

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
BETWEEN :**

**JEFFREY BOGAERTS**

Applicant

-and-

**THE ATTORNEY GENERAL OF ONTARIO**

Respondent

---

**Application Record  
VOLUME I**

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**THE ATTORNEY GENERAL OF ONTARIO**  
Constitutional Law Branch  
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Toronto, ON M7A 2S9

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Counsel for the Respondent,  
The Attorney General of Ontario

To: Kurtis R. Andrews

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**TAB 1**



Court File No. 749/13

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGARTS

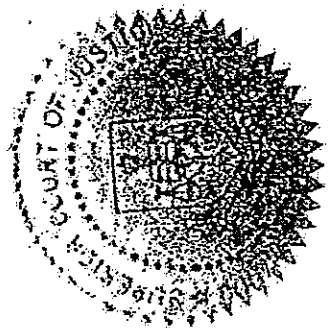
Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

### NOTICE OF APPLICATION



TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come for a hearing on a date and at a time to be set by the Registrar of the Superior Court of Justice at Perth Courthouse, 43 Drummond Street east, Perth, Ontario, K7H 1G1.

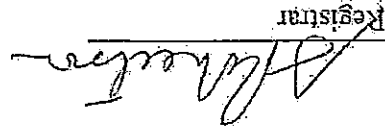
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TO: The Attorney General of Ontario  
Public Law Division  
Constitutional Law Branch  
7th Floor, 720 Bay Street  
Toronto, Ontario, M5G 2K1

Address of court office:  
Perth Courthouse  
43 Drummond Street East  
Perth, Ontario, K7H 1G1

Issued by:   
Local Registrar

Date: 04.18.2013

- a. The grounds for the application are:
  - 1. The applicant makes application for:
    - a. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"] that sections 1, 11, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 [the "*OSPCA Act*"], as amended, violate section 7 of the *Charter* and therefore are of no force or effect;
    - b. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Charter* that sections 11.4, 12, 13 and 14 of the *OSPCA Act*, as amended, violate section 7 and 8 of the *Charter* and therefore are of no force or effect;
    - c. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, and section 52(1) of the *Constitution Act, 1982*, that the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, as amended, violate sections 91 and 92 of the *Constitution Act, 1982*, and therefore are of no force or effect; and
    - d. Such further and other relief as counsel may advise and this Honourable Court may permit
  - 2. The grounds for the application are:
    - a. Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined, under section 7 of the *Charter*;
    - b. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;
    - c. The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally vague in that it does not provide sufficient guidance for legal debate;

