Superior Court File No.: 749/13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFREY BOGAERTS

Applicant

– and –

THE ATTORNEY GENERAL OF ONTARIO

Respondents

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ONTARIO

THE ATTORNEY GENERAL OF ONTARIO

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9
Fax: 416-326-4015

Daniel Huffaker (LSUC#56804F)
Tel: (416) 326-0296
Email: daniel.huffaker@ontario.ca

Of Counsel for the Respondent,
The Attorney General of Ontario

TO: **KURTIS R ANDREWS**

Lawyer
P.O. Box 12032 Main P.O.
Ottawa, ON K1S 3M1

Tel: (613) 565-3276
kurtis@kurtisandrews.ca

Lawyer for the Applicant,
Jeffrey Bogaerts

I. Overview

1. This application raises broad issues of whether provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act* ("the Act") violate ss. 7 and 8 of the *Charter* and whether certain offences in the Act are *intra vires* the province. Ontario submits that the application should be dismissed.

2. With respect to the s. 7 challenge, Ontario submits that the impugned provisions are more properly reviewed under s. 8 of the *Charter*. In any event, Ontario submits that the impugned provisions do not deprive anyone of their life, liberty, or security of the person. Section 7 of the *Charter* is therefore not engaged. Even if s. 7 were engaged, the provisions are in accordance with the principles of fundamental justice. In particular, Ontario submits that the applicant cannot establish that the provisions are arbitrary. A law is "arbitrary" contrary to s. 7 only if there is "no connection" between the objective of the law and its effects. That test is not met here. Furthermore, there is no constitutional principle that police and investigative powers can only be assigned to police.

3. With respect to the s. 8 challenge, Ontario submits that the standards of prior judicial authorization set out in *Hunter v. Southam* and applicable to the criminal context are not applicable to the impugned provisions because the Act relates to a regulated activity and there is a lower expectation of privacy in regulated activities. In any event, the impugned provisions do not authorize unreasonable searches or seizures contrary to s. 8 because they incorporate safeguards such as requiring prior judicial authorization where inspectors and agents have reasonable grounds to believe that an animal is in distress, and permitting warrantless entry only where there are reasonable grounds to believe that an animal is in immediate distress.

4. Finally, with respect to challenge to the *vires* of the legislation, Ontario submits that the pith and substance of the Act and the impugned provisions is the protection of animals and the prevention of cruelty to animals. This falls within provincial legislative jurisdiction over property and civil rights and matters of a merely local and private nature. The fact that the conduct regulated by the Act is socially undesirable has no bearing on the *vires* of the legislation, as morality is not the exclusive domain of the criminal law. Furthermore, the fact that the Act creates offences and imposes penalties for those offences does not make the Act in pith and substance criminal law. The province is entitled to impose penalties under s. 92(15) of the *Constitution Act, 1867*.

II. Facts

Legislative context

(a) The applicant

5. Mr. Bogaerts ("the applicant") was granted public interest standing to bring this application. He works as a paralegal with a law firm that deals with animal welfare law. He currently owns two dogs, but he has never been subject to a search by the OSPCA, been the subject of a compliance order, or had any animals seized by the OSPCA. The subject of the application is not the exercise of the Ontario Society for the Prevention of Cruelty's ("OSPCA") statutory powers in any particular case, regarding the applicant or anyone else, but the legislation itself.

Affidavit of Jeffrey Bogaerts sworn February 18, 2015, Application Record (AR), Vol 1, Tab 5, p 32 **[**"*Bogaerts Affidavit*"]
Cross examination of Jeffrey Bogaerts, AR, Vol 3, pp 7–8
Bogaerts v Ontario (Attorney General), 2016 ONSC 3123 at para 18 (Decision on motion to strike), AR, Vol 1, Tab 4
Ibid at para 15

(b) The Act

6. In general terms, the Act continues the OSPCA and gives the OSPCA's agents and inspectors the statutory powers needed to carry out its object.

> *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990 c O 36, AR, Vol 2, Tab 8B (The "Act")

7. Section 2 of the Act continues the OSPCA, which was originally incorporated by an act of the legislature in 1919. Section 3 sets out the object of the OSPCA:

> Object
>
> 3. The object of the Society is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom.

(c) Offences

8. The Act creates two general offences related to animal welfare: failing to comply with the standards of care for owning or having custody of an animal (s. 11.1), and causing or permitting an animal to be in distress (s. 11.2).

9. Section 11.1(1) requires everyone who has custody or care of an animal to comply with prescribed standards of care for that animal:

> 11.1 (1) 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.

10. A regulation to the Act sets out prescribed standards of care.

> O Reg 60/09

11. Sections 11.1(2) and (3) set out exceptions. The requirement in s. 11.1(1) does not apply to activities carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; prescribed classes of animals living in prescribed circumstances or conditions, or prescribed activities; or veterinarians providing veterinary care or boarding as part of care in accordance with the *Veterinarians Act*.

Act s. 11.1(2), (3), AR, Vol 2, Tab 8B

12. Section 11.2(1) provides that no person shall cause an animal to be in distress, while s. 11.2(2) provides that no owner or custodian of an animal shall permit the animal to be in distress.

13. "Distress" is defined in the Act as "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".

Act, s. 1, "distress", AR, Vol 2, Tab 8B

14. Section 11.2(6) set out exceptions similar to the exceptions for the standard of care provision, with the addition of activities permitted under the *Fish and Wildlife Conservation Act* in relation to wildlife in the wild (and, per regulation, hunting as permitted by the same Act) and, in addition in relation to fish, the *Fisheries Act*.

Act s. 11.2(6), AR, Vol 2, Tab 8B
O Reg 62/09

15. The Act also creates several more specific offences such as a prohibition on training animals to fight and a prohibition on possessing or breeding orcas, in addition to offences that are ancillary to the inspection regime such as interfering with an inspector or agent, failing to produce records, and failing to comply with an order.

Act s. 18.1(1), AR, Vol 2, Tab 8B

(d) The Act gives OSPCA inspectors and agents the powers of a police officer for the purposes of enforcing animal welfare legislation

16. Section 11 of the Act provides that the inspectors and agents of the OSPCA have and may exercise any of the powers of a police officer for the purposes of enforcing the Act or any other law in force in Ontario pertaining to the welfare of animals or the prevention of cruelty to animals. This includes the *Criminal Code* provisions respecting animal cruelty.

> 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.

17. In addition to the general grant of police powers in s. 11, the Act provides inspectors with specific powers of inspection, search, and seizure. These powers are reviewed below.

(e) Inspection of places where animals are kept for exhibition, entertainment, etc.

18. Section 11.4 of the Act gives inspectors and agents of the OSPCA the ability to enter a building or place where animals are kept for the purposes of exhibition, entertainment, boarding, hire or sale in order to determine whether the standards of care set out in the Act are being met. This power of inspection does not apply to dwellings except with the consent of the occupier, or to accredited veterinary facilities, and may only be exercised between 9 a.m. and 5 p.m. or when the building or place is open to the public.

Act s 11.4, AR, Vol 2, Tab 8B

19. Section 11.4.1 gives inspectors and agents the power to demand that a person produce a record or thing for inspection. This power can only be exercised for the purposes of ensuring that the standards of care are being met, and can only be exercised in relation to persons who own or have custody or care of animals that are being kept for the purposes of animal exhibition, entertainment, boarding, hire or sale.

Act s 11.4.1, AR, Vol 2, Tab 8B

(f) Entry with warrant where animal is in distress

20. Section 12 of the Act authorizes an inspector, with a warrant, to enter "any building or place" where she has reasonable grounds to believe there is an animal in distress. The purpose of the entry is to determine whether there is an animal in distress in the building or place. "Distress" is defined in the Act.

Entry where animal is in distress

Warrant

12. (1) If a justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that there is in any building or place an animal that is in distress, he or she may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress.

"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;

21. Sub-section 12(6) of the Act provides for warrantless entry into any building or place other than a dwelling where an inspector or agent has reasonable grounds to believe there is an animal in immediate distress. Immediate distress is also defined in the Act.

Immediate distress – entry without warrant

(6) If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress.

(8) For the purpose of subsection (6),

"immediate distress" means distress that requires immediate intervention in order to alleviate suffering or to preserve life.

(g) Taking a sample of an animal, substance, or carcass

22. Section 12.1 of the Act allows inspectors and agents who are lawfully present in a building or place to examine an animal and take a sample of any substance, carcass, or a sample from a carcass, in the building or place. The taking of the sample or carcass must be for the purposes for which the inspector or agent is authorized to be in the building or place. Section 12.1 does not provide a power of entry.

Authorized activities

Inspect animals, take samples, etc.

12.1 (1) An inspector or an agent of the Society or a veterinarian, who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act, may examine any animal there and, upon giving a receipt for it, take a sample of any substance there or take a carcass or sample from a carcass there, for the purposes set out in the provision under which the inspector's, agent's or veterinarian's presence is authorized or the warrant is issued.

23. Sub-section 12.1(4) allows inspectors and agents who are lawfully present in a building or place to seize things that are in plain view if the inspector or agent has reasonable grounds to believe that the thing seized will afford evidence of an offence under the Act, or reasonable grounds to believe that the thing seized was or is being used in connection with the commission of an offence under the Act and its seizure is necessary to prevent the continuation or repetition of the offence. Like s. 12.1, s. 12.1(4) does not provide a power of entry. It is premised on the inspector or agent's lawful presence in a building or place.

Seizure of things in plain view

(4) An inspector or an agent of the Society who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act may, upon giving a receipt for it, seize anything that is produced to the inspector or agent or that is in plain view if the inspector or agent has reasonable grounds to believe,

(a) that the thing will afford evidence of an offence under this Act; or

(b) that the thing was used or is being used in connection with the commission of an offence under this Act and that the seizure is necessary to prevent the continuation or repetition of the offence.

(h) Relieving an animal from distress or having an animal examined

24. Section 13 of the Act gives agents and inspectors the power to order the owner or custodian of an animal to take steps to relieve the animal from distress or have the animal examined and treated by a veterinarian. Section 13(1) requires the inspector or agent to have reasonable grounds to believe that an animal is in distress to issue a compliance order. It also applies only when the owner or custodian of the animal is present or may be found promptly.

Order to owner of animals, etc.

13. (1) Where an inspector or an agent of the Society has reasonable grounds for believing that an animal is in distress and the owner or custodian of the animal is present or may be found promptly, the inspector or agent may order the owner or custodian to,

(a) take such action as may, in the opinion of the inspector or agent, be necessary to relieve the animal of its distress; or

(b) have the animal examined and treated by a veterinarian at the expense of the owner or custodian.

25. Sub-section 13(6) authorizes agents and inspectors to enter, without warrant, any building or place for the purpose of determining whether an order is being complied with.

Authority to determine compliance with order

(6) If an order made under subsection (1) remains in force, an inspector or an agent of the Society may enter without a warrant any building or place where the animal that is the subject of the order is located, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the animal and the building or place for the purpose of determining whether the order has been complied with.

(i) The training of OSPCA inspectors

26. Connie Mallory, the current Chief Inspector of the OSPCA, gave evidence about the training of new agents and the OSPCA's internal disciplinary mechanisms. Ms. Mallory's evidence established that:

a. The OSPCA receives funding from the government of Ontario pursuant to a transfer payment agreement. The two most recent agreements, signed in 2013 and 2015, mandated 16 weeks of training for new agents. The training program includes material on basic investigative competencies, investigative techniques, the *OSPCA Act*, the standards of care in the Act, rights and entry and *Charter* limitations, how to recognize disease and distress.

Affidavit of Connie Mallory, sworn May 2, 2017, pp 153–156 at para 13 ["Mallory Affidavit"], AR, Vol 2, Tab 8 and 8E

b. If a trainee fails to demonstrate to their supervising officer that they have a thorough knowledge of the material, their training may be extended. All recruits must pass exams throughout their training, achieving a score of 80 per cent or higher on each exam, failing which they will not be appointed as agents.

Cross-examination of Connie Mallory, pp 153–156, AR, Vol 3, Tab 2

c. Agents continually undergo training to ensure that their knowledge remains current with advancements in law and technology. Moreover, agents are made aware of specific incidents where fellow agents have overstepped the bounds of their authority through briefings and memoranda so that they can be avoided in the future.

Mallory Affidavit at paras 15–16, 20, AR, Vol 2, Tab 8

d. The Chief Inspector for the OSPCA has the power to discipline agents for improper exercise of their duties through probation, suspension, or termination. The current Chief Inspector, Connie Mallory, has undertaken that duty on numerous occasions.

OSPCA bylaw 12, s. 15.3, AR, Vol 2, Tab 8L
Mallory Affidavit at para 19, AR, Vol 2, Tab 8

(j) Costs of care and funds from the sale of animals seized

27. Ms. Mallory also gave evidence regarding the power of the OSPCA to require an owner to pay the costs of caring for an animal that has been seized before the animal is returned to the owner. Ms. Mallory's evidence was that:

a. While there is a general expectation that the costs of care incurred by the OSPCA will be paid before an animal is returned, in practice the OSPCA often negotiates the costs of care with the owner and returns the animal to the owner for less than

the costs of care incurred. The OSPCA also returns animals to owners at no cost in certain situations.

