COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. Bogaerts, 2019 ONCA 876
DATE: 20191114
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Sharpe, Hourigan and Roberts JJ.A.

BETWEEN

The Attorney General of Ontario

Respondent (Appellant in appeal)

and

Jeffrey Bogaerts

Applicant (Respondent in appeal)

Daniel Huffaker, for the appellant

Kurtis R. Andrews, for the respondent

Shain Widdifield, for the intervener the Attorney General of Canada

Arden Beddoes, Camille Labchuk and Kaitlyn Mitchell, for the intervener Animal Justice Canada

Stephen McCammon, for the intervener the Information and Privacy Commissioner of Ontario

Andrew Faith and Brookelyn Kirkham, for the intervener Railway Association of Canada

Graeme A. Hamilton and Alannah Fotheringham, for the intervener Canadian Civil Liberties Association

Heard: October 1, 2019

On appeal from the order of Justice J.M. Johnston of the Superior Court of Justice, dated June 15, 2016, with reasons reported at 2016 ONSC 3123, and the judgment

of Justice Timothy Minnema of the Superior Court of Justice, dated January 2, 2019, with reasons reported at 2019 ONSC 41, 426 C.R.R. (2d) 303.

Sharpe J.A.:

[1] This appeal considers the constitutionality of the statutory authority conferred upon inspectors and agents designated by the Ontario Society for the Prevention of Cruelty to Animals (the "OSPCA") to exercise the powers of a peace officer in the enforcement of laws pertaining to the welfare and prevention of cruelty to animals.

[2] The respondent is a paralegal who was given public interest standing to challenge certain provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act,* R.S.O. 1990, c. O.36 (the "Act").

[3] The application judge dismissed the respondent's argument that provisions in the Act creating offences were matters of criminal law and therefore beyond the legislative authority of the province. The application judge also dismissed the respondent's contention that certain provisions in the Act infringed s. 8 of *Charter of Rights and Freedoms* guaranteeing the right to be secure against unreasonable search and seizure. However, the application judge accepted the submission that some of the Act's search and seizure provisions violated the s. 7 right not to be denied liberty and security of the person except in accordance with the principles of fundamental justice. He found that those search and seizure powers engaged the liberty and security of the person interests and he recognized a novel principle

of fundamental justice, namely, that "law enforcement bodies must be subject to reasonable standards of transparency and accountability". The application judge struck down the sections of the Act conferring the powers of a peace officer on OSPCA officers and agents as well as two sections authorizing search and seizure.

[4] The appellant, the Attorney General of Ontario, appeals the order granting the respondent public interest standing and the s. 7 order striking down three sections of the Act. The respondent cross-appeals the dismissal of the s. 8 argument and seeks to add that "law enforcement bodies must be funded in such manner to avoid actual or perceived conflicts of interest or apprehension of bias" as an additional principle of fundamental justice.

[5] For the following reasons, I would allow the appeal and dismiss the cross-appeal. In my view, the application judge erred in finding that the liberty and security of the person interests protected by s. 7 were engaged. It is also my view that he further erred in accepting that "law enforcement bodies must be subject to reasonable standards of transparency and accountability" as a novel principle of fundamental justice. However, he did not err in dismissing the s. 8 claim.

OVERVIEW OF THE ACT

[6] The relevant statutory provisions are set out in the Appendix to these reasons and may be summarized as follows.

[7] The object of the Act "is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom" (s. 3). The Act constitutes the OSPCA and provides for its governance by a board of directors. While the OSPCA essentially functions as a private organization, the Lieutenant Governor in Council has the power to annul any by-law it enacts (s. 7(3)). The Act provides that the OSPCA shall appoint a Chief Inspector (s. 6.1(1)) who has the authority to establish qualifications, requirements and standards for inspectors and agents and to appoint, supervise and remove them (s. 6.1(2)).

[8] The provision central to this challenge is s. 11(1) which confers the powers of a police officer on OSPCA inspectors and agents for the purpose of enforcing the Act and any other law pertaining to animal safety and the prevention of cruelty to animals.

[9] The Act establishes obligations and prohibitions regarding the care of and harm to animals.

[10] The respondent challenged two provisions, ss. 11.2(1) and 11.2(2), making it an offence to cause or permit an animal to be "in distress", defined as "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 or unnecessary hardship, privation or neglect" (s. 1). The application judge rejected the contention that those provisions were *ultra vires* the province on the ground that they were, in pith and

substance, criminal law. No appeal is taken from that aspect of the application judge's order.

