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

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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, Joint Book of Authorities (JBOA), Tab(A)(38)

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, JBOA, Tab(A)(39)

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, JBOA, Tab(B)(4)
R v Pelletier, 1989 CanLII 4617 (SKQB) at para 26, JBOA, Tab(B)(5)

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, JBOA, Tab(B)(34)

(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, JBOA, Tab(B)(2)
Blencoe v British Columbia (Human Rights Commission), [2000] 2 SCR 307 at para 47 ["*Blencoe*"] , JBOA, Tab(B)(36)

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"], JBOA, Tab(C)(1)
> *Blencoe*, *supra* at paras 49, 54, JBOA, Tab(B)(36)
> *Carter v Canada*, 2015 SCC 5 at para 64, JBOA, Tab(B)(37)

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), JBOA, Tab(C)(1)

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*"] , JBOA, Tab(B)(25)

> 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, JBOA, Tab(B)(38)
Chaoulli c Quebec (Procureur general), 2005 SCC 35, JBOA, Tab(B)(4) , JBOA, Tab(B)(39)
Blencoe, supra, JBOA, Tab(B)(36)

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.
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> *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 111 [Italics in original] ["Bedford"], JBOA, Tab(B)(6)

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).
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> [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.
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> *Bedford, supra* at paras 117–119 [Italics in original; underline added], JBOA, Tab(B)(6)

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*, JBOA, Tab(B)(6)
> *R v Moriarity*, 2015 SCC 55 at paras 26–30, JBOA, Tab(B)(40)

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), JBOA, Tab(B)(1)
Beazley (Re), [2007] NJ No 337 (NL Prov Ct), JBOA, Tab(B)(8)
R v Pauliuk, [2005] OJ No 1393 (OCJ), JBOA, Tab(B)(9)

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, JBOA, Tab(A)(40)
Law Society Act, RSO 1990 c L.8, ss. 49.2–49.1, JBOA, Tab(A)(41)

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, JBOA, Tab(B)(41)

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"], JBOA, Tab(B)(42); *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*"], JBOA, Tab(B)(17)
British Columbia Securities Commission v Branch, [1995] 2 SCR 3 at para 52, JBOA, Tab(B)(43)

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, JBOA, Tab(B)(42); Hogg, *supra* at 48-38–48-39, JBOA, Tab(C)(1)
Potash, *supra* at paras 15–16, JBOA, Tab(B)(17). See also: *R v Quesnel*, [1985] 53 OR (2d) 338 (CA), leave to appeal to SCC refused, [1986] 55 OR (2d) 543 n, JBOA, Tab(B)(44).

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*"], JBOA, Tab(B)(13)

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*"], JBOA, Tab(B)(46)

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*"], JBOA, Tab(B)(30)

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*"], JBOA, Tab(B)(47); *R v McKinlay Transport*, [1990] 1 SCR 627 at paras 26 to 31, JBOA, Tab(B)(48); *Jarvis*, *supra* at para 69, JBOA, Tab(B)(46); *R v Nolet*, [2010] 1 SCR 851 at paras 30 to 31, JBOA, Tab(B)(49)

(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, JBOA, Tab(B)(47). See also: *Potash*, *supra* at para 13, JBOA, Tab(B)(17)

(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, JBOA, Tab(B)(50)

b. forfeiting proceeds of crime,

Chatterjee v Ontario (Attorney General), 2009 SCC 19, JBOA, Tab(B)(51)

c. regulating video lottery terminals,

Siemens v Manitoba (AG), 2003 SCC 3 at paras 19-36, JBOA, Tab(B)(52)

d. closing disorderly houses,

Bédard v Dawson, [1923] SCR 681 at 684-87, JBOA, Tab(B)(53)

e. banning nude entertainment,

Rio Hotel Ltd v New Brunswick (Liquor Licensing Board), [1987] 2 SCR 59 at 63-67, JBOA, Tab(B)(54)

f. suspending impaired drivers' licences,

Prince Edward Island (Provincial Secretary) v Egan, [1941] SCR 396 at 400-03, JBOA, Tab(B)(55) and 414-19; *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5 at 9-10 and 13, JBOA, Tab(B)(56)

g. censoring obscene films,

Nova Scotia (Board of Censors) v. McNeil, [1978] 2 SCR 662 at 687-88, 691-93, and 695-97, JBOA, Tab(B)(57); *R. v Glad Day Bookshops Inc* (2004), 70 OR (3d) 691 at paras 54-67 (SCJ) , JBOA, Tab(B)(50) , JBOA, Tab(B)(58)

h. prohibiting the sale and display of drug paraphernalia,

Smith v St. Albert (City), 2014 ABCA 76 at paras 21-56, JBOA, Tab(B)(59)

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"], JBOA, Tab(B)(60)

j. issuing restraining orders against stalkers, and

Baril v Obelnicki, 2007 MBCA 40 at paras 32-42, JBOA, Tab(B)(61)

k. requiring the registration of sex offenders.

R v Dyck, 2008 ONCA 309 at paras 37-63, JBOA, Tab(B)(62)

(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*"], JBOA, Tab(B)(26)

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, JBOA, Tab(B)(60)
Canadian Western Bank v. Alberta, 2007 SCC 22 at para 30, JBOA, Tab(B)(50)

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, JBOA, Tab(C)(1)
R v Hydro-Québec, [1997] 3 SCR 213, per La Forest J, at para 153, JBOA, Tab(B)(63)

> 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, JBOA, Tab(B)(64)
R v Hydro-Québec, *supra*, per La Forest, para 128, JBOA, Tab(B)(63)
Firearms Reference, *supra* at paras 28-29, JBOA, Tab(B)(26)

(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*"] , JBOA, Tab(B)(32)

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, JBOA, Tab(B)(32)

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, JBOA, Tab(B)(32)

(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, JBOA, Tab(B)(30)

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, JBOA, Tab(B)(30)

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, JBOA, Tab(B)(65)

> 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, JBOA, Tab(B)(66)

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, JBOA, Tab(C)(1)
Banks, supra at para 33, JBOA, Tab(B)(60)
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5t, 1867, s. 92(15) , JBOA, Tab(A)(37)
Constitution Act, 1867, supra at ss 92(13), (15), (16), JBOA, Tab(A)(37)

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 JBOA, Tab(B)(30)

(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] JBOA, Tab(B)(67)

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".

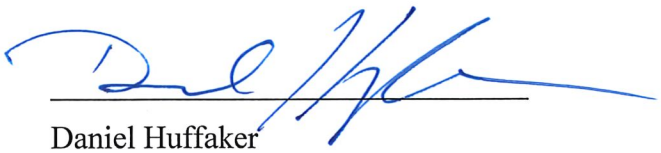
Morgentaler, *supra* at p 498–99 JBOA, Tab(B)(25)

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 1st day of May 2018



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Court File No.: 749/13

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- and -	
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SUPERIOR COURT OF JUSTICE

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