Court File No. C66542

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Respondent (Appellant in appeal,
Respondent in cross-appeal)

-and-

JEFFREY BOGAERTS

Applicant (Respondent in appeal
Appellant in cross-appeal)

FACTUM OF THE APPELLANT IN CROSS-APPEAL (APPLICANT, RESPONDENT IN APPEAL)

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PART I: THE APPLICANT (APPELLANT IN CROSS-APPEAL) AND THE DECISION APPEALED FROM

1. The Applicant, Mr. Jeffrey Bogaerts, cross-appeals parts of the decision of Justice Minnema of the Superior Court of Justice dated January 2, 2019.

2. The original Application was about the *OSPCA Act* and three key areas of concern: (1) the constitutionality of delegating police powers to a private charitable organization without any oversight, (2) issues related to various search and seizure powers authorized by the Act, and (3) a federalism question respecting the Act.

3. Regarding the first item, the case asked whether there should be any constitutionally-mandated safe-guards / oversight prescribed when police powers are granted to a private organization. In his decision, Justice Minnema declared that sections 11, 12 and 12.1 of the *OSPCA Act* are unconstitutional under section 7 of the *Charter* because the Act delegates police powers to the OSPCA, a private charitable organization, without reasonable standards of transparency or accountability. The Attorney General of Ontario [hereinafter "Ontario"] has appealed this finding.

4. The Applicant agrees with Justice Minnema's judgement respecting oversight, but cross-appeals to request that the decision be varied to add another requirement to the institutional structures of law enforcement bodies; namely, that law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias[1].

5. As a second part of this cross-appeal, the Applicant appeals part of the court below's decision related to search and seizure provisions authorized by the Act.

6. Regarding this second part, the court below found that none of the challenged sections of the *OSPCA Act* authorized unreasonable searches and seizures contrary to Section 8 of the *Charter*. The court found that the impugned sections did not involve a "search" or "seizure" for constitutional purposes on account of there being no expectation of privacy. The Applicant appeals this finding as it relates to only three of the previously challenged sections of the *OSPCA Act*; namely, sections 13(6), 14(1)(b) and 14(1)(c), all of which authorize warrantless searches of, and seizures from, peoples' homes

7. The below submissions follow the Applicant's submissions contained in his "Factum of the Respondent". Some references to that factum will be made in this factum.

PART II: NATURE OF THE CASE AND MATTERS AT ISSUE

> The OSPCA as constituted under the *OSPCA Act* is not a government agency but a private charity that operates by way of a board. While it receives government funding, there is a significant shortfall and as such it needs to raise funds through donations or other revenues to attempt to cover a large portion of its operating expenses. This results in potential for conflicts of interest
>
> *Bogaerts v. Ontario (Attorney General)*, [2019] O.J. No. 5 (Ont. S.C.J.) at ¶85.

[1] The Applicant has revised the wording of the proposed principle of fundamental justice contained in the Notice of Cross-appeal from "law enforcement bodies must be funded publicly to avoid actual or perceived conflicts of interest" to "law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehension of bias".

8. The first part of the cross-appeal is concerned with the funding structure of the OSPCA, as a law enforcement body empowered by sections 11, 12 and 12.1 of the *OSPCA Act*. The Applicant submits that the particular combination of the OSPCA's funding structure, with a significant portion of its investigation budget being reliant upon discretionary private donations (approximately $1 million or 1/3 the total investigation budget), together with the *OSPCA Act*'s delegation of police powers, is inconsistent with section 7 of the *Charter*. The Applicant submits that this combination is contrary to principles of fundamental justice because law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias. The current structure created by the *OSPCA Act* fails to do this.

9. Justice Minnema touched on this issue as part of his analysis to determine if institutional "integrity" may qualify as a principle of fundamental justice. He found that "integrity" did not qualify as a principle of fundamental justice. The Applicant does not appeal this finding specifically, because it is agreed that the principle of "integrity" is too vague and synonymous with morality. However, if that principle was narrowed down to the essential element of its main issue, which was that the funding structure of the OSPCA is the root of potential conflicts of interest and apprehensions of bias, it would be sufficiently precise to qualify as a principle of fundamental justice.

Bogaerts v. Ontario (Attorney General), [2019] O.J. No. 5 (Ont. S.C.J.) at ¶85.

10. The second part of the cross-appeal is concerned with the constitutionality of sections 13(6), 14(1)(b) and 14(1)(c) of the *OSPCA Act*, insofar as these sections authorize unreasonable searches of, and seizures from, peoples' homes. Justice Minnema reviewed these sections (along with other search and seizure sections of the Act), but he found that

the Applicant did not establish "a reasonable expectation of privacy for the types of searches [/ seizures authorized by the Act]".

