Environmental Appeal Board

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DECISION NO. 2017-WIL-017(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Earl Pfeifer	**APPELLANT**
AND:	Director of Wildlife	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Linda Michaluk, Panel Chair	
DATE:	October 1-4, 2018. Concluded in writing on November 15, 2018.	
PLACE:	Nelson, BC	
APPEARING:	For the Appellant: Andrew Phypers, Counsel; Jared Craig, Counsel For the Respondent: Cory Bargen, Counsel; Stephen King, Counsel	

APPEAL

[1] This is an appeal by Earl Pfeifer against the August 16, 2017 decision of Dr. Jennifer Psyllakis, the Director of Wildlife (the "Director"), Fish and Wildlife Branch, Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). In her decision, the Director denied an application by Mr. Pfeifer, doing business as RunCheetahRun, for a permit to possess "controlled alien species"; specifically, she denied a permit to possess and house two cheetahs.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act* (the "*Act*"). Section 101.1(5) of the *Act* provides that the Board may:

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[3] The Appellant asks the Board to approve the permit and award him costs for the appeal.

[4] The Respondent asks the Board to dismiss the appeal.

BACKGROUND

[5] In 2009, certain species, including cheetahs (*Acinonyx jubatus*), were designated as "controlled alien species" ("CAS") under the *Controlled Alien Species Regulation*, B.C. Reg. 94/2009 (the "*CAS Regulation*").

[6] Under the *CAS Regulation*, a person is prohibited from possessing a CAS unless the person holds a permit. A permit may be granted to possess a CAS by the Director under section 4 of the *Permit Regulation*, B.C. Reg. 253/2000 on the following conditions:

4 The director may issue a permit in accordance with this regulation on the terms and for the period he or she specifies,

> ...
>
> (f) authorizing a person to possess a species individual of a controlled alien species <u>if</u>
>
> > (i) the species individual was in British Columbia on March 16, 2009,
> >
> > (ii) the person operates a zoo or is an educational or research institution, or
> >
> > (iii) the director is satisfied that special circumstances exist,
>
> ....
>
> [Emphasis added]

Permit Application History

[7] Before applying for the subject permit, the Appellant applied for, and was refused, other permits to possess the two cheetahs.

[8] In July, 2011, the Appellant and Carol Plato[1] submitted a CAS application for a permit to possess cheetahs for personal use. The application was denied by the then Director of Wildlife in April, 2012. At that time, the Appellant was not in possession of any cheetahs.

[9] In 2013, the Appellant and Ms. Plato imported two cheetahs, one male (Robin) and one female (Annie), both born in 2012, into Ontario from a breeder in South Africa (the De Wildt Cheetah and Wildlife Centre, now called the Ann Van Dyke Cheetah Centre) after obtaining the necessary import permits from Ontario. The cheetahs were then transported to a facility in Alberta, again with the proper permits, where they remained until October, 2014.

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[1] On this application, she is listed as Carol Pfeifer, but in subsequent correspondence she is referred to as Carol Plato.

[10] In April, 2014, RunCheetahRun, an organization operated by the Appellant and Ms. Plato for the purposes of cheetah awareness and conservation, applied to the Ministry for a permit to possess the two cheetahs in Kaslo, BC, "for zoos and education and research institutions". In January, 2016, the BC Conservation Officer Service advised the then Director, that the applicants no longer owned/controlled the Kaslo property. This was confirmed by the applicants in March, 2016. That Director subsequently denied the permit in April 2016, as CAS permits are location specific. This denial was not appealed.

[11] At the same time the Kaslo application was being considered, the Appellant applied for a permit to possess the cheetahs at another location. Specifically, in June, 2014, RunCheetahRun applied to possess two cheetahs in Creston, BC. In July, 2016, the then Director denied the Creston application on the basis of the location and ownership of that property. In addition, that Director advised that there were additional concerns that he had not canvassed during his preliminary review of the application including, but not limited to, whether sufficient special circumstances existed to justify issuing the permit. This decision was appealed by the Appellant, but later abandoned in light of the present matter.

[12] Meanwhile, in December 2015, a cheetah was spotted loose on Highway 3A near Crawford Bay, BC. On December 16, 2016, the Appellant was charged with possessing an alien species without a permit in relation to this incident. In June, 2017, the Crown directed a stay of proceedings on all charges against the Appellant due to improperly obtained evidence.

[13] In January 2016, the cheetahs imported by the Appellant and Ms. Plato were confirmed to be in Ontario.

[14] On June 29, 2016, the Appellant applied for the subject permit "for zoos and education and research institutions" on behalf of RunCheetahRun. Like the previous application, the subject application is for a permit to possess CAS, but it seeks to possess the cheetahs at a new location in Crawford Bay, BC.

[15] The 2016 application was subject to review and comment by the CAS Permit Advisory Committee ("PAC"), and others, in accordance with regular Ministry policies and procedures. Of note, the CAS PAC is a committee appointed by the Director and comprised of professionals from the Canadian Association of Zoos and Aquariums ("CAZA"), the Pet Industry Joint Advisory Council, the BC Society for the Prevention of Cruelty to Animals ("BCSPCA"), and Ministry specialists. The purpose of this committee is to review and advise the Director on permit applications concerning prohibited species individuals.

[16] The Appellant was given the opportunity to reply to the information and comments in relation to his application in March, 2017. The Appellant's comments were provided to the reviewers.

[17] When the review process was completed, the comments and responses were summarized and a decision package was finalized and provided to the Appellant in June 2017, for further review and comment by July 2017. The Appellant provided further documents in support of the application before and after the July date. The Director confirmed that she would consider the additional information.

[18] On August 16, 2017, the Director advised the Appellant of her decision to deny the permit application. She considered the legislation, the Ministry policies and procedures, and the materials before her. Among other things discussed in her detailed reasons, the Director noted that the application did not fit within the categories in the Ministry's policies and procedures, and that the CAS PAC did not support the application. Ultimately, the Director concluded that there were no "special circumstances" justifying the issuance of a CAS permit to possess the cheetahs.

The Appeal

[19] On August 30, 2017, the Appellant appealed the Director's decision providing five grounds for appeal, which are summarized as follows:

- The Director erred in construing the legislative framework for her exercise of discretion.
- The Director fettered her own decision by elevating the policies and procedures developed by the Ministry to legislative status.
- The Director unreasonably relied on the comments of the CAS PAC members.
- The Director relied on information upon which she was not entitled to rely; namely, the unlawfully obtained evidence underlying the charges that were stayed by the Crown. Alternatively, she reached a perverse conclusion based on that illegally obtained evidence.
- The Director, without any evidentiary foundation, found that the cheetahs posed a danger to the public's health and safety. The Appellant submits that, in fact, they do not pose a material danger to human health and safety.

[20] The Appellant's requested remedies are summarized as follows:

- Reverse the decision of the Director and issue a CAS permit to possess the two cheetahs at the specified location in Crawford Bay for a period of no less than two years, for the sole purpose of education and outreach programs as described in the original application;
- Provide an option to renew the permit after the stated period so that RunCheetahRun can continue its educational and outreach activities into the future; and
- Order the Respondent to pay the Appellant's costs related to this appeal.

[21] In support of his case, the Appellant called one witness to testify at the hearing.

[22] The Respondent submits that there is a reasoned and lawful basis to deny the application; special circumstances do not exist to justify the exceptional

granting of a permit to possess the cheetahs. In support, the Respondent called seven witnesses to testify at the hearing, including the Appellant.

[23] The Respondent opposes the application for costs against her.

ISSUES

[24] The issue central to this appeal is whether special circumstances exist that support the CAS possession permit being granted.

[25] The other issue is whether an order for costs should be awarded to the Appellant in this case.

RELEVANT LEGISLATION

The *Act*

[26] The *Act* provides for the designation and control of alien species as follows:

Controlled alien species

6.4 If the minister considers that a non-native species described in paragraph (a) or (b) of the definition of "species" poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat, the minister may make regulations designating the species as a controlled alien species.

Regulation of controlled alien species

6.5 (1) The minister may, by regulation, regulate, prohibit and impose requirements in relation to the following:

(a) the possession of a species individual of a controlled alien species;

(b) the breeding of controlled alien species;

(c) the release of a species individual of a controlled alien species;

(d) trafficking in species individuals of a controlled alien species;

(e) the shipping or transporting in British Columbia of, or the engaging of another person to ship or transport in British Columbia, a species individual of a controlled alien species.

(2) In making regulations under subsection (1), the minister may do one or more of the following:

(a) define classes of controlled alien species;

(b) make different regulations for different controlled alien species or classes of controlled alien species;

(c) delegate a matter to a person;

(d) confer a discretion on a person.

The *CAS Regulation*

[27] Of relevance to this appeal, the *CAS Regulation* provides as follows:

Definitions

1 (1) In this regulation:

...

"prohibited species individual" means any of the following:

(a) a single live member of a controlled alien species designated in Schedule 1, at any developmental stage;

...

Designation of species as controlled alien species

2 For the purposes of paragraph (a) of the definition of **"controlled alien species"** in section 1 (1) of the Act, the species listed in Schedules 1 to 4 are designated as controlled alien species.

Possession

3 A person must not possess a prohibited species individual unless the person holds a permit authorizing the possession of that prohibited species individual.

[28] Section 1(j) of Schedule 1 designates *Acinonyx jubatus* (cheetah) as a CAS.

MINISTRY POLICIES AND PROCEDURES

[29] There are two main policy and procedure manuals developed by the Ministry that are relevant to this appeal: the Controlled Alien Species Policy Manual (the "CAS Policy"), and the Controlled Alien Species Procedure Manual (the "CAS Procedure").

[30] The CAS Policy provides as follows:

Policy Statement

It is the policy of the Ministry

1. To reduce the number of privately owned prohibited species individuals in the province

2. To minimize the risk that prohibited species individuals pose to the public's health and safety, and to property, wildlife, and wildlife habitat, by

   a. restricting the number of prohibited species individuals in British Columbia

   ...

5. To prohibit public display of prohibited species individuals except by those organizations who meet the criteria described in the Controlled Alien Species Procedure, with the intent of reducing the attractiveness of owning a prohibited species individual as a pet.

[Bold in original]

[31] The CAS Procedure provides as follows:

2 Possession criteria for CAS <u>not</u> in BC on March 16, 2009

2.1 The Director has no authority to issue a permit to possess a prohibited species individual that was not in BC on March 16, 2009, to anyone other than a person who operates a zoo or is an educational or research institution, or unless satisfied that special circumstances exist. The following should be considered special circumstances:

   a. the prohibited species individual will leave BC after a specified short period of time, but only if the permit is issued on condition that the prohibited species individual remain in BC for no longer than that specified time (a "transitory permit"),

   b. the holder of a permit for the purpose of commercial filming wants to replace a prohibited species individual that has died (i.e. so they can continue their business),

   c. the applicant has a rescue centre permit, or

   d. a person wants to obtain a prohibited species individual from a person who holds a rescue centre permit.

2.2 The Director should be more inclined to issue a permit to possess a prohibited species individual that was not in BC on March 16, 2009 to an accredited zoo or a certified educational institution or certified research institution.

5 Public display of prohibited species individuals

5.1 The Director should include on every permit to possess a prohibited species individual a condition that prohibits its display unless 5.2 or 5.3 applies.

5.2 A condition barring public display should not be included on a permit issued to a certified research institution, a certified educational institution, or an organization that operates an accredited zoo. This is because of their rigorous safety procedures, professionalism, and institutional standing. Displaying prohibited species individuals at these institutions is less likely to motivate a member of the general public to acquire one of these dangerous animals.

5.3 The Director should consider allowing display to the public of a prohibited species individual if the applicant intends to become CAZA accredited and

a. maintains $2 million in public liability and property damage insurance,

b. has a business licence from the local government (if required by the local government) to run a commercial operation for the display of CAS,

c. will not be displaying the prohibited species individual as part of a show that travels and uses it for public entertainment or public display,

d. runs a business that has possessed and displayed CAS for a minimum of seven years prior to March 16, 2009, and

e. provides documentation showing that they are working with the Canadian Association of Zoos and Aquariums [CAZA] toward accreditation (i.e. a business plan).

6 Potential mitigating factors

6.1 When considering whether to issue a permit concerning a prohibited species individual, the Director should take into consideration

a. the risk that a prohibited species individual will pose to the public's health or safety or to property, wildlife, or wildlife habitat,

b. comments and recommendations from CAS PAC and ministry employees working in the relevant region (including Victoria),

c. whether the applicant is in compliance with all applicable laws, including by considering evidence that the applicant is in non-compliance of a law related to CAS (e.g. from an investigative report from the Conservation Officer Service), and

d. any conviction under the *Wildlife Act* or the *Prevention of Cruelty to Animals Act* that is relevant to the permit being applied for.

[Bold in original]

DISCUSSION AND ANALYSIS

1. Whether special circumstances exist that support the CAS possession permit being granted.

[32] To assist in deciding this issue, the Panel has grouped the evidence and submissions into three broad subject areas:

a) Purposes of the legislation and whether the CAS Policy and CAS Procedure are consistent with those purposes;

b) Whether the Director failed to properly exercise her discretion; and

c) New evidence and the Panel's evaluation of the application

a) Purposes of the legislation and whether the CAS Policy and CAS Procedure are consistent with those purposes

The Appellant's submissions

[33] The Appellant submits that the CAS permit regime is based on two prime considerations: public safety, and animal welfare and conservation.

[34] The Appellant submits that general cannons of statutory interpretation govern the interpretation of the permit regime, as well as the considerations that govern the exercise of discretion under that regime.

[35] The Appellant further submits in closing argument as follows:

> 67. Regulations passed under statutory authority are subject to the same rules of interpretation as the statute itself. As the Supreme Court of Canada explains in *Glykis v Hydro-Québec* [2004 SCC 60],
>
> > A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

[36] In terms of public safety, the Appellant submits that all discretion exercised by the Director must be consistent with this consideration, as the Director's legislative authority stems from section 6.4 of the *Act* which provides:

6.4 If the minister considers that a non-native species described in paragraph (a) or (b) of the definition of "species" poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat, the minister may

> make regulations designating the species as a controlled alien species. [Appellant's emphasis]

[37] The Appellant further submits that as a result of this section of the *Act,* classification of a species as a CAS and their regulation under the *Act*, is based primarily on whether a species poses a risk to the health or safety of any person.

[38] The Appellant submits that a second primary purpose of the permit regime, and wildlife legislation in BC, is animal welfare and conservation. In support, the Appellant cites the BC Supreme Court's decision in *The Association for the Protection of Fur-Bearing Animals v. British Columbia (Minister of Environment and Climate Change Strategy)*, 2017 BCSC 2296 [*Association*], at paragraph 46:

> It is undisputed that the main purposes of the *Wildlife Act* include the preservation and conservation of wildlife habitat, the enhanced production of wildlife as well as the regulation of the consumptive use of wildlife: British Columbia Ministry of Environment, "*A New Wildlife Act*", Discussion Paper, 1981. [Underlining added]

[39] The Appellant submits that biodiversity encompasses the whole spectrum of life on earth, including species diversity and genetic diversity.

[40] In terms of the CAS Policy and Procedure, the Appellant submits that these manuals do not align with the public safety and conservation purposes of the enabling legislation and regulations, in that they import irrelevant considerations that fall outside of the ambit of these aims.

[41] As regards the CAS Policy, the Appellant points to section 5 which indicates that the purpose of the policy is, among other things "[t]o prohibit public display of prohibited species individuals except by those organizations who meet the criteria described in the CAS Procedure, *with the intent of reducing the attractiveness of owning a prohibited species individual as a pet*". The Appellant submits the aims of the *Act* and the permit regime are not to reduce the attractiveness of owning a CAS; they are to prevent threats to public safety and to promote conservation.

[42] As regards the CAS Procedure, the Appellant submits that the Director and the Ministry misapprehend the purpose of the regime and have created their own policy goals and rules. The Appellant notes that section 4(f) of the *Permit Regulation* imports the notion of "special circumstances" as an operative modifier. The Appellant submits that, rather than interpreting this term purposively in accordance with the primary aims of the regime, the Director and the Ministry appear to have adopted a rigid approach by way of a fixed list of what constitutes "special circumstances" in section 2 of the CAS Procedure.

[43] The Appellant submits that the CAS Procedure restricts what constitutes a "special circumstance" to a list that is limited simply to transitory permits, commercial filming, and rescue centre permits: it precludes permits where there is no risk to public safety, and precludes permits that would serve the aims of promoting conservation and biodiversity.

The Respondent's submissions

[44] In her evidence, the Director agreed that the *Act* and the *Permit Regulation* do not explicitly prohibit private individuals from owning a CAS, and that her interpretation of the permit regime, i.e., that public safety was served by minimizing the numbers of CAS in public ownership, had informed her assessment of the application. The Director further testified that, read collectively, the provisions of the *Act* and the regulations confirm that there is an explicit difference between private and institutional possession of CAS.

[45] The Respondent explained the history of the CAS legislation. She states that there was a high profile incident in 2007, where a captive tiger in BC killed a friend of its owner. As a result, the BC Legislature, in the interest of public safety and to protect human health and the environment, decided to stop the flow of exotic species into BC. Changes were made to the *Act* and associated regulations to provide a comprehensive scheme of wild animal management in the province, including regulation of the possession, shipping, transportation and breeding of CAS.

[46] Of relevance to this appeal, the Respondent states that section 6.4 of the *Act* was created. It authorizes the Minister of Forests, Lands, Natural Resource Operations and Rural Development (the "Minister") to designate, by regulation, species as CAS. Pursuant to this authority, in 2009 the Minister designated certain alien species as CAS in schedules 1 and 2 of the *CAS Regulation.* These schedules list animals that, in the Minister's consideration, pose a risk to "the health or safety of any person or poses a risk to property, wildlife or wildlife habitat". Cheetah (A*cinonyx jubatus*) were listed as a prohibited CAS in BC in section 1(j) of Schedule 1.

[47] The Respondent submits that the Minister's belief that a non-native species poses a risk to the health or safety of any person is a sufficient criterion for designation under section 6.4 of the *Act*. However, the Respondent also states that, before making the designation, there were extensive consultations with experts internal and external to government, CAS owners, and animal welfare groups and institutions.

[48] The Respondent submits that, in creating the laws which regulate the possession of CAS, the government gave special treatment to the CAS that were already in BC at the time the law came into force. The *Permit Regulation* expressly authorizes the Director to issue a permit for CAS that were in BC on March 16, 2009. However, for CAS not in BC as of that date, the Director may only issue a permit to a person if the person either operates a zoo or is an educational or research institution, or the Director is satisfied that "special circumstances" exist.

[49] The Respondent submits that the *Act* and the regulations are intended to ensure the safety of the public and the control of exotic animals.

[50] In support of this submission regarding the purpose of the CAS legislation, the Respondent provided various extracts from Hansard relating to the *Environmental (Species and Public Protection) Statutes Amendment Act*, 2008, including the following from the Honourable Barry Penner, then Minister of

Environment, and Shane Simpson, Member of the Legislative Assembly for Vancouver-Hastings (NDP):

> From Wednesday, April 16, 2008, Afternoon Sitting, Volume 31, Number 1, at page 11441
>
> > ...
> >
> > *Hon. B. Penner: I'm pleased to introduce the Environmental (Species and Public Protection) Statutes Amendment Act, 2008. This bill contains amendments to the Wildlife Act.*
> >
> > *I'll begin by noting a few of the amendments to the Wildlife Act. Amendments to that act will provide the government for the very first time with new authority to regulate the possession of alien species such as large carnivores, venomous snakes, primates and other animals and fish that can harm British Columbians and our native wildlife and wildlife habitat.*
> >
> > ...
>
> From Thursday, May 15, 2008, Morning Sitting, Volume 33, Number 6, at pages 12481-12482
>
> > *Hon. B. Penner: ...*
> >
> > *... There have been other troubling incidents involving alien species since Ms. Dumstrey-Soos' death. It was only a few months ago, ... that a young man was bitten by his pet cobra in the Lower Mainland, and only his good luck helped him escape serious injury or worse, although I believe he eventually suffered amputation of several fingers of his hand.*
> >
> > *These incidents show that some alien species need to be regulated, if they are a threat to public safety. Potentially harmful species that are foreign to British Columbia, such as tigers and exotic venomous snakes, will be listed as "controlled alien species" in regulation under the Wildlife Act. This list will be updated from time to time as needed.*
> >
> > ...
> >
> > *It is also important to recognize that not all alien species are harmful. We are only concerned with controlling the possession of those species that pose a risk to human health and safety, property, wildlife or wildlife habitat.*
> >
> > *A limited number of alien species will be designated as "controlled alien species." Not all controlled alien species will be treated the same way but will be managed according to their level of risk. ... We anticipate that the list of controlled alien species will be divided into three categories: prohibited, referring to the most harmful alien species; restricted, referring to those species where potential risks can be effectively reduced through correct care and handling;*

> *and monitored, referring to those alien species where there's simply a reporting requirement.*
>
> ...

From Tuesday, May 20, 2008, Morning Sitting, Volume 33, Number 8, at pages 112569-112570:

> *S. Simpson:* ...
>
> *I think it makes good sense, and I don't think that there's any complaint about the notion that it's time that we put limits on alien species to ensure the protection of the public and to ensure the protection of those species themselves. This piece of legislation does go a ways to dealing with that issue around alien species.*
>
> ...

At page 112576,

> *S. Simpson:* ...
>
> ... *It deals with alien species that could create risk to humans and that could certainly be harmful to native wildlife. It makes sense to be able to manage those and to prohibit ownership that isn't responsible ownership of those alien species.* ....

[51] The Respondent submits that these Hansard extracts demonstrate that public protection is an underlying purpose of the *Act* and its supporting regulations. This object is achieved when exotic alien species, including big cats such as the cheetah, are prevented from being imported to live with families in residential areas.

[52] As regards CAS Policy and CAS Procedure, the Respondent submits that they guide the approach to the regulation of CAS. The CAS Policy states that "It is the policy of the Ministry ... (1) to reduce the number of privately owned prohibited species individuals in the province". That policy statement is buttressed by another portion of the CAS Policy which confirms the Ministry's policy:

> (5) To prohibit public display of prohibited species individuals except by those organizations who meet the criteria described in the Controlled Alien Species Procedure, with the intent of reducing the attractiveness of owning a prohibited species individual as a pet.

[53] The Respondent submits that the CAS Procedure provides further guidance on the limited role public display of prohibited species is intended to play under the legislative and regulatory regime for CAS. Section 5.2, for example, emphasizes the importance of the "rigorous safety procedures, professionalism, and institutional standing" at certified institutions and accredited zoos.

[54] In terms conservation and biodiversity, the Respondent submits that the aims of the *Act* are focused on the protection of BC's wildlife and environment, and should not be read to prioritize untested conservation programs for non-native species in captivity over BC's wildlife and ecosystems.

[55] The Respondent submits that the law and regulation demonstrate the government's goal of discouraging both the importation to, and the possession of,

CAS in BC, and that the CAS Policy and CAS Procedure are consistent with the wording of the *Act*, the *CAS Regulation* and the *Permit Regulation*.

The Panel's findings

[56] Both parties agree that public safety, and animal welfare and conservation are at the heart of the *Act*. The parties disagree on whether the regulatory framework relevant to CAS falls within, or exceeds, the public safety and animal welfare considerations of the *Act*.

[57] As noted earlier in this decision, the legislature included CAS in the *Act* following a high profile incident where a captive tiger killed a friend of its owner.

[58] The *Act* was amended to regulate CAS in BC, whether the CAS are owned by institutions or individuals. Provision was made within the regulatory framework to address both CAS that were in the province at the time the framework was enacted, and those that could enter the province after that time. The Director was given the discretion to grant (or deny) CAS-related permits, and the CAS Policy and CAS Procedure were developed to assist in guiding the exercise of that discretion.

[59] Neither the *Ac*t nor the regulations set out explicitly that the regulatory purpose is to reduce the number of privately owned CAS in the province, or to reduce their attractiveness as pets. These statements are set out in the CAS Policy and are reflected in the CAS Procedure, which, in the Appellant's view, results in irrelevant considerations being applied by the Director when making decisions regarding CAS permits.

[60] The Panel notes, and accepts, that regulating possession of a species may not necessarily mean that the number of the species regulated is intended to be capped or to decrease. In this particular instance, however, the Panel is of the view that the *Permit Regulation*, itself, suggests that numbers of CAS in private ownership are intended to decrease.

[61] As noted earlier in this decision, the regulatory framework differentiates between CAS that were present in BC before a certain time, and those that people wish to bring into the province. It also addresses the breeding of CAS. The *Permit Regulation* provides as follows:

4 The director may issue a permit in accordance with this regulation on the terms and for the period he or she specifies,

...

(f) authorizing a person to possess a species individual of a controlled alien species if

(i) the species individual was in British Columbia on March 16, 2009,

(ii) the person operates a zoo or is an educational or research institution, or

(iii) the director is satisfied that special circumstances exist,

(g) authorizing a person who possesses a species individual of a controlled alien species and who operates a zoo or is an educational or research institution to allow that species individual to breed, or

....

[62] Therefore, while the Director has the authority to issue a permit to an individual who had a CAS in BC on March 16, 2009, the Director does not have the authority to issue a permit allowing that same person to breed their CAS. Breeding permits, according to the *Permit Regulation*, are available only to zoos, educational or research institutions, not to individuals who may own a CAS. For a permit to breed, subsection 4(g) requires the person to both possess the CAS **and** operate a zoo, or be an educational or research institution.

[63] Further, the *CAS Regulation* addresses breeding "prohibited" species and provides as follows:

Breeding

4 (1) Subject to subsection (2), a person who possesses a prohibited species individual must prevent the prohibited species individual from breeding.

(2) A person who possesses a prohibited species individual may allow the prohibited species individual to breed if

(a) the person

(i) operates an accredited zoo or aquarium,

(ii) is a certified educational institution, or

(iii) is a certified research institution,

(b) the person holds a permit authorizing the person to allow that prohibited species individual to breed, and

(c) the breeding is in accordance with a management plan approved by a regional manager.

[64] The Panel finds that there is no conflict between the *CAS Regulation* and the *Permit Regulation*; neither regulation provides for private individuals who are permitted to possess a CAS to breed the CAS.

[65] In short, the regulatory framework:

- Provides an opportunity for privately owned CAS that were in the province prior to a specified date to remain in the province under private ownership;
- Gives preference to allowing a zoo, an educational institution, or a research institution to possess CAS;
- Requires that privately owned CAS after the specified date may only be brought into the province if the Director decides that "special circumstances" exist; and

- Prohibits owners of CAS who are private individuals from breeding the CAS.

[66] The ultimate result of such an approach is to reduce the numbers of CAS in private ownership. The Panel notes that this conclusion is reflected in the CAS Policy as statement #1. The Panel finds that it is reasonable to conclude that the regulatory framework is intended to reduce the numbers of CAS in private ownership and, as such, inclusion of such a statement in the CAS Policy is consistent with the legislative intent.

[67] The Appellant contends that CAS Policy and CAS Procedure, by including the phrase "with the intent of reducing the attractiveness of owning a prohibited species individual as a pet" in its purpose statement, falls outside of the aims of the *Act* and permit regime.

[68] The question for the Panel to consider on this point is whether the legislature intended the CAS regulatory framework to reduce the attractiveness of owning a prohibited species individual as a pet. In considering this statement, the Panel notes that the term used in the CAS Policy statement is "prohibited" species, as opposed to the broader term CAS. The *CAS Regulation* provides:

> **"prohibited species individual"** means any of the following:
>
> (a) a single live member of a controlled alien species designated in Schedule 1, at any developmental stage;
>
> (b) a single live member of a controlled alien species designated in section 1(1) or (2) of Schedule 2 that is 3 metres or more in length when measured from the front of the snout to the tip of the tail while the animal is fully extended;
>
> (c) a single live member of a controlled alien species designated in section 1(3) of Schedule 2 that is 2 metres or more in length when measured from the front of the snout to the tip of the tail while the animal is fully extended;
>
> ...
>
> **"restricted species individual"** means a single live member of a controlled alien species designated in Schedule 2, at any developmental stage, but does not include a prohibited species individual.

[69] "Prohibited species", therefore, are those species in Schedule 1 and animals exceeding a particular size in Schedule 2. Neither the *Act* nor the *CAS Regulation* provide a basis for why a CAS is designated in Schedule 1 or Schedule 2, or why a CAS is designated "prohibited" as opposed to "restricted".

[70] The Appellant's submissions proved helpful to the Panel in considering the Schedule 1/Schedule 2 issue, particularly the reference provided by the Appellant to *Glykis v Hydro-Québec* (2004 SCC 60), wherein it is stated:

> A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the

> intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations. [Emphasis added]

[71] According to the Supreme Court of Canada, it is appropriate to consider "the scheme and object of the statute, and the intention of the legislature" when interpreting legislation and regulations.

[72] One way to gauge the intention of the legislature is through Hansard. The Panel notes that there is authority for consideration of Hansard as an extrinsic aid to interpreting legislation. For instance, in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the Supreme Court of Canada found that the Ontario Court of Appeal had erred in focusing too narrowly on the "plain meaning" of the provision in question, and in failing to give adequate consideration to the scheme of the Act, the intention of the legislature, and the context in which the words were found. The Court also emphasized that legislative history is a useful tool in determining the intention of the legislature, as is recourse to Hansard. With respect to the use of Hansard as an aid to interpretation, Mr. Justice Iacobucci acknowledged the frailties of Hansard evidence, but went on to say that it can play a limited role in the interpretation of legislation, quoting the following passage from *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at page 484:

> … until recently the courts have balked at admitting evidence of legislative debates and speeches …. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

[73] In the Panel's view, one of the Hansard extracts submitted by the Respondent is particularly helpful in considering the genesis of the *CAS Regulation* schedules.

[74] From Thursday, May 15, 2008, Morning Sitting, Volume 33, Number 6 at page 12482:

> *Hon. B. Penner: …*
>
> *It is also important to recognize that not all alien species are harmful. We are only concerned with controlling the possession of those species that pose a risk to human health and safety, property, wildlife or wildlife habitat.*
>
> *A limited number of alien species will be designated as "controlled alien species". Not all controlled alien species will be treated the same way but will be managed according to their level of risk. … We anticipate that the list of controlled alien species will be divided into three categories: prohibited, referring to the most harmful alien species; restricted, referring to those species where potential risks can be effectively reduced through correct care and handling; and*

monitored, referring to those alien species where there's simply a reporting requirement.

[75] A second extract goes to the issue of limiting CAS in general:

From Tuesday, May 20, 2008, Morning Sitting, Volume 33, Number 8 at pages 112569-112570:

S. Simpson: I think it makes good sense, and I don't think that there's any complaint about the notion that it's time that we put limits on alien species to ensure the protection of the public and to ensure the protection of those species themselves. This piece of legislation does go a ways to dealing with that issue around alien species.

[76] These extracts support a conclusion that CAS designated as "prohibited species individual" were intended to be viewed as "the most harmful alien species", and that the legislature intended to put limits on alien species.

[77] Is it difficult to interpret the final legislation as being "pet friendly" as regards the keeping of CAS as pets. Indeed, keeping alien species as pets was specifically cited in the Hansard at pages 12481-2 of the Thursday, May 15, 2008, Morning Sitting, (Volume 33, Number 6):

Hon. B. Penner: ... There have been other troubling incidents involving alien species since Ms. Dumstrey-Soos' death. It was only a few months ago, ... that a young man was bitten by his pet cobra in the Lower Mainland, and only his good luck helped him escape serious injury or worse, although I believe he eventually suffered amputation of several fingers of his hand.

These incidents show that some alien species need to be regulated, if they are a threat to public safety. Potentially harmful species that are foreign to British Columbia, such as tigers and exotic venomous snakes, will be listed as "controlled alien species" in regulation under the Wildlife Act. This list will be updated from time to time as needed.

[78] Based on the wording of the *Act* and the regulations, as well as the statements in Hansard, the Panel finds that the legislature intended to enact a regulatory regime that sets a high bar for the private ownership of CAS. In the Panel's view, it is reasonable to believe that the framework was established to discourage - not only the keeping of a prohibited species individual CAS as pets - but private ownership of all CAS in general.

[79] The Panel has also considered whether the regulations are consistent with the conservation aim of the *Act*. The Appellant relies on *the Association* case in which the BC Supreme Court confirmed that "conservation of wildlife habitat, the enhanced production of wildlife as well as the regulation of the consumptive use of wildlife" are purposes of the *Act*. The Appellant contends that, as a result, the conservation of species such as cheetah should be considered as falling within the ambit of the *Act*. The Respondent submits that the conservation aims of the *Act* are focused on the protection of BC's wildlife and environment, and that it should not be read to include non-native species in captivity.

[80] The Panel notes that the *Association* case considered whether a BC conservation officer had the authority to kill a wild animal (a black bear cub) that was neither in distress nor posing a threat to persons, property, wildlife, or wildlife habitat. The Panel finds that the quote was focused on protection of BC's wildlife and environment. Moreover, the Panel finds that the conservation focus in the *Act* generally is on BC's wildlife and wildlife habitat. The Panel prefers the position of the Respondent on this point, and agrees that the focus of the *Act* is on BC wildlife. The aim is not to protect the whole spectrum of life on earth, including species biodiversity and the genetic diversity of animals within other jurisdictions. As such, the Panel is of the view that the CAS Policy and CAS Procedure are consistent with the conservation aims of the *Act*.

[81] Therefore, the Panel finds that when exercising discretion around the issue of possession of a prohibited CAS, the general policy statement included in the CAS Policy fall within the ambit of the *Act* and regulations, as intended by the legislature. Accordingly, they are relevant considerations in the exercise of discretion under section 4 of the *Permit Regulation*.

b) Whether the Director failed to properly exercise her discretion

The Appellant's submissions

[82] The Appellant submits that the Director, in reaching her decision:

- fettered her discretion by improperly relying on the CAS Policy and CAS Procedure;
- sub-delegated her discretion to other agencies; and
- failed to take into account relevant factors, such as the primary purposes underlying the permit regime which governed her discretion.

i) Fettering

[83] In terms of the CAS Procedure, the Appellant submits that it stands to reason that the notion of "special circumstances" in section 4(f) of the *Permit Regulation* should be interpreted purposively in accordance with the primary aims of the regulatory regime. However, he submits that the Director and the Ministry appear to have adopted a rigid approach in that the CAS Procedure restricts what constitutes a "special circumstance" to a fixed list in section 2; that is, "special circumstances" are limited simply to transitory permits, commercial filming, and rescue centre permits. The CAS Procedure precludes circumstances where there is no risk to public safety, and restricts the Director from considering permits that would serve the aims of promoting conservation and biodiversity.

[84] The Appellant further submits that while the CAS Policy and CAS Procedure are not binding, the Director did not treat them as informal policies or guidelines. Rather, she treated them as binding rules and failed to consider the individual case. In her reasons, the Director specifically referenced the section 2 list, and indicated that the application did not meet the "noted special circumstances". Further, the Appellant notes that, at the hearing, the Director testified that she relied heavily on

the CAS Policy and CAS Procedure, and that she had little prior knowledge of cheetahs.

[85] The Appellant submits that while the Director considered the conservation goals of his application, and specifically recognized that cheetahs are endangered, these considerations were only superficial: she did not find them to constitute a special circumstance. Instead, she found that conservation was not specifically listed in the *CAS Regulation*, or in the CAS Policy and CAS Procedure. The Appellant argues that, as these concepts have been expressly acknowledged, and as conservation is identified as one of the main purposes of the *Act*, the Director fettered her discretion through rigid adherence to non-binding policies and procedures.

ii) Unlawful sub-delegation

[86] The Appellant submits that the Director's reliance on the CAS PAC comments was problematic, in that she specifically notes in her decision that the CAS PAC was "unanimously not in support of the application". The Appellant submits that the CAS PAC is advisory only and there is no legal authority to sub-delegate decision-making power to such a body.

[87] The Appellant further submits that the Director's reliance on the CAS PAC position is weakened by the following:

- The CAZA representative on the CAS PAC did not oppose the application, but noted that the application did not include a secondary perimeter fence;
- The BCSPCA representative did not consider the application, but instead applied the BCSPCA policy to oppose the importation of exotic animals into BC without exception; and
- The Provincial Veterinarian opposed the application on the grounds that the application did not meet the special circumstances set out in the CAS Procedure which, in effect, usurped the Director's authority to interpret the law.

[88] In terms of the CAZA member's comments specifically, the Appellant submits that - not only did the Director fail to take into account the member's lack of opposition - the Director failed to consider adding conditions to the permit regarding the enclosure that could have addressed some of the CAZA's concerns (e.g., the lack of the secondary perimeter fence).

iii) Failed to consider relevant factors

[89] The Appellant submits that the Director made minimal, if any, substantive findings of her own in respect of the application – let alone those based on relevant factors. He submits that the only place the Director addressed issues related to public safety was in Appendix A of her reasons. In Appendix A, she concludes that cheetahs are dangerous based solely on Hansard records and unsubstantiated, non-scientific observations. The Appellant submits that the expert evidence at the hearing establishes otherwise. The Appellant submits that this evidence regarding

the low risk to public safety posed by cheetahs should supplant the Director's considerations.

The Respondent's submissions

[90] The Director testified that she reviewed the Ministry's file information, as well as information provided by the Appellant in support of the application. She also considered the legislative context and her discretionary authority to make a determination on the application. The Director advised that she received, and considered, additional information provided by the Appellant after the official date for submitting information had passed, including particular chapters in a book on cheetahs authored by Dr. Marker.

[91] In addition, the Director testified that she considered the CAS PAC comments to be advisory only, not binding.

[92] The Director was taken through her decision. She maintained that her approach to the application was appropriate, and that her conclusion was sound.

[93] The Respondent submits that the Director made her own decision, and that no fettering or impermissible delegation occurred.

[94] In terms of the CAS Policy and Procedure, the Respondent submits that these documents are in place to ensure that the objects of the *Act* and CAS-related regulations are achieved in a consistent manner. The CAS Policy and Procedure are consistent with the legislation and regulations and, therefore, the Director's reference to those documents did not fetter her statutory decision-making powers.

[95] The Respondent maintains that the Director's decision letter, and her sworn testimony, demonstrate that she came to her decision with an open mind, considered the relevant statutory and regulatory provisions, and considered the entire context to arrive at her decision.

[96] For the same reason, the Respondent submits that no inappropriate delegation of the Director's authority took place: the Director considered the views of CAS PAC members and regional operations staff, but reviewed the application in detail, with an open mind, and drew her own reasonable conclusion on its merits.

The Panel's findings

[97] On August 16, 2017, the Director issued her decision not to grant the Appellant's permit to possess two cheetahs. The relevant portions of the decision letter state as follows:

> ...
>
> The focus of my determination was whether or not I am satisfied that special circumstances exist.
>
> As part of my determination of being satisfied that special circumstances exist, I considered the extent that your application aligns with the expectations of Canada's Accredited Zoos and

Aquariums [CAZA] standards; given your interest in providing the public opportunity to interact with the cheetahs.

After carefully considering the information submitted with your application and other material that has been shared with you, … I am denying your application based on the rationale provided below.

Understand that this is not a statement on your or Carol's ability to care for and provide a loving home to Robin and Annie, rather, it is that your application and your intent is misaligned with the *Wildlife Act* and the Controlled Alien Species (CAS) Regulation. ….

…

Our Ministry CAS Procedure provides the following considerations for special circumstances:

…

I did not find your application to meet the above noted special circumstances.

I did further consider the intended conservation goals of using Robin and Annie as cheetah ambassadors as a potential special circumstance. While I recognize that cheetahs are endangered and that ambassador animals may increase public involvement in conservation, I do not think this is a special circumstance. I have taken note of the number of endangered animals that are currently listed as CAS and have concluded that if it was Government's objective to permit the possession of CAS to encourage conservation this factor would have been noted in either the Controlled Alien Species Regulation or in the policy and procedure associated with CAS.

Public display is generally considered permissible when the permit is issued to a certified research institution, a certified educational institution, or an organization that operates an accredited zoo or aquarium. This is because of their rigorous public safety procedures, professionalism and institutional standing. The possession and display of prohibited species individuals at these institutions is recognized as being distinct from a member of the general public possessing and displaying one of these animals as a pet.

I note that you have made substantial efforts to meet or exceed Canada's Accredited Zoos and Aquariums (CAZA) accreditation standards when designing your enclosure.

Your safety protocols appear reasonable. The intended location, however, at a family home in a residential area, may motivate (as opposed to deter) other individuals to privately own prohibited species.

I considered the vision for your operation, RunCheetahRun, to inspire people to take effective and immediate action to save the cheetah species and contribute to other areas of conservation. The documentation included with the application notes that program areas

> (classes and group studies) are still under development; therefore, it is difficult to determine the potential success, or measureable outcomes, of this type of program with the information that is included with the application.
>
> The CAZA member of the CAS Permit Advisory Committee (PAC) similarly advised that the application falls short of the information that is needed to support reasonable conclusions of future performance and does not demonstrate a flow from values, systems, practices and facilities to assess the overall "systems approach" necessary to assess consistency with CAZA accreditation standards.
>
> I do not suggest that more effort be invested in program development as the activity, location and business model conflicts with the basic principles of the CAS Regulation in BC.
>
> I also considered all comments from members of the CAS PAC (which includes the Conservation Officer Service, the BC Society for the Prevention of Cruelty to Animals, the Provincial Wildlife Veterinarian, Canada's Accredited Zoos and Aquariums) and regional Ministry staff. The CAS PAC members and regional Ministry staff were unanimously not in support of the application for some of the reasons that I have noted above.
>
> ...

[98] Attached to the Director's decision is Appendix "A", containing her "additional writings concerning the statutory intent of Government in regulating the possession of CAS." In it, the Director states that she took into account specific documents when determining statutory intent, including Hansard records relating to the *Environmental (Species and Public Protection) Statutes Amendment Act, 2008*. She states, in part, that:

> ... by defining cheetahs as prohibited species individuals Government has determined that cheetahs are one of the most dangerous species of wildlife. I also take note of the inherent danger associated with possessing a cheetah based on the potential harm they could inflict with their teeth and claws. Based on the above I conclude that statutory decision makers should only authorize the possession of prohibited species individuals (i.e. cheetahs) in limited cases. (page 6)

[99] The decision letter goes on to address an additional consideration applied by the Director (the cheetah sighting on Highway 3A in December 2015) that will be addressed later in this decision.

[100] In short, when making her decision that the application was "misaligned" with the regulatory regime, the Director:

- considered the statutory intent of government in putting the CAS regulatory regime in place;

- considered whether the permit application fell under any of the recommended list of circumstances set out in the CAS Procedure, and found that it did not;
- considered whether the intended conservation goals were a "special circumstance", and decided they were not;
- considered whether the intended location of the enclosure was in keeping with the intent of the regulatory regime, and decided it was not; and
- considered whether the vision of the operation would inspire others to participate in cheetah conservation and decided that, as the program was still under development, the information to support such a decision was lacking.

[101] The Panel accepts, and the Board has previously found, that policies are an important means of guiding decision-making. However, policies are not law and cannot "bind" a decision-maker: policies cannot "fetter" a decision-maker's exercise of discretion.

[102] The rule against fettering was described by the Board in *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, (Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), December 23, 2015); [2015] B.C.E.A. No. 25 (Q.L.), as follows:

> 133. The BC Supreme Court has held that an administrative decision-maker who blindly follows a policy, or closes his or her mind to the evidence, will have fettered their discretion. ... the BC Court of Appeal discussed the concept of fettering in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), at para. 62:
>
> > The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant .... Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And <u>valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy</u> .... [Emphasis in Board's decision]

[103] Further, in *Jozef and Bibiana Demcak v. Director of Wildlife*, (Decision No. 2012-WIL-012(a), June 14, 2013), the Board considered how a decision-maker should apply the Ministry's policy regarding CAS when exercising the discretion to issue a permit under section 19 of the *Act*, as follows:

> 91. The CAS Policy and Procedure provide guidance to the Director and are not legally binding. Although the CAS Policy and the CAS Procedure provide guidance that permits to publicly display CAS should

be limited to circumstances where a number of considerations are met, the Panel finds that the Director must evaluate each permit application on its own merits, and must exercise his discretion in a manner that is consistent with the objectives and purposes of the *Act* and the regulations, including protecting human health and safety from the risks posed by CAS.

[104] In the present case, the Panel finds that the Director turned her mind to the application at hand. In so doing, the Director considered the extent that the application aligned with CAZA expectations and standards given the Appellant's interest in providing the public opportunity to interact with the cheetahs. Further, the Director considered the list provided by the CAS Procedure, and also considered whether there were, in her opinion, other elements that should be considered under the ambit of "special circumstances", i.e., she did not simply apply a list provided in a guidance document. The Panel finds that the Director did not fetter her discretion when exercising her decision-making authority on whether to issue the CAS possession permit to the Appellant.

[105] In terms of the Director's consideration of the CAS PAC and Ministry staff comments, the Director considered the comments within the provisions of the regulatory regime and appears to have come to her own conclusion. The fact that the Director's conclusion was ultimately the same as that of the commenters, does not mean that she simply adopted the position put forward by the commenters, or delegated her discretion to them. The Panel is not persuaded that she did either.

[106] Further, from a careful review of the decision letter, including Appendix "A", the Panel finds that the Director took into account relevant factors, such as the primary purposes underlying the permit regime which governed her discretion. In conclusion, the Panel finds that the Director's discretion was exercised in a reasonable manner, and was based on relevant considerations.

c) New evidence and the Panel's evaluation of the application

[107] The Panel has conducted the appeal as a "new hearing" pursuant to its authority under section 101.1(4) of the *Act*. As such, the Panel heard evidence not before the Director. This allows the Panel to consider the merits of the Appellant's permit application a decide whether, based on the totality of the evidence and argument, the Director's decision ought to be confirmed, reversed or varied, sent back to the Director with directions, or whether the Panel should exercise its power under section 101.1(5)(c) of the *Act* to make any decision the Director could have made and that the Panel considers appropriate in the circumstances.

The Appellant's submissions

[108] The Appellant submits that a primary defect in the Director's decision is her failure to identify any risk to the public posed by cheetahs.

[109] The Appellant contends that cheetahs in general, and that Annie and Robin in particular, do not pose a risk to the health or safety of any person. Five videos

were presented and played as evidence of the socialized demeanor of Annie and Robin. Further, the Appellant provided the expert evidence of Ms. Linda Rosenlöf.

[110] Ms. Rosenlöf was qualified to give opinion evidence on:

- the behavioural characteristics of cheetahs;
- the handling of domesticated cheetahs (including making determinations of cheetah socialization); and
- the ability of enclosures to contain cheetahs.

[111] Ms. Rosenlöf testified that cheetahs are the most docile of the large cats and are, in their demeanor, more like dogs than are other cats. Ms. Rosenlöf also testified that cheetahs have limited jaw pressure that reduces their level of danger. According to Ms. Rosenlöf, cheetahs can be trained and socialized to interact with humans and that their natural instincts, such as a "stalking instinct", can be mitigated with proper handling. In the opinion of Ms. Rosenlöf, these characteristics contribute to cheetahs' suitability as "ambassador animals".

[112] Ms. Rosenlöf testified that Annie and Robin were born at the De Wildt Cheetah and Wildlife Centre in South Africa in 2012. The cheetahs were then sent to Cheetah Outreach (also in South Africa) for about 10 months before returning to De Wildt, where they remained for about two months. During that time, Ms. Rosenlöf was part of a team of five to 10 people who worked with Annie and Robin before the cheetahs where shipped to the Appellant and Ms. Plato in Ontario. Ms. Rosenlöf has not interacted with the two cheetahs since that time, and has only seen videos of them. Ms. Rosenlöf stated that she has seen the cheetah enclosure at the Crawford Bay property and, in her opinion, it is appropriate and meets or exceeds enclosures that she has seen elsewhere.

[113] Ms. Rosenlöf considers Annie and Robin to be well socialized and suitable as ambassador animals, particularly Robin who is blind. Ms. Rosenlöf testified that she does not consider Annie and Robin to pose a risk to public safety. On being shown a newspaper picture of the cheetah that was spotted loose on Highway 3A near Crawford Bay in December, 2015, Ms. Rosenlöf confirmed that the cheetah was Annie.

[114] In light of Ms. Rosenlöf's evidence, the Appellant submits that listing a non-native species under Schedule 1 of the *CAS Regulation* is not sufficient to determine that individuals of that species are "one of the most dangerous species of wildlife".

[115] The Appellant argues that, if classification in this schedule and anatomy were themselves sufficient to justify refusing a permit, the *Permit Regulation* and the notion of "special circumstances" would have little or no meaning: all CAS would be refused permits by virtue of being listed in the schedules, regardless of "special circumstances".

[116] The Appellant submits that there is good evidence from both parties' expert witnesses to show that cheetahs, particularly Annie and Robin, do not pose a danger to the public. Further, the Director noted in her decision that the safety procedures proposed by the Appellant appear reasonable.

[117] In terms of the cheetah enclosure, the Director recognized in her decision that the Appellant had made substantial efforts to design the enclosure to meet or exceed CAZA accreditation standards, and Ms. Rosenlöf confirmed that the enclosure was appropriate for the two cheetahs. Further, the Provincial Wildlife Veterinarian did not express any concerns about the enclosure or public safety.

[118] The Appellant submits that the training of the cheetahs as ambassadors, the low safety risk posed to the public, and the mission of RunCheetahRun, constitute "special circumstances" warranting a possession permit.

The Respondent's submissions

[119] The Respondent called Dr. Laurie Marker as an expert witness. Dr. Marker resides in Namibia, but was in the United States at the time of the hearing. She testified via Skype.

[120] Dr. Marker was qualified as an expert in the field of cheetah biology, ecology, behaviour, breeding, conservation and handling. She testified that cheetahs have a powerful bite, although when hand-raised are gentle with their mouths. In terms of cheetahs in an ambassador context, Dr. Marker testified that it is essential that cheetahs receive training during the early months and throughout their life, and that trainers/handlers need to be professionally trained and mentored. In her opinion, the risks associated with cheetah behaviour can be mitigated through professional handlers and professional training of the animals.

[121] Dr. Marker watched the five videos of Annie and Robin that were provided as part of the Appellant's case. The videos showed the animals in a relaxed setting with the Appellant's family in their yard. In Dr. Marker's opinion, the videos do not provide an indication of how the animals will act during a public presentation as the situations are so different.

[122] Dr. Marker also gave evidence about wildlife education programs. She said that it is difficult to determine how to deliver education programs, how to measure a program's effectiveness, and whether there is a resulting benefit to the species, in this case, cheetahs. Dr. Marker testified that she has used cheetahs during some of her presentations, but does not run an ambassador cheetah program in Namibia because such programs are not allowed in the country.

[123] The Appellant, Mr. Pfeifer, did not testify as part of his case. He was called, however, as a witness by the Respondent. The Appellant testified that he and Ms. Plato took time before acquiring the cheetahs to learn what they could from publications and people who ran facilities in the USA, sometimes by attending zoos and then requesting meetings with staff who worked with cheetahs. He confirmed that neither he nor Ms. Plato have ever had formal training or hands-on mentoring by anyone about how to train and handle cheetahs, or how to run an ambassador program; rather, they developed the procedures set out in the application forms to the best of their ability.

[124] The Appellant confirmed that he applied for the previous permits between October 2013 and October 2014 while he and the cheetahs were in Alberta. He did so because he knew that a permit was necessary to bring the cheetahs into BC.

[125] The Appellant also confirmed that he brought Annie and Robin to BC without a permit at the end of October 2014, and that they remained in BC for 14 months. The Appellant testified that, during that time, the cheetahs were kept at his Crawford Bay residence. Each day he took them from his home to a different property owned by Ms. Plato for walks. It was on one of these walks in December, 2015, when Annie, who was not wearing her GPS collar, "took off after a deer". The Appellant recaptured her within approximately one hour by banging on the side of her dinner dish. He did not initiate the safety protocol, which is included in his permit application (i.e., call the police), during that time.

[126] The Appellant confirmed that, when questioned in late December by Conservation Officers as to the whereabouts of the cheetahs, he advised that the cheetahs were not in BC when, in fact, they were. It was shortly after this time that he drove the cheetahs to Ontario, where they have remained with Ms. Plato. The Appellant has seen the cheetahs once since that time.

[127] As regards the enclosure on the Crawford Bay property, the Appellant testified that the cheetahs will need to be exercised (walking and running) in areas away from the enclosure as they require mental and physical stimulation. While it may be possible to achieve this by fencing the property owned by Ms. Plato, the Appellant considered it impractical, and does not have plans to do this.

[128] Doug Bos, the owner of the Discovery Wildlife Park in Alberta, testified by telephone. Mr. Bos explained that the cheetahs were housed at his facility from October 2013 to October 2014. He stated that the Appellant and Ms. Plato did not follow the facility's safety protocols during the time that the cheetahs were there, and that he observed nipping and biting behaviour from the cheetahs on two or three occasions. Mr. Bos did not consider the cheetahs to be "leash trained". Based on his experience with them, Mr. Bos described them as undisciplined.

[129] Two members of the CAS PAC provided evidence at the hearing: Dr. Sara Dubois, Chief Scientific Officer, BCSPCA; and Dr. Helen Schwantje, Provincial Wildlife Veterinarian.

[130] Dr. Dubois testified that, in her role with the BCSPCA, she has served on the CAS PAC since its inception, and was involved with a variety of stakeholders in Ministry consultations respecting the development of the *Permit Regulation*. In terms of Schedule 1 of the *Permit Regulation*, the list submitted to the Ministry by the BCSPCA was longer than what was ultimately adopted in the legislation.

[131] Dr. Dubois confirmed that the BCSPCA has a long-standing Position Statement that sets out the organization's opposition to the breeding and keeping of exotic animals as companion animals, and to the importation and commercial trade in exotic animals destined for the pet market. Dr. Dubois testified that she assisted in the development of the Statement, and that her professional opinion was guided by, and consistent with, the Position Statement. Dr. Dubois testified that, in considering CAS PAC referrals as the BCSPCA representative, the main principles considered were:

- what is the quality of life of the animal;
- what conservation outcomes are valid and measurable; and

- what are the risks.

[132] In terms of this specific application, Dr. Dubois drew upon comments that she had made with respect the previous applications made by the Appellant, and that she still considered relevant. In her comments, Dr. Dubois raised concerns about the qualifications of the owners to care for the cheetahs, long term animal welfare issues, financial sustainability, public safety of local residents and pets, and the lack of educational value or conservation impact of the proposal. Specific concerns on information arising from the application under appeal included: public safety issues associated with the location of adjacent properties, and the presence of a school bus route. Dr. Dubois strongly opposed this application on the basis of animal welfare, public safety and purpose of use, and because it was inconsistent with BCSPCA policy.

[133] Dr. Helen Schwantje, Provincial Wildlife Veterinarian, testified that she was involved when the CAS regulatory regime was conceived and developed. Her review of the veterinary certificates of the cheetahs showed that both animals had demonstrated health challenges (eye abnormalities and dental issues). In her opinion, they may both require ongoing attention by a veterinary practice with considerable experience with large cats/exotic animals. Dr. Schwantje was not aware of any such care being available in the Crawford Bay area, although she also noted that she had not made specific enquiries in this regard. Dr. Schwantje testified that she was also concerned with the ease of access to, and visibility of, the enclosure and the cheetahs. In her view, the cheetahs require a higher degree of security than proposed in the application.

[134] The final witness to testify at the hearing was the Director. Her evidence regarding the exercise of discretion was summarized above. For the purposes of the Panel's consideration of the application, the following information is relevant.

The Panel's findings

[135] The evidence presented by both the Appellant and Respondent is that cheetahs have anatomical differences from, and are the most docile of, the large cats. Further, with proper training and handling, they have the potential to be trained, and have been trained, to represent the species as ambassador animals.

[136] In BC, however, the Minister has designated cheetahs as CAS after consultation with a variety of stakeholders. The very fact that the Minister included cheetahs as CAS indicates that the Minister considered cheetahs to "pose a risk to the health or safety of any person" or to "pose a risk to property, wildlife or wildlife habitat" under section 6.4 of the *Act*. Moreover, cheetahs are included under Schedule 1 of the *CAS Regulation* which, the Panel has found, indicates that cheetahs are considered to be in the class of non-native species that are "the most harmful alien species": they are designated as "*prohibited* species individual" as opposed to "*restricted* species individual".

[137] At the same time, however, the *Permit Regulation* authorizes the Director (and now the Board) to issue possession permits for prohibited species to zoos, educational or research institutions, or to private individuals where "special circumstances" exist. The Panel has considered whether the Appellant or

RunCheetahRun can be considered a zoo or an educational or research institution. The Appellant provided no evidence that it fits within these categories; in fact, evidence was presented that the Appellant does not consider his operation to be a zoo.[2] Further, the Panel finds that, based upon the description of the program and the operation, RunCheetahRun could not be properly considered an educational or research institution. Therefore, despite the heading on the application, the Panel, like the Director, has considered the application as one for personal possession which requires special circumstances.

[138] Given that the Minister has designated cheetah as a prohibited species under Schedule 1, the Panel finds that the threshold for "special circumstances" justifying a possession permit must be high. This is so regardless of the Appellant's submissions and evidence regarding cheetah behavior, generally. The merits of their designation under Schedule 1 is not a matter that the Board can decide.

[139] To determine whether the Appellant's application meets the high threshold required for a permit to possess Schedule 1 CAS, the Panel finds that the specific cheetahs involved - Annie and Robin – must be considered, as well as the Appellant's abilities *vis-à-vis* cheetah training and handling.

[140] Ms. Rosenlöf testified that cheetahs are not dangerous animals when socialized and trained by someone who knows what they are doing, and that Annie and Robin are suitable for use as ambassador animals. Under cross-examination, Ms. Rosenlöf acknowledged that her assessment was based on her involvement with the animals prior to their shipment to the Appellant in 2013, and not on any recent knowledge or exposure. The Panel also notes that Ms. Rosenlöf testified that the video evidence was the only time that she has ever seen Annie and Robin interact with the Appellant or Ms. Plato and, further, that the videos show none of the variables, such as loud noise or sudden movement, that can arise from visiting members of the public.

[141] Dr. Marker's view of the video evidence was similar to that of Ms. Rosenlöf. She stated that showing the animals in a relaxed setting, with their family in their yard, does not provide an indication of how the animals will act during a public presentation, as the situations are very different.

[142] Of the witnesses before the Panel, the only individual, other than the Appellant, with relatively recent exposure to Annie and Robin was Mr. Bos. He observed that they were inclined to nip and bite, and were not, in his view, leash trained.

[143] Although the Appellant and Ms. Rosenlöf both testified that Robin, in particular, would make a good ambassador animal due to his blindness, the Appellant's statements in his August 5, 2016 letter to Dan Peterson, Director Fish and Wildlife, suggest otherwise. For example, the Appellant states at page 2:

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[2] "zoo" is defined in section 1 of the *Permit Regulation* as: a place or enclosure where animals <u>are kept in captivity for public viewing or public display</u>, but does not include a permitted rehabilitation facility or a business for the sale of live animals." [Emphasis added].

> …
>
> My wife is not fully confident that Robin will ever be able to participate in contact with the public. This is not a cheetah problem but an eyesight problem. Although we are very comfortable taking him into the public with proper restraint we have had difficulty stopping him from "nipping" at new people. We feel this is due to his poor eyesight and that he is doing a "prey, predator, peer" test on anything that comes close to him. We continue to work with him but he may never be suitable for contact work.
>
> I think you will understand when I say that Carol is a thousand times more concerned about public safety than you could ever be. These animals are her children.
>
> …

[144] In terms of the particular cheetahs, Annie and Robin, the Appellant testified that one of the activities that he hopes to offer is for the public to, for a fee, assist with walking and feeding the cheetahs. Given the evidence before the Panel, the Panel has concerns about the suitability of these particular cheetahs for activities of this nature. The Panel notes that these types of activities (i.e., public involvement with the animals), are central to the Appellant's proposed business plan. In terms of the Appellant's ability as a cheetah trainer and handler, the Appellant testified that neither he, nor Ms. Plato, have any formal training in this regard. Ms. Rosenlöf testified that there are no formalized study programs for this type of enterprise. This statement appears to be in conflict with the testimony of Dr. Marker, and with the following passages from the textbook by Marker, Boast, Schmidt-Kuentzel, ed. *Cheetahs: Biology and Conservation* (London: Academic Press, 2018) at page 410:

> …
>
> Many factors are vital to the successful raising of a cheetah as an ambassador. Cheetahs are not pets; they are wild animals and should be treated as such.
>
> …
>
> Handlers work long and hard to train their animals to behave gently and appropriately. The importance of consistency cannot be overstated. … As ambassadors get older, they can be introduced to additional handlers, but consistency in care and training, and familiarity with the handlers is necessary to provide the cheetah with security. …
>
> Working with cheetahs requires extensive previous experience with animal training and handling. There are both courses and books that teach training practices that use positive reinforcement. Additionally, trainers new to cheetahs must begin their hands-on work with a mentor or with experienced cotrainers.
>
> …

[145] The Panel notes that the Appellant referred to Dr. Marker as the "reigning queen of cheetahs" in correspondence with the Director (correspondence 2017-07-31, in Exhibit 2, Vol 1 Tab 16).

[146] The Appellant testified that he has six years of experience walking the cheetahs on a leash. The Panel notes that this appears to be at odds with the evidence given that the cheetahs were acquired by the Appellant in 2013, and taken to Ontario at the end of 2015/beginning of 2016. As he has not had any contact with them since that time, it would appear that he has only two-three years of contact and leash time with Annie and Robin, and no recent experience in this regard.

[147] Given Dr. Marker's acknowledged expertise in this matter by both the Appellant and Respondent, the Panel prefers the evidence of the Respondent. The Panel accepts that formalized training and consistency in care and handling is a requirement for anyone intending to work with cheetahs. The Panel notes that, according to the Appellant's testimony, he has no formalized training in cheetah training/handling, and he has only seen the cheetahs once since they returned to Ontario in 2016. As a result, the Panel has concerns with the level of formalized training and with consistency of care.

[148] Of particular concern is the evidence regarding Annie's escape in December 2015. This reflects on the Appellant's abilities as a handler, although the Panel accepts that this incident raises more issues than simply handling expertise.

[149] At the time that the Director was considering this matter, the Director was aware that there were allegations surrounding the Appellant's illegal possession of a cheetah and inappropriate safety protocols. As noted earlier in this decision, following the sighting of an unescorted cheetah on the road in the general vicinity of the Appellant's residence, an investigation was launched and charges were laid against the Appellant. The matter was of some interest in local and regional newspapers. The charges were later stayed due to issues surrounding the collection of evidence.

[150] All members of the CAS PAC were aware of the incident and the stayed charges. All members of the CAS PAC referenced it in their comments, although all members of the CAS PAC had additional reasons for not supporting the application. The incident was specifically noted in the Director's decision where she advised that she considered that the incident bolstered her decision to deny the application, even though she would have denied the application solely on other factors.

[151] The Panel is of the view that it would have been disingenuous for the Director to not take this incident into consideration in her decision given its nature, and the publicity surrounding it. The Panel also finds that, provided there is sufficient compelling evidence, an incident that gives rise to a criminal charge that is stayed, may still be a relevant and appropriate consideration in a regulatory manner. The standard of proof and purpose of criminal proceedings is different than those in a permitting context. In any event, the Panel is in a different position than the Director in relation to this incident, as the Appellant testified at the hearing that:

- he had brought the cheetahs into BC without a possession permit while being aware that a permit was required;

- it was his cheetah, Annie, that was photographed on the road;
- Annie was off lead and not wearing a GPS collar while he was taking her for a walk;
- Annie had run off to chase a deer and was recaptured within an hour;
- he had not initiated the safety protocols included in his application that was intended to address a cheetah escape; and
- he was not truthful with the Conservation Service Officers during their investigation.

[152] The Panel notes that this was only admitted by the Appellant following the testimony of his witness, Ms. Rosenlöf, who identified Annie with certainty from the newspaper photograph during cross-examination by the Respondent. The Appellant subsequently professed regret at bringing the cheetahs into the province without the legally required permit.

[153] The Appellant testified that he was walking Annie, a non-permitted prohibited species, at night, in a remote rural area, with no lead and no GPS collar when she saw/heard a deer and chased it. Annie was recaptured about an hour later when he banged on her dinner dish with a fork. When questioned by the Conservation Officer Service about the incident, the Appellant was not truthful.

[154] Although the Appellant has focused on safety, the Panel notes that section 6.4 of the *Act* sets out other categories as reasons for classifying a non-native species as a CAS, such as risk to property, wildlife and wildlife habitat. If a cheetah escapes, it can pose a risk to all of these values.

[155] The Appellant submits that his proposed enclosure addresses the risk to these values.

[156] The Panel finds that the size of the Appellant's enclosure appears to be satisfactory according to Ms. Rosenlöf, Dr. Schwantje, and the Director - who considered its size appropriate for the cheetahs. However, the Panel notes that the photographs and drawings of the enclosure show that it is not only attached to the Appellant's residence, but it is part of the residence, i.e., an outdoor deck with direct access to the residence, forms part of the enclosure. This may pose a risk to visitors of the residence, invited and unexpected, in light of the evidence of Mr. Bos.

[157] In addition, the Panel notes the description of the enclosure provided by the Appellant in his permit application wherein he states:

> ONCE AGAIN, we mention these cheetahs LIVE with us and by that I mean they SLEEP in our house or near us ….

[158] The Panel also notes that the Appellant testified that the cheetahs would need daily walks and exercise outside of the enclosure for their mental and physical health. In the Panel's view, even if the enclosure is technically sufficient to house the cheetahs, the fact that it is not large enough for the day-to-day activities required by the animals raises the potential risk of harm to people, property, wildlife or wildlife habitat.

[159] There are numerous references throughout the exhibits entered at the hearing that the cheetahs always wear GPS collars when they are out of the enclosure. Clearly this was not previously the case. Further, the fact that Annie ran after a deer is evidence that the cheetahs' natural instincts remain, despite being trained, fed by, and living with, humans.

[160] There are numerous references throughout the exhibits regarding the safety protocols that will be in place to address cheetah escapes, yet the protocols were not actioned when one of the cheetahs actually escaped.

[161] There were also numerous statements made throughout the hearing by the Appellant, attesting to his abilities to control the cheetahs, and to his respect for safety standards and protocols. The Appellant's actions, however, indicate otherwise.

[162] It appears that this is not the first time that the Appellant has shown a lack of commitment to meeting safety issues associated with the cheetahs. The testimony of Mr. Bos was that the Appellant did not adhere to the safety protocols of the Alberta facility when the cheetahs were resident there.

[163] The Appellant, in short, has demonstrated a disregard for the BC laws and regulations regarding CAS, and for safety procedures and protocols of his own design, and of others. This is of particular concern to the Panel because the Appellant states that the cheetahs, if permitted, will require regular walks and exercise outside of the enclosure. It is also a concern because the cheetahs live in his residence and the enclosure is part of the residence. More importantly, it is a concern because the Appellant's plan is for the cheetahs to be used for educational and outreach programs as described in the application. Although the plan is based on the important goal of bringing attention to – and public interest in – conservation of the species, it is clear that an important target for the education program is children. At page 3 of the application, the Appellant states:

> ***How will RunCheetahRun® complement and enhance the area's communities?***
>
> First of all, we are SO excited about our children's programs! A major part of our mandate is to provide the kids in neighbouring communities with meaningful, exciting and inspiring educational opportunities. Children in most small towns have very limited access to the kinds of programs that kids in large centres often take for granted. We want the area's young people to have AMAZING opportunities, and ***RunCheetahRun's®*** cheetah based programs will provide educational opportunities that very few children anywhere in Canada will have unless they travel to Ontario, the USA or Africa – there is only one other cheetah in Western Canada, and Duma does not participate in these types of programs.
>
> ...

[164] At page 6 of the application, the Appellant explains another aspect of the

RunCheetahRun project:

> ***Cheetah experience®***
>
> A chance to get up close and personal with a cheetah.
>
> … 1 to 4 supervised guests and their guides actually enter a special (barrier controlled) area of the cheetah enclosure, to observe the cheetahs over a longer time period (1.5 to 3 hours). …

[165] In conclusion, the Panel cannot conceive of any additional "special circumstances" that support this particular applicant receiving a possession permit for these particular prohibited species.

[166] After considering all of the evidence and argument afresh, including significant new expert evidence, the Panel confirms that there are no special circumstances that warrant granting a permit for these particular CAS under section 4(f) of the *Permit Regulation*. The Panel also notes that any defect that may have resulted from the Director considering the stayed charges has been addressed due to the *de novo* nature of these proceedings.

2. Whether an order for costs should be awarded to the Appellant in this case?

The Appellant's submissions

[167] The Appellant submits that this appeal has been a significant financial burden on his family, given the extended period of time between the initial notice of appeal and the current proceedings, as well as the need to bring an expert from South Africa. He therefore asks the Panel to issue an order requiring the Respondent to pay his costs in the proceeding.

The Respondent submissions

[168] The Respondent opposes any order for costs against her.

The Panel's findings

[169] Section 47 of the *Administrative Tribunals Act* provides the Board with the power to order costs in respect of an appeal.

[170] The Board's policy on awarding costs is described in its Practice and Procedure Manual on page 55, as follows:

> The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." The objectives of the Board's costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct. Thus, the Board's policy is to award costs in special circumstances. Those circumstances include:

(a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

(b) where the action of a party/participant/intervener, or the failure of a party/participant/intervener to act in a timely manner, results in prejudice to any of the other parties/participants/interveners;

(c) where a party/participant/intervener, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing";

(d) where a party/participant/intervener unreasonably delays the proceeding;

(e) where a party's/participant's/intervener's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party/participant/intervener; and

(f) where a party/participant/intervener has continued to deal with issues which the Board has advised are irrelevant.

The panel is not bound to order costs when one of the above-mentioned examples occurs, nor does it have to find that one of the examples must have occurred to order costs.

...

[171] As regards the length of time between the initial Notice of Appeal and the current proceedings, the Panel notes that the Board canvassed both parties availability for a hearing and suggested a range of dates. Selection of the hearing date was collaborative, and was ultimately influenced by the Appellant's change of counsel, the availability of the Appellant's expert witnesses, and the deadlines for providing notice of expert evidence and notice of expert reply. The Panel finds that the time frame, while appearing on its face to be "extended", was reasonable under the circumstances.

[172] As regards the need to bring an expert from South Africa, the Panel notes that the option to have the witness provide testimony by Skype did not appear to be investigated by the Appellant. The Respondent chose the Skype option for Dr. Marker's evidence and the parties agreed to hear Mr. Bos's evidence via teleconference. The Panel finds that the expense incurred by the Appellant *vis-à-vis* the witness was of the Appellant's own choosing.

[173] For these reasons, the Panel finds that there are no special circumstances in this case that would warrant ordering the Respondent to pay the Appellant's costs associated with his appeal to the Board.

[174] Therefore, the application for costs is denied.

DECISION

[175] In making this decision, the Panel has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated herein.

[176] For the reasons set out above, the appeal is dismissed.

[177] In addition, the Appellant's application for costs is denied.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

March 4, 2019