

**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

and

CENTRE FOR FREE EXPRESSION, ANIMAL ALLIANCE OF CANADA,
REGAN RUSSELL FOUNDATION

Interveners

FACTUM OF THE INTERVENER, CENTRE FOR FREE EXPRESSION

ST. LAWRENCE BARRISTERS PC
33 Britain Street
Toronto ON M5A 1R7

Alexi N. Wood (LSO# 54683F)

Tel: 647.245.8283
alex.wood@stlbarristers.ca

Lillianne Cadieux-Shaw (LSO# 74936H)

Tel: 647.245.3122
lil.cadieux.shaw@stlbarristers.ca

Abby Deshman (LSO# 56757T)

Tel: 647.245.2222
abby.deshman@stlbarristers.ca

Tel: 647.245.2121

Lawyers for the Intervener,
Centre for Free Expression

TO: **ANIMAL JUSTICE**
720 Bathurst St.
Toronto ON M5S 2R4

Kaitlyn Mitchell (LSO# 55912J)
Tel: 647.746.8702
kmitchell@animaljustice.ca

Scott Tinney (LSO# 78160W)
Tel: 416.720.8681
stinney@animaljustice.ca

Tel: 647.746.8702

STOCKWOODS LLP
Barristers and Solicitors
77 King Street West, Suite 4130
P.O. Box 140
TD North Tower, Toronto-Dominion Centre
Toronto ON M5K 1H1

Andrea Gonsalves (LSO# 52532E)
Tel: 416.593.3497
andreag@stockwoods.ca

Fredrick Schumann (LSO# 59377L)
Tel: 416.593.2490
fredricks@stockwoods.ca

Tel: 416.593.7200

Lawyers for the Applicant,
Animal Justice

AND TO: **BEDDOES LITIGATION**
Suite 1700, Nelson Square
808 Nelson Street
Vancouver BC V6Z 2H2

Arden Beddoes (LSO# 62108W)
arden@beddoeslitigation.com

Tel: 604.248.4744

Lawyers for the Applicants,
Jessica Scott-Reid and Louise Jorgensen

AND TO: **THE ATTORNEY GENERAL OF ONTARIO**
4-720 Bay Street, 8th Floor
Toronto ON M7A 2S9

Yashoda Ranganathan (LSO# 57236E)

Tel: 416.326.4456
yashoda.Ranganathan@ontario.ca

Robin Basu (LSO# 32742K)

Tel: 416.326.4476
robin.basu@ontario.ca

Elizabeth Guilbault (LSO# 83208O)

Tel: 416.326.2220
elizabeth.guilbault@ontario.ca

Tel: 416.326.4456

Lawyers for the Respondent, The Attorney General of Ontario

AND TO: **NICOLAS M. ROULEAU PROFESSIONAL CORPORATION**
41 Burnside Dr.
Toronto ON M6G 2M9

Nicolas M. Rouleau (LSO# 54515D)

Tel: 416.885.1361
RouleauN@gmail.com

Vibhu Sharma (LSO# 70130V)

Tel: 416.668.3072
SharmaVibhu@outlook.com

Lawyers for the Intervener, Animal Alliance of Canada

AND TO: **RUBY SHILLER ENENAJOR DIGIUSEPPE**
Barristers
171 John Street, Suite 101
Toronto, ON M5T 1X3

Stephanie Di Giuseppe (LSO# 60065J)
sdigiuseppe@rubyshiller.com

Heather Gunter (LSO# 85466L)
hgunter@rubyshiller.com

Tel: 416.964.9664

Counsel for the Intervener, Regan Russell Foundation

TABLE OF CONTENTS

I. OVERVIEW 1

II. FACTS 2

III. LEGAL ISSUES..... 3

A. Whistle-blowing and the Right to Know..... 3

B. The Whistle-blower’s Ordeal..... 4

C. Section 2(b) Offers Expansive and Generous Protection 5

D. The *Act* Prohibits False Utterances, Contrary to Section 2(b) 6

E. The *Act* Compels Speech, Contrary to Section 2(b) 8

F. The *Act* Chills Press-Like Activities, Recordings, and Photographs, Contrary to Section 2(b) 10

G. The Section 2(b) Violations are not Justified Under Section 1 12

IV. ORDER REQUESTED 15

I. OVERVIEW

1. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.¹

In a democracy, the first step to remedying corruption and corporate immorality is to shine a light on it. Journalists contribute to this needed function, but the journalist's exposé is often only possible because of the courageous acts of whistle-blowers. Caught between conscience and career, the prospective whistle-blower must decide whether to engage in expressive activities, at great personal and professional risk, in order to get important information about wrong-doing to the press or the public. This type of expressive activity is deeply linked to the pursuit of truth, democratic and social discourse, and self-fulfillment.

2. The *Security from Trespass and Protecting Food Safety Act, 2020*, SO 2020, c. 9 (the *Act*) affects activists and journalists who seek employ in agricultural facilities to expose the abuses within. But the *Act* also affects individuals without such pre-meditated plans: employees of agricultural facilities who become horrified by what they see and decide they can no longer turn a blind eye to what is happening around them. These employees may witness animal torture, illegal activity, or dangerous health and safety protocols. Guided by their conscience, these individuals may decide to take great personal and professional risks to document, collect, and eventually disclose this information to an authority or the public.