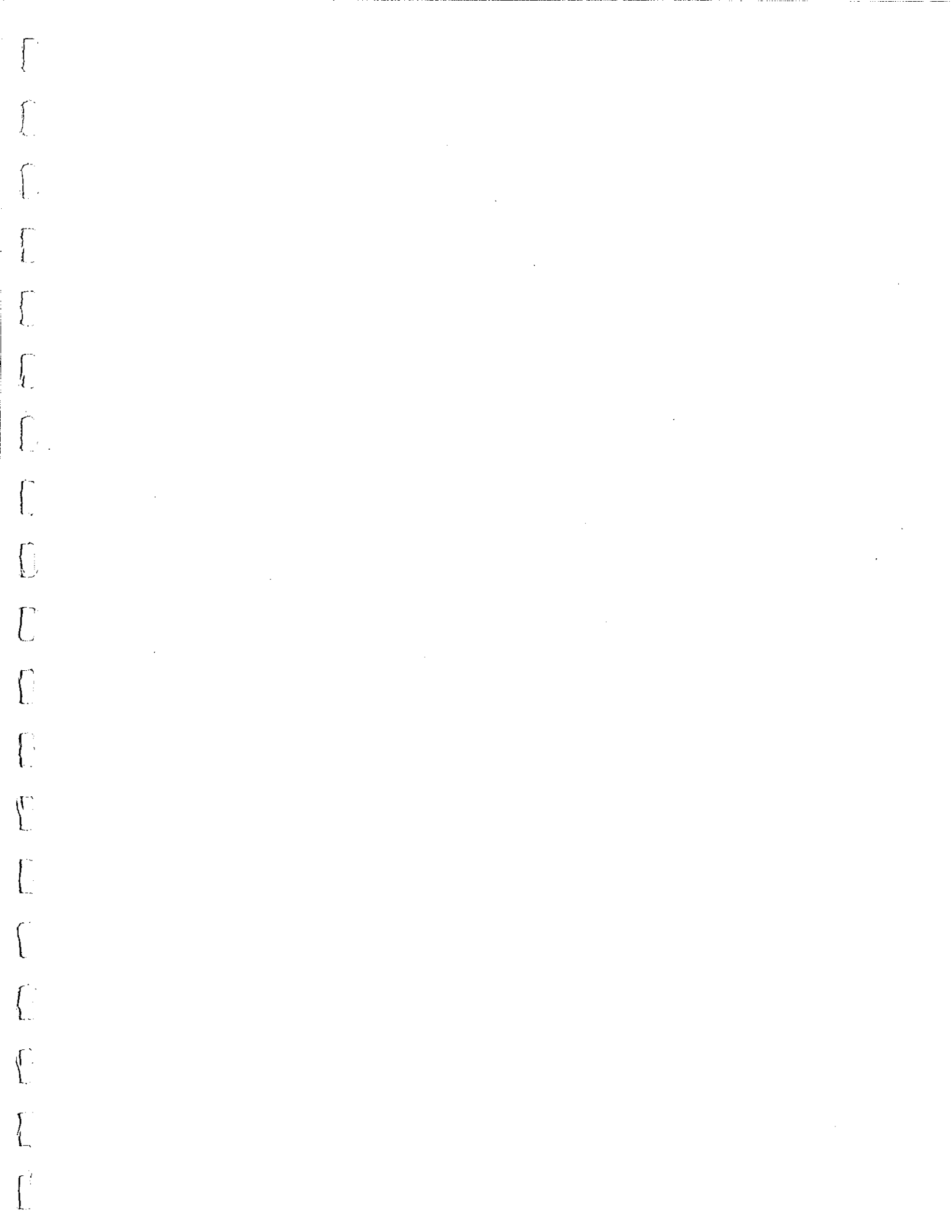
APPLICATION

- v. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, an organization which is also trusted to raise its own revenues to fund its investigations and salaries of the same Officers, and which raises said revenues by selling seized animals and other products of its investigations, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- vi. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, and the OSPCA and/or its Officers are not subject to:
  - i. *Police Services Act*, R.S.O. 1990, c. P.15 and regulations passed thereunder;
  - ii. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31 and regulations passed thereunder;
  - iii. *Ombudsman Act*, R.S.O. 1990, c. O.6 and regulations passed thereunder;
 it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- vii. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, without statutorily prescribed restraints afforded to police officers in Ontario, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- viii. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, with no public oversight, accountability or transparency, it does not accord with principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- ix. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Ontario residents as little as possible; chosen are not proportional to the limits put on peoples' rights and do not impair the *OSPCA Act* cannot be saved by section 1 of the *Charter* because the means Wartanless search and seizure powers provided by sections 11.4, 13 and 14 of section 8 of the *Charter*;
- x. makes judicial authorization impracticable, it is not reasonable and violates



- c. The Affidavit of Carl Noble, to be sworn, and the exhibits annexed thereto;
  - b. The Affidavit of Dr. Lawrence Gray, to be sworn, and the exhibits annexed thereto;
  - a. Affidavit of the Applicant, Jeffrey Bogarts, to be sworn, and the exhibits annexed thereto;
3. The following documentary evidence will be used at the hearing of the application:

- cc. Such further and other grounds as counsel may advise and this Honourable Court may permit.
- bb. The severity of penalties prescribed by section 18.1 of the *OSPCA Act* further characterizes the Act as criminal law; and
- aa. Sections 11.1, 11.2 and 18.1 of the *OSPCA Act* effectively duplicates the "Cruelty to Animals" section of the *Criminal Code*, namely sections 445.1 to 447.1, and said overlap supports an inference that the *OSPCA Act* serves a criminal law purpose;
- z. The *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the Act, exposes Ontario residents to criminal prosecution while bypassing the protection provided by criminal law and procedure;
- y. To the extent that the *OSPCA Act* intrudes into criminal law, an area which is the exclusive jurisdiction of the Parliament of Canada, the Act is *ultra vires* the Province of Ontario for violating sections 91 and 92 of the *Constitution Act, 1982*;
- x. The pith and substance of the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the Act, is of a moral issue related to criminal law, and constitutes an attempt by the province of Ontario to legislate in the area of criminal law;
- w. Conferral of police powers upon Officers of a private organization, as prescribed by section 11 of the *OSPCA Act*, violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;



**TAB 2**



IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, YOU OR YOUR LAWYER MUST, IN ADDITION TO SERVING YOUR NOTICE OF APPEARANCE, SERVE A COPY OF THE EVIDENCE ON THE APPLICANT'S LAWYER OR, WHERE THE APPLICANT DOES NOT HAVE A LAWYER, SERVE IT ON THE APPLICANT, AND FILE IT, WITH PROOF OF SERVICE, IN THE COURT OFFICE WHERE THE APPLICATION IS TO BE HEARD AS SOON AS POSSIBLE, BUT AT LEAST FOUR DAYS BEFORE THE HEARING.

IF YOU WISH TO OPPOSE THIS APPLICATION, TO RECEIVE NOTICE OF ANY STEP IN THE APPLICATION OR TO BE SERVED WITH ANY DOCUMENTS IN THE APPLICATION, YOU OR AN ONTARIO LAWYER ACTING FOR YOU MUST FORTHWITH PREPARE A NOTICE OF APPEARANCE IN FORM 38A PRESCRIBED BY THE RULES OF CIVIL PROCEDURE, SERVE IT ON THE APPLICANT'S LAWYER OR, WHERE THE APPLICANT DOES NOT HAVE A LAWYER, SERVE IT ON THE APPLICANT, AND FILE IT, WITH PROOF OF SERVICE, IN THIS COURT OFFICE, AND YOU OR YOUR LAWYER MUST APPEAR AT THE HEARING.

THIS APPLICATION WILL COME FOR A HEARING ON A DATE, AND AT A TIME TO BE SET BY THE REGISTRAR OF THE SUPERIOR COURT OF JUSTICE AT PERTH COURTHOUSE, 43 PRINCE OF WALES STREET EAST, PERTH, ONTARIO, K7H 1G1.

