

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

Additional Submissions of the Respondent re Intervenor

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I. Overview

1. Ontario makes these submissions in response to the submissions of the intervenor, Animal Justice Canada. These submissions are confined to Animal Justice’s position on the recognition of a novel principle of fundamental justice under s. 7 of the *Charter*. These submissions are in the alternative, as Ontario continues to rely on its argument that s. 7 of the *Charter* is not engaged. Ontario’s submissions on whether s. 7 is engaged can be found in paragraphs 32–41 of its factum dated May 1, 2018.

2. The intervenor, Animal Justice Canada, argues that it is a principle of fundamental justice “that law enforcement bodies must bear certain institutional characteristics—such as transparency, accountability, and integrity” (para. 59). Furthermore, the intervenor argues that the Ontario Society for the Prevention of Cruelty to Animals (the “OSPCA”) fails to meet this standard because it is not subject to the *Freedom of Information and Protection of Privacy Act* or

the *Police Services Act* and because it is a private charity that relies on fundraising to cover part of its operating expenses.

3. Ontario submits that the proposed principle does not meet the criteria set out by the Supreme Court of Canada for a principle of fundamental justice: it is not a legal principle and it is not capable of being identified with precision or applied to situations in a manner that yields predictable results.

4. Rather than a legal principle, the proposed principle is a statement of values. Furthermore, while transparency, accountability, and integrity may be desirable characteristics in a law enforcement agency, they are not characteristics that can be easily defined (and in fact the intervenor has not attempted to define them). Finally, even if there is a consensus that these characteristics are desirable, the proposed principle does not give courts or legislatures any guidance as to which agencies would be constitutionally required to have which characteristics, and in what degree.

II. Argument

The test for recognizing a principle of fundamental justice

5. Ontario agrees with the intervenor that the criteria for recognizing a principle of fundamental justice under s. 7 of the *Charter* are set out in the Supreme Court of Canada's decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*. A principle of fundamental justice:

(1) Must be a legal principle;

(2) Must be supported by a sufficient consensus that the alleged principle is “vital or fundamental to our societal notion of justice”; and

- (3) Must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 at para. 8 [Canadian Foundation]

6. In order to be recognized as a principle of fundamental justice a principle must meet all three of these criteria.

7. In its factum the intervenor sets out the key passage from the Court's decision in the *Canadian Foundation* case. Ontario reproduces it here for convenience:

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, 2003 SCC 74 (CanLII), 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 CanLII 81 (SCC), [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 CanLII 75 (SCC), [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.

Canadian Foundation at para 8

The proposed principle does not meet the *Canadian Foundation* criteria

8. In *Re B.C. Motor Vehicle Act*, Lamer J. (as he then was) explained that the principles of fundamental justice lie in "the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system".

Re B.C. Motor Vehicle Act, [1985] 2 SCR 486 at 503

9. In *Rodriguez v. British Columbia (Attorney General)*, Sopinka J. stressed that in order to qualify as a principle of fundamental justice a principle must be more than a “vague generalization” about what society considers to be ethical or moral:

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. The now familiar words of Lamer J. in *Re B.C. Motor Vehicle Act* [citation omitted] are as follows:

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519 at 590–91 [*Rodriguez*]

10. The Court stressed this requirement again in the *Canadian Foundation* case. It contrasted legal principles with the “realm of general public policy” and Sopinka J.’s “broad” and “vague generalizations”. In *Canadian Foundation* the Court recognized the best interests of the child as a legal principle on the basis of its extensive use in international legal instruments and Canadian statutes:

The “best interests of the child” is a legal principle, thus meeting the first requirement. A legal principle contrasts with what Lamer J. (as he then was) referred to as “the realm of general public policy” (*Re B.C. Motor Vehicle Act*, supra, at p. 503), and Sopinka J. referred to as “broad” and “vague generalizations about what our society considers to be ethical or moral” (*Rodriguez*, supra, at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication. The “best interests of the child” is an established legal principle in international and domestic law. Canada is a party to international conventions that treat “the best interests of the child” as a legal principle: see the Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Art. 3(1), and the Convention on the Elimination of All Forms of Discrimination against Women, Can. T.S. 1982 No. 31, Arts. 5(b) and 16(1)(d). Many Canadian statutes explicitly name the “best interests of the child” as a legal consideration: see, for example, Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 25, 28, 60, 67, 68 and 69; Youth Criminal Justice Act, S.C. 2002, c. 1, ss.

25(8), 27(1), 30(3) and (4); Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 16(8), (10), 17(5) and (9). Family law statutes are saturated with references to the “best interests of the child” as a legal principle of paramount importance: though not an exhaustive list, examples include: Family Relations Act, R.S.B.C. 1996, c. 128, s. 24(1); Child and Family Services Act, R.S.O. 1990, c. C.11, s. 1(a); Children’s Law Reform Act, R.S.O. 1990, c. C.12, s. 19(a). Clearly, the “best interests of the child” has achieved the status of a legal principle; the first requirement is met.

Canadian Foundation at para 9

11. “Transparency”, “accountability”, and “integrity” are not recognized legal principles.

While they may arguably be one of the objects of statutory regimes such as the *Police Services Act* and the *Freedom of Information and Protection of Privacy Act*, they do not have any fixed legal meaning and there is no established legal test to apply to determine whether an organization has these characteristics. The intervenor has not defined them and has not cited any legal instrument that defines these principles or applies them.

12. Furthermore, the proposed principle, even if it were a legal principle, cannot be defined with enough precision to yield predictable results. Determining whether any given law enforcement agency has “sufficient” or “reasonable” quantities of transparency, accountability, and integrity would involve the court in a subjective balancing exercise with very little guidance. For example: What is meant by accountability, transparency, and integrity? Does the principle apply to any body that enforces any law? Does the principle require these bodies to be subject to a particular statute or statutes? If so, which statutes? Is the whole statutory regime constitutionalized (including, for example, the discretionary exemptions in the Freedom of Information and Protection of Privacy Act) or only certain aspects? Which aspects? How a court will determine what degree of accountability, oversight, or transparency is required of any particular body in a particular situation? What is a “sufficient” or “reasonable” degree of accountability, oversight, or transparency? Does the degree of oversight vary with the type of laws that the body enforces, or with the powers that the body exercises?

In the alternative, the OSPCA meets the standard

13. Should this court recognize the proposed principle as a principle of fundamental justice, Ontario submits that the OSPCA does possess a sufficient degree of transparency, accountability, and integrity.

14. First, while the intervenor asserts that “in practice, the OSPCA has refused to provide information to those who request it”, the evidence did not establish that the OSPCA had or has such a practice. Ms. Mallory was asked whether, to the best of her knowledge, the OSPCA had ever provided a person’s investigative file to that person (in a situation where no charges were laid). Ms. Mallory answered that it had not, although she did recall one instance where a person asked the OSPCA for a copy of the investigative file for use in a landlord-tenant dispute and the OSPCA responded that the person would need to subpoena the inspecting officer.

Cross-examination of Connie Mallory, pp 119–122, AR, Vol 3, Tab 2

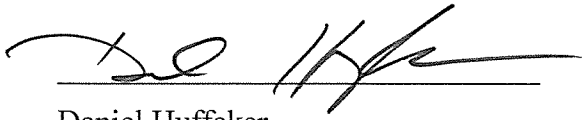
15. Second, the record establishes that while the OSPCA is not subject to the *Police Services Act*, it has established its own internal checks on its police powers including a disciplinary process and a public-facing complaints process.

Mallory Affidavit at paras 18–21, AR, Vol 2, Tab 8

16. Finally, with respect to an alleged conflict of interest, Ms. Mallory’s evidence was that roughly \$2 million of the OSPCA’s more than \$3 million budget for investigations is funded by the government, and the remainder of the budget is raised by the OSPCA itself through other sources, including charitable donations. There is no evidence in the record establishing that the OSPCA ignores animal welfare complaints involving donors or prioritizes animal welfare complaints from its donors.

Cross-examination of Connie Mallory, pp 53, 57, AR, Vol 3, Tab 2

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May 2018

A handwritten signature in black ink, appearing to read 'D. Huffaker', written over a horizontal line.

Daniel Huffaker

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Jeffrey Bogaerts

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