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)

FACTUM OF THE APPELLANT, THE ATTORNEY GENERAL OF ONTARIO

March 13, 2019

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Table of Contents

Part I – The Appellant and the Decision Appealed From

1. This is an appeal by the Attorney General of Ontario ("Ontario") from a decision of the Superior Court of Justice holding that provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act* ("the *Act*") infringe s. 7 of the *Charter*. Ontario makes three main points in this appeal:

   (1) The application judge erred in finding that the challenged provisions engage the liberty interest under s. 7 of the Charter. The provisions do not create any offence and their connection to the possibility of imprisonment for any offence in the Act is too remote to engage s. 7.

   (2) The application judge erred in finding that the challenged provisions engage the security of the person interest under s. 7 of the *Charter*. The application judge conflated security of the person with the right to be secure against unreasonable search or seizure. In any event, the application judge did not make any finding that the provisions authorize an unreasonable search or seizure.

   (3) The application judge erred in creating a novel, imprecise, and unworkable principle of fundamental justice that law enforcement bodies must be subject to "reasonable standards of transparency and accountability".

2. The main focus of the application was whether ss. 11, 12, and 12.1 of the Act violate s. 7 of the *Charter*. The application judge dismissed Mr. Bogaerts' federalism challenge to the *vires* of the Act's provisions concerning causing distress or permitting distress to be caused to an animal as well as Mr. Bogaerts' challenge under s. 8 of the *Charter* to various other provisions in the Act.

3. The provisions invalidated by the application judge give police powers and specific inspection powers to OSPCA agents and inspectors.

   (a) **Section 11(1)** provides that OSPCA agents and inspectors have and may exercise any of the powers of a police officer for the purposes of enforcing the Act and any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals.

(b) **Section 12** allows OSPCA agents and inspectors to search a building or place to determine if there is an animal in distress. This search is on the authority of a warrant, granted on information under oath that the agent or inspector has reasonable grounds to believe that an animal is in distress in the building or place.

(c) **Section 12.1** allows OSPCA agents, inspectors, and veterinarians who are lawfully present in a place to take a sample, a carcass, or a sample of a carcass that is in the place, for the purpose for which they are present in the place.

Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990 c O.36, ss 11–12.1 [Act].

4. The application judge found that these provisions engaged the liberty interest protected by s. 7 of the *Charter* because other provisions of the Act create offences that are punishable by imprisonment. The application judge also found that the provisions "clearly engage" security of the person because they require warrants.

5. The application judge rejected Mr. Bogaerts' argument regarding arbitrariness. However, the application judge recognized a novel principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency and accountability". This was a modification of the principle initially proposed by the intervenor, Animal Justice Canada.

Bogaerts v Attorney General of Ontario, 2019 ONSC 41 at paras 76–79, 83 [*Bogaerts*].

6. The application judge held that the OSPCA did not comply with the newly recognized principle of fundamental justice that law enforcement bodies must be subject to reasonable standards of transparency and accountability.

Bogaerts, *supra* at paras 84–86.

Part II – Nature of the Case and Matters in Issue

7. The OSPCA is a specialized body that enforces animal welfare and animal cruelty legislation, including the animal cruelty provisions in the *Criminal Code*. The Act makes OSPCA agents and inspectors peace officers for that purpose. Like many other specialized law enforcement bodies, the OSPCA has developed particular expertise in its subject area as a result of its long experience enforcing these laws. If accepted, the reasons below would jeopardize the legislature's ability to create specialized law enforcement bodies such as the OSPCA that are responsive to the specific laws that they enforce and the context for those laws.

8. Contrary to the applicant's arguments and the application judge's reasons, the corporate form of the OSPCA does not insulate it from review. It is a body created by statute and when it exercises statutory powers, its conduct is subject to scrutiny, including *Charter* scrutiny, before the Divisional Court, the Ontario Court of Justice, and the Animal Care Review Board.

9. The principal issues for this court is whether the application judge erred in law by holding that the challenged provisions engage s. 7 and, if they do, whether the application judge erred by recognizing a novel principle of fundamental justice.

10. Sections 11, 12 and 12.1 of the Act do not deprive anyone of their liberty or security of the person. The provisions confer particular powers on OSPCA agents and inspectors. With respect to liberty, while evidence that is discovered using these powers could be used in the investigation or prosecution of an offence under the Act or another statute (including the animal cruelty provisions in the *Criminal Code*), it is speculative to draw a link between these provisions and any deprivation of liberty.

11. With respect to security of the person, ss. 11, 12, or 12.1 of the Act do not authorize any intrusion onto bodily integrity or personal autonomy, and there was no evidence that they result in serious state imposed psychological stress. While these sections might appropriately be the subject of separate analysis under s. 8 of the *Charter*, they do not engage security of the person under s. 7. Accordingly, the s. 7 analysis should have stopped at the first step of the s. 7 test.

12. Even if these provisions do engage s. 7, the court erred by recognizing a novel principle that does not meet the criteria for a principle of fundamental justice set out by the Supreme Court of Canada in *R. v. Malmo-Levine*. The principle that "law enforcement bodies must be subject to reasonable standards of transparency and accountability" is not a legal principle, is not backed by a societal consensus that it is vital or fundamental to the way in which our justice system ought to operate, and is not capable of being identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty, or security of the person. The application judge's finding that "transparency and accountability" are principles of fundamental justice is not consistent with the Supreme Court of Canada jurisprudence and is in direct conflict with the British Columbia Superior Court's decision in *USA v. Wakeling* (which was affirmed on other grounds by the British Columbia Court of Appeal and the Supreme Court of Canada).

> *R v Malmo-Levine*, 2003 SCC 74 [*Malmo-Levine*].
> *USA v Wakeling*, 2011 BCSC 165 [*Wakeling*], aff'd on other grounds: 2012 BCCA 397, 2014 SCC 72.

13. Finally, the court below erred in granting public interest standing to Mr. Bogaerts, who has never been personally subject to any exercise of the impugned powers by any OSPCA agent or inspector or demonstrated a history of a genuine interest in the matter.

PART III - Summary of the Facts

A. The applicant

14. Mr. Bogaerts has never been the subject of a search or seizure by OSPCA inspectors or agents. He has had no interaction with the OSPCA other than work he did for a former law firm as a paralegal. He was granted public interest standing to challenge a variety of provisions in the Act.[1]

> Affidavit of Jeffrey Bogaerts sworn July 31, 2014, Appeal Book Tab Tab 9, para 2. Transcript of cross-examination of Jeffrey Bogaerts on August 30, 2017, Appeal Book Tab 10 pp 4–8.

B. The OSPCA Act

15. The OSPCA is a not-for-profit corporation that exercises statutory powers. The Act continues the Society, which was created by statute in 1919 (ss. 2–10). It also creates the Animal Care Review Board, which reviews compliance orders issued by the Society and animal removals carried out by the Society (ss. 16–18).

16. The Act makes it an offence to cause distress or permit distress to be caused to an animal (ss. 11.2(1), 11.2(2), and 18.1, with certain exceptions listed in s. 11.2(6) and (7)). It also creates more specific offences such as training or permitting animals to fight or owning animal fighting equipment or structures (11.2(3), (4)); harming law

[1] The application raised three issues: (1) the challenge under s. 7 of the *Charter* to ss. 11, 12, and 12.1 of the Act; (2) the challenge under s. 8 of the *Charter* to ss. 11.4, 11.4.1, 12(6), 13, and 14(1) (except 14(1)(a)) of the Act; and (3) the *vires* challenge to ss. 11.2 and 18(1)(c) of the Act. The court below dismissed the s. 8 *Charter* challenge and the *vires* challenge.

enforcement animals (s. 11.2(5)); possessing or breeding orcas (s. 11.3.1); and failing to meet the applicable standards of care or administrative requirements (s. 18.1).

17. The Act confers certain statutory powers on OSPCA agents and inspectors to investigate and prevent these offences, including:

(a) the powers of a police officer for the purposes of enforcing the Act and any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals (s. 11(1));

(b) the power to inspect animals that are being kept for exhibition, entertainment, boarding, hire or sale, and the power to demand a record or thing, to ascertain if the standards of care of administrative requirements are being met (ss. 11.4, 11.4.1);

(c) the power to search (with a warrant) a building or place where an inspector or agent has been prevented from entering or inspecting or there are reasonable grounds to believe will be prevented from entering or inspecting (11.5(1));

(d) the power to enter a building or place where an animal is in distress (s. 12(1));

(e) the power to enter a building or place (other than a dwelling house) where there are reasonable grounds to believe an animal is in immediate distress (12(6));

(f) the power to take samples of substances and of carcasses from places where agents and inspectors are lawfully present (s. 12.1);

(g) the power to order a person to take action to relieve an animal of distress or have the animal examined and treated by a veterinarian (s. 13);

(h) the power to enter a place that is the subject of a compliance order to determine if it is being complied with (s. 13(6)); and

(i) the power to take possession of an animal for the purposes of relieving its distress (14(1)).

18. As noted above, the particular provisions at issue in the s. 7 challenge are s. 11(1), s. 12, and s. 12.1. The current version of s. 11(1), which confers police powers on

OSPCA agents and inspectors for the purposes of enforcing animal welfare and animal cruelty legislation in force in Ontario, provides:

> **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.

19. The effect of s. 11 is to make OSPCA agents and inspectors peace officers for the purposes of enforcing legislation relating to animal welfare and the prevention of cruelty to animals, including the *Criminal Code* provisions regarding animal cruelty.

> *R v Baker* (2004), 73 OR (3d) 132 at para 21 (CA).
> *Criminal Code*, RSC 1985, c C-46, s 2, "peace officer".

20. Section 12(1) provides for a power of entry, with a warrant, where a justice of the peace or a provincial judge is satisfied by information on oath that there is in any building or place an animal that is in distress. If issued, the warrant authorizes the agent or inspector to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the agent considers advisable, to inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress.

21. Sub-section 12(6) sets out a power of immediate entry without a warrant where an inspector or agent has reasonable grounds to believe that there is an animal in immediate distress in a building or place other than a dwelling.

22. Section 12.1 authorizes agents and inspectors of the OSPCA who are lawfully present in a building or place under the authority of a provision of the *Act* or a warrant issued under the *Act* to examine any animal in the building or place and to take a sample

of a substance or a sample of a carcass (or the entire carcass) that is in the building or place. Sub-section 12.1(4) authorizes OSPCA agents and inspectors who are lawfully present in a building or place to seize things in plain view.

23. The full text of these provisions is set out in Schedule B.

Part IV - Issues and Argument

A. The application judge erred by concluding that the provisions engage s. 7

i. The provisions do not engage the liberty interest under s. 7 of the Charter

24. The application judge's conclusion that the challenged provisions engage the liberty interest under s. 7 of the *Charter* is contrary to the jurisprudence from this court establishing that a deprivation of liberty must not be too remote from the provision that is actually challenged. Sections 11, 12, and 12.1 do not create any offence that is punishable by imprisonment. The application judge did not explain how these provisions deprive anyone of their liberty. Instead, he accepted Mr. Bogaerts' argument that ss. 11, 12, and 12.1 of the *Act* engage s. 7 of the *Charter* because there are offences elsewhere in the *Act* that may be punished by imprisonment.

> *R v Schmidt*, 2014 ONCA 188 at paras 42–44.
> *R v Polewsky*, (2005) 202 CCC (3d) 257 (Ont CA); leave to appeal refused [2006] SCCA No 37 [*Polewsky*].
> *R v Asante-Mensah*, [1996] OJ No 1821 at para 137 (Sup Ct), rev'd (on other grounds) (2001), 204 DLR (4th) 51 (CA), rev'd (on other grounds) [2003] 2 SCR 3 [*Asante-Mensah*].

25. In *Polewsky* this court held that the offence of speeding in s. 128 of the *Highway Traffic Act* does not engage the accused's liberty interest under s. 7 of the *Charter*. Speeding is not punishable by imprisonment. However, the accused argued that the

offence engaged s. 7 because he could be imprisoned for failing to pay the fine imposed as a penalty for speeding.

26. This court held that s. 128 did not deprive Mr. Polewsky of his liberty despite the fact that defaulting on the fine imposed as a penalty for the offence could conceivably lead to imprisonment. This was because the *Provincial Offences Act* provided for a separate procedure for determining whether Mr. Polewsky should be imprisoned as a result of defaulting on the fine, and this separate procedure included an assessment of his means to pay the fine.

> *R v Polewsky, supra* at para 4.
> See also *Asante-Mensah, supra* at paras 134–137.
> *Provincial Offences Act*, RSO 1990, c P.33.

27. In *Schmidt* this court held that that the statutory terms of probation under the *Provincial Offences Act* do not engage the liberty interest protected by s. 7. Mr. Schmidt was convicted of selling and distributing unpasteurized milk contrary to the *Health Protection and Promotion Act* and of related charges under the *Milk Act*. These offences did not include imprisonment as a potential penalty. He nevertheless argued that security of the person was engaged because he was liable on conviction to probation and to pay a fine and, if the fine was not paid, to imprisonment. This court cited its decision in *Polewsky* and concluded that the terms of probation under the *Provincial Offences Act* did not have a significant impact on the accused's liberty interest.

> *Schmidt, supra* at paras 42–44.
> See also *Mulgrew v Law Society of British Columbia*, 2016 BCSC 1279 at paras 95–96; *Glendale Securities Inc (Re)* (1996), 19 OSCB 6273 at para 19 (ON Securities Commission)

28. These cases establish that where there are a number of intermediate steps between the effect of a provision and a potential deprivation of liberty, the court will not engage

in a series of "what ifs" in order to hold that s. 7 is engaged. This prevents the court from being involved in speculation and grounds the court's analysis of any deprivation in the provision that is being challenged.

29. The indirect deprivation of liberty arising from these provisions is considerably more speculative than the alleged deprivations that were rejected in *Polewsky* or *Schmidt.* In this case, in order for s. 11, 12, or 12.1 to lead to a deprivation of anyone's liberty, the following steps would have to occur:

(a) An OSPCA agent or inspector would have to exercise a police power under s. 11 or enter a building or place under s. 12 or 12.1. In the case of a police power, the agent or inspector would have to satisfy whatever criteria are applicable in the *Criminal Code* or the common law for the exercise of the power. In the case of s. 12, the agent or inspector would have to have satisfied a justice of the peace or a provincial judge that there are reasonable grounds to believe that an animal is in distress in the building or place to be entered. In the case of s. 12.1, the agent or inspector would have to be lawfully authorized to be in the building or place;

(b) The search or seizure would have to yield evidence that could be used in the prosecution of the person either under the Act or the *Criminal Code*;

(c) The person would have to be actually charged with an offence either under the Act or the *Criminal Code*;

(d) The person would have to be convicted of an offence under the Act or the *Criminal Code* that provided for imprisonment as a potential penalty.

30. This court should follow its decisions in *Polewsky* and *Schmidt* and hold that ss. 11, 12, and 12.1 of the Act do not deprive anyone of their liberty.

ii. The provisions do not engage security of the person under s. 7 of the Charter

31. The application judge erred by concluding that ss. 11, 12, or 12.1 of the Act deprive individuals of their security of the person for four reasons.

32. First, the application judge failed to apply the correct test for finding that security of the person is engaged. According to that test, security of the person under s. 7 is engaged by (1) interference with bodily integrity and autonomy, including deprivations of control over one's own body, and (2) serious-state imposed psychological stress. There was no evidence that the provisions interfere with anyone's bodily integrity or cause serious state-imposed psychological stress.

> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 93.
> *Carter v Canada*, 2015 SCC 5 at paras 66–67.
> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 58–67.
> *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at paras 81–86.

33. Second, the application judge applied an incorrect test by conflating the analyses under s. 7 of the *Charter* with the analysis under s. 8. The application judge held that security of the person under s. 7 includes freedom from unreasonable search and seizure. On that basis, he held that ss. 11, 12, and 12.1 of the Act engaged security of the person under s. 7.

34. The proposition that security of the person includes freedom from unreasonable search and seizure is not correct. Some searches that are contrary to s. 8 may also engage s. 7 because they involve an intrusion onto bodily integrity or impose serious psychological stress. For example, the taking of blood samples is a search that also constitutes an interference with bodily integrity, and engages security of the person under s. 7. Even in this kind of case, courts have proceeded with the analysis under the more particular provision (i.e., s. 8).

> *R v Rodgers; R v Jackpine*, 2006 SCC 15 at para 23.
> *R. v. Pearson*, [1992] 3 SCR 665 at para 42:

> However, in this case, I am also of the view that the *Charter* challenge falls to be determined according to s. 11(e) of the *Charter*, rather than under s. 7. Section 11(e) offers "a highly specific guarantee" which covers precisely the respondent's complaint.
>
> *R v Knight*, 2008 NLCA 67 at para 48.
> See also *R v Six Accused Persons*, 2008 BCSC 212; *R v Riley*, [2008] OJ No 2887 (SCJ); *Wakeling*, *supra* at paras 36–42 (BC Sup. Ct).