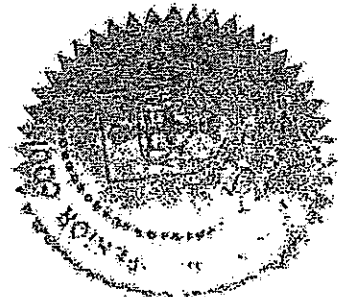
A LEGAL PROCEEDING HAS BEEN COMMENCED BY THE APPLICANT. THE CLAIM MADE BY THE APPLICANT APPEARS ON THE FOLLOWING PAGE.

TO THE RESPONDENT

**AMENDED NOTICE OF APPLICATION**

Respondent

ATTORNEY GENERAL OF ONTARIO



BETWEEN:

JEFFREY BOGARTS

-and-

Registrar, Superior Court of Justice

Pursuant to Rule: 26.02(1)

Amended this 24th day of February, 2017

ONTARIO  
SUPERIOR COURT OF JUSTICE

Court File No. 749/13

2V 13-749 11

Issued by: *A. A. [Signature]*  
Local Registrar

Address of court office:  
Perth Courthouse  
43 Dunnington Street East  
Perth, Ontario, K7H 1G1

TO: The Attorney General of Ontario  
Public Law Division  
Constitutional Law Branch  
7th Floor, 720 Bay Street  
Toronto, Ontario, M5G 2K1

Date: October 18, 2013

APPLICATION

1. The applicant makes application for:

- a. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Canadian Charter of Rights and Freedoms* [the "Charter"] that sections 7, 11, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c. O.36 [the "OSPCA Act"], as amended, violate section 7 of the *Charter* and therefore are of no force or effect;

- b. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Charter* that sections 11.4, 11.4.1, 12(6), 13, and 14(D) (except subsection 14(1)(a)) of the *OSPCA Act*, as amended, violate section 7 and/or 8 of the *Charter* and therefore are of no force or effect;

- c. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, and section 52(1) of the *Constitution Act, 1982*, that the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1(D)(c) of the *Act*, as amended, violate sections 91 and 92 of the *Constitution Act, 1982*, and therefore are of no force or effect; and

- d. Such further and other relief as counsel may advise and His Honourable Court may permit.

2. The grounds for the application are:

- a. Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*;

- b. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;

- c. The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally vague in that it does not provide sufficient guidance for legal debate;

- d. ~~The definition of "distress" in section 1 of the OSPCA Act does not provide fair notice to the residents of Ontario respecting minimally acceptable care and treatment of animals in Ontario;~~
- e. ~~The definition of "distress" in section 1 of the OSPCA Act does not provide sufficient direction to those enforcing the law to prevent arbitrary exercise of their discretion;~~
- f. ~~The definition of "distress" in section 1 of the OSPCA Act does not provide sufficient direction to those issuing warrants or orders, as authorized by the Act, to prevent arbitrary exercise of their discretion;~~
- g. ~~The definition of "distress" in section 1 of the OSPCA Act is unconstitutionally overbroad in that it may capture capture acceptable and/or normal care and treatment of animals in Ontario;~~
- h. ~~The definition of "distress" in section 1 of the OSPCA Act violates section 7 of the Charter and cannot be saved under section 1 of the Charter because it is not rationally connected to the purpose of the legislation and does not impair the rights of Ontario residents as little as possible;~~
- i. ~~To the extent that sections 1, 11.2(1), 11.2(2), 12, 12.1, 13, and 14 of the OSPCA Act rely on and incorporate the definition of "distress" from section 1 of the Act, these sections are unconstitutionally vague and overbroad and cannot be saved by section 1 of the Charter;~~
- j. ~~To the extent that section 12 of the OSPCA Act relies on and incorporates the definition of "distress" from section 1 of the Act, it is unconstitutionally vague and overbroad and, in turn, violates sections 7 and 8 of the Charter because it fails to adequately specify an appropriate standard for the issuance of warrants;~~
- k. ~~To the extent that section 12 of the OSPCA Act relies on and incorporates the definition of "distress" from section 1 of the Act, it cannot be saved by section 1 of the Charter because it is not rationally connected to the purpose of the legislation, the means chosen are not proportional to the rights put on people, rights, and it does not impair the rights of Ontario residents as little as possible;~~



1. Sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* grant powers of search and seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by section 7 and/or 8 of the *Charter*.
- m. To the extent that section 11.4 and 11.4.1 of the *OSPCA Act* confers upon OSPCA Officers the power to search private property and demand production of private property located thereon at the complete discretion of the Officer, including property where a dwelling unit may be located, either alone or accompanied by any number of other persons as he or she considers advisable, and irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*.
- n. To the extent that section 13(6) of the *OSPCA Act* confers upon OSPCA Officers the power to enter private property at the complete discretion of the Officer, including a dwelling unit, at any hour of the day or night into the future forever, either alone or accompanied by any number of other persons as he or she considers advisable, at any time and irrespective of any situation of urgency, it is not reasonable and violates section 8 of the *Charter*.
- o. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer, and irrespective of taking any reasonable steps to confirm with a veterinarian that an animal is in distress, and irrespective of whether there is any situation of urgency which makes the obtaining of a search warrant impracticable, it is not reasonable and violates section 8 of the *Charter*.
- p. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, and an appeal of an Order issued under section 13(1) expires after only 5 business days, and while the entry powers prescribed under 13(6) go on forever, it is not reasonable and violates section 8 of the *Charter*.

cc. Such further and other grounds as counsel may advise and this Honourable Court

may permit.

3. The following documentary evidence will be used at the hearing of the application:

a. Affidavits of the Applicant, Jeffrey Bogarts, to be sworn, and the exhibits annexed thereto; and

b. ~~The Affidavit of Dr. Lawrence Gray, to be sworn, and the exhibits annexed~~

~~thereto;~~

c. ~~The Affidavit of Carl Noble, to be sworn, and the exhibits annexed thereto;~~

d. ~~The Affidavit of Viola Stetson, to be sworn, and the exhibits annexed thereto;~~

e. ~~The Affidavit of Jessica Johnson, to be sworn, and the exhibits annexed thereto;~~

f. ~~The Affidavit of Anne Probst, to be sworn, and the exhibits annexed thereto;~~

g. ~~The Affidavit of Cynthia Lajoie, to be sworn, and the exhibits annexed thereto;~~

and

h. Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

DATE: October 18, 2013  
AMENDED: January 23, 2017

KURTIS R. ANDREWS

Lawyer

P.O. Box 12032 Main P.O.

Ottawa, Ontario, K1S 3M1

Kurtis R. Andrews (LSUC # 5797AK)

Tel: 613-565-3276

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E-mail: kurtis@kurtisandrews.ca

Lawyer for the Applicant

**JEFFREY BOGALERTS**  
Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**  
Respondent

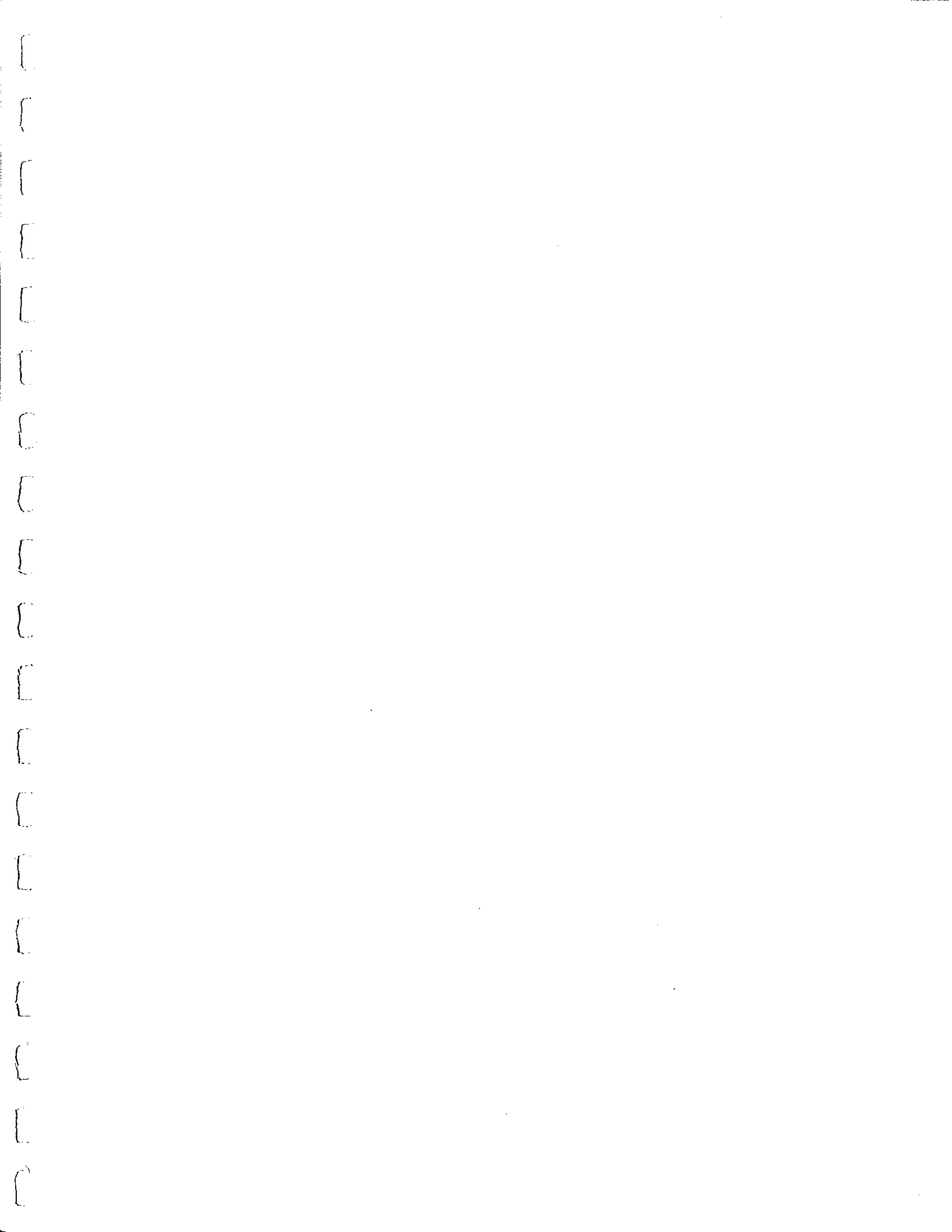
Court File No. 749/13

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT**  
**PERTH, ONTARIO**

**AMENDED NOTICE OF APPLICATION**

**KURTIS R. ANDREWS**  
Lawyer  
P.O. Box 12032 Main P.O.  
Ottawa, Ontario, K1S 3M1  
**Kurtis R. Andrews (LSUC # 57974K)**  
Tel: 613-565-3276  
Fax: 613-565-7192  
email: [kurtis@kurtisandrews.ca](mailto:kurtis@kurtisandrews.ca)  
Lawyer for the Applicant.



