Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

THE ATTORNEY GENERAL OF ONTARIO

Respondent

REPLY FACTUM OF THE APPLICANT

Dated: April 6, 2018

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PART I: OVERVIEW

1. This Reply Factum responds to the issues raised by the Respondent, The Attorney General of Ontario (hereinafter "Ontario"), in its Factum.

2. The Applicant notes that Ontario's Factum mischaracterizes many of the Applicant's submissions set out in his original Factum, or does not address them at all. So, in addition to the responses set out below, the Applicant repeats and relies upon his submissions set out in the original Factum of the Applicant.

PART II: ISSUES AND THE LAW

A section 7 analysis is not redundant

3. Ontario argues that the constitutionally of the impugned provisions should only be examined under section 8 of the *Charter*, rather than conducting a section 7 analysis to deal with the Applicant's submissions respecting the delegation of police and other investigative powers to a private organization. The Applicant agrees that there is overlap between a section 7 and 8 analysis; however, the Applicant submits that an analysis under section 7 is nevertheless necessary to deal with all of the Applicant's issues, submissions,

and grounds raised for challenging the constitutionality of the impugned provisions.

4. Ontario's argument to dismiss the Applicant's section 7 submissions does not account for the crux of the Applicant's section 7 arguments, which is that it is unconstitutional for the Crown to delegate police and other investigative powers to a private organization, and the OSPCA in particular, especially without any, or adequate, legislated restraints, oversight, accountability or transparency.

5. Ontario's argument focuses solely on search and seizure powers granted to the OSPCA by way of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 (hereinafter the "OSPCA Act" or simply the "Act"), and it ignores all of the other ancillary investigative powers enabled by the impugned provisions of the Act, which the Applicant claims are also collectively unconstitutional in the hands of a private organization, such as:

   a. Decision making and policy setting powers regarding against who, for what, where and how investigations are commenced (including but not limited to searches and seizures, and the manner they are conducted);
   b. Decision making and policy setting powers regarding who is charged with offences, including *Criminal Code* offences and offences under the Act, and the OSPCA's inevitable involvement in people's prosecution proceedings;
   c. Decision making and policy setting powers regarding the conduct of OSPCA law-enforcement officers; and
   d. Decision making and policy setting powers regarding people's privacy and information collection through the course of an investigation.

6. The Applicant's section 7 submissions are focussed on <u>who</u> is exercising police and other investigative powers, and this necessitates a review in a much broader context that goes beyond looking at the reasonableness of any particular search or seizure powers. The Applicant submits that these broader issues are more appropriately considered pursuant to a section 7 analysis, which includes a "principles of fundamental justice" analysis.

7. Distinguishable from these considerations are the Applicant's section 8 submissions, which deal with the constitutionality of specific search and seizure provisions of the *OSPCA Act*, regardless of who exercises these powers (although it is submitted that the delegation of these powers to a private organization serves to exacerbate the unreasonableness of these powers).

Section 7 of the* Charter *is engaged

8. Ontario also claims that section 7 of the *Charter* does not apply because the right not to be deprived of "life, liberty and security of the person" is not engaged in this case. Specifically, Ontario argues that: (a) the search and seizure provisions do not permit the taking of bodily samples and therefore the "security of the person" aspect of section 7 is not engaged; (b) because section 18.1, which provides incarceration penalties, is not being specifically challenged, there is no risk of deprivation of the "liberty" aspect of section 7; and (c) there is insufficient "state-imposed psychological stress" to engage the "security of the person" aspect of section 7. The Applicant disagrees with these arguments and responds as follows.

9. The law is clear that unreasonable searches and /or seizures trigger the "security of the person" aspect of section 7 of the *Charter*. The law is also clear that that, where there is a risk of incarceration, the "liberty" aspect of section 7 is engaged. From there, the analysis moves to determining whether or not the subject infringement is in accordance with principles of fundamental justice, which involves its own analysis.

10. The search and seizure provisions of the *OSPCA Act*, which include provisions to permit searches of homes, farms and other private properties, triggers the "security of the person" aspect of the section 7. The Court of Appeal for Ontario, in *R. v. Orlandis-Habsburgo* held:

> An unconstitutional search of a residence strikes at the heart of the privacy and security of the person interests protected by s. 8 of the *Charter*. The negative impact on those interests occasioned by the search cannot be described as anything other than very serious.