35. The application judge erred in relying on the Supreme Court of Canada's decision in *Re B.C. Motor Vehicle Act* for the proposition that violations of ss. 8–14 of the *Charter* can be analyzed under s. 7 of the *Charter*. In *R. v. Mills*, the Supreme Court of Canada considered this very passage and concluded that while consistency with s. 8–14 is a concern with respect to the principles of fundamental justice, not every search or seizure necessarily engages s. 7:

> In *Re B.C. Motor Vehicle Act*, *supra*, at p. 502, Lamer J. stated for the majority:
>
> > Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14.
>
> Of course, later cases have held that the text of the *Charter* supports some differences between ss. 7 and 8. For example, s. 8 applies to corporations whereas s. 7 does not: Hunter v. Southam, supra; Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927. <u>In *CIP Inc.*, *supra*, at p. 854, this Court held that the concern that there be no incongruity between ss. 7 and 8–14 related to the principles of fundamental justice and not to the scope of life, liberty and security of the person.</u>
>
> *R v Mills*, [1999] 3 SCR 668 at paras 87–88 [emphasis added].
> *R v Sharpe*, 2001 SCC 2 at para 26.

36. In *Orlandis-Hapsburgo* Justice Doherty writing for the court did state that an unconstitutional search of a residence "strikes at the heart of the privacy and security of the person interests protected by s. 8 of the *Charter*". However, this statement should not be read too broadly. There appears to have been no s. 7 issue raised and no argument

regarding the interaction of ss. 7 and 8 of the *Charter*. *Orlandis-Hapsburgo* was a case about an electricity utility that provided information regarding electricity use in a residence to police, who investigated the residence and ultimately obtained a warrant to search it based on the information provided by the utility and the subsequent investigation. The defence argued that the search of the residence violated s. 8 of the *Charter*.

R v Orlandis-Hapsburgo, 2017 ONCA 649 at para 133.

37. Third, the application judge did not conduct any analysis of whether ss. 11, 12, 12.2 of the *Act* authorize an unreasonable search or seizure. Even if the court were correct that security of the person under s. 7 includes the right to be free from unreasonable searches and seizures, the first step in the analysis would be to determine whether these provisions do in fact authorize an unreasonable search or seizure. Mr. Bogaerts did not explain how these sections engaged security of the person (in the court's words, he "approached it as obvious") and the application judge did not explain how he concluded that the provisions authorize an unreasonable search of seizure. The finding that these provisions engage security of the person in the absence of any evidence or analysis is an error of law.

38. Fourth, with respect to both liberty and security of the person the application judge appears to have been under the impression that Mr. Bogaerts did not need to establish a "factual underpinning" establishing an infringement of the *Charter* because he was granted public interest standing. This appears to have led the application judge to find a deprivation under s. 7 in the absence of any evidence.

Bogaerts, *supra* at para 64.

39. A grant of public interest standing allows an applicant to bring the issues to court despite lacking personal standing to do so. Public interest standing does not remove the necessity for infringements of the *Charter* to be proved with evidence.

> *MacKay v Manitoba*, [1989] 2 SCR 357.
> *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at para 100.
> *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 74 [*Downtown Eastside*].

B. The application judge erred in recognizing a novel principle of fundamental justice

40. Even if the impugned provisions are found to engage either liberty or security of the person, the application judge erred by recognizing a novel principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency and accountability". This principle fails to meet any of the three criteria for a principle of fundamental justice: it is not a legal principle, there is no consensus that it is vital or fundamental to our justice system, and it does not produce a workable, objective standard.

i. The proposed principle is not a legal principle

41. The application judge erred by failing to apply the jurisprudence requiring principles of fundamental justice to be legal principles. Transparency and accountability are statements of general policy, not legal principles. This conclusion ought to have followed from a review of the Supreme Court of Canada's jurisprudence on the principles of fundamental justice. It is further supported by a trial-level decision from British Columbia that rejected transparency and accountability as principles of fundamental justice.

42. In *Canadian Foundation for Children, Youth and the Law v. Canada* the Supreme Court of Canada explained that the requirement for principles of fundamental justice to be legal principles serves two purposes. First, it ensures that the s. 7 guarantee has meaningful content. Second, it avoids the adjudication of policy matters. In other words, the principles of fundamental justice do not include statements of policy. This is because reviewing legislation for compliance with such statements would exceed the court's institutional competence and constitutional role. The requirement for principles of fundamental justice to be legal principles ensures that courts cannot be accused of exceeding their role by substituting their own judgment on the wisdom of legislation for the legislature's.

> Thus, ss. 8 to 14 [of the *Charter*] provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the Canadian Bill of Rights, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).
>
> It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.
>
> *Re BC Motor Vehicle Act* at paras. 31–32 [emphasis added]

> A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (*Re B.C. Motor Vehicle Act*, *supra,* at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez, supra* at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication.

Canadian Foundation for Children, Youth and the Law v Canada (AG), 2004 SCC 4 at para 9 [*Canadian Foundation*].

43. The Supreme Court has looked to the use of a principle in legislation for evidence that it is a legal principle. For example, the Supreme Court of Canada (although it ultimately rejected it as a principle of fundamental justice) recognized "the best interests of the child" as a legal principle because it is employed extensively in Canadian and international law.

Canadian Foundation, supra at para 9.

44. The application judge did not give any examples of transparency or accountability being employed as a legal test or a legal principle in a particular statute. In the examples he did give, transparency and accountability are objectives <u>of</u> statutes or rules, not principles employed <u>in</u> statutes:

(a) The application judge gave as examples of transparency "rules and legislation" requiring open hearings in most situations and permitting free access to nearly all public information.

(b) The application judge gave as examples of accountability the requirement for decisions to be supported by reasons that are subject to public discourse and/or higher judicial scrutiny.

Bogaerts, *supra* at para 84.

45. Thus transparency and accountability are not like the "best interests of the child". They are not a factor in a legal test in legislation or at common law. They are more like the "harm principle" that the Supreme Court refused to recognize as a legal principle in *R. v. Malmo-Levine*. The majority of the Court in that case found that the harm principle was better characterized as a description of an important state interest—in the sense of being a sufficient, but not necessary reason for the state to impose criminal liability—rather than a normative "legal" principle.

Malmo-Levine, supra at para 114.

46. Transparency and accountability were specifically rejected as principles of fundamental justice by the Supreme Court of British Columbia in *U.S.A. v. Wakeling*. Mr. Wakeling was accused of drug related offences in British Columbia and the United States sought to extradite him. The search that yielded the drugs in question was based on information intercepted as a result of a wiretap authorization. Mr. Wakeling challenged the *Criminal Code* provisions authorizing the wiretap, as well as the provisions of the federal *Privacy Act* that permitted law enforcement officials to disclose personal information to other state authorities. He argued that these provisions deprived him of his liberty in a manner that was not in accordance with the principles of fundamental justice of transparency, accountability, and the rule of law.

Wakeling, supra at para 42.

47. Mr. Wakeling's definition of transparency and accountability was similar to the definitions given by the court below in this case. Mr. Wakeling asserted that "the same principles and values that dictate open courts, similarly dictate transparent and accountable policing and, in particular, transparency and accountability with respect to the circumstances under which personal information is disseminated".

Wakeling, supra at para 44.

48. The court found that transparency and accountability are matters that fall into the realm of general public policy, not legal principles:

> […] I agree with the submission of the Attorney General for Canada that while the concepts of openness, transparency and accountability are important values or objectives, they are not legal principles, fundamental to the legal system, which can be identified with sufficient precision to be regarded as principles of fundamental justice pursuant to the test identified in *Malmo-Levine.* Rather, these

> concepts like the "harm principle" posited by the accused in *Malmo-Levine* are more properly regarded as matters falling into the realm of public policy.
>
> *Wakeling, supra* at para 47.

49. The court in *Wakeling* correctly relied on the jurisprudence from the Supreme Court of Canada and its decision should be followed by this court.

ii. There is no consensus that the proposed principle is fundamental to our societal notion of justice

50. The second requirement for a principle of fundamental justice is that there must be a sufficient consensus that the principle is vital or fundamental to our societal notion of justice. The application judge erred by finding that transparency and accountability satisfy this requirement. More specifically, he failed to recognize that a principle is not "fundamental" if it can be subordinated to other concerns in appropriate contexts.

> Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice.
>
> *Canadian Foundation, supra* at para 8.

51. According to the Supreme Court of Canada one of the indicia of whether a principle is "vital" or "fundamental" or "essential" to our societal notion of justice is whether it can be subordinated to other considerations. The best interests of the child is an example of a principle that failed for this reason. While the majority of the Supreme Court accepted that the best interests of the child is a legal principle, it found that the best interests of the child may be subordinated to other concerns in appropriate contexts.

> *Canadian Foundation, supra* at para 10.

52. Accountability and transparency may similarly be subordinated to other concerns in appropriate contexts. For example:

(a) Access to information legislation does not guarantee an absolute right of access to information in the custody of public bodies. The *Freedom of Information and Protection of Privacy Act* contains a general right of access to information (s. 10) but that right is qualified by numerous exemptions, including exemptions for records that would compromise Cabinet confidentiality (s. 12), reveal advice to government in certain circumstances (s. 13), interfere with a law enforcement matter (s. 14(1)(a)), reveal investigative techniques currently in use or likely to be used in law enforcement (s. 14(1)(c), or deprive a person of the right to a fair trial or impartial adjudication (s. 14(1)(f)). Solicitor-client privilege (s. 19) is another example.

Freedom of Information and Protection of Privacy Act, RSO 1990 c F.31, s 1 [FIPPA].

(b) The open courts principle can be limited in accordance with the *Dagenais/Mentuck* test in consideration of rights and interests such as privacy and security, the administration of justice, and the right to a fair trial—for example by orders to hold proceedings *in camera* and publication bans.

Vancouver Sun (Re), 2004 SCC 43 at paras 23–31.

(c) The law does not recognize an unqualified or constitutional right to appeal decisions by public bodies, including courts. Rights of appeal, if they are provided, may be limited for reasons including the administration of justice and the management of judicial resources, the avoidance of unnecessary delay, and the value of finality.

Kourtessis v MNR, [1993] 2 SCR 53 at paras 17–18

53. The court in the *Wakeling* case came to the same conclusion and its decision offers further examples. After determining that transparency and accountability are not legal principles, the court went on to note that there is no evidence that these concepts are constitutionally mandated or applicable without regard to any other considerations in all contexts:

> Principles of "openness" and "transparency" are often spoken of within the context of court proceedings (*Vancouver Sun (Re)*, 2004 SCC 43 judicial review

> from an administrative tribunal's determination (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47) and access to court records (*BC Govt Serv. Empl. Union v. British Columbia (Minister of Health Services)*, 2005 BCSC 446 aff'd 2007 BCCA 379 However, the fact that this is so does not mean that these same principles are constitutionally mandated in all contexts. There are areas relating to the administration of justice in which the application of these principles is either unworkable or rendered of secondary import because of other, more compelling interests. The Supreme Court acknowledged this reality in *Charkaoui v. Canada (Citizen and Immigration)*, 2007 SCC 9 at paragraph 57:
>
> > The right to know the case to be met is not absolute. Canadian statutes sometimes provide for ex parte or in camera hearings, in which judges must decide important issues after hearing from only one side. In Rodgers the majority of this Court declined to recognize notice and participation as invariable constitutional norms, emphasizing a context-sensitive approach to procedural fairness. […]
>
> It is clear from the Supreme Court of Canada's decision in *Michaud v. Quebec (Attorney General)*, 1996 CanLII 167 (SCC), [1996] 3 S.C.R. 3, that materials governed by Part VI of the *Criminal Code* are not subject to the open courts principle. The reasoning in *Michaud* has been applied in subsequent cases to hold that intercepted private communications are governed by Part VI of the *Criminal Code* and are not subject to the "open court principle", see: *National Post Co. v. Canada (Attorney General)* (2003 (ON SC), 176 C.C.C. (3d) 432 (ON S.C.), *R. v. Adam*, 2006 BCSC 601
>
> *Wakeling*, *supra* at paras 49–50 [emphasis added].

iii. The proposed principle does not produce a workable standard

54. The third requirement for a principle of fundamental justice is that it must be capable of being defined with sufficient precision to be applied in a predictable manner. This part of the test is concerned with whether the principle can produce a justiciable standard.

> *Canadian Foundation*, *supra* at para 8.

55. The application judge was not correct to find that the principle produces a workable standard because it is "already applied to virtually every public body and law enforcement agency". If what the principle requires is the application of specific pieces

of legislation such as the *Police Services Act*, the *Ombudsman Act*, or the *Freedom of Information and Protection of Privacy Act* (as evidenced by the application judge's application of the principle to the OSPCA itself), then it is evident that the principle is not already applied to virtually every public body and law enforcement agency because these laws are not applicable to virtually every public body and law enforcement agency. In fact the differential application of these statutes among law enforcement bodies illustrate that the principle does not produce a workable standard. For example:

(a) Numerous not-for-profit corporations carry out public functions including inspections and investigations in Ontario without being subject to the *Police Services Act*, the *Ombudsman Act*, or the *Freedom of Information and Protection of Privacy Act*. Examples include the Tarion Warranty Corporation, which administers the Ontario New Home Warranties Plan; the Real Estate Council of Ontario, which administers the *Real Estate and Business Brokers Act, 2002*; the Electrical Safety Authority, which administers Part VIII of the *Electricity Act, 1998*; and the Vintners Quality Alliance Ontario, which administers the act of the same name.

(b) The Law Society of Ontario is a corporation that exercises audit and investigatory powers but is not subject to the *Police Services Act*, the *Ombudsman Act*, or the *Freedom of Information and Protection of Privacy Act*.

(c) The Ontario Securities Commission is a Crown corporation that investigates offences under the *Securities Act*, including offences punishable by imprisonment. It is not subject to the *Police Services Act*. (It is, however, subject to the *Ombudsman Act* and the *Freedom of Information and Protection of Privacy Act*.)

56. A principle of fundamental justice that requires the application of particular pieces of legislation raises more questions than it answers. Does the principle require the application of all of these pieces of legislation, or is it satisfied by the application of some? In what circumstances? Does the principle require the application of the entirety of these statutes, or only parts? For example, does it include all of the exemptions in the *Freedom of Information and Protection of Privacy Act*? In order to determine whether

the principle is satisfied, does a court have to conduct an analysis under the *Freedom of Information and Protection of Privacy Act*? Is the principle satisfied only by the current version of the statutes? May the legislature still amend these statutes or are they effectively constitutionalized by the application judge's decision?

57. In any event, there is no dispute that when the OSPCA exercises statutory powers its conduct is subject to review by the Animal Care Review Board, the Ontario Court of Justice, and the Divisional Court. In carrying out its public functions it must comply with the law, including the *Charter*.[2] There were numerous decisions before the application judge illustrating this fact, including the Newfoundland Provincial Court decisions in *R. v. Clarke* and *Beazley (Re)*. The application judge did not explain why the application of particular pieces of legislation would meet the standard but scrutiny by the Divisional Court, the Ontario Court of Justice, or the Animal Care Review Board would not.

> *McKinney v University of Guelph*, [1990] 3 SCR 229.
> *Bogaerts*, *supra* at para 90.
> *R v Clarke*, [2001] NJ No 191 (Prov Ct).
> *Beazley (Re)*, [2007] NJ No 337 (Prov Ct).

58. *Clarke* was a trial on a charge of animal cruelty under the *Criminal Code*. *Beazley* was an application for a search warrant under Newfoundland's SPCA legislation. The application judge erred in relying on the alleged potential misconduct by the Newfoundland Society's volunteer investigators in those two decisions to hold that the Ontario legislation was invalid. In doing so, the Court ignored the distinction made by

[2] This applies not only to the Ontario Court of Justice in proceedings under the Act or the *Criminal Code* but also to the Animal Care Review Board, which has been held to be a court of competent jurisdiction for the purposes of s. 24(1) of the *Charter*: see *Johnson v. Ontario Society for the Prevention of Cruelty to Animals* at para 65 below.

the Supreme Court of Canada between section 52(1) of the *Constitution Act, 1982* and section 24(1) of the *Charter*.

> Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights.
>
> *R v Ferguson*, 2008 SCC 6 at para 61.

59. The application judge should have followed the earlier 2016 decision in *Bogaerts v. Ontario.* In granting Ontario's motion to strike out voluminous evidence from Mr. Bogaerts (that was purporting to describe various instances of alleged misconduct in specific cases by particular Society inspectors), Justice Johnston correctly held:

> The Supreme Court of Canada has repeatedly held that where a *Charte*r 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 SCC 69 at para 133-35. (R v. Khawaja (2012) S.C.C. 69 at para 83.)
>
> 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.
>
> *Bogaerts v Ontario (AG)*, 2016 ONSC 3123 at paras 28–30 [*Bogaerts* (2016)].

C. <u>The motions judge erred by granting public interest standing to Mr. Bogaerts</u>

60. Finally, Ontario submits that the court below erred in granting public interest standing to Mr. Bogaerts. The grant of public interest standing is a discretionary

decision that may be set aside by this court if the court below misdirected itself or failed to give sufficient weight to relevant considerations.

> *Elsom v Elsom*, [1989] 1 SCR 1367.
> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

61. Ontario brought a motion to strike the application for lack of standing. The motion judge held that Mr. Bogaerts did not have private standing but went on to grant Mr. Bogaerts public interest standing.

62. When deciding whether to grant public interest standing a court must consider:

(a) whether there is a serious justiciable issue raised;

(b) whether the plaintiff has a real stake or a genuine interest in it; and

(c) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

> *Downtown Eastside, supra* at para 37.

63. Assuming that the application did raise a serious justiciable issue, Mr. Bogaerts did not meet the second and third criteria. First, he did not demonstrate that he has a real stake or a genuine interest in the challenge to the OSPCA. Mr. Bogaerts admitted that he had never been the subject of an investigation or inquiry by the OSPCA. The motion judge erred by finding that he had a "serious" or "genuine" interest in the issues as required by the case law.

> Affidavit of Jeffrey Bogaerts sworn July 31, 2014, Appeal Book Tab 9 at para 2.
> *Landau v Ontario (AG)*, 2013 ONSC 6152 at paras 22, 26–28 (SCJ).
> *R v Jayaraj*, 2014 ONSC 6367 at para 6 (Div Ct).
> *United Steel v Canada (Minister of Citizenship and Immigration)*, 2013 FC 496 at paras 18–19.
> *Inshore Fishermen's Bonafide Defence Fund Assn v Canada* (1994), 130 NSR (2d) 121 at para 31 (SC).

64. Second, with respect to whether the application was a reasonable and effective way to bring the issues before the court, the court appeared to concede that the various issues raised in the application could and did arise in proceedings before the Ontario Court of Justice and the Animal Care Review Board. In fact, the motion judge had before him affidavit material from a number of other individuals that had been the subject of investigations before the OSPCA and had been subject to proceedings before the Animal Care Review Board.

65. While much of this material was struck on the ground that it did not address the validity of the *Act,* it nevertheless demonstrated that there were a cohort of people that have had direct experience under the *Act* and a genuine interest in challenging its validity. This material also demonstrated that the constitutional validity of the impugned provisions could have been raised either before the Ontario Court of Justice or the Animal Care Review Board, which has jurisdiction to hear and decide *Charter* issues that arise before it. It also demonstrated that a Rule 14.05 application for a declaration of invalidity in the Superior Court of Justice could have been brought by one of these directly affected individuals.

> *Johnson v Ontario Society for the Prevention of Cruelty to Animals*, 2013 CarswellOnt 13013 at para 40 (Animal Care Review Board).

66. Unlike *Downtown Eastside*, there was no evidence before the motion judge even suggesting that other people who are more directly affected by the legislation in question were economically disadvantaged or transient, or unable for some other reason to serve as applicants.

67. The motion judge erred in concluding that Mr. Bogaerts' application was a reasonable and effective way to bring the issue before the courts because not all of the various issues addressed by the application might arise in any one forum. Taken to its logical conclusion, this would mean that public interest standing would be more likely to be granted where a proposed litigant increased the number of sections of a statute challenged in their prayer for relief, divorced from their own genuine interest in, or connection to, those provisions.

68. There is a further danger with the motion judge's approach which manifests itself in this case. The fundamental difficulty with this application was that while Mr. Bogaerts challenged multiple provisions in the Act his arguments and evidence were instead directed at the structure of the OSPCA itself. He described what he saw as the constitutional problem with the Act not as a problem with the powers themselves, but with the fact that it was the Society's investigators that exercised them. The result was an application in which the constitutional validity of the actual provisions that were being challenged were incidental to the arguments being made. This put the court in the difficult position of having to decide the validity of these provisions in the abstract, and arguably contributed to the errors made by the application judge.

Bogaerts (2016), *supra* at para 20.

Part V - Order Sought

69. Ontario respectfully submits that the appeal should be granted and the order of Justice Minnema overturned. In the alternative, should the appeal be dismissed, the Attorney General requests the opportunity to make further submissions to this Court

should a further extension of the suspension of the declaration of invalidity be required in order to remedy any constitutional violation consistent with this Court's reasons.

70. Ontario seeks its costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 13, 2019

Daniel Huffaker
Counsel for the Respondent
(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)

CERTIFICATE OF THE APPELLANT, THE ATTORNEY GENERAL OF ONTARIO

---

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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Superior Court File No.: 749/13

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SCHEDULE A – AUTHORITIES

1. *Bogaerts v Attorney General of Ontario*, 2019 ONSC 41
2. *R v Malmo-Levine*, 2003 SCC 74
3. *USA v Wakeling*, 2011 BCSC 165, aff'd 2012 BCCA 397, 2014 SCC 72
4. *R v Baker* (2004), 73 OR (3d) 132 (CA)
5. *R v Schmidt*, 2014 ONCA 188
6. *R v Polewsky*, (2005) 202 CCC (3d) 257, leave to appeal refused [2006] SCCA No 37
7. *R v Asante-Mensah*, [1996] OJ No 1821, rev'd (2001), 204 DLR (4th) 51 (CA), rev'd [2003] 2 SCR 3
8. *Mulgrew v Law Society of British Columbia*, 2016 BCSC 1279
9. *Glendale Securities Inc (Re)* (1996), 19 OSCB 6273
10. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44
11. *Carter v Canada*, 2015 SCC 5
12. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46
13. *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307
14. *R v Rodgers; R v Jackpine*, 2006 SCC 15
15. *R v Pearson*, [1992] 3 SCR 665
16. *R v Knight*, 2008 NLCA 67
17. *R v Six Accused Persons*, 2008 BCSC 212
18. *R v Riley*, [2008] OJ No 2887 (SCJ)
19. *R v Mills*, [1999] 3 SCR 668
20. *R v Sharpe*, 2001 SCC 2
21. *R v Orlandis-Hapsburgo*, 2017 ONCA 649
22. *MacKay v Manitoba*, [1989] 2 SCR 357
23. *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157

24. *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

25. *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4

26. *Vancouver Sun (Re)*, 2004 SCC 43

27. *Kourtessis v MNR*, [1993] 2 SCR 53

28. *McKinney v University of Guelph*, [1990] 3 SCR 229

29. *R v Clarke*, [2001] NJ No 191 (Prov Ct)

30. *Beazley (Re)*, [2007] NJ No 337 (Prov Ct)

31. *R v Ferguson*, 2008 SCC 6

32. *Bogaerts v Ontario (AG)*, 2016 ONSC 3123

33. *Elsom v Elsom*, [1989] 1 SCR 1367

34. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3

35. *Landau v Ontario (AG)*, 2013 ONSC 6152 (SCJ)

36. *R v Jayaraj*, 2014 ONSC 6367 (Div Ct)

37. *United Steel v Canada (Minister of Citizenship and Immigration)*, 2013 FC 496

38. *Inshore Fishermen's Bonafide Defence Fund Assn v Canada* (1994), 130 NSR (2d) 121 (SC)

39. *Johnson v Ontario Society for the Prevention of Cruelty to Animals*, 2013 CarswellOnt 13013 (Animal Care Review Board)

SCHEDULE B – LEGISLATION

1. *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36
2. *Criminal Code*, RSC 1985, c C-46, s 2 “peace officer”
3. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, ss 1, 10(1), 12–23

Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990, c O.36

ONTARIO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

Interpretation

1. (1) In this Act,

"accredited veterinary facility" means a veterinary facility as defined in the Veterinarians Act that is accredited under that Act; ("établissement vétérinaire agréé")

"Board" means the Animal Care Review Board; ("Commission")

"business day" means a weekday, excluding a day that is a holiday; ("jour ouvrable")

"distress" means the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect; ("détresse")

"orca" means a member of the species Orcinus orca; ("épaulard")

"place" includes a vehicle or vessel; ("lieu")

"prescribed" means prescribed by regulation made under this Act; ("prescrit")

"veterinarian" means a person licensed as a veterinarian by the College of Veterinarians of Ontario. ("vétérinaire") 2008, c. 16, s. 1; 2009, c. 33, Sched. 9, s. 9 (1); 2015, c. 10, s. 1.

Minor owner, custodian

(2) Where the owner or custodian of an animal is a minor, the owner or custodian for the purposes of this Act is deemed to be the minor's parents or guardians.

Society continued

2. The Ontario Society for the Prevention of Cruelty to Animals, a body politic and corporate incorporated by An Act to Incorporate the Ontario Society for the Prevention of Cruelty to Animals, being chapter 124 of the Statutes of Ontario, 1919, is continued under the name The Ontario Society for the Prevention of Cruelty to Animals in English and Société de protection des animaux de l'Ontario in French.

Object

3. The object of the Society is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom.

Membership

4. The Society shall consist of class A members, being affiliated societies, class B members, being individual members, and class C members, being honorary members, and each class has such rights and obligations as are provided in the by-laws of the Society.

Board of directors: executive committee

5. The affairs of the Society shall be controlled and managed by a board of directors and by an executive committee, both of which shall be composed and have such powers and duties as are provided in the by-laws of the Society.

Officers

6. The Society shall have such officers with such powers and duties as are provided in the by-laws of the Society.

Chief Inspector

6.1 (1) The Society shall appoint an employee of the Society as the Chief Inspector.

Powers, duties

(2) In addition to the powers and duties of an inspector or an agent of the Society, the Chief Inspector shall have the powers and duties that may be prescribed by regulation, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties.

Same

(3) The Chief Inspector of the Society may have additional powers and duties as are provided in the by-laws of the Society.

By-laws

7. (1) The Society may pass such by-laws, not contrary to law, as it considers necessary for the control and management of its affairs and the carrying out of its object.

Approval

(2) No by-law of the Society is valid or shall be acted upon until it has been approved by a majority of the votes cast in accordance with the by-laws of the Society at an annual or special general meeting.

Annulment

(3) The Lieutenant Governor in Council may annul any by-law of the Society.

Powers

8. The Society,

(a) may acquire and hold as a purchaser, donee, devisee or legatee, or in any other capacity, any interest in real estate;

(b) may accept, receive and hold gifts, bequests or subscriptions of personal estate;

(c) may grant, lease, bargain for, mortgage, sell, assign or otherwise dispose of any of its real or personal estate;

(d) may erect, construct, equip and maintain such buildings and works as it considers advisable for its purposes; and

(e) may do all such other matters and things as it considers advisable for carrying out its object.

Exemption of property from taxation

9. The lands and buildings of the Society are exempt from taxation except for local improvements and school purposes so long as they are held, used and occupied for the purposes of the Society.

Prohibitions re holding out as Society, affiliated society

10. (1) No corporation or other entity, other than the Society or an affiliated society, shall,

(a) hold itself out as being the Society or an affiliated society having authority under this Act; or

(b) use the name "humane society", "society for the prevention of cruelty to animals" or "spca" or the equivalent of any of those names in any other language, alone or in combination with any other word, name, initial or description.

Exception

(2) Despite clause (1) (b), a corporation or other entity that was an affiliated society on April 3, 2008 may continue to use the name "humane society", "society for the prevention of cruelty to animals" or "spca", or the equivalent of any of those names in any other language, alone or in combination with any other word, name, initial or description, even if it is no longer an affiliated society.

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.

OBLIGATIONS AND PROHIBITIONS RE CARE OF AND HARM TO ANIMALS

Standards of care and administrative requirements for animals

11.1 (1) Every person who owns or has custody or care of an animal shall comply with the prescribed standards of care, and the prescribed administrative requirements, with respect to every animal that the person owns or has custody or care of.

Exception

(2) Subsection (1) does not apply in respect of,

(a) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; or

(b) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities.

Same

(3) Subsection (1) does not apply to,

(a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the Veterinarians Act;

(b) a person acting under the supervision of a veterinarian described in clause (a); or

(c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders.

Prohibitions re distress, harm to an animal

Causing distress

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

Permitting distress

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

Training, permitting animals to fight

(3) No person shall train an animal to fight with another animal or permit an animal that the person owns or has custody or care of to fight another animal.

Owning animal fighting equipment, structures

(4) No person shall own or have possession of equipment or structures that are used in animal fights or in training animals to fight.

Harming law enforcement animals

(5) No person shall harm or cause harm to a dog, horse or other animal that works with peace officers in the execution of their duties, whether or not the animal is working at the time of the harm.

Exception

(6) Subsections (1) and (2) do not apply in respect of,

(a) an activity permitted under the Fish and Wildlife Conservation Act, 1997 in relation to wildlife in the wild;

(b) an activity permitted under the Fish and Wildlife Conservation Act, 1997 or the Fisheries Act (Canada) in relation to fish;

(c) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; or

(d) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities.

Same

(7) Subsections (1) and (2) do not apply to,

(a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the Veterinarians Act;

(b) a person acting under the supervision of a veterinarian described in clause (a); or

(c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders.

Veterinarians' obligation to report

11.3 Every veterinarian who has reasonable grounds to believe that an animal has been or is being abused or neglected shall report his or her belief to an inspector or an agent of the Society.

PROHIBITION RE ORCA POSSESSION AND BREEDING

Prohibition of orca possession and breeding

11.3.1 (1) No person shall possess or breed an orca in Ontario.

Transition

(2) Despite subsection (1), a person may continue to possess an orca in Ontario if the person possessed the orca in Ontario on March 22, 2015.

Same

(3) Despite subsection (1), a person who first possessed an orca in Ontario on or after March 23, 2015, but before the day the Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015 received Royal Assent, may continue to possess the orca in Ontario until the day that is six months after the day the Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015 received Royal Assent.

PROTECTION OF ANIMALS BY SOCIETY

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.

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.

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.

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.

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.

(5) Repealed: 2015, c. 10, s. 4 (2).

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.

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.

Warrant – places where animals kept

11.5 (1) A justice of the peace or provincial judge may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter a building or place specified in the warrant, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and to inspect the building or place and do anything authorized under section 11.4 if the justice of the peace or provincial judge is satisfied by information on oath that,

(a) an inspector or an agent of the Society has been prevented from entering or inspecting the building or place under section 11.4; or

(b) there are reasonable grounds to believe that an inspector or an agent of the Society will be prevented from entering or inspecting the building or place under section 11.4.

Telewarrant

(1.1) 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. 2009, c. 33, Sched. 9, s. 9 (2).

When warrant to be executed

(2) Every warrant issued under subsection (1) or (1.1) 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

(3) 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

(4) A warrant issued under this section may contain terms and conditions in addition to those provided for in subsections (1) to (3) as the justice of the peace or provincial judge considers advisable in the circumstances.

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 activities

Inspect animals, take samples, etc.

12.1 (1) An inspector or an agent of the Society or a veterinarian, who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act, may examine any animal there and, upon giving a receipt for it, take a sample of any substance there or take a carcass or sample from a carcass there, for the purposes set out in the provision under which the inspector's, agent's or veterinarian's presence is authorized or the warrant is issued.

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 necessaries 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).

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.

Order to be in writing

(2) Every order under subsection (1) shall be in writing and shall have printed or written thereon the provisions of subsections 17 (1) and (2).

(3) Repealed: 2008, c. 16, s. 10 (1).

Time for compliance with order

(4) An inspector or an agent of the Society who makes an order under subsection (1) shall specify in the order the time within which any action required by the order shall be performed.

Idem

(5) Every person who is served with an order under subsection (1) shall comply with the order in accordance with its terms until such time as it may be modified, confirmed or revoked and shall thereafter comply with the order as modified or confirmed.

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.

Revocation of order

(7) If, in the opinion of an inspector or an agent of the Society, the order made under subsection (1) has been complied with, he or she shall revoke the order and shall serve notice of the revocation in writing forthwith on the owner or custodian of the animal that is the subject of the order.

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,

(a) a veterinarian has examined the animal and has advised the inspector or agent in writing that the health and well-being of the animal necessitates its removal;

(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.

Order for Society to keep animal

(1.1) A justice of the peace or provincial judge may make an order authorizing the Society to keep in its care an animal that was removed under subsection (1) if,

(a) the owner or custodian of the animal has been charged, in connection with the same fact situation that gave rise to the removal of the animal under subsection (1), with an offence under this Act or any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals; and

(b) the justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that the animal may be harmed if returned to its owner or custodian.

Order re costs

(1.2) Where a justice of the peace or provincial judge makes an order under subsection (1.1), he or she may also order that the whole or any part of the cost to the Society of providing food, care or treatment to the animal pursuant to its removal under subsection (1) and pursuant to the order under subsection (1.1) be paid by the owner or custodian of the animal to the Society.

Same

(1.3) The Society or owner or custodian of the animal may at any time apply to a justice of the peace or provincial judge to vary an order made under subsection (1.2) and the justice of the peace or provincial judge may make such order as he or she considers appropriate.

Order to return animal

(1.4) The Society or the owner or custodian may apply to a justice of the peace or provincial judge to order the return of an animal that is the subject of an order made under subsection (1.1) and, if satisfied that there are no longer reasonable grounds to believe that the animal may be harmed if returned to its owner or custodian, the justice of the peace or provincial judge may order the return of the animal to its owner or custodian, subject to any conditions that the justice of the peace or provincial judge considers appropriate.

Destruction of animal

(2) An inspector or an agent of the Society may destroy an animal,

(a) with the consent of the owner; or

(b) if a veterinarian has examined the animal and has advised the inspector or agent in writing that, in his or her opinion, it is the most humane course of action.

Notice

(3) An inspector or an agent of the Society who has removed or destroyed an animal under subsection (1) or (2) shall forthwith serve written notice of his or her action on the owner or custodian of the animal, if known.

Same

(4) Every notice under subsection (3) respecting the removal of an animal under subsection (1) shall have printed or written on it the provisions of subsections 17 (1) and (2). 2009, c. 33, Sched. 9, s. 9 (5).

Liability of owner for expenses

15. (1) If an inspector or an agent of the Society has provided an animal with food, care or treatment, the Society may serve on the owner or custodian of the animal a statement of account respecting the food, care or treatment and the owner or custodian is, subject to an order made under subsection 14 (1.2) or (1.3) or 17 (6), liable for the amount specified in the statement of account.

Power to sell

(2) Where the owner or custodian refuses to pay an account under subsection (1) within five business days after service of the statement of account or where the owner or custodian, after reasonable inquiry, cannot be found, the Society may sell or dispose of the animal and reimburse itself out of the proceeds, holding the balance in trust for the owner or other person entitled thereto.

Society, affiliated society deemed to be owner of abandoned animal

15.1 If the Society or an affiliated society takes custody of an animal and no person is identified as the animal's owner or custodian within a prescribed period of time, the Society or affiliated society, as the case may be, is deemed to be the owner of the animal for all purposes.

ANIMAL CARE REVIEW BOARD

Board continued

16. (1) The Animal Care Review Board is continued under the name Animal Care Review Board in English and Commission d'étude des soins aux animaux in French.

Idem

(2) The Board shall consist of not fewer than three persons who shall be appointed by the Lieutenant Governor in Council.

Chair, vice-chair

(3) The Lieutenant Governor in Council may appoint one of the members of the Board as chair and another of the members as vice-chair.

Composition of Board for hearings

(4) A proceeding before the Board shall be heard and determined by a panel consisting of one or more members of the Board, as assigned by the chair or vice-chair of the Board.

Remuneration of members

(5) The members of the Board shall receive such remuneration and expenses as the Lieutenant Governor in Council determines.

Appeal to Board

17. (1) The owner or custodian of any animal who considers themself aggrieved by an order made under subsection 13 (1) or by the removal of an animal under subsection 14 (1) may, within five business days of receiving notice of the order or removal, appeal against the order or request the return of the animal by notice in writing to the chair of the Board.

Same

(1.1) The notice shall set out the remedy or action sought and the reasons for the appeal or request.

No appeal if there is order for Society to keep animal

(1.2) Subsection (1) does not apply if an order in respect of the animal under subsection 14 (1.1) is in force.

Application for revocation of order

(2) Where, in the opinion of the owner or custodian of an animal in respect of which an order under subsection 13 (1) has been made, the animal has ceased to be in distress, the owner or custodian may apply to the Board to have the order revoked by notice in writing to the chair of the Board.

Notice of hearing

(3) Within five business days of the receipt of a notice under subsection (1) or (2), the chair of the Board shall,

(a) fix a time, date and place at which the Board will hear the matter; and

(b) notify the Society and the owner or custodian who issued the notice of the time, date and place fixed under clause (a).

Date of hearing

(4) The date fixed for a hearing shall be not more than 10 business days after the receipt of a notice under subsection (1) or (2).

Procedure at hearing

(5) At a hearing, the Society and the owner or custodian are entitled to hear the evidence, cross-examine, call witnesses, present argument and be represented by persons authorized under the *Law Society Act* to represent them.

Powers of Board

(6) After a hearing or, with the consent of the Society and the person who issued the notice under subsection (1) or (2), without a hearing, the Board may,

(a) respecting an order made under subsection 13 (1), confirm, revoke or modify the order appealed against;

(b) respecting the removal of an animal under subsection 14 (1), order that the animal be returned to the owner or custodian and may make an order in the same terms as an order may be made under subsection 13 (1);

(c) order that the whole or any part of the cost to the owner or custodian of an animal of complying with an order made under subsection 13 (1) be paid by the Society to the owner or custodian; or

(d) order that the whole or any part of the cost to the Society of providing food, care or treatment to an animal pursuant to its removal under subsection 14 (1) be paid by the owner or custodian of the animal to the Society.

Notice of decision

(7) Notice of the decision of the Board made under subsection (6), together with reasons in writing for its decision, shall be served forthwith on the Society and the owner or custodian of the animal.

Society order not stayed

(8) An appeal to the Board in respect of an order made under subsection 13 (1) does not stay the operation of the order.

Appeal

18. (1) The Society or the owner or custodian may appeal the decision of the Board to a judge of the Superior Court of Justice.

Notice of appeal

(2) The appeal shall be made by filing a notice of appeal with the local registrar of the court and serving a copy thereof on the other parties before the Board within 15 business days after the notice of the Board's decision is served on the appellant under subsection 17 (7).

Date of hearing

(3) The appellant or any person served with notice of appeal may, upon at least two business days notice to each of the other parties, apply to the judge to fix a date for the hearing of the appeal.

Decision

(4) The appeal shall be a new hearing and the judge may rescind, alter or confirm the decision of the Board and make such order as to costs as he or she considers appropriate, and the decision of the judge is final.

OFFENCES

Offences

18.1 (1) Every person is guilty of an offence who,

(a) contravenes subsection 11 (5);

(b) contravenes or fails to comply with section 11.1;

(c) contravenes subsection 11.2 (1), (2), (3), (4) or (5);

(c.1) contravenes subsection 11.3.1 (1);

(c.2) contravenes subsection 11.4.1 (2);

(d) contravenes subsection 13 (5);

(e) contravenes or fails to comply with an order of the Board; or

(f) knowingly makes a false report to the Society in respect of an animal being in distress.

Penalty – individuals

(2) Every individual who commits an offence under clause (1) (a), (c.2), (d), (e) or (f) is liable on conviction to a fine of not more than $1,000 or to imprisonment for a term of not more than 30 days, or to both.

Same

(3) Every individual who commits an offence under clause (1) (b), (c) or (c.1) is liable on conviction to a fine of not more than $60,000 or to imprisonment for a term of not more than two years, or to both.

Penalty – corporations

(4) Every corporation that commits an offence under subsection (1) is liable on conviction to the same fine to which an individual is liable for the offence.

Penalty – directors, officers

(5) Every director or officer of a corporation who authorized, permitted or participated in the corporation's commission of an offence under subsection (1) is also guilty of the offence and on conviction is liable to the same penalty to which an individual is liable for the offence, whether or not the corporation has been prosecuted or convicted.

Prohibition order

(6) If a person is convicted of an offence under clause (1) (b) or (c), the court making the conviction may, in addition to any other penalty, make an order prohibiting the convicted person and, if the convicted person is a corporation, the directors and officers of the corporation described in subsection (5), from owning, having custody or care of, or living with any animal, or any kind of animal specified in the order, for any period of time specified in the order, including, in the case of an individual, for the remainder of the person's life and, in the case of a corporation, forever.

Restitution order

(7) If a person is convicted of an offence under clause (1) (b) or (c), the court making the conviction may, in addition to any other penalty, make an order that the convicted person pay the whole or any part of the cost to the Society of providing food, care or treatment to an animal that was the victim of the offence of which the convicted person was convicted.

Other orders

(8) If a person is convicted of an offence under clause (1) (b) or (c), the court making the conviction may, in addition to any other penalty, make any other order that the court considers appropriate, including an order that the convicted person undergo counselling or training.

Order to remove orca

18.2 (1) When a person is convicted of possessing an orca in Ontario in contravention of subsection 11.3.1 (1), the court shall order the person to remove the orca from Ontario within a period of time specified by the court.

Prohibition does not apply

(2) The prohibition against possessing an orca in subsection 11.3.1 (1) does not apply in respect of an orca that is the subject of an order under subsection (1) until the period of time specified by the court has elapsed.

Offence, failure to remove orca

(3) A person who fails to comply with an order described in subsection (1) is guilty of an offence.

Penalty — individuals

(4) An individual who commits an offence under subsection (3) is liable on conviction to a fine of not more than $250,000 or to imprisonment for a term of not more than two years, or to both.

Penalty — corporations

(5) A corporation that commits an offence under subsection (3) is liable on conviction to the same fine to which an individual is liable for the offence.

Penalty — directors, officers

(6) A director or officer of a corporation who authorized, permitted or participated in the corporation's commission of an offence under subsection (3) is also guilty of the offence and on conviction is liable to the same penalty to which an individual is liable for the offence, whether or not the corporation has been prosecuted or convicted.

Order to allow Society to cause orca to be removed

18.3 (1) If a person has been convicted of an offence under subsection 18.2 (3) for failing to comply with an order to remove an orca from Ontario, and if the person continues to possess the orca in Ontario, the Society may apply to a judge of the Ontario Court of Justice for any order necessary to allow the Society to cause the orca to be removed from Ontario.

Costs

(2) If an order is made under subsection (1), the person referred to in subsection (1) shall pay the Society any costs that the Society incurred in bringing the application and any costs the Society incurs in causing the orca to be removed from Ontario.

MISCELLANEOUS MATTERS

Inspector, etc., not personally liable

19. No inspector or agent of the Society and no veterinarian or member of the Board is personally liable for anything done by him or her in good faith under or purporting to be under the authority of this Act.

Service of orders, notices, etc.

20. Any order, notice or statement of account required or authorized to be served under this Act shall be served personally or by registered mail, courier, fax, electronic mail or other prescribed method in accordance with the regulations.

Conflict with municipal by-laws

21. In the event of a conflict between a provision of this Act or of a regulation made under this Act and of a municipal by-law pertaining to the welfare of or the prevention of cruelty to animals, the provision that affords the greater protection to animals shall prevail.

REGULATIONS

Regulations

22. (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing activities that constitute activities carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry for the purposes of clauses 11.1 (2) (a) and 11.2 (6) (c);

(b) prescribing classes of animals, circumstances and conditions or activities for the purposes of clauses 11.1 (2) (b) and 11.2 (6) (d);

(c) exempting any person or class of persons from any provision of this Act or of a regulation made under this Act, and prescribing conditions and circumstances for any such exemption.

Same

(2) The Minister responsible for the administration of this Act may make regulations,

(a) prescribing and governing the powers and duties of the Chief Inspector of the Society, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties;

(b) prescribing standards of care for the purposes of section 11.1;

(b.1) prescribing administrative requirements for the purposes of section 11.1 relating to animals that a person owns or has custody or care of, including, but not limited to,

(i) requiring the establishment of a committee to oversee an animal's welfare and prescribing the functions, duties, governance and operation of such a committee,

(ii) requiring a committee referred to in subclause (i) to develop and implement a plan to promote an animal's care,

(iii) requiring the development and implementation of a program designed by a veterinarian to provide care for an animal, and

(iv) requiring specified records to be kept or disclosed;

(c) governing the report required under section 11.3, including its contents and the manner of making the report;

(d) prescribing forms for the information on oath required by subsection 11.5 (1), 12 (1) or 14 (1.1), for a warrant issued under subsection 11.5 (1) or 12 (1) and for an order issued under subsection 14 (1.1) or (1.4);

(e) governing applications for and the issue of warrants by telephone or other means of telecommunication for the purposes of subsections 11.5 (1.1) and 12 (2), prescribing the forms required to apply for a warrant under those subsections and the forms for the warrants issued under those subsections, prescribing rules for the execution of such warrants and prescribing evidentiary rules with respect to such warrants;

(f) prescribing a period of time for the purpose of section 15.1;

(g) governing the service of orders, notices and statements of account for the purposes of section 20.

Criminal Code, RSC 1985, c C-46

Definitions

2. In this Act, […]

peace officer includes

(a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,

(b) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the Corrections and Conditional Release Act, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the Corrections and Conditional Release Act,

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(c.1) a designated officer as defined in section 2 of the Integrated Cross-border Law Enforcement Operations Act, when

(i) participating in an integrated cross-border operation, as defined in section 2 of that Act, or

(ii) engaging in an activity incidental to such an operation, including travel for the purpose of participating in the operation and appearances in court arising from the operation,

(d) an officer within the meaning of the Customs Act, the Excise Act or the Excise Act, 2001, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,

(d.1) an officer authorized under subsection 138(1) of the Immigration and Refugee Protection Act,

(e) a person designated as a fishery guardian under the Fisheries Act when performing any duties or functions under that Act and a person designated as a fishery officer under the Fisheries Act when performing any duties or functions under that Act or the Coastal Fisheries Protection Act,

(f) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the Aeronautics Act, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(g) officers and non-commissioned members of the Canadian Forces who are

(i) appointed for the purposes of section 156 of the National Defence Act, or

(ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers; (agent de la paix)

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31

Purposes

1 The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[…]

Right of access

10 (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[…]

EXEMPTIONS

Cabinet records

12 (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Advice to government

13 (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

Law enforcement

14 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

Idem

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

Refusal to confirm or deny existence of record

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

Exception

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

Idem

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Civil Remedies Act, 2001

14.1 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the Civil Remedies Act, 2001, conduct a proceeding under that Act or enforce an order made under that Act.

Prohibiting Profiting from Recounting Crimes Act, 2002

14.2 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the Prohibiting Profiting from Recounting Crimes Act, 2002, conduct a proceeding under that Act or enforce an order made under that Act.

Relations with other governments

15 A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution; or

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

Relations with Aboriginal communities

15.1 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or

(b) reveal information received in confidence from an Aboriginal community by an institution.

Definition

(2) In this section,

"Aboriginal community" means,

(a) a band within the meaning of the Indian Act (Canada),

(b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to,

(i) Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*, or

(ii) a treaty, land claim or self-government agreement, and

(c) any other Aboriginal organization or community prescribed by the regulations.

Defence

16 A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

Third party information

17 (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Tax information

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

Consent to disclosure

(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

Economic and other interests of Ontario

18 (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

(i) submissions in respect of a matter under the Municipal Boundary Negotiations Act commenced before its repeal by the Municipal Act, 2001, by a party municipality or other body before the matter is resolved;

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services.

Exception

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

Information with respect to closed meetings

18.1 (1) A head may refuse to disclose a record that reveals the substance of deliberations of a meeting of the governing body or a committee of the governing body of an educational institution or a hospital if a statute authorizes holding the meeting in the absence of the public and the subject-matter of the meeting,

(a) is a draft of a by-law, resolution or legislation; or

(b) is litigation or possible litigation.

Exception

(2) Despite subsection (1), the head shall not refuse to disclose a record under subsection (1) if,

(a) the information is not held confidentially;

(b) the subject-matter of the deliberations has been considered in a meeting open to the public; or

(c) the record is more than 20 years old.

Application of Act

(3) The exemption in subsection (1) is in addition to any other exemptions in this Act.

Solicitor-client privilege

19 A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

Danger to safety or health

20 A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

Personal privacy

21 (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Criteria re invasion of privacy

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Presumed invasion of privacy

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution;

(c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario; or

(d) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

Refusal to confirm or deny existence of record

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Species at risk

21.1 A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

(a) killing, harming, harassing, capturing or taking a living member of a species, contrary to clause 9 (1) (a) of the *Endangered Species Act, 2007*;

(b) possessing, transporting, collecting, buying, selling, leasing, trading or offering to buy, sell, lease or trade a living or dead member of a species, any part of a living or dead member of a species, or anything derived from a living or dead member of a species, contrary to clause 9 (1) (b) of the *Endangered Species Act, 2007*; or

(c) damaging or destroying the habitat of a species, contrary to clause 10 (1) (a) or (b) of the *Endangered Species Act, 2007*.

Information soon to be published

22 A head may refuse to disclose a record where,

(a) the record or the information contained in the record has been published or is currently available to the public; or

(b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

Exemptions not to apply

23 An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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Proceeding commenced at Perth

COURT OF APPEAL FOR ONTARIO

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