

## LexisNexis® Agricultural Law *NetLetter*

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### HIGHLIGHTS

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- \* A Justice of the Ontario Superior Court of Justice has declared unconstitutional a number of sections of the Ontario Society for the Prevention of Cruelty to Animals Act which give the OSPCA (a private association), investigation and policing powers. The Court concluded that it was a principle of fundamental justice that law enforcement bodies must be subject to reasonable standards of transparency and accountability and that while police officers are subject to provincial legislation which provides for comprehensive oversight and accountability for police, the Ombudsman Act and the Freedom of Information and Privacy Act, the OSPCA is not subject to similar oversight and operates in a way that is shielded from public view while at the same time fulfilling public functions. The Court suspended the declaration of constitutional invalidity for a period of 1 year to afford the province an opportunity to amend the Act. Challenges to the search and seizure provisions of the Act, and an argument that the provisions of the Act was an unconstitutional exercise of exclusive federal authority over criminal law were both dismissed. The decision contains a comprehensive discussion of the law with respect to the constitutional validity of provincial legislation aimed at preventing cruelty to animals. (Bogaerts v. Ontario (Attorney General), [CALN/2019-010](#), [\[2019\] O.J. No. 5](#), Ontario Superior Court of Justice)

### NEW CASE LAW

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#### Bogaerts v. Ontario (Attorney General);

Ontario Superior Court of Justice,

T. Minnema J.,

January 2, 2019.

[CALN/2019-010](#)

[\[2019\] O.J. No. 5](#) | [2019 ONSC 41](#)

### **Animals in Distress — Constitutional Validity of Provincial Legislation Regarding Prevention of Cruelty to Animals.**

Jeffrey Bogaerts ("Bogaerts") applied to the Ontario Superior Court of Justice for a declaration that certain provisions of the Ontario Society for the Prevention of Cruelty to Animals, [RSO 1990, c. O.36](#) ("OSPCA Act") were unconstitutional.

Bogaerts is a paralegal with a law firm that deals with animal welfare law. It was initially held that he lacked personal standing to bring the application, however he was granted leave to proceed based on public interest standing.

Bogaerts sought a declaration that a number of the sections in the OSPCA Act were unconstitutional, and have no force and effect. He asked the Court to consider the following questions:

1. Does s. 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?
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. 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?

Decision: Minnema, J answered the questions as follows:

1. Question 1: "No". The OSPCA Act is enacted under the province's peace order and good government power and is not an unconstitutional exercise of federal jurisdiction with respect to criminal law [para. 92].
2. Question 2: "No". The OSPCA Act is not invalid on the grounds that specific warrantless search or seizure powers violate s. 8 of the Charter [at para. 93].
3. Question 3: "Yes". Certain provisions to assign police and other investigation powers are of no force and effect [at para. 94]. The extent to which these sections are unconstitutional are discussed in detail below.

The Court considered the following issues:

1. Does s. 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?

Sections 11.2(1) and 11.2(2) of the OSPCA Act provide 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.

Section 1(1) of the OSPCA Act defines distress as follows:

"...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.

Section 18 of the OSPCA Act provides that everyone who contravenes these sections has committed an offence and is liable on conviction to a fine of not more than \$60,000.00 or imprisonment for a term of not more than 2 years, or both.

Sections 445.1(a) and (b) of the Criminal Code, [RSC 1985, c. C-46](#) provide as follows:

445.1(1)(a) Every one commits an offence who...wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird.

445.1(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.

The penalties for conviction under the Criminal Code vary from a fine of \$5,000.00 to \$10,000.00 or imprisonment to a maximum of 18 months or 5 years, depending on whether the Crown proceeds by indictment.

Section 3 of the OSPCA Act provides that the purpose of the Act is to:

"to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom."

Minnema, J concluded [at para. 22 to 24] that the stated purpose of the OSPCA Act is animal protection and the prevention of cruelty to animals, and that there is "nothing in the OSPCA Act or its effects to suggest a purpose other than animal protection and the prevention of animal cruelty to animals".

Minnema, J agreed with a decision of the Nova Scotia Provincial Court in *R v Vaillancourt*, [\[2003\] N.S.J. No. 510](#) in which the Justice of the Nova Scotia Provincial Court came to the same conclusion in looking at substantially similar Nova Scotia legislation.

Minnema, J concluded that the OSPCA Act fell within provincial constitutional authority stating, at para. 27:

[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 to the class of subject "Property and Civil Rights in the Province".

Minnema, J held that although the provisions of the Criminal Code were very similar to the OSPCA Act, the OSPCA Act is not inconsistent with the Criminal Code. Provinces can enact provisions with the same legal effect as federal legislation, provided that this is done pursuant to a provincial head of power [at para. 28 and 29].

Minnema, J concluded [at para. 30]:

"...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 these 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."

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?

Bogaerts argued that s. 8 of the Charter guaranteed the right of everyone in Canada to be secure against reasonable search and seizure; that an inspection is a search and a taking is a seizure, and that a person has a reasonable privacy interest in the object or subject matter of a stayed action, and the information to which it gives access. Bogaerts also argued that an expectation of privacy will attract the protection of s. 8 if "reasonable and informed people in the position of the accused would accept privacy", and that if s. 8 is engaged, the Court must determine whether the search or seizure was reasonable [at para. 31].

Minnema, J observed [at para. 32 to 38] that there were two steps to the process of assessing the s. 8 Charter argument. The first step is whether s. 8 applies and whether there is a reasonable expectation of privacy based on the totality of the circumstances. If the section applies, the onus shifts to the Crown to establish the search or seizure was reasonable [at para. 32 to 36].

Minnema, J observed that an alternative s. 7 argument was not made.

Minnema, J considered each of the sections under the OSPCA Act which had been impugned:

(a) Sections 11.4 and 11.4.1 which gave inspectors or agents for the OSPCA the right, without warrant, to inspect buildings where animals are kept in order to determine whether the standards described under the Act are being complied with if the animals are being kept for the purpose of animal exposition, entertainment, boarding, hiring or for sale, subject to a number of limitations, including the limitation that the inspector or agent be conducted by a veterinarian; that the right of inspection cannot be used to enter a dwelling or an accredited veterinary facility, and that the inspection only be exercised between the hours of 9:00 a.m. and 5:00 p.m.;

(b) The right of inspection under s. 12(6) to enter into any building or place without a warrant if the OSPCA has reasonable grounds to believe that there is an animal in immediate distress in any building or place other than a dwelling;

(c) The right, under s. 13(1) and 13(6) to order the owner or custodian of an animal to take reasonable steps to relieve an animal of its distress or have the animal examined by a veterinarian if the OSPCA has reasonable grounds for believing an animal to be in

distress, and to enter a building or place where the animals are kept to determine whether this order has been complied with; and

(d) The authority under s. 14(1) to take possession of an animal for the purpose of providing the animal with food, care and treatment to relieve distress where the OSPCA has reasonable grounds for believing the animal is in distress, the owner or custodian is not present and cannot be found, or the order to relieve distress has not been complied with.

With respect to s. 11.4 and 11.4.1, Minnema, J concluded that these sections do not attract a reasonable expectation of privacy, stating [at para. 49]:

[49] Looking at the totality of the circumstances, the juristic character of the OSPCA Act is animal protection, and the impugned sections are focused 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.

Minnema, J held that the right of entry without warrant where there was immediate distress under s. 12(6) fell squarely within the "within the criminal law exigent circumstances exception" [at para. 52].

With respect to s. 13(1) and 13(6) of the OSPCA Act, Minnema, J held [at para. 57 and 58] that Bogaerts had not established a reasonable expectation of privacy for the type of searches permitted by these sections. With respect to s. 14(1), Minnema, J came to the same conclusion [at para. 61].

3. 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?

Minnema, J attached these lengthy sections as an appendix to his decision. The sections generally deal with the appointment of inspectors and agents who have the authority to exercise the powers of peace officers; the authority of a Justice of the Peace or a Provincial Judge to issue a warrant authorizing inspectors to enter buildings for the purpose of ascertaining whether there are animals in distress; telewarrants; how warrants may be exercised, the presence of veterinarians and third parties, and other matters related to the search and seizure.

Bogaerts' application with respect to these sections was based on s. 7 of the Charter which provides that "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". Bogaerts focused on the question of whether it was unconstitutional under s. 7 for the Province to delegate police and other investigative powers to a private organization, and the OSPCA in particular. Bogaerts did not develop an alternative s. 8 argument [para. 62].

Bogaerts argued that there had been a deprivation of life, liberty or security of the person, and that fundamental justice had been breached relying on a "novel argument" summarized as follows at para. 80:

...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.

Minnema, J concluded that the OSPCA Act had contravened a principle of fundamental justice, stating, at para. 89 to 91:

[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 Clark*, [2001] NJ No. 191 at paragraph 6, and *Beazley (Re)*, [2007] NJ 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, *RSO 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, *RSO 1990, s. O.6*, or similar legislation. Unlike virtually every public body in Ontario, the OSPCA is not subject to the Freedom of Information and Protection of Privacy Act, *RSO 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 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.

Minnema, J declared s. 11, 12 and 12.1 to be unconstitutional [at para. 94] and of no force and effect, but suspended the declaration of invalidity for a period of 1 year [at para. 98] to give the Ontario legislature sufficient time to consider how the OSPCA Act might be rendered constitutional.

## CREDITS

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