**TAB 3**



2. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;

1. The following is the legal basis for the constitutional question:  
Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*;

1. The following are the material facts giving rise to the constitutional question:  
A copy of the Notice of Application dated October 18, 2013 is attached and sets out the relevant facts and evidentiary basis of the Application.

The question is to be argued on a date and at a time to be set by the Registrar of the Superior Court of Justice at the Perth Courthouse, 43 Drummond Street east, Perth, Ontario, K7H 1G1.  
The Applicant intends to question the constitutional validity of sections 1, 11, 11.1, 11.2, 11.4, 12, 12.1, 13, 14 and 18.1 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, and claim a remedy regarding same under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* and section 52(1) of the *Constitution Act, 1982*.

## NOTICE OF CONSTITUTIONAL QUESTION

Respondent

ATTORNEY GENERAL OF ONTARIO

-and-

Applicant

JEFFREY BOGARTS

BETWEEN:

ONTARIO  
SUPERIOR COURT OF JUSTICE

Court File No. 749/13

because it is not rationally connected to the purpose of the legislation, the means of "distress" from section 1 of the *Act*, it cannot be saved by section 1 of the *Charter* To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition

specify an appropriate standard for the issuance of warrants. and, in turn, violates sections 7 and 8 of the *Charter* because it fails to adequately of "distress" from section 1 of the *Act*, it is unconstitutionally vague and overbroad To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition

of the *Charter*; sections are unconstitutionally vague and overbroad and cannot be saved by section 1 rely on and incorporate the definition of "distress" from section 1 of the *Act*, these To the extent that sections 1, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *OSPCA Act*

Ontario residents as little as possible; rationally connected to the purpose of the legislation and does not impair the rights of *Charter* and cannot be saved under section 1 of the *Charter* because it is not The definition of "distress" in section 1 of the *OSPCA Act* violates section 7 of the

animals in Ontario; overbroad in that it may capture acceptable and/or normal care and treatment of The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally

arbitrary exercise of their discretion; direction to those issuing warrants or orders, as authorized by to the *Act*, to prevent The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient

direction to those enforcing the law to prevent arbitrary exercise of their discretion; of animals in Ontario. notice to the residents of Ontario respecting minimally acceptable care and treatment The definition of "distress" in section 1 of the *OSPCA Act* does not provide fair

in that it does not provide sufficient guidance for legal debate; The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally vague



- 12. Sections 11.4, 13 and 14 of the *OSPCA Act* grant powers of search and seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by section 8 of the *Charter*;
- 13. To the extent that section 11.4 of the *OSPCA Act* confers upon OSPCA Officers the power to search private property at the complete discretion of the Officer, including property where a dwelling unit may be located, either alone or accompanied by any number of other persons as he or she considers advisable, and irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
- 14. To the extent that section 13(6) of the *OSPCA Act* confers upon OSPCA Officers the power to enter private property at the complete discretion of the Officer, including a dwelling unit, at any hour of the day or night into the future forever, either alone or accompanied by any number of other persons as he or she considers advisable, at any time and irrespective of any situation of urgency, it is not reasonable and violates section 8 of the *Charter*;
- 15. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer, and irrespective of taking any reasonable steps to confirm with a veterinarian that an animal is in distress, and irrespective of whether there is any situation of urgency which makes the obtaining of a search warrant impracticable, it is not reasonable and violates section 8 of the *Charter*;
- 16. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, and an appeal of an Order issued under section 13(1) expires after only 5 business days, and while the entry powers prescribed under 13(6) go on forever, it is not reasonable and violates section 8 of the *Charter*;

*Charter*;

therefore, breaches section 7 of the *Charter*;

investigations, it does not accord with the principles of fundamental justice and, and which raises said revenues by selling seized animals and other products of its to raise its own revenues to fund its investigations and salaries of the same Officers, officer" upon Officers of a private organization, an organization which is also trusted To the extent that section 11 of the *OSPSCA Act* confers "the powers of a police

22.

section 7 of the *Charter*;

it does not accord with the principles of fundamental justice and, therefore, breaches c. *Ombudsman Act*, R.S.O. 1990, c. O.6 and regulations passed thereunder;

b. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c.F.31 and regulations passed thereunder;

a. *Police Services Act*, R.S.O. 1990, c. P.15 and regulations passed thereunder;

officer" upon OSPSCA Officers, and the OSPSCA and /or its Officers are not subject to: To the extent that section 11 of the *OSPSCA Act* confers "the powers of a police

21.

justice and, therefore, breaches section 7 of the *Charter*;

police officers in Ontario, it does not accord with the principles of fundamental officer" upon OSPSCA Officers, without statutorily prescribed restraints afforded to To the extent that section 11 of the *OSPSCA Act* confers "the powers of a police

20.

justice and, therefore, breaches section 7 of the *Charter*;

accountability or transparency, it does not accord with principles of fundamental officer" upon Officers of a private organization, with no public oversight, To the extent that section 11 of the *OSPSCA Act* confers "the powers of a police

19.

Ontario residents as little as possible;

are not proportional to the limits put on peoples' rights and do not impair the rights of *OSPSCA Act* cannot be saved by section 1 of the *Charter* because the means chosen Warrantless search and seizure powers provided by sections 11.4, 13 and 14 of the

18.

*Charter*;

judicial authorization impracticable, it is not reasonable and violates section 8 of the power to seize private property, irrespective of any situation of urgency which makes To the extent that section 14 of the *OSPSCA Act* confers upon an OSPSCA Officer the

17.

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 Lawyers for the Applicant

DATE: October 21, 2013

23. Conferral of police powers upon Officers of a private organization, as prescribed by section 11 of the *OSPCA Act*, violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
24. The pith and substance of the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, is of a moral issue related to criminal law, and constitutes an attempt by the province of Ontario to legislate in the area of criminal law;
25. To the extent that the *OSPCA Act* intrudes into criminal law, an area which is the exclusive jurisdiction of the Parliament of Canada, the *Act* is *ultra vires* the Province of Ontario for violating sections 91 and 92 of the *Constitution Act, 1982*;
26. The *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, exposes Ontario residents to criminal prosecution while bypassing the protection provided by criminal law and procedure;
27. Sections 11.1, 11.2 and 18.1 of the *OSPCA Act* effectively duplicates the "Cruelty to Animals" section of the *Criminal Code*, namely sections 445.1 to 447.1, and said overlap supports an inference that the *OSPCA Act* serves a criminal law purpose;
28. The severity of penalties prescribed by section 18.1 of the *OSPCA Act* further characterizes the *Act* as criminal law; and
29. Such further and other grounds as counsel may advise and this Honourable Court may permit.

TO: The Attorney General of Ontario  
 Constitutional Law Branch  
 4th floor, 720 Bay Street  
 Toronto, Ontario M5G 2K1  
 Fax: 416-326-4015

AND TO: The Attorney General of Canada  
 Justice Building  
 234 Wellington Street  
 Ottawa, Ontario K1A 0H8  
 Fax: 613-954-1920

**JEFFREY BOGAERTS**  
Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**  
Respondent

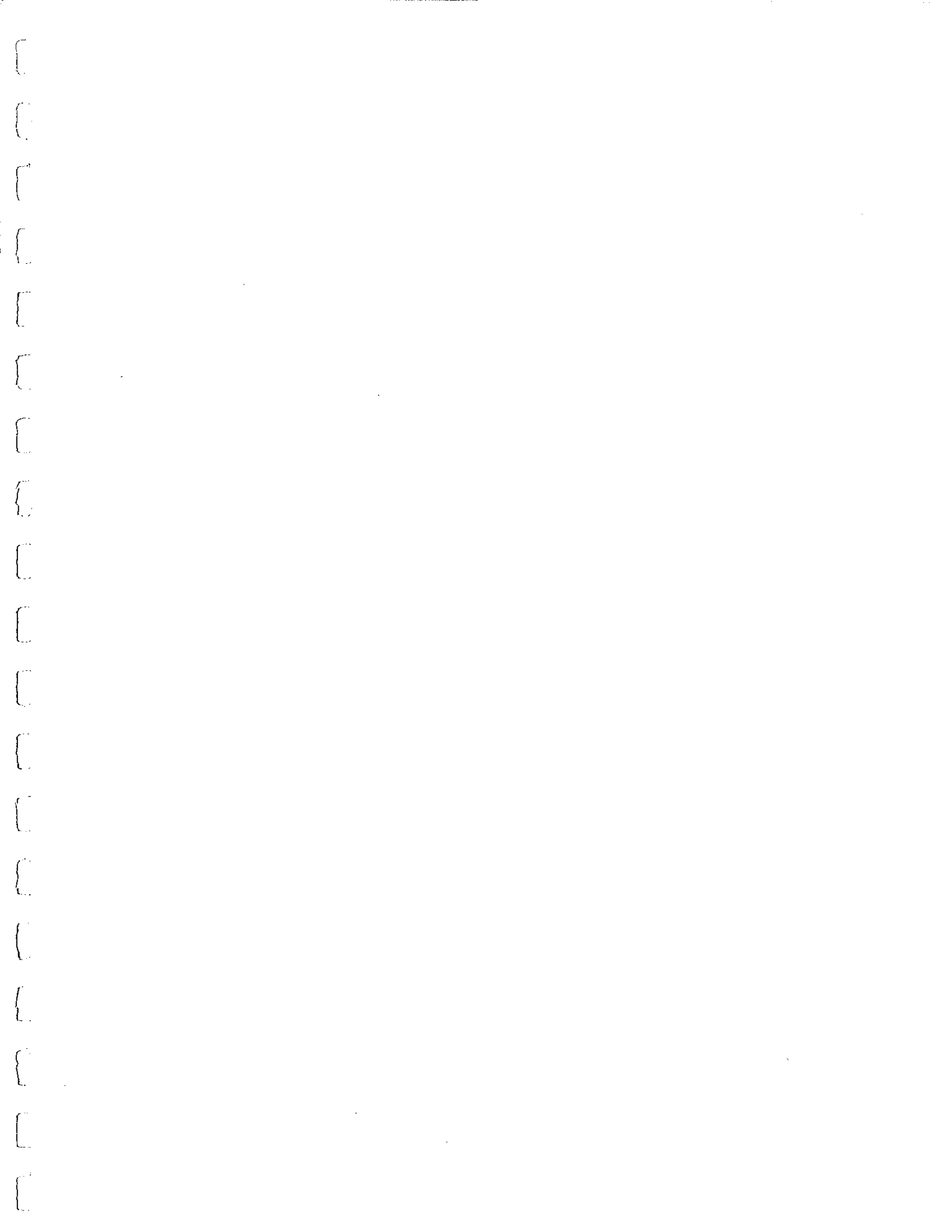
Court File No. 749/13

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT  
PERTH, ONTARIO**

**NOTICE OF CONSTITUTIONAL QUESTION**

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**TAB 4**





CITATION: Bogarts v. Attorney General for Ontario, 2016 ONSC 3123  
COURT FILE NO.: CV749/13  
DATE: 2016/June 15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jeffrey Bogarts, Applicant