3. The *Act* infringes on the expressive rights of these whistle-blower employees. It prohibits and restricts prospective employee whistle-blowers from engaging in expressive activity clearly protected by s. 2(b) of the *Charter*, such as false utterances. It compels expression by controlling the content and timing of whistle-blower disclosure. Finally, it chills press-like activities

¹ Louis Brandeis, "Other People's Money, and How the Bankers Use It," *Ch. V: What Publicity Can Do* (1914), available [online](#) (Brandeis School of Law).

(including, for example, making video or audio recordings of wrong-doing) and deters whistle-blower expression by employees in the agricultural sector. The *Act* therefore infringes s. 2(b) and does not do so in a manner that is connected to its objectives or minimally impairing.

II. FACTS

4. The *Act* is well summarized by the parties. The CFE takes no position on any contested facts and will focus only on provisions addressing whistle-blowers.

5. Section 5 of the *Act* makes it an offence to enter an animal protection zone or interfere or interact with a farmed animal (including indirect physical contact, and regardless of whether the animal is dead or alive) without consent from the owner or occupier.² Consent will be vitiated if it was obtained under false pretences.³ False pretences is defined as any “false statement” given to obtain consent to enter an animal protection zone or interfere or interact with a farmed animal.⁴ There are no limits on what might be considered a “false statement.”

6. Section 8 of *Act* authorizes facility owners and operators to arrest individuals whom they believe to have violated s. 5 of the *Act*, including where consent is vitiated, without a warrant.

7. The Regulation to the *Act* provides some relief from this punitive provision for certain groups of people. Section 12, for instance, purports to provide an exemption for whistle-blowers. However, this relief is extremely narrow in scope. For a whistle-blower to be protected from punishment, the individual must meet the following criteria, among others:

- a. The person must be an employee;
- b. The person must have succeeded in obtaining evidence of harm to animals, harm

² *Security from Trespass and Protecting Food Safety Act, 2020*, [SO 2020, c 9](#) [“the *Act*”] at ss. 5(1)-(4). For the definition of “interference or interaction with a farm animal,” see O Reg 701/20: [General](#), under the *Act*, supra [“the **Regulation**”] at s. 8.

³ The *Act*, supra, at s. 5(6).

⁴ The Regulation, supra at s. 9.

to food safety, or other illegal activity; and,

- c. The person who gave the false statement must disclose the information or evidence described above to a police officer or other authority as soon as practicable after obtaining the information or evidence.⁵
8. Further, the narrow protections granted by this provision will not apply if:
- a. The whistle-blower is asked to stop or leave before they have completed gathering the information or evidence;
 - b. The whistle-blower has failed to comply with any biosecurity measures; *or*,
 - c. The whistle-blower directly or indirectly caused or contributed to any harm to a farm animal or to food safety, or harm to an individual (including emotional or psychological injury, undue stress, or monetary harm), either in the process of obtaining the consent or as part of the wrong-doing ultimately disclosed.⁶

III. LEGAL ISSUES

A. Whistle-blowing and the Right to Know

9. Whistle-blowing is the act of alerting the public to “scandal, danger, malpractice, corruption or other immoral or unethical behaviour.”⁷ By disclosing wrongdoing, whistle-blowers ensure the public knows information that could impact their political decisions, personal beliefs, and consumer choices. Whistle-blowing is thus a fundamental tool for the public’s right to know.

10. The Supreme Court of Canada has held that the public’s right to know is part and parcel of the *Charter*’s free expression guarantee: “freedom of expression, which includes freedom of the

⁵ The Regulation, *supra* at s. 12(1).

⁶ The Regulation, *supra* at s. 12(2).

⁷ Richard Haigh & Peter Bowal, “[Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis](#)” (2012) *Comparative Research in Law & Political Economy. Research Paper No. 1974982*. at p. 1.

press, protects both those who express ideas and opinions and those who read or hear them.”⁸ It protects readers and listeners, as well as writers and speakers.⁹ As noted in *R v Vice Media*:

*Section 2(b) sets out generous protections designed to facilitate the healthy functioning of our democracy. But they are incomplete if s. 2(b) is viewed only as an individual right to freedom of expression, reading out protection of “freedom of the press”. A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It provides the public with the information it needs to engage in informed debate. In other words, it is the public’s “right to know” that explains and animates the distinct constitutional protection for freedom of the press.*¹⁰

11. The Supreme Court of Canada has also acknowledged the essential role whistle-blowers play in the public’s right to know under s. 2(b), holding that the public has an interest in “being informed about matters of importance that may only see the light of day” through the work of internal whistle-blowers.¹¹ Without the work of whistle-blowers, “democratic institutions and social justice will suffer.”¹² Without adequate protections for whistle-blowers, “the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies.”¹³

B. The Whistle-blower’s Ordeal

12. Few employee whistle-blowers start out intending to shine a light on corruption or immorality. Most find themselves in their role by accident when they realize they can no longer stay silent in the face of corruption, fraud, or other wrong-doing. Once faced with knowledge of wrong-doing, the employee must then grapple with a profound ethical choice: stay silent and allow the wrongdoing to continue, or speak out. The direction they choose may be irreversible.¹⁴

13. Speaking out can be dangerous; the employee whistle-blower is vulnerable to reprisal by

⁸ *Denis v Côté*, [2019 SCC 44](#) at para 46

⁹ *R v National Post*, [2010 SCC 16](#) [“*National Post*”] at para 28.

