

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants

and

ATTORNEY GENERAL OF ONTARIO

Respondent

**FACTUM OF THE INTERVENOR
ANIMAL ALLIANCE OF CANADA**

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PART I – OVERVIEW AND FACTUAL CONTEXT

1. The intervenor Animal Alliance of Canada (**AAC**) is 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. AAC is well recognized for its advocacy, litigation, research, and dissemination of information on animal rights, ethical treatment of animals, and animal conditions. AAC holds governments and non-governments accountable for breaches of ethical and legal standards on animal and environmental issues.
2. On 28 February 2023, AAC was granted leave to intervene in the Applicants' challenge to the *Security from Trespass and Protecting Food Safety Act, 2020*, SO 2020, c 9 (**Act**) and associated Ontario Regulation 701/20 (**Regulation**). It makes two submissions.
3. **First**, the Act has the purpose and effect of (i) Curtailing the expression and activities of animal advocates who promote truth and transparency about animal suffering, harm, and abuses in the poorly regulated animal agriculture industry; and (ii) Delegitimizing expression and activities of animal advocates by falsely branding them as dangerous to animals, farmers, and food security. For these reasons, the Act violates s 2(b) of the *Charter*.
4. The Ontario government purported to pass the Act to protect food and animal safety. But the legislative debates did not outline evidence of harm committed by animal advocates. Rather, it is animal advocates who have been responsible for exposing inhumane and unsanitary practices in the largely self-regulated, minimally accountable, and opaque factory farming industry. Yet, instead of addressing the central problem by enacting more stringent animal and food safety or biosecurity requirements applicable to farms and slaughterhouses, the Act turns whistleblowers, journalists, and protestors into criminals for their efforts to expose wrongdoings on matters of public concern. The Act thus curtails and punishes the

dissemination of critical information on the condition of animals to the detriment of the public, academics, journalists, animal advocates and, ultimately, animals themselves.

5. **Second**, the Act violates the presumption of innocence protected by s. 11(d) of the *Charter* by imposing on the accused (typically animal advocates, whistleblowers, or journalists) the burden of proving the absence of consent in the prosecution of an offence under ss. 5(1)-(4) and 6(2) of the Act. There is no s. 1 justification for the violation, given how easy it would be for a farm owner or truck driver to testify on this point.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

The Act violates s 2(b) of the *Charter*

Section 2(b) of the Charter

6. Section 2(b) of the *Charter* provides that everyone has the fundamental freedoms “of thought, belief, opinion and expression, including freedom of the press and other media of communication”. In *Edmonton Journal v Alberta (AG)*, Cory J. wrote that it “is difficult to imagine a guaranteed right more important to a democratic society... The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms... It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.”¹
7. The Supreme Court has adopted a three-part test to analyze breaches of s. 2(b): (i) Does the activity in question have expressive content?; (ii) Does the method or location of this expression remove s. 2(b) protection?; and (iii) If the expression is protected by s. 2(b), does the government action in question infringe that protection, either in purpose or effect?²

¹ *Edmonton Journal v Alberta (AG)*, [\[1989\] 2 SCR 1326](#) at 1336.

² *Canadian Broadcasting Corp v Canada (Attorney General)*, [2011 SCC 2](#), para 38.

8. Section 2(b) is to be interpreted expansively. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of “expression”. Further, if the purpose or effect of the impugned governmental action is to frustrate any of “the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing”, a limit on expressive freedom will be shown.³

The Act has the purpose and effect of frustrating the pursuit of truth about animal suffering, harm, and abuses in the poorly regulated factory farming industry

9. The Act was passed at the request of the factory farming industry.⁴ Its stated purpose is to protect farm animals, the food supply, the economy, farmers, drivers who transport farm animals, and others from the “unique” risks that are created when trespassers enter places where farm animals are kept or when persons engage in unauthorized interactions with farm animals.⁵ Introducing the Act, Ernie Hardeman, the Minister of Agriculture, Food and Rural Affairs claimed it would protect against trespassers who “may not realize how their actions could lead to the introduction of disease among livestock and provide them with undue stress [and] would... mean that Ontario would have some of the strongest animal welfare laws in Canada.”⁶ Other MPPs similarly claimed the Act would safeguard the integrity of Ontario’s food system and protect the welfare and safety of farm animals, farmers, and workers.⁷

10. In reality, the legislative debates failed to present any evidence of a need to protect farm animals, the food supply, the economy, farmers, drivers who transport farm animals, and

³ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969, 972, 976-977; *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 765-767.

⁴ Affidavit of Scott Duff, Respondent Application Record (RAR) Vol 4, p. 815.

⁵ Randy Pettlepice, [Hansard Session 42.1 – Part I, Second Reading – December 10, 2019 \(Hansard, 2nd Reading, Dec 10\)](#), p 6795; Goldie Ghamari, [Hansard, 2nd Reading, Dec 10](#), p. 6816-6818; Amarjot Sandhu, [Hansard Session 42.1 – Part II, Second Reading – December 11, 2019 \(Hansard, 2nd Reading, Dec 11\)](#), p 6824.

⁶ [Hansard, 2nd Reading, Dec 10](#), p. 6780.

⁷ Toby Barrett (MPP from Haldimand–Norfolk); Robbery Bailey (MPP from Sarnia-Lambton), [Hansard, 2nd Reading, Dec 10](#), at pp 6798, 6802.

others from any risks created by trespassers or animal advocates who interact with farm animals. For example, there was no evidence about the number of biosecurity incidents due to activists,⁸ any statistics or information of disease or contamination by unauthorized animal advocates,⁹ or whether any disease or contamination on Ontario's farm facilities had previously been caused by unauthorized visitors such as animal advocates. Nor was there evidence that animal advocates, activists, whistleblowers or any other investigators perpetrated acts of violence against farmers in their homes or were similarly charged.

11. The Respondent's record before this court likewise fails to present significant credible evidence of actual harm caused by animal advocates. While witnesses for the Respondent have reported a few instances of reprehensible conduct by groups on a scale completely distinct from the behaviour proscribed by the Act,¹⁰ virtually all other allegations are bald boilerplate assertions or highly contentious and typically unsourced hearsay statements of alleged harm to farmers and animals (see Appendix "B" of the Applicants' factum). In fact, the evidence in the application record reveals that, on the balance, the actions and work of animal advocates, whistleblowers, and trespassers have *enhanced* public and animal security:

- (a) Undercover investigations have revealed instances of bad practices and animal suffering in the US and Canada even leading to prosecutions. The largest meat recall in history was prompted by an undercover investigation of a slaughterhouse by the

⁸ MPP Mike Schreiner, [Hansard Session 42.1 - Part II, Standing Committee on General Government – June 9, 2020 \(Hansard, Standing Comm. June 9\)](#), p. G676.

⁹ See responses from Kathleen Long from Maple Leaf Foods (and a Veterinarian), [Hansard, Standing Comm. June 9](#), p. 676.

¹⁰ For example, the mention in the Affidavit of Robert Boellart (RAR, Vol 1) of the release of hundreds of minks and foxes from a farm in 2013 by a self-described "animal liberation" group, which would obviously constitute criminal conduct different from the informational activities of animal advocates, whistleblowers, and journalists proscribed by the Act.

humane society in California.¹¹ In Canada, undercover investigations have led to farms and individuals being charged with and pleading guilty to animal cruelty.¹²

(b) Animal advocates have revealed that animals on farms are confined in overcrowded spaces, which is facilitated through painful mutilations such as cutting off the horns of cattle, cutting off the beaks of chickens, and docking the tails of sheep, pigs, and indoor feedlot cattle.¹³ Dr Jan Hajek, an infectious disease specialist, has confirmed that animal welfare and public health measures get sidelined in profit-driven high intensity agriculture.¹⁴ Similar treatment of non farmed animals (for example companion animals) would be illegal and readily prosecuted.¹⁵

(c) Animal advocates have confirmed that the transportation conditions of farmed animals lead to deaths, “downed” animals and serious injuries, including prolapses, broken wings, swollen joints, injured joints, bulging udders and injuries causing bleeding, abuses from overcrowding, vehicle design and conditions, dehydration, lack of food and unhygienic conditions.¹⁶

12. This work by animal advocates is essential because although animal protection legislation in Canada and Ontario broadly recognizes the importance of avoiding animal suffering and distress,¹⁷ the existing mechanisms for animal and public health harm prevention and

¹¹ Dr. Jan Hajek, [Hansard, Standing Comm. June 9](#), p. 690.

¹² Affidavit of Camille Labchuk affirmed June 30, 2021 [“**Labchuk Affidavit**”] ¶¶107-110, 117-121, 126-131, 135 **Application Record of the Applicants [“ARA”]**, p 78, 81-82, 84-88; *R v Keefer*, [2017 BCPC 142](#)

¹³ Affidavit of Jessica Scott-Reid (**Scott-Reid Affidavit**), ¶ 23, **ARA** p. 1837.

¹⁴ Dr. Jan Hajek, [Hansard, Standing Comm. June 9](#), p. 690.

¹⁵ *E.g.*, *R v MacIsaac*, [2008 NSPC 81](#); *R v Chen*, [2021 ABCA 382 \(CanLII\)](#); *R v Marshall*, [2013 ONCJ 61](#); *R v Galloro*, [2006 ONCJ 263](#); *R v. Vassell*, [2022 ONCJ 415](#); *R v Baker*, [2004 CanLII 569 \(ON SC\)](#).

¹⁶ Labchuk Affidavit, ¶¶62, 63, 72, Ex MM, **ARA**, pp. 64, 67, p. 483, Affidavit of Louise Jorgensen, ¶¶42,43, **ARA**, p. 1562.

¹⁷ For example, s. 445.1(1) of the *Criminal Code*, [RSC 1985, c C-46](#) makes it an offence to wilfully cause or permit to be caused unnecessary pain, suffering or injury to an animal or a bird; s. 15 of the *Provincial Animal Welfare*

measures of accountability governing farms and slaughterhouses are ineffective and the factory farming industry remains largely invisible to the general public. Animals are frequently kept inside private commercial structures on private property. The vast majority of farmed animals spend their entire lives indoors in cages or pens (some cattle raised for meat are the exception) and are only exposed to the outdoors during transport.¹⁸ The industry has minimal regulatory and government oversight and has successfully lobbied for self-serving legislative changes, including the Act itself. For example:

- (a) There are no legally prescribed regulatory standards of care governing the treatment of farmed animals in Ontario to protect their welfare. There are no proactive disclosure requirements, legally binding standards, biosecurity standards or regular inspections of farm facilities or farmed animals to ensure health and welfare. Studies show that Canadian farms demonstrate poor adherence to voluntary biosecurity protocols, which have also led to outbreak of diseases on multiple occasions.¹⁹ The federal *Health of Animals Act* provides some ostensible (but inadequate) protection to farmed animals when being transported or slaughtered, but not on farms. Animal suffering, harm, and abuses remain rampant in animals when transported.²⁰
- (b) As the Applicants note in their factum (para 13), there are no proactive government inspections of animal welfare conditions on farms in Ontario. The *Provincial Animal Welfare Services Act, 2019* (the **PAWS Act**) prohibits causing an animal to be in

Services Act, 2019, [SO 2019, c 13](#) prevents causing (or exposing to undue risk of) distress to animals, although it makes an exception for animal agriculture to be governed by “reasonable and generally practices of animal agriculture care”.

¹⁸ Labchuk Affidavit, ¶48, ARA, p. 58.

¹⁹ Labchuk Affidavit, Ex G (Disease Outbreaks and Biosecurity Failures), ARA, pp. 227, 230-236.

²⁰ Labchuk Affidavit, ¶59-64, ARA p. 62-64.

distress but exempts “reasonable and generally accepted practices of agricultural animal care, management or husbandry”, even if they cause distress, without defining what “reasonable and generally accepted” agricultural practices are. Non-binding recommended codes of practice from the National Farmed Animal Care Council (NFACC) are considered “reasonable and generally accepted” agricultural practices. Yet many of the practices included in NFACC guidelines cause significant animal suffering and have been banned or restricted in other jurisdictions including in the European Union and the United Kingdom for this reason.²¹

13. In the face of a poorly regulated industry, the Act’s bald claim that animal advocates constitute a (if not the) primary risk to food safety does not ring true. In reality, animal diseases and harm are almost wholly caused by the actions of farm owners and operators.²² The limited evidence of biosecurity or food safety concerns linked to animal advocates suggests that in pushing for the Act, factory farming industry representatives were motivated by their desire to avoid bad press and limit public exposure of animal suffering, harm, and abuses in the industry.²³

14. In purpose and effect, therefore, the Act is an anti-sunshine law, which prevents transparency of factory farming practices. By preventing protests, awareness and investigations of animal

²¹ For example, Canada continues to use battery cages for laying hens, which result in overcrowding and loss of mobility for the hens and have been banned the EU since 2012; Canada also uses gestation crates for sows (pregnant pigs), which are severely restrictive and cruel and have been banned by the EU since 2002 (talks to ban them in Canada are ongoing): Affidavit of Dr Moira Harris (**Harris Affidavit**), Ex. D, pp 2-5, ARA, Tab I, pp 2160-2163; [Code of Practice for the Care and Handling of Pullets and Laying Hens \(NFACC, 2017\)](#); [Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens \(European Council, 1999\)](#); [Code of Practice for the Care and Handling of Pigs \(NFACC, 2014\)](#); [Council Directive 2008/120/EC laying down minimum standards for the protection of pigs \(European Council, 2008\)](#).

²² *E.g.*, Labchuk Affidavit, ¶¶45, 65-147, ARA, pp. 56-57, 65-92.

²³ Dr. Jan Hajek, [Hansard, Standing Comm. June 9](#), p. 690.

harm, the Act unconstitutionally shields the powerful factory farming industry from law enforcement and public scrutiny of their practices involving millions of animals.

15. In the U.S., laws like the Act are referred to as “ag-gag” laws and include one or more of three key elements: (1) a prohibition of documentation of agricultural practices; (2) a prohibition of misrepresentations in job applications utilized to gain access to closed facilities; and (3) a requirement for immediate reporting of illegal animal cruelty.²⁴ Ontario has gone further than a typical U.S. ag-gag law by also enacting provisions that infringe the rights of those that bear witness and demonstrate in public spaces, interact with animals.
16. Ag-gag laws have been found unconstitutional in various U.S. states;²⁵ lawsuits are ongoing in others. Furthermore, between 2012 to 2024, ag-gag bills were defeated in 20 states,²⁶ many of them repeatedly, through successful campaigns by animal advocates and journalists.²⁷ Courts have found ag-gag laws unconstitutional for violating free speech rights for prohibitions on recording and disseminating footage from industrial farms or for entering an agricultural site based on a misrepresentation.²⁸
17. For example, in 2021, the Tenth Circuit struck down a Kansas ag-gag law that made it illegal to enter a facility to take pictures without the owner’s consent and with intent to damage the

²⁴ Center for Constitutional Rights, [Ag-gag across America](#), 2017.

²⁵ Including Utah, Idaho, Iowa, and Kansas.

²⁶ Including California, Arizona, Colorado, Nebraska, Illinois, New Mexico, Tennessee, Florida, New York.

²⁷ Center for Constitutional Rights, [Ag-gag across America](#), 2017.

²⁸ [Animal Legal Defense Fund v Wasden](#), 878 F (3d) 1184 (9th Cir 2018); [Animal Legal Defense Fund v Herbert](#), 263 F Supp (3d) 1193 at 1198 (D Utah 2017); [Animal Legal Defense Fund v Reynolds](#), 353 F Supp (3d) 812 (SD Iowa 2019).

enterprise of the facility. The court confirmed that these provisions restrict protected speech by discriminating against viewpoints.²⁹

18. In 2021, the Eight Circuit ruled that an *Iowa Code* provision that made it illegal to obtain employment based on false representations while intending to commit an act not authorized by the employer violated the First Amendment. The Court agreed that proscribing false statements for obtaining employment violated protected speech.³⁰

19. In 2017, in *Animal Legal Defence Fund v Herbert* the court found that provisions in the Utah Code § 76-6-112 that made it illegal to record images or sounds of an “agricultural operation” without the owner’s consent and to gain employment with intent to do so were unconstitutional and were struck down. The court observed:

On first blush, this inquiry appears to pit the First Amendment broadly against the privacy and property interests of landowners. Indeed, it might seem to involve a weighing of the value of undercover investigations against the wisdom and reasoning behind laws suppressing them. Ultimately, however, because of both the breadth of the Act and the narrow grounds on which the state defended it, these complex policy questions never really materialize in this case.³¹

20. Utah, like Ontario in this matter, defended its ag-gag law on the grounds that the law sought to target the risk posed by trespassers, who could spread diseases to and injure animals and workers. The Court rejected this argument, finding that the legislative history did not evince this intention and that the record failed to establish that animal advocates had created diseases or injured workers. The court agreed that there may be a legitimate interest in addressing

²⁹ [Animal Legal Defense Fund v Kelly](#), 9 F.4th 1219 (10th Cir. 2021); writ of certiorari denied in [Kelly v Animal Legal Defense Fund](#), 142 S. Ct. 2647, 212 L. Ed. 2d 605 (2022).

³⁰ [Animal Legal Defense Fund v Reynolds](#), 8 F.4th 781 (8th Cir. 2021) at 787.

³¹ [Animal Legal Defense Fund v Herbert](#), 263 F. Supp. 3d 1193 (D. Utah 2017) at 1211.

perceived threats to the agricultural industry. But the suppression of broad swaths of protected speech without sufficient evidence was not the way to respond to this concern.³²

The Act has the purpose and effect of delegitimizing and frustrating the political and community participation of animal advocates

21. The expression of animal advocates proscribed by the Act, such as bearing witness to, protesting against, criticizing, and exposing animal suffering, harm, and abuses does not only reveal the truth. It is also meant to encourage social and political participation amongst the community of animal advocates and by other citizens. Political speech lies at the core of freedom of expression.³³ Section 2(b) of the *Charter* protects the right of a minority to express its view, however unpopular it may be. This purpose extends to the protection of minority beliefs that the majority regards as wrong or false.³⁴ Hindering or condemning political views harms the openness and equality of Canadian democracy.³⁵
22. Permitting an effective voice for unpopular and minority views is essential to deliberative democracy.³⁶ The right to participate in political discourse is a right to effective participation, which includes the ability to effectively communicate and disseminate information to others.³⁷ Freedom of expression allows each Canadian including animal advocates and journalists to voice their vision for community and nation, and to advocate for change to the larger social, political and economic landscape.³⁸ In fact, freedom of expression also protects

³² [Animal Legal Defense Fund v Herbert](#), 263 F. Supp. 3d 1193 (D. Utah 2017) at 1197, 1212.

³³ [Harper v Canada \(AG\)](#), [2004] 1 SCR 827, para 11, [R v Guignard](#), 2002 SCC 14, para 20; [R v Sharpe](#), 2001 SCC 2, para 23; [Thomson Newspapers Co. v Canada \(AG\)](#), [1998] 1 SCR 877, para 92; [Committee for the Commonwealth of Canada v Canada](#), [1991] 1 SCR 139 at 175; [Edmonton Journal v Alberta \(AG\)](#), [1989] 2 SCR 1326 at 1336; [Irwin Toy Ltd v Quebec \(AG\)](#), [1989] 1 SCR 927 at 968.

³⁴ [R v Zundel](#), [1992] 2 SCR 731.

³⁵ [R v Keegstra](#), [1990] 3 SCR 697 at 764.

³⁶ [Harper v Canada \(AG\)](#), [2004] 1 SCR 827, para 14.

³⁷ [Harper v Canada \(AG\)](#), [2004] 1 SCR 827, para 15.

³⁸ [Harper v Canada \(AG\)](#), [2004] 1 SCR 827, para 16, [R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages \(West\) Ltd.](#), 2002 SCC 8, para 32; [U.F.C.W., Local 1518 v KMart Canada Ltd.](#), [1999] 2 SCR 1083, para 43.

the recipient – members of the public as viewers, listeners, readers, and also electors who have a right to information on public matters. Canadians have the right to inform others and to be informed about public issues.³⁹

23. As a result of the activities of animal advocates, courts in Canada are beginning to recognize that animals are a sentient and highly vulnerable group whose rights are of importance.⁴⁰

Much remains to be done: for example, discussions on animal welfare in the UK Parliament exhibit a much broader appreciation of the animal welfare, sentience and care and the UK has passed the *Animal Welfare (Sentience) Act* 2022⁴¹, which recognises in law that all vertebrate animals and invertebrates such as crabs, lobsters and octopuses are sentient beings, which will form the bedrock of the animal welfare policy of the future. Recent discussions in the UK Parliament also acknowledge that CCTVs are now mandatory in slaughterhouses in England; the launch of the new Animal Sentience Committee will advise Government on how policy decisions should take account of animal welfare; and that they are committed to legislate on animal welfare.⁴²

24. Here, in addition to curtailing truths about harmful and abusive animal practices, the Act appears to be motivated by a desire to delegitimize the animal advocacy movement and community in the public sphere by branding them as dangerous and on the fringe. For example, in introducing the Act, despite extensive consultations with the factory farming lobby, the Ministry of Agriculture, Food and Rural Affairs (**OMAFRA**) did not consult with

³⁹ *Harper v Canada (AG)*, [2004] 1 SCR 827, para 17, 18.

⁴⁰ *Reece v Edmonton (City)*, 2011 ABCA 238, para 88 (Fraser CJ in dissent).

⁴¹ United Kingdom, <https://www.legislation.gov.uk/ukpga/2022/22/enacted>.

⁴² UK Parliament, [Hansard, Volume 733](#): debated on Thursday 25 May 2023.

the animal advocacy community,⁴³ including the Animal Protection Party of Canada⁴⁴. In the legislative debates, animal agriculture industry representatives repeatedly and extensively referred to animal advocates as “activists.” They were also called “vigilante”⁴⁵ and their behaviour was termed harassing,⁴⁶ deplorable,⁴⁷ aggressive,⁴⁸ unwise,⁴⁹ extreme bullying and threatening.⁵⁰ In other correspondence with government, a mink farm owner also referenced animal advocates as animal extremists, terrorists and their actions as “continued terrorism”.⁵¹ Finally, in the legislative debates, MPP Randy Pettapiece and others decried the difficulty of prosecuting agri-food trespassing cases under the *Criminal Code* given the need to show “intention” and the fact that, “in some cases, crown counsel have withdrawn charges because of a lack of a reasonable prospect of conviction.”⁵²

25. The text of the Act itself (for example s. 1) implies that animal advocates who trespass on farms and come into innocuous contact with animals (for example during protests) are a danger to farmers, the economy, food safety, and even to animals themselves. Sections 8, 10, and 11 of the Act download extensive police powers to owners to arrest trespassers, including in a context where their activities may not endanger anyone. Section 13 likewise permits

⁴³ Reply Affidavit of Camille Labchuk, ¶¶ 3-6, ARA, pp 880-884: In documents received from OMAFRA of discussions between OMAFRA and agricultural industry representatives regarding the introduction of Bill 156, animal activists, trespassing, and undercover exposés at farms, there was no mention of any animal protection, civil liberties, or journalism groups that was consulted prior to the introduction of Bill.

⁴⁴ A Canadian federal political party dedicated to the protection of animals and the environment, which has contested seats in multiple Canadian federal elections: <https://www.animalprotectionparty.ca/>.

⁴⁵ John de Bruyn, [Hansard, Standing Comm. June 9](#), p. 683; MPP Daryl Kramp, [Hansard Session 42.1 – Part, Third Reading – June 16, 2020 \(Hansard, 3rd Reading, June 16\)](#), p. 8156.

⁴⁶ Keith Currie, [Hansard, Standing Comm. June 9](#), p. 651.

⁴⁷ Keith Currie, [Hansard, Standing Comm. June 9](#), p. 651.

⁴⁸ Shikha Jain, [Hansard, Standing Comm. June 9](#), p. 666.

⁴⁹ John de Bruyn, [Hansard, Standing Comm. June 9](#), p. 687.

⁵⁰ Jason LeBond, [Hansard, Standing Comm. June 9](#), p. 682.

⁵¹ Affidavit of Clarence Bollert, Exhibit J, RAR, Vol 1, 207.

⁵² MPP Randy Pettapiece, [Hansard, 2nd Reading, Dec 10, p 6796](#), [Hansard, 3rd Reading, June 16](#), p. 8146.

police officers to arrest trespassers who are not endangering anyone, without a warrant and in the context of a summary offence. These powers further present animal advocates as dangerous – certainly much more so than regular trespassers – and contribute to a delegitimization of their causes. Yet as noted above, animal diseases and harm are almost wholly caused by the actions of farm owners and operators.⁵³

26. Similar tactics have been adopted in the U.S., where animal advocates and journalists have been vilified, prejudiced and stigmatized as terrorists, enemies, invaders, vigilante, and marauding invaders.⁵⁴ In Idaho, the court found that the negative characterization of animal advocates as terrorists or militants provided context of the true motivation of ag-gag law. Thus, in addition to finding that the ag-gag law violated free speech rights, the court found it violated the right to equal protection under the law because it was motivated in substantial part by animus towards animal welfare groups.⁵⁵

The Act violates s 11(d) of the *Charter*

27. Section 11(d) of the Charter provides that any person charged with an offence has the right to be presumed innocent until proven guilty. The presumption of innocence entails two essential elements, namely (1) that an accused must be proven guilty beyond a reasonable doubt, and (2) that the Crown bears the burden of establishing such guilt.⁵⁶

28. Section 11(d) precludes “reverse onus” provisions: provisions that impose on *the accused* (instead of the Crown) the burden to disprove on a balance of probabilities (ie, the “persuasive burden”) any factor affecting verdict. Reverse onus provisions violate the

⁵³ E.g., Labchuk Affidavit, ¶¶45, 65-147, ARA, pp. 56-57, 65-92.

⁵⁴ [Animal Legal Defense Fund v Otter](#), 118 F. Supp. 3d 1195 (D. Idaho 2015), p. 1200.

⁵⁵ [Animal Legal Defense Fund v Otter](#), 118 F. Supp. 3d 1195 (D. Idaho 2015), p. 1209.

⁵⁶ *R v Oakes*, [1986] 1 SCR 103.

presumption of innocence because it would be possible for an accused to be convicted despite a reasonable doubt as to the existence of that element of the offence.⁵⁷

29. Section 14(3) of the Act violates s. 11(d) by requiring the accused to prove that they received consent of the farm owner or truck driver to enter an animal protection zone or interact with a farmed animal.

30. The breach of s. 11(d) of the *Charter* is not justified under s. 1 of the *Charter*. A reverse onus provision in the context of a regulatory offence can be justified where 1. the offence serves a pressing and substantial objective in support of a public welfare scheme of fundamental importance to Canadian society; and 2. it would be extremely difficult for the Crown to prove the absence of lawful excuse by the accused where there exists proportionality between this objective and the means used to achieve it (in other words, where “there is simply no other practical solution” to administer the regulatory scheme).⁵⁸ This is the case, for example, where a reverse onus places a persuasive burden on the accused to establish due diligence on a balance of probabilities.⁵⁹

31. In the present case, the reverse onus provision does not serve any pressing and substantial concern, nor would it be difficult for the Crown to prove the absence of lawful excuse by the accused. The objective of the reverse onus provision is to shield owners from the need to testify in these cases. This case is unlike other regulatory reverse onus cases,⁶⁰ where the

⁵⁷ *R v Oakes*, [1986] 1 SCR 103; *R v Whyte*, [1988] 2 SCR 3; *R v Keegstra*, [1990] 3 SCR 697; *R v Fisher*, 17 OR (3d) 295 (Ont CA), leave to appeal SCC refused, [1994] SCCA No 176.

⁵⁸ *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at 241-249; *R v Godin*, 1992 CanLII 4736 (NB CA) at 3-8.

⁵⁹ *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at 241.

⁶⁰ E.g., *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154; *R v Joseph Martin*, 1991 CanLII 7340 (ON CA); *R v Ellis-Don Ltd.* 1990 CanLII 6968 (ON CA).

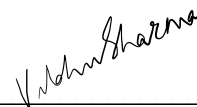
objective is to avoid the loss of convictions because the relevant facts (for example whether the accused performed due diligence) are particularly in the knowledge of the accused:

- (a) In matters under the Act, the responsible farm owner or truck driver will know whether consent has been given to the accused. He or she will be able to directly testify to that effect and the prosecution can ensure convictions where all the elements of the offence have been proved.
- (b) Given s. 14(2) of the Act, which invalidates the consent of an owner or driver where this consent has been obtained under false pretences or duress, the reverse onus also burdens the accused with the often difficult task of showing that consent was properly obtained (which may require showing that there was no misunderstanding between the accused and the owner/driver as to the specifics of the pretence).
- (c) The violation of the accused's s 11(d) *Charter* right and the resulting conviction under the Act would also have a disproportionately large effect on the accused, given the abnormally large penalty for offences, ranging up to \$15,000 for a first offence and \$25,000 for a subsequent offence. This contrasts with s. 2 of the *Trespass to Property Act*, [RSO 1990, c T.21](#), which only provides for fines of up to \$10,000 for trespassers.

PART III - COSTS AND ORDER REQUESTED

32. AAC requests that no costs be awarded against it as a public interest intervenor of limited financial means.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September 2023.



Vibhu Sharma / Nicolas M. Rouleau
Lawyers for the Intervenor Animal Alliance of Canada

SCHEDULE “A” – LIST OF AUTHORITIES

Case law

1. *Canadian Broadcasting Corp v Canada (Attorney General)*, [2011 SCC 2](#)
2. *Committee for the Commonwealth of Canada v Canada*, [\[1991\] 1 SCR 139](#)
3. *Edmonton Journal v Alberta (AG)*, [\[1989\] 2 SCR 1326](#)
4. *Ford v Quebec (Attorney General)*, [\[1988\] 2 SCR 712](#)
5. *Irwin Toy Ltd v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#)
6. *Harper v Canada (AG)*, [\[2004\] 1 SCR 827](#)
7. *R v Baker*, [2004 CanLII 569 \(ON SC\)](#)
8. *R v Chen*, [2021 ABCA 382 \(CanLII\)](#)
9. *R v Ellis-Don Ltd.* [1990 CanLII 6968 \(ON CA\)](#)
10. *R v Fisher*, [17 OR \(3d\) 295 \(Ont CA\)](#)
11. *R v Fisher*, [1994] SCCA No 176
12. *R v Galloro*, [2006 ONCJ 263 \(CanLII\)](#)
13. *R v Godin*, [1992 CanLII 4736 \(NB CA\)](#)
14. *R v Guignard*, [2002 SCC 14](#)
15. *R v Joseph Martin*, [1991 CanLII 7340 \(ON CA\)](#)
16. *R v Keefer*, [2017 BCPC 142 \(CanLII\)](#)
17. *R v Keegstra*, [\[1990\] 3 SCR 697](#)
18. *R v MacIsaac*, [2008 NSPC 81 \(CanLII\)](#)
19. *R v Marshall*, [2013 ONCJ 61 \(CanLII\)](#)
20. *R v Oakes*, [\[1986\] 1 SCR 103](#)
21. *R v Sharpe*, [2001 SCC 2](#)
22. *R v Vassell*, [2022 ONCJ 415 \(CanLII\)](#)
23. *R v Wholesale Travel Group Inc.*, [\[1991\] 3 SCR 154](#)
24. *R v Whyte*, [\[1988\] 2 SCR 3](#)
25. *R v Zundel*, [\[1992\] 2 SCR 731](#)
26. *Reece v Edmonton (City)*, [2011 ABCA 238](#)
27. *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, [2002 SCC 8](#)
28. *Thomson Newspapers Co. v Canada (AG)*, [\[1998\] 1 SCR 877](#)
29. *U.F.C.W., Local 1518 v KMart Canada Ltd.*, [\[1999\] 2 SCR 1083](#)

US case law

1. [*Animal Legal Defense Fund v Herbert*](#), 263 F Supp (3d) 1193 at 1198 (D Utah 2017)
2. [*Animal Legal Defense Fund v Kelly*](#), 9 F.4th 1219 (10th Cir. 2021)
3. [*Animal Legal Defense Fund v Otter*](#), 118 F. Supp. 3d 1195 (D. Idaho 2015), p. 1209
4. [*Animal Legal Defense Fund v Reynolds*](#), 8 F.4th 781 (8th Cir. 2021)
5. [*Animal Legal Defense Fund v Reynolds*](#), 353 F Supp (3d) 812 (SD Iowa 2019)
6. [*Animal Legal Defense Fund v Wasden*](#), 878 F (3d) 1184 (9th Cir 2018)
7. [*Kelly v Animal Legal Defense Fund*](#), 142 S. Ct. 2647, 212 L. Ed. 2d 605 (2022)

Secondary sources, commentary and legislative debates

1. [Hansard Session 42.1 – Part I, Second Reading – December 10, 2019](#)
2. [Hansard Session 42.1 – Part II, Second Reading – December 11, 2019](#)
3. [Hansard Session 42.1 – Part, Third Reading – June 16, 2020](#)
4. [Hansard Session 42.1 – Part I, Second Reading – December 10, 2019](#)
5. Center for Constitutional Rights, [Ag-gag across America](#), 2017
6. [Code of Practice for the Care and Handling of Pullets and Laying Hens \(NFACC, 2017\)](#)
7. [Code of Practice for the Care and Handling of Pigs \(NFACC, 2014\)](#)
8. [Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens \(European Council, 1999\)](#)
9. [Council Directive 2008/120/EC laying down minimum standards for the protection of pigs \(European Council, 2008\)](#)
10. [Animal Welfare \(Sentience\) Act 2022](#), c. 22, United Kingdom

SCHEDULE “B” – LIST OF STATUTES

Canadian Charter of Rights and Freedoms, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2 Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

Criminal Code, RSC 1985, c C-46

Causing unnecessary suffering

445.1 (1) Every one commits an offence who (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird; (b) in any manner encourages, aids, promotes, arranges, assists at, receives money for or takes part in (i) the fighting or baiting of animals or birds, or (ii) the training, transporting or breeding of animals or birds for the purposes of subparagraph (i); (c) wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it; (d) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or (e) being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (d).

Punishment

- (2) Every one who commits an offence under subsection (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
 - (b) an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

Failure to exercise reasonable care as evidence

- (3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

Presence at baiting as evidence

- (4) For the purpose of proceedings under paragraph (1)(b), evidence that an accused was present at the fighting or baiting of animals or birds is, in the absence of any evidence to the contrary, proof that he or she encouraged, aided or assisted at the fighting or baiting.

Security from Trespass and Protecting Food Safety Act, 2020, SO 2020, c 9

Prohibitions re trespass, etc.

Animal farms

- 5 (1) No person shall enter in or on an animal protection zone on a farm without the prior consent of the owner or occupier of the farm.

Processing facilities

- (2) No person shall enter in or on an animal protection zone on an animal processing facility without the prior consent of the owner or occupier of the facility.

Other animal premises

- (3) No person shall enter in or on an animal protection zone on prescribed premises without the prior consent of the owner or occupier of the premises.

No interaction with farm animals

- (4) No person shall interfere or interact with a farm animal in or on an animal protection zone on a farm, animal processing facility or prescribed premises, or carry out a prescribed activity in or on the animal protection zone, without the prior consent of the owner or occupier of the farm, facility or premises.

