Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

FACTUM OF THE APPLICANT

Dated: February 5, 2018

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INDEX

TAB	DESCRIPTION	PAGE
1	Factum of the Applicant, Jeffrey Bogaerts	1
	PART I: STATEMENT OF THE CASE	1
	PART II -THE FACTS	3
	PART III: ISSUES AND THE LAW	12
	ISSUES	12
	THE LAW	13
	PART IV – ORDER REQUESTED	47
A	Schedule “A”: Authorities Cited	48

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FACTUM OF THE APPLICANT

PART I: STATEMENT OF THE CASE

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> ***The Constitution Act, 1982*, s. 52; Joint Book of Authorities, Tab A(22).**

> That a private organization such as the S.P.C.A. would be given the authority to investigate and sometimes to even prosecute alleged *Criminal Code of Canada* offences is unacceptable. Private individuals and organizations cannot be allowed to usurp the responsibilities of the police and the Attorney General.
>
> ***R. v. Clarke*, [2001] N.J. No. 191 (N.L Prov. Ct.) at ¶6; Joint Book of Authorities, Tab B(1).**

1. This is an application for declaratory relief, questioning the constitutionality of various provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 [hereinafter the "*OSPCA Act*" or simply the "Act"].

2. The issues raised in this Application can be summarized into three key questions:

   (1) Do sections 11, 12 and /or 12.1 of the *OSPCA Act* breach section 7 (or section 8 in the alternative) of the *Canadian Charter of Rights and Freedoms* [hereinafter the "*Charter*"] by granting police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private

organization? In the alternative, if it can be constitutional to grant such powers to a private organization, does the *OSPCA Act* nevertheless breach section 7 (or section 8 in the alternative) of the *Charter* by granting these powers to the OSPCA, specifically, without any, or adequate, legislatively mandated restraints, oversight, accountability and / or transparency?

(2) Do various sections of the *OSPCA Act* breach section 8 (or section 7 in the alternative) of the *Charter* by authorizing unreasonable (including warrantless) searches of peoples' homes and farms and seizures of their animals without any, or adequate, judicial authorization or oversight? and

(3) Does section 11.2 of the *OSPCA Act* fall outside the province's jurisdiction by being, in pith and substance, criminal in nature and within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1867*?

3. Question #1 asks whether or not it is constitutional, under section 7 of the *Charter*, to assign police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization, and the OSPCA in particular. It is noteworthy that the Applicant does not question the constitutionality of these powers if they were delegated to a proper agent of the Crown, such as the police or ministry officers. While the Applicant frames this question according to a section 7 analysis, it could also be examined pursuant to a section 8 analysis (i.e. to ask if it is unconstitutionally "unreasonable" to delegate police and search and seizure powers to a private organization), and so the Applicant respectfully requests that this question be alternatively reviewed pursuant to a section 8 analysis in accordance with the Applicant's submissions set out below at paragraphs 90–135 in relation to question #2.

4. Question #2, meanwhile, asks whether or not the impugned search and seizure provisions of the *OSPCA Act* are unconstitutionally "unreasonable" under sections 8 of the *Charter*, regardless of the entity exercising these powers. At the same time, it is submitted that the unreasonableness of the impugned sections is aggravated by the fact that these extraordinary (including warrantless) search and seizure powers have been delegated to a private organization, and the OSPCA in particular. While the Applicant frames this question according to a section 8 analysis, it could also be examined pursuant to a section 7 analysis (i.e. upon finding that these provisions infringe upon the "security of the person" aspect of section 7, to ask if these extraordinary search and seizure powers are in accordance with principles of fundamental justice, especially when they are delegated to

a private organization), and so the Applicant respectfully requests that this question be alternatively reviewed pursuant to a section 7 analysis in accordance with the Applicant's submissions set out below at paragraphs 38–85 in relation to question #1.

5. These alternative submissions for questions #1 and #2 are reflective of the well-established overlap between the constitutional protections afforded by sections 7 and 8 of the *Charter*, as cited below at paragraphs 86 and 136.

PART II -THE FACTS

The OSPCA is a private organization

6. The OSPCA is not a government organization or agent of the Crown. The OSPCA operates independently from the Ontario government. It is a privately run charitable organization established by provincial statue that has been given certain legislative powers, including police and search and seizure powers, for the purpose of protecting animal welfare in Ontario.

Affidavit of Lisa Kool, at ¶5, Application Record vol. II, pp. 532-533.

Cross-examination of Connie Mallory, transcript p. 7, questions 13-18; Application Record vol. III, p. 48.

Lisa Kool, Ministry of Community Safety and Correctional Services, answer to undertaking, Sessional Paper No. P-53; Application Record vol. III, Tab 3(B), p. 239.

7. It is noteworthy that Article 22 of the 2013 "Transfer Payment Agreement" [hereinafter "TPA"] between the OSPCA and the Ontario government expressly states that "[the OSPCA] is not an agent, joint venture, partner or employee of the [government of Ontario], and [the OSPCA] shall not take any actions that could establish or imply such a relationship". Article 23 of the 2015 TPA contains a similar provision. It is the Applicant's understanding that the current TPA, executed in 2017, also features a similar provision.

Exhibits 7(A) & 7(C) – 2013 & 2015 Transfer Payment Agreements; Application Record vol. II, pp. 551 & 613.

8. The OSPCA describes its mission as "to facilitate and provide for province-wide leadership on matters relating to the prevention of cruelty to animals and the promotion of animal welfare". The OSPCA describes its goals as "to be a strong, unified and collaborative organization dedicated to the cultivation of a compassionate Ontario for all

animals". This mission and these goals were established independently from the Ontario government by OSPCA senior management, board of directors, staff, and chief executive officer [hereinafter "CEO"].

Exhibit 5(A) – OSPCA mission statement, etc., Application Record vol. I, pp. 39-40.[1]

Cross-examination of Connie Mallory, transcript pp. 86-88, questions 378-387; Application Record vol. III, pp. 127-129.

9. Policies and practices of the OSPCA as it relates to its statutory powers are also established internally by the OSPCA, sometimes with consultation, guidance or advice from third parties.

Cross-examination of Connie Mallory, transcript pp. 88-91, questions 388-400; Application Record vol. III, pp. 129-132.

10. The OSPCA, as an organization, is comprised of four key components: (1) investigations; (2) animal sheltering; (3) rescue and relief; and (4) spay and neuter clinics. All of these components are operated under the authority of one board of directors, one CEO, and one finance department.

Cross-examination of Connie Mallory, transcript pp. 7-11, questions 19-23, 27-28, 38-42; Application Record vol. III, pp. 48-52.

11. The chain of command related to the investigations wing of the OSPCA flows as follows: (1) agents report to inspectors; (2) inspectors report to regional inspectors; (3) regional inspectors report to senior inspectors; and (4) senior inspectors report to the Chief Inspector. The Chief Inspector of the OSPCA is appointed by the CEO. Connie Mallory is currently the Chief Inspector of the OSPCA. The government has no statutory authority to influence the leadership of the OSPCA.

Cross-examination of Connie Mallory, transcript p. 91 & 144, questions 401-402 & 648; Application Record vol. III, p. 132 & 185.

12. Until 2013, the OSPCA had been entirely responsible for raising its own revenues to pay for its law-enforcement obligations under the *OSPCA Act*. Before this time, the OSPCA had been operating with financial deficits in the millions of dollars. In 2013, the OSPCA and the Ontario government entered into a TPA that provided $5.5 million dollars in funding to be used for various purposes, including enforcement. The TPA is not a

[1] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

legislated document.

Exhibit 5(M) - OSPCA Audited Financial Statements for years ended 2009-2012; Application Record vol. I, pp. 45-58.[2]

Affidavit of Lisa Kool, at ¶7, Application Record vol. II, p. 533.

13. Currently, the OSPCA's investigations budget is at least $3 million annually. Of the $5.5 million provided through the TPA, approximately $2 million goes toward the OSPCA's investigations budget, leaving approximately $1 million for the OSPCA to raise itself through charitable donations or other revenues. If the government cancelled the TPA, as it is unilaterally entitled to do under the terms of the agreement, the OSPCA would again be responsible for raising all of its funds for its investigations budget.

Cross-examination of Connie Mallory, transcript pp. 15-17, questions 57-66; Application Record vol. III, pp. 56-57.

14. Other terms and conditions of this agreement are also part of the TPA. For example, the TPA includes provisions related to training of OSPCA officers. The effect of the TPA means that, while the Ontario government has practically no control over the OSPCA by statute, the TPA imposes some control as a condition of financing.

Affidavit of Lisa Kool, at ¶9, Application Record vol. II, p. 534.

15. The first TPA expired in 2015. A second similar TPA was entered into in 2015 and was set to expire in 2017. It is the Applicant's understanding that a new similar TPA was enacted in 2017. The Ontario government can cancel the TPA at any time without cause (see article 12 of the 2013 TPA, and article 13 of the 2015 TPA). This means that any change in government or government mandate can have the effect of undoing the limited contractual obligations imposed upon the OSPCA by the TPA.

Affidavit of Lisa Kool, at ¶10, Application Record vol. II, pp. 534-535.

Exhibits 7(A) & 7(C) – 2013 & 2015 Transfer Payment Agreements; Application Record vol. II, pp. 546-547 & 608-609.

Cross-examination of Lisa Kool, transcript pp. 31-37, questions 59-74; Application Record vol. III, p. 225-231.

16. The Ontario government has no direct statutorily prescribed control over the OSPCA's policy, mandate or operations, except that it "may annul any by-law of the [OSPCA]", as

[2] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

provided by section 7(3) of the *OSPCA Act*. Notwithstanding section 7(3) of the Act, the OSPCA exercises its legislative powers, including police and other investigative powers, with virtual autonomy from the government of Ontario (more on these legal elements will be covered below in Part III).

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 at s. 7(3); Joint Book of Authorities, Tab A(3).**

17. The OSPCA currently exercises its statutory police and investigative powers pursuant to its "Investigations Policy and Procedures Manual" [hereinafter "policy manual"]. The policy manual includes the OSPCA's policies associated with entering people's homes and seizures of personal property. The policy manual was established at the complete discretion of the OSPCA and it is not a public document. The government of Ontario has no input into the contents or functionality of the policy manual. There is no legislative requirement for training, although the TPA described above does mandate some aspects of training. The amount of training required by OSPCA officers has changed over the years, from only two-days of training 20 years ago, to approximately 16-weeks currently. The amount of training provided to OSPCA agents and inspectors has changed in accordance with government funding for same.

Affidavit of Connie Mallory, at ¶8-16, Application Record vol. II, pp. 634-636.

Cross-examination of Connie Mallory, transcript pp. 111-120, questions 497-522; Application Record vol. III, pp. 152-161.

18. In a previous version of the training manual, the OSPCA set out its "Animal Welfare Position Statements", which included "positions that the [OSPCA] wishes [all agents and inspectors] to follow". These positions are essentially animal-activist-type political positions, including opposition to "factory farming", sport hunting, the fur industry, animals being used for entertainment purposes (i.e. circuses and rodeos), and various types of animal testing.

Exhibit 5(B) - OSPCA Animal Welfare Position Statements, Application Record vol. I, pp. 45-58.[3]

Cross-examination of Connie Mallory, transcript pp. 92-94, questions 410-416; Application Record vol. III, pp. 133-135.

19. There is no statutorily prescribed complaint process or disciplinary procedure applicable to the OSPCA or its officers. Such matters are exclusively dealt with internally within the

[3] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

OSPCA in a non-transparent manner.

Affidavit of Connie Mallory, at ¶18-21, Application Record vol. II, pp. 636-638.

20. The Ontario government has received communications from the public expressing concerns about how the OSPCA operates as a private organization, and that enforcement of animal welfare laws should be in the control of the government.

Cross-examination of Lisa Kool, transcript pp. 14-15, questions 25-30; Application Record vol. III, p. 208-209.

21. The OSPCA invariably collects personal information about people through the course of its investigations. At the same time, not all people who have information collected about them are charged with an offence (i.e. not all targets are charged, and not all persons involved in an investigation are targets). Regarding this information, the OSPCA has no internal "Freedom of Information" policy except that it destroys such information after a period of two years. In practice, however, the OSPCA does not make such information available to people upon request. As an example, when a person requested a copy of his OSPCA file, the OSPCA refused to provide it unless an OSPCA officer was subpoenaed to court.

Cross-examination of Connie Mallory, transcript pp. 73-81, questions 316-356; Application Record vol. III, pp. 114-122.

22. The OSPCA has a "Communications Department" that is responsible for putting out media releases through the OSPCA website and newswire services, as well as reports sent to donors. These media releases sometimes call for donations to support OSPCA operations, and they sometimes include information about cases where charges have been laid against individuals, animals have been seized, and / or convictions have been obtained. Donor reports include statistics related to the number of OSPCA investigations, animals seized and charges laid as a means to inform donors about how their money is spent by the OSPCA.

Affidavit of Connie Mallory, at ¶28-30, Application Record vol. II, p. 640.

Cross-examination of Connie Mallory, transcript pp. 17-18 & 20-22, questions 67-74 & 83-87; Application Record vol. III, pp. 58-59, 61-63.

Exhibit 5(H) - OSPCA annual reports, Application Record vol. I, pp. 144-211.[4]

Exhibit 5(O) - OSPCA media releases, Application Record vol. I, pp. 492-514.[5]

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[4] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

23. The OSPCA oversees a zoo and aquarium registration program. This is related to specific terms of the TPA described above. To become a "registered" operation as part of this program, zoos and aquariums are obligated to provide private information to the OSPCA, including information that the OSPCA would not otherwise have access to. The OSPCA acknowledges that it views "unregistered" zoo and aquarium operations with greater suspicion than "registered" operations, stating that "a registered provider […] is more likely to be in compliance with the Act than an unregistered provider". OSPCA Chair Rob Godfrey was quoted in a newspaper article as saying that "zoos and aquariums that don't join [the registration program] will be subject to more scrutiny than others". OSPCA Chief Inspector Connie Mallory confirmed that "unregistered" zoos and aquariums are subject to more unannounced warrantless inspections pursuant to sections 11.4 and 11.4.1 of the *OSPCA Act*.

Affidavit of Connie Mallory, at ¶31-32, Application Record vol. II, pp. 640-641.

Exhibit 8(M) - OSPCA letter to zoos & aquariums, Application Record vol. II, pp. 810-811.

Cross-examination of Connie Mallory, transcript pp. 105-106, questions 482-485; Application Record vol. III, pp. 146-148.

Exhibit 5(E) – Toronto Star article dated October 25, 2013, Application Record vol. I, pp. 68-70.

24. The OSPCA has also entered into "memorandums of understanding" [hereinafter "MOUs"] with various livestock agencies in Ontario (i.e. Dairy Farmers of Ontario, Beef Farmers of Ontario, Chicken Farmers of Ontario). These MOUs have been entered into at the complete discretion of the OSPCA and are not related to the TPA with the Ontario government. These MOUs vary somewhat from one agency to another, but they all essentially set out an investigation procedure to be followed by the OSPCA when an investigation involves a member of a particular livestock agency. As a result, the OSPCA conducts its investigations differently when the subject of an investigation is a MOU-agency-member.

Affidavit of Jeffrey Bogaerts, at ¶7, Application Record vol. I, pp. 33-34.

Exhibit 5(D) – Media releases re: MOUs, Application Record vol. I, pp. 60-66.[6]

Cross-examination of Connie Mallory, transcript pp. 107-108, questions 487-488; Application Record vol. III, pp. 107-108.[7]

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[5] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

[6] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

25. Separately from its investigations unit, the OSPCA operates one of the larger animal rescue operations in the province. The OSPCA will sometimes investigate other animal rescue operations and, in some cases, the OSPCA has issued section 13 compliance orders and laid charges against non-OSPCA animal rescue operations. With respect to complaints about their own animal rescue operations, the OSPCA deals with it internally through a chain of command.

Cross-examination of Connie Mallory, transcript pp. 81-85, questions 357-377; Application Record vol. III, pp. 122-126.

Search and seizure powers

26. The *OSPCA Act* permits the OSPCA to enter a dwelling unit without a warrant pursuant to section 13(6) of the Act. However, the OSPCA has established a policy to obtain a warrant whenever permission to enter a dwelling unit is not obtained. This policy is not in the public domain. As such, and given the language of section 13(6), a reasonably well-informed person will not know that they may refuse warrantless entry into their home.

Cross-examination of Connie Mallory, transcript pp. 42-47, questions 184-204; Application Record vol. III, pp. 83-88.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 13; Joint Book of Authorities, Tab A(11).**

27. The *OSPCA Act* provides no restrictions on what time of day an OSPCA Inspector or Agent can enter private property without a warrant pursuant to section 13(6) of the Act, including a dwelling unit. However, the OSPCA has set its own policy to restrict its officers from entering property outside of daylight hours. The OSPCA's reason for this policy is for officer safety considerations.

Cross-examination of Connie Mallory, transcript pp. 34-40, questions 153-177; Application Record vol. III, pp. 75-81.

28. The OSPCA does not have a policy with regards to how long a section 13 compliance order (and corresponding section 13(6) warrantless entry powers) can last. As a result, section 13 compliance orders, and corresponding section 13(6) warrantless entry powers,

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[7] Upon cross examination, the respondent and /or the OSPCA refused to provide copies of the MOUs; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

can theoretically last a year or longer.

Cross-examination of Connie Mallory, transcript pp. 40-41, questions 178-182; Application Record vol. III, pp. 81-82.

29. Section 13(6) of the *OSPCA Act* allows an OSPCA officer to enter property, including a dwelling unit, while accompanied by "other persons as he or she considers advisable". The OSPCA does not have a policy to limit who may accompany an OSPCA officer when entering such private property. This decision is at the complete discretion of the OSPCA officer in attendance.

Cross-examination of Connie Mallory, transcript pp. 47-48, questions 205-207; Application Record vol. III, pp. 88-89.

30. The OSPCA does not have a policy requiring a veterinarian to confirm the merits of a section 13(1) order, including with respect to general animal welfare (i.e. regarding: food, water, grooming, nail-trimming, hoof trimming, cleanliness of the environment, ventilation, etc.); nor is there a policy whereby a veterinarian is required to be consulted to confirm the satisfaction of such an order. This means that it is at the complete discretion of an OSPCA officer to invoke or revoke a section 13(1) compliance order (and corresponding section 13(6) warrantless entry powers).

Cross-examination of Connie Mallory, transcript pp. 50-54, questions 218-232; Application Record vol. III, pp. 91-95.

31. Likewise, the OSPCA does not have a policy requiring a veterinarian to confirm distress prior to an OSPCA officer seeking a warrant pursuant to section 12 of the Act, regardless of any situations of urgency.

Cross-examination of Connie Mallory, transcript pp. 54-56, questions 233-241; Application Record vol. III, pp. 95-97.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 12; Joint Book of Authorities, Tab A(9).**

32. The OSPCA also does not have a policy requiring a veterinarian to confirm distress prior to the OSPCA seizing animals pursuant to sections 14(1)(b) and 14(1)(c) of the Act, or to confirm that an animal may be returned to its owner.

Cross-examination of Connie Mallory, transcript pp. 56-61, questions 242-261; Application Record vol. III, pp. 97-102.

33. Section 14 of the *OSPCA Act* allows the OSPCA to seize people's animals in specified circumstances, and section 15 of the Act allows the OSPCA to sell people's animals and keep the proceeds to compensate the OSPCA for their expenses (a.k.a. restitution claims). When this occurs, there is no OSPCA policy to provide an accounting or otherwise a means to review the OSPCA's claims for compensation. OSPCA Chief Inspector Connie Mallory stated that she is aware of only one occasion many years ago when some proceeds from the sale of seized animals were returned to an animal owner.

Affidavit of Connie Mallory, at ¶22-27, Application Record vol. II, pp. 639-640.

Cross-examination of Connie Mallory, transcript pp. 29-73, questions 134-141; Application Record vol. III, pp. 70-73.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 14; Joint Book of Authorities, Tab A(12).**

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 15; Joint Book of Authorities, Tab A(13).**

34. The OSPCA's policy for assessing restitution claims does not involve calculating actual out-of-pocket costs of the OSPCA. Instead, the OSPCA has established a flat fee system that uses pre-established rates that are comparable to for-profit animal boarding facilities' rates. Generally speaking, there is an expectation on behalf of the OSPCA that these costs be paid prior to an animal being returned to its owner. Any waiver of these fees would be at the sole discretion of the OSPCA.

Cross-examination of Connie Mallory, transcript pp. 32-34 & 61, questions 142-152 & 262; Application Record vol. III, pp. 73-75 & 102.

35. While it is common to seize and keep animals, the OSPCA very rarely obtains an order to keep a seized animal pursuant to section 14(1.1) of the Act. The OSPCA takes the position that such an order is not required to keep an animal in most cases.

Cross-examination of Connie Mallory, transcript pp. 63-64, questions 276-274; Application Record vol. III, pp. 104-105.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 14; Joint Book of Authorities, Tab A(12).**

Provisions of the Act being criminal in nature

36. When amendments to the *OSPCA Act* came into force on March 1, 2009, including new provisions prohibiting the causing or permitting of "distress" (as defined by the Act), the

OSPCA described these provisions as dealing with "animal abuse" and "animal cruelty". In response to Sessional Paper No. P-53, tabled March 21, 2013, the Minister of Community Safety and Correctional Services, Madeleine Meilleur, referred to these amendments to the *OSPCA Act* as having "clamped down on animal abusers".

Exhibit 5(P) - OSPCA media release re: the "new" *OSPCA Act*, Application Record vol. I, p. 516.[8]

Lisa Kool, ministry of Community Safety and Correctional Services, answer to undertaking, Sessional Paper No. P-53; Application Record vol. III, Tab 3(B), p. 239.