[11] The Act contains several provisions authorizing search and seizure. The respondent's challenge to the following provisions was dismissed by the application judge:

- Section 11.4 allows entry (without warrant into any place other than a dwelling, and into a dwelling with a warrant) where animals are kept for commercial purposes (exhibition, entertainment, boarding, hire or sale) to determine whether applicable standards are being met, provided that entry into a dwelling is not permitted without the consent of the occupier (s. 11.4(2));
- Section 11.4.1(1) gives inspectors and agents the power to demand production of records in relation to the same class of animals;
- Section 12(1) allows inspectors and agents with a warrant to search a building or place to determine if an animal is in distress;
- Section 12(6) allows for entry without a warrant into any building or place other than a dwelling if the inspector or agent has reasonable grounds to believe that there is an animal in immediate distress, defined as "distress that requires immediate intervention in order to alleviate suffering or to preserve life" (s. 12(8));

- Section 12.1 allows inspectors, agents and veterinarians who are lawfully in a place to take a carcass or sample of a carcass;
- Section 13(1) allows an inspector or agent who has reasonable grounds to believe that an animal is in distress to order any person present or found promptly to take action to relieve the distress or to have the animal treated or examined by a veterinarian at the owner or custodian's expense;
- Section 13(6) allows for entry without a warrant if an order made under s. 13(1) remains in force to determine if the order has been complied with;
- Section 14(1) allows an inspector or agent to remove an animal for the purpose of providing it with care upon reasonable grounds to believe that an animal is in distress and the owner or custodian cannot be found or if a s. 13 order has been made and not complied with.

[12] The Act constitutes the Animal Care Review Board and gives it the authority to entertain appeals from compliance orders made under s. 13(1) and from animal removals pursuant to s. 14(1).

[13] Section 22(2)(a) gives the Minister responsible for the administration of the Act the authority to make regulations prescribing the powers and duties of the OSPCA's Chief Inspector, including the power to appoint, oversee and establish qualifications, requirements and standards for OSPCA inspectors and agents. Pursuant to that provision, the Minister enacted O Reg 59/09, s. 1(1), requiring the

Chief Inspector to establish such standards and to oversee inspectors and agents in the performance of their duties.

DECISION OF THE MOTION JUDGE ON STANDING

[14] The respondent is a paralegal who works in the animal care area and owns animals. The Attorney General challenged his standing to bring this application. The motion judge ruled that the respondent lacked sufficient interest to satisfy the test for private interest standing but accepted that he should be given public interest standing.

[15] The motion judge concluded that the respondent satisfied the test for public interest standing set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 37: "(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts". There was a justiciable issue, the respondent had a genuine interest as a paralegal who works in the area of animal welfare, and the proposed application was a reasonable and effective way to bring the issue before the courts.

[16] Having granted public interest standing, the motion judge accepted the Attorney General's argument that he should strike from the record affidavit

evidence alleging specific complaints that inspectors, agents and members of the Animal Care Review Board had engaged in conduct that infringes or denies the *Charter* rights of non-parties. He did so on the basis that the public interest standing challenge was to the constitutionality of the Act, not to the specific exercise of discretion to which the affidavits were directed.

DECISION OF THE APPLICATION JUDGE

Federalism

[17] The application judge rejected the respondent's contention that ss. 11.2(1) and 11.2(2) were, in pith and substance, criminal law and therefore beyond the legislative competence of the province. He concluded that the "matter" of the OSPCA is animal protection and prevention of cruelty to animals and that it fell within s. 92(13) of the *Constitution Act, 1867*, conferring upon the province the authority to make laws in relation to "Property and Civil Rights in the Province". No appeal is taken from that aspect of the application judge's decision.

Charter s. 8: Unreasonable Search and Seizure

[18] The application judge dismissed the respondent's contention that ss. 11.4, 12(6), 13(1) and (6), and 14(1)(b) and (c) breached s. 8 of the *Charter*.

[19] He found that the purpose of s. 11.4 is to deal with commercial activity and that it is essentially regulatory in nature. He concluded that the respondent had failed to show a reasonable expectation of privacy when this provision was used

for the purpose for which the section was intended, namely protection of vulnerable animals.

[20] The application judge found that as s. 12(6) dealt with exigent circumstances and did not authorize warrantless searches of dwellings, it did not infringe s. 8 of the *Charter*, and he rejected the respondent's argument that the legislature should have included certain safeguards.

[21] With respect to ss. 13(1) and (6), the application judge found that as s. 13(6) simply allowed an inspector to follow up on a s. 13(1) order in relation to an animal in distress, no reasonable expectation of privacy was established.

[22] Finally, the application judge found that the exercise of the powers conferred by s. 14(1)(b) and (c) to remove an animal in distress in order to provide it with the care required to relieve the distress did not give rise to a reasonable expectation of privacy.

Charter s. 7: Liberty, Security of the Person and the Principles of Fundamental Justice

[23] The principal focus of the application was the argument that the delegation of police and other investigative powers in ss. 11, 12 and 12.1 to the OSPCA, a private organization, violates s. 7 of the *Charter*. The application judge properly analyzed this issue in two stages: first, do the impugned provisions engage life, liberty or security of the person; and if the answer is yes, second, is the denial of

life, liberty or security of the person in accordance with the principles of fundamental justice.

[24] The application judge accepted the submission that ss. 11, 12 and 12.1 deprive someone subjected to those powers of liberty and security of the person. He rejected the appellant's contention that as a deprivation of liberty would only arise after prosecution, conviction and sentencing, the search powers were too remote to trigger a s. 7 claim. The application judge also found that the impugned provisions engaged the security of the person interest and he rejected the appellant's submission that the challenge to the impugned provisions should proceed under the more specific guarantee of s. 8.

[25] The application judge then turned to the issue of whether the interference with liberty and security of the person was in accordance with the principles of fundamental justice. He rejected the argument that the impugned provisions ran afoul of the principle of non-arbitrariness, the only accepted principle of fundamental justice raised by the respondent. However, he accepted as a novel principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency and accountability", while rejecting the inclusion of "integrity" as being too vague. He found, at para. 25, that while the respondent had "made a good case that the institutional integrity of the OSPCA may be lacking in the way it has been funded and structured", integrity was

"essentially a synonym for morality" and a "vague concept" that did not amount to "a legal principle".

[26] The application judge found that this formulation met the three-part test set out by the Supreme Court of Canada in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 112-13 and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8. It must be (1) "a legal principle" (2) that is "vital or fundamental to our societal notion of justice" and (3) "capable of being identified with precision and applied to situations in a manner that yields predictable results."

[27] The application judge found that accountability and transparency were basic tenets of our legal system. It was, he ruled, vital for the public to have confidence in the enforcement of laws, and that "a reasonable level of transparency and accountability is the cornerstone for that confidence." He was satisfied that the proposed principle was capable of being identified with precision and applied in a manner that would yield predictable results.

[28] The application judge concluded that the impugned provisions contravened this novel principle of fundamental justice. As a private organization, the OSPCA lacked the required degree of transparency and accountability. OSPCA investigators and agents are not subject to the *Police Services Act,* R.S.O. 1990, c. P.15, which provides a comprehensive system of oversight and accountability.

He noted that while the OSPCA does have a policy manual relating to search and entry, it is not a public document and that complaints and discipline issues are dealt with by the OSPCA internally. Nor is the OSPCA subject to the *Ombudsman Act,* R.S.O. 1990, c. O.6, or the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F31. He agreed with the intervener's submission that "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."

[29] The application judge declared ss. 11, 12 and 12.1 of no force and effect on the ground that they violated s. 7 of the *Charter.* He suspended his declaration of invalidity for one year to give the legislature the opportunity to consider alternative arrangements.

INTERIM LEGISLATION

[30] We were advised during oral argument that there has been a change in the legislation since the decision of the application judge. The OSPCA has withdrawn from enforcement of the Act. Interim legislation, the *Ontario Society for the Prevention of Cruelty to Animals Amendment Act (Interim Period)*, 2019, S.O. 2019, c. 11, allows for the appointment of a Chief Inspector who has the power to

appoint any person as an inspector under the Act. The legislature has yet to enact any other legislation to deal with the suspended declaration of invalidity.

ISSUES

[31] The following issues arise on the appeal and cross-appeal.

1. Did the motion judge err by granting the respondent public interest standing?
2. Did the application judge err by rejecting the s. 8 challenge to ss. 13(6), 14(1)(b) and 14(1)(c)?
3. Did the application judge err by finding that ss. 11, 12 and 12.1 engage the liberty and security of the person interests under s. 7?
4. Did the application judge err in recognizing a novel principle of fundamental justice?

ANALYSIS

(1) Did the motion judge err by granting the respondent public interest standing?

[32] The Attorney General appeals the order of the motion judge granting the respondent public interest standing. However, the Attorney General rested on his factum and made no oral submissions on this point. As it is my view that this court should decide the appeal and cross-appeal in any event in order to clarify the law in relation to s. 7, I do not propose to deal with this ground of appeal in any detail.

[33] I would, however, point out that the combined effect of the order granting the respondent public interest standing and striking out the affidavits providing specific instances of the infringement of *Charter* rights resulted in this court having a less than satisfactory record. In *Downtown Eastside Sex Workers*, the case recognizing generous scope for public interest standing, the Supreme Court noted, at para. 74, that there was a substantial record of affidavit evidence as to the operation and impact of the challenged legislation, to "provide a concrete factual background" for the challenge. By contrast, on this application and appeal, the constitutional arguments were advanced in the abstract without a proper factual foundation. In my view, it would have been preferable had this challenge come before the court either on the application of an individual who had been subjected to the challenged statutory powers, or upon some other proper record, to provide a concrete factual context for the consideration of the constitutional issues raised.

(2) Did the application judge err by rejecting the s. 8 challenge to ss. 13(6), 14(1)(b) and 14(1)(c)?

[34] As I have indicated, the respondent's cross-appeal of the application judge's dismissal of the s. 8 challenge is restricted to three provisions.

[35] Section 13(6) allows for entry without a warrant if a s. 13(1) order remains in force. A s. 13(1) order can require an owner or custodian to take action to relieve the distress or to have an animal treated or examined by a veterinarian at the

owner's or custodian's expense, where there are reasonable grounds to believe that an animal is in distress and the owner or custodian is present or may be found promptly.

[36] Section 14(1)(b) allows an inspector or agent to remove an animal for the purpose of providing it with care where the inspector or agent has examined the animal and has reasonable grounds to believe that an animal is in distress and the owner or custodian is not present and cannot be found promptly.

