

2013 CarswellOnt 13013
Ontario Animal Care Review Board

Johnson v. Ontario Society for the Prevention of Cruelty to Animals

2013 CarswellOnt 13013

**In the Matter of Jessica Johnson, ("Appellant") and the Ontario
Society for the Prevention of Cruelty to Animals, ("OSPCA")**

Rae Legault Chair, Louise Menard Member

Heard: June 26, 2012; September 11, 2012; September 12, 2012; September 25, 2012; September 26,
2012; September 27, 2012; October 29, 2012; October 30, 2012; October 31, 2012; November 1, 2012

Judgment: January 31, 2013

Docket: 2012-03

Counsel: Kurtis Andrews, for Appellant

Clayton Ruby, Gerald Chan, for Ontario Society For The Prevention Of Cruelty To Animals

Subject: Occupational Health and Safety; Criminal; Constitutional; Property

Decision of the Board:

1 This is the decision of the Board with respect to an appeal by Appellant, pursuant to section 17 of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O.1990, Chapter 0.36, as amended ("OSPCA Act" or "Act") of an order, dated May 18, 2012, made pursuant to subsection 13(1) of the Act issued to Appellant by the OSPCA, and with respect to Appellant's claim that her rights under [section 8 of the Canadian Charter of Rights and Freedoms](#) were infringed by the OSPCA's entry into her residence on May 18, 2012.

Overview

2 On May 11, 2012, an anonymous complaint was received on an answering machine of an affiliate of the OSPCA regarding the housing for Appellant's dogs. On May 14, 15 and 16, 2012, OSPCA Agent Maryanne Hitchen attended at Appellant's property to investigate the complaint but was not successful in making contact with Appellant.

3 On May 18, 2012, Agent Hitchen sought and was granted a warrant from a Justice of the Peace ("JP") to enter Appellant's property to search for animals in distress. The warrant was executed on May 18, 2012, at about 1:00 pm. While in Appellant's residence, Agent Hitchen found Appellant's animals to be in distress, as that term is defined in the Act, and issued an order pursuant to section 13(1) of the Act, dated May 18, 2012 ("Order"). [Exhibit 17].

4 Part of this Order addressed the living conditions in Appellant's home for Appellant's five adult dogs, ten puppies and two cats. This part was revoked by the OSPCA on June 28, 2012, and is not at issue in this appeal.

5 The other part of the Order required Appellant to have her five adult dogs examined by a veterinarian with special attention to dental issues and to follow the recommendations of the veterinarian. Appellant is appealing this part of the Order.

6 On June 28, 2012, the Order was modified to apply to only four of Appellant's dogs. [See Notice of Modification, Exhibit 18] This modification reflected the fact that one of the dogs, "Logan", had been removed for non-compliance with the Order [Exhibit 10], and taken to a veterinarian to be examined and treated and then returned to Appellant, at no cost to Appellant.

7 Appellant complied with the modified Order by having her four other dogs, Vicki, Tammy, Crystal and Laya, examined by a veterinarian on July 30, 2012. The veterinarian found Vicki to have a severe build-up of tartar on her teeth and severe gum disease, and recommended follow-up treatments to address these problems.

8 On August 16, 2012, the OSPCA revoked the part of the Order pertaining to Tammy, Crystal and Laya. [Exhibit 24] In furtherance of the examining veterinarian's recommendations with respect to Vicki, the Order was modified, as it pertained to Vicki, to require Appellant to consult with the examining veterinarian to develop a treatment plan for Vicki and to follow the treatment plan. Appellant is appealing this modified Order ("Notice of Modification") [Exhibit 19].

9 Appellant is also claiming that her rights under [section 8 of the Canadian Charter of Rights and Freedoms](#) were infringed by the OSPCA's entry into her residence on May 18, 2012.

10 Appellant is seeking the following remedies:

1) In the event the Board finds that her rights under [s. 8 of the Charter](#) were infringed, an exclusion of the evidence obtained as a result of OSPCA investigators entrance into her residence on May 18, 2012, pursuant to [s. 24\(2\) of the Charter](#)

2) An award of the veterinary costs she incurred in complying with the Order as modified on June 28, 2012, pursuant to section 17(6)(c) of the Act

3) A revocation of the Notice of Modification, dated August 16, 2012, of the Order, pursuant to section 17(6)(a) of the Act

4) An award of her legal costs, pursuant to [s. 24\(1\) of the Charter](#)

11 The issues in this decision are as follows:

PART I CHARTER JURISDICTION

1) Whether the Board has general [Charter](#) jurisdiction and,

2) if so, whether the Board has the jurisdiction to provide [the Charter](#) remedies sought by Appellant

PART II THE CHARTER ISSUE

1) Whether Appellant's [s. 8 Charter](#) rights were infringed by the OSPCA investigators' entry into her residence on May 18, 2012 and,

2) if so, whether the evidence obtained in Appellant's residence on May 18, 2012 is admissible under [s. 24\(2\) of the Charter](#).

PART III THE MERITS

1) Whether the Order, as modified on June 28, 2012, was made in accordance with section 13(1) of the Act for the purpose of deciding whether, pursuant to section 17(6) (c), Appellant is entitled to an award of the veterinary costs she incurred in complying with the modified Order, and

2) whether, pursuant to section 17(6)(a) of the Act, the Notice of Modification in respect of Vicki, dated August 16, 2012, is confirmed, modified or revoked by the Board.

Exhibits

12 The exhibits submitted at the hearing are listed in Appendix A.

Testimony

13 The witnesses testified under oath or affirmation and their testimony was subject to cross-examination. The testimony was recorded by Gillespie Reporting Services, Ottawa, Canada

Part I Charter Jurisdiction

Whether the Board Has the Jurisdiction to Consider Charter Issues and the Jurisdiction to Provide the Charter Remedies Sought by Appellant

Introduction

14 In the past, the Board has declined to consider claims of *Charter* violations related to the matters before it on the grounds that it did not have *Charter* jurisdiction. This position left the appellant with two alternatives: either to take their *Charter* claims to a court or to forgo having them litigated.

15 Although the Board is generally committed to maintaining predictable positions on issues, given the evolving position of the Supreme Court with respect to expanding the *Charter* jurisdiction of administrative tribunals, culminating in the "new approach" in *R. v. Conway*, [2010] 1 S.C.R. 765 (S.C.C.), it became apparent to the Board that it should revisit its position as to whether it has *Charter* jurisdiction.

16 As a result of Appellant's claim of infringements of her *Charter* rights and her request for *Charter* remedies under s. 24 of the *Charter*, the Board agreed with the parties that it is incumbent upon it to issue a preliminary ruling with its reasons as to whether it has *Charter* jurisdiction. Consequently, the Board has considered the oral and written submissions of the parties as to their position regarding whether the Board has *Charter* jurisdiction.

17 Appellant's position is that the Board has both the jurisdiction to consider *Charter* issues and to provide the *Charter* remedies sought. The OSPCA's position is that the Board does not have the jurisdiction to decide *Charter* issues or, in the alternative, that it does not have the jurisdiction to grant the particular *Charter* remedies sought by Appellant.

18 The "new approach" in respect of the relationship of administrative tribunals with the *Charter*, developed in *Conway*, is a consolidation of the results from the Supreme Court's gradual expansion of the role of administrative tribunals with respect to the *Charter*, which evolved in the form of three distinct constitutional streams. The first stream of cases started with *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), which provided a test for determining whether an administrative tribunal was a court of competent jurisdiction under s. 24(1) of the *Charter*. The *Mills* test consisted of a three-part inquiry as to whether the tribunal had jurisdiction over the person, the subject matter and the remedy sought. (The third part of this inquiry is still used today.) The second stream started with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), which established that any exercise of statutory discretion is subject to the *Charter* and its values. The third stream started with the "Cuddy Chicks trilogy", consisting of *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.) followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.) and *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 (S.C.C.). The *Cuddy Chicks* trilogy left a legacy with their conclusions that specialized tribunals with the expertise and authority to decide questions of law were in the best position to hear and decide constitutional questions related to their statutory mandates, a legacy that was followed in *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504 (S.C.C.). [*Conway*, paras 3-7]

19 Abella, J. in *Conway* noted that the two main observations flowing from *Mills*, *Slaight* and the *Cuddy Chicks* trilogy jurisprudential evolution are:

first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, that administrative tribunals must act consistently with the *Charter* and its values when exercising their statutory functions. [*Conway*, para. 78]

20 Building on this jurisprudential evolution, Abella, J. explains in *Conway* that when a *Charter* remedy is first sought from an administrative tribunal, there is a two-stage inquiry to be applied. The proper initial inquiry is:

whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* - and the *Charter* remedies - when resolving the matters properly before it. [*Conway*, para.81]

21 If this threshold question is resolved in favour of *Charter* jurisdiction, the second branch of the inquiry is whether the tribunal can grant the particular remedy sought given the relevant statutory scheme. [*Conway*, para. 82]

A: Whether the Board Has the Jurisdiction to Consider Charter Issues

22 As noted above, the first question to ask in resolving the issue of whether the Board has *Charter* jurisdiction in general, is whether the Act provides the Board with the authority to decide questions of law.

23 The OSPCA points out that the Act does not contain an explicit grant of authority to the Board to decide questions of law which distinguishes the Board from tribunals such as the Nova Scotia Workers' Compensation Appeals Tribunal, which is expressly authorized by the *Nova Scotia Workers' Compensation Act* to "determine all questions of fact and law". However, in *Martin*, Gonthier, J. states, "[A]bsent an explicit grant, it becomes necessary to consider whether the legislation intended to confer upon the tribunal implied jurisdiction to decide questions of law." Gonthier, J. goes on to explain that in discerning whether a tribunal has implied power to decide questions of law, relevant factors include 1) the statutory mandate of the tribunal and whether deciding questions of law is necessary to fulfilling this mandate effectively; 2) whether the tribunal is adjudicative in nature; and 3) practical considerations such as the Board's capacity to consider questions of law. He further states, however, that practical considerations "cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate." [*Martin*, para. 41]

24 The OSPCA further maintains that by explicitly setting down the Board's mandate in section 17(6) of the Act, which authorizes the Board to decide whether to confirm, modify or revoke an OSPCA compliance order, whether a removed animal should be returned, and whether certain costs should be paid by the animal owner or the OSPCA, all of which do not engage questions of law, the legislature indicates that it did not intend to provide the Board with the power to decide questions of law. It is the Board's view, however, that these express powers are only a means of implementing the Board's broader dual statutory mandate, which is to facilitate relieving an animal of its distress, as that term is defined in the Act, and to protect the animal owner from arbitrary actions on the part of the OSPCA's investigators. In order to effectively fulfill this mandate, the Board is required to decide the questions of law that regularly arise in the litigation of the merits of an appeal.

25 In *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.), Chief Justice McLachlin, referring to Halsbury's Laws of England (4th ed. 1995), stated that "[I]t is well established that a statutory body enjoys not only the powers expressly conferred upon it but also by implication all powers that are reasonably necessary to accomplish its mandate" and added, citing *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), "[I]n other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions. (*Dunedin*, para. 70]

26 Examples of questions of law that the Board has had to decide in past appeals in order to effectively fulfill its mandate are as follows:

- Whether the Board has continued jurisdiction under the Act to determine the validity of an OSPCA compliance order when that order has been revoked by the OSPCA but there are outstanding issues for which the Board can grant a remedy, depending on the outcome of the determination.

- Whether, for purposes of deciding if an OSPCA order has been issued in accordance with subsection 13(1) of the Act, the definition of "distress" in the Act may be interpreted to mean that an animal that is sick and in pain and suffering, which are elements of the definition, is not in distress when the animal is housed in a facility that has a resident veterinarian.
- Whether, in the case of filing an appeal by mail, for purposes of ascertaining whether the appeal was filed within the statutory time limit, the legislators intended the common law "mailbox rule" (the rule that the proper and timely mailing of a document raises a rebuttable presumption that the document was received on time) or the common law "physical delivery rule" (the date the appeal is delivered to the Board) to apply, and the related question of whether extrinsic evidence is admissible to establish the date the notice of appeal was mailed when there is no legible postmark on the envelope.
- Whether, in the case where an "original complaint" was transcribed into a "derived complaint" which resulted in a visit to the animal owner's property by an OSPCA investigator, the Board could order that the original complaint be provided to the appellant under the "open court principle" and if so, the extent of the safeguards required to protect the common law "informant's privilege".
- The determination of the meaning of the term, "promptly" in paragraph 14(1)(b) of the Act in reference to finding an absentee animal owner, depending on the totality of the circumstances.

27 Other questions of law, such as those relating to interpretation of provisions in the Act, also routinely arise in the exercise of the Board's statutory mandate.

28 The Board considers these questions of law in the same proceedings as it considers the merits, usually issuing its conclusions in interlocutory rulings with the reasons incorporated into the final decision on the merits.

29 Instead of deciding the above noted questions of law, the Board could have directed the appellant to take them to a court for resolution. This is not feasible, however, since appeals before the Board deal with animals that are alleged to be in distress or that are in the custody of the OSPCA thereby incurring on-going boarding costs, to say nothing of the trauma of the separation to both the animal owner and the animal. Also, since these questions of law were closely related to the factual issues before the Board, it is doubtful that the legislature intended a bifurcation of proceedings with the consequential delays inherent in court proceedings and additional financial and procedural burdens on the appellant. Referring to McLachlin, J.'s enunciation in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) of the "exclusive jurisdiction model", Abella, J. points out that it is now a fairly well established principle of law that an administrative tribunal should decide all matters whose essential character falls within the tribunal's statutory jurisdiction. [*Conway*, para. 30]

30 The OSPCA refers to *R. v. Hynes*, [2001] 3 S.C.R. 623 (S.C.C.) in which it was held that a preliminary inquiry court does not have the jurisdiction to decide *Charter* issues as this would undermine its expeditious nature, maintaining that the same consideration applies to the Board. The function of preliminary inquiry court, however, is limited to determining whether there is sufficient evidence to go to trial. As observed by McLachlin, J. in *Hynes*, granting *Charter* jurisdiction to a preliminary inquiry court would probably have the effect of changing the nature of its proceedings such that it would become "less preliminary and more like a trial". [*Hynes*, para 39] In contrast, the Board's proceedings are, by nature, similar to a trial. The Board is a quasi-judicial body that hears evidence under oath, follows court-like proceedings and issues decisions. Since the Board's proceedings are adjudicative in nature, unlike the "limited screening function of the preliminary inquiry" [*Dunedin*, para. 58], it possesses the appropriate structure for handling questions of law.

31 As a practical consideration, the OSPCA points out that the Act does not require Board members to be legally trained or to have received any legal education. Although the Act is silent with respect to the composition of the Board, the fact that for the past two decades, at least two members of the Board have been lawyers and currently five of the eight members are lawyers demonstrates that the Board has ensured that it is well represented by legally trained members.

32 As shown above, the effective fulfillment of the Board's mandate requires the resolution of questions of law that arise during the exercise of that mandate. It is also apparent that it would be inexpedient to bifurcate claims between the Board and

the superior courts during the litigation, since the appeals before the Board involve the relatively urgent situation of an animal alleged to be in distress. Finally, the Board has the appropriate structure for deciding questions of law. From these premises, it is the Board's opinion that it can be concluded that the legislature intended the Board to have the authority to decide questions of law. Further, this scheme is compatible with the well-established principle that "an administrative tribunal should decide all matters, including constitutional questions whose essential factual character falls within the tribunal's specialized statutory jurisdiction". [Conway, para 30] The Board therefore concludes that it has implied authority under the Act to decide questions of law. Further, the Act does not contain any explicit withdrawal of authority of the Board to decide *Charter* issues.

33 The OSPCA argues that the strict time constraints in the Act indicate that Board hearings are to be dealt with swiftly and therefore it is not expedient for the Board to take the time to consider *Charter* issues, which implies that the legislature intended to exclude *Charter* jurisdiction from the Board. This argument may have merit with respect to the initial appeals before the Board with *Charter* issues. But as the Board becomes familiar with the proceedings and builds up a system of precedents, the time it would take the Board to resolve a *Charter* issue would probably be a fraction of the time it would take to go through a court proceeding with the inherent delays and adjournments due to a back log of cases.

34 Further, the argument that the Board should not combine *Charter* issues with the issues on the merits of the appeals is inconsistent with the principle of constitutional supremacy. Justice Abella stated in *Conway* that, as a result of the jurisprudential evolution, the Court not only accepts the proposition that expert tribunals should play a primary role in the determination of *Charter* issues but also, "in exercising their statutory discretion, they must comply with the *Charter*". [Conway, para.21] Abella, J. further asserted in *Conway*, that a corollary to the supremacy clause are the views expressed over the years by McLachlin J., Major J., La Forest J., McIntyre, J. and echoed by Gonthier J. in *Martin* that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available without the need for parallel proceedings before the courts." [Conway, para. 66]

35 The OSPCA points out that an appeal of the Board's decision to the Superior Court, is a "trial de novo" under subsection 18(4) of the Act and concludes that an appeal of the Board's decision would result in time consuming duplicate litigation on the *Charter* issues of the appeal. The Board is not persuaded by this argument since it rests on the premise that the appellant should purposely refrain from presenting a vigorous *Charter* argument before the Board, saving it for the second time around. Moreover, many appellants do not have the financial means or the legal sophistication to seek an appeal of the Board's decision, making this option for those appellants illusory in practice. [Dunedin, para 82]

36 The OSPCA contends that the complexity and breadth of *Charter* litigation and the possible long term ramifications of a *Charter* remedy would require sacrificing either the efficiency intended by the legislature for appeals to the Board or the thoroughness demanded by the Constitution for *Charter* jurisdiction. The issue of an administrative tribunal's competency to effectively resolve *Charter* issues has been considered in the Supreme Court's jurisprudence. In *Martin*, Gonthier, J. in affirming and synthesizing the principles emerging from the *Cuddy Chicks* trilogy, explains that *Charter* disputes do not take place in a vacuum. Since an administrative tribunal has the fullest account of the facts and thorough understanding of the objectives of the legislative scheme under which it is operating, it is in an advantageous position to provide appropriate and just resolutions to *Charter* disputes. [Martin, para. 30] He quotes from La Forest, J.'s observation in *Cuddy Chicks* with respect to *Charter* issues arising in the context of a particular tribunal:

It must be emphasized that the process of *Charter* decision-making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record is also of invaluable assistance. [Martin, para. 30]

37 The OSPCA cautions that, should the Board have the jurisdiction to decide questions of law and therefore hear *Charter* issues then from time to time the Board may be required to hear challenges to the constitutionality of statutory provisions. The OSPCA maintains such challenges would not fit in with the Board's informal and speedy procedures. It is not likely, however that the Board would be challenged beyond its competence, in light of Gonthier, J.'s, explanation in *Martin* that

constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid, pursuant to *the Charter*, is not binding on future decision makers, within or outside the tribunal's administrative scheme. [*Martin*, paragraph 31]

38 It is only by obtaining a formal declaration of invalidity by a court, involving the intervention of the Solicitor General of Canada and of Ontario in the litigation procedure, can the invalidity of a legislative provision be established for all future cases.

39 While the above challenges by the OSPCA's with respect to the Board's practical capacity to decide *Charter* issues may contain relevant considerations in determining the scope of the Board's jurisdiction to grant particular *Charter* remedies, in the Board's opinion, they are not sufficient either singly or collectively to establish a clear implicit withdrawal of *Charter* jurisdiction from the Board.

40 Since the Board has found that it has implied authority to decide questions of law and there is no explicit or implied withdrawal of *Charter* jurisdiction under the Act, the Board concludes that it has the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. Thus, the Board is a court of competent jurisdiction for purposes of s. 24 of the *Charter*. With this finding of general *Charter* jurisdiction, the first branch of the Conway test has been met.

B: Whether the Board Has the Authority to Grant the Remedies Sought by Appellant

41 The second branch of the *Conway* test is whether the Board can grant *the Charter* remedies sought by Appellant. This question turns on "whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal." According to Abella, J., the proper approach in determining this issue is to focus on the tribunal's function and structure, as elaborated in *Dunedin*. [*Conway*, para. 82] The function of a tribunal is an expression of its purpose or mandate and it is of principle importance in assessing whether it is vested with an implied power to grant the remedies sought. [*Dunedin*, paras. 44 and 71]

42 The structure of a tribunal relates to the compatibility of the tribunal and its processes with the remedy sought under s. 24 of the *Charter*. According to McLachlin, C.J., depending on the particular remedy at issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial, the role of counsel, the applicability of traditional rules of proof and evidence; whether the court or tribunal can issue a summons, whether evidence is offered under oath; the expertise and training of the decision maker, the workload of the court or tribunal, the time constraints it operates under; and its ability to compile an adequate record for a reviewing court. [*Dunedin*, para. 45]

43 The Board has a dual function: (1) that of facilitating relief for an animal in distress as that term is defined in the Act and (2) protecting the animal owner from arbitrary orders and actions on the part of the OSPCA investigators. The provisions of the Act balance these two interests of the public by requiring the Board to assess whether the investigator's belief that an animal is in distress is based on reasonable grounds. The Board implements its mandate by confirming, modifying or revoking the OSPCA order issued to an animal owner and, in the case of the removal of an animal, by ordering its immediate return if it has been found to have been arbitrarily removed, at no expense to the owner or, if the animal has been removed in accordance with the Act, by setting out the conditions under which it may be returned to its owner.

44 The Board has the power to exclude evidence for a variety of reasons such as irrelevance, non-disclosure, and in situations where the prejudicial effect of the evidence outweighs its probative value. The Board's decisions are based on a wide scope of factual evidence as well as interlocutory rulings on questions of law that arise in connection with the proceedings, and are also a result of considering all of the circumstances and balancing factors associated with the Board's dual function noted above.

45 With respect to the Board's structure, the Act expressly sets out guidelines for the Board's proceedings, which are adjudicative in nature. Subsection 17(5) of the Act provides as follows:

At a hearing, the Society and the owner or custodian are entitled to hear the evidence, cross examine, call witnesses, present arguments and be represented by persons authorized under the *Law Society Act* to represent them.

46 All evidence at Board hearings is given under oath. The Board may issue summons.

47 There is a right of appeal of the Board's decisions to the Superior Court and its legal rulings are subject to judicial review. There is no backlog of cases to delay the commencement of the drafting of the decision. All decisions are in writing and include the relevant facts and the reasons for the Board's conclusions.

48 The quasi-judicial structure of the Board guarantees the independence of the Board; it provides an effective mechanism for hearing evidence from both parties, and furnishes it with the procedures and processes capable of fairly and justly considering the *Charter* issues before it.

49 With this background analysis of the Board's function and structure in accordance with the *Dunedin* approach, the Board turns to the specific remedies sought.

50 The *Charter* remedies sought by Appellant are:

1) That the search warrant obtained by the OSPCA to search her property on May 18, 2012, be treated as null and void for the purposes of the ACRB hearing.

2) That all evidence gathered during the May 18, 2012, search of her property and any subsequent searches be excluded pursuant to s. 24(2) of the *Charter*.

3) That all orders of the OSPCA made as a result of the May 18, 2012, search of her property and any subsequent searches be declared null and void pursuant to section 24(1) of the *Charter*, or otherwise revoked by the Board.

4) That she be granted her costs in this matter pursuant to s, 24(1) of the *Charter*.

51 The relevant *Charter* provisions are as follows:

8. Everyone has the right to be secure against unreasonable search or seizure.

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Charter remedies sought by Appellant

1) *That the search warrant obtained by the OSPCA to search her property on May 18, 2012, be treated as null and void for the purposes of any ACRB hearing.*

52 The OSPCA maintains that there is no such thing in law as a search warrant being "treated as null and void" and therefore what Appellant is really seeking is a declaratory judgment to this effect, but declaratory relief falls exclusively within the inherent jurisdiction of the Superior Court. The OSPCA further maintains that although a warrant can be quashed in an application for *certiorari*, such application may only be made to the Superior Court.

53 In addition to the specifics of this argument, the Board agrees with the general assertion that it does not have the power to set aside a warrant, based on the common law "rule against collateral attack". [*R. v. Garofoli*, [1990] 2 S.C.R. 1421 (S.C.C.)]

paras. 13 and 116] However, the court in *Garofoli* provided an alternative basis for questioning the validity of a warrant. As Charron, J. explained in *R. v. Lising*, [2005] 3 S.C.R. 343 (S.C.C.):

[T]his Court in *Garofoli* consolidated these hearings, wiping away much of the complexity created by the earlier litigation by using the overriding constitutional nature of the challenge to the admissibility of the evidence as the relevant framework of analysis. In adopting this approach, jurisdictional issues were resolved and any court authorized to entertain a Charter challenge has jurisdiction to conduct a full substantive review of the authorization. [*Pires*, para.7]

54 If it is found by the Board that the evidence obtained under a search warrant is the result of an unreasonable search that violates an animal owner's s. 8 rights under the *Charter*, the Board would have the discretion to exclude the evidence, if its reception would tend to bring the administration of justice into disrepute under s. 24(2) of the *Charter*. [*Garofoli* paras. 15 and 118]

55 The legislators have codified the pre-conditions for a reasonable search, that is, the "minimum constitutional requirements demanded by s.8 of the *Charter*, set out in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.)", [*Garofoli*, para 33] in section 12(1) of the Act. If the statutory pre-conditions of subsection 12(1) of the Act have not been complied with, the search will have infringed Appellant's rights under s.8 of the *Charter* and the *Charter* remedy is the exclusion of evidence under s. 24(2).

56 In *R. v. Morelli*, [2010] 1 S.C.R. 253 (S.C.C.), Fish, J. explained that the admissibility of evidence depends on two constitutional considerations:

In reviewing the sufficiency of a warrant, whereas the first constitutional consideration is whether the search and seizure was unreasonable under s.8 of the *Charter*, the second is whether the admission of the evidence thereby obtained would bring the administration of justice into disrepute and should therefore be excluded under s. 24(2). [*Morelli*, para 61]

2) That all evidence gathered during the May 18, 2012 search of her property and any subsequent searches be excluded pursuant to s. 24(2) of the *Charter*.

57 If the search is found to be unreasonable under s.8 of the *Charter*, the remedy is a determination under s. 24(2). [*Garofoli*, para.15]

58 In questioning the Board's competency to perform a comprehensive s. 24(2) analysis, the OSPCA first points out that there is a fundamental difference between the Board's practice of excluding evidence for irrelevancy and unreliability and excluding evidence pursuant to an analysis under s. 24(2). The OSPCA maintains that the Board in this case is similar to the preliminary enquiry court in *Hynes*, and the National Parole Board in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 (S.C.C.), in which it was held that the legislation did not intend for these bodies to have such jurisdiction. However, there is a major difference between the quasi-judicial structure of the Board, which assesses evidence and draws conclusions, and the screening procedure of the preliminary inquiry court and the non-adjudicative nature of the National Parole Board.

59 In its submission, the OSPCA outlines the three-factor test set out in [*R. v. Grant*, [2009] 2 S.C.R. 353 (S.C.C.)] The purpose of the s. 24(2) analysis is to determine from the evidence before it and all relevant circumstances, whether the overall repute of the justice system, viewed objectively, and in the long term will be adversely affected by the admission of the evidence. [*Grant*, para. 68]

60 The three avenues of inquiry in the *Grant* test are: 1) the seriousness of the *Charter* infringing state conduct; 2) the impact of the breach on the *Charter* protected interest, and 3) society's interest in the adjudication of the case on the merits. The Board acknowledges that a s. 24(2) analysis can require a comprehensive and complex assessment in light of all relevant circumstances.

61 Due to its involvement with the relevant facts and surrounding circumstances, the Board is in an advantageous position to apply the factors in the *Grant* test in the context of the Board's function. In addition, since, in exercising its dual-mandate of facilitating relief for an animal in distress and protecting the animal owner from arbitrary OSPCA orders and actions, both

aspects of which are rooted in the public interest, the Board has gained expertise in the type of balancing of factors required by a s. 24(2) analysis, and therefore the remedy of the exclusion of evidence fits in with the Board's statutory framework.

3) *That all orders of the OSPCA made as a result of the May 18, 2012, search of her property and any subsequent searches be declared null and void pursuant to section 24(1) of the Charter, or otherwise revoked by the Board.*

62 McLachlin, C.J. explains that the jurisprudence dealing with Charter issues indicates that s. 24(1) commands a broad and purposive interpretation and appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights. [*Dunedin*, para. 18] However, should the Board find an infringement of Appellant's Charter rights but finds the evidence to be admissible under a s.24 (2) analysis, the Board's opinion is that the issue of whether the OSPCA order is valid should be determined by the truth-seeking process of the adjudication of the matter on its merits in accordance with the Board's statutory mandate. Resort to a direct remedy under s. 24(1) in this stage will not add to the Board's capacity to properly address the Charter complaint. [*Conway*, para 103]

4) *That Appellant be granted her costs in this matter pursuant to section 24(1) of the Charter.*

63 Appellant has asked for legal costs in the event that the Board concludes that her Charter rights have been breached. As a court of competent jurisdiction within the meaning of s.24(1), the Board generally has the discretion to make such an award. Whether the Board would consider that an award of legal costs is compatible with the intention of the legislation is an issue to be considered on a case by case basis. The Act already provides that the Board may make orders for costs incurred in complying with an order, or associated with the removal of an animal to either party, depending on the outcome of the hearing. As McLachlin, J. cautioned in *Dunedin*, the framers of the Charter did not intend "to intrude on legislative powers more than necessary to achieve the aims of the Charter". [*Dunedin*, para 23]

Conclusion — Part I

64 The Board concludes that it has the jurisdiction to consider Charter issues and the jurisdiction to provide the Charter remedies sought by Appellant.

65 Appeals made to the Board in which a Charter issue is raised will almost always involve an alleged infringement of s. 8 Charter rights. Therefore, to use the words of Fish, J., writing for the majority in *Morelli*, the issue will almost always concern "the right of everyone in Canada ... to be secure against unreasonable search and seizure." [*Morelli*, para.1]. Accordingly, the following oft-quoted statement by McLachlin, J. (as she was then) in her dissent in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.) in paragraph 70, endorsed in *Martin* is apt:

[T]he Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and lawmakers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [*Conway*, para 77]

Part II — The Charter Issue

Whether Appellant's Charter Rights Were Infringed by a Search of Her Residence with a Warrant on May 18, 2012, and If So, Whether the Evidence Obtained in As a Result of the Search is Admissible

66 Agent Hitchen was granted a warrant from a JP on May 18, 2012. [Exhibit 12], which was executed on the same day at approximately 1:00 pm.

67 Appellant is claiming that her right to be secure against unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms* was infringed when the OSPCA entered her home with this search warrant on May 18, 2012.

68 The purpose of [section 8](#) is to protect individuals from unjustified state intrusion upon their privacy. As stated in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), a valid warrant justifies the superiority of state interests in certain case to that of the individual.

69 The issue of whether Appellant's rights under [s.8 of the Charter](#) were infringed by the OSPCA's execution of this warrant can be divided into three sub-issues:

- 1) Whether the search warrant was facially valid
- 2) Whether the search warrant was supported by reasonable and probable grounds
- 3) Whether the OSPCA investigators executed the search warrant in a reasonable manner.

Sub-Issue 1): Whether the Search Warrant Was Facially Valid

70 The search warrant issued by a JP to OSPCA Agent Hitchen does not specify the time during which the warrant may be carried out nor does it specify the type of "building or place" located at the address on the warrant that is the subject of the search.

Failure to specify a time restriction

71 Appellant points out that section 12(3) of the Act provides that "Every warrant ... shall specify the time, which may be at any time during the day or night, during which the warrant may be carried out ...", and takes the position that the lack of a specified time on the warrant violates the Act and renders the warrant invalid.

72 The OSPCA, on the other hand, cites several cases that stand for the principle that form does not necessarily trump substance when assessing the validity of a warrant: In *R. v. Arsenault*, [2008] N.B.J. No. 177 (N.B. Q.B.), at paragraphs 42 - 46, the court states that a failure to "fill in all the blanks on the warrant" does not constitute a fatal defect, to render a warrant invalid. In *Canada (Attorney General) v. Guay*, [1997] N.B.J. No. 73 (N.B. C.A.), at paragraph 12, the court held that the erroneous time period of 21:00 hours to 20:00 hours on the face of the warrant, which should have specified 12:00 hours to 20:00 hours, amounted to a trivial error that would not affect the validity of the warrant, and especially in this case, where the warrant was in fact carried out during the intended time period of between noon and 4:00 pm. The court in *R. v. Stacey*, [2011] N.J. No. 313 (N.L. Prov. Ct.) at paragraph 84 also stated that the failure to fill in the blanks for the time of the search was not a fatal omission.

73 Citing *R. v. Genest*, [1989] 1 S.C.R. 59 (S.C.C.), Appellant concedes that facial defects on a warrant are not, in all cases fatal to a warrant independent of other factors, but maintains that such defects demonstrate carelessness in how the search was carried out.

74 In *Genest*, the grounds for seeking the search warrant was an informer's tip that the accused was using his house as a base for supplying drugs. The court's concern was that the absence of times of execution of the warrant coupled with the absence of a list of the objects to be searched was tantamount to a fishing license and indicated the worthlessness of the warrant. In the case at hand, however, there is no evidence that Agent Hitchen demonstrated bad faith with respect to the freedom from express restrictions as to time on the warrant. For instance, she did not arrive at the house after dark or stay in the house for an excessively long time.

75 In cross-examination, Agent Hitchen said she noticed that the time was not on the warrant after she got into the truck. When asked if she took any steps to correct this, she responded, "I didn't because the time is written in my ITO [Information to Obtain the warrant], for the time I wanted the warrant ..." and added that she didn't think it mattered that the time was missing because "the JP read my ITO". [Transcript p. 926]

76 The Board agrees with the OSPCA's position that it is not irrational to infer that the Justice of the Peace intended the warrant to be executed between the hours of 9 am and 7 pm, as requested in Agent Hitchen's Information to Obtain the warrant

("ITO") and, therefore, when Agent Hitchen entered Appellant's residence at 1:00 pm and left at 2:16 pm, she was under the impression that she was in compliance with the time authorized by the warrant.

77 Although the Board does not condone the fact that section 12(3) of the Act was not complied with, the Board is persuaded in this situation by the case law that establishes that that form does not necessarily win over substance in assessing the facial validity of a search warrant. Moreover, Appellant was not prejudiced by the lack of a specified time on the warrant since Agent Hitchen did not take advantage of her technical freedom from time restrictions.

Failure to identify the "building or place" subject to the warrant

78 The warrant contained Appellant's address, without specifying whether it applied to the house and/or the garage. Appellant maintains that the words on the warrant, "to enter a building or place" implies that the particular building or place must be identified in addition to providing the address. Appellant further maintains that, given the high expectation of privacy accorded to a residence, it should be clearly articulated on the face of the warrant that it is authorizing a search of a residence. Appellant cites *R. v. Barrick*, [2008] O.J. No. 2964 (Ont. C.J.) in which the JP authorized a search of the barn but not the house on the property. However, *Barrick* is not on point here. In *Barrick* two successive warrants were issued for a search of the same place and it was agreed that the first warrant would govern the issuance of the second warrant. The first warrant only authorized a search of the barn. When the police officer applied for the second warrant, he sought a warrant to search the barn and the house without providing additional support for the search of the house. The JP only authorized a search of the barn as had been agreed. The accused submitted that the justice's refusal to authorize a search of the accused's home demonstrated overreaching by the police in their application for the second warrant. [*Barrick*, para. 8] Thus, *Barrick* does not support Appellant's argument that it must be expressly stated on the warrant that it authorizes a search of a residence, over and above setting out the address. Furthermore, if the JP was of the opinion that the ITO only supported a search of the garage, it is reasonable to infer that this would have been indicated on the warrant.

79 Appellant also cites *Royal American Shows Inc. v. R.*, [1975] A.J. No. 409 (Alta. T.D.) in which the warrant only contained an address and was therefore held invalid for lack of specificity. But, as the OSPCA argues, *Royal American Shows Inc.* is not directly applicable here considering the number of buildings at an exhibition including, tents and trailers, as compared to a house and garage.

Conclusion — Sub-Issue 1 Whether the Warrant is Facially Valid

80 In conclusion, the Board finds that Appellant's arguments that the failure to specify on the warrant the time allotted for the search and that the residence on the property was subject to the search are fatal defects, are not sufficiently persuasive to establish that the warrant is facially invalid.

Sub-Issue 2): Whether the Search Warrant Was Supported by Reasonable Grounds

81 As McLachlin, J. expressed in *Garofoli* (dissenting but not on this point):

[T]he Judgment of Parliament is ... clear. Privacy is to be protected but must yield to the higher interests of the administration of justice where the criteria for obtaining an authorization are established. The fairness of the trial process is maintained in that unlawfully obtained evidence is not admitted.

82 In the OSPCA Act, in order to facilitate the relief of an animal's distress while minimizing incursions on the animal owner's privacy rights, the Act provides for a search under the pre-conditions set out in subsection 12(1) of the Act as follows:

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 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.

83 As noted previously in this decision, section 12(1) of the Act is a codification of the pre-conditions for a search that satisfies the minimum constitutional requirements under s.8 of the *Charter*. [*Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.) as set out in *Garofoli*, para. 33]

84 On the morning of May 18, 2012, Agent Hitchen presented her sworn ITO to a JP in application for a warrant to search the property at [Appellant's address] on May 18, 2012, between the hours of 9:00 am and 7:00 pm. [Exhibit 13] She stated in her ITO that she had reasonable and probable grounds for believing that there were animals in distress at that location. The JP granted the search warrant and it was executed at 1:00 pm the same day.

85 Appellant is challenging the warrant on the grounds that it was not issued in accordance with section 12(1) of the Act because it was not supported by reasonable grounds and, therefore, the execution of the warrant was an unreasonable search under s. 8 of the *Charter*.

86 The test for the constitutionality of a warrant is whether there was reliable evidence contained in the ITO that might reasonably be believed on the basis of whether the warrant could have issued. [*R. v. Araujo*, [2000] 2 S.C.R. 992 (S.C.C.), para. 54] The issue is whether there is any basis upon which the JP could be satisfied that the preconditions for a reasonable search in section 12(1) of the OSPCA Act existed.

87 In accordance with *Garofoli*, the Board does not substitute its view for that of the JP. [*Garofoli*, para. 56] Based on the ITO before the JP, edited, if necessary, to protect the identification of the informant, amplified to correct any minor errors, and severed of any misleading or erroneous information, or evidence obtained in breach of the *Charter*, the Board assesses whether sufficient reliable information remains in the ITO to support the warrant. The content of the ITO is as follows:

The ITO

88 The content of the ITO is as follows:

Paragraphs 9 - 11:

On May 11, 2012, the Ontario SPCA received a telephone call from an anonymous informant regarding a concern they had for small dogs being housed in feces and urine at [the address provided in the complaint]. In response to this complaint, Agent Hitchen made three investigative visits to the property, on May 14, 15, and 16, 2012. When she arrived at the residence on May 14, 2012, she recognized Appellant's red station wagon in the driveway. She went to the door of the house and knocked but there was no response. She could hear several dogs barking and saw about four dogs running loose in the house through a window in the middle of the door. She posted a "While your were out" notice on the door and left the property. She attended at the property on the following day, May 15, 2012, at 2:45 pm. There was no response to her knock on the door. She observed that the "While you were out" notice she had posted on the door the previous day was gone. The red station wagon was in the driveway. She heard several dogs barking but did not see any dogs as the blind on the window in the door had been pulled down. She posted another notice on the door before leaving the property. On May 16, 2012, Agent Hitchen returned to the property at 10:30 am. Her notice from the previous day was gone. The red station wagon was in driveway. The blind on window in door was pulled down. She could hear several dogs barking. She posted another notice and left the property.

Agent Hitchen also stated in the ITO that there were ads on kijiji.ca regarding puppies for sale owned by Appellant

Paragraph 12

At 11:46 am on May 16, 2012, Agent Hitchen received an email from the manager at the Brockville branch of the OSPCA saying that Appellant had called about the notices left on her door and had said that if Agent Hitchen wanted to talk to her she had to call her at midnight because she slept most of the day, but she would not leave her phone number.

Paragraphs 6 - 8

Agent Hitchen stated that about 15 months ago, on February 23, 2011, a complaint was received from a couple that had gone to Appellant's home, at the same address, to purchase a puppy advertised on Kijiji.ca. The complaint expressed a concern about Appellant's dogs having matted coats and being kept in feces and urine. Agent Rene Baker had investigated the complaint and had issued several orders to Appellant. The orders were in respect of the dogs' dental, grooming and body condition issues and they also stipulated that the house be cleaned of garbage and feces to provide a sanitary environment for the dogs and that adequate ventilation was to be provided to reduce the ammonia levels. The compliance date on the orders was March 2, 2011.

89 On March 3, 2011, at 11:00 am Agent Hitchen attended at Appellant's property with Agent Baker and an OPP officer with a search warrant to check on the compliance of the orders issued on February 23, 2011. Appellant answered the door but requested that they return later as she doesn't get up until noon. When they returned and entered the house, Agent Hitchen observed that it was unkempt with "garbage and debris all over." Appellant was using a walker and was having a hard time getting around. Agent Hitchen also observed "feces and urine all over the home" and in the cages, and that the dogs had greasy and sticky coats. Appellant acknowledged that she had not complied with the orders.

90 Appellant's 16 dogs were removed for non-compliance of the orders and the orders were modified in respect of the living environment specifications. The three dogs that had not been examined by a veterinarian, as had been ordered, were taken to a veterinarian who found them to be underweight and in need of bathing and dental cleaning with extractions.

The Garofoli Threshold Test

91 Appellant submitted an application to the Board for leave to cross-examine affiant, Agent Hitchen, on the contents of her ITO. The Board heard arguments from the parties with their respective positions on whether and to what extent this cross-examination should be permitted.

92 A determination of whether to grant leave to cross examine on the content of the ITO, pursuant to the *Garofoli* threshold test, is separate and distinct from a determination of the wider question in this *Garofoli* hearing of whether, on the basis of the ITO, the JP could reasonably have concluded that there were reasonable grounds to believe that there were dogs in distress in the place specified in the warrant, that is, whether the warrant was valid. [*R. v. Lising*, [2005] 3 S.C.R. 343 (S.C.C.), para. 69]

93 The *Garofoli* threshold test requires Appellant to provide a preliminary showing of a reasonable likelihood that the proposed cross-examination of Agent Hitchen on her ITO will elicit testimony that will discredit the existence of reasonable grounds to issue the warrant. The *Garofoli* threshold test is grounded on two basic rules of evidence: relevance and materiality, and stems from concerns about the proximity of proceedings and the need to protect the identity of an anonymous informant. [Pires *Lising*, para. 3] If leave is permitted, the proposed cross-examination should be limited to questions that are directed toward establishing that there is no basis on which the warrant could have been granted. [*Garofoli*, para 89]

Appellant's Requests

94 Appellant points out that the Supreme Court states in *R. v. Araujo*, [2000] 2 S.C.R. 992 (S.C.C.), at paragraph 46 that "[T]he legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts...", and based on this principle has requested leave to cross-examine in respect of three areas of information in the ITO: 1) the circumstances surrounding the receipt of the complaint; 2) the fact that there was a prior JP involved in the issuance of the warrant, and 3) lack of adequate information regarding the housekeeping status of Appellant's house in March 2011.

1) Circumstances surrounding the receipt of the complaint

95 Appellant submits that information received from the OSPCA in disclosure indicates that by the time Agent Hitchen received the complaint it was fourth-hand hearsay information. The informant had left the complaint on a telephone answering machine at the Gananoque Humane Society, which was then transferred to a telephone answering machine at the OSPCA (of which the Gananoque Humane Society is an affiliate). The complaint was retrieved by Agent Rene Baker and passed along to

Agent Hitchen. Appellant maintains that cross-examining Agent Hitchen on the ITO may reveal that the complaint was altered in the process of passing it along and would also establish that Agent Hitchen failed to be full, fair and frank by not disclosing this chain of hearsay in the ITO.

96 Appellant did not, however, proffer any evidence to show that cross-examination would likely elicit evidence that the complaint was altered as it was being forwarded along to Agent Hitchen. Since the forwarding of the complaint was done entirely within the OSPCA organization, in an assumedly business-like atmosphere, as opposed to a situation that would be conducive to it ending up as mere gossip, it is likely that the complaint ended up with Agent Hitchen intact. Further, the fact that Agent Hitchen stated in the ITO that the complaint was received by "the Ontario SPCA" indicates she was not attempting to mislead the JP into thinking that she received it directly from the informant.

97 More importantly, cross-examination in this area carries a risk of eliciting facts that might identify the informant. With an anonymous informant, it is difficult to predict whether the answer to a particular question would reveal identifying facts. Quoting with approval from McLachlin, J. in her dissent in *Garofoli*, the Court in *Lising*, at paragraph 36, underlines the fact that "[O]nce a damaging statement is made in answer to a question in cross-examination, editing is to no avail". Thus, any assistance to the Board ensuing from the testimony that would shine light on the accuracy of the complaint would be outweighed by the risk of eliciting evidence tending to identify the informant.

98 For the reasons given above, the Board declines to grant leave to cross-examination in the area of the circumstances surrounding the receipt of the complaint.

2) Involvement of another JP in the issuance of the warrant

99 Appellant requests leave to cross-examine Agent Hitchen regarding the OSPCA's unsuccessful attempt to obtain a warrant from a JP prior to presenting the ITO to the JP who issued the warrant. Appellant contends that the proposed cross-examination may reveal that the OSPCA was "judge shopping" and, in any event, Agent Hitchen again failed to be full and frank by not disclosing the fact that there were two JP's involved in processing the issuance of the warrant.

100 The OSPCA pointed out in its submission, however, that there was documentation in disclosure to Appellant, to the effect that the ITO was not even considered by the first JP in Kingston because Appellant's property was outside of that JP's jurisdiction and, therefore, Agent Hitchen was directed to present the ITO to a JP in Brockville.

101 The Board is not persuaded that cross-examination to delve into the details of this issue would produce evidence that would discredit the existence of reasonable grounds to issue a warrant, and, therefore, would not be an efficient use of judicial time. [Pires *Lising*, paragraphs 33ff.]

102 The Board declines to grant leave to cross-examination in the area of the involvement of another JP in the issuance of the warrant.

4) Ambiguity of information regarding the housekeeping state of Appellant's house in 2011

103 Appellant presented a factual basis for claiming that cross-examination would elicit evidence that in March of 2011, Appellant had cleaned up her house to the satisfaction of the OSPCA by the time the Statement of Account for the costs of removal was issued to her, which was only four days after the dogs were removed. Statements for the cost of the removal of the dogs, dated March 5 and 8, 2011, (with a final notice on March 16, 2011), were submitted as Exhibits 6A, B & C. Paragraph 28 (and the last sentence of paragraph 27) of Appellant's Application for Leave stated that there was information indicating that the cross-examination will reveal that the only reason the OSPCA did not return the dogs to Appellant was that she was unable to pay the amount of the cost of removal, which, Appellant submits, demonstrates that the OSPCA was satisfied with the care the dogs were receiving.

104 Leave was granted to Appellant to cross-examine Agent Hitchen with respect to her description of the housekeeping conditions in paragraph 8 of the ITO. In the subsequent cross-examination, evidence was elicited to confirm that the Appellant

was unable to have her dogs returned to her in 2011 because she was unable to pay the statement of costs and not because she had not complied with the OSPCA orders by not cleaning up her house.

105 In retrospect, there was no need to cross-examine Agent Hitchen to find out more about the state of the house on March 3, 2011, as there was no reasonable likelihood that the cross-examination would elucidate anything further of probative value. At best it could only reveal that Agent Hitchen overstated the unsanitary condition of Appellant's house on March 3, 2011, since Appellant had cleaned up her house to the satisfaction of the OSPCA in only four days, indicating that it is unlikely that the feces was seriously imbedded in the woodwork or floors. The issuance of the orders to clean the house of garbage and feces and Appellant's lack of compliance remained in the ITO to establish a propensity on the part of Appellant to provide unsanitary housing for her dogs.

106 Thus the cross-examination did not have a significant effect on the foundation of the authorization. [*Lising*, para 69].

Amplification of the ITO

107 The ITO was amplified in two respects by Agent Hitchen in her testimony at the hearing. First, she said that on her visit to Appellant's residence on May 14, 2012, she could detect an odour of feces and urine emanating from the house through the door and, second, in response to an inquiry she had made, she received an email from Kijiji Canada showing an active listing for three Yorkie puppies for sale by Appellant. Agent Hitchen said that her failure to include these two items of information in the ITO was inadvertent. [Transcript, pp 761,762, 766-768]

Whether on the Basis of the ITO, As Amplified, The JP Could Have Been Satisfied that the Reasonable Grounds Standard in Section 12(1) of the Act Was Met.

108 In her ITO, Agent Hitchen sets out the complaint: "On May 11, 2012, the Ontario SPCA received a telephone call from an anonymous informant regarding a concern they had for small dogs being housed in feces and urine at [Appellant's address]..." The three elements of the complaint, each of which require corroboration to ascertain whether the complaint is reliable are that

- 1) Appellant lives at the address provided in the ITO
- 2) There are dogs in Appellant's residence
- 3) The dogs were being housed in feces and urine

109 In her attendance at Appellant's property to investigate the complaint, prior to obtaining the warrant, Agent Hitchen was able to corroborate the first two of these elements of the complaint and partially corroborate the third element. In her investigative visit on May 14, 2012, to the address provided in the complaint, she recognized Appellant's red station wagon in the driveway from previous visits to Appellant's residence and while waiting at the door for an answer to her knock she saw small dogs running around through the window in the door. Agent Hitchen was also able to make a preliminary corroboration of the third element as she detected an odour of feces and urine emanating from the house when she was standing at the door.

110 These initial corroborations set out in the ITO as well as the ongoing advertisement for dogs for sale in Kijiji.ca, supported the reliability of the complaint and therefore provide support for the reasonable grounds requirement under section 12(1) of the Act.

111 The main piece of evidence for the corroboration of the part of the complaint referring to the dogs being housed in feces and urine is the similar fact evidence of the unsanitary state of state of Appellant's house in February and March 2011, when compared to the complaint received on May 18, 2012.

112 The Ontario Court of Appeal, in *R. v. Debot*, [1986] O.J. No. 994 (Ont. C.A.), explains that evidence of prior misconduct is permitted at the investigatory stage of a search:

Evidence of prior... misconduct is excluded at trial in a criminal charge, not on the ground that the evidence has no probative value but on policy grounds because the prejudicial effect of such evidence outweighs its probative value. The policy rule that in general excludes such evidence in an accused's trial has no application in determining whether reasonable and probable grounds exist for an arrest or a search.

113 The Ontario Court of Appeal in *R. v. MacDonald*, [2012] O.J. No. 1673 (Ont. C.A.), para. 18] points to Martin, J.A.'s observation in *Debot* that although a criminal record deserves some weight, it does not by itself make out reasonable probability, but also finds that the cogency of the criminal record depends on the similarity of the criminal activity alleged by the tipster and the past criminal activity. [*MacDonald*, para. 23] In *MacDonald* the appellant was convicted of possession of a prohibited firearm, the very criminal activity the tipster alleged. In the case at hand, the similarity of Appellant's past misconduct of housing the dogs under unsanitary conditions of feces and urine in the house, which Appellant was ordered by the OSPCA to clean up, and the complaint received on May 18, 2012, that Appellant's dogs are being housed in feces and urine, is striking rendering the complaint compelling.

114 MacDonald further states that in establishing reasonable probability, in addition to the similarity of the tip and the criminal record, the cogency of the criminal record depends on the age of the record In *MacDonald* the fact that the prior conviction took place within twenty-four months of the anonymous tip was considered to provided a fair measure of cogency to the criminal record. [*MacDonald*, para.23] In the case at hand, the prior misconduct took place within the significantly shorter time of 15 months.

115 Appellant submits that the corroborating information provided to the JP in the ITO which refers to events that took place back in February and March 2011, and therefore is stale evidence which is not probative corroborating evidence. In support of this view, Appellant cites *R. v. Burns*, [2003] O.J. No. 6323 (Ont. C.J.) and *R. v. Bingley*, [2010] N.S.J. No. 666 (N.S. Prov. Ct.), where the evidence was considered stale despite time lapses of 15 months and 5 months, respectively. Those cases however, are not similar to the case at hand because the time lapse referred to in *Burns* is the time between obtaining the information for the compliant and making the complaint and in *Bingley* the time lapse refers to the period between receiving the complaint and investigating it, whereas the time lapse in the case at hand was between the time of the corroborating past event and the receipt of the complaint.

116 Appellant also relies on the Saskatchewan Court of Appeal case, *R. v. Turcotte* (1987), [1988] 2 W.W.R. 97 (Sask. C.A.), in which the Court lists, as one of the criteria for satisfying a JP that a warrant could be issued, is that it was based on current grounds. The time lapse in *Turcotte* was between two criminal offences, the theft of 100 cheques and the cashing of a stolen cheque by the accused one month later. The issue was whether these two events could reasonably be connected to establish that there were reasonable grounds to believe that the 100 stolen cheques would be found in the accused's residence. Since the fact situation in *Turcotte* also does not deal with 'similar fact' evidence in order to establish a propensity to act in a certain way as in the case at hand, this case is of little assistance to Appellant to weaken the evidence submitted to the JP on the basis that the evidence is stale.

Conclusion — Sub-Issue 2 Whether There Were Reasonable Grounds to Support the Warrant

117 The Board concludes that the JP, on the basis of the ITO, as amplified, could have issued the search warrant. The totality of the circumstances consisting of the corroboration of the elements of the complaint by Agent Hitchen in her investigative visits to Appellant's residence prior to seeking a warrant and the strikingly similar fact evidence which occurred less than two years before the receipt of the complaint provide sufficient reasonable grounds required by section 12(1) of the Act.

Sub-Issue 3): Whether the Search Warrant Was Executed in a Reasonable Manner.

118 The manner in which the entry into Appellant's house took place was provided by the testimony of Agent Hitchen and Appellant.

Agent Hitchen

119 Agent Hitchen testified that she executed the warrant at 1:00 pm on May 18, 2012. She attended at Appellant's residence with Agent Baker and two OPP officers for the purpose of keeping the peace, and two students from St. Lawrence College who are aspiring to become OSPCA investigators and were being trained in OSPCA procedures.

120 She said that upon their arrival at Appellant's property, she and one of the police officers went to Appellant's door and knocked, but there was no response. She could hear several dogs barking inside the house. Knowing that Appellant takes a while to answer the door, they waited for a few minutes and then knocked again. After knocking repeatedly one of the police officers went around the house to see if there were any open windows through which he could call to get Appellant's attention. There was an open window to the bathroom and in looking in they could see that the bathroom door was open to the rest of the house. One of the officers yelled through the window for Appellant to come to the door as the OSPCA was there with a warrant and needed to speak with her. As there was no response, they discussed possible ways to get into the house with the least amount of damage. Agent Baker popped out the screen from the front door but the window was locked so she replaced the screen. The open bathroom window was too small to climb through. At that point one of the police officers pulled the screen out from a window to a bedroom. It was decided that Agent Hitchen should be the one to go through the window, as she was the smallest one of the group. When asked how long they had been outside before gaining entry through the bedroom window, Agent Hitchen said, "About 20 minutes." [Transcript, p. 772]

121 The door of the bedroom was closed. Before opening it, Agent Hitchen called out to Appellant that it was Maryanne from the SPCA and she was here with a warrant. Then she opened the bedroom door and went into the main living area of the house. She observed several dogs running loose and cages with dogs in them. She noted a strong odour of urine and feces and garbage. Appellant was sitting in a chair in the living room, on the phone. When Appellant saw Agent Hitchen, she screamed at her asking her what she was doing in her house. Agent Hitchen told her that she was there with the OPP and they had a warrant. She then went to the front door and let one of the police officers enter. She handed Appellant the warrant and then the others came into the house.

122 Agent Baker took photographs of the interior to the house, which upset Appellant such that she went up to Agent Baker aggressively, backing her into a corner, although she kept about an eighteen-inch distance from her. The police officers stepped in, telling Appellant to calm down. [Transcript, pp 769-834]

123 Agent Baker wrote up a three-page order to put the house into a sanitary condition and to take Appellant's five adult dogs to a veterinarian to be examined for possible dental issues. The Order was signed by Agent Hitchen and served on Appellant. [Exhibit 17] Agent Hitchen testified that they all left Appellant's property at 2:16.

124 [Transcript, p.837]

Appellant

125 Appellant testified that on May 18, 2012, she had been sleeping on a chair in the living room since about 7 am and the barking dogs woke her up from a deep sleep at, she thinks, around 2:00 pm. She immediately called a friend and said "I think there's somebody trying to break into the house" and the next thing she knew, Agent Hitchen walked out of what she calls the "storage bedroom". She said to Agent Hitchen, "What the hell are you doing in my house?" [Transcript, p. 206] Agent Hitchen looked surprised and then went to the door and let people in. Appellant said there were two OPP officers, another OSPCA investigator and two OSPCA workers who were in street clothes and they never said a word. They had a search warrant which they threw on the couch and then proceeded through the house. Agent Baker started taking pictures of her house and that made her very angry and she yelled at her saying, "No pictures in my house." [Transcript, p. 350].

126 In order for a search to be reasonable under *s. 8 of the Charter*, it must be conducted in a reasonable manner. [*R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.) para. 23] The Supreme Court of Canada has set out guidelines for a reasonable search in the case of a forced entry into a private home in [*R. v. Cornell*, [2010] 2 S.C.R. 142 (S.C.C.) para.18]:

Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case they should give (i) notice of presence by knocking or ringing the door bell; (ii) notice of authority by identifying themselves as law enforcement officers and (iii) notice of purpose by stating a lawful reason for entry:

127 The Court also states that "... the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises." [*Cornell*, para. 24]

Findings of the Board

128 The Board finds that the OSPCA agents and the police officers satisfied the conditions for a reasonable execution of a search warrant at a private dwelling, as set out in *Cornell*, given the lack of cooperation from Appellant and that *Cornell* allows a certain amount of latitude in deciding the manner of entering the premises. They knocked repeatedly on the door. One of the police officers yelled through an open window that the police and OSPCA officers were there with a warrant and they needed to speak to her. They were outside the house for about 20 minutes trying to get Appellant's attention and figuring out the least intrusive method of entry. In deciding to have Agent Hitchen climb through a bedroom window, as opposed to, say, breaking down the door with a battering ram, they accomplished the entry without any damage to the house. Before going through the bedroom door into the main living area of the house, Agent Hitchen called out, identifying herself and saying that she had a warrant.

Conclusion — Sub-Issue 3 Manner of Execution of the Warrant

129 The Board concludes that the search warrant was executed in a reasonable manner given the circumstances of not receiving any cooperation from Appellant.

Conclusion — Part II - The Charter Issue

130 Since the Board has found that the search warrant is facially valid, supported by reasonable grounds, as required by the Act, and was executed in a reasonable manner, the Board concludes that Appellant's rights under s. 8 of the *Charter* were not infringed by a search of her residence on May 18, 2012.

131 It is therefore not necessary to consider whether the evidence obtained as a result of the search is admissible under s. 24(2) of the *Charter* and the Board can proceed to a decision on the merits.

Part III — The Merits

132 In compliance with the Order, as modified on June 28, 2012, Appellant had her four adult dogs, Vicki, Tammy, Crystal and Laya, examined by Dr. Julia Brown at the Westport Veterinary Services on July 30, 2012. Dr. Brown's report of these examinations, together with the invoice, was submitted as Exhibit 4. The cost of these examinations, as set out in the invoice, are agreed to be the costs of compliance with the Order.

133 In determining whether Appellant is entitled to an award of these costs, pursuant to section 17(6)(c) of the Act, and whether the Modification to the Order should be confirmed, modified or revoked in accordance with section 17(6)(a) of the Act the first question to ask is whether the Order was made in compliance with section 13(1) of the Act. Relevant sections of the Act are as follows:

17(6) [A]fter a hearing..., the Board may,

(a) respecting an order made under **subsection 13(1)** confirm revoke or modify the order appealed against;

(c) order that the whole or any part of the cost to the owner or custodian of an animal of complying with an order made under **subsection 13(1)** be paid by the Society to the owner or custodian;

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.

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;

134 In exercising its powers under clause 17(6), in respect of an appeal of an OSPCA order, the Board considers factual evidence presented by each party at a hearing as to whether the order was made in accordance with 13(1). This determination centers on whether the OSPCA investigating officer's belief that the animal was in "distress", as defined in subsection 1(1) of the Act, was based on reasonable grounds at the time the order was issued. If, after a hearing, the Board is of the opinion that the order was not valid, that is, it was not made in compliance with [subsection 13\(1\)](#), the Board will generally award any costs incurred in complying with the order to the appellant. Conversely, if the Board is of the opinion that the order was valid, the Board will decline to award costs of compliance to the appellant.

135 The Order with respect Tammy, Crystal and Laya was revoked by the OSPCA on August 16, 2012. [Exhibit 24] However, Appellant's compliance with the Order, pursuant to section 13(5) of the Act, occurred prior to this revocation. The Board's position is that, notwithstanding the revocation by the OSPCA of its own order, the Board retains jurisdiction for the purpose of awarding costs of compliance under section 17(6) of the Act. [See *Toronto Humane Society v. OSPCA*, Ref. 2009-12 and *Robinson v. OSPCA*, Ref. 2011-11 and 13]. The process of determining whether or not to award such costs of compliance is the same as that described in the previous paragraph: After a hearing, the Board awards costs of compliance, if any, to the Appellant if the Board finds that the OSPCA order was not made in accordance with section 13(1) of the Act.

Appellant's Witnesses

136 Appellant presented her position that the Order was not made in compliance with section 13(1) of the Act, by way of testimony from: Dr. Kellie Stein, Dr. Julia Brown, and her own testimony

Kellie Stein, DVM

137 Dr. Stein testified that she is licensed by the College of Veterinarians of Ontario and has been practicing veterinary medicine for three years. She practices at Island City Animal Hospital in Brockville. Dr. Stein was duly qualified as an expert witness and testified as follows:

138 She examined the dog, Logan, on June 19, 2012, and found him to be of normal body condition and normal gait, and to have a good demeanor. He had moderate dental tartar but no evidence of pain, as he did not flinch when his head was approached and was amenable to having a probe gently tap his teeth and gums. Dr. Stein said that the condition of this dog's teeth was such that she would generally recommend removing the tartar, polishing his teeth and then once the tartar was removed assessing whether any extractions were necessary.

139 When asked for a rough estimate of how much this would cost, Dr. Stein said that the animal hospital out of which she practices has dentistry packages that start at \$350 and then depending on the number of teeth that needed to be extracted, could end up around \$800 to \$900. She said that the hospital requires the bill to be paid in full and if an owner wants to pay the bill in installments they would have to make arrangements with a separate financing company such as "Pet Card".

140 Dr. Stein said that about 80% of adult small-breed dogs she sees have moderate dental tartar due to the fact that they have crowded mouths. Brushing their teeth may help, but these dogs will accumulate tartar over time. She said that tartar cleaning is being recommended more often now, as more people can afford this procedure. When she sees a dog with moderate tartar, with no dental pain, and the owner cannot proceed with dentistry for financial reasons, she will either direct them to a financial institution that she will help finance dental procedures, if they would like to go that route, or she will give them tips to prevent further accumulation of tartar such as brushing, dental diets, and sometimes antibiotics. She said that she would only speak to the OSPCA about a dental situation if the dog is refusing food, having a difficult time chewing, losing body condition or flinching when its head is approached. Dr. Stein's report of her examination of Logan was submitted as Exhibit 1.

Julia Brown, DVM

141 Dr. Julia Brown graduated from the Ontario Veterinary College in 1989 and has been in clinical practice since then. She is licensed with the College of Veterinarians of Ontario and has been working with the Westport Veterinary Services since 1994. She was duly qualified as an expert witness.

142 She examined the four adult dogs at issue on July 30, 2012, and prepared a report of her examination, which was submitted at the hearing. [Exhibit 2] At the request of Appellant, Dr. Brown provided a follow-up letter, dated August 9, 2012, that summarized the detailed medical records in her report. [Exhibit 3]

143 Dr. Brown qualified the explanations of her report in her testimony by first explaining that she had no previous medical history of the dogs. She said the dogs were generally well cared for and testified as follows with respect to the particular dogs:

Vicki

144 Vicki, a nine-year old, intact female Yorkshire Terrier-cross was bright and alert, friendly and social. Her temperature, pulse and respiration were within normal limits.

145 Her body condition was neither overweight nor underweight, and she showed no sign of infectious disease. Thus, her mouth was the primary problem. Vicki resisted the examination of her mouth indicating to Dr. Brown that it was sore. Dr. Brown found severe tartar build-up, severe gingivitis and recession, and recommended dental cleaning and follow-up dentistry. Dr. Brown said that if Vicki did not receive dental attention, her gum infection would get worse.

146 Dr. Brown gave a "ball park" estimate of \$500 to \$1,000 for the cost of Vicki's recommended dental treatment. She said that the two most common reasons why an animal owner does not have the recommended treatment done are financial and the reluctance to have their dog put under an anesthetic with its inherent risks. Dr. Brown also explained that small dogs are more prone to dental problems, one of the reasons being that small dogs are not chewers, for instance, they don't chew on sticks and bones when outside.

Tammy

147 Tammy is a six-year old, intact, female Terrier cross. Dr. Brown described Tammy as a friendly and social little dog. Her weight was fine; there was no finding of fleas or flea dirt and her eyes, ears and lymph nodes were normal. She had mild tartar, but no gingivitis and, thus, the state of her mouth was within the normal limits for a dog of her age. Auscultation and palpation did not reveal any abnormal findings. On the whole Dr. Brown found Tammy healthy and appeared to be well cared for.

Crystal

148 Crystal is a six-year old intact female Maltese. According to Dr. Brown, she too, was friendly and social. Her temperature, pulse, and respiration were all normal and her weight was good; her body condition score was three out of five. She had some minor staining in her flanks, suggesting that she had a recent skin allergy usually associated with a flea problem, but the condition was resolving. Dr. Brown did not find any fleas or flea dirt. There was no inflammation in eyes or ears and her lymph nodes were normal. She had a mild bit of tartar and some mild gum recession in the upper canine teeth, but there was no decay and

no discomfort in her mouth. She had a few mats in her fur and her nails required trimming which was done at the time of examination. Dr. Brown said she appeared to be fairly well cared for.

Laya

149 Laya, a year and a half old intact female Yorkshire terrier, was also friendly and quite social. Her temperature, pulse, respiration, colour and hydration were normal. Her lymph nodes were normal and auscultation and abdominal palpation were normal. She had no fleas or flea dirt and her eyes and ears were nice and clean. She had a small scab in her left armpit that looked like a healing wound, but did not have any infection. Dr. Brown said her teeth were beautiful; there wasn't any tartar, and they were nice and white, and her bite was good.

150 In cross-examination, Dr. Brown was asked whether, if an OSPCA investigator had seen the adult dogs on May 18, 2012, and had taken the view that some of them were in a state of needing dental care whether that would echo the view Dr. Brown has formed six weeks later. Dr. Brown's answer was that one could agree with that statement in the case of Vicki, as she needed dental care and her dental condition didn't start overnight. Dr. Brown added that without veterinary dental care, Vicki's teeth would not get better over time.

151 Dr. Brown's invoice from Westport Veterinary Services for the examination and vaccination of the dogs was submitted as Exhibit 4. In cross-examination Dr. Brown was asked how much of the total amount pertained to the examination alone, without the vaccinations. She responded that she could not provide a breakdown of the amount as it was a "package" that included the core vaccinations for distemper, hepatitis, para-influenza, parvo, leptospirosis and rabies. She said that the invoice had been paid.

Appellant

152 Appellant recounted that the OSPCA's investigators had visited her residence from time to time in the past, in response to calls they had received with concerns about her animals. She said she did not find this a problem. The investigators would arrive accompanied by a veterinarian and they might find one dog out of whole group of dogs that had a dental issue. Appellant would then take the dog to her own veterinarian to have its teeth treated.

153 In February and March of 2011, the OSPCA investigators came to her house without a veterinarian. According to Appellant, the investigators made sweeping statements and orders. She was ordered to take all of her dogs (around 16 dogs counting the puppies) to a veterinarian and was given two weeks to comply. She said that since she was retired and on a small fixed income, she could not afford to take all her dogs to the veterinarian at one time and thus could not comply with the orders by the compliance deadline. The OSPCA removed her animals for non-compliance. After four days, the OSPCA came out to inspect her house and found it to be cleaned up and presented her with a bill for \$2,449.51. [Exhibit 6B] Appellant said that since she was unable to pay the bill, she was unable to have her dogs returned to her.

154 In cross-examination, Appellant was asked, whether, since she did not have any veterinary training, she would be able to tell by looking in her dogs' mouths if they required dental treatment. She replied that she would realize that there was a problem if she saw red gums, noticed that the animal were not eating or was losing weight, or just looked sick and if so, she would then take it to a veterinarian. When asked to identify the dog with red gums in a photograph of a dog's mouth taken on May 18, 2012, by Agent Baker [Exhibit 20T], Appellant said that she assumed it was a photograph of Vicki by the white fur and, according to her, Vicki was only dog that had a dental problem on May 18, 2012. When asked how long it has been since the last time she had taken her dogs to the veterinarian to have their teeth checked before May 18, 2012, Appellant answered that they get their teeth examined when they get their yearly shots.

OSPCA's Witnesses

155 The OSPCA presented its position, which is that the Order was made in accordance with section 13(1) of the Act, by way of testimony from: Agent Maryanne Hitchen and Agent Rene Baker.

Maryanne Hitchen

156 Agent Maryanne Hitchen testified that she has been employed by the OSPCA since 2004. From 2004 to 2011, she was a member of the animal care staff of the OSPCA and a part-time investigator. Since 2011, she has been an animal cruelty investigator. She is a graduate of a Veterinary Assistant Program (a one-year program) from St. Lawrence College. On first being hired in 2004, she took the one-week OSPCA training course and in May of 2011, she took the four-week on-line OSPCA training course. Included in her agent training courses was a presentation on dental issues and what they can cause. Also, prior to being employed by the OSPCA, she worked for an animal clinic, which included assisting with dental work and observing dental work being done.

157 Agent Hitchen testified as follows with respect to her observations of Appellant's dogs on May 18, 2012, resulting in her issuance of the Order on that day.

158 Agent Hitchen explained that as a result of her training in dentistry, she looks for tartar, gingivitis, redness and swelling of the mouth for concluding whether a dog is in need of proper care. Agent Hitchen said she issued the Order for Appellant's dogs to be seen by a veterinarian because she believed the dogs were in need of proper dental care.

159 When asked what it was about the five adult dogs listed in the Order that made her think they needed proper care, she provided the following reasons: They had bad breath; their gums were red and inflamed; they had a brownish-yellowish tinge on their teeth and various stages of tartar build-up on their teeth. When asked how those five symptoms were spread out through the five adult dogs, she responded, "They all had various stages of each one of those". [Transcript, p.837] Agent Hitchen said that when she and Agent Baker were pulling up the dogs' lips to observe their teeth, the dogs were wincing in pain. She said she can tell the difference between a dog being in pain and not wanting you to approach their mouth but didn't elaborate on the nature of the difference.

160 In cross-examination, Agent Hitchen was asked whether in the case of a dog that had "moderate" tartar, whether this tartar would have to be cleaned off for the dog to be considered to be receiving proper care and, therefore, not in distress. Agent Hitchen responded that it would depend on the severity of the tartar and that would be up to the veterinarian to decide. When asked whether she could identify what she would consider to be moderate tartar, she said she would not feel comfortable classifying tartar as "moderate" or "severe"; rather, she can just tell if the dog's mouth is not right; that is, it does not look like it's supposed to look.

Rene Baker

161 Agent Rene Baker testified that she has been investigating animals in distress for the OSPCA for the past five years. When she first started working with the OSPCA it was on a part-time basis and she was also providing care to the animals in the shelter and examining them on their arrival at the shelter, which included assessing a dog's level of dental disease and making decisions as to whether they should be seen by a veterinarian.

162 Agent Baker has a college diploma in veterinary medicine. She said that in the program she learned, among other things, how to identify dental issues such as an accumulation of tartar, reddening of the gums, pain and discomfort and being in poor body condition. She also received the training provided by the OSPCA.

163 Agent Baker said that she was at Appellant's residence on May 18, 2012, to assist Agent Hitchen in the execution of a search warrant to determine whether there were animals in distress in Appellant's residence.

164 Agent Baker was shown the picture that Appellant had identified as Vicki's mouth (Exhibit 20T) and asked why she took that particular photograph. Agent Baker responded that the importance of this photograph is the depiction of the dental disease in the dog's mouth. More specifically, she said she took the photograph because this dog's teeth were green and brown in colour, had a build up of tartar and inflammation of the gums. She said that the photograph shows that the dog's head was being restrained because the dog was pulling his head away, thus, appearing to be in pain and also it had horrible breath. Agent Baker said that she concluded that this dog had some level of dental disease and needed to be seen by a veterinarian.

165 Agent Baker said she examined all five dogs and had observed that they had the same symptoms as the dog in the photograph, but to varying degrees, some worse than others but she didn't note the particular symptoms or the degree of these symptoms present in the dogs other than the one in the photograph. She said that, although she is not a veterinarian, she had noted that all the dogs had the signs and symptoms of dental disease in various stages because all the dogs had various degrees of red, inflamed gums and had different levels of tartar or plaque build-up, and winced when they had their mouths touched, indicating that they were in pain or discomfort. She added that she was not an expert and said that she and Agent Hitchen decided to issue an order to Appellant to seek medical attention to let a veterinarian decide on a course of action.

166 In response to a request to talk about specific cases of red or inflamed gums of the dogs, Agent Baker said that she didn't specifically note each symptom that she had seen. When she was pressed and asked to explain what she meant by them all having some level of dental disease, she answered that she wasn't sure because she is not a veterinarian, so basically she just informed Appellant that she needs to seek veterinary care for all the dogs.

167 When asked about short compliance time of 14 days, Agent Baker responded that the compliance date was decided on the basis of the condition of dogs' teeth. The fact that the dogs were in discomfort; that they had an accumulation of tartar/plaque buildup on their teeth, and that their teeth were brown and green colour, she and Agent Hitchen could not make the compliance date any later than it was. She added that if the build up tartar had been mild, she probably would have just had a discussion with Appellant rather than issue an Order.

Findings of the Board

168 1. The Board finds that Agent Hitchen had reasonable grounds for believing that the dog, Vicki, was in distress because of lack of proper [dental] care.

169 The evidence presented by Agent Hitchen and Agent Baker as constituting reasonable grounds for Agent Hitchen's belief that the four dogs at issue were in need of proper care and, therefore, in distress, when she issued the Order consisted largely of general conclusory statements that did not specify which dog had what symptoms of dental disease. An exception, however, was Agent Baker's observations of green and brown coloured teeth, tartar buildup and very red gums in the mouth of a particular dog whose photograph she took on May 18, 2012, submitted as Exhibit 20T.

170 Agent Hitchen testified that, as a result of her training in dentistry, she looks for tartar, gingivitis, redness and swelling of the dogs gums for concluding whether a dog is in need of proper dental care and, therefore, in distress as the term is defined in the Act. The Board found that the photograph in Exhibit 20T depicted a dog with the symptoms that Agent Hitchen was on the lookout for to an extreme degree.

171 The dog in the photograph had been identified by Appellant as Vicki. In her testimony, Dr. Brown said the opinion she had formed on July 30, 2012, that Vicki had severe tartar build-up and severe gingivitis would have been the same on May 18, 2012, as Vicki's dental condition didn't start overnight.

172 For the above reasons, the Board is persuaded that Agent Hitchen had reasonable grounds for believing that one of the four dogs was in distress at the time she issued the Order and that dog was Vicki. Therefore, the part of the Order pertaining to Vicki was made in compliance with [section 13\(1\)](#) and Appellant is not entitled to an award of the veterinary costs she incurred in respect of Vicki on July 30, 2012.

173 2. The Board finds that Agent Hitchen did not have reasonable grounds for believing that the dogs Tammy, Crystal and Laya were in distress for lack of proper dental care.

174 The Board finds that except for pulling back the lips of all the dogs and observing that this made them flinch, there is no evidence that either Agent Hitchen or Agent Baker made an assessment of the condition of the teeth of each of the three dogs. Agent Hitchen said that the five dogs listed in the original Order were in need of proper dental care because they had all had various stages of inflamed gums, discoloured teeth and tartar build-up. However, no details or photographs with respect to each

of these three dogs were presented to support this general conclusory statement. Similarly, Agent Baker said that she examined the five dogs listed in the Order and they all had the same symptoms as the dog in the photograph, but to varying degrees. It was as if the evidence presented for Vicki applied to all of the dogs, albeit to a lesser degree.

175 The Board acknowledges that in certain cases the evidence from an examination of one animal can be extrapolated to cover all of the animals at issue. In *Roy Bevan v. OSPCA*, decided in December 2003, the Board held that a veterinarian can only sign a Certificate of a Veterinarian for purposes of section 14 of the Act, advising that the health and well being of an animal necessitates its removal if the veterinarian has examined that particular animal. The Court of Appeal, Docket 43937, heard February 14, 2007, upheld the decision of the Superior Court of Justice, which had overturned the Board's decision, by holding that a veterinarian's examination does not invariably require a physical hands-on examination of every single animal. In *Bevan* the veterinarian physically examined one sheep under its coat of wool, which he found to be very thin and grazing on a field of "golf course length grass". He observed from a distance that a herd of fifteen sheep were also grazing on this sparse grass and concluded that all of the sheep were not receiving adequate food and should be removed. The situation in *Bevan*, however, is very different from the case at hand where the dental conditions of dogs in the same house can vary from a situation of no tartar buildup to severe tartar buildup and gum disease.

176 The Board finds that except for severe conditions of tartar buildup, as in Vicki's case or in very mild cases, neither Agent Hitchen nor Agent Baker, by their own acknowledgement, possessed the requisite knowledge to decide whether a specific buildup of tartar amounted to a case where the dog was in need of dental care and therefore in distress.

177 Agent Hitchen said that in the case of moderate tartar buildup it would be up to the veterinarian to decide whether the tartar would have to be removed for her to consider that the dog was receiving proper care. She admitted that she was uncomfortable using the veterinary term, "moderate" and made her assessment on the basis of whether the dog's mouth looked like it was supposed to look. Agent Baker said that since she was not a veterinarian, she could not particularize her statement that all the dogs had some level of dental disease. She then added that since neither she nor Agent Hitchen are veterinarians, they decided to issue an order to for the five dogs to be seen by a veterinarian for the veterinarian's consideration of a course of action. It is the Board's opinion that such mere suspicion cannot constitute reasonable grounds for the belief that the three dogs at issue here were in distress. Consequently, it does not provide reasonable grounds for issuing an order to have the dogs examined by a veterinarian particularly given Dr. Stein's statement that about 80% of the small breed dogs she sees have moderate tartar accumulation and the onerous sanctions under the Act for non-compliance of an OSPCA order. Although the Act is silent regarding a requirement to have a veterinarian advise the OSPCA investigators as to the state of an animals health and well being, in this case it would have been necessary to obtain the advice of a veterinarian in order for the Agent Hitchen to decide if these three dogs were in distress for being in need of proper care.

178 The conclusions reached by Agent Hitchen and Agent Baker as to the state of the teeth of the dogs, Tammy, Crystal and Laya, are in stark contrast to the conclusions reached by Dr. Brown in her examination of these three dogs six weeks later. Dr. Brown did not find that any of these dogs were in discomfort or required treatment. She reported that Tammy and Crystal had mild tartar which was in the normal limits for these dogs and she pronounced Laya's teeth to be beautiful, that is, without tartar and nice and white. Since dental disease if left untreated tends to get worse as time passes, the 6-week time gap between the issuance of the Order and Dr. Brown's assessment of the dogs' teeth does not diminish this lack of corroboration of the OSPCA investigators' observations.

179 For the above reasons, the Board is persuaded that Agent Hitchen did not have reasonable grounds for believing that the dogs, Tammy, Crystal and Laya were in distress at the time she issued the Order and therefore the part of the Order pertaining to these three dogs was not made in accordance with section 13(1) of the Act. Therefore, Appellant is entitled to the costs of complying with this Order she incurred by having these three dogs examined by Dr. Brown.

180 3. The Board finds the Notice of Modification, dated August 16, 2012, requiring Appellant to consult with the veterinarian who examined Vicki, on July 30, 2012, to develop a follow- up treatment plan with respect to Vicki's dental issues; to follow the veterinarian's recommendations, and to send the veterinarian's report outlining the treatments recommended and undertaken to the OSPCA. [Exhibit 19] to be justified.

181 Agent Hitchen said she had issued the Notice of Modification to provide Appellant with more details of Dr. Brown's recommendation. Given that the Board found that the Order as it applied to Vicki was made in compliance with section 13(1) of the Act and Dr. Brown's opinion that if Vicki is not treated, her gum infection will get worse, the Board is confirming the Notice of Modification with certain minor changes.

Decision — Part III - The Merits

182 The Board's decision on the merits is as follows:

- 1) The Board orders the OSPCA to pay to Appellant the amount set out in Dr. Brown's Invoice, submitted as Exhibit 4, in respect of the examinations of the dogs, Tammy, Crustal and Laya, which is \$61.20 plus HST per dog for a total of \$207.47 for the three dogs.
- 2) The Notice of Modification, dated August 16, 2012, which applies to the dog, Vicki, is further modified by:
 - (a) replacing the compliance date of August 22, 2012, with a compliance date of February 28, 2013, and
 - (b) adding the words, "or another veterinarian of Appellant's choice", after the words, "the examining veterinarian".

Final Conclusions

183 After hearing the testimony and the oral arguments of counsel for each party, including the final submissions, during the ten days of the hearing, and reading the final written submissions of counsel for each party, a summary of the Board's final conclusions with respect to:

- the issues in the case, and
- Appellant's request for remedies

are as follows:

Issues

I Charter Jurisdiction

The Board has general *Charter* jurisdiction and the jurisdiction to grant *the Charter* remedies sought.

II The Charter Issue

Appellant's rights under *s.8 of the Charter* were not infringed by the search of her residence on May 18, 2012.

III The Merits

- 1) Appellant is entitled to the veterinary costs she incurred in complying with the modified Order, in respect of the dogs, Tammy, Crystal and Laya.
- 2) The Notice of Modification in respect of the dog, Vicki, dated August 16, 2012, is confirmed with the compliance date extended to February 28, 2013.

Remedies

- 1) Since the Board has found that Appellant's rights under *s.8 of the Charter* were not infringed by the search of her residence on May 18, 2012, the evidence obtained as a result of the search is admissible, without a *s. 24(2)* analysis.

- 2) Appellant is awarded the veterinary costs she incurred in complying with the Order as modified on June 28, 2012, pursuant to section 117(6)(c) of the Act in respect of the dogs, Tammy, Crystal and Laya.
- 3) The Notice of Modification, dated August 16, 2012, of the Order is confirmed, but modified as to the compliance date, pursuant to section 17(66)(a) of the Act.
- 4) Appellant is not entitled to an award of legal costs pursuant s. 24(1) of the *Charter*.

Appendix A

Exhibits

- 1 Veterinary report by Dr. Kellie Stein of the Island City Animal Hospital in Brockville, Ontario, regarding the examination of Appellant's dog, "Logan" presented by the Leeds & Grenville SPCA. (Not dated).
- 2 Veterinary report by Dr. Julia Brown of the Westport Veterinary Services, dated July 31, 2012, regarding the examination of six of Appellant's dogs on July 30, 2012, including medical reports for each of the dogs.
- 3 Letter from Dr. Brown to Mr. Andrews (counsel to Appellant), dated August 9, 2012, explaining certain of the notes in the medical records of the individual dogs.
- 4 Invoice, dated July 30, 2012, sent to Appellant from Westport Veterinary Services, for the examination of the six dogs referred to in Exhibits 2 and 3 above.
- 5 A - O Series of fifteen photographs of the interior and exterior of Appellant's home, taken by witness, Shawn Carmichael, on May 29, 2012.
- 6 A - B A: Cost of Removal invoice, as of March 5, 2011, signed by Agent Baker; B: Statement of Account, as of March 8, 2011, signed by Agent Hitchen; C: Statement of Account as of March 16, 2011, signed by Agent Hitchen.
- 7 Sketch of the floor plan of Appellant's residence.
- 8 A - U Series of twenty-one photographs taken by OSPCA Agent Rene Baker on May 18, 2012, printed in black and white.
- 9 Series of four photographs taken by Ian Cummings, a reporter, "on the weekend after May 18, 2012".
- 10 Notice of Removal of a male Yorkie-type dog, dated June 19, 2012, signed by Agent Hitchen.
- 11 Statement of Account, as of June 25, 2012, signed by Agent Hitchen.
- 12 Warrant, Form 2, for entry onto Appellant's premises on May 18, 2012, signed by Justice of the Peace for Ontario, John W. Doran.
- 13 Appendix A, A sworn Information to Obtain a warrant by Agent Hitchen to search Appellant's residence on May 18, 2012, between the hours of 9:00 am and 7:00 pm for animals in distress.
- 14 Warrant, Form 2, for entry onto Appellant's premises on June 5, 2012, between 11:30 am and 6:30 pm, signed by a Justice of the Peace for Ontario.
- 15 Warrant, Form 2, for entry onto Appellant's premises on June 19, 2012, between 2:00 pm and 7:00 pm, signed by a Justice of the Peace for Ontario, dated July 19, 2012.
- 16 Warrant, Form 2 for entry onto Appellant's premises on September 7, 2012, between 0900 hours and 2300 hours, signed by a Justice of the Peace for Ontario on September 5, 2012.
- 17 Three-page OSPCA Compliance Order, dated May 18, 2012: Page 1: in respect of "5 adult dogs - Yorkie, Maltese type dogs"; Page 2: in respect of "all dogs located in residence"; and Page 3: regarding "all animals located in the residence", signed by Agent Hitchen.
- 18 OSPCA Notice of Modification of the Order, dated June 28, 2012, in respect of "4 remaining adult dogs — Yorkie, Maltese type dogs and 2 Siamese type cats, with a compliance date of June 4, 2012, signed by Agent Hitchen.
- 19 OSPCA Notice of Modification of the Order, dated August 16, 2012, in respect of "Vicki", a "Yorkshire Terrier, white and grey female" with a compliance date of August 22, 2012.
- 20 A-U Series of twenty-one photographs taken by OSPCA Agent Baker on May 18, 2012, printed in colour. (Same photos as in Exhibit 8).

- 21 Email from Mr. Chan to Mr. Andrews re chain of conveyance of complaint from informant to Agent Hitchen. Not formally submitted — may be submitted in connection with Garofoli Application
- 22 A, B & C A: A page copied from Agent Hitchen's Duty Notes of May 18, 2012; B: Another page copied from Agent Hitchen's Duty Notes of May 18 2012; C: email correspondence between Mr. Chan and Mr. Andrews regarding disclosure.
- 23 Notice of Revocation of housekeeping stipulations and those relating to the cats in the Order submitted as Exhibit 17, dated June 28, 2012, signed by Agent Hitchen.
- 24 Notice of Revocation of Order in Exhibit 17, in respect of the 3 remaining dogs, dated August 16, 2012, signed by Agent Hitchen.
- 25 OSPCA "While you were out" notice, dated May 14, 2012, completed by Agent Hitchen.
- 26 A & B A: OSPCA "While you were out" notice, dated May 15, 2012, completed by Agent Hitchen and B: OSPCA "While you were out" notice, dated May 16, 2012, completed by Agent Hitchen and.
- 27 Email to Agent Hitchen (name of sender redacted) dated May 16, 2012, stating that Appellant has an active Kijiji advertisement for 3 Yorkie puppies for sale.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.