

☒ RULE/LA RÈGLE 26.02 (B)

Court File No. CV-21-658393-0000

☐ THE ORDER OF _____ **ONTARIO**
L'ORDONNANCE DU
DATED/FAIT LE _____ **SUPERIOR COURT OF JUSTICE**

Judith Richards
.....
REGISTRAR
SUPERIOR COURT OF JUSTICE

Digitally signed by Judith Richards
DN: cn=Judith Richards, o=Ministry of The Attorney General,
ou=Civil Intake, email=judith.richards@ontario.ca, c=CA
Date: 2022.01.22 09:05:33 -05'00'

GREFFIER
COUR SUPÉRIEURE DE JUSTICE
ANIMAL JUSTICE, JESSICA SCOTT-REID,
and LOUISE JORGENSEN

APPLICANTS

- and -

THE ATTORNEY GENERAL OF ONTARIO

RESPONDENTS

APPLICATION UNDER Rule 14.05(3)(h) of the *Rules of Civil Procedure*

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing

- ☐ In person
☐ By telephone conference
☒ By video conference

at the following location:

Video conference; details to be provided.

On a day to be set by the registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date March 8, 2021 Issued by "Signed"
Local Registrar

Address of court office: Superior Court of Justice
330 University Ave.
8th Floor
Toronto, Ontario
M5G 1R7

TO ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, ON M7A 2S9

APPLICATION

OVERVIEW

This Application challenges the constitutionality of ss 5(4), 5(6), 6(2), 6(4), 8(4), and 14(2) of the *Security from Trespass and Protecting Food Safety Act, 2020* (“**the Act**”) and ss 8-12 of Ontario Regulation 701/20 (“**the Regulation**”) on the basis that these provisions unjustifiably restrict political expression and peaceful protest activities. This unconstitutional impact on fundamental freedoms is compounded by unduly harsh and unconstitutional arrest and penalty provisions.

The purpose and effect of the impugned provisions is to prevent persons, including animal protection advocates, journalists, and researchers, from gathering and publicly disseminating information, photographs, and videos documenting the abuse of farmed animals, and the conditions in which farmed animals are kept, transported, and slaughtered. The Act does this in two primary ways: (1) by making it an offence to enter an agricultural facility under “false pretences” (ss 5(6), 6(4)), and (2) by making it an offence to “interfere or interact” with farmed animals (ss 5(4), 6(2)).

The Applicants challenge these provisions on the basis that they infringe their rights, and the rights of the public, to freedom of expression and freedom of the press as guaranteed by s 2(b) of the *Canadian Charter of Rights and Freedoms* (“**the Charter**”). This includes the public’s right to listen to and access information that would enable them to make informed democratic, personal, economic, and food purchasing choices. The Applicants also challenge ss 5(4) and 6(2) of the Act, and the corresponding s 8 of the Regulation, on the basis that these provisions

infringe their rights, and the rights of the public, to peaceful assembly guaranteed by s 2(c) of the *Charter*.

The impugned provisions' interference with rights set out in ss 2(b) and (c) of the *Charter* is compounded by deliberately harsh and excessive arrest and penalty provisions, which are themselves unconstitutional. Subsection 8(1)(d) of the Act, in conjunction with s 15 of the Regulation, violates ss 7 and 9 of the *Charter* by authorizing facility owners and operators to arrest, and thus restrain the liberty of, individuals whom they believe to have violated ss 5 or 6 of the Act, even in the absence of objectively reasonable and probable grounds to justify such action. Furthermore, facility owners and occupiers carrying out a citizen's arrest can exercise those arrest powers knowing they will not be liable for any injuries caused by the arrest, so long as their actions are not willful or reckless (ss 20(1), (3)), a standard departing from that of "reasonable" or "necessary" force.

RELIEF SOUGHT

1. The Applicants make Application for:
 - (a) A declaration under s 52 of the *Constitution Act, 1982* that ss 5(4) and 6(2) of the Act, together with s 8 of the Regulation, violate ss 2(b) and (c) of the *Charter* in a manner that cannot be saved under s 1 and are therefore of no force and effect;
 - (b) A declaration under s 52 of the *Constitution Act, 1982* that ss 5(6), 6(4), and 14(2) of the Act, together with ss 9, 10, 11, and 12 of the Regulation, violate s 2(b) of the *Charter* in a manner that cannot be saved under s 1 and are therefore of no force and effect;

- (c) A declaration under s 52 of the *Constitution Act, 1982* that s 8(4) of the Act violates s 2(b) of the *Charter* in a manner that cannot be saved under s 1 and is therefore of no force and effect;
- (d) A declaration under s 52 of the *Constitution Act, 1982* that s 8(1)(d) of the Act, together with s 15 of the Regulation, violate ss 7 and 9 of the *Charter* in a manner that cannot be saved under s 1 and are therefore of no force and effect;
- (e) A declaration under s 52 of the *Constitution Act, 1982* that s 14(3) of the Act violates s 11(d) of the *Charter* in a manner that cannot be saved under s 1 and is therefore of no force and effect;
- (ef) Costs of this Application; and
- (fg) Such further and other relief as this Honourable Court may deem just.

GROUND

2. The grounds for the Application are:

A. Exposing farmed animal suffering is in the public interest

- (a) The *Criminal Code* and provincial animal protection laws prohibit animal cruelty, neglect, and abuse in light of society's recognition of the inherent moral value and dignity of animals, and the fact that cruelty to animals is incompatible with civilized society.
- (b) The vast majority of the roughly 240 million farmed land animals slaughtered in Ontario each year are born and raised indoors on private property, out of sight of anyone but the facility's owners and employees. Although there are some regulatory standards under the federal *Health of Animals Act* governing farmed animals when they are being transported

or slaughtered, there are no legally binding standards of care to protect the welfare of farmed animals during their lives on Ontario farms. Distress caused by “reasonable and generally accepted” agricultural practices is exempt from Ontario’s animal protection law.