***R. v. Orlandis-Habsburgo*, 2017 ONCA 649 (CA), at ¶ 133;**
Joint Book of Authorities, Tab B(28).

11. In *F.(S.) v. Canada (Attorney General)*, the Court of Appeal for Ontario held:

> Section 7 of the *Charter* is the overriding protection to an accused person in a criminal proceeding that he will not be deprived of his fundamental freedoms without due process, that is to say, one that is in conformity with the rules of fundamental justice. Sections 8 through 14 enumerate specific constitutional restrictions on the State where it seeks to deprive the individual of his or her constitutional right to life, liberty and security of the person. One of them is s. 8, which states that

> everyone has the right to be secure against unreasonable search and seizure.

***F.(S.) v. Canada (Attorney General)*, [2000] O.J. No. 60 (CA), at ¶17;**
Joint Book of Authorities, Tab B(29).

12. Insofar as the impugned provisions authorize unreasonable searches and /or seizures, the "security of the person" aspect of section 7 of the *Charter* is clearly engaged.

13. Ontario's argument that "liberty" is not engaged, because section 18.1 of the Act (which provides potential incarceration as a penalty) is not specifically being challenged, ignores the fact that the impugned provisions of the Act inevitably expose people to the risk of incarceration. The penalty provisions of the Act and animal cruelty sections of the *Criminal Code* cannot be examined in isolation from the various police and other investigative powers provided by the *OSPCA Act*.

14. Section 18.1, and the animal cruelty provisions in the *Criminal Code*, cannot be disentangled from the impugned provisions. All penalties under section 18.1 and the animal cruelty provisions in the *Criminal Code* include potential incarceration. Section 18.1 is engaged together with the impugned provisions because exposure to penal consequences directly flows from the impugned provisions. Once the impugned provisions are utilized by the OSPCA (i.e. to investigate and gather evidence to charge individuals), a person is automatically exposed to a risk of incarceration via section 18.1 and the animal cruelty provisions in the *Criminal Code*. "Liberty" is therefore clearly engaged when looking at the totality of the circumstances enabled by the Act.

15. The Applicant also notes that, while section 18.1 is not being specifically challenged under section 7, the Notice of Application for this matter does set out (at paragraph 2(a)) that "[s]ection 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*". The Applicant has therefore included section 18.1 of the Act in this Application, insofar as it relates to a section 7 constitutional review.

16. The Applicant submits that both "liberty" and "security of the person" are engaged for the reasons set out above and set out in his original Factum.

17. Alternatively, section 7 could be engaged on the basis that that the impugned provisions can cause sufficient "state-imposed psychological stress" to breach the "security of the person" protections of the *Charter*. A law that authorizes a private organization, without any, or adequate, legislated restraints, oversight, accountability or transparency, to enter people's homes, farms and other private properties, in some cases without a warrant, and in some cases to seize their animals, including families' companion animals (animals are as precious as children to some people), without any or adequate judicial scrutiny, is sufficient to cause a high degree of "state-imposed psychological stress".

The impugned provisions are arbitrary

18. At paragraphs 42-47 of Ontario's Factum, the province argues that the Applicant is using the wrong test for arbitrariness. However, in doing so, Ontario mischaracterizes the Applicant's submissions, as set out at paragraphs 53-57 and 60-68 of his Factum, where the Applicant argues that <u>there is no connection</u> between the protection of animals and the assignment of police and other investigative powers to a private organization.

19. As noted in Ontario's Factum, the Supreme Court of Canada held in *Bedford v. Canada (Attorney General)*:

> 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".
>
> <u>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</u>. [emphasis added]

***Bedford v. Canada (Attorney General)*, 2013 SCC 72 (SCC), at ¶111, 119;**
Joint Book of Authorities, Tab B(6).

20. To repeat, the Applicant submits that there is <u>no connection</u> between the purpose of animal protection, and the inevitable negative effects of granting police powers to a

private organization, especially without any, or adequate, legislated restraints on its powers, oversight, accountability or transparency.

21. This Application is concerned with the lack of connection between the objective (animal protection) and "who" is enforcing the law. The Applicant is not arguing that there is no connection between animal protection and providing animal protection enforcement powers *per se*, as Ontario appears to colour the Applicant's submissions. To be clear, this Application is concerned with the lack of connection with the principle of delegating such powers to a private organization.

