Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGAERTS

Applicant
(Responding party to the AGO's motion;
Moving party to the Applicant's motion)

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent
(Moving party to the AGO's motion;
Responding party to the Applicant's motion)

FACTUM OF THE APPLICANT /RESPONDENT

AGO's motion to strike proceedings /evidence; Applicant's motion for advanced costs

DATED: August 28, 2015

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A. AGO'S MOTION

Overview

1. The Respondent of this application, the Attorney General of Ontario [AGO], has brought a motion to dismiss the application on the basis of standing and /or strike evidence from the Application Record and /or convert this application into an action to be set down for a three week trial.

2. At the same time, the applicant, Mr. Jeffery Bogaerts, has brought a motion for advanced funding /interim costs to pay for the balance of these proceedings.

3. This Factum will first respond to the AGO's motion, followed by submissions respecting the motion for advanced funding /interim costs.

AGO's Issue One: Standing of the Applicant

4. The AGO claims that Mr. Bogaerts has neither private nor public interest standing. Mr. Bogaerts respectfully submits that he has both.

A) Private Interest Standing

5. The AGO's challenge of Mr. Bogaerts' private interest standing fails to properly consider the seminal fact set out in his affidavit that he owns and cares for animals. The AGO's motion is also premature by failing to first conduct cross examinations to assess the full scope of Mr. Bogaerts' interest in the matter.

Affidavit of Jeffery Bogaerts sworn July 31, 2014; Application Record vol. 1, Tab 3, p. 18 at ¶2.

6. The fact that Mr. Bogaerts owns and cares for animals makes him subject to the Act, which imposes a number of specific coercive burdens directly upon him, including conduct and housing obligations with respect to the care of his animals (see especially the Act at sections 1 (definition of "Distress"), 11.1 and 11.2 and prescribed "Standards of Care" set out in the Act's regulations).

***Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36* at ss. 1, 11.1 & 11.2; Book of Authorities of the Applicant /Respondent, Tab 1.**

(Standards of Care) O. Reg. 60/09 at ss. 2 & 3; Book of Authorities of the Applicant /Respondent, Tab 2.

7. The nature of this Application is identical to *Cochrane v. Ontario (Attorney General)*, [2007] O.J. No. 1090 (also heard by the Ontario Court of Appeal), in which the applicant challenged the constitutionality of the *Dog Owners' Liability Act*, RSO 1990, c. D.16 [DOL Act] insofar as the Act imposed specific coercive burdens upon owners of "pit-bulls". In that case, the applicant held standing for simply being the owner of a Staffordshire Terrier.

***Cochrane v. Ontario (Attorney General)*, [2008] O.J. No. 4165 (Ont. C.A.); Book of Authorities of the Applicant /Respondent, Tab 5.**

***Cochrane v. Ontario (Attorney General)*, [2007] O.J. No. 1090 (Ont. S.C.J.); Book of Authorities of the Applicant /Respondent, Tab 5.**

***Cochrane v. Ontario (Attorney General)*, Court File No. 05-CV-295948PDI, "Amended Notice of Application" and "Notice of Constitutional Question"; Book of Authorities of the Applicant /Respondent, Tab 5.**

8. The applicant respectfully submits that, if he was denied standing in his case, he would be treated much differently by the courts compared to Ms. Cochrane.

9. The AGO intimates in its submissions that Mr. Bogaerts must first be subject to charges or at least an investigation by the OSPCA to maintain standing, but the case law does not

support this argument. As an animal owner, the *OSPCA Act* applies to Mr. Bogaerts in a manner that does not apply to non-animal owners. The legislative obligations set out in the Act make him "exceptionally prejudiced" in the same manner as Ms. Cochrane was, as a pit-bull owner, exceptionally prejudiced by the DOL Act:

> **48 In some cases, a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if he or she has no right to damages or other coercive relief: see Peter Hogg, Constitutional Law of Canada, 5th ed. looseleaf (Scarborough: Carswell, 2007) vol. 2 at 59-4. A party will not have private standing to pursue such an action when he or she is affected by the statute no differently than any other member of society. However, if the law applies to a party differently from other members of the general public, he or she is said to be "exceptionally prejudiced" and is entitled to seek a declaration of invalidity: Smith v. The Attorney General of Ontario, [1924] S.C.R. 331.**
>
> ***Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057 (Ont. S.C.J.) at ¶48; Book of Authorities of the Applicant /Respondent, Tab 6.**

