

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

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

-and-

JEFFREY BOGAERTS

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

-and-

THE ATTORNEY GENERAL OF CANADA

Intervenor
(Party pursuant to *Constitutional Question Act*)

-and-

**ANIMAL JUSTICE CANADA and INFORMATION AND
PRIVACY COMMISSIONER OF ONTARIO**

Intervenors

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DATED: June 19, 2019

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PART I – OVERVIEW OF FACTS

1. Animal Justice Canada (“**Animal Justice**”) intervenes in this appeal as a friend of the Court pursuant to the order of Chief Justice Strathy dated May 21, 2019. The appellant, the Attorney General of Ontario (the “**AGO**”), appeals the holding of the Superior Court of Justice that certain provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act* (the “**Act**”) unjustifiably infringe s. 7 of the *Charter*. The respondent Mr. Bogaerts, by cross-appeal, appeals the Superior Court’s holding that certain provisions of the *Act* do *not* infringe s. 8 of the *Charter*.

A. Animal Justice

2. Animal Justice is the only Canadian advocacy organization focused on animal law. Among its primary objects is the prevention of cruelty to animals through the meaningful and effective enforcement of existing animal protection laws.

3. Accordingly, Animal Justice is interested in ensuring that those tasked with administering animal protection statutes possess search powers necessary to adequately enforce the law, and that animal law enforcement bodies are structured in a way that ensures animal protection laws are rigorously and effectively enforced.

4. These objectives are essential to ensuring that animals benefit from the protections afforded by existing laws, and that the public can have confidence in animal law enforcement.

B. The Ontario SPCA

5. The Ontario SPCA is created by provincial statute, and is empowered to enforce any and all laws in force in Ontario pertaining to the welfare of or the prevention of cruelty to

animals.¹ Its broad jurisdiction makes it a key gatekeeper of animal law enforcement, not just for protections available to animals under the *Act*, but also under other provincial statutes, federal criminal animal cruelty laws, federal laws protecting farmed animals during transportation and slaughter, and even municipal by-laws.

PART II – POSITION WITH RESPECT TO POINTS IN ISSUE

6. Animal Justice addresses two legal issues in this appeal:
 - a. how the unique context of animal neglect and abuse ought to inform the Court's assessment of the provisions in the *Act* that Mr. Bogaerts challenges under s. 8 of the *Charter*; and
 - b. the legal principles applicable to the recognition of a novel principle of fundamental justice under s. 7 of the *Charter*, and how the principle that requires law enforcement bodies to possess certain institutional qualities – accountability, transparency and the avoidance of conflicts of interest – falls within the principles of fundamental justice.
7. Animal Justice's submissions emanate from its over-arching concern that animal protection legislation be rigorously and effectively enforced in a manner that reflects modern societal values in relation to the moral status of animals.
8. The very existence of the *Act* demonstrates society's belief in the moral worth of animals. Public concern about the well-being of animals is increasing – a development that

¹ *Act*, s. 11(1)

has been observed by courts across the country.² Therefore, effective enforcement of laws designed to prevent animal cruelty is necessary to protect a core public value.

9. Animal Justice respectfully submits that, in order to be effective – and, just as importantly, to be *seen* to be effective – these laws must be enforced by public bodies that (a) are vested with search powers that reflect the unique context of animal cruelty and neglect, and (b) are subject to reasonable standards of transparency and accountability, and are structured in a manner that avoids conflicts of interest, in order to maintain public confidence in the fair, rigorous, and effective enforcement of animal protection legislation.

PART III – ARGUMENT

A. A Contextual Approach to Section 8 of the *Charter*

10. The *Act* is animated by a recognition that animals are both sentient and vulnerable, and that the manner in which they are treated has ethical implications for society as a whole. This is confirmed by the name of the *Act* itself, and the preamble to a 2008 amendment to the *Act*, which states that the “people of Ontario and their government”:

Believe that how we treat animals in Ontario helps define our humanity, morality and compassion as a society;

Recognize our responsibility to protect animals in Ontario; ...³

11. The legislative purposes of animal protection legislation can only be realized if those laws are meaningfully enforced. It is therefore critically important that state agencies have the powers necessary to effectively enforce animal protection legislation.

