.

28. In 2012, the Society seized 39 dogs and 19 cats from the appellants. While most of the animals were eventually returned to the appellants with conditions, the seizure and its aftermath caused the appellants to sue the Society and the City of Burnaby, alleging an illegal seizure and defamation.

29. In December 2014, the BC Supreme Court rejected the appellants' position that the animals were unlawfully seized. The Court noted the evidence of the Society and Burnaby that the animals seized from the appellants required "veterinary care, totaling about $10,000, for problems such as dental and eye issues". The Court stated that: "There were demonstrated medical problems with some of the animals including malnutrition".

30. While the Court rejected the claim of unlawful seizure, and rejected most of the allegations of defamation, the Court found that one incident of defamation had been made out, and awarded Ms. Simans what the court described as "modest general damages" of $2500 against the Society. That incident involved the publication of a photograph of a dog, and the suggestion that its injuries (which were pre-existing) were the result of Ms. Simans' inability to care for such a large number of animals: *Simans v. Burnaby (City)*, 2014 BCSC 2442.

31. In September 2016, the Society seized 88 animals from Ms. Simans, including some of the same animals that had been the subject of the 2012 seizure.

32. The 2016 seizure culminated in BCFIRB's December 2, 2016 decision dismissing an appeal from the Society's October 7, 2016 review decision.

33. The panel's reasons in the December 2016 Decision are extensive and I will not reproduce them here. In summary, the panel found that there were multiple grounds on which the animals were in distress, including Ms. Simans' failures to obtain and follow veterinary advice. It is also clear from the decision that the panel had no confidence, based on Ms. Simans' history and the evidence at the hearing, the animals would remain distress-free if returned. Among other things, the panel stated:

> 198. The Appellant said several times during the hearing that she was doing the best that was humanly possible for her animals, that she loves her animals and wants them returned home. Her sincerity is beyond question. Unfortunately, however, she has, in my view, proved time and time again with virtually every decision she made about the care and health and treatment of her animals that she made poor decisions and her poor choices negatively impacted her animals. Indeed, the biggest concern with a return in my view is that the Appellant seems so unaware of how her decisions and actions hurt her animals even while she portrays herself as a helper to her animals. In my respectful view, she could not be more wrong….

205. These animals were in the Appellant's care for at least a year and in most cases many years. Clearly, in my opinion, these animals were thin due largely or entirely to the Appellant's failure to feed them enough, her failure to seeking veterinary care when her home remedies were not successful or even not the best course of action, her failure to notice their conditions including deteriorating conditions, and her failure to follow veterinary advice.

206. I therefore find that if these animals were returned to the Appellant they would again fall into a situation of distress. These animals have begun their rehabilitation in the Society's care. These animals have suffered enough and I find they will not be returned to the Appellant.

34. The appellants applied to judicially review BCFIRB's December 2, 2016 decision. The judicial review petition was heard on March 9, 2017. The decision remains under reserve at the time of writing.

35. The subject matter and operation of the *PCAA*, and the realities of animal ownership, have given rise to the inevitability of BCFIRB having to address appeals by the same parties arising from different seizures over time. This raises the issue as to what if any effect a panel hearing an appeal ought to give to a previous appeal decision involving the same parties.

36. In my view, the question whether any particular animal is in "distress" as defined by s. 1(2) of the *PCAA* must stand or fall on its own merits and without regard to the past. If BCFIRB finds that an animal was not in distress as defined in s. 1(2) of the *PCAA* when it was removed, that is the end of the matter. However, if BCFIRB finds that an animal was validly found to be in distress, history properly informs the assessment whether the owner would promptly take steps to relieve the distress (e.g., whether they should be given a "second chance" as discussed in *Ulmer v. BCSPCA*, 2010 BCCA 519), and also informs the assessment of whether animals ought to be returned. That is because the issues of "second chance" and "return" are necessarily forward-looking. They are risk assessments where past conduct necessarily plays a part. Where, as here, a panel of this Board has previously and recently made findings that reflect little confidence that animals would remain distress-free if returned to the appellants, those findings cannot be ignored. At the same time, however, an appellant can and should be given every opportunity to demonstrate that current circumstances support a different conclusion, and I have approached this case accordingly.

VI. The Review Decision

37. As noted above, the animals were removed on March 20, 2017. The appellants, through counsel, exercised their right under s. 20.2 to seek a review of the decision to take custody of the animals. Ms. Moriarty issued her review decision on April 6, 2017 pursuant to s. 20.2 of the *PCAA*.

38. Ms. Moriarty concluded firstly that the animals were removed in accordance with the *PCAA* because they met the definition of distress under the Act, and the appellants were either unwilling or unable to relieve that distress.

39. With respect to the cats, Ms. Moriarty upheld SPC Thomson's assessment that the cats were in distress, despite her agreement that the ammonia strips she used were out of date and had limited evidentiary value. Ms. Moriarty emphasized SPC's Thomson's personal observations of the cats' symptoms ("consistent with what can expected from being exposed to elevated levels of ammonia"), and other medical concerns noted by the SPC "including low body score in one cat, ocular and nasal discharge, infected incisor and flea dermatitis". Ms. Moriarty emphasized Ms. Simans' continual denial, even as against the veterinary evidence of Dr. Walton, "that there was anything wrong with these cats", and her failure to address the underweight body condition of the male cat except to state that he is a senior cat that is "quite frail".

