

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**ATTORNEY GENERAL OF ONTARIO**

Respondent (Appellant in appeal)

-and-

**JEFFREY BOGAERTS**

Applicant (Respondent in appeal)

**NOTICE OF CROSS-APPEAL**

**THE RESPONDENT CROSS-APPEALS** in this appeal and asks that the judgment be varied as follows:

1. As part of Justice Minnema’s judgment, he recognized a new principle of fundamental justice, whereby “law enforcement bodies must be subject to reasonable standards of transparency and accountability”. As it relates to this finding, the Respondent asks that the judgment be varied to recognize a concurrent or conjunctive principle of fundamental justice, whereby “law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest”. The Respondent asks that the judgment be correspondingly varied to declare that sections 11, 12, and 12.1 of the *Ontario Society for the Prevention of Cruelty to Animals Act* [the “*OSPACA Act*”] also violate section 7 of the *Canadian Charter of Rights and Freedoms* [the “*Charter*”] for contravening this other newly established principle of fundamental justice;

2. In the event that this Court agrees with the Appellant, insofar as the Appellant claims that section 7 of the *Charter* is not engaged, and that the constitutionality of sections 11, 12, and 12.1 of the *OSPCA Act* should have been assessed pursuant to a section 8 *Charter* analysis, the Respondent asks that the judgment be alternatively varied to declare the same impugned sections of the *OSPCA Act* to be unconstitutional for violating section 8 of the *Charter* instead;
3. In addition, and independent from the above relief sought, the Respondent asks that the judgment be varied to declare sections 13(6), 14(1)(b) and 14(1)(c) (which work conjunctively with section 13(1)) of the *OSPCA Act* violate section 8 of the *Charter*, and are therefore of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*; and
4. Such further and other relief as counsel may advise and this Honourable Court deems just.

**THE GROUNDS FOR THIS CROSS-APPEAL** are as follows:

To include a declaration that “law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest” as a principal of fundamental justice

1. Sections 11, 12, and 12.1 of the *OSPCA Act* confer police powers to officers of the Ontario Society for the Prevention of Cruelty to Animals [the “OSPCA”], which is a private organization. Justice Minnema was correct to declare that that these provisions are unconstitutional because the OSPCA, as a private organization, is not subject to legislated accountability or transparency. In coming to his conclusion, Justice Minnema

recognized a new principle of fundamental justice, whereby “law enforcement bodies must be subject to reasonable standards of transparency and accountability”;

2. While Justice Minnema accepted “accountability” and “transparency” as requisite legislative elements to validly delegate police powers to a private organization, he rejected a third proposed requirement that was ultimately termed “integrity” in the judgment. Both the Applicant and the Intervenor argued in favour of including this principle (albeit termed in different ways) as a newly recognized principle of fundamental justice. The essential element of the Applicant’s and Intervenor’s arguments pertaining to the “integrity” principle revolved around a lack of public financing to fund OSPCA investigations, and the inevitable real or perceived conflicts of interest that arise when a law enforcement agency is primarily dependent on private donations to fund its investigative work;
3. Justice Minnema rejected the principle of “integrity” as a newly recognized principle of fundamental justice because it is too vague and akin to morality, which he rightly found cannot form the basis of a principle of fundamental justice. The Applicant does not appeal this finding, but asks that the judgment be varied to flesh out the essential element of the formerly proposed “integrity” principle, which is “law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest”. Unlike the excessively broad / vague proposed principle of “integrity”, a “public funding” requirement is a narrower principle that ought to succeed as a recognized principle of fundamental justice;
4. This other proposed principle of fundamental justice, whereby “law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest”, is vital and fundamental to our societal notion of justice. Unlike the more broad characterization of

“integrity”, this principle is also capable of being identified with sufficient precision and applicable to situations in a manner that yields predictable results;

5. While the Court below did not recognize this principle as a principle of fundamental justice, it nevertheless found, as a fact, that the OSPCA is primarily reliant on private funding, and donations in particular, to fund investigations. Public funding of the OSPCA is limited, and accounts for only a minor portion of its investigations budget. The Court also found, as a fact, that the OSPCA’s current funding structure results in potential for conflicts of interest. As a result, if the proposed principle (“law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest”) is recognized as a principle of fundamental justice, the *OSPCA Act* would certainly be found to contravene the principle, and correspondingly violate section 7 of the *Charter* as a result.

To declare that sections 13(6), 14(1)(b) and 14(1)(c) violate section 8 of the *Charter*

6. Section 13(6) (working conjunctively with s. 13(1)) of the *OSPCA Act* confers upon OSPCA officers the power to enter private property at any hour of the day or night at the complete discretion of an OSPCA officer, either alone or accompanied by any number of other persons as an OSPCA officer considers advisable, all without judicial authorization and irrespective of any situation of urgency. Unlike other entry powers prescribed by the *OSPCA Act*, there is no exception for dwellings under section 13(6). Section 13(6) of the *OSPCA Act* therefore authorizes warrantless entry into people’s homes;
7. Sections 14(1)(b) and 14(1)(c) (the latter working conjunctively with s. 13(1)) of the *OSPCA Act* confer upon OSPCA officers warrantless seizure powers, including seizures from people’s homes, at the complete discretion of an OSPCA officer, again all without

judicial authorization and irrespective of any situation of urgency;

8. In finding that sections 13(6), 14(1)(b) and 14(1)(c) of the *OSPCA Act* do not violate section 8 of the *Charter*, the Court below erred in law by finding that there is no reasonable expectation of privacy that is interfered with by the impugned sections;
9. Such a finding is contrary to the well-established presumption that a heightened expectation of privacy exists within a dwelling. The Supreme Court of Canada has repeatedly found that private dwellings carry heightened privacy expectations because our homes are where our most intimate and private activities are most likely to take place;
10. The Supreme Court of Canada has also confirmed that the protections of section 8 are engaged if there is a reasonable expectation of privacy of any degree. Only where there is no expectation of privacy, will section 8 not be engaged. The Court below therefore erred in law by determining that section 8 is not engaged and ending its analysis there. Such a finding is impossible because there must be at least some degree of a reasonable expectation of privacy when the subject matter involves entry and seizures from people's homes;
11. As it relates to sections 14(1)(b) and 14(1)(c) of the *OSPCA Act* specifically, the Court below additionally erred in law by not considering the key question set out by the Supreme Court of Canada when determining whether or not legislation involves a "seizure", as it pertains to section 8 of the *Charter*. It is well-established that the essence of a section 8 "seizure" involves the taking of a thing from a person by a public authority without that person's consent. If the impugned legislation authorizes such action, then section 8 of the *Charter* is engaged. The Court below erred by failing to consider this

qualification, which ought to have been found in the affirmative in relation to sections 14(1)(b) and 14(1)(c) of the *OSPCA Act*;

12. Upon the below Court's erroneous findings that section 8 was not engaged by each of sections 13(6), 14(1)(b) and 14(1)(c) of the *OSPCA Act*, the Court below further erred by not proceeding to the remainder of a section 8 *Charter* analysis, which ought to have found that the warrantless search and seizure provisions of the impugned sections are presumptively unreasonable, and the Crown was obliged to rebut such a presumption for the impugned sections to be constitutional. Such is the proper analysis set out by the Supreme Court of Canada. The Applicant takes the position that the presumption of unreasonableness cannot be rebutted, given the circumstances of this case.

DATED: February 15, 2019

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