² *R. v. Munroe*, 2010 ONCJ 226 [*Munroe*]; *D.L.W.*, ¶69; *Reece v. Edmonton (City)*, 2011 ABCA 238 [*Reece*], ¶42; *R. v. Alcorn*, 2015 ABCA 182 [*Alcorn*], ¶42; *Baker v. Harmina*, 2018 NLCA 15, ¶48

³ *Provincial Animal Welfare Act*, S.O. 2008, c. 16; cited in *Bogaerts v. Attorney General of Ontario*, 2019 ONSC 41 [*Bogaerts*], ¶9

12. Section 8, as much as any other section of the *Charter*, requires a contextual analysis.⁴

13. This means that the “reasonableness” of a search must be understood in light of the context in which it is undertaken, the statutory regime at issue including its purpose and objects, and what is required as a practical matter to ensure meaningful enforcement. This context informs the assessment of whether, “in a particular situation”, the government’s interest in law enforcement outweighs the public’s interest in being left alone.⁵

14. The extent of a person’s reasonable expectations of privacy are likewise dependent on this context. As the Supreme Court stated in *McKinlay Transport*:

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is “reasonable” in a given context must be flexible if it is to be realistic and meaningful.⁶

15. Animal Justice submits that three key contextual factors in assessing the reasonableness of the search provisions at issue in this proceeding are:

- a. the unique practical difficulties associated with policing and enforcing animal protection legislation;
- b. the increased recognition of animals as sentient beings with inherent moral value, and the consequent importance of ensuring that the state can adequately prevent animal abuse and neglect from occurring or continuing; and

⁴ See e.g. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, ¶53; *R. v. Jacques*, [1996] 3 S.C.R. 312, ¶20; *R. v. Buhay*, 2003 SCC 30, ¶¶18 and 21; *R. v. Edwards*, [1996] 1 S.C.R. 128, ¶31; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at 647 [*McKinlay Transport*]; *R. v. Rodgers*, 2006 SCC 15, ¶¶26-27

⁵ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at 159-60

⁶ *McKinlay Transport*, at 645

- c. the protective functions built into the existing statutory scheme, and how that scheme is responsive to the unique difficulties in achieving meaningful enforcement in this context.

- i. **Animal Protection Legislation is Uniquely Difficult to Enforce**

16. The contextual approach to *Charter* analysis includes an assessment of the practical difficulties associated with enforcing a legislative regime.

17. In *McKinley Transport*, the Supreme Court of Canada considered the constitutionality of s. 231(3) of the *Income Tax Act*,⁷ which set out broad powers allowing persons authorized by the Minister to, among other things, “enter into any premises” and examine the books and records of a taxpayer which “may relate to the information that is or should be in the books or records or the amount of tax payable under [the *Income Tax Act*].”

18. The Court observed that the *Income Tax Act* is based on the principle of self-reporting and self-assessment, which “depends for its success upon the taxpayers’ honesty and integrity in preparing their returns.” As a result of this unique feature of the legislation, “[a] spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained.”⁸

19. Likewise, in *Thomson Newspapers*, in the course of discussing the “less strenuous and more flexible standard of reasonableness [under s. 8] in the case of administrative or regulatory searches and seizures”, the Supreme Court observed that the s. 8 analysis must be responsive to the practical challenges involved in the enforcement of certain laws:

⁷ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

⁸ *McKinley Transport*, at 648

... In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.⁹

20. As with the examples cited by the Supreme Court in *Thomson Newspapers*, the state is unable to meaningfully ensure compliance with animal protection legislation short of inspecting the properties at which animals are kept.

21. Animal protection legislation requires robust preventative and investigative search powers, because:

- a. animals are frequently kept on private property, out of public view, and are therefore especially vulnerable to being abused out of public sight;
- b. animals cannot self-report the abuse they are suffering;
- c. unlike in many regulatory contexts – which tend to involve at least some oversight mechanisms, such as reporting and filing requirements – there are virtually no attendant oversight mechanisms to ensure breaches of animal protection laws are identified; and
- d. whereas in many regulatory contexts involving the manufacture of consumer

⁹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 [*Thomson Newspapers*], at 506-07 [Emphasis added]

goods regulatory violations can be identified by examining the final product, the flesh, skin or fur of a slaughtered animal generally will not disclose how it was treated during its lifetime.

22. For these reasons, it is submitted that regulatory or preventative searches are even more justified in the context of animal protection legislation than in other regulatory contexts in which they have been found to be consistent with s. 8 because of the unique difficulties associated with identifying and bringing to light animal abuses.

ii. Legislative and Judicial Recognition of the Moral Significance of Animals

23. The reasonableness of the searches at issue in this proceeding should also be considered in the context of society's increasing awareness and recognition of the moral significance of animals. The very existence of animal protection legislation, along with recent case law, reflects society's move away from viewing animals as mere chattel, to viewing them as living beings deserving of ethical consideration.¹⁰

24. For example, in a lengthy dissenting opinion in *Reece*, Chief Justice Fraser of the Alberta Court of Appeal observed that over time the law has moved away from the view that animals are property to be used and abused and humans see fit, towards a recognition that "humans have a moral and ethical obligation to treat animals humanely."¹¹ Justice Abella, dissenting in *D.L.W.*, cited Chief Justice Fraser's remarks in *Reece* before observing the "transformed legal environment consisting of more protection for animals."¹²

25. Similarly, in *Alcorn*, the Alberta Court of Appeal unanimously dismissed an appeal

¹⁰ *Munroe*, *D.L.W.*, ¶69

¹¹ *Reece*, ¶42

¹² *D.L.W.*, ¶141

of a sentence for the *Criminal Code* offence of committing cruelty to an animal. The Court considered it “pertinent to note” Chief Justice Fraser’s dissenting comments in *Reece* to the effect that “a civilized society should show reasonable regard for vulnerable animals. Sentient animals are not objects.”¹³ In upholding a sentence of 20 months of imprisonment and 3 years of probation – the accused having strung up a cat by its hind legs and cut its throat so it bled to death – the Court observed that:

By enacting s 445.1 of the *Criminal Code*, which allows the Crown to proceed by indictment and imposes a maximum sentence of 5 years’ imprisonment, Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society: see, generally, Peter Sankoff, Vaughan Black & Katie Sykes eds, *Canadian Perspectives on Animals and the Animals and the Law* (Irwin Law, 2015).¹⁴

26. The moral relevance of how human society treats animals has increasingly been recognized in other countries, as well.¹⁵

27. Animal abuse is therefore not treated by society as a form of property damage, directly relevant only to the interests of the owner. Rather, it is rightly treated as harm to sentient, morally significant beings which may require urgent action on the part of law enforcement. This recognition demonstrates the pressing importance of maintaining public confidence through ensuring the timely and effective enforcement of animal protection legislation, which Animal Justice submits forms part of the relevant context in the s. 8 analysis.

iii. Statutory Recognition of the Unique Challenges of Enforcement

28. The two important contextual factors outlined above – unique difficulties associated

¹³ *Alcorn*, ¶41

¹⁴ *Alcorn*, ¶42

¹⁵ See e.g. Anne Peters, “Introduction to Symposium on Global Animal Law (Part I): Animals Matter in International Law and International Law Matters for Animals” *American Journal of International Law* (September 18, 2017), Vol. 111, pp. 252-56

with enforcement, and judicial and legislative recognition of the importance of protecting vulnerable animals from abuse – are reflected in ss. 11.4(1) and 12(6) of the *Act*.

29. As outlined above, s. 8 jurisprudence has long recognized that a person's reasonable expectations of privacy are lower in the context of regulatory and investigative searches than in the context of criminal or quasi-criminal searches.¹⁶ This is particularly so for entities that engage in conduct that is regulated as a matter of course.¹⁷ While s. 11.4(1) of the *Act* authorizes warrantless inspections, it does so only with respect to those who have chosen to engage in a regulated activity, namely: keeping animals “for the purpose of animal exhibition, entertainment, boarding, hire or sale.”

30. Because, for the reasons set out above at paragraph 21, these activities are particularly difficult to monitor, the “common sense assumption” that the Supreme Court referred to in *McKinlay Transport* – “that the threat of unannounced inspection may be the most effective way to induce compliance” – is appropriate here.¹⁸

31. That is, the circumstances of animal cruelty law enforcement necessitate the type of search power set out in s. 11.4(1) in order to ensure animals are treated in a manner that reflects society's recognition of their moral worth.

32. Section 12(6) of the *Act* also reasonably responds to the context and moral gravity of animal cruelty enforcement. It provides that state officials do not require a warrant if there are reasonable grounds to believe an animal is in “immediate distress”.

¹⁶ *McKinlay Transport; Thomson Newspapers*

¹⁷ *McKinlay Transport*, at 645

¹⁸ *McKinlay Transport*, at 645

33. The word “immediate” connotes considerable exigency. Requiring a warrant in such circumstances would compromise the object of ensuring animals are treated in accordance with the values that animate the *Act* and are reflected in recent case law. If a state official determines on reasonable grounds that an animal is in immediate distress, but is required to obtain a warrant before intervening, the delay could make a significant difference to the welfare of the animal; it could be the difference between life and death.

34. At the very least, in every case where there is ongoing abuse or neglect, delay will lead to increased or prolonged suffering, which is incompatible with the very purpose of the legislation, and the moral value the legislature and the courts accord to animals.

35. Permitting the ongoing abuse or suffering of animals while a warrant is obtained is not a mere administrative delay or inconvenience – the *Act* is, by necessity, describing “exigent circumstances”, where warrantless searches are permitted.¹⁹

36. Animal cruelty is also unlike cases involving alleged property damage or tax code violations, as the harm in question is to sentient beings. The circumstances of animal abuse are more analogous to where a person is in distress or their safety is at risk, where warrantless searches have been found to be reasonable.²⁰

37. As the Court explained in *Godoy*, the ability to conduct a warrantless search is particularly important where a person may be unable to report the risk they are facing:

Further, the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the hallmarks of this crime is its private

¹⁹ See e.g. *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Feeney*, [1997] 2 S.C.R. 13 [*Feeney*]

²⁰ *R. v. Godoy*, [1999] 1 S.C.R. 311 [*Godoy*]; *R. v. Mann*, 2004 SCC 52, ¶40; *R. v. MacDonald*, 2014 SCC 3, ¶¶32, 40-41

nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response.²¹

38. While many humans face barriers to reporting abuse that takes place behind closed doors, animals are entirely unable to report their abuse. Just as the police do not require a warrant if they have a reasonable belief that an individual is currently being harmed or abused, Animal Justice submits that s. 8, interpreted in the unique context of animal protection legislation, should not require a warrant where an enforcement agent has reasonable grounds to believe that an animal is in "immediate distress" such that they would continue to be harmed or abused while a warrant is obtained.

B. Section 7 of the Charter

39. As noted above, Animal Justice's overriding interest in this proceeding is to promote an understanding of constitutional principles that will best ensure that animal cruelty laws are effectively, rigorously, and fairly enforced.

40. Just as this requires search powers that adequately respond to the unique context of animal cruelty and neglect, so too does it require that those laws be enforced in a manner that promotes public confidence in the fair and effective enforcement of animal protection laws, and therefore public confidence in the administration of justice more broadly.

41. In the court below, Mr. Bogaerts made an alternative argument for a novel principle of fundamental justice, which he characterized as a principle that law enforcement powers

²¹ *Godoy*, ¶21

must not be delegated to a private organization, especially those not subject to adequate legislative restraints, oversight, accountability or transparency.²²

42. Animal Justice proposed a related but different principle: that “law enforcement bodies must be subject to reasonable standards of transparency, integrity, and accountability,”²³ with the term “integrity” intended to represent the importance of avoiding conflicts of interest in the exercise of police powers.

43. Although the court below held that the term “integrity” could not be supported as part of the proposed principle,²⁴ it otherwise accepted the principle as framed by Animal Justice, and held that it constituted a principle of fundamental justice.²⁵

44. The court below also agreed with Animal Justice’s submission that the principle is contravened by the *Act*, finding that the OSPCA is “opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot be confident that the laws it enforces will be fairly and impartially administered.”²⁶

45. In response to the Attorney General of Ontario’s appeal from the Superior Court’s finding on this point, Mr. Bogaerts makes arguments very similar to those made by Animal Justice and accepted in the court below, to the effect that the proposed principle satisfies

²² *Bogaerts*, ¶80 (proposing a principle “that denies the delegation of police and investigative powers to a private organization, especially when the assignment of such powers does not include any, or adequate, legislated restraints, oversight, accountability or transparency.”)

²³ *Bogaerts*, ¶81

²⁴ As noted in the following section, Animal Justice accepts the concerns articulated by the Court below with respect to the term “integrity”, and has slightly reformulated its principle in response.

²⁵ It accepted this conclusion primarily on the basis of submissions advanced by Animal Justice. See discussion in *Bogaerts*, ¶¶83-89.

²⁶ *Bogaerts*, ¶91

the three-part test for recognition of a principle of fundamental justice, as set out in *Canadian Foundation*.²⁷

46. As a result, in order to avoid duplication, Animal Justice will focus its submissions on elaborating upon two of its central arguments:

- a. that while the proposed principle of fundamental justice does not create an absolute, bright-line standard that eliminates reasonable disagreement as to its application in particular cases, this does not undermine its case for recognition, and is in fact entirely consistent with principles of fundamental justice that have been recognized in the past; and
- b. that the “integrity” criterion, when rearticulated as the avoidance of conflicts of interest, is an important aspect of the proposed principle of fundamental justice, which is best understood to operate as a single, integrated whole.

i. The Principle is Sufficiently Clear and Precise

47. The central constitutional value at issue in this case is the importance of maintaining public confidence in the fair and effective enforcement of criminal and regulatory laws, and hence in the administration of justice more broadly.²⁸ This value can be eroded where criminal and regulatory laws are enforced by organizations that are insular, opaque, unaccountable, and subject to real or potential conflicts of interest.

²⁷ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 [*Canadian Foundation*]

²⁸ This value is reflected in the jurisprudence of this Court and the Supreme Court of Canada emphasizing the close link between effective law enforcement and the integrity of the administration of justice, see e.g., *R. v. Qureshi*, 2004 CanLII 40657 (ONCA), ¶¶8-9; *R. v. J.S.M.* [2003] O.J. No. 72 (C.A.), ¶57; *R. v. Askov*, [1990] 2 S.C.R. 1199, at 1240; *A.G. of Que. and Keable v. A.G. of Can. et al.*, [1979] 1 S.C.R. 218, at 257

48. In order to safeguard this constitutional value, law enforcement bodies with powers that engage s. 7 of the *Charter* must meet reasonable standards of transparency and accountability, and must be structured so as to avoid real or perceived conflicts of interest.

49. Like other principles of fundamental justice, this principle does not create a bright-line rule that eliminates reasonable disagreements as to the exact contours of the principle, or where the line should be drawn in particular cases.

50. It does, however, reflect a general societal consensus and a workable standard, particularly when considered through the lens of the fundamental constitutional value of maintaining public confidence in the fair and effective enforcement of laws, and hence the administration of justice more broadly.

51. Two important clarifications may help address the AGO's opposition to this principle.

52. First, transparency, accountability, and the avoidance of conflicts of interests do not each operate as discrete principles of fundamental justice. As such, it is not necessary that each element of the principle *independently* meet the standard set out in *Canadian Foundation*, in a manner untethered to the principle as a whole.

53. Rather, there is one integrated principle: that *law enforcement bodies must bear certain institutional hallmarks – namely, reasonable standards of accountability, transparency, and avoidance of conflicts of interest – in order to maintain public confidence in the administration of justice.*

54. Assessing each element independently ignores that they operate as part of a single, unified principle that applies only to law enforcement bodies whose investigations and enforcement mechanisms can lead directly to penal sanctions that engage s. 7.²⁹

55. For instance, whether “accountability”, as an abstract concept, independently constitutes a “legal principle” at the first branch of the *Canadian Foundation* test is not the relevant question in this case. The relevant question at that stage of the analysis is whether the principle that law enforcement bodies must be subject to certain institutional safeguards, including in relation to accountability, has meaningful content and relates to the administration of justice. Animal Justice respectfully submits that it does.

56. Second, the AGO appears to take the position that principles of fundamental justice must present absolute, precise legal rules that cannot be subject to reasonable disagreement in their application in order to be a workable legal principle representing a broad societal consensus. With respect, that submission is inconsistent with the nature and operation of existing principles of fundamental justice, which Animal Justice submits should inform the Court’s understanding of the three-part analysis from *Canadian Foundation*.

57. No principle of fundamental justice is absolute, in the sense that it can never yield to alternative values.³⁰ They are no more absolute than other *Charter* rights, which can be subject to reasonable justifications when in conflict with other important societal values.

²⁹ Notably, while the court below uses the phrase “law enforcement bodies”, the principle can only apply to law enforcement bodies *with powers that actually engage s. 7 in the first place*, i.e., powers that can lead directly to a deprivation of liberty as protected by s. 7. For this reason, most of the bodies referred to by the Appellant at ¶55 of its factum would not be subject to the proposed principle, because their investigatory and enforcement powers cannot lead to a deprivation of liberty.

³⁰ See, e.g., *R. v. S.A.B.*, 2003 SCC 60 at para 34 (“the principle against self-incrimination may mean different things at different times and in different contexts” indicating that the principle is not absolute”); *R. v.*

58. And contrary to the AGO's apparent suggestion,³¹ the "legal principle" requirement from *Canadian Foundation* does not require that a proposed principle be a factor in an established legal test, or be found as a uniform concept in legislation.

59. Many principles of fundamental justice do not fit this criteria, such as the principle of "unconstitutional vagueness", or that the fault element of an offence must be commensurate with its stigma.³² While reflecting general values underlying the legal system, these principles have often been made concrete *as a result* of the Court's jurisprudence under s. 7, not prior to it. As Professor Hogg has noted, the proper articulation of the principles of fundamental justice is often subject to reasonable disagreement, notwithstanding the requirement that they reflect a clear societal consensus.³³

60. Similarly, many of the principles of fundamental justice have evolved considerably over the years, demonstrating that they are not necessarily immutable principles with clearly defined contours.³⁴

61. If a rigorous standard of specificity and perfection, or the absence of any reasonable dispute about their scope, were required in order for a principle of fundamental justice to be recognized, few would ever be recognized and no subsequent evolution could occur.

Charlebois, 2000 SCC 53 at para 37, citing *R. v. Worth* (1995), 98 C.C.C. (3d) 133 (ONCA) ("An accused's right to silence is not absolute").

³¹ See, e.g., Factum of the Appellant, ¶¶44-45

³² See *R. v. Morrison*, 2019 SCC 15 at para 75.

³³ Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (looseleaf), s. 47.10(b)

³⁴ See the discussion in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], ¶¶ 95-123

62. Nor does the “predictability” standard mean that there cannot be any dispute over the application of a principle of fundamental justice in specific cases and contexts.³⁵ Courts have articulated a broad range of principles of fundamental justice, from the very specific – that “a person who was not criminally responsible at the time of the offence should not be convicted”³⁶ – to the very general – that laws not be overly “vague”.³⁷

63. Unsurprisingly, these principles often provoke considerable debate at the highest levels in terms of both their articulation and application in any given case,³⁸ as do the other legal rights in the *Charter*.³⁹

64. The point is not that the three *Canadian Foundation* criteria should be ignored, but rather that they must be understood in light of the principles of fundamental justice that have already been recognized, which evince different degrees of consensus in relation to both their articulation and their application.

65. Animal Justice submits that the key insight arising from the s. 7 case law as a whole is that a principle of fundamental justice must be expressed in terms that reflects a core, widely-shared understanding about how the administration of justice should operate, and that it establishes a workable standard to guide courts in the future.

³⁵ See, e.g., Factum of the Appellant, ¶56

³⁶ *R. v. Waring*, [1998] 3 S.C.R. 579, ¶59

³⁷ See *Canadian Foundation*, ¶¶42-43

³⁸ Consider the debate between the majority and dissenting judges in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, with respect to the proper understanding of “arbitrariness”.

³⁹ See the recent disagreement in terms of the application of s. 8 in cases like *R. v. Mills*, 2019 SCC 22. See also the majority and dissenting judgments regarding the right to silence in *R. v. Singh*, 2007 SCC 48 and *R. v. Sinclair*, 2010 SCC 35.

66. Animal Justice respectfully submits that the proposed principle of fundamental justice in this case meets that standard, especially given that, like other principles of fundamental justice, this principle is not to be applied in a conceptual vacuum. Rather, in articulating the boundaries of the principle in future cases, the courts can be guided by the constitutional value underlying the principle: ensuring public confidence in the administration of justice generally, and in the fair and effective enforcement of laws specifically.

ii. Law Enforcement Bodies Must be Structured to Avoid Conflicts of Interest

67. In initially advancing “integrity” as an element of a proposed principle of fundamental justice, Animal Justice was particularly concerned that the organizational and funding structure of the OSPCA gives rise to potential or perceived conflicts of interest.

68. Animal Justice appreciates the court below’s observation that “integrity” is a broader and more nebulous concept than is necessary to capture the simple point that law enforcement bodies must not be structured or funded in a way that creates conflicts of interest, real or perceived.⁴⁰ As such, Animal Justice adopts the latter principle here.

69. That law enforcement bodies must be structured so as to avoid conflicts of interest is an important aspect of the integrated principle of fundamental justice at issue in this case. Together with transparency and accountability, it plays an important role in safeguarding the animating constitutional value underlying the proposed principle – the need to maintain public confidence in the fair and effective enforcement of regulatory and criminal laws.

70. The present circumstances demonstrate the risk that this important constitutional

⁴⁰ *Bogaerts*, ¶91

value may be undermined by institutional characteristics that produce real or perceived conflicts of interest. In particular, as the Superior Court observed,⁴¹ the OSPCA does not receive sufficient government funding for its operations, and as such it raises money through private donations, potentially including the very industries over which it has jurisdiction to enforce animal cruelty laws.⁴²

71. The OSPCA also maintains memorandums of understanding (“MOU”) with organizations representing those industries.⁴³ These MOUs specify certain investigative procedures, and the OSPCA has stated that when it receives complaints in regards to industries with whom it maintains an MOU, it will contact the relevant group *before* investigating the complaint, and have an industry representative attend the inspection.⁴⁴

72. These arrangements undermine the constitutional value underlying the proposed principle of fundamental justice, because they give rise to a real risk that public faith in the important responsibility of animal protection enforcement will be compromised.

73. Just as Canadian society would not countenance police forces being funded by private donors, or a securities commission being funded by a brokerage firm, it should not countenance the potential for animal cruelty enforcement to be similarly compromised.

74. As discussed above, the three elements of the proposed principle work together to

⁴¹ *Bogaerts*, ¶85

⁴² Cross-examination of Connie Mallory, transcript pp. 15-17, qq. 57-66; Exhibit Book of the Respondent, Vol. 2., pp. 310-12

⁴³ Affidavit of Jeffrey Bogaerts sworn July 31, 2014 (“Bogaerts Affidavit”), Exhibit D; Exhibit Book of the Respondent, Vol. 1, pp. 28-35

⁴⁴ Cross-examination of Connie Mallory, transcript pp. 107-108, qq. 486-488; Exhibit Book of the Respondent, Vol. 2, pp. 381-82

create a coherent whole. Reasonable standards of transparency in operations are critical to maintaining and ensuring accountability and the avoidance of conflicts of interest, including by ensuring the public's right to know and opportunity to engage in critical expression with respect to those law enforcement bodies that exercise police powers.⁴⁵

75. Similarly, without the type of accountability mechanisms that exist for the vast majority of bodies exercising such police powers, it is difficult for the public to ensure that the enforcement body is carrying out its mandate in accordance with the gravity of its task, as is necessary to maintain public confidence in the administration of justice.

76. Animal Justice does not submit that it has advanced the only possible formulation of a principle of fundamental justice that can safeguard this constitutional value, or that a principle without all three elements would be futile. However, it submits that including all three elements in the proposed principle of fundamental justice will best protect the underlying constitutional value at stake: the importance of maintaining public confidence in the fair and effective enforcement of criminal and regulatory laws.

77. This will not only protect public confidence in the administration of justice more broadly; it will help to ensure the rigorous and effective enforcement of animal cruelty laws in a manner that reflects the moral value society accords to animals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of June, 2019.



Arden Beddoes and Benjamin Oliphant

⁴⁵ For similar observations in a different constitutional context, see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

SCHEDULE A - AUTHORITIES

CASE LAW

A.G. of Que. and Keable v. A.G. of Can. et al., [1979] 1 S.C.R. 218

Baker v. Harmina, 2018 NLCA 15

Bogaerts v. Attorney General of Ontario, 2019 ONSC 41 [*Bogaerts*]

Canada (Attorney General) v. Bedford, 2013 SCC 72 [*Bedford*]

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 [*Canadian Foundation*]

Chaoulli v. Quebec (Attorney General), 2005 SCC 35

Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46

Hunter et al. v. Southam Inc. [1984] 2 S.C.R. 145

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23

R. v. Alcorn, 2015 ABCA 182 [*Alcorn*]

R. v. Askov, [1990] 2 S.C.R. 1199

R. v. Buhay, 2003 SCC 30

R. v. Charlebois, 2000 SCC 53

R v. D.L.W., 2016 SCC 22 [*D.L.W.*]

R. v. Edwards, [1996] 1 S.C.R. 128

R. v. Feeney, [1997] 2 S.C.R. 13 [*Feeney*]

R. v. Godoy, [1999] 1 S.C.R. 311 [*Godoy*]

R. v. Grant, [1993] 3 S.C.R. 223

R. v. M. (J.S.), 2003 CanLII 10419 (ONCA)

R. v. Jacques, [1996] 3 S.C.R. 312

R. v. MacDonald, 2014 SCC 3

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627 [*McKinlay Transport*]

R. v. Mann, 2004 SCC 52

R. v. Mills, 2019 SCC 22

R. v. Morrison, 2019 SCC 15

R. v. Munroe, 2010 ONCJ 226 [Munroe]

R. v. Qureshi, 2004 CanLII 40657 (ONCA)

R. v. Rodgers, 2006 SCC 15

R. v. S.A.B., 2003 SCC 60

R. v. Sinclair, 2010 SCC 35

R. v. Singh, 2007 SCC 48

R. v. Warsing, [1998] 3 S.C.R. 579

Reece v. Edmonton (City), 2011 ABCA 238 [Reece]

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425 [Thomson Newspapers]

Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 BCCA 395

SECONDARY SOURCES

Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (looseleaf), s. 47.10(b)

Anne Peters, "Introduction to Symposium on Global Animal Law (Part I): Animals Matter in International Law and International Law Matters for Animals" *American Journal of International Law* (18 September 2017), Vol. 111, pp. 252 56

LEGISLATION

Canadian Charter of Rights and Freedoms, ss. 7-8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 (the "Act"), ss. 11(1), 11.4(1), 12(6)

SCHEDULE B - LEGISLATION

Canadian Charter of Rights and Freedoms, ss. 7-8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

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

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 (the "*Act*"), ss. 11(1), 11.4(1), 12(6)

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.

...

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.

...

Entry where animal is in distress

12 ...

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.

Jeffrey Bogaerts
Applicant (Respondent in
Appeal)

-and-

The Attorney General of Ontario
Respondents (Appellant in Appeal)

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

Proceeding commenced at Perth

COURT OF APPEAL FOR ONTARIO

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

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

-and-

JEFFREY BOGAERTS

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

-and-

THE ATTORNEY GENERAL OF CANADA

Intervenor

(Party pursuant to *Constitutional Question Act*)

-and-

**ANIMAL JUSTICE CANADA and INFORMATION AND
PRIVACY COMMISSIONER OF ONTARIO**

Intervenors

CERTIFICATE OF THE INTERVENOR, ANIMAL JUSTICE CANADA

1. An Order under subrule 61.09(2) is not required.
2. The Intervenor, Animal Justice Canada, estimates that 40 minutes will be required for its oral argument.

DATED: June 19, 2019

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