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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant in Appeal)

and

JEFFREY BOGAERTS

Applicant
(Respondent in Appeal)

FACTUM OF THE INTERVENOR RAILWAY ASSOCIATION OF CANADA

August 16, 2019

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PART I - OVERVIEW

1. The Railway Association of Canada (**"RAC"**) intervenes to raise three issues:

a) ***First***, the *Ontario Society for the Prevention of Cruelty to Animals Act,* R.S.O. 1990, c. O.36 (the "*OSPCA Act*") does not confer police powers on the Ontario Society for the Prevention of Cruelty to Animals (the "**OSPCA**") as a "private organization". In fact, the *OSPCA Act* grants the powers to individual inspectors and agents who are personally subject to the *Charter*, to the *Criminal Code*, and to common law restrictions on their actions. OSPCA inspectors are as much subject to the restrictions against arbitrary arrest and unreasonable search and seizure as other peace officers, even if the organizations that employ them are different.

b) ***Second***, the requirement that "law enforcement bodies must be subject to reasonable standards of transparency and accountability"[1] is not a valid principle of fundamental justice. While this statement may be laudable public policy, the ambiguity of what constitutes a "law enforcement body" and a "reasonable standard of transparency and accountability" make it impossible to characterize the statement as a "basic value underpinning our constitutional order".[2] In conflating the standards applicable to a municipal or provincial police service with those applicable to OSPCA inspectors, the application judge demonstrates the unworkability of this novel principle of fundamental justice. OSPCA inspectors operate within a scope of authority that is only a fraction of that within which typical police officers operate.

c) ***Third***, if the application judge's decision is upheld, this Court should confine it to the particular circumstances of the OSPCA. Canada's major railway companies have employed railway constables, whose power derives from the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.) (the "*Railway Safety Act*") for over 100 years. The ambiguity of the application judge's findings could undermine the lawful authority of railway constables and other peace officers employed by private organizations who are legitimately and successfully acting in the public interest.

PART II - THE RAILWAY ASSOCIATION OF CANADA

2. RAC was established in 1917 and is one of Canada's leading trade associations. It now represents nearly 60 freight and passenger railway companies operating across the country. RAC's mission is to work with regulators, governments, and communities across Canada, while

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[1] *Bogaerts v. Attorney General of Ontario*, 2019 ONSC 41("**Endorsement on Application**") at para. 89.
[2] *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at para. 96 [*Bedford*].

supporting the interests of the country's rail businesses. RAC is an established authority on the Canadian railway industry, including on issues relating to safety and security.[3]

3. The Canadian National Railway Company ("**CN**") and the Canadian Pacific Railway Company ("**CP**") are member railways of RAC. For over a century, CN and CP have each operated a railway police service to protect persons and property on their vast rail networks—the CN Police Service and the CP Police Service, respectively.[4] Although railway policing existed before Confederation, federal legislation has, since at least 1919, empowered the superior courts of each province and territory to appoint railway constables nominated by the railway companies.[5] Contemporary railway policing is governed by the *Railway Safety Act*.

PART III - ISSUES AND POSITION

4. RAC intervenes on this appeal on the following three issues:

a) The *OSPCA Act* does not confer police powers on the OSPCA as an organization. Rather, it confers police powers on individual inspectors and agents who are personally subject to the *Charter*, to the *Criminal Code*, and to common law restrictions on their actions.

b) The application judge's novel principle of fundamental justice is vague and unworkable, and was established without sufficient evidence.

c) If the application judge's decision is upheld, it should be strictly limited to the particular circumstances of the OSPCA.

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[3] Affidavit of Tanis Peterson sworn July 12, 2019 ("Peterson Affidavit) at paras. 4-7, Motion Record of the Railway Association of Canada (Motion for Leave to Intervene) dated July 12, 2019 ("RAC MR"), Tab 2, p. 11.
[4] Peterson Affidavit at paras. 19-20, RAC MR, Tab 2, p. 14.
[5] Peterson Affidavit at para, 13, RAC MR, Tab 2, p. 13.

