CITATION: Animal Justice et al. v A.G of Ontario 2024 ONSC 1753
COURT FILE NO.: CV-21-658393-0000
DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

2024 ONSC 1753 (CanLII)

BETWEEN:	
ANIMAL JUSTICE, JESSICA SCOTT-REID, and LOUISE JORGENSEN	*Andrea Gonsalves, Fredrick Schumann, Kaitlyn Mitchell, Scott Tinney* for the applicant Animal Justice *Arden Beddoes* for the applicants Jessica Scott-Reid, And Louise Jorgensen
Applicants	
– and –	
THE ATTORNEY GENERAL OF ONTARIO	*Robin Basu, Yashoda Ranganathan, Elizabeth Guilbault, Priscilla Atkinson* for the respondent Attorney General Of Ontario
Respondent	
– and –	
ANIMAL ALLIANCE OF CANADA	*Nicolas Rouleau, Vibhu Sharma* for the intervener Animal Alliance of Canada
Intervener	
– and –	
CENTRE FOR FREE EXPRESSION	*Alexi Wood, Lillianne Cadieux-Shaw, Nicky Kim* for the intervener Centre for Free Expression
Intervener	

– and –	)	
	)	
REGAN RUSSELL FOUNDATION	)	
	)	
Intervener	)	*Stephanie DiGiuseppe, Heather Gunter* for the intervener Regan Russell Foundation
	)	

HEARD: October 30, 31, November 1, 2023

2024 ONSC 1753 (CanLII)

KOEHNEN J.

REASONS FOR JUDGMENT

Contents

2024 ONSC 1753 (CanLII)

OVERVIEW

[1] The applicants and intervenors are animal rights activists. They ask the court to find that a number of sections of the *Security from Trespass and Protecting Food Safety Act*,[1](the "Act") and the Regulation[2] passed under it (the "Regulation") violate their rights under the *Canadian Charter of Rights and Freedoms,* and are of no force or effect.

[2] The Act requires the consent of the owner or occupier for anyone to be on certain types of premises where animals are kept, raised or slaughtered (the " agricultural premises").

[1] Security from *Trespass and Protecting Food Safety Act*, 2020, SO 2020, c 9.
[2] General, O Reg 701/20

[3] Section 5(6) of the Act provides that any consent to be on agricultural premises is voided if it was obtained under false pretences “in the prescribed circumstances.” Section 5(6) does not violate the applicants’ Charter rights. There is nothing unconstitutional as such about a provision that voids a consent that has been previously given. The real issue is not so much about the fact that consents has been voided as it is about the “prescribed circumstances” in which the consent is voided. Those circumstances are set out in ss 9 and 10 of the Regulation.

[4] Section 9 of the Regulation, in effect, makes it an offence to make any sort of false statement to gain access to agricultural premises. Section 10 makes it an offence to claim one has qualifications one does not have to get a job on agricultural premises.

[5] The applicants say that s. 5(6) of the Act and ss 9 and 10 of the Regulation are targeted at animal rights activists who obtain jobs at agricultural premises in order to make videos showing how animals are treated. Those videos are then posted online or shared with journalists.

[6] Candidates for jobs at such premises are asked questions during job interviews that are aimed at determining whether the person is affiliated with an animal rights group. Common questions are whether the candidate has a university degree or is affiliated with an animal rights group. To get the job, the activist must give a false answer. As a result, if they get the job, they have obtained consent to be on the premises by false pretences which voids the consent, turns them into trespassers and makes them subject to penalties under the Act. The applicants

2024 ONSC 1753 (CanLII)

submit that this violates their right to freedom of expression under s. 2(b) of the Charter.

[7] Ontario submits that the Act is aimed at protecting animal safety, biosecurity, and the safety of farmers as well as preventing economic harm that can arise from threats to animal safety and biosecurity.

[8] Ontario argues as well that the expression at issue is not protected by the Charter because it occurs on private property and the Charter does not apply to private property or private actors. That misses an important nuance. Although the right of a property owner to remove someone from their property is not subject to review under the Charter, government restrictions on and penalties for expressing oneself are. Although the applicants do not have a positive right to use the property of others as a platform for their freedom of expression, that does not necessarily mean that the state should be able to penalize people for saying certain things without attracting Charter scrutiny. Both ss 9 and 10 of the Regulation are government actions that limit freedom of expression. Both are subject to review under the Charter.

[9] In my view, s. 9 of the Regulation is overly broad and disproportionate. It penalizes misstatements like denying affiliation with an animal rights group or having a university degree. Those sorts of misstatements have no bearing on objectives like animal safety or food security. Section 9 turns a person into an offender under the Act even though they are on the property with the owner's consent and are carrying out the owner's instructions on the property. They are turned into an

2024 ONSC 1753 (CanLII)

offender simply because, to use the example the applicants did, they denied having a university degree or denied being associated with an animal rights organization. In addition, as a practical matter, a person would be charged under the act only if they tried to communicate what they saw on the agricultural premises. It is highly unlikely that anyone who got a job by making a false statement but who then was a model employee for the rest of their career and never communicated what they saw would be charged under the Act.

[10] In my view, s. 9 of the Regulation is not saved by s. 1 of the Charter.

[11] Section 10 of the Regulation is, in my view, saved by s. 1 of the Charter. Section 10 intrudes on freedom of expression only minimally. It prohibits a person only from claiming to have qualifications they do not in fact have. That is a proportionate response to the risks the Act seeks to control. Exaggerating one's qualifications can lead to serious harm for biosecurity and animal safety.

[12] The applicants also challenge ss 11 and 12 of the Regulation. Those provisions exempt journalists and whistleblowers from the application of ss 9 and 10 of the Regulation. The applicants say they should be struck out because they impose a number of limitations on who is a whistleblower or journalist. I find that some, but not all, of the provisions of ss 11 and 12 violate the Charter.

[13] The second principal focus of the applicants' challenge is to ss 5(4), 6(2) and 6(4) of the Act. Section 5(4) prohibits any person from interfering or interacting with a farm animal on agricultural premises without consent of the owner or occupier.

2024 ONSC 1753 (CanLII)

Section 6(2) prohibits any person from interfering or interacting with a farm animal being transported by a motor vehicle without the prior consent of the driver. The applicants submit that ss 5(4) and 6(2) infringe on their rights to freedom of expression under the Charter and that s. 6(2) also infringes on the applicants freedom of assembly under the Charter.

[14] I find that ss 5(4) and 6(2) do not violate freedom of expression or assembly as the applicants submit. Although interaction with animals is a form of expression, it is not protected by the Charter. The Charter was never intended to give one person the right to physically interact with another person's property without the other's consent under the guise of freedom of expression.

[15] Section 6(4) of the Act voids any consent given to interact with animals if such consent was obtained by false pretences in prescribed circumstances. Section 6(4) of the Act does not infringe on the applicants' Charter rights. First, because the applicants have no right to interact with another person's property without the owner's consent. Second, because as with s. 5(6), the issue is not so much voiding consent as it is the circumstances in which consent is voided. Those circumstances are addressed in ss 9-12 of the Regulation which have been addressed above.

[16] Finally, the applicants challenge the powers of arrest and the reverse onus provisions in the Act as infringing on their right to life, liberty and security of the person, and their right to be presumed innocent under the Charter. I am unable to

2024 ONSC 1753 (CanLII)

accept that submission. Similar provisions have been upheld in a long line of cases by which I am bound and which it would be inappropriate to reverse.

[17] In the result, I declare s. 9 and certain provisions of ss 11 and 12 of the Regulation to violate the right to freedom of expression under the Charter and that, subject to the comments in the conclusion of these reasons, I declare them to have no force or effect.

2024 ONSC 1753 (CanLII)

I. Background

A. The Parties

[18] The applicant, Animal Justice, describes itself as Canada's leading animal law organization that works to strengthen animal protection laws, alert authorities to animal abuse, and inform the public about the treatment of animals used for food, fashion, entertainment, and scientific research. Animal Justice relies on information and footage obtained covertly about practices involving animal abuse.

[19] The applicant Jessica Scott-Reid is a freelance journalist who reports regularly on issues related to animal rights and welfare in Canada. To report on how farmed animals are raised, slaughtered, and transported, she relies on firsthand information and footage from others, such as employee whistleblowers, animal advocates, and individuals engaged in what the applicants and interveners refer to as "bearing witness" near transport trucks outside of slaughterhouses.

[20] The applicant Louise Jorgensen is a graphic artist and social media content creator with the Animal Save Movement. She endeavours to show the public how farmed

animals are treated by documenting the animals themselves and the conditions in which they are transported.

[21] The applicants' Charter challenge is supported by a number of interveners who were granted standing[3] to make submissions. They are the Centre for Free Expression, Animal Alliance of Canada and the Regan Russell Foundation.

[22] The Centre for Free Expression describes itself as "a non-partisan research, public education, and advocacy centre" that advances the public's right to see, receive and share information. It is particularly involved in issues concerning the protection and promotion of whistleblower rights.[4]

[23] The Animal Alliance of Canada describes itself as "a federally incorporated non-profit organization committed to the protection of all animals and to the promotion of a harmonious relationship among humans, non-humans and the environment.[5]

[24] The Regan Russell Foundation describes itself as a foundation that fosters peaceful protest, freedom of speech, freedom of association, and public education, particularly regarding animal rights activism.[6] It is named after Regan Russell, an animal rights activist who died on June 19, 2020 after being struck by a truck transporting livestock while she was protesting outside a slaughterhouse.

2024 ONSC 1753 (CanLII)

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[3] See *Animal Justice et al v Attorney General of Ontario*, 2023 ONSC 3147
[4] *Animal Justice et al v Attorney General of Ontario*, 2023 ONSC 3147 at para. 19.
[5] *Animal Justice et al v Attorney General of Ontario*, 2023 ONSC 3147 at para. 28.
[6] *Animal Justice et al v Attorney General of Ontario*, 2023 ONSC 3147 at para. 34.

[25] For ease of reference, I will refer to the applicants and the interveners collectively as the applicants unless the context demands otherwise.

B. Factual Background

2024 ONSC 1753 (CanLII)

[26] The *Act* was passed in 2020 in response to demands from the agricultural industry and approximately 120 municipal resolutions calling on government to do more to control trespass onto agricultural properties.

[27] The application arises out of a debate about acceptable animal husbandry practices. That debate involves four contextual factors that have been raised in this application: the increasing industrialization of animal husbandry, the nature of animal husbandry standards in Canada, the nature of accepted practices in Canada, and the usefulness of undercover exposés.

[28] Turning first to industrialization. The trend over the last few decades has been to consolidate animal husbandry into a smaller number of farms producing a larger number of animals with fewer employees. By way of example, in 1976 there were 18,622 pig farms in Canada. In 2016 there were 2,760. The average number of pigs on those farms has increased from 103 in 1976 to 1,280 in 2016. The applicants point to examples of farms with 1,200 pigs being run with seven employees and to farms with 10,000 turkeys being run with 15 employees. The applicants argue that raising animals is no longer about bucolic family farms but about highly mechanized industrial operations. They note, for example, that at

present, approximately 240 million animals are slaughtered annually in Ontario. The applicants say this proceeding has little, if anything to do with "family farms." In support of this they point to the evidence of Eric Schwindt, one of the respondent's affiants and a former Chair of the Ontario Pork Producers' Marketing Board, who, during cross-examination, described a "family farm" as any farm that is privately owned. Thus, a family farm would include the farms owned by the Dutch multinational corporation that raises 90% of turkeys in Canada. The applicants submit that increased industrialization has led to increased production pressures which has led to a deterioration of animal welfare, all the more so given that staff at these facilities tend to be unskilled, entry-level positions with little training.

[29] The second contextual factor is the nature and source of regulation of the livestock industry. The current regulation for treatment of any animal in Ontario is the *Provincial Animal Welfare Services Act*.[7] Although one provision of that act makes it an offence to cause an animal to be in distress, that provision does not apply to animal husbandry carried out in accordance with administrative requirements, or, in the absence of administrative requirements, carried out in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry.[8] The applicants submit that this regime is ineffective for two reasons. First, because those standards that do exist are voluntary and

[7] *Provincial Animal Welfare Services Act*, 2019, S.O. 2019, c. 13.
[8] *Provincial Animal Welfare Services Act*, 2019, S.O. 2019, c. 13 s. 15(1) and 15(4).

2024 ONSC 1753 (CanLII)

are developed primarily by industry representatives. Second, because inspections occur only in response to specific complaints. There are no random, unannounced inspections to ensure that relevant standards are being adhered to. Even in the face of a complaint, the target receives advance notice of any inspection as does the relevant commodity group, representatives of which are invited to attend the inspection.

[30] The third contextual factor involves the standards themselves. The applicants point out that certain accepted practices in Canada would be illegal if applied to a pet and include practices that have been banned in jurisdictions like the U.K. and the EU. These practices include castrating, docking tails and removing teeth of piglets all without anaesthetic or analgesic; keeping chickens in cages so small that they cannot spread their wings; throwing live male chicks into meat grinders to kill them; and keeping sows in gestation and farrowing crates that do not allow them to turn around.

[31] Ontario submits that such practices are necessary to reduce damage to livestock. It says, for example, that piglet castration is required to avoid aggression in males that causes them to harm other pigs and to avoid an unpleasant taste known as boar taint from affecting the meat. Piglets' tails are docked because pigs bite and chew on each other's tails causing infection. Piglets' teeth are removed to avoid injury to other pigs in cases of aggression. Male chicks are killed because they are not economically productive and become aggressive as they mature. Sows are kept in gestation crates because they are aggressive and hierarchical. They

2024 ONSC 1753 (CanLII)

fight and injure each other if not separated. Sows are kept in farrowing crates to prevent them from killing newborn piglets by inadvertently stepping or lying on them and to prevent more deliberate savaging behaviour by sows towards piglets.

[32] The applicants reply that aggressive behaviours in animals can be reduced if they are given adequate space and feeding arrangements that do not have them compete for food.

[33] The fourth contextual factor involves undercover exposés. The applicants submit that the only way of bringing the conditions in which animals are raised to the public eye is through covert exposés; for the most part by individuals who seek employment for the purpose of recording the conditions in which animals are raised. The applicants submit that ordinary employees are not realistic sources of such exposés because they are unskilled, entry-level employees, often immigrants or migrants who are economically vulnerable and who cannot take the risk of exposing the conditions they see.

[34] The applicants introduced several videos made by animal-rights groups at various livestock producers. Some have been shown on news programs such as W5 and the CBC. Some have led to convictions against the livestock producers involved. The applicants submit that the public exposure of even legal practices to which animals are subject fuels public debate, influences purchasing decisions and contributes to improvement in animal husbandry.

2024 ONSC 1753 (CanLII)

[35] Ontario argues that some of the applicants and interveners object to the use of animals for any purpose in the service of humans. Ontario also submits that agricultural practices are studied by academics and institutions around the world. Those studies involve determining what best practices are and how to improve existing practices. As a result, argues Ontario, undercover exposés about standard practices are not necessary and are not conducive to informed public debate.

[36] That, however, does not necessarily end the discussion. Studies by academics and agricultural institutes are carried out in controlled environments, usually by highly trained technicians or scientists. In day-to-day operations, the practices are implemented by unskilled, entry-level employees who receive relatively little training. A practice that may be humane in an academic environment when carried out by scientists can be inhumane when implemented by untrained, unskilled employees who may be subject to pressures to process a certain number of animals in a certain period of time.

[37] By way of example, “piglet thumping” arose as a practice in one of the videos before me. It is unclear on the record before me whether it is deemed to be an acceptable practice. In theory, it involves euthanizing a sick piglet by striking its head against a concrete surface. One can envisage circumstances in which that may be humane if it is carried out to ensure that death is instant and that the animal feels no pain. One can also envisage a myriad of circumstances in which it is inhumane and causes needless suffering. How, for example, does one ensure

2024 ONSC 1753 (CanLII)

that an unskilled worker carries out the practice so the point of impact is precisely where it leads to instant death? How does one ensure that repeated efforts are not required to euthanize a particular animal? The video of "piglet thumping" in the record shows a piglet being picked up and thrown repeatedly onto a concrete floor without any effort to ensure that the point of contact leads to instant death.

[38] It may well be that the practices to which the applicants object are acceptable general practices. Whether that is the case ultimately depends on social consensus around the issue. The applicants argue that freedom of speech is designed to bring issues like this into the open so that social consensus can develop and evolve.

C. Preliminary Issues

[39] There are two preliminary issues to address before turning to the applicants' challenges. The first concerns the participation of the intervener, Regan Russell Foundation. Regan Russell was a protester who participated in demonstrations outside slaughterhouses. She was killed in an accident involving a truck while doing so. The Regan Russell Foundation was granted intervener status to make submissions "on the issues defined in the application".[9] Some of its submissions related to the circumstances of her death and the propriety of Ontario using her death as the reason for bringing certain provisions of the Act into force earlier than initially anticipated. Those submissions go beyond the issues defined in the

[9] *Animal Justice et al v Attorney General of Ontario*, 2023 ONSC 3147 at para. 38.

2024 ONSC 1753 (CanLII)

application and therefore go beyond the terms of the intervention. As a result, I will not address those submissions or make any findings in that regard. I note as well that the circumstances of Ms. Russell's tragic death are the subject of other judicial proceedings into which it would not be appropriate for me to stray.

[40] The second preliminary issue concerns the admissibility of an affidavit that Ontario filed. The affidavit is from Susan Fitzgerald. It addresses biosecurity, safety concerns, animal welfare issues and the regulation of livestock transportation. The applicants object to the admissibility of her affidavit as that of an expert because they argue she lacks both expertise and independence. The applicants note that Ms. Fitzgerald has no formal credentials or research papers with respect to the issues to which she opines and has worked for agricultural associations for 35 years. She is currently the Executive Director of the Ontario Livestock Transporters Alliance.

[41] The evidence from Ms. Fitzgerald's affidavit of which Ontario asks the court to take note is not controversial. It consists of two points and two documents. The two points are: the special importance of biosecurity and that the interior floors of trucks can become slippery if water is sprayed on them. The two documents are a publication of the Ontario Ministry of Agriculture, Food and Rural Affairs entitled *Biosecurity Fundamentals for Visitors to Livestock Facilities* and a report of the Standing Committee on Agriculture and Agri-Food of the House of Commons entitled *Mental Health: A Priority For Our Farmers.* No one contested the authenticity of those documents.

2024 ONSC 1753 (CanLII)

[42] The threshold for admissibility of an expert is low.[10] The fact that an expert has engaged in prior advocacy does not necessarily prevent admission of the report.[11] An expert need not have obtained her expertise through formal credentials or publications and can have achieved it through experience. Ms. Fitzgerald appears to have acquired her knowledge through experience, albeit through a particular lens. Whether the lens through which an expert views an issue deprives her of independence is better gauged through admission of the report and consideration of the issue of independence in the context of the record as a whole rather than by excluding the report from the outset. I therefore admit the report. Given that the two factual points on which Ms. Fitzgerald opines are not controversial and given that the reports she attaches are government documents the authenticity of which is not contested, I accept those points and documents and need not make any further findings about Ms. Fitzgerald's alleged lack of independence.

II. Freedom of Expression and False Pretences

A. The Statutory Provision

[43] Subsections 5(1) - (3) of the Act prohibit anyone from entering an "animal protection zone" of a farm, animal processing facility or other prescribed premises without the prior consent of the owner or occupier of the premises. "Animal

[10] *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, [2015] 2 SCR 182 at paras. 48-49.
[11] *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108 at paras. 26-29.

2024 ONSC 1753 (CanLII)

Protection" zone is defined as, among other things, any area on which farm animals may be kept or located.[12]

[44] Subsection 5(6) provides:

> (6) For the purposes of subsections(1), (2), (3) and (4), **consent to entering in or on an animal protection zone,** to interfering or interacting with farm animals or to carrying out prescribed activities **is invalid if it is obtained from the owner or occupier** of the relevant farm, animal processing facility or prescribed premises using duress or **under false pretences in the prescribed circumstances** or for the prescribed reasons **and a consent so obtained shall be deemed not to have been given**. (Emphasis added)

[45] I digress here momentarily to consider the Regulations under the Act. As noted, s. 5(6) of the Act vitiates consent obtained under false pretences "in the prescribed circumstances." The prescribed circumstances are contained in ss. 9 and 10 of the Regulation. They will be discussed in greater detail later in these reasons. For present purposes they can be summarized as follows: Section 9 of the Regulation considers consent to have been obtained under false pretences if a person makes a false statement to an owner or occupier of a facility as a result of which the person receives consent to carry out an act that, without consent, would be prohibited under subsections 5(1) - (4) (i.e. entering an Animal Protection Zone or interacting with animals in such a zone). Section 10 of the Regulation deems

[12] Security from *Trespass and Protecting Food Safety Act*, 2020, SO 2020, c 9, (the "Act") s. 2.

2024 ONSC 1753 (CanLII)

consent to have been given under false pretences if a person makes a false statement which suggests that they have qualifications that they do not have.

[46] Sections 11 and 12 of the Regulation exempt journalists and whistleblowers from ss 9 and 10 of the of the Regulation. Ontario submits that the journalists and whistleblowers exemptions demonstrate that the Act is minimally impairing. The applicants submit that the journalists and whistleblower exemptions have significant limitations which not only fail to make the Act minimally impairing but which further infringe on freedom of expression. Those provisions will be considered in further detail when considering the concept of minimal impairment later in these reasons.

[47] Returning to the Act, Section 14(1) makes it an offence to contravene specifically enumerated sections of the Act including subsection 5(1) - (4). The Act sets out fines for a first offence of up to $15,000 and up to $25,000 for any subsequent offences.[13]

[48] Ontario first submits that obtaining consent by false pretences is not an offence because s. 5(6) is not one of the sections the breach of which is listed as an offence in s. 14(1). In my view, Ontario has stopped reading too soon. Section 14(2), in effect, makes it an offence to have obtained access to the property by false pretences. It provides:

[13] Act s. 15(1)

2024 ONSC 1753 (CanLII)

> **Any person who uses** duress or **false pretences** in the prescribed circumstances or for the prescribed reasons **to obtain the consent of the owner or occupier** of a farm, animal processing facility or prescribed premises or the driver of a motor vehicle transporting farm animals, **to do anything** that would otherwise be **prohibited under subsection 5(1), (2), (3) or (4)** or 6(2) **is guilty of an offence**. (Emphasis added)

In essence, that means if one obtains consent by way of s. 5 (6) one is guilty of an offence.

[49] Ontario then submits that if gaining access by false pretences is punishable under s. 14(2), it is subject to a maximum fine of only $5,000 because the Act does not provide a penalty for using false pretences. If no penalty for an offence is set out in an Ontario statute, the offence is governed by the *Provincial Offences Act*[14] which limits fines to $5,000.

[50] I do not entirely agree with that submission either. Given that the owner's consent has been vitiated by the false pretences, the person would be in violation of ss. 5(1) to 5(4). If anything, the person could be subject to two fines: one of up to $5,000 for the false pretence and another of up to $25,000 for being on premises without consent.

[51] The applicants say these provisions will put an end to undercover exposés because the people who seek jobs to expose abuses must usually misrepresent themselves during a job interview in order to be hired. Employment candidates

[14] *Provincial Offences Act*, RSO 1990, c P.33

2024 ONSC 1753 (CanLII)

would typically be asked questions during an interview to determine whether they are affiliated with animal rights organizations. The question can be as direct as whether they are affiliated with any such organization or as oblique as whether they have a university degree, the assumption apparently being that no one with a university degree would want such a job unless they intended to conduct an undercover exposé. The applicants further submit that most people who conduct exposés are of modest means and could not afford the risk of being found liable under the Act as a result of which such exposés would end.

[52] Of the statutory provisions related to s. 5 of the Act, the applicants seek a declaration that ss 5(4), 5(6), and 14(2) of the Act and ss 9 – 12 of the Regulation infringe one or both of ss 2(b) and 2(c) of the Charter in a manner that cannot be saved under s. 1 of the Charter and are therefore of no force and effect.

B. Does Section 5 Restrain Freedom of Expression?

[53] To determine whether government action infringes on freedom of expression under s. 2(b) of the Charter the court must ask itself three questions:

i. Does the communication have expressive content?

ii. If so, does the method or location of this expression remove the protection?

2024 ONSC 1753 (CanLII)

iii. If the expression is protected by s. 2(b), does the government action infringe on that protection either in purpose or effect?[15]

i. Expressive Content

[54] All expressive activity is presumptively protected by s. 2(b).[16] Whether the expressive content has sufficient merit to warrant protection is usually decided in the s. 1 inquiry, if one is needed, and not when determining whether the communication has expressive content. The false pretence is clearly expressive activity.

[55] Ontario tries to avoid the expressive content branch of the test by characterizing the applicants' challenge as a "positive rights" claim in which the applicants seek a right to access private property to conduct undercover exposés; a right they do not otherwise have. In support of that submission, Ontario cites the Supreme Court of Canada's distinction between a positive or negative rights claim in the *Toronto v. Ontario*[17] as follows:

> Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation . . . rather than a positive obligation of protection or assistance". A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage".[18]

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[15] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at para. 56.
[16] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at para. 58.
[17] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34
[18] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 16.

2024 ONSC 1753 (CanLII)

[56] Ontario argues that the applicants are not *otherwise free to engage* in trespass or interfere with private property, as a result of which, punishing those activities does not infringe on freedom of expression.

[57] Ontario also characterizes the application as a claim for a right to information and argues that government conduct that makes it more difficult to obtain information does not necessarily violate freedom of expression. In addition, Ontario argues that any right to information is restricted to information from government and does not extend to information from private parties.[19]

[58] I do not accept those characterizations. In my view, Ontario's argument in this regard conflates the concept of trespass that is prohibited in s. 5(1) to 5(3) with the prohibition on false pretences in s. 5(6). The applicants do not challenge ss. 5(1) to 5(3). They do not challenge an owner or occupier's right to prevent someone from accessing their property without consent. What the applicants challenge is the prohibition on seeking employment by false pretences.

[59] To use the language of *City of Toronto,* while people are not "otherwise free to engage in" trespass, they *are* otherwise free to gain entry to other premises by using false pretences without punishment by the state. The state does not penalize or brand as trespassers people who exaggerate their passion for a particular

[19] *Ontario v. Criminal Lawyers' Association,* 2010 SCC 23 at para. 30-31.

2024 ONSC 1753 (CanLII)

industry in a job interview or who get into a bar by claiming to be 19 when they are not. It is the penalization of the false pretence the applicants object to.

2024 ONSC 1753 (CanLII)

ii. Does the Location of the Expression Remove Charter Protection

[60] Ontario submits that the expression at issue here occurs on private property and is therefore immune from Charter protection. In support, Ontario points to the Supreme Court of Canada's statement in *Committee for the Commonwealth of Canada v. Canada*[20] that:

> Freedom of expression does not, historically, imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the Charter does not extend to private actions. It is therefore clear that s. 2(b) confers no right to use private property as a forum for expression.[21]

[61] Ontario notes that the Supreme Court more recently affirmed the same proposition in *Montreal (City) v. 2952-1366 Québec Inc.* [22] when it directed courts to consider whether the location of the expression removes it from the protection of s. 2(b) of the Charter.

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[20] *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119(SCC), [1991] 1 SCR 139
[21] *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119(SCC), [1991] 1 SCR 139 at p. 228
[22] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141

[62] While it is correct to say that a person cannot compel a private actor to make his property available as a forum from which the person can exercise his right to freedom of expression, that does not necessarily end the analysis. The Supreme Court added an important nuance in this regard in *City of Montreal (City) v. 2952-1366 Québec Inc.,* when it said:

> Section 2(b) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(b) **absent state-imposed limits on expression**, since state action is necessary to implicate the Canadian Charter.[23] (emphasis added)

[63] It is the state-imposed limit on expression that is at issue here. The applicants do not assert a right to compel the agricultural industry to allow them to use their property as a forum from which to speak. They challenge the "state imposed limit on expression" in s. 5(6) and the penalization of that expression in 14(2) of the act.

[64] The Act penalizes a private statement made by one person to another. The simple fact that the statement is made on private property should not excuse the government's penal sanction from Charter scrutiny. If it did, it would just as easily enable the state to penalize what private citizens say to each other on any private property, including their own homes. I was not taken to any other circumstance in which the state punishes people for what they tell others in a private conversation absent criminal conduct like fraud, assault, harassment, hate speech or the like.

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[23] *Montreal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, [2005] 3 SCR 141 at para. 62

2024 ONSC 1753 (CanLII)

[65] In *City of Montreal*, the Supreme Court held that courts should ask themselves two questions to determine whether the location of the expression removes it from the protection of s. 2(b): (i) Are the actual or historical functions of the place ones that attract freedom of expression? (ii) Would freedom of expression in the place at issue undermine the values the guarantee is designed to promote," namely democratic discourse, truth finding and self-fulfillment.[24] With the second question being the "ultimate question."[25]

[66] Although it is not the function of a workplace to act as a forum for free expression, all that means is that the speaker could not object if the employer/owner had the speaker removed from the premises if the employer/owner did not agree to the expression at issue. It has also, however, never been the historical function of a workplace to be the subject of state restrictions about what one can or cannot say there, save, as noted, for criminal or quasi-criminal conduct.

[67] The fact that an animal rights activist wants to obtain a job in a particular facility to describe to the public the conditions to which animals are subject in that facility does not undermine the values that freedom of expression is designed to promote. If anything, it provides the public with information on an issue of interest to at least some members of the public. Although the applicants have no positive right to use agricultural facilities as a platform for their freedom of speech that does not

[24] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at paras. 74-77.
[25] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at para. 77.

2024 ONSC 1753 (CanLII)

necessarily mean that the state should be able to penalize individuals for making certain types of statements without attracting Charter scrutiny.

[68] Ontario argues that it is not legal to obtain employment with one employer in order to spy on that employer on behalf of a different employer. Ontario points out that such conduct can amount to breach of contract, breach of fiduciary duty, deceit, trespass and intrusion on seclusion. This, says Ontario, is what undercover employees are doing. They are employees of an animal rights group using deception to be hired by the facility in order to spy on the facility for the benefit of the animal rights group. Once again, the difference is that those torts do not involve government action restraining freedom of expression. They involve private civil conduct to which the Charter does not apply.

[69] Ontario notes as well that any property owner has an absolute right to decide who is allowed to remain on his or her property without regard to natural justice or being obliged to give any reason for asking the intruder to leave.[26] That too, is not at issue here. The employer of an undercover activist has the right to terminate person's employment and has the right to ask the person to leave the premises immediately just as an employer has that right with any other employee.

[70] Putting a slightly different characterization on the owner's right to control access to premises, Ontario argues that the Act prohibits unlawful trespass, and is not targeted at speech. That is a somewhat circular argument though. The speaker's

[26] *Russo v. Ontario Jockey Club (Ont. H.C.J.)*, 1987 CanLII 4356.

2024 ONSC 1753 (CanLII)

presence on the property only becomes unlawful because the Act makes it so by virtue of the statement the person made. In the scenario under discussion, the employee is on the property with the owner's consent. The employer wants the employee to be there every day to carry out their job duties. Except for surreptitious recordings or other communications about what the employee sees, everything the employee does, including interaction with animals, is with the employer's consent. Indeed it is at the employer's direction. The employee only becomes a trespasser because they have denied receiving a university degree or have denied affiliation with an animal rights group. It is that expression that makes them a trespasser.

[71] Finally, Ontario argues that extending s. 2(b) protection here would allow others to use deception to gain access to other private property to record what occurs there, including venues like abortion clinics, retirement homes and hospitals. Ontario notes that American courts have rejected such claims.[27] I do not find that argument persuasive.

[72] As the Supreme Court noted in *City of Montreal*, the separation between spaces where free speech is permitted and where it is not permitted will inevitably be subject to some imprecision that must be resolved case by case.[28] Just where to

[27] *Armes v City of Philadelphia*, 706 F Supp 1156 (1989) (US District Ct, ED Penn); *Madsen v Women's Health Centre, Inc*, 512 US 753 (1994) (USSC); *Planned Parenthood Federation of America, Inc. v Newman (*Court of Appeals, 9th Circuit, 2022

[28] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 , [2005] 3 SCR 141 at para. 78.

2024 ONSC 1753 (CanLII)

draw the line in any individual case may be influenced by factors such as the nature of: the restriction, the place and the expression.

[73] At least at the first level of analysis, the restriction here is the government's penalization of a statement that one person makes to another in private. Even if one extends the analysis beyond the initial misrepresentation that helped get the job to the activist recording the way animals are raised or slaughtered; that recording does not give rise to privacy interests of the same nature or degree as would recording the internal operations of abortion clinics, hospitals or retirement homes.

[74] Finally, the interpretive tendency in Canadian jurisprudence has been to give Charter rights a large and liberal interpretation[29] and to analyse the legitimacy of any limitations when considering whether the infringement is demonstrably justified in a free and democratic society under s 1 of the Charter. Although that does not relieve the court of the obligation to determine whether the location of the expression attracts the protection of s. 2(b), it does suggest courts should not be overly hasty to exclude Charter protection when dealing with more ambiguous cases.

[29] See for example *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87(SCC), [1989] 1 SCR 927 at p. 970, 971.

2024 ONSC 1753 (CanLII)

[75] For the foregoing reasons I find that the location of the expression does not remove the expression from the ambit of s. 2(b) of the Charter.

2024 ONSC 1753 (CanLII)

iii. Is the Purpose or Effect to Restrict Freedom of Expression?

[76] The third step in the analysis is to determine whether the purpose or effect of the Act is to restrict freedom of expression. The applicant bears the onus in this regard and must satisfy that onus with reference to the principles and values underlying freedom of speech.[30] Those principles and values are:

> (1) Seeking and attaining the truth;
>
> (2) Fostering participation in social and political decision-making; and
>
> (3) Cultivation of individual self-fulfillment in a welcoming environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[31]

[77] While one may agree or disagree with the applicants, their goal in pursuing undercover exposés is consistent with the principles that underlie freedom of expression. They seek to tell the public about the conditions in which animals are raised and slaughtered. They do so to bring about social and political change. They do so in the pursuit of self-fulfillment.

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[30] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87(SCC), [1989] 1 SCR 927 at p.976.
[31] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87(SCC), [1989] 1 SCR 927 at p. 978.

[78] The applicants pursue these goals in a social and legal context in which the Supreme Court of Canada has recognized that: (i) “important controversies” are often unearthed only because of secret sources, including internal whistleblowers;[32] and (ii) that “democratic institutions and social justice will suffer”[33] without the work of whistle-blowers.

[79] Ontario submits that the purpose of the Act is not to limit freedom of expression but, as set out in s. 1 of the Act, to prevent trespass; protect farm animals and the food supply chain from the risks of trespass; protect the safety of agricultural workers; and prevent adverse effects of trespass on Ontario’s economy.

[80] When determining whether the purpose or effect of government action is to restrict freedom of speech, the Supreme Court has noted that rules can be framed as neutral even if the true purpose is to control expression.[34] In this regard it is noteworthy that the Act’s conception of trespass is not limited to people who are on private property without colour of right but extends to people who are on the property with the consent of its owner but who become trespassers by virtue of having made a misrepresentation. It is also important to take into account in this regard that Scott Duff, the civil servant charged with passage of the Act and the Regulation, agreed on cross-examination that the impetus behind s. 5(6) of the Act was to limit undercover investigations.[35]

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[32] *R v National Post*, 2010 SCC 16, at para. 28.
[33] *R v National Post*, 2010 SCC 16, at para 28.
[34] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87(SCC), [1989] 1 SCR 927 at p. 975.
[35] Cross-examination of Scott Duff, q. 79.

2024 ONSC 1753 (CanLII)

[81] In *Irwin Toy*, the Supreme Court assessed the issue of purpose by explaining:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee.[36]

[82] The Act penalizes misrepresentations that lead to access to certain premises. That singles out meanings that are not to be conveyed. If one accepts the evidence of Scott Duff, the Act also seeks to restrict a form of expression by eliminating undercover exposés. That singles out a further meaning that is not to be conveyed and controls the ability to convey a meaning.

[83] Quite apart from the purpose of the Act, s. 5(6) and 14(2) have the effect of limiting freedom of expression in two ways. First, they restrict what a potential employee can tell an employer without being penalized. Second, the applicants have testified that they will no longer carry out undercover exposés in light of the penalties associated with them. Both effects restrict expression.

[84] Ontario submits that these effects do not limit the applicants' freedom of expression. They remain free to advocate about animal husbandry practices as they wish without making false statements to owners or occupiers of agricultural premises. While that may be the case, courts have recognized that some modes

[36] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87(SCC), [1989] 1 SCR 927 at p. 979

2024 ONSC 1753 (CanLII)

of expression are also protected by s. 2(b). For example, in *Bracken v. Niagara Parks Police*,[37] the Ontario Court of Appeal noted:

> … Over some range of cases at least, the medium is the message. Tone of voice, volume, facial expressions and body language all convey meaning that cannot necessarily be conveyed effectively in words. The exercise of free expression is diminished by restrictions on the means that make it effective. So, it is no answer for the respondent to say there is no limit on one's exercise of freedom of expression -- that everyone is free to convey whatever ideas they want -- provided they use appropriately temperate language. To take a familiar example from U.S. First Amendment case law, the meaning conveyed by shouting "fuck the draft" does not translate, without significant loss of meaning, to the quiet declaration, "I am implacably opposed to the draft": *Cohen v. California*, 403 U.S. 15(1971).[38]

[85] Similarly, here, the Act limits the mode of expression by preventing undercover exposés or even eyewitness descriptions of the conditions in which animals are raised or slaughtered if the person providing the description gained access to premises using false pretences.

[86] In light of the foregoing, I find that one of the purposes and one of the effects of the Act and the Regulation is to infringe on the applicants' freedom of expression.

2024 ONSC 1753 (CanLII)

[37] *Bracken v. Niagara Parks Police*, 2018 ONCA 261
[38] *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at para. 57.

C. Is Section 5(6) Saved by Section 1 of the Charter?

[87] Section 1 of the Charter provides that its rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This requires the government to demonstrate that the Act and the Regulation: (i) further a pressing and substantial objective; (ii) are rationally connected to the objective; (iii) minimally impair the right at issue; and (iv) are proportionate in that they result in benefits that outweigh their deleterious effects.[39]

i. Pressing and Substantial Objective

[88] Section 1 of the Act sets out its purposes as follows:

> The purposes of this Act are to prohibit trespassing on farms and other properties on which farm animals are located and to prohibit other interferences with farm animals in order to,
>
> (a) eliminate or reduce the unique risks that are created when individuals trespass on those properties or interfere with farm animals, including the risk of exposing farm animals to disease and stress as well as the risk of introducing contaminants into the food supply;
>
> (b) protect farm animals and the food supply chain from the risks described in clause (a);
>
> (c) protect the safety of farmers, their families and persons working in or on farms, animal processing facilities and prescribed premises as well as the safety of drivers of motor vehicles transporting farm animals; and

[39] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103,

2024 ONSC 1753 (CanLII)

(d) prevent any adverse effects the risks described in clause (a) may have on Ontario's overall economy.

[89] The objectives then are preventing trespass, protecting animal safety, protecting biosecurity of the food supply chain, protecting those working with animals and preventing the adverse economic effects that these risks can create.

[90] I accept that those are pressing and substantial objectives of government.

2024 ONSC 1753 (CanLII)

ii. Rational Connection

[91] Under this branch of the test the government must demonstrate that there is a rational connection between the impugned provisions and the purposes of the Act.

[92] The onus is on the government to demonstrate rational connection. It has been described as a “not particularly onerous” burden.[40]

[93] Ontario points to the potentially devastating impact of biosecurity threats on livestock and the economy. Ontario notes that a single case of mad cow disease in Alberta led to a 33% plunge in Canadian farm cash receipts from cattle in 2003. Introduction of a disease can require quarantine or culling an entire herd or flock. A spread of the disease from one farm to another can cause an entire region of

[40] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, at para.228.

farms to be shut down. Recent outbreaks of Avian Flu, for example, have affected millions of Canadian poultry flocks.

[94] In addition to massive herd losses, disease can cause export markets to close and result in substantial losses. By way of example, Ontario notes that its pork industry markets 5.8 million hogs yearly, has created over 15,000 full-time equivalent jobs and generates economic value of $2.7 billion per year. Approximately 60% of pork sales are to foreign markets.

[95] Ontario argues that trespassers on farms or people who interact with animals in transport trucks do not understand and do not follow biosecurity protocols. Videos to which I was directed show trespassers not wearing (or constantly removing) masks, not wearing farm-dedicated clothing or shoes, and not changing their clothes and shoes when moving from one area to another (as is often required by biosecurity protocols). In one example, trespassers took close-range photos of deadstock bins before moving to other areas of the farm. This poses a significant risk of pathogen spread. Deadstock is legally required to be segregated. In this context I am using the term trespasser in the sense of someone who has broken into an animal protection zone without colour of right and not to people who have been hired as employees but who have the personal objective of conducting an undercover exposé.

[96] In my view there is a rational connection between the purposes the Act is designed to further and at least some of the situations to which ss 5(6) and 14(2) of the Act are designed to apply.

2024 ONSC 1753 (CanLII)

iii. Minimal Impairment

[97] The third branch of the test to determine whether government conduct falls within s. 1 of the Charter requires the government to demonstrate that the means adopted to further the objective infringe rights as little as possible. The minimal impairment stage calls on the court to ask "whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit."[41] Under this branch of the test, the court must be satisfied that there is no alternative method that would advance the Act's objectives that restricts rights less than the Act does.

[98] Legislatures are not held to a standard of perfection, but rather are accorded leeway in the tailoring process.[42] Legislatures must, however, adopt measures that fall within a range of reasonable alternatives."[43]

[99] Ontario argues that the Act is reasonably tailored and impairs rights minimally because it protects the rights of *bona fide* employees who act as whistleblowers and because it protects the rights of journalists.

2024 ONSC 1753 (CanLII)

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[41] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 53.
[42] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para. 160.; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 54.
[43] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para. 149.

[100] In my view Ontario has not satisfied the minimal impairment test. I arrive at this conclusion for three reasons. First, the restrictions on expression are not reasonably tailored when compared to the purposes of the Act. Second, and third, the whistleblower and journalist exceptions are defined in an unnecessarily narrow fashion which restrict freedom of expression more than necessary.

2024 ONSC 1753 (CanLII)

a. Restrictions are Not Reasonably Tailored to Objectives

[101] Ontario says it introduced the Act in response to over 900 letters from farmers, agricultural businesses and agricultural organizations and approximately 120 municipal council resolutions requesting the government to better protect the agricultural industry from "agricultural based trespass."[44]

[102] The evidence to which Ontario took me to justify the Act did not relate to people who gained access to agricultural facilities under false pretences, but related to those who gained access by breaking and entering into premises, accessed animals and in some cases released or stole animals. Neither the applicants nor the interveners participate in such conduct, nor do they defend it. The Act's provisions that address this sort of conduct are not at issue in this proceeding.

[103] The main provision that is being impugned is s. 5(6). I repeat it here for convenience:

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[44] Affidavit of Scott Duff affirmed December 6, 2021, at para. 5-7.

> For the purposes of subsections (1), (2), (3) and (4), consent to entering in or on an animal protection zone, to interfering or interacting with farm animals or to carrying out prescribed activities is invalid if it is obtained from the owner or occupier of the relevant farm, animal processing facility or prescribed premises using duress or under false pretences in the prescribed circumstances or for the prescribed reasons and a consent so obtained shall be deemed not to have been given.

[104] There are three triggers that activate s. 5(6). The first is entry into an animal protection zone. Animal protections zone is broadly defined to include an enclosure for farm animals, whether or not it is marked as an animal protection zone.[45] The second trigger is that consent to enter an animal protection zone is invalid if it is obtained from the owner or occupier of the prescribed premises under false pretences. Prescribed premises is broadly defined in the Regulation to include premises on which farm animals "are ordinarily bought and sold" and "premises at which farm animals are displayed for public viewing."[46] The third trigger is that consent is deemed not to have been given if it was be obtained under false pretences in the "prescribed circumstances or for the prescribed reasons." Those prescriptions are found in the ss 9 and 10 of the Regulation.

[105] I turn first to s. 10 of the Regulation which is, in my view, minimally impairing. Section 10 provides that a consent is considered to have been given under false pretences for the purposes of s. 5(6) of the Act if the false statement "expresses or implies that the person possesses the qualifications necessary to carry out the

[45] Act s. 2.
[46] Regulation, s. 6.1 and 6.2

2024 ONSC 1753 (CanLII)

employment in a manner that would not cause harm to" animals, food safety or to an individual "when in fact the person does not possess those qualifications." Section 10 focuses on misstatements that are directly related to the articulated purposes of the Act of protecting animal safety, protecting biosecurity, protecting those working with animals and preventing adverse economic effects that these risks can cause. Pretending to have qualifications one does not have creates a potential threat with respect to these concerns. As a result, s. 10 of the Regulation is reasonably tailored to the Act's objectives.

[106] Section 9 of the Regulation is, in my view, not minimally impairing and goes further than necessary to advance the avowed purposes of the Act. It provides:

> False statement resulting in contravention of Act
>
> 9. A person who gives a false statement to the owner or occupier of a farm, animal processing facility or prescribed premises or to the driver of a motor vehicle transporting farm animals and who obtains the consent of the owner, occupier or driver to carry out an act that, without the consent, is prohibited under subsection 5(1), (2), (3) or (4) or 6(2) of the Act, is considered to have obtained the consent under false pretences for the purposes of subsections 5(6), 6(4) and 14(2) of the Act if,
>
> (a) the statement is made either orally or in writing;
>
> (b) the false statement is given for the purpose of obtaining the consent;
>
> (c) the owner, occupier or driver provides the consent in reliance on the false statement; and
>
> (d) as a result of the consent being given, the person making the statement carries out an act that would otherwise be prohibited under the Act.

2024 ONSC 1753 (CanLII)

[107] In other words, if a person makes any sort of false statement to gain entry onto a farm, animal processing facility or prescribed premises, the person turns into a trespasser even though the owner or occupier was otherwise content to have the person on the premises. This occurs by virtue of s. 5(6) which deems consent not to have been given in those circumstances.

[108] Thus, an undercover activist who obtains a job at a farm, animal processing facility or prescribed premises by denying any affiliation with an animal rights group or by understating their qualifications and denying that they have a university degree automatically becomes a trespasser although they have done nothing to increase any of the risks that the Act is aimed at reducing. The person could in fact be a model employee who has adhered to all biosecurity protocols, treated animals with the highest degree of care and ensured the safety of their co-workers.

[109] Recall also that “prescribed premises” is defined as including places where animals are ordinarily bought and sold, or places in which animals are displayed for public viewing. This would include petting zoos, rodeos, fairs and circuses. There was no evidence or explanation led about how a false statement to gain entry into an auction, petting zoo, rodeo or circus creates a risk to food security, animal safety or human safety any more than does the presence of people who did not make a false statement to gain entry. In these contexts, s. 9 of the Regulation is not reasonably tailored or minimally impairing. It turns into

2024 ONSC 1753 (CanLII)

trespassers a broad swath of individuals who create no risk in relation to any of the Act's avowed objectives.

2024 ONSC 1753 (CanLII)

b. The Whistleblower Exception

[110] Ontario submits that the Act and Regulation are minimally impairing and reasonably tailored to its objectives because s. 12 of the Regulation creates an exemption for whistleblowers. Section 12 of the Regulation provides that, despite ss 9 and 10 of the Regulation, a person who gave a false statement shall not be considered to have obtained consent under false pretences if the circumstances set out in s. 12 of the Regulation apply.

[111] The applicants submit that s. 12 of the Regulation contains four provisions that not only do not make the Act minimally impairing but which further contribute to the Act's infringement on freedom of expression.

[112] The first limitation is found in s. 12(1)(c) of the Regulation which restricts the whistleblower exemption to a person who, as a result of the false statement:

> was able to obtain information or evidence of harm to a farm animal, harm with respect to food safety or harm to an individual, **or another** illegal activity, being carried out on a farm, animal processing facility or prescribed premises … (emphasis added)

[113] The qualifier "or another illegal activity" in this clause suggests that the evidence of harm to a farm animal that the whistleblower finds must amount to "illegal

activity" to fall within the exemption. Thus, if the whistleblower were to find evidence of piglet thumping,[47] castration without anaesthetic or analgesic or throwing live chicks into a meat grinder, those would not amount to illegal activities and the person would not enjoy the benefit of the whistleblower exemption. Put another way, the provision has the effect of allowing communication about illegal activity but not allowing communication about legal activity. This has further restrictive consequences for freedom of expression.

[114] The provision requires each individual to determine in advance whether the practice about which they are communicating is illegal. This means that the whistleblower will now be required to engage in a legal analysis about what is clearly a highly nuanced issue before knowing whether their exercise of speech will be punishable by law. By way of example, although I heard three days of argument, I am unclear whether piglet thumping is a generally accepted practice and therefore legal, or not. In addition, the uninitiated layperson may well believe that throwing a live chick into a meat grinder amounts to illegal conduct when in fact it appears to be legal. I hasten to add that I am not saying that throwing live chicks into a grinder is necessarily cruel or that it should be illegal. Although it sounds cruel at first blush, it may well be a form of euthanizing chicks that is instant and painless. That issue is not before me. I use these examples only to demonstrate how nuanced the issue of legality is in the circumstances that the Act addresses. The Regulation puts employees into an untenable position by requiring

[47] Assuming it is a generally accepted practice.

2024 ONSC 1753 (CanLII)

instant and correct decisions about legality before they communicate something when the circumstances in which they find themselves are fraught with nuance and lack of guidance.

[115] The second limitation is found in s. 12(1)(d) of the Regulation which provides that the whistleblower exemption only applies if the person who gave the false statement discloses the information they found to a police officer or other authority "as soon as practicable after obtaining the information or evidence." In other words, any delay in providing the information to a police officer or other authority removes the whistleblower exemption. As a result, any whistleblower would be restricted to recording and disclosing only a single act or perhaps a single day of acts or risk being subject to prosecution. This prevents whistleblowers from recording systemic patterns of abuse or wrongdoing. The applicants argue that this makes it relatively easy for an individual facility to dismiss a whistleblowing incident as a one time, unfortunate mishap involving a single bad actor when in fact it may disclose a regular practice or systemic weaknesses in the facility's training or oversight of employees.

[116] This second limitation also compels disclosure to a governmental authority. Rather than being minimally impairing, this provision creates a further infringement on freedom of expression because s. 2(b) of the Charter protects the right to say

2024 ONSC 1753 (CanLII)

nothing.[48] In *McAteer v Canada (Attorney General),*[49] the Ontario Court of Appeal posed three questions to determine if government action amounts to compelled speech contrary to s. 2(b) of the Charter:

a. Is the compelled activity expression?
b. Is the *purpose* of the law aimed at controlling expression? If it is, then it is automatically held to be a violation of s. 2(b).
c. If the *purpose* is not aimed at controlling expression, then the applicant must show the law has an adverse *effect* on expression, and that effect is worthy of constitutional disapprobation.[50]

[117] Answering these three questions, both sides agree that reporting to the police amounts to expression. The stated purpose of the Act, on its face, does not relate to the control of expression. Mr. Duff's evidence suggests that one purpose of the Act is to control undercover exposés. Regardless of the potential dispute over purpose, the Act does have an adverse effect on expression. The Act controls both the nature of the expression by compelling reporting to police or governmental authority and the timing of that expression by compelling disclosure as soon as practicable after obtaining the information. Both have an adverse effect on expression. People may be reluctant to report given that doing so may subject them to prosecution if they do not disclose illegal conduct. The requirement that

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[48] *CCLA v Attorney General of Ontario*, 2020 ONSC 4838 ["***CCLA***"] at para 42; citing *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at para 95.
[49] *McAteer v. Canada (Attorney General)*, 2014 ONCA 578
[50] *CCLA*, supra at para 45; *McAteer v. Canada(Attorney General)*, 2014 ONCA 578 at para 69.

2024 ONSC 1753 (CanLII)

the report be made as soon as practicable adversely affects expression because it likely limits the expression to a single incident or a single day. In my view, that effect on expression is worthy of constitutional disapprobation. The expression being affected is expression that goes to the heart of the reason we protect freedom of expression which the Supreme Court of Canada described as follows in *R. v. Keegstra:*

> At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information.[51]

[118] Although many will disagree with the applicants' views, their expression is aimed at truth seeking and aimed at promoting social and political dialogue about a matter of public policy. In my view, s. 12(1)(d) of the Regulation does amount to compelled speech of the sort that infringes s. 2(b) of the Charter.

[119] The third limitation arises out of s. 12(2)(a)(i) and (ii) of the Regulation which removes the whistleblower exemption if the person "directly or indirectly":

> (i) caused or contributed to the disclosed harm to a farm animal, … or illegal activity, or

[51] *R v Keegstra*, [1990] 3 SCR 697 at p 762.

2024 ONSC 1753 (CanLII)

> (ii) caused any harm to a farm animal … to obtain the information that is disclosed to the police officer or the authority.

Section 12(2)(a)(i) appears to cover harm or illegal activity unrelated to the communication the whistleblower is making. Section 12(2)(a)(ii) is limited to causing harm in order to obtain the information the whistleblower is disclosing to the governmental authority.

[120] These provisions do not exclude from their ambit harm caused by generally accepted practices of animal husbandry. The applicants submit that, as a result, an employee who docked tails, castrated piglets without anaesthesia or threw live chicks into a grinder would potentially lose the whistleblower exemption because they had caused harm to an animal.

[121] Ontario submits that this concern is unfounded because courts will first interpret the statute properly and then determine whether it involves a breach of Charter rights. In doing so, courts will presume that legislatures do not create meaningless exemptions and that courts will read down legislative instruments that purport to do so. It relies on *Montreal (City) v. 2952-1366 Québec Inc*.[52] and *Canada (Attorney General) v. JTI-Macdonald Corp.* for this proposition.[53] In *JTI,* the court was confronted with a provision that it described as ambiguous and held at paragraph 55:

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[52] *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 , [2005] 3 SCR 141 at paras. 18-35.
[53] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 , [2007] 2 SCR 610;

2024 ONSC 1753 (CanLII)

> Confronted with a statutory provision that, read literally, seems to make no sense, the court should ask whether the section can be interpreted in a manner that fits the context and achieves a rational result.[54]

[122] Applying this principle, Ontario submits that a court would never conclude that harming an animal using generally accepted practices of animal husbandry amounts to harm to an animal for purposes of the Regulation.

[123] The words of the Regulation make sense in the context of provisions that were implemented to reduce or eliminate undercover exposés. In that context, the broad language of the Regulation can be seen to have a chilling effect. If the purpose is to reduce undercover exposés, a chilling effect would in fact be the intention. That chilling effect could easily be removed by carving out from ss 12(2)(a)(i) and (ii) harm that results from generally accepted practices of animal husbandry.

[124] This third limitation also removes the whistleblower exemption if the person engaged in illegal activity. On the face of the Regulation this includes illegal conduct that the employee was directed to engage in by their employer. As with earlier provisions, this requires a whistleblower to make an instant and correct distinction between generally accepted practices of animal husbandry and illegal activity in circumstances that are, as noted, fraught with ambiguity. The regulation could also have been drafted to exclude harm that results from a task that the employee was required to perform as part of their employment duties.

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[54] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 , [2007] 2 SCR 610 at para. 55.

2024 ONSC 1753 (CanLII)

[125] Finally on this third limitation, it is no answer to an allegation of a Charter breach to say that courts will read down the statute when charges are laid as a result of which the court should not trouble itself with the issue on an application for a declaration such as this.

[126] I am mindful that the concept of minimal impairment does not require the government to show that the method it has chosen is the least drastic means of achieving its objective. Courts must accord some deference to the legislature by giving it a certain latitude. If the law falls within a range of reasonable alternatives, courts will not find it overbroad simply because they can think of an alternative which might impair rights less.[55]

[127] In circumstances where one of the concerns is the chilling effect of the Regulation on expression and where the respondent's chief witness agrees that the impetus behind s. 5(6) of the Act was eliminate undercover exposés, the failure of the Regulation to protect conduct carried out in accordance with generally accepted practices of animal husbandry or conduct that an employee was directed to engage in as part of their employment duties removes s. 9 of the Regulation from a range of reasonable alternatives.

[128] The fourth limitation arises out of s. 12(2)(c) of the Regulation which removes the whistleblower exemption if:

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[55] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, at para.149

2024 ONSC 1753 (CanLII)

> before the person completed gathering information, the owner or occupier of the farm, animal processing facility or the prescribed premises or the driver of the motor vehicle, as the case may be, asks the person to leave the farm, facility or premises or the area where the motor vehicle is located, or to stop interfering or interacting with farm animals.

2024 ONSC 1753 (CanLII)

[129] In other words, if the whistleblower is caught before completing his or her information gathering, they lose the whistleblower exemption. This risks creating an offence retroactively. That is to say, when the whistleblower begins gathering information, there is no offence but if the whistleblower is caught in the act of gathering information, their past conduct becomes an offence because, if they are caught while gathering information, they have, by definition, not "completed gathering information." In those circumstances, no one would ever know, while gathering information, if they were committing an offence because the penal nature of the activity would turn on whether the person is caught in the act, something that could never be determined in advance.

[130] Ontario submits that s. 12(2)(c) of the Regulation means simply that the person has no right to remain on the premises under the whistleblower exemption if they have been asked to leave. I do not accept that submission. That is simply not what the provision says. It does not refer to the whistleblower having to leave the premises if asked to do so. It removes the whistleblower exemption which in turn would remove the consent that the whistleblower had to be on the property which turns them into a trespasser and renders them liable to punishment under the Act. The respondent's interpretation is entirely unnecessary because any individual is required to leave premises at the request of an owner or occupier. The *Trespass*

to Property Act[56] already makes that clear. If the objection to that analysis is that fines in the *Trespass to Property Act* are too low, one could simply have taken the language from the *Trespass to Property Act* that requires someone to leave premises immediately when asked and put it in into s. 12(2)(c) of the Regulation.

[131] As a result of the foregoing, I conclude that ss 12(1)(c) and (d); 12(2)(a)(i) and (ii); and 12(2)(c) of the regulation are not minimally impairing or reasonably tailored to the Act's avowed objectives but instead, further the restriction on freedom of expression.

c. Journalism Exemption

[132] Ontario submits that the Act and its Regulation are minimally impairing because s. 11 of the Regulation contains an exemption for journalists. It is similar to the whistleblower exemption. It provides that, despite ss 9 and 10 of the Regulation, a person who gave a false statement shall not be considered to have obtained consent under false pretences if the person is a journalist.

[133] Like the whistleblower exemption the journalism exemption only applies if the journalist does not cause or contribute to harm to a farm animal (s. 11(1)(d) of the

[56] *Trespass to Property Act*, RSO 1990, c T.21, s. 2(1)(b)

2024 ONSC 1753 (CanLII)

Regulation) and the owner does not ask the journalist to leave before the journalist has completed gathering information (s. 11(1)(e) of the Regulation).

[134] A journalist in this context is most likely to be acting as an undercover employee, as a result of which the same analysis applies to these provisions here as applied in the context of whistleblowers. If the journalist was following the direction of the owner or occupier of the agricultural premises, the requirement in s. 11(1)(d) should not apply.

[135] The provision that makes the journalists exception applicable only if the owner or occupier does not ask the journalist to leave the premises before the journalist has completed gathering information in s. 11(1)(e) of the Regulation fails to make the Regulation minimally impairing and furthers the restriction on freedom of expression for the same reasons as set out in the discussion of the parallel provision in the whistleblower exemption.

[136] In addition, the journalism exemption is further limited by s. 11(2) of the Regulation which defines a “journalist” to mean a person who:

> (a) is employed or hired by, or works in connection with, the news media, a press association, news agency, wire service or post-secondary journalism course or program, and
>
> (b) contributes directly to the collection, writing or production of information for dissemination by the news media or other entity referred to in clause (a) to the public in the public interest;
>
> “news media” means corporations or entities whose primary function is to disseminate information to the general public on a regular basis, whether in writing or by radio, television or similar electronic means.

2024 ONSC 1753 (CanLII)

[137] The applicants argue that the journalists' exemption is of no practical use because it is limited to traditional news media which would rarely, if ever, conduct investigations that require them to obtain employment under false pretences.

[138] The respondent argues that the narrower definition is required in s. 11(2) of the Regulation because true journalists follow proper journalistic methods when gathering information and verify such information to ensure that it is accurate. True journalists also give the other side a chance to respond; undercover operatives do not.

[139] Both sides filed experts reports. The applicants from Robert Cribb; the respondent from Ivor Shapiro. Both are highly qualified experts. Their reports are thoughtful and impartial. Both reports point to the difficulty of defining journalism at today's juncture because society's conception of journalism is in flux. Traditionally, a journalist was readily identifiable as someone working for an accredited media organization or perhaps someone who was a full-time freelance journalist who contributed to accredited news organizations. The advent of social media has disrupted that traditional understanding. Journalism has historically acted as a gatekeeper of information. It served a curatorial function which allowed the public to have a degree of confidence in what was published in reputable media. That degree of confidence may be less justified in uncurated media.

[140] The applicants ask me to strike s. 11 of the Regulation as unconstitutional, because its more limited definition of journalism does not take into account the

2024 ONSC 1753 (CanLII)

many reputable journalists now working through social media as a result of massive layoffs from traditional media over the last few years.

[141] A definition of journalism has always been difficult. It is even more difficult today for the reasons outlined above. To some degree, the definition may depend on its purpose. A tax definition of journalist may differ from one used for confidentiality of sources or freedom of expression. That said, I note that the Supreme Court of Canada recognized the importance of newer, non-traditional media in facilitating broader discussions of matters of public interest in *Grant v. Torstar Corp*.[57] In that case the court modified the law of defamation to recognize the defence of responsible communication on matters of public interest. In doing so the court noted:

> … However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is "available to anyone who publishes material of public interest in any medium.[58] (Citations omitted).

[142] The only concerns Ontario advanced to support its limitation of journalism to traditional media and limited types of freelancers is that they follow certain methods and verify information. Those concerns, however, also applied to the

[57] *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 SCR 640
[58] *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 SCR 640 at para. 96.

2024 ONSC 1753 (CanLII)

disseminators of information that the Supreme Court held should be subject to the same laws as media outlets. Moreover, Ontario did not take me to any exposés of undercover activists that it alleged were inaccurate. I was, however, taken to examples of exposé videos created by undercover activists that were then published by established media such as CTV and CBC.

[143] Given the limited amount of space and time devoted to this issue in the factums and oral argument, this is not the case in which to embark on a judicial definition of "journalism." While I do not use *Grant* as a basis for striking the definition of journalism in s. 11 (2) of the Regulation as unconstitutional, I do find that the more limited definition of journalism is s. 11 is one that prevents the provision from being minimally impairing for purposes of the s. 1 analysis.

iv. Proportionality

[144] The final stage of the s. 1 analysis requires the court to balance the salutary and deleterious effects of the government conduct. This balancing exercise "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[59] The Supreme Court of Canada has described the proportionality test as follows:

> The final question is whether there is proportionality between the *effects* of the measure that limits the right and the law's *objective*. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of

[59] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para. 77.

2024 ONSC 1753 (CanLII)

> the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified? [60]

[145] The salutary effect of the legislation is said to be to deter unlawful trespass, protect biosecurity, and avoid harm to animals, farmers and the economy. I agree that those are all valuable, legitimate, salutary effects of the legislation.

[146] In my view, however, the deleterious effect of some provisions of the Act and Regulation are disproportionately large when one balances them against the limitations on freedom of expression.

[147] I turn first to the effects that are proportionate.

[148] The restrictions that the Act imposes on more traditional trespass in the sense of being on a property without any colour of right or in the sense of breaking and entering onto properties are proportionate. Individuals simply do not have the right to break into or enter onto property without any colour of right in the purported exercise of freedom of expression. In this light, the prohibitions in the Act are no different than breaking into a residential property or checking for unlocked doors and entering an unlocked residential property without any invitation from its owner or occupant.

[149] Similarly, s. 10 of the Regulation which characterizes someone who has overstated their qualifications as a trespasser is also proportionate. The prohibition on

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[60] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30, [2007] 2 SCR 610

2024 ONSC 1753 (CanLII)

overstatement is directly related to the Act's objectives relating to biosecurity and safety of animals. For someone to claim qualifications in for example, biosecurity or veterinary care, when they have no such credentials can imperil biosecurity and animal safety. The limits on freedom of expression that s. 10 imposes are proportionate in that they are tightly aligned with the Act's objectives in this regard. In addition, the importance of biosecurity and animal health outweigh the freedom to overstate one's qualifications. In this light, s. 10 of the Regulation is more in line with traditionally accepted limitations on freedom of speech involving fraud or misrepresentation.

[150] Section 9 of the Regulation is more troublesome. It targets false statements more generally. The practical effect of that restriction is to target people who understate their qualifications or deny affiliations with animal rights groups to get jobs in places where animals are raised or slaughtered. The language of the Act and Regulation, however, go even further and turn into trespassers people who have gained access to otherwise public or quasi public places like animal auctions, petting zoos, fairs and circuses by, for example, denying affiliation with any animal rights groups.

[151] I consider the proportionality of this restriction against the following factors: the value of the expression at issue, biosecurity and animal safety, farmer safety, the economy and the applicants' long-term goals.

Value of the Expression

2024 ONSC 1753 (CanLII)

[152] The freedom and the value of the expression at issue here can be assessed at two levels. The first level penalizes the misrepresentation made to gain entry to the agricultural premises no matter how unrelated to the purposes of the Act. The second level, in effect, penalizes a person for communicating what they see on the premises after having gained entry.

[153] Turning to the first level of expression. As noted, the most immediate concern for the applicants is the undercover activist who obtains a job by denying that they have a university degree or by denying any association with an animal rights group. Ontario also asks me to take into account the low social and constitutional value of lying in the proportionality analysis.

[154] The Supreme Court of Canada has held that misrepresentations and lies are constitutionally protected speech. In *R. v. Zundel,*[61] a notorious Holocaust denier was convicted at trial under s. 181 of the *Criminal Code* which provided:

> Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence …

[155] The Supreme Court reversed the conviction and found that s. 181 of the *Criminal Code* amounted to an infringement of freedom of expression under s. 2(b) of the Charter which was not justified under s. 1. In response to the Crown's argument

[61] *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731

2024 ONSC 1753 (CanLII)

that the Zundel's speech served none of the values underlying freedom of expression, the Supreme Court noted:

> … A deliberate lie, it is said, does not promote truth, political or social participation, or self-fulfilment. Therefore, it is not deserving of protection.
>
> Apart from the fact that acceptance of this argument would require this Court to depart from its view that the content of a statement should not determine whether it falls within s. 2(b), the submission presents two difficulties which are, in my view, insurmountable. The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s. 2(b) of the Charter. The second lies in the difficulty of determining the meaning of a statement and whether it is false.
>
> The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., `cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's Satanic Verses, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.[62]

[156] If lies can amount to protected speech in a context as odious as Holocaust denial, they should be equally protected when someone denies having a university degree

[62] *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731at 754-755.

2024 ONSC 1753 (CanLII)

or being affiliated with an animal rights group to obtain employment at or entry to an animal auction, petting zoo, rodeo, fair or circus.

[157] I turn now to the second level of analysis which I have described as, in effect, penalizing a person for communicating what they see on the premises after having gained entry.

[158] On its face, the Act does not purport to penalize the communication of what a person sees on the premises. As a practical matter, however, no one is likely to be charged for making a false statement during a job interview if they then work on the premises as a diligent employee for the rest of their careers. A charge and penalty for the false statement is likely to arise only if the person communicates what they see on the premises or if the person is caught while trying to communicate what they see by, for example, recording a video.

[159] This becomes even clearer from the whistleblower exemption which relieves a whistleblower of liability if they disclose illegal activity but does not relieve them of liability if they disclose legal activity. In that instance it is the nature of the second communication that determines liability.

[160] In my view the value of the first and second communications is high. The misrepresentation to gain access is made in order to communicate what the person sees on the premises. The second form of expression communicates what the person sees.

2024 ONSC 1753 (CanLII)

[161] The expression is of public interest. Publicizing the way in which animals are treated is an issue of interest to at least some members of the public. It is an issue about which the public is entitled to be informed if they want to be. It will then be for the public to determine whether they find the conditions acceptable when balanced against the consequences, if any, of changing those conditions.

[162] This is all the more so in light of the Supreme Court's direction to consider the value of the expression in the context of "the diversity in forms of individual self-fulfillment and human flourishing [which] ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."[63]

Biosecurity and Animal Safety

[163] In justifying the Act and the Regulation, Ontario relies heavily on threats to biosecurity, contamination of the food supply chain and the safety of farm animals. As noted earlier, Ontario points to the ease with which herds or flocks can be infected and the serious consequences such infections can have on animals and the economy. Those are important concerns.

[164] However, for a potential employee to deny any association with animal-rights groups in a job interview does not threaten biosecurity, the food supply chain or

[63] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at p. 278.

2024 ONSC 1753 (CanLII)

animal safety. Nor does the follow-up act of such an activist communicating what they see in an agricultural facility.

[165] Ontario's affiant, Scott Duff suggests in para. 37 of his affidavit that the Act is also aimed at undercover operatives who obtain employment and fail to follow biosecurity protocols. Ontario asked in oral argument how do we know whether undercover employees observe biosecurity protocols? That, however, is not the question. The question should be whether there is any greater risk of undercover employees failing to follow biosecurity protocols than there is of ordinary employees failing to follow them.

[166] There was no evidence put to me which suggests that undercover employees create any overall greater risk to biosecurity or animal safety than that caused by any other employee. Nor was there any evidence put to me of an undercover employee importing a biosecurity hazard into a facility.

[167] The respondent's fact witness, Eric Schwindt, a career hog producer and former Chair of the Ontario Pork Producers' Marketing Board, agreed on cross-examination that an under cover employee poses no greater biosecurity risk than any other employee.[64] Both the undercover operative and the ordinary employee receive the same level of training on biosecurity hazards and procedures, both receive the same level of supervision and both receive the same level of discipline for failure to follow protocols. If anything, an undercover employee has as much

[64] Cross-examination of Eric Schwindt q.162,

2024 ONSC 1753 (CanLII)

or greater incentive to comply with protocols as a regular employee because the under cover employee wants to remain on site until they have the information they would like. Harming animals by wilfully introducing diseases would also appear to contradict the overall goal of animal rights activists to improve animal welfare.

[168] The respondent's swine health expert, Dr. Robert Friendship explained that the greatest risk to biosecurity comes from an infected animal being brought to a facility or being moved from one contained area in a facility to another area in the same facility. Dr. Friendship also agreed that some of the abuses shown on undercover videos such as bodies of dead animals lying exposed next to living animals, feeding mouldy food to animals or employees leaving a facility during a break and re-entering without sanitizing themselves, all amount to biosecurity hazards.

[169] Moreover, despite the concern for biosecurity, there are no mandatory biosecurity standards or requirements in Ontario. While certain industry organizations have developed best practices for biosecurity, it is left to each facility to decide what protocols to apply and how to apply them.

[170] The government's affiant, Scott Duff, agreed on cross-examination that any concern about biosecurity would be at least as well addressed as it is under the

2024 ONSC 1753 (CanLII)

Act if all individuals in Animal Protection Zones were required to follow biosecurity protocols.[65]

[171] To highlight concerns about animal safety, Ontario took me to two affidavits in which livestock producers complained about two animal rights activists that they had inadvertently hired. One is alleged to have failed to report health issues about minks under her care. The other is alleged to have failed to milk goats thereby causing them discomfort. There are no doubt people on both sides of the debate who occasionally neglect animals. That is inevitable when dealing with a group of people of a certain size. That should not, however, limit the freedom of expression of the larger group. There is also contrary evidence in the record which suggests that animal rights activists are more likely to be attentive to livestock health because of their concern for animals.

[172] Although the Act's concerns about biosecurity and animal safety are valid, a misrepresentation that understates one's qualifications or that denies association with an animal rights group and the subsequent communication of what the person saw has no bearing on biosecurity or animal safety.

Farmer Safety

[173] A further goal of the Act is the safety of farmers, their families and persons working in or on farms, animal processing facilities and prescribed premises.

[65] Cross-examination of Scott Duff at q. 269.

2024 ONSC 1753 (CanLII)

[174] Ontario took me to evidence of farmers who had been intimidated and harassed by activists. The House of Commons report attached to Ms. Fitzgerald's affidavit spoke of cyber bullying. There is, however, no evidence before me that individuals who, for example, gain employment by deceptive means are the ones who harass farmers. I accept, however, that the publication of videos showing the conditions in which animals are kept can lead certain types of people to become overly aggressive and can lead them to harass those that they believe are mistreating animals. To that extent, the communication by animal rights activists of what they saw on certain premises can have an adverse effect on the psychological health of the victims of the harassment.

[175] The House of Commons report attached to Ms. Fitzgerald's affidavit sets out the common stressors to farmers.[66] They are: finances, volatile markets, long hours, family disagreements, lack of sleep, unreasonable personal goals, weather, administrative burden, machinery breakdowns, injury, dangerous goods and livestock well-being. Harassment is not identified as one of the key stressors. That said, the report does speak about the stigmatization of farming as follows:

> Ms. Connery said that some of the stress farmers feel stems from "the difference between the public perception of what a farm is and the reality of what a farm is, including how we treat our animals, our land, our water supplies, and all of the resources we use.
>
> This lack of understanding of farmers' work can sometimes cause distress, especially when individuals question the integrity of certain farmers. Some witnesses told the

[66] See CaseLines p. B-1-4740

2024 ONSC 1753 (CanLII)

> Committee that activist groups use social media to put pressure on livestock producers. Ms. Desrosiers argued that "animal rights activists" are "a growing threat" to livestock producers.
>
> Mr. Campbell described to the Committee how he has been cyberbullied: "I've been told online that I'm a murderer. My wife has been asked why she would ever be with someone who rapes animals." Mr. Skinner had a similar experience: "there is also a small minority of people who attack my integrity and question my morality because I raise animals for food." He admitted that being targeted in this way has had a serious impact on his mental health.

2024 ONSC 1753 (CanLII)

[176] The Committee's recommendation in this respect was as follows:

> Recommendation 3
>
> Given the prevalence of government initiatives, studies, and programs to combat cyber bullying and other forms of intimidation and coercion targeted at students and vulnerable Canadians, the Government should engage with farmers and agricultural stakeholder groups to develop public awareness campaigns and strategies to combat the growing incidence of cyber bullying, intimidation, and threats targeted at Canada's agricultural workers which results in a significant increase in stress. In addition, the Committee recommends that the Government of Canada consider including any form of intimidation or cyberbullying targeted at any group of Canadians based on their occupation or place of residence as a Criminal Code offence.

[177] In other words, the Committee recognized that harassment was not unique to agricultural workers but was a wider problem within society. The Committee's recommendation to develop public awareness campaigns is far more consistent with freedom of expression and proportionality than penalizing representations that do not, in and of themselves, harass farmers.

[178] Freedom of expression is not without cost. Some will be offended by the expression itself. Others will take a communication which may not be harmful in

and of itself and use it as a springboard for offensive conduct like harassment. Rather than punishing the expression, the more proportionate response is counter speech that explains the practices at issue and why they are necessary. It will then be up to social consensus to determine whether the practice should continue or be modified. An alternative proportionate measure would be sanctions that target harassment. Targeting those who engage in truthful communication because those communications incite others into inappropriate conduct, strikes me as disproportionate.

2024 ONSC 1753 (CanLII)

Avoiding Economic Harm

[179] Section 1(d) of the Act articulates one of its purposes as preventing "any adverse effects the risks described in clause (a) may have on Ontario's overall economy." The risks in clause (a) are those "that are created when individuals trespass on farm property or interfere with animals including the risk of exposing farm animals to disease and stress as well as the risk of introducing contaminants into the food supply."

[180] If economic harm in this regard refers to harm caused by biosecurity threats or contamination of the food supply, the provisions of the Act that prohibit trespass in the traditional sense of someone being on a property without colour of right and that penalize those who purport to have qualifications that they do not actually have are valid and proportionate.

[181] The simple fact that an undercover activist obtains a job by understating their qualifications does not create economic harm. If the intention, however, is to protect the economy from harm that may be done by people who record or describe what they have seen in an animal protection zone, then the measure is disproportionate. Indeed, penalizing truthful statements because they might harm the economy would seem to strike at the very heart of freedom of expression.

Applicants' Long Term Goals

[182] Ontario submits that the application puts the court at the edge of a slippery slope because the political goal of some of the interveners is not to improve animal welfare but to eliminate the use of animals in the service of humans for any purpose.[67] The fact that particular views may be outside of the mainstream does not mean that their expression should be constrained any more than views that are within the mainstream. It is, in fact, usually the opposite. Those who find themselves in the mainstream of social consensus rarely need to invoke freedom of expression because their speech gives rise to little, if any, opposition. It is the very fact that certain views lie outside of the general social consensus that makes freedom of expression important to protect.

[183] In light of the foregoing I find that general prohibition on misstatements is not saved by s. 1 of the Charter.

[67] See for example q. 195 on the cross-examination of Cindy Beals from Last Chance for Animals.

2024 ONSC 1753 (CanLII)

D. Conclusion on False Pretences and Freedom of Expression

[184] Bringing these various strands of analysis together, I find that ss 5(6) and 14(2) of the Act do not infringe on the applicants' Charter rights. Those sections are more enabling provisions than they are operative provisions. That is to say, neither of them does the actual infringing. Section 5(6) merely says that consent to enter certain premises is vitiated in prescribed circumstances. Section 14(2) makes it an offence for a person to use false pretences in prescribed circumstances to do certain things on certain premises.

[185] More critical are the prescribed circumstances themselves. Those are found in the Regulation.

[186] For the reasons set out above, I find that s. 9 of the Regulation infringes on freedom of expression and is not saved by s. 1 of the Charter.

[187] The applicants ask me to find that ss. 11 and 12 of the Regulation infringe on freedom of expression in their entirety. I decline to do so. While those provisions may not be perfect, they may, in some circumstances, protect freedom of expression. The preferable course of action is to make findings about those specific provisions that infringe on freedom of expression and are not saved by s. 1 of the Charter. As a result, for the reasons set out above I find that ss 11(1)(d) and (e); ss 12(1)(c) and (d); 12(2)(a)(i) and (ii) and 12(2)(c) of the Regulation infringe on freedom of expression and are not saved by s. 1 of the Charter.

2024 ONSC 1753 (CanLII)

[188] Although s. 10 of the Regulation infringes on freedom of expression, it is saved by s. 1 of the Charter.

[189] While I find that the definition of journalist in s. 11(2) of the Regulation is controversial, this is not the appropriate case in which to embark on a judicial definition of journalist or journalism given the more limited role that issue played in the application. Moreover, given my striking of s. 9 of the Regulation and certain provisions of ss 11 and 12 of the Regulation, the definition of journalism becomes more of an academic issue for purposes of this application.

2024 ONSC 1753 (CanLII)

III. Freedom of Expression and Interaction with Animals

A. The Statutory Provisions

[190] The second principal challenge the applicants mount to the Act concerns the provisions that limit the applicants' ability to interact with animals.

[191] Section 5(4) prohibits anyone from interfering or interacting with a farm animal in an animal protection zone without the prior consent of the owner or occupier of the premises. Section 5(6) of the Act vitiates any consent to interact with such animals if the consent was obtained under false pretences.

[192] Section 6(2) provides:

> No person shall interfere or interact with a farm animal being transported by a motor vehicle without the prior consent of the driver of the motor vehicle.

[193] Section 6(4) of the Act provides that any consent to interacting with a farm animal is invalid if it was obtained using false pretences in the prescribed circumstances. As with s. 5 of the Act, the prescribed circumstances are found in ss. 9 and 10 of the Regulation.

[194] Although the applicants do not challenge it, s. 6(1) is relevant to the challenge to s. 6(2). Section 6(1) provides:

> No person shall stop, hinder, obstruct or otherwise interfere with a motor vehicle transporting farm animals.

[195] Section 14 makes it an offence to breach ss. 5(4), 6(1) or (2) and makes infractions of those sub-sections punishable by fines of up to $15,000 for the first offence and up to $25,000 for subsequent offences.

B. Do Limits on Interacting with Animals Restrain Freedom of Expression?

[196] The applicants submit that the limits on interacting with animals contained in ss 5(4), 5(6), 6(2) and (4) of the Act infringe on their freedom of expression under s. 2(b) of the Charter because interacting with animals is integral to their self-fulfillment.

[197] In addition, the applicants submit that the limitations that ss 6(2) and (4) of the Act impose on their ability to interact with animals being transported infringe on their

2024 ONSC 1753 (CanLII)

right to freedom of assembly under s. 2(c) of the Charter. The applicants say this infringes on what they refer to as "bearing witness." Bearing witness involves the holding of a vigil or protest outside of a slaughterhouse and observing trucks transporting livestock as they enter the facility. As part of that exercise, protesters sometimes stop trucks and interact with animals by putting their faces close to vents in the truck, or giving animals water through the vents. As described in the applicants' factum, the object of such interactions is to "show kindness and compassion to [animals] in their final moments, including by petting animals who seek affection."[68] The applicants submit that this interaction is an integral part of their self-fulfillment.

[198] I agree that the conduct that ss 5(4) and 6(2) prohibit is a form of expression.

[199] The purpose of ss 5(4) and 6(2) is not to restrain speech but to protect animal safety and biosecurity. In addition, s. 6(2) seeks to protect the safety of protesters. The Regan Russell Foundation submits that protester safety is not an avowed purpose of the Act but that only biosecurity and animal safety are. I do not agree with that characterization. Section 1(a) of the Act defines one of its purposes as being to "eliminate or reduce the unique risks that are created when individuals… interfere with farm animals…" One of those risks is physical danger to protesters.

[68] Applicants' factum para. 93.

2024 ONSC 1753 (CanLII)

[200] Although the purpose of ss 5(4) and 6(2) is not to limit freedom of expression, their effect is to do so insofar as they limit the ability of people to interact with livestock in trucks or more generally.

[201] Interacting with livestock is not, however, in my view, expressive content that is protected by the Charter. As noted in the analysis dealing with s. 5(6), one of the questions the court must ask itself in considering whether government conduct infringes on freedom of expression is whether the location of the expression removes it from the protection of s. 2(b).

[202] I am satisfied that the location and mode of the expression that ss 5(4) and 6(2) of the Act address, removes the expression from s. 2(b) of the Charter. The protection the applicants seek is to interact with animals. In other words, the applicants want to use physical contact with the private property of another person as a means to their self-fulfillment. I was not directed to any authority that extends Charter protection to that degree nor would it, in my view, be appropriate to do so. The purpose of protecting freedom of expression is to do just that, allow people to express themselves. It does not allow people to appropriate, even momentarily, the property of others as a means for that expression.

[203] The Regan Russell Foundation analogizes the limitation under s. 6(2) to being free to attend a demonstration but being prohibited from having incidental contact with another demonstrator or being free to walk down the street with a child but being penalized if the child touches someone's lawn. I do not find those to be helpful analogies. In those analogies, the contact with another's private property or

2024 ONSC 1753 (CanLII)

person is an insignificant, incidental, and accidental consequence of the expression. The physical contact the applicants want with someone else's property *is* the expression.

[204] The Act does not infringe on freedom of assembly. It does not prohibit protesting in the immediate vicinity of slaughterhouses or trucks that transport animals. Protesters are free to continue to hold vigils outside of slaughterhouses, display signs, hand out pamphlets and photograph the interior of the transport trucks to document the conditions in which animals are being transported.

2024 ONSC 1753 (CanLII)

C. Are ss 5(4) and 6(2) of the Act Saved by s. 1 of the Charter?

[205] Although I have found that ss 5(4) and 6(2) do not infringe on Charter protected rights, I will nevertheless proceed to consider whether those subsections would be saved by s. 1 of the Charter in the event I am wrong in my analysis of the Charter infringement.

[206] As noted earlier, to justify an infringement of a Charter right under s. 1, the government must demonstrate that the measure: (i) furthers a pressing and substantial objective; (ii) is rationally connected to the objective; (iii) minimally impairs the right at issue; and (iv) is proportionate in that its benefits outweigh its deleterious effects.[69] I am satisfied that s. 6 meets all four of these requirements.

Pressing and Substantial Objective

[69] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103,

[207] As noted, the purpose of ss 5(4) and 6(2) as articulated in s. 1(h) of the Act is to "eliminate or reduce the unique risks that are created when individuals… interfere with farm animals…"

[208] Two such risks are biosecurity and animal safety. I have already identified those as pressing and substantial objectives.

[209] A further risk is the safety of protesters if they interact with animals in large transport trucks. The Court of Appeal has held that regulating the interaction of pedestrians and vehicles on roadways is a pressing and substantial government objective.[70]

Rational Connection

[210] There is a rational connection between biosecurity, animal safety and protester safety on the one hand and the restriction on interacting with animals.

[211] Protesters who bear witness often give water to animals. Although giving water to animals is not, in and of itself a threat to biosecurity, giving other sorts of substances to animals may well create a threat to biosecurity and animal safety. Ensuring that noxious substances are not given to animals in transport is one way of meeting the objective of both biosecurity and animal safety.

[70] *R. v. Banks*, 2007 ONCA 19 at para. 129.

2024 ONSC 1753 (CanLII)

[212] In addition, protesters will sometimes spray water into the truck in the belief that they are helping cool down animals on hot days. That water makes its way to the floor of the truck. When it mixes with excrement on the floor, it creates slippery conditions that can lead to animals falling. The cramped conditions on the trucks then make it difficult for a fallen animal to get back up on its feet and creates the risk of the fallen animal being walked or stomped on by other animals.

[213] In *R. v. Banks*,[71] the Court of Appeal for Ontario accepted that there was a rational connection between regulating pedestrians approaching vehicles on a roadway and traffic safety. Quite apart from any finding in *Banks*, I am satisfied that the limitations in s. 6 have a rational connection to the safety of protesters.

[214] The videos in the record show the dangers that protester interaction with animals can create. They show protesters putting their hands through ventilation holes in trucks. If a truck began moving while someone's hand was in the ventilation gap, it could cause serious injury. Those dangers would be exacerbated in slippery conditions caused by rain, ice or snow.

[215] Danger to protester safety is further exacerbated by the characteristics of the trucks. They are large and have substantial blind spots. The evidence before me indicated that in the middle of a right turn, a driver can see only approximately 25% of the right side of the trailer. Similarly, the trucks offer only limited visibility to what is immediately in front of them because of the large size and height of the

[71] *R. v. Banks*, 2007 ONCA 19 at para. 130.

2024 ONSC 1753 (CanLII)

front hood. Protesters tend not to be familiar with the limitations of trucks this large or how their performance differs from automobiles. These various factors create considerable risks for protesters who interact with animals on the trucks.

[216] If the operator of the truck consents to the interaction between protesters and animals, these dangers to protester safety are unlikely to arise because, in those circumstances, the truck is unlikely to move during the interaction.

[217] In the foregoing circumstances, I am satisfied that prohibiting protester interaction with animals in trucks without the operator's consent is rationally connected to protester safety.

Minimal Impairment

[218] I am equally satisfied that ss 5(4) and 6(2) of the Act minimally impair freedom of expression and freedom of assembly.

[219] Both subsections minimally impair freedom of expression. They simply control access of one person to another person's private property.

[220] With respect to freedom of assembly, the evidence demonstrates that protests at slaughterhouses have continued since the Act came into force.

[221] The legislation does not prohibit protesting in the immediate vicinity of slaughterhouses or trucks that transport animals. The legislation does not require

2024 ONSC 1753 (CanLII)

protesters to keep a certain distance from trucks. The provision at issue simply prohibits interaction with animals on the trucks.

2024 ONSC 1753 (CanLII)

Proportionality

[222] In my view ss 5(4) and 6(2) impose limitations that are proportional to the objectives of biosecurity, animal safety and protester safety. I am equally satisfied that their benefits outweigh their deleterious effects.

[223] The limitations of both subsections are directly connected to animal safety and biosecurity. Their deleterious effect is merely to restrain behaviour that the person who seeks to interact with animals has no right to in the first place. Upholding the constitutionality of ss 5(4) and 6(2) would not have any adverse effect on the freedom of expression that I have found to be protected by the Charter when discussing s. 5(6) of the Act and s. 9 of the Regulation. A person who receives an owner's consent to interact with animals by virtue of a false statement that does not overstate the person's qualifications would not run afoul of s. 5(4) or 6(2) based on my earlier analysis. That person would have the owner's (or driver's) consent to interact. That consent is not vitiated by virtue of a statement that understated the person's qualifications.

[224] With respect to the limit on interacting with animals in transport trucks in s. 6(2), the Regan Russell Foundation submits that a level of risk to public or personal safety is tolerable to ensure that democratic freedoms are maintained. It argues

that some risk is tolerable and that s. 1 cannot be invoked to justify limits on freedom of expression simply because the expression involves risk. I accept that proposition insofar as it goes. However, the risk and the limitation on freedom must be balanced against each other. Ontario is not seeking to limit freedom of expression broadly in the face of minimal risk. The opposite is the case. Section 6(2) imposes minimal limitations on expression to prevent serious harm that has a high risk of occurring.

[225] The Foundation notes that in the context of police powers, courts have identified "a real risk of imminent harm," as the point at which proactive measures to maintain the peace justify interference with liberty.[72] I do not agree that this is the relevant test here. That is the test for the exercise of police powers. Those are discretionary powers exercised on the spur of the moment without an express statutory foundation. Legislation is a more deliberative act developed through greater consensus building than is a police officer's decision to take action.

[226] Even, however if the proper test were "a real risk of imminent harm," I am satisfied that protesters do face a real risk of imminent harm if they interact with livestock on transport trucks given the visibility limitations associated with those trucks. One protester, Regan Russell, has already died as a result of those risks. That strikes me as sufficient evidence of a real risk of imminent harm to others.

[72] *Brown v Regional Municipality of Durham Police Service Board*, [1998] OJ No 5274 (ON CA) at PDF p. 36; see also, *Figueiras v Toronto(Police Services Board),* 2015 ONCA 208.

2024 ONSC 1753 (CanLII)

[227] If the question is one of line drawing as the Regan Russell foundation submits, I am satisfied that prohibiting protesters from interacting with animals on large transport trucks whose drivers have limited visibility, minimally impairs freedom of expression (assuming that such contact is constitutionally protected in the first place). As noted, protesters continue to be able to protest at slaughterhouse sites and continue to be able to photograph the interiors of trucks. They simply cannot interact with animals on the trucks.

[228] In *R. v. Banks*,[73] the Ontario Court of Appeal found that directionally similar provisions which prohibited squeegeeing and solicitation of people in vehicles on roadways were justified under s. 1 of the Charter. There, the court held that regulating the interaction of pedestrians and vehicles on roadways was sufficiently important to warrant infringing on freedom of expression.

[229] The applicants try to distinguish *Banks* by arguing that the value of the expression in that case, squeegeeing or asking for change, was lower than the value of their expression. To me the issue here turns not so much on the value of the expression as on the value of lives. The applicants' lives are no less valuable than those of squeegeers. The state has the same responsibility to legislate to protect them.

2024 ONSC 1753 (CanLII)

[73] *R. v. Banks*, 2007 ONCA 19

[230] In the foregoing circumstances I am more than satisfied that the benefits of s. 6(2) of the Act outweigh its deleterious effects and that it would amount to a proportional limitation on s. 2(b) rights if those rights were triggered here.

[231] I turn then to s. 6(4) which vitiates consent to interact with an animal if the consent was obtained under false pretences in the prescribed circumstances. The applicants submit that this provision breaches their Charter rights. Here, as with s. 5(6), the prescribed circumstances that vitiate consent are found in ss 9 and 10 of the Regulation. As with s. 5(6), the Charter issue here is not so much that a legislative provision vitiates consent as it is about the circumstances that vitiate consent. As with s. 5(6) of the Act, I uphold s. 6(4) and focus instead on the prescribed circumstances that vitiate consent. The reasons for striking s. 9 and upholding s. 10 of the Regulation apply here with respect to s. 6(4) in the same way as they do with respect to s. 5(6).

[232] As a result of the foregoing, I decline the relief the applicants seek with respect to ss 5(4), 6(2) and 6(4) of the Act.

E. Section 8 of the Regulation

[233] In a similar vein, the applicants seek a declaration that s. 8 of the Regulation violates their rights to freedom of expression and freedom of assembly under ss

2024 ONSC 1753 (CanLII)

2(b) and (c) of the Charter which cannot be saved under s. 1 and are therefore of no force and effect.

[234] Section 8 of the Regulation defines interference with and interaction with farm animals. I decline to award the applicants the relief they seek for the same reasons that I have declined to grant the relief they seek with respect to s. 6 of the Act. Section 8 of the Regulation deals with one person's ability to interact with another person's property. As noted earlier in these reasons, that is not a right that is subject to Charter protection.

IV. Section 7 and the Power of Arrest

[235] Section 8(1)(d) of the Act gives the owner or occupier of the facility the power to arrest someone who is on premises in contravention of ss 5(1) - (4) and (7).[74] The applicants argue that this violates their right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice under s. 7 of the Charter and their right not to be arbitrarily detained or imprisoned under s. 9 of the Charter.

[236] Ontario submits that the power of arrest does not apply to false pretences because the power to arrest applies only to breaches of enumerated sections of the Act which sections do not include the false pretences provision in s. 5(6) of the Act. I do not agree with that interpretation. The arrest power applies where someone is

[74] Section 5(7) deals with defacing or removing signs delineating an animal protection zone.

2024 ONSC 1753 (CanLII)

on premises without the prior consent of the owner. The false pretences provision vitiates consent. As a result, someone who is on premises by virtue of false pretences is by definition there without consent.

[237] The applicants submit that the private power of arrest breaches their Charter rights because the power can be exercised based on only the subjective belief of the owner that there are reasonable and probable grounds for arrest. The applicants base this argument on s. 15 of the Regulation which provides that an owner or occupier can exercise powers of arrest only "if the owner or occupier believes there are reasonable and probable grounds for carrying out the arrest…"

[238] The Ontario Court of Appeal has, however, rejected the applicants' argument when dealing with similar arrest powers contained in the *Trespass to Property Act.*[75] In addition, the Supreme Court has held that where legislation speaks of a belief about having "reasonable and probable grounds," that state of belief implicitly includes both subjective and objective components.[76] In other words, a belief in reasonable and probable grounds requires not only that the person making the arrest believe that there are such grounds but also that a reasonable person in the shoes of the person making the arrest would believe that reasonable and probable grounds exist.[77] That constitutes a complete answer to the applicants' objections.

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[75] *R. v. Asante-Mensah*, 2001 CanLII 7279 (ON CA) at paras. 32-33.
[76] *Assante-Mensah*, at para.33; *Storrey v The Queen*, 1990 CanLII 125 (SCC), p250-51
[77] *Storrey v The Queen*, 1990 CanLII 125 (SCC), p250-51

2024 ONSC 1753 (CanLII)

[239] Moreover, given my findings with respect to s. 9 of the Regulation, the arrest power would now be applicable only with respect to true trespassers who are on property without colour of right or to people who have obtained access to property by overstating their qualifications.

[240] The applicants also challenged the constitutionality of s. 8(4) of the Act which states that no person shall provide false or misleading information in response to a request for the person's name and address made under s. 8(1)(a). Section 8(1)(a) provides that an owner or occupier of premises who finds a person in an animal protection zone in contravention of subsection 5(1) - (4) or (7) may request that the person provide his or her name and address.

[241] The applicants submit that this provision violates their freedom of expression under s. 2(b) of the Charter. Neither the applicants nor the respondent spent much time on this submission. I therefore feel myself slightly disadvantaged by having to analyse the provision in somewhat of a vacuum. Although the provision infringes on freedom of speech, I find the infringement to be saved by s. 1 of the Charter.

[242] In light of my earlier findings which have the effect of striking out s. 9 of the Regulation, the person in the animal protection zone in contravention of subsections 5(1) – (4) and (7) of the Act are true trespassers or those who have gained access by exaggerating their qualifications. Those are persons who do pose a potential risk to animal safety and biosecurity.

2024 ONSC 1753 (CanLII)

[243] The prohibition on false information here is rationally connected to the Act's purpose of protecting animal safety and biosecurity. The owner and the state have a right to identify a person who may have caused a risk to animal safety and biosecurity. Receiving false information in this regard could lead an investigation down a false road in circumstances where speed can be important.

[244] The impairment is minimal. It simply prohibits false information; it does not compel a response. The person has the complete right to remain silent. Although that may subject them to arrest, that is the risk one runs by trespassing on and interacting with another's property without colour of right.

[245] The impairment is proportional. The benefit of the provision is that it avoids investigators having to follow false leads in an investigation that may be urgent. The deleterious effect is that it deprives the person being asked from leading investigations down a false path. I note that there are directionally analogous provisions in other areas of the law such as s. 403 of the *Criminal Code*[78] which makes it an offence to fraudulently impersonate another person with intent to gain advantage or obstructing a police officer under s. 129 of the *Criminal Code*.[79]

[246] For the foregoing reasons I decline the relief the applicants seek with respect to s. 8(4) of the Act.

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[78] *Criminal Code*, RSC 1985, c C-46, as amended.
[79] *Criminal Code*, RSC 1985, c C-46, as amended.

2024 ONSC 1753 (CanLII)

V. Section 14(3) and the Reverse Onus Provision

[247] Section 14(3) of the Act provides that the consent of an owner is presumed not to have been given and places the onus on the person charged to prove on the balance of probabilities that they obtained consent before engaging in the conduct they did.

[248] The applicants and, in particular, the intervenor Animal Alliance of Canada argues that this provision violates the presumption of innocence under s. 11(d) of the Charter. The applicants submit that the issue is particularly sensitive because even a small misunderstanding can result in a conviction where the onus is based on a balance of probabilities rather than on proof beyond a reasonable doubt.

[249] Reverse onus provisions have been upheld where the accused is in the best position to resolve the issue and prove the existence of an exemption.[80] Here, it is substantially easier for an accused to indicate who provided consent than it is for the Crown to check with and call as witnesses, every possible individual (including former employees) to prove the absence of consent.[81]

[250] The reverse onus provision is also consistent with s. 47(3) of the *Provincial Offences Act*[82] which provides:

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[80] *R v Schwartz*, [1988] 2 SCR 443, at para.80, 84; see also *Regina v. Lee's Poultry Ltd*, 1985 CanLII 166.
[81] Duff Aff, RR, V4, T6, p 828-29, at para.40-43
[82] *Provincial Offences Act*, RSO 1990, c P.33.

2024 ONSC 1753 (CanLII)

> The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[251] The Ontario Court of Appeal upheld the constitutionality of this provision in *Regina v. Lee's Poultry Ltd*,[83] as a long-standing and broadly recognized exception to the burden of proof as being justified under s. 1 of the Charter. That holding has never been reversed[84] and is binding on me.

Conclusion and Disposition

[252] For the reasons set out above I declare that ss 9, 11(d) - (e); 12(1)(c) - (d); 12(2)(a)(i) - (ii); and 12(2)(c) of the Regulation infringe on the right to freedom of expression guaranteed under s. 2(b) of the Charter in a manner that is not saved by s. 1 of the Charter and that those provisions are therefore of no force and effect.

[253] During oral argument Ontario asked that, in the event any elements of the Act were found to be unconstitutional, I suspend my ruling pending a hearing on the point. I grant that relief. I will contact the parties for such a hearing date on the release of these reasons.

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[83] *Regina v. Lee's Poultry Ltd*, 1985 CanLII 166.
[84] See for example: See for example *R v Ahmad*, 2019 ONCJ 853; *R v Shaikh*, 2013 ONCJ 33; *Proulx v Krukowski*, 1993 CanLII 9408 (ON CA); *R v Clouston*, [1986] OJ No 1869 (Co Ct) p30; *R v Asante-Mensah*, [1996] OJ No 1821(Ont Ct Gen Div) at para.133, reversed on other grounds (2001), 204 DLR(4th) 51 (CA), affirmed 2003 SCC 38 at p. 18; *R v Shaikh*, [2013] OJ No 457 (OCJ), at para. 90-91, 111; *R v Schwartz*, [1988] 2 SCR 443 at para.80

2024 ONSC 1753 (CanLII)

[254] Any party seeking costs arising out of these reasons will have three weeks to deliver written submissions. The responding part(ies) will have two weeks to deliver its (their) answer with a further one week for reply.

Koehnen J.

Released: April 2, 2024

2024 ONSC 1753 (CanLII)

CITATION: Animal Justice et al. v A.G of Ontario 2024 ONSC 1753
COURT FILE NO.: CV-21-658393-0000
DATE: 20240402

2024 ONSC 1753 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANIMAL JUSTICE, JESSICA SCOTT-REID, and LOUISE JORGENSEN

Applicants

– and –

THE ATTORNEY GENERAL OF ONTARIO

Respondent

– and –

ANIMAL ALLIANCE OF CANADA

Intervener

– and –

CENTRE FOR FREE EXPRESSION

Intervener

– and –

REGAN RUSSELL FOUNDATION

Intervener

REASONS FOR JUDGMENT

Koehnen J.

Released: April 2, 2024