No implied consent

- (5) For the purposes of subsections (1), (2), (3) and (4), prior consent of an owner or occupier shall not be inferred by a person seeking to enter in or on an animal protection zone referred to in those subsections, or to interfere or interact with a farm animal or carry out a prescribed activity in or on the animal protection zone, solely on the basis that,
- (a) the owner or occupier has not prohibited the person directly, orally or in writing, from entering the animal protection zone, from interfering or interacting with a farm animal or

carrying out the prescribed activity or has not otherwise objected to the person's presence;
or

(b) no signs have been erected on the farm, animal processing facility or prescribed premises to restrict or prohibit the entry in or on the animal protection zone or the interference, interaction or prescribed activity.

Consent under duress, false pretences

(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.

Animal protection zone signs

(7) No person shall deface, alter, damage or remove any signs that have been posted on a farm, animal processing facility or prescribed premises to demarcate an animal protection zone or to prohibit or regulate access to or activities carried out in or on animal protection zones.

Non-application of Trespass to Property Act

(8) The *Trespass to Property Act* does not apply to animal protection zones to which this section applies.

Prohibition re transportation of farm animals

6 (1) No person shall stop, hinder, obstruct or otherwise interfere with a motor vehicle transporting farm animals.

No interaction with farm animals

(2) 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.

...

Offences

14 (1) Every person who contravenes any of the following provisions is guilty of an offence:

1. Subsection 5 (1), (2), (3) or (4).
2. Subsection 5 (7).
3. Subsection 6 (1) or (2).
4. Subsection 8 (3) or (4).
5. Subsection 9 (2). 6. Section 12.

Consent under duress, false pretences

(2) 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.

Onus of proof

- (3) In the prosecution of an offence under subsection 5 (1), (2), (3) or (4) or 6 (2),
- (a) the consent of the owner or occupier of the farm, animal processing facility or prescribed premises or the consent of the driver of the motor vehicle transporting a farm animal, as the case may be, is presumed not to have been given; and
 - (b) the onus is on the person charged with the offence to prove on the balance of probabilities that he or she obtained the consent of the owner or occupier or the consent of the driver, as the case may be, before engaging in the conduct that he or she is accused of doing without consent.

Same, sign

- (4) For the purposes of subsection (3), consent is sufficiently proven if the defendant establishes on the balance of probabilities that,
- (a) a sign was posted at or near the animal protection zone on the farm, animal processing facility or prescribed premises authorizing persons to enter in or on the animal protection zone or authorizing the interference or interaction with farm animals or the carrying out of the prescribed activity in or on the animal protection zone; and
 - (b) the defendant reasonably believed that the sign authorized the defendant to enter the animal protection zone on the farm, animal processing facility or prescribed premises or to interfere or interact with the farm animal or to carry out the prescribed activity in or on the animal protection zone.

Penalties

- 15 (1) A person who is found guilty of an offence under subsection 14 (1) is liable on conviction to a fine of,
- (a) for a first offence, not more than \$15,000; and
 - (b) for any subsequent offence, not more than \$25,000.

Increased penalties

- (2) If a person is found guilty of an offence as a result of a contravention of subsection 5 (1), (2), (3), (4) or (7) or 6 (1) or (2) and the court finds that the offence was committed in prescribed circumstances that resulted in an increase to the gravity of the offence, the amount of the penalty may be increased in accordance with the regulations.

Decision not to increase

- (3) If a court determines that the amount of a penalty should not be increased despite the existence of prescribed circumstances mentioned in subsection (2), the court shall include the reasons for this determination in its decision.

Provincial Animal Welfare Services Act, 2019, SO 2019 c 13

Distress

Causing distress

- 15 (1) No person shall cause an animal to be in distress.

Permitting distress

(2) No owner or custodian of an animal shall permit the animal to be in distress.

Exposure to undue risk of distress

(3) No person shall knowingly or recklessly cause an animal to be exposed to an undue risk of distress.

Exception

- (4) Subsections (1), (2) and (3) do not apply in respect of,
- (a) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* in relation to wildlife in the wild;
 - (b) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* or the *Fisheries Act (Canada)* in relation to fish;
 - (c) an activity regarding agricultural animal care, management or husbandry carried on in accordance with,
 - (i) any standards of care or administrative requirements that expressly provide that they apply to that activity, or
 - (ii) if no standards of care or administrative requirements expressly provide that they apply to that activity, the reasonable and generally accepted practices of agricultural animal care, management or husbandry;
 - (d) a prescribed class of animals or animals living in prescribed circumstances or conditions; and
 - (e) prescribed activities.

Exception, veterinarians

- (5) Subsections (1), (2) and (3) do not apply to,
- (a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the *Veterinarians Act*;
 - (b) a person acting under the supervision of a veterinarian described in clause (a); and
 - (c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders.

Trespass to Property Act, RSO 1990, c. T.21

Trespass an offence

- 2 (1) Every person who is not acting under a right or authority conferred by law and who,
- (a) without the express permission of the occupier, the proof of which rests on the defendant,
 - (i) enters on premises when entry is prohibited under this Act, or
 - (ii) engages in an activity on premises when the activity is prohibited under this Act; or
 - (b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000. R.S.O. 1990, c. T.21, s. 2 (1); 2016, c. 8, Sched. 6, [s. 1](#).

ANIMAL JUSTICE, et al
Applicants

- and -

Court File No. CV-21-658393-0000
ATTORNEY GENERAL OF ONTARIO
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced at TORONTO

**FACTUM OF THE INTERVENOR, ANIMAL
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