

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

-and-

ANIMAL JUSTICE CANADA

Intervener

FACTUM OF THE INTERVENER ANIMAL JUSTICE CANADA

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PART I – OVERVIEW OF FACTS

1. Animal Justice Canada (“**Animal Justice**”) intervenes as a friend of the Court in this Application pursuant to the order of Mr. Justice Abrams dated April 20, 2018, which granted Animal Justice leave to serve and file a factum of up to 20 pages, and to make oral arguments of up to 30 minutes, at the discretion of the Justice hearing the Application.

A. Animal Justice

2. Animal Justice is the only Canadian animal advocacy organization focused on animal law. The objects of Animal Justice include the prevention of cruelty to animals through the meaningful and effective enforcement of existing laws.
3. Animal Justice has a long track record of making submissions to courts regarding laws affecting animals, animal advocates, and their protections, including at the Supreme Court of Canada.

4. As part of its mandate, Animal Justice seeks to ensure that those tasked with administering animal protection statutes possess search powers necessary to adequately enforce the law, and that animal law enforcement bodies are structured and funded in a way that promotes transparency, accountability, and effectiveness. These objectives are essential to ensuring animals benefit from the protections afforded by existing laws, and that the public can have confidence in animal law enforcement.
5. Animal Justice has not filed any evidence in respect of this Application, and it accepts the evidentiary record as prepared by the parties.

B. The Ontario SPCA

6. The Ontario SPCA is created by provincial statute, but is empowered by statute to enforce any and all laws in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals.
7. The Ontario SPCA's broad jurisdiction thus makes it a key gatekeeper of animal law enforcement, not just for protections available to animals under the provincial *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 (the "**OSPCA Act**"), but also under other provincial statutes, federal criminal animal cruelty laws, federal laws protecting farmed animals during transportation and slaughter, and even municipal by-laws.

C. The Application

8. This application was commenced on October 18, 2013. The Amended Amended Notice of Application was filed on February 13, 2018 (the "**Application**").
9. The Application seeks, among other things, declarations that certain provisions of the *OSPCA Act* violate sections 7 and/or 8 of the *Canadian Charter of Rights and Freedoms* ("**Charter**") and therefore are of no force and effect.
10. The Attorney General of Ontario opposes the Application.

PART II – POSITION WITH RESPECT TO POINTS IN ISSUE

11. Animal Justice addresses two legal issues in this Application:
 - a. The proper approach to assessing the reasonableness of the provisions in the *OSPCA Act* that the Applicant impugns pursuant to section 8 of the *Charter*, and how the unique context of animal protection legislation ought to guide the reasonableness analysis under section 8; and
 - b. The legal principles applicable to the recognition of a novel principle of fundamental justice under section 7 of the *Charter*, and how the principle that requires law enforcement bodies to possess certain institutional qualities – accountability, transparency, and integrity – falls within the principles of fundamental justice.
12. Animal Justice’s submissions regarding the section 8 *Charter* analysis emanate from its concern that animal protection legislation must be interpreted so as to ensure the effective enforcement of animal protection laws.
13. Animal Justice’s submissions with respect to section 7 of the *Charter*, regarding the principle of fundamental justice proposed by the Applicant, emanate from its belief that the meaningful enforcement of animal protection laws depends on the enforcement of regulatory and criminal law by public bodies that bear the hallmarks of transparency, integrity, and accountability.
14. Animal Justice submits that these features are necessary to ensure not only that persons subject to laws are treated fairly, but also to ensure that the laws themselves are adequately enforced, in order to promote public confidence both in the efficacy of laws requiring the proper and humane treatment of animals, and in the fair and impartial administration of justice more broadly.

PART III – ARGUMENT

A. A Contextual Approach to Section 8 of the Charter

15. By enacting animal protection legislation, the legislative assembly affirmed the sentience and moral value of animals and sought to eliminate conditions that would cause them to suffer. As set out in the preamble to the *OSPCA Act*:

The people of Ontario and their government:

Believe that how we treat animals in Ontario helps define our humanity, morality and compassion as a society;

Recognize our responsibility to protect animals in Ontario;

16. The legislative purposes of animal protection legislation can only be realized if those laws are meaningfully enforced. It is therefore critically important that state agencies have the powers they need to effectively enforce animal protection legislation, particularly in the unique context of animal abuse and neglect.
17. Section 8, as much as any other section of the *Charter*, requires a contextual analysis.¹ This means that the “reasonableness” of the search for the purposes of section 8 must be understood in light of the context in which the search is undertaken, the statutory regime at issue including its purpose and objects, and what is required as a practical matter to ensure meaningful enforcement. The extent of a person’s reasonable expectations of privacy are likewise dependent on this context.
18. As the Supreme Court of Canada stated in *R v. Rogers*:

[26] The notion of what is “reasonable”, by its very nature, must be assessed in context. This Court in *R. v. McKinlay Transport Ltd.* [1990] 1 S.C.R. 627, reiterated the need for a flexible and purposive test. Wilson J. stated (at p. 645):

¹ See e.g. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 250, 2015 SCC 46 at para 53; *R. v. Jacques*, [1996] 3 SCR 312 at para 20; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 18 and 21; *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 31; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 647 (“*McKinley Transport*”).

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is “reasonable” in a given context must be flexible if it is to be realistic and meaningful.

[27] Hence any assessment of reasonableness requires a balancing of the relevant competing interests. In the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60, Dickson J. described the s. 8 test as follows:

[A]n assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.

Where the constitutional line of “reasonableness” will be drawn then becomes a function of both the importance of the state objective and the degree of impact on the individual’s privacy interest.

19. Animal Justice submits that the key contextual factors in assessing the reasonableness of the searches at issue in this proceeding are:
 - a. The unique difficulties associated with policing and enforcing animal protection legislation;
 - b. The increased recognition of the vulnerability of animals to abuse and neglect, and the importance of ensuring that the state can adequately fulfil its important interest in preventing this abuse from occurring or continuing; and
 - c. The protective functions built into the existing statutory scheme, and how that scheme is responsive to the unique difficulties in achieving meaningful enforcement in this context.
20. Taking these contextual factors into account is important in determining the “reasonableness” of searches authorized by law.

B. Animal Protection Legislation is Uniquely Difficult to Enforce

21. The Supreme Court of Canada has on numerous occasions emphasized that the contextual approach to *Charter* analysis includes an assessment of the practical difficulties associated with enforcing a legislative regime.
22. For example, in *McKinley Transport*, the Supreme Court of Canada considered the constitutionality of s. 231(3) of the *Income Tax Act*,² which set out broad powers allowing persons authorized by the Minister of National Revenue, “for any purpose related to the administration or enforcement of this Act”, to, among other things,

enter into any premises..., and (a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act, ... require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination...

23. In reasons adopted by a majority of the Court, Justice Wilson observed that, for practical reasons, the *Income Tax Act* is based on the principle of self-reporting and self-assessment, and as a result “depends for its success upon the taxpayers’ honesty and integrity in preparing their returns,”

Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained.³

² RSC, 1985, c. 1 (5th Supp.).

³ *McKinley Transport, supra*, at 648.

24. Likewise, in *Thomson Newspapers*, in discussing the “less strenuous and more flexible standard of reasonableness [under section 8] in the case of administrative or regulatory searches and seizures”, the Supreme Court of Canada observed:

[122] ... In a modern industrial society, it 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. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

[123] It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.⁴

25. As with many of the examples cited by the Supreme Court in *Thomson Newspapers*, the state is unable to meaningfully ensure compliance with animal protection legislation short of inspecting the properties at which animals are kept.
26. In particular, animal protection legislation requires robust preventative and investigative search powers, because:
- a. Animals are frequently kept on private property, out of public view. They are therefore especially vulnerable to being abused out of public sight;
 - b. Animals cannot self-report the abuse they are suffering; and

⁴ *Thomson Newspapers, supra*, at 506-507. [Emphasis added]

- c. Unlike in many regulatory contexts – which tend to involve at least some oversight mechanisms, such as reporting and filing requirements – there are virtually no attendant oversight mechanisms to ensure breaches of animal protection laws are identified.
27. Indeed, it is submitted that regulatory or preventative searches are even more justified in the context of animal protection legislation than in other regulatory contexts in which they have been found to be consistent with section 8, because of the unique difficulties associated with identifying and bringing to light animal abuses.