PART IV - ARGUMENT

A. The *OSPCA Act* empowers individuals, and not a "private organization", to exercise policing powers

5. The application judge found that it was "unconstitutional under section 7 of the *Charter* for the *OSPCA Act* to assign police and other investigative powers per sections 11, 12, and /or 12.1 to the OSPCA."[6] However, like other similar legislation, the *OSPCA Act*, in fact, confers police powers *on individuals* the OSPCA or the Chief Inspector nominates: "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." [7] The *OSCPA Act* does not confer police powers on the OSPCA itself. The application judge's misconception of the effect of sections 11, 12, and 12.1 of the *OSPCA Act* underlays his recognition of a principle of fundamental justice applicable to "law enforcement bodies" rather than to individuals who are statutorily empowered to act as peace officers. As a result of this misconception, the application judge improperly focused on the distinction between "private" and "public" organizations that employ peace officers. Instead, the focus should have been on whether, in light of the legal responsibilities and constraints imposed on them personally, peace officers employed by private organizations create an unacceptable risk to section 7 *Charter* rights. The only reasonable conclusion is that they do not.

Parliament conferred the powers of a peace officer on individuals, not organizations

6. Preserving peace, protecting property, and preventing crime are public duties performed by many individuals in the public interest. Parliament has recognized the myriad of individual

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[6] Endorsement onApplication at para. 94 [emphasis added].
[7] *Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36* (OSPCA Act), s. 11(1) [emphasis added].

actors engaged in the enforcement of laws under the definition of "peace officer" in section 2 of the *Criminal Code*, R.S.C., 1985, c. C-46, which includes: a "mayor, warden, reeve…and justice of the peace"; "the pilot in command of an aircraft…while the aircraft is in flight"; "a person designated as a fishery guardian under the *Fisheries Act*..."; and a "person employed for the preservation and maintenance of the public peace or for the service or execution of civil process."[8]

7. Notably, in granting powers to peace officers, the *Criminal Code* does not confer rights or impose responsibilities on policing organizations. Although peace officers may be employed by municipal, provincial, or federal police services, this is not always the case: consider, for example, reeves, airline pilots, and justices of the peace. Parliament has granted powers of arrest, detention, search, and seizure to various classes of *individuals* to facilitate law enforcement, many of whom are not employed by "law enforcement bodies". In reviewing the definition of "peace officer" in section 2 of the *Criminal Code*, the British Columbia Supreme Court held in *R. v. Lord*:[9]

> It is clear that Parliament intended the definition of "peace officer" to be broad. Our society requires that many individuals be employed for the preservation and maintenance of the public peace. Parliament intended that individuals who are appointed as police officers, police constables, bailiffs, constables, or other persons who carry out the important task of preserving the public peace have the powers and protections given to peace officers in the *Criminal Code*.

Powers of arrest and detention are granted even to private persons

8. The powers that the application judge found to engage section 7 of the *Charter* are not even the exclusive domain of peace officers. Some or all of the powers granted to peace officers are conferred on: every person assisting a peace officer;[10] every person preventing imminent harm

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[8] *Criminal Code*, R.S.C., 1985, c. C-46 (*Criminal Code*), s. 2.
[9] *R v Lord*, 2010 BCSC 1046 at para 26, aff'd 2011 BCCA 295 [emphasis added].
[10] *Criminal Code,* s. 25(4).

on an aircraft;[11] every one preventing an offence causing harm to others;[12] every one preventing a breach of the peace;[13] any one stopping an indictable offence;[14] or any one preventing a person who has committed a criminal offence from evading lawful arrest by others.[15] Parliament has granted such powers to individuals even though common measures of "transparency" or "accountability" could not possibly apply in such circumstances.

The Criminal Code creates personal liability for the wrongful exercise of the powers it confers

9. Furthermore, the *Criminal Code* itself limits the powers it confers upon peace officers. Both peace officers and private persons face extreme penalties for failing to exercise their powers lawfully and on reasonable grounds: they are criminally liable for their actions.[16] The unreasonable use of force or the powers of arrest could result in prosecution for homicide, assault, kidnapping, or forcible confinement. Peace officers may also face civil liability for the unlawful deprivation of another's liberty, under the torts of battery, assault, and false imprisonment, and in negligence.

10. Finally, the actions of peace officers are always subject to *Charter* review, regardless of who employs them. In *R. v. Lord*, the British Columbia Court of Appeal rejected the argument that railway police constables were immune from *Charter* scrutiny because they were appointed "at the initiation of a multinational corporation".[17] The Court determined that: "once appointed, these constables exercise their authority pursuant to the statute under which they are appointed, and as

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[11] *Criminal Code,* s. 27.1(1).
[12] *Criminal Code*, s. 27.
[13] *Criminal Code*, s. 30.
[14] *Criminal Code*, s. 494(1)(a).
[15] *Criminal Code*, s. 494(1)(b).
[16] See, e.g., *Criminal Code*, s. 25(3).
[17] *R v. Lord*, 2011 BCCA 295 at para. 16.

such, are then subject to the same *Charter* scrutiny as any others who fall within the definition of peace officers found in s. 2 of the *Code.*"[18]

11. The powers of a peace officer are thus granted to individuals, and the consequences of failing to exercise those powers are borne by those individuals, regardless of the identity of their employer.

Parliament and the courts have recognized the legal constraints on the powers of a peace officer

12. It is clear that Parliament regarded the constraints of criminal and civil liability as sufficient to protect the public against peace officers' misuse of their policing powers. This is demonstrated by the fact that the *Criminal Code* imposes a condition of civilian oversight only on the Minister of Public Safety and Emergency Preparedness and the equivalent provincial ministers as it relates to RCMP officers and provincial police officers who have been granted specific immunity against prosecution for criminal acts committed for the purpose of law enforcement.[19] It is the immunity—i.e. the removal of the criminal and civil constraints on unlawful conduct—that justified the requirement for oversight. The absence in the *Criminal Code* of a similar requirement of civilian oversight for peace officers acting in the ordinary execution of their duties demonstrates Parliament's recognition that criminal and civil constraints are sufficient to protect against violations of individuals' *Charter* rights.

13. The Courts have also recognized that the powers conferred on a peace officer are limited by other legal constraints. In reviewing the definition of "peace officer" as it relates to military personnel, the Supreme Court of Canada determined that the definition "serves only to grant

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[18] *R v. Lord* (BCCA) at para. 16.
[19] *Criminal Code*, s. 25.1.

additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their statutory or common law sources of authority."[20]

The application judge failed to recognize the existence of personal constraints against the abuse of power

14. The application judge's decision improperly focuses on the nature of the OSPCA as a private organization, rather than on the powers granted to its individual inspectors and agents. The application judge found that the OSPCA was "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."[21] Although the OSPCA may, as an organization, hire and train inspectors and direct and allocate resources toward investigations, the individual inspectors and agents vested with policing powers (and not the organization itself) engage in the enforcement activities that could give rise to a deprivation of liberty. The actions of the inspectors and agents will be subject to scrutiny under the law of tort and the criminal law, regardless of the structure or policies of the organization that employs them. Moreover, their actions will be subject to the *Charter* protections that constrain peace officers' conduct, such as the rights against unreasonable search and seizure and against arbitrary detainment and imprisonment. There is no gap in private individuals' *Charter* protections that needs to be filled by a principle of fundamental justice such as the one the application judge formulated in this case.

B. The impugned principle of fundamental justice is vague and unworkable

15. The application judge erred in applying the relevant legal test to find a principle of fundamental justice requiring that "law enforcement bodies must be subject to reasonable

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[20] *R. v Nolan*, [1987] 1 S.C.R. 1212, at para. 20 [emphasis added].
[21] Endorsement on Application at para. 91.

standards of transparency and accountability". While this principle is attractive as a broad expression of public policy, it is far too vague and unworkable to represent a "basic value underpinning our constitutional order"[22] enforceable by the courts. Specifically, it fails the final two of the three criteria the Supreme Court has set out for finding a principle of fundamental justice – that is, that "there must be sufficient consensus that the alleged principle is vital or fundamental to our societal notion of justice" and that the alleged principle "must be capable of being identified with precision and applied to situations in a manner that yields predictable results."[23]

16. ***First,*** the principle assumes a consensus as to what constitutes "law enforcement bodies". In applying the newly recognized principle, the application judge compared the OSPCA to provincially regulated police services, pointing to oversight legislation that applies to such services but not to OSPCA inspectors and agents.[24] The application judge failed, however, to recognize the substantial differences between the OSPCA and ordinary police services. The OSPCA's mandate is vastly narrower than that of municipal or provincial police. For example:

- The purpose of the OSPCA is to "facilitate and provide for the prevention of cruelty of animals and their protection and relief therefrom";[25]
- The powers of OSPCA inspectors and agents are restricted to the enforcement of the *OSPCA Act* and laws which relate solely to the protection and welfare of animals;[26]
- OSPCA inspectors' powers of inspection without a warrant are limited to inspections of non-residential buildings[27] where the animals are "kept for the purpose of animal

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[22] *Bedford* at para. 96.
[23] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 8.
[24] Endorsement on Application at para. 91.
[25] *OSPCA Act*, s. 3.
[26] *OSPCA Act*, s. 11(1).
[27] *OSPCA Act*, s. 11.4(2).

exhibition, entertainment, boarding, hire, or sale"[28] or are reasonably believed to be in "immediate distress".[29] Any other inspections must be authorized by warrant.[30]

- The powers of seizure are limited to things produced to an inspector or agent or found in plain view that afford evidence of an offence under the *OSPCA Act* or whose seizure would prevent a continuation or repetition of the offence.[31] Anything seized must be brought before a justice of the peace.[32]

- The powers to order an owner or custodian of an animal are limited to remedial action to relieve an animal of its distress.[33] Such orders are appealable to the Animal Care Review Board.[34]

17. Contrast these narrow powers with those of municipal or provincial police officers, who have the power to investigate virtually any offence under provincial or federal law, and have the full powers of arrest, search, and seizure afforded to peace officers under the *Criminal Code.* In formulating and applying the impugned principle of fundamental justice, the application judge failed to consider that small, private organizations like the OSPCA differ significantly from typical law enforcement bodies, in terms of both resources and mandate. The application judge did not explain how any "consensus" could be established that all "law enforcement bodies" should be subject to measures of accountability and transparency despite their substantial differences.

18. ***Second***, the impugned principle of fundamental justice requires that a "law enforcement body" have "reasonable" standards of transparency and accountability. The injection of a "reasonableness" threshold requires the court to consider competing policy interests such as the allocation of resources, and to assess proportionality. Such a standard makes the impugned principle incapable of identification and predictable application since what a court considers

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[28] *OSPCA Act*, s. 11.4(1).
[29] *OSPCA Act*, s. 12(6).
[30] *OSPCA Act*, s. 11.5 and 12.
[31] *OSPCA Act*, s. 12.1(1) and (4).
[32] *OSPCA Act*, s. 12.1(5).
[33] *OSPCA Act*, s. 13(1), s. 14(1).
[34] *OSPCA Act*, s. 17(1).

"reasonable" will depend on the widely varying nature of enforcement bodies and the specific measures of accountability and transparency that may apply to them.

19. In *R v. Lord*, in which the accused challenged the powers of police constables under the *Railway Safety Act*, the British Columbia Supreme Court wrote the following, [35] which the Court of Appeal cited with approval on appeal:[36]

> [...] I do not have the ability to interpret legislation by substituting my view of proper policy choices for those set out in legislation. I cannot rely on reports such as the report of the Canada Transportation Act Review Panel to fashion a decision in this case. Rather, I must interpret the legislation as it is written and apply it to the facts of the case. Mr. Lord's arguments regarding railway policing policy would be better directed to Parliament than to the courts.

20. The application judge's attempt to apply the "reasonableness" threshold to the case at bar illustrates its impracticability. The application judge engaged a cursory analysis of the legislation applicable to large, full-scale police services in Ontario and found that the inapplicability of such legislation to the OSPCA represented an unconstitutional failure of accountability and transparency. The application judge failed to consider that standards that may be reasonably necessary for public police constables may not be reasonable or necessary for peace officers operating under highly specialized and circumscribed statutory powers.

21. For the foregoing reasons, this Court should reject the impugned principle of fundamental justice.

C. The application of the decision under appeal, if upheld, must be circumscribed

22. The respondent accepts that his application challenged legislation in which peace officers employed by a private organization were empowered to exercise limited police powers without

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[35] *R. v. Lord* (BCSC) at para.17.
[36] *R. v. Lord* (BCCA) at para.11.

any standards of accountability or transparency: "This is not a case where there is a concern that the transparency or accountability standards prescribed are not good enough – the problem is that there are no standards at all."[37] If this Court elects to uphold the decision under appeal, it should limit its application to these particular circumstances.

23. The application judge need not have recognized such a broad principle of fundamental justice to find that the impugned provisions of the *OSPCA Act* violated section 7 of the *Charter.* The lower court could have articulated a narrower, more workable principle, such as: "legislation that permits an organization to employ peace officers must require the organization to create policies that ensure accountability and transparency". Formulated in this way, the principle of fundamental justice would not require courts to weigh the relative merit or effectiveness of an organization's policies, but merely whether the legislation ensures they exist.

24. The broader articulation recognized by the application judge opens the door to any accused to challenge the "reasonableness" of a law enforcement body's policies in any given case. In addition to affecting the many other private and quasi-governmental agencies that employ peace officers, the application of a "reasonableness" standard will undermine the operations of police services maintained for over a century by RAC members. It will permit accused persons to challenge policies of transparency and accountability whether or not they are already imposed by statute, as they are in the case of the *Railway Safety Act.*

25. Furthermore, the implication that peace officers employed by "private" organizations should be subject to greater *Charter* scrutiny than are police officers, or that these peace officers

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[37] Factum of the Respondent at para. 72.

employed by such organizations are more likely to put *Charter* rights at risk, was unsupported in the evidence and should be rejected.

26. Although operated by commercial enterprises, the CN Police Service and the CP Police Service are statutory policing bodies under Part IV.1 of the *Railway Safety Act*. Railway police constables exercise their authority under the *Railway Safety Act*, and have jurisdiction on or within 500 metres of property administered by the railway companies.[38] They enforce Part III of the *Canada Transportation Act* and federal and provincial laws insofar as their enforcement relates to the protection of railway companies' property and the persons on that property,[39] and may take before the court persons charged with offences under the laws they enforce.[40]

27. Although they are employed by the railway companies, railway police constables are deemed to be public servants just as city police who are employed by municipalities are considered agents of the Crown.[41]

28. Railway police constables are also "peace officers" within the meaning of section 2 of the *Criminal Code*.[42] Within their limited jurisdiction, railway police constables can detain, arrest, use force, and conduct searches. They are responsible for preventing and detecting crime, preserving the peace, maintaining law and order, responding to emergency situations, participating in planned enforcement operations, and conducting investigations.

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[38] *Railway Safety Act*, s. 44(3).
[39] *Railway Safety Act*, s. 44(1).
[40] *Railway Safety Act*, s. 44(4).
[41] *Thomas v. Canadian Pacific Railway*, 1906 CarswellOnt 382, at paras. 16-17 (Div. Ct.).
[42] *R v. Lord* (BCSC) at para. 25,cited with approval in *R v. Lord* (BCCA) at para. 9.

29. Under the *Railway Safety Act*, railway police constables are appointed[43] and may be terminated[44] by a judge of a provincial superior court. As the British Columbia Court of Appeal found in *R. v. Lord*, this process provides "assurance that only suitable candidates will be appointed."[45] Under section 44.1(1) of the *Railway Safety Act*, railway companies must establish and implement procedures for receiving and dealing with complaints concerning their police constables. The railway companies must file a copy of their procedures for addressing complaints with the Minister of Transport and must implement his or her recommendations, including any recommendations regarding the publication of the procedures.[46] Both the CN Police Service and the CP Police Service have complaints procedures.[47]

30. Furthermore, as federally regulated corporations, railway companies are subject to the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, regarding the collection, use, and disclosure of personal information.

31. Over their long history, railway police services have developed various internal policies and procedures related to investigations, searches, seizures, and access to information, in addition to the legislative requirements of the *Railway Safety Act*. For instance, the CN Police Service and the CP Police Service have access to information policies, codes of ethics, and detailed internal operation guidelines.[48]

32. The application judge's implicit finding that peace officers employed by private organizations pose a greater risk to individuals' *Charter* rights was unwarranted and unsupported

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[43] *Railway Safety Act*, s. 44(1).
[44] *Railway Safety Act*, s. 44(6).
[45] *R v. Lord* (BCCA) at para. 16.
[46] *Railway Safety Act*, s. 44.1(2).
[47] Peterson Affidavit at para. 22 and Exhibits G and H, RAC MR, Tabs 2, 2G and 2H, pp. 15, 38, and 68.
[48] Peterson Affidavit at paras. 19-20, 23 and Exhibits E, F, I, and J, RAC MR, Tabs 2, 2E, 2F, 2I, and 2J, pp. 15, 28, 31 74, and 79.

by evidence. RAC, for example, knows of no case in which a railway police constable was found to have violated the *Charter*. Should this Court uphold the application judge's decision, it should not do so on the basis that the OSPCA is a private or quasi-governmental organization.

PART V - ORDER REQUESTED

33. RAC does not seek any costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August 2019.

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