[37] Section 14(1)(c) allows for the removal of an animal where a s. 13(1) order has been made and not complied with.

[38] The principal focus of the respondent's cross-appeal is that all three provisions allow for warrantless searches of and seizures from dwellings.

[39] It is worth noting that the OSPCA's internal policy requires inspectors and agents to obtain a warrant before searching a dwelling. Because of the public interest standing ruling, the case was argued in the abstract without a factual foundation. As a result, we do not have before us a warrantless search of a dwelling and, if the OSPCA follows its policy, none may exist. Courts should not be asked to decide hypothetical cases of this nature. However, for the sake of completeness, I will express my view on the challenge to these provisions.

[40] The application judge rejected the s. 8 challenge on the ground that a person subject to a search or seizure under the challenged provisions would not have a

reasonable expectation of privacy, in part at least because of their non-criminal nature. I agree with the respondent that the application judge's analysis is unpersuasive. There can be no doubt that individuals enjoy an expectation of privacy in their dwellings.

[41] However, as I will explain, the search and seizure powers at issue all favour a lower standard of reasonableness. Considering certain specific features of the impugned provisions that I outline below, I am satisfied that they do not violate s. 8 of the *Charter*.

[42] The powers conferred by ss. 13(6) and 14(1)(c) depend upon a s. 13(1) order having been made. To make a s. 13(1) order, an inspector or agent must have reasonable grounds to believe that an animal is in distress, that is, "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 or unnecessary hardship, privation or neglect" (s. 1(1)). A s. 13(1) order must be in writing. Upon being notified of the order, the owner of custodian is given the opportunity to challenge the order before the Animal Care Review Board. This means that entry into a dwelling can only take place after an inspector or agent has reasonable grounds to believe an animal is in distress, a written order has been given to the owner or custodian, and the owner or custodian has not complied with or challenged the order. While this falls short of the protection afforded by prior authorization obtained through a judicially

approved search warrant, in my view, it is a sufficient safeguard against unreasonable search and seizure in the context of animal protection.

[43] First, as the application judge observed, we are dealing with a regulatory rather than a criminal matter where a "less strenuous and more flexible standard of reasonableness" applies: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 506.

[44] Second, these provisions deal less with gathering evidence and more with the prevention and alleviation of harm. We are dealing with exigent circumstances where the expectation of privacy yields to prevention of imminent harm: *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 21. An animal in distress is unable to draw attention to its plight. More serious harm or even death may result if prompt action is not taken to relieve the animal's distress. Entry under ss. 13(6) and 14(1)(c) is only permitted where the owner or custodian has already been ordered to act to relieve animal distress. Seizure under s. 14(1)(b) is only permitted where an animal is in distress and the owner or custodian is not present and cannot be found promptly.

[45] Given the nature of the search powers at issue, I would dismiss the cross-appeal with respect to ss. 13(6), 14(1)(b) and 14(1)(c).

(3) Did the application judge err by finding that ss. 11, 12 and 12.1 engage the liberty and security of the person interests under s. 7?

[46] It is well-established that the analysis under s. 7 proceeds in two stages. The first question is whether the impugned law infringes life, liberty or security of the person. If the answer to that question is yes, the second question is whether the infringement is in accordance with the principles of fundamental justice. I turn first to whether ss. 11, 12 and 12.1 infringe the liberty or security of the person interest of those subjected to the powers conferred by those provisions.

Liberty

[47] The application judge concluded that because the exercise of the powers conferred by ss. 11, 12 and 12.1 could lead to prosecution, conviction and imprisonment under the offence provisions of the Act, the liberty interest was engaged. In my respectful view, this amounted to an error of law for two reasons.

[48] First, we are not dealing with an appeal from conviction. I agree with the appellant that viewed on their own, the powers conferred by those provisions are too remote from the possibility of conviction and imprisonment to engage the liberty interest. As the appellant points out, several steps would have to occur after the search before an individual would be deprived of liberty:

- The criteria prescribed in those provisions search would have to be satisfied to authorize the search;

- The search would have to yield evidence that could be used in a prosecution;
- The person would have to be charged with an offence;
- The person would have to be tried, convicted and sentenced to imprisonment for the offence.

[49] We were given no authority for the proposition that a power of search and seizure, without more, engages the liberty interest. The case law suggests the contrary. Two decisions of this court hold that the risk of imprisonment for non-payment of a fine imposed for a provincial offence is too remote to permit a challenge to the provincial offence itself on the ground that it infringes the liberty interest protected by s. 7: *London (City) v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 37 (speeding); and *R. v. Schmidt*, 2014 ONCA 188, 119 O.R. (3d) 145 (selling unpasteurized milk). While the prospect of imprisonment was arguably more remote in those cases, they do stand for the proposition that where there are intermediate steps between the operation of a provision and deprivation of liberty, the court will not engage in speculation as to the possible eventual outcome to bring the case within s. 7.

[50] Second, holding that the risk of imprisonment is possible as an eventual consequence of a search would turn virtually every s. 8 challenge into a s. 7 challenge as well. In my view, that would be wrong and contrary to established authority. As I will explain in more detail below with respect to security of the person, this would run counter to the principle that where a specific section of the

Charter such as s. 8 is engaged, *Charter* scrutiny should be conducted under that specific provision and not under the more general guarantee of s. 7.

Security of the person

[51] In my respectful view, the application judge also erred in concluding that the impugned provisions engaged the security of the person interest protected by s. 7.

[52] To demonstrate an interference with security of the person, an applicant must show either (1) interference with bodily integrity and autonomy, including deprivation of control over one's body: *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 66-67, or (2) serious state-imposed psychological stress: *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2002] 2 S.C.R. 307, at paras. 81-86; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2019), at pp. 95-106.

[53] The impugned powers plainly do not interfere with bodily integrity or control over one's body. No doubt it would be unsettling to have one's premises or dwelling subjected to a search under the impugned powers. However, as the application judge found, there is nothing in the record to suggest that a search of that nature would impose the level of state-imposed stress contemplated by the case law. In *Blencoe*, the Supreme Court warned, at para. 86, against "stretch[ing] the meaning of this right" by accepting lesser levels of stress as engaging the security of the

person interest. It rejected the contention that a lengthy delay in dealing with a human rights complaint against the applicant, that had led to him suffering depression, humiliation and lack of employment, amounted a denial of security of the person.

[54] Even in the case of a search that does involve an intrusion into bodily integrity (taking bodily samples), the Supreme Court of Canada held in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 23, that "because s. 8 provides a more specific and complete illustration of the s. 7 right" any s. 7 analysis is "redundant." This follows the more general principle that where a *Charter* claim falls within one of the provisions of ss. 8 to 14, the challenge should be considered under that specific provision rather than under the more general guarantee found in s. 7: *R. v. Pearson,* [1992] 3 S.C.R. 665, at p. 688; *R. v. Généreux,* [1992] S.C.R. 259, at p. 310; *R. v. Mills,* [1999] 3 S.C.R. 668, at paras. 87-88; *R. v. Knight*, 2008 NLCA 67, 241 C.C.C. (3d) 353, at para. 48. In *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549, the applicant challenged a wiretap under s. 7. He argued that transparency and accountability were principles of fundamental justice. As I explain below, that argument was rejected at first instance. The Supreme Court of Canada did not find in necessary to deal with the issue of whether transparency and accountability were principles of fundamental justice, but ruled, at para. 52, that "the accountability concerns … are best dealt with under s. 8."

[55] The failure of the respondent to show either interference with bodily integrity or serious state-imposed psychological stress should have ended the security of the person inquiry. The application judge held, however, that as ss. 8 to 14 of the *Charter* are specific illustrations of the s. 7 right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice, the constitutionality of the impugned search and seizure powers could be considered under s. 7.

[56] This produced an unusual result. The application judge dismissed the respondent's s. 8 challenge to some of the Act's search provisions under the *Charter's* specific guarantee against unreasonable search and seizure. The s. 7 challenge involved ss. 12 and 12.1, provisions that were not challenged under s. 8. However, in view of the application judge's reasons on the s. 8 challenge, it is difficult to see any reason why the application judge would have not ruled the same way with respect to ss. 12 and 12.1. Yet he allowed the challenge to ss. 12 and 12.1 under the more general constitutional standard found in s. 7 on the ground that s. 7 embraced the right conferred by s. 8.

[57] In my view, the application judge should have confined his analysis of any challenged search and seizure provision to the specific s. 8 guarantee. I do not agree with the application judge's determination that a s. 7 analysis was appropriate in the "particular context" of this case to address the respondent's issues. There was a proper way to deal with the questions posed by the

respondent. The issue should have been framed in terms of the reasonableness of the powers of search and seizure. To succeed, the respondent should have been required to show that conducting a search or seizure without reasonable standards to ensure transparency, accountability and adequate funding is unreasonable under s. 8.

[58] The respondent submits that if we accept that the analysis should proceed under s. 8, we should still strike down ss. 11, 12 and 12.1 on the grounds that the absence of transparency, accountability and adequate funding renders searches conducted under these provisions unreasonable.

[59] I disagree. I explain below why I reject the proposition that "law enforcement bodies must be subject to reasonable standards of transparency, adequate funding, and accountability" is a principle of fundamental justice. In my view, the proposed principle fares no better when framed in terms of the reasonableness of the impugned powers of search and seizure. The proposed principle deals with general issues of governance and institutional design, not with the reasonableness, scope or exercise of powers of search and seizure. The alleged shortcomings in the legislation are too remote from the definition of the challenged statutory powers and the manner in which those powers are carried out. To succeed on this ground, the respondent would have to show that the lack of measures to ensure transparency, accountability and adequate funding realistically had or risked having an actual impact on the exercise of the challenged

statutory powers. There is no such evidence in this case. The respondent's complaint is with the general governance of the OSPCA, not with the definition of its statutory powers or the manner in which they are exercised.

[60] The fact that the respondent had been given public interest standing to challenge the Act did not relieve him of the obligation to establish a *Charter* infringement.

[61] I turn finally to the specific provisions challenged as being unreasonable. It will be recalled that the provisions at issue are ss. 12 and 12.1. Section 12(1) allows inspectors and agents with a warrant to search a building or place to determine if an animal is in distress while s. 12(6) allows for entry without a warrant upon reasonable grounds to believe that an animal is in immediate distress. Section 12.1 allows inspectors, agents and veterinarians who are lawfully in a place to take a carcass or sample of a carcass.

[62] Neither provision authorizes the warrantless search of a dwelling. Section 12, dealing with exigent circumstances and the seizure of a carcass or part of a carcass, represents a minimal interference with the owner's or custodian's rights. They are arguably less intrusive of an owner's or custodian's privacy interest than the other provisions with which I have already dealt. For the reasons I gave with respect to the other provisions challenged under s. 8, I reject the challenge to ss. 12 and 12.1.

(4) Did the application judge err in recognizing a novel principle of fundamental justice?

[63] The appellant submits that the application judge erred by recognizing "law enforcement bodies must be subject to reasonable standards of transparency and accountability" as a novel principle of fundamental justice. The respondent cross-appeals, asking that we recognize as a principle of fundamental justice that law enforcement be properly funded, amplified in his factum as the principle that "law enforcement bodies must be funded in such manner to avoid actual or perceived conflicts of interest or apprehension of bias." This is a re-formulation of the integrity argument the respondent made before the application judge.

[64] I have no doubt that it would be a good idea and sound public policy to make all law enforcement bodies subject to reasonable standards of transparency, accountability and adequate funding and that they be properly funded. But not all good ideas and sound public policies are constitutionally protected or mandated. Our task is not to decide what would be sound policy. We are charged with the more specific task of deciding what the Constitution requires: see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590: "Principles of fundamental justice must not ... be so broad as to be no more than vague generalizations about what society considers to be ethical or moral."

[65] The fact that we are faced with a novel *Charter* claim does not, of course, mean that the claim cannot succeed. We are mandated to give the *Charter* a purposive interpretation, recognizing that it must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155. At the same time, we must recognize the importance "not to overshoot the actual purpose of the right or freedom in question" and ensure that the right or freedom is "placed in its proper linguistic, philosophic and historical [context]": *R. v. Big M Drug Mart,* [1985] 1 S.C.R. 295, at p. 344.

[66] The judicial interpretation of the Constitution should be broad and generous but must also be disciplined by the need to provide a reasoned justification based upon recognized principles and values of our constitutional order. These principles confer on the courts a legal duty to interpret and protect guaranteed rights in a generous manner. But because our mandate is legal, the capacity of the courts to right all perceived wrongs is limited.

[67] As I will explain, since the enactment of the *Charter,* the courts have recognized what has become a long list of new principles of fundamental justice. But the courts have also rejected a long list of other proposed principles of fundamental justice. It is not always easy to determine whether a novel principle of fundamental justice should or should not be recognized. However, we are assisted in that task by considering the pattern revealed by the decisions in past

cases and by the need to satisfy three criteria summarized by the Supreme Court of Canada in *Malmo-Levine*, at para. 113, and *Canadian Foundation for Children,* at para. 8.

[68] The first criterion is that the proposed principle of fundamental justice must be "a legal principle" to satisfy two purposes: (1) that it "provides meaningful content for the s. 7 guarantee"; and (2) that it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503.

[69] The second criterion is that the alleged principle must be "vital or fundamental to our societal notion of justice": *Rodriguez*, at p. 590. This was explained in *Canadian Foundation for Children*, at para. 8: "The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice."

[70] The third criterion is that "the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results": *Canadian Foundation for Children*, at para. 8.

[71] I agree with the appellant that the proposed new principle of fundamental justice meets none of these three criteria.

[72] I turn first to the question of whether transparency, accountability and adequate funding qualifies as a "legal principle" capable of supporting s. 7 analysis.

[73] The application judge gave as examples of transparency the open court principle and legislation relating to access to information. The need to support legal decisions with reasons was given as an example of accountability. In my view, those examples fall short of supporting what is required to constitute a legal principle that "provides meaningful content for the s. 7 guarantee" and that avoids the "adjudication of policy matters". A legal principle that is used "as a rule or test in common law, statutory or international law" will satisfy first criterion of the principles of fundamental justice test: *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at para. 91. Transparency and accountability have a more limited legal pedigree. They are background values that the law sometimes takes into account in various ways and in various contexts. Courts may consider these values when interpreting the Constitution, statutes and common-law rules but they have not crystalized into the kind of operational or normative legal principle that can be independently deployed by a court to determine rights and obligations that will satisfy the s. 7 test.

[74] Transparency and accountability were explicitly rejected by the Supreme Court of Canada in *Wakeling,* where the court stated, at para. 47:

> [W]hile the concepts of openness, transparency and accountability are important values or objectives, they

> are not legal principles, fundamental to the legal system, which can be identified with sufficient precision to be regarded as principles of fundamental justice pursuant to the test identified in *Malmo-Levine*. Rather, these concepts like the "harm principle" posited by the accused in *Malmo-Levine* are more properly regarded as matters falling into the realm of public policy.