22. We know that the purpose of the law is not connected to the specific effects caused by assigning police and other investigative powers to a private organization because no other laws in Ontario are enforced in the same way, and not all provinces in Canada delegate animal protection enforcement powers to a private organization. To put it another way, the province arbitrarily delegated police and other investigative powers to the OSPCA, rather than assigning these powers to a proper agent of the Crown.

23. It is consistent with the *Bedford* test, described above, for the Applicant to argue that there is no connection between the effect and the objective, and so the negative effects of the *OSPCA Act* are "unnecessary" (see paragraphs 53-57 and 60-67 of the Applicant's Factum for examples). In addition, it also follows the *Bedford* test to argue that some effects of the *OSPCA Act* actually undermine the objective of protecting animals, and so the Act is "inconsistent" with the objective (see paragraphs 58-59 and 68-70 of the Applicant's Factum for examples).

24. The Applicant respectfully puts this question back to Ontario, and asks: how is the objective of protecting animals so unique, compared to all of the other important legislative objectives of the province, that it must be investigated and these laws enforced by a private organization? Why must the province's animal protection laws be investigated and enforced by a private organization, especially without any, or adequate, legislated restraints on its powers, oversight, accountability or transparency? Where is the <u>connection</u> between the effects of this legislative scheme (as it specifically relates to assigning police and other investigative powers to a private organization), and the objective of protecting animals?

Response to the argument there is no constitutional principle requiring police powers to be assigned to police

25. The fact that this Application raises novel issues does not mean the impugned provisions are constitutional.

26. The Applicant submits that the impugned provisions are unconstitutional because they provide extraordinary police and other investigative powers to a private organization, and the OSPCA in particular, without any, or adequate, legislated restraints on the powers, oversight, accountability or transparency. These powers can be used to charge individuals with serious regulatory and criminal offences which carry very harsh penalties, including incarceration, and these charges attract a very high degree of stigma. Exacerbating this is the fact that the OSPCA relies on publicity from its investigations, seizures and charges to inspire donations to support its operations. There is simply no comparable legislative scheme that operates in such a manner against members of the general public. It should be no surprise, therefore, that this Application raises novel issues.

27. The *Law Society Act* and *Securities Act*, as cited by Ontario as supposedly similar legislative schemes, do not come close to the *OPSCA Act* as it relates to the extent of the powers delegated to a private organization. These statues are not even in the same ballpark in terms of interfering with people's private lives and expectations of privacy, intrusions onto private property (including entering into people's homes) and seizures of very personal property. These statutes also do not apply to the public at large, and are instead directed at specific individuals' professions and financial affairs. The fact that these are the best comparators that Ontario was able to come up with, in response to this Application, only underlines how unique the *OSPCA Act* truly is.

28. The Law Society of Ontario is a self-regulating body, funded by fees charged to licensees, that regulates lawyers and paralegals in Ontario. The *Law Society Act* permits the Law Society to enter the premises of a licensees' business during business hours to examine records to ensure compliance with the Law Society's rules and duties. Prior judicial authorization is required before entering any other premises. This is not comparable to the extraordinary police and other investigative powers given to the OSPCA, including to enter homes and seize private property of the general public. The Law Society's investigative powers are far more limited than the OSPCA's, far less

intrusive, and apply only to licensees' who invariably opt into this legislative scheme as a condition of the profession. The governing body of the Law Society, known as benchers, are also elected by licensees, so licensees have some influence over policy. Benchers also sit as adjudicators to hear discipline cases concerning licensees. The general public is essentially unaffected by the investigative components of the *Law Society Act*.[1]

***Law Society Act*, R.S.O. 1990, c. L.8, at s. 49.3 & 49.10;**
Joint Book of Authorities, Tab A(36).

29. Similarly, the Ontario Securities Commission's investigative powers are far more limited than the OSPCA's, far less intrusive, and apply only to market participants who invariably opt into this legislative scheme by participating in the markets. Except for market participants, the general public is essentially unaffected by the investigative components of the *Securities Act*. The Securities Commission is an independent Crown corporation that is responsible for regulating the capital markets in Ontario. It is funded by way of fees charged to market participants. Private residences are broadly excluded from the inspection powers authorized under section 13 of the *Securities Act*, and judicial authorization is required to conduct all searches and /or to keep any property seized by way of an inspection. Property that could be seized by the Securities Commission (i.e. financial records) would also obviously be far less personal in nature, compared to people's animals.

