

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**ANIMAL JUSTICE, JESSICA SCOTT-REID,  
and LOUISE JORGENSEN**

APPLICANTS

- and -

**THE ATTORNEY GENERAL OF ONTARIO**

RESPONDENT

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## A. Overview

1. Much of the Respondent's argument focuses on a straw man: trespass or "occupation" incidents where individuals have overtly entered agricultural facilities without permission.<sup>1</sup> Such activities have long been illegal. The constitutional problem with the Act is not that it penalizes such trespass activity; it is that it prohibits obtaining consent to enter premises using false pretences, in order to inform the public about how animals are kept and treated.
2. Similarly, the Respondent focuses on the stopping of trucks and dangerous interactions between drivers and protestors near the Fearman's slaughterhouse in Burlington. Again, this is a straw man argument. The Applicants do not claim a *Charter* right to obstruct trucks or engage in dangerous conduct. They challenge s 6(2) of the Act based solely on the restrictions it imposes on peaceful protest and related expressive conduct on public sidewalks and roads.

## B. The applicants are not claiming a positive right

3. The Respondent wants the Court to apply one of the more rigorous "positive rights" tests under s 2. These arguments rely on mischaracterizing the Applicants' claim. First, the *Criminal Lawyers' Association* framework applies only to claims about access to information in government hands.<sup>2</sup> The Applicants do not claim a positive right to be given information.
4. Similarly, the *Baier* framework does not apply because the Applicants do not claim access to a "statutory or regulatory platform for expression".<sup>3</sup> The Applicants seek freedom from a

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<sup>1</sup> These incidents have led to police investigations and charges against activists under existing laws, including the *Criminal Code*. See, e.g. McDowell Affidavit Ex. B, **ARR Vol 7, Tab 15**, p 2070.

<sup>2</sup> Respondent's Factum, ¶ 78; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, ¶¶ 1-2, 37-38; *Fraser v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 821, ¶ 95.

<sup>3</sup> *Baier v Alberta*, 2007 SCC 31, [*Baier*] ¶¶ 30, 35; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, ¶¶ 19, 22, 36; *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, ¶¶ 30, 34-35, 139; *Alberta March for Life Association v Edmonton (City)*, 2021 ABQB 802, ¶¶ 28, 50-51, 55, 72.

statutory *prohibition* on obtaining consent to enter property by using false pretences.<sup>4</sup> Courts have warned that the *Baier* framework should be tightly constrained.<sup>5</sup> Ontario seeks to expand *Baier* to a case where no “statutory or regulatory platform for expression” is at issue. This would allow *Baier*’s use in virtually any challenge to a law restricting expression, severely curtailing s 2(b).

5. Contrary to Ontario’s submissions, the Applicants do not claim a *Charter* right to *enter* facilities. They accept that, if they are refused entry or are asked to leave, they cannot enter. Although people are not “otherwise free to engage in trespass”, they *are* otherwise free to obtain consent to enter virtually any other commercial property by using false pretenses. The state does not brand as trespassers those who exaggerate their experience in a job interview, or say they are over 19 to get into a bar. The Act is an exception, created to protect the animal industry.

6. The Applicants do not claim a right to use private property for expressive purposes. Access to such property is based on, and subject to, the consent of the owner—if the owner denies or withdraws consent, there can be no entry.<sup>6</sup> But state-imposed prohibitions and punishments regarding speech made on, or to gain access to, private facilities implicate the *Charter*.<sup>7</sup>

7. The Applicants also do not seek a right to make their expression more “effective”, but rather to make it *possible*. Without information and evidence about the treatment of animals, the raw material for the expression does not exist. Though it is possible to speak about the same

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<sup>4</sup> This conduct was previously legal. The absence of similar restrictions in other provinces suggests the law is not minimally impairing for the purposes of the s 1 analysis: *Canada (Attorney General) v JTI-MacDonald Corp*, 2007 SCC 30, ¶ 138; *Carter v Canada*, 2015 SCC 5 [*Carter*], ¶¶ 8-9, 103-105.

<sup>5</sup> *Association des cadres de la société des casinos du Québec v Société des casinos du Québec*, 2022 QCCA 180, ¶¶ 125-129, 131; *Montreal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141 [*Montreal (City)*], ¶¶ 34-35.

<sup>6</sup> Owners and operators can similarly penalize employees who have engaged in dishonesty. See, e.g. Richard Haigh and Peter Bowal, “Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis” (2012), *Comparative Research in Law & Political Economy*, [Research Paper No. 1974982](#), p 12.

<sup>7</sup> *Montreal (City)*, ¶ 62. Similarly, speech that occurs on a farm or other private property is not outside of First Amendment protection in the United States. See *Animal Legal Defence Fund et al v Herbert et al*, [No. 2:2013cv00679 \(2017 D. Utah\)](#), p 24.

*general topics* by other means, s 2(b) protects not just a minimal level of expression on general topics, but also shields the specific content and manner of expression from legal restrictions.<sup>8</sup>

**C. The impugned provisions cannot be justified under s 1 of the Charter**

8. Contrary to Ontario’s claims, the Act did not pass with “all party support”, and in fact faced vigorous opposition in the legislature.<sup>9</sup>

9. None of the Respondent’s three proposed “pressing and substantial objectives” succeeds under the *Oakes* test. Those objectives are: (1) deterring trespass, (2) “protecting biosecurity of food production”, and (3) “increasing safety around transport trucks.”<sup>10</sup> Because the first objective is relevant only to the Act’s increased penalties for trespass (provisions that are not at issue in this Application), the following submissions focus on objectives 2 and 3 only.

**(i) Biosecurity concerns**

10. Several features of the Act, in the context of the evidence, show that protecting the biosecurity of food production is not its true purpose. First, the Act applies to petting zoos, rodeos, and fairs, where animals are used for entertainment, not food production. Similarly, animals farmed for fur have nothing to do with food production. Ontario advances no argument to connect those places with the objective of protecting biosecurity of “food production”. This complete lack of a rational connection further shows that the Act’s true purpose is to protect the animal

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<sup>8</sup> Respondent’s Factum, ¶¶ 69-72, 79. *Doshi v Canada (Attorney General)*, 2018 FC 710, ¶ 84; *Bracken v. Niagara Parks Police*, 2018 ONCA 261, ¶ 57.

<sup>9</sup> Respondent’s Factum, ¶ 9. But see: Bill 156, Dec 10, 2019, 2nd reading, **ARR, Vol 9, Tab 20B**, pp 2477 - 2478 (Vanthof); Bill 156, Feb 18, 2020, 2nd reading, **ARR Vol 9, Tab 20D**, pp 2581 - 2585 (Fife), 2590 -2593 (Singh); 2658 (Sattler); Bill 156, Jun 16, 2020, 3rd reading, **ARR, Vol 10, Tab 20L**, p 3076 (Schreiner).

<sup>10</sup> Respondent’s Factum, ¶¶ 102, 104. Because the legislation is not aimed at protecting a vulnerable group, and due to the nature of the expression restricted, a less deferential approach to the minimal impairment analysis is appropriate: *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 [*Thomson Newspapers*], ¶¶ 111-118.

agriculture industry from damaging disclosures of how it treats animals.<sup>11</sup> Such a purpose is inconsistent with the principles integral to a free and democratic society.

11. Second, undercover exposés do not increase biosecurity risks. On the contrary: undercover exposés can and do often *promote* biosecurity and food safety by publicly exposing food safety and disease risks, leading to food recalls and other enforcement action.<sup>12</sup>

12. There is no evidence that undercover employees have ever spread disease on farms or that they are any less compliant with biosecurity measures than other employees.<sup>13</sup> They have the same incentive all employees have to follow biosecurity protocols: to keep their jobs.

13. The Respondent’s affiant Duff conceded that one of the purposes of the legislation is to “reduce” undercover exposés.<sup>14</sup> That objective is telling. The only reason to be concerned about undercover exposés *specifically* is to shelter the industry from the reputational and economic consequences that result from the public being shown how animals are really kept and treated.

14. The Respondent’s own expert testified that the “large-scale, industrialized model” of animal production *intensifies* biosecurity risks.<sup>15</sup> If Ontario’s objective had really been to promote biosecurity, it would have legally mandated specified biosecurity protocols. At present, these standards are optional, and vary from farm to farm and driver to driver. Ontario’s government

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<sup>11</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, [*Hutterian Brethren*], ¶ 55; *R v Oakes*, [1986] 1 SCR 103 [*Oakes*], ¶ 70.; *Thomson Newspapers*, ¶¶ 39-40; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, ¶ 144; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, ¶¶ 15-18.

<sup>12</sup> CX of Friendship, pp 87-94, **JCET Vol 3, Tab 10**, pp 1155-1162; Alan Chen and Justin Marceau, “High Value Lies, Ugly Truths, and the First Amendment” (2015) 68:6 *Vanderbilt Law Rev*, pp1467-1468; Jodi Lazare, “Animal Rights Activism and the Constitution: Are Ag-Gag Laws Justifiable Limits?” *Osgoode Hall LJ* 59.3 (2022), pp 678, 687, 695.

<sup>13</sup> Respondent’s Factum, ¶ 18. There have also been zero documented cases of an animal protection advocate introducing any disease into a farm in Canada through protests or trespass incidents (see CX of Friendship, pp 34-36, **JCET Vol 3, Tab 10**, pp 1102-1104).

<sup>14</sup> CX of Duff, pp 23-25, **JCET Vol 2, Tab 7**, pp 707-709. See also Labchuk Reply Affidavit, Ex. A, B, C, G, H, I, **ARA Tab C**, pp 892-973, 1001-1024-1034.

<sup>15</sup> CX of Friendship, pp 23-34, **JCET Vol 3, Tab 10**, pp 1091-1102.



affiant confirmed that such a measure would equally address any concern about biosecurity.<sup>16</sup>

And, of course, it would have no impact on freedom of expression.<sup>17</sup>

15. Ontario makes other unfounded assertions about risks allegedly posed by undercover exposés, including that employees who covertly record conditions “can neglect their duties.”<sup>18</sup> There is no evidence of any undercover employee being fired or reprimanded for alleged poor performance. In fact, many undercover employees were hired back by the same employer and received positive job performance feedback; alleged “concerns” about their performance arose, conveniently, only *after* the authorities started investigating.<sup>19</sup>

16. Second, Ontario claims that undercover employees could “abandon their duties” and/or not give notice. This is mere speculation. Even if true, it would apply to any employee in what are low-skilled positions.<sup>20</sup> In any event, protecting employers from employees leaving their jobs suddenly is neither a stated purpose of the Act nor a pressing and substantial objective that could justify a constitutional infringement.

17. Third, Ontario speculates that conduct in covertly-obtained footage “can be misleadingly depicted” without being able to cite a single example of this occurring or explaining why existing laws (like defamation or injurious falsehood) do not address this risk.<sup>21</sup>

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<sup>16</sup> CX of Duff, pp 107-109, **JCET Vol 2, Tab 7**, pp 791-793.

<sup>17</sup> Carter, ¶ [102](#), citing *Hutterain Brethren*, ¶ [55](#).

<sup>18</sup> Respondent’s Factum, ¶ 21.

<sup>19</sup> Picanco Affidavit, Ex. B, **ARR, Vol 7, Tab 17**, pp 2108-2113; CX of Picanco, pp 32-34, **JCET Vol 7, Tab 22**, pp 2697-2699. See also: CX of Lyons, pp 20-21, **JCET Vol 6, Tab 19**, pp 2411-2412 (complaint about an undercover employee submitted only after the OPP investigated the facility); Beal Affidavit, ¶¶ 42-43, **ARA Tab H**, p 2077; CX of Parkinson, pp 10-12, 42-46, **JCET Vol 7, Tab 21**, pp 2554-2556, 2586 - 2590 (complaint submitted only after the OSPCA launched an investigation).

<sup>20</sup> Respondent’s Factum, ¶¶ 21-22. Ontario relies on an allegation by Lyons that an employee at his goat farm did not give notice before quitting. There is conflicting evidence on this point and the evidence of Lyons was largely discredited (see Beal Affidavit, ¶¶ 15, 22, **ARA Tab H**, p 2074-2075; CX of Beal, pp 76-80, **JCET Vol 1, Tab 1**, pp 76-80).

<sup>21</sup> Respondent’s Factum, ¶ 50. Two of the Respondent’s affiants made unsubstantiated claims to this effect. Lyons alleged the exposé at his goat farm was altered, but this is inaccurate. (Lyons Affidavit, ¶¶ 32-34, Ex B **ARR Vol 7, Tab 14**, pp 2026-2029, 2035-2036; Beal Affidavit ¶¶ 12-19, Ex. D, E, F, **ARA Tab H**, pp 2073-2074, 2093-2104; Affidavit of Dr Moira Harris, Ex. D, **ARA Tab I**, pp 2169-2170). Though footage from Mr. Parkinson’s mink farm

18. The Respondent alleges that employees who covertly record “do not immediately” report abuse and that groups have held onto footage from exposés for six months. This claim has no basis in fact.<sup>22</sup> Farm and slaughterhouse employees are instructed to report concerns to management, not animal welfare services, and undercover employees commonly do so.<sup>23</sup> In all exposés showing unlawful conduct, they have also promptly reported concerns to law enforcement.<sup>24</sup> From beating turkeys with shovels (Hybrid Turkeys), to sexually abusing chickens (Elite Farm Services), to performing an illegal c-section on a live pig (Paragon), to beating cows with chains and hanging a live cow by her neck from a forklift (Chilliwick), the *only* individual to report abuse to authorities was the undercover employee.<sup>25</sup>

(ii) **Road safety**

19. The Applicants challenge s 6(2) of the Act only insofar as it unreasonably restricts peaceful protest activities. There is no evidence that any risk to biosecurity or physical safety arises if individuals briefly pet or show physical kindness to farmed animals in lawfully stopped vehicles, or if they are inadvertently licked or nudged by animals while photographing conditions of transport. Aside from arguments about giving water to thirsty animals in transport, the Respondent appears to concede as much.<sup>26</sup>

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showed significant animal suffering and unlawful cruelty, his evidence focused on a discrete issue of whether some matter shown on wire cages was feces vs feed (CX of Parkinson, pp 48-49, **ARR Vol 7, Tab 21**, pp 2592-2593; Beal Affidavit, ¶ 39, Ex. O, **ARA Tab H**, pp 2077, 2134-2136).

<sup>22</sup> Respondent’s Factum, ¶ 30, 106. See Boogerd Affidavit, ¶ 36, **ARR, Vol 2, Tab 3**, p 225; CX of Boogerd, pp 50-53, **JCET Vol 1, Tab 3**, pp 248-251; Answers to Undertakings from Transcripts (CX of Boogerd), **JCET Vol 10, Tab 27I**, p 3772-3773; Beal Affidavit, ¶ 12, **ARA Tab H**, p 2073. See also Bouilly Affidavit, ¶¶ 25-26, **ARR Vol 3, Tab 4**, p 478; CX of Bouilly, pp 40-46, **JCET Vol 1, Tab 4**, pp 295-301; Answers to Undertakings from Transcripts (CX of Bouilly), **JCET Vol 8, Tab 27**, p 3273.

<sup>23</sup> Applicants’ Factum ¶ 22. See also CX of Friendship, pp 132-135, **JCET Vol 3, Tab 10**, pp 1200 - 1203; CX of Boogerd, pp 53-54, **JCET Vol 1, Tab 3**, pp 251-252; CX of Bouilly, pp 51-55, **JCET Vol 1, Tab 4**, pp 306-310.

<sup>24</sup> Note that animal welfare services is not a “first responder agency”. When a complaint is received, commodity groups and even the facility itself may be notified in advance of any resulting inspection. See Fthenos Affidavit, ¶ 36, **ARR Vol 5, Tab 10**, p 1458; CX of Fthenos, pp 27-32, **JCET Vol 3, Tab 11**, pp 1245 - 1250.

<sup>25</sup> Labchuk Affidavit, ¶¶ 87-89, 92-93 117, 126, 135, Ex. II, PP, XX, **ARA Tab B**, pp 71-73, 81, 84, 87-88, 448-449, 514-515, 756-757; Labchuk Reply Affidavit, Ex. LL-OO, **ARA Tab C**, pp 1527-1534.

<sup>26</sup> Respondent’s Factum, ¶ 19.

20. There is, however, significant evidence that peacefully bearing witness and observing and documenting animals in transport is expressive activity integral to truth seeking and self-fulfillment of demonstrators that promotes the values underlying freedom of expression.<sup>27</sup> The possibility that demonstrators peacefully bearing witness near slaughterhouses may inconvenience truck drivers does not justify infringing demonstrators' 2(b) and (c) rights.<sup>28</sup>

21. Ontario had less harmful and drastic means available to it to achieve the goal of road safety,<sup>29</sup> such as increasing penalties for unlawfully stepping in front of moving motor vehicles or increasing fines for giving contaminated or harmful substances to farmed animals. Furthermore, while legislators are not required to consult with affected parties before passing legislation, such efforts can assist the government in the minimal impairment inquiry.<sup>30</sup> No such efforts were made here. The entire legislative scheme was developed based on the views of industry alone.<sup>31</sup>

#### **D. Conclusion**

22. In the final analysis, the illusory benefits of the legislation do not justify its severe and deleterious effects on public discourse and free expression.<sup>32</sup> The Ontario public deserves to know what is involved in the production of food and other animal products. The incomplete and sanitized images that the animal industry chooses to publish are no substitute for the real and visceral information and evidence captured by undercover exposés or in transport trucks.

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<sup>27</sup> Jorgensen Affidavit, ¶¶ 21, 23-24, 28, 29, 32, 36, 65, 77-80, **ARA Tab D**, pp 1557-1561, 1569, 1572-1573; Maneesha Deckha, "The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law" [\(2019\) 5:1 CJCL](#), at 78-84, 93-95, 109-110; *Montreal (City)*, ¶ 61.

<sup>28</sup> *Ontario (Attorney General) v Dieleman*, [1994] OJ No 1864 (QL), pp 41-43; Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada", [\(2018\) 8:1 UWO J Leg Stud 4](#), p 7.

<sup>29</sup> *Hutterian Brethren*, ¶¶ 53-54; *Carter*, ¶ 102.

<sup>30</sup> *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, ¶¶ 157-161; *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 CAF 311, ¶ 56.

<sup>31</sup> Applicants' Factum ¶ 32.

<sup>32</sup> *Frank v Canada (Attorney General)*, 2019 SCC 1, ¶¶ 76, 78-80.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of October, 2023.

A handwritten signature in black ink, appearing to read "Fredrick Schuman", is written over a horizontal line.

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## SCHEDULE “A” - LIST OF AUTHORITIES

### Case law

1. *Alberta v Hutterian Brethren of Wilson Colony*, [\[2009\] 2 SCR 567](#)
2. *Alberta March for Life Association v Edmonton (City)*, [2021 ABQB 802](#)
3. *Animal Legal Defence Fund et al v Herbert et al*, [No. 2:2013cv00679 \(2017 D. Utah\)](#)
4. *Association des cadres de la société des casinos du Québec v Société des casinos du Québec*, [2022 QCCA 180](#)
5. *Baier v Alberta*, [2007 SCC 31](#)
6. *Bracken v. Niagara Parks Police*, [2018 ONCA 261](#)
7. *Canada (Attorney General) v JTI-MacDonald Corp*, [2007 SCC 30](#)
8. *Canada (Governor General in Council) v Mikisew Cree First Nation*, [2016 FCA 311](#)
9. *Carter v Canada*, [2015 SCC 5](#)
10. *Doshi v Canada (Attorney General)*, [2018 FC 710](#)
11. *Frank v Canada (Attorney General)*, [2019 SCC 1](#)
12. *Fraser v Canada (Public Safety and Emergency Preparedness)*, [2021 FC 821](#)
13. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009 SCC 31](#)
14. *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007 SCC 27](#)
15. *Montreal (City) v 2952-1366 Quebec Inc.*, [\[2005\] 3 SCR 141](#)
16. *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015 SCC 1](#)
17. *Ontario (Attorney General) v Dieleman*, [\[1994\] OJ No 1864 \(QL\)](#)
18. *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, [2010 SCC 23](#)
19. *R v Oakes*, [\[1986\] 1 SCR 103](#)
20. *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#)

21. *Thomson Newspapers Co v Canada (Attorney General)*, [\[1998\] 1 SCR 877](#)

22. *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#)

### **Secondary sources, commentary and legislative debates**

1. Alexander, "[Exploring a More Independent Freedom of Peaceful Assembly in Canada](#)", (2018) 8:1 UWO J Leg Stud 4.
2. Chen and Marceau, "[High Value Lies, Ugly Truths, and the First Amendment](#)" (2015) 68:6 Vanderbilt Law Review.
3. Deckha, "[The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law](#)" (2019) 5:1 *Canadian Journal of Comparative and Contemporary Law* 77-110.
4. Haigh and Bowal, "[Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis](#)" (2012), *Comparative Research in Law & Political Economy*, Research Paper No. 1974982.
5. Lazare, "[Animal Rights Activism and the Constitution: Are Ag-Gag Laws Justifiable Limits?](#)" *Osgoode Hall Law Journal* 59.3 (2022), pp 678, 681, 687, 695