10. The applicant further respectfully submits that the AGO's submissions at paragraph 5 of its Factum do not apply to the issue of standing in the context of this case. The *Child and Family Services Act* is not an appropriate comparable because it does not impose specific coercive burdens on parents in a manner similar to the "Distress" and "Standards of Care" provisions of the *OSPCA Act*. Meanwhile, *Strickland v. Canada (Attorney General)*, 2013 FC 475, as cited by the AGO in reference to the *Family Law Act* and *Divorce Act*, does not actually support the AGO's submissions. That case states that persons directly or indirectly affected by a coercive burden imposed by "a child support court order" has standing to challenge the associated provisions of the legislation, while persons who are not affected by such an order do not have standing.

> ***Strickland v. Canada (Attorney General)*, 2013 FC 475 (F.C.C.) at ¶32-38; Book of Authorities of the AGO.**

11. A more appropriate comparable to the *OSPCA Act* would be the *Dog Owners' Liability Act* which, as discussed above, imposes legislated obligations on pit-bull owners and, in turn, entitles standing to owners of pit-bulls who wish to challenge that Act.

12. In addition to the AGO's challenge of Mr. Bogaerts' standing being inappropriate, given the evidence in his original affidavit, it is also premature because Mr. Bogaerts has not yet been subject to cross examinations respecting his affidavit. If he had been cross-examined, and the AGO elected to inquire further regarding the direct effect of the legislation on him, Mr. Bogaerts would have provided additional facts supporting his

standing. Such facts are now expressly set out in his affidavit sworn August 28, 2015, and includes the following:

a. Mr. Bogaerts is now a licensed paralegal (as of May 1, 2015) who works at a law firm that specializes in animal welfare law.
b. Mr. Bogaerts provides outdoor housing to his dogs in a form prescribed by the legislation, but it is not what he would voluntarily elect to provide if not for the obligations imposed by the Act; and
c. Mr. Bogaerts provides dental care to his dogs in a manner prescribed by the legislation, but not in the form that he would voluntarily elect to provide if not for the obligations imposed by the Act;

Affidavit of Jeffery Bogaerts sworn August 28, 2015 at ¶3 & 6;
Motion Record of the Applicant /Respondent, Tab 3, p. 8.

13. For the reasons above, Mr. Bogaerts respectfully submits that he is directly affected by the subject legislation.

B) Public Interest Standing

14. In addition to being entitled to private interest standing, Mr. Bogaerts is also entitled to the court's discretion to be granted public interest standing. The factors to consider regarding public interest standing are as follows:

a. Whether there is a serious justiciable issue raised;
b. Whether the applicant has a real stake or a genuine interest in it; and
c. Whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts

Mr. Bogaerts notes that the above test is to be "applied purposively and flexibly" and, depending on the court's finding with respect to private interest standing, Mr. Bogaerts should qualify as a "preferred" public interest litigant due to his entitlement to "standing as of right".

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,
[2012] S.C.J. No. 45 (S.C.C.) at ¶37; Book of Authorities of the Applicant /Respondent, Tab 7.

15. First, the AGO's contention that there is no "serious justiciable issue raised" is impossible to make out because the AGO has presented its submissions regarding this first factor in the context of an incorrect and misguided account of the applicant's case.

Paragraphs 15 to 22 of the AGO's factum purports to set out our arguments on our behalf, and is totally wrong with its misguided speculation. The AGO then concludes, based solely on its incorrect interpretation of our case, that we are "aimed at the wrong target". Furthermore, the AGO's attempt to dismiss this application on such grounds, even if they were correct (and we deny that they are), effectively attempts to transform a motion regarding standing into a motion for summary judgement.

16. The grounds and legal basis of Mr. Bogaerts' application are properly set out in the Notice of Application [NOA] and Notice of Constitutional Question [NOCQ]. Such grounds and basis are *prima facie* tenable in law and respectfully should weigh in favor of granting public interest standing. There is no reference to OSPCA "conduct" in any of the applicant's originating documents.

