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

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jeffrey Bogaerts, Applicant

AND

The Attorney General of Ontario, Respondent

AND

Animal Justice Canada, Intervener

BEFORE: Mr. Justice Timothy Minnema

COUNSEL: Kurtis R. Andrews, for the Applicant

Daniel Huffaker, for the Respondent

Arden Beddoes and Benjamin Oliphant, for the Intervener

HEARD: May 16, 2018

ENDORSEMENT ON APPLICATION

Nature of the Case

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

Background/History

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

[3] The application was amended on February 24, 2017. In May of 2017, the respondent filed two responding affidavits, one by Lisa Kool, Director of the Public Safety Division within

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

Relevant Constitutional Provisions

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

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

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

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

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

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

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

[9] The *OSPCA Act* was substantially amended in 2008, although the OSPCA's status and role did not change. The enforcement powers as quoted above also did not change, the only difference being the substitution of the word "has" for "shall have". The preamble in the amending legislation (Bill 150, *Provincial Animal Welfare Act*, 2008) included the following:

> The people of Ontario and their government:
>
> Believe that how we treat animals in Ontario helps define our humanity, morality and compassion as a society;
>
> Recognize our responsibility to protect animals in Ontario; …

[10] There is no dispute, in view of the above, that the OSPCA is not an agent of the Crown nor is it a part of the Government of Ontario. It is an independent charitable organization that has been given certain statutory powers relating to animal welfare in the province. Its stated object, pursuant to section 3 of the current Act, is "to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom." It does this not just under the *OSPCA Act*, but also under other provincial statutes, federal criminal animal cruelty laws, federal laws protecting farmed animals during transportation and slaughter, and even municipal bylaws.

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

Issues/Positions

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

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

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

3. Does section 11.2 of the *OSPCA Act* fall outside the province's jurisdiction by being, in pith and substance, criminal in nature and within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1987*?

[13] The respondent's position is that the answer to all the posed questions is "no", and the application should therefore be dismissed. The intervener supports the respondent's position that the search and seizure provisions in the *OSPCA Act* are not unreasonable. However, it supports the applicant's position that it is unconstitutional for the legislature to grant police powers, including certain search and seizure powers, to the OSPCA as a private organization. I address the issues in the reverse order, moving from the one that received the least attention in argument to the one that received the most.

Does section 11.2 of the *OSPCA Act* fall outside the province's jurisdiction by being, in pith and substance, criminal in nature and within the exclusive jurisdiction of the Parliament of Canada under section 91(27) of the *Constitution Act, 1987*?

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

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

> 11.2(1) No person shall cause an animal to be in distress.
>
> 11.2(2) No owner or custodian of an animal shall permit the animal to be in distress.

[16] "Distress" is defined in section 1(1) to mean "the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue unnecessary hardship, privation or neglect."

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

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

> 445.1(1)(a) Every one commits and offence who … wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird.
>
> 446(1)(b) Every one commits an offence who … being the owner or person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

[19] The penalties for a *Criminal Code* section 445.1(1)(a) offence on summary conviction are a fine not exceeding $10,000 or imprisonment for a term of not more than eighteen months or both, and if proceeding by way of indictment, imprisonment for a term of not more than five years (*Criminal Code* section 445.1(2)). The penalties for a 446(1)(b) offence on summary conviction are a fine not exceeding $5,000 or imprisonment for a term of not more than six months or both, and if proceeding by way of indictment, to imprisonment for a term of not more than two years (section 446(2)). In addition, section 447.1(1) provides prohibition and restitution orders as possible penalties.

The Test

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

> *(a) Pith and Substance*
>
> 58. The first step is to determine the "matter" of the legislation in issue. The analysis involves an examination of: (i) the purpose of the enacting body, and (ii) the legal effect of the law: *Reference re Firearms Act*, 2000 SCC 31 (CanLII), [2000] 1 S.C.R. 783, at para. 16. This exercise is traditionally known as determining the law's "pith and substance": *Chatterjee*, at para. 16 [*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 S.C.R. 624]. …
>
> *(b) Assignment to a Head of Power*
>
> 64. Once the pith and substance has been identified, the second step in the analysis is to assign the matter of the challenged legislation to a head of power under either ss. 91 or 92 of the *Constitution Act, 1867*. …
>
> 67. Where measures enacted pursuant to a provincial power overlap with a federal power, the court must identify the "dominant feature" of the measure: *Chatterjee*, at para. 29. If the dominant feature is the subject matter of provincial authority, "the enactment will not be invalidated because of an 'incidental' intrusion into the criminal law": *Chatterjee*, at para. 29.

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

Pith and Substance

[22] The stated purpose of the *OSPCA Act* is animal protection and the prevention of cruelty to animals. This is set out in section 3 (see paragraph 10 above) and referred to in the preamble to the 2008 amendments (noted at paragraph 9 above). The applicant's references to the 2008 Hansard debates only supports that as the defining purpose. Although in an insurance law

context, it is affirmed in *Ontario Society for the Prevention of Cruelty to Animals v. The Sovereign General Insurance Co.*, 2015 ONCA 702, at paragraph 56.

[23] As to the legal effects, as noted in *Reference Re Firearms Act (Canada)*, 2000 SCC 31, at paragraph 18, this exercise involves considering how the law will operate and effect on Ontarians. As further noted in that paragraph "[i]n some cases, the effects of the law may suggest a purpose other than that which is stated in the law … [i]n other words, a law may say that it intends to do one thing and actually do something else." This is often referred to as the legislation's "practical effect". As noted in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at paragraph 32, in the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority. It therefore follows that the "effects" only take on analytical significance when they "so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose": *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at paragraph 156 per Wilson J.

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

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

Assignment to a Head of Power

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

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

[28] The applicant argues that as the two impugned provisions are criminal in nature, which is federal jurisdiction, they must be struck down as a result the principle of parliamentary supremacy. We are now at the "dominant feature" part of the test. In my view that argument is

not supported for "… even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power" (*York* at paragraph 54). When the overlap is related to criminal law, the ability to have co-existing legislation is more apparent given section 92-15 of the *Constitution Act, 1867* (noted at paragraph 6 above). The only question is whether the federal and provincial criminal laws are contradictory (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paragraph 32) for as noted in *York* at paragraph 73 "[a] province may legislate in relation to conduct that is encompassed by the Criminal Code, provided that the pith and substance of the law relates to a provincial head of power and the federal and provincial legislation do not conflict."

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

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

Conclusion

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

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

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

> 34. Section 8 of the *Charter* guarantees the right of everyone in Canada to be secure against unreasonable search or seizure. An inspection is a search, and a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access.
>
> 35. Privacy is a matter of reasonable expectations. An expectation of privacy will attract *Charter* protection if reasonable and informed people in the position of the accused would expect privacy.
>
> 36. If the claimant has a reasonable expectation of privacy, s. 8 is engaged, and the court must then determine whether the search or seizure was reasonable.
>
> **The Test**

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

> 39. Whether Mr. Cole had a reasonable expectation of privacy depends on the "totality of the circumstances".
>
> 40. The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances. …

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

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

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

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

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

Unreasonable Search and Seizure: Sections 11.4 and 11.4.1

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

> Inspection — animals kept for animal exhibition, entertainment, boarding, hire or sale
>
> 11.4 (1) An inspector or an agent of the Society may, without a warrant, enter and inspect a building or place where animals are kept in order to determine whether the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with if the animals are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale. 2015, c. 10, s. 4 (1).
>
> Accompaniment
>
> (1.1) An inspector or an agent of the Society conducting an inspection under this section may be accompanied by one or more veterinarians or other persons as he or she considers advisable. 2015, c. 10, s. 4 (1).
>
> Dwellings
>
> (2) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place used as a dwelling except with the consent of the occupier. 2008, c. 16, s. 8.

Accredited veterinary facilities

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

Time of entry

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

Power to demand record or thing

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

Subject of demand shall produce record or thing

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

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

[39] There are really two main circumstances that have been raised in argument related to the reasonable expectation of privacy surrounding these search and/or seizure powers. They apply not just to the analysis of these sections, but to the remaining impugned sections under this second main heading as well. The applicant focusses on the criminal powers in the Act, and the respondent focusses on the regulatory nature of the Act. I suggest these are one set of

circumstances, in the sense of being two different points on the same continuum. As noted in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at paragraph 52: "[t]he greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness." The second set of circumstances are raised by the intervener, and focus on the unique context of animal protection legislation. It cites two aspects, namely the importance of protecting animals from abuse, and the difficulties of policing and enforcing animal protection laws.

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

> 122. … the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state.

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

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

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

[43] While the expectation of privacy is high when the state is investigating a criminal offence, there is a "very low" expectation of privacy for the regulation of business and social activity: *Thomson Newspapers* at paragraphs 123 and 124. As noted by the intervener, these particular searches apply only "to those who have chosen to engage in a regulated activity." It

argues that while in most cases the person affected by the search will have an interest in animals, any subjective expectation of privacy related to them cannot be said to be objectively reasonable given the essentially commercial nature of the activity (animal exhibition, entertainment, boarding, hire or sale) where regulation is common and expected. As summarized in *British Columbia Securities* at paragraph 52:

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

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

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

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

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

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

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

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

Unreasonable Search: Section 12(6)

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

Immediate distress – entry without warrant

12. (6) If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress. 2008, c. 16, s. 9.

[51] The applicant recognizes that "where prior judicial authorization is impracticable due to a situation of urgency, the Crown may be capable of rebutting the presumption of the unreasonableness of a warrantless search." However, he is still of the view that there is a constitutional issue, asserting that the section as it stands is unreasonable because it lacks the safeguards of notice to the person affected and post-entry judicial oversight given that the searches do not necessarily lead to charges.

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

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

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

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

Order to owner of animals, etc.

13. (1) Where an inspector or an agent of the Society has reasonable grounds for believing that an animal is in distress and the owner or custodian of the animal is present or may be found promptly, the inspector or agent may order the owner or custodian to,

(a) take such action as may, in the opinion of the inspector or agent, be necessary to relieve the animal of its distress; or

(b) have the animal examined and treated by a veterinarian at the expense of the owner or custodian. R.S.O. 1990, c. O.36, s. 13 (1).

Authority to determine compliance with order

(6) If an order made under subsection (1) remains in force, an inspector or an agent of the Society may enter without a warrant any building or place where the animal that is the subject of the order is located, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the animal and the building or place for the purpose of determining whether the order has been complied with. 2008, c. 16, s. 10 (3).

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

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

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

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

Unreasonable Seizure: Section 14(1)

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

Taking possession of animal

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

(b) the inspector or agent has inspected the animal and has reasonable grounds for believing that the animal is in distress and the owner or custodian of the animal is not present and cannot be found promptly; or

(c) an order respecting the animal has been made under section 13 and the order has not been complied with. R.S.O. 1990, c. O.36, s. 14 (1).

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

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

Do sections 11, 12, and /or 12.1 of the *OSPCA Act* breach section 7 (or section 8 in the alternative) of the *Charter* by granting police and other investigative powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to a private organization? In the alternative, if it can be constitutional to grant such powers to a private organization, does the *OSPCA Act* nevertheless breach section 7 (or section 8 in the

alternative) of the *Charter* by granting these powers to the OSPCA, specifically, without any, or adequate, legislatively mandated restraints, oversight, accountability and/or transparency?

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

[63] As noted, the applicant's submissions here are focussed on who is exercising police and other investigative powers. It is distinguishable from the considerations under the previous general heading which dealt with the constitutionality of specific search provisions of the *OSPCA Act* regardless of who was exercising those powers. For that reason, and for ease, I do not set out all of the impugned sections in the body of this decision, but they are attached as Schedule "A". The following summary aligns with the applicant and respondent's submissions. Section 11 of the *OSPCA Act* assigns police powers (including search and seizure powers under the *OSPCA Act* and *Criminal Code*) to the OSPCA and such powers may be further delegated by the OSPCA to third-party affiliates. Section 12 assigns search powers to the OSPCA and specifies grounds to obtain a judicially authorized warrant. Section 12.1 assigns seizure powers to the OSPCA related to collecting and testing evidence from a section 12 search, and it sets out the requirements to report/obtain orders regarding the same to/from a justice of the peace or provincial judge.

Test

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

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

1. The first requirement is that the applicant has the burden of proving a deprivation, specifically that the impugned sections deprive someone of life, liberty, or security of the person.

2. If the deprivation is proved, then the burden remains on the applicant to also prove the second requirement, that the impugned provisions breach a principle of fundamental justice.

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

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

[67] The Supreme Court of Canada has since articulated the above as a distinct three-part test. A new principle of fundamental justice must: (1) be a legal principle; (2) have sufficient consensus that it is vital or fundamental to our societal notion of justice; and (3) be capable of being identified with precision and applied to situations in a manner that yields predictable results: *Canadian Foundation for Children, Youth and the Law* at paragraph 8.

Deprivation

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

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

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

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

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

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

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

Fundamental Justice

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

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

[75] The principles of fundamental justice lie "in the inherent domain of the judiciary as the guardian of the justice system" (*R. v. Malmo-Levine* at paragraph 112) and "are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system" (*Reference Re s. 94(2) of Motor Vehicle Act (British Columbia)* at paragraph 62).

Arbitrariness

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

[77] The purpose of the *OSPCA Act* is clear. It is to protect animals and prevent cruelty to them. The effect or result or outcome of the impugned sections, being the search, seizure, fine or imprisonment provisions, are clearly designed to achieve that purpose. In my view it simply cannot be said that there is no connection between the Act's purpose and the specified section 7 deprivations.

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

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

Proposed New Principle

[80] The applicant asserts in his factum:

> … if this Court does not agree that these submissions fall within the ambit of "arbitrariness", then the Applicant seeks recognition of a novel principle of fundamental justice that denies the delegation of police and investigative powers to a private organization, especially when the assignment of such powers does not include any, or adequate, legislated restraints, oversight, accountability or transparency.

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

Is it a Legal Principle?

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

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

[84] In my view the proposed new principle is still problematic in the sense that it lumps together three concepts to purport to stand for one single principle. "Transparency" is straightforward, and in my view can form part of a legal principle. It is the government's obligation to share information with its citizens. Our legal system in all aspects strives to be transparent, and in almost all adjudicative steps in the legal process there is some ability to review state action. Not only agencies who are enforcing laws but governments

generally must operate in such a way that it is easy for others to see what actions are performed. This is echoed by rules and legislation, for example requiring open hearings in most situations and permitting free access to nearly all public information. Similarly, "accountability" can be seen as a legal principle within the context of state action, and within the legal system. Not only law enforcement agencies and institutions, but civil servants and politicians, and indeed the government itself, must be accountable to the public and to legislative bodies. Within the legal system decisions must be supported by reasons that are subject to public discourse (via various media, within academia, etc.) and/or higher judicial scrutiny. These two concepts are therefore related, and in my view can form part of the same legal principle in the sense that accountability and transparency work in tandem to provide for open government and reviewable government action in a free society. "Integrity", however, is something different.

[85] What the applicant and intervener are getting at generally with the concept of integrity (and the lack of legislative restraints that was mentioned in the applicant's initial formulation), is the organizational nature of, specifically, the OPSCA. The OSPCA as constituted under the *OSPCA Act* is not a government agency but a private charity that operates by way of a board. While it receives government funding, there is a significant shortfall and as such it needs to raise funds through donations or other revenues to attempt to cover a large portion of its operating expenses. This results in potential for conflicts of interest (for example see *R. v. Pauliuk*, [2005] O.J. No. 1393 (O.C.J.) and *Ontario Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*, [2017] O.J. No. 4722 (S.C.J.)). However, as noted a principle of fundamental justice must not be so broad as to become a vague generalization of what our society considers ethical or moral (*Rodriguez v. B.C.*, [1993] S.C.R. 519 at page 591). In that respect "integrity", by its own definition, simply means the quality of having strong moral principles (see the *Concise Oxford English Dictionary*). While the applicant made a good case that the institutional integrity of the OSPCA may be lacking in the way it has been funded and structured, I cannot see how integrity related to regulatory and law enforcement agencies can be said to be a legal principle. As it is essentially a synonym for morality, "integrity" is a vague concept, and when fused to transparency and accountability it erodes their clarity as a single legal principle.

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

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

[87] In my view, for the very reasons in paragraph 84 above, the answer to this question is yes. Transparency and accountability are basic tenets of our legal system, as well as our democratic process. This has been recognized by courts, Parliament, and the legislature in many different contexts (open courts, freedom of the press, access to information legislation, appeal

processes, etc.). It is vital that the public have confidence in the enforcement of our laws (for example see *R. v. Qureshi*, [2004] O.J. No. 4711 (C.A.) at paragraph 9). A reasonable level of transparency and accountability is the cornerstone for that confidence.

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

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

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

[89] I find that the applicant has established a principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency and accountability". The last question then in this analysis is whether the *OSPCA Act* in constituting the OSPCA contravenes that principle. In my view the answer, once again, is yes.

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

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

[1] Anecdotally, during my deliberations the Ontario government announced plans to introduce legislation to increase "transparency and accountability" at Hydro One a "partially privatized company" (Financial Post website, July 16, 2018).

law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot be confident that the laws it enforces will be fairly and impartially administered.

Decision/Remedy

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

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

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

[95] There was no suggestion that the unconstitutional sections could be modified or read down to make them *Charter* compliant. I do not see how they could be. As in *Bedford*, there was no argument by the respondent that the impugned sections could be saved by section 1 of the *Charter*. As noted in *R. v. Safarzadeh-Markhali*, 2016 SCC 14, at paragraph 57, it would be difficult if not impossible to justify a section 7 violation under section 1. The remaining question, then, is whether the declaration of invalidity should be suspended and, if so, for how long. There was also no argument on this point.

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

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

different schemes for animal protection in other provinces that the legislature could look at, as noted by the intervener in its factum (footnotes omitted):

> … other provinces have recognized the importance of ensuring adequate oversight of animal protection enforcement. In Manitoba, animal protection laws are primarily enforced by provincially-appointed inspectors employed by the Chief Veterinary Office, which is a division of Manitoba Agriculture and therefore a state agency, subject to oversight by the government. In Quebec, agents employed by the Ministry of Agriculture, Fisheries, and Food are primarily responsible for enforcing provincial laws. Animal protection laws in Newfoundland [and Labrador] are enforced by the police – namely the RCMP and the Royal Newfoundland Constabulary. In British Columbia, Alberta, and Nova Scotia, SPCA inspectors exercising police powers are appointed by the provincial government and are subject to the same oversight and accountability mechanisms as peace officers.

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

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

Mr. Justice Timothy Minnema

Date: January 2, 2019

SCHEDULE "A"
OSPCA Act

Inspectors and agents
Powers of police officer

11. (1) For the purposes of the enforcement of this Act or any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals, every inspector and agent of the Society has and may exercise any of the powers of a police officer.

Inspectors and agents of affiliates

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

Local police powers

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

Identification

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

Interfering with inspectors, agents

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

Entry where animal is in distress
Warrant

12. (1) If a justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that there is in any building or place an animal that is in distress, he or she may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents

consider advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress.

Telewarrant

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

When warrant to be executed

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

(a) specify the times, which may be at any time during the day or night, during which the warrant may be carried out; and

(b) state when the warrant expires.

Extension of time

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

Other terms and conditions

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

Immediate distress – entry without warrant

(6) If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress.

Accredited veterinary facilities

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

Definition – immediate distress

(8) For the purpose of subsection (6),

"immediate distress" means distress that requires immediate intervention in order to alleviate suffering or to preserve life.

Authorized activities
Inspect animals, take samples, etc.

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

Same

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

Supply necessaries to animals

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

Seizure of things in plain view

(4) An inspector or an agent of the Society who is lawfully present in a building or place under the authority of any provision of this Act or of a warrant issued under this Act may, upon giving a receipt for it, seize any thing that is produced to the inspector or agent or that is in plain view if the inspector or agent has reasonable grounds to believe,

(a) that the thing will afford evidence of an offence under this Act; or

(b) that the thing was used or is being used in connection with the commission of an offence under this Act and that the seizure is necessary to prevent the continuation or repetition of the offence.

Report to justice, judge

(5) An inspector or an agent of the Society shall,

(a) report the taking of a sample or a carcass under subsection (1) to a justice of the peace or provincial judge; and

(b) bring any thing seized under subsection (4) before a justice of the peace or provincial judge or, if that is not reasonably possible, report the seizure to a justice of the peace or provincial judge.

Order to detain, return, dispose of thing

(6) Where any thing is seized and brought before a justice of the peace or provincial judge under subsection (5), the justice of the peace or provincial judge shall by order,

(a) detain it or direct it to be detained in the care of a person named in the order;

(b) direct it to be returned; or

(c) direct it to be disposed of, in accordance with the terms set out in the order.

Same

(7) In an order made under clause (6) (a) or (b), the justice of the peace or provincial judge may,

(a) authorize the examination, testing, inspection or reproduction of the thing seized, on the conditions that are reasonably necessary and are directed in the order; and

(b) make any other provision that, in his or her opinion, is necessary for the preservation of the thing.

Application of *Provincial Offences Act*

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

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

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Jeffrey Bogaerts, Applicant

AND

The Attorney General of Ontario, Respondent

AND

Animal Justice Canada, Intervener

BEFORE: Mr. Justice Timothy Minnema

COUNSEL: Kurtis R. Andrews, for the Applicant

Daniel Huffaker, for the Respondent

Arden Beddoes and Benjamin Oliphant, for the Intervenor

ENDORSEMENT ON APPLICATION

Mr. Justice Timothy Minnema

Released: January 2, 2019