¹⁰ *R. v. Vice Media Canada Inc.*, [2018 SCC 53](#) at para 125, emphasis added.

¹¹ *National Post*, supra at para 28.

¹² *National Post*, supra at para 28.

¹³ *National Post*, supra at para 29.

¹⁴ David Hutton, “The Whistleblower’s Ordeal” (2016) *Centre for Free Expression*, available [online](#) [“**Hutton**”].

the organization, which can take many forms. The employee may suddenly find cold shoulders and ostracism, swirling rumours, or bullying. Her performance reviews may be inexplicably poor, she may receive assignments far above or below her rank, or she may face other roadblocks to advancement. She may find herself demoted or fired. If she continues to speak out, what typically follows is a war of attrition where the organization holds all the firepower:

On one side stand the wrongdoers, still with the credibility and authority of their positions and with the full resources of the organization behind them: legions of lawyers and public relations people, private detective agencies, perhaps even hired thugs, and seemingly unlimited funds (often being provided by the taxpayer).

On the other side stands the whistleblower, by now typically discredited in the public's eyes, unemployed, unemployable (because of the notoriety of their case), running out of money, and perhaps losing the support of friends and family.¹⁵

14. It is no wonder that, when faced with wrong-doing, an employee may choose to do nothing; doing something “is a very dangerous thing to do, and few people have the courage required.”¹⁶

15. Currently in Canada there is no statutory regime protecting whistle-blowers in the private sector. Some types of whistle-blowers have specific protective legislation for their particular industries.¹⁷ Agricultural employees, however, are not protected by any whistle-blowing statute.¹⁸

C. Section 2(b) Offers Expansive and Generous Protection

16. Section 2(b) of the *Charter* grants every person in Canada the “freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.”¹⁹ This

¹⁵ Hutton, *supra*.

¹⁶ Hutton, *supra*.

¹⁷ See, e.g., Abbas Kassam, “Developing a Whistleblowing Culture in Canada,” (2018) Centre for Free Expression, available [online](#).

¹⁸ In particular, see *Occupational Health and Safety Act*, [RSO 1990, c. O.1](#); *Employment Standards Act 2000*, [SO 2000, c. 41](#); *Agricultural Employees Protection Act, 2002*, [SO 2002, c. 16](#). None of these statutes contain specific provisions for whistleblowers, though they do contain limited protections for employees facing reprisal for exercising specific rights granted under each statute.

¹⁹ [Part 1](#) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, (UK) 1982, c 11 [the “*Charter*”] s. 2(b).

is an expansive right. As stated by the Supreme Court of Canada:

The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the “means indispensable to the discovery and spread of political truth.”²⁰

17. Section 2(b) is infringed where (1) the activity in question is an expressive activity protected by s. 2(b), and (2) that expressive activity is infringed by either the purpose or the effect of the impugned government action.²¹ Expressive activity is interpreted broadly to include any activity that conveys or attempts to convey meaning.²²

18. As outlined in more detail below, s. 2(b) specifically protects expressive activities that whistle-blowers rely on, such as taking video and audio recordings or photographs, or engaging in deceptive expression in order to capture wrong-doing. Section 2(b) also protects freedom *from* compelled speech, including the right *not* to engage in whistle-blower expression.

19. The *Act* infringes on all of these expressive activities.

D. The *Act* Prohibits False Utterances, Contrary to Section 2(b)

20. Prospective whistle-blowers may need to engage in deceptive expression in order to capture wrong-doing. By prohibiting this type of expressive activity, the *Act* infringes s. 2(b).

21. Once a prospective whistle-blowers suspects, has heard about, or has herself observed wrong-doing, the whistle-blower will usually try to gather evidence to confirm her suspicions, support her allegations, or have something concrete to bring to the authorities. The whistle-blower may need to act covertly or even lie about her intentions or activities so she can gather the

²⁰ *Toronto (City) v Ontario (Attorney General)*, [2021 SCC 34](#) [*"Toronto (City)"*] at para 127 (in dissent, though not disputed by the majority on this point).

²¹ *Toronto (City)*, supra at para 124.

²² *Toronto (City)*, supra at para 124.

necessary evidence;²³ otherwise, she risks reprisals, denials, and cover-up operations.²⁴

22. Section 5 of the *Act* makes it an offence to gain access to animal protection zones or to interact with farm animals via any “false statement.” This infringes s. 2(b).

23. Deliