



Environmental Appeal Board

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DECISION NO. 2012-WIL-012(a)

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

BETWEEN:	Jozef and Bibiana Demcak	APPELLANT
AND:	Director of Wildlife	RESPONDENT
AND:	Attorney General of British Columbia	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Gabriella Lang, Panel Chair James S. Mattison, Member Reid White, Member	
DATE:	July 16 to 20, 2012	
PLACE:	Richmond, B.C.	
APPEARING:	For the Appellant: Jozef and Bibiana Demcak For the Respondent: Joseph McBride, Counsel For the Third Party: Tara Callan, Counsel	

APPEAL

[1] Jozef and Bibiana Demcak appealed the March 28, 2012 decision of Andrew Wilson, Director of Wildlife (the "Director"), Ministry of Forests, Land and Natural Resource Operations (the "Ministry"). The Director refused to amend the Appellants' controlled alien species ("CAS") possession permit to allow them to publicly display six Burmese pythons and a Black-throated monitor lizard.

[2] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 93 of the *Environmental Management Act*, and section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488 (the "Act"). Section 101.1(5) of the *Act* provides that, on an appeal, 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 Appellants request a number of remedies, which are discussed further below. Among other things, the Appellants request that the Board order the Director to lift all prohibitions imposed on them in relation to their CAS reptiles, order that the Black-throated monitor lizard be removed from the list of CAS, order the Director to pay the Appellants' appeal costs, and award damages to the Appellants for the alleged harm they have suffered as a result of actions or inactions by the Director and other Ministry staff.

BACKGROUND

[4] For many years, the Appellants owned and publicly displayed various reptiles, including six Burmese pythons and a Black-throated monitor lizard. They displayed live and dead reptiles in public venues such as schools, community centers and church halls. They also used some of their reptiles in travelling magic shows throughout B.C., Alberta and Saskatchewan. The Appellants earned an income from their magic shows. The Appellants cared for the reptiles as their pets. The Appellants assert that, as a result of permit requirements imposed on them, and the actions or inactions of the Director and other Ministry staff, they have been treated unfairly and have been prejudiced in a number of ways, including being deprived of their ability to earn a livelihood as they did in the past.

The regulatory framework

[5] In 2009, certain species were designated as "controlled alien species" under the *Controlled Alien Species Regulation*, B.C. Reg. 94/2009 (the "*CAS Regulation*"), which was a new regulation created pursuant to sections 6.4 and 6.5 of the *Act*. The designated CAS included *Python molurus* (Indian and Burmese pythons) and all species in the family Varanidae (monitor lizards) that can grow to more than 2 metres in length when measured from the front of the snout to the tip of the tail. The *CAS Regulation* also designated live *Python molurus* and live monitors that can grow to more than 2 metres in length as "prohibited species individuals". Under section 3 of the *CAS Regulation*, a person is prohibited from possessing a prohibited species individual without a permit authorizing the possession of that prohibited species individual. Section 4 of the *CAS Regulation* prohibits a person who possesses a prohibited species individual from allowing the prohibited species to breed, subject to certain exceptions. In addition, section 5.1 of the *CAS Regulation* prohibits shipping or transporting in B.C. a prohibited species individual unless the person holds a permit to do so.

[6] On December 19, 2012, the *CAS Regulation* was amended. Among those amendments was a change in the definition and classifications of "prohibited species individual." As a result, certain monitors, including the Appellants' Black-throated monitor lizard, are no longer "prohibited species individuals." The effect of that change on the Appellants is discussed further below.

[7] Under section 19 of the *Act* and section 4(f)(i) of the *Wildlife Act Permit Regulation*, B.C. Reg. 253/2000 (the "*Permit Regulation*"), the Director may issue a permit authorizing a person to possess a CAS individual, if the species individual was in B.C. on March 16, 2009. Similarly, under section 4(h) of the *Permit Regulation*, the Director may issue a permit authorizing a person to ship or

transport a CAS individual in B.C. Section 4 states that the Director may issue such permits "in accordance with this regulation on the terms and for the period he or she specifies."

The Permit issued in May 2010

[8] In or about February 2010, Mr. Demcak applied to the Ministry for a permit to possess and transport certain CAS for personal use. His application was accompanied by a letter requesting the permit "under special circumstances to keep and to present CAS" in educational presentations and magic shows, in the same manner as he had been doing for many years.

[9] On May 21, 2010, the Director issued CAS Permit VI10-60930 (the "Permit") to Mr. Demcak. The Permit authorized the Appellants to possess the CAS listed in the Permit; namely, six Burmese pythons and one Black-throated monitor lizard. The Permit authorized transporting the CAS only for the purpose of receiving veterinary care. The Permit prohibited displaying the CAS for public viewing. Although the Permit was originally issued to Mr. Demcak, the parties subsequently agreed that both of the Appellants should be named in the Permit.

[10] The Appellants did not appeal the May 21, 2010 Permit to the Board. Instead, they brought a civil action in the B.C. Supreme Court. This occurred because the May 21, 2010 decision letter did not set out the permit holder's right to appeal to the Board. As discussed below, the Court ultimately dismissed the Appellants' civil action.

The Ministry's CAS Policy

[11] On April 1, 2011, the Director and the Ministry's Assistant Deputy Minister signed off on a Ministry policy with respect to CAS (the "CAS Policy"). At the same time, the Director also signed off on a Ministry Procedure with respect to CAS (the "CAS Procedure"). Both the CAS Policy and the CAS Procedure indicate that the Ministry's policy with respect to permits for CAS is generally to prohibit the public display of prohibited species individuals, except by organizations that meet certain criteria. The Director referred to the CAS Policy and the CAS Procedure in the appealed decision, and in his appeal submissions. Relevant portions of the CAS Policy and the CAS Procedure are set out below.

[12] The CAS Policy states that its purpose is "to establish a consistent approach for permitting possession, shipping, transportation, breeding, and public display of prohibited species individuals and to describe relationships to other interested organizations." The CAS Policy states, in part, as follows:

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...

3. To issue permits to possess, ship, transport, or breed prohibited species individuals only to persons who meet the criteria described in the Controlled Alien Species Procedure.
4. To generally issue possession permits for the life of prohibited species individuals that reside permanently in BC.
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.
6. To work collaboratively with the Union of BC Municipalities to promote compliance with municipal bylaws regarding CAS.
7. To work collaboratively with the BC Society for the Prevention of Cruelty to Animals in their role of enforcing the *Prevention of Cruelty to Animals Act* and the Criminal Code as they relate to CAS.
8. To work collaboratively with the Canadian Association of Zoos and Aquariums [CAZA] when a zoo that is permitted to possess prohibited species individuals loses its accreditation.

...

[13] The CAS Procedure includes guidelines with respect to the public display of prohibited species individuals, which states as follows:

- 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 in 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 toward accreditation (i.e., a business plan).

[14] The CAS Procedure also lists “potential mitigating factors”, as follows:

- 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 [the Controlled Alien Species Permit Advisory Committee] and ministry employees working in the relevant region (including Victoria),
 - c. whether the applicant is in compliance with all applicable laws ..., 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.

The amended Permit issued in 2011

[15] On September 28, 2011, the Permit was amended to allow the Appellants to possess their CAS at a new address in Surrey, B.C. This version of the Permit was in effect when the Appellants filed their appeal with the Board.

[16] The Permit, as amended, continues to prohibit publicly displaying the CAS individuals listed in the Permit. The Permit states as follows on page 1:

The permit holder must ensure that the CAS individuals are not displayed to the public.

[17] The Permit contains a number of Appendices, which the Panel has summarized as follows. Appendix A contains a list of General Conditions, including conditions about public safety, measures to take and notices to be given in case of release or escape, the type of enclosures the CAS are to be kept in, and transport/transfer requirements including an emergency plan. Appendix A also reiterates the prohibition on publicly displaying the CAS. Appendix B states various responsibilities the permit holder has regarding all applicable laws, and requires that each CAS is uniquely identifiable.

[18] The Permit also includes Appendices 1 and 2, which are based on information provided by the Appellants. Appendix 1 has descriptions of the CAS enclosures, such as dimensions, composition and security. Appendix 2 is the “Controlled Alien Species Public Safety Plan” which consists of a number of questions for the Appellants to answer regarding handling of the CAS, preventing escape, recapture, notification in case of escape, threats to the public in case of escape, transfer to and transport in containers, and the emergency plan if the CAS escaped.

The December 2011 application for an amendment to the Permit

[19] On or about November 28, 2011, the Appellants' Supreme Court case was dismissed by consent of the parties, on the basis that the Appellants had not exhausted the available administrative remedies (i.e., appealing to the Board), but with the assurance that the Director would consider an application to amend the Permit.

[20] By a letter dated December 8, 2011, the Appellants applied to the Ministry for a Permit amendment. The first two pages of the Appellants' application letter sets out a number of complaints they had regarding their treatment by various individuals and groups, including the Ministry's Permit and Authorization Service Bureau (the "Permit Bureau"). The Appellants alleged harassment by the Permit Bureau and the BC SPCA. The Appellants requested an investigation of the Permit Bureau in order to stop the alleged harassment.

[21] The remainder of the Appellants' application letter sets out the requested amendments to the Permit, with reasons and objections to the Ministry's response or lack of response. The Panel has summarized the requested amendments, as follows:

1. Remove the prohibition on displaying or exhibiting the CAS, on the basis that exhibiting is not included in the *CAS Regulation*.
2. Remove the demand to microchip the CAS, because inserting microchips is painful, causes infections and cancer.
3. Allow identification of the CAS by pictures which demonstrate each animal has specific markings.
4. Yearly veterinary examination of the CAS is unnecessary, but the Appellants will comply if the Ministry insists on it. The Appellants will take the CAS for examinations once a year, but only if they leave B.C. Multiple veterinary examinations of healthy animals is a financial burden.
5. The CAS do not touch any grounds or any other animals. Snakes do not carry any communicable diseases, other than possibly salmonella, which is easily managed by washing hands. Salmonella is not being examined in routine examinations of healthy animals.
6. Remove the restriction on traveling in B.C. All safety arrangements are described in the original Permit application which is in the Ministry file. The Permit Bureau provided no suggestions as to how to improve their safety arrangements. In the past, the Appellants travelled Canada, USA and Europe under permits, including CITES, and public safety is the main consideration.

[22] In the application letter, the Appellants also submitted arguments to support the requested amendments, and they requested other remedies. The Panel has summarized the remaining points in the letter as follows:

- The Appellants' qualifications and recommendations from B.C. teachers, principals, and school boards were enclosed in their original permit application. Their request for a transitory permit originally was denied without one single reason which is contrary to the *Wildlife Act*. Later reasons

were added, but the conditions were impossible to meet resulting in an effective prohibition.

- On July 2, 2010, Mr. Demcak applied again for a transitory CAS permit which was denied. The Appellants argued that the transportation permit is connected with their livelihood, and the denial resulted in a violation of their constitutional right to pursue the gaining of a livelihood in any province.
- The Appellants cannot meet CAZA [Canadian Association of Zoos and Aquariums] accreditation because CAZA does not accredit artistic and educational travelling activities like theirs. The Appellants argued that this requirement was arbitrary, and made by the Ministry to prohibit small productions such as theirs.
- The Appellants have been inspected multiple times by the BC SPCA, during their travelling tours in B.C., during their presentations and at their home. There were no concerns or citations issued regarding the treatment of their "pets" or the safety of the public or any other issues.
- In their signs and oral educational lectures, and also in their artistic presentations, the Appellants will continue to advise that these "pets are not suitable for general keeping." They would promote that these animals require a permit in B.C., and the permit would be posted for the general public to view, which would "have 100 times more positive effect than any prohibition."
- Remove the Black-throated monitor lizard from the prohibited list or transfer it to the controlled list of CAS, because this species does not grow over two meters in length and "there is no shred of evidence that this kind of lizard ever hurt anybody."
- Drop the two to three metre rule. No one can assess the danger of any animal by its size. The Appellants' reptiles became gentler as they grew larger.
- Deal with the Appellants' application as soon as possible. If the Appellants receive approval within 30 days, they may be able to save some dates in the next season. Otherwise, a "third year will be ruined as most booking is already done by all respectable companies."
- Consider awarding the Appellants "compensation for damages" caused to them, with a reference to the doctor's report that was enclosed.

[23] The letter concluded with a request that the original permit application be used, "as everything remains the same for the past 30 years", and "There were no changes to the safety plan nor to any considerable adjustments."

[24] The Appellants enclosed exhibits with the letter in support of their application. Those exhibits were also provided to the Panel, and are referred to and described below, where relevant and applicable, in this decision's discussion and analysis of the issues.

The Director's March 2012 Decision

[25] On March 28, 2012, the Director issued his decision not to amend the Permit. The relevant portions of the decision letter state as follows:

"After considering all of the information you submitted with your application, the Controlled Alien Species Permit Advisory Committee (CAS PAC) summary of recommendations, and comments from the lower Mainland Ministry of Forests, Lands and Natural Resource Operations regional office, I have decided, for the reasons stated below, not to amend your CAS personal possession permit to allow you to publicly display your CAS.

I am willing to consider amending your existing CAS permit to allow you to ship and transport your CAS within British Columbia for the purpose of leaving and coming back into BC without needing to be pit-tagged or micro-chipped if adequate information and photographs are supplied, as described below.

Ministry policy suggests that a permit condition prohibiting public display of CAS should normally be included in personal possession permits so as to not motivate the general public to acquire one of these animals as a pet.

The Ministry's policy of generally permitting Canadian Association of Zoos and Aquariums (CAZA) accredited zoos to display CAS to the public is based on their rigorous animal welfare standards, public safety procedures, professionalism, and institutional standing. The display of CAS at these institutions serves a valid social purpose and is less likely to motivate a member of the general public to acquire one as a pet.

I have taken into consideration the strong personal reasons you have provided for wanting to continue publicly displaying your CAS individuals, that you have cared for your CAS individuals for the duration of their lives and that prior to the CAS regulation being enacted in 2009, your livelihood relied on your ability to publicly display your CAS. After considering all of the information in your application, and contrasting it with the rigorous standards of animal welfare, animal safety and public safety referred to in the Ministry policy and procedures, I can see no reason to depart from Ministry policy.

As I mentioned above, I am willing to consider amending your existing CAS permit to allow you to ship and transport your CAS individuals within British Columbia so that you will have opportunities to display your CAS individuals outside B.C. Also, I encourage you to pursue opportunities to work with accredited facilities in BC that may be willing to accept liability/responsibility for your CAS and magic show.

Good quality photographs could be used to uniquely identify your CAS individuals as an alternative to micro-chipping or pit tagging. If you wish to proceed on this basis, please provide photographs for my review that meet the following criteria..."

[26] This decision meant that the Appellants still could not display their CAS in magic shows or in exhibits at schools, community halls and other public locations around the province. Also, the Appellants still could not ship or transport their CAS except for the purpose of veterinary care, although the Director expressed a willingness to allow shipping and transport within B.C. so the Appellants could display their CAS outside of B.C., if the Appellants provided photographs to allow identification of their CAS individuals.

The Appeal

[27] On April 26, 2012, the Appellants appealed the Director's decision. The Appellants provided lengthy grounds for appeal in their Notice of Appeal, which was followed by an amended Notice of Appeal on May 2, 2012. The Panel has summarized the Appellants' grounds for appeal as follows:

- The Director's decision forbidding the Appellants from publicly displaying their CAS deprived the Appellants of their livelihood in B.C. and outside of B.C.
- The Director's decision is contrary to the regulations and sections 6.5, 101 and 101.1 of the *Act*.
- The Director's decision is contrary to the Appellants' rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), which is part of the *Constitution Act, 1982*.
- In making his decision, the Director relied on Ministry policy, and not factors connected with the purposes of the *Act*, such as public safety and animal welfare.
- The Director's decision failed to provide reasons for prohibiting the Appellants from publicly displaying their CAS, contrary to section 101(1) of the *Act*.
- The restrictions in the Permit amount to punishments, are undemocratic, and are without legal foundation.
- The Director refused to respond to the Appellants' request to consider financial damages for loss of livelihood, loss of dignity, and harm to the Appellants' health.
- The Director did not address the Appellants' request to investigate alleged illegal actions by public servants under his responsibility.

[28] In their amended Notice of Appeal, the Appellants requested that the Board make a number of orders and/or recommendations, which the Panel has summarized as follows:

- order the Director to lift all prohibitions on the Appellants displaying their CAS or having CAS as tools for education or as participants in artistic presentations;
- order the Director to lift all restrictions and conditions that were "invented" by Jennifer Smith, a Ministry employee, because those conditions are cruel, outrageous and impossible to meet;

- recommend that the Ministry create certain laws to end cruelty to animals and people;
- order or recommend that the Black-throated monitor lizard be removed from the list of CAS;
- award damages for the Appellants' being unable to continue with their livelihood, for being prohibited from leaving or returning to BC, being deprived of basic human rights, and suffering harm to their mental and physical health;
- recommend investigation or a public inquiry into the fabrication and enforcement of "fake laws" against displaying CAS; and
- stop the Ministry's Permit Bureau from causing more damage to animals labeled as CAS, and humans.

[29] The Appellants requested further remedies at the appeal hearing, as discussed below.

[30] In addition, by a letter dated May 28, 2012, the Appellants served notice to the Board, the Director, and the Attorney General that they sought a remedy under section 24(1) of the *Constitution Act, 1982*, on the basis that the Director's decision unjustifiably infringed the Appellants' rights under sections 2(b), 6(2)(b), 7, 12, and 15(1) of the *Charter*.

Post-appeal amendments to the Permit

[31] After the appeal was filed and the appeal hearing concluded, but before this decision was issued, the Director made certain amendments to the Permit. As a result, some of the remedies sought by the Appellants in the appeal proceedings were provided by the Director, before this decision was issued.

[32] Specifically, by a letter dated January 15, 2013, the Director amended the Permit by removing the Black-throated monitor lizard from the list of CAS in the Permit, consistent with the December 2012 amendments to the *CAS Regulation* described above. As a result, the terms and conditions of the Permit no longer apply to the Black-throated monitor. In addition, the Director amended the Permit by authorizing the Appellants to ship or transport their CAS for the purpose of leaving and returning to B.C., as well as for veterinary care. As a result, the Appellants may ship and transport their CAS into other provinces, and according to the Appellants, this would allow them the opportunity to conduct their public displays and magic shows involving their CAS in other provinces.

[33] Since those requests have been granted by the Director, the Board need not consider whether to order the Director to remove the Black-throated monitor lizard from the list of CAS in the Permit, or to allow the Appellants to ship and transport their CAS for the purposes of leaving and returning to B.C. Given that those remedies have been granted by the Director, those aspects of the appeal are now moot, and need not be decided by the Board.

ISSUE OF THE BOARD'S JURISDICTION

[34] Based on the Appellants' submissions and the remedies they requested, it became apparent to the Panel that it should clarify the nature of the Board's jurisdiction and the remedies that it may order in this appeal. During the appeal hearing, the Panel addressed which of the issues raised, and remedies sought, by the Appellants are within the Board's jurisdiction. However, for clarity, the Panel will address those matters again in this decision.

[35] Some of the Appellants' grounds for appeal and some of the remedies they seek address matters that are outside of the Board's jurisdiction. This is evident from the Appellants' Notice of Appeal (as amended), their submissions, and their opening statement at the appeal hearing. For example, in their opening statement, the Appellants asked the Board to:

1. Order the Director to reverse his decision and return to them their right to display and present their CAS in their educational and artistic presentations without any new requirements.
2. Make the following decision for the Director:
 - (a) take the Black Throated Monitor lizard off the list of CAS.
 - (b) return their mobility rights without any demands that amount to effective prohibitions.
3. Award the Appellants their costs in relation to the appeal.
4. Award the Appellants their costs in relation to preparing for the proceedings in the B.C. Supreme Court action.
5. Award general damages, special damages, punitive and exemplary damages to the Appellants.

[36] In addition, the Panel notes that the Appellants' Notice of Constitutional Question asserts that the appeal hearing before the Board "is effectively a continuation from the Supreme Court Civil Proceedings ... held on November 28, 2011."

[37] The Panel finds, unequivocally, that this appeal proceeding is not a continuation of the Appellants' Supreme Court action. This appeal arises from the Director's March 28, 2012 decision, which arose from the Appellants' December 2011 application. The Supreme Court proceeding concluded before the Appellants filed their December 2011 application. Furthermore, the Board's appeal process is separate from the Court's process, and the Board's powers and procedures stem from an entirely different legal authority than those of the Supreme Court.

[38] In the present appeal, the Board's jurisdiction and powers are set out in the *Act* and the *Environmental Management Act*. In particular, sections 100 and 101.1(1) the *Act* provide that the Board may hear appeals of certain decisions issued by a regional manager or the director, including decisions that affect a permit or an application for a permit. Thus, the Panel has the authority to hear the appeal of the Director's March 28, 2012 decision regarding the Permit. Further, in terms of the remedies, section 101.1(5) of the *Act* states 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.

[39] In the context of this appeal, those powers relate to the Director and his March 28, 2012 decision only. Thus, the Panel may confirm, reverse or vary the Director's decision, or send the matter back to the Director with directions. Also, the Panel may make any decision that the Director could have made, and that the Panel considers appropriate in the circumstances. In addition, under section 101.1(4) of the *Act*, the Board may conduct an appeal as a new hearing, which means that the Board is not limited to reviewing the Director's decision for errors, and the Board is not restricted to considering only the evidence that was before the Director.

[40] The Board also has the jurisdiction to decide constitutional questions arising in appeals, as the Board is empowered under section 94(2) of the *Environmental Management Act* to hear questions of law, which includes constitutional questions. Thus, the Panel has the authority to decide the *Charter* issues raised in this appeal.

[41] In addition, under section 95(2) of the *Environmental Management Act*, the Board may order a party to pay all or part of the costs of another party in connection with the appeal. Thus, the Panel has the authority to consider the Appellants' request for their costs in relation to this appeal.

[42] However, the Board has no jurisdiction to award the Appellants their costs in relation to preparing for the Supreme Court action. The Board also has no jurisdiction to award damages to the Appellants for any prejudice they argue that they may have suffered, such as being unable to continue with their livelihood, being prohibited from leaving or returning to BC, being deprived of basic human rights, or suffering harm to their mental and physical health.

[43] Finally, the Panel finds that the Board has no authority to direct the Government or the Minister to enact or amend laws "to end cruelty to animals and people" as requested by the Appellants. The Board's powers in an appeal are restricted to those found in its enabling legislation, as described above, and there is nothing in the Board's enabling legislation that empowers the Board to review or direct how the Government or the Minister exercises legislative functions.

ISSUES

[44] The following issues raised in this appeal are within the Board's jurisdiction, have not been rendered moot by the Director's post-appeal amendments to the Permit, and therefore, have been addressed by the Panel:

1. Whether the Board should amend the Permit to allow the Appellants to publicly display their CAS individuals.
2. Whether the Director's decision infringed the Appellants' rights under sections 2(b), 6(2)(b), 7, 12, or 15(1) of the *Charter*, without justification

under section 1 of the *Charter*, and if so, whether the Board should order a remedy.

3. Whether the Board should order the Director to pay the Appellants' costs associated with the appeal.

[45] As discussed above, the other issues raised by the Appellants are either outside of the Board's jurisdiction in this appeal, or were resolved by the Director's January 2013 amendments to the Permit, and therefore, need not be decided by the Panel.

RELEVANT LEGISLATION

[46] The following sections of the *Act* are relevant to this appeal:

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.

Permits

19 (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

(b) to omit to do anything that the person is required to do by this Act or the regulations,

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

(2) The form and conditions of the permit may be specified by the director.

...

(4) The regional manager or the person authorized by the regional manager may amend the conditions of a permit as determined by him or her and issued under this section, but the amendment is not effective until the permittee has notice of it.

Powers of director

100 (1) In addition to other powers given under this Act, the director may do an act or thing that a regional manager is empowered to do.

[47] The following sections of the *CAS Regulation* are relevant to this appeal.

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.

...

Shipping or transportation

5.1 A person must not ship or transport in British Columbia a prohibited species individual unless the person holds a permit authorizing the shipping or transportation of the prohibited species individual.

[48] The following sections of the *Permit Regulation* are relevant to this appeal.

Director's permits

- 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,

...

- (h) authorizing a person to ship or transport a species individual of a controlled alien species in British Columbia.

DISCUSSION AND ANALYSIS

1. Whether the Board should amend the Permit to allow the Appellants to publicly display their CAS individuals.

Appellants' submissions

[49] The Appellants are most concerned about their inability to publicly display their CAS individuals. The Appellants submit that neither the *Act* nor the regulations prohibit the public display of CAS, yet the Director put this prohibition in the Permit and is unwilling to remove it. The Appellants submit that, without a permit to publicly display their CAS, they can no longer conduct their magic show using a python, put on their school presentations, and generally display live reptiles, as they did for many years before permits were required. They submit that this has prevented them from pursuing their livelihood, and has caused them a great deal of financial and personal stress. In addition, the Appellants submit that they have many years of experience in caring for and handling reptiles. They maintain that their CAS individuals have always been kept, transported, and displayed in a safe and secure manner, and they do not encourage other people to own CAS as pets. They submit that the Director has failed to take into account their circumstances, and has applied the CAS Policy and the CAS Procedure as if they are laws.

[50] In addition, it was apparent from the Appellants' testimony that they were under the impression that "publicly display" meant that no one other than themselves could see their pythons, and that they had to black out the windows where their CAS were kept.

[51] It should be noted that the Appellants also made submissions with respect to their request to remove the Black-throated monitor lizard from the CAS listed in the Permit, and their request for an amendment of the Permit to allow them to ship or transport their CAS for the purpose of leaving and returning to B.C. However, as

discussed above, those issues have been rendered moot by the Director's January 2013 amendments to the Permit, which removed the Black-throated monitor lizard from the list of CAS in the Permit, and authorized the Appellants to ship or transport their CAS for the purpose of leaving and returning to B.C.

[52] Mr. and Mrs. Demcak testified on their own behalf. They testified that they have ten snakes, six of which are CAS. They explained that, in the past, they would travel for most of the year, and would put on educational displays in schools and churches for free, and would earn money from their magic shows. They testified that they would use one of their large CAS pythons in the climax of their magic show.

[53] The Appellants emphasized that they do not advocate having CAS as pets. They testified about how they care for, feed, transport, and maintain control over their pythons. They maintained that their pythons are gentle and unlikely to escape. The Appellants submit that they cannot meet the CAZA standards for accreditation, because CAZA does not accredit what they described as travelling, educational and artistic shows such as theirs and to try to meet these standards would be too expensive for them. They sought to distinguish their circumstances from the examples in the Director's evidence, involving pythons killing people. The Appellants asserted that the pythons that killed people had not been fed and/or were not secured within the homes.

[54] In addition, during the appeal hearing, the Appellants set up their display of dead reptiles, reptile bones, eggs and skins, for the Panel to view.

[55] On cross-examination, Mr. Demcak was shown a photo of himself and some children holding a large python. He explained that this was done to "educate" the children. When asked if he could use one of his smaller, non-CAS snakes in the magic show, he responded that there was little public interest in the show when the Appellants used a smaller snake. Similarly, Mrs. Demcak testified that the large python is the "star" of the show, and there was little interest in their show without the large python.

[56] The Appellants called four other witnesses in support of their submissions.

[57] The Appellants called Marcie Moriarty as a witness. Ms. Moriarty a Manager with the BC SPCA. Ms. Moriarty testified about the BC SPCA's submissions during the development of the CAS regulations and subsequent policies. She said that the BC SPCA was one of many organizations and individuals, such as wildlife experts and veterinarians with various expertise, that provided recommendations for the regulations and policies.

[58] Ms. Moriarty also testified about the BC SPCA's role when asked to comment on permit applications. She said that, based on the information it receives, the BC SPCA makes recommendations to the Ministry. The BC SPCA generally recommends against public display of CAS and exotic animals, and that there be no contact with the public. It has the same position regarding circuses and traveling exotic exhibits. Ms. Moriarty stated that the BC SPCA's position is also that any owners of CAS must microchip their animals for identification purposes, but it also makes the same recommendation for owners of all animals, including cats and dogs. In addition, she said that, with CAS animals, safety is a big concern.

[59] Ms. Moriarty stated that animal health and welfare is the BC SPCA's highest priority. Therefore, it recommends yearly examination of CAS animals by veterinarians. She said that she has made the same recommendation for sled dogs, and she believes all animals should be examined yearly by veterinarians who are experts.

[60] Ms. Moriarty also testified that she managed animal cruelty investigations. The BC SPCA has authority under the *Prevention of Cruelty to Animals Act* to inspect any facility during business hours. Sometimes it makes unannounced inspections. Sometimes it responds to a complaint or information received at a branch and then a constable attends. Complaints may come from a member of the public, from the RCMP, from veterinarians, or others. However, a facility also can be inspected without a complaint. Ms. Moriarty said that the BC SPCA has a constable on staff who has experience with zoos and reptiles, but the BC SPCA will defer to the opinions of veterinarians regarding the health and welfare of any animals. She testified that, over the years, the BC SPCA have had many calls and concerns about exotic animals, although the vast majority of concerns involve dogs, cats, livestock and horses.

[61] Ms. Moriarty explained that the BC SPCA's inspection reports are not endorsements, stamps of approval or certifications of any kind. The BC SPCA does not have that type of function. An inspection report only states what was observed at the time of the inspection. A report may state "no order required" or may give an owner notice to relieve the distress of an animal. For example, if a horse has overgrown hooves, the owner may be ordered to have the hooves trimmed within a certain period of time.

[62] Ms. Moriarty was asked by the Appellants about inspections conducted by an animal inspection officer in late 2011 at a facility where the Appellants were housing their CAS animals. Ms. Moriarty stated that the officer was refused entry and was not allowed to inspect the animals at that time.

[63] With respect to the Appellants' December 2011 permit amendment application, Ms. Moriarty confirmed that the BS SPCA had been contacted regarding its position on the Appellants' request to publicly display their CAS animals. Ms. Moriarty stated that the BC SPCA had huge safety concerns about the travelling nature of the exhibits, the type of public displays and types of enclosures to be used. It was the BC SPCA's position in response to the application, that pythons can kill adults or children and there are documented cases of such deaths. Ms. Moriarty stated that the Appellants' exhibits were not a natural environment for their CAS animals, and she indicated concerns about what stimulation the animals would get while enclosed during travels, and then later put into the hands of children. Ms. Moriarty said that pythons were lethal, dangerous animals. She testified that having smaller snakes for children to handle would be better.

[64] The Appellants also called Jack Trudgian as a witness. Mr. Trudgian stated that he has been a Conservation Officer with the Ministry for seven years, and was a resource officer for 25 years before that. He testified that he inspected the room where the Appellants' pythons were kept on September 28, 2010. He explained that he conducted the inspection because he had been provided with information that CAS were on display at the Richmond Night Market, and the Appellants had not

applied for a permit for the Black-throated monitor lizard. Mr. Trudgian testified that the Appellants did not have a permit for the monitor at that time, they had been asked to get a permit, and were told not to put the monitor on public display or let people touch it. He also explained that he looks to staff in the Ministry's Wildlife Branch for expertise regarding CAS before conducting enforcement action.

[65] In addition, the Appellants called Gary Oliver as a witness. Mr. Oliver testified that he has 50 years of experience working with CAS, he studied veterinary medicine at Guelph, and he previously worked at the Toronto zoo. He explained that he had a business called Cinema Zoo, which provided education about CAS. He explained that it was not a "petting zoo", and he had non-venomous snakes to show to the public. He testified that he had handled his snakes since they were babies, and they were not aggressive. He testified that only he handled the snakes, and he did not allow the public to touch live snakes, but he had a skin from a 20-foot long snake that people could touch. He stated that, when he showed a live snake to the public, he was in control of the snake's head at all times.

[66] Mr. Oliver also explained that, when B.C. began to regulate CAS, he applied for the necessary permits for his business, but the Ministry told him that he couldn't display, transport or show his CAS for educational purposes, and that the animals would be euthanized if he didn't remove them from B.C. He testified that, as a result, he sent his CAS to Alberta. He testified that seeing live animals is different from seeing them in books or videos, and not all children are able to view CAS at a registered zoo, as many children live below the poverty line, there are no zoos in remote areas, and not all families can afford to travel to a zoo.

[67] On cross-examination, Mr. Oliver was shown the photo of Mr. Demcak holding the front part of a large python with several children also holding the python. Mr. Oliver stated that he would not allow members of the public to hold a large python, and that displaying the python as shown in the photo posed a danger to the public because the python was not in the handler's control. He stated that large pythons need to be handled in a safe way, which requires maintaining control of the snake's head, and these snakes should not be allowed near children.

[68] Finally, the Appellants called Gail Watson as a witness. Mr. Watson described himself as a snake enthusiast with about 40 years of experience in handling and educating with snakes. He explained that he educates children about snakes, and has been a member of the Westcoast Society for the Protection and Conservation of Reptiles for about 35 years. He testified that he has done presentations at Science World, the Lynn Canyon Ecological Centre, the Richmond Nature Park, community centres and events, and for Boy Scout and Cub troops. He said that he displays small snakes, and it is important for kids to gain education by seeing and touching snakes. He testified that snakes are not interested in biting people, and he has never seen a python bite or behave unpredictably. He said there are no statistics about any deaths by pythons in B.C. or attacks on humans in Canada. He testified that a python wouldn't survive in B.C. if it escaped. He also stated that he has known the Appellants for about 20 years, has seen their public displays and shows dozens of times, and has never seen any problems or danger with the Appellants' display of their CAS.

Director's submissions

[69] The Director submits that, in rendering his decision, he considered all of the materials in the application package, comments from the Appellants, and comments from others including the CAS PAC and the BC SPCA. He submits that there were a number of shortcomings with the Appellants' request to publicly display their CAS, particularly with respect to safety. Specifically, he argues that there was insufficient information about the public venues where the CAS would be displayed, the distance between the audience and the CAS, and what sort of display cases would be used. Furthermore, the Appellants provided no plans outlining how they would respond to emergency situations, first aid situations, or escaped animals.

[70] In addition, the Director submits that he considered the CAS Policy and the CAS Procedure, and the Appellants' application did not address or did not meet several requirements with respect to safety and security standards, standards for human and animal contact, having a written education plan, or CAZA standards regarding the use of wild or exotic animals in performances.

[71] In particular, the Director submits that the Appellants' CAS pythons pose a risk to the public if they escape, because they are large constrictors that could injure or kill a person. They could also hurt native wildlife if they escape. The Director submits that pythons are very quick and unpredictable wild animals.

[72] Moreover, the Director submits that the Permit does not prohibit the Appellants from displaying deceased CAS, and the Appellants can still use any of their non-CAS pets in their public displays and magic shows.

[73] In support of those submissions, the Director provided a number of documents and articles, and showed videos of instances in which pythons have killed people. Also, two witnesses testified in support of the Director's submissions: Jennifer Smith, and the Director himself.

[74] Jennifer Smith, a Human Dimensions Specialist with the Ministry's Fish and Wildlife Branch, testified that her role in relation to the list of species in the *CAS Regulation* was to shepherd the draft list through the Branch, and to work with legislative drafters. She explained that her role was not to develop the list of species in the *CAS Regulation*; rather, the list was developed with input from specialists in the Fish and Wildlife Branch, universities, zoos, representatives from the pet industry, and other agencies such as the West Coast Society for Protection and Conservation of Reptiles. She explained that large pythons are on the CAS list due to their strength and ability to kill. She referred to cases of human deaths in the U.S. involving pythons. She also suggested several types of non-CAS reptiles that the Appellants could use in their public displays and magic shows.

[75] In addition, Ms. Smith testified that the objectives of the CAS Policy include reducing the number of CAS in B.C., ensuring public safety, and regulating the use of CAS at education and research facilities or for commercial purposes such as in the film industry and zoos. She also stated that the CAS Policy is intended to be read together with the CAS Procedure, because the latter gives more detail. She referred to section 5 of the CAS Procedure, which addresses public display, and she explained that it provides guidance to assist the Director in making decisions. She testified that, under the CAS Policy and the CAS Procedure, the Director is

"encouraged" to ensure public protection in cases where a permit applicant is not CAZA accredited.

[76] Ms. Smith testified that she is not part of the Permit Bureau, but she assists the Permit Bureau with applications involving CAS, and she had a limited role with the Appellants' application. She also provided a general overview of the Ministry's process for handling applications for CAS permits.

[77] In cross-examination, Ms. Smith acknowledged that the public display of CAS is not prohibited by the legislation. She confirmed that public display is allowed in some circumstances, such as at accredited zoos or aquariums. She also confirmed that the Ministry's policy documents provide guidance, and are not directives.

[78] The Director testified on his own behalf. The Director explained that the Ministry's policies on CAS evolved out of the CAS amendments to the *Act*, and assist in interpreting and applying the CAS amendments to the *Act* and regulations. He stated that the CAS Policy's objectives are to ultimately reduce the number of CAS in B.C., and to protect the public. He explained that the CAS Policy generally prohibits the public display of CAS by non-accredited facilities, so that the public sees CAS less often and will be less inclined to want a CAS as a pet. He stated that Burmese pythons are designated as CAS based on information, provided by experts, that these pythons are large constrictors that ambush prey and are capable of wounding and killing humans.

[79] He explained that the CAS Policy and CAS Procedure provide guidance on how to consider applications for permits to transport, breed, and display CAS, and the mitigating factors to consider. He testified that he considers, but is not bound by, the CAS Policy and CAS Procedure when he reviews a permit application. For example, he explained that he issued a public display permit to the "Croc Talk" facility in B.C., despite the fact that it was not CAZA certified, because the applicant was taking steps to meet critical CAZA requirements. He found that the applicant had addressed the underlying policy objectives, and he issued a two-year temporary permit, which would allow the applicant time to seek CAZA accreditation.

[80] The Director also explained how permit applications are generally processed within the Ministry. His testimony in that regard, together with Ms. Smith's, is summarized as follows. They explained that the Permit Bureau is an administrative unit of the Ministry that handles permit requests under the *Act* and other statutes. The Permit Bureau receives permit applications and supporting materials, circulates the application and supporting materials to individuals or organizations for comment and then forwards the application, the materials and any comments and/or recommendations to the statutory decision-maker, in this case the Director. The Director emphasized that the Permit Bureau does not make decisions; rather, it co-ordinates collecting the appropriate information and sends it to the decision-maker.

[81] The Director summarized the process with respect to the Appellants' December 8, 2011 application as follows:

- The Permit Bureau received the Appellants' application letter, with attachments, on December 14, 2011.

- On January 17, 2012, the Appellants' application letter was referred to the CAS Permit Advisory Committee (CAS PAC) for comment. Comments were received from the Ministry's wildlife veterinarian and the BC SPCA.
- Also on January 17, 2012, the Appellants' application package, with CAS PAC comments, was sent to the Ministry's South Coast region for review.
- On February 1, 2012, the Permit Bureau sent the CAS PAC's comments and the South Coast region's comments and questions to the Appellants for comments and answers. The Permit Bureau received the Appellants' response that day.
- On February 2, 2012, the Appellants' response was sent to CAS PAC and the South Coast region, both of which sent further comments, which were forwarded to the Appellants.
- The Appellants replied on March 1, 2012.
- On March 7, 2012, the entire application package, including all comments and responses, was provided to the Director.

[82] The Director stated that when he received the whole application package on March 7, 2012, he specifically did not review decisions made by the previous director, or any materials that were relied on for the earlier decision. He stated that he considered the material in the application package, including all comments, as well as the CAS Policy and the CAS Procedure. In particular, he considered that the BC SPCA recommended against allowing public display and the Ministry's wildlife veterinarian supported the recommendation against allowing public display. The Ministry's wildlife veterinarian also questioned why the Appellants could not continue their business using non-CAS species.

[83] The Director testified that the Appellants' application did not establish that the Appellants met the standards of animal welfare and public safety described in the CAS Policy and CAS Procedure. The Director testified that he had concerns about public safety and security, particularly given that the Appellants travel to different venues to display their CAS. He stated that the Appellants' displays involved "unknown venues" and "unknown conditions," which raised questions about public safety and security. He expressed concern about the safety of displaying the python in venues such as schools and churches in remote areas, especially given that the Appellants did not take precautions such as using barriers or cages on stage. In the Director's view, the Appellants had provided no risk analysis and no specific plan addressing public safety or what to do in an emergency.

[84] The Director also testified that he was not satisfied that the Appellants had addressed the risk of salmonella being transmitted from their reptiles to people through physical contact. Although this risk was downplayed by the Appellants, the Director stated that this is a documented risk from reptiles. He stated that the public should not handle reptiles unsupervised, and people should always wash their hands after handling reptiles. He stated that the Appellants' application provided no information about veterinary examinations to ensure that the Appellants' reptiles are disease-free.

[85] Although there is no definition of “public display” in the Permit or in the legislation, the Director explained that “public display” in this case does not mean that people such as the Appellants’ friends or family cannot view the Appellants’ CAS, nor does it mean that the Appellants have to black out windows where their CAS are housed. According to the Director, no “public display” means that the Appellants cannot display their live CAS individuals during their magic shows and exhibits at public venues in B.C.

[86] In addition, the Director explained that his March 28, 2012 letter sets out his decision with respect to the Appellants’ request to publicly display their CAS, but it states that he had not made a decision about the Appellants’ request for authorization to transport their CAS within B.C. In the letter, he gave the Appellants an opportunity to provide more information in support of that request, i.e., photographs that would allow identification of their CAS individuals. He also explained that on June 14, 2012, he issued a further letter to the Appellants, which provided them with instructions on how to get permission to transport their CAS within B.C., but the Appellants had not responded to it.

[87] On cross-examination, the Director confirmed that there is no legal prohibition of public display in the *Act* or the regulations. However, he explained that section 4 of the *Permit Regulation* gives him the authority to impose terms and conditions in permits, and that he may insert terms that are needed for public safety. He stated that he decides each permit application on a case-by-case basis. He stated that, in the Appellants’ case, he considered their specific circumstances, including their experience and how long they had been in business, but he also considered that the Appellants had no satisfactory safety plan, would be travelling in remote communities, and had no information about the public venues they would use or what they would do if an incident occurred.

Panel’s findings

[88] The Panel has reviewed sections 6.4, 6.5, and 19 of the *Act*. Under section 6.4, the minister may make regulations designating a species as a CAS. Under section 6.5 of the *Act*, the minister may, by regulation, “regulate, prohibit and impose requirements” in relation to, among other things, the possession, shipping and transporting of CAS.

[89] Permits to possess CAS are issued under the authority of section 19 of the *Act* and section 4 of the *Permit Regulation*. Section 19(1) of the *Act* states that a regional manager (or a director, who under section 100(1) of the *Act* has the powers of a regional manager) may issue a permit “subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit.” Further, section 19(2) states that “The form and conditions of the permit may be specified by the director.” Similarly, section 4 of the *Permit Regulation* states that a director may issue a permit “on the terms and for the period he or she specifies.” The Panel finds that section 19 of the *Act* and section 4 of the *Permit Regulation* both indicate that the authority to issue permits is a discretionary one, and in issuing a permit, the Director has broad discretion to impose the terms and conditions that are consistent with the objectives of the legislation and that he determines to be appropriate in the circumstances.

[90] Neither the *Act* nor the applicable regulations expressly prohibit the public display of CAS. However, the Panel notes that section 6.4 of the *Act* states that the minister may designate a species as a CAS if the minister considers that a non-native species “poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat” [underlining added]. This language indicates that the designation of a species in the *CAS Regulation* depends on a consideration of the risk the species poses to human health and safety, as well as to property and wildlife or wildlife habitat. Based on the language in section 6.4 of the *Act*, the Panel finds that protecting human health and safety is one of the objectives of section 6.4 of the *Act*. Consequently, the Panel also finds that the need to protect human health and safety is a relevant consideration when reviewing permit applications regarding CAS, and when determining the appropriate terms and conditions for CAS possession permits.

[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.

[92] The Panel finds that the Director’s March 28, 2012 decision letter failed to provide adequate reasons for his decision denying the Appellants’ request for an amendment to allow public display of their CAS. In the letter, the Director referred to the CAS Policy but did not explain how he applied it to the Appellants’ circumstances, and he did not explain what aspects of the Appellants’ public display of their CAS raised concerns in relation to safety or human health. The Panel also finds that neither the Permit nor the Director’s decision letter explains what was meant by no “public display.” It was not until the appeal hearing that the Director explained that the Appellants did not need to black out windows where their CAS are housed, and that the Appellants’ family and friends could view the CAS when visiting the Appellants.

[93] However, at the appeal hearing, the Director explained in detail his reasons for not granting the Permit amendment. Based on the evidence presented at the hearing, the Panel finds that the Director did consider the Appellants’ specific circumstances in making his decision, and that his reasons for denying the amendment were based primarily on concerns about public safety. The Director’s testimony establishes that he did not fetter his discretion in applying the CAS Policy and CAS Procedure to assist in his evaluation of the Appellants’ application. He acknowledged that, despite the Ministry’s general policy against authorizing the public display of CAS except where CAZA criteria are met, he may grant a permit allowing public display of CAS in certain circumstances, even if not all CAZA criteria are met. Indeed, the Director testified that he issued a permit authorizing the public display of CAS to a facility in B.C. that was not CAZA certified, because that facility demonstrated that it was providing public education, was addressing potential risks and concerns with respect to public health and safety, and was ensuring a high quality of care for its animals.

[94] Further, the Panel finds that the Director did not rely solely on the comments provided by the BC SPCA, or others who commented on the Appellants' application, in reaching his decision. The comments provided by the CAS PAC, the BC SPCA, and others, were part of the entire package of material that the Director reviewed in reaching his decision. It is apparent from the evidence that the Director's main concern was that the Appellants' application, and their responses to comments on their application, failed to address some critical issues with respect to public safety and security. In particular, the Appellants provided insufficient information about the venues that they would be using for their public displays and magic shows, how far the audience would be from live CAS individuals, what sort of display cases might be used, or how the Appellants planned to respond in the event of an escape or an emergency situation.

[95] The Panel also finds that any errors in the Director's decision-making process have been remedied by the appeal hearing before the Board, which was conducted as a new hearing of the matter. During the appeal hearing, all parties had the opportunity to make oral submissions with respect to issues of law, fact and jurisdiction. Also, all parties had a full opportunity to call witnesses and present evidence, including new evidence that was not before the Director, and to cross-examine the other party's witnesses. The Panel has considered all of the relevant evidence and submissions in reaching its decision.

[96] Based on the evidence, the Panel finds that there are valid reasons to deny the Appellants' request for authorization to publicly display their CAS. First and foremost are considerations of public safety. The Panel has already concluded above that section 19 of the *Act* and section 4 of the *Permit Regulation* provide the Director with broad discretion to impose permit terms and conditions that are consistent with the objectives of the *Act* and the regulations, including protecting human health and safety from the risks posed by CAS, and that are appropriate in the circumstances. The Panel finds that the evidence presented by the Appellants at the appeal hearing fails to address some critical public safety considerations regarding publicly displaying their pythons. The Panel finds that the Appellants have no specific plans that address the public safety risks, and foreseeable potential emergency situations such as a CAS escape, that could arise in the various venues they would be using.

[97] The Panel is also concerned that the Appellants have not demonstrated adequate control of the python when displaying it to the public in the past. The Panel is especially concerned by the photos showing Mr. Demcak allowing members of the public to touch a large python, and even placing it around another person's neck. There is ample evidence before the Panel that Burmese pythons that are as large as the ones owned by the Appellants are potentially dangerous and have the capacity to injure and kill humans, even if such incidents are rare. Moreover, Mr. Oliver, one of the Appellants' witnesses, who is a very experienced snake handler, stated that he would not allow members of the public to hold a large python as demonstrated in the photo of Mr. Demcak, and that doing so posed a danger to the public because the python's head was not in the handler's control.

[98] Although the Appellants argued that the Permit restriction against publicly displaying their CAS amounts to a complete prohibition on their public shows and their livelihood, the Panel disagrees. The Permit only prohibits the public display of the Appellants' live CAS individuals in B.C. The Appellants are still able to publicly display their collection of dead reptiles, reptile skeletons, skins, and eggs, which they displayed at the appeal hearing. Also, the Appellants can still publicly display their live non-CAS reptiles in B.C. Despite the Appellants' claim that the public is uninterested unless the large python is a part of their show, the Panel finds that Mr. Watson provided evidence that the public is interested in viewing his displays of smaller, non-CAS snakes in various public venues. That evidence supports Ms. Smith's suggestion that the Appellants could potentially use smaller, non-CAS snakes in their public displays.

[99] Moreover, it appears that the Appellants are able to publicly display their CAS reptiles in Alberta and Saskatchewan, and the Appellants are now authorized to transport and ship their CAS for the purposes of leaving and re-entering B.C. While the Appellants' desire and preference may be to publicly display their live CAS in B.C. as well as other provinces, the prohibition in the Permit does not amount to a complete prohibition on conducting their travelling public displays as they did in the past, as it only applies to their live CAS in B.C.

[100] In summary, the Panel finds that the Director exercised his discretion in a reasonable manner and based on relevant considerations, when he denied the Appellants' application for an amendment to allow the Appellants to publicly display their CAS in B.C. Furthermore, based on the evidence presented at the appeal hearing, the Panel finds that there are still valid public safety concerns regarding the Appellants' public display of their live CAS. In these circumstances, the Panel finds that it is in the interests of public safety to continue to include in the Permit a condition that prohibits the Appellants from publicly displaying their live CAS individuals in B.C. If the Appellants had satisfactorily addressed the issues related to public safety, the Panel's decision with respect to public display may have been different.

2. Whether the Director's decision infringed the Appellants' rights under sections 2(b), 6(2)(b), 7, 12, or 15(1) of the *Charter*, and if so, whether the infringement is justified under section 1 of the *Charter*.

[101] The Appellants provided a notice of constitutional questions to the Attorney General of British Columbia and the Attorney General of Canada by registered mail. The Attorney General of B.C. responded to that notice, and provided submissions on the constitutional issues, as discussed below.

[102] In their notice, the Appellants state that they are "seeking a remedy under section 24(1) of the *Charter* on the basis that the Respondent's exercise of discretion" infringed their rights under the following sections of the *Charter*:

- 2(b) - fundamental freedom of expression
- 6(2)(b) - mobility rights of citizens to pursue the gaining of a livelihood in any province

- 7 - right to life, liberty and security of the person
- 12 - right not to be subject to any cruel and unusual treatment or punishment
- 15(1) - right to be equal before and under the law without discrimination
- 52(1) - the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is of no force or effect

[103] In their notice, the Appellants submit that the Director implements prohibitions on their display of their CAS, "without any legislative discretion." They also argue that "the Respondent illegally fabricated fake law and published named prohibitions in the interpretation of the Legislation on the Ministry of Environment Website, thus confusing the public and illegally acting on it." The Appellants further submit that "enforcement of other unreasonable prohibitions and restrictions, concerning ownership, display and transportation of their pets, unjustifiably deprives the Appellant effectively of all basic human rights, depriving the Appellants also of their livelihood, caused them serious health damages and driving them to financial ruin." Finally, the Appellants state that they are not challenging the legislation; they were challenging the "illegal implementation of it and actions of the Respondent."

[104] In terms of remedies, the Appellants requested as follows in their notice:

- Remove all prohibitions and restrictions that were illegally imposed on them.
- Remove all other restrictions and prohibitions that infringe any section or subsection of the *Charter*.
- General and special damages pursuant to section 24(1) of the Constitution Act, 1982. Costs and other relief as the Board may deem just.

[105] The Attorney General submits that the mere showing or displaying of CAS does not constitute artistic expression as contemplated by section 2(b) of the *Charter*, and alternatively, the restrictions placed on the Appellants' public display of their CAS are demonstrably justified as reasonable limits under section 1 of the *Charter*. Specifically, the *CAS Regulation* was enacted to protect the public and the ecosystem from potentially dangerous alien species, and the prohibition on displaying reptiles that could escape or injure the public is rationally connected to the objective of protecting public safety. Furthermore, the Attorney General submits that the Appellants have only been minimally impaired in respect of their Charter rights and their livelihood, as they may still conduct their public displays and magic shows using their non-CAS reptiles.

[106] The Panel has already found that the Permit restriction on public display does not amount to a complete prohibition on the Appellants' ability to conduct their public shows and earn their livelihood as they did in the past, and that they may still conduct their public shows and potentially earn a livelihood within B.C. using their non-CAS reptiles. In addition, the Appellants may still earn a livelihood using their CAS outside of B.C., as they did in the past. In any event, there is insufficient financial evidence before the Panel to make any findings with respect to how the

Appellants' livelihood may have been adversely affected by the Permit. In the circumstances, the Panel finds that the Appellants have not established that the Permit violates their rights under sections 2(b), 6(2)(b), 7, or 12 of the *Charter*.

[107] In addition, the Panel finds that there is no evidence that the Director discriminated against the Appellants contrary to section 15(1) of the *Charter*.

[108] Finally, even if the Panel had found that the Appellants' *Charter* rights were violated, the Panel has already explained above that the Board has no jurisdiction under its enabling legislation to grant general and/or special damages as requested by the Appellants.

3. Whether the Board should order the Director to pay the Appellants' costs associated with the appeal.

[109] The Board has adopted a general policy to award costs in "special circumstances." The Board's policy on awarding costs is set out at pages 45 and 46 of its Procedure Manual, which states 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, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;
- (c) where a party, 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 unreasonably delays the proceeding;
- (e) where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and
- (f) where a party has continued to deal with issues which the Board has advised are irrelevant.

A panel of the Board is not bound to order costs when one of the abovementioned examples occurs, nor does the panel have to find that one of the examples must have occurred to order costs.

[110] The Appellants submit that the actions of the Director, as well as the previous Director and Ministry staff, justify an order of costs against the Director. However, the Panel notes that the Board's authority under section 95(2) of the *Environmental Management Act* is limited to ordering a party to pay all or part of the costs of another party "in connection with the appeal." Thus, the Panel has no authority to consider awarding costs in relation to the previous Director, who did not make the appealed decision, nor does the Board have the jurisdiction to award costs in relation to any actions or inactions by the Director or other Ministry staff that do not relate to the present appeal proceedings.

[111] The Panel has found that the Director failed to provide adequate reasons in his decision letter of March 28, 2012. However, the Panel has also found that, during the appeal hearing, the Director provided detailed public safety reasons for not granting the Permit amendment. The Panel has also found that the Appellants fully participated in the new hearing of the matter by the Board, and that the appeal hearing remedied any errors in the Director's decision-making process. As such, any prejudice that may have been suffered by the Appellants as a result of the Director's decision-making process has been remedied by a full new hearing of the matter by the Board.

[112] The Panel has also considered that, after the appeal was filed, the Director issued another letter on June 14, 2012, that provided the Appellants with greater certainty as to what was required to obtain a Permit amendment to transport their CAS in B.C. The requirements in that letter are specific. Moreover, ultimately, the Director granted that amendment, as well as the request to remove the Black-throated monitor from the CAS listed in the Permit. As a result, the Board did not need to decide two of the issues raised in the appeal.

[113] The Panel recognizes that the Appellants have had a stressful and arduous time trying to continue to publicly display their CAS, ever since the province created a new regulatory regime regarding CAS. The Panel also understands that the Appellants feel that they have been treated unfairly by the Director and the Ministry. However, the Panel also finds that the Appellants' submissions and testimony in regard to the Director and other Ministry staff were, at times, inflammatory and consisted of unsubstantiated allegations regarding the conduct of various Ministry staff. It was inappropriate for the Appellants to make such inflammatory and unsubstantiated allegations in these proceedings.

[114] For all of these reasons, the Panel finds that there are no special circumstances in this case that would warrant ordering the Director to pay the Appellants' costs associated with their appeal to the Board.

DECISION

[115] In making this decision, the Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[116] For the above reasons, the Panel confirms the Director's decision. The appeal is dismissed. In addition, the Appellants' application for costs is denied.

"Gabriella Lang"

Gabriella Lang, Panel Chair
Environmental Appeal Board

"James S. Mattison"

James S. Mattison, Member
Environmental Appeal Board

"Reid White"

Reid White, Member
Environmental Appeal Board

June 14, 2013