AND:

Attorney General for Ontario, Respondent

BEFORE: The Honourable Mr. Justice J. M. Johnston

COUNSEL: Counsel for the Plaintiff, K. Andrews

Counsel for the Defendant, H. Schwartz

HEARD: January 29, 2016

RULING ON MOTION

[1] This is a Ruling in response to a Motion commenced by the Respondent, The Attorney General of Ontario (AGO), who seeks an Order striking out the Notice of Application. The AGO, in the alternative, seeks an Order striking out the Affidavits of the Applicant, Jeffrey Bogarts, sworn July 1, 2014 and February 18, 2015 and the Affidavits of Jessica Johnson, Menno Steicher and Probst, Dr. Lawrence Gray, Carl R. Noble and Mark Killman. In the further alternative, an Order striking out portions of the Affidavits as set out in a chart submitted to this Court during the court of hearing.

[2] The AGO seeks to strike the Application on the grounds that the moving party does not have either a private or public interest and/or standing to challenge the constitutional validity of the impugned provisions of the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, S.O. 36.

[3] In the event the Court grants standing to the Applicant, the AGO seeks to strike the Applicant's Affidavits on the basis that they are irrelevant to validity of the impugned legislation and questions of law that are in issue before this Court.

Issue of Standing:

Background:

[4] Jeffrey Bogarts brings an Application under Section 52(1) of the Constitution Act, 1982, for a declaration that parts of the Ontario Society for the Prevention of Cruelty to Animals Act (OSPCA) are unconstitutional.

[5] The AGO argues that the Applicant lacks personal standing to bring this Application. The Respondent argues that the Applicant has never been personally inspected, investigated or directly affected by the OSPCA. He has never been the subject of a search of his property by the Society's inspectors, nor has he been brought before the Animal Care Review Board or subjected to Provincial Offences prosecution for failure to comply with the Act.

[6] Further, the AGO argues that the Applicant does not meet the test for public interest standing. He fails to satisfy any of the three factors that are to be weighed in the granting of such standing:

- (i) whether there is a serious justiciable issue raised;
- (ii) whether the Applicant has a real stake or genuine interest in it; and
- (iii) whether, in all the circumstances, the proposed Application is a reasonable and effective way to bring the issue before the Courts.

The Applicant's standing to bring this application:

Analysis:

[7] For reasons that follow, I find that the Applicant lacks personal standing to bring this Application. However, I find that the test for public interest standing has been met and, accordingly, permit the Applicant bringing this Application.

Private interest standing:

[8] I do not agree with the Applicant that the nature of his Application is identical to *Cochrane v. Ontario (Attorney General)* [2007] O.J. No. 1090. The fact the Applicant owns and cares for animals does not in and of itself give rise to standing, to challenge the constitutionality of the legislation.

[9] I agree with the Applicant's argument that he need not first be subject to charges or even an investigation by the OSPCA to maintain standing. However, the legislative obligations set out in the Act do not make him "exceptionally prejudiced" in the same manner as *Mrs. Cochrane* was as the pitbull owner. I concur that in some cases a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if she has no right of damages or other relief. However, this is not such a case.

[10] The Applicant seeks a declaration that the Act is invalid and, as such, he must establish that he is personally directly affected by the impugned provisions. The British Columbia Court of Appeal found in *Kitimat (District) v. Alcan Inc.* (2006) B.C.A. 75 at para. 92:

*A simple claim to declaratory relief, in the absence of some adversely affected legal interest does not give the Court an overriding discretion to grant that relief, and to ignore the legal principles governing private interest standing.*

[17] I adopt the comments of the Supreme Court of Canada SCC in *Canada (Attorney General) v. Downtown East Sex Workers United Against a Violent Society* supra at paragraph 28:

[16] Second, I conclude that the Applicant does have a real stake and/or a genuine interest in the constitutionality of the Act. I do not agree with the AGO's characterization that the Applicant has all of the hallmarks of a "busybody".

[15] The Notice of Constitutional Question raises the broad issues of whether or not the OSPCA Act encroaches upon Federal Constitutional powers, i.e., whether the "pith and substance" of the legislation is criminal law, whether the definition of "distress" in Section 1 of the OSPCA Act is unconstitutionally vague and whether provisions of the OSPCA Act confer "the powers of a police officer" upon officers of a private organization, with no public oversight, accountability or transparency.

[14] The AGO argues that the Application is aimed "at the wrong target and is seriously misplaced".

[13] The grounds and legal basis for the Applicant's Application are properly set out in his Notice of Application and Notice of Constitutional Question. This is not a Motion for Summary Judgment. The Notice of Application and Constitutional Question both raise serious justiciable issues.

- (i) whether there is a serious justiciable issue raised;
- (ii) whether the Applicant has a real stake or genuine interest in it; and
- (iii) whether in all the circumstances the proposed Application is a reasonable and effective way to bring the issue before the Courts.

[12] I find that the Applicant does satisfy the test set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against a Violent Society* (2012) S.C.C. 45 at para. 37, as follows:

Public interest standing:

The *substantum* of principles shared by the doctrine of mootness and the doctrine of standing include the "natural reluctance on the part of the Courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in this subject matter of the litigation in conformity with the philosophy that it is for the Courts to -decide actual controversies between parties, not academic or hypothetical questions". See *Robinson v. Western Australian Museum* (1977) 138 CLR 283 at 327.

[11] One must be aggrieved or directly affected by the impugned provisions. *Watson, J.* stated in *Larouche v. Court of Queens Bench of Alberta* (2015) ABQB 25 at para. 47:

- [22] Second, I turn to deal with the Applicant's [ AGO's ] alternative argument that the evidence file in support should be struck.
- [21] The Court is always concerned that unmeritorious cases not use up scarce judicial resources. Given the lack of challenge to the constitutionality of the Act in the past, it is unlikely that allowing the Applicant standing on the basis of "public interest" will "open the floodgates". In all of the circumstances, I conclude that it is proper to exercise the Court's discretion to grant public interest standing.
- [20] I concur with the Applicant that, while it is theoretically conceivable to bring some of the issues featured in this Application before the Court by way of other proceedings, it is unreasonable to suggest that all of the issues that make up the Application would apply to any one proceeding before the Ontario Court of Justice or the Animal Care Review Board. If counsel, with the assistance of the Court, properly frames the arguments, the matter can be dealt with in an efficient manner.
- [19] Finally, I conclude that, in all of the circumstances, the proposed Notice of Application is a reasonable and effective way to bring the issues before the Courts. The AGO argues that there are other reasonable and effective ways in which these issues can be before the Court. The Application Record contains the Affidavits of individuals who have been directly affected by the OSPCA including individuals who have been subject to proceedings before the Animal Care Review Board. The AGO argues that any one of the dependents of these Affidavits is "more directly affected" by the legislation than the Applicant.
- [18] I conclude that the Applicant has a genuine interest. The Applicant works as a paralegal with a law firm that deals with this area of the law. He has further developed a genuine interest through volunteering in the community to assist with vulnerable people affected by the subject legislation and the Applicant is an animal owner. While his interest as an animal owner does not entitle him to the "private interest" standing, it is a factor to consider under this heading.
- [1975] 1 S.C.R. 138, at p. 145.  
*busybodies: see, e.g., Thorson v. Attorney General of Canada, 1974 CanLII 6 (SCC), means to address the dangers of a multiplicity of suits or litigation brought by mere abuse and have the power to award costs, all of which may provide more appropriate dangers. Courts can screen claims for merit at an early stage, can intervene to prevent not the only, or necessarily the most appropriate means of guarding against these Harv. L. Rev. 645, at p. 674. Moreover, the blunt instrument of a denial of standing is "Standing in the Supreme Court — A Functional Analysis" (1973), 86 a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the proper purpose. As Professor K. E. Scott once put it, "[t]he tale and whimsical plaintiff, people, after all, bring cases to court in which they have no interest and which serve no been acknowledged. But it has also been recognized that they may be overstated. Few These concerns about a multiplicity of suits and litigation by "busybodies" have long*

[23] The AGO argues in the alternative if the Court does not strike the Application on the basis of standing, then it should strike the Applicant's evidence in its entirety, impose a timetable for hearing of the constitutional challenge on the merits.

[24] For the reasons that follow I strike all Affidavits except for the Applicant's initial Affidavit sworn July 31, 2014 with certain exceptions.

#### Reasons to Strike

[25] Mr. Bogaerts agrees to strike some of the contents of the Affidavits filed in support of the Application if the Court deems it necessary or preferable to do so at this stage. The Applicant argues that the Affidavit information is necessary to give context and background to the constitutional issues raised. At paragraph 31 of his Factum, the Applicant states "it should go without saying that it is not unusual for an Affidavit to contain information that is not necessarily directly relevant to the proceedings, but it is nevertheless helpful to produce a coherent narrative and context to the Affidavit".

[26] The Applicant filed numerous Affidavits alleging that inspectors, officials, employees and agents of the Ontario Society for the Prevention of Cruelty to Animals (the "Society") and members of the Animal Care Review Board have engaged in conduct that infringes or denies the Charter rights of non-parties.

[27] I agree with the position of the AGO, the Affidavits of Jessica Johnson, Anne Probst, Dr. Lawrence B. Gray and Carl R. Noble are irrelevant to the issue of whether or not the OSPCA Act is unconstitutional.

[28] The Supreme Court of Canada has repeatedly held that where a Charter challenger is complaining about the exercise of discretion by government officials, the proper target of the challenge is not the statutory provision granting the discretion itself, but to the specific exercise of discretion:

*Nor can improper conduct by the State actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement not to declare the statute unconstitutional. Little Sisters Book and Art Emporium v. Canada (Minister of Justice), (2000) S.C.C. 69 at para 133-35.*

*R v. Khawaja (2012) S.C.C. 69 at para 83.*

[29] The Affidavits in question challenge specific officials purporting to act pursuant to the legislation. It is those actions and not the constitutional validity of the legislation that is raised in the various Affidavits filed in support of the Notice of Application.

[30] Permitting the Affidavits into the evidence in this Application will unduly lengthen the proceedings and require the Respondent to respond to unnecessary allegations. Some of the allegations raised in the Affidavits could have and should have been argued in the appropriate forum at the appropriate time. This Court will not permit this Application