

*Case Name:*

**R. v. Toronto Humane Society**

**Between**

**The Toronto Humane Society, Applicant, and  
Her Majesty the Queen, Respondent, and  
Ontario Society for the Prevention of Cruelty to Animals,  
Moving Party**

[2010] O.J. No. 1856

213 C.R.R. (2d) 261

Ontario Superior Court of Justice  
Toronto, Ontario

**J.B. McMahon J.**

Heard: January 19, 2010.

Judgment: January 19, 2010.

(88 paras.)

*Criminal law -- Criminal Code offences -- Wilful and forbidden acts in respect of certain property -- Cruelty to animals -- Motion by Ontario Society for Prevention of Cruelty to Animals for standing or intervenor status in Toronto Humane Society's application to quash search warrant allowed in part -- OSPCA played role of law enforcement in investigation into allegations THS was mistreating animals -- Crown intervened to lay criminal charges so had carriage of matter and it would thus no longer be appropriate to grant OSPCA standing -- However, search warrant dealt with live animals alleged to have been mistreated, so OSPCA had unique interest and could make helpful submissions without causing prejudice -- Intervenor status granted, limited to making submissions.*

*Criminal law -- Powers of search and seizure -- Search warrants -- Validity -- Motion by Ontario Society for Prevention of Cruelty to Animals for standing or intervenor status in Toronto Humane Society's application to quash search warrant allowed in part -- OSPCA played role of law enforcement in investigation into allegations THS was mistreating animals -- Crown intervened to lay criminal charges so had carriage of matter and it would thus no longer be appropriate to grant OSPCA standing -- However, search warrant dealt with live animals alleged to have been mistreated, so OSPCA had unique interest and could make helpful submissions without causing prejudice -- Intervenor status granted, limited to making submissions.*

*Criminal law -- Procedure -- Intervenors -- Motion by Ontario Society for Prevention of Cruelty to Animals for standing or intervenor status in Toronto Humane Society's application to quash search warrant allowed in part -- OSPCA played role of law enforcement in investigation into allegations THS was mistreating animals -- Crown intervened to lay criminal charges so had carriage of matter and it would thus no longer be appropriate to grant*

*OSPCA standing -- However, search warrant dealt with live animals alleged to have been mistreated, so OSPCA had unique interest and could make helpful submissions without causing prejudice -- Intervenor status granted, limited to making submissions.*

Motion by the Ontario Society for the Prevention of Cruelty to Animals for standing or intervenor status on the Toronto Humane Society's application to quash a search warrant. THS alleged the search warrant violated its s. 8 Charter rights since it had not been charged with an offence. The Crown supported the OSPCA's motion. OSPCA inspectors had obtained a search warrant to investigate allegations of mistreatment of animals at THS. The search warrant had been ongoing since November 26. Various THS employees had been charged with criminal offences, which the Crown had taken carriage of.

HELD: Motion allowed in part. If the OSPCA's request for standing were granted, it would mean that all police agencies would have standing in challenges of search warrants, which they clearly did not. Once the Crown intervened, it had carriage over the criminal charges and played a separate role from the OSPCA, so it would not be appropriate to grant standing. However, because the search warrant dealt with the seizure of live animals that had allegedly been treated cruelly, the OSPCA had a unique interest and could make helpful submissions separate from those of the Crown. Granting intervenor status would not create prejudice or delay and the OSPCA would be limited to making oral and written submissions.

#### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8

Criminal Code, R.S.C. 1985, c. C-46, s. 487

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36,

#### **Counsel:**

F. Addario, Esq.: for the Applicant.

Ms. M. Saksznajder: for the Crown/Respondent.

C.C. Ruby, Esq. and G.J. Chan, Esq.: for the Moving Party.

### **REASONS FOR JUDGMENT**

**1 J.B. McMAHON J.:**-- The Ontario Society for the Prevention of Cruelty to Animals (hereinafter referred to as the "OSPCA"), is seeking an order granting the OSPCA standing or, in the alternative, intervener status to participate in an application by the Toronto Humane Society (hereinafter the "THS"). The THS is seeking in the nature of certiorari an order quashing a search warrant of the THS property at 11 River Street. Further, a declaration that the search warrant which continues to be executed violates the THS's rights pursuant to s. 8 of the Charter. In the alternative, an order directing the OSPCA and its agents to forthwith withdraw from the THS's operation at 11 River Street.

**2** The Crown, who is the respondent in the THS application, supports the OSPCA's application to be granted standing or, in the alternative, intervener status.

**3** The THS opposes the OSPCA being granted standing or intervener status.

**4** To determine the issue of standing, it is necessary to briefly review what has transpired to this point in time.

**5** On November 25, 2009, an Inspector Strooband of the OSPCA obtained a Criminal code search warrant. The search warrant, pursuant to s. 487, allowed the informant who is a peace officer to search the premises and grounds of 11 River Street, the business address for the THS, for animals, medical records of animals that had previously been housed at the THS, statistical records, adoption records, other financial records and wireless communications, along with personal records, pay records and certain briefcases. The offences alleged to have been committed were cruelty to animals, obstruct peace officer and conspiracy to commit an indictable offence.

**6** The warrant to search found at tab 2 of the THS's application record allows the peace officer to enter the premises and grounds as of 26 November, 12 noon, 2009. Remarkably, there is no end date to the search. Further, the warrant does not address the issue of potential solicitor-client privileged information or documentation which may be present in the location to be searched.

**7** On the record filed, the OSPCA has been in occupation of 11 River Street, conducting a search from the 26th of November until at least last week when I heard this application. I was advised that to some extent the search is still continuing of part of that premises.

**8** Further, from the record, it would appear that various individuals have been charged with Criminal Code offences as well as some OSPCA offences. I was advised on this application that the Provincial Crown has intervened on the criminal charges and has taken carriage of those criminal prosecutions. Further, I have been advised that the OSPCA still has carriage of the OSPCA Act provincial offences.

**9** The THS as a legal entity is not charged with any criminal or OSPCA offences. In December of 2009, the THS brought its application in Superior Court and, as indicated, is seeking a Charter remedy as a third party affected by the execution of the search warrant. It seeks a declaration that the continued execution of the search warrant violates the applicant's rights guaranteed by s. 8 of the Charter. Further, a declaration that the manner in which the search was conducted is unreasonable and is contrary to s. 8 of the Charter. The THS is also seeking a declaration requiring the OSPCA and its agents to forthwith withdraw from the premises or, in the alternative, the Court should set a specified date and time for the withdrawal.

**10** On December 22, 2009, the THS's application was scheduled to be heard on an emergency basis. However, the Crown sought an adjournment. Nordheimer J. granted an adjournment but upon certain terms. He set up a procedure whereby the documents would be sealed so solicitor client privilege could be protected, and the documents would be placed in the hands of a third party. As of 9:00 a.m. on December 29, 2009, the OSPCA shall cease to prevent or prohibit any employees of the THS or members of its Board of Directors not criminally charged accessing degrees all books, computer systems or material for the purpose of carrying out their business.

**11** On my reading of the terms of Nordheimer J., as of December 29, 2009, the only area of 11 River Street that the OSPCA could continue to control would be the premises that are devoted to the care and treatment of the animals. The status quo would remain until the THS application could be heard in January 2010.

**12** It is based upon this background that the OSPCA seeks standing or intervener status in the application of the THS.

**13** What this case really boils down to is basically two issues. First, on the THS application, should the execution of the criminal search warrant continue indefinitely at the THS property located at 11 River Street?

**14** Second, on this OSPCA application, should the OSPCA be granted either standing or intervener status on the first issue?

**15** On the first issue, the Provincial Crown has intervened and has taken carriage of the criminal prosecution and has also taken carriage of the third party application brought before this Court by the THS.