Notice of Application; Application Record vol. 1, Tab 1, pp. 1.
Notice of Constitutional Question; Application Record vol. 1, Tab 2, p. 10.

17. In addition, paragraphs 15 to 22 of the AGO's factum conspicuously ignores the portions of the application related to criminal law and alleged violations of sections 91 and 92 of the *Constitution Act, 1982*. This part of the application is a straight forward examination of the nature of the impugned provisions of the Act and relies in no way on the affidavit evidence. We note that the AGO has not challenged the merits of this part of the application in any way whatsoever.

Notice of Application at ¶1(c) & 2(x)-2(bb); Application Record vol. 1, Tab 1, pp. 2 & 7.
Notice of Constitutional Question at ¶24-28; Application Record vol. 1, Tab 2, p. 14.

18. Second, Mr. Bogaerts refutes the AGO's contention that he is a mere "busybody". Instead, Mr. Bogaerts respectfully submits that he clearly has a "real stake [and] genuine interest" in the matter.

19. It should be noted immediately that the AGO's contention that the courts aggressively deny standing as a means to conserve judicial resources is incorrect or overstated. While protection of judicial resources is a valid concern, it does not simply trump peoples' access to the courts. The Supreme Court recently clarified this issue as follows:

> **28 These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. *Few people,***

> ***after all, bring cases to court in which they have no interest and which serve no proper purpose.*** **As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court -- A Functional Analysis" (1973), 86 Harv. L. Rev. 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see e.g. Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, at p. 145. [emphasis added]**
>
> ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,*** **[2012] S.C.J. No. 45 (S.C.C.) at ¶28; Book of Authorities of the Applicant /Respondent, Tab 7.**

20. Mr. Bogaerts' "stake or genuine interest" has already been described above as part of his submissions with respect to private interest standing. In addition to these facts, Mr. Bogaerts has also developed a genuine interest in the matter through volunteering in the community to assist vulnerable people affected by the subject legislation; including:

    a. In 2011, he assisted Mr. David Evans, a senior from Smiths Falls, Ontario, with navigating through the court system after he was charged under the *OSPCA Act*, as well as with regards to alleged perjury committed by an OSPCA officer;
    b. In 2012-2013, he assisted Mr. Earl Lake, an elderly and impoverished rural gentleman from the County of Leeds & Grenville, with navigating through the court system after he was charged under the *OSPCA Act*.

    Affidavit of Jeffery Bogaerts sworn August 28, 2015 at ¶5;
    Motion Record of the Applicant /Respondent, Tab 3, pp. 9-10.

    The above examples are further in addition to Mr. Bogaerts' current work as a paralegal in the field of animal welfare law, and obvious engagement with the other affiants featured in the Application Record.

21. It should also be emphasized that, when assessing the nature of a party's interest in a matter, the courts are to take a purposive and flexible approach:

> **43 In Finlay, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In Finlay, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In Borowski, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and tax-payer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in Canadian Council of Churches, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the**

> **refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. T. Roach, Constitutional Remedies in Canada (loose-leaf), at para 5.120).**
>
> ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] S.C.J. No. 45 (S.C.C.) at ¶43; Book of Authorities of the Applicant /Respondent, Tab 7.**

22. Mr. Bogaerts has at least as much interest in the issues of this application as the examples identified by the Supreme Court above. Mr. Bogaerts again notes that the AGO has seemingly rushed to its conclusions without properly examining his stake or interests through cross examinations.

23. Lastly, Mr. Bogaerts respectfully submits that, in all the circumstances, this Application is a reasonable and effective way to bring the issues before the courts. This is especially true given that this type of proceeding enables the production of evidence from multiple affiants demonstrating a variety of contexts to underpin the court's analysis of the constitutional questions.

24. Mr. Bogaerts notes that the AGO's submissions regarding the third element of the analysis (AGO's Factum at ¶12), where the AGO suggests that public interest standing should be denied because "there are *other* reasonable and effective ways to bring these issues before the courts", is an incorrect interpretation of the case law. The Supreme Court recently made this clear:

> **44 [The third] factor has often been expressed as a strict requirement. For example, in Borowski, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there is <u>no</u> other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also Finlay, at p. 626; Hy and Zel's, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, *a reasonable and effective means to bring the challenge to court*. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area. [emphasis added]**
>
> ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] S.C.J. No. 45 (S.C.C.) at ¶44; Book of Authorities of the Applicant /Respondent, Tab 7.**

25. While it is theoretically conceivable to bring some of the issues featured in this application before the courts by way of other proceedings, it is unreasonable to suggest that <u>all</u> of the issues that make up this application would apply to any *one* proceeding

before the Ontario Court of Justice or the Animal Care Review Board. It is therefore respectfully submitted that this application is the most preferable method of addressing all of issues at the same time. At the very least, this application qualifies as "a reasonable and effective means to bring the challenge to court".

26. In addition, it is beneficial to have the issues of this application dealt with by way of a standalone application because it provides an opportunity to bring forward more than one person's story to provide context. It would be a significant disadvantage to assess the seriousness of the unconstitutionality of the *OSPCA Act*, and how it actually affects people's lives (especially vulnerable people), if it was examined on a case by case basis. In this way, this case resembles the context featured in the *Downtown Eastside* case.

27. This case also resembles *Downtown Eastside* insofar as the other affiants are unable or unwilling to assume the roles of applicant. The AGO's assertion that "[a]nyone of these deponents could have brought a challenge to the constitutionality of the impugned legislation […] in a standalone civil application for a declaration" is a baseless submission lacking any proof whatsoever (see AGO's Factum at ¶12). For example:

a. Ms. Anne Probst specifically states that she would be unwilling to assume the role of applicant because she "cannot risk [her] family's wellbeing, the farm's financial health, or [her] children's education to ensure that the issues are heard".

Affidavit of Anne Probst sworn August 18, 2015 at ¶6-9;
Applicant's Responding Motion Record, Tab 2, pp. 5-6.

b. Ms. Jessica Johnson's affidavit clearly illustrates her health conditions that severely limit her mobility. In addition, she states that she lives off of a fixed income (Canada Post pension) which will inevitably restrict her financial means.

Affidavit of Jessica Johnson sworn August 6, 2014 at ¶2-3;
Application Record vol. 3, Tab 4, pp. 479-480.

c. Mr. Menno Streicher's affidavit states that, as a person of the old order Amish faith, he is prohibited from challenging the authority of the state and is specifically prohibited on religious grounds from bringing "an application for a remedy under the Canadian Charter of Rights and Freedoms, or any other law".

Affidavit of Menno Streicher sworn August 13, 2014 at ¶2-4;
Application Record vol. 3, Tab 5, pp. 597-598.

d. In addition, Mr. Bogaerts' lawyer received a letter purportedly from three other Amish farmers who have also been affected by the Act.

Affidavit of Jeffery Bogaerts sworn February 18, 2015 at ¶4;
Supplemental Application Record, Tab 3(c), pp. 15-17.

The other three affiants provide no evidence that they have the will or the means to withstand the possible financial consequences of assuming the role of the applicant.

28. While it is clear that all of the affiants are concerned about the effects of the *OSPCA Act*, as demonstrated by the contents of their affidavits, or even solely on the basis that they were motivated enough to tender evidence in support of this application, it is unreasonable to conclude that any of them are prepared to assume the financial risks associated with being a party.

29. Lastly, with respect to this issue, we respectfully submit that the fact that the impugned provisions of the *OSPCA Act* have never before been the subject of constitutional scrutiny demonstrates, in itself, that other means to bring such questions before the courts are, at the very least, impractical or unlikely (note: the impugned sections of the Act have been in force for over six years, with some sections being in force for decades).

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 **(version Nov. 27, 2008 to Feb. 28, 2009); Book of Authorities of the Applicant /Respondent, Tab 3.**

AGO's Issue Two: The Applicant's Evidence

30. The AGO has moved to strike all of the applicant's evidence for supposedly being "aimed at the wrong target". These submissions ignore the grounds set out in the NOA and legal basis set out in the NOCQ – both of which properly identify the impugned sections of the *OSPCA Act* and neither of which complain about improper conduct of the OSPCA. As stated above, the AGO's entire submission on this point is baselessly speculative and predicated on a made-up version of the applicant's case.

Notice of Application; Application Record vol. 1, Tab 1, pp. 1.
Notice of Constitutional Question; Application Record vol. 1, Tab 2, p. 10.

31. As will be set out in greater detail below, Mr. Bogaerts agrees to strike some of the contents of the affidavits if the court deems it necessary or preferable to do so at this stage of the proceedings. Having said this, it should go without saying that it is not unusual for an affidavit to contain information that is not necessary directly relevant to the proceedings, but is nevertheless helpful to produce a coherent narrative and context to the affidavit.

AGO's Issue Three: Trial of an Issue and Striking Portions of the Affidavits

32. The AGO has elected to attack the affiants evidence in minute detail, regardless of whether or not any particular detail of the affiants' stories are to be relied upon as part of the applicant's submissions regarding the application proper.

33. Mr. Bogarts recognizes that some parts of the affidavits do express opinion, hearsay and may not be relevant to the proceedings, but he also respectfully submits that such statements frequently form part of affidavit evidence in order to produce a coherent document.

34. If the affidavits are pulled apart in the manner proposed by the AGO, the narratives and contexts may become incomprehensible – which would not benefit the court and would prejudice the applicant.

35. Mr. Bogaerts respectfully submits that the affidavits should remain 'as is' at this stage of the proceedings, and only be subject to dissection and striking out if Mr. Bogaerts ultimately attempts to rely on inadmissible evidence. However, if this court deems it necessary or preferable to deal with this issue now, Mr. Bogaerts will agree to narrow the issues by striking out some portions of the affidavits entirely, and other portions within specified limitations, as set out in the following tables.

36. For ease of reference, the following tables are set out in the same format as the tables featured in the AGO's Notice of Motion.

Affidavit of Jeffery Bogaerts sworn July 31, 2014

AGO Item #	Para. #	Applicant's position
1	3	Agree to strike entire paragraph
2	5	Agree to strike "While such a mission and goals may be noble in nature, I also believe that it demonstrates ideological activism on behalf of the OSPCA."
3	6	Agree to strike "I believe that such goals are extreme and indicative of an activist agenda of the OSPCA. Such goals are similar to those of other activist groups, such as People for the Ethical Treatment of Animals [PETA]. For example, a copy of PETA's Basic Care Standards for Dairy-Farmed Cows is attached as Exhibit "C" to this my affidavit."
4	7	Agree to strike "Such MOUs effectively result in some

		individuals being treated differently under the law by the OSPCA."
5	8	Agree to strike "In other words, facilities that do not register and disclose private information (which they are not legally obligated to disclose) will be treated differently under the law."
6	9	Agree to strike "Unlike every other agency in Ontario with police powers, the OSPCA is a private organization with no government oversight."
7	10	Agree to strike entire paragraph except those portions whish describe and otherwise qualify the exhibit evidence
8	12	Agree to strike "I believe that such a situation with a police agency, with no government financial backing, creates a dangerous situation where decisions of the OSPCA through the course of their investigations may be prone to financial influence."
9	13	Do not agree to strike. Statement simply describes OSPCA publication.
10	14	Agree to strike "I believe that these two components of the OSPCA are in an inherent and ongoing conflict of interest with each other, and it inevitably leads to situations where seizures of animals may be influenced by financial interests of the OSPCA."
11	15	Agree to strike "I believe that these offence provisions are, in pith and substance, criminal offences." and "By enacting these provisions through provincial law, such sections of the Act deny individuals the procedural protections of the criminal law, while convictions under these provisions nevertheless impart the stigma of a criminal offence."
12	Exhibit "C"	Agree to strike

Affidavit of Jeffery Bogaerts sworn February 18, 2014

AGO Item #	Para. #	Applicant's position
1	4; Exhibit "C"	Do not agree to strike. Statement merely describes document and how it came into applicant's possession.

Affidavit of Jessica Johnson sworn August 6, 2014

AGO Item #	Para. #	Applicant's position
1	15-17; Exhibits "C" & "E"	Agree to strike except insofar and the statements and evidence demonstrate Ms. Johnson's particular vulnerabilities and hardship experienced as a result of the *OSPCA Act*. Note: the applicant has no intention to question or attack completed proceedings.
2	20-22; Exhibits "I" & "K"	Agree to strike except insofar and the statements and evidence demonstrate Ms. Johnson's particular vulnerabilities and hardship experienced as a result of the *OSPCA Act*. Note: the applicant has no intention to question or attack completed proceedings.
3	23	Do not agree to strike. Statement merely expresses a firsthand account of affiant's feelings.
4	24	Agree to strike

Affidavit of Menno Streicher sworn August 13, 2014

AGO Item #	Para. #	Applicant's position
1	4-6	Do not agree to strike. Statements merely state affiant's subjective religious beliefs and source of his religious beliefs.
2	13	Agree to strike "None of the orders served any purpose, because we were already providing adequate care to all of our dogs."
3	14; Exhibits "D" & "E"	Agree to strike except insofar and the statements and evidence demonstrate Mr. Streicher's particular vulnerabilities and hardship experienced as a result of the *OSPCA Act*. Note: the applicant has no intention to question or attack completed proceedings.
4	15-17; Exhibit "F"	Agree to strike except insofar and the statements and evidence demonstrate Mr. Streicher's particular vulnerabilities and hardship experienced as a result of the *OSPCA Act*. Note: the applicant has no intention to question or attack completed proceedings.
5	18	Agree to strike "I verily believe that the OSPCA targeted our kennel, starting at the top with a Senior Bishop, in order to set an example to others within the Old Order Amish Community."

Affidavit of Anne Probst sworn August 13, 2014

AGO Item #	Para. #	Applicant's position
1	3, Exhibit "A"	Do not agree to strike. The notes were prepared by the affiant at the time of the events.
2	23-25 Exhibit "E"	Do not agree to strike. There is no attack on the proceedings, which were favourable to the affiant in any event.
3	26	Do not agree to strike. There is no legal argument.

Affidavit of Dr. Lawrence Gray sworn August 6, 2014

AGO Item #	Para. #	Applicant's position
1	5	Agree to strike "were too impatient".
2	7	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any).
3	8-11	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any).
4	13, 14	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any).
5	15	Do not agree to strike. Paragraph is a statement of fact.
6	16	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any). Agree to strike "after unsubstantiated accusations".
7	17	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any). Agree to strike entire last sentence.
8	18	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided in the affidavit and cross-examinations (if any). Do not agree to strike. Not hearsay.
9	19	Applicant seeks to qualify affiant as an expert on the subject of animal health and welfare based on the information provided

		in the affidavit and cross-examinations (if any). Agree to strike entire paragraph except "I believe that animals' best interests are often not well served by the OSPCA policy and procedures".

Affidavit of Carl Noble sworn August 13, 2014

AGO Item #	Para. #	Applicant's position
1	8	Do not agree to strike. Paragraph is a statement of fact and affiant is in a position to speak on behalf of the GBHS.
2	14	Agree to strike entire paragraph.
3	15	Agree to strike entire paragraph.
4	17	Do not agree to strike. Paragraph is a statement of fact and affiant is in a position to speak on behalf of the GBHS.
5	19	Agree to strike entire paragraph.
6	23	Do not agree to strike. Paragraph is a statement of fact and affiant is in a position to speak about his personal experiences on the provincial OSPCA Board.
7	26	Agree to strike "I verily believe that this section was omitted deliberately in order to keep an activist-type agenda secret from its own board members".
8	27	Agree to strike last two sentences of paragraph.

37. Lastly, with respect to the AGO's issue three, Mr. Bogaerts does not agree that this matter should be converted to an action for hearing of a three week trial.

38. It is respectfully submitted that if this court agrees to convert this matter into an action, the Applicant should receive advanced funding /interim costs necessary to carry out a three week trial.

B. APPLICANT'S MOTION FOR ADVANCED FUNDING

PART I -THE FACTS

39. This application has proceeded to the point where Mr. Bogaerts has filed and served the applicant's Application Record of more the 1000 pages, with affidavits from eight

individuals. Up to this point, Mr. Bogaerts' legal fees of just over $40,000.00 have been paid by third parties.

Affidavit of Jeffery Bogaerts sworn August 28, 2015 at ¶7;
Motion Record of the Applicant /Respondent, Tab 3, p. 10.

40. The third party funding is now exhausted, and Mr. Bogaerts cannot afford to pay for the remainder of this litigation. The litigation is therefore unable to proceed if an order for advanced funding is not provided.

Affidavit of Jeffery Bogaerts sworn August 28, 2015 at ¶8;
Motion Record of the Applicant /Respondent, Tab 3, p. 10.

41. The grounds set out in the NOA and legal basis set out in the NOCQ raise issues that transcend Mr. Bogaerts' individual interests and are of public importance. Although this should be obvious, the breadth of the greater public interest is demonstrated by the various affidavit evidence contained in the Application Record and Supplemental Application Record.

Notice of Application; Application Record vol. 1, Tab 1, pp. 1.
Notice of Constitutional Question; Application Record vol. 1, Tab 2, p. 10.

42. The issues raised by this application have not been resolved in any previous case.

43. In addition, while there may be other individuals who are willing to assume the role of applicant, there are no alternatives willing to assume the associated financial risks, no matter how remote.

Affidavit of Anne Probst sworn August 18, 2015 at ¶6-9;
Motion Record of the Applicant /Respondent, Tab 2, pp. 5-6.

44. If this matter cannot proceed to a hearing due to the finances of the applicant, or other potential applicants, all of the efforts and work invested in this application to date, including over $40,000.00 in legal fees, will be wasted while answers to the applicant's questions will remain outstanding.

PART II – THE LAW

45. Mr. Bogaerts respectfully submits that this application raises fundamental questions about individual freedoms and the limits of government that should be tested in the courts.

46. The Supreme Court has set out the criteria that should be present when the court exercises its discretion to order advanced funding /interim costs:

> **a. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.**
>
> **b. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.**
>
> **c. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.**
>
> ***British Columbia (Minister of Forests) v. Okanagan Indian Band,***
> **[2003] S.C.J. No. 76 (S.C.C.) at ¶40; Book of Authorities of the Applicant /Respondent, Tab 8.**

47. As stated by the Supreme Court:

> **The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid".**
>
> ***Courts of Justice Act*, R.S.O. 1990, c. C.43 at s. 131(1);**
> **Book of Authorities of the Applicant /Respondent, Tab 4.**
>
> ***British Columbia (Minister of Forests) v. Okanagan Indian Band,***
> **[2003] S.C.J. No. 76 (S.C.C.) at ¶35; Book of Authorities of the Applicant /Respondent, Tab 8.**

48. The rationale behind awarding such funding /costs has been recognized in a number of cases:

> **28 [Referring to the importance of ensuring that "ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole" at ¶27] Courts have referred to the importance of this objective on numerous occasions. In Canadian Newspapers Co. v. Attorney-General of Canada (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), Osler J. opined that "it is desirable that bona fide challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6). […] In Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 60 O.R. (2d) 486 (H.C.J.), White J. held that "it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means" (p. 526), […] Referring to both Canadian Newspapers and Lavigne in Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 467 (S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy**

and ... making Charter litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective"

British Columbia (Minister of Forests) v. Okanagan Indian Band,
[2003] S.C.J. No. 76 (S.C.C.) at ¶27-28; Book of Authorities of the Applicant /Respondent, Tab 8.

49. More recently, the above principles were applied in relation to a challenge of the constitutionality of amendments to the *Mental Health Act*. In that case, while the application was unsuccessful, the learned judge nevertheless found that, if the applicant had sought advanced funding or interim costs, it probably would have been awarded. As a result, the court awarded costs to the unsuccessful litigant in the amount of $100,000.00.

Thompson et al. v. Attorney General of Ontario **(2013), 118 O.R. (3d) 34 (Ont. S.C.J.) at ¶19-20; Book of Authorities of the Applicant /Respondent, Tab 9.**

50. Mr. Bogaerts seeks similar funding to that of the *Thompson* case in the amount of $100,000.00 or more if the AGO is successful with its motion to turn this application into an action and conduct a three week trial.

51. The evidence shows that there is no question that Mr. Bogaerts cannot afford to pay for the litigation, now that third party funding has been exhausted. The nature and scope of the application is such that there is no practical alternative to bring the matter to a hearing. In other words, this application cannot afford to continue without advanced funding /interim costs.

52. The application and grounds set out in the NOA and legal basis set out in the NOCQ are *prima facie* tenable in law, meritorious and /or "at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because [Mr. Bogaerts] lacks financial means".