[75] I agree with that assessment.

[76] In *Malmo-Levine*, it was argued that s. 7 precluded the criminalization of possession of marijuana because doing so would violate the principle that the criminal law could only impose imprisonment for conduct that results in harm to others. The majority rejected that proposition, explaining that while harm may justify criminalization, the absence of proven harm does not preclude legislative action. At para. 114, the majority explained: "the 'harm principle' is better characterized as a description of an important state interest rather than a normative 'legal' principle." In my view, the same can be said of transparency, accountability and proper funding. If the harm principle does not qualify as a legal principle, nor can the novel principle proposed in this case.

[77] I turn to the second question, namely whether transparency, accountability and adequate funding are "vital or fundamental to our societal notion of justice." In *Canadian Foundation for Children,* the Supreme Court of Canada held that while "the best interests of the child" is a legal principle that succeeds at the first stage, it fails to meet the second criterion as a principle that is vital to our societal notion of justice. The majority stated, at para. 10, that while the "'best interests of the

child' is widely supported in legislation and social policy and is an important factor for consideration in many contexts", it is not "a foundational requirement for the dispensation of justice" because it is only one factor to be considered and it "may be subordinated to other concerns in appropriate contexts."

[78] In my view, "best interests of the child" is much closer to being "vital or fundamental to our societal notion of justice" than transparency, accountability and proper funding. The latter values are regularly subordinated to other concerns. For example, the right to access information under legislation such as the *Freedom of Information and Protection of Privacy Act* is heavily qualified by exemptions for matters such as Cabinet confidentiality, certain types of advice to government, the interests of law enforcement, and solicitor-client privilege. The open court principle is subject to many exceptions required to protect competing rights and interests. As explained by the British Columbia Supreme Court in *Wakeling*, at para. 49, with respect to transparency and accountability, "[t]here are areas relating to the administration of justice in which the application of these principles is either unworkable or rendered of secondary import because of other, more compelling interests." The adequacy of funding for law enforcement bodies is plainly a matter for political debate and subject to being reconciled with other competing demands on the public purse.

[79] Finally, I do not think that the proposed principle satisfies the third branch of the test that it "be capable of being identified with precision and applied to situations in a manner that yields predictable results."

[80] It is far from clear to me what measures would be required to satisfy this alleged principle of fundamental justice. Achieving transparency, accountability and adequate funding for any public body opens a complex and multifaceted inquiry that could yield a wide range of outcomes. In the words of *Re B.C. Motor Vehicle Act,* at p. 503, transparency, accountability and adequate funding "lie in the realm of general public policy" and they do not fall within the category of "the basic tenets of our legal system". Section 7 creates and protects individual legal rights and should not to be mistaken as a general guarantee of good governance. The design of a proper regime of law enforcement, one that ensures that peace officers are accountable, that their actions are subject to public scrutiny and that the law is enforced with integrity, are questions of public policy, not individual legal rights. The shape and contours of a properly designed system cannot be "identified with some precision" and we have been offered no standards that could be "applied to situations in a manner that yields predictable results."

[81] Again, the observations of the Supreme Court in *Canadian Foundation for Children* are applicable. The majority held, at para. 11, that "best interests of the child" fell short:

> It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

[82] If the "best interests of the child" principle falls short, transparency, accountability and adequate funding must fall well short. There is an extensive body of case law on "best interests of the child". It is applied every day in the courts of this province. Lawyers and judges understand what it means and know how to apply it. Transparency, accountability and adequate funding are, on the other hand, background values that some laws promote with varying degrees of stringency.

[83] As Prof. Stewart explains in *Fundamental Justice,* at p. 124, recognizing a principle of fundamental justice creates a standard against which non-compliant legislation will be struck down. It is therefore "essential that the principle be sufficiently precise" so that "the public, the legislature, and other courts and tribunals understand exactly what is the defect in the legislation that leads to its invalidation and how that defect might be cured." The respondent and the interveners have failed to identify with any degree of precision the content of this alleged principle. There is very little legal guidance on what it means or requires.

[84] I recognize, of course, that to satisfy the third branch of the principles of fundamental justice test, a proposed principle does not have to define a precise, bright-line rule and that the exercise of judgment may be required to determine its meaning in any given case. Obvious examples are the principles that laws must not be arbitrary, overly broad or grossly disproportionate: see *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101. However, a proposed principle does have to set out what the Supreme Court described in a similar context as an intelligible standard, capable of providing "an adequate basis for legal debate ... as to its meaning by reasoned analysis applying legal criteria": *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, at p. 693. This requirement is satisfied in the case of arbitrariness, overbreadth and gross disproportionality. Those principles require the court to "compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness": *Bedford*, at para. 123. The inquiry is disciplined, defined and confined by the right at issue and the contours and effect of the law that is being challenged. It requires the court to apply some general external value of good governance.

