

Court File No.

749/13

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JEFFREY BOGAERTS

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent



NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come for a hearing on a date and at a time to be set by the Registrar of the Superior Court of Justice at Perth Courthouse, 43 Drummond Street east, Perth, Ontario, K7H 1G1.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: Oct 18. 2013

Issued by: 
Local Registrar

Address of court office:
Perth Courthouse
43 Drummond Street East
Perth, Ontario, K7H 1G1

TO: **The Attorney General of Ontario**
Public Law Division
Constitutional Law Branch
7th Floor, 720 Bay Street
Toronto, Ontario, M5G 2K1

APPLICATION

1. The applicant makes application for:
 - a. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"] that sections 1, 11, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 [the "*OSPCA Act*"], as amended, violate section 7 of the *Charter* and therefore are of no force or effect;
 - b. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, section 52(1) of the *Constitution Act, 1982*, and section 24(1) of the *Charter* that sections 11.4, 12, 13 and 14 of the *OSPCA Act*, as amended, violate section 7 and 8 of the *Charter* and therefore are of no force or effect;
 - c. A declaration pursuant to sections 97 and 109 of the *Courts of Justice Act*, and section 52(1) of the *Constitution Act, 1982*, that the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, as amended, violate sections 91 and 92 of the *Constitution Act, 1982*, and therefore are of no force or effect; and
 - d. Such further and other relief as counsel may advise and this Honourable Court may permit
2. The grounds for the application are:
 - a. Section 18.1 of the *OSPCA Act*, by providing for a term of imprisonment following a conviction for an offence under the *Act*, restricts the liberty of people, animal owners and animal custodians in the province of Ontario, as defined under section 7 of the *Charter*;
 - b. The provisions of the *OSPCA Act* which restrict the liberty of people, animal owners and animal custodians in Ontario do not accord with the principles of fundamental justice and, therefore, breach section 7 of the *Charter*;
 - c. The definition of "distress" in section 1 of the *OSCPA Act* is unconstitutionally vague in that it does not provide sufficient guidance for legal debate;

- d. The definition of "distress" in section 1 of the *OSCPA Act* does not provide fair notice to the residents of Ontario respecting minimally acceptable care and treatment of animals in Ontario.
- e. The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those enforcing the law to prevent arbitrary exercise of their discretion;
- f. The definition of "distress" in section 1 of the *OSPCA Act* does not provide sufficient direction to those issuing warrants or orders, as authorized by to the *Act*, to prevent arbitrary exercise of their discretion;
- g. The definition of "distress" in section 1 of the *OSPCA Act* is unconstitutionally overbroad in that it may capture acceptable and /or normal care and treatment of animals in Ontario;
- h. The definition of "distress" in section 1 of the *OSPCA Act* violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation and does not impair the rights of Ontario residents as little as possible;
- i. To the extent that sections 1, 11.2(1), 11.2(2), 12, 12.1, 13 and 14 of the *OSPCA Act* rely on and incorporate the definition of "distress" from section 1 of the *Act*, these sections are unconstitutionally vague and overbroad and cannot be saved by section 1 of the *Charter*;
- j. To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it is unconstitutionally vague and overbroad and, in turn, violates sections 7 and 8 of the *Charter* because it fails to adequately specify an appropriate standard for the issuance of warrants.
- k. To the extent that section 12 the *OSPCA Act* relies on and incorporates the definition of "distress" from section 1 of the *Act*, it cannot be saved by section 1 of the *Charter* because it is not rationally connected to the purpose of the legislation, the means chosen are not proportional to the limits put on peoples' rights, and it does not impair the rights of Ontario residents as little as possible;

- l. Sections 11.4, 13 and 14 of the *OSPCA Act* grant powers of search and seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by section 8 of the *Charter*;
- m. To the extent that section 11.4 of the *OSPCA Act* confers upon OSPCA Officers the power to search private property at the complete discretion of the Officer, including property where a dwelling unit may be located, either alone or accompanied by any number of other persons as he or she considers advisable, and irrespective of any situation of urgency which makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;
- n. To the extent that section 13(6) of the *OSPCA Act* confers upon OSPCA Officers the power to enter private property at the complete discretion of the Officer, including a dwelling unit, at any hour of the day or night into the future forever, either alone or accompanied by any number of other persons as he or she considers advisable, at any time and irrespective of any situation of urgency, it is not reasonable and violates section 8 of the *Charter*;
- o. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, subject only to an initial "reasonable grounds for believing that an animal is in distress" on the part of an OSPCA officer, and irrespective of taking any reasonable steps to confirm with a veterinarian that an animal is in distress, and irrespective of whether there is any situation of urgency which makes the obtaining of a search warrant impracticable, it is not reasonable and violates section 8 of the *Charter*;
- p. To the extent that sections 13(1) and 13(6) of the *OSPCA Act* conjunctively confer upon OSPCA Officers warrantless entry powers, and an appeal of an Order issued under section 13(1) expires after only 5 business days, and while the entry powers prescribed under 13(6) go on forever, it is not reasonable and violates section 8 of the *Charter*;
- q. To the extent that section 14 of the *OSPCA Act* confers upon an OSPCA Officer the power to seize private property, irrespective of any situation of urgency which

makes judicial authorization impracticable, it is not reasonable and violates section 8 of the *Charter*;

- r. Warrantless search and seizure powers provided by sections 11.4, 13 and 14 of the *OSPCA Act* cannot be saved by section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
- s. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, with no public oversight, accountability or transparency, it does not accord with principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- t. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, without statutorily prescribed restraints afforded to police officers in Ontario, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- u. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon OSPCA Officers, and the OSPCA and /or its Officers are not subject to:
 - i. *Police Services Act*, R.S.O. 1990, c. P.15 and regulations passed thereunder;
 - ii. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 and regulations passed thereunder;
 - iii. *Ombudsman Act*, R.S.O. 1990, c. O.6 and regulations passed thereunder;it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;
- v. To the extent that section 11 of the *OSPCA Act* confers "the powers of a police officer" upon Officers of a private organization, an organization which is also trusted to raise its own revenues to fund its investigations and salaries of the same Officers, and which raises said revenues by selling seized animals and other products of its investigations, it does not accord with the principles of fundamental justice and, therefore, breaches section 7 of the *Charter*;

- w. Conferral of police powers upon Officers of a private organization, as prescribed by section 11 of the *OSPCA Act*, violates section 7 of the *Charter* and cannot be saved under section 1 of the *Charter* because the means chosen are not proportional to the limits put on peoples' rights and do not impair the rights of Ontario residents as little as possible;
 - x. The pith and substance of the *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, is of a moral issue related to criminal law, and constitutes an attempt by the province of Ontario to legislate in the area of criminal law;
 - y. To the extent that the *OSPCA Act* intrudes into criminal law, an area which is the exclusive jurisdiction of the Parliament of Canada, the *Act* is *ultra vires* the Province of Ontario for violating sections 91 and 92 of the *Constitution Act, 1982*;
 - z. The *OSPCA Act*, and especially sections 11.1, 11.2 and 18.1 of the *Act*, exposes Ontario residents to criminal prosecution while bypassing the protection provided by criminal law and procedure;
 - aa. Sections 11.1, 11.2 and 18.1 of the *OSPCA Act* effectively duplicates the "Cruelty to Animals" section of the *Criminal Code*, namely sections 445.1 to 447.1, and said overlap supports an inference that the *OSPCA Act* serves a criminal law purpose;
 - bb. The severity of penalties prescribed by section 18.1 of the *OSPCA Act* further characterizes the *Act* as criminal law; and
 - cc. Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- a. Affidavit of the Applicant, Jeffrey Bogaerts, to be sworn, and the exhibits annexed thereto;
 - b. The Affidavit of Dr. Lawrence Gray, to be sworn, and the exhibits annexed thereto;
 - c. The Affidavit of Carl Noble, to be sworn, and the exhibits annexed thereto;

- d. The Affidavit of Viola Streicher, to be sworn, and the exhibits annexed thereto;
- e. The Affidavit of Jessica Johnson, to be sworn, and the exhibits annexed thereto;
- f. The Affidavit of Anne Probst, to be sworn, and the exhibits annexed thereto;
- g. The Affidavit of Cynthia Lajoie, to be sworn, and the exhibits annexed thereto;
and
- h. Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

DATED: October 18, 2013

GREEN & ASSOCIATES

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JEFFREY BOGAERTS
Applicant

-and-

ATTORNEY GENERAL OF ONTARIO
Respondent

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