Notice of Application; Application Record vol. 1, Tab 1, pp. 1.
Notice of Constitutional Question; Application Record vol. 1, Tab 2, p. 10.

53. Lastly, the issues raised in this application clearly transcend Mr. Bogaerts' individual interests, are of public importance, and have never been tested before by the courts.

54. Pursuant to the above submissions, it is respectfully submitted that this is an appropriate case for the court to exercise its discretion and award advanced funding /interim costs to the applicant.

55. In the alternative, the applicant respectfully requests that an order be provided to disentitle the AGO from later seeking costs in the event that this application is unsuccessful. While such an order may be novel, it is really no different in nature to that of an order for advanced funding /interim costs since both orders entail a decision on costs before the completion of the matter. Such an order is especially important in this case if this court denies Mr. Bogaerts' standing and an alternative applicant must be sought (Note: Ms. Anne Probst has already affirmed that she would assume the role of applicant provided that she is shielded from potential costs consequences in the future).

Affidavit of Anne Probst sworn August 18, 2015 at ¶6-9;
Motion Record of the Applicant /Respondent, Tab 2, pp. 5-6.

56. We note that costs would not likely be awarded to the AGO in any event, even if this application was unsuccessful, given that "test cases or public interest litigation are traditionally dealt with in the court's discretion to not award costs against an unsuccessful public interest litigant" [emphasis added]. In other words, an order to deny future costs would not depart measurably from the normal findings of the court at the end of this type of proceeding. Just the same, we respectfully submit that such an order is necessary now to avoid the inevitable 'chill' that arises from fear of potential costs consequences, no matter how remote, in the event that a substitute applicant must be sought.

***Thompson et al. v. Attorney General of Ontario* (2013), 118 O.R. (3d) 34 (Ont. S.C.J.) at ¶12;**
Book of Authorities of the Applicant /Respondent, Tab 9.

PART III – ORDER REQUESTED

57. The applicant respectfully requests:

a. An order dismissing the AGO's motion regarding standing;

b. In the alternative, an order granting leave to add or substitute a new applicant who has had a direct interaction with the OSPCA;

c. An order dismissing the AGO's motion to strike evidence;

d. In the alternative, an order striking the applicant's evidence only to the extent that the applicant sets out above;

e. An order dismissing the AGO's motion to convert this application into an action;

f. In alternative, an order granting advance funding /interim costs to the applicant in order to carry out a three week trial;

g. An order granting the applicant $100,000.00 in advanced funding /interim costs to enable the application to proceed;

h. In the alternative, an order disentitling the AGO from later seeking costs against the applicant in the event that the application is unsuccessful;

i. Costs of this Motion; and

j. Such further and other relief that this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF AUGUST, 2015.

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Kurtis R. Andrews

SCHEDULE "A"
AUTHORITIES CITED

Legislation

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 at ss. 1, 11.1 & 11.2.

(Standards of Care) O. Reg. 60/09 at ss. 2 & 3.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 (version Nov. 27, 2008 to Feb. 28, 2009).

Ontario Courts of Justice Act, R.S.O. 1990, c. C.43 at ss. s. 131(1).

Jurisprudence

Cochrane v. Ontario (Attorney General), [2008] O.J. No. 4165 (Ont. C.A.).

Cochrane v. Ontario (Attorney General), [2007] O.J. No. 1090 (Ont. S.C.J.).

Cochrane v. Ontario (Attorney General), Court File No. 05-CV-295948PDI, "Amended Notice of Application" and "Notice of Constitutional Question".

Bedford v. Canada (Attorney General), [2010] O.J. No. 4057 (Ont. S.C.J.).

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] S.C.J. No. 45 (S.C.C.).

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Thompson et al. v. Attorney General of Ontario (2013), 118 O.R. (3d) 34 (Ont. S.C.J.).

JEFFREY BOGAERTS
Applicant

-and-

ATTORNEY GENERAL OF ONTARIO
Respondent

Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT PERTH, ONTARIO

FACTUM OF THE APPLICANT /RESPONDENT

AGO'S MOTION TO STRIKE PROCEEDINGS /EVIDENCE; APPLICANT'S MOTION FOR ADVANCED COSTS

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