PART III: ISSUES AND THE LAW

ISSUES

37. The issues of this Application can be summarized as follows:

   a. Do sections 11, 12 and /or 12.1 of the *OSPCA Act* breach section 7 (or section 8 in the alternative) of the *Charter* by:

      i. granting police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization? and;

      ii. if it can be constitutional to grant such powers to a private organization, does the *OSPCA Act* nevertheless breach section 7 (or section 8 in the alternative) of the *Charter* by granting these powers to the OSPCA specifically without due restraints, oversight, accountability or transparency?

   b. Do various sections of the *OSPCA Act* breach section 8 (or section 7 in the alternative) of the *Charter* by authorizing unreasonable (including warrantless) searches of peoples' homes and farms and seizures of their animals without any, or adequate, judicial authorization or oversight? and

   c. Does section 11.2 of the *OSPCA Act* fall outside the province's jurisdiction by being in pith and substance criminal in nature and thereby within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1867*.

[8] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

THE LAW

A. DELEGATION OF POLICE AND OTHER INVESTIGATIVE POWERS TO A PRIVATE ORGANIZATION VIOLATES SECTION 7 OF THE *CHARTER*

Engagement of section 7 of the Charter

38. Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Constitution Act, 1982, Part I at s. 7; Joint Book of Authorities, Tab A(20).

39. Any offence that includes incarceration as a possible sanction engages the liberty aspect of section 7 of the *Charter*. In addition, protection against unreasonable searches and seizures also falls within the ambit of the "security of the person" aspect of section 7, notwithstanding that these protections are also provided under section 8.

Reference re Motor Vehicle Act (British Columbia) S 94(2), [1985] 2 S.C.R. 486 (SCC), at ¶4 & 35; Joint Book of Authorities, Tab B(2).

R. v. Smith, 2015 SCC 34 (SCC), at ¶17; Joint Book of Authorities, Tab B(3).

R. v. Racette, [1988] 2 W.W.R. 318 (Sask. CA), at ¶72-73; Joint Book of Authorities, Tab B(4).

R. v. Pelletier (1989), 17 M.V.R. (2d) 23 (QB), at ¶25; Joint Book of Authorities, Tab B(5).

The Constitution Act, 1982, Part I at s. 8; Joint Book of Authorities, Tab A(21).

40. Section 18.1 of the *OSPCA Act* provides incarceration as a possible sanction for offences under the Act. Incarceration is also a possible sanction for animal welfare offences under the *Criminal Code*. "Security of the person" is also triggered by the various search and seizure powers enabled by the *OSPCA Act* and *Criminal Code*. Section 7 of the *Charter* is therefore engaged by the penalty and search and seizure provisions of the *OSPCA Act* and *Criminal Code*, and so the impugned provisions of the Act must accord with the principles of fundamental Justice.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 at s. 18.1 and various investigative sections; Joint Book of Authorities, Tabs A(1) & A(15).

Criminal Code, R.S.C. 1985, c. C-46, at s. 445.1(1)(a) & 446(1)(b); Joint Book of Authorities, Tabs A(23) & A(24).

Principles of fundamental justice: private police force

41. Section 7 protects individual's autonomy and personal legal rights from the actions of the Crown. Denials of rights to life, liberty and security of the person will only be constitutional if it is in accordance with principles of fundamental justice.

42. Principles of fundamental justice set out the minimum requirements that a law must meet if it negatively impacts on a person's life, liberty, or security of the person. "The term *principles of fundamental justice* is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right."

***Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 (SCC), at ¶70; Joint Book of Authorities, Tab B(2).**

43. Recognized principles of fundamental justice include elements of procedural fairness, basic values against arbitrariness, overbreadth, gross disproportionality, and may also include novel claims.

***Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 (SCC), at ¶94-100; Joint Book of Authorities, Tab B(6).**

44. In *Bedford*, The Supreme Court held that:

> [L]aws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

***Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 (SCC), at ¶105; Joint Book of Authorities, Tab B(6).**

45. This Application is concerned with the arbitrariness of the legislation insofar as the Act assigns police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization, rather than assigning such powers to agents of the Crown, such as the police or ministry investigators. Such a

legislative scheme is a complete anomaly and fraught with inevitable justice issues (as discussed in greater detail below).

46. Section 11 of the *OSPCA Act* assigns police powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to the OSPCA and such powers may be further delegated by the OSPCA to third-party "affiliates":

> 11. (1) For the purposes of the enforcement of this Act or any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals, every inspector and agent of the Society has and may exercise any of the powers of a police officer.
>
> (2) Every inspector and agent of an affiliated society who has been appointed by the Society or by the Chief Inspector of the Society may exercise any of the powers and perform any of the duties of an inspector or an agent of the Society under this Act and every reference in this Act to an inspector or an agent of the Society is deemed to include a reference to an inspector or agent of an affiliated society who has been appointed by the Society or by the Chief Inspector of the Society.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 11; Joint Book of Authorities, Tab A(4).**

47. Section 12 of the *OSPCA Act* assigns search powers to the OSPCA and specifies grounds to obtain a judicially authorized warrant.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 12; Joint Book of Authorities, Tab A(9).**

48. Section 12.1 of the *OSPCA Act* assigns seizure powers to the OSPCA related to collecting and testing evidence from a section 12 search, and it sets out requirements to report / obtain orders regarding same to / from a justice of the peace or provincial judge.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 12.1; Joint Book of Authorities, Tab A(10).**

49. It is submitted that section 11(2) of the Act exacerbates the section 7 violation related to sections 11, 12 and /or 12.1 by permitting the OSPCA to further delegate its legislated police and other investigative powers to "affiliates", which are not only independent from the government, but also independent from the OSPCA.

50. It is further submitted that the violation of section 7 of the *Charter* in this case is made more egregious because the delegation of police and other investigative powers to the

OSPCA is done without any, or adequate, legislated restraints, oversight, accountability or transparency (as discussed in greater detail at paragraphs 71- 85 below).

51. Alternatively, if this Court does not agree that these submissions fall within the ambit of "arbitrariness", then the Applicant seeks recognition of a novel principle of fundamental justice that denies the delegation of police and investigative powers to a private organization, especially when the assignment of such powers does not include any, or adequate, legislated restraints, oversight, accountability or transparency.

Arbitrariness

52. The root question to answer when determining whether a law is unconstitutionally arbitrary was explained by McLachlin C.J. in *Bedford*:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears no connection to its objective arbitrarily impinges on those interests.
>
> […]
>
> [W]hether the law is inherently bad because there is no connection, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

***Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 (SCC), at ¶111 & 119; Joint Book of Authorities, Tab B(6).**

53. The object of the *OSPCA Act*, to protect animals, has obvious merit. However, the means chosen to achieve this object, namely the delegation of police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*)

to a private organization, is not connected to the objective. This departure from a traditional law enforcement model is clearly unnecessary. For example, there is no similar law enforcement scheme legislated in Ontario, and the SPCA does not enforce animal welfare laws everywhere in Canada. As a result, the negative consequences (which will be discussed in greater detail below) that flow from having these powers delegated to the OSPCA are clearly unnecessary. All of this amounts to an unnecessary departure from the principles of fundamental justice that has no connection to the object of protecting animals. In some situations (which are noted below), the object of protecting animals may even be undermined by the delegation of police powers to the OSPCA.

54. The *Bedford* citation above at paragraph 52 notes "the ultimate question remains whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose." It is unquestionably out of the norm to assign police and other investigative powers to a private organization. This is especially true where it involves extraordinary search and seizure powers, including warrantless entry into people's homes and seizure of private property without any or adequate judicial authorization or oversight. People expect that such powers will only be trusted to the Crown or agents of the Crown, such as the police or ministry officers.

55. Police and ministry officers are agents of the Crown and act on the Crown's behalf. Their actions are ultimately the responsibility of the Crown. A Chief of Police is appointed pursuant to the *Police Services Act*, not by a CEO of a private organization. Ministry officers are hired by the government, not by an unaccountable board or CEO. Administrative decisions (including policy) of the Crown or Crown agents are also generally publicly accessible and may be reviewable under administrative law. This is the traditional law enforcement model that the public expects in a free and democratic society.

56. Importantly, as part of a traditional law enforcement model, police and ministry investigations are funded publicly. This means that police and ministry investigators are adequately insulated from budgetary concerns (including those related to their own salaries) and influences from their funding providers. The police and ministry

investigators have no need to advertise the number of investigations, charges and property seized in order to inspire donations. They also have no need to satisfy donors that they are busy enough, or tough enough, or meeting any sort of subjective expectations.

57. The OSPCA, on the other hand, is dependent upon donor dollars to pay for investigations and investigators' salaries (at least in part at the moment). This connection between funding and meeting certain people's expectations is a clear conflict of interest. At minimum, these facts promote a perception that the OSPCA may not always be objective when carrying out its investigations. At worst, the OSPCA may be genuinely influenced by donors' demands, especially where high-profile cases are concerned. The OSPCA's "Animal Welfare Position Statements" that set out activist-type political ideals, formerly contained in the OSPCA's training manual, provides a concrete example of such dangers.

Exhibit 5(B) - OSPCA Animal Welfare Position Statements, Application Record vol. I, pp. 45-58.[9]

58. The funding responsibilities of the OSPCA may also serve to undermine the object of the legislation in situations where the OSPCA is in a budgetary shortfall. Put another way, without direct access to the deep pockets of the Crown, the OSPCA may at times be financially incapable of properly enforcing the law. The OSPCA used to be responsible for funding all of its investigations, and it ran substantial deficits for years. Now, the Ontario government funds a portion of the OSPCA's investigations budget through the TPA, but the OSPCA is still responsible for funding at least $1M of its budget, and the Ontario government can unilaterally cancel its funding at any time.

59. Another conflict of interest that the *OSPCA Act* creates relates to the fact that the OSPCA concurrently functions as both a law enforcement organization and as an animal "rescue" organization that provides shelter and adoption services. As part of its investigative duties, the OSPCA sometimes investigates / issues orders to / lays charges against competing "rescue" providers. In a completely different fashion, the OSPCA deals with complaints regarding its own rescue operations internally through a chain of command.

60. To summarize, the public expects law enforcement agencies to be an agent of the Crown and /or part of our democracy. The public does not expect law enforcement agencies to be

[9] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

ruled by an independent board of directors and CEO. The public also does not expect law enforcement agencies to be burdened with fundraising responsibilities or conflicts of interest, thereby creating a perception that these agencies might lack objectivity or even be prone to financial influence.

61. The Applicant's position is that the *OSPCA Act* is fundamentally flawed insofar as it arbitrarily discards a traditional law enforcement model, and all of the inherent benefits that come with it, in favour of assigning police powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to an independent private organization. To this extent, the legislative scheme of the *OSPCA Act* is arbitrary and therefore does not accord with the principles of fundamental justice.

62. It is irrelevant, from a principles of fundamental justice standpoint, whether or not the justice issues described above are actual or merely perceptional. Justice must not only be done, it must also be seen to be done. As Justice Sopinka held in *R. v. La*:

> [The matter at issue] engages the fundamental principle that justice must be seen to be done, as well as actually being done… there may still be a *Charter* violation if [the matter at issue] "violates those fundamental principles that underlie the community's sense of decency and fair play."

***R. v. La*, [1997] 2 S.C.R. 680 (SCC), at ¶55; Joint Book of Authorities, Tab B(7).**

63. It is also irrelevant whether or not the OSPCA is doing a "good job". The arbitrariness analysis does not involve an assessment of how well the OSPCA is carrying out its duties. Instead, we look at whether or not the law is fundamentally flawed. In *Bedford*, McLachlin C.J. described it as follows:

> All three principles - arbitrariness, overbreadth, and gross disproportionality - compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

***Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 (SCC), at ¶123; Joint Book of Authorities, Tab B(6).**

64. It is noteworthy that, while the substance of this Application may be novel from a constitutional law standpoint, the judiciary has nevertheless commented on the apparent injustices and dangers related to the delegation of police and other investigative powers to a private organization – and the SPCA in particular.

65. In the Newfoundland and Labrador decision, *R. v. Clarke*, the Court recognized the inherent flaws of that province's legislation, which, at the time, also delegated investigative powers (including search and seizure powers) to the NLSPCA:[10]

> That a private organization such as the S.P.C.A. would be given the authority to investigate and sometimes to even prosecute alleged *Criminal Code* of Canada offences is unacceptable. Private individuals and organizations cannot be allowed to usurp the responsibilities of the police and the Attorney General.

***R. v. Clarke*, [2001] N.J. No. 191 (N.L Prov. Ct.) at ¶6; Joint Book of Authorities, Tab B(1).**

66. While commenting on the *Clarke* case, the Court in *Beazley (Re)* held:

> [The province's *Animal Protection Act*] includes a provision for an application by a "peace officer" for a search warrant to apprehend animals which are believed to be in distress. Unlike most public statutes, section 2 of the Act includes members of a corporation, the SPCA, as "peace officers."
>
> Despite these constitutional guarantees of the right to sanctity and security in one's home, our *Animal Protection Act* purports to allow a member of the SPCA to apply for a search warrant to enter a private dwelling, by force if necessary.
>
> ...Since Magna Carta, as a society we have established a core set of human rights. We must never take these rights for granted, for they were hard earned, and paid for literally with the blood, sweat, toil and tears of our forebears. Chief among these is the right to be secure in our homes from unwarranted government action. No private citizen ought to have the ability to apply for judicial authorization to invade one's home.

***Beazley (Re)*, [2007] N.J. No. 337 (N.L Prov. Ct.), at ¶3-6 & 22; Joint Book of Authorities, Tab B(8).**

67. It is noteworthy that, in 2012, Newfoundland and Labrador rescinded the NLSPCA's investigative powers (including search and seizure powers), leaving these powers to the RCMP.

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[10] At the time of the *Clarke* case, N.L.'s *Animal Protection Act*, RSNL 1990 Chapter A-10, similarly assigned police powers to the NLSPCA. However, in 2012, that province rescinded the SPCA's investigative and seizure powers through the enactment of the new *Animal Health and Protection Act*, SNL 2010, c A-9.1. Since then, the RCMP is responsible for enforcing animal welfare in N.L.

68. In Ontario, Courts have also recognized the fundamental flaw in having the OSPCA rely on publicity to inspire donations to pay for its investigations. In *R. v. Pauliuk*, the Court dismissed animal welfare charges upon finding:

> [The OSPCA] hires its own agents and inspectors, determines the parameters of their employment, and using aforementioned police powers, enters property, seizes animals as in this case (without warrant or judicial intervention) and lays charges - all the while attending to its own need to fund raise. In order to do the latter, it relies heavily on the publicity it can glean from high profile seizures and charges. Indeed, there is a communications branch tasked with this. It is a not-for-profit organization and a registered charity. Without publicity and high profile charges, the funds the S.P.C.A. needs to operate would no doubt dry up.
>
> It goes without saying that a strong and active enforcement of animal cruelty laws must be maintained. But I would be naïve to suggest that the current set-up could not foster the perception in reasonable, open-minded people, that bias may exist and that conflicts will result. However trite it may be, it is still true that 'Justice must not only be done, it must be seen to be done'. It is unfortunate, for example, that Dr. Mogavero, a highly qualified and well-respected professional, was placed in the position he was in this case. He directed the operation of the Society, he earned money from the Society, he helped fund-raise for the Society, he was concerned for the budgetary needs of the Society, he took part in the investigation, made the decision to seize the horses, made the decision to board and care for the horses, and profited from so doing.
>
> ...The perception of bias that looms over all the Crown evidence of this case is like a stake to the heart - totally damaging the Crown's ability to prove its case.
>
> It would be unreasonable and dangerous to convict on this evidence and I refuse to do so.

R. v. Pauliuk, [2005] O.J. No. 1393 (OCJ), at ¶28-32; Joint Book of Authorities, Tab B(9).

69. The *Pauliuk* case is especially noteworthy because it highlights how the *OSPCA Act*, and its delegation of police powers to the OSPCA, can actually undermine the prosecution of a case, thereby undermining the object of legislation.

70. The very recent case of *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals* is also noteworthy for two reasons:

a. The case highlights the discretionary nature of the OSPCA’s entitlement to delegate or revoke police / investigative powers to / from affiliates at the OSPCA’s complete discretion; and

b. The case highlights the fact that the OSPCA, as a private organization, is entitled to make operational decisions for its own organizational welfare, which may or may not undermine the object of protecting animal welfare. This case shows that the OSPCA suspended the police / investigative powers (and related funding) of its largest provincial affiliate, including with respect to six enforcement officers. There can be no doubt that this move disrupted the protection of animals in Ottawa to at least some degree.

***Ottawa Humane Society v. OSPCA*, [2017] O.J. No. 4722 (OCJ), at ¶6-9 & 68-71; Joint Book of Authorities, Tab B(10).**

***The lack of legislative restraint, oversight, accountability and transparency violates section 7 of the* Charter**

71. In the event that this Court finds that it may be <u>possible</u> to assign police powers (including search and seizure powers) to a private organization <u>in some situations</u> without offending section 7 of the *Charter*, the Applicant alternatively submits that the *OSPCA Act* is nevertheless unconstitutional because the OSPCA, specifically, is not subject to any, or adequate, legislated restraints on its powers, oversight, accountability or transparency.

72. Under the *Police Services Act*, R.S.O. 1990, c. P.15 [hereinafter the "PSA"], police in Ontario are subject to various restraints associated with their powers. These include prescribed:

a. Code of conduct;

***General*, O Reg 268/10, at s. 30; Joint Book of Authorities, Tab A(27).**

b. Training requirements;

***Courses of Training for Members of Police Forces*, O Reg 36/02; Joint Book of Authorities, Tab A(28).**

c. Use of equipment and training regarding same;

***Equipment and Use of Force*, RRO 1990, Reg 926; Joint Book of Authorities, Tab A(29).**

a. Dress code; and

***General*, O Reg 268/10, at s. 7-10; Joint Book of Authorities, Tab A(27).**

b. Policy re: disclosure of personal information.

***Disclosure of Personal Information*, O Reg 265/98; Joint Book of Authorities, Tab A(30).**

73. The OSPCA and its officers are not subject to the PSA[11], or any other similar statute.

74. Part V of the PSA, and *Public Complaints - Local Complaints*, O Reg 263/09 of the PSA, provides a comprehensive system for the oversight and accountability of police. The legislation provides not only a mechanism to bring a complaint about the conduct of a particular officer, but also with regards to the policies and services of a police force in Ontario.

***Police Services Act*, R.S.O. 1990, c. P.15 at Part V; Joint Book of Authorities, Tab A(26).**
***Public Complaints - Local Complaints*, O Reg 263/09; Joint Book of Authorities, Tab A(31).**

75. While government ministries and ministry officers are not subject to the PSA, they are subject to the complaint review process overseen by the Ontario Ombudsman.

***Ombudsman Act*, R.S.O. 1990, c. O.6, at s. 14; Joint Book of Authorities, Tab A(32).**

76. The *Provincial Advocate for Children and Youth Act, 2007* provides similar ombudsman-like powers to the Provincial Advocate for Children and Youth to investigate matters relating to the actions of a children's aid society.

***Provincial Advocate for Children and Youth Act, 2007*, S.O. 2007, c. 9, at s. 15-16.1; Joint Book of Authorities, Tab A(33).**

77. There is no similar legislated oversight or accountability of the OSPCA, or otherwise any independent review process accessible to the public.[12] As the evidence shows, the OSPCA deals with complaints against it and its officers internally.

78. Quite the opposite from providing a mechanism for oversight or accountability of the OSPCA, section 19 of the *OSPCA Act* actually releases OSPCA inspectors from any civil liability associated with their conduct, except when proven to be done in bad faith.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 19; Joint Book of Authorities, Tab A(16).**

79. Under Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [hereinafter the "FOIPPA"], the public has the right to request records containing

[11] Confirmed by the Respondent, the Attorney General of Ontario; see response to undertakings found at Tab 2(A), Application Record vol. III, p. 191.

[12] The Respondent, the Attorney General of Ontario, confirmed that the *Ombudsman Act* does not apply to the OSPCA; see response to undertakings found at Tab 2(A), Application Record vol. III, pp. 190-191.

their personal information from the Ontario Provincial Police or a municipal police service (subject to some exceptions). The same is true with respect to information collected in association with provincial ministry investigations. Police / ministry information that can be requested via the FOIPPA include:

a. incident and investigation reports;
b. witness statements;
c. Crown or police briefs;
d. records of arrests;
e. officers' notes; and
f. policies, position statements, and the like (again subject to certain exceptions).

***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, at s. 10-11;**
Joint Book of Authorities, Tab A(34).

80. The OSPCA and its officers are not subject to the FOIPPA[13] or any other similar access to information statute. The OSPCA has no formal access to information policy. In practice, however, the OSPCA does not provide access to information. This means that a person could be the target of an investigation, or unwittingly been under surveillance (as a target or not), or otherwise had information collected by the OSPCA about them, or had their personal privacy otherwise breached by the OSPCA, and there would be no reasonably accessible means to discover it.

81. An example of the difficulty that exists to obtain access to OSPCA held information is found in *Hunter v. Ontario Society for the Prevention of Cruelty to Animals*. In that case, a motion was required to obtain access to OSPCA held information (including OSPCA polices, complaint records, and animal-boarding-tariffs), despite the OSPCA being otherwise obligated to produce it through the normal civil litigation discovery process. It stands to reason that OSPCA held information is even less accessible in situations where there are no disclosure obligations related to court proceedings.

***Hunter v. OSPCA*, [2013] O.J. No. 4856 (OCJ), at ¶19, 29-33, &42-44;**
Joint Book of Authorities, Tab B(11).

82. It is also noteworthy that, as part of this Application, the OSPCA refused to disclose

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[13] Confirmed by the Respondent, the Attorney General of Ontario; see response to undertakings found at Tab 2(A), Application Record vol. III, p. 190.

copies of the MOUs between the OSPCA and various livestock groups, which were requested as an undertaking during the cross-examination of OSPCA Chief Inspector Connie Mallory. This refusal further confirms a general policy of the OSPCA to deny access to information.

Response to undertakings found at Tab 2(B), Application Record vol. III, p. 192; Application Record vol. III, p. 132 & 185.

83. The *OSPCA Act* has therefore created a situation where a private police force is capable of secretly collecting and keeping files on members of the public without a means to know about it or access it. This further prevents the OPSCA from being held accountable for its conduct and / or policies. It is respectfully submitted that history has proven that such a secretive / non-transparent private police force is dangerous and cannot be tolerated in a free and democratic society.

84. It is noteworthy that, through the course of this Application, a number of previously unknown policies and position statements of the OSPCA have been discovered (notwithstanding the denied MOUs). A good example of this is the fact that the OSPCA has a policy to not exercise its section 13(6) warrantless entry rights into a dwelling without a warrant. Until this policy was revealed in these proceedings, the public had no way of knowing about it.

85. In summary, police and ministry officers are subjected to legislated restraints on their powers, oversight and accountability regarding their policy and conduct, and transparency with regards to internal policy and information that they collect about people. The OSPCA meanwhile, despite having extraordinary police and other investigative powers, are not subjected to any of these important checks and balances. It is therefore respectfully submitted that it is a departure from the principles of fundamental justice to provide police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to the OSPCA without also subjecting the OSPCA to the same, or similar, legislative restraints, oversight, accountability and transparency that the police and ministry investigators are subjected to.

Police and other investigative powers alternatively contravene section 8 of the* Charter *for being unreasonable

86. "[T]he right to be secure against unreasonable search and seizure, guaranteed by section 8 of the *Charter*, is but one component of the right to security of the person guaranteed by section 7".

***Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 (SCC), at ¶35; Joint Book of Authorities, Tab B(2).**

***R. v. Racette*, [1988] 2 W.W.R. 318 (Sask. CA), at ¶72-73; Joint Book of Authorities, Tab B(4).**

***R. v. Pelletier* (1989), 17 M.V.R. (2d) 23 (QB), at ¶25; Joint Book of Authorities, Tab B(5).**

87. The Applicant alternatively submits that sections 11, 12 and / or 12.1 of the *OSPCA Act* infringe section 8 of the *Charter* for, directly or indirectly, authorizing unreasonable search and seizure powers. The Applicant submits that these powers are unreasonable for being delegated to a private organization, and the OSPCA in particular.

***The Constitution Act, 1982*, Part I at s. 8; Joint Book of Authorities, Tab A(21).**

88. In support of this alternative submission, the Applicant repeats and relies upon his above section 7 *Charter* submissions, as applicable, together with his section 8 *Charter* submissions, as applicable, described below at paragraphs 90–135.

The infringement is not justified under section 1 of the Charter

89. If this Honourable Court accepts that sections 11, 12 and /or 12.1 of the *OSPCA Act* are contrary to sections 7 and /or 8 of the *Charter*, the onus will shift to the Crown to attempt to justify the infringement under section 1. The Applicant submits that the infringement of sections 7 and /or 8 cannot be saved by section 1. While the Applicant will respond to the Crown's section 1 submissions in his Reply Factum, he briefly notes that the Supreme Court has found that a breach of the liberty aspect of section 7 of the *Charter* can only be saved by section 1 in extraordinary cases:

> It is difficult, but not impossible, to justify a s. 7 violation under s. 1. Laws that deprive individuals of liberty contrary to a principle of fundamental justice are not easily upheld. However, a law may be saved under s. 1 if the state can point to public goods or competing social interests that are themselves protected by the *Charter*.

***R. v. Safarzadeh-Markhali*, 2016 SCC 14 (SCC), at ¶57; Joint Book of Authorities, Tab B(12).**

***The Constitution Act, 1982*, Part I, at s. 1; Joint Book of Authorities, Tab A(19).**

B. UNCONSTITUTIONAL SEARCH AND SEIZURE POWERS OF THE *OSPCA ACT*

90. The Applicant submits that sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* contravene section 8 of the *Charter*. All of these sections are unique within the Act by authorizing warrantless searches and seizures.

91. Section 8 of the *Charter* states:

> Everyone has the right to be secure against unreasonable search or seizure.

The Constitution Act, 1982, Part I, at s. 8; Joint Book of Authorities, Tab A(21).

92. Warrantless searches are *prima facie* unreasonable. The party seeking to justify a warrantless search has the onus of rebutting the presumption of unreasonableness. Because the impugned sections of the *OSPCA Act* permit warrantless searches and seizures, the Respondent must rebut the presumption of unreasonableness.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶30; Joint Book of Authorities, Tab B(13).

93. Where legislation authorizes entry into people's homes (or those areas considered to be extensions of the home), the rebuttal of unreasonableness will be very difficult to make out. It has long been held that "[t]he sanctity of the home has constituted a bulwark against the intrusion of state agents"

R. v. Evans, [1996] S.C.J. No. 1 (SCC), at ¶3; Joint Book of Authorities, Tab B(14).

94. The obligation to obtain judicial authorization prior to conducting a search was explained by the Supreme Court in *Hunter v. Southam Inc.*:

> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶32; Joint Book of Authorities, Tab B(13).

95. The Court further explained that "[the person providing authorization] need not be a judge, but [he /she] must at a minimum be capable of acting judicially".

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶32; Joint Book of Authorities, Tab B(13).

96. The Court also held that an investigative body does not itself possess the necessary neutrality or detachment to also act judicially:

> … This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the *Act*) ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state…

Hunter v. Southam Inc., **[1984] 2 S.C.R. 145 (SCC), at ¶35; Joint Book of Authorities, Tab B(13).**

97. In *R. v. Campanella*, the Court of Appeal for Ontario held (quoting Dickson J. in *Hunter*):

> …an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective".
>
> …I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

R. v. Campanella **(2005), 130 C.R.R. (2d) 259 (CA), at ¶16; Joint Book of Authorities, Tab B(15).**

98. The Applicant recognizes that this Application does not involve a constitutional review of criminal law, and that the standard of reasonableness is a lower threshold when outside the realm of criminal law. However, the OSPCA is authorized by the *OSPCA Act* to concurrently investigate and charge individuals with animal cruelty offences under the *Criminal Code*, and so the search and seizure provisions of the *OSPCA Act* can expose people to criminal liability.

R. v. Campanella **(2005), 130 C.R.R. (2d) 259 (CA), at ¶20-21; Joint Book of Authorities, Tab B(15).**

99. There will always be some situations of urgency and potential for imminent harm where prior judicial authorization is impracticable, and so it may still be reasonable to perform a warrantless search in such circumstances. However, this is not to say that adequate safeguards are to be abandoned altogether. In *R. v. Tse*, the Supreme Court explained it as

follows:

> The jurisprudence is clear that an important objective of the prior authorization requirement is to prevent unreasonable searches. In those exceptional cases in which prior authorization is not essential to a reasonable search, additional safeguards may be necessary, in order to help ensure that the extraordinary power is not being abused. Challenges to the authorizations at trial provide some safeguards, but are not adequate as they will only address instances in which charges are laid and pursued to trial. Thus, the notice requirement, which is practical in these circumstances, provides some additional transparency and serves as a further check that the extraordinary power is not being abused.

***R. v. Tse*, [2012] S.C.J. No. 16 (SCC), at ¶ 16, 18, 61, 82-85, 94-95; Joint Book of Authorities, Tab B(16).**

100. Sections 11.4, 11.4.1, 12(6), 13, and 14(1) of the *OSPCA Act* either expressly permit warrantless entry onto private property and /or seizure of property, or the preconditions for entry and /or seizure do not demand judicial authorization (either before or after), and / or “safeguards” designed to avoid abuse of these powers are nonexistent or inadequate.

Unreasonable search and seizure: sections 11.4, 11.4.1

101. Section 11.4(1) permits warrantless entry into a “building or place where animals are kept […] if the animals are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale”. Subsection 11.4(2) exempts “a building or place used as a dwelling”. Subsection 11.4(4) limits the times of entry. When a section 11.4 inspection takes place, section 11.4.1 permits an OSPCA inspector to demand production of “a record or thing for inspection”, and requires the owner to produce it. There is no exception under section 11.4.1 for items that may be located in a dwelling.

102. These sections speak of “inspections” rather than “searches”. However, inspections under a regulatory statute remain subject to section 8 scrutiny. In *Comité paritaire de l’industrie de la chemise c. Sélection Milton*, the Supreme Court confirmed inspections are nevertheless subject to section 8 *Charter* protection. Justice L’Heureux-Dubé, in the majority decision, held in part:

> ...The term "search" in s. 8 cannot be limited to searches of a criminal nature. It may encompass, inter alia, various sorts of access, in the context of administrative law or in criminal matters; this may, however, result in

> differences in the scope of the constitutional guarantee. To conclude otherwise would amount to unduly minimize the purpose of the guarantee against "unreasonable search or seizure," which does not seem desirable. In short, although this is an administrative inspection, nonetheless the access to work premises conferred by the ACAD is comparable to a "search," and as such is subject to s. 8 of the *Charter*. This conclusion does not, however, mean that the standard of reasonableness will necessarily be as strict in a matter involving the regulation of an industrial sector as it is in criminal matters. [*references omitted*]

***Comité paritaire de l'industrie de la chemise c. Sélection Milton*, [1994] 2 S.C.R. 406 (SCC), at ¶ 53-59, 61-62; Joint Book of Authorities, Tab B(17).**

103. Sections 11.4, 11.4.1 of the *OSPCA Act* permit warrantless entry and seizures. Evidence obtained from section 11.4 entry and section 11.4.1 seizures can be used to charge and convict individuals with offences under the *OSPCA Act* and potentially lead to criminal liability. Furthermore, while *OSPCA Act* charges are not criminal offences, some offences are virtually indistinguishable from *Criminal Code* offences and carry similar if not the same stigma and penalties. It is submitted that animal welfare offences carry more stigma than most, if not all, other regulatory offences. It is noteworthy that *OSPCA Act* charges and convictions are widely publicized by the OSPCA as involving acts of "animal cruelty".

Exhibit 5(O) - OSPCA media releases, Application Record vol. I, pp. 494 & 499.[14]

104. The potential stigma associated with animal welfare offences was discussed by Justice Gorman in *R. v. White* (in the context of *Criminal Code* offences):

> [T]he "manner in which we treat animals may be considered as a reflection of our own humanity, or lack thereof. It has been suggested that intentional cruelty to animals is an indicator of a 'potential for increasing violence and dangerousness' against people (see the Federal Department of Justice's 1998, Consultation Paper, Crimes Against Animals)." In *R. v. Brown*, [2004] A.J. No. 201 (Alta. Prov. Ct.), at paragraph 31, it was noted that protection of animals "is part of our criminal law because a person's treatment of animals, like the treatment of children, the infirm or other vulnerable parties, is viewed as a barometer of that person's treatment of people. As with all other criminal offences, harming animals amounts to harming everyone."

***R. v. White*, 2012 CarswellNfld 258 (PC), at ¶9; Joint Book of Authorities, Tab B(18).**

[14] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

105. In *R. v. Way*, Justice Horkins noted the stigma that animal welfare charges and convictions can have on an individual and the devastating consequences it can have on their personal and professional lives, even when there is no finding of cruel intentions:

> Ms. Way's crime is one of negligence and I am persuaded that Ms. Way has suffered extreme collateral consequences from being tried and found guilty of these offences. She has suffered tremendous personal embarrassment and loss of reputation in both her social and professional communities.
>
> This case received significant attention in the media. The media held her up a "crazy cat lady". And whether the shoe fits or not, the stigma of that offensive characterization has stung her deeply. Part of the tragic irony of this case is that Ms. Way loved these cats and yet her neglect lead to the need to euthanize all but one of the over 100 animals seized by the authorities. This has not rested lightly on her shoulders.
>
> ...Ms. Way is both a lawyer and a teacher. She has not practiced law in years but the Law Society has documented an express interest in the outcome of this case. Ms. Way's teaching contracts came to an abrupt end expressly as a result of these charges being laid against her.