C. Legislative and Judicial Recognition of the Moral Significance of Animals

28. Further, the reasonableness of searches at issue in this proceeding must be understood in the unique context of animal protection legislation. The very existence of animal protection legislation demonstrates that animals are protected under Canadian law because of their unique vulnerability to abuse and neglect, as well as their inherent moral value. Recent case law has reflected society’s move away from viewing animals as mere chattel, to viewing them as living beings deserving of moral consideration.⁵
29. For example, in a lengthy dissenting opinion in *Reece v. Edmonton (City)*, Chief Justice Fraser of the Alberta Court of Appeal observed that over time the law has moved away from the view that animals are property to be used and abused and humans see fit, towards a recognition that “humans have a moral and ethical obligation to treat animals humanely.”⁶
30. Justice Abella, dissenting in *R. v. D.L.W.*, cited Chief Justice Fraser’s remarks in *Reece* before referencing the “transformed legal environment consisting of more protection for animals.”⁷
31. Similarly, in *R. v. Alcorn*, the Alberta Court of Appeal unanimously dismissed an appeal of a sentence for the *Criminal Code* offence of committing cruelty to an animal. In

⁵ *R. v. Munroe*, 2010 ONCJ 226; *R v. D.L.W.*, 2016 SCC 22, at para. 69.

⁶ 2011 ABCA 238, at para. 42

⁷ 2016 SCC 22, at para. 141.

upholding a sentence of 20 months imprisonment and 3 years probation – the accused having strung up a cat by its hind legs and cut its throat so it bled to death – the Court observed that:

By enacting s 445.1 of the Criminal Code, which allows the Crown to proceed by indictment and imposes a maximum sentence of 5 years' imprisonment, Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society: see, generally, Peter Sankoff, Vaughan Black & Katie Sykes eds, *Canadian Perspectives on Animals and the Law* (Irwin Law, 2015).⁸

32. The Alberta Court of Appeal considered it “pertinent to note” Chief Justice Fraser’s dissenting comments in *Reece* to the effect that “a civilized society should show reasonable regard for vulnerable animals. Sentient animals are not objects.”⁹ This recognition is increasingly supported by the law in other countries, as well.¹⁰
33. Finally, in a recent case in which the Newfoundland and Labrador Court of Appeal considered how custody over pets should be determined in matrimonial disputes, in dissenting reasons taking issue with the traditional, property-law driven paradigm that typically applies, Justice Hoegg observed:

[D]ogs are more than just animate. People form strong emotional relationships with their dogs, and it cannot be seriously argued otherwise. Dogs are possessive of traits normally associated with people, like personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them.¹¹

34. Consistent with recent case law recognizing society’s concern for animal welfare, the preamble to the *OSPCA Act* explicitly sets out society’s recognition that the way it treats animals “helps define our humanity, morality and compassion as a society”, and that, as a

⁸ 2015 ABCA 182, at para. 42 [*Alcorn*].

⁹ *Alcorn*, *supra* at para. 41.

¹⁰ See e.g. Introduction to Symposium on Global Animal Law (Part I): *Animals Matter in International Law and International Law Matters for Animals*, by Anne Peters, Director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg (Germany) and Professor of International Law at the Universities of Basel, Heidelberg, and Berlin.

¹¹ *Baker v. Harmina*, 2018 NLCA 15, at para. 48.

result, society has a “responsibility” to protect animals at risk of abuse, neglect, and suffering.

D. Statutory Recognition of the Unique Challenges of Enforcement

35. Animal Justice respectfully submits that the two important contextual factors outlined above – the recognition of the unique difficulties in the enforcement, and the increased judicial and legislative recognition of the importance of protecting vulnerable animals from abuse and neglect – are reflected in the provisions of the *OSPCA Act* at issue in this proceeding.

(a) Section 11.4(1) of the OSPCA Act

36. The section 8 jurisprudence has long recognized that a person’s reasonable expectations of privacy are lower in the context of regulatory and investigative searches than in the context of criminal or quasi-criminal searches.¹²
37. As in other contexts in which regulatory searches have been upheld, the searches in s. 11.4(1) of the *OSPCA Act* are limited to those who have chosen to engage in a regulated activity, namely: keeping animals “for the purpose of animal exhibition, entertainment, boarding, hire or sale”.
38. And as noted above, the activities of those who use animals for these purposes are particularly difficult to monitor because they take place behind closed doors, animals cannot complain that they are being abused, and there are no other attendant monitoring mechanisms akin to, e.g., tax filing requirements.¹³
39. Regulatory searches such as those provided for in s. 11.4(1) of the *OSPCA Act* also create a disincentive to engaging in the prohibited conduct, which is particularly important in

¹² *McKinley Transport, supra; Thomson Newspapers, supra.*

¹³ While other regulated aspects of animal agriculture, such as food safety, can be otherwise monitored by inspecting products produced by a person using animals, this is not the case for animal protection legislation designed to protect animals from abuse: the final product does not disclose how the animal was treated while alive.

the context of animal protection legislation, given the lack of other oversight mechanisms and the statutory and judicial recognition that how we treat animals is morally significant.

(b) Section 12(6) of the OSPCA Act

40. A contextual approach to section 8 also assists in assessing the reasonableness of s. 12(6), which provides:

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.

41. Section 12(6) provides that state officials should not require a warrant if there are reasonable grounds to believe that an animal is currently in “immediate distress”.
42. Requiring a warrant even where a state official has reasonable grounds to believe an animal is in “immediate distress” – the word “immediate” connoting significant exigency requiring a timely response – would compromise the object of ensuring animals are treated in accordance with the shared values reflected in recent case law and the purposes of the *OSPCA Act*.
43. That is because if a state official determines on reasonable grounds that animals are in immediate distress, but is required to obtain a warrant before intervening, any delay could make a significant difference to the welfare of animals meant to be protected by the legislation.
44. At the very least, in every case where there is ongoing abuse or neglect, delay will lead to increased or prolonged suffering. At the extreme, a delay in intervention could even make the difference between life and death for the animal. That result would be entirely incompatible with the very purpose of the legislation, and the moral value the legislature and the courts accord to animals.

45. Animal protection legislation is designed to protect the physical and psychological integrity of animals, in the same way that other legal restrictions are designed to protect humans and their property.
46. Permitting the ongoing abuse or suffering of animals while a warrant is obtained is not a mere administrative delay or inconvenience – the statute is, by necessity, describing “exigent circumstances”, where warrantless searches are permitted.¹⁴
47. The requirement that an official have reasonable grounds to believe an animal is in *immediate distress* before s. 12(6) is engaged is analogous to a situation in which a person is in distress or their safety is at risk, where the Supreme Court has held that a warrantless search is reasonable.¹⁵
48. As the Court explained in *Godoy*, the ability to conduct a warrantless search is particularly important where a person may be unable to report the risk they are facing:

[21] Further, the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the hallmarks of this crime is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one’s privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response.

49. Similarly, animals are unable to self-report their abuse, and that abuse takes place behind closed doors.
50. Therefore, just as the police do not need to get a warrant if they have a reasonable belief that a person is currently in the process of being harmed or abused, Animal Justice submits that section 8, interpreted in the context of animal protection legislation, should not require a warrant where an enforcement agent has reasonable grounds to believe that

¹⁴ See e.g. *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Feeney*, [1997] 2 S.C.R. 13 (“*Feeney*”).

¹⁵ *R. v. Godoy*, [1999] 1 SCR 311; *R. v. Mann*, [2004] 3 SCR 59, 2004 SCC 52 at para 40; *R. v. MacDonald*, [2014] 1 SCR 37, 2014 SCC 3 at paras 32, 40-41

an animal is in “immediate distress” such that they would continue to be harmed or abused while a warrant is obtained.

E. Section 7 of the Charter

51. Animal Justice’s second interest in this litigation is grounded in the critical importance of ensuring that bodies charged with enforcing animal protection legislation can undertake that task effectively and in a manner that promotes public confidence in the administration of justice.
52. In Animal Justice’s respectful submission, this requires that law enforcement bodies bear certain institutional characteristics that are uniformly required and expected across the Canadian judicial system – namely, the hallmarks of transparency, integrity, and accountability.
53. Animal Justice further submits that a principle that law enforcement bodies such as the Ontario SPCA must possess and observe these hallmarks in order to be delegated law enforcement powers meets the test for recognition as a principle of fundamental justice.
54. Animal Justice’s submissions in this regard relate to and expand upon the Applicant’s alternative submission with respect to section 7 that seeks recognition of a novel principle of fundamental justice.¹⁶
55. While the Applicant’s submissions are primarily focused on demonstrating that the impugned provisions violate the principle of fundamental justice in relation to “arbitrariness”, it is submitted that the considerations set out by the Applicant¹⁷ are better conceived of as factors that would support the recognition of a new principle of fundamental justice.

¹⁶ See Applicant’s Factum, at para 51 (seeking “recognition of a novel principle of fundamental justice that denies the delegation of police and investigative powers to a private organization, especially when the assignment of such powers does not include any, or adequate, legislated restraints, oversight, accountability or transparency”).

¹⁷ At paragraphs 71-85, under the subtitle “The lack of legislative restraint, oversight, accountability and transparency violates section 7 of the Charter”, the Applicants sets out concerns that are similar to Animal Justice’s concerns, and ground Animal Justice’s submissions herein regarding the novel principle of fundamental justice referred to in the Applicant’s paragraph 51.

(a) The Test for Recognizing a Principle of Fundamental Justice

56. In *Rodriguez v. British Columbia (Attorney General)*, the Supreme Court of Canada addressed the task of giving legal voice to the “principles of fundamental justice” referred to in s. 7 of the *Charter*:

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.¹⁸

57. In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,¹⁹ the Supreme Court set out the test for recognizing a novel principle of fundamental justice in these terms:

Jurisprudence on s. 7 has established that a “principle of fundamental justice” must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at para. 113. First, it must be a legal principle. This serves two purposes. First, it “provides meaningful content for the s. 7 guarantee”; second, it avoids the “adjudication of policy matters”: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is “vital or fundamental to our societal notion of justice”: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

¹⁸ [1993] 3 S.C.R. 519, at 590-591 [emphasis added].

¹⁹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4, at para. 8 (“*Canadian Foundation for Children, Youth and the Law*”).

58. The principle that regulatory and law enforcement bodies should bear the hallmarks of transparency, integrity, and accountability, meets each of the three elements identified by the Supreme Court of Canada.

i. The Proposed Principle is a Legal Principle

59. The principle that law enforcement bodies must bear certain institutional characteristics – such as transparency, accountability, and integrity – is a legal principle, in the sense that it is “a principle that relates to how our system of justice operates”.²⁰

60. That law enforcement bodies must possess the institutional characteristics necessary to uphold public confidence in the administration of justice is not a vague principle of public policy, but rather is integral to the structure of the administration of justice and the justice system more generally.

61. Other recognized principles of fundamental justice – such as arbitrariness, vagueness, overbreadth, and gross disproportionality – are not legal principles in the sense that they are clearly written laws or leave no room for judicial discretion. However, they do fulfill the two purposes of the legal principles criterion identified by the Supreme Court in *Canadian Foundation for Children, Youth and the Law*: they provide meaningful content for the s. 7 guarantee and they avoid the adjudication of pure policy matters.²¹

62. The same can be said of requiring at least a reasonable level of transparency, integrity, and accountability on the part of law enforcement bodies. Whether any particular law enforcement body should observe these principles cannot be considered a mere matter of policy, because these institutional characteristics impact the public’s confidence in the effective enforcement of the law, and therefore the administration of justice more broadly.²²

²⁰ *Trang v. Alberta (Edmonton Remand Centre)*, 2007 ABCA 263 at para 30.

²¹ *Canadian Foundation for Children, Youth and the Law*, *supra* at para. 8.

²² For cases noting the close link between effective law enforcement and the integrity of the administration of justice in other contexts, see e.g. *A.G. of Que. and Keable v. A.G. of Can. et al.*, [1979] 1 SCR 218 at 257; *R. v. Qureshi*, [2004] O.J. No. 4711 (C.A.) at para 9; *R. v. Levogiannis*, 1 O.R. (3d)

ii. *The Proposed Principle is Fundamental to Our Shared Notions of Justice*

63. A wide array of legislation from other regulatory and law enforcement contexts demonstrates that these principles are vital and fundamental to our notions of justice
64. In particular, Animal Justice submits that the following statement from the Applicant's factum, and the legislative and judicial sources offered in support, is consistent with Animal Justice's submission that transparency, integrity, and accountability on the part of law enforcement bodies ought to be a recognized principle of fundamental justice:

In summary, police and ministry officers are subjected to legislated restraints on their powers, oversight and accountability regarding their policy and conduct, and transparency with regards to internal policy and information that they collect about people. The Ontario SPCA meanwhile, despite having extraordinary police and other investigative powers, are not subjected to any of these important checks and balances. It is therefore respectfully submitted that it is a departure from the principles of fundamental justice to provide police and other investigative powers (including search and seizure powers under the Ontario SPCA Act and Criminal Code) to the Ontario SPCA without also subjecting the Ontario SPCA to the same, or similar, legislative restraints, oversight, accountability and transparency that the police and ministry investigators are subjected to.²³

65. As the Applicant points out, under the *Police Services Act* police in Ontario are subjected to a comprehensive system for the oversight and accountability of police. Other government ministries and officers are also subject to a complaint review process overseen by the Ontario Ombudsman.²⁴
66. Further, also as pointed out by the Applicant, virtually every public body in Ontario is subject to some kind of access to information legislation. Since Canada's first access to information legislation came into force in the 1980s, access to information has become a critical means by which public bodies are kept transparent and accountable.

351 (C.A.) at 18 (QL); *R. v. J.S.M.*, [2003] O.J. No. 72 (C.A.) at para 57; *Inquiry into the Confidentiality of Health Records in Ontario* (1979), 24 O.R. (2d) 545 (C.A.) at 15 (QL); *R. v. Ponnuthurai*, 2014 ONCJ 511 at para 8; *R. v. Ross (Sask. C.A.)*, [1989] S.J. No. 201 at para 5; *R. v. Pasquet (Sask. C.A.)*, [1989] S.J. No. 423 at para 8; *R. v. Watson*, 1994 St. J. No. 2059 (N.L.S.C.).

²³ Applicant's factum, para. 85.

²⁴ See, e.g, Applicants factum, paras. 73-77.

67. Access to information has become a fundamental aspect of Canada’s legal landscape; it is a “shared assumption upon which our system of justice is grounded”, and is viewed by society as “essential to the administration of justice”.²⁵
68. Finally, other provinces have recognized the importance of ensuring adequate oversight of animal protection enforcement. In Manitoba, animal protection laws are primarily enforced by provincially-appointed inspectors employed by the Chief Veterinary Office, which is a division of Manitoba Agriculture and therefore a state agency, subject to oversight by the government.²⁶ In Québec, agents employed by Ministry of Agriculture, Fisheries, and Food are primarily responsible for enforcing provincial laws.²⁷ Animal protection laws in Newfoundland are enforced by the police—namely the RCMP and the Royal Newfoundland Constabulary.²⁸ In British Columbia,²⁹ Alberta,³⁰ and Nova Scotia,³¹ SPCA inspectors exercising police powers are appointed by the provincial government and are subject to the same oversight and accountability mechanisms as peace officers.

iii. The Proposed Principle is Sufficiently Clear and Precise

69. The fact that this proposed principle is already applied to virtually every public body and law enforcement agency demonstrates that it is sufficiently certain so as to present a cognizable and applicable principle of fundamental justice.
70. While the *manner and extent* of transparency and accountability, for instance, will vary depending on context does not render the proposed principle incapable of being recognized as a principle of fundamental justice.

²⁵ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 8.

²⁶ Animal Care Act, CCSM, c A-84, s. 37.1.

²⁷ Animal Health Protection Act, CQLR c P-42, ss. 1, 2.01, 22.2, 55.9.17, 35, 55, 95.

²⁸ Animal Health and Protection Act, SNL 2010, c A-9.1, s 2(1)(u).

²⁹ Prevention of Cruelty to Animals Act, RSBC 1996, c 372, ss. 10, 21

³⁰ Animal Protection Act, RSA 2000, c A-41, ss. 1(1)(g), 9.

³¹ Animal Protection Act, SNS 2008, c 33, s. 34.

71. For example, the principles of fundamental justice that laws must be reasonably clear, not arbitrary, not overbroad, and not grossly disproportionate, obviously do not, in and of themselves, present clear formulas for their application. Yet these principles have been recognized as principles of fundamental justice, and their precise content has been revised and clarified over time.
72. Similarly, while the precise nature of the proposed principle of fundamental justice will require ongoing judicial elaboration, it is sufficient at this stage to recognize the existence of the principle in general terms, as guided by the types of institutional characteristics required of all other law enforcement bodies in the province and across the country, and to identify clear deviations from that principle.

iv. Summary

73. For the reasons set out above, Animal Justice submits that ensuring reasonable transparency, integrity, and accountability on the part of bodies tasked with law enforcement powers and responsibilities is a principle that is “vital or fundamental to our societal notion of justice”,³² and constitutes a “basic norm for how the state deals with its citizens”.³³
74. That is because if bodies charged with law enforcement responsibilities are permitted to be opaque, insular, unaccountable, and potentially subject to external influence, Canadians cannot be confident that the laws they enforce will be fairly and impartially administered.

(b) The Ontario SPCA does not meet the Proposed Principle of Fundamental Justice

75. The Ontario SPCA, and more particularly the legal framework in which it functions, does not bear the hallmarks of accountability, transparency, and integrity that are expected of

³² *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590; *Canadian Foundation for Children, Youth and the Law, supra* at para 7; *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 SCR 571, 2003 SCC 74 at para 112.

³³ *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, 2004 SCC 42 at para 68; *Canadian Foundation for Children, supra* at para 8.

all other law enforcement bodies, and which constitute a fundamental assumption upon which our justice system is based.

76. The legal regime governing the Ontario SPCA fails to meet these principles because:
- a. **Lack of Transparency:** It is substantially less transparent than other policing agencies, as it is not subject to freedom of information legislation. This leaves animal protection organizations, as well the general public, with no way to obtain data that assists in evaluating the effectiveness of animal cruelty investigations and prosecutions in Ontario. For instance, the public is not entitled to information about the number of complaints made or their nature, the number of investigations opened, and the outcomes of those investigations, including whether compliance orders were issued or charges were laid. In practice, the Ontario SPCA has refused to provide information to those who request it.³⁴
 - b. **Lack of Accountability:** There is little ability to challenge the conduct of the Ontario SPCA or of an individual agent or inspector, as the Ontario SPCA is not subject to police accountability legislation that applies to police officers, despite Ontario SPCA inspectors and agents being vested with the authority of police officers when exercising their duties with respect to animals. Further, the Ontario SPCA is a self-governing organization and creates its own bylaws, which are not required to be publicly available. The Ontario SPCA is thus not required to be accountable to citizens, and the government can easily avoid accountability for animal cruelty concerns in general and the Ontario SPCA's actions in particular by stating that the Ontario SPCA is an independent body. Put another way, the Ontario SPCA's independence allows the publically accountable government a level of "plausible deniability" as regards complaints concerning the OSCPA and animal cruelty enforcement generally.
 - c. **Lack of Institutional Integrity:** The Ontario SPCA's funding model puts it in a conflict of interest that can undermine the public confidence in the enforcement of animal protection legislation. The Ontario SPCA is a private charity and relies largely on donations from the public to cover its operating expenses. Since 2013, the Ontario SPCA has received \$5.5 million in annual funding from the provincial government, but this funding does not cover the Ontario SPCA's budget for cruelty investigations. The Ontario SPCA covers the shortfall through fundraising efforts, i.e., soliciting donations from the public, including animal owners—the very individuals it is charged with monitoring and investigating.³⁵

³⁴ See, e.g, Transcript of Cross-Examination of Connie Mallory on September 7, 2017, pp. 73-81; Application Record of the Attorney General of Ontario, Volume III, pp. 114-122.

³⁵ Transcript of Cross-Examination of Connie Mallory on September 7, 2017, p. 16; Application Record of the Attorney General of Ontario, Volume III, p. 57.

77. In practice, these facts may result in precisely the sorts of concerns that are sought to be avoided by the basic principle – observed in all other contexts – that law enforcement bodies must be subject to the principles of transparency, accountability and integrity.
78. That is, there is a real risk that public faith in animal protection enforcement, and the public confidence in that important responsibility, will be undermined as a result of the Ontario SPCA’s lack of transparency and accountability, and the fact that it is or can reasonably be perceived as acting in a conflict of interest.
79. In summary, Animal Justice respectfully submits that the issues and concerns raised in the Applicants submissions, and elaborated upon above, are supportive of a new principle of fundamental justice: that law enforcement bodies must be subject to reasonable standards of transparency, accountability, and integrity.
80. Institutional arrangements that promote and safeguard meaningful and accountable law enforcement are critical to the broader integrity of and public confidence in the justice system, in the same way as principles designed to ensure that laws are not arbitrary, overbroad, or grossly disproportionate.
81. The proposed principle of fundamental justice protects not only the interests of the accused, but perhaps even more importantly, the broader public importance of adequate and meaningful enforcement bodies, and the public confidence in the administration of justice.
82. Therefore, it is respectfully submitted that in order to maintain public confidence in the administration of justice, the state must ensure that the bodies tasked with enforcing regulatory and criminal laws are subject to the safeguards necessary to ensure meaningful, fair and effective law enforcement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver this 4th day of May, 2018



Arden Beddoes (62108W) and Benjamin Oliphant (69954K), Counsel for Animal Justice

SCHEDULE “A” - AUTHORITIES

A.G. of Que. and Keable v. A.G. of Can. et al., [1979] 1 SCR 218 at 257;

Application under s. 83.28 of the Criminal Code (Re), [2004] 2 SCR 248, 2004 SCC 42 at para 68; *Canadian Foundation for Children*

Baker v. Harmina, 2018 NLCA 15

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 SCR 76, 2004 SCC 4

Goodwin v. British Columbia (Superintendent of Motor Vehicles), [2015] 3 SCR 250, 2015 SCC 46

Inquiry into the Confidentiality of Health Records in Ontario (1979), 24 O.R. (2d) 545 (C.A.) at 15 (QL);

Introduction to Symposium on Global Animal Law (Part I): *Animals Matter in International Law and International Law Matters for Animals*, by Anne Peters, Director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg (Germany) and Professor of International Law at the Universities of Basel, Heidelberg, and Berlin.

R. v. Qureshi, [2004] O.J. No. 4711 (C.A.) at para 9;

R. v. Levogiannis, 1 O.R. (3d) 351 (C.A.) at 18 (QL);

R. v. J.S.M., [2003] O.J. No. 72 (C.A.) at para 57;

R. v. Ponnuthurai, 2014 ONCJ 511 at para 8;

R. v. Ross (Sask. C.A.), [1989] S.J. No. 201 at para 5;

R. v. Pasquet (Sask. C.A.), [1989] S.J. No. 423 at para 8;

R. v. Watson, 1994 St. J. No. 2059 (N.L.S.C.)

R. v. Alcorn, 2015 ABCA 182

R. v. Malmo-Levine; R. v. Caine, [2003] 3 SCR 571, 2003 SCC 74

R. v. Grant, [1993] 3 S.C.R. 223

R. v. Feeney, [1997] 2 S.C.R. 13

R. v. Munroe, 2010 ONCJ 226

R. v. Jacques, [1996] 3 SCR 312

R. v. Buhay, 2003 SCC 30, [2003] 1 S.C.R. 631

R. v. Edwards, [1996] 1 S.C.R. 128

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627

R v. D.L.W., 2016 SCC 22

R. v. Godoy, [1999] 1 SCR 311

R. v. Mann, [2004] 3 SCR 59, 2004 SCC 52

R. v. MacDonald, [2014] 1 SCR 37, 2014 SCC 3

Reece v. Edmonton (City), 2011 ABCA 238

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, [1990] S.C.J. No. 23

SCHEDULE “B” - LEGISLATION

Animal Care Act, CCSM, c A-84, s. 37.1.

Animal Health Protection Act, CQLR c P-42, ss. 1, 2.01, 22.2, 55.9.17, 35, 55, 95.

Animal Health and Protection Act, SNL 2010, c A-9.1, s 2(1)(u).

Animal Protection Act, RSA 2000, c A-41, ss. 1(1)(g), 9.

Animal Protection Act, SNS 2008, c 33, s. 34.

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

Prevention of Cruelty to Animals Act, RSBC 1996, c 372, ss. 10, 21

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Respondent

Court File No. 749/13

ONTARIO
SUPERIOR COURT OF JUSTICE

**PROCEEDING COMMENCED AT
PERTH, ONTARIO**

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