40. With respect to Hadley, the greyhound, Ms. Moriarty wrote:

> You have provided submissions that you had complied with a previous notice of the BC SPCA requiring you to have Hadley seen by a veterinarian in February. At the time of this warrant, SPC Thomson observed that Hadley had red skin irritation, hair thinning and appeared to have a skin condition. She spoke with the receptionist at your vet clinic who said at the time Hadley was examined, the vet noted "mild dandruff" however, what SPC Thomson was currently observing was more than just mild dandruff and required further treatment based on what was observed in late March. You denied that anything is wrong and that you were treating him with "flax and oil". As such, I find that SPC Thomson acted in good faith in finding the dog met the definition of distress with the untreated skin condition and you were not willing to treat it. Dr. Walton later examined this dog and concluded that he had skin lesions and polyuria. Hadley was prescribed vanectyl P for purities [sic – pruritis]. As such, there were more concerns than simply "mild dandruff" that needed to be addressed.

41. With respect to the rabbit that was removed, Ms. Moriarty emphasized that while the Society never suggested that Ms. Simans injured the rabbit, the decision to remove the rabbit was taken in good faith based on the leg/foot on the rabbit's right hind being observed to be "abnormally sideways" and based on the absence of any veterinary records concerning the rabbit. Ms. Moriarty stated:

> Subsequent examination of the rabbit has confirmed that the left rear leg was dislocated and there was significant scarring consistent with an old fracture. Metacam was prescribed for pain control and on a subsequent examination it was recommended that due to difficulty ambulating, an amputation was recommended to improve the quality of life for this rabbit.
>
> You have submitted that you would have done the same thing that the BC SPCA is doing for the rabbit and would have worked with your veterinarian on a plan. The reality was that at the time of the warrant you indicated to SPC Thomson that the injury "would heal itself" and so I am not convinced that you would have followed up with pain medication.

> In coming to this conclusion I am also persuaded by the actions of your past and the conclusion made by the presiding member in the BC Farm Industry Review Board in their December 2, 2016 decision upholding the decision of the Society not to return 85 animals seized from you back in September 2016 ("the FIRB Decision") that you are neither willing or capable of providing veterinary care to your animals as needed (para. 201).

42. This part of the review decision also expressed Ms. Moriarty's disappointment that Ms. Simans did not advise the SPC at the time of the seizure that a Rhodesian Ridgeback dog and its puppies, also removed, were not her animals. While noting that those dogs were not the subject of the review application, Ms. Moriarty stated that: "I do not feel this demonstrates that you had the best interests of these dogs in mind but were rather more focused on your relationship with the BC SPCA."

43. In concluding that all the animals at issue were removed in good faith based on the information provided to her at the time the warrant was executed, Ms. Moriarty emphasized the statement at paragraph 180 of BCFIRB's December 2, 2016 decision that the definition of distress "does not require the Society to make a finding of pain and suffering as a precondition to removing an animal….Rather, in accord with the purposes of this protective statute, the definition extends beyond that. The first three criteria listed in s. 1(2) – any of which is sufficient to satisfy the definition – also constitute 'distress', and make clear that the Society is not required to find 'pain' and 'suffering' before it may move to protect an animal."

44. Ms. Moriarty turned next to the issue whether it was in the animals' best interest to return them – whether they would remain distress-free if returned. She stated: "The question that I feel is of utmost importance in this case is, <u>if returned, would these Animals remain in good condition free from distress</u>" (emphasis in original). Ms. Moriarty stated:

> … To answer that question, I need to look at the history of your care of animals.
>
> I do not intend to repeat the entirety of your history in this decision but rather rely on my overview in my previous decision letter dated October 7, 2016 to cover off events prior to last year's seizure. For the purposes of this decision, I find the conclusions of the BC Farm Industry Review Board in the FIRB Decision upholding the decision of the Society not to return 85 animals seized from you back in September 2016 particularly persuasive in answering the best interest question. The conclusions set out in the 49 page decision are germane to the present decision as I do not feel that much has changed since last year, with the exception that you have not yet acquired the same number of animals and now appear to have branched out into the boarding of animals. The bottom line is that you have a pattern of seeking out compromised animals and only taking minimal steps, if any, to improve their situation. In the FIRB Decision, Ms. Van't Haaff concludes:
>
> > [218] … the noble intention of rescuing an animal from distress or harm or neglect does not provide any rescuer with an opportunity to create or perpetuate

> an additional albeit different situation of distress for the rescued animal to live in. It is not enough to exchange one situation of distress for another, even if it is a slightly less harmful situation of distress; such an exchange cannot be anything other than unacceptable to humans and unbearable on the animals in question. To continue such suffering, even under the umbrella of rescue, is unacceptable. That is why the PCAA does and should apply to everyone.
>
> [219] *It is vital that any rescuer be on guard against the very real mischief of being unable to say no to the next animal needing rescue when that person is stretched in caring for the animals already in his or her charge* (emphasis added).

I am not suggesting that the condition of the Animals removed this time from your care are necessarily experiencing the same level of distress as the ones that were removed in 2016, however, that is not the test as has been stated above. I truly do not believe that you have the ability to a) realize when an animal requires veterinary treatment in most cases, b) the ability to follow veterinary instructions in most cases, and c) recognize your limits in accumulating more animals. This is also a conclusion that was come to by the presiding member in the FIRB Decision at para. 205.

Conclusion

In light of all of the above, I do not feel that it is in the best interests of the Animals to be returned to you as I do not feel that you will be able to keep them free from distress pursuant to s. 9.1. In addition, I do not believe that given your past history, you would make good on your submission that you would adhere to a care plan for these Animals. Finally, I am not satisfied that you would be cooperative with the BC SPCA in the future to assist with ensuring that animals in your care are being kept free from distress according to the law.

VII. Grounds of Appeal

45. The Notice of Appeal sets out the following grounds of appeal:

1. The Warrant under which the subject animals were seized contained erroneous and misleading information.

2. The subject animals were not in distress; the seizing officer ignored current & relevant information about the condition of the subject animals at the time of the seizure.

3. The seizing officer ignored current & relevant information about the capability & willingness of Simans to take steps to relieve the potential distress of any of these animals, should such occur.