***Securities Act*, R.S.O. 1990, c. S. 5, at s. 13(9);**
Joint Book of Authorities, Tab A(37).

30. Ontario has put its best foot forward, but it has failed to show the Court any statutory scheme that is similar to the *OSPCA Act*. At best, Ontario has shown that there are only a couple of examples where a private organization is authorized to exercise <u>very limited</u> investigative powers <u>over a very limited sector of society</u>, involving only those people who have essentially consented to oversight by the subject organization as a condition of participating in a specific profession or financial markets. With both of Ontario's examples, the subject organizations are also funded internally by fees charged to licensees and market participants, unlike the OSPCA which must still impress funders to

[1] Licensed lawyers and paralegals in Ontario represent under 0.4% of the population. See: https://www.lsuc.on.ca/faq.aspx?id=1275#q1266

inspire donations to fund its investigations.

31. It is noteworthy that, even if there was some other statute that was similar to the *OSPCA Act*, it would not simply stand as proof of finding the *OSPCA Act* is constitutional. This Application, and the evidence on the record, are unique and only concerned with the *OSPCA Act*.

Re: section 8 - the requirements in* Hunter v. Southam *apply

32. Ontario argues 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". The Applicant disagrees with this summation of the law, and notes that *Hunter* is routinely referenced outside of the criminal law context. However, the Applicant agrees with Ontario insofar as, at paragraph 53 of Ontario's Factum, it recognizes that "the totality of the circumstances" must be considered when assessing the reasonableness of searches and seizures.

33. This is precisely what the Applicant argues in his Factum in support of this part of the Application. The circumstances that should be considered in this case include: various sections of the *OSPCA Act* permit warrantless entry into people's homes, seizures of very personal property (including companion animals), warrantless entry onto farms and other property at or near people's homes, and the law exposes people to very harsh penalties, serious stigma, publicity perpetuated by the OSPCA as a means to fund-raise, and potential charges under the *Criminal Code*. There is also a widespread lack of judicial oversight, despite frequently dealing with non-urgent situations, a complete lack of oversight to ensure that warrantless powers are not being abused, and, where appeal mechanisms are in place, there are serious access to justice issues (i.e. five-day limitation periods), especially for vulnerably people who are often subjected to OSPCA scrutiny.

34. In addition, the circumstance that negatively permeates throughout this Application is the fact that the *OSPCA Act* delegates extraordinary search and seizure powers to a private organization without any, or adequate, oversight, accountability or transparency of the organization. The unreasonableness of this fact alone cannot be overstated.

35. The Applicant recognizes that the standard of reasonableness is a lower threshold when outside the realm of criminal law. However, at paragraphs 98 and 102-106 of his Factum, the Applicant makes submissions supporting that the threshold should still be very high. The Applicant makes submissions at paragraphs 107-112 in support of why the expectation of privacy at farms and on other residential properties is almost as high as within people's homes.

36. In *R. v. Vaillancourt* the Nova Scotia Provincial Court held that section 12(4) of Nova Scotia's *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22, which permitted warrantless searches and seizures, was contrary to section 8 of the *Charter*. Section 12(4) stated:

> (4) Where the peace officer has reasonable and probable grounds for believing that an animal is in distress
>
> > (a) in or upon any premises <u>other than a private dwelling</u> place; or
> >
> > (b) in any vehicle or thing,
>
> the peace officer may, with or without a warrant, and by force, if necessary, enter the premises, vehicle or thing and search for the animal and exercise the powers conferred on the peace officer by this Section with respect to any animal in distress found therein.

***R. v. Vaillancourt*, 2003 NSPC 59 (PC), at ¶41;**
Joint Book of Authorities, Tab B(30).

37. In *R. v. Vaillancourt*, Justice Baitot concluded:

> In the case at bar, s. 12(4) authorizes the officer, who has reasonable and probable grounds to believe that an animal is in distress, to, *with or without a warrant*, enter and seize such animal. If she/he has such a reasonable ground, then he or she would be able to obtain a prior judicial authorization.
>
> Animals within the purview of this Act may be found in many different places or premises, moving or non-moving; such as a truck, a train, a bus or a car, a boat, or on land, on public property as well as private.
>
> The word *premises* is defined as *a house or building with its grounds or other appurtenances* (the Shorter Oxford, supra, at p. 1656, def. 4). It implies a private building or yard. A distinction between a house and a *private dwelling place* must then be made, but it is not clear upon what terms, or by what definition, since, for most Nova Scotians, I would venture to say, both expressions may means the same thing, a home, and would include the yard appertaining thereto.

> ...In light of the Charter, and the relevant jurisprudence, the statutory authorization to enter premises without a warrant is over broad and in breach of s. 8 of the Charter: in the majority of circumstances, there is no need to infringe a person's right for the Society to fulfill its mandate, even though the cooperation of the owner may be obtained. <u>A warrant is the best guarantee that a person's right is safeguarded, through the prior assessment of the reasonableness of the peace officer's ground to enter and seize an animal he or she believes is in distress.</u>
>
> ...I am satisfied that there is no justification under s. 1 of the Charter for the over reaching of s. 12(4). Indeed, in light of the present amendments to the Summary Proceedings Act, there is no necessity for it.
>
> Pursuant to s. 24 (1), I must declare, as inconsistent with s. 8 of the Charter, the following underlined words in the phrase the peace officer may, with or without a warrant, and by force... of s. 12 (4) of the Act. As a result the section will then comply with both the Charter and the jurisprudence; at the same time, a peace officer may still act without a warrant in exigent circumstances, the proof of which is on the Crown. In light of Rao and Grant**,** supra, that a vehicle or thing - if that is the case - is not fixed would be very relevant. <u>At the same time, in most cases, a prior judicial authorization, which, in light of the recent amendments to the Summary Proceedings Act, can conveniently and quickly be obtained by telephone, will allow a more objective balance between the duties of the Society, and the rights of the individual</u>.

R. v. Vaillancourt, 2003 NSPC 59 (PC), at ¶50-57;
Joint Book of Authorities, Tab B(30).

38. Although *R. v. Vaillancourt* is not binding on this Court, it is persuasive and properly decided. A similar finding in the instant case would be appropriate.

Sections 13(1) and 13(6)

39. Sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA officers the power to enter private property, <u>including a dwelling</u>, <u>without a warrant</u> at the complete discretion of the officer and irrespective of any situation of urgency, and at any hour of the day or night without any limitations on duration.

40. Ontario argues that such searches are limited to locations where the animal subject to an order is kept. However, there is no dispute that this can include people's homes. It can also include a farm or some other property where a residence is located. There is no, or inadequate, judicial oversight after such a search is conducted. The fact that section 13(6) does not provide an exception for dwellings makes these warrantless entry powers

especially unreasonable.

41. Ontario cites *R. v. Nicol* for the proposition that, for the most part, there is no requirement for belief or suspicion of non-compliance for inspection powers to be used. *R. v. Nicol* is readily distinguishable. It involved a municipal by-law respecting garbage and debris. The by-law officer climbed a fence in a vacant yard and took a picture of the yard of the accused that confirmed the accused did not comply with an order.

42. In the instant case, the *OSPCA Act* permits OSPCA agents to enter people's homes without a warrant at any time of the day or night without a limitation on duration. At the very least, to comply with section 8 of the *Charter*, section 13(6) must exclude searches of dwelling houses and require adequate judicial oversight to ensure these powers are not being abused or going on forever.

43. Ontario's arguments ignore the fundamental democratic guarantee, that all Canadians are entitled to the highest possible degree of privacy within our own homes. In *R. v. Kokesch*, the Supreme Court of Canada held:

> From the point of view of individual privacy, which is the essential value protected by s. 8 of the Charter, this illegal intrusion onto private property must be seen as far from trivial or minimal. Even before the enactment of the Charter, individuals were entitled to expect that their environs would be free of prowling government officials unless and until the conditions for the exercise of legal authority are met. The elevation of that protection to the constitutional level signifies its deep roots in our legal culture. La Forest J. put it this way in *Dyment*, supra, in words that commend themselves to me (at pp. 427-28) [references omitted]:
>
> > Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. <u>The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.</u>

***R. v. Kokesch*, [1990] 3 S.C.R. 3 (SCC), at ¶50;**
Joint Book of Authorities, Tab B(31).

44. Ontario did not cite any case law to support its proposition that sections 13(1) and 13(6) of the Act can constitutionally stand to permit warrantless entry into people's homes

because no such case law exists.

Sections 11.2(1) and 11.2(2) of the* OSPCA Act *are ultra vires the Province

45. The Applicant applied the proper test for determining if the impugned provisions are *ultra vires* the province, contrary to Ontario's arguments. The Applicant relies on the same test as is set out in Ontario's Factum at paragraphs 77-80. The test is not in dispute:

> The first step is to determine the "matter" of the legislation in issue. The analysis involves an examination of: (i) the purpose of the enacting body, and (ii) the legal effect of the law. This exercise is traditionally known as determining the law's "pith and substance".
>
> ...Once the pith and substance 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 the criminal law". [references omitted]

***York (Regional Municipality) v. Tsui*, 2017 ONCA 230 (CA), at ¶58, 64, & 67; Joint Book of Authorities, Tab B(32).**

46. The Applicant submits that some of Ontario's submissions regarding this part of the Application, and how to distinguish between provincial and federal laws, serve only to confuse the matter. The above test should be firmly adhered to in this case.

47. At paragraph 72 of its Factum, Ontario argues that "to the extent that the [*OSPCA 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". The Applicant disagrees with this summation of the law, which essentially puts the proverbial cart before the horse. What matters is the "dominant feature" of the law and which head of power, under either ss. 91 or 92 of the *Constitution Act, 1867*, it fits into.

48. Contrary to Ontario's submissions on this point, the Supreme Court in *Morgentaler* expressly distinguished how the "dominant feature" of the law may be characterized as within either provincial or federal competence:

> The issue we face in the present case is whether Nova Scotia has, by the

> present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

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

49. Of the examples of provincial law provided by Ontario at paragraph 72, none of them feature a "dominant purpose" to suppress or punish socially undesirable conduct *per se*. In each case, such an effect (if any) is incidental to the "dominant purpose" of controlling the quality and nature of the respective subject matters.

50. The Applicant properly applied the law in his Factum and repeats and relies on the arguments set out therein.

51. In *R. v. Vaillancourt*, relied on by Ontario, the Court did consider whether Nova Scotia's animal welfare laws were within that province's jurisdiction. However, *Vaillancourt* did not consider a key element of the Applicant's submissions; specifically, that the *OSPCA Act* features two separate prohibitory provisions (one to prescribe standards of care, and another to prohibit causing or permitting distress, including abuse), and that a distinction between the purposes of these two provisions must invariably lead to a similar distinction, in this particular case, between the pith and substance of the two provisions.

52. Ontario's arguments and reliance on the *Vaillancourt* decision ignores that there must be a distinction between the purposes of sections 11.1 and 11.2 of the *OSPCA Act*. Ontario ignores the Applicant's submissions that the dominant purpose of section 11.1(1) is directed at controlling the nature, quality and standards of animal welfare (which properly falls within the ambit of "property and civil rights and matters of a merely local or private nature"), while the dominant purpose of sections 11.2(1) & 11.2(2) are instead clearly directed at suppressing or punishing socially undesirable conduct associated with animal welfare (i.e. animal abuse; which properly falls within the ambit of criminal law).

53. If the *OSPCA Act* featured only one or the other of sections 11.1 or 11.2, then Ontario *might* succeed with its argument that the Act has only incidentally intruded into the area of federal jurisdiction while attempting to legislate in the area of "property and civil

rights and matters of a merely local or private nature". However, as the *OSPCA Act* is written, with each section necessarily carving out a separate purpose and with section 11.1 so clearly dealing with animal welfare as it relates to "property and civil rights and matters of a merely local or private nature", and with it being necessary to examine the entire statute to properly interpret the the impugned provisions, the Applicant submits that there is no room left for section 11.2 to cover the same ground as 11.1. Ontario does not address the necessary distinction between sections 11.1(1) and 11.2(1) & 11.2(2) because it will inconveniently undermine its arguments and reliance on the *Vaillancourt* decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6TH DAY OF APRIL, 2018.

Kurtis R. Andrews

SCHEDULE “A”
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Legislation

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Applicant **Respondent**

Court File No. 749/13

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SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
PERTH, ONTARIO

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