

# The Constitutional Elephant in the Room: Section 8 *Charter* Issues with *The Animal Care Act*

RYAN ZIEGLER \*

## ABSTRACT

*The Animal Care Act* (Manitoba) is touted as one of the most comprehensive animal protection statutes in Canada. Its strength derives largely from the unparalleled entry and search powers that it confers upon animal protection officers appointed under the statute. Sections 8(5) and 10.3(1) of *The Animal Care Act* respectively permit warrantless entries and searches of non-commercial non-residential premises and dwellings.

This article examines whether ss. 8(5) and 10.3(1) of *The Animal Care Act* can withstand s. 8 *Charter* scrutiny, and, if not, whether these sections are justifiable under s. 1 of the *Charter*. This article contends that although *The Animal Care Act* provides for regulatory search powers, that fact alone does not diminish one's expectation of privacy as a matter of course. Rather, the extent of the privacy expectation with respect to a regulated activity depends on context. This article suggests that a fulsome appraisal of context with respect to *The Animal Care Act* must consider (1) the stigma, publicity and consequences that attach to animal cruelty charges; (2) the extraordinary scope of the ss. 8(5) and 10.3(1) entry and inspection powers; and (3) the inadequate or non-existent safeguards provided for by *The Animal Care Act*. As such, the system of prior authorized searches that the Supreme Court of Canada outlined in *Hunter v Southam* should apply to *The*

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\* Ryan Ziegler is a graduate of Robson Hall (2019), currently pursuing a career in criminal defence and *Charter* litigation in Calgary, Alberta. The author would like to thank Professor Richard Jochelson (Robson Hall) and Michael Walker (Legal Aid Manitoba) for their encouragement; his fiancée for her support and patience; the anonymous reviewers for their invaluable feedback; and the student editors for their assistance in bringing this article to completion.

*Animal Care Act*. This article further questions whether, given the availability of tele-warrants under *The Provincial Offences Act*, this overreaching is necessary.

**Keywords:** Section 8; search; seizure; animal welfare; animal cruelty; animal protection; criminal law; regulatory search; Manitoba; *Charter*; *Oakes*; stigma; *Hunter v Southam*

## I. INTRODUCTION

In 1996, the Legislature of Manitoba enacted *The Animal Care Act* (“the ACA”).<sup>1</sup> The ACA is considered to be amongst the most stringent animal protection statutes in Canada.<sup>2</sup> Much of this strength flows from a catalogue of entry and search powers conferred upon animal protection officers (“APOs”) appointed under the ACA. In particular, ss. 8(5) and 10.3(1) of the ACA provide broad warrantless entry and search powers to APOs under certain conditions into non-residential non-commercial private premises, as well as, dwellings.<sup>3</sup>

Canadian courts have consistently shielded the sanctity of one’s dwelling, and on occasion private premises, from warrantless searches by state agents.<sup>4</sup> In 1984, the Supreme Court of Canada (“the SCC”) outlined a system of prior authorization for searches in *Hunter v Southam* (“*Hunter*”).<sup>5</sup> This system requires a neutral and impartial judicial figure to issue a warrant based on information sworn under oath.<sup>6</sup> No challenges to ss. 8(5) and

<sup>1</sup> *The Animal Care Act*, SM 1996, c 69 [ACA].

<sup>2</sup> Animal Legal Defence Fund, “Prince Edward Island Jumps to Top Spot as Canada’s Best Province for Animal Protection Laws” (17 July 2017), online: <[aldf.org/article/prince-edward-island-jumps-to-top-spot-as-canadas-best-province-for-animal-protection-laws/](http://aldf.org/article/prince-edward-island-jumps-to-top-spot-as-canadas-best-province-for-animal-protection-laws/)> [perma.cc/EY7B-UG2Q]; Animal Legal Defence Fund, “2016 Canadian Animal Protection Law Rankings” (21 July 2016), online: <[aldf.org/article/2016-canadian-animal-protection-laws-rankings/](http://aldf.org/article/2016-canadian-animal-protection-laws-rankings/)> [perma.cc/5F4L-36SU]; Animal Legal Defence Fund, “2015 Canadian Animal Protection Law Rankings” (7 July 2015), online: <[aldf.org/article/2015-canadian-animal-protection-laws-rankings/](http://aldf.org/article/2015-canadian-animal-protection-laws-rankings/)> [perma.cc/S3Q2-S3S9].

<sup>3</sup> This article refers to ss. 8(5) and 10.3(1) of the ACA simply as ss. 8(5) and 10.3(1) to avoid cumbersome phrasing.

<sup>4</sup> *R v Evans*, [1996] 1 SCR 8, [1996] SCJ No 1 (QL).

<sup>5</sup> *Hunter v Southam*, [1984] 2 SCR 145, 1984 CarswellAlta 121 [cited to CarswellAlta] [*Hunter*].

<sup>6</sup> *Ibid.*

10.3(1) of the ACA have been reported to date though each provision appears to be *prima facie* constitutionally impermissible in relation to s. 8 of the *Canadian Charter of Rights and Freedoms* (“the Charter”).<sup>7</sup>

This article will begin by briefly outlining the ACA’s legislative history, and the developments of ss. 8(5) and 10.3(1). Next, this article will review *Hunter*, and several SCC decisions on regulatory searches. Subsequently, this article will explore what expectation of privacy one ought to reasonably expect in relation to the ss. 8(5) and 10.3(1). In defining one’s reasonable expectation of privacy (“REP”) in relation to the ACA, I will contend that a contextual, rather than bright-line, approach is the proper analytical basis. By adopting this contextual approach, this article will argue that (1) stigma, publicity and statutory consequences; (2) the extraordinary scope and application of ss. 8(5) and 10.3(1); and (3) the inadequacy of statutory safeguards under the ACA, must be considered when determining REP in

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<sup>7</sup> Manitoba appears to have only three reported decisions involving independent constitutional analyses in the context of ACA searches and regulatory prosecutions. Results were found by searching for “animal care act’ manitoba” on LexisNexis QuickLaw, and then narrowing results to include only decisions relating to “Constitutional Law” in “Manitoba”. The exact same decisions are found on WestLawNext when using the same search terms and by applying the same filters. These results were cross-referenced with the results yielded by using the same search terms in each legal database, but by filtering the results to include only “Criminal Law” decisions.

There are actually four reported decisions in Manitoba that touch on ACA searches and regulatory prosecutions and the *Charter*. A review of these decisions reveals, however, that only three (listed below) of these four decisions contain original constitutional analyses. The remaining reported decision, an appeal decision, mentions, and endorses, only in passing the s. 24(2) analysis performed in earlier proceedings, but does not undertake an analysis of its own.

The three decisions with independent constitutional analyses are: *R v Bernier*, 2012 MBPC 36 [Bernier]; *R v Nikkel*, 2013 MBQB 207 [Nikkel]; *R v Taylor*, 2015 MBQB 193 [Taylor]. The remaining decision is *R v Ragnanan*, 2014 MBCA 1.

These decisions’ respective engagements with the ACA are circumscribed to s. 24(2) *Charter* applications to exclude evidence based on alleged s. 8 *Charter* breaches. The depth of analysis across these decisions varies considerably. For example, the Manitoba Provincial Court in *Bernier* dedicates two lines in a 362 paragraph decision to the issue of s. 8 *Charter* breaches and s. 24(2) exclusion analysis. By contrast, the Manitoba Court of Queen’s Bench spends 32 paragraphs in 57 paragraph decision conducting ss. 8 and 24(2) *Charter* analyses. Further, none of these three decisions examine ss. 8(5) and 10.3(1) of the ACA but rather actively discuss either s. 8(1) of the ACA or consent searches as they relate to the ACA. Only *R v Taylor*, which is discussed throughout below, involves a consideration of ACA searches as they relate to the dwelling.

relation to the ACA. From these analyses, this article argues that the s. 8 *Charter* safeguards outlined in *Hunter* ought to apply to ss. 8(5) and 10.3(1). This article then concludes that ss. 8(5) and 10.3(1) cannot be justified under s. 1 of the *Charter*.

## II. A BRIEF LEGISLATIVE HISTORY OF THE ACA

One could be forgiven for mistakenly assuming that the ACA is long-standing legislative artifact. In reality, Manitoba enacted the ACA in 1996; moreover, many of the ACA's entry and search powers were enacted by way of amendment in 2009.<sup>8</sup> Prior to its enactment, the seeds of the ACA germinated in related but separate provincial statutes: *The Animal Diseases Act*, *The Animal Husbandry Act*, *The Highway Traffic Act*, and *The Wildlife Act*.<sup>9</sup> Further protection was, and continues to be, afforded by federal legislation: the *Criminal Code*, the *Health of Animals Act*, and the *Meat Inspection Act*.<sup>10</sup>

*The Animal Disease Act* related primarily to preventing and controlling diseases amongst commercial animals, *viz.* livestock.<sup>11</sup> In contrast, *The Animal Husbandry Act* focused solely on animal mistreatment.<sup>12</sup> Both statutes prescribed minimal standards of treatment to animals, definitions for "deprivation," and powers for agents appointed under these respective statutes.<sup>13</sup> As the Law Reform Commission of Manitoba pointed out, however:

An analysis of these legislative provisions suggests that they suffer from a lack of coordination and clarity with the result that those individuals responsible for enforcing and administering these statutes are hampered as much as assisted by them. The first and most obvious problem with the current law is that it is confusing...There are no less than seven categories of enforcing agents mentioned in the three acts...[D]ifferent provisions of the Act[s] have grouped them differently...As a result of this haphazard approach to animal protection provisions, they are difficult to locate. Not only are they divided into four statutes

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<sup>8</sup> ACA, *supra* note 1; *The Animal Care Amendment Act*, SM 2009, c 4 [ACAA].

<sup>9</sup> Manitoba, Manitoba Law Reform Commission, *Animal Protection*, Report #93 (Manitoba: Law Reform Commission, 1996) at 8-11 [Manitoba Law Reform Commission].

<sup>10</sup> *Ibid* at 4-5.

<sup>11</sup> *Ibid* at 5-6.

<sup>12</sup> *Ibid* at 6-8.

<sup>13</sup> *Ibid* at 5-8.

but none of the statutes in question readily identify themselves to a searcher for these provisions.<sup>14</sup>

The proliferation of “puppy mills” throughout rural Manitoba in the mid-1990s provided the Legislature with the impetus to resolve these issues.<sup>15</sup>

In drafting the ACA, the Legislature pulled and modified provisions from *The Animal Husbandry Act* and *The Animal Diseases Act*, introduced new legislative measures, and combined them. The ACA increased penalties for falling below minimal standards of care, and, more significantly, established animal cruelty as a provincial regulatory concern, rather than a federal criminal concern.<sup>16</sup> Additionally, the ACA drew explicit distinctions between commercial animals and companion animals that were codified, in part, in s. 8(5):

[A]t any reasonable time and where reasonably required to determine compliance with this Act...enter and inspect any facility, premises or other place that is not a dwelling place...in which the animal protection officer believes on reasonable grounds there is a companion animal in distress...<sup>17</sup>

In 2009, the Legislature significantly amended the ACA, which included the introduction of s. 10.3(1). Section 10.3(1) signified a remarkable departure from previous iterations of the ACA. Section 10.3(1)(a) provides that:

An animal protection officer may, at any reasonable time and where reasonably required to determine compliance with an order made under subsection 10.1(1)...enter and inspect any place in which the animal protection officer believes on reasonable grounds there is or should be an animal, structure, supply of food or water, shelter, enclosure, area, document, record or other thing to which the order applies.<sup>18</sup>

Section 10.1(1) of the ACA provides that where a director under the ACA has reasonable grounds to believe that an animal “is in distress or an animal’s owner is not carrying out his or her duties toward the animals as set out in section 2; the director may order the owner to take any action that

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<sup>14</sup> *Ibid* at 8-10.

<sup>15</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3864 (Rosann Wowchuk).

<sup>16</sup> *Ibid* at 3858 (Stan Struthers).

<sup>17</sup> ACA, *supra* note 1, s 8(5) [emphasis added].

<sup>18</sup> *Ibid*, s 10.3(1)(a) [emphasis added].

the director believes is necessary.”<sup>19</sup> In effect, a s. 10.1(1) director’s order compels an animal owner, including private pet owners, to either undertake or cease specific actions with respect to the pet owner’s duties under s. 2(1) of the ACA.

The addition, in 2009, of director’s orders amendments dramatically broadened the availability of entry and search powers under the ACA, housing a scheme whereby an individual (the director), charged with significant investigatory functions, could also authorize warrantless entries and searches of places, including dwellings.

Section 10.3(1) is unprecedented not only in Manitoba but throughout Canada, other than Ontario. Aside from a few qualified exceptions, ss. 8(5) and 10.3(1) do not represent the legislative norm throughout Canada’s other provinces with respect to animal protection legislation.<sup>20</sup> Where other provincial animal welfare statutes authorize warrantless entries to private premises, these private premises are commercial and non-residential in nature since the inspection powers clearly relate to commercial practices.<sup>21</sup> The vast majority of provincial animal protection legislation in Canada either expressly requires a warrant to enter a dwelling or declines to empower APOs to enter dwellings without a warrant, aside from codifications of exigent search powers.<sup>22</sup> Moreover, federal regulatory

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<sup>19</sup> *Ibid*, s 10.1(1).

<sup>20</sup> In general, it appears that no provincial animal welfare statutes, other than ss 13(1) and 13(6) of the *Ontario Society for the Prevention of Cruelty to Animals Act*, permit agents/inspectors to repeatedly enter and inspect someone’s home without a warrant on the basis of a director’s order or a comparable legislative instrument. Section 23(4) of the *Animal Protection Act* of Nova Scotia permits warrantless searches of non-residential non-commercial property; as is explored below though, this provision was found to be unconstitutional.

<sup>21</sup> See: *Preventions of Cruelty to Animals Act*, RSBC 1996, c 372, ss 14(1), 14(2), 15, 15.1, 15.2 (British Columbia); *Animal Protection Act*, RSA 2000, c A-41, ss 4(1), 10(1) (Alberta); *The Animal Protection Act*, 2018, SS 2018, c A-21.2, s 12(1) (Saskatchewan); *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, ss 11.4(1), 12(6) (Ontario); *Animal Welfare and Safety Act*, CQLR, c B-3.1, s 39 (Quebec); *Animal Health and Protection Act*, SNL 2010, c A-9.1, s 10(1) (Newfoundland and Labrador); *Society for the Prevention of Cruelty to Animals Act*, RSNB 2014, c 132, s 8(1) (New Brunswick); NB Reg 2010-299, s 2 (New Brunswick); *Animal Welfare Act*, RSPEI 1988, c A-11.1, ss 19, 31(1), 31(2), 32(1) (Prince Edward Island); *Animal Protection Act*, SNS 2008, c 33, s 23(4) (Nova Scotia).

<sup>22</sup> *Ibid*. It is worth noting, that s. 22(2) of *The Tax Administration and Miscellaneous Taxes Act* of Manitoba does allow tax officers appointed under the act a statutory right of warrantless entry into any premises or place, but not a right of inspection of that

statutes touching on animal welfare, such as the *Food and Drugs Act*, and the *Health of Animals Act*, all require warrants to enter and search a dwelling.<sup>23</sup>

### III. TENSIONS BETWEEN SECTION 8 OF THE *CHARTER*, *HUNTER*, AND REGULATORY INSPECTIONS

Section 8 provides that “Everyone has the right to be secure from unreasonable search and seizure.”<sup>24</sup> The SCC in *Hunter*—a case involving searches under the *Combines Investigation Act*, a regulatory statute—explained the obligation to obtain judicial authorization prior to conducting a search:

The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual’s right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.<sup>25</sup>

*Hunter* outlined two broad preconditions for meaningful prior authorization: (1) the “[person providing authorization] must at a minimum be capable of acting judicially,” meaning she cannot be assigned concurrent prosecutorial or investigatory functions or duties; and (2) reasonable grounds, established under oath, “to believe that an offence has been committed and that there is evidence to be found at the place of the search.”<sup>26</sup> These are the minimum standards for authorizing a search under s. 8.<sup>27</sup>

*Hunter* is the starting point for s. 8 cases, but not the final word. Outside criminal prosecutions, the *Hunter*-criteria may be inapplicable. The SCC has struggled mightily to provide conceptual clarity for s. 8 as it relates to

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premises or place, where there are “reasonable grounds to believe records relevant to the administration or enforcement of a tax Act are kept”: RSM 1987, c R150.

<sup>23</sup> *Food and Drugs Act*, RSC 1985, c F-27, s 23(1.1); *Health of Animals Act*, SC 1990, c 21, s 39(1); *Meat Inspection Act*, RSC 1985, c 25 (1<sup>st</sup> Supp), s 13(3).

<sup>24</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 8 [*Charter*].

<sup>25</sup> *Hunter*, *supra* note 5 at para 32.

<sup>26</sup> *Ibid* at paras 32, 43.

<sup>27</sup> *Ibid*.

administrative searches and regulatory inspections, opting instead for something of a piecemeal approach.<sup>28</sup> As Professor Don Stuart commented:

[W]hether the *Hunter* standards will be applied [outside of *Criminal Code* and drug offence prosecutions] will not often depend on the uncertain vagaries of classification or administrative or a contextual analysis of the particular power and the particular form of regulation.<sup>29</sup>

This commentary is borne out by the case law. For example, in *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Selection Milton*, the SCC found it “neither useful nor prudent to introduce into Canadian law a prior system of authorization” for administrative warrants, and declined to apply the safeguards in *Hunter*.<sup>30</sup> In some sense, *Comité* attempted to immunize regulatory inspections from *Hunter* requirements on the basis that many administrative inspections are conducted “before it is even possible to establish the existence of reasonable grounds to believe that a breach of the law has occurred.”<sup>31</sup>

Eight years later, the SCC adopted a more characteristically contextual approach to regulatory inspections (and informational privacy) under the *Income Tax Act* (“the *ITA*”) in *R v Jarvis*.<sup>32</sup> The issue in *Jarvis* was determining when the predominant purpose of an inquiry under the *ITA* went to penal liability or was a mere audit. Where the predominant purpose is a penal investigation, full *Hunter* protections apply since an adversarial relationship arises between the taxpayer and the state. Since an audit is a tool by which to determine a taxpayer’s regulatory compliance with self-reporting requirement, rather than penal liability, accordingly the safeguards in *Hunter* are inapplicable.

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<sup>28</sup> RTH Stone, “The Inadequacy of Privacy: *Hunter v Southam* and the Meaning of ‘Unreasonable’ in Section 8 of the *Charter*” (1989) 34 McGill LJ 686 at 698.

<sup>29</sup> Don Stuart, *Charter Justice in Canadian Criminal Law*, 6<sup>th</sup> ed (Toronto: Carswell, 2014) at 356-357.

<sup>30</sup> *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Selection Milton*, [1994] 2 SCR 406, [1994] SCJ No 7 (QL) at para 90 [Comité]

<sup>31</sup> *Ibid* at para 92.

<sup>32</sup> *R v Jarvis*, 2002 SCC 73 at paras 59-65, 69-98.

#### IV. REASONABLE EXPECTATIONS OF PRIVACY, CONTEXT, AND THE ACA

In light of the above, one could argue that since entries and inspections under ss. 8(5) and 10.3(1) may be classified as regulatory or administrative, there should be accorded either no or a diminished expectation of privacy as a matter of course. This line of argument would conclude that (1) the safeguards outlined in *Hunter* are not strictly required for *Charter* compliance with respect to ss. 8(5) and 10.3(1), and (2) the safeguards in place under the ACA are sufficient under the circumstances.

It is difficult, however, to bootstrap the reasoning in *Comité* to analyses of ss. 8(5) and 10.3(1). *Comité* essentially justifies warrantless administrative searches on the absence of reasonable grounds as a practical policy consideration. In other words, regulatory inspection powers exist to uncover evidence of reasonable grounds of an offence— as such, it would be circular, and pointless, to require reasonable grounds to inspect. Sections 8(5) and 10.3(1), however, are operable only where reasonable grounds of an animal in distress already exist. In that sense, neither section bears much similarity to regulatory inspections as they are discussed in *Comité*.

Further, I would argue that this statutory fact also complicates the predominant purpose test outlined in *Jarvis*. For example, s. 10.3(1) is meant to determine compliance with a s. 10.1(1) director's order, which can only be made where there are reasonable probable grounds that an animal is in distress or an animal owner is failing to carry out her duties under s. 2 of the ACA. I would suggest that there will be few practical situations in which a determination of non-compliance with s. 2 of the ACA is readily separate from a determination of penal liability. ACA offences, unlike tax evasion, are strict liability offences so an inquiry of non-compliance with s. 2 of the ACA is necessarily a finding on penal liability as well. The same cannot be said for a taxpayer failing to comply with self-reporting requirements under the *ITA* whereby a parallel criminal investigation may be necessary, practically speaking, to establish mental culpability only.

Notwithstanding these tensions, it seems manifestly clear from *Jarvis*, and earlier SCC decisions, that one must look to the entire context when determining a person's expectation of privacy in relation to regulatory searches:

The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy

interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.<sup>33</sup>

As La Forest J. stated in *Wholesale Travel* "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context". In this connection, differing levels of Charter protection may obtain under the same statute, depending on the circumstances. Compare *Hunter v. Southam Inc.* and *Thomson Newspapers*: each dealt with the former Combines Investigation Act, which, although it created penal offences, was recognized on the whole to embody "a complex scheme of economic regulation". The provisions impugned in *Hunter v. Southam* authorized entry onto private premises and hence attracted a much greater expectation of privacy than the provision ordering the production of documents in *Thomson Newspapers*. In this measure, the ITA presents no different consideration. Wilson J. acknowledged as much in *McKinlay Transport*, where she suggested that greater s. 8 protection would obtain under the ITA if tax officials were to enter onto private property in order to conduct a search or seizure for the purposes of the Act, rather than to compel the same documentation by way of requirement letters...[C]ontext will determine the expectation of privacy that one can reasonably expect...[s. 8] to protect.<sup>34</sup>

Indeed, the Manitoba Court of Queen's Bench ("MBQB") held as much in *R v Taylor*. *Taylor* dealt with consent searches vis-à-vis regulatory animal control inspections under the ACA, but not specifically ss. 8(5) and 10.3(1). In *Taylor*, an anonymous caller tipped off the Chief Veterinarian's Office ("the CVO") and the RCMP that Ms. Taylor was keeping her dogs in unsanitary conditions, and with insufficient food, water, and shelter. The anonymous caller further advised that Ms. Taylor might have been maintaining a cannabis grow operation. APO Daniel Fryer, accompanied by RCMP officers, attended Ms. Taylor's dwelling to check on the welfare of her dogs. APO Fryer observed several dogs outside that were properly kept. He advised Ms. Taylor at her door of who he was, and that there had been a complaint about her animals although he withheld that the complaint had also mentioned that Ms. Taylor might have a grow operation in her dwelling. APO Fryer asked Ms. Taylor if he could come into her house to check on her animals. APO Fryer declined to advise Ms. Taylor that she did

<sup>33</sup> *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627, [1990] SCJ No 25 at para 34 [emphasis added] [*McKinlay Transport*].

<sup>34</sup> *Jarvis*, *supra* note 32 at paras 61-62, 64 [footnotes omitted].

not have to allow him to enter, and could simply bring her animals to the door for inspection. It was APO Fryer's practice to deliberately not tell pet owners that they could choose to bring their animals to the door for inspection unless they objected to his entry into their dwelling or were otherwise reluctant. APO Fryer knew he could not enter Ms. Taylor's dwelling without a warrant unless she consented to the entry.<sup>35</sup>

Ms. Taylor allowed APO Fryer and the two RCMP officers accompanying him to enter her house. APO Fryer found that the dogs on the main floor of the house were properly cared for. He asked Ms. Taylor whether she had more animals in her house, and she indicated that she had some cats in the basement. Without asking permission, APO Fryer went to her basement, accompanied by Constable Lagace, and found several cats. Although the cats' living conditions were not ideal, they appeared to be healthy. At this point, APO Fryer moved a board that was blocking a corridor. He went down the corridor with Cst. Lagace and opened a door to find more cats. They instead found a cannabis grow operation. APO Fryer opened a second door, and found more cannabis plants. Cst. Lagace returned upstairs and arrested Ms. Taylor. Subsequently, a search warrant was obtained, and the RCMP seized 97 cannabis plants.<sup>36</sup>

During a *Charter* voir dire on the matter, the Crown argued that the officers never triggered s. 8 since they had conducted a regulatory inspection under the ACA. The Crown further argued that a person has no reasonable expectation of privacy in her own when regulatory inspections are undertaken. The Crown's position, in other words, was one's own home automatically becomes a *Charter*-free zone as soon as pet ownership is undertaken.<sup>37</sup>

Although the key issue in *Taylor* was the validity of Ms. Taylor's consent, the MBQB, in disposing of the Crown's arguments, underwent an analysis of the common law on regulatory inspections. *Taylor* holds that regulatory inspections under the ACA are not beyond s. 8 scrutiny since "the extent to which a person has an expectation of privacy with respect to regulated activity depends on the context," and "[a]s explained in *Jarvis*, the application of the *Charter* in any case is not determined simply by whether the search was regulatory or criminal. One must look to the entire

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<sup>35</sup> *Taylor*, *supra* note 7 at paras 2-6, 54.

<sup>36</sup> *Ibid* at paras 6-11.

<sup>37</sup> *Ibid* at paras 17-20.

context.”<sup>38</sup> At least in Manitoba, the fact that a search is regulatory in character is but one factor when determining REP; the fact that the ACA provides for regulatory searches does not automatically lower one’s REP.<sup>39</sup>

The natural question is, then, what else ought to inform context? I will argue below that context, and in turn REP, should be established in connection to the stigma, publicity and consequences attendant to animal cruelty charges; the scope and application of the ss. 8(5) and 10.3(1) entry and inspection powers; and the absence of meaningful privacy safeguards in the ACA.

### A. Stigma and Publicity, and Consequences of Animal Cruelty Charges

As discussed above, the SCC in *Comité* took the view that one’s REP will be lower in relation to regulatory investigations. Part of this decision, however, was justified on the premise that regulatory charges typically result in relatively low penalties and little, if any, stigma:

The exercise of the powers of inspection set out in the second paragraph of s. 22(e) [of the *Act respecting Collective Agreement Decrees*] does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian.<sup>40</sup>

Indeed, stigma is something of a leitmotif in SCC s. 8 analyses of regulatory inspections:

The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence

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<sup>38</sup> *Ibid* at paras 25, 30.

<sup>39</sup> In *R v Bogaerts*, 2019 ONSC 41, the ONSC took the view that identical search provisions under Ontario’s animal protection legislation did not violate s. 8. The ONSC’s ruling on this point centred on the “juristic character” of the legislation. For the purposes of this paper, I would assert without arguing that this particular ruling is inconsistent with *Taylor*, and that the ONSC decided wrongly on this point.

<sup>40</sup> *Comité*, *supra* note 30 at para 13.

has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.<sup>41</sup>

An absence of stigma is relied upon, to some extent, to justify the inapplicability of *Hunter* in regulatory contexts.<sup>42</sup> Naturally, then, the stigma and consequences associated with an investigation should be a logical starting point in determining one's expectation of privacy in a regulatory context.

If we accept (1) that the stigma inherent in an investigation "requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search...by those responsible" for enforcement, (2) the requirement of a warrant on reasonable grounds that an offence has been committed, amongst other things, provides this protection, and (3) that animal welfare inspections, including those under the ACA, are sufficiently stigmatizing, it follows that some ACA searches should be subject to warrant requirements.<sup>43</sup>

Arguably, it is not the fact alone of a criminal investigation that entitles a person to a greater expectation of privacy but, rather, the suspicion and stigma that inheres to criminal investigations. As such, one should consider whether an investigation at issue would tend to seriously lower the community standing of a person subject to the search, not merely whether the search is classifiable as criminal or administrative. As such, where certain charges, regulatory or criminal, and an associated exercise of powers of entry and search carry the stigma and consequences associated with criminal investigations, an affected individual ought to have a higher expectation of privacy.

Arguably, animal cruelty offences carry more stigma than most, if not all, regulatory offences, and many offences under the *Criminal Code*. It is worth noting some of the language and tone used by Members of the Legislative Assembly of Manitoba while debating the enactment of the ACA in 1995 and 1996:

In the community in which I live, and the communities of which I have lived in the past in rural Manitoba, there is hardly a crime taken so seriously as the animal owner who does not feed his animals and leaves them in pens to the point at which they become emaciated, the point in which they become ill, and sometimes to the

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<sup>41</sup> *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, [1990] SCJ No 23 (QL) at para 124 [Thomson].

<sup>42</sup> See also *Goebel v Robertson*, 2015 ONSC 4454 at para 41.

<sup>43</sup> *Thomson*, *supra* note 41 at para 124.

point at which they actually die. I know that the cases that have come before us in rural Manitoba that deal with the predominantly larger animals, the people who have been convicted and penalized for these kind of atrocities against animals have been certainly ostracized in our communities and their standing in the community is knocked down significantly by the way they have treated their animals.<sup>44</sup>

As the minister indicated, this issue [the discovery of puppy mills and their concomitant conditions in rural Manitoba in 1995] probably brought more phone calls than some more serious issues, although this was a serious situation, but people have very serious concerns when animals are being abused.<sup>45</sup>

There is a clear understanding that in the agriculture that has always been there, that mankind has availed him or herself with the use of animals for many different purposes. There is no excuse, never has been an excuse, to do that in a way that is unnecessary, unmindful of the animals' welfare.<sup>46</sup>

Moreover, Canadian case law recognizes the stigma, or at least conceptions of society's relationships to animals that is logically and practically suggestive of stigma, attached to animal cruelty offences (albeit in the context of *Criminal Code* offences).<sup>47</sup> In *R v Way*, the Ontario Court of Justice noted the stigma and social and professional consequences of animal welfare charges and convictions even where there was no finding of cruel intentions:

Ms. Way's crime is one of negligence and I am persuaded that Ms. Way has suffered extreme collateral consequences from being tried and found guilty of these offences. She has suffered tremendous personal embarrassment and loss of reputation in both her social and professional communities.

This case received significant attention in the media. The media held her up a "crazy cat lady". And whether the shoe fits or not, the stigma of that offensive characterization has stung her deeply. Part of the tragic irony of this case is that Ms. Way loved these cats and yet her neglect lead to the need to euthanize all but one of the over 100 animals seized by the authorities. This has not rested lightly on her shoulders.

...Ms. Way is both a lawyer and a teacher. She has not practiced law in years but the Law Society has documented an express interest in the outcome of this

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<sup>44</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (4 June 1996) at 3858 (Stan Struthers).

<sup>45</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-1, No 10(B) (5 June 1995) at 744 (Rosann Wowchuk) [emphasis added].

<sup>46</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (4 June 1996) at 3188 (Harry Enns) [emphasis added].

<sup>47</sup> *R v Brown*, 2004 ABPC 17 at para 31; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 117; *R v Munroe*, 2010 ONCJ 226 at para 23; *R v White*, 326 Nfld & PEIR 225, [2012] NJ No 263 at para 9; *R v Zeller*, 1998 ABPC 19 at para 35 citing *R v Michelin*, 1995 [no citation provided].

case. Ms. Way's teaching contracts came to an abrupt end expressly as a result of these charges being laid against her.<sup>48</sup>

Similar judicial attitudes have been also expressed in purely regulatory settings like agriculture or zookeeping.<sup>49</sup>

Whether animals are treated poorly as a matter of intention or neglect, a high degree of censure ensues. The Legislature, various academic literature, and *obiter dicta* in the case law have all described animal abuse, whether criminal or regulatory in classification, as immoral, unethical, uncivilized, unenlightened, without excuse, and reflective of untrustworthiness, a lack of humanity, and “palpable evil.”<sup>50</sup> In many cases, an accused individual may be at risk of social, professional, or political ostracization. Mistreatment of animals is not some incidental regulatory consideration but a fraught and loaded moral and social issue where nonfeasance has far-reaching ramifications.

Inspections for animal welfare, by extension, naturally carry tremendous stigma as well. To be investigated for whether an animal is in distress, sends a message to the community that the subject of the inspection may be or is abusing animals or inflicting some type of cruelty whether affirmatively or through neglect. Such a message would almost certainly tarnish one's standing in the community especially if inspections gave rise to charges. The SCC has recognized that the lesser the departure from the realm of the criminal law, the less “flexible... the approach to the standard of reasonableness.”<sup>51</sup> Stigma is a hallmark of the criminal law, which, in this case, has been transposed to a regulatory setting.<sup>52</sup> It is hardly appropriate, then, for APOs, who are charged in part with investigating and uncovering stigmatizing subject matter, to also assume the role of detached and neutral arbiter and authorize their own searches, and bypass the balancing process altogether.

This observation is thrown into stark relief when one considers that animal welfare charges and convictions are highly publicized in Manitoba

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<sup>48</sup> *R v Way*, 2016 ONCJ 514 at paras 10-11, 14.

<sup>49</sup> *R v Maple Lodge Farms* 2014 ONCJ 212 at para 1; *Reece v Edmonton (City)* 2011 ABCA 238 at paras 57-58.

<sup>50</sup> *Ibid*; Katie Sykes, “Rethinking the Application of Canadian Criminal Law in Factory Farming” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 33 at 34-35, 37.

<sup>51</sup> *BC (Securities Commission) v Branch*, [1995] 2 SCR 3, [1995] SCJ No 32 at para 52 [Branch].

<sup>52</sup> *R v Beatty*, 2008 SCC 5 at para 70; *R v Roy*, 2012 SCC 26 at para 2.

and Canada at large. These stories detail the sordid circumstances of a given case, and in some instances name the parties involved, and provide photographs of the abused animals. Just as often, these animal welfare stories are circulated in national newspapers of record and regional newspapers, as well as other news sources.<sup>53</sup>

Furthermore, the consequences for contravening a provision of the ACA, as laid out by s. 34 of the ACA, are significant. A first offence under

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<sup>53</sup> See e.g. Amber McGuckin, “Manitoba dog rescued after being shot multiple times with pellet gun”, *Global News* (24 February 2018), online: <globalnews.ca/news/4045821/manitoba-dog-rescued-after-being-shot-multiple-times-with-pellet-gun/> [perma.cc/45PY-ZGSF]; Aviva Jacob, “What are we doing wrong? 2017 worst year in past decade for animal welfare complaints in Manitoba”, *CBC News* (16 April 2018), online: <www.cbc.ca/news/canada/manitoba/manitoba-animal-welfare-complaints-2017-1.4619667> [perma.cc/MVP4-DXRW]; Brittany Greenslade, “Burned dog rescued from northern Manitoba making ‘miraculous’ recovery”, *Global News* (29 May 2018), online: <globalnews.ca/news/4231469/burned-dog-rescued-northern-manitoba-miraculous-recovery/> [perma.cc/4RZN-NCGJ]; Bryce Hoye, “After years of complaints, neighbours vent frustration over ramshackle city farm”, *CBC News* (19 July 2018), online: <www.cbc.ca/news/canada/manitoba/st-marys-road-farm-animal-welfare-complaints-1.4750009> [perma.cc/46F4-ZAT3]; The Canadian Press, “Manitoba Mountie finds starving horse, owners charged with animal neglect”, *CBC News* (2 May 2018), online: <www.cbc.ca/news/canada/manitoba/rcmp-melita-starving-horse-1.4644938> [perma.cc/ED8A-V9KC]; CBC News, “Foul odour, barking for years at home of Winnipeg dog seizure: neighbours”, *CBC News* (10 August 2016), online: <www.cbc.ca/news/canada/manitoba/dogs-winnipeg-rescue-neighbours-1.3715855> [perma.cc/7WEE-TVCD]; Dana Hatherly, “Winnipeg police investigating officer shown on video mocking women reporting animal abuse”, *CBC News* (18 June 2017), online: <www.cbc.ca/news/canada/manitoba/winnipeg-police-humane-society-dog-abuse-1.4711661> [perma.cc/B98K-N7FB]; Holly Caruk, “Animal rights organization PETA offers provincial vet \$10K to enforce regulations”, *CBC News* (12 August 2016), online: <www.cbc.ca/news/canada/manitoba/animal-rights-peta-offers-provincial-vet-1.3719336> [perma.cc/TPJ8-CQ3K]; John Lehmann, “Authorities seize 120 cats from Winnipeg house”, *The Globe and Mail* (13 December 2013), online: <www.theglobeandmail.com/news/national/authorities-seize-120-cats-from-winnipeg-house/article15970964/> [perma.cc/BRW6-RQ6F]; Josh Crabb, “Investigation launched after one dog found dead, four seized in East Kildonan home”, *CTV News Winnipeg* (10 August 2016), online: <winnipeg.ctvnews.ca/investigation-launched-after-one-dog-found-dead-four-seized-in-east-kildonan-home-1.3023422> [perma.cc/C866-BB66]; Lorraine Nickel, “Elderly couple could be jailed for dog hoarding”, *Global News* (4 December 2013), online: <globalnews.ca/news/1006202/elderly-couple-could-be-jailed-for-dog-hoarding/> [perma.cc/5TzM-BH8H]; Sharon Pfeifer, “Owner of dog and puppies abandoned in northern Manitoba arrested”, *Global News* (23 February 2018), online: <globalnews.ca/news/4042432/owner-of-dog-and-puppies-abandoned-in-northern-manitoba-arrested/> [perma.cc/A5QT-HKEB].

the ACA can include a maximum fine of \$10,000 or imprisonment for up to six months, or both; a second offence can include a maximum fine of \$20,000 or imprisonment for up to 12 months, or both. Indeed, the fact of potential jail time should, by itself, inform consideration of one's expectation of privacy.<sup>54</sup> By contrast, the maximum consequence for a contravening a provision under the act that the SCC was considering in *Comité* is \$5000.

Consequences under s. 34 of the ACA, then, seem to more closely resemble criminal sanctions than typical regulatory fines. It is clear from the legislative debates that they were designed that way:

Currently, fines must be applied through the Criminal Code of Canada proceedings, taking many months in court. Under this bill [Bill 70, which became *The Animal Care Act*], if it proceeds, it should take no more than two months and would much speed up the process, but certainly the fines should curtail people from activities that are considered an unfair treatment of animals.<sup>55</sup>

Section 34 is another part of The Animal Care Act that I think is a legitimate part of Bill 70 in which it talks about an increase in fines and moves the cases from the criminal courts to the civil courts. That suggests to me, and I am no Philadelphia lawyer, that it would speed up the process, which is something that I am certain would get support in the province and within this Legislature as well.<sup>56</sup>

We like very much that there are stiff fines, that the fines have been increased in some cases tenfold. We feel that this is important to act as a deterrent, hopefully, for people from mistreating animals, both agriculturally and in personal ownership and in organizations for animals for sale. We also hope that it will act not only as a deterrent but that it will send a message to people who are convicted under this legislation that this is a very negative thing to do and that they will be punished severely for transgressing the elements of Bill 70.<sup>57</sup>

Clearly, the consequences under s. 34 of the ACA cannot be characterized as less draconian than those associated with criminal investigations. The Legislature appears to have intended to widen the scope of liability using regulatory law, and approximate criminal consequences using the same regulatory law.

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<sup>54</sup> *R v Grant*, [1993] 3 SCR 223, [1993] SCJ No 98 (QL) at para 24 [Grant].

<sup>55</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3856 (Rosann Wowchuk).

<sup>56</sup> *Ibid* at 3858 (Stan Struthers) [emphasis added].

<sup>57</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 61 (8 October 1996) at 4080 (Becky Barrett).

In light of the above, animal welfare cases implicate a moral element neither contemplated by the SCC in cases such as *Comité* or *Jarvis* nor generally associated with most regulatory searches. It is difficult to think of another regulatory offence that invites significant financial support from activist organizations, invokes universal public revulsion, commands the headlines, and sparks near-instant legislative responses to the extent that animal welfare cases do. Whether they are criminal or regulatory in origin, animal welfare charges are clearly an inherently sensitive social and moral issue that carry, understandably, a high degree of opprobrium. With that in mind, it should not be left to APOs or the CVO to delicately balance social and privacy interests while simultaneously launching investigations, which themselves may be stigmatizing. Thus, the stigma of animal welfare charges, and concomitant inspections, as well as the consequences for convictions under the ACA, should significantly inform the context in which one's reasonable expectation of privacy under s. 8 of the *Charter* is determined.

## **B. The Extraordinary Scopes of Sections 8(5) and 10.3(1) of the ACA**

### ***1. Section 10.3(1) of the ACA***

In considering REP, the context, in this case, must also be informed by the fact that s. 10.3(1) allows APOs to enter and search people's homes without a warrant, at any "reasonable" time and where "reasonably required", and for, conceivably, an unlimited duration by way of s. 10.1(5) of the ACA. Moreover, s. 8.1 of the ACA allows an APO to use reasonable force in executing a s. 10.3(1) entry and inspection. An APO may force her way into one's dwelling to ensure compliance with a s. 10.1 director's order. By contrast, the statute under consideration in *Comité* does "not permit inspectors to use force to gain access to the workplace. "In the event of a refusal by the employer, the inspectors can only lay charges under s. 33 ACAD for obstruction of an inspection, as was done in the present case."<sup>58</sup>

To be clear, the robustness of the s. 10.3(1) power is not necessarily problematic. The unique difficulties in enforcing animal protection legislation, particularly since animal abuse generally occurs out of public view, and animals are unable to make abuse complaints of their own accord,

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<sup>58</sup> *Comité*, *supra* note 30 at para 75.

likely warrants the scope of s. 10.3(1). Section 10.3(1) is problematic because it provides for warrantless searches notwithstanding its extraordinary scope, a lack of appropriate legislative safeguards, and the ability to enter and inspect dwellings using reasonable force by way of s. 8.1 of the ACA.

Section 10.3(1) empowers an investigator to search any place at any reasonable time (which is left undefined), and where reasonably required (which is also left undefined) to determine compliance with a s. 10.1(1) director's order. The director under the ACA is charged with and exercises investigatory functions.<sup>59</sup> In other words, insofar as s. 10.1(1) of the ACA is a precondition for s. 10.3(1) entries and inspections, an individual with a significant investigatory role authorizes general entries and inspections.

Moreover, given the inherent breadth of the word “any,” the absence of any language in s. 10.3 excepting a subject's home from a s. 10.3(1) inspection, and the presence of language elsewhere in the ACA excepting one's private dwelling from warrantless searches, “any place” as referred to in s. 10.3(1) necessarily includes a subject's home, as well as any other private property such as outbuildings or sheds.

Individuals have a very high expectation of privacy in their own homes, and a relatively high expectations of privacy in the rest of their private property, depending on the circumstances.<sup>60</sup> What is paramount, then, is not simply whether a search is administrative but the level of expectation of privacy individuals have in their dwellings, and, as will be explored in greater detail below, other areas of their private property. That some activity occurring within the home may be illegal, for example, keeping animals that are in distress or falling below minimum standards of care, is irrelevant for s. 8 purposes.<sup>61</sup>

One's expectation of privacy in one's home cannot and should not be displaced simply by the fact that a search is regulatory. While the SCC in *Jarvis*, for example, found that “an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities [in his place of work],” the same cannot necessarily be said of private pet owners in their own respective homes or on their own respective private properties. The SCC has

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<sup>59</sup> Manitoba Agriculture, “Animal Welfare Program” (last visited 10 June 2019), online: <[www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/humane-inspection.html](http://www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/humane-inspection.html)> [perma.cc/4SQ4-D3Y2].

<sup>60</sup> *Grant*, *supra* note 54 at paras 24, 29.

<sup>61</sup> *R v Wong*, [1990] 3 SCR 36, [1990] SCJ No 118 (QL).

recognized the significant privacy interest one has in one's own home even with respect to regulatory searches.<sup>62</sup> Moreover, the MBQB in *Taylor* rejected the notion that s. 8 *Charter* protections do not apply to one's home as a consequence of owning animals.<sup>63</sup> As such, the fact of a director's order under s. 10.1(1) of the ACA should not disentitle one from normal s. 8 *Charter* protections with respect to one's own home.

It is worth noting that "any reasonable time" as per s. 10.3(1) of the ACA is undefined in that section and elsewhere in the ACA. Section 37(1) *The Provincial Offences Act* ("the POA") requires that a warrant be executed between 8 a.m. and 8 p.m. unless the warrant specifically provides otherwise. Other provincial animal welfare statutes stipulate that inspections must be undertaken during regular business hours. However, no clear requirement exists for the execution of inspections pursuant to a director's order under ss. 10.1(1) and 10.3(1). It is unclear when is a "reasonable time," what makes that time "reasonable," and for whom that time is "reasonable."

Presumably, an APO's ability under s. 10.3(1) to enter and inspect at any time unannounced is based on the common-sense assumption that the threat of an unannounced inspection may be the most effective way to induce compliance with the director's order. While such a practice may be permissible in other settings, it should not be countenanced with respect to one's home without *Hunter* safeguards in place.

Additionally, the ACA provides no guidance as to when determining compliance is "reasonably required" under s. 10.3(1). A generalized belief or suspicion of non-compliance with the order may be the basis for when an inspection is "reasonably required" but the ACA is not that specific. Naturally, a s. 10.1(1) director's order will require some kind of follow-up inspection since the legal basis for the s. 10.1(1) director's order is reasonable grounds that an animal is in distress. However, nothing in the ACA suggests when subsequent inspections are "reasonably required." In the absence of clear statutory guidelines, follow-up inspections under s. 10.3(1) are a function of an individual APO's discretion. Indeed, the word "reasonable" often imputes discretion.

Finally, s. 10.1(5)(b) of the ACA stipulates that "[a]n order expires one year after the date it is given, unless it is...extended by the director for a

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<sup>62</sup> *McKinlay Transport*, *supra* note 33 at para 34.

<sup>63</sup> *Taylor*, *supra* note 7 at paras 20-21.

further period that must not exceed one year.” By contrast, a search warrant under s 35(2) of the POA must expire 15 days after it is issued. Moreover, the ACA is silent as to the circumstances in which the director may extend the order. While, arguably, an inference could be drawn that a director’s order under s. 10.1(1) of the ACA would and should be extended only where, on reasonable grounds, an animal continues to be in distress, the ACA does not explicitly say so. Further, the ACA does not appear to expressly preclude the director from making multiple extensions. Since s. 10.3(1) of the ACA authorizes an APO to inspect any place to determine compliance with a director’s order under s. 10.1(1) of the ACA, s. 10.1(5)(b) of the ACA conceivably provides for limitless warrantless entries and inspections under s. 10.3(1) of the ACA following service of a s. 10.1(1) director’s order.

As such, s. 10.3(1) of the ACA, to borrow language from *Hunter*, “is tantamount to a licence to roam at large.” Given the high level of expectation of privacy in an individual’s own homes, the open-ended and “breathtaking sweep” of s. 10.3(1) of the ACA, and the s. 8.1 power to use force, one’s expectation of privacy ought to remain high notwithstanding the fact that s. 10.3(1) entries and inspections are technically regulatory. As such, the s. 10.3(1) power to enter and inspect ought to be authorized by a neutral and impartial judicial arbiter, especially in light of the stigma and consequences that can subsequently attach to inspections that determine an individual has failed to comply with a s. 10.1(1) director’s order.

## 2. Section 8(5) of the ACA

To be clear at the outset, s. 8(5) applies to companion animals, as opposed to commercial animals:

[A]t any reasonable time and where reasonably required to determine compliance with this Act [...] enter and inspect any facility, premises or other place that is not a dwelling place [...] in which the animal protection officer believes on reasonable grounds there is a companion animal in distress...<sup>64</sup>

Section 8(5) does not include a person’s home, but it still permits warrantless entries, and, in conjunction with s 9(1)(b) of the ACA, seizures of companion animals on private property where homes are located. Places where companion animals may be kept outside of the home may be not open to the public, so the expectation of privacy can be very high.

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<sup>64</sup> ACA, *supra* note 1, s 8(5) [emphasis added].

Similar to s. 10.3(1), the APO's inspection powers under s. 8(5) are largely unbounded. Although s. 8(5) expressly excepts the dwelling house from entries and inspections, an APO under this section is still empowered to enter and inspect at any reasonable time in non-urgent circumstances. Similar to s. 10.3(1), "reasonable time" is undefined.

The fact that s. 8(5) applies directly to companion animals is significant insofar as it empowers APOs, in some instances, to enter non-commercial non-residential private premises in addition to commercial non-residential private premises. The potential exists that outbuildings an APO enters and inspects under s. 8(5) would properly be considered an extension of the house and, therefore, subject to the same, or similar, high degree of privacy. Outbuildings on private property may be subject to a reasonable expectation of privacy depending on the context.<sup>65</sup> Numerous lower courts throughout Canada have recognized the expectation of privacy one holds in private premises located on private property where homes are also located. Further, in many instances, private premises that are not the literal dwelling house may be considered curtilage in which a person has a very high expectation of privacy.<sup>66</sup>

Not all non-residential private premises owned by a private pet owner or on a private pet owner's private property will attract a uniformly high expectation of privacy. In many instances, however, the location and normal use of an outbuilding or private premise, other than a dwelling house, will provide for a high expectation of privacy. These are the sort of factors that an impartial and neutral judicial figure, but not an APO, is perfectly situated to consider.

## **C. Inadequate or Non-Existent Safeguards Under the ACA**

### ***1. Section 10.3(1) of the ACA***

The ACA provides a number of measures that function as minimal safeguards for the privacy interest of individuals subject to s. 10.3(1) entries and inspections:

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<sup>65</sup> *R v Moran* (1987), 36 CCC (3d) 225, 1987 CarswellOnt 1116 (Ont CA) at paras 47, 49; *R v Robertson*, 2010 BCPC 2 at para 48; *R v Rodriguez*, 2014 ABPC 44 at paras 75-76.

<sup>66</sup> *R v Le*, 2005 BCPC 47 at paras 14-16; *R v NNM*, 223 CCC (3d) 417, [2007] OJ No 3022 (QL) at paras 369-370.

- (1) A private pet owner may appeal the order within seven days of receiving the s. 10.1(1) director's order under s. 10.1(6) of the ACA;
- (2) A s. 10.1(1) director's order must be based on reasonable grounds that an animal is in distress; and
- (3) Pursuant to s. 10.3(1), an APO can enter and inspect any place only where:
  - (a) it is reasonably required to determine compliance with the director's order, and
  - (b) an APO has reasonable grounds that there is or should be animal or other related thing to which the order applies in the place to be inspected.

With respect to the appeal mechanism under s. 10.1(6) of the ACA, unjustified searches are meant to be prevented before they happen, rather than determining, after the fact on a s. 10.1(6) appeal, that the entry and inspection should not have occurred in the first place.<sup>67</sup> In the absence of normal s. 8 *Charter* safeguards, the right of appeal under s. 10.1(6) of the ACA, in effect, forces the individual subject to a director's order to re-establish his or her s. 8 *Charter* rights in an exclusively *ex post facto* process within seven days, rather than the state agent justifying warrantless and potentially limitless entries and inspections before the fact.

Further, resort to a s. 10.1(6) appeal may be infeasible and unreasonable in situations where a person affected by a s. 10.1(1) order and corresponding s. 10.3(1) entry and inspection powers is incapable of initiating a s. 10.1(6) appeal due to financial, mobility or cognitive or mental health issues, particularly within seven days. In this situation, affected individuals may be forced to forego enforcing their rights, rather than the state justifying infringements. Indeed, in instances where an individual subject to a director's order fails to file an appeal within seven days, that individual is essentially to challenging the director's order only if charges are laid and a trial is pursued.

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<sup>67</sup> Hunter, *supra* note 5 at para 27.

It is worth noting that in 2017, only five per cent of individuals subject to a s. 10.1(1) director's order appealed the order. While it is impossible to determine precisely why appeals were not pursued, to some extent, this is irrelevant. This statistic indicates that with respect to s. 10.1(1) director's order, 95 per cent of the time in 2017, the state was relieved from justifying actions that may have included entries of and inspections within people's homes.<sup>68</sup>

Moreover, under s. 10.1(7) of the ACA, an appeal of an order under s. 10.1(1) of the ACA does not stay the operation of that order. It is reasonable to envision a scenario where after weeks, or possibly months, of s. 10.1(6) proceedings, the appeal board finds in favour of an applicant, yet that applicant has still been exposed to unjustified warrantless entries and inspections under s. 10.3(1) during that time.

With respect to s. 10.1(1) of the ACA, the fact that the director must confirm on reasonable grounds that an animal is "in distress" as defined in s. 6(1) of the ACA, provides some minimal measure of protection. Reasonable grounds that an animal is in distress, and may continue to be in distress, are, in all likelihood, what justifies entries and inspections undertaken via s. 10.3(1) of the ACA. However, the fact that, the director, who effectively authorizes the s. 10.3(1) entries and inspections by way of s. 10.1(1), has investigatory duties to discharge is problematic.

Finally, the fact that, as per s. 10.3(1), an APO can enter any place only where "reasonably required" to determine compliance with the director's order and where it is believed on reasonable grounds that the place being inspected contains or should contain an animal to which an order applies are insufficient safeguards. These "safeguards" are essentially clarificatory in character, and codify that an APO cannot arbitrarily exercise the s. 10.3(1) entry and inspection powers by entering and inspecting places for reasons unrelated to compliance with the director's order particularly, and where those places might not contain animals or items to which the director's order applies. The fact that an APO cannot look for things unrelated to a s. 10.1(1) director's order in places where the subject of the order might not be located is, at best, an absolute bare minimum protection, and certainly

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<sup>68</sup> Manitoba, Animal Welfare Program, "Animal Welfare Program Statistics January to December 2017", by Manitoba Agriculture, online: <[www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html](http://www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html)> [perma.cc/YD3Q-HJTY].

not an adequate substitute for a system of prior authorization as outlined in *Hunter*.

Sections 10.1(1) and 10.3(1), then, functionally provides for a regime whereby the director and APO justify orders, entries and inspections only to themselves. It is conceivable to simply bypass warrant applications under ss. 8(9) and 10.3(2) of the ACA entirely since ss. 10.1(1), 10.3(1), and 10.4(1) of the ACA provide for warrant powers without having to apply for a warrant in the first place. Arguably, the warrant provision under s. 10.3(2) of the ACA exists chiefly to enable peace officers to accompany APOs during entries and inspections.

## 2. Section 8(5) of the ACA

Unlike ss. 10.1(1) and 10.3(1), the ACA provides *no* standalone pre- or post-review mechanisms for s. 8(5) inspections. Section 14(1) of the ACA does provide a right of appeal for seizures under s. 9(1) of the ACA. Presumably, a s. 14(1) proceeding would necessarily include a review of the grounds for a s. 8(5) inspection in situations where the APO relied on s. 8(5) of the ACA prior to the seizure. Unless charges are laid and a trial is pursued, or animals are seized specifically under s. 9(1), an APO's grounds for a s. 8(5) entry and inspection are functionally exempt from review. As such, a private pet owner is conceivably subject to unlimited entries and inspections of his or her non-commercial non-residential private premises where entries and inspections are affected up until animals are seized.

Only Nova Scotia and Quebec provide for similar powers under their respective animal care statutes. It is noteworthy that a provision equivalent to s. 8(5) in the Nova Scotia's animal welfare legislation was declared unconstitutional by its Provincial Court ("the NSPC") in 2003.<sup>69</sup> To date, it does not appear that Quebec's animal welfare legislation, enacted in 2015, has been subject to constitutional challenge in any respect.

## 3. Sections 8(5) and 10.3(1) are Not Codifications of Exigent Search/Inspection Powers

There may be some attraction to an argument that ss. 8(5) and 10.3(1) are highly specified codifications of the exigent circumstances exception. However, I would argue that ss. 8(5) and 10.3(1) generally apply to non-urgent situations, and are not codifications of the exigent circumstances exception.

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<sup>69</sup> *R v Vaillancourt*, 2003 NSPC 59 [Vaillancourt].

To begin with, s. 8(11) of the ACA permits an APO to search a dwelling or any place, and seize animals or other “things” where that APO has reasonable grounds to believe there is an animal in distress, or offence under the ACA is being committed, but, by reason of exigent circumstances, it would be impracticable to obtain a warrant. That the Legislature would create redundant provisions is unlikely. Clearly, the ACA does not seem to view an animal in distress as an exigent circumstance in and of itself.

Admittedly, the language used in s. 6(1) of the ACA to define when an animal is “in distress” is broad. For example, s. 6(1)(a) of the ACA holds that “an animal is in distress if it is...subjected to conditions that, unless immediately alleviated, will cause the animal death or serious harm.”<sup>70</sup> On the other hand, s. 6(1)(f) of the ACA also provides that an animal is in distress if it is “subjected to conditions that will, over time, significantly impair the animal’s health or well-being.”<sup>71</sup> Section 6(1)(c) of the ACA provides that an animal is in distress if it is “not provided food and water sufficient to maintain the animal in a state of good health.”<sup>72</sup>

What constitutes “distress” in an animal under s. 6(1) of the ACA is context-specific. Circumstances where an animal is caught within the scope of s. 6(1)(a) of the ACA might be viewed as exigent. However, “distress” as described in ss. 6(1)(c) and (f) of the ACA is clearly conditioned on a decline in conditions over time, as opposed to an acute or emergent situation, and, it is submitted, would not be caught by the exigent circumstance exception provided for by s. 8(11) of the ACA or the common law without rendering that section redundant.

As such, the fact that an APO has reasonable grounds that an animal is in distress does not, by itself, necessarily give rise to exigent circumstances. The “type” of distress being responded to is important since, clearly, not all “distress” under s. 2(1) of the ACA is, by definition, identical in magnitude.

It is worth noting the absence in ss. 8(5) and 10.3(1) of an adjective such as “critical,” “acute,” or “immediate” to qualify the type of “distress” engaged. This is the kind of language used for exigent circumstances provisions in some provincial animal welfare statutes.<sup>73</sup>

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<sup>70</sup> ACA, *supra* note 1, s 6(1)(a) [emphasis added]

<sup>71</sup> *Ibid*, s 6(1)(f) [emphasis added]

<sup>72</sup> *Ibid*, s 6(1)(c) [emphasis added]

<sup>73</sup> See, for example: *Preventions of Cruelty to Animals Act*, (British Columbia) ss 12, 14; *Ontario Society for the Prevention of Cruelty to Animals Act*, (Ontario) s 12(6); *Animal Health and Protection Act*, s 11(4) (Newfoundland and Labrador).

#### 4. *Hunter-Redux*

Dickson CJ speaking for the majority in *Hunter* considered prior authorization by a neutral and impartial arbiter as imperative:

In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties...ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. [A member of the Restrictive Trade Practices Commission] simply cannot be the impartial arbiter necessary to grant an effective authorization...On this basis alone I would conclude that the prior authorization mandated by s. 10(3) of the *Combines Investigation Act* is inadequate to satisfy the requirement of s. 8 of the *Charter*...<sup>74</sup>

Yet, in Manitoba, the director under the ACA functionally authorizes s. 10.3(1) inspections, which permits entries into and inspections of homes, despite discharging extensive investigatory duties of her own. The director may lay and swear Informations before the court, reinforcing the director's investigatory role. With respect to s. 8(5), an APO authorizes her own searches. This is precisely what the SCC in *Hunter* cautioned against.

With respect to s. 10.3(1), APOs should, at minimum, receive authorization at some point in the process from a neutral and impartial judicial arbiter, i.e. a warrant, before entering and inspecting a home, particularly since once a s. 10.1(1) director's order is given, the ability to enter and inspect someone's home is largely at the discretion of the APO tasked with inspecting. With respect to s. 8(5), *Vaillancourt* from the NSPC is instructive. Obviously *Vaillancourt* is not binding in Manitoba but its reasoning is persuasive. There is no necessity for a warrantless search of private premises in non-urgent situations with respect to the ACA. Section 46(2) of the *POA*, subject to s. 97(2), permits an enforcement officer to make an application for a warrant to enter and inspect by telephone or any means acceptable to the court.

Given the foregoing, I would contend that ss. 8(5) and 10.3(1) violate s. 8 of the *Charter*.

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<sup>74</sup> *Hunter*, *supra* note 5 at paras 35-36 [emphasis added].

## V. SECTION 1 OF THE *CHARTER*

Assuming that ss. 8(5) and 10.3(1) violate s. 8, I would argue that that neither section can be justified under s. 1 of the *Charter*. The overreaching of both sections is largely unnecessary, and, therefore, not minimally impairing. Further, the salutary effects do not outweigh the deleterious effects. Indeed, the SCC has held that infringements of the s. 8 *Charter* right are unlikely to be justified under s. 1 of the *Charter* given the overlap between the reasonableness standard under s. 8 of the *Charter*, and the minimal impairment analysis under the s. 1 test.<sup>75</sup>

*R v Oakes* is the seminal case on justification analysis under s. 1 of *Charter*. *Oakes* created a two-step balancing step to determine whether the government can justify a law that limits *Charter* rights:

- i) The law under review must have a goal that is pressing and substantial, and
- ii) The means chosen must be reasonable and demonstrably justified.<sup>76</sup>

The second-step, commonly referred to as proportionality analysis, includes three sub-tests:

- i) The measure must be rationally connected to the legislative objective;
- ii) The means, if rationally connected to the objective, should minimally impair the *Charter* right or freedom in question; and
- iii) There must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the pressing and substantial legislative objective.<sup>77</sup>

Each step of the *Oakes* test must be satisfied for ss. 8(5) and 10.3(1) to be “saved” under s. 1 of the *Charter*.

It is clear from the *Hansard* debates that the purpose of the modern ACA is to bring under control the abuse of animals at the hands of negligent

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<sup>75</sup> *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 46; *Grant*, *supra* note 54 at para 46; *Thomson*, *supra* note 41 at para 107; *Canada (Attorney General) v Chambre des notaires*, 2016 SCC 20 at paras 89-91

<sup>76</sup> *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7.

<sup>77</sup> *Ibid.*

owners, and to ensure proper care for animals. Indeed, the ACA was a legislative response to the discovery of puppy mills in rural Manitoba in 1995, more specifically the horrendous and inhumane conditions in which a number of the dogs were found, and the concomitant suffering of those dogs.<sup>78</sup>

As noted above, s. 10.3(1) was adopted in only 2009 by way of the ACAA, although s. 8(5) essentially existed in the ACA prior to 2009. The specific motivation for the amendments is unclear, but the *Hansard* debates indicate an ongoing concern over the continued proliferation of puppy mills and general animal abuse throughout rural Manitoba. The ACAA was characterized in part as providing stronger inspection and search and seizure powers to APOs, which, as matter of logical necessity, included s. 10.3(1). Evidently, no meaningful debate in House and Committee happened over the new warrantless inspection powers. The issue was raised once in House, and once in Committee but was never discussed on record beyond that.<sup>79</sup>

In any event, the pressing and substantial objective of ss. 8(5) and 10.3(1) is to effect the statute's overall purpose of protecting animals from abuse by ensuring compliance with statutorily-prescribed minimum standards of care. This is, indisputably, an important government goal.<sup>80</sup>

I would argue, however, that ss. 8(5) and 10.3(1) are not minimally impairing. In asking whether measures are minimally impairing, the Court must also determine:

- (1) The level of deference, if any, owed to the provincial legislature in enacting legislative measures, and
- (2) Whether the legislative measures enacted fall within a range of minimally impairing solutions.

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<sup>78</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3855 (Rosann Wowchuk).

<sup>79</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39-5, No 17B (9 December 2008) at 379 (Rosann Wowchuk), 379 (Blaine Pedersen), 382 (Ralph Eichler); Manitoba, Legislative Assembly, *Standing Committee on Agriculture and Food (Hansard)*, 39-3, No 1 (17 March 2009) at 36 (Rory McAlpine, Vice President, Government & Industry Relations, Maple Leaf Foods Inc.).

<sup>80</sup> In my analysis, I assume that the measures are prescribed by law. Further, I would concede that the legislative measures are rationally connected to the legislative objective insofar as the measures are one way of achieving the legislative objective.

Regarding deference, the legislature is owed some level of deference in trying to protect a vulnerable group, assuming animals qualify as a “vulnerable group.” Further when the prosecution of a regulatory offence is at issue, some deference is warranted, although Parliamentary deference is not unlimited.<sup>81</sup>

With respect to whether the legislative measures enacted fall within a range of minimally impairing solutions, the test is whether the government can demonstrate that among the range of reasonable alternatives available, there is no other less rights-impairing means of achieving the objective in a real and substantial manner.<sup>82</sup>

Clearly, under the circumstances, the Legislature is entitled to some degree of deference in attempting to balance individual expectations of privacy with society’s interests in protecting the welfare of an extremely vulnerable group, the care of which, or lack thereof, can give rise to regulatory prosecutions. Despite this deference, there is an obvious less rights-impairing measure already available in the ACA: warrant applications under ss. 8(9), 8(10), and 10.3(2) supplemented by ss. 46(2) and 97(2) of the POA. Section 46(2) of the POA, subject to s. 97(2), permits an enforcement officer to make an *ex parte* application for a warrant to enter and inspect by telephone or any means acceptable to the court. In other words, an APO merely has to pick up the phone and communicate her reasonable grounds to a Justice. As the NSPC held in *Vallaincourt*: “A warrant is the best guarantee that a person’s right is safeguarded, through the prior assessment of the reasonableness of the peace officer’s ground to enter and seize an animal he or she believes is in distress.”<sup>83</sup> As such, in situations where ss. 8(5) or 10.3(1) are used to legally justify an entry and inspection, it will almost always be practicable, and desirable, to obtain a warrant.

It is noteworthy that the Law Reform Commission’s Report, the recommendations of which, were, to some extent, incorporated into the ACA, recommended that agents should apply for a warrant before entering a residence except where exigent circumstances make obtaining a warrant impracticable:

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<sup>81</sup> *Wholesale Travel Group Inc v The Queen*, [1991] 3 SCR 154, [1991] SCJ No 79 (QL); *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, [1995] SCJ No 68 at paras 129, 136.

<sup>82</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 102 citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55.

<sup>83</sup> *Vaillancourt*, *supra* note 69 at para 54.

[I]ndividuals' expectation of privacy are highest in the apartments, houses and other premises in which they make their homes. Therefore, although society has a legitimate interest protecting animals in residences, the powers of agents to enter premises in pursuit of those interests must, in our view, be significantly restricted.

...

[A]s a general rule, agents should be required to obtain a warrant from a judicial officer prior to entering a residence. Allowing an impartial person to review the evidence prior to an entry will ensure that reasonable and probable grounds do, in fact, exist or belief that an animal is suffering within the residence.

...

In addition, we recognize that the power of warrantless entry to residences is exceptional and could be abused.<sup>84</sup>

Up until 2009, an APO required a warrant to enter dwelling.<sup>85</sup>

The Manitoba Law Reform Commission also argued that warrants should still be required even when entering non-commercial private premises except where exigent circumstances make obtaining a warrant impracticable:

In our view, non-residential private premises...give rise to a somewhat lower expectation of privacy than residences...In general, we believe that agents acting to protect animals should still require a warrant prior to entering a non-residential private premises.<sup>86</sup>

It is worth noting that the Manitoba Law Reform Commission's views in 1996 are much more closely aligned with the animal welfare legislation of most Canadian provinces with respect to entry and investigation powers as of 2018. Obviously, the Manitoba Law Reform Commission's views are not legally binding in any way. Nonetheless, these views are persuasive insofar as they further reinforce the proposition that less-rights impairing measures are available and desirable in a free society. With the above in mind, the clear availability of telewarrants under the *POA* suggests that ss. 8(5) and 10.3(1) are not minimally impairing.

The final step in the proportionality analysis asks whether the benefits of the legislative measures outweigh the deleterious effects. The effects of the limit must be proportional to the objective; the more serious the deleterious impact on the rights in question, the more important the objective must be. Where the legislative means at issue will not fully or nearly fully achieve the objective, the salutary effects of the measure must

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<sup>84</sup> Manitoba Law Reform Commission, *supra* note 9 at 47-48

<sup>85</sup> *ACA*, *supra* note 1 as it appeared between 1 August 1998 to 19 September 2010, s 8(7).

<sup>86</sup> Manitoba Law Reform Commission, *supra* note 9 at 49.

outweigh the deleterious effects as measured against the values underlying the *Charter*.<sup>87</sup>

As has been argued above, people hold an extremely high expectation of privacy in their own home, a relatively high expectation of privacy in non-residential and non-commercial private premises (although this expectation of privacy is subject to variation), and animal welfare charges can result in significant stigma and consequences. A warrant requirement for entrance and inspection would balance these interests and factors with the goals of the ACA. Sections 8(5) and 10.3(1), however, side-step the balancing exercise particular to warrant applications.

It is worth noting that in 2009, the CVO investigated 323 complaints; in 2017, it investigated 1026—a 300 per cent increase. In Winnipeg, in 2017, the Winnipeg Humane Society investigated 1575 investigations compared to 1129 in 2015. Of all animal abuse complaints investigated in 2017 by the CVO, only 39 per cent resulted in findings of non-compliance. In 2016, the CVO dismissed nearly 53 per cent of the 952 complaints received following investigation. It would appear that between 2009 to 2013, approximately 40 per cent of all complaints were unjustified.<sup>88</sup>

These statistics are significant with respect to salutary and detrimental effects of the legislative measures. It is conceivable and reasonable to suggest that the exercise of warrantless search powers under s. 8(5), for example, may have been relied on some of the time in response to unwarranted complaints, and, as such, there is potential for abuse. The problem of false complaints has been recognized to some extent:

There was a comment made earlier in regard to false complaints and potentially requesting a deposit from people who are filing complaints. As an animal protection officer, if I am asked to inspect a complaint I do that in a very methodical way. Around 50 percent of the time, the complaint that is brought forth to me upon inspection is proven to be unjustified. That may be due to lack of education by the person filing the complaint, may be due to family or neighbourly conflicts. It may just be due to lack of education. If a complaint is

<sup>87</sup> *Canada (Attorney General) v JTI-MacDonald*, 2007 SCC 30 at para 45; *Thomson*, *supra* note 41.

<sup>88</sup> Manitoba Agriculture, Animal Welfare Program, “Animal Welfare Program Statistics January to December 2017”, online: <[www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html](http://www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html)> [perma.cc/J3Y4-772J]; Manitoba Agriculture, Animal Welfare Program, “Animal Welfare Program Statistics January to December 2016”, online: <[www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2016.html](http://www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2016.html)> [perma.cc/NJ2J-QLZH]; Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 40-2, No 66B (27 June 2013) at 2895 (Ron Kostyshyn).

deemed to be unjustified and we receive future complaints about the same individual within a short period of time, we don't necessarily go back and continually probe that individual. We recognize the problem that was present, if it was present...If not, then we keep those complaints on file and we take note, but our goal isn't to constantly be at somebody's backdoor and barrage them on a weekly or a monthly basis. I think if we were to impose a levy on people or a fee on people filing complaints, it would actually discourage people from filing complaints in good faith.<sup>89</sup>

This statement is troubling in two ways: (1) there is a history or at least recognition of a significant number of false or unjustified complaints, and (2) even if an individual who is the target of an unjustified complaint is not subjected to subsequent probes, that individual was subjected to an initial unjustified intrusion. Further, that one APO may be “methodical” during an initial probe is not an indication that other APOs are as discreet. Moreover, what is “methodical” with respect to an initial probe is discretionary, and may not properly balance interests to the extent that a neutral and impartial judicial arbiter would, particularly since APOs serve as law enforcement agents for the ACA.

The increases in complaints and investigations are themselves noteworthy with respect to the salutary and deleterious effects of ss. 8(5) and 10.3(1). On one hand, the increases may represent heightened public vigilance of animal abuse in Manitoba, and the existence of the animal complaint line and the CVO. On the other hand, they may be consistent with an increase in the incidence, and complexity of animal abuse cases throughout the province. The implications of the latter explanation warrant some exploration. The volume and severity of animal abuse cases in Manitoba appear to be worsening. Therefore, strong measures of some sort are necessary for achieving the Legislature's pressing and substantial legislative goal. At the same time, however, measures such as ss. 8(5) and 10.3(1), which have been in force since 2009, are clearly not having their intended effect. In other words, both provisions are, to some extent, failing to aid in achieving the Legislature's goal with respect to the ACA. It is difficult to seriously argue, then, that the salutary effects of ss. 8(5) and 10.3(1) outweigh their detrimental effects when it is unclear that they have had any salutary effects at all.

In light of the above, I would argue that ss. 8(5) and 10.3(1) cannot be saved under s. 1 of the *Charter*.

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<sup>89</sup> Manitoba, Legislative Assembly, *Standing Committee on Agriculture and Food (Hansard)*, 39-3, No 1 (17 March 2009) at 19 (Dr. Colleen Marion) [emphasis added].

## VI. CONCLUSION: HOW DO YOU EAT A CONSTITUTIONAL ELEPHANT?

I have argued that given (1) the stigma and consequences endemic to animal cruelty charges, and (2) the vast respective scopes of ss. 8(5) and 10.3(1), diminishing privacy interests in the dwelling, or even non-residential non-commercial premises, purely on the basis of legal taxonomy borders on intellectually bankrupt. I would further contend that the SCC in decisions such as *Comité* or *Jarvis* never intended the classification of “regulatory inspection” or “administrative search” as something to hide behind and with which ignore otherwise plausible and reasonable privacy concerns.

I have also argued that ss. 8(5) and 10.3(1) fall well-short of the standards established in *Hunter*. Strict adherence to that standard matters here. For all of the reasons above, the ACA fails to strike a proper balance between the interests of society and the individual’s right to privacy, particularly with respect to one’s dwelling. The fact that a statute is regulatory, may mean that one’s REP is reduced under certain circumstances; that does not mean that no balance needs to be struck at all. In *Comité*, the relevant inspection powers were clearly restricted by the “nature of the persons affected—the employer and employee,” and it is always “possible to challenge abuses” under the pertinent act.<sup>90</sup> The same is not true of the ACA. The Crown has previously (and unsuccessfully) argued that “if you own a dog or a cat, your home is a ‘Charter-free zone’ for animal control officers and those assisting them in carrying out their duties.”<sup>91</sup> Furthermore, there is little data with which to conclude that ss. 8(5) and 10.3(1) have achieved the ACA’s goals.

A bright-line analytical approach to ss. 8(5) and 10.3(1) causes one to question the meaning of privacy rights in an era already replete with exceptions to s. 8. While such an approach is superficially consistent with decisions such as *Thomson*, *Comité*, and *Branch*, it (1) ignores the SCC and MBQB’s emphases on context, and (2) disrupts our constitutional and common law narratives on privacy interests in the dwelling. Under this paradigm, a private pet owner has a greater privacy interest in text messages she has sent to someone else’s phone than in her own home when a search

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<sup>90</sup> *Comité*, *supra* note 30 at para 19.

<sup>91</sup> *Taylor*, *supra* note 7 at para 20.

thereof is categorized as regulatory.<sup>92</sup> Under this paradigm, a private pet owner disclaims her privacy interest in any non-residential non-commercial private property by virtue of pet ownership. Under this paradigm, a private pet owner altogether abandons her privacy interest in her dwelling once served with a s. 10.1(1) director's order. The question, then, is not how does one eat a constitutional elephant, but how does a constitutional elephant eat you? Apparently, one right at a time.

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<sup>92</sup> *R v Marakah*, 2017 SCC 59.