[85] To accept transparency, accountability and adequate funding as a principle of fundamental justice would, in my view, create uncertainty and necessarily involve the courts in the "adjudication of policy matters". As the Railway Association of Canada points out, federal and provincial legislation confer law

enforcement powers on a wide array of individuals, including railway constables, who are not members of any formal police force. The *Criminal Code* gives such powers to "every person" in many situations, including: assisting a police officer (s. 25(4)), preventing an offence causing harm to others (s. 27), and preventing a breach of the peace (s. 30). The principle of fundamental justice accepted by the application judge would, in my view, invite more questions than it would answer. It would inevitably involve the courts in complex policy issues regarding law enforcement and institutional design, issues for which legal analysis under the *Charter* is ill-suited.

[86] I think it important to add as a final note that the operation of the Act is not entirely devoid of transparency and accountability. If a prosecution is brought by the OSPCA, any searches or seizures are subject to judicial and *Charter* scrutiny. Orders regarding animals in distress, including removal orders, may be appealed to the Animal Care Review Board. These features do subject the OSPCA to a certain level of accountability. Persons charged with offences are entitled to full disclosure of the fruits of an investigation under the principle established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, thereby ensuring transparency.

[87] The Minister responsible for the administration of the Act has exercised the statutory authority to enact regulations "to oversee the inspectors and agents of the [OSPCA] in the performance of their duties": s. 22(2)(a) of the Act. These regulations require the Chief Inspector to establish standards for inspectors and

agents, to oversee inspectors and agents in the performance of their duties, and where appropriate, to remove them: O Reg 59/09, s. 1.

[88] The OSPCA has developed a detailed Investigations Policy and Procedures Manual. While the Manual is not a public document, it does set out the OSPCA's policies regarding searches, seizures, enforcement and disciplinary procedures applicable to inspectors and agents. The OSPCA's funding agreements with the province require detailed reporting to the Ministries providing the funding.

CONCLUSION

[89] For these reasons, I would allow the appeal and set aside the application judge's declaration of invalidity. I would dismiss the cross-appeal.

COSTS

[90] Both parties filed written costs submissions seeking costs of this appeal. The appellant submits that if successful, it should be awarded costs fixed at $20,000. The respondent submits that as a public interest litigant, he should be awarded $20,000, plus HST, regardless of the outcome of the appeal. None of the interveners asks for costs and no costs are requested against the interveners.

[91] In my view, the circumstances of this appeal do not warrant an order requiring the respondent to pay the appellant's costs. The respondent was successful at first instance and following that decision the OSPCA withdrew from enforcing the Act. The appellant brought the appeal because of concern over the

implications of the application judge's decision and to clarify the law. As is apparent from these reasons, I agree with the appellant's concerns and in my view the appeal was properly brought. That said, as the OSPCA had withdrawn from enforcement duties, the respondent has achieved practical if not legal success. I am not persuaded that the ordinary "loser pays" rule should be applied in these circumstances.

[92] The case law recognizes a discretion to depart from the "loser pays" principle and decline a costs order in favour of a successful government litigant in constitutional litigation: see *Incredible Electronics v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (Sup. Ct.), at para. 74; *Thompson and Empowerment Council v. Ontario,* 2013 ONSC 6357, 118 O.R. (3d) 34. I would apply that discretion in this case and decline to order costs in favour of the appellant.

[93] There is also a discretion to award an unsuccessful public interest litigant costs in *Charter* litigation. However, "highly unusual" circumstances are required to justify such an order which should be made "only in very rare cases": *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315, at p. 390. In my view, this case does not call for an exceptional order. The respondent is not a marginalized, disadvantaged person. There is no evidence that he is a person of limited means. He was given public interest standing and access to justice concerns are adequately met by departing from the "loser pays" principle and declining to order costs against him.

[94] Accordingly, I would make no order as to the costs of this appeal.

Released: RJS NOV 14 2019

Robert J. Sharpe J.A.

I agree.

I agree. J.B. Rakuts J.A.

APPENDIX

Charter of Rights and Freedoms

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.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O., c. O.36

1(1) In this Act,

"distress" means 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 or unnecessary hardship, privation or neglect;

3 The object of the Society is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom.

6.1(1) The Society shall appoint an employee of the Society as the Chief Inspector.

(2) In addition to the powers and duties of an inspector or an agent of the Society, the Chief Inspector shall have the powers and duties that may be prescribed by regulation, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties.

7(3) The Lieutenant Governor in Council may annul any by-law of the Society.

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.

11.2(1) No person shall cause an animal to be in distress.

(2) No owner or custodian of an animal shall permit the animal to be in distress.

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.

(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.

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.

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.

(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.

(8) For the purpose of subsection (6),
"immediate distress" means distress that requires immediate intervention in order to alleviate suffering or to preserve life.

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.

(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.

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,

(a) a veterinarian has examined the animal and has advised the inspector or agent in writing that the health and well-being of the animal necessitates its removal;
(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.

22(2) The Minister responsible for the administration of this Act may make regulations,
(a) prescribing and governing the powers and duties of the Chief Inspector of the Society, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties;