

Court of Appeal File No.:
Superior Court File No.: 749/13

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Respondent (Appellant in appeal)

and

JEFFREY BOGAERTS

Applicant (Respondent in appeal)

NOTICE OF APPEAL

THE APPELLANT, THE ATTORNEY GENERAL OF ONTARIO, APPEALS to the Court of Appeal for Ontario from the judgment of the Honourable Justice Timothy Minnema of the Superior Court of Justice dated January 2, 2019, made at Perth, Ontario.

THE APPELLANT ASKS that the judgment be set aside and a judgment be granted as follows:

(1) That the appeal be allowed and the application be dismissed;

(2) Such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL are as follows:

The court erred in law by finding that ss. 11, 12 and 12.1 of the Act engage the interests protected by s. 7 of the Charter

1. The court below erred in law by finding that ss. 11, 12, and 12.1 of the *Ontario Society for the Prevention of Cruelty to Animals Act* (“the Act”) deprive anyone of their life, liberty, or security of the person and thus engage s. 7 of the *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act, 1982* (“the Charter”).

2. The relevant portion of s. 11 of the *Act* provides that every agent and inspector of the Ontario Society for the Prevention of Cruelty to Animals (“the OSPCA”) “has and may exercise any of the powers of a police officer ... for the purposes of the enforcement of [the *Act*] and any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals”.

3. Section 12 authorizes a justice of the peace or provincial judge to issue a warrant authorizing one or more inspectors or agents of the OSPCA to enter and inspect a building or place, where the justice of the peace or justice is satisfied by information on oath that there are reasonable grounds to believe that an animal is in distress in the building or place. Sub-section 12(6) provides that an inspector or agent of the OSPCA may enter and inspect a building or place without a

warrant if the inspector or agent has reasonable grounds to believe that there is an animal in immediate distress in the building or place.

4. Section 12.1 authorizes an inspector or agent of the OSPCA or a veterinarian who is lawfully present in a building or place to examine any animal in the building or place and take a sample of any substance and a carcass or sample from a carcass in the building or place for the purpose for which the person's presence in the building or place was authorized or the warrant was issued. Sub-section 12(4) provides a plain view seizure power.

5. The court held that these provisions engage s. 7 of the *Charter* because they have the potential to deprive someone of liberty and because they have the potential to deprive someone of security of their person.

6. The court's decision that these provisions engage the liberty interest under s. 7 because imprisonment is a potential penalty for certain offences under the *Act* that were not challenged in the application below is an unprecedented extension of s. 7 to search and seizure powers. The court's decision is inconsistent with decisions of the Supreme Court of Canada and this Honourable Court requiring a sufficiently close relationship between the deprivation of liberty and the provision being challenged.

7. The court's decision that these provisions engage security of the person under s. 7 because security of the person includes the right to be secure against unreasonable search and seizure is contrary to the Supreme Court of Canada's jurisprudence. According to this jurisprudence, security of the person may be engaged either by interference with bodily integrity or by serious state-imposed

psychological stress. There was no evidence in the record that the provisions above interfere with bodily integrity or impose serious psychological stress sufficient to engage s. 7. Moreover, the court's decision that security of the person under s. 7 includes the right to be secure against unreasonable search and seizure is an unprecedented and unnecessary extension of the reasonable expectation of privacy analysis under s. 8 of the *Charter* to s. 7.

The court erred in law by recognizing a novel and unfettered principle of fundamental justice

8. Second, the court below erred by recognizing a novel principle of fundamental justice, namely that law enforcement bodies must be subject to reasonable standards of transparency and accountability. This principle does not meet the criteria for a principle of fundamental justice set out by the Supreme Court of Canada. Namely, it is not a legal principle recognized in the *Police Services Act*, the *Freedom of Information and Protection of Privacy Act*, or any other provincial or federal legislation. Nor is there a sufficient consensus that the principle is vital or fundamental to our societal notions of justice. Finally, the principle is not capable of being identified with precision and applied to situations in a manner that yields predictable results.

In the alternative, the court erred in law in invalidating ss. 12 and 12.1

9. Even if s. 11 of the *Act* violates section 7 because it gives OSPCA investigators the power of a police officer in animal welfare matters without imposing sufficient standards of transparency and accountability, the court erred by also invalidating sections 12 and 12.1. As reviewed above, these provisions

give OSPCA agents and inspectors particular investigative powers. They do not confer police powers on OSPCA agents and inspectors.

10. No reason was given in the decision to invalidate these provisions. The court appeared to rely on provincial court decisions from other jurisdictions where the conduct of individual OSPCA investigators was found to be egregious. In doing so, the Court arguably confused validity of the statute itself (which does not mandate or authorize such behaviour) with the constitutionality of a particular investigator's conduct in a given case. This is contrary to a number of Supreme Court decisions that have emphasized the distinction between the validity of laws and the constitutionality of specific conduct.

The court should not have granted public interest standing to the applicant

11. Finally, Ontario submits that in his decision of June 15, 2016, Johnston J. erred in holding that Jeffrey Bogaerts, a paralegal who has argued OSPCA cases on behalf of his clients, should be granted public interest standing to challenge the constitutionality of numerous provisions of the Act. The Act has never been applied to Mr. Bogaerts personally. There are reasonable alternate means to bring such a constitutional challenge, either in provincial prosecutions before the Ontario Court of Justice or in administrative hearings before the Animal Care Review Board. In this way a Court would have been able to assess validity in the context of actual facts involving the application of the Act on affected individuals and, in the case of a review of a decision of the Board, would have the benefit of the Board's specialized expertise.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

(1) Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as it is an appeal from a final order of the Superior Court of Justice.

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Notice of Appeal

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