***R. v. Way*, [2016] O.J. No. 4517 (CJ), at ¶10-11, 14; Joint Book of Authorities, Tab B(19).**

106. Given that charges under the *OSPCA Act* carry a great deal of stigma, provide exposure to harsh penalties (including incarceration), and are often widely publicized, and given that searches made under the *OSPCA Act* can also lead to animal cruelty charges under the *Criminal Code*, it is submitted that the standard of "reasonableness" applied to the search and seizure provisions in the *OSPCA Act* should be as strict, or at least close to as strict, as in criminal matters.

107. While it is understood that section 11.4(1) does not include a dwelling unit, it permits warrantless entry and seizures on private property where residences are often located. Places where animals are kept for the purpose of boarding (i.e. horse or canine boarding facilities) and sale often include farms and other residential properties. These properties are often not open to the public, so the expectation of privacy can be very high. The sanctity of privacy of these premises might not be as high as a dwelling unit, but it can be close.

108. The potential exists that the outbuildings that OSPCA officers can search under section 11.4(1) would properly be considered an extension of the house and subject the same, or similar, high degree of privacy. For example, a dog kennel located next to a house.

109. Barns and other outbuildings on private property are subject to a reasonable expectation of privacy.

***R. v. Moran*, [1987] O.J. No. 794 (CA), at ¶47; Joint Book of Authorities, Tab B(20).**

110. In *R. v. Le*, Justice Hoy held:

> It would be an error to examine the barn in isolation. Rather, it is an integral and essential building for a farm. The barn in these circumstances is not unlike an office. In many respects it is an extension of the residence. A farm is a unique environment where those who live such a lifestyle blend their daily life activities around work on the property. As farming duties are performed, it is reasonable to say that some would be performed in the privacy of a structure such as the barn in question. Furthermore this farm was a privately run business. That is, it was not a place to which the public was invited

***R. v. Le*, 2005 BCPC 47 (PC), at ¶14-16; Joint Book of Authorities, Tab B(21).**

111. In *R. v. Robertson*, Justice Woods held:

> I have been mindful of the fact that searches, even of outbuildings, on properties where citizens reside entail significant intrusions into those citizens' zones of privacy.

***R. v. Robertson*, 2010 BCPC 2 (PC), at ¶48; Joint Book of Authorities, Tab B(22).**

112. In *R. v. Rodriguez*, Justice Semenuk held:

> Judicial opinion as to whether a detached garage is part of a dwelling-house is divided [*references omitted*].
>
> That being said, the law is clear that for the purposes of section 8 of the *Charter*, there is the same expectation of privacy in a detached garage, workshop, or other outbuilding on the property, as there is for the dwelling-house.

***R. v. Rodriguez*, 2014 ABPC 44 (PC), at ¶75-76; Joint Book of Authorities, Tab B(23).**

113. In summary, sections 11.4 and 11.4.1 of the *OSPCA Act* permit warrantless entry and seizures on private property, often involving residential properties, in situations where there is no urgency. The information obtained from these searches and seizures can be used to charge and convict individuals with offences under the *OSPCA Act* and / or the *Criminal Code*, both of which carry harsh penalties and significant stigma. This combination is unreasonable and contrary to section 8 of the *Charter*.

Unreasonable search: section 12(6)

114. Section 12(6) of the *OSPCA Act* permits OSPCA officers to enter any building or place, other than a dwelling, without a warrant where they have reasonable grounds to believe there is an animal in immediate distress. Section 12(6) provides no notice requirement or requirement of *post facto* judicial authorization or oversight.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 12; Joint Book of Authorities, Tab A(9).**

115. The Applicant recognizes that, where prior judicial authorization is impracticable due to a situation of urgency, the Crown may be capable of rebutting the presumption of unreasonableness of a warrantless search. Section 12(6) of the *OSPCA Act* is clearly designed to deal with such situations of urgency.

116. However, in those exceptional cases where prior authorization is not required, additional safeguards are necessary to help ensure that these extraordinary powers are not being abused. Such safeguards may include a requirement to provide notice to persons affected, and /or *post facto* judicial authorization or oversight.[15]

***R. v. Tse*, [2012] S.C.J. No. 16 (SCC), at ¶ 16, 18, 61, 82-85, 94-95; Joint Book of Authorities, Tab B(16).**

117. The warrantless entry powers of section 12(6) of the *OSPCA Act* cannot stand as presently drafted. There is nothing built into this section to review the use of these extraordinary powers to ensure that they are being exercised appropriately and only in truly exigent circumstances, nor is there any notice requirement to ensure that affected persons are even aware of a section 12(6) search. It is not enough to say that a section 12(6) search can be challenged at trial, because such searches do not necessarily lead to charges. The potential for abuse of section 12(6) powers is therefore very real. The lack of any judicial oversight or other safeguards applicable to section 12(6) makes the section unreasonable and therefore contrary to section 8 of the *Charter*.

Unreasonable search: sections 13(1) and 13(6)

118. Sections 13(1) and 13(6) of the *OSPCA Act* work conjunctively to confer upon OSPCA

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[15] See, for example, the *post facto* reporting and authorization obligations in relation to seizures of evidence at sections 12.1(5) & 12.1(6) of the *OSPCA Act*; Joint Book of Authorities, Tab A(10).

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.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 11; Joint Book of Authorities, Tab A(4).**

119. Section 13(6) of the *OSPCA Act* confers upon OSPCA officers the power to enter private property, including a dwelling, without a warrant at the complete discretion of the officer 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, and irrespective of any situation of urgency. The fact that section 13(6) does not provide an exception for dwellings makes these entry powers especially unreasonable.

120. It is noteworthy that the OSPCA has set its own policy to restrict its section 13(6) warrantless entry powers as it relates to entering dwellings. However, this policy is discretionary since it is not statutorily prescribed. As a result, the OSPCA could enter a dwelling without a warrant and not be in contravention of the *OSPCA Act*. The enactment of this OSPCA policy may be an acknowledgment on behalf of the OSCPA that section 13(6) of the Act constitutes an unreasonable search, and if they were to rely upon these warrantless entry powers to enter a dwelling, they could nevertheless be found to be in contravention of section 8 of the *Charter*.

121. It is noteworthy that the legislation does not require a veterinarian to confirm the merits of an OSPCA officer's initial belief that an animal may have been in distress, so there is not even the slightest legislated check on these powers.

122. There is nothing about section 13(6) that suggests it is directed at emergency situations.

123. There is also no or inadequate judicial oversight or accountability under section 13(6). The Applicant acknowledges that, under section 17 of the *OSPCA Act*, there is a right to appeal a section 13(1) order, and a person can apply to the board to have such an order revoked. However, unjustified searches are supposed to be prevented before they happen, rather than determining, after the fact on a section 17 appeal, that the search ought not to have occurred in the first place. This principle was explained in *Hunter v. Southam*:

> Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a

> means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation.

***Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 (SCC), at ¶27; Joint Book of Authorities, Tab B(13).**

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 17; Joint Book of Authorities, Tab A(14).**

124. The OSPCA should be legislatively required to confirm the merits of a section 13(1) order, rather than placing the onus on the person affected to appeal the order. This is especially true given that it will inevitably lead to section 13(6) warrantless entry powers, and these powers are not stayed during an appeal (see section 17(8) of the Act). The Applicant submits that the onus should not be on the person affected by the order to reestablish their section 8 *Charter* rights.

125. There will be many situations where the person affected by a section 13(1) order and corresponding section 13(6) warrantless entry powers is incapable (due to finances, cognitive ability, mobility, mental health or religion) of initiating a section 17 appeal. It is also noteworthy that a person's right to appeal the merits of a section 13(1) order expires after only 5 business days, while section 13(6) entry powers can conceivable go on forever. As mentioned above, it is also noteworthy that a section 17 appeal does not stay the section 13(1) order or corresponding section 13(6) warrantless entry powers, and section 17 appeal proceedings can conceivably go on for months, resulting in months of exposure to section 13(6) warrantless entry powers.[16]

126. In summary, the warrantless entry powers that are conjunctively provided by sections 13(1) and 13(6) of the *OSPCA Act* are unreasonable and contrary to section 8 of the *Charter* because they authorize warrantless entry onto private property, including within dwellings, at any time of day or night in non-urgent situations without any, or adequate, judicial oversight. Equally alarming is the ability of OSPCA officers to issue section 13(1) orders, and thus impose section 13(6) warrantless entry powers, without any consultation with a veterinarian to confirm the merits of the order. Appeal provisions provided by section 17 of the *OSPCA Act* are exclusively *post facto*, and nevertheless

[16] See for example *Jessica Johnson v. OSPCA* (2013), Decision Ref. No. 2012-03 (ACRB); Joint Book of Authorities, Tab B(24); the hearing lasted over four months and the decision was not rendered for six months.

provide inadequate oversight and / or safeguards to rebut the presumption of unreasonableness.

Unreasonable seizure: section 14(1)

127. Sections 14(1)(b) and 14(1)(c) confers upon an OSPCA officer the power to seize private property, irrespective of any situation of urgency and without any consultation with a veterinarian.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 14; Joint Book of Authorities, Tab A(12).**

128. Section 14(1)(b) confers warrantless seizure powers upon OSPCA officers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer. The legislation does not require a veterinarian to confirm that the animal is / was in actual distress.

129. Sections 14(1)(c) and 13(1) of the *OSPCA Act* work conjunctively to confer upon OSPCA officers warrantless seizure powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" at the time when the section 13(1) order was issued. The legislation does not require a veterinarian to confirm that the initial section 13(1) order had any merit to begin with, or that a seizure is necessary for the welfare of the animal.

130. Section 17 of the *OSPCA Act* provides a right to appeal a section 14(1) seizure, and a person can apply to the board to have their animal(s) returned. However, once again, the Applicant submits that the onus should not be on the person affected by the removal to challenge the seizure. Instead, the OSPCA should be obliged to report and obtain an order from a justice of the peace or provincial judge to legally keep an animal seized pursuant to section 14(1), similar to that which is required by way of sections 12.1(5), 12.1(6) and /or 14(1.1) of the Act.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 12.1; Joint Book of Authorities, Tab A(10).**

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 14; Joint Book of Authorities, Tab A(12).**

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 17; Joint Book of Authorities, Tab A(14).**

131. This is especially true given the fact that the OSPCA charges fees at a for-profit rate on an ongoing basis after removing an animal, and these fees can quickly become unaffordable to the person affected. These fees can also quickly escalate during section 17 appeal proceedings. The OSPCA's decision to keep an animal may be perceived as being financially motivated. The OSPCA typically does not return an animal without such fees being paid, and so the OSPCA may also be perceived as using their fees as a means to keep an animal that should otherwise be properly returned.

132. There will be many situations where a person affected by a seizure will be incapable (due to finances, cognitive ability, mobility, mental health or religion) of initiating a section 17 appeal. It is also noteworthy that a person's right to appeal a section 14(1) seizure expires after only 5 business days. So, even if a person was capable of commencing such an appeal, they would be prohibited if they did not do so within these extraordinarily short timelines.

133. It is noteworthy that, when the OSPCA seizes a dead animal pursuant to section 12.1(1) of the Act, they are obliged to report it to a justice of the peace or provincial judge pursuant to section 12.1(5) of the Act, and obtain an order to keep it, return it, or dispose of it pursuant to section 12.1(6) of the Act; but the same safeguards / oversight do not exist with respect to the seizure of a person's living animal seized under section 14(1) of the Act. In other words, the safeguards related to seizures of dead animals are greater than those related to living animals.

134. In summary, the seizure provisions in sections 14(1)(b) and 14(1)(c) of the *OSPCA Act* are contrary to section 8 of the *Charter* because they authorize the seizures of animals in non-urgent situations without any, or adequate, judicial oversight. Also alarming is the ability for OSPCA officers to seize animals without any consultation with a veterinarian. Seized animals that are kept by the OSPCA are subject to fees charged by the OSPCA, which can result in a perception that the OSPCA is profiting by the seizures, or the OSPCA is using unpaid fees as an excuse to improperly withhold the return of seized animals. Appeal provisions provided by section 17 of the *OSPCA Act* are exclusively *post facto*, and nevertheless provide inadequate oversight and / or safeguards to rebut the presumption of unreasonableness.

Warrantless search and seizure powers in tandem with police powers delegated to a private organization

135. The Applicant submits that the fact that the impugned search and seizure powers described above are delegated to a private organization without any, or adequate, legislative restraint, oversight, accountability and transparency, makes the unreasonableness of these warrantless search and seizure powers more egregious, and / or aggravates the unreasonableness of it as it relates to section 8 of the *Charter*. Put another way, warrantless entry and seizure powers are extraordinary powers and cannot be trusted to a private organization without being unreasonable.

***Warrantless search and seizure powers alternatively contravene section 7 of the* Charter**

136. The Applicant alternatively submits that sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* infringe the "security of the person" aspect of section 7 of the *Charter* in a manner that is contrary to principles of fundamental justice. "Unreasonable searches and seizures are but examples of the manner in which a deprivation of the right to security of the person can be achieved."

***Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 (SCC), at ¶35; Joint Book of Authorities, Tab B(2).**

***R. v. Racette*, [1988] 2 W.W.R. 318 (Sask. CA), at ¶72-73; Joint Book of Authorities, Tab B(4).**

***R. v. Pelletier* (1989), 17 M.V.R. (2d) 23 (QB), at ¶25; Joint Book of Authorities, Tab B(5).**

***The Constitution Act, 1982*, Part I at s. 7; Joint Book of Authorities, Tab A(20).**

137. In support of this alternative submission, the Applicant repeats and relies upon his above section 8 *Charter* submissions, as applicable, together with his section 7 *Charter* submissions, as applicable, described above at paragraphs 38–85.

The infringement is not justified under section 1 of the Charter

138. If this Honourable Court accepts that some or all of sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* are contrary to sections 7 and / or 8 of the *Charter*, the onus will shift to the Crown to justify the infringement under section 1. The Applicant submits that the infringement of sections 7 and /or 8 in this case cannot not be saved by section 1. The Applicant will respond to the Crown's section 1

submissions in his Reply Factum.

***The Constitution Act, 1982*, Part I, at s. 1; Joint Book of Authorities, Tab A(19).**

C. SECTIONS 11.2(1) AND 11.2(2) OF THE *OSPCA ACT* ARE *ULTRA VIRES* THE PROVINCE OF ONTARIO

139. Section 11.2(1) and 11.2(2) are in pith and substance criminal in nature and within the exclusive power of the Parliament of Canada under section 91(27) of the *Constitution Act, 1867*.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 11.2(1) & 11.2(2); Joint Book of Authorities, Tab A(6).**

***The Constitution Act, 1867*, at s. 91; Joint Book of Authorities, Tab A(18).**

140. Section 91(27) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative jurisdiction over criminal law "in the widest sense of the term". Criminal law involves "some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened." "The presence or absence of a criminal public purpose or object is thus pivotal".

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶ 37-39; Joint Book of Authorities, Tab B(25).**

141. The features of criminal legislation are: (1) a criminal law purpose; (2) backed by a prohibition; and (3) a penalty.

***Reference Re: Firearms Act (Canada)*, 2000 SCC 31 (SCC), at ¶ 27; Joint Book of Authorities, Tab B(26).**

142. *R. v. Morgentaler* sets out the analysis to be followed when determining whether or not a law has entered the realm of criminal law. Such an analysis "is not and never can be an exact science".

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶ 26; Joint Book of Authorities, Tab B(25).**

143. The classification of a law involves first identifying the leading feature or true character of the law, often described as its pith and substance. The analysis is to be flexible, not formalistic. Purpose and effect of the law are relevant considerations, but the legislation's

dominant objective is the key consideration.

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶ 26-27; Joint Book of Authorities, Tab B(25).**

144. A "pith and substance" analysis starts with determining the legislative legal effect. To determine this, the first step is to look at the "four corners of the legislation". The "four corners of the legislation" are the words of the legislation itself.

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶ 28-29; Joint Book of Authorities, Tab B(25).**

145. In the *OSPCA Act*, sections 11.2(1) and 11.2(2) fall under the heading "Prohibitions re distress, harm to an animal". Sections 11.2(1) and 11.2(2) read as follows:

> 11.2 (1) No person shall cause an animal to be in distress.
>
> (2) No owner or custodian of an animal shall permit the animal to be in distress.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 11.2(1) & 11.2(2); Joint Book of Authorities, Tab A(6).**

146. The Act defines "distress" at section 1(1) as:

> "distress" means the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect;

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 1(1); Joint Book of Authorities, Tab A(2).**

147. Sections 11.2(1) and 11.2(2) have the obvious legal effect of prohibiting causing or permitting "distress" (as defined by the Act), and providing penalties in order to deter such conduct.

148. The next step involves comparing the impugned provisions to similar provisions of the *Criminal Code*. Under the heading "Cruelty to Animals", sections 445.1(1)(a) ("Causing unnecessary suffering") and 446(1)(b) ("Causing damage or injury") state:

> 445.1 (1) Every one commits an offence who (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
>
> 446. (1) Every one commits an offence who (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress

or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

***Criminal Code*, R.S.C. 1985, c. C-46, at s. 445.1(1)(a) & 446(1)(b); Joint Book of Authorities, Tabs A(23) & A(24).**

149. While the *OSPCA Act* and *Criminal Code* provisions are very similar, the main difference is the qualifier "willfully" in the *Criminal Code* provisions, which necessarily brings in a *mens rea* component. By comparison, the *OSPCA Act* creates strict liability offences, requiring no proof of *mens rea*. This makes it much easier to convict under the *OSPCA Act* for essentially the same act.

150. The penalty provisions of the *OSPCA Act* and *Criminal Code* offences are also very similar. Under section 18.1 of the *OSPCA Act*, an offence under sections 11.2(1) or 11.2(2) may be punishable by a fine of up to $60,000, imprisonment for up to two years, a prohibition order against owning or caring for animals, and / or a restitution order payable to the OSPCA.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 18.1; Joint Book of Authorities, Tab A(15).**

151. Section 445.1 penalties include fines up to $10,000 and imprisonment of up to eighteen months on summary conviction, or up to five years imprisonment for an indictable offence. Section 446 penalties include fines of up to $5,000 and imprisonment up to six months on summary conviction, or up to two years imprisonment for an indictable offence. In addition, section 447.1(1) of the *Criminal Code* provides prohibition and restitution orders as possible penalties.

***Criminal Code*, R.S.C. 1985, c. C-46 at s. 445.1(2), 446(2) & 447.1(1); Joint Book of Authorities, Tabs A(23), A(24), & A(25).**

152. The Applicant submits that the similarities between sections 11.2(1) and 11.2(2) of the *OSPCA Act* and the *Criminal Code* offences provide an inference that the province has transgressed into the area of criminal law. The penalty provisions are also similar, with some penalties in the *OSPCA Act* actually being more severe than the *Criminal Code* equivalent.

153. The Court has found that "[p]rovincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*". As

mentioned already, the main difference between sections 11.2(1) and 11.2(2) of the *OSPCA Act* and the *Criminal Code* provisions is that the *OSPCA Act* does not require a *mens rea* component and is therefore easier to convict. This suggests an intent to "invade the criminal field by attempting to stiffen, supplement or replace the criminal law […] or to fill perceived defects or gaps therein". Put another way, there appears to be intent on behalf of the province to make it easier to convict animal cruelty cases by incorporating the elements of the criminal law into a strict liability provincial offence.

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶54-55; Joint Book of Authorities, Tab B(25).**

154. Another comparison that is very important to consider involves looking within the *OSPCA Act* itself. Section 11.1(1) of the *OSPCA Act* actually provides an example of how the province can properly legislate in the area of animal welfare, without transgressing into criminal law. Under the heading "Standards of care and administrative requirements for animals", section 11.1(1) of the Act reads as follows:

> Every person who owns or has custody or care of an animal shall comply with the prescribed standards of care, and the prescribed administrative requirements, with respect to every animal that the person owns or has custody or care of.

***Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, at s. 11.1; Joint Book of Authorities, Tab A(5).**

155. At section 2 of the "Standards of Care" regulations provided by the *OSPCA Act*, the prescribed standards of care for all animals include:

> 2. (1) Every animal must be provided with adequate and appropriate food and water.
>
> (2) Every animal must be provided with adequate and appropriate medical attention.
>
> (3) Every animal must be provided with the care necessary for its general welfare.
>
> (4) Every animal must be transported in a manner that ensures its physical safety and general welfare.
>
> (5) Every animal must be provided with an adequate and appropriate resting and sleeping area.
>
> (6) Every animal must be provided with adequate and appropriate,
>
> > (a) space to enable the animal to move naturally and to exercise;
> >
> > (b) sanitary conditions;

(c) ventilation;

(d) light, and;

(e) protection from the elements, including harmful temperatures.

(7) If an animal is confined to a pen or other enclosed structure or area,

(a) the pen or other enclosed structure or area, and any structures or material in it, must be in a state of good repair;

(b) the pen or other enclosed structure or area, and any surfaces, structures and materials in it, must be made of and contain only materials that are,

(i) safe and non-toxic for the animal, and

(ii) of a texture and design that will not bruise, cut or otherwise injure the animal; and

(c) the pen or other enclosed structure or area must not contain one or more other animals that may pose a danger to the animal.

(8) Every animal that is to be killed must be killed by a method that is humane and minimizes the pain and distress to the animal; an animal's pain and distress are deemed to be minimized if it is killed by a method that produces rapid, irreversible unconsciousness and prompt subsequent death.

***Standards of Care*, O Reg 60/09, at s. 2; Joint Book of Authorities, Tab A(17).**

156. The above "standards of care and administrative requirements for animals" provisions fit precisely within the province's constitutional mandate.

157. The main difference between the impugned sections 11.2(1) and 11.2(2) and the proper section 11.1(1) of the Act is that section 11.1(1) merely purports to <u>control the quality and nature</u> of animal welfare, which is within provincial competence. By comparison, sections 11.2(1) and 11.2(2) are directed at <u>suppressing or punishing socially undesirable conduct</u> associated with animal welfare, which makes it criminal law.

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶37; Joint Book of Authorities, Tab B(25).**

158. Put another way, sections 11.2(1) and 11.2(2) are directed at prohibiting cruelty, harm and abuse of animals. This is not the same as section 11.1(1), even though section 11.1(1) certainly includes an ancillary moral component. The pith and substance of section 11.1(1) is concerned with controlling the "standards of care and administrative requirements for animals" (as that section's heading makes it clear).

159. We know that the pith and substance of section 11.1(1) cannot be the same as sections 11.2(1) and 11.2(2) because there is a presumption against redundancy in legislation.

This means that the main thrust of the two sections must serve two different purposes.

***Tower v. Canada (Minister of National Revenue - M.N.R.) (F.C.A.)*, [2004] 1 F.C.R. 183 (FCA), at ¶ 15-17; Joint Book of Authorities, Tab B(27).**

160. In addition to looking at a comparison between relevant legislation, a pith and substance analysis may also look at the background and context of the impugned legislation. This can include the use of extrinsic materials, such as Hansards and other inherently reliable information. Such materials in this case provide further proof that the province intended to address criminal matters when it added sections 11.2(1) and 11.2(2) to the *OSPCA Act* in 2008 / 2009.

***R. v. Morgentaler*, [1993] 3 S.C.R. 463 (SCC), at ¶ 30-32; Joint Book of Authorities, Tab B(25).**

161. Section 11.2 was brought into the *OSPCA Act* as part of *Bill 50, Provincial Animal Welfare Act, 2008* [the "Bill"]. It is noteworthy that the preamble of the Bill suggests an intent to influence societal conduct:

> The people of Ontario and their government:
>
> Believe that how we treat animals in Ontario helps define our humanity, morality and compassion as a society;
>
> Recognize our responsibility to protect animals in Ontario;

***Bill 50, Provincial Animal Welfare Act, 2008*; Joint Book of Authorities, Tab A(35).**

162. The following is a summary of some of the 2008 Hansard debates associated with the Bill.

163. During the debate on May 5, 2008, when describing the proposed amendments to the *OSPCA Act*, there are two key components that are discussed as an object of the changes: (1) the implementation and enforcement of prescribed standards of care for animals, and (2) the prevention of unconscionable conduct towards animals, such as causing or permitting cruelty, abuse and /or harm to animals (described interchangeably with the term "distress"). It is respectfully submitted that the former is within provincial competence, while the latter relates to criminal law.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Hansard Issue L039 (5 May 2008) (Hon. Bruce Crozier); Joint Book of Authorities, Tab C(1).

164. During the debate, the words "abuse", "abused", "exploit", "harm", "cruel" and "cruelty"

are used more than two-dozen times in relation to the treatment of animals. In one instance, "unspeakable cruelty" is referenced. MPP (Sudbury) Rick Bartolucci used an example of a puppy that was thrown out of a speeding pickup truck in support of the Bill. MPP (Brant) Dave Lavac stated that "unfortunately, it is not uncommon to hear of the acts of uncaring individuals who exploit or harm defenseless animals - and research tells us that the next step is people". He later said "[the debate / decision on the Bill] is a window to our souls. Many great people who have spoken in the past have said that how we treat the animals is how we treat ourselves". MPP (Dufferin-Caledon) Sylvia Jones reiterated this same point by stating "if an individual is inclined to abuse their animal, they are more likely to abuse their spouse or child". These discussions suggest that the legislature's intent was to deal with the type of unconscionable conduct that is normally reserved for the criminal law.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Hansard Issue L039 (5 May 2008) at p. 2, 4, 6, & 8 (Mr. Bruce Crozier); Joint Book of Authorities, Tab C(1).

165. It is noteworthy that, at the time when the *OSPCA Act* was amended in 2008 / 2009, the OSPCA itself described the new *OSPCA Act* as dealing with "animal abuse", and specifically described sections 11.2(1) and 11.2(2) as dealing with "animal cruelty". Meanwhile, the Minister of Community Safety and Correctional Services (the Minister responsible for the *OSPCA Act*), Madeleine Meilleur, referred to the new *OSPCA Act* as having "clamped down on animal abusers".

Exhibit 5(P) - OSPCA media release re: the "new" OSPCA Act, Application Record vol. I, p. 516.[17]

Lisa Kool, ministry of Community Safety and Correctional Services, answer to undertaking, Sessional Paper No. P-53; Application Record vol. III, Tab 3(B), p. 239.

166. It is also particularly telling that, during the Bill 50 legislative debates, MPP Lavac described the changes to the legislation as "giving the OSPCA a new option [besides *Criminal Code* charges], charging a person with a new provincial offence." Mr. Lavac described how the amendments to the *OSPCA Act* would make it easier to convict people compared to the similar *Criminal Code* offences because the OSPCA would not have to prove the harm was willful. He stated "[r]ather than having to prove that the harm was

[17] Confirmed by the OSPCA to be a true copy of an OSPCA document; see response to undertakings found at Tab 2(B), Application Record vol. III, p. 192.

willful, the OSPCA would only need to determine the owner of the animal and that the [distress] did occur". This expressly suggests an intent to supplant the *Criminal Code* provisions with provincial law while widening the scope of liability to fill a perceived defect, knowing that it would be easier to obtain a conviction under the new *OSPCA Act*.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Hansard Issue L039 (5 May 2008) at p. 4 & 5 (Mr. Bruce Crozier); Joint Book of Authorities, Tab C(1).

167. In summary, the legal effect of section 11.2(1) and 11.2(2) is to prohibit and punish animal cruelty. It is similar to *Criminal Code* offences that possess the same legal effect, except the *OSPCA Act* provision makes it easier to convict for the same acts, suggesting an effort to supplant, undermine and / or cure a perceived defect in the *Criminal Code*. In comparison with section 11.1(1) of the *OSPCA Act*, sections 11.2(1) and 11.2(2) are directed at suppressing or punishing socially undesirable conduct associated with animal welfare, which is in the nature of criminal law, while section 11.1(1) is properly directed at controlling the nature, quality and standards of animal welfare. The two provisions cannot have the same purpose due to the presumption against redundancy.

168. Sections 11.2(1) and 11.2(2) of the *OSPCA Act* are unconstitutional for falling outside the province's jurisdiction by being in pith and substance criminal in nature and within the exclusive power of the Parliament of Canada under section 91(27) of the *Constitution Act, 1867*.

PART IV – ORDER REQUESTED

169. The Applicant requests:

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 *Charter*, that sections 11, 12 and /or 12.1 of the *OSPCA Act*, as amended, violate section 7 (or section 8 in the alternative) of the *Charter* and is not saved by section 1 of the *Charter* and is therefore 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(1) (except subsection 14(1)(a)) of the *OSPCA Act*, as amended, violate section 8 (or section 7 in the alternative) of the *Charter* and are not saved by section 1 of the *Charter* and are therefore 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 sections 11.2 and 18.1(1)(c) of the *OSPCA Act*, as amended, violate sections 91 and 92 of the *Constitution Act, 1867*, and are therefore of no force or effect;

d. Leave to file a Factum in excess of 30 pages, if required, pursuant to Rule 2.03 of the *Rules of Civil Procedure*;

e. Leave to amend the Notice of Application, if required, pursuant to Rules 26.01 and 26.02 of the *Rules of Civil Procedure*; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF FEBRUARY, 2018.

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, ss. 1, 7, 11, 11.1, 11.2, 11.4, 11.4.1, 12, 12.1, 13, 14, 15, 17, 18.1, 19

Standards of Care, O Reg 60/09, at s. 2

The Constitution Act, *1867*, s. 91

The Constitution Act, 1982, ss. 1, 7, 8, 52

Criminal Code, R.S.C. 1985, c. C-46, at s. 445.1 & 446, 447.1

Police Services Act, R.S.O. 1990, c. P.15 at Part V

General, O Reg 268/10, at ss. 7-10, 30;

Courses of Training for Members of Police Forces, O Reg 36/02;

Equipment and Use of Force, RRO 1990, Reg 926;

Disclosure of Personal Information, O Reg 265/98;

Public Complaints - Local Complaints, O Reg 263/09;

Ombudsman Act, R.S.O. 1990, c. O.6, at ss. 14

Provincial Advocate for Children and Youth Act, 2007, S.O. 2007, c. 9, ss. 15-16.1

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 10-11

Jurisprudence

R. v. Clarke, [2001] N.J. No. 191 (N.L Prov. Ct.)

Reference re Motor Vehicle Act (British Columbia) S 94(2), [1985] 2 S.C.R. 486 (SCC)

R. v. Smith, 2015 SCC 34 (SCC)

R. v. Racette, [1988] 2 W.W.R. 318 (Sask. CA)

R. v. Pelletier (1989), 17 M.V.R. (2d) 23 (QB)

Canada (Attorney General) v. Bedford, [2013] 3 S.C.R. 1101 (SCC)

R. v. La, [1997] 2 S.C.R. 680 (SCC)

Beazley (Re), [2007] N.J. No. 337 (N.L Prov. Ct.)

R. v. Pauliuk, [2005] O.J. No. 1393 (CJ)

Ottawa Humane Society v. OSPCA, [2017] O.J. No. 4722 (SCJ)

Hunter v. OSPCA, [2013] O.J. No. 4856 (OCJ)

R. v. Safarzadeh-Markhali, 2016 SCC 14 (SCC)

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC)

R. v. Evans, [1996] S.C.J. No. 1 (SCC)

R. v. Campanella (2005), 130 C.R.R. (2d) 259 (CA)

R. v. Tse, [2012] S.C.J. No. 16 (SCC)

Comité paritaire de l'industrie de la chemise c. Sélection Milton, [1994] 2 S.C.R. 406 (SCC)

R. v. White, 2012 CarswellNfld 258 (PC)

R. v. Way, [2016] O.J. No. 4517 (CJ)

R. v. Moran, [1987] O.J. No. 794 (CA)

R. v. Le, 2005 BCPC 47 (PC)

R. v. Robertson, 2010 BCPC 2 (PC)

R. v. Rodriguez, 2014 ABPC 44 (PC)

Jessica Johnson v. OSPCA (2013), Decision Ref. No. 2012-03 (ACRB)

R. v. Morgentaler, [1993] 3 S.C.R. 463 (SCC)

Reference Re: Firearms Act (Canada), 2000 SCC 31 (SCC)

Tower v. Canada (Minister of National Revenue - M.N.R.) (F.C.A.), [2004] 1 F.C.R. 183 (FCA)

Bill 50, Provincial Animal Welfare Act, 2008

Other Sources

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Hansard Issue L039 (5 May 2008) (Hon. Bruce Crozier)

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Applicant **Respondent**

Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
PERTH, ONTARIO

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