Bogaerts v. Ontario (Attorney General), [2019] O.J. No. 5 (Ont. S.C.J.) at ¶58 & 61.

11. The Applicant submits that the two-part section 8 test was not correctly employed by the learned Justice, since the matters at issue involve what can only be considered to be objectively reasonable privacy interests. Section 13(6) authorizes entry onto private property, including into dwellings, and sections 14(1)(b) and 14(1)(c) authorize seizures of peoples' animals, including from peoples' homes. Clearly, these sections engage objectively reasonable privacy interests so as to qualify as "searches" and "seizures" for constitutional purposes. This is an error of such a degree as to require review on a correctness standard. Upon finding that the first step of the section 8 analysis was not satisfied, Justice Minnema ended his analysis there and did not consider the second step.

12. The second step of the section 8 test that should have been employed involves a determination of whether the "searches" or "seizures" that are authorized by the Act are unreasonable. Due to the fact that the impugned sections involve warrantless searches and seizures, there is a presumption of unreasonableness that must be rebutted by Ontario.

PART III: SUMMARY OF FACTS

13. The relevant facts regarding the cross-appeal are contained in Part II of the Applicant's "Factum of the Respondent".

PART IV: ISSUES AND ARGUMENT RAISED BY THE APPELLANT IN CROSS-APPEAL

A. Law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias

14. Both the Applicant and the Intervenor made extensive submissions at trial on the broader issue of what was eventually termed the "integrity" principle by the court. The central concern expressed by both the Applicant and the Intervenor regarding the "integrity" of the OSPCA, as structured by the *OSCPA Act*, had to do with its funding structure and reliance upon private donations to fund its investigations in particular.

15. While Justice Minnema dismissed the "integrity" principle as a principle of fundamental justice, and did not consider the more narrow funding principle specifically, he did find as a fact that the OSPCA's funding structure "results in potential for conflicts of interest" and the OSPCA is "potentially subject to external influence, and as such Ontarians cannot be confident that the laws it enforced will be fairly and impartially administered". This is extremely critical language of a justice issue which supports the contention that the OSPCA, as a law enforcement body created by the *OSPCA Act*, is subject actual or perceived conflicts of interest and apprehensions of bias.

Bogaerts v. Ontario (Attorney General), [2019] O.J. No. 5 (Ont. S.C.J.) at ¶85 & 91.

16. If the "integrity" principle is narrowed down to focus on the funding concerns, it should qualify as a principle of fundamental justice for the following reasons.

Engagement of the protected interests of section 7 of the Charter

17. The Applicant's submissions respecting the engagement of the "Liberty" and "Security of the Person" aspects of section 7 of the *Charter* are the same as those submitted at

paragraphs 30-54 of the Applicant's "Factum of the Respondent". The Applicant repeats and relies upon those submissions.

The criteria for a principle of fundamental justice

18. The three criteria for a principle of fundamental justice are: (1) it must be a legal principle; (2) consensus that the proposed principle is fundamental to our societal notion of justice; and (3) the principle produces a workable standard.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] S.C.J. No. 6 (S.C.C.) at ¶8.

Criteria #1: legal principle

19. The proposed principle that law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias, is a legal principle in the sense that it is "a principle that relates to how our system of justice operates".

Trang v. Alberta (Edmonton Remand Centre), [2007] A.J. No. 907 (Alta. C.A.) at ¶30.

20. The proposed principle is essential to our sense of justice, the administration of justice and our justice system. Whether any particular law enforcement body should observe the proposed principle cannot be considered a mere matter of policy, because this institutional characteristic is essential to maintaining the public's confidence in the fair, objective and effective enforcement of the law.

21. A requirement for law enforcement bodies to be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias goes hand-and-hand with requiring law enforcement bodies to carry out its duties objectivity, fairly and free from external influences. Avoiding the taint of bias and partiality is more than a mere public policy concern, it is a justice issue.

22. The Applicant submits that the proposed principle is essential to maintaining the public's trust in the justice system. An apprehension of bias will always loom like a dark cloud over a law enforcement body (and its investigative work) when it is dependent upon discretionary external funding. It is not unlike the legal principle against an apprehension of bias on the part of the judiciary. Justice must not only be done, it must also be seen to be done, as Justice Sopinka held in the context of a section 7 analysis in *R. v. La*:

> [The matter at issue] engages the fundamental principle that justice must be seen to be done, as well as actually being done… there may still be a *Charter* violation if [the matter at issue] "violates those fundamental principles that underlie the community's sense of decency and fair play."
>
> *R. v. La*, [1997] 2 S.C.R. 680 (S.C.C.), at ¶55.

