

**Court of Appeal File No.:** C66542  
**Superior Court File No.:** 749/13

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**THE ATTORNEY GENERAL OF ONTARIO**

Respondent (Appellant in appeal)

and

**JEFFREY BOGAERTS**

Applicant (Respondent in appeal)

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**APPEAL BOOK AND COMPENDIUM OF THE RESPONDENT  
(APPELLANT IN APPEAL),  
THE ATTORNEY GENERAL OF ONTARIO**

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March 12, 2019

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**COURT OF APPEAL FOR ONTARIO**

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**THE ATTORNEY GENERAL OF ONTARIO**

Respondent (Appellant in appeal)

and

**JEFFREY BOGAERTS**

Applicant (Respondent in appeal)

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**NOTICE OF APPEAL**

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**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.

January 30, 2019

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**Court of Appeal File No.:**

**Court File No.: 749/13**

**Jeffrey Bogaerts**

**- and -**

**Attorney General of Ontario**

**Applicant (Respondents in Appeal)**

**Respondents (Appellants in Appeal)**

**COURT OF APPEAL FOR ONTARIO**

**Notice of Appeal**

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Court File No. C66542

**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 “OSPCA 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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Applicant (Respondent)

**-and-**

**ATTORNEY GENERAL OF ONTARIO**  
Respondent (Appellant)

Court File No. C66542

**COURT OF APPEAL FOR ONTARIO**

**NOTICE OF CROSS-APPEAL**

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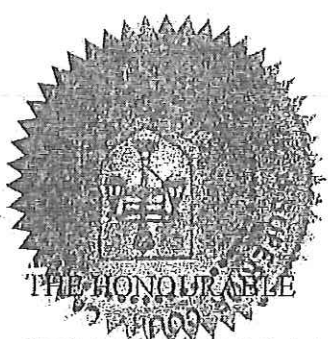
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Court File No. 749/13

ONTARIO  
SUPERIOR COURT OF JUSTICE

THE HONOURABLE  
JUSTICE TIMOTHY MINNEMA

)  
)  
)  
WEDNESDAY  
~~FRIDAY~~, THE ~~14th~~ 2nd  
DAY OF ~~MARCH~~, 2019  
JANUARY

A handwritten signature, likely of the Justice, is written to the right of the date.

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

ORDER

THIS APPLICATION, made by the Applicant, Jeffrey Bogaerts, was heard on May 16, 2018 at Perth, Ontario.

ON READING the materials filed by the parties and the intervenor, Animal Justice Canada, and on hearing the submissions of the lawyers for the parties and intervenor.

THIS COURT ORDERS that:

1. Sections 11, 12, and 12.1 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, as amended, violate section 7 of the *Canadian Charter of Rights and Freedoms* and therefore are of no force or effect pursuant to section 97 of the *Courts of Justice Act*, R.S.O., 1990, c. C.43 and section 52(1) of the *Constitution Act, 1982*; and
2. The aforementioned declaration shall be suspended for a period of one year, commencing on January 2, 2019.

SIGNED: MARCH 18, 2019

A large, stylized handwritten signature of Justice Timothy Minnema is written over a horizontal line.

JUSTICE MINNEMA



Superior Court of Justice  
Family Court

Cour supérieure de Justice  
Cour de la famille



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January 2, 2019

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**Re: Jeffrey Bogaerts v. Attorney General of Ontario and Animal Justice Canada,  
Perth Court File 749/13**

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Please find attached Justice Minnema's Endorsement on Application on the above-named file.

Yours very truly,

Jennifer Walker  
Judicial Assistant

*Encl.*

**CITATION:** Bogaerts v. Attorney General of Ontario, 2019 ONSC 41  
**PERTH COURT FILE NO.:** 749/13  
**DATE:** 20190102

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Jeffrey Bogaerts, Applicant

**AND**

The Attorney General of Ontario, Respondent

**AND**

Animal Justice Canada, Intervener

**BEFORE:** Mr. Justice Timothy Minnema

**COUNSEL:** Kurtis R. Andrews, for the Applicant

Daniel Huffaker, for the Respondent

Arden Beddoes and Benjamin Oliphant, for the Intervener

**HEARD:** May 16, 2018

**ENDORSEMENT ON APPLICATION**

**Nature of the Case**

[1] This is a constitutional challenge asserting that certain provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, ("*OSPCA Act*") violate sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and the division of powers in the *Constitution Act, 1867*, and should therefore be of no force or effect.

**Background/History**

[2] Mr. Bogaerts is a paralegal with a law firm that deals with animal welfare law. His application was issued on October 18, 2013. He has never been investigated by the Ontario Society for the Prevention of Cruelty to Animals ("*OSPCA*"). On June 15, 2016, in response to a motion brought by the respondent The Attorney General for Ontario, he was found by Justice Johnston to lack personal standing. However, he was granted public interest standing. Justice Johnston struck various non-party affidavits as not relevant to the constitutional challenges, but allowed two modified affidavits by the applicant to stand to assist in framing the issues.

[3] The application was amended on February 24, 2017. In May of 2017, the respondent filed two responding affidavits, one by Lisa Kool, Director of the Public Safety Division within the Ministry of Community Safety & Correctional Services, and the other by Connie Mallory, Chief

Inspector of the OSPCA. Cross-examination on all the affidavits took place in the fall of 2017, and the transcripts and undertakings have been filed. The application was amended a second time on February 22, 2018. On April 20, 2018, Animal Justice Canada, an advocacy organization focussed on animal law, was granted permission to intervene as a friend of the Court.

### **Relevant Constitutional Provisions**

[4] Pursuant to section 52(1) of the *Constitution Act, 1982*, “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Pursuant to section 52(2) of the *Constitution Act, 1982*, “Constitution of Canada” includes Part 1 of that Act which is the *Charter*, and the *Constitution Act, 1867*.

[5] Sections 7 and 8 of the *Charter* read as follows:

7. Everyone 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.

8. Everyone has the right to be secure against unreasonable search or seizure.

[6] Sections 91 and 92 of the *Constitution Act, 1867*, deal with the distribution of legislative powers between federal Parliament and the provincial legislatures. Section 91-27 provides that Parliament has the exclusive legislative authority to make laws in the class of subject “The Criminal Law.” Section 92-13 provides that the provinces have the exclusive authority to make laws in relation of the class of subject “Property and Civil Rights in the Province.” In addition, section 92-15 provides that the provinces have the exclusive authority to make laws in relation to “[t]he Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.”

### **The OSPCA and the Ontario Society for the Prevention of Cruelty to Animals Act**

[7] The OSPCA was founded in 1873 as a charitable organization. In 1919, the Province of Ontario enacted its first legislation to protect animals, which included incorporating the OSPCA and giving it carriage of that objective. For the purposes of enforcement, it provided that any inspector or agent of the OSPCA shall have the powers of a constable in any municipality or district in Ontario.

[8] That original Act was repealed and replaced in 1955, but the basic structure, namely aspects of animal welfare and protection being administered by a separate corporation being the OSPCA, was continued. Among the changes, the new *OSPCA Act* provided in section 11(1) that “for the purposes of enforcement of this or any other Act or law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals, every inspector and agent of the Society shall have and may exercise any of the powers of a police officer.”

[9] The *OSPCA Act* was substantially amended in 2008, although the OSPCA’s status and role did not change. The enforcement powers as quoted above also did not change, the only difference

being the substitution of the word “has” for “shall have”. The preamble in the amending legislation (Bill 150, *Provincial Animal Welfare Act*, 2008) included the following:

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; ...

[10] There is no dispute, in view of the above, that the OSPCA is not an agent of the Crown nor is it a part of the Government of Ontario. It is an independent charitable organization that has been given certain statutory powers relating to animal welfare in the province. Its stated object, pursuant to section 3 of the current Act, is “to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom.” It does this not just under 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 bylaws.

[11] Currently there are 26 branches of the OSPCA including the Provincial Office, and 14 affiliates across Ontario. They work together to provide animal protection, rehabilitation and care, and advocacy and humane education.

### Issues/Positions

[12] The applicant has identified eight sections of the *OSPCA Act* that he seeks to have declared of no force and effect. In his factum he summarizes the issues by way of the following questions asserting that the answer to each is “yes”:

1. Do sections 11, 12, and /or 12.1 of the *OSPCA Act* breach section 7 (or section 8 in the alternative) of the *Charter* by granting police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization? In the alternative, if it can be constitutional to grant such powers to a private organization, does the *OSPCA Act* nevertheless breach section 7 (or section 8 in the alternative) of the *Charter* by granting these powers to the OSPCA, specifically, without any, or adequate, legislatively mandated restraints, oversight, accountability and/or transparency?
2. Do various sections of the *OSPCA Act* [namely 11.4, 12(6), 13, and 14(1) (except subsection 14(1)(a))] breach section 8 (or section 7 in the alternative) of the *Charter* by authorizing unreasonable (including warrantless) searches of people’s homes and farms and seizures of their animals without any, or adequate, judicial authorization or oversight?
3. Does section 11.2 of the *OSPCA Act* fall outside the province’s jurisdiction by being, in pith and substance, criminal in nature and within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1982*?

[13] The respondent’s position is that the answer to all the posed questions is “no”, and the application should therefore be dismissed. The intervener supports the respondent’s position that

the search and seizure provisions in the *OSPCA Act* are not unreasonable. However, it supports the applicant's position that it is unconstitutional for the legislature to grant police powers, including certain search and seizure powers, to the OSPCA as a private organization. I address the issues in the reverse order, moving from the one that received the least attention in argument to the one that received the most.

**Does section 11.2 of the *OSPCA Act* fall outside the province's jurisdiction by being, in pith and substance, criminal in nature and within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1982*?**

[14] The applicant asserts that subsections 11.2(1) and 11.2(2) of the *OSPCA Act* are in pith and substance criminal in nature and within the exclusive power of the Parliament of Canada under subsection 91(27) of the *Constitution Act, 1867*, and are therefore “*ultra vires*” or beyond the powers of the provincial legislature to enact. The constitutional parameters for this challenge are set out in paragraph 6 above.

[15] Sections 11.2(1) and 11.2(2) of the *OSPCA Act* read as follows:

11.2(1) No person shall cause an animal to be in distress.

11.2(2) No owner or custodian of an animal shall permit the animal to be in distress.

[16] “Distress” is defined in section 1(1) to mean “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 unnecessary hardship, privation or neglect.”

[17] The *OSPCA Act* at section 18(1)(c) provides that everyone is guilty of an offence who contravenes subsections 11.2(1) or (2). It also provides in subsections 18.1(3) and (4) that every individual or corporation who commits such an offence is liable on conviction to a fine of not more than \$60,000 or imprisonment for a term of not more than two years, or to both.

[18] The comparative provisions in the *Criminal Code*, R.S.C. 1985, Chap. C-46, read as follows:

445.1(1)(a) Every one commits an offence who ... wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird.

446(1)(b) Every one commits an offence who ... being the owner or person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

[19] The penalties for a *Criminal Code* section 445.1(1)(a) offence on summary conviction are a fine not exceeding \$10,000 or imprisonment for a term of not more than eighteen months or both, and if proceeding by way of indictment, imprisonment for a term of not more than five years (*Criminal Code* section 445.1(2)). The penalties for a 446(1)(b) offence on summary conviction are a fine not exceeding \$5,000 or imprisonment for a term of not more than six months or both, and if proceeding by way of indictment, to imprisonment for a term of not more than two years

(section 446(2)). In addition, section 447.1(1) provides prohibition and restitution orders as possible penalties.

### **The Test**

[20] The test for determining the issue of jurisdiction is not in dispute. It is a two-step process summarized in *York (Regional Municipality) v. Tsui*, 2017 ONCA 230 at paragraphs 58, 64, and 67, as follows:

#### *(a) Pith and Substance*

58. The first step is to determine the “matter” of the legislation in issue. The analysis involves an examination of: (i) the purpose of the enacting body, and (ii) the legal effect of the law: *Reference re Firearms Act*, 2000 SCC 31 (CanLII), [2000] 1 S.C.R. 783, at para. 16. This exercise is traditionally known as determining the law’s “pith and substance”: *Chatterjee*, at para. 16 [*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 S.C.R. 624]. ...

#### *(b) Assignment to a Head of Power*

64. Once the pith and substance 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*. ...

67. Where measures enacted pursuant to a provincial power overlap with a federal power, the court must identify the “dominant feature” of the measure: *Chatterjee*, at para. 29. If the dominant feature is the subject matter of provincial authority, “the enactment will not be invalidated because of an ‘incidental’ intrusion into the criminal law”: *Chatterjee*, at para. 29.

[21] The onus is on applicant in this case to establish that the impugned provisions are outside of the legislative jurisdiction of the province. The *OSPCA Act* is presumed to be constitutional: *York* at paragraph 72.

### **Pith and Substance**

[22] The stated purpose of the *OSPCA Act* is animal protection and the prevention of cruelty to animals. This is set out in section 3 (see paragraph 10 above) and referred to in the preamble to the 2008 amendments (noted at paragraph 9 above). The applicant’s references to the 2008 Hansard debates only supports that as the defining purpose. Although in an insurance law context, it is affirmed in *Ontario Society for the Prevention of Cruelty to Animals v. The Sovereign General Insurance Co.*, 2015 ONCA 702, at paragraph 56.

[23] As to the legal effects, as noted in *Reference Re Firearms Act (Canada)*, 2000 SCC 31, at paragraph 18, this exercise involves considering how the law will operate and effect on Ontarians. As further noted in that paragraph “[i]n some cases, the effects of the law may suggest a purpose other than that which is stated in the law ... [i]n other words, a law may say that it intends to do one thing and actually do something else.” This is often referred to as the legislation’s “practical

effect”. As noted in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at paragraph 32, in the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority. It therefore follows that the “effects” only take on analytical significance when they “so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose”: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paragraph 156 per Wilson J.

[24] There is nothing in the *OSPCA Act* or its effects to suggest a purpose other than animal protection and the prevention of cruelty to animals. Indeed, even the applicant acknowledges in his factum that the impugned sections 11.2(1) and 11.2(2) “have the obvious legal effect of prohibiting causing or permitting “distress” (as defined by the Act), and providing penalties in order to deter such conduct.” Clearly, these sections align with the purpose of the legislation taken as a whole.

[25] The approach in assessing pith and substance must be flexible and a technical, formalistic approach is to be avoided: *R. v. Morgentaler* at paragraph 24. In my view there can be little debate that the “matter” of the *OSPCA Act* is animal protection and the prevention of cruelty to animals. That is its “leading feature” and “true character”. I agree with Justice Batiot of the Nova Scotia Provincial Court in *R. v. Vaillancourt*, [2003] N.S.J. No. 510 at paragraph 34, who said when looking at substantially similar legislation “[t]he 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 ...”.

#### Assignment to a Head of Power

[26] It needs to be kept in mind that it is the “matter” of the challenged legislation that is being assigned to a constitutional head of power. It is not, as the applicant suggests, each specific section within the legislation, namely in this case sections 11.2(1) and 11.2(2). Those sections standing alone are not assessed as to their “pith and substance.”

[27] Having found that the “matter” of legislation is animal protection and the prevention of cruelty to animals, I find that it falls under the *Constitution Act, 1867* head of power in section 92-13, which grants the provinces the authority to make laws in relation of the class of subject “Property and Civil Rights in the Province.”

[28] The applicant argues that as the two impugned provisions are criminal in nature, which is federal jurisdiction, they must be struck down as a result the principle of parliamentary supremacy. We are now at the “dominant feature” part of the test. In my view that argument is not supported for “... even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power” (*York* at paragraph 54). When the overlap is related to criminal law, the ability to have co-existing legislation is more apparent given section 92-15 of the *Constitution Act, 1867* (noted at paragraph 6 above). The only question is whether the federal and provincial criminal laws are contradictory (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paragraph 32) for as noted in *York* at paragraph 73 “[a] province may legislate in relation to conduct that is

encompassed by the Criminal Code, provided that the pith and substance of the law relates to a provincial head of power and the federal and provincial legislation do not conflict.”

[29] It is undisputed that there is no conflict here between sections 11.2(1) and 11.2(2) of the *OSPCA Act* and sections 445.1(1)(a) and 446(1)(b) of the *Criminal Code* in the sense of the provisions being inconsistent. Indeed, the applicant himself argues that they “possess the same legal effect” and are “very similar.” As noted by Prof. Peter W. Hogg in *Constitutional Law of Canada*, 5<sup>th</sup> Ed. Vol. 1 (Toronto: Thomson Carswell, 2007) at pages 498 and 499, duplication should not be a test of inconsistency. I would once again echo the words of Justice Batiot in *R. v. Vaillancourt*, looking at the substantially similar *Animal Cruelty Prevention Act* in Nova Scotia where he said:

37. Both statutes deal in part with the same subject matter, and the Criminal Code section is broader in coverage. There is thus duplication. Has the Province usurped the federal parliament's jurisdiction with respect to criminal law, found in s. 91(27) of the Constitution Act, 1867? If not, is there a conflict between the two to bring to the fore the doctrine of paramountcy [?]. I must conclude the Province has not: both have the same aim. Indeed they use the same wording so that here duplication is, in Professor Lederman's phrase, approved by the Supreme Court of Canada in *Multiple Access Limited v. McCutcheon*, [1982] 2 S.C.R. 161, at pg. 190, the ultimate in harmony. There is no conflict since a person need not breach one law to comply with the other; the doctrine of paramountcy, therefore, has no application.

### **Conclusion**

[30] As noted in *York* at paragraph 27, it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. To that point, Prof. Hogg commented at page 447 of *Constitutional Law of Canada*, Vol. 1, that “[t]he characterization of a statute is often decisive as to its validity ... [t]he choice between competing characteristics of the statute, in order to identify the most important one as the “matter”, may be nothing less than a choice between validity or invalidity.” In my view that is the case here. The “matter” of the *OSPCA Act* is animal protection and the prevention of cruelty to animals, not criminal law, and I fail to see any inconsistency between the impugned subsections and the similar ones contained in the *Criminal Code*. For those reasons I find that the applicant has failed to rebut the presumption of the constitutionality of sections 11.2(1) and 11.2(2) of the *OSPCA Act*.

**Do various sections of the *OSPCA Act* [namely 11.4, 12(6), 13, and 14(1) (except subsection 14(1)(a))] breach section 8 (or section 7 in the alternative) of the *Charter* by authorizing unreasonable (including warrantless) searches of people's homes and farms and seizures of their animals without any, or adequate, judicial authorization or oversight?**

[31] The applicant did not develop the alternative section 7 argument. This issue then is to be approached by reference to the following excerpts from *R. v. Cole*, [2012] 3 S.C.R. 34 (citations omitted):

34. Section 8 of the *Charter* guarantees the right of everyone in Canada to be secure against unreasonable search or seizure. An inspection is a search, and a



taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access.

35. Privacy is a matter of reasonable expectations. An expectation of privacy will attract *Charter* protection if reasonable and informed people in the position of the accused would expect privacy.

36. If the claimant has a reasonable expectation of privacy, s. 8 is engaged, and the court must then determine whether the search or seizure was reasonable.

### **The Test**

[32] From the preceding paragraph, it is clear that assessing a section 8 issue is essentially a two-step process. First the claimant, or the person seeking *Charter* protection, must have a reasonable expectation of privacy, and on that point the decision in *Cole* notes:

39. Whether Mr. Cole had a reasonable expectation of privacy depends on the “totality of the circumstances”.

40. The “totality of the circumstances” test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances. ...

[33] Once a reasonable expectation of privacy finding has been made, the court must then determine whether the search or seizure was reasonable per section 8:

37. Where, as here, a search is carried out without a warrant, it is presumptively unreasonable. To establish reasonableness, the Crown must prove on the balance of probabilities (1) that the search was authorized by law, (2) that the authorizing law was itself reasonable, and (3) that the authority to conduct the search was exercised in a reasonable manner.

[34] As noted the applicant has not been subjected to any intervention by the OSPCA. There is no actual search or seizure to be considered. In granting the applicant standing Justice Johnston indicated (*Bogaerts v. Attorney General for Ontario*, 2016 ONSC 3123 at paragraph 20) that “[i]f counsel, with the assistance of the Court, properly frames the arguments, the matter can be dealt with in an efficient manner.” In view of their arguments, the parties appear to have accommodated the absence of a factual context as follows.

[35] For the first step the applicant needs to establish that section 8 applies. He has been given a pass on the second line of inquiry (establishing a direct interest in animals) and is assumed to have a subjective expectation of privacy in relation to animals (the third line of inquiry). As such the totality of circumstances arguments were only directed at the remaining two lines of inquiry, the nature of the subject matter and whether the expectation of privacy is objectively reasonable.

[36] For the second step, if the applicant were to establish that section 8 applies, the onus would shift to the Crown to prove that the search or seizure was reasonable. The respondent appears to have been given a pass on whether the search or seizure was authorized and exercised in a reasonable manner (the first and third parts of the test). The only remaining question would therefore be whether the authorizing law itself is reasonable. Given my findings on the first step, this step is not reached.

#### **Unreasonable Search and Seizure: Sections 11.4 and 11.4.1**

[37] The applicant challenges the following impugned sections taken together because they allow warrantless searches and seizures in certain distinct situations.

##### **Inspection — animals kept for animal exhibition, entertainment, boarding, hire or sale**

11.4 (1) An inspector or an agent of the Society may, without a warrant, enter and inspect a building or place where animals are kept in order to determine whether the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with if the animals are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale. 2015, c. 10, s. 4 (1).

##### **Accompaniment**

(1.1) An inspector or an agent of the Society conducting an inspection under this section may be accompanied by one or more veterinarians or other persons as he or she considers advisable. 2015, c. 10, s. 4 (1).

##### **Dwellings**

(2) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place used as a dwelling except with the consent of the occupier. 2008, c. 16, s. 8.

##### **Accredited veterinary facilities**

(3) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place that is an accredited veterinary facility. 2008, c. 16, s. 8.

##### **Time of entry**

(4) The power to enter and inspect a building or place under this section may be exercised only between the hours of 9 a.m. and 5 p.m., or at any other time when the building or place is open to the public. 2008, c. 16, s. 8.

Power to demand record or thing

11.4.1 (1) An inspector or an agent of the Society may, for the purpose of ensuring that the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with, demand that a person produce a record or thing for inspection if the person owns or has custody or care of animals that are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale. 2015, c. 10, s. 5.

Subject of demand shall produce record or thing

(2) If an inspector or an agent of the Society demands that a record or thing be produced for inspection, the person who is subject to the demand shall produce it for the inspector or agent within the time provided for in the demand. 2015, c. 10, s. 5.

[38] The applicant's concern with these sections is that the "[e]vidence obtained from section 11.4 entry and section 11.4.1 seizures can be used to charge and convict individuals with offences under the OSPCA Act and potentially lead to criminal liability" ... and that "animal welfare charges carry more stigma than most, if not all, other regulatory offences." He adds that such searches may involve structures (ie. farms and outbuildings) on residential properties (not including dwellings) where the expectation of privacy can be high, and that there is no requirement of urgency. He asks the court to find that the totality of these circumstances results in a reasonable expectation of privacy akin to that reserved for criminal law, and that the sections are therefore unconstitutional because a warrant should be required. The respondent and intervener take the position that the juristic character of these sections is simply regulatory, the criminal sanctions are incidental to that purpose, and that when one takes into consideration the unique context of animal protection legislation the only conclusion is that the reasonable expectation of privacy is so low that a warrant is not required.

[39] There are really two main circumstances that have been raised in argument related to the reasonable expectation of privacy surrounding these search and/or seizure powers. They apply not just to the analysis of these sections, but to the remaining impugned sections under this second main heading as well. The applicant focusses on the criminal powers in the Act, and the respondent focusses on the regulatory nature of the Act. I suggest these are one set of circumstances, in the sense of being two different points on the same continuum. As noted in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at paragraph 52: "[t]he greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness." The second set of circumstances are raised by the intervener, and focus on the unique context of animal protection legislation. It cites two aspects, namely the importance of protecting animals from abuse, and the difficulties of policing and enforcing animal protection laws.

[40] Regarding the first set of circumstances, there can indeed be a considerable range of privacy expectations depending on the purpose of the search or seizure. As noted in *Thompson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.J. No. 23 at paragraph 122:

122. ... the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. 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.

[41] One consideration in assessing the reasonable expectation of privacy is the “juristic character” of the Act in question, which has been described as “crucial”: see *Thomson Newspapers* at paragraph 121. The criminal powers in the *OSCPA Act* do not define its juristic character. As noted in *Thomson Newspapers* at paragraph 126 dealing with the federal *Combines Investigation Act*:

126. Nor do I regard it as determinative that the Act defines offences and provides for the imprisonment of those who commit them. While I recognize that these features give the Act something of the flavour of criminal law, I do not believe that the fact that an Act provides for sanctions usually associated with the criminal law necessarily means that those subject to its operation have the same expectations of privacy as persons suspected of committing what are by their very nature criminal offences.

[42] The applicant has cited considerable judicial authority about the unquestionable importance of protecting a person's privacy, particularly in their own homes (although these impugned sections do not permit a warrantless search of a dwelling). However, even he recognizes that his application does not involve a constitutional review of criminal law, and that the standard of reasonableness is a lower threshold when outside of that realm.

[43] While the expectation of privacy is high when the state is investigating a criminal offence, there is a “very low” expectation of privacy for the regulation of business and social activity: *Thomson Newspapers* at paragraphs 123 and 124. As noted by the intervener, these particular searches apply only “to those who have chosen to engage in a regulated activity.” It argues that while in most cases the person affected by the search will have an interest in animals, any subjective expectation of privacy related to them cannot be said to be objectively reasonable given the essentially commercial nature of the activity (animal exhibition, entertainment, boarding, hire or sale) where regulation is common and expected. As summarized in *British Columbia Securities* at paragraph 52:

52. ... it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: per La Forest J. in *Thomson Newspapers*. ... The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.

[44] The applicant points out that along with regulatory search and seizure powers, the OSPCA is authorized by the *OSPCA Act* to “concurrently” investigate and charge individuals with animal cruelty offences under that Act and the *Criminal Code*. As an example, an OPSCA investigator or agent attending on a person’s farm where horses are being boarded, can enter the barn without a warrant under the *OSPCA Act* with respect to the OSPCA’s regulatory function. However, if the same officer attended on the same farm to investigate a complaint of animal cruelty with a view to laying a *Criminal Code* charge, which is clearly within his or her power, a warrant would be required.

[45] Notwithstanding that the expectation of privacy would be low when a search or seizure is done for the stated purposes of sections 11.4 and 11.4.1, the applicant argues that the sections could be abused. He therefore asserts that the expectation of privacy should always be high and in-line with the criminal law test. This would seriously curtail the OSPCA’s regulatory function. As noted in the majority decision in *R. v. Colarusso*, [1994] 1 S.C.R. 20, where a blood sample that was properly seized by a coroner without a warrant was held to be a warrantless seizure breaching section 8 of the *Charter* when introduced into evidence in criminal proceedings (paragraphs 89, 90, and 92), the use of information collected is restricted to the purpose for which it was obtained (paragraph 86). To paraphrase from paragraph 92 of that case, the “criminal law enforcement arm” of the state cannot rely on the seizure by the regulatory arm of the state to circumvent the constitutional guarantees against unreasonable search and seizure, as the regulatory seizure is valid for non-criminal purposes only. What muddies the waters here somewhat is that both “arms” of the state dealing with animal care, the regulatory arm and criminal arm, could be attached to the same body, namely the OSPCA. However, as noted in *R. v. Cole* at paragraph 69, “[w]here a lower constitutional standard is applicable in an administrative context ... the police cannot invoke that standard to evade the prior judicial authorization that is normally required for searches or seizures in the context of criminal investigations.” The state can have both regulatory and criminal search and seizure powers, but cannot use the former to effect the latter purpose. If it did, that would go to the reasonableness of the search or seizure itself. In other words, where the regulatory inspection provision is improperly used to gather evidence for a criminal prosecution, the remedy is not to invalidate the inspection provision itself but to exclude the evidence from that prosecution under section 24(2) of the *Charter*: see *R. v. Jarvis*, 2002 SCC 73, at paragraph 97.

[46] Turning now to the second set of circumstances, the first contextual element raised by the intervener is that, in balancing between an individual’s reasonable expectation of privacy and society’s interests, the court needs to be mindful of the increased judicial and legislative recognition of the importance of protecting vulnerable animals from abuse and neglect. It points to the preamble to the *OSPCA Act* noted at paragraph 9 above, which affirms that the people of Ontario and their government believe that how we treat animals helps define our humanity, morality and compassion as a society. It also points to numerous judicial comments to the effect that sentient animals are not objects, that civilized society should show reasonable regard to all vulnerable animals, and that humans have a moral and ethical obligation to treat animals humanely: for example see *R. v. Munroe*, 2010 ONCJ 226 at paragraph 23, *R. v. D.L.W.*, 2016 SCC 22 at paragraphs 69, 140 and 141, *Reese v. Edmonton (City)*, 2011 ABCA 238 at paragraph 42, and *R. v. Alcorn*, 2015 ABCA 182 at paragraphs 41 and 42.

[47] The second contextual aspect asserted by the intervener relates to the difficulties in enforcing animal protection legislation. As it points out, animals are uniquely vulnerable; they are frequently kept on private property out of public view; they cannot report neglect or abuse; and there are no oversight mechanisms to ensure that breaches related to their care are identified. Unlike children, for example, there is no expectation that they will be visible in the community (regular medical care, school attendances, celebration of special occasions, etc.). As noted in *R. v. Munroe* at paragraph 26:

26. ... A person who abuses a child always runs the risk that the child will overcome his fear and report his suffering. The abuser of an animal has no such concern. So long as he commits his abuses beyond the reach of prying eyes, he need not fear that his victim will reveal his crimes.

[48] The intervener therefore asserts that animal protection legislation requires robust preventative and investigative search powers, more so, for example, than in other regulatory contexts (income tax, public health, building codes, etc.) where certain search and seizure powers without a warrant have not been found to violate section 8 of the *Charter*. It submits that both of these aspects related to the unique nature of animal protection legislation should weigh heavily against an individual's right to privacy.

[49] Looking at the totality of the circumstances, the juristic character of the *OSPCA Act* is animal protection, and the impugned sections are focussed on regulatory objectives related to essentially commercial activity, not the criminal law. The subject matter of the search or seizure would clearly be an animal or animals, they are unique, and vigorous preventative and investigative search and seizure powers are necessary to meet the objectives of the Act with respect to them. I find that sections 11.4 and 11.4.1 of the *OSPCA Act* when used for the purposes for which they were intended do not attract a reasonable expectation of privacy. For those reasons, the applicant has failed to establish that they are unconstitutional.

#### **Unreasonable Search: Section 12(6)**

[50] The applicant challenges the following section concerning search powers under the *OSPCA Act*:

##### **Immediate distress – entry without warrant**

12. (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. 2008, c. 16, s. 9.

[51] The applicant recognizes that “where prior judicial authorization is impracticable due to a situation of urgency, the Crown may be capable of rebutting the presumption of the unreasonableness of a warrantless search.” However, he is still of the view that there is a

constitutional issue, asserting that the section as it stands is unreasonable because it lacks the safeguards of notice to the person affected and post-entry judicial oversight given that the searches do not necessarily lead to charges.

[52] The respondent points out that this section is an “exigent circumstances” exception to the general warrant provision in section 12, and that even then it does not permit warrantless entry into a dwelling. The intervener argues that requiring a warrant when an official has reasonable grounds to believe an animal is in immediate distress would run contrary to the object of protecting animals and be incompatible with the very purpose of the legislation. It agrees with the respondent that this provision falls squarely within the criminal law exigent circumstances exception to the warrant requirement.

[53] With the applicant acknowledging the urgency exception, which I accept applies to animals, I forgo the full *R. v. Cole* analysis. As to the safeguards the applicant suggests are lacking, it is not clear to me what kind of notice he feels is required in an emergency or urgent situation, or what he proposes as a follow up post-search hearing. The court cannot strike down legislation as unconstitutional on the basis that the legislature could have done a better job in drafting it. In my view the applicant has failed to establish that section 12.6 of the *OSPCA Act* is unconstitutional.

#### **Unreasonable Search: Sections 13(1) and 13(6)**

[54] The applicant challenges the following subsections of the *OSPCA Act* in the way they work conjunctively to confer upon OSPCA investigators and agents warrantless entry into a person’s home:

##### **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. R.S.O. 1990, c. O.36, s. 13 (1).

##### **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. 2008, c. 16, s. 10 (3).

[55] The applicant argues that as section 13(6) is not directed at emergency situations and does not provide for an exception for dwellings it is especially unreasonable. He notes that the OSPCA has set its own policy to restrict section 13(6) warrantless entry powers as it relates to dwellings, but argues that as the policy is not statutorily prescribed if an investigator or agent were to rely on the section to enter a dwelling without a warrant he or she would be in breach of section 8. He adds that although there is a right to appeal a 13(1) order, unjustified searches should be prevented before they happen, for in many situations persons subject to the orders will be incapable (finances, health, etc.) to mount an appeal.

[56] The respondent notes that section 13(6) is exclusively connected to determining compliance with lawful orders made under section 13(1) that were based on reasonable grounds for believing that an animal is in distress, and it is limited to the locations where the animal subject to the order is kept. It argues that these powers should not be restricted to situations where the OSPCA investigator or agent has a belief or suspicion of non-compliance with the order, as section 13(6) is founded on the assumption that the threat of unannounced inspection may be the most effective way to induce compliance (see *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at page 645). The intervener did not specifically reference this section in its factum, however it is generally concerned about the difficulty of enforcing a 13(1) order and the importance of being able to follow up in a timely way to determine whether the distress of an animal has been addressed.

[57] The totality of the circumstances here are similar to those addressed in reference to sections 11.4 and 11.4.1 above. The juristic character of the Act has not changed, and the important and unique subject matter of the search (animals and their welfare) has not changed. For the fourth and critical line of inquiry, namely whether the subjective expectation of privacy would be objectively reasonable, it is difficult to see how it could be when the OSPCA investigator initially had reasonable grounds for believing the animal was in distress, had by way of an order directed the owner or custodian of the animal to address that distress, and per section 13(6) is simply following up to determine whether the animal's need of proper care, water, food or shelter, or need to attend a veterinarian, has been dealt with.

[58] In my view the applicant has not established a reasonable expectation of privacy for the type of searches permitted by these sections, and has therefore failed to establish that they are unconstitutional.

#### **Unreasonable Seizure: Section 14(1)**

[59] The applicant challenges the following impugned section because it allows warrantless seizures in certain distinct situations.

#### **Taking possession of animal**

14. (1) An inspector or an agent of the Society may remove an animal from the building or place where it is and take possession thereof on behalf of the Society for the purpose of providing it with food, care or treatment to relieve its distress where, ...



- (b) the inspector or agent has inspected the animal and has reasonable grounds for believing that the animal is in distress and the owner or custodian of the animal is not present and cannot be found promptly; or
- (c) an order respecting the animal has been made under section 13 and the order has not been complied with. R.S.O. 1990, c. O.36, s. 14 (1).

[60] The applicant complains that these subsections confer upon an OSPCA officer “the power to seize private property, irrespective of any situation of urgency and without any consultation with a veterinarian.” He is also concerned that the warrantless seizure would be subject only to an OSPCA officer’s initial reasonable grounds for believing that an animal is in distress. While he acknowledges that section 17(1) of the *OSPCA Act* provides for a right of appeal, his view is that the onus should not be on the person affected by the removal but that the OSPCA should report to a judicial officer and obtain an order to keep the animal because affected persons may be incapable (finances, cognitive ability, etc.) to mount an appeal. He is concerned with the fees the OSPCA charges for keeping the animal after removal. The respondent argues that the owner or custodian of an animal in distress who cannot be found or who is subject to a lawful order to relieve the animal’s distress that has not been complied with can only have a low expectation of privacy related to that animal and the location which is it kept. The intervener per its general position supports that argument.

[61] The considerations here are the same as those dealt with related to section 13(6) above. It is difficult to see how there could be a reasonable expectation of privacy when the seizure is for the express purpose of providing the animal with needed food, care or treatment to ameliorate its suffering. In my view the applicant has failed to establish that section 14(1) of the *OSPCA Act* is unconstitutional.

**Do sections 11, 12, and /or 12.1 of the *OSPCA Act* breach section 7 (or section 8 in the alternative) of the *Charter* by granting police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization? In the alternative, if it can be constitutional to grant such powers to a private organization, does the *OSPCA Act* nevertheless breach section 7 (or section 8 in the alternative) of the *Charter* by granting these powers to the OSPCA, specifically, without any, or adequate, legislatively mandated restraints, oversight, accountability and/or transparency?**

[62] We now turn to the main focus of this application, whether it is unconstitutional under section 7 of the *Charter* for the province to grant or delegate police and other investigative powers to a private organization, and to the OSPCA in particular. The applicant did not develop the alternative section 8 argument.

[63] As noted, the applicant’s submissions here are focussed on who is exercising police and other investigative powers. It is distinguishable from the considerations under the previous general heading which dealt with the constitutionality of specific search provisions of the *OSPCA Act* regardless of who was exercising those powers. For that reason, and for ease, I do not set out all of the impugned sections in the body of this decision, but they are attached as Schedule “A”. The following summary aligns with the applicant and respondent’s submissions. Section 11 of the *OSPCA Act* assigns police powers (including search and seizure powers under the *OSPCA Act* and

*Criminal Code*) to the OSPCA and such powers may be further delegated by the OSPCA to third-party affiliates. Section 12 assigns search powers to the OSPCA and specifies grounds to obtain a judicially authorized warrant. Section 12.1 assigns seizure powers to the OSPCA related to collecting and testing evidence from a section 12 search, and it sets out the requirements to report/obtain orders regarding the same to/from a justice of the peace or provincial judge.

### Test

[64] As the applicant has been granted standing he is able to proceed by application for a declaration relying on section 7 of the *Charter* despite the lack of a factual underpinning; see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2000] O.J. No. 2535 (S.C.J.) at paragraph 8, [2002] O.J. No. 61 (Ont. C.A.) at paragraph 7, and [2004] 1 S.C.R. 76 (S.C.C.) at paragraph 1.

[65] At paragraphs 3 and 4 of the latter decision the Supreme Court of Canada set out the approach to be taken, which I summarize as follows:

1. The first requirement is that the applicant has the burden of proving a deprivation, specifically that the impugned sections deprive someone of life, liberty, or security of the person.
2. If the deprivation is proved, then the burden remains on the applicant to also prove the second requirement, that the impugned provisions breach a principle of fundamental justice.

[66] As to the second requirement, the applicant argues that there are two principles of fundamental justice that are offended by the *OSPCA Act*. The first is the established principle that laws are not to be arbitrary. The second as will be seen is “novel” in the sense that it has not been recognized previously by a Canadian court. The criteria for recognizing a new principle is set out in *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571 at paragraph 113:

In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[67] The Supreme Court of Canada has since articulated the above as a distinct three-part test. A new principle of fundamental justice must: (1) be a legal principle; (2) have sufficient consensus that it is vital or fundamental to our societal notion of justice; and (3) 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* at paragraph 8.

### Deprivation

[68] It is obvious, and the applicant does not argue otherwise, that the impugned provisions do not deprive anyone of their life.

[69] It would seem similarly obvious, on the other hand, that as the Act provides for incarceration, “liberty” per section 7 of the *Charter* is engaged. The respondent, however, argued that as the applicant is not specifically taking issue with section 18.1, the possibility of incarceration has no bearing on this challenge. In my view that is an overly technical and formulistic position. It bears repeating that subsection 11(1) refers to the “enforcement” of “any law” pertaining to cruelty to animals. Every OSPCA inspector has the powers of a police officer not just with respect to section 18.1 of the *OSPCA Act* that includes incarceration, but also with respect to the *Criminal Code* provisions pertaining to the welfare of or prevention of cruelty to animals that also include incarceration. Put another way, the province has legislated that an employee of a private organization (the OSPCA) is a police officer for enforcing certain provisions of the *Criminal Code* and the *OSPCA Act* that could include incarceration. As noted at paragraph 17 of *R. v. Smith*, 2015 SCC 34, and as concisely summarized by Prof. Hogg (Vol. 2, page 371) “[a]ny law that imposes a penalty of imprisonment ... is by virtue of that penalty a deprivation of liberty, and must conform to the principles of fundamental justice.” In reading section 11(1) along with sections 11.2(1) and (2), 18(1)(c), and 18.1(3) and (4) (see paragraphs 20 to 24 above), in my view a person’s right to liberty is engaged.

[70] Regarding whether the impugned search and seizure sections engage “security of the person” in section 7, the applicant and the intervener approached this as obvious. The applicant in his initial factum simply pointed to the impugned search and seizure powers, and intervener in its factum skipped directly to the issue of fundamental justice. The respondent, however, argued that some but not all searches and seizures engage security of the person under section 7, and that even if section 7 “security of the person” is engaged the search and seizure provisions should only be considered under section 8 of the *Charter* not section 7.

[71] As noted in *Reference Re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at pages 502 and 503:

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the “right” to life, liberty and security of the person; they are examples of instances in which the “right” to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice.

[72] It is clear from that decision that the right to security of the person includes the right to be secure against unreasonable search and seizure. The impugned search and seizure powers here require warrants under the *OSPCA Act* and clearly engage “security of the person”. However, the respondent relied on *R. v. Rogers*, [2006] 1 S.C.R. 554, where the Supreme Court of Canada indicated that even though section 7 was engaged, it preferred to analyze a challenge to the taking of a DNA sample under section 8 instead. The respondent argued that I should take the same approach and not consider section 7. It specifically noted that the court in that case at page 574 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.” I cannot see how that deflects the proposed analysis away from section 7 on these facts. The section 7 analysis is required in the “particular context” here to properly address the applicant’s issues,

submissions, and grounds. I find that section 7 is engaged regarding the impugned search and seizure provisions with respect to “security of the person”.

[73] The applicant argued that “security of the person” is also engaged on the basis that the impugned provisions could cause “state-imposed psychological stress”. Reference was made to two cases where the removal of children by child protection authorities was found to constitute serious interference with parents’ psychological integrity (*New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46) and result in serious stigma and psychological stress (*Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 46). The respondent did not dispute the core proposition, but pointed to several other Supreme Court of Canada decisions clarifying that the stresses of ordinary administrative and judicial processes do not meet the test. Determining the boundaries of state-imposed psychological stress is an “inexact science” (*New Brunswick* at page 77). While for some people the removal of a companion animal or favorite pet could indeed result in a degree of psychological stress that might approach what a parent experiences with the removal of a child, I note that the specific impugned sections here do not involve the apprehension of a live animal. I therefore fail to see how security of the person is also engaged on this basis.

### **Fundamental Justice**

[74] As summarized recently in *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at paragraph 96,

... the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values.

[75] The principles of fundamental justice lie “in the inherent domain of the judiciary as the guardian of the justice system” (*R. v. Marmo-Levine* at paragraph 112) and “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” (*Reference Re s. 94(2) of Motor Vehicle Act (British Columbia)* at paragraph 62).

### **Arbitrariness**

[76] There is no dispute that “arbitrariness” is an established principle of fundamental justice. We have a basic value against arbitrary laws. The court in *Bedford* noted at paragraph 108 that the arbitrariness principle is directed at the “evil” of an “absence of a connection between the infringement of rights and what the law seeks to achieve – the situation where a law’s deprivation of an individual’s life, liberty, or security of the person is not connected to the purpose of the law.” The “ultimate question” regarding arbitrariness is whether “the law violates basic norms because there is *no connection* between its effect and purpose” (paragraph 119).

[77] The purpose of the *OSPCA Act* is clear. It is to protect animals and prevent cruelty to them. The effect or result or outcome of the impugned sections, being the search, seizure, fine or imprisonment provisions, are clearly designed to achieve that purpose. In my view it simply

cannot be said that there is no connection between the Act's purpose and the specified section 7 deprivations.

[78] The applicant's focus in this challenge on who is doing the investigations, seizures, and laying the criminal charges, had him framing the test somewhat differently. He conceded that the object of the Act is to protect animals, but argued that "the means chosen to achieve this object, namely the delegation of police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization, is not connected to the objective." However, the "ultimate question" relating specifically to the arbitrariness principle of fundamental justice is the connection between the law's "effect and purpose" not one of the connection between the law's means and purpose. As noted by the respondent, the test of arbitrariness is not whether the *OSPCA Act* could meet its objective or purpose in a different way or more efficiently, but a "no connection" test.

[79] The applicant is attempting to reformulate the arbitrariness principle. I find that when it is applied as articulated by the Supreme Court he has failed to establish that the impugned sections are arbitrary in that they have no connection to the purposes of the *OSPCA Act* itself.

#### **Proposed New Principle**

[80] The applicant asserts in his factum:

... if this Court does not agree that these submissions fall within the ambit of "arbitrariness", then the Applicant seeks 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.

[81] The intervener supports and in some sense narrows the scope of this argument, submitting that this court should recognize a new principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency, integrity, and accountability". The respondent denies the existence of a new principle of fundamental justice arguing that the required three-part test is not met.

#### **Is it a Legal Principle?**

[82] What is considered to be a legal principle within the test for a new principle of fundamental justice? In *R. v. Malmo-Levine* the argument was that unless the state can establish that the use of marijuana is harmful to others, a prohibition against its use would not comply with section 7. This "harm principle" was being proposed as a principle of fundamental justice. The court rejected that argument, simply indicating that the harm principle was not a legal principle but better characterized as "an important state interest" (paragraph 114). In *Canadian Foundation for Children, Youth and the Law*, the court had no difficulty finding that "best interests of the child" was a legal principle. It had been established as such in numerous provincial, federal, and international statutes. The Supreme Court at paragraph 9 referred to a number of its previous decisions that assisted in defining a legal principle by pointing out what it is not. A legal principle is not general public policy nor is it a vague generalization about what our society considers to be ethical or moral.

[83] The initial position of the applicant (per paragraph 12-1 above) was somewhat unclear as to whether he was advocating for one new principle of fundamental justice or two. The first argument was that police and investigative powers cannot be designated to a private organization. The second alternative argument was that the *OSPCA Act* breaches section 7 of the *Charter* by granting police and investigative powers to the OSPCA without any, or adequate, legislatively mandated restraints, oversight, accountability and/or transparency. The two arguments appear to be very similar if not the same, in that he assumes two realms of organizations -- private and public -- and that the latter is generally transparent, accountable, etc. while the former generally is not. In my view 'no police powers to a private organization' is conclusionary and too narrow of a proposition to fit within the exercise here of discerning whether a "principle" exists in the sense of a basic rule or doctrine. For the second alternative principle, there was a lack of clarity to its parameters as initially proposed. While "oversight" might be subsumed in some aspect of "accountability" as a concept, the phrase "without any, or adequate, legislatively mandated restraints" is vague for a legal principle. I find that the somewhat more concise statement put forward by the intervener that "law enforcement bodies must be subject to reasonable standards of transparency, integrity, and accountability" is the proposed legal principle. While the applicant was the first to identify and advocate for a new principle of fundamental justice, he supported this refinement.

[84] In my view the proposed new principle is still problematic in the sense that it lumps together three concepts to purport to stand for one single principle. "Transparency" is straightforward, and in my view can form part of a legal principle. It is the government's obligation to share information with its citizens. Our legal system in all aspects strives to be transparent, and in almost all adjudicative steps in the legal process there is some ability to review state action. Not only agencies who are enforcing laws but governments generally must operate in such a way that it is easy for others to see what actions are performed. This is echoed by rules and legislation, for example requiring open hearings in most situations and permitting free access to nearly all public information. Similarly, "accountability" can be seen as a legal principle within the context of state action, and within the legal system. Not only law enforcement agencies and institutions, but civil servants and politicians, and indeed the government itself, must be accountable to the public and to legislative bodies. Within the legal system decisions must be supported by reasons that are subject to public discourse (via various media, within academia, etc.) and/or higher judicial scrutiny. These two concepts are therefore related, and in my view can form part of the same legal principle in the sense that accountability and transparency work in tandem to provide for open government and reviewable government action in a free society. "Integrity", however, is something different.

[85] What the applicant and intervener are getting at generally with the concept of integrity (and the lack of legislative restraints that was mentioned in the applicant's initial formulation), is the organizational nature of, specifically, the OPSCA. The OSPCA as constituted under the *OSPCA Act* is not a government agency but a private charity that operates by way of a board. While it receives government funding, there is a significant shortfall and as such it needs to raise funds through donations or other revenues to attempt to cover a large portion of its operating expenses. This results in potential for conflicts of interest (for example see *R. v. Pauliuk*, [2005] O.J. No. 1393 (O.C.J.) and *Ontario Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*, [2017] O.J. No. 4722 (S.C.J.)). However, as noted a principle of fundamental justice must not be so broad as to become a vague generalization of what our society considers ethical or

moral (*Rodriguez v. B.C.*, [1993] S.C.R. 519 at page 591). In that respect “integrity”, by its own definition, simply means the quality of having strong moral principles (see the *Concise Oxford English Dictionary*). While the applicant made a good case that the institutional integrity of the OSPCA may be lacking in the way it has been funded and structured, I cannot see how integrity related to regulatory and law enforcement agencies can be said to be a legal principle. As it is essentially a synonym for morality, “integrity” is a vague concept, and when fused to transparency and accountability it erodes their clarity as a single legal principle.

[86] Where does this leave us? It would be of no benefit to reject the applicant’s complete argument based on the overly broad manner that it has been framed, only to require this process to start again. The arguments on transparency and accountability have already been made with an opportunity to respond. In my view continuing forward with a more limited proposed principle of fundamental justice, namely that “law enforcement bodies must be subject to reasonable standards of transparency and accountability” is both available and appropriate. Thus framed, it meets the test of being a legal principle.

**Is There Sufficient Consensus that the Alleged Principle is Vital or Fundamental to our Societal Notion of Justice?**

[87] In my view, for the very reasons in paragraph 84 above, the answer to this question is yes. Transparency and accountability are basic tenets of our legal system, as well as our democratic process. This has been recognized by courts, Parliament, and the legislature in many different contexts (open courts, freedom of the press, access to information legislation, appeal processes, etc.). It is vital that the public have confidence in the enforcement of our laws (for example see *R. v. Qureshi*, [2004] O.J. No. 4711 (C.A.) at paragraph 9). A reasonable level of transparency and accountability is the cornerstone for that confidence.

**Is the Alleged Principle Capable of being Identified with Precision and Applied to Situations in a Manner that Yields Predictable Results?**

[88] In my view the answer to this question is also yes, and once again I point to the reasons in paragraph 84 above. This principle is precise enough that we have legislation and rules to ensure that it is adhered to. As stated by the intervener, while the manner and extent of the transparency and accountability will vary depending on context, this proposed principle is already applied to virtually every public body and law enforcement agency, demonstrating that it is a “cognizable and applicable” principle of fundamental justice.<sup>1</sup>

**Does the OSPCA Act Contravene the Identified Principle of Fundamental Justice?**

[89] I find that the applicant has established a principle of fundamental justice that “law enforcement bodies must be subject to reasonable standards of transparency and accountability”.

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<sup>1</sup> Anecdotally, during my deliberations the Ontario government announced plans to introduce legislation to increase “transparency and accountability” at Hydro One a “partially privatized company” (Financial Post website, July 16, 2018).

The last question then in this analysis is whether the *OSPCA Act* in constituting the OSPCA contravenes that principle. In my view the answer, once again, is yes.

[90] The OSPCA is a private organization. Private organizations by their nature are rarely transparent, and have limited public accountability. Prior to 2012, Newfoundland and Labrador had similar legislation to Ontario which delegated police and investigative powers, including search and seizure powers, to its own Society for the Prevention of Cruelty to Animals. Before that legislation was rescinded, two of that province's Provincial Court judges indicated in strong terms that a private organization having such powers was simply unacceptable: *R. v. Clarke*, [2001] N.J. No. 191 at paragraph 6, and *Beazley (Re)*, [2007] N.J. No. 337, at paragraphs 3–6 and 22. Where reasonable transparency and accountability is lacking, I share that view.

[91] The OSPCA investigators and agents while having police powers, are not subject to the *Police Services Act*, R.S.O. 1990, c. P.15, which has a comprehensive system for oversight and accountability for police. Rather the OSPCA has a policy manual that it has created related to entering homes and seizures of property, and that manual is not a public document. Complaints and discipline are dealt with internally. The OSPCA is not subject to the *Ombudsman Act*, R.S.O. 1990, c. O.6, or similar legislation. Unlike virtually every public body in Ontario, the OSPCA is not subject to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Indeed, the evidence establishes that the OSPCA has no formal access to information policy, and in practice does not provide access to information. Overall the OSPCA appears to be an organization that operates in a way that is shielded from public view while at the same time fulfilling clearly public functions. As stated by the intervener, although charged with law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot be confident that the laws it enforces will be fairly and impartially administered.

### **Decision/Remedy**

[92] In summary, I would answer the third stated question (dealt with first above) regarding whether the distribution of legislative powers in the *OSPCA Act* are unconstitutional (this refers to the declaration sought in paragraph 1(c) of the Amended Amended Notice of Application) as “no”, and deny the request for a declaration.

[93] I would answer the second stated question regarding whether certain specific warrantless search and/or seizure powers granted by the *OSPCA Act* are unconstitutional in view of section 8 of the *Charter* (this refers to the declaration sought in paragraph 1(b) of the Amended Amended Notice of Application) as “no”, and deny the request for a declaration.

[94] I would answer the first stated question (dealt with last above) regarding whether it is unconstitutional under section 7 of the *Charter* for the *OSPCA Act* to assign police and other investigative powers per sections 11, 12, and /or 12.1 to the OSPCA (this refers to the declaration sought in paragraph 1(a) of the Amended Amended Notice of Application) as “yes”, and grant the request for a declaration that the named sections are of no force and effect, subject to the below.

[95] There was no suggestion that the unconstitutional sections could be modified or read down to make them *Charter* compliant. I do not see how they could be. As in *Bedford*, there was no



argument by the respondent that the impugned sections could be saved by section 1 of the *Charter*. As noted in *R. v. Safarzadeh-Markhali*, 2016 SCC 14, at paragraph 57, it would be difficult if not impossible to justify a section 7 violation under section 1. The remaining question, then, is whether the declaration of invalidity should be suspended and, if so, for how long. There was also no argument on this point.

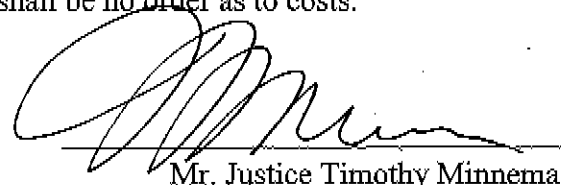
[96] The declaration taking effect immediately could deprive animals of the protections afforded by the *OSPCA Act* while the province considers its next step. Compromising animal welfare even for a transitional period would be an untenable result in my view. Also, the immediate implementation of this decision without an opportunity to plan could adversely impact staff at the OSPCA and its affiliates. As the applicant made clear in his submissions, this constitutional challenge is not an attack on the OSPCA itself. He saw the OSPCA as a victim of the legislation, and acknowledged it may be doing the best it can in the circumstances.

[97] I would suspend the declaration of invalidity. As for how long, in *R. v. Tse*, 2012 SCC 16 at paragraph 102, the court found a section of the *Criminal Code* relating to wiretaps unconstitutional and suspended the declaration of invalidity for 12 months “to afford Parliament the time needed to examine and redraft the provision.” Ken Roach in *Constitutional Remedies in Canada* (Toronto: Thomson Reuters, 2017) at paragraphs 14.1630, 14.1760 and 14.1770 summarized the law indicating that a one-year period of temporary validity may be appropriate where the legislature has a range of constitutional options to select from. There are a number of different schemes for animal protection in other provinces that the legislature could look at, as noted by the intervener in its factum (footnotes omitted):

... 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. In Quebec, agents employed by the Ministry of Agriculture, Fisheries, and Food are primarily responsible for enforcing provincial laws. Animal protection laws in Newfoundland [and Labrador] are enforced by the police – namely the RCMP and the Royal Newfoundland Constabulary. In British Columbia, Alberta, and Nova Scotia, SPCA inspectors exercising police powers are appointed by the provincial government and are subject to the same oversight and accountability mechanisms as peace officers.

[98] In my view it would be beneficial to allow the legislature sufficient time to consider the range of possibilities or to start from scratch in making policy choices. As in *Bedford*, I conclude that the declaration of invalidity should be suspended for one year, and so order.

[99] The parties have reasonably agreed that there shall be no order as to costs.



Mr. Justice Timothy Minnema

SCHEDULE "A"  
*OSPCA Act*

Inspectors and agents

Powers of police officer

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.

Inspectors and agents of affiliates

(2) Every inspector and agent of an affiliated society who has been appointed by the Society or by the Chief Inspector of the Society may exercise any of the powers and perform any of the duties of an inspector or an agent of the Society under this Act and every reference in this Act to an inspector or an agent of the Society is deemed to include a reference to an inspector or agent of an affiliated society who has been appointed by the Society or by the Chief Inspector of the Society.

Local police powers

(3) In any part of Ontario in which the Society or an affiliated society does not function, any police officer having jurisdiction in that part has and may exercise any of the powers of an inspector or agent of the Society under this Act.

Identification

(4) An inspector or an agent of the Society who is exercising any power or performing any duty under this Act shall produce, on request, evidence of his or her appointment.

Interfering with inspectors, agents

(5) No person shall hinder, obstruct or interfere with an inspector or an agent of the Society in the performance of his or her duties under this Act. 2008, c. 16, s. 7 (3).

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.

#### Telewarrant

(2) If an inspector or an agent of the Society believes that it would be impracticable to appear personally before a justice of the peace or provincial judge to apply for a warrant under subsection (1), he or she may, in accordance with the regulations, seek the warrant by telephone or other means of telecommunication, and the justice of the peace or provincial judge may, in accordance with the regulations, issue the warrant by the same means.

#### When warrant to be executed

(3) Every warrant issued under subsection (1) or (2) shall,

- (a) specify the times, which may be at any time during the day or night, during which the warrant may be carried out; and
- (b) state when the warrant expires.

#### Extension of time

(4) A justice of the peace or provincial judge may extend the date on which a warrant issued under this section expires for no more than 30 days, upon application without notice by the inspector or agent named in the warrant.

#### Other terms and conditions

(5) A warrant issued under subsection (1) or (2) may contain terms and conditions in addition to those provided for in subsections (1) to (4) as the justice of the peace or provincial judge considers advisable in the circumstances.

#### 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.

#### Accredited veterinary facilities

(7) The power to enter and inspect a building or place under subsection (6) shall not be exercised to enter and inspect a building or place that is an accredited veterinary facility.

Definition – 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.

Authorized activitiesInspect 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.

Same

(2) An inspector, agent or veterinarian who takes a sample or carcass under subsection (1) may conduct tests and analyses of the sample or carcass for the purposes described in subsection (1) and, upon conclusion of the tests and analyses, shall dispose of the sample or carcass.

Supply necessities to animals

(3) If an inspector or an agent of the Society 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 and finds an animal in distress, he or she may, in addition to any other action he or she is authorized to take under this Act, supply the animal with food, care or treatment.

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 any thing 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.

Report to justice, judge

- (5) An inspector or an agent of the Society shall,
- (a) report the taking of a sample or a carcass under subsection (1) to a justice of the peace or provincial judge; and
  - (b) bring any thing seized under subsection (4) before a justice of the peace or provincial judge or, if that is not reasonably possible, report the seizure to a justice of the peace or provincial judge.

Order to detain, return, dispose of thing

- (6) Where any thing is seized and brought before a justice of the peace or provincial judge under subsection (5), the justice of the peace or provincial judge shall by order,
- (a) detain it or direct it to be detained in the care of a person named in the order;
  - (b) direct it to be returned; or
  - (c) direct it to be disposed of, in accordance with the terms set out in the order.

Same

- (7) In an order made under clause (6) (a) or (b), the justice of the peace or provincial judge may,
- (a) authorize the examination, testing, inspection or reproduction of the thing seized, on the conditions that are reasonably necessary and are directed in the order; and
  - (b) make any other provision that, in his or her opinion, is necessary for the preservation of the thing.

Application of *Provincial Offences Act*

- (8) Subsections 159 (2) to (5) and section 160 of the *Provincial Offences Act* apply with necessary modifications in respect of a thing seized by an inspector or an agent of the Society under subsection (4).

**CITATION:** Bogaerts v. Attorney General of Ontario, 2019 ONSC 41  
**PERTH COURT FILE NO.:** 749/13  
**DATE:** 20190102

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**RE:** Jeffrey Bogaerts, Applicant

**AND**

The Attorney General of Ontario,  
Respondent

**AND**

Animal Justice Canada, Intervener

**BEFORE:** Mr. Justice Timothy Minnema

**COUNSEL:** Kurtis R. Andrews, for the Applicant

Daniel Huffaker, for the Respondent

Arden Beddoes and Benjamin Oliphant,  
for the Intervenor

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**ENDORSEMENT ON APPLICATION**

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Mr. Justice Timothy Minnema

**Released:** January 2, 2019

CITATION: Bogaerts v. Attorney General for Ontario, 2016 ONSC 3123  
COURT FILE NO.: CV749/13  
DATE: 2016/June 15

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Jeffrey Bogaerts, Applicant

**AND:**

Attorney General for Ontario, Respondent

**BEFORE:** The Honourable Mr. Justice J. M. Johnston

**COUNSEL:** Counsel, for the Plaintiff, K. Andrews

Counsel, for the Defendant, H. Schwartz

**HEARD:** January 29, 2016

**RULING ON MOTION**

- [1] This is a Ruling in response to a Motion commenced by the Respondent, The Attorney General of Ontario (AGO), who seeks an Order striking out the Notice of Application. The AGO, in the alternative, seeks an Order striking out the Affidavits of the Applicant, Jeffrey Bogaerts, sworn July 1, 2014 and February 18, 2015 and the Affidavits of Jessica Johnson, Menno Streicher and Probst, Dr. Lawrence Gray, Carl R. Noble and Mark Killman. In the further alternative, an Order striking out portions of the Affidavits as set out in a chart submitted to this Court during the court of hearing.
- [2] The AGO seeks to strike the Application on the grounds that the moving party does not have either a private or public interest and/or standing to challenge the constitutional validity of the impugned provisions of *the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, S.O. 36*.
- [3] In the event the Court grants standing to the Applicant, the AGO seeks to strike the Applicant's Affidavits on the basis that they are irrelevant to validity of the impugned legislation and questions of law that are in issue before this Court.

**Issue of Standing:**

**Background:**

- [4] Jeffrey Bogaerts brings an Application under *Section 52(1)* of the *Constitution Act, 1982*, for a declaration that parts of the Ontario Society for the Prevention of Cruelty to Animals Act (OSPCA) are unconstitutional.

- [5] The AGO argues that the Applicant lacks personal standing to bring this Application. The Respondent argues that the Applicant has never been personally inspected, investigated or directly affected by the OSPCA. He has never been the subject of a search of his property by the Society's inspectors, nor has he been brought before the Animal Care Review Board or subjected to Provincial Offences prosecution for failure to comply with the Act.
- [6] Further, the AGO argues that the Applicant does not meet the test for public interest standing. He fails to satisfy any of the three factors that are to be weighed in the granting of such standing:
- (i) whether there is a serious justiciable issue raised;
  - (ii) whether the Applicant has a real stake or genuine interest in it; and
  - (iii) whether, in all the circumstances, the proposed Application is a reasonable and effective way to bring the issue before the Courts.

**The Applicant's standing to bring this application:**

**Analysis:**

- [7] For reasons that follow, I find that the Applicant lacks personal standing to bring this Application. However, I find that the test for public interest standing has been met and, accordingly, permit the Applicant bringing this Application.

**Private interest standing:**

- [8] I do not agree with the Applicant that the nature of his Application is identical to *Cochrane v. Ontario (Attorney General)* [2007] O.J. No. 1090. The fact the Applicant owns and cares for animals does not in and of itself give rise to standing, to challenge the constitutionality of the legislation.
- [9] I agree with the Applicant's argument that he need not first be subject to charges or even an investigation by the OSPCA to maintain standing. However, the legislative obligations set out in the Act do not make him "exceptionally prejudiced" in the same manner as Ms. Cochrane was as the pitbull owner. I concur that in some cases a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if she has no right of damages or other relief. However, this is not such a case.
- [10] The Applicant seeks a declaration that the Act is invalid and, as such, he must establish that he is personally directly affected by the impugned provisions. The British Columbia Court of Appeal found in *Kitmat (District) v. Alcan Inc.* (2006) B.C.A. 75 at para. 92:

*A simple claim to declaratory relief, in the absence of some adversely affected legal interest does not give the Court an overriding discretion to grant that relief, and to ignore the legal principles governing private interest standing.*



- [11] One must be aggrieved or directly affected by the impugned provisions. Watson, J. stated in *Larouche v. Court of Queens Bench of Alberta* (2015) ABQB 25 at para. 47:

*The substratum of principles shared by the doctrine of mootness and the doctrine of standing include the "natural reluctance on the part of the Courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in this subject matter of the litigation in conformity with the philosophy that it is for the Courts to decide actual controversies between parties, not academic or hypothetical questions". See Robinson v. Western Australian Museum (1977) 138 CLR 283 at 327.*

**Public interest standing:**

- [12] I find that the Applicant does satisfy the test set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violent Society* (2012) S.C.C. 45 at para. 37, as follows:

- (i) whether there is a serious justiciable issue raised;
- (ii) whether the Applicant has a real stake or genuine interest in it; and
- (iii) whether in all the circumstances the proposed Application is a reasonable and effective way to bring the issue before the Courts.

- [13] The grounds and legal basis for the Applicant's Application are properly set out in his Notice of Application and Notice of Constitutional Question. This is not a Motion for Summary Judgment. The Notice of Application and Constitutional Question both raise serious justiciable issues.

- [14] The AGO argues that the Application is aimed "at the wrong target and is seriously misplaced".

- [15] The Notice of Constitutional Question raises the broad issues of whether or not the OSPCA Act encroaches upon Federal Constitutional powers, i.e., whether the "pith and substance" of the legislation is criminal law, whether the definition of "distress" in *Section 1* of the *OSPCA Act* is unconstitutionally vague and whether provisions of the *OSPCA Act* confer "the powers of a police officer" upon officers of a private organization, with no public oversight, accountability or transparency.

- [16] Second, I conclude that the Applicant does have a real stake and/or a genuine interest in the constitutionality of the Act. I do not agree with the AGO's characterization that the Applicant has all of the hallmarks of a "busybody".

- [17] I adopt the comments of the *Supreme Court of Canada SCC in Canada (Attorney General) v. Downtown East Sex Workers United Against a Violent Society supra* at paragraph 28:

*These concerns about a multiplicity of suits and litigation by “busybodies” have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, “[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom”: “Standing in the Supreme Court — A Functional Analysis” (1973), 86 Harv. L. Rev. 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see, e.g., Thorson v. Attorney General of Canada, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, at p. 145.*

- [18] I conclude that the Applicant has a genuine interest. The Applicant works as a paralegal with a law firm that deals with this area of the law. He has further developed a genuine interest through volunteering in the community to assist with vulnerable people affected by the subject legislation and the Applicant is an animal owner. While his interest as an animal owner does not entitle him to the “private interest” standing, it is a factor to consider under this heading.
  
- [19] Finally, I conclude that, in all of the circumstances, the proposed Notice of Application is a reasonable and effective way to bring the issues before the Courts. The AGO argues that there are other reasonable and effective ways in which these issues can be before the Court. The Application Record contains the Affidavits of individuals who have been directly affected by the OSPCA including individuals who have been subject to proceedings before the Animal Care Review Board. The AGO argues that any one of the deponents of these Affidavits is “more directly affected” by the legislation than the Applicant.
  
- [20] I concur with the Applicant that, while it is theoretically conceivable to bring some of the issues featured in this Application before the Court by way of other proceedings, it is unreasonable to suggest that all of the issues that make up the Application would apply to any one proceeding before the Ontario Court of Justice or the Animal Care Review Board. If counsel, with the assistance of the Court, properly frames the arguments, the matter can be dealt with in an efficient manner.
  
- [21] The Court is always concerned that unmeritorious cases not use up scarce judicial resources. Given the lack of challenge to the constitutionality of the *Act* in the past, it is unlikely that allowing the Applicant standing on the basis of “public interest” will “open the floodgates”. In all of the circumstances, I conclude that it is proper to exercise the Court’s discretion to grant public interest standing.
  
- [22] Second, I turn to deal with the Applicant’s [ AGO’s] alternative argument that the evidence file in support should be struck.

- [23] The AGO argues in the alternative if the Court does not strike the Application on the basis of standing, then it should strike the Applicant's evidence in its entirety, impose a timetable for hearing of the constitutional challenge on the merits.
- [24] For the reasons that follow I strike all Affidavits except for the Applicant's initial Affidavit sworn July 31, 2014 with certain exceptions.

#### Reasons to Strike

- [25] Mr. Bogaerts agrees to strike some of the contents of the Affidavits filed in support of the Application if the Court deems it necessary or preferable to do so at this stage. The Applicant argues that the Affidavit information is necessary to give context and background to the constitutional issues raised. At paragraph 31 of his Factum, the Applicant states "*it should go without saying that it is not unusual for an Affidavit to contain information that is not necessarily directly relevant to the proceedings, but it is nevertheless helpful to produce a coherent narrative and context to the Affidavit*".
- [26] The Applicant filed numerous Affidavits alleging that inspectors, officials, employees and agents of the Ontario Society for the Prevention of Cruelty to Animals (the "Society") and members of the Animal Care Review Board have engaged in conduct that infringes or denies the Charter rights of non-parties.
- [27] I agree with the position of the AGO, the Affidavits of Jessica Johnson, Anne Probst, Dr. Lawrence E. Gray and Carl R. Noble are irrelevant to the issue of whether or not the *OSPCA Act* is unconstitutional.
- [28] The Supreme Court of Canada has repeatedly held that where a Charter challenger is complaining about the exercise of discretion by government officials, the proper target of the challenge is not the statutory provision granting the discretion itself, but to the specific exercise of discretion:

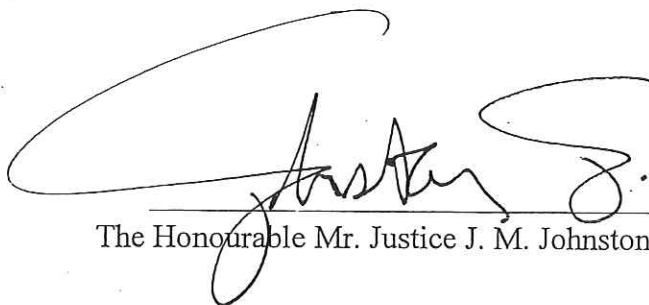
*Nor can improper conduct by the State actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement not to declare the statute unconstitutional: Little Sisters Book and Art Emporium v. Canada (Minister of Justice), (2000) S.C.C. 69 at para 133-35.*

*R v. Khawaja (2012) S.C.C. 69 at para 83.*

- [29] The Affidavits in question challenge specific officials purporting to act pursuant to the legislation. It is those actions and not the constitutional validity of the legislation that is raised in the various Affidavits filed in support of the Notice of Application.
- [30] Permitting the Affidavits into the evidence in this Application will unduly lengthen the proceedings and require the Respondent to respond to unnecessary allegations. Some of the allegations raised in the Affidavits could have and should have been argued in the appropriate forum at the appropriate time. This Court will not permit this Application

regarding the constitutional questions raised to devolve into a re-examination of past cases and allegations of impropriety by agents purporting to act under the legislation. Further, the Society is not a party to this Application. Many of the allegations, in fairness, would require the Society to be afforded an opportunity to file response.

- [31] I have concluded that there is a justiciable issue raised in the Notice of Application, however, it is not in relation to past actions of agents of the OSPCA.
- [32] I will permit the Applicant's original Affidavit sworn July 23, 2014 at Tab 3 to stand as amended by agreement at paragraph 36 of the Applicant's Factum. Paragraph 13 of the Affidavit is struck.
- [33] I permit the Affidavit of the Applicant to stand on the basis that it is of some use to the framing of the issues raised in the Notice of Application.
- [34] I permit the Affidavit of Jeffrey Bogaerts of February 18, 2015 on the same grounds, except for paragraph 4 and Exhibit "C" thereto. This evidence is irrelevant and not admissible.
- [35] I am seizing myself of case management of this file and direct that counsel for the parties contact the Trial Coordinator and arrange for a case management meeting to discuss the issues moving forward on scheduling including, as I understand, a further Motion by the Applicants for funding.
- [36] In the event that there is an issue regarding costs of this Motion, submissions may be made to me at the Perth Courthouse in writing limited to three pages, with a Bill of Costs within twenty-one days and reply fourteen days thereafter.



The Honourable Mr. Justice J. M. Johnston

Date: June 15, 2016

Court File No. 749/13

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**JEFFREY BOGAERTS**

Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**

Respondent

**AMENDED AMENDED NOTICE OF APPLICATION**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come for a hearing on a date and at a time to be set by the Registrar of the Superior Court of Justice at Perth Courthouse, 43 Drummond Street east, Perth, Ontario, K7H 1G1.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

**IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

Date: October 18, 2013

Issued by: \_\_\_\_\_  
Local Registrar

Address of court office:

**Perth Courthouse**  
43 Drummond Street East  
Perth, Ontario, K7H 1G1

**TO:**        **The Attorney General of Ontario**  
Public Law Division  
Constitutional Law Branch  
7th Floor, 720 Bay Street  
Toronto, Ontario, M5G 2K1

## APPLICATION

## 1. The applicant makes application for:

- a. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"] that sections ~~1~~, 11, ~~11.2(1), 11.2(2)~~, 12, and 12.1, ~~13 and 14~~ of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 [the "*OSPCA Act*"], as amended, violates sections 7 and /or 8 of the *Charter* and therefore are of no force or effect;
- b. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Charter* that sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act*, as amended, violates sections 7 and /or 8 of the *Charter* and therefore are of no force or effect;
- c. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, and section 52(1) of the *Constitution Act, 1982*, that the *OSPCA Act*, and especially sections ~~11.1~~, 11.2 and 18.1(1)(c) of the *Act*, as amended, violate sections 91 and 92 of the *Constitution Act, 1982*, and therefore are of no force or effect; and
- d. Such further and other relief as counsel may advise and this Honourable Court may permit

## 2. The grounds for the application are:

- a. Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*;
- b. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;
- c. ~~The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally vague in that it does not provide sufficient guidance for legal debate;~~

- d. ~~The definition of "distress" in section 1 of the *OSCPA Act* does not provide fair notice to the residents of Ontario respecting minimally acceptable care and treatment of animals in Ontario;~~
- e. ~~The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those enforcing the law to prevent arbitrary exercise of their discretion;~~
- f. ~~The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those issuing warrants or orders, as authorized by to the *Act*, to prevent arbitrary exercise of their discretion;~~
- g. ~~The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally overbroad in that it may capture acceptable and /or normal care and treatment of animals in Ontario;~~
- h. ~~The definition of "distress" in section 1 of the *OSPCA Act* violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation and does not impair the rights of Ontario residents as little as possible;~~
- i. ~~To the extent that sections 1, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *OSPCA Act* rely on and incorporate the definition of "distress" from section 1 of the *Act*, these sections are unconstitutionally vague and overbroad and cannot be saved by section 1 of the *Charter*;~~
- j. ~~To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it is unconstitutionally vague and overbroad and, in turn, violates sections 7 and 8 of the *Charter* because it fails to adequately specify an appropriate standard for the issuance of warrants;~~
- k. ~~To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it cannot be saved by section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation, the means chosen are not proportional to the limits put on peoples' rights, and it does not impair the rights of Ontario residents as little as possible;~~



- l. Sections 11.4, 11.4.1, 12(6), 13, and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* grant powers of search and seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by section 7 and /or 8 of the *Charter*;
- m. To the extent that section 11.4 and 11.4.1 of the *OSPCA Act* confers upon OSPCA Officers the power to search private property and demand production of private property located thereon at the complete discretion of the Officer, including property where a dwelling unit may be located, either alone or accompanied by any number of other persons as he or she considers advisable, and irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
- n. To the extent that section 13(6) of the *OSPCA Act* confers upon OSPCA Officers the power to enter private property at the complete discretion of the Officer, including a dwelling unit, at any hour of the day or night into the future forever, either alone or accompanied by any number of other persons as he or she considers advisable, at any time and irrespective of any situation of urgency, it is not reasonable and violates section 8 of the *Charter*;
- o. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer, and irrespective of taking any reasonable steps to confirm with a veterinarian that an animal is in distress, and irrespective of whether there is any situation of urgency which makes the obtaining of a search warrant impracticable, it is not reasonable and violates section 8 of the *Charter*;
- p. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, and an appeal of an Order issued under section 13(1) expires after only 5 business days, and while the entry powers prescribed under 13(6) go on forever, it is not reasonable and violates section 8 of the *Charter*;

- q. To the extent that section 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* confers upon an OSPCA Officer the power to seize private property, irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
- r. Warrantless search and seizure powers provided by sections 11.4, 11.4.1, 12(6), 13 and 14(1) (except subsection 14(1)(a)) of the *OSPCA Act* cannot be saved by section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
- s. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" and sections 11.4, 11.4.1, 12, 12.1, 13 and 14 of the OSPCA Act confer search and seizure powers upon Officers of a private organization, with no public oversight, accountability or transparency, it does not accord with principles of fundamental justice and, therefore, breaches section 7 and /or 8 of the *Charter*;
- t. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" and sections 11.4, 11.4.1, 12, 12.1, 13 and 14 of the OSPCA Act confer search and seizure powers upon OSPCA Officers, without statutorily prescribed restraints afforded to police officers in Ontario, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 and /or 8 of the *Charter*;
- u. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" and sections 11.4, 11.4.1, 12, 12.1, 13 and 14 of the OSPCA Act confer search and seizure powers upon OSPCA Officers, and the OSPCA and /or its Officers are not subject to:
  - i. *Police Services Act*, R.S.O. 1990, c. P.15 and regulations passed thereunder;
  - ii. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 and regulations passed thereunder;
  - iii. *Ombudsman Act*, R.S.O. 1990, c. O.6 and regulations passed thereunder;
 it does not accord with the principles of fundamental justice and, therefore, breaches section 7 and /or 8 of the *Charter*;

- v. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" and sections 11.4, 11.4.1, 12, 12.1, 13 and 14 of the *OSPCA Act* confer search and seizure powers upon Officers of a private organization, an organization which is also trusted to raise its own revenues to fund its investigations and salaries of the same Officers, and which raises said revenues by selling seized animals and other products of its investigations, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 and /or 8 of the *Charter*;
- w. Conferral of police and search and seizure powers upon Officers of a private organization, as prescribed by sections 11, 11.4, 11.4.1, 12, 12.1, 13 and 14 of the *OSPCA Act*, violates section 7 and /or 8 of the *Charter* and cannot be saved under section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
- x. The pith and substance of the *OSPCA Act*, and especially sections ~~11.1~~, 11.2 and 18.1(1)(c) of the *Act*, is of a moral issue related to criminal law, and constitutes an attempt by the province of Ontario to legislate in the area of criminal law;
- y. To the extent that the *OSPCA Act* intrudes into criminal law, an area which is the exclusive jurisdiction of the Parliament of Canada, the *Act* is *ultra vires* the Province of Ontario for violating sections 91 and 92 of the *Constitution Act, 1982*;
- z. The *OSPCA Act*, and especially sections ~~11.1~~, 11.2 and 18.1(1)(c) of the *Act*, exposes Ontario residents to criminal prosecution while bypassing the protection provided by criminal law and procedure;
- aa. Sections ~~11.1~~, 11.2 and 18.1(1)(c) of the *OSPCA Act* effectively duplicates the "Cruelty to Animals" section of the *Criminal Code*, namely sections 445.1 to 447.1, and said overlap supports an inference that the *OSPCA Act* serves a criminal law purpose;
- bb. The severity of penalties prescribed by section 18.1 of the *OSPCA Act* further characterizes the *Act* as criminal law; and

cc. Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. The following documentary evidence will be used at the hearing of the application:
  - a. Affidavits of the Applicant, Jeffrey Bogaerts, to be sworn, and the exhibits annexed thereto; and
  - ~~b. The Affidavit of Dr. Lawrence Gray, to be sworn, and the exhibits annexed thereto;~~
  - ~~c. The Affidavit of Carl Noble, to be sworn, and the exhibits annexed thereto;~~
  - ~~d. The Affidavit of Viola Streicher, to be sworn, and the exhibits annexed thereto;~~
  - ~~e. The Affidavit of Jessica Johnson, to be sworn, and the exhibits annexed thereto;~~
  - ~~f. The Affidavit of Anne Probst, to be sworn, and the exhibits annexed thereto;~~
  - ~~g. The Affidavit of Cynthia Lajoie, to be sworn, and the exhibits annexed thereto;~~  
and
  - h. Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

DATED: October 18, 2013  
AMENDED: January 23, 2017  
AMENDED: February 13, 2018

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 Lawyer for the Applicant

**JEFFREY BOGAERTS**  
Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**  
Respondent

Court File No. 749/13

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT  
PERTH, ONTARIO**

**AMENDED AMENDED NOTICE OF  
APPLICATION**

**KURTIS R. ANDREWS**

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Lawyer for the Applicant

Court File No. 749/13

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**JEFFREY BOGAERTS**

Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**

Respondent

**NOTICE OF CONSTITUTIONAL QUESTION**

The Applicant intends to question the constitutional validity of sections 1, 11, 11.1, 11.2, 11.4, 12, 12.1, 13, 14 and 18.1 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, and claim a remedy regarding same under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* and section 52(1) of the *Constitution Act, 1982*.

The question is to be argued on a date and at a time to be set by the Registrar of the Superior Court of Justice at the Perth Courthouse, 43 Drummond Street east, Perth, Ontario, K7H 1G1.

The following are the material facts giving rise to the constitutional question:

1. A copy of the Notice of Application dated October 18, 2013 is attached and sets out the relevant facts and evidentiary basis of the Application.

The following is the legal basis for the constitutional question:

1. Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*;
2. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;

3. The definition of "distress" in section 1 of the *OSCPA Act* is unconstitutionally vague in that it does not provide sufficient guidance for legal debate;
4. The definition of "distress" in section 1 of the *OSCPA Act* does not provide fair notice to the residents of Ontario respecting minimally acceptable care and treatment of animals in Ontario.
5. The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those enforcing the law to prevent arbitrary exercise of their discretion;
6. The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those issuing warrants or orders, as authorized by to the *Act*, to prevent arbitrary exercise of their discretion;
7. The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally overbroad in that it may capture acceptable and /or normal care and treatment of animals in Ontario;
8. The definition of "distress" in section 1 of the *OSPCA Act* violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation and does not impair the rights of Ontario residents as little as possible;
9. To the extent that sections 1, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *OSPCA Act* rely on and incorporate the definition of "distress" from section 1 of the *Act*, these sections are unconstitutionally vague and overbroad and cannot be saved by section 1 of the *Charter*;
10. To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it is unconstitutionally vague and overbroad and, in turn, violates sections 7 and 8 of the *Charter* because it fails to adequately specify an appropriate standard for the issuance of warrants.
11. To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it cannot be saved by section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation, the means

chosen are not proportional to the limits put on peoples' rights, and it does not impair the rights of Ontario residents as little as possible;

12. Sections 11.4, 13 and 14 of the *OSPCA Act* grant powers of search and seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by section 8 of the *Charter*;
13. To the extent that section 11.4 of the *OSPCA Act* confers upon OSPCA Officers the power to search private property at the complete discretion of the Officer, including property where a dwelling unit may be located, either alone or accompanied by any number of other persons as he or she considers advisable, and irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
14. To the extent that section 13(6) of the *OSPCA Act* confers upon OSPCA Officers the power to enter private property at the complete discretion of the Officer, including a dwelling unit, at any hour of the day or night into the future forever, either alone or accompanied by any number of other persons as he or she considers advisable, at any time and irrespective of any situation of urgency, it is not reasonable and violates section 8 of the *Charter*;
15. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer, and irrespective of taking any reasonable steps to confirm with a veterinarian that an animal is in distress, and irrespective of whether there is any situation of urgency which makes the obtaining of a search warrant impracticable, it is not reasonable and violates section 8 of the *Charter*;
16. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, and an appeal of an Order issued under section 13(1) expires after only 5 business days, and while the entry powers prescribed under 13(6) go on forever, it is not reasonable and violates section 8 of the *Charter*;



17. To the extent that section 14 of the *OSPCA Act* confers upon an OSPCA Officer the power to seize private property, irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
18. Warrantless search and seizure powers provided by sections 11.4, 13 and 14 of the *OSPCA Act* cannot be saved by section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
19. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, with no public oversight, accountability or transparency, it does not accord with principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
20. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, without statutorily prescribed restraints afforded to police officers in Ontario, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
21. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, and the OSPCA and /or its Officers are not subject to:
  - a. *Police Services Act*, R.S.O. 1990, c. P.15 and regulations passed thereunder;
  - b. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 and regulations passed thereunder;
  - c. *Ombudsman Act*, R.S.O. 1990, c. O.6 and regulations passed thereunder;
 it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
22. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, an organization which is also trusted to raise its own revenues to fund its investigations and salaries of the same Officers, and which raises said revenues by selling seized animals and other products of its investigations, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;

23. Conferral of police powers upon Officers of a private organization, as prescribed by section 11 of the *OSPCA Act*, violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
24. The pith and substance of the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, is of a moral issue related to criminal law, and constitutes an attempt by the province of Ontario to legislate in the area of criminal law;
25. To the extent that the *OSPCA Act* intrudes into criminal law, an area which is the exclusive jurisdiction of the Parliament of Canada, the *Act* is *ultra vires* the Province of Ontario for violating sections 91 and 92 of the *Constitution Act, 1982*;
26. The *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, exposes Ontario residents to criminal prosecution while bypassing the protection provided by criminal law and procedure;
27. Sections 11.1, 11.2 and 18.1 of the *OSPCA Act* effectively duplicates the "Cruelty to Animals" section of the *Criminal Code*, namely sections 445.1 to 447.1, and said overlap supports an inference that the *OSPCA Act* serves a criminal law purpose;
28. The severity of penalties prescribed by section 18.1 of the *OSPCA Act* further characterizes the *Act* as criminal law; and
29. Such further and other grounds as counsel may advise and this Honourable Court may permit.

DATED: October 21, 2013

**GREEN & ASSOCIATES**

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Ottawa, Ontario K1A 0H8  
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**JEFFREY BOGAERTS**  
Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**  
Respondent

Court File No. 749/13

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT**  
**PERTH, ONTARIO**

**NOTICE OF CONSTITUTIONAL QUESTION**

**GREEN & ASSOCIATES LAW OFFICES**

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Lawyers for the Applicant

Court File No. C66542

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**ATTORNEY GENERAL OF ONTARIO**

Respondent (Appellant in appeal)

-and-

**JEFFREY BOGAERTS**

Applicant (Respondent in appeal)

**NOTICE OF CONSTITUTIONAL QUESTION**

The Applicant (Respondent in appeal) intends to question the constitutional validity of sections 11, 12, 12.1, 13(6), 14(1)(b) and 14(1)(c) of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, and claim a remedy regarding same under section 52(1) of the *Constitution Act, 1982*.

The question is to be argued on a date and at a time to be set by the Registrar of the Court of Appeal for Ontario at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

The following are the material facts giving rise to the constitutional question:

1. A copy of the Notice of Cross-appeal dated February 15, 2019 is attached and sets out the material facts giving rise to the constitutional question.

The following is the legal basis for the constitutional question:

1. A copy of the Notice of Cross-appeal dated February 15, 2019 is attached and, under “Ground for this Cross-appeal”, sets out the legal basis for the constitutional question.

DATED: February 15, 2019

**KURTIS R. ANDREWS**

Lawyer

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Lawyer for the Respondent in Appeal

Court File No. 749/13

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**JEFFREY BOGAERTS**

Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO**

Respondent

**AFFIDAVIT OF JEFFREY BOGAERTS**

(sworn July 31, 2014)

I, **JEFFREY BOGAERTS**, of Lanark County, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the applicant of the above application, and as such have direct knowledge of the matters herein deposed. Unless I indicate to the contrary, these matters are within my own knowledge and are true. Where I have indicated that I have obtained facts from other sources, I have identified the source and I believe those facts to be true.
2. For most of my life, including presently, I have owned and cared for animals in Ontario. While I have never been subjected to an Ontario Society for the Prevention of Cruelty to Animals [OSPCA] investigation or inquiry, the fact that I own and care for animals makes me subject to the *OSPCA Act*.
3. ~~I have brought this application in the public's interest. I have read about various incidents involving the OSPCA and have personally attended several court proceedings involving the OSPCA, and it is my belief that various provisions of the OSPCA Act must be unconstitutional. I do not stand to gain anything from the outcome of this application, except satisfaction that the questions being asked with respect to this application and the constitutionality of the OSPCA Act have been determined by the Court.~~

4. Through research done by me and /or my lawyer, I have obtained the following documents which I believe may be relevant to these proceedings.
5. The OSPCA is a private provincial charity, with police powers granted through section 11 of the OSPCA Act. The OSPCA has a self described mission to "facilitate and provide for province-wide leadership on matters relating to the prevention of cruelty to animals and the promotion of animal welfare" and self described goals which include "to be a strong, unified and collaborative organization dedicated to the cultivation of a compassionate Ontario for all animals". A copy of the OSPCA "Backgrounder" and "Fact Sheet" from the OSPCA's website is attached as **Exhibit "A"** to this my affidavit. ~~While such a mission and goals may be noble in nature, I also believe that it demonstrates ideological activism on behalf of the OSPCA.~~
6. The OSPCA has expressly set out goals it wishes to achieve with respect to animal welfare. Such goals have been determined privately and internally, and are formally set out at section 1 of the OSPCA's Agent and Inspector Training Manual. A copy of excerpts from the OSPCA Training and Reference Manual: Section 1, Animal Welfare Position Statements are attached as **Exhibit "B"** to this my affidavit. ~~I believe that such goals are extreme and indicative of an activist agenda of the OSPCA. Such goals are similar to those of other activist groups, such as People for the Ethical Treatment of Animals [PETA]. For example, a copy of PETA's Basic Care Standards for Dairy Farmed Cows is attached as **Exhibit "C"** to this my affidavit.~~
7. In addition to privately and internally setting out policies to follow and goals to strive for while administering the law, the OSPCA has also negotiated agreements with other private organizations to determine how it will administer the law with respect to such

organizations' members. Various farm organizations, including Dairy Farmers of Ontario, Chicken Farmers of Ontario, Ontario Pork and Ontario Sheep Marketing Agency, have entered into "Memorandums of Understanding" [MOU] with the OSPCA, including an agreement on investigative practices. ~~Such MOUs effectively result in some individuals being treated differently under the law by the OSPCA.~~ I have been advised by my lawyer, Kurtis Andrews, and verily believe it to be true, that the OSPCA and the above livestock groups refuse to release a copy of the respective MOUs. A copy of media releases associated with these MOUs are attached as **Exhibit "D"** to this my affidavit.

8. The OSPCA has also implemented a zoos and aquariums registry which requires zoos, aquariums and other animal exhibit operators to register and disclose private information to the OSPCA. The registry is not legally prescribed, and is described as "voluntary", but the OSPCA has promised that "[zoos and aquariums] that don't join will be subject to more scrutiny". ~~In other words, facilities that do not register and disclose private information (which they are not legally obligated to disclose) will be treated differently under the law.~~ A copy of a newspaper report quoting the OSPCA with respect to the zoos and aquariums registry is attached as **Exhibit "E"** to this my affidavit. Such policies are especially concerning given the OSPCA's open deploiment of animal exhibition, which is not prohibited under the law. A copy of the OSPCA's winter 2006 magazine, *Animals' Voice*, is attached as **Exhibit "F"** to this my affidavit.

9. ~~Unlike every other agency in Ontario with police powers, the OSPCA is a private organization with no government oversight.~~ The OSPCA's by-laws set out the corporate structure and voting procedures. Among the voting rules set out in the bylaws, the bylaws set out provisions which give more power to members (branch affiliates) that raise



greater revenues. Such revenues include proceeds from seized animals and donations inspired by promoting investigations and charges laid against people. A copy of Ontario Society for the Prevention of Cruelty to Animals: By-law Number Nine is attached as Exhibit "G" to this my affidavit. A copy of OSPCA Annual Reports are attached as Exhibit "H" to this my affidavit.

10. ~~To the best of my knowledge, the OSPCA is the only private organization with police powers in Ontario. As a private organization, the OSPCA is excluded from provincial oversight and accountability legislation. Most notably:~~
  - a. ~~Pursuant to the *Police Services Act*, the OSPCA does not fall under the definition of a "police force", and OSPCA agents and inspectors do not fall under the definition of "police officer". This means that complaints about the OSPCA and its officers cannot be brought to Ontario's Independent Police Review Director pursuant to section 5 of the *Police Services Act*;~~
  - b. ~~Pursuant to the *Ombudsman Act*, the OSPCA does not fall under the definition of a "governmental organization", which means that complaints about the OSPCA and its officers cannot be brought to Ontario's Ombudsman pursuant to the *Ombudsman Act*. The Ombudsman has recognized the problem with delegating legislative powers to non-governmental agencies with no or inadequate oversight. A copy of 2011-2012 Ombudsman Annual Report is attached as Exhibit "I" to this my affidavit. A copy of 2012-2013 Ombudsman Annual Report is attached as Exhibit "J" to this my affidavit; and~~
  - c. ~~Pursuant to the *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*, the OSPCA does not fall under the definition of an "institution", which means that information about the OSPCA and policies of the OSPCA, as well as information being kept by the OSPCA about people subjected to investigations or other members of the public, cannot be accessed pursuant to the *Freedom of Information and Protection of Privacy Act* or *Municipal Freedom of Information and Protection of Privacy Act*. A copy of a document titled "Making an Access Request to a Police Service" is attached as Exhibit "K" to this my affidavit;~~
11. The OSPCA is on record confirming that proceeds from seized animals and revenues associated with recovering costs associated with seized animals are entered into the OSPCA general revenue accounts. Such accounts also serve to pay the salaries of

OSPCA Agents and Inspectors, meaning that OSPCA officers' salaries are directly linked to the financial products of their investigations. An excerpt from the cross-examination of OSPCA Chief Inspector Connie Mallory, on record as part of Court File No. SR11-992, is attached as **Exhibit "L"** to this my affidavit.

12. In recent years, the OSPCA has been suffering from increased financial deficits. ~~I believe that such a situation with a police agency, with no government financial backing, creates a dangerous situation where decisions of the OSPCA through the course of their investigations may be prone to financial influence.~~ A copy of OSPCA Audited Financial Statements are attached as **Exhibit "M"** to this my affidavit.

13. ~~The OSPCA has expressly stated that it considers the expectations of donors when it enacts policy respecting its approach to enforcing animal welfare laws. More specifically, the OSPCA has recognized that its "tough" approach to law enforcement is expected from its donors who ultimately pay for agent and inspector's salaries and resources. A copy of the OSPCA's summer 2006 magazine, *Animals' Voice*, is attached as **Exhibit "N"** to this my affidavit.~~

14. The OSPCA provides both shelter services and law enforcement. The OSPCA Act provides seizure powers and statutory authority to obtain ownership of animals through its law enforcement powers. The OSPCA also sells animals and uses stories associated with "rescued" animals to promote and inspire donations associated with its shelter services. ~~I believe that these two components of the OSPCA are in an inherent and ongoing conflict of interest with each other, and it inevitably leads situations where seizures of animals may be influenced by financial interests of the OSPCA.~~ A copy of

OSPCA press releases from the OSPCA's website are attached as **Exhibit "O"** to this my affidavit.

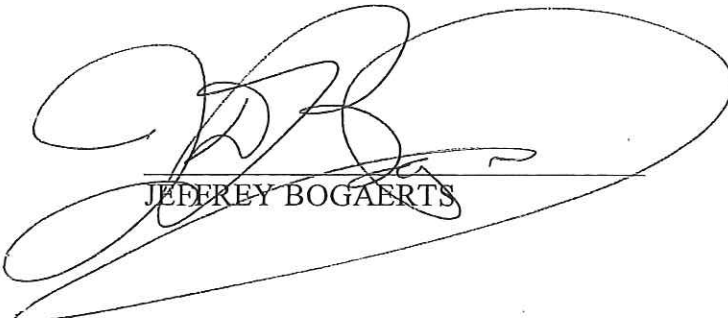
15. On March 1, 2009, amendments to the OSPCA Act came into force. The amendments included, for the first time, offence provisions prohibiting the causing or permitting animals to be in distress, and failing to provide prescribed standards of care. ~~I believe that these offence provisions are, in pith and substance, criminal offences.~~ These provisions interdict conduct in the interest of public morals. Even the OSPCA views these provisions in this way, describing these provisions as dealing with "animal abuse" and "animal cruelty". ~~By enacting these provisions through provincial law, such sections of the Act deny individuals the procedural protections of the criminal law, while convictions under these provisions nevertheless impart the stigma of a criminal offence.~~ A copy of OSPCA press releases from the OSPCA's website, describing such offences in this way, are attached as **Exhibit "P"** to this my affidavit.

16. I make this affidavit in support of the within application and for no other or improper purpose.

SWORN before me  
at the City of Ottawa,  
in the Province of Ontario,  
on this 31<sup>st</sup> day of July, 2014.

  
\_\_\_\_\_  
A commissioner etc.

)  
)  
)  
)

  
JEFFREY BOGAERTS

Examination No. 17-1323

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

Respondent

\*\*\*\*\*

CROSS-EXAMINATION OF JEFFREY BOGAERTS ON  
AFFIDAVITS DATED JULY 31, 2014 and FEBRUARY 18, 2015  
pursuant to an appointment made on consent of the  
parties to be reported by Catana Reporting Services,  
on August 30, 2017 commencing at the hour of 12:55  
in the afternoon.

\*\*\*\*\*

APPEARANCES:

Kurtis R. Andrews

for the Applicant

Don Pyper

for the Respondent

This Examination was taken down by sound recording by  
Catana Reporting Services Ltd.

**COURT COPY**

CATANA REPORTING SERVICES,  
Tel: (613) 231-4664

800-170 Laurier Ave. W., Ottawa, ON K1P 9V5  
1-800-893-6272 Fax: (613) 231-4605

2

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NAME OF WITNESS: JEFFREY BOGAERTS

CROSS-EXAMINATION BY MR. PYPER:

NUMBER OF PAGES: 40

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

\*O\* ..... 17, 39

NO EXHIBITS

DATE TRANSCRIPT ORDERED: AUGUST 30, 2017

DATE TRANSCRIPT COMPLETED: SEPTEMBER 8, 2017

1

JEFFREY BOGAERTS, SWORN:

CROSS-EXAMINATION BY MR. PYPER:

1. Q. Good afternoon, Mr. Bogaerts.

A. Good afternoon.

2. Q. Just for the Record could I have your name  
and spelling for the Record?

A. First name Jeff J-E-F-F, last name Bogaerts  
B-O-G-A-E-R-T-S, middle initial D. for David.

3. Q. And I understand you are here to answer  
questions in respect of two Affidavits sworn in this  
proceeding, the first July 31<sup>st</sup>, 2014 ---

A. Yes.

4. Q. --- and the second is February 18<sup>th</sup>, 2015?

A. Yes.

5. Q. And are there any corrections you'd like to  
make to the Affidavits?

A. Not at this time, no.

6. Q. No changes you'd like to make?

A. No.

7. Q. Okay. I understand you are a paralegal?

A. That is correct.

8. Q. You're still a paralegal, correct?

A. Correct.

9. Q. And what do you do as part of your  
professional responsibilities?

1 A. I do provincial offences, criminal summary  
2 convictions, and small claims court.

3 10. Q. Okay. And who is your current employer?

4 A. I am self-employed.

5 11. Q. You're self-employed. So you were never at  
6 any time employed by your counsel in this proceeding Mr.  
7 Andrews?

8 A. No, I was not.

9 12. Q. Okay. Do you have clients who interact with  
10 the OSPCA, the Ontario Society for the Prevention of  
11 Cruelty to Animals?

12 A. I do not have clients now, but I did have  
13 clients when I worked for a law firm when I first  
14 started.

15 13. Q. I see. When, can you give us a period of  
16 time?

17 A. I've been licensed since 2015 and I was  
18 working for Green and Associates law firm beginning in  
19 2014 up until September of last year. And during that  
20 time period I assisted Mr. Green with some OSPCA issues.

21 14. Q. Okay. Sorry, just help me with those time  
22 lines, just trying to get context. You said you got  
23 certified in 2015?

24 A. I wrote my exam and received my license from  
25 The Law Society in May of 2015.

1 15. Q. Oh, okay.

2 A. And while I was going to school I was  
3 working part-time for Mr. Green, Green and Associates,  
4 which was in this building as a matter of fact.

5 16. Q. I see.

6 A. And then once I finished my schooling I  
7 continued on as an apprentice so to speak up until I  
8 received my license in 2015 at which time I became a  
9 full-time paralegal and I worked for his office up until  
10 September of 2016.

11 17. Q. Okay. So at the time you swore your first  
12 Affidavit which is July 31<sup>st</sup>, 2014 you weren't a licensed  
13 paralegal at that time?

14 A. No, no, not until May of 2015.

15 18. Q. But you say you were working part-time?

16 A. Yes, I did my entire field placement with  
17 Mr. Green and when I finished my schooling there was a  
18 timing issue with respect to writing the exam.

19 So I finished my schooling, passed all my exams  
20 at the school, made application to The Law Society but  
21 by the time I wrote or had scheduled to write the exam  
22 it was into 2015.

23 19. Q. Okay. And I understand you said that when  
24 you were working for Mr. Green that he had a number of  
25 clients who were the subject of OSPCA investigations?



1 A. That's correct, yes.

2 20. Q. Charges?

3 A. Yes.

4 21. Q. Compliance Orders?

5 A. Yes.

6 22. Q. And so on. So would you say that  
7 professionally your dealings with the OSPCA have always  
8 been in opposition to OSPCA enforcement?

9 A. I would not say entirely so. I was on the  
10 Board of Directors for a period of time for Lanark  
11 Animal Welfare Society and in that perspective my job  
12 was to promote animal welfare and to interact with the  
13 OSPCA, not myself personally but as a member of the  
14 Board of Directors.

15 23. Q. Okay. Is that an affiliate of the OSPCA,  
16 the Lanark ---

17 A. I believe they are. I don't know if they  
18 still are, I'm not on the Board of Directors any longer.

19 MR. ANDREWS: I can clarify if you wish,  
20 Counsel.

21 MR. PYPER: Sure.

22 MR. ANDREWS: The Lanark Animal Welfare Society  
23 used to be an affiliate of the OSPCA and then they  
24 withdrew their affiliation. It would depend on Mr.  
25 Bogaerts timing though whether he was on the Board at

1 the time that they were still an affiliate.

2 MR. PYPER: Not a problem, just trying to get  
3 some context.

4 BY MR. PYPER:

5 24. Q. I understand you own some animal?

6 A. Correct. I've owned animals pretty much all  
7 my life; dogs, cats, birds, fish, birds that have fallen  
8 out of the trees, you know, things like that.

9 25. Q. Okay. So what I'm hearing from you is pets,  
10 is that right?

11 A. Personally, on a personal basis, yes, it  
12 would be pets.

13 26. Q. Okay. They're not agricultural animals?

14 A. No, they're not agricultural animals. No,  
15 I've never been in an agricultural position or owned a  
16 farm or have been in any way -- now, not to say that I  
17 haven't gone to farms and helped friends over the past  
18 decades but I've not owned or been commercially involved  
19 in agriculture involving animals.

20 27. Q. Right, okay. And I think you've actually  
21 mentioned this in one of your Affidavits but my  
22 understanding is you've never personally been searched  
23 by the OSPCA?

24 A. No, I have not.

25 28. Q. Or been the subject of a Compliance Order or

1 had animals seized?

2 A. No, I have not.

3 29. Q. Nothing, okay. So I'm going to submit to  
4 you that the Ontario Society for the Prevention of  
5 Cruelty to Animals Act doesn't really have application  
6 to you in your personal life?

7 A. I would have to tend to disagree with you on  
8 that point. Any piece of legislation whether it's  
9 Federal, Provincial, or in my local municipality that  
10 has or potentially has a direct effect upon me is  
11 something that I would be either interested in or I  
12 could be affected the same way as if I was driving down  
13 the 401 with a driver's license at any time I could be  
14 stopped by an OPP officer and the vehicle could be  
15 reviewed or my license could be reviewed, my insurance  
16 could be reviewed, and therefore I'm subject to that  
17 legislation.

18 The OSPCA could at any time on a complaint from  
19 the local neighbor show up on my doorstep. So as long  
20 as the legislation is in place in my opinion I can be  
21 subject to it.

22 30. Q. That's fine. I'm going to refer you to  
23 paragraph 9 of your first Affidavit. And I don't  
24 actually anticipate asking any questions about the  
25 second Affidavit, just to forecast that, so I think

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9 THIS IS TO CERTIFY THAT the foregoing is a  
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**Court of Appeal File No.:** C66542  
**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)

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**CERTIFICATE OF THE APPELLANT,  
THE ATTORNEY GENERAL OF ONTARIO**

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1. An Order under subrule 61.09(2) is not required.
2. The Appellant, the Attorney General of Ontario, estimates that 90 minutes will be required for its oral argument.

March 13, 2019

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Counsel for the Appellant in Appeal

**Court of Appeal File No.:** C66542

**Superior Court File No.:** 749/13

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**THE ATTORNEY GENERAL OF ONTARIO**

Respondent (Appellant in appeal)

and

**JEFFREY BOGAERTS**

Applicant (Respondent in appeal)

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**CERTIFICATE OF COMPLETENESS**

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I, Daniel Huffaker, lawyer for the appellant the Attorney General of Ontario, certify that the appeal book and compendium in this appeal is complete and legible.

March 12, 2019



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RCP-E 61H (July 1, 2007)

Jeffrey Bogaerts

- and -

Attorney General of Ontario

**Applicant (Respondents in Appeal)****Respondents (Appellants in Appeal)****Proceeding commenced at Perth****COURT OF APPEAL FOR ONTARIO**

**APPEAL BOOK AND COMPENDIUM OF THE  
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