4. There was no objective evidence on which to reasonably support a potential finding of distress sufficient to warrant the seizure of the animals.

46. Counsel for the appellants, citing this BCFIRB's decision in *Viitre v. BCSPCA* (January 10, 2017, at para. 154), did not press her objection to the process leading up to the warrant, but reserved the right to "raise the issue of the validity of the warrant should this matter proceed to a Judicial Review". For the record, I confirm that I adopt the reasoning in *Viitre*, which is consistent with the long-standing view that BCFIRB's role on a *PCAA* appeal is not to review the validity of a warrant to enter property, which view was upheld in *Binnersley v. BCSPCA*, 2014 BCSC 2338.

47. The key issues on this appeal are thus whether the review decision correctly concluded that the animals were validly seized and should not be returned: *BC Society for Prevention to Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331.

VIII. Evidence

48. CH, a "fast friend" of Ms. Simans, testified that she was in attendance at both the 2016 and 2017 seizures. CH testified that she "saw no issues" with the condition of the animals seized in September of 2016, even though none of the animals were returned on appeal and several needed to be euthanized as they were in critical distress. CH also disagrees with the seizure of the animals that are the subject of this appeal, describing Ms. Simans as "an excellent caregiver".

49. The reliability of CH's evidence was questioned in cross-examination, as there was evidence from the Society that she smelled of liquor at the time of the seizure. I do not find it necessary to make a finding on whether she had been drinking that afternoon. In the end, I found her testimony to be of limited assistance, particularly because of her lack of appreciation of the seriousness of the issues that attended the September 2016 seizure.

50. Ms. Simans testified that she completed the Animal Welfare Certificate Program at Thompson Rivers University in 2006, and subsequently decided to do animal rescue work. She says pets are her friends and "part of the family".

51. Ms. Simans testified that she was devastated by the September 2016 seizure and disagrees that that seizure was necessary. While she agreed that not everything was "in total order", she would not admit that any of those animals were in distress. As noted above, Ms. Simans has exercised her right to apply for judicial review of the BCFIRB's December 2, 2016 decision to not return the animals.

52. Ms. Simans testified she acquired the dog Hadley from an unidentified individual shortly after the September 2016 seizures. She was aware of several scrapes, abrasions and

dermatitis. She was also aware of the frequent urination at the time of the seizure, but took the view that Hadley only urinated frequently when excited or stressed. Subsequent testing that was done by Dr. Walton revealed lack of urine concentration, a condition known as isosthenuria. Ms. Simans indicated that if the dog were returned, she would have it examined further as to the cause of this condition.

53. Ms. Simans testified she acquired the rabbit at auction, for $8.00, only eight days before the March 20, 2017 seizure that gave rise to this appeal. She had noted that the rabbit's right rear leg seemed to be "turned out" or crooked. She bought the rabbit because she felt it needed a break. She felt sorry for it. Ms. Simans testified that she took the rabbit to the Metrotown Veterinary Clinic the next day, where it was briefly examined by Dr. Tomar at no cost to Ms. Simans. No records of this examination were kept. After this consultation, Ms. Simans decided to undertake no further treatment.

54. As for the cats, Ms. Simans testified they were kept in a bedroom. She testified that "Onyx", an elderly cat, was acquired free, through Craigslist, in February 2017, from a Ms. RT. "Angel", the other cat, has been in Ms. Simans' possession for 5-6 years. When asked about testimony that there was strong ammonia odors in the cat room, Ms. Simans disputed that ammonia levels in the cat room were an issue.

55. Ms. Simans testified that she was looking after the Rhodesian Ridgeback Rhea for Ms. JL and that she was being paid $10-12 per day for the care of this dog. She testified she was unaware of Rhea having mastitis. I note that this testimony differs from the record of her statement to the SPC at the time of the seizure that she was aware that the dog had mastitis which she was "watching". Ms. Simans denied having made this comment to the SPC, an issue on which she was not cross-examined.

56. Ms. Simans was asked about her record keeping and documentation of the care the animals received. Ms. Simans admitted she had not made a practice of doing this, although she stated she had commenced better record keeping since the March 20, 2017 seizure. No evidence of this record keeping was produced.

57. Dr. Adrian Walton examined the four animals that are the subject of this appeal, as well as the two cats, the dog Rhea and her pups that belonged to others. These examinations were done within 3-4 hours of the seizure.

58. I pause here to note that the appellant, in cross-examination, challenged Dr. Walton's impartiality and objectivity. Dr. Walton effectively answered that challenge, noting among other things that he is a very busy veterinarian, that his work for the Society represents a very small fraction of his work (2-3%), and that his interest is solely in the welfare of the animals he sees, not the position of the Society. In my view, Dr. Walton convincingly refuted the notion that he would in any way be biased in favour of the Society. His evidence was careful, professional and detailed. I accept his evidence.

Further, I will say here that I prefer Dr. Walton's evidence where it conflicts with the evidence of Dr. Tomar, discussed below.

59. I will include Dr. Walton's evidence with regard to Rhea as Ms. Simans' care for this dog was part of the larger context of the evidence and arguments advanced on this appeal.

60. With respect to Rhea, Dr. Walton, whose written report included photographs, found that Rhea suffered from mammary tissue that was hot to the touch, with discolored milk found in one teat. He diagnosed Rhea as suffering from mastitis, a serious mammary system infection. He prescribed immediate treatment with Clavamox, an antibiotic. Dr. Walton underlined that the failure to treat mastitis promptly can lead to catastrophic consequences. I have noted that two days later, Rhea's owner had her examined at Peace Arch Veterinary Hospital and apparently no mastitis was found. When asked about this Dr. Walton said he was not surprised by this as mastitis can resolve quickly once appropriate medication is administered. As noted, I accept his evidence.

61. With respect to the cats, Dr. Walton found that all the cats smelled very strongly of ammonia. He also found eye and nasal discharges, possibly caused by irritation due to ammonia smells. He also found the cats had dirty ears with a chestnut-brown wax material built up in their ears. Dr. Walton testified that cats are a fastidious animal, normally taking care to cover their waste, so as not to smell. He said the strong ammonia smell associated with these cats was not normal.

62. With respect to Hadley, Dr. Walton's written report states: "Skin multiple lesions noted including right rear dorsal foot with marked erythema and inflammation…. Right front lateral carpus abrasion…. Left medical carpus 1 cm abrasion… Generalized bilateral alopecia with no inflammation or irritation on her buttocks. Dry skin present. Animal noted to urinate excessively." His report states that the main areas of concern are "skin lesions and polyuria". Under the heading "Urinalysis Results" his report states: "Urinalysis shows isosthenuria or lack of concentration of urine. Possibilities include chronic renal failure or Cushing's disease (hypo adrenocortism). There is no evidence of bladder infection, bladder stones or inflammation that would account for this dilute urine. Recommend full geriatric blood panel to assess if it is pre or post kidney failure."

63. Dr. Walton testified that greyhounds are a very sensitive breed, especially sensitive to skin conditions, and require very specialized knowledge on behalf of the caregiver. Dr. Walton indicated that there were multiple possible causes of isosthenuria and considerable work would need to be done to isolate the cause of Hadley's condition. Regarding the alopecia, a spot baldness, especially on the thighs, Dr. Walton suggested more bedding would be required. Dr. Walton diagnosed active dermatitis on the rear right leg with a pronounced "barbering" effect, that is, very short hair usually caused by extensive licking of the sensitive area. He prescribed Vanectyl B for pruritis and further examinations if skin condition did not improve.

64. With respect to the rabbit, Dr. Walton had the right rear hip x-rayed and found that it was dislocated. He testified that the rabbit would be in pain as a result of the injury and he prescribed pain medication pending further treatment, which could include amputation of the leg to improve quality of life.

65. The Society asked Dr. Danks of the Dewdney Animal Hospital for his opinion of the rabbit's x-rays. After identifying a dislocation of the hip joint and pelvic fractures, Dr. Danks stated that: "In my opinion, the dislocation and fractures, as a result of trauma, would be considerably disabling and painful for this rabbit and surgical intervention, while causing initial discomfort, which can be controlled with pain medication, is (indicated) for rehabilitation and long term relief. Amputation would most likely be the surgery of choice, to which the rabbit is likely to adapt well". He notes that the pelvis is not symmetrical.[1]

66. On the initiative of BCFIRB, Dr. Tomar was summoned as a witness to testify as to his examinations of the rabbit and Hadley. Dr. Tomar spends most of his time practicing in Washington State and only works in the Lower Mainland one day a week, usually on weekends.

67. With respect to Hadley, Dr. Tomar agreed that greyhounds are a sensitive breed with skin issues being quite common. In February 2017, he prescribed Omega fatty acids and shampoo to treat Hadley's lesions.

68. With respect to the rabbit, Dr. Tomar had examined it briefly, free of charge, and noted the abnormal rear leg position. He suggested an x-ray could be done to diagnose the condition more accurately, but as the injury had likely occurred some time ago, just "watching" it for now was also an option, as, in his opinion, the rabbit was not in pain. Ms. Simans subsequently decided not to have the leg x-rayed.

69. I found Dr. Tomar's testimony to be somewhat confused as he seemed to have difficulty accurately remembering the past history of these two animals. Also, in an email dated April 23, 2017 referred to a "dislocation of shoulder joint" of the rabbit, when it is clear from all other evidence, including his own, that it was the rear leg that was in question. It remained unclear whether Dr. Tomar had the appropriate documentation before him at the hearing. He was vague and even casual in response to several questions. While I accept that Dr. Tomar advised Ms. Simans that it was his opinion that the rabbit was not in pain, I prefer the evidence of Dr. Walton and Dr. Danks that the animal was in fact in pain, and that the Society (which was not in any event able to reach Dr. Tomar on the date of the seizure) appropriately removed the animal on that basis.

[1] I will pause here to note that there is some confusion in the various reports as to whether the dislocation was in the right or left hip. What is clear is that the rabbit suffered from a dislocated hip and an asymmetrical pelvis which, I have accepted based on the evidence, was a source of ongoing pain for this animal.

70. SPC Christine Carey, whose evidence I accept, was present at the March 20, 2017 seizure of the animals. She noted that the dog Hadley was in a wire crate which was in a poor state of repair, with protruding wire. Hadley was urinating frequently and the bedding in the cage was wet.

71. SPC Carey entered the room where the cats were kept. She testified the room smelt strongly of ammonia, that this smell was obvious and "offensive". SPC Carey did not inspect the individual cats. She did however test the ammonia levels in the room with Hydrion ammonia strips. The test determined the ammonia levels to be "of concern". Several days later it was found the test strips used were out of date. No evidence was presented as to any effect this would have had on the reliability of the test results but in any event, as noted above, Ms. Moriarty's review decision did not rely on the ammonia strips but rather on the direct observations of the SPCs and Dr. Walton.

72. SPC Carey examined the rabbit. She found the cage in which it was kept was too small, with no refuge area. She stated refuge areas are important to rabbits as they are a species that are preyed upon and their instinct is to want to hide. When handling the rabbit she noted the leg to be "not natural-looking".

73. SPC Thomson, whose evidence I accept, also attended the March 20, 2017 seizure. She testified that when Ms. Simans refused to open the door earlier in the day, a warrant was obtained. She also testified to the strong ammonia smell in the cat room, saying the "whole room smelled". The ammonia test strip revealed a reading of 10-20, which is excessive. Maximum readings allowable are deemed to be in the 2-5 range. Because of the strong odor, poor ventilation, discharges from eyes and noses, as well as debris built up in ears, it was decided to seize the cats.

74. With respect to Hadley, SPC Thomson noted excessive urination, much more than would be the case in a dog that was excited or scared. She underlined that, while dogs will urinate in small amounts when excited or stressed, the amount of urination here was clearly excessive. She also noted the ongoing skin irritation, first seen by her at the February 16, 2017 visit. She decided to seize Hadley.

75. With respect to the rabbit, its leg was sticking out sideways while it seemed to be attempting to pull it in. Based on this deformity and the rabbit's reaction, that is, attempting to pull the leg in, SPC Thomson determined the rabbit was in pain and it was decided to seize the rabbit.

76. SPC Thomson's handwritten notes at time of seizure were also presented as evidence. Amongst other things she noted that Ms. Simans was aware that Rhea had mastitis and that she was "watching it". As noted, Ms. Simans testified before me that she was

unaware that the dog had mastitis and denied having made that statement to SPC Thomson.

77. As noted above, several other animals were also present on the property that day: a pig, a duck, a dog and some birds. While these animals were not seized, orders were issued with respect to the pig and the duck for improvements to be made in their care. The other animals were deemed to be in "adequate" health. This to me is evidence that the Society did not enter the property intent on removing all of the animals. It did not remove animals indiscriminately, but evaluated each animal on its own merits. This also belies the suggestion that the Society acted pursuant to some sort of vendetta or with the intent to persecute the appellants.

78. Several affidavits were presented in support of Ms. Simans:

(a) An affidavit from RT, a previous owner of Onyx, regarding its health status prior to Ms. Simans' ownership of the cat.

(b) An affidavit from JL, the owner of Rhea, suggesting she was happy with the care Ms. Simans had been providing and that when examined on March 22, 2017, her own veterinarian stated the dog was not sick.

(c) An affidavit from DH, a housemate of Ms. Simans of eight years' standing. He attested to Ms. Simans' cleanliness and good care of animals.

79. None of these individuals was called to evidence at the hearing and none was subject to cross-examination. As such, I give their evidence less weight. I would also observe as follows. First, with respect to RT, her evidence that the cat Onyx was old and thin in any event does not speak to the concern that the cat was housed in what I accept was a poorly ventilated room fouled with urine, giving rise to the health risks posed by ammonia. With respect to JL, her evidence of a veterinary report of the dog's condition on March 22, 2017 ("doesn't look infected at the moment", "no indication of mastitis at the time") not address the dog's condition on March 20, 2017, particularly in light of Dr. Walton's evidence , which I accept, that mastitis can resolve quickly with proper treatment. With respect to the evidence of DH, Ms. Simans' housemate, I give his evidence (for example, "At no time have I smelled an odor of ammonia at the house where I reside") little weight given his interest as a supporter of the appellants and as against the observations of the SPCs and Dr. Walton.

VIII. The Appellant's Arguments

80. Counsel for the appellants argued that the Society erred in determining that the animals were in distress.

81. With respect to Hadley, a former racing greyhound, counsel has submitted that Ms. Simans was well aware of the behavioral issues faced by dogs that were formerly in the dog racing industry, and that she worked intensively to teach Hadley appropriate behavior in a home environment. Counsel submits that Ms. Simans, despite her disagreement that this was necessary, took Hadley to see Dr. Tomar on February 19, 2017 in compliance with the Society's February 16, 2017 Order, and she complied with all of Dr. Tomar's suggestions. Counsel argues that on the date of the seizure, Hadley was thriving in her care, and he did not satisfy the definition of distress. She argues that if Hadley has a kidney issue, Ms. Simans can follow up on that issue with her veterinarians with whom she consults regularly.

82. I note that the Appellants' written submission, tendered before the appeal hearing, stated that: "Previous to the seizure, Ms. Simans had not observed any unusual patterns of urination in Hadley". At the hearing itself, Ms. Simans testified that Hadley only urinated frequently when excited or stressed, which at least implied that she was aware of frequent urination before the seizure. This point, while perhaps a small one on its own, speaks to the larger issues of Ms. Simans' capacity or willingness to recognize and address veterinary issues in her animals.

83. With respect to the cats Angel and Onyx, counsel submits that Ms. Simans disputes the SPC accounts that there was a strong ammonia smell in the cat room, which she was not permitted to enter until the "purported testing" was complete. She notes that the ammonia test strip results are "invalid" as the test strips were from a batch that expired May, 2015. She argues that in the absence of any other objective evidence of elevated ammonia levels, the seizure of the cats cannot be justified. Ms. Simans disputes Dr. Walton's findings that the cats had dirty ears or that evidence of flea infestation was visible, and stated that she uses appropriate anti-flea medication and has the house sprayed for fleas as needed.

84. With respect to the rabbit, counsel emphasizes that Ms. Simans relied on Dr. Tomar's March 12, 2017 advice that he believed the apparent injury to be an old dislocation for which surgery was possible but not guaranteed to be successful, and his recommendation that Ms. Simans monitor the rabbit for mobility and pain response, which she did. Ms. Simans submitted that the rabbit "exhibited a voracious appetite, was alert and mobile and did not exhibit any weight loss or behaviors suggestive of pain or distress".

85. With respect to Rhea, counsel submitted that the care that Ms. Simans was providing for this dog was in fact "optimum care" and that "on the morning of the seizure, Ms. Simans

washed Rhea's teats and rubbed her belly. She noted that, other than scratches from the puppies' nails and aggressive suckling, her teats were soft and doughy, not hard as in mastitis." She states that "the finding of mastitis was not confirmed" by the veterinarian who examined Rhea after she was returned to its owner.

86. Counsel argued that none of these animals was in distress, and submitted that it is improper to seize an animal based largely on the owner's previous history. Counsel submitted improvements had been made in how Ms. Simans cared for her animals and that she was in fact providing objectively excellent care. She argues that to sustain this seizure would effectively be imposing a *de facto* ban on Ms. Simans owning or caring for animals. She emphasized that, in contrast to the two previous seizures, Ms. Simans was now caring for fewer animals (17) and the animals were in overall good health. Counsel suggested further orders by the Society would have been more appropriate than more seizures.

87. On the issue of return, counsel submitted that since the 2016 seizure, Ms. Simans has gained greater recognition of her own limitations, and is prepared to limit the number of animals in her care to "a manageable number, dependent on relevant factors. For example, Ms. Simans agrees that she would not care for more than one dam and puppies at a time". Further, counsel states that Ms. Simans is committed to improving her documentation of animals in her care. Thus, even if the animals were validly seized, these commitments should convince the panel to return the animals to her on reasonable conditions.

IX. Decision

Distress

88. The first issue to be determined is whether the four animals in question were in distress at the time of the seizure on March 20, 2017.

89. For this purpose, it is necessary to set out the definition of "distress" in s. 1(2) of the *PCAA*, which must be read together with s. 11 of the *PCAA*:

> 1 (2) For the purposes of this Act, an animal is in distress if it is
>
> (a) deprived of adequate food, water, shelter, ventilation, light, space, exercise, care or veterinary treatment,
>
> (a.1) kept in conditions that are unsanitary,
>
> (a.2) not protected from excessive heat or cold,
>
> (b) injured, sick, in pain or suffering, or
>
> (c) abused or neglected.

> 11 If an authorized agent is of the opinion that an animal is in distress and the person responsible for the animal
>
> (a) does not promptly take steps that will relieve its distress, or
>
> (b) cannot be found immediately and informed of the animal's distress,
>
> the authorized agent may, in accordance with sections 13 and 14, take any action that the authorized agent considers necessary to relieve the animal's distress, including, without limitation, taking custody of the animal and arranging for food, water, shelter, care and veterinary treatment for it.

90. I adopt the understanding of the statutory test set out in the December 2016 decision:

> 180. In approaching this question, I note that "distress" in s. 1(2) of the PCAA is a specialized term. It does not require the Society to make a finding of pain and suffering as a precondition to removing an animal. While pain and suffering were present here for many of the animals, that is not necessary for the definition of "distress" to be met. Rather, in accord with the purposes of this protective statute, the definition extends beyond that. The first three criteria listed in s. 1(2) – any one of which is sufficient to satisfy the definition – also constitute "distress", and make clear that the Society is not required to find "pain" and "suffering" before it may move to protect an animal. Those factors reflect serious risk factors that would foreseeably give rise to suffering and harm if protective action is not taken. While they must not be trivialized in their application, they also do not require the Society to wait until the worst happens.

91. I will address each of the animals individually.

92. Hadley is a former racing greyhound and it appears to be common ground that such animals require a highly skilled caregiver.

93. There is no record that Ms. Simans took Hadley to the veterinarian about his skin condition before the Society's attendance on February 16, 2017. I find that she did so, only reluctantly, pursuant the Society's February 16, 2017 Order where the SPC identified the skin condition with some hair loss and scabs evident. I do not accept the explanation that either Ms. Simans' legal proceedings or her "high degree of familiarity with greyhounds" excuse this omission. It was Ms. Simans' decision to take in this dog in September 2016, following the seizure of the 88 animals, which seizure she knew was going to contest. Her duty to the dog had to come first.

94. Dr. Tomar, on February 19, 2017, identified mild dandruff and an area of alopecia on the dorsal thigh. He prescribed Omega 3 fatty acids and shampoo to treat the skin issues. While Ms. Simans says she complied fully with this recommendation, I note that there is no documentation (for example receipts or care records) to support this, and there is no evidence of any follow up visit to a veterinarian. This is especially pertinent as there was

no indication of improvement in Hadley's condition by the date of the seizure on March 20, 2017 which, as Ms. Moriarty correctly noted, was by then more than mere dandruff. There was evidence of a "barbering" effect on the right rear leg, which was suggested as strong evidence of constant irritation and resultant licking of this area by the dog. The SPCs witnessed Hadley chewing on his right hind leg. I note that Dr. Tomar himself provided further email information noting that "dermatological issues in greyhounds are fairly common" and identifying numerous potential causes and solutions. For her part, Ms. Simans, during the warrant process denied that anything was wrong and stated that she was treating him with "flax and oil".

95. The fact that a condition requiring veterinary attention was present a full month later means either that Ms. Simans did not comply with the advice given, or the advice given was clearly not effective, which called for a follow up visit to see what else should be done. Either way, I find that the animal was suffering and deprived of proper veterinary treatment. The appellants should not have to be ordered to provide this care in order to seek it out in a timely fashion. Thus, in my view, Hadley was validly removed on the ground that he was in distress as he was suffering and was deprived of veterinary treatment. Given Ms. Simans' history of failing to obtain appropriate veterinary care for her animals, the Society was under no obligation to give Ms. Simans a further opportunity to relieve that distress, and that is particularly so where, as here, Ms. Simans did not agree that there were any issues requiring such care.

96. As is also clear, issues concerning frequent urination were evident with Hadley on the date of the removal. Given that Dr. Walton diagnosed Hadley to be affected by isosthenuria, a lack of urine concentration, I consider it unlikely that the condition emerged for the first time during the seizure, which is consistent with Ms. Simans' hearing testimony that this occurred when the animal was excited or stressed. In my view, the animal's condition required veterinary treatment which Ms. Simans was either not in a position to recognize or recognized and did not seek out. In my view, the dog's frequent urination was also a valid basis for the removal of the animal on the ground that it was deprived of veterinary care.

97. I turn next to the rabbit. Upon acquisition of the rabbit, Ms. Simans took it to a veterinarian, Dr. Tomar. The rabbit had obvious difficulty with its right rear leg which was immediately noticeable by all witnesses. Dr. Tomar examined the rabbit only briefly, charged no fee and, for reasons that are not apparent, kept no record of the examination. He explained to Ms. Simans that the injury was likely an old one, and in his judgment the rabbit was not in pain. He suggested that an x-ray could be done, but just watching the rabbit for some time would also be appropriate, given the assumption of no pain. Ms. Simans decided to take no further action.

98. I accept that Ms. Simans relied on the advice of Dr. Tomar, and took the lower cost option he provided. However, Dr. Tomar's opinion, and Ms. Simans' reliance on it, does

not answer the question before me now, which is whether it was valid for the Society to independently conclude, under the *PCAA*, that the animal was objectively "in pain or suffering" – an indicia of distress that does not require "fault" on the part of the owner. In my view, it was entirely valid for the SPCs to conclude, as they did, that the animal, given the deformity of its hip, was in pain or suffering, and required veterinary care. That this was an entirely legitimate conclusion for the SPC to reach is supported by the subsequent medical evidence of both Dr. Walton and Dr. Danks. In my view, the rabbit was validly removed on the basis that it was in distress, and on the basis that Ms. Simans would not be able or willing to do what was necessary to relieve the animal's distress. In this regard, I agree with Ms. Moriarty's statement as follows: "You have submitted that you would have done the same thing that the BC SPCA is doing for the rabbit and would have worked with your veterinarian on a plan. The reality was that at the time of the warrant you indicated to SPC Thomson that the injury 'would heal itself' and so I am not convinced that you would have followed up with pain medication."

99. With respect to the cats, I begin by noting that no party sought to question the basic proposition that high ammonia levels in a poorly ventilated room present foreseeable health risks to cats.[2] The argument before me revolved around what those levels were. The evidence of both SPCs Thomson and Carey was that there were high levels of ammonia present in the poorly ventilated room where the cats were kept. Dr. Walton found that each cat strongly smelled of ammonia when he examined them on the day of the seizure. In my view, this is objective evidence of high ammonia levels and inadequate ventilation, despite the fact that the ammonia strips were expired. For her part, it is significant Ms. Simans disputes that there were high levels of ammonia and thus does not even acknowledge that there was a problem. I note as well that there no evidence or documentation of appropriate veterinary care for the cats given the several identified health concerns such as eye and nasal discharge. Based on the evidence, I conclude these cats were in distress as they were deprived of adequate ventilation and adequate veterinary treatment. I further conclude, based on Ms. Simans' denials of any significant problem, that the removal was necessary as she would not have relieved the cause of the distress.

Return

100. Having concluded that the removals were valid and justified, the next issue is whether the animals should be returned.

[2] See for example, *Parker v. BCSPCA*, March 20, 2017, referencing the significant adverse impacts of high ammonia levels and poor ventilation for cats.

101. In considering this question, Ms. Simans' history is relevant. Ms. Moriarty's review decision gets to the core of the issue as follows:

> The bottom line is that you have a pattern of seeking out compromised animals and only taking minimal steps, if any, to improve their situation…..
>
> I am not suggesting that the condition of the Animals removed this time from your care are necessarily experiencing the same level of distress as the one that were removed in 2016, however, that is not the test as has been stated above. I truly do not believe that you have the ability to a) realize when an animal requires veterinary treatment in most cases, b) the ability to follow veterinary instructions in most cases, and c) recognize your limits in accumulating more animals. This is also a conclusion that was come to by the presiding member in the FIRB Decision at para. 205.

102. I have reflected carefully on the passage from *Viitre v. BCSPCA* (January 10, 2017), cited by counsel for the appellant, where the BCFIRB panel rightly stated that history, while relevant to the issue return, is not determinative because "people can and do learn, and change". I agree, just as I agree with the panel's subsequent statement that a panel "should not be naïve in its assessments, or assume that promises made will necessarily be kept…. [E]ach case must be decided on its facts".

103. When I take into account the particular facts and circumstances here, I find that I must agree with Ms. Moriarty.

104. I start by noting that Ms. Simans must be given credit for proactively taking the rabbit to Dr. Tomar shortly after purchasing it on March 11, 2017. Further, Ms. Simans was entitled to rely on Dr. Tomar's advice that she could take a "wait and see" approach.

105. However, that limited credit is far outweighed, in my view, by Ms. Simans' failure to identify and take adequate steps to seek veterinary care for Hadley, and by her failure to keep her cats in an environment that was properly ventilated and where she continued to strenuously deny that ammonia levels were a problem. I note as well that, with respect to the dog Rhea, Ms. Simans' reaction was to question the diagnosis of mastitis as being "contradicted" by the subsequent veterinary examination (see Ms. Simans' March 30, 2017 submission to the Society), rather than recognizing that a serious concern had been identified and that both diagnoses could live together. That Ms. Simans exhibited all these deficiencies in the wake of the lengthy history of neglect described above, and in the face of the findings made in the December 2016 decision, is especially concerning. It shows an ongoing lack of insight and is part of what is regrettably an ongoing pattern of numerous failures to provide appropriate care to animals generally. I have no confidence that the animals would remain distress-free if returned to her care.

106. Counsel for the appellants has offered the option of a return with conditions. She has submitted that Ms. Simans is now committed to "improving her documentation of all animals in her care, whether permanent or temporary, to ensure that routine metrics of health are both measured and recorded on a regular basis for each animal. This would

include maintaining current records of veterinary consultations for both routine and specific reasons".

107. In my view, no set of conditions that could apply to the appellants would be effective without meaningful external monitoring. However, the appellants have not suggested any external monitor, let alone one who, apart from the Society, could credibly act as an external monitor. It is obvious to me that conditions that depend on effective monitoring by the Society would, as circumstances currently stand, be doomed to fail. The facts of this case clearly demonstrate Ms. Simans' ongoing hostile and distrustful attitude toward the Society, an attitude that needs to be understood in light of previous disputes, including the lawsuit arising from the 2012 seizure and Ms. Simans' challenge to the 2016 seizure. The Society itself has expressed concern about how the appellant's attitude and conduct will impact her ability to work with the Society in the future.

108. When the Society attended on February 15, 2017, Ms. Simans refused to answer the door. When the Society attended on February 16, 2017, they were only allowed to enter the garage, and Ms. Simans declined to answer whether she had any more animals. On February 21, 2017, the Society was advised by the animal hospital that "we were told not to speak to you". On March 20, 2017, when the Society attended the property the first time (following the JJP's refusal to grant a warrant), they were met with foul, abusive and aggressive language. On March 20, 2017, after the warrant was issued, the appellant's responses to the Society's questions denied or minimized any concerns about the health and well-being of the animals.

109. Effective monitoring depends on good faith and cooperation on both sides. To be blunt, and to use the words of *Viitre*, it would be "naïve" of me to conclude that this would be reasonably possible, at least as matters stand today. Once again, I agree with Ms. Moriarty who stated:

> … I do not believe that given your past history, you would make good on your submission that you would adhere to a care plan for these Animals. Finally, I am not satisfied that you would be cooperative with the BC SPCA in the future to assist with ensuring that animals in your care are being kept free from distress according to the law.

110. Finally, I wish to make clear that I disagree with counsel's submission that a decision sustaining the removals in this case is effectively imposing a "*de facto* ban" on Ms. Simans owning animals. That argument is belied by the very fact that the Society itself did not remove 10 of the animals. It is also belied by my approach which insists that the issue of "distress" must be considered on its own merits and without regard to history, though history rightly enters into the issue whether an owner can reasonably be expected to relieve distress, and the issue whether an animal ought to be returned on appeal. What this decision "bans" are acts or omissions that fail to relieve distress in animals, all of which is particularly concerning where an owner takes a particular interest in rescuing or boarding animals whose condition might be concerning to begin with.

X. Order

111. I have concluded that all four of the animals at issue on this appeal were in distress, that their removal was appropriate and that they would likely and foreseeably return to situations of distress if they were returned to the appellants. Consequently, and pursuant to s. 20.6(b) of the *PCAA*, the Society is permitted, in its discretion, to destroy, sell, or otherwise dispose of the animals.

112. I note that Ms. Moriarty's affidavit states that the Society's intention is to permanently settle the animals with adoptive owners.

XI. Costs of Care

113. Section 20 of the *PCAA* states:

> 20 (1) The owner of an animal taken into custody or destroyed under this Act is liable to the society for the reasonable costs incurred by the society under this Act with respect to the animal.
>
> (2) The society may require the owner to pay all or part of the costs, with or without conditions, for which he or she is liable under subsection (1) before returning the animal.
>
> (3) Subject to subsection (4), the society may retain the proceeds of a sale or other disposition of an animal under section 17 or 18.
>
> (4) If the proceeds of a sale or other disposition exceed the costs referred to in subsection (1), the owner of the animal may, within 6 months of the date the animal was taken into custody, claim the balance from the society.
>
> (5) Payment of costs under subsection (2) of this section does not prevent an appeal under section 20.3.

114. Section 20.6(c) of the *PCAA* states that on hearing an appeal the board may "confirm or vary the amount of costs for which the owner is liable under section 20 (1) or that the owner must pay under section 20 (2)".

115. Ms. Moriarty's March 22, 2017 letter to Ms. Simans (which letter gave Ms. Simans an opportunity to be heard prior to the review decision) specifically advised Ms. Simans that: "As has been explained to you, pursuant to s. 20 of the *Act*, as of the date of seizure, you are responsible for the costs of care associated [sic] the Animals whether they are returned to you or not."

116. The appellants did not specifically appeal the issue of costs as part of their notice of appeal, as the Society did not advance a specific costs claim until the appeal process had commenced. That costs claim is set out in Ms. Moriarty's affidavit, and sets out the basis for the Society's claim of $4,159.84 in care costs.

117. In those circumstances, I did not require the appellants to file a fresh appeal form on the care costs issue (nor did the appellants suggest that I should), as this would only add time and expense to the appellants as time passed and costs mounted. That said, the appellants have provided only the most general submission in reply to the Society on the issue of costs. Counsel's written reply submission states:

> With respect to the costs claimed by the Respondent, the Appellant maintains that as the Seizure was unjustified, so too are the costs imposed on the Appellant by the precipitous and heavy-handed actions of the Respondent in seizing these animals. The Appellant therefore requests that the costs as submitted by the Respondent by dismissed or, in the alternative, varied to a reasonable amount.

118. As I have found the removals to be justified, I reject the appellants' first argument. With regard to the appellants' suggestion that the costs should be varied to a reasonable amount, the appellants have provided no specifics suggesting what component of the claimed costs was unreasonable. Having reviewed those costs, I find them to be reasonable.

119. I note that liability for costs is limited to the "owner". The appellants, who have both appealed, could have but did not suggest that only one of them is the owner of the animals.

120. Counsel for the appellants indicated that, as her client Ms. Simans is on disability, some sort of modest repayment schedule would need to be worked out if she ultimately is found responsible for payment of these expenses. That is in my view a matter between the parties.

121. In the result, I confirm, pursuant to s. 20.6(c) of the *PCAA*, that the appellants are liable to the Society for the amount of **$4,159.84** to the Society as the reasonable costs incurred by the Society with respect to the animals.

Dated at Victoria, British Columbia this 24th day of May, 2017.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

_____
John Les, Chair & Presiding Member