Cross-examination of Connie Mallory, pp 102–103, AR, Vol 3, Tab 2
Mallory Affidavit at para 25, AR, Vol 2, Tab 8

b. In situations where the owner cannot be located or does not pay for the costs of care, the OSPCA may sell the animal. Any proceeds of the sale in excess of the costs of care are held in trust for the owner.

Mallory Affidavit at para 24, AR, Vol 2, Tab 8

III. Argument

The impugned provisions do not violate s. 7 of the Charter

(a) The impugned provisions should be analyzed pursuant to s. 8 of the Charter, not s. 7

28. The applicant challenges the provisions in the Act that give inspectors and agents of the OSPCA police powers (s. 11), allow inspectors and agents to inspect places where animals are kept for exhibition, entertainment, boarding, hire or sale (s. 11.4), enter any building or place where an animal is in distress (s. 12), take samples of any substance or carcass and seize things in plain view (s. 12.1), and enter a building or place to determine whether an order is being complied with (s. 13) (collectively, the "impugned provisions").

29. The applicant argues that "security of the person" is triggered by the impugned provisions. Ontario's position is that these provisions do not engage security of the person under s. 7, but that even if they did, they are more properly challenged under s. 8 of the *Charter*.

30. Some searches or seizures may engage security of the person under s. 7 of the *Charter* because they involve taking a bodily sample (for example, a blood sample). Both of the cases cited by the applicant involve taking blood samples. In one, the Crown had conceded that the

search at issue engaged security of the person under s. 7. However, this does not mean that all searches engage s. 7.

R v Racette, 1988 CanLII 5335 (SKCA) at para 112
R v Pelletier, 1989 CanLII 4617 (SKQB) at para 26

31. In a more recent case, the Supreme Court of Canada preferred to analyze a challenge to a search provision under s. 8 of the *Charter*. The search engaged s. 7 because it involved taking a DNA sample from the claimant. The Court nonetheless accepted the Crown's argument that s. 8 of the *Charter* "provides a more specific and complete illustration of the s. 7 right in this particular context, making the s. 7 analysis redundant." Ontario submits that this court should take the same approach and analyze the impugned provisions under s. 8, not s. 7.

R v Rodgers, [2006] 1 SCR 554 at para 23

(b) In the alternative, the impugned provisions do not deprive anyone of their life, liberty, or security of the person

32. Section 7 of the *Charter* states that "[e]veryone 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."

33. Section 7 protects a single right: the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice. There is no freestanding right to the principles of fundamental justice absent a deprivation of life, liberty, or security of the person. If a claimant cannot prove that s. 7 is engaged by a deprivation of life, liberty, or security of the person, there is no need to consider whether the law complies with the principles of fundamental justice. The analysis stops there.

Reference re: BC MVA, [1985] 2 SCR 486 at paras 22–23
Blencoe v British Columbia (Human Rights Commission), [2000] 2 SCR 307 at para 47 ["*Blencoe*"]

34. The applicant has not demonstrated that the impugned provisions engage anyone's life, liberty, or security of the person.

35. First, the applicant does not argue that the impugned provisions deprive anyone of their life.

36. Second, with respect to liberty, the applicant points out, correctly, that any offence that includes incarceration as a possible sanction engages the liberty interest in s. 7. There is no dispute that s. 18.1 of the Act provides imprisonment as a potential sanction. However, the Appellant is not challenging s. 18.1 and so the fact that it provides for imprisonment has no bearing on the challenge to the impugned provisions in the Act.

37. "Liberty" in s. 7 of the *Charter* includes freedom from physical constraint. It is engaged by, for example, statutory duties to submit to fingerprinting, to appear at proceedings and give testimony, or not to loiter in or near specific areas. Liberty also includes the right to make fundamental personal choices such as whether to have an abortion or whether to end one's own life.

> Peter W Hogg, Constitutional Law of Canada, 5th ed, (Toronto: Carswell, 2007) (loose-leaf 2016 supplement), vol 2, at §47.7(a) ["Hogg"]
> *Blencoe*, *supra* at paras 49, 54
> *Carter v Canada*, 2015 SCC 5 at para 64

38. The impugned provisions do not physically restrain anyone nor do they compel anyone to be at or in a certain place. They also do not prevent anyone from making fundamental personal choices.

39. Liberty in s. 7 should not be interpreted so broadly that it encompasses the other rights guaranteed by the *Charter*, which have their own internal limits and which have developed their own jurisprudence. For example, liberty should not be interpreted to mean freedom from any sort of intrusion by the state, given that s. 8 of the *Charter* prohibits unreasonable searches and seizures and guarantees a reasonable expectation of privacy.

> Hogg, *supra* at §47.7(c)

40. Finally, the impugned provisions do not violate anyone's physical integrity. "Security of the person" in s. 7 protects one's physical integrity and ability to make choices in relation to one's physical integrity. It is engaged by, for example, a prohibition on abortion. It is also engaged by serious state-imposed psychological stress such as that occasioned by an order removing a child from parental custody. However, the Supreme Court of Canada has cautioned that serious state-imposed psychological stress would not easily include the stresses that are an ordinary part of administrative and judicial processes.

> *R v Morgentaler*, [1993] 3 SCR 463 ["*Morgentaler*"]
>
> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.
>
> *New Brunswick (Minister of Health & Community Services) v G (J)*, [1999] 3 SCR 46 at para 59
> *Chaoulli c Quebec (Procureur general)*, 2005 SCC 35
> *Blencoe, supra*

41. The impugned provisions are not like the demands for bodily samples that have been reviewed under s. 7 in the cases cited by the applicant. They do not compromise anyone's bodily integrity. Nor is there any evidence that the impugned provisions impose serious psychological stress on anyone, including the applicant.

(c) In any event, the impugned provisions are not arbitrary

42. Even if s. 7 of the *Charter* were engaged, the applicant has not demonstrated that the impugned provisions are not in accordance with a principle of fundamental justice. More specifically, the applicant has not shown that the provisions are arbitrary.

43. The applicant argues that the provisions are arbitrary because it is "not necessary" to delegate inspection and seizure powers to the OSPCA to achieve the Act's objective. This is not the test for arbitrariness set out by the Supreme Court of Canada.

44. "Arbitrariness" as described by the Supreme Court of Canada in *Bedford v. Canada* requires a relationship between the objective of the law and the means chosen to achieve that objective. A law is "arbitrary" if there is no connection between the object of the law and the limits that the law imposes on the interests protected by s. 7.

> [111] 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. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.
>
> *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 111 [Italics in original] ["Bedford"]

45. In *Bedford* the Court went on to examine what degree of connection is required before a law is not arbitrary. It explained that the degree of connection (or lack thereof) between the objective and the effects of a law could cover a spectrum and could be described in a variety of ways. At one end of the spectrum, a court might find that the effects of a law actually undermined the objective of the law and the law was therefore "inconsistent" with the objective. At the other end of the spectrum, a court might find that while the effects of the law did not undermine its objective, it was "unnecessary" because there was simply no connection between the impugned provisions and the objective of the law.

> [117] Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

> [118] An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233–34).
>
> [119] As noted above, the root question is whether 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.
>
> *Bedford, supra* at paras 117–119 [Italics in original; underline added]

46. This passage makes it clear that the test for whether a law is arbitrary is not whether the provision is "necessary" to fulfill the law's objective. The test for arbitrariness articulated by the Supreme Court of Canada is whether there is no connection between the objective of the impugned provisions and their effects on an interest protected by s. 7.

> *Bedford, supra*
> *R v Moriarity*, 2015 SCC 55 at paras 26–30

47. Ontario submits that there is an obvious connection between preventing cruelty to animals and giving inspectors and agents of the OSPCA police powers for the purposes of enforcing animal welfare legislation (s. 11), allowing inspectors and agents to inspect places where animals are kept for exhibition, entertainment, boarding, hire or sale (s. 11.4), to enter any building or place where an animal is in distress (s. 12), to take samples of any substance or carcass and seize things in plain view (s. 12.1), and to enter a building or place to determine whether an order is being complied with (s. 13). These provisions enable OSPCA inspectors and agents to take steps

to prevent cruelty to animals and relieve the effects of cruelty to animals where they find it. There is thus no merit to the applicant's argument that the provisions are arbitrary.

(d) There is no basic norm or constitutional principle requiring police powers to be assigned to police

48. The applicant also appears to argue that the impugned provisions are arbitrary because it is a "basic norm" to "assign police and other investigative powers" to police, and the impugned provisions give investigative powers to OSPCA agents and inspectors. Once again, this is not the test set out by the Supreme Court of Canada. A law is not "arbitrary" within the meaning of s. 7 because it violates a "basic norm". Rather, the "basic norm" is that laws should not be arbitrary and the test for whether they are is whether there is any connection between the effects of the law and its objective.

Factum of the Applicant at paras 52, 54, 61

49. Ontario denies that there is any constitutional principle requiring that police powers only be assigned to police (or that OSPCA agents and inspectors must receive a certain amount of training, or that the OSPCA be entirely publicly funded, or that certain statutes must apply to the OSPCA). The applicant has not identified any source in the Constitution for this principle. Nor do the cases cited by the applicant stand for the proposition that there is any such constitutional principle.

R v Clarke, [2001] NJ No 191 (NL Prov Ct)
Beazley (Re), [2007] NJ No 337 (NL Prov Ct)
R v Pauliuk, [2005] OJ No 1393 (OCJ)

50. The applicant does not define what "police powers" would be affected by this principle. If the "police powers" in issue are powers of search and seizure such as those in the impugned provisions, the OSPCA Act is far from the only provincial statute that gives "police powers" to persons and entities that are not police officers. For example, the *Securities Act* authorizes

investigators from the Ontario Securities Commission to conduct inspections and obtain search warrants. The *Law Society Act* gives similar powers to Law Society investigators. It is in fact common for regulatory statutes to provide investigative powers to non-police persons. There is no authority to suggest that any of these grants of power are unconstitutional because the powers were not granted to police.

Securities Act, RSO 1990 c S.5, s. 13
Law Society Act, RSO 1990 c L.8, ss. 49.2–49.13

51. In any event, the applicant's argument that there is inadequate oversight of OSPCA agents and inspectors is unfounded. The record establishes that OSPCA agents and inspectors receive extensive training and are subject to oversight, through an internal disciplinary process as well as through external checks including the Animal Care Review Board and the courts.

Mallory Affidavit, AR, Vol 3, Tab 2

The impugned provisions do not violate s. 8 of the Charter

(a) The requirements in Hunter v. Southam do not apply

52. The applicant argues that sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except 14(1)(a)) of the Act authorize unreasonable searches contrary to s. 8 of the *Charter*.

53. Section 8 of the *Charter* guarantees a right to be secure against unreasonable search and seizure. To claim the protection of s. 8, a person must first establish that they have a reasonable expectation of privacy in the subject matter of the search. Whether the claimant has a reasonable expectation of privacy depends on the totality of the circumstances, including (1) the subject matter of the search (2) the interest of the claimant in the subject matter of the search (3) whether the claimant had a subjective expectation of privacy in the subject matter and (4) whether the expectation of privacy is objectively reasonable. Section 8 is only engaged if the answer to (4) is "yes".

R v Cole, 2012 SCC 53 at paras 34, 40

54. There is a diminished expectation of privacy in places and information that are subject to regulation as a matter of course. In addition, the standard of "reasonableness" according to which searches and seizures are judged is not as strict in the regulatory context as it is in the criminal context. In particular, the requirement for prior authorization set out in *Hunter v. Southam* in the criminal context does not apply in the regulatory context.

Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 SCR 425 at 507 ["Thomson Newspapers"]; *Comité paritaire de l'industrie de la chemise v Potash*; *Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 SCR 406 at paras 12, 57, 63 ["*Potash*"]
British Columbia Securities Commission v Branch, [1995] 2 SCR 3 at para 52

55. For example, the Supreme Court of Canada has repeatedly upheld the constitutionality of warrantless inspection powers, without reasonable and probable ground requirements, in the regulatory context. As the applicant acknowledges, the Act is a regulatory statute. The ownership and care of animals is a regulated activity.

> [I]t is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations.

Thomson Newspapers, *supra* at paras 122 to 123; Hogg, *supra* at 48-38–48-39
Potash, *supra* at paras 15–16. See also: *R v Quesnel*, [1985] 53 OR (2d) 338 (CA), leave to appeal to SCC refused, [1986] 55 OR (2d) 543 n.

56. In any event, the Act requires agents and inspectors to obtain a warrant when they have reasonable grounds to believe that an animal is in distress and only permits an exception to this rule in exigent circumstances where there are reasonable grounds to believe that an animal is in immediate distress in a building or place other than a private dwelling.

Factum of the Applicant at para 103

57. The applicant appears to argue that the s. 8 requirements that apply in the criminal context nevertheless apply here "because the OSPCA is authorized under the Act to concurrently investigate and charge individuals with animal cruelty offences under the *Criminal Code*".

Factum of the Applicant at para 98
Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc, [1984] 2 SCR 145 ["*Hunter v Southam*"]

58. The fact that OSPCA agents and investigators have the ability to investigate animal cruelty offences under the *Criminal Code* does not affect the expectation of privacy that people have in relation to the OSPCA's regulatory functions. The fact that an inspection may result in charges under the *Criminal Code* does not change the fact that it is an inspection occurring in a regulatory context. It is only when the predominant purpose of an investigation is the determination of penal liability under the *Criminal Code* that the requirements of *Hunter v. Southam* apply. Where an inspection provision is improperly used to gather evidence for a criminal prosecution, the remedy is not to invalidate the inspection provision but to exclude the evidence from that prosecution under s. 24(2) of the *Charter*.

R v Jarvis, 2002 SCC 73 ["*Jarvis*"]

59. Ontario submits that when the regulatory context is properly taken into account, the impugned provisions have sufficient safeguards such that they do not authorize unreasonable searches or seizures contrary to s. 8. The provisions and the safeguards applicable to them are reviewed below.

60. *R. v. Vaillancourt* is the only decision that Ontario is aware of that considers a s. 8 challenge to animal welfare legislation. In *Vaillancourt*, the Nova Scotia Provincial Court considered s. 12(4) of Nova Scotia's *Animal Cruelty Prevention Act*. This provision allowed a peace officer who had reasonable and probable grounds to believe that an animal is in distress to enter, with or without a warrant, any premises other than a private dwelling place. The court

reasoned that the statutory authorization to enter without a warrant was "overbroad" and breached s. 8 because in the majority of circumstances a warrant could be obtained.

61. Ontario submits that *Vaillancourt* is incorrectly decided on this point. It did not include any consideration of the regulatory context of the statute or any consideration of whether there is a reasonable expectation of privacy in the circumstances. This is mandated by the Supreme Court of Canada decisions, which are binding on this court. The decision in *Vaillancourt* is not.

R v Vaillancourt, 2003 NSPC 59 ["*Vaillancourt*"]

62. Furthermore, even if the reasoning in *Vaillancourt* were correct, Ontario's statute permits warrantless entry only in limited circumstances. Under s. 12(6) of the Act an agent or inspector may only enter a building or place (other than a dwelling) where he or she has reasonable grounds to believe that an animal is in immediate distress. There was no such limitation in the Nova Scotia statute.

(b) Sections 11.4 and 11.4.1

63. The inspection powers conferred by s. 11.4(1) and s. 11.4.1(1) apply only in the commercial and public contexts where animals are being kept for entertainment and exhibition purposes, or for hire or sale. Furthermore, s. 11.4(2) prohibits Society inspectors from using the warrantless inspection powers to enter a private dwelling, and s. 11.4(4) restricts warrantless entry to business hours (between 9 a.m. and 5 p.m.). The s. 11.4(1) inspection powers are expressly connected to determining compliance with standards of care prescribed by a regulatory scheme.

R v Nicol, [1997] OJ No 916 at para 8 (CA) ["*Nicol*"]; *R v McKinlay Transport*, [1990] 1 SCR 627 at paras 26 to 31; *Jarvis*, *supra* at para 69; *R v Nolet*, [2010] 1 SCR 851 at paras 30 to 31

(c) Section 12(6)

64. Section 12(6) is an exigent circumstances exception to the general warrant provision in s. 12. It permits a warrantless entry only when an inspector or agent has reasonable grounds to believe that an animal is in immediate distress. It does not permit warrantless entry into dwellings.

(d) Section 13

65. The warrantless inspection powers in s. 13(6) are exclusively connected to determining compliance with lawful orders based on reasonable grounds to believe that an animal is in distress under s. 13(1), and are limited to locations where the animal subject to the order is kept. The Court of Appeal for Ontario held in *R v Nicol* that "for the most part there is no requirement that regulatory powers, like the power of inspection in this by-law, be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance".

Nicol, *supra* at para 9. See also: *Potash*, *supra* at para 13

(e) Section 14

66. A society agent or inspector may only act under s. 14 on the written recommendation of an animal health care professional, or when their own professional judgment indicates the necessity of the removal of the animal after a lawful inspection, or to enforce an order that has not been complied with. The owner or custodian of an animal that has been lawfully examined, or subject to a lawful order, can only have a low expectation of privacy in that animal and the location where it is kept.

Section 11.2(1) and 11.2(2) of the Act are intra vires the province

67. The applicant argues that ss. 11.2(1) and 11.2(2) of the Act are in pith and substance criminal law and therefore *ultra vires* the province. He argues that these provisions are concerned with "suppressing or punishing undesirable conduct associated with animal welfare".

Factum of the Applicant at para 157

68. As the Supreme Court held in *Siemens*:

> […] the presence of moral considerations does not per se render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the Constitution Act, 1867 did not intend to remove all morality from provincial legislation. In many instances, it will be impossible for the provincial legislature to disentangle moral considerations from other issues.

69. Put another way, the fact that the conduct regulated by a provincial law is socially undesirable is beside the point. The question is whether the matter relates to a provincial head of power identified in the Constitution Act, 1867. Morality is not a head of power assigned to either level of government.

70. Furthermore, Ontario submits that the applicant has relied on the wrong test. The applicant cites the test for determining whether a federal enactment is criminal law. However, the question is not whether the federal government could have enacted the Act, but whether the province can. This requires the court to analyze the pith and substance of the provisions and assign them to a head of legislative power.

71. When the correct test is applied, Ontario submits that the pith and substance of the Act, and the impugned provisions in particular, is the promotion of animal welfare and the prevention of animal cruelty. This is a matter within the province's authority to legislate with respect to property and civil rights and matters of a merely local and private nature.

72. In any event, to the extent that the Act is aimed at suppressing undesirable conduct, Ontario submits that it is well established in law that the suppression or punishment of socially

undesirable conduct does not render a provincial law *ultra vires* the province. Many provincial laws attempt to suppress or punish socially undesirable conduct. Some go even further and attempt to suppress conditions that are conducive to crime. They are nonetheless valid if enacted pursuant to a provincial head of power. For example, courts have upheld provincial laws:

a. prohibiting dangerous driving,

Canadian Western Bank v Alberta, 2007 SCC 22 at para 30

b. forfeiting proceeds of crime,

Chatterjee v Ontario (Attorney General), 2009 SCC 19

c. regulating video lottery terminals,

Siemens v Manitoba (AG), 2003 SCC 3 at paras 19-36

d. closing disorderly houses,

Bédard v Dawson, [1923] SCR 681 at 684-87

e. banning nude entertainment,

Rio Hotel Ltd v New Brunswick (Liquor Licensing Board), [1987] 2 SCR 59 at 63-67

f. suspending impaired drivers' licences,

Prince Edward Island (Provincial Secretary) v Egan, [1941] SCR 396 at 400-03 and 414-19; *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5 at 9-10 and 13

g. censoring obscene films,

Nova Scotia (Board of Censors) v. McNeil, [1978] 2 SCR 662 at 687-88, 691-93, and 695-97; *R. v Glad Day Bookshops Inc* (2004), 70 OR (3d) 691 at paras 54-67 (SCJ)

h. prohibiting the sale and display of drug paraphernalia,

Smith v St. Albert (City), 2014 ABCA 76 at paras 21-56

i. prohibiting panhandling,

R v Banks, 2007 ONCA 19 at paras. 28-72, 84 OR (3d) 1, leave to appeal to SCC dismissed [2007] SCCA No 139 ["Banks"]

j. issuing restraining orders against stalkers, and

Baril v Obelnicki, 2007 MBCA 40 at paras 32-42

k. requiring the registration of sex offenders.

R v Dyck, 2008 ONCA 309 at paras 37-63

(a) The applicant relies on the wrong test

73. The applicant relies on a passage from the *Firearms Reference* in which the Supreme Court reaffirmed that a statute may be categorized as criminal law if it has a criminal law purpose that is enforced by a prohibition coupled with a penalty.

Factum of the Applicant at para 141
Reference re Firearms Act (Canada), 2002 SCC 31 at para 27 ["*Firearms Reference*"]

74. This is the test for determining whether a federal enactment is a valid exercise of the criminal law power. It is not the test for the determining whether a provincial law is *ultra vires*.

75. Constitutional law recognizes that some matters may be the subject of both valid provincial and federal laws. Accordingly, showing that one order of government could have enacted a law pursuant to a head of power within its jurisdiction does not establish that the other order of government could not have also enacted the law pursuant to one of its own heads of power.

Banks, *supra* at paras 29–31
Canadian Western Bank v. Alberta, 2007 SCC 22 at para 30

76. This is particularly applicable to criminal law. The Supreme Court of Canada has recognized that there is a broad overlap between criminal law and areas of provincial legislative jurisdiction. As Professor Hogg concludes in his review of the jurisprudence: "much of the field which may loosely be thought of as criminal law legislative power is concurrent." Given the breadth of the criminal law power and its overlap with many areas of provincial legislative jurisdiction, the criminal law power rarely curtails the provincial power to legislate.

> In truth, there is a broad area of concurrency between federal and provincial powers in areas subjected to criminal prohibitions, and the courts have been alert to the need to permit adequate breathing room for the exercise of jurisdiction by both levels of government.

Hogg, *supra* at 18-32
R v Hydro-Québec, [1997] 3 SCR 213, per La Forest J, at para 153

> The criminal power under s. 91(27) of the *Constitution Act, 1867* does not establish a "domain" or "general area" of criminal law that prevents the exercise of provincial jurisdiction. This characteristic of the criminal law power gives it a unique elasticity; while it is easily stretched to authorize federal criminal legislation over a broad range of subjects, it rarely operates to curtail the exercise of provincial jurisdiction.

O'Grady v. Sparling, [1960] SCR 804, per Judson J. for the majority, at 808, 810-811
R v Hydro-Québec, *supra*, per La Forest, para 128
Firearms Reference, *supra* at paras 28-29

(b) The proper procedure for determining the pith and substance of a law

77. The procedure for determining the *vires* of a law is well established. It was recently reviewed by the Ontario Court of Appeal in *York (Regional Municipality) v. Tsui*.

York (Regional Municipality) v Tsui, 2017 ONCA 230 ["*York*"]

78. The first step in the analysis is to determine the "matter" of the legislation at issue. This involves an examination of both the purpose of the enacting body and the legal effect of the law.

79. Once the matter (the "true character" or "the pith and substance") of the legislation has been identified, the second step in the analysis is to assign the matter of the challenged legislation to a head of power under either ss. 91 or 92 of the *Constitution Act, 1867*. Where measures enacted pursuant to a provincial power overlap with a federal power, the court must identify the "dominant feature" of the measure. If the dominant feature is the subject matter of provincial authority, the enactment will not be invalidated because of an incidental intrusion into an area of federal authority (e.g., criminal law).

York, *supra* at paras 58, 64, 67

80. The onus is on the party challenging the *vires* of a law to establish that it is outside of the legislative jurisdiction of the enacting body. Laws are presumed to be constitutional and the applicant must overcome this presumption to succeed.

York, *supra* at para 72

(c) The pith and substance of the provisions is the protection of animals and the prevention of cruelty to animals

81. The purpose of the Act is the protection of animals and the prevention of cruelty to animals. This is apparent from a review of s. 3 of the Act, which provides that the object of the OSPCA is "to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom". It is also clear from a review of the overall scheme of the Act, which creates offences of causing distress to an animal or permitting an animal to be in distress, and which prescribes standards for the care and custody of animals and makes it an offence to fail to meet those standards.

82. There is no dispute about the legal effect of the impugned provisions, which is to make it an offence to cause distress to an animal or, in the case of an animal that is owned or in someone's custody, to permit an animal to be in distress.

83. In *R. v. Vaillancourt*, the Nova Scotia Provincial Court considered whether s. 11(2) of that province's animal welfare legislation was *ultra vires* the province. This provision provided that no owner of an animal or person in charge of an animal shall cause or permit the animal to be or to continue to be in distress. "Distress" was defined for the purposes of the Nova Scotia act as either in need of adequate care, food, water, or shelter, or injured, sick, in pain, or suffering undue hardship, privation or neglect.

Vaillancourt, *supra* at paras 6, 10

84. The court determined that the pith and substance of the legislation was to protect animals from unnecessary pain, suffering or distress.

> The only conclusion one can reach from reading this Act, is that its pith and substance, its matter, is to protect animals from unnecessary pain, suffering or distress; its object is to secure, through a private Society, a timely intervention, wherever an animal may be found in need of protection, to terminate and/or prevent cruel or negligent treatment of animals owned by, or in the possession of persons, except as such jurisdiction may be pre-empted

> by other Acts, such as the Agriculture and Marketing Act or the Sheep Protection Act, or those in research laboratories which meet certain standards, referred to in the Act.
>
> *Vaillancourt, supra* at para 34

85. There is one Ontario decision that addresses the purpose and effect of the Act, albeit not in a constitutional context. This case dealt with whether the respondent, an insurance company, had a duty to defend lawsuits brought against the OSPCA. The respondent denied coverage to the OSPCA on the grounds that the policy excluded claims arising out of the willful violation of a "penal" statute, among other reasons. Accordingly, the court had to decide whether the Act was a "penal" statute within the meaning of the policy. It held that it was not. The court's characterization was upheld by the Court of Appeal.

> Undoubtedly, the *Act* also creates prohibitions and makes contravention of particular prohibitions an offence that carries a penalty. However, as mentioned, these sections must be interpreted in light of the object of the legislation as a whole which, in my view, is ultimately to prevent animal cruelty, not to punish behaviour that is morally blameworthy.
>
> *Ontario Society for the Prevention of Cruelty to Animals v Sovereign General Insurance Co*, 2014 ONSC 3345 at paras 82–84

> The purpose of the Act is not penal. The Act is designed for animal protection and the prevention of cruelty to animals.
>
> *Ontario Society for the Prevention of Cruelty to Animals v Sovereign General Insurance Co*, 2015 ONCA 702 at para 56

86. These decisions support the characterization of the pith and substance of the Act as the protection of animals and the prevention of cruelty towards animals.

(d) The pith and substance of the legislation relates to property and civil rights

87. The second step of the analysis is to assign the matter to a provincial or federal head of power.

88. The province has authority to legislate with respect to animal welfare and animal cruelty pursuant to its jurisdiction over property and civil rights and matters of a merely local and private

nature. Furthermore, the province has the constitutional authority to impose punishment, by fine, penalty, or imprisonment, for the purpose of enforcing laws within its legislative jurisdiction. As the Court of Appeal for Ontario noted in *R. v. Banks*, "the existence of penal consequences has little bearing on whether provincially enacted provisions are criminal law". This power is ancillary to other provincial heads of power. Many provincial laws contain prohibitions and penalties for the breach of those prohibitions.

> Hogg, *supra* at 18-31–18-33
> *Banks*, *supra* at para 33
> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5t, 1867, s. 92(15)
> *Constitution Act, 1867*, *supra* at ss 92(13), (15), (16)

89. The court in *R. v. Vaillancourt* came to the same conclusion. It found that legislation which in pith and substance related to the protection and animals and the prevention of cruelty towards animals was within provincial competence under the heads of property and civil rights and matters of a merely local or private nature.

> *Vaillancourt*, *supra* at para 35

(e) Similarities between a provincial law and the Criminal Code do not make the provincial law ultra vires

90. The applicant argues that similarities between the Act and the animal cruelty provisions in the *Criminal Code* give rise to an inference that the Act is, in pith and substance, criminal law. The Supreme Court's recent decision in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* is a complete answer to this argument. In *Goodwin*, the Supreme Court upheld British Columbia's automatic roadside prohibition scheme as a valid exercise of the province's jurisdiction over property and civil rights (although the Court found that the provisions violated s. 8). It did so despite finding that the scheme "target[ed], in part, specific criminal activity". The Court affirmed earlier cases holding that a provincial statute will not invade the federal power

over criminal law "merely because its purpose is to target conduct that is also captured by the *Criminal Code*":

> Provincial drunk-driving programs and the criminal law will often be interrelated. Some provincial schemes have relied incidentally on criminal convictions: see *Egan* and *Ross*. A number of provincial courts of appeal have also upheld schemes that are not dependent on criminal convictions but rely incidentally on *Criminal Code* provisions: *Buhlers; Gonzalez v. Driver Control Board (Alta.)*, 2003 ABCA 256, 330 A.R. 262; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.). This jurisprudence makes clear that a provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the *Criminal Code*.
>
> *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 45 at para 32 [Emphasis added]

91. To the extent that the applicant relies on the Court's decision in *Morgentaler* (1993), Ontario submits that this decision is distinguishable. In *Morgentaler* the Supreme Court of Canada held that a provincial law making it an offence to perform an abortion outside a hospital was *ultra vires* the province of Nova Scotia because it related to criminal law. Several years earlier, in 1988, the Court had struck down the provision in the *Criminal Code* prohibiting the procurement of abortions except in the context of therapeutic abortion committees because it violated s. 7 of the *Charter* (although it held that the offence was a valid exercise of the criminal law power).

92. The Court in *Morgentaler* agreed that similarities in effect between a provincial law and a *Criminal Code* provision could be relevant to the pith and substance analysis. However, it cautioned that even a "virtually identical" effect does not determine the validity of an enactment given the double aspect doctrine. At most, similarity in effect may give rise to an "inference" about the dominant purpose of the enactment. The Court also referred to the overlap in effects as "a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation".

Morgentaler, *supra* at p 498–99

93. This "other evidence" before the Court in *Morgentaler* demonstrated that the real purpose of the provincial legislation was to prohibit abortions. This case is different than *Morgentaler* because the prohibition of abortion was a matter with only incidental connections to any provincial head of power. The protection of animals and the prevention of cruelty to animals, by contrast, has a clear connection to provincial heads of power in relation to property and civil rights and matters of a merely local or private nature.

IV. Remedy Sought

94. Ontario respectfully requests that the application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of March 2018

Daniel Huffaker
LSUC #56804F

Schedule A

1. *Bogaerts v Ontario (Attorney General)*, 2016 ONSC 3123
2. *R v Racette*, 1988 CanLII 5335 (SKCA)
3. *R v Pelletier*, 1989 CanLII 4617 (SKQB)
4. *R v Rodgers*, [2006] 1 SCR 554
5. *Reference re: BC MVA*, [1985] 2 SCR 486
6. *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307
7. *Carter v Canada*, 2015 SCC 5
8. *R v Morgentaler*, [1993] 3 SCR 463
9. *New Brunswick (Minister of Health & Community Services) v G (J)*, [1999] 3 SCR 46
10. *Chaoulli c Quebec (Procureur general)*, 2005 SCC 35
11. *Bedford v Canada (Attorney General)*, 2013 SCC 72
12. *R v Moriarity*, 2015 SCC 55
13. *R v Clarke*, [2001] NJ No 191 (NL Prov Ct)
14. *Beazley (Re)*, [2007] NJ No 337 (NL Prov Ct)
15. *R v Pauliuk*, [2005] OJ No 1393 (OCJ)
16. *R v Cole*, 2012 SCC 53
17. *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425
18. *Comité paritaire de l'industrie de la chemise v Potash*; *Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406

19. *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3

20. *R v Quesnel*, [1985] 53 OR (2d) 338 (CA), leave to appeal to SCC refused, [1986] 55 OR (2d) 543 n

21. *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, [1984] 2 SCR 145

22. *R v Jarvis*, 2002 SCC 73

23. *R v Vaillancourt*, 2003 NSPC 59

24. *R v Nicol*, [1997] OJ No 916 (CA)

25. *R v McKinlay Transport*, [1990] 1 SCR 627

26. *R v Nolet*, [2010] 1 SCR 851

27. *Canadian Western Bank v Alberta*, 2007 SCC 22

28. *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19

29. *Siemens v Manitoba (AG)*, 2003 SCC 3

30. *Bédard v Dawson*, [1923] SCR 681

31. *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59

32. *Prince Edward Island (Provincial Secretary) v Egan*, [1941] SCR 396

33. *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5

34. *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 SCR 662

35. *R. v Glad Day Bookshops Inc* (2004), 70 OR (3d) 691 (SCJ)

36. *Smith v St. Albert (City)*, 2014 ABCA 76

37. *R v Banks*, 2007 ONCA 19, 84 OR (3d) 1, leave to appeal to SCC dismissed [2007] SCCA No 139

38. *Baril v Obelnicki*, 2007 MBCA 40

39. *R v Dyck*, 2008 ONCA 309

40. *Reference re Firearms Act (Canada)*, 2002 SCC 31

41. *R v Hydro-Québec*, [1997] 3 SCR 213

42. *O'Grady v. Sparling*, [1960] SCR 804

43. *York (Regional Municipality) v Tsui*, 2017 ONCA 230

44. *Ontario Society for the Prevention of Cruelty to Animals v Sovereign General Insurance Co*, 2014 ONSC 3345

45. *Ontario Society for the Prevention of Cruelty to Animals v Sovereign General Insurance Co*, 2015 ONCA 702

46. *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 45

Schedule B

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5t, 1867

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

13. Property and Civil Rights in the Province.

…

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

LEGAL RIGHTS

Life, liberty and security of person

7. 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.

Search or seizure

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

Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990, c O.36

INTERPRETATION

Interpretation

1. (1) In this Act,

"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; ("détresse")

Object

3. The object of the Society is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom. R.S.O. 1990, c. O.36, s. 3.

Inspectors and agents
Powers of police officer

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. 2008, c. 16, s. 7 (1).

Inspectors and agents of affiliates

(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. 2008, c. 16, s. 7 (2).

Local police powers

(3) In any part of Ontario in which the Society or an affiliated society does not function, any police officer having jurisdiction in that part has and may exercise any of the powers of an inspector or agent of the Society under this Act. R.S.O. 1990, c. O.36, s. 11 (3).

Identification

(4) An inspector or an agent of the Society who is exercising any power or performing any duty under this Act shall produce, on request, evidence of his or her appointment. 2008, c. 16, s. 7 (3).

Interfering with inspectors, agents

(5) No person shall hinder, obstruct or interfere with an inspector or an agent of the Society in the performance of his or her duties under this Act. 2008, c. 16, s. 7 (3).

OBLIGATIONS AND PROHIBITIONS RE CARE OF AND HARM TO ANIMALS

Standards of care and administrative requirements for animals

11.1 (1) 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. 2015, c. 10, s. 2.

Exception

(2) Subsection (1) does not apply in respect of,

(a) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; or

(b) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities. 2008, c. 16, s. 8.

Same

(3) Subsection (1) does not apply to,

(a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the *Veterinarians Act*;

(b) a person acting under the supervision of a veterinarian described in clause (a); or

(c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders. 2008, c. 16, s. 8.

Prohibitions re distress, harm to an animal
Causing distress

11.2 (1) No person shall cause an animal to be in distress. 2008, c. 16, s. 8.

Permitting distress

(2) No owner or custodian of an animal shall permit the animal to be in distress. 2008, c. 16, s. 8.

Training, permitting animals to fight

(3) No person shall train an animal to fight with another animal or permit an animal that the person owns or has custody or care of to fight another animal. 2008, c. 16, s. 8.

Owning animal fighting equipment, structures

(4) No person shall own or have possession of equipment or structures that are used in animal fights or in training animals to fight. 2008, c. 16, s. 8.

Harming law enforcement animals

(5) No person shall harm or cause harm to a dog, horse or other animal that works with peace officers in the execution of their duties, whether or not the animal is working at the time of the harm. 2008, c. 16, s. 8.

Exception

(6) Subsections (1) and (2) do not apply in respect of,

(a) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* in relation to wildlife in the wild;

(b) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* or the *Fisheries Act* (Canada) in relation to fish;

(c) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; or

(d) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities. 2008, c. 16, s. 8.

Same

(7) Subsections (1) and (2) do not apply to,

(a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the *Veterinarians Act*;

(b) a person acting under the supervision of a veterinarian described in clause (a); or

(c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders. 2008, c. 16, s. 8.

Section Amendments with date in force (d/m/y)

Veterinarians' obligation to report

11.3 Every veterinarian who has reasonable grounds to believe that an animal has been or is being abused or neglected shall report his or her belief to an inspector or an agent of the Society. 2008, c. 16, s. 8.

PROHIBITION RE ORCA POSSESSION AND BREEDING

Prohibition of orca possession and breeding

11.3.1 (1) No person shall possess or breed an orca in Ontario. 2015, c. 10, s. 3.

Transition

(2) Despite subsection (1), a person may continue to possess an orca in Ontario if the person possessed the orca in Ontario on March 22, 2015. 2015, c. 10, s. 3.

Same

(3) Despite subsection (1), a person who first possessed an orca in Ontario on or after March 23, 2015, but before the day the *Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015* received Royal Assent, may continue to possess the orca in Ontario until the day that is six months after the day the *Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015*received Royal Assent. 2015, c. 10, s. 3.

Inspection — animals kept for animal exhibition, entertainment, boarding, hire or sale

11.4 (1) An inspector or an agent of the Society may, without a warrant, enter and inspect a building or place where animals are kept in order to determine whether the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with if the animals are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale. 2015, c. 10, s. 4 (1).

Accompaniment

(1.1) An inspector or an agent of the Society conducting an inspection under this section may be accompanied by one or more veterinarians or other persons as he or she considers advisable. 2015, c. 10, s. 4 (1).

Dwellings

(2) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place used as a dwelling except with the consent of the occupier. 2008, c. 16, s. 8.

Accredited veterinary facilities

(3) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place that is an accredited veterinary facility. 2008, c. 16, s. 8.

Time of entry

(4) The power to enter and inspect a building or place under this section may be exercised only between the hours of 9 a.m. and 5 p.m., or at any other time when the building or place is open to the public. 2008, c. 16, s. 8.

(5) REPEALED: 2015, c. 10, s. 4 (2).

Power to demand record or thing

11.4.1 (1) An inspector or an agent of the Society may, for the purpose of ensuring that the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with, demand that a person produce a record or thing for inspection if the person owns or has custody or care of animals that are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale. 2015, c. 10, s. 5.