Criteria #2: fundamental to our societal notion of justice

23. The public expects that our law enforcement bodies are funded in such a way as to avoid the inevitable influence that flows from being dependent upon discretionary private funding. The public expects an adequate buffer between the financial interests of a law enforcement body, and its investigative decisions which may or may not impress the special interests of its funders.

24. Maintaining financial independence from private special interests is a fundamental aspect of Canada's law enforcement system. It is a "shared assumption upon which our system of justice is grounded", and is viewed by society as "essential to the administration of justice".

> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6 (S.C.C.) at ¶8.

25. Ensuring that law enforcement bodies are free from external financial influences is a principle that is "vital or fundamental to our societal notion of justice", it constitutes a "basic norm for how the state deals with its citizens", and it is "fundamental in the sense

that [it has] general acceptance among reasonable people".

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 (S.C.C.), at ¶139, 141 & 173.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] S.C.J. No. 6 (S.C.C.) at ¶8.

26. Institutional structures (of law enforcement bodies) that promote and safeguard impartiality and objectivity are critical to the broader integrity of and public confidence in the justice system, in the same way as principles designed to ensure the right to make a full answer and defence are critical.

27. If bodies charged with law enforcement responsibilities are potentially subjected to external influences on account of their dependence on discretionary private funding, Ontarians cannot be confident that the laws they enforce will be fairly and impartially administered.

Criteria #3: produces a workable standard

28. The fact that the proposed principle is already applied to virtually every other law enforcement institutional structure demonstrates that it is sufficiently cognizable and applicable principle of fundamental justice. We can rely on these norms for guidance on how the new principle could be applied. [2]

29. While it is acknowledged by the Applicant that the newly recognized principle may require ongoing judicial elaboration over time on a case-by-case basis, similar to those principles designed to ensure the right to make a full answer and defence, it is sufficient for the purposes of this case to recognize the existence of the principle in general terms,

[2] The enforcement of laws applicable to the public at large are virtually always funded through the public purse. Enforcement of laws applicable only to specific groups, such as particular professionals or specific businesses or market participants, may be financed through a licensing and / or membership fee system. Either model avoids inevitable conflicts of interest or apprehensions of bias, since funding is stable and not dependent upon inspiring donations. The OSPCA is unique insofar as it is dependent upon discretionary donations from individuals or groups who, inevitably, will only donate if they approve of the investigative decisions and actions of the OSPCA.

as guided by the institutional characteristics of the OSPCA specifically, and the clear deviations from the principle as it relates to the *OSPCA Act* in the present case.

Does the OSPCA Act contravene the proposed principle of fundamental justice?

30. There is no question that the OSPCA, and more particularly the legal framework in which it functions, contravenes the proposed principle of fundamental justice. Sections 11, 12 and 12.1 of the *OSPCA Act* delegate police powers to the OSPCA. Justice Minnema found as a fact, and the OSPCA's own evidence supports it, that the funding structure of the OSPCA is largely dependent on discretionary private donations. This is unlike virtually every other law enforcement body in Ontario.

31. The OSPCA is heavily reliant on discretionary funding from the private sector. At least $1 million dollars (or 1/3 of its total investigations budget) must be raised through private donations to cover the shortfall from government funding. All of this assumes that the Transfer Payment Agreement with the province, which provides government funding, is renewed or not cancelled. Without that agreement, the OSPCA would revert back to its pre-2013 funding circumstances, whereby it was responsible for raising 100% of its investigations budget.

32. While this issue has not been reviewed before in the context of a *Charter* section 7 analysis, the court has previously recognized the fundamental flaw in having the OSPCA rely on donations to pay for its investigations. In *R. v. Pauliuk*, the Court dismissed animal welfare charges upon the following findings:

> [The OSPCA] hires its own agents and inspectors, determines the parameters of their employment, and using aforementioned police powers, enters property, seizes animals as in this case (without warrant or judicial intervention) and lays charges - all the while attending to its own need to fundraise. In order to do the latter, it relies heavily on the publicity it can glean from high profile seizures and charges. Indeed, there is a communications branch tasked with this. It is a not-for-profit organization

> and a registered charity. Without publicity and high profile charges, the funds the S.P.C.A. needs to operate would no doubt dry up.
>
> It goes without saying that a strong and active enforcement of animal cruelty laws must be maintained. But I would be naïve to suggest that the current set-up could not foster the perception in reasonable, open-minded people, that bias may exist and that conflicts will result. However trite it may be, it is still true that 'Justice must not only be done, it must be seen to be done'. It is unfortunate, for example, that Dr. Mogavero, a highly qualified and well-respected professional, was placed in the position he was in this case. He directed the operation of the Society, he earned money from the Society, he helped fund-raise for the Society, he was concerned for the budgetary needs of the Society, he took part in the investigation, made the decision to seize the horses, made the decision to board and care for the horses, and profited from so doing.
>
> ...The perception of bias that looms over all the Crown evidence of this case is like a stake to the heart - totally damaging the Crown's ability to prove its case.
>
> It would be unreasonable and dangerous to convict on this evidence and I refuse to do so.
>
> [*emphasis added*]
>
> *R. v. Pauliuk*, [2005] O.J. No. 1393 (OCJ), at ¶28-32.

33. The *Pauliuk* case is especially noteworthy because it highlights how the funding structure created by the *OSPCA Act* is not only wrong from a principles of fundamental justice standpoint, but it can also undermine the object of the Act by disqualifying the prosecution of cases.

34. The funding responsibilities of the OSPCA may also serve to undermine the object of the legislation in situations where the OSPCA is suffering a budgetary shortfall. Put another way, without access to the deep pockets of the public purse, the OSPCA may at times be financially incapable of effectively enforcing the law.

35. Another conflict of interest that the *OSPCA Act* creates relates to the fact that the OSPCA concurrently functions as both a law enforcement organization and as an animal "rescue" organization that provides shelter and adoption services. As part of its investigative duties, the OSPCA sometimes investigates competing "rescue" providers. In a completely

different fashion, the OSPCA deals with complaints regarding its own rescue operations internally through a chain of command. In other words, no one is investigating the OSPCA.

36. The connection between funding and meeting certain people's expectations is a clear conflict of interest. At minimum, these facts promote a perception that the OSPCA may not always be objective when carrying out its investigations. At worst, the OSPCA may be genuinely influenced by donors' demands. The OSPCA's "Animal Welfare Position Statements" that set out activist-type political ideals, formerly contained in the OSPCA's training manual, provides a concrete example of such dangers. These position statements are clearly designed to impress a specific sector of potential donators.

Exhibit 5(B) - OSPCA Animal Welfare Position Statements, Respondent's Compendium tab 14, pp. 378-392.

37. By delegating police powers to the OSPCA, a private charity, through sections 11, 12 and 12.1 of the *OSPCA Act*, the OSPCA is the only law enforcement body in Ontario with police powers that must also fundraise to finance a large portion of its investigations budget. None of this legislative framework bears the hallmarks of an impartial and objective law enforcement body that is free from external influences, conflicts of interest and reasonable apprehensions of bias, all of which inevitably arise when a body is reliant on satisfying the demands of it donours.

38. The impartiality and objectivity of our law enforcement bodies constitute a fundamental assumption upon which our justice system is based. The OSPCA, and more particularly the legal framework in which it functions, falls well short of satisfying those assumptions. Sections 11, 12 and 12.1 of the *OSPCA Act* are therefore inconsistent with the proposed principle of fundamental justice and section 7 of the *Charter* as a result.

B. Warrantless searches of and seizures from dwellings

The impugned sections

39. Separate and apart from the above described component of the Applicant's cross-appeal, the Applicant asks this Court to vary the below Court's finding regarding sections 13(6), 14(1)(b) and 14(1)(c) of the *OSPCA Act* as it relates to section 8 of the *Charter*. The grounds for the Applicant's cross-appeal in relation to these sections is very straightforward: these sections are unconstitutional for permitting warrantless searches of, and seizures from, peoples' homes.

40. The Supreme Court of Canada has repeatedly found that private dwellings carry heightened privacy expectations. The warrantless authorizations to conduct searches and seizures provided by the impugned sections are unlike virtually every other statute providing similar authority to conduct searches and seizures because there is no exception for a dwelling. It is also unlike other newer sections of the *OSPCA Act*, such as sections 12(6) and 11.4.

41. Sections 13(1) and 13(6) operate conjunctively to authorize warrantless entry onto private property, including within a dwelling, irrespective of any situation of urgency, at the complete discretion of an OSPCA officer, at any hour of the day or night, and into the future forever, either alone or accompanied by any number of other persons as an OSPCA officer considers advisable. These are extraordinarily intrusive powers.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 at s. 13(1) & 13(6).

42. It is noteworthy that the OSPCA has an internal policy to require a warrant to conduct a section 13(6) search without consent. This clearly demonstrates that a warrant requirement is feasible.

Cross-examination of Connie Mallory, transcript pp. 42-47, questions 184-204;
Respondent's Compendium tab 1, p. 29-34.

43. Sections 14(1)(b) and 14(1)(c) authorize seizures of peoples' animals, including seizures from peoples' homes at any hour of the day or night, without any prior or subsequent judicial supervision, at the complete discretion of an OSPCA officer. Similar to how section 13(6) works conjunctively with section 13(1), section 14(1)(c) also works conjunctively with section 13(1).

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 at s. 14(1).

44. It is noteworthy that seizures authorized under the newer sections of 12.1(1), 12.1(4), 12.1(5) and 12.1(6) of the *OSPCA Act* function to require *post facto* reporting and an order from a Judge or Justice of the Peace to keep anything seized. This section of the Act demonstrates that subsequent judicial supervision for seizures under 14(1)(b) and 14(1)(c) is feasible.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 at s. 12.1

The section 8 test

45. The Application judge relied on *R. v. Cole* to set out the section 8 test and to perform his analysis. However, *Cole* examines the constitutionality of a particular search or seizure, not the constitutionality of a law that authorizes a search or seizure. The Applicant respectfully submits that it would be better to employ the analysis used by this court in *R. v. Campanella*, [2005] O.J. No. 1345 (Ont. C.A.). Not only does this case examine the constitutionality of a law rather than a particular search or seizure, it also examines a provincial law that falls outside realm of the *Criminal Code*, being similar to the present case.

R. v. Campanella, [2005] O.J. No. 1345 (Ont. C.A.) at ¶14-29.

46. The section 8 analysis used to assess the constitutionality of a law involves a two-step process: (1) does the impugned legislation authorize a "search" or a "seizure" for constitutional purposes? and (2) if so, does the impugned legislation authorize a search or seizure that is unreasonable?

R. v. Campanella, [2005] O.J. No. 1345 (Ont. C.A.) at ¶14 & 16.

Step #1: a "search" or a "seizure" for constitutional purposes?

47. The Application judge ended his analysis by concluding that the impugned sections did not authorize a "search" or a "seizure" for constitutional purposes. He came to this conclusion upon determining that the affected person(s) would not have a reasonable expectation of privacy in the circumstances.

48. While it is true that not every form of "examination" conducted by the government and / or "taking" by the government will constitute a "search" or "seizure" for constitutional purposes, it is equally true that searches and seizures from peoples' homes will certainly affect a person's "reasonable expectation of privacy" and therefore constitute a "search" or a "seizure" for constitutional purposes. To conclude otherwise would go against practically all jurisprudence on the subject.

R. v. Tessling, [2004] 3 S.C.R. 432 (S.C.C.) at ¶22-23.
R. v. Evans, [1996] S.C.J. No. 1 (SCC), at ¶3.
R. v. Kokesch, [1990] 3 S.C.R. 3 (SCC), at ¶47.

49. The Applicant acknowledges that searches conducted pursuant to the authority granted under section 13(6) of the *OSCPA Act* are not searches of a criminal nature, and this factor serves to diminish the standard of reasonableness applicable to the context. Just the same, non-criminal searches are subject to section 8 scrutiny:

> ...The term "search" in s. 8 cannot be limited to searches of a criminal nature. It may encompass, inter alia, various sorts of access, in the context of administrative

> law or in criminal matters; this may, however, result in differences in the scope of the constitutional guarantee. To conclude otherwise would amount to unduly minimize the purpose of the guarantee against "unreasonable search or seizure," which does not seem desirable. In short, although this is an administrative inspection, nonetheless the access to work premises conferred by the ACAD is comparable to a "search," and as such is subject to s. 8 of the *Charter*. This conclusion does not, however, mean that the standard of reasonableness will necessarily be as strict in a matter involving the regulation of an industrial sector as it is in criminal matters. [*references omitted*]

Comité paritaire de l'industrie de la chemise c. Sélection Milton, [1994] 2 S.C.R. 406 (SCC), at ¶ 53-59, 61-62.

50. While the administrative nature of the search and seizure provisions of the *OSPCA Act* may lower the standard of reasonableness, the fact that the impugned sections of the *OSPCA Act* include (or do not exclude) searches and seizures from peoples' homes will serve to raise the standard of reasonableness.

51. In *Campanella*, the search of a woman's purse at a courthouse, despite signs throughout the courthouse warning that people will be subjected to searches, was accepted as still constituting a "search" without further explanation. The same conclusion should certainly be reached in a case where the circumstances involve authority to enter into, search, and seize things from peoples' homes.

52. The Applicant anticipates that Ontario will argue that there is no reasonable expectation of privacy where there is an outstanding compliance order issued pursuant to section 13(1) of the *OSPCA Act*. In response, the Applicant submits that the issuance of a compliance order may diminish an expectation of privacy, but it certainly does not extinguish it altogether. Section 8 of the *Charter* will still be engaged as long as there is a reasonable expectation of privacy of <u>any</u> degree – diminished or not. It appears that it is upon this matter of law that Justice Minnema made his error and incorrect finding.

R. v. Cole, [2012] 3 S.C.R. 34 (S.C.C.) at ¶9.

53. The Application judge was clearly wrong by finding no expectation of privacy of any degree and ending his analysis there. The analysis should have at least proceeded to step #2 to determine if the subject searches and seizures authorized by the *OSPCA Act* are unreasonable.

Step #2: authority to conduct a search or seizure that is unreasonable?

54. The impugned sections of the *OSPCA Act* authorize warrantless entry into peoples' homes and seizures therefrom without judicial authorization or supervision.

55. Warrantless searches are *prima facie* unreasonable. Prior authorization is to be granted by a neutral and impartial arbiter capable of acting judicially. The party seeking to justify a warrantless search has the onus of rebutting the presumption of unreasonableness. The onus therefore falls on Ontario in this case to rebut the presumption of unreasonableness.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶30.

56. Where legislation authorizes entry into peoples' homes, the rebuttal of unreasonableness will be very difficult to make out. It has long been held that "[t]he sanctity of the home has constituted a bulwark against the intrusion of state agents".

R. v. Evans, [1996] S.C.J. No. 1 (SCC), at ¶3.
R. v. Kokesch, [1990] 3 S.C.R. 3 (SCC), at ¶47.

57. The obligation to obtain judicial authorization prior to conducting a search was explained by the Supreme Court in *Hunter v. Southam Inc.*:

> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.
>
> *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 (SCC), at ¶32.

58. The Court further explained that "[the person providing authorization] need not be a judge, but [he /she] must at a minimum be capable of acting judicially".

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶32.

59. The Court also held that an investigative body does not itself possess the necessary neutrality or detachment to also act judicially:

> … This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the *Act*) ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state…

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶35.

60. The authority to search pursuant to section 13(6) of the Act and to seize pursuant to section 14(1)(c) of the Act are both initiated by a discretionary decision of an OSPCA officer to issue a compliance order pursuant to section 13(1) of the Act. This is all dependent on the officer's "reasonable grounds for believing that an animal is in distress". This is effectively the same standard required to obtain a search warrant under section 12 of the Act, but section 13(1) omits the requirement of judicial authorization.

61. A reasonable law is one that strikes a reasonable balance between the particular state interest that is pursued by the law, and the privacy interests of the individual. There is no such balance with the impugned search and seizure provisions of the *OSPCA Act*.

Comité paritaire de l'industrie de la chemise c. Sélection Milton, [1994] 2 S.C.R. 406 (SCC), at ¶ 9-10.

62. While there is no "hard and fast" test for reasonableness under section 8, considerations include: (1) the nature and purpose of the legislative scheme, (2) the mechanism employed having regard for the degree of its potential intrusiveness and its reliability, and

(3) the availability of judicial supervision.

Goodwin v. British Columbia (Superintendent of Motor Vehicles), [2015] 3 S.C.R. 250 (S.C.C.) at ¶57.

63. Re: "the nature and purpose of the legislative scheme", the Applicant has already acknowledged that the non-criminal nature of the impugned search and seizure provisions weigh in favour of a lower standard of reasonableness. At the same time, however, the fact that the provisions authorize (or do not exclude) searches of, and seizures from, peoples' homes weigh in favour of a higher standard.

64. In a Nova Scotia case involving their provincial animal-welfare law, the *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22, the court reviewed the following section of the Act:

> (4) Where the peace officer has reasonable and probable grounds for believing that an animal is in distress
>
> (a) in or upon any premises other than a private dwelling place; or
>
> (b) in any vehicle or thing,
>
> the peace officer may, with or without a warrant, and by force, if necessary, enter the premises, vehicle or thing and search for the animal and exercise the powers conferred on the peace officer by this Section with respect to any animal in distress found therein.

R. v. Vaillancourt, 2003 NSPC 59 (PC), at ¶41.

65. Unlike the *OSPCA Act*, the Nova Scotia Act included an exemption for dwellings. This means that the impugned sections of the *OSPCA Act* should be considered even more unreasonable.

66. Even with an exemption for dwellings in the Nova Scotia Act, the court still found that the warrantless search and seizure provisions were unreasonable. The feasibility of judicial supervision was the determining factor in that case, as it should be in this case. The presumption of unreasonableness was not rebutted in *Vaillancourt*, despite the fact that that law was non-criminal in nature (like the *OSPCA Act*) and it excluded peoples'

homes (unlike the *OSPCA Act*).

R. v. Vaillancourt, 2003 NSPC 59 (PC), at ¶50-57.

67. Although *Vaillancourt* is not binding on this Court, it is persuasive and properly decided. Especially considering that the the standard of reasonableness is higher in the present case, a similar finding in this case is appropriate.

68. Re: the second *Goodwin* consideration, the Applicant does not contest the reasonableness of the "mechanism employed", except, again, insofar as it involves an intrusion into peoples' homes.

69. It is upon the third consideration of the analysis that the Applicant submits that the *OSPCA Act* clearly fails, as it did in *Vaillancourt*, because there is ample evidence to demonstrate that judicial supervision is feasible.

70. The OSPCA already has an internal policy to require a warrant to conduct a section 13(6) search when entry is refused. It is therefore clearly feasible to require a warrant.

71. The Applicant acknowledges that, under section 17 of the *OSPCA Act*, there is a right to appeal a section 13(1) order, and a person can apply to the board to have such an order revoked. However, unjustified searches are supposed to be prevented before they happen. This principle was explained in *Hunter v. Southam*:

> Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (SCC), at ¶27.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, at s. 17.

72. In *R. v. Campanella*, this Court held (quoting Dickson J. in *Hunter*):

> …an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective".
>
> …I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.
>
> *R. v. Campanella*, [2005] O.J. No. 1345 (Ont. C.A.) at ¶16.

73. It is noteworthy that section 17 of the *OSPCA Act* puts the onus on a person affected by a section 13(1) order to appeal the order, otherwise it remains in place and section 13(6) warrantless entry powers are correspondingly activated. This is akin to putting the onus on the person affected to reestablish their section 8 *Charter* rights. Such a scheme is not fair or reasonable, especially considering that it will inevitably involve vulnerable people in our society who may not be capable of initiating a section 17 appeal. It is also noteworthy that a person's right to appeal the merits of a section 13(1) order expires after only 5 business days, while section 13(6) entry powers can conceivable go on forever. Initiation of a section 17 appeal also does not stay the section 13(6) warrantless entry powers, and section 17 appeal proceedings can go on for months before relief from the section 13(6) warrantless entry powers is even possible.[3]

74. As it relates to sections 14(1)(b) and 14(1)(c), it is acknowledged that there will always be some situations of urgency and potential for imminent harm where prior judicial authorization is impracticable. It is certainly foreseeable that there will be times when an immediate seizure of an animal will be necessary in order to provide for its wellbeing. However, this does not support abandoning constitutional safeguards altogether.

[3] See for example *Jessica Johnson v. OSPCA* (2013), Decision Ref. No. 2012-03 (ACRB); Joint Book of Authorities, Tab B(24); the hearing lasted over four months and the decision was not rendered for six months.

Adequate judicial supervision does not necessarily need to be prior authorization; where prior authorization is not feasible, *post facto* judicial supervision may be appropriate.

R. v. Tse, [2012] S.C.J. No. 16 (SCC), at ¶ 16, 18, 61, 82-85, 94-95.

75. There are already mechanisms in place at sections 12.1(5) and 12.1(6) of the Act to judicially supervise and confirm seizures *post facto* of all things except for live animals, which are instead dealt with under section 14 with no judicial supervision. It is therefore surely feasible to employ the same judicial supervision mechanisms in relation to sections 14(1)(b) and 14(1)(c) pertaining to seizures of live animals. A similar mechanism is also already in place pertaining to live animals in very specific circumstances at section 14(1.1) of the Act.

76. It is acknowledged that section 17 of the *OSPCA Act* provides a right to appeal a section 14(1) seizure, and a person can apply to the board to have their animal(s) returned. However, once again, the onus should not be on the person affected by the removal to challenge the seizure because it will again inevitably involve vulnerable people. Instead, the OSPCA should be obliged to report the seizure to a judge or justice of the peace and obtain an order to keep the seized animal, similar to that which is required by way of sections 12.1(5), 12.1(6) and / or 14(1.1) of the Act. The onus to obtain judicial authorization (either prior or *post facto*) should always be on the Crown except in the most exceptional circumstances.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, at s. 12.1.
Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, at s. 14.
Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, at s. 17.

C. Alternative review of sections 11, 12 & 12.1 of the *OSPCA Act* under section 8 of the *Charter*

77. As part of its appeal, Ontario argues that sections 11, 12 & 12.1 of the *OSPCA Act* should have been reviewed under section 8 of the *Charter*, rather than section 7. This is the same argument that Ontario made at trial. At trial, the Applicant made an alternative argument that these sections could alternatively be reviewed for violating section 8, although he remained, and still remains, steadfast that a section 7 analysis was / is more appropriate given the context of the case and that the issues go beyond only search and seizure concerns. Justice Minnema ultimately agreed with the Applicant on this point and rendered his decision by preferring a section 7 analysis.

78. In the event that this court agrees with Ontario's submissions on this point, and prefers a section 8 analysis, the Applicant requests that the judgement of Justice Minnema be varied to review the constitutionality of sections 11, 12 & 12.1 of the *OSPCA Act* under section 8 of the *Charter*.

79. The *Campanella* section 8 analysis described above at paragraph 47 is repeated and relied upon by the Applicant for the purpose of such an analysis.

R. v. Campanella, [2005] O.J. No. 1345 (Ont. C.A.) at ¶14 & 16.

80. Given Ontario's arguments in favour of employing the section 8 analysis, it appears that it concedes the impugned sections involve "searches" and / or "seizures" for constitutional purposes, thus satisfying the first step of the section 8 analysis. Otherwise, the Applicant submits that it is obvious. The Applicant repeats and relies upon the case-law cited above a paragraphs 49-52 & 54.

81. The *Goodwin* considerations described above at paragraph 63, for the purpose of assessing the "unreasonableness" of the authorized searches and / or seizures, are

repeated and relied upon by the Applicant for the purpose of the present section 8 analysis.

Goodwin v. British Columbia (Superintendent of Motor Vehicles), [2015] 3 S.C.R. 250 (S.C.C.) at ¶57.

82. Of the *Goodwin* considerations described above, the "mechanism employed" is the greatest failure of sections 11, 12 & 12.1 of the *OSPCA Act*, with the "mechanism employed" in these sections being the delegation of police powers to a private charitable organization without any legislated oversight safeguards.

83. If this court prefers to review sections 11, 12 & 12.1 of the *OSPCA Act* under section 8 of the *Charter*, then the Applicant respectfully submits that the search and seizure powers enabled by the impugned sections are unreasonable for the same reasons that the Applicant submits that it is contrary to principles of fundamental justice to delegate police powers to a private organization without reasonable standards of transparency and accountability (see the Applicants submissions at paragraphs 68-75 & 84-100 of the Factum of the Respondent) and because the OSPCA is not funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias (see above at paragraphs 23-27 & 30-38). Sections 11, 12 & 12.1 of the *OSPCA Act* would correspondingly be unconstitutional for violating section 8 the *Charter*.

PART VI: ORDER SOUGHT

84. The Applicant requests:

a. The cross-appeal be granted and the corresponding parts of Justice Minnema's order be varied to reflect same; namely, to provide a declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, and section 52(1) of the *Constitution Act, 1982*, that:

   i. sections 11, 12 and /or 12.1 of the *OSPCA Act*, as amended, also violate section 7 of the *Charter*, for being inconsistent with the proposed fundamental principle of justice ("law enforcement bodies must be funded in such a manner to avoid actual or perceived conflicts of interest or apprehensions of bias"), and are therefore of no force or effect;

   ii. sections 13(6), 14(1)(b) and 14(1)(c) of the *OSPCA Act*, as amended, violate section 8 of the *Charter*, for authorizing unreasonable searches and seizures, and are therefore of no force or effect;

b. Leave to amend the Notice of Cross-appeal, if necessary;

c. In the event that this Court agrees with Ontario, insofar as Ontario claims that section 7 of the *Charter* is not engaged by sections 11, 12 and /or 12.1 of the *OSPCA Act*, and that the constitutionality of the impugned sections should have instead been assessed pursuant to section 8 *Charter*, the Applicant requests that the judgment be alternatively varied to declare the same impugned sections to be unconstitutional for violating section 8 of the *Charter* instead;

d. Costs; and

e. Such further and other relief that this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF MAY, 2019.

_____

Kurtis R. Andrews

Court File No. C66542

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Respondent (Appellant in appeal,
Respondent in cross-appeal)

-and-

JEFFREY BOGAERTS

Applicant (Respondent in appeal
Appellant in cross-appeal)

RESPONDENT'S CERTIFICATE

The Applicant (Respondent in appeal, Appellant in cross-appeal) certifies that an order under subrule 61.09(2) of the Rules of Civil Procedure is not required, and that he will require 1.5 hours for oral argument of the cross-appeal, not including reply.

_____

Kurtis R. Andrews

SCHEDULE "A"
AUTHORITIES CITED

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SCHEDULE "B"
STATUTES AND REGULATIONS CITED

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

ATTORNEY GENERAL OF ONTARIO
Respondent (Appellant in appeal, respondent in cross-appeal)

-and-

JEFFREY BOGAERTS
Applicant (Respondent in appeal, appellant in cross-appeal)

Court File No. C66542

COURT OF APPEAL FOR ONTARIO

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