- (c) There are no regular or proactive government inspections in Ontario to monitor the welfare of farmed animals. There are no disclosure requirements or other regulations to fill this enforcement gap. Provincial animal welfare law enforcement authorities conduct inspections at farms only when they receive a complaint about a given facility.
- (d) Because criminal or regulatory offences involving farmed animals take place almost exclusively behind closed doors, one of the primary sources of information underlying complaints to law enforcement about mistreatment of farmed animals has been information, images, or footage that is obtained by employee whistleblowers, animal protection advocates, or journalists.
- (e) The public release of information, images, and footage from these sources is also one of the primary ways, if not the only way, that members of the public are able to learn about, and see for themselves, the conditions in which farmed animals are kept.
- (f) The work of animal protection advocates, journalists, researchers, and whistleblowers is therefore essential if unlawful and pernicious practices are to be exposed, and the public is to be informed on matters of pressing public interest. This allows the scourge of animal suffering to be brought to light and enables informed choices to be made by individuals as consumers, commentators, and voters.
- (g) Activities such as collecting and disseminating information, taking photographs and videos, engaging in investigative journalism, conducting undercover exposés, and

partaking in protests are core among the democratic freedoms. These expressive activities do not pose risks to farmed animals or food safety. They are necessary for journalists, researchers, and advocates to effectively document and publicly expose animal cruelty, workplace safety violations, or risks to the environment or public health at industrial farms and slaughterhouses.

- (h) Through the vehicle of the impugned Act, the Ontario government has sought to severely restrict these essential information-gathering and protest activities in relation to farmed animals.
- (i) The Act is an example of what is commonly known as an “agricultural gag” or “ag gag” law. For the purposes of this Application, an “ag gag” law is legislation that restricts the documentation of activities and conditions on industrial farms, as well as the dissemination of that information or footage, so as to shield animal suffering from public view.
- (j) The “false pretences” prohibition at s 5(6) of the Act in particular mirrors the language found in several American ag gag laws. These laws began to emerge in the 1990s, following undercover exposés that shone a media spotlight on farming practices. Ag gag laws in Kansas, Wyoming, Iowa, Utah, Idaho, and North Carolina have been ruled unconstitutional by U.S. courts, in whole or in part, due to restrictions on the right to free speech.

B. The Applicants

- (k) The Applicants are individuals and a not-for-profit organization whose interests are directly impacted by the Act, and who claim both public interest and private standing to bring this Application.
- (l) None of the Applicants have engaged in any conduct that poses a risk to food safety, farmed animals, or farmers.

1. Animal Justice

- (m) The Applicant Animal Justice is a national animal law organization based in Toronto, Ontario. Animal Justice's objects include using the law to protect animals, working to strengthen laws relating to animals, and protecting the rights of individuals who advocate on behalf of animals. One of Animal Justice's areas of focus is stopping the spread of ag gag laws in Canada and educating the public about the risks posed by such laws.
- (n) Animal Justice has engaged in undercover exposés at animal-use facilities in Ontario. It has also relied on information and footage obtained by other persons, including whistleblowers, investigative journalists, and researchers at farms, slaughterhouses, and other facilities at which farmed animals are kept.
- (o) Animal Justice uses such information and footage to publicly expose and spread awareness about a range of subjects, including:
- i. farmed animal abuse and mistreatment, including the suffering caused by standard agricultural industry practices, and
 - ii. workplace safety, and public health and environmental risks in the animal agricultural sector.

- (p) Raising public awareness about these issues is integral to the organization's advocacy and public education work, as well as its work to strengthen Canadian laws protecting farmed animals.
- (q) Animal Justice relies on information and footage obtained by individuals who engage in protest activities near trucks transporting animals to slaughterhouses in Ontario and throughout Canada to submit complaints to the Canadian Food Inspection Agency ("CFIA") and provincial animal welfare law enforcement agencies in cases where it appears that the treatment of animals contravenes the *Health of Animals Act*, Health of Animals Regulations, and/or provincial animal welfare laws. Animal Justice also relies on this information and footage for public advocacy as part of its work to improve Canada's animal transport laws.
- (r) Animal Justice would like to carry out future undercover exposés in Ontario but cannot do so at farms, slaughterhouses, livestock auctions, horse race tracks, rodeo arenas, petting zoos, agricultural fairs, or other premises to which the Act applies, for fear of prosecution under s 5(6) of the Act.
- (s) Animal Justice has thousands of engaged supporters across Canada. Many of these supporters (i) participate in peaceful protest activities near trucks transporting animals to slaughter, or (ii) have an active interest in seeking out information and footage obtained by such individuals, or by whistleblowers, researchers, or journalists who gain access to farms, slaughterhouses, or other premises covered by the Act. Animal Justice supporters and other members of the public may choose to seek out such information and footage in order to understand, and engage in public debate and discussion regarding, the treatment of farmed animals in Canada.

2. Jessica Scott-Reid

- (t) The Applicant Jessica Scott-Reid is a freelance journalist and animal protection advocate based in Winnipeg, Manitoba. She writes for major media outlets in Canada and the United States, including the Globe and Mail, the Toronto Star, the Canadian Broadcasting Corporation (“**CBC**”), the National Observer, Maclean’s, and Sentient Media, as well as a range of local publications.
- (u) Ms. Scott-Reid frequently relies on information and footage from farms and slaughterhouses, including in particular facilities in Ontario, obtained by whistleblowers and investigative journalists in order to accurately report on matters related to the treatment of farmed animals. She also relies on information and footage obtained by individuals engaging in protest activities near trucks transporting animals to slaughter in Ontario and elsewhere, in order to accurately report on matters related to the treatment of farmed animals during transport.
- (v) Ms. Scott-Reid depends on footage from these sources because there are few, if any, other sources of footage and information regarding conditions inside farms, slaughterhouses, and transport trucks, other than footage and information intentionally published by the facilities themselves or by industry groups.

3. Louise Jorgensen

- (w) The Applicant Louise Jorgensen lives in Caesarea, Ontario and is the volunteer organizer of Toronto Cow Save - an unincorporated group affiliated with the Animal Save Movement. The Animal Save Movement is a global community with more than 1,000 chapters worldwide, including approximately 20 chapters in Ontario.

- (x) In her capacity as organizer of Toronto Cow Save, Ms. Jorgensen regularly participates in and organizes vigils and protests outside of St. Helen's Meat Packers slaughterhouse in Toronto, Ontario.
- (y) A slaughterhouse "vigil" involves persons engaging in protest activities, typically in association with others. Participants typically assemble at a specified location on public property near a slaughterhouse, and engage in various expressive activities, including distributing information and holding signs visible to passing pedestrians, motorists, and cyclists to expose the conditions of animals inside transport trucks, as well as persons coming face-to-face with animals in transport trucks in order to "bear witness" and document the suffering of individual animals.
- (z) "Bearing witness" involves peacefully observing and recording the conditions in which farmed animals such as cows, chickens, goats, sheep, horses, and pigs are transported to slaughter. The objective is to witness, and often document (via photograph or video), the suffering of individual animals in order to show compassion to these animals as individuals, raise awareness about the suffering of farmed animals, and encourage people to avoid purchasing and consuming products containing meat, dairy, and eggs.
- (aa) Ms. Jorgensen is employed as a graphic artist and social media content creator with the Animal Save Movement. Her work with the Animal Save Movement is expressive in nature. She uses images and footage obtained by individuals bearing witness near transport trucks, as well as images and footage from inside farms and slaughterhouses obtained by journalists, researchers, animal protection advocates, and others.

- (bb) Ms. Jorgensen uses the photographs and videos that she and others take of farmed animals to raise awareness about their suffering and encourage others to avoid consuming animal products.

C. The Applicants have standing to bring the Application

- (cc) The Applicants are directly impacted by the Act and have a real stake and genuine interest in protecting farmed animals from abuse and suffering, including that caused by standard industry farming practices. They are regularly and genuinely engaged in activities aimed at increasing public awareness of the treatment of farmed animals, including through means that are prohibited or restricted under the Act.
- (dd) The Applicants also have a genuine interest in preventing and publicly exposing workplace health and safety violations, and environmental and public health risks at industrial farms and slaughterhouses.
- (ee) This Application is a reasonable and effective way to bring issues involving the constitutionality of the Act before the Court in view of the fact that: (i) the issues raised impact not only animal advocates and individuals concerned about the treatment of farmed animals, but also members of the public in Ontario and throughout Canada; (ii) the Applicants have the expertise, experience, resources, and commitment to bring this Application forward; and (iii) the Applicants are well-placed to bring this Application and demonstrate the interrelated and cumulative impacts of numerous provisions in the Act based on a comprehensive evidentiary record.

D. The *Trespass to Property Act*

(ff) The purposes and effects of the impugned Act must be understood in light of the fact that Ontario law already creates robust protections for property owners, including the owners and occupiers of agricultural premises.

(gg) In particular, under the *Trespass to Property Act*, a person found guilty of trespassing on private premises, including farms, slaughterhouses, and other agricultural facilities, is liable on conviction to a fine of up to \$10,000 (s 2(1)). If the person causes damages while trespassing, they may also be required to compensate the person who suffered the damage (ss 12(1), (3)).

(hh) Entry on land used primarily for agricultural purposes, or on land that is enclosed by a fence or other barrier, is presumptively prohibited under *Trespass to Property Act* (s 3(1)). The statute establishes mechanisms by which property owners can post signs indicating what types of entry and activities are and are not permitted on their property (s 7).

(ii) Property occupiers have the authority under the *Trespass to Property Act* to arrest any person whom they believe “on reasonable and probable grounds” to be trespassing on their property (s 9). Such persons can also be arrested by a police officer (ss 9, 10).

E. The *Security from Trespass and Protecting Food Safety Act, 2020*

(jj) The Act received Royal Assent on June 18, 2020. Subsections 6(1), 6(7), 14(1) paragraph 3, and 15(1) came into force upon proclamation by the Lieutenant Governor on September 2, 2020. The remaining sections of the Act, as well as the Regulation, came into force on December 5, 2020.

(kk) Section 1 of the Act states that its purposes include prohibiting “trespassing on farms and other properties on which farm animals are located” and prohibiting “other interferences” with farmed animals in order to protect farmers, farmed animals, and food safety.

(ll) Section 5 of the Act establishes “Prohibitions re trespass, etc.”. Trespassing at farms, slaughterhouses, and other prescribed premises was already unlawful in Ontario, but the Act increases fines for trespassing in or on “animal protection zones” at such facilities. Animal protection zones are areas at facilities in which farmed animals may be kept or slaughtered, and that meet certain requirements set out in s 2 of the Act and s 3 of the Regulation.

(mm) A person found guilty of trespassing in or on an animal protection zone contrary to s 5 is liable on conviction to a fine of up to \$15,000 for a first offence and up to \$25,000 for any subsequent offence (s 15(1)).

(nn) The Act also goes far beyond the *Trespass to Property Act*, and prohibits a broad range of other activities in relation to farmed animals, or which take place near areas where farmed animals are kept, including activities which are aimed at protecting farmed animals and food safety. It is these broad prohibitions and restrictions that are the subject of this Application.

1. The Act applies to a broad range of facilities

(oo) The Act “applies to all farms, animal processing facilities and prescribed premises” at which farmed animals are kept.

(pp) An “animal processing facility” is defined as a facility at which farmed animals are processed for consumption. Although “processed” is not defined in the Act or the

Regulation, it is generally understood to refer to the slaughter of farmed animals, as well as cutting, preparing, and packaging their meat for consumption.

(qq) Prescribed premises to which the Act applies are listed at s 6 of the Regulation, and include livestock auctions, premises at which farmed animals are displayed for public viewing, and premises at which farmed animals compete against one another. Many such premises, including rodeos, horse racetracks, and petting zoos, have no connection to the food system.

(rr) The Regulation defines the term “farm animal” to include land animals and fish that are raised, bred, or kept for a range of “agricultural purposes”, including for consumption; to provide commodities such as fur, milk, or eggs for human use; to be ridden for pleasure; to be shown publicly at an exhibition; or to undertake competitions (s 5).

(ss) The Applicants generally refer to these animals as “farmed animals” because animals typically used for agricultural purposes are not biologically destined or designed for those purposes, but rather are animals who are farmed by humans. For the purposes of this Application, the terms “farm animals” and “farmed animals” refer to the same animals and are used interchangeably.

2. The “False Pretenses” Prohibition

(tt) The Act creates a new offence of entering an animal protection zone under “false pretences”. Subsection 5(6) of the Act states that “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 is obtained from the owner or occupier of the relevant farm, animal processing facility or prescribed premises...under false pretences in the prescribed circumstances or for the prescribed reasons...”.

(uu) Subsection 6(4) of the Act, which applies to farmed animals in transport trucks, is worded in a similar manner to s 5(6). Subsection 6(4) states that consent to interfering or interacting with a farmed animal is invalid if it is obtained from a driver under “false pretences in the prescribed circumstances or for the prescribed reasons.”

(vv) Section 9 of the Regulation sets out the “prescribed circumstances” in which consent obtained under “false pretences” shall be deemed not to have been given. This section states that any person who gives any false statement to the owner or occupier of a farm, slaughterhouse, or prescribed premises, or to a transport truck driver, and who thereby obtains consent to enter an animal protection zone or to interact with farmed animals, is guilty of an offence under ss 5(6), 6(4) and 14(2) of the Act if:

- i. the statement is made either orally or in writing;
 - ii. the false statement is given for the purposes of obtaining the consent;
 - iii. the owner, occupier, or driver provides the consent in reliance on the false statement;
- and
- iv. 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 (i.e., entering an animal protection zone or interacting with a farmed animal).

(ww) The term “false statement” is not defined in the Act.

(xx) The only exceptions to this broad prohibition against all false statements made to gain access to farms, slaughterhouses, livestock auctions, horse racetracks, rodeo arenas, petting zoos, livestock auctions, and other prescribed premises are the narrow

exemptions for some journalists and some employee whistleblowers set out at ss 11 and 12 of the Regulation, and discussed in more detail below.

(yy) Subsections 5(6) and 6(4) of the Act both prohibit false speech. Individuals who engage in these prohibited forms of expression and enter a facility or interact with an animal commit an offence (s 14(2)) and can be liable on conviction to the fines set out in s 15(1) of the Act.

(zz) In addition to establishing severe fines for those who enter animal protection zones or interact with farmed animals, including under “false pretences”, the Act reverses the onus for proof ~~of~~ for specified offences, including the offence of entry or interaction under false pretences ~~(s 14(3))~~. ~~That is, w~~Where a person is prosecuted for giving a false statement to obtain consent to enter an animal protection zone (s 5(6)) or interact with a farmed animal (s 6(4)), the onus is on the person charged to prove, on a balance of probabilities, that they did not obtain consent by making a false statement or that they meet one of the subjective and multi-pronged exemptions under ss 11 or 12 of the Regulation. Further, s 14(3) of the Act requires persons charged under ss. 5(1)-(4) and 6(2) of the Act to prove that they obtained “consent” to enter facilities or to interact with farmed animals.

(aaa) In addition to the fines set out in s 15(1) of the Act, a person found guilty of entering a facility or interacting with an animal under false pretences may also be required to pay damages to the owner or occupier of the facility, or to a driver, for any loss or damage caused by the commission of the offence (s 16). This includes losses suffered during the commission of the offence, as well as those incurred as a result of the

commission of the offence, such as losses suffered when images or footage of conditions at a facility are released publicly.

(bbb) Moreover, the owner or occupier of a facility can arrest a person without a warrant, using “reasonable force”, if they find that a person in an animal protection zone obtained consent to enter using false pretences (ss 8(1), 10). Although such owners or operators are only specifically authorized to use “reasonable force” in undertaking an arrest, s 20 of the Act shields them from liability unless the actions which caused harms or damage were deliberate or reckless.

(ccc) Pursuant to the Regulation, the facility’s owner or occupier must subjectively *believe* that there are reasonable and probable grounds for carrying out a citizen’s arrest under the Act (s 15). Unlike the *Trespass to Property Act* (s 9), and contrary to fundamental legal principles, there is no requirement for there to in fact be objectively reasonable and probable grounds for the arrest. A police officer may arrest a person without a warrant where the officer “believes on reasonable and probable grounds” that the person violated ss 5(6) or 6(4) of the Act (s 13).

Restrictions on journalists

(ddd) Section 11 of the Regulation sets out an exemption to the Act’s “false pretences” prohibition for some journalists under some circumstances.

(eee) Where a “journalist”, as defined in the Act, uses a false statement to obtain consent to carry out an act otherwise prohibited under ss 5 or 6 of the Act (i.e., entering an animal protection zone or interacting with farmed animals), the journalist shall not be considered to have obtained consent under false pretenses for the purposes of ss 5(6),

6(4), and 14(2) of the Act *only if* the journalist satisfies all five requirements listed in s 11(1) of the Regulation. Those requirements are as follows:

i. The false statement does not imply that the journalist has qualifications to do a particular task or job in a manner that would not cause “harm to farm animals, harm with respect to food safety or harm to an individual” if the journalist does not in fact have those qualifications.

ii. The journalist must be acting for “a valid journalistic purpose”, and must enter the animal protection zone or gain access to the transport truck “in order to gather information and disseminate that information to the public.” “Valid journalistic purpose” is not defined in the Act or the Regulation.

iii. The journalist must comply with all biosecurity measures related to the farm, slaughterhouse, prescribed premises, or transport truck.

iv. The journalist must not “cause or contribute to causing harm to a farm animal, harm with respect to food safety or harm to an individual”.

v. The owner or occupier of the farm, slaughterhouse, or prescribed premises, or the driver, must not ask the journalist to leave or stop interacting with farmed animals before the journalist has completed gathering information.

(fff) If any of the listed requirements are not met, the journalist may be found guilty of violating the Act’s “false pretences” prohibition.

Restrictions on employee whistleblowers

(ggg) Section 12 of the Regulation sets out an exemption from the Act’s “false pretences” prohibition for some employee whistleblowers under some circumstances.

(hhh) If a person who enters a facility or interacts with farmed animals under false pretences is an employee of a facility or motor vehicle company, or they are the owner or employee of a company that is allowed at the facility or that is allowed to access the transport truck at issue, there are some circumstances in which they will be exempt from the false pretences prohibition in the Act.

(iii) As with the exemption for journalists, the employee's false statement must not imply or express that they have qualifications necessary to do a particular task or job in a manner that would not cause "harm to farm animals, harm with respect to food safety or harm to an individual" if the employee does not in fact have those qualifications. In this respect, s 12 of the Regulation operates in conjunction with s 10, which sets out the types of false statements regarding employment qualifications that will be found to violate ss 5(6), 6(4), and 14(2) of the Act. Pursuant to s 10, consent is given under "false pretences" where:

- i. a person gives a "false statement" to the owner or occupier of a farm, slaughterhouse or prescribed premises or to a driver, orally or in writing, for the purpose of obtaining employment;
- ii. as part of their employment the employee carries out acts, such as entering an animal protection zone or interacting with farmed animals, that would otherwise be prohibited under the Act;
- iii. the false statement expresses or implies that the person has qualifications necessary to do a job in a manner that would not cause "harm to farm animals, harm with respect to food safety or harm to an individual" but the person does not in fact have those qualifications; and

iv. the owner, occupier, or driver employs the person in reliance on the false statement.

(jjj) Furthermore, in order to be exempt from the false pretences prohibition, the employee must then *actually 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...” (s 12(1)(c)). If the employee does not obtain such information or evidence, or if they are found out before they are able to obtain it, they will not be exempt and may be found to have contravened ss 5(6) or 6(4), and 14(2), of the Act.

(kkk) This requirement to actually obtain evidence of harm or illegal activity does not appear in the list of requirements for exempt journalists.

(lll) In order to avoid prosecution under the Act, the employee who gave the false statement must disclose the information or evidence of harm or other illegal activity “to a police officer or other authority as soon as practicable” after it is obtained (s12(1)(d)).

(mmm) This quick reporting requirement does not appear in the list of exemption requirements for journalists. It prevents employee whistleblowers from documenting and publicly exposing patterns of abuse and mistreatment.

(nnn) As with the journalist exemption (Reg s 11(1)(d)), s 12(2) of the Regulation states that the employee whistleblower exemption does not apply if the person, directly or indirectly, caused or contributed to harm to an individual (s 12(2)(a)(i)), or caused any harm to a farmed animal in order to obtain the information or footage (s 12(2)(a)(ii)).

(ooo) This means that if an employee or journalist working at a facility is required to euthanize, kill, or otherwise harm a farmed animal in the course of their employment, they will not be exempt from the “false pretences” prohibition. Similarly, if the employee’s or journalist’s actions of recording and publicly releasing footage showing

animal abuse or other unethical or unlawful activities cause an individual, including a coworker or supervisor, to experience “emotional or psychological injury”, the employee or journalist can be prosecuted under the Act.

(ppp) As with the journalist exemption, s 12(2) of the Regulation states that the employee whistleblower exemption does not apply if the person fails to comply with any biosecurity measures or if they are asked to leave the premises or to stop interfering or interacting with farmed animals before they finish gathering information.

3. Prohibited interference and interaction with farmed animals

(qqq) Subsection 5(4) of the Act makes it an offence to “interfere or interact” with a farmed animal in an animal protection zone without the prior consent of the facility’s owner or occupier. The prohibition applies where the farmed animal is in an animal protection zone, regardless of whether the person interacting with the animal is themselves in the zone or is outside of the zone, even if they are on public property or are on their own adjacent property.

(rrr) Subsection 6(2) of the Act is similar to s 5(4), in that it prohibits interference or interaction with farmed animals being transported by a motor vehicle without the prior consent of the driver.

(sss) Section 8 of the Regulation lists the acts considered “interferences and interactions” with farmed animals for the purposes of ss 5(4) and 6(2) of the Act. The list includes “[p]roviding any substance, whether in liquid or solid form, to a farm animal”. It is already a criminal offence to administer a poisonous or injurious substance to a farmed animal (*Criminal Code* s 445.1(1)(c)).

(ttt) The list of prohibited “interferences and interactions” also includes “[d]irectly or indirectly having physical contact with a farm animal, whether the farm animal is dead or alive”, and any activity that “causes or is likely to cause harm to a farm animal”, including undue stress. “Undue stress” is not defined in the Act.

(uuu) Pursuant to these provisions, it is an offence in Ontario to stand on a public boulevard and, *inter alia*, provide water to a thirsty horse or cow over a fence on a farm property, or in a transport truck, even on a hot day and even if that animal is in visible distress. It is similarly an offence to provide food to such an animal even if the animal is demonstrating clear signs of hunger and/or malnourishment. In addition, it is an offence to gently pet and comfort a farmed animal or to incidentally make contact with an animal in an animal protection zone or in a transport truck.

(vvv) As with the false pretences prohibition described above, a person who interacts with a farmed animal contrary to ss 5(4) or 6(2) is liable on conviction to a fine of up to \$15,000 for a first offence or up to \$25,000 for a subsequent offence (s 15(1)).

(www) A person found interacting with a farmed animal in transport can be arrested by a police officer without a warrant (s 13(c)). If a person stops, hinders, obstructs, or otherwise interferes with a vehicle transporting farmed animals, or interferes or interacts with a farmed animal in transport, the driver of the vehicle will not be liable for any injury or damages caused to that person unless the driver deliberately harms them or acts in a reckless manner (s 20(2)).

4. Owners and occupiers of agricultural facilities have broad rights to question and arrest individuals

(xxx) Section 8 of the Act sets out certain rights on the part of the owner or occupier of a farm, slaughterhouse, or prescribed premises when they find a person who is damaging signage or who is in an animal protection zone at the facility, including when the owner or occupier finds that a person obtained consent to enter under false pretences.

(yyy) In these circumstances, the facility's owner or occupier may arrest the individual without a warrant (s 8(1)(d)). Although s 8(2) states that the Act does not give a facility's owner or occupier any citizen's arrest rights beyond those provided for under s 9(1) of the *Trespass to Property Act*, the scope of the citizen's arrest rights in the Act is in fact much broader.

(zzz) Notably, unlike the *Trespass to Property Act* and all other citizen's arrest provisions, a facility's owner or occupier needs only to have a subjective belief that there are reasonable grounds for an arrest (Reg s 15). Objectively reasonable and probable grounds need not in fact exist. The arrest power set out at s 8(1)(d) can also be used in a seemingly limitless range of circumstances, including where an employer believes that an employee working at a facility may have made a false statement years ago on their resume or during their job interview.

(aaaa) In addition to arresting a person at a facility without a warrant, s 8(1)(a) states that the facility's owner or occupier may request that the person provide their name and address.

(bbbb) Subsection 8(4) prohibits the person from providing false or misleading information in response to such a request. A person who violates s 8(4) is liable on conviction to the severe fines set out in s 15(1) of the Act (s 14(1)).

F. The Act is unconstitutional

(cccc) The Act unjustifiably restricts the rights of animal protection advocates, journalists, researchers, employee whistleblowers, and other persons. In addition to its impacts on individuals engaged in targeted information-gathering activities, the Act restricts the rights of all members of the public who may use that information to make informed purchasing choices and other political and economic decisions.

(dddd) As explained below, the Act:

i. Violates s 2(b) of the *Charter* by preventing journalists, animal protection advocates, researchers and others from using “false pretences” to gather important information, images, and videos documenting conditions at farms, slaughterhouses, livestock auctions, rodeo arenas, horse racetracks, and other premises (ss 5(6), 6(4)). This prevents such persons from then disseminating this important information and footage to members of the public, who have a corresponding right to receive it.

ii. Violates s 2(b) of the *Charter*, by cutting off an important source of information about the conditions in agricultural facilities, thereby interfering with the newsgathering activities of journalists and individuals engaged in press-like activities, and the corresponding right of the public to benefit from the fruits of a free and robust press (ss 5(4), 5(6), 6(2), 6(4)).

iii. Violates s 2(b) of the *Charter*, by prohibiting persons from providing false information about their name and address to the owners or employees of farms, slaughterhouses, and other premises, notwithstanding the risk that this may pose to the privacy and security of the persons from whom the information is being solicited (s 8(4)).

iv. Violates ss 2(b) and (c) of the *Charter* by preventing animal protection advocates and other persons from “interfering or interacting” with farmed animals, thus restricting a broad range of peaceful protest activities and other forms of expression that take place on public property near farms, slaughterhouses, and trucks transporting animals to slaughter (ss 5(4), 6(2)).

(eeee) The penalty and civil liability provisions of the Act include a broad and arbitrary citizen’s arrest power, and grant near immunity from liability for farm owners and operators, and the operators of vehicles transporting animals, who injure animal protection advocates, journalists, researchers, and others at agricultural facilities or near transport trucks (ss 8(1), 8(4), 14, 16, 20; Reg s 15). These broad, arbitrary, and excessively punitive provisions not only breach ss 7 and 9 of the *Charter*, but also exacerbates the Act’s harms to section 2(b) and (c) interests.

1. The “false pretences” prohibition unjustifiably restricts political expression

The Act prohibits undercover exposés at agricultural facilities

(ffff) Aside from the narrow exemptions for some journalists and some whistleblowers under sections 11 and 12 of the Regulation, the Act prohibits all false statements made to gain entry into a facility covered by the Act.

(gggg) The definition of “journalist” is excessively narrow and excludes a range of individuals and organizations engaged in gathering and publicly disseminating information and footage.

(hhhh) Animal Justice is one of several animal protection groups that has engaged in undercover exposés at Ontario farms and slaughterhouses. Such exposés involve several key common elements. These include:

- i. A person gets a job at a farm, slaughterhouse, or other facility without disclosing to their prospective employer: (a) their intention to covertly record footage on the job and publicly expose any animal abuse or other unethical or unlawful activity that may be witnessed, and (b) their affiliation with an animal protection group or other organization.
- ii. Depending on the person's employment background, they may withhold information or make other false statements on their resumé or during the job interview process. If asked whether they are affiliated with an animal protection group, or if they plan to film conditions at the facility, they lie and answer in the negative.
- iii. While at work, the person wears a recording device or otherwise photographs or records their surroundings.
- iv. While at work, the person follows all requirements of the job, including following biosecurity protocols and reporting animal abuse or other unlawful activities to their supervisor.
- v. The person continues employment for a number of weeks or months in order to document patterns of animal abuse or other unlawful or unethical activity. In order to demonstrate a pattern of abuse, they typically do not immediately provide footage to authorities the first time they observe conduct that may be contrary to relevant animal protection laws or industry codes of practice.

vi. The person, or the organization with which they are affiliated, releases the footage publicly, either on their own or by working with a news outlet such as CTV or CBC. The person, or the organization, additionally provides any evidence of animal abuse or unlawful activity to the appropriate law enforcement authorities, requesting an investigation.

vii. Unless and until the person decides to stop engaging in employee whistleblower exposés, they and the organization with which they are affiliated keep their identity confidential so as not to jeopardize the person's ability to get jobs in the agricultural sector in the future, and to protect their safety.

(iiii) Journalists may similarly make false statements in order to engage in investigative work, including by obtaining employment at farms, slaughterhouses, horse racetracks, rodeos, or other prescribed facilities.

(jjjj) Even when an employee whistleblower has not made a prohibited false statement about employment qualifications, they are vulnerable to prosecution under the Act up until the time they actually obtain information or evidence of unlawful activities (Reg s 12(1)(c)). Although there may be some instances where a whistleblower working at a facility obtains information or evidence of unlawful activities within hours or days of commencing their employment, other times the person may not obtain such information or evidence for many days or weeks after they have been at a facility, leaving them vulnerable to prosecution under the Act.

(kkkk) The quick reporting requirement at s 12(1)(d) of the Regulation is a common feature of American ag gag laws, including several that have been struck down as unconstitutional. In effect, this requirement prohibits an employee whistleblower who

does not meet the definition of a “journalist” from collecting evidence - for example, in the form of photos or video footage - demonstrating a pattern of mistreatment of animals, as opposed to a single incident.

(llll) Even if a journalist or employee whistleblower meets all other requirements to be exempt from the false pretences prohibition, they can be convicted under the Act if, during the course of the exposé, they cause harm to a farmed animal (Reg ss 11(1)(d), 12(2)(a)). In following the requirements of their employment, a journalist or employee whistleblower working at a farm or slaughterhouse may cause “harm to farm animals” as defined at s 1 of the Regulation if they are required to euthanize or slaughter animals, or if they are required to cause physical harm to farmed animals by engaging in standard industry practices such as castrating piglets, slicing off the tails of pigs, or debeaking chickens or other birds without anaesthesia.

(mmmm) Similarly, a journalist or employee whistleblower who causes “harm to an individual”, including emotional or psychological injury, as a result of their exposé can be convicted under the Act, even if they meet all other requirements to be exempt from the false pretences prohibition. The public release of footage showing animal abuse and other unlawful or unethical activities often causes facility operators or employees to experience emotional or psychological injury. For instance, individuals caught on camera engaging in animal abuse or other unlawful activities can experience stress or other psychological or emotional harm when that footage is publicly released. Such individuals may lose their jobs or face other repercussions in their professional or personal life. Such individuals may be charged and, in extreme instances, sentenced to

prison time. Other persons who own or work at the facility at issue may similarly experience stress or other psychological harm following the public release of footage.

(nnnn) So heavy-handed are the Act's restrictions on whistleblower exposés that an individual found guilty of entering a facility or interacting with farmed animals under false pretences can not only be arrested and fined tens of thousands of dollars, but can also be required to pay damages to the facility's owner or occupier for losses suffered as a result of the commission of the offence when footage showing abuse, mistreatment, or other unlawful or unethical activity is publicly released (s 16). Section 16 therefore not only discourages individuals from engaging in information-gathering activities necessary for expression on matters of public interest, but may have the effect of subjecting individuals to civil liability for engaging in those expressive activities.

Undercover exposés are high value expression that is in the public interest

(oooo) Misrepresentations made to gain access to an agricultural facility or other premises to which the Act applies are a form of expression protected by s 2(b) of the Charter. In addition to being protected in their own right, misrepresentations made to gain access to agricultural facilities enable information-gathering and undercover investigations by journalists that give the public access to important information that enables informed food purchasing and other fundamental choices.

(pppp) Undercover exposés at Canadian farms and other facilities at which animals are held, including facilities in Ontario specifically, have played a vital role in exposing animal cruelty, public health risks, and unsafe working conditions in the animal agriculture industry. They have resulted in investigations by appropriate authorities, as well as charges being laid against the individuals and companies involved.

(qqqq) In addition to law enforcement action, the public release of footage from whistleblower exposés often garners significant media coverage and has been the subject of significant public dialogue concerning the ethics of how farmed animals are treated. The coverage not only documents instances of violence and abuse, but also the conditions in which farmed animals are commonly kept. Footage showing standard industry practices, such as keeping pregnant pigs in gestation crates so small that they cannot turn around, breeding chickens to grow so large that their legs cannot support the weight of their body, or killing piglets by holding their back legs and slamming their head against a concrete floor, contributes to public debate and dialogue about the acceptability of those practices, as well as issues involving food safety.

(rrrr) In prohibiting persons from making false statements to gain access to animal protection zones, the Act restricts political speech and violates the s 2(b) rights of the Applicants and other members of the public. Indeed, the Act threatens the very core of what s 2(b) of the *Charter* is intended to protect by preventing the Applicants and others from engaging in debate and dialogue to persuade their fellow citizens that the treatment of farmed animals at industrial agricultural facilities is cruel and unethical.

2. The Act targets vigils outside of slaughterhouses and unjustifiably restricts political expression

(ssss) In her role as organizer of and participant at Toronto Cow Save vigils, Ms. Jorgensen stands with other vigil participants on public property near transport trucks. She feels a deep moral imperative to attend vigils and bear witness to the suffering of cows slaughtered for food. Specific actions that Ms. Jorgensen and other vigil attendees

engage in include standing on public property near transport trucks that are not moving so as to:

- i. look inside vehicles to observe animals and, at times, take photographs or videos documenting the conditions in which they are transported; and
- ii. speak to and otherwise interact with, cows in order to show kindness and compassion toward them in their final moments of life.

(tttt) When taking photographs of cows inside stationary transport trucks, Ms. Jorgensen and other vigil attendees often inadvertently have indirect physical contact with animals, including when cows nudge or otherwise touch cell phones or cameras. Similarly, although Ms. Jorgensen instructs participants not to put their hands inside vehicles, cows frequently come to participants, sticking their nose out of vehicles so as to nudge, sniff, or lick individuals' hands.

(uuuu) When she attends weekly vigils, Ms. Jorgensen now fears that she will be charged and fined thousands of dollars, or even arrested, unless she stops bearing witness to the suffering of animals in transport trucks. As organizer of these vigils, Ms. Jorgensen now warns other participants about their potential to be fined or arrested when bearing witness or otherwise interacting with cows in transport. While some participants choose to continue bearing witness and interacting with cows arriving for slaughter, others now choose not to.

(vvvv) Because drivers are not required to take reasonable care to avoid injuring individuals bearing witness (s 20(2)), and will be liable only for injuries that are caused intentionally or recklessly, Ms. Jorgensen fears for her safety and the safety of other vigil attendees.

(www) Although Animal Justice does not organize vigils or protests, the organization is regularly contacted by individuals who participate in such activities in Ontario and who provide photographs and footage of conditions that appear to violate relevant laws and regulations, such as the *Health of Animals Act* and Health of Animals Regulations. Animal Justice uses this evidence to file complaints with the CFIA and relevant provincial law enforcement authorities. The organization also uses footage from vigils as part of its public advocacy to strengthen animal transport laws in Canada.

(xxx) Ms. Scott-Reid and other journalists use information and footage obtained by individuals protesting and/or bearing witness near trucks transporting farmed animals in order to write articles about the conditions in which farmed animals are transported in Ontario and elsewhere in Canada.

(yyy) The prohibition against “interference and interaction” restricts the form and location of political expression on public property that is aimed at truth-seeking, self-fulfillment, and participation in public discourse and political decision-making regarding the treatment of farmed animals during transport and in prescribed facilities. By prohibiting persons from engaging in peaceful protest and other non-violent expressive activities on public property near transport trucks and animal protection zones, the Act violates the ss 2(b) and (c) *Charter* rights of the Applicants and other members of the public.

(zzz) In this context, s 2(b) of the *Charter* should be informed by the associational aspects of vigil activities in rectifying power imbalances between animal advocates and those in the animal agriculture industry. Preventing individuals from bearing witness to, and raising awareness about, the suffering of farmed animals in transport deprives

advocates of an important tool to meet on more equal terms the democratic and economic strength of industrial farming operations and animal agriculture industry groups.

3. The Act gives facility owners and operators sweeping powers to demand truthful personal information from individuals and to conduct arbitrary citizen's arrests

(aaaaa) A person who is asked by a private individual, including the owner or operator of a prescribed facility, to provide their name or address may have valid reasons for not wanting to provide that personal information to the private individual. They may not want the facility's owner or occupier, or others in the agricultural industry, to know their name or where they live for fear of threats or retaliation.

(bbbbb) By prohibiting a person accused of trespassing or damaging signage from engaging in false speech by providing a false name or address (s 8(4)) to private actors, the Act restricts important rights to expression under s 2(b) of the *Charter*. Subsection 8(4) puts the liberty and security of such persons at risk, essentially requiring them to either provide truthful information about their name and/or address, or refuse to provide their name or address at all and risk escalating tensions such that the owner or occupier arrests them using physical force.

(ccccc) Although the Act states that a facility's owner or occupier can only use "reasonable force" in carrying out a citizen's arrest (s 10), such an individual is given significant leeway under s 20 of the Act, and can proceed with an arrest knowing that they will not be liable for any injury or damage that they cause to the arrested individual unless their actions are willful or reckless, or unless they intentionally injure the individual. In shielding facility owners and operators from liability in this manner, the Act departs from norms regarding the degree of force acceptable in the making of a citizen's arrest and arrests in general, and extends protection from liability to farm

owners and operators arising from unnecessary force that is not extended to police, peace officers, or other members of the public in undertaking a citizen's arrest.

(ddddd) The Act departs from well-established democratic and legal principles by authorizing facility owners and operators to arrest individuals on their premises absent objectively reasonable and probable grounds (Reg s 15), in violation of ss 7 and 9 of the *Charter*.

(eeee) That the restrictions on speech and assembly rights in ss 5(4), 5(6), 6(2), 6(4), 8(4), and 14(2) of the Act are backed up by excessively punitive arrest (s 8(1)(d), Reg s 15) and penalty (ss 15(1), 16) provisions, as well as a reverse onus (s 14(3)), illustrates the draconian and unconstitutional nature of the Act. In fact, the reverse onus provision (s. 14(3)) violates s. 11(d) of the *Charter* by reversing the burden of proof. It requires the accused to prove they received consent, rather than requiring the Crown to prove lack of consent, and thus allows for an accused to be convicted despite a reasonable doubt as to the existence of that element of the offence. The Act goes even further, effectively shielding the owner from having to provide evidence about whether or not consent was provided.

G. The provisions are not justified under s 1 of the *Charter*

(ffff) The Act is allegedly aimed at preventing trespass and harmful interference with farmed animals, but trespass, criminal mischief, and administering injurious substances to farmed animals were illegal in Ontario long before the Act came into force. In reality, the Act is not aimed at any pressing and substantial objective.

(ggggg) Even if the Court finds that Ontario passed the Act to address a real and concrete problem related to trespass or risks to food safety, the impugned provisions have no connection to those objectives, are overly broad and riddled with vagueness, and inappropriately target a range of activities essential to truth-finding, democratic discourse, and self-fulfillment. The impugned provisions cannot be demonstrably justified in a free and democratic society.

STATUTORY INSTRUMENTS RELIED UPON

(hhhhh) *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c II, sections 1, 2(b), 2(c), 7, 9, and 52.

(iiiiii) *Security from Trespass and Protecting Food Safety Act, 2020*, SO 2020, c 9.

(jjjjj) Ontario Regulation 710/20.

(kkkkk) *Trespass to Property Act*, RSO, c T21.

(lllll) *Criminal Code*, RSC 1985, c C-46.

(mmmmm) *Health of Animals Act*, SC 1990, c 21.

(nnnnn) *Health of Animals Regulations*, CRC, c 296.

(ooooo) *Provincial Animal Welfare Services Act, 2019*, SO 2019, c 13.

(ppppp) *Courts of Justice Act*, RSO 1990, c C.43.

(qqqqq) *Rules of Civil Procedure*, RRO 1990, Reg 194 and, in particular, rules 2.03, 14.05, 38 and 39.

(rrrrr) Such further and other grounds as counsel may advise and this Honourable Court may deem just.

DOCUMENTARY EVIDENCE

3. The following documentary evidence will be used at the hearing of the Application:

- (a) The affidavit of Camille Labchuk, to be affirmed.
- (b) The affidavit of Jessica Scott-Reid, to be affirmed.
- (c) The affidavit of Louise Jorgensen, to be affirmed.
- (d) Such other affidavit material and evidence as counsel may advise and this Honourable Court may deem proper.

January 6, 2022

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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