Subject of demand shall produce record or thing

(2) If an inspector or an agent of the Society demands that a record or thing be produced for inspection, the person who is subject to the demand shall produce it for the inspector or agent within the time provided for in the demand. 2015, c. 10, s. 5.

Warrant – places where animals kept

11.5 (1) A justice of the peace or provincial judge may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter a building or place specified in the warrant, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and to inspect the building or place and do anything authorized under section 11.4 if the justice of the peace or provincial judge is satisfied by information on oath that,

(a) an inspector or an agent of the Society has been prevented from entering or inspecting the building or place under section 11.4; or

(b) there are reasonable grounds to believe that an inspector or an agent of the Society will be prevented from entering or inspecting the building or place under section 11.4. 2008, c. 16, s. 8.

Telewarrant

(1.1) If an inspector or an agent of the Society believes that it would be impracticable to appear personally before a justice of the peace or provincial judge to apply for a warrant under subsection (1), he or she may, in accordance with the regulations, seek the warrant by telephone or other means of telecommunication, and the justice of the peace or provincial judge may, in accordance with the regulations, issue the warrant by the same means. 2009, c. 33, Sched. 9, s. 9 (2).

When warrant to be executed

(2) Every warrant issued under subsection (1) or (1.1) shall,

(a) specify the times, which may be at any time during the day or night, during which the warrant may be carried out; and

(b) state when the warrant expires. 2008, c. 16, s. 8; 2009, c. 33, Sched. 9, s. 9 (3).

Extension of time

(3) A justice of the peace or provincial judge may extend the date on which a warrant issued under this section expires for no more than 30 days, upon application without notice by the inspector or agent named in the warrant. 2008, c. 16, s. 8.

Other terms and conditions

(4) A warrant issued under this section may contain terms and conditions in addition to those provided for in subsections (1) to (3) as the justice of the peace or provincial judge considers advisable in the circumstances. 2008, c. 16, s. 8.

Entry where animal is in distress
Warrant

12. (1) If a justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that there is in any building or place an animal that is in distress, he or she may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress. 2008, c. 16, s. 9.

Telewarrant

(2) If an inspector or an agent of the Society believes that it would be impracticable to appear personally before a justice of the peace or provincial judge to apply for a warrant under subsection (1), he or she may, in accordance with the regulations, seek the warrant by telephone or other means of telecommunication, and the justice of the peace or provincial judge may, in accordance with the regulations, issue the warrant by the same means. 2008, c. 16, s. 9.

When warrant to be executed

(3) Every warrant issued under subsection (1) or (2) shall,

(a) specify the times, which may be at any time during the day or night, during which the warrant may be carried out; and

(b) state when the warrant expires. 2008, c. 16, s. 9.

Extension of time

(4) A justice of the peace or provincial judge may extend the date on which a warrant issued under this section expires for no more than 30 days, upon application without notice by the inspector or agent named in the warrant. 2008, c. 16, s. 9.

Other terms and conditions

(5) A warrant issued under subsection (1) or (2) may contain terms and conditions in addition to those provided for in subsections (1) to (4) as the justice of the peace or provincial judge considers advisable in the circumstances. 2008, c. 16, s. 9.

Immediate distress – entry without warrant

(6) If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress. 2008, c. 16, s. 9.

Accredited veterinary facilities

(7) The power to enter and inspect a building or place under subsection (6) shall not be exercised to enter and inspect a building or place that is an accredited veterinary facility. 2008, c. 16, s. 9.

Definition – immediate distress

(8) For the purpose of subsection (6),

"immediate distress" means distress that requires immediate intervention in order to alleviate suffering or to preserve life. 2008, c. 16, s. 9.

Section Amendments with date in force (d/m/y)

Authorized activities
Inspect animals, take samples, etc.

12.1 (1) An inspector or an agent of the Society or a veterinarian, who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act, may examine any animal there and, upon giving a receipt for it, take a sample of any substance there or take a carcass or sample from a carcass there, for the purposes set out in the provision under which the inspector's, agent's or veterinarian's presence is authorized or the warrant is issued. 2008, c. 16, s. 9.

Same

(2) An inspector, agent or veterinarian who takes a sample or carcass under subsection (1) may conduct tests and analyses of the sample or carcass for the purposes described in subsection (1) and, upon conclusion of the tests and analyses, shall dispose of the sample or carcass. 2008, c. 16, s. 9; 2009, c. 33, Sched. 9, s. 9 (4).

Supply necessaries to animals

(3) If an inspector or an agent of the Society is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act and finds an animal in distress, he or she may, in addition to any other action he or she is authorized to take under this Act, supply the animal with food, care or treatment. 2008, c. 16, s. 9.

Seizure of things in plain view

(4) An inspector or an agent of the Society who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act may, upon giving a receipt for it, seize any thing that is produced to the inspector or agent or that is in plain view if the inspector or agent has reasonable grounds to believe,

(a) that the thing will afford evidence of an offence under this Act; or

(b) that the thing was used or is being used in connection with the commission of an offence under this Act and that the seizure is necessary to prevent the continuation or repetition of the offence. 2008, c. 16, s. 9.

Report to justice, judge

(5) An inspector or an agent of the Society shall,

(a) report the taking of a sample or a carcass under subsection (1) to a justice of the peace or provincial judge; and

(b) bring any thing seized under subsection (4) before a justice of the peace or provincial judge or, if that is not reasonably possible, report the seizure to a justice of the peace or provincial judge. 2008, c. 16, s. 9.

Order to detain, return, dispose of thing

(6) Where any thing is seized and brought before a justice of the peace or provincial judge under subsection (5), the justice of the peace or provincial judge shall by order,

(a) detain it or direct it to be detained in the care of a person named in the order;

(b) direct it to be returned; or

(c) direct it to be disposed of, in accordance with the terms set out in the order. 2008, c. 16, s. 9.

Same

(7) In an order made under clause (6) (a) or (b), the justice of the peace or provincial judge may,

(a) authorize the examination, testing, inspection or reproduction of the thing seized, on the conditions that are reasonably necessary and are directed in the order; and

(b) make any other provision that, in his or her opinion, is necessary for the preservation of the thing. 2008, c. 16, s. 9.

Application of *Provincial Offences Act*

(8) Subsections 159 (2) to (5) and section 160 of the *Provincial Offences Act* apply with necessary modifications in respect of a thing seized by an inspector or an agent of the Society under subsection (4). 2008, c. 16, s. 9.

Order to owner of animals, etc.

13. (1) Where an inspector or an agent of the Society has reasonable grounds for believing that an animal is in distress and the owner or custodian of the animal is present or may be found promptly, the inspector or agent may order the owner or custodian to,

(a) take such action as may, in the opinion of the inspector or agent, be necessary to relieve the animal of its distress; or

(b) have the animal examined and treated by a veterinarian at the expense of the owner or custodian. R.S.O. 1990, c. O.36, s. 13 (1).

Order to be in writing

(2) Every order under subsection (1) shall be in writing and shall have printed or written thereon the provisions of subsections 17 (1) and (2). R.S.O. 1990, c. O.36, s. 13 (2).

(3) REPEALED: 2008, c. 16, s. 10 (1).

Time for compliance with order

(4) An inspector or an agent of the Society who makes an order under subsection (1) shall specify in the order the time within which any action required by the order shall be performed. R.S.O. 1990, c. O.36, s. 13 (4).

Idem

(5) Every person who is served with an order under subsection (1) shall comply with the order in accordance with its terms until such time as it may be modified, confirmed or revoked and shall thereafter comply with the order as modified or confirmed. R.S.O. 1990, c. O.36, s. 13 (5); 2008, c. 16, s. 10 (2).

Authority to determine compliance with order

(6) If an order made under subsection (1) remains in force, an inspector or an agent of the Society may enter without a warrant any building or place where the animal that is the subject of the order is located, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the animal and the building or place for the purpose of determining whether the order has been complied with. 2008, c. 16, s. 10 (3).

Revocation of order

(7) If, in the opinion of an inspector or an agent of the Society, the order made under subsection (1) has been complied with, he or she shall revoke the order and shall serve notice of the revocation in writing forthwith on the owner or custodian of the animal that is the subject of the order. 2008, c. 16, s. 10 (3).

OFFENCES

Offences

18.1 (1) Every person is guilty of an offence who,

(a) contravenes subsection 11 (5);

(b) contravenes or fails to comply with section 11.1;

(c) contravenes subsection 11.2 (1), (2), (3), (4) or (5);

(c.1) contravenes subsection 11.3.1 (1);

(c.2) contravenes subsection 11.4.1 (2);

(d) contravenes subsection 13 (5);

(e) contravenes or fails to comply with an order of the Board; or

(f) knowingly makes a false report to the Society in respect of an animal being in distress. 2008, c. 16, s. 16; 2015, c. 10, s. 6 (1).

O Reg 60/09

Standards of Care and Administrative Standards

PART I
APPLICATION AND DEFINITION

Application

1. (1) The basic standards of care applicable to all animals are set out in section 2. O. Reg. 60/09, s. 1 (1).

(2) In addition to the basic standards of care applicable to all animals set out in section 2,

(a) standards of care specific to dogs that live primarily outdoors are set out in section 3; and

(b) standards of care specific to wildlife kept in captivity are set out in sections 4 and 5. O. Reg. 60/09, s. 1 (2).

(3) In addition to the basic standards of care applicable to all animals set out in section 2 and the standards of care specific to wildlife kept in captivity set out in sections 4 and 5, the standards of care specific to primates kept in captivity are set out in section 6. O. Reg. 60/09, s. 1 (3).

(3.1) In addition to the basic standards of care applicable to all animals set out in section 2 and the standards of care specific to wildlife kept in captivity set out in sections 4 and 5, the standards of care and administrative standards specific to marine mammals kept in captivity are set out in Part III. O. Reg. 438/15, s. 3.

(4) A requirement that a standard of care be adequate and appropriate or necessary is a requirement that the standard of care be adequate and appropriate or necessary to the specific animal, having regard to its species, breed and other relevant factors. O. Reg. 60/09, s. 1 (4).

Definitions

1.1 In this Regulation,

"animal welfare committee", in relation to a marine mammal, means an animal welfare committee that meets the requirements of section 7 and that develops an animal welfare plan for the marine mammal; ("comité du bien-être animal")

"animal welfare plan", in relation to a marine mammal, means an animal welfare plan that has been completed for the marine mammal and that meets the requirements of section 8; ("plan de bien-être animal")

"marine mammal" means a sea otter (Enhydra lutris) or a member of the order Cetacea (whales, dolphins and porpoises), the order Sirenia (manatees and dugongs) or, within the

order Carnivora, a member of the family Phocidae (true seals), the family Otariidae (eared seals and sea lions) or the family Odobenidae (walruses); ("mammifère marin")

"marine mammal veterinarian" means a veterinarian who has experience with marine mammal biology and marine mammal medicine, including marine mammal pharmacology. ("vétérinaire spécialiste des mammifères marins") O. Reg. 438/15, s. 4.

PART II
GENERAL STANDARDS OF CARE FOR ANIMALS

Basic standards of care for all animals

2. (1) Every animal must be provided with adequate and appropriate food and water. O. Reg. 60/09, s. 2 (1).

(2) Every animal must be provided with adequate and appropriate medical attention. O. Reg. 60/09, s. 2 (2).

(3) Every animal must be provided with the care necessary for its general welfare. O. Reg. 60/09, s. 2 (3).

(4) Every animal must be transported in a manner that ensures its physical safety and general welfare. O. Reg. 60/09, s. 2 (4).

(5) Every animal must be provided with an adequate and appropriate resting and sleeping area. O. Reg. 60/09, s. 2 (5).

(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. O. Reg. 60/09, s. 2 (6).

(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. O. Reg. 60/09, s. 2 (7).

(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. O. Reg. 60/09, s. 2 (8).

Standards of care for dogs that live outdoors

3. (1) Every dog that lives primarily outdoors must be provided with a structurally sound enclosure for its use at all times. O. Reg. 60/09, s. 3 (1).

(2) The enclosure must be weather-proofed and insulated. O. Reg. 60/09, s. 3 (2).

(3) The size and design of the enclosure must be adequate and appropriate for the dog. O. Reg. 60/09, s. 3 (3).

(4) A chain, rope or similar restraining device used to tether a dog that lives primarily outdoors,

(a) must be at least three metres long;

(b) must allow the dog to move safely and unrestricted (except by its length); and

(c) must allow the dog to have access to adequate and appropriate water and shelter. O. Reg. 60/09, s. 3 (4).

Standards of care for captive wildlife

4. (1) Wildlife kept in captivity must be provided with adequate and appropriate care, facilities and services to ensure their safety and general welfare as more specifically set out in subsections (2) and (3) of this section and in sections 5 and 6. O. Reg. 60/09, s. 4 (1).

(2) Wildlife kept in captivity must be provided with a daily routine that facilitates and stimulates natural movement and behaviour. O. Reg. 60/09, s. 4 (2).

(3) Wildlife kept in captivity must be kept in compatible social groups to ensure the general welfare of the individual animals and of the group and to ensure that each animal in the group is not at risk of injury or undue stress from dominant animals of the same or a different species. O. Reg. 60/09, s. 4 (3).

Standards for enclosures for captive wildlife

5. (1) A pen or other enclosed structure or area for wildlife kept in captivity must be of an adequate and appropriate size,

(a) to facilitate and stimulate natural movement and behaviour;

(b) to enable each animal in the pen or other enclosed structure or area to keep an adequate and appropriate distance from the other animals and people so that it is not psychologically stressed; and

(c) to ensure that the natural growth of each animal in the pen or other enclosed structure or area is not restricted. O. Reg. 60/09, s. 5 (1).

(2) A pen or other enclosed structure or area for wildlife kept in captivity must have,

(a) features and furnishings that facilitate and stimulate the natural movement and behaviour of each animal in the pen or other enclosed structure or area;

(b) shelter from the elements that can accommodate all the animals in the pen or other enclosed structure or area at the same time;

(c) surfaces and other materials that accommodate the natural movement and behaviour of each animal in the pen or other enclosed structure or area;

(d) one or more areas that are out of view of spectators; and

(e) one or more sleeping areas that can accommodate all the animals in the pen or other enclosed structure or area at the same time and that are accessible to all the animals at all times. O. Reg. 60/09, s. 5 (2).

(3) A pen or other enclosed structure or area for wildlife kept in captivity must be made of and contain only materials that are,

(a) safe and non-toxic for the animals kept in the pen or other enclosed structure or area; and

(b) of a texture and design that will not bruise, cut or otherwise injure the animals. O. Reg. 60/09, s. 5 (3).

(4) A pen or other enclosed structure or area for wildlife kept in captivity and any gates or other barriers to it, including moats, must be designed, constructed and locked or otherwise secured to prevent,

(a) interaction with people that may be unsafe or inappropriate for the wildlife;

(b) animals escaping from the pen or other enclosed structure or area by climbing, jumping, digging, burrowing or any other means; and

(c) animals or people (other than people who are required to enter the enclosure as part of their duties) from entering the pen or other enclosed structure or area by climbing, jumping, digging, burrowing or any other means. O. Reg. 60/09, s. 5 (4).

(5) A pen or other enclosed structure or area for wildlife kept in captivity and any gates or other barriers to it, including moats, must be designed, constructed and maintained in a manner that presents no harm to the wildlife. O. Reg. 60/09, s. 5 (5).

Standards of care for captive primates

6. Every primate kept in captivity must be provided with,

(a) daily interaction with a person having custody or care of the primate;

(b) a varied range of daily activities, including foraging or task-oriented feeding methods; and

(c) interactive furnishings, such as perches, swings and mirrors. O. Reg. 60/09, s. 6.

PART III
ADDITIONAL STANDARDS OF CARE AND ADMINISTRATIVE REQUIREMENTS FOR MARINE MAMMALS

ANIMAL WELFARE COMMITTEE

Animal welfare committee

7. (1) A person who possesses at least one marine mammal in Ontario shall establish and maintain an animal welfare committee to develop an animal welfare plan for each marine mammal the person possesses. O. Reg. 438/15, s. 7.

(2) Subsection (1) does not apply to a marine mammal who is possessed in Ontario for 30 continuous days or less. O. Reg. 438/15, s. 7.

(3) The animal welfare committee must be comprised of at least the following members:

1. A marine mammal veterinarian.
2. A person who,

i. is not an employee or independent contractor of the person who possesses the marine mammal, and

ii. is a resident of the municipality where the marine mammal is located.

3. A person who,

i. is not an employee or independent contractor of the person who possesses the marine mammal, and

ii. has studied marine mammal biology at a post-secondary institution.

4. A person who is responsible for the daily care of the marine mammal.
5. A person who is responsible for the maintenance of the location where the marine mammal is kept. O. Reg. 438/15, s. 7.

(4) The animal welfare committee must be chaired by the marine mammal veterinarian member. O. Reg. 438/15, s. 7.

(5) The chair of the animal welfare committee shall,

(a) schedule the animal welfare committee's meetings;

(b) conduct the animal welfare committee's meetings;

(c) determine the number of members of the animal welfare committee that constitutes a quorum for any purpose; and

(d) provide recommendations to the person who possesses the marine mammal regarding persons to appoint to the animal welfare committee, if appropriate. O. Reg. 438/15, s. 7.

(6) The animal welfare committee must meet at least once every six months. O. Reg. 438/15, s. 7.

Animal welfare plan

8. (1) An animal welfare plan must include at least the following:

1. Procedures for routine interactions with, and routine care of, the marine mammal.
2. Training requirements for the marine mammal.
3. A plan to collect and record information about the marine mammal, whether by observation of the animal's behaviour or by other means, to ensure that appropriate care can be provided to it and to ensure that the animal welfare plan is based on appropriate evidence.
4. Minimum staff and resource requirements to ensure the physical, psychological and social well-being of the marine mammal.
5. A stimulation program that is sufficient to maintain the marine mammal's health and mental wellness.
6. Appropriate social groupings for the marine mammal, including consideration for a companion animal if the marine mammal is the only animal housed in its enclosure.
7. A plan for providing the marine mammal with feedings at night, if appropriate.
8. A plan for providing the marine mammal with social interaction at night, if appropriate.
9. A plan for providing the marine mammal with training, social enrichment and play sessions, if appropriate.
10. A list of the types of environmental enrichment objects that must be provided in the enclosure of the marine mammal, if any, the number of objects that must be provided and the schedule for changing those objects.

Note: On May 1, 2018, subsection 8 (1) of the Regulation is amended by adding the following paragraphs: (See: O. Reg. 438/15, s. 8 (2))

10.1 Detailed species-specific enclosure and environmental requirements for the marine mammal, including requirements regarding the number and type of fixed features to be included in the marine mammal's enclosure, that take into account the unique needs of the individual marine mammal and that are designed to ensure its well-being and ensure compliance with the requirements of this Regulation.

10.2 If the marine mammal requires a portion of its enclosure be shaded, the minimum portion of the enclosure that must be shaded to meet its needs.

11. Situations where the marine mammal must be housed in an indoor enclosure, if any.

12. Methods to ensure that enclosure air is free of harmful concentrations of pollutants.

13. Measures to ensure the welfare of the marine mammal in the event of a disruption of normal operations, such as a power failure, an extreme weather event or a labour disruption.

14. A determination of whether it would be consistent with the immediate and long-term health of the marine mammal and of any offspring to attempt to breed the marine mammal, having regard to the age and health of the marine mammal, the health care needs of any offspring and the immediate and long-term housing needs of the marine mammal and of any offspring.

15. A plan for the care of any offspring if the marine mammal is to be bred, including procedures for hand-rearing the offspring if hand-rearing could be required.

16. Procedures for euthanasia of the marine mammal.

17. A list of records related to the marine mammal that must be maintained. O. Reg. 438/15, s. 8 (1).

(2) In developing the portion of the animal welfare plan referred to in paragraphs 5 to 10 of subsection (1), the animal welfare committee must consult with a person or persons with expertise in the social and enrichment needs of the marine mammal's species. O. Reg. 438/15, s. 8 (1).

(3) The animal welfare committee must complete the animal welfare plan within six months after the day the person obtained possession of the marine mammal or before May 1, 2017, whichever is later. O. Reg. 438/15, s. 8 (1).

(4) The animal welfare committee must review every animal welfare plan it has developed at least annually. O. Reg. 438/15, s. 8 (1).

Compliance with animal welfare plan

9. Every person who has custody or care of a marine mammal shall ensure that the marine mammal is cared for in a manner that is consistent with its animal welfare plan. O. Reg. 438/15, s. 9.

Nutrition

10. (1) Every marine mammal must be provided with a diet that,

(a) includes a sufficient range of food of appropriate quality that meets the nutritional needs of the marine mammal;

(b) accommodates individual preferences, subject to the availability of particular types of fish or other food items; and

(c) complies with the dietary requirements in the program of preventative health care referred to in section 12. O. Reg. 438/15, s. 10.

(2) Vitamin supplementation must be provided in accordance with a marine mammal veterinarian's advice. O. Reg. 438/15, s. 10.

(3) Food inventories for the marine mammal must be managed and properly stored to ensure the availability of food of appropriate quality that meets the nutritional needs of the marine mammal. O. Reg. 438/15, s. 10.

(4) Any sudden or unexpected change in a marine mammal's appetite must be brought to a marine mammal veterinarian's attention immediately. O. Reg. 438/15, s. 10.

(5) Food deprivation shall not be used as a method of training a marine mammal. O. Reg. 438/15, s. 10.

Reproduction

11. (1) The reproduction of every marine mammal must be managed in a way that promotes the immediate and long-term health of the marine mammal and any offspring. O. Reg. 438/15, s. 11 (1).

(2) Pre-parturient and lactating female marine mammals must be held in appropriate social groups within enclosures that encourage successful rearing of offspring. O. Reg. 438/15, s. 11 (1).

(3) A marine mammal must not be bred if the breeding would be inconsistent with its animal welfare plan. O. Reg. 438/15, s. 11 (2).

Preventative and veterinary care

12. (1) Every marine mammal must be provided with a program of preventative health care designed by a marine mammal veterinarian. O. Reg. 438/15, s. 12.

(2) The program must include,

(a) a complete annual physical examination;

(b) the establishment of diets specific to the marine mammal;

(c) regular oral examinations at frequencies specified by the marine mammal veterinarian; and

(d) regular treatment of any dental problems. O. Reg. 438/15, s. 12.

(3) Every marine mammal must be under the care of a marine mammal veterinarian who provides preventative care and who is readily available to provide emergency care at any time of day. O. Reg. 438/15, s. 12.

Post mortem examination

13. (1) If a marine mammal dies, a *post mortem* examination of the body must be conducted by a marine mammal veterinarian. O. Reg. 438/15, s. 12.

(2) The findings of the marine mammal veterinarian must be recorded in a report that is reviewed by a pathologist with experience caring for marine mammals. O. Reg. 438/15, s. 12.

(3) The marine mammal veterinarian must be asked for recommendations to prevent similar deaths. O. Reg. 438/15, s. 12.

Public contact program

14. (1) This section applies to marine mammals who are housed in an enclosure that could expose them to physical contact with members of the public. O. Reg. 438/15, s. 12.

(2) The person who possesses the marine mammal must have a written policy that,

(a) clearly identifies any risks to the health or safety of the marine mammal associated with the physical contact;

(b) identifies and addresses any other safety issues or concerns; and

(c) identifies the qualifications of the persons who are overseeing the physical contact. O. Reg. 438/15, s. 12.

(3) Any risks identified in the written policy must be mitigated. O. Reg. 438/15, s. 12.

Enrichment and social needs

15. (1) Every marine mammal must be provided with a feeding enrichment program which may include, but is not limited to, the use of live fish, the introduction of novel foods or the use of task-oriented feeding methods. O. Reg. 438/15, s. 13 (1).

(2) Every marine mammal must be provided with daily training, social enrichment and play sessions unless otherwise specified in its animal welfare plan. O. Reg. 438/15, s. 13 (2).

(3) The enclosure of every marine mammal must have the environmental enrichment objects, if any, specified in its animal welfare plan. O. Reg. 438/15, s. 13 (2).

(4) The environmental enrichment objects must be non-toxic and must not be breakable or ingestible by the marine mammal. O. Reg. 438/15, s. 13 (2).

ENCLOSURE

General enclosure requirements

16. (1) Every marine mammal must be provided with an enclosure that meets the requirements of this section. O. Reg. 438/15, s. 14 (1).

(2) Measures must be taken to minimize the risk that the enclosure will be contaminated with potentially harmful microorganisms. O. Reg. 438/15, s. 14 (1).

(3) The enclosure must be provided with a backup generator or generators that are sufficient to provide power to the enclosure in the event of a power failure. O. Reg. 438/15, s. 14 (1).

Note: On May 1, 2018, the Regulation is amended by adding the following subsections: (See: O. Reg. 438/15, s. 14 (2))

(4) The enclosure must meet the following requirements:

1. The enclosure must provide the marine mammal with sufficient space and features for species-appropriate activities both in and, if appropriate, out of the water.
2. The enclosure must be designed to facilitate cleaning.
3. The enclosure must include fixed features that provide visual and tactile enrichment, which may include, but are not limited to, any of the following:
    i. Bubble walls.
    ii. Privacy baffles.
    iii. Different substrates.
    iv. Water jets.
    v. Sprinklers.
    vi. Mirrors or other reflective surfaces.
    vii. Areas on the bottom of the pool that simulate pebbles on the seafloor.
4. If more than one marine mammal is housed in the enclosure, the enclosure must include privacy baffles, other fixed features or retreat areas that allow a marine mammal to separate itself from other marine mammals in order to avoid aggression, unwanted attention or disturbance.
5. The enclosure must have a drain that can lower water levels to facilitate cleaning and animal management activities. O. Reg. 438/15, s. 14 (2).

(5) In addition to a pool of water, an enclosure that houses a sea otter or a member of the family Phocidae (true seals), the family Otariidae (eared seals and sea lions) or the family Odobenidae (walruses) must have a permanent haul-out. O. Reg. 438/15, s. 14 (2).

(6) The haul-out mentioned in subsection (5) must be capable of simultaneously accommodating all of the marine mammals listed in that subsection that are housed in the enclosure. O. Reg. 438/15, s. 14 (2).

Enclosure water quality

17. (1) Every marine mammal in an enclosure must be provided with a reliable water supply that is sufficient to ensure the marine mammal's health. O. Reg. 438/15, s. 15.

(2) The person who possesses the marine mammal shall maintain a program for monitoring water quality to ensure that a healthy aquatic environment is provided, including daily monitoring of water salinity. O. Reg. 438/15, s. 15.

(3) The salinity of the water must be maintained within the range appropriate for the marine mammal. O. Reg. 438/15, s. 15.

(4) The results of the water quality tests must be recorded and kept for at least one year. O. Reg. 438/15, s. 15.

(5) Water circulation equipment in the enclosure must be sufficient to circulate water throughout the pool. O. Reg. 438/15, s. 15.

(6) An enclosure that houses a marine mammal must meet the following water quality requirements:

1. Coliform bacteria in the water must not exceed 500 MPN (most probable number) per 100 mL, and testing must occur at least weekly.
2. The water must be tested at least twice daily and treated as necessary to maintain pH values not less than 7.2 or more than 8.2.
3. The total free and combined chlorine concentration must not exceed 1.5 mg/L, and the water must be tested at least twice daily for chlorine concentration.
4. The water must be free of residual dissolved ozone. O. Reg. 438/15, s. 15.

Environmental protection

18. (1) Every marine mammal must be provided with environmental temperature and humidity ranges appropriate for the species. O. Reg. 438/15, s. 16 (1).

(2) Every marine mammal must be provided with shelter from inclement weather if it is necessary for the marine mammal's comfort or well-being. O. Reg. 438/15, s. 16 (1).

(3) Any artificial light used in the enclosure must be as similar as possible to the light spectrum of sunlight. O. Reg. 438/15, s. 16 (1).

(4) Every marine mammal must be provided with exposure to natural or simulated annual photoperiods that reflect the needs of the species, particularly with respect to moult. O. Reg. 438/15, s. 16 (1).

(5) Every marine mammal must be protected from noise that could cause auditory discomfort or distress. O. Reg. 438/15, s. 16 (1).

(6) The enclosure air must be free of harmful concentrations of pollutants. O. Reg. 438/15, s. 16 (1).

Note: On May 1, 2018, section 18 of the Regulation is amended by adding the following subsections: (See: O. Reg. 438/15, s. 16 (2))

(7) Every marine mammal must be housed in an enclosure that is outdoors or that provides access to an outdoor area unless its animal welfare plan provides otherwise. O. Reg. 438/15, s. 16 (2).

(8) Every marine mammal must be provided with an area of shade in its enclosure in accordance with its animal welfare plan. O. Reg. 438/15, s. 16 (2).

Other enclosures and areas

19. (1) An enclosure for veterinary care or temporary holding of marine mammals must be provided. O. Reg. 438/15, s. 17.

(2) A quarantine area to isolate marine mammals must be provided. O. Reg. 438/15, s. 17.

(3) A method to separate any marine mammal for behavioural or management purposes must be provided. O. Reg. 438/15, s. 17.

OTHER ADMINISTRATIVE REQUIREMENTS

Information management and records

20. (1) Every marine mammal must be individually identifiable. O. Reg. 438/15, s. 18 (1).

(2) The means used to ensure that a marine mammal is individually identifiable must be minimally intrusive. O. Reg. 438/15, s. 18 (1).

(3) Procedures must be put in place for every marine mammal to ensure timely transfer of critical information between persons who provide care to the marine mammal. O. Reg. 438/15, s. 18 (1).

(4) The following records must be kept for every marine mammal:

1. The date that possession of the marine mammal was obtained by the person who possesses the marine mammal.
2. Whether the marine mammal was captive-born or wild-caught.
3. The name of the person from whom the marine mammal was acquired, if applicable.
4. The species, sex, colour, markings and physical abnormalities, if any, of the marine mammal.
5. The marine mammal's date of birth or, if wild-caught, the marine mammal's estimated date of birth.
6. The marine mammal's parents, if known.
7. Records related to any attempt to breed the marine mammal, including the identity of the marine mammal with which breeding was attempted, the outcome of the breeding and the identity of any offspring.
8. Veterinary clinical records.
9. A list of any medication given to the marine mammal and the reason for which it was given.
10. Training records.
11. A record of any abnormal behaviours exhibited by the marine mammal, including the expression of any stereotypies, such as inappetence or food refusal, vomiting, actions that result in self-inflicted injuries or aggression towards trainers or other animals.
12. Any information that the marine mammal's animal welfare plan requires to be maintained. O. Reg. 438/15, s. 18.

(5) The records required by this section must be retained for five years following the death of the marine mammal. O. Reg. 438/15, s. 18 (1).

Transfer and movement

21. (1) A written policy must be prepared for every marine mammal to promote the marine mammal's welfare when it is transferred between social groups or moved to another location. O. Reg. 438/15, s. 19.

(2) Before a marine mammal is transferred or moved, a behavioural and medical assessment must be carried out by a marine mammal veterinarian to determine whether it can be safely transferred or moved. O. Reg. 438/15, s. 19.

(3) Before a marine mammal is transferred or moved, the transportation must be planned and documented in a detailed transportation plan, approved by the marine mammal's animal welfare committee, that addresses the marine mammal's health and well-being during transport. O. Reg. 438/15, s. 19.

(4) The transportation plan must accompany the marine mammal during the transfer or move and be made available for review by any person involved in the transfer or move. O. Reg. 438/15, s. 19.

(5) A marine mammal must be accompanied by one or more attendants during the transfer or move who are competent and knowledgeable in the transportation of that species. At least one of the attendants must be a marine mammal veterinarian or a person licensed to practise veterinary medicine in the jurisdiction to which the marine mammal is being moved or from which it is being moved. O. Reg. 438/15, s. 19.

O Reg 62/09

Exemptions

Exemptions

1. Subsections 11.2 (1) and (2) of the Act do not apply to,

   (a) persons who are hunting as permitted under the *Fish and Wildlife Conservation Act, 1997*, other than as described in clause 11.2 (6) (a) of the Act; or

   (b) persons who permit hunting as described in clause (a). O. Reg. 62/09, s. 1.

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 62/09, s. 2.

Securities Act, RSO 1990 c S.5

Power of investigator or examiner

13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.

Law Society Act, RSO 1990 c L.8

AUDITS, INVESTIGATIONS, ETC.
Audit of financial records

49.2 (1) The Society may conduct an audit of the financial records of a licensee or group of licensees for the purpose of determining whether the financial records comply with the requirements of the by-laws. 2006, c. 21, Sched. C, s. 43.

Powers

(2) A person conducting an audit under this section may,

(a) enter the business premises of the licensee or group of licensees between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or by any licensee in the group of licensees;

(b) require the production of and examine the financial records maintained in connection with the professional business of the licensee or group of licensees and, for the purpose of understanding or substantiating those records, require the production of and examine any other documents in the possession or control of the licensee or group of licensees, including client files; and

(c) require the licensee or group of licensees, and people who work with the licensee or group of licensees, to provide information to explain the financial records and other documents examined under clause (b) and the transactions recorded in those financial records and other documents. 2006, c. 21, Sched. C, s. 43.

Section Amendments with date in force (d/m/y)

Investigations
Conduct

49.3 (1) The Society may conduct an investigation into a licensee's conduct if the Society receives information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming a licensee. 2006, c. 21, Sched. C, s. 43.

Powers

(2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,

(a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;

(b) require the production of and examine any documents that relate to the matters under investigation, including client files; and

(c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, s. 43.

Capacity

(3) The Society may conduct an investigation into a licensee's capacity if the Society receives information suggesting that the licensee may be, or may have been, incapacitated. 2006, c. 21, Sched. C, s. 43.

Powers

(4) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section is satisfied that there are reasonable grounds for believing that a licensee being investigated under subsection (3) may be, or may have been, incapacitated, the person conducting the investigation may,

(a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;

(b) require the production of and examine any documents that relate to the matters under investigation, including client files; and

(c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, s. 43.

49.4-49.7 REPEALED: 2006, c. 21, Sched. C, s. 43.

Privilege
Disclosure despite privilege

49.8 (1) A person who is required under section 42, 49.2, 49.3 or 49.15 to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (1).

Disclosure by other person, body

(1.1) The Society or the Complaints Resolution Commissioner, as the case may be, may receive from any person or body information or documents in relation to a review under section 42, an audit under section 49.2, or an investigation under section 49.3 or 49.15, even if the information or documents are privileged or confidential. 2013, c. 17, s. 14 (1).

Admissibility despite privilege

(2) Despite clause 15 (2) (a) and section 32 of the *Statutory Powers Procedure Act*, information provided and documents produced under section 42, 49.2, 49.3 or 49.15 and information or documents described in subsection (1.1) are admissible in a proceeding under this Act even if the information or documents are privileged or confidential. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (2); 2013, c. 17, s. 14 (2).

(2.1) REPEALED: 2013, c. 17, s. 14 (3).

Privilege preserved for other purposes

(3) Subsections (1), (1.1) and (2) do not negate or constitute a waiver of any privilege and, even though information or documents that are privileged must be disclosed under subsection (1) or may be received under subsection (1.1), and are admissible in a proceeding under subsection (2), the privilege continues for all other purposes. 2013, c. 17, s. 14 (4).

Removal for copying

49.9 (1) A person entitled to examine documents under section 42, 49.2, 49.3 or 49.15 may, on giving a receipt,

(a) remove the documents for the purpose of copying them; and

(b) in the case of information recorded or stored by computer or by means of any other device, remove the computer or other device for the purpose of copying the information. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (2).

Return

(2) The person shall copy the documents or information with reasonable dispatch and shall return the documents, computer or other device promptly to the person from whom they were removed. 1998, c. 21, s. 21.

Order for search and seizure

49.10 (1) On application by the Society, the Superior Court of Justice may make an order under subsection (2) if the court is satisfied that there are reasonable grounds for believing,

(a) that one of the following circumstances exists:

(i) a review of a licensee's professional business under section 42 is authorized,

(ii) an investigation into a licensee's conduct under subsection 49.3 (1) is authorized, or

(iii) a licensee whose capacity is being investigated under subsection 49.3 (3) may be, or may have been, incapacitated;

(b) that there are documents or other things that relate to the matters under review or investigation in a building, dwelling or other premises specified in the application or in a vehicle or other place specified in the application, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person; and

(c) that an order under subsection (2) is necessary,

(i) because of urgency,

(ii) because use of the authority in subsection 42 (2) or 49.3 (2) or (4) is not possible, is not likely to be effective or has been ineffective, or

(iii) because subsection 42 (2) or 49.3 (2) or (4) does not authorize entry into the building, dwelling or other premises specified in the application or the vehicle or other place specified in the application. 2006, c. 21, Sched. C, s. 46 (1).

Contents of order

(2) The order referred to in subsection (1) may authorize the person conducting the investigation or review, or any police officer or other person acting on the direction of the person conducting the investigation or review,

(a) to enter, by force if necessary, any building, dwelling or other premises specified in the order or any vehicle or other place specified in the order, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person;

(b) to search the building, dwelling, premises, vehicle or place;

(c) to open, by force if necessary, any safety deposit box or other receptacle; and

(d) to seize and remove any documents or other things that relate to the matters under investigation or review. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 46 (2).

Terms and conditions

(3) An order under subsection (2) may include such terms and conditions as the court considers appropriate. 1998, c. 21, s. 21.

Assistance of police

(4) An order under subsection (2) may require a police officer to accompany the person conducting the investigation or review in the execution of the order. 1998, c. 21, s. 21.

Application without notice

(5) An application for an order under subsection (2) may be made without notice. 1998, c. 21, s. 21.

Removal of seized things

(6) A person who removes any thing pursuant to an order under this section shall,

(a) at the time of removal, give a receipt to the person from whom the thing is seized; and

(b) as soon as practicable, bring the thing before or report the removal to a judge of the Superior Court of Justice. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

Order for retention

(7) If the judge referred to in clause (6) (b) is satisfied that retention of the thing is necessary for the purpose of the investigation or review or for the purpose of a proceeding under this Part, he or she may order that the thing be retained until,

(a) such date as he or she may specify; or

(b) if a proceeding under this Part has been commenced, until the proceeding, including any appeals, has been completed. 1998, c. 21, s. 21.

Extension of time

(8) A judge of the Superior Court of Justice may, before the time for retaining a thing expires, extend the time until,

(a) such later date as he or she may specify; or

(b) if a proceeding under this Part has been commenced, until the proceeding, including any appeals, has been completed. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

Return

(9) If retention of a thing is not authorized under subsection (7) or the time for retaining the thing expires, it shall be returned to the person from whom it was seized. 1998, c. 21, s. 21.

Seizure despite privilege

(10) An order under this section may authorize the seizure of a thing even if the thing is privileged or confidential. 1998, c. 21, s. 21.

Admissibility despite privilege

(11) Despite clause 15 (2) (a) and section 32 of the *Statutory Powers Procedure Act*, a thing seized under this section is admissible in a proceeding under this Act even if the thing is privileged or confidential. 1998, c. 21, s. 21.

Privilege preserved for other purposes

(12) Subsections (10) and (11) do not negate or constitute a waiver of any privilege and, even though a thing that is privileged may be seized under subsection (10) and is admissible in a proceeding under subsection (11), the privilege continues for all other purposes. 1998, c. 21, s. 21.

Identification

49.11 On request, a person conducting an audit, investigation, review, search or seizure under this Part shall produce identification and proof of his or her authority. 1998, c. 21, s. 21.

Confidentiality

49.12 (1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part. 1998, c. 21, s. 21.

Exceptions

(2) Subsection (1) does not prohibit,

(a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;

(b) disclosure required in connection with a proceeding under this Act;

(c) disclosure of information that is a matter of public record;

(d) disclosure by a person to his or her counsel;

(e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure; or

(f) disclosure, if there are reasonable grounds for believing that,

(i) if the disclosure is not made, there is a significant risk of harm to the person who was the subject of the audit, investigation, review, search, seizure or proceeding or to another person, and

(ii) making the disclosure is likely to reduce the risk. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 47.

Testimony

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1). 1998, c. 21, s. 21.

Disclosure to public authorities

49.13 (1) The Society may apply to the Superior Court of Justice for an order authorizing the disclosure to a public authority of any information that a bencher, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing under section 49.12. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

Restrictions

(2) The court shall not make an order under this section if the information sought to be disclosed came to the knowledge of the Society as a result of,

(a) the making of an oral or written statement by a person in the course of the audit, investigation, review, search, seizure or proceeding that may tend to criminate the person or establish the person's liability to civil proceedings;

(b) the making of an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege; or

(c) the examination of a document that the court determines to be subject to solicitor-client privilege. 1998, c. 21, s. 21.

Documents and other things

(3) An order under this section that authorizes the disclosure of information may also authorize the delivery of documents or other things that are in the Society's possession and that relate to the information. 1998, c. 21, s. 21.

No appeal

(4) An order of the court on an application under this section is not subject to appeal. 1998, c. 21, s. 21.

Peter W Hogg, Constitutional Law of Canada, 5th ed, (Toronto: Carswell, 2007)
(Copied from Pro-View)

18.12 — Criminal law and regulatory authority

P 18-32 in Loose Leaf

In Re Assisted Human Reproduction Act (2010),[179f] Parliament, acting under its criminal-law power, enacted an Act to regulate the practices and technologies associated with assisted human reproduction. Some of the provisions of the Act were absolute prohibitions, for example, of human cloning, the creation of human embryos for a purpose other than creating a human being, the determination of an embryo's sex for non-medical reasons, the payment of consideration to surrogate mothers, the purchase of human sperm or ova, and the sale or purchase of human embryos. Other prohibitions were qualified by exceptions. Still other prohibitions (referred to in the Act as "controlled activities") applied to activities unless they were carried out in accordance with regulations made under the Act, under licence and in licensed premises. These included altering, manipulating, storing, transferring, destroying, importing and exporting human embryos or other human reproductive material, combining the human genome with that of another species, and reimbursing expenses incurred by the donor of sperm or ova or a surrogate mother. All the prohibitions were backed by penalties. The Act included the power to make regulations and established the Assisted Human Reproduction Agency of Canada to administer the licensing and regulatory functions. Quebec directed a reference to its Court of Appeal to challenge the constitutionality of most of the Act. The absolute prohibitions were conceded to be valid criminal law and were not challenged. The Quebec Court of Appeal accepted Quebec's arguments and held that all but the absolute prohibitions were unconstitutional. The Government of Canada appealed to the Supreme Court of Canada.

47.7 — Liberty

(a) — Physical liberty

Section 7 protects "life, liberty and security of the person". What is included in "liberty"?

"Liberty" certainly includes freedom from physical restraint. Any law that imposes the penalty of imprisonment, whether the sentence is mandatory[26] or discretionary,[27] is by virtue of that penalty a deprivation of liberty, and must conform to the principles of fundamental justice. A law that imposes only the penalty of a fine is not a deprivation of liberty, and need not conform to the principles of fundamental justice.[28] Nor is the suspension of a driver's licence a deprivation of liberty.[29] As well as imprisonment, statutory duties to submit to fingerprinting,[30] to produce documents,[31] to give oral testimony[32] and not to loiter in or near schoolgrounds, playgrounds, public parks and bathing areas,[33] are also deprivations of liberty attracting the rules of fundamental justice. On the other hand, the deportation of a non-citizen is not a deprivation of liberty, attracting the rules of fundamental justice, because a non-citizen has no right to enter or remain in Canada.[33a]

Once a criminal defendant has been convicted and sentenced to a term of imprisonment, will a change in the terms of the sentence amount to a deprivation of liberty? In *Cunningham v. Canada* (1993),[34] the defendant had been sentenced in 1981 to 12 years' imprisonment for manslaughter. Under the Parole Act in force at the time of his sentencing, he was entitled to be released on mandatory supervision after serving two-thirds of the sentence, provided he had been of good behaviour. Before he reached the two-thirds point of his sentence (which was 1989), the Parole Act was amended (in 1986) to empower the National Parole Board to cancel the conditional release and require the continued detention of the prisoner for the rest of his sentence. This power was exercisable where there was reason to believe that the inmate, if released, was likely to commit an offence causing death or serious harm during the unexpired portion of his sentence. The Board exercised its new power in this case, and the defendant was accordingly not released on mandatory supervision in 1989. He applied for habeas corpus. The Supreme Court of Canada held that, although the amendment of the Parole Act had not had the effect of lengthening the defendant's 12-year sentence, it had altered the manner in which the sentence was to be served. Serving time on mandatory supervision was a lesser deprivation of liberty than serving time in prison. This change in the law should be treated as the deprivation of a liberty interest, making s. 7 of the Charter potentially applicable. The Court went on to hold that the change in the law was not a breach of the principles of fundamental justice,[35] so that the defendant remained in prison.

In *May v. Ferndale Institution* (2005),[36] the Court was asked to review a decision by the Correctional Service of Canada to transfer a prisoner in the federal penitentiary system from a minimum-security institution to a medium-security institution. The medium-security institution would be more restrictive of the prisoner's liberty than the minimum-security institution. Therefore, the Court held, following *Cunningham*, the decision to transfer the prisoner was a deprivation of his "residual liberty". Section 7 applied and the decision had to observe the principles of fundamental justice. In this case, the Court held that the failure of the Correctional Service to fulfil a statutory obligation to provide information as to the reasons for the transfer

was not sufficiently important to amount to a breach of fundamental justice.[37] (It did make the transfer unlawful, however, and the Court ordered that the prisoner be returned to a minimum-security institution.)

The Supreme Court of Canada has often been urged to extend liberty beyond freedom from physical restraint, and has been reluctant to set off down a slippery slope that would vastly extend the scope of s. 7.[38] However, in *Blencoe v. British Columbia* (2000),[39] Bastarache J., speaking for a majority of five judges of the Supreme Court of Canada, asserted that liberty in s. 7 is "no longer restricted to mere freedom from physical restraint"; it applies whenever the law prevents a person from making "fundamental personal choices".[40] The case involved a claim by Mr Blencoe that his liberty interest had been impaired because of the unreasonable delay of the British Columbia Human Rights Commission in disposing of complaints of sexual harassment made against him by two women. It is very difficult to see how a plausible deprivation of liberty can be constructed out of these facts, and Bastarache J. with little discussion held that "in the circumstances of this case, the state has not prevented [Mr Blencoe] from making any fundamental personal choices"'.[41] Mr Blencoe was therefore denied a remedy. LeBel J. for the dissenting minority of four (who would have ordered an expedited hearing on administrative-law principles) pointedly refused to comment on the scope of s. 7 of the Charter.[42] With respect, LeBel J.'s caution seems the more appropriate position to take in a case that did not call for a ruling about the protection of such vague notions as fundamental personal choices.[43]

Bastarache J.'s dictum in *Blencoe* was quoted with approval by a unanimous Supreme Court in *Carter v. Canada* (2015).[43a] At issue was the constitutionality of the Criminal Code offence of aiding or abetting a person to commit suicide. The plaintiff was a person who suffered from a fatal degenerative disease that was progressively robbing her of her physical abilities. She wanted to die peacefully at a time and in a manner of her own choice, but she knew that she would probably need the help of a doctor when that time came. She challenged the validity of the offence under s. 7, and was successful. On liberty, it was the disease not the law that restricted her physical liberty. However, the law certainly denied her the right to make a fundamental personal choice free from state interference (as contemplated by the dictum in *Blencoe*), but the Court did not leave it at that:[43b]

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty.

The challenged law therefore involved a deprivation of liberty.[43c] The Court went on to hold that the law was not in accordance with the principles of fundamental justice because it was overbroad.[43d] The Court accordingly held that the law was invalid to the extent that it prohibited physician-assisted suicide by a competent adult person in a situation similar to that of the plaintiff.

…

(c) — Political liberty

"Liberty" does not include freedom of conscience and religion, freedom of expression, freedom of assembly, freedom of association, the right to vote and be a candidate for election, or the right to travel. These rights are all guaranteed elsewhere in the Charter of Rights, and should be excluded from s. 7.[53]

…

48.7 (f) — Diminished expectation of privacy

(pp 48-48 – 48-39 in Loose Leaf)

Another circumstance that will lower the standard of reasonableness imposed by s. 8, and will often excuse the absence of a warrant, is a diminished expectation of privacy. Of course, if there is *no* reasonable expectation of privacy, then there is no search or seizure within s. 8 and no requirement of reasonableness.[153] There are, however, situations where there is a reasonable expectation of privacy, but the expectation is not sufficiently high to require fulfilment of the warrant requirements of *Hunter v. Southam.*[154] This is the case in a prison, for example, where inmates, although retaining some expectation of privacy, must expect routine or random frisk searches of their person, and routine or random surveillance and inspection of their cells.[155] A person arrested for a crime and in custody, but not convicted, has to submit to fingerprinting, photographing and other identification measurements without prior judicial authorization.[156] A person convicted of multiple serious offences and in custody has to submit to the taking of a DNA sample for a data bank without the need to show any link to any particular investigation.[157] There is also a diminished expectation of privacy in a school, where a warrantless search by the principal of a student's person for drugs has been held to be reasonable.[158]

The facts of *R. v. Reeves* (2017)[158a] were that the accused and his common-law spouse co-owned and (most of the time) cohabited a house in which there was a computer which they also shared. During a period when the accused was absent, the spouse discovered that there were child pornography images and videos on the computer; she reported that to the police. In response, a police officer came to the house without a warrant, was admitted by the spouse, and, after confirming with her that she was reporting child pornography on the computer, and, after obtaining her written consent, the police officer seized the computer. The police did not search the computer until they had obtained a search warrant to do so, and their search revealed images and videos of child pornography.[158b]The accused was charged with possessing and accessing child pornography. He made a pre-trial application to exclude the computer-based evidence as having been obtained in breach of s. 8. The Ontario Court of Appeal denied the application, admitting the evidence. LaForme J.A., who wrote the opinion of the Court, acknowledged that the accused had not consented to the police entry or the taking of the computer, but he held that cohabitation greatly diminished the accused's reasonable expectation of privacy in the shared house and possessions. At the time of the police visit, the accused would have had no reasonable

expectation that his spouse would deny entry to a police officer or would refuse consent to the taking of the computer.[158c] Neither of these police actions was in breach of s. 8.

By the same token, a heightened sense of privacy will raise the standard of reasonableness. We have earlier noticed[159] that a search of the person incident to an arrest does not require a warrant, because the reasonable and probable grounds for the arrest are regarded as making the accompanying search reasonable too. In *R. v. Golden* (2001),[160] the Supreme Court held that, if the arrested person is to be subjected to a strip search, additional safeguards must be observed. The requirement of a warrant is still impracticable, but, in addition to their grounds for making the arrest, the police must have reasonable grounds to suspect that the accused is concealing weapons or evidence under his or her clothing, and they must make efforts to carry out the search in a place that affords some privacy (for example, the police station rather than the restaurant where the arrest was made). Another example is afforded by the taking of samples of hair, saliva or blood from a suspected person for the purpose of DNA analysis. The interference with bodily integrity raises the standard of reasonableness. In *R. v. S.A.B.*(2003),[161] the Court upheld the Criminal Code procedure that had been enacted to authorize the taking of a bodily sample. In addition to the requirement of a warrant issued by a judge on reasonable grounds, the Code required the sample to be taken in a manner that was reasonable and respectful of privacy, forbade its use for other than forensic purposes, required its destruction if its DNA did not match that found at the crime scene, and imposed other safeguards. Of course, once an offender has been convicted, the expectation of privacy diminishes markedly, and the Court has upheld the Criminal Code provisions authorizing the taking of a DNA sample for inclusion in a DNA data bank.[162]