**16** It is argued by the OSPCA that as a law enforcement body, responsible for the conduct of the investigation and search, that it has an interest separate and apart from the Crown who has taken carriage of the matter. As such, it is submitted, it is entitled to standing and to call evidence and make representations on this application.

**17** If the OSPCA is correct in this submission and analysis, then every police agency in this province would have the right to standing in any challenge to the manner in which a Criminal Code search warrant is executed.

**18** As pointed out by counsel for the THS, counsel for the OSPCA could not, in either its materials or in oral submissions, point to one case where a police agency in Ontario had been granted standing to challenge a Criminal Code search warrant or its execution where the Crown had taken carriage of the prosecution.

**19** I find that it would be a dangerous precedent to allow police agencies or other third party agencies standing on the lawfulness of the issuance and execution of Criminal Code search warrants. Counsel for the OSPCA submits that there is a distinction between the actual criminal prosecution and the investigative stages in the execution of a search warrant.

**20** I disagree with this submission. Once the Crown has elected to intervene in a criminal prosecution and the execution of the Criminal Code search warrant, then the Crown has carriage of the case (see *R. v. Regan* (2002), 161 C.C.C. (3d) 97 at para. 155). I recognize that Ginnie J. is speaking in dissent when he stated the following, at 155:

"It is clear that Crown attorneys perform an essential Minister of Justice role at all stages of their work ...

The Minister of Justice responsibility is not confined to the courtroom and attaches to the Crown attorney in all dealings in relation to an accused person whether before or after the charges are laid."

**21** While this was said in dissent, as is noted in Justice Rosenberg's paper, the majority do not take issue with this statement off the law. Further, this is the traditional role the Crown has played in Ontario for many years. Mr. Justice G. Arthur Martin came to the exact same conclusion in the Martin Report. He emphasized the important role the Crown must play during the investigative stages and providing advice on reasonable prospect of conviction and other advice. The Crown has intervened in the criminal prosecution and, importantly, this application.

**22** The THS application is not squarely within a criminal prosecution. It is a third party application. The third party application is directly related to the lawfulness of the execution of a Criminal Code search warrant upon which the Crown has taken carriage.

**23** There are sound reasons why the Crown, as the quasi Minister of Justice, must be the party responsible for the carriage of this case. The Crown, as the quasi Minister of Justice, plays a role, importantly, independent of the police agency who obtains the search warrant and executes it. The Crown must serve the public interest, which is separate and apart from that of the law enforcement agency.

**24** This principle was yet again reiterated by the Supreme Court of Canada in *R. v. Regan*, supra, by Justice LeBel at paragraphs 66 and 70. She stated:

"[66] The need for separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada.

[70] The parties agree in the present case that Crown objectivity and the separation of the Crown from police functions are elements of the judicial process which must be safeguarded."

**25** In the application at bar, the role of the Crown is separate and distinct from the OSPCA. The Crown cannot abdicate or delegate quasi Minister of Justice functions to the OSPCA. Equally, I do not see that it would be either appropriate or necessary to grant the OSPCA standing based upon this argument.

**26** It has further been argued by the OSPCA that it is not only a law enforcement agency conducting the search, it is also the prosecutor of the provincial offence charges. It is submitted that it has an interest separate and distinct as one of the Crown prosecutors. It is argued that it has a vested interest in the fruits of the Criminal Code search warrant and as such, it should be granted standing in its capacity as prosecutor.

**27** On a daily basis, in this province, Criminal Code search warrants are executed which result in the seizure of property as well as narcotics. The fruits of the Criminal Code search warrants assist both the Provincial Crown as well as the Federal Crown who, by statute, has a responsibility for narcotics prosecutions. Both Crowns are not given standing to argue the legality of the same warrant or its execution. To allow a second prosecutorial agency standing to argue such applications would result in duplication, lengthier applications and a potential unfair advantage to the prosecution.

**28** I am satisfied in this case that the Provincial Crown can fairly argue the merits of this application without the need of the OSPCA being granted standing. Further, in relation to the OSPCA's argument as a prosecutor, it is important to recognize that the resolution of the THS application will not impact directly the admissibility of any fruits of the Criminal Code search warrant at either the criminal or provincial offence trials. For the OSPCA to remain the prosecutor in the provincial offence trials, it would be open to them, should they wish to do so, to attempt to lead such evidence and argue it on the merits before the trial judge.

**29** For these reasons, I am not prepared to grant the OSPCA standing on this application.

**30** In the alternative, the OSPCA has sought intervener status. It seeks intervener status to lead evidence, cross-examine and make submissions. It would appear that all three parties to this application are in agreement. In determining intervener status, there are three criteria that must be met:

1. Has the OSPCA a unique interest in the application?
2. Can the OSPCA make useful and distinctive submissions? and
3. Will the OSPCA's intervention prejudice the parties?

(see: *R. v. Thurlow*, [1994] O.J. No. 68 (Ont. Gen. Div.); see also Rule 1.04(2) of the Criminal Proceeding Rules and Rule 13.01 of the Rules of Civil Procedure).

**31** It is also important to recognize that the OSPCA is not seeking third party intervener status in an actual criminal prosecution. It is seeking intervener status in relation to a free-standing application wherein the applicant is seeking a constitutional remedy.

**32** In dealing with the first criteria, the Criminal Code search warrant in question here does not simply deal with the seizure of inanimate objects. In a rather unusual case; it allows for the seizure of live animals and their investigation of those animals in relation to alleged allegations of cruelty. As potential evidence of the criminal offence of animal cruelty, this, by its very nature, makes this an unusual search. The OSPCA, by its legislative mandate, has a specific expertise and responsibility for the welfare of animals. It was integrally involved in the obtaining of the warrant, the execution of the warrant and has a unique legislative obligation in relation to the animals.

**33** I am satisfied that it has a unique interest in this application.

**34** On the second criteria, I am satisfied that because of the unique nature of the search warrant involving live animals, the OSPCA could make useful and distinctive submissions separate from those of the Crown. The OSPCA is in

a unique position to address this point. Live animals as evidence of animal cruelty and the well-being of the animals would not be something that generally would be within the Provincial Crown to deal with very often. For these reasons, I am satisfied that the applicant has met the second criteria of the test.

**35** Lastly, I am satisfied that the OSPCA's intervention will not prejudice the parties. The greatest risk of prejudice would be any delay in hearing of this time-sensitive application by the THS. During oral argument, I have been advised that all counsel will be available for a third day of argument, if necessary, next week so there will be no delay in the hearing of this, and there will be no delay in the decision of this Court.

**36** The second potential issue would be prejudice caused by the manner of adducing evidence and cross-examination of witnesses.

**37** I am satisfied that any such prejudice can be limited by structuring the nature of the intervener status.

**38** I am satisfied like any other challenge to a Criminal Code search warrant, the Provincial Crown will bear the responsibility of calling the evidence it wishes to rely on and cross-examine any evidence put forward by the applicant, THS. The OSPCA, like any police agency, will provide whatever technical information and advice it wishes to the Crown so the Crown can be properly prepared to lead the necessary evidentiary foundation.

**39** While I am ruling the OSPCA is granted intervener status, its intervener status will be limited to making oral and written submissions on this matter. The OSPCA will not be entitled to present evidence, to call witnesses or to cross-examine. The OSPCA will be entitled, however, to make both oral and written submissions based on the evidentiary record provided by the THS and the Crown. In a moment I will ask counsel's submission for timelines so the matter is not delayed, and the submissions of the OSPCA, should they elect to wish to make them, can be set out.

**40** THE COURT: So, gentlemen and Madam Crown, that is the decision of the Court.

**41** MS. SAKSZNAJDER: Thank you, Your Honour.

**42** THE COURT: So with that, Mr. Chan, being time sensitive and if you wish to make written submissions in relation to the matter, are we ready to look at timelines for doing that?

**43** MR. CHAN: Certainly, Your Honour. Before we get to that question, I think it would be helpful for the -- I know that the original application as framed by the THS was quite broad, sought various forms of release and it's come out in the course of oral argument on this motion and also on previous set dates that the situation has changed on the ground and the THS may not be looking for the exact same set of remedies as it originally was.

**44** THE COURT: Right.

**45** MR. CHAN: But we don't yet have, and I'm sure my friend can speak to this, a revised notice of application setting out what the issues are on this application.

**46** THE COURT: I think that's a fair comment. My understanding, Mr. Addario made it pretty clear last day, is that basically what he wants I think, he can speak for himself, is he wants the Court to declare that the search warrant -- the time for searching is now over, and under the Criminal Code search warrant you can no longer lawfully be in that premises, whether you can be there some other way, but I think that's what Mr. Addario's looking to get, but we can ask him. Mr. Addario, what's ---

**47** MR. ADDARIO: Yes. Well, that's right, Your Honour. I made it clear I'm not seeking to exclude evidence, nor probably could I, and what I said about narrowing down the notice of application, I've really done orally --

**48** THE COURT: Right.

**49** MR. ADDARIO: -- by indicating that Justice Nordheimer gave us the kind of Lavallee protection that should have been in the original.

**50** THE COURT: Right. I guess the only other question I have for this, and I asked Mr. Ruby last day but he didn't know, now that you're going to get intervener status, is there any date for the search warrant to end, Mr. Chan, or are you still continuing on?

**51** MR. CHAN: I'm not in a position to say at this moment. I know that there was an affidavit filed, it was either served or filed, I don't know if it as filed officially yesterday, on the separate civil application for the Public Guardian and Trustee to get involved. There was an affidavit filed on behalf of the OSPCA saying that we expected to finish examining animals by today. I think we are still in the process of copying vet records in the animal care areas, and I'm of in a position here today to say exactly -- provide an exact date to the Court as to when to be finished -- when we expect to be finished, whether it's prior to the hearing next week or it's post.

**52** THE COURT: Okay.

**53** MR. CHAN: Sorry.

**54** THE COURT: No, no. All right. So the bottom line is the search warrant continues to be executed.

**55** MR. CHAN: That's correct.

**56** THE COURT: As of today's date.

**57** MR. CHAN: That's correct. And perhaps if I could get one additional point of clarification from my friend on this.

**58** THE COURT: Sure.

**59** MR. CHAN: Sounds like privilege as an issue is no longer in dispute.

**60** THE COURT: I think it's in dispute. What's happened is Justice Nordheimer's solved that problem in a way that it worked for the people, that basically what was missing in the warrant, through the work of everybody and Justice Nordheimer, solicitor-client is now being protected by the vehicle that was drafted by Justice Nordheimer, I think.

**61** MR. CHAN: That's -- my point of confusion, though, is concerning whether my friend is still seeking to have a general declaration that the manner of the OSPCA search has violated s. 8 of the Charter because much of the affidavit material that we were originally provided with discusses, you know, all the -- who we did and didn't exclude during the search, how we conducted the search, you know, the involvement of media, and so if my friend is still seeking a general declaration to that effect, that will put into play the bulk of the affidavit material that we were originally served with.

**62** If it's simply a narrow question of can we stay in there any longer than the hearing, you know, when this matter's heard next week, that would seem to confine and narrow the issue significantly which would our preparation much easier.

**63** THE COURT: Okay.

**64** MR. CHAN: And quicker.

**65** THE COURT: But I think Mr. Addario's been pretty clear on that. Ms. Saksznajder, are you -- do you have any issue with what Mr. Addario's position is?

**66** MS. SAKSZNAJDER: I'm not -- I don't take any issue with respect to the remedy he's seeking now. I understand that that's quite narrow, but I echo my friend's comments, Mr. Chan's comments that Mr. Addario in his original

materials outlined various ways in which he alleges the search was unreasonable, the manner of the search was unreasonable. Those included a videotape of the search itself. It included not having a provision for solicitor-client privilege. It included excluding certain persons from the premises when they were not charged or otherwise to be excluded.

67 THE COURT: Or putting things on YouTube.

68 MS. SAKSZNAJDER: I beg -- yes, so that was my friend's basis for saying that the manner of the execution of the search was unreasonable.

69 Now I appreciate he's not seeking remedies connected to those specific allegations, but if they still form the underlying basis upon which he's asking this Court to determine whether the search was or wasn't unreasonable, then I think -- I understood that to be what Mr. Chan is wondering, as am I, because it does affect the breadth of our factum in response.

70 THE COURT: Mr. Addario?

71 MR. ADDARIO: Well, I'll try to help you to the extent I can, Your Honour. I'm doing it as an outsider as opposed to having any disclosure. Obviously Ms. Saksznajder doesn't have an official responsibility to disclose to me what's going on.

72 We took the -- I took the presentation of evidence on YouTube and other things that have taken place as evidence of a lack of good faith in the execution of the warrant, a lack of bona fides for a strict purpose authorized by His Worship.

73 To the extent, that the search is not complete, notwithstanding what Justice Nordheimer was told and what the justice of the peace was told, that lack of good faith will be relevant, but no, I don't need to prove -- I don't need to get Your Honour to say the manner of search was unreasonable if you're willing to draw the inferences I want about why the search should have been over a month ago. I hope that helps. If it doesn't --

74 THE COURT: Okay.

75 MR. ADDARIO: -- I'll -- you know, I want to talk to Ms. Saksznajder over the next two or three days a lot and try to narrow the issues.

76 THE COURT: I think I know where we're going, but you can -- if there's issues between Mr. Chan and Ms. Saksznajder and yourself -- if everybody's on the same page, there's no -- I don't see an absolute need for it for my purposes. If there is anything that you want to file with the Court, that's fine, you can. You don't have to. As long as your friends know what the argument is.

77 MR. ADDARIO: Now ---

78 THE COURT: If you do that, it wouldn't hurt for me to see it as well.

79 MR. ADDARIO: And I'm conscious of the fact we'll get a better hearing if the issues are focused and Your Honour has less to decide rather than more.

80 THE COURT: Okay. So with that, as far as -- Mr. Chan, you get -- what day is today because I just -- today is --

81 MR. ADDARIO: Tuesday the 19th.

82 THE COURT: -- Tuesday the 19th, and we're going to start this next Tuesday, so whatever material -- now, just as you're -- based on my ruling, obviously you won't be calling evidence or cross-examining. If there's anything you wish,

depending on the role the Crown takes and what she thinks is appropriate and you can canvass and consult like any other agency, but as far as your submissions, when do you think we would be able to get those? Would Friday be a reasonable day if you find out today?

**83** MR. CHAN: I was hoping for Monday, Your Honour, for a few reasons. One, because there's going to be I gather discussions over the next couple of days as to what the issues are and also what affidavits the Crown is going to want to put in and whether my friend will be relying on any further affidavits. That's the first reason. Second is also Mr. Ruby's away all of this week and is returning Saturday.

**84** THE COURT: Okay, you know what.

**85** MR. CHAN: So if we could file the factum, serve and file the factum on Monday, that would be very helpful.

**86** THE COURT: Mr. Addario, what about -- I mean do you -- you can respond -- put it this way. I don't expect you to file anything in response to theirs because of the late service of it. You could do it orally, so that's fine. You're not prejudiced by getting it on Monday?

**87** MR. ADDARIO: No, I can -- I can deal with that. It might be that because it's an unusual case, if Your Honour's in the building, we may need a little bit of guidance tomorrow and the next day. Are you around?

**88** THE COURT: No, I'm not going anywhere, so if you need to come back on how it's going to unfold next week, that would be great. So I'm going to be here if you need me on the thing, and we'll see everybody back -- so the application record will be endorsed:

Request for standing denied. Intervener status granted for the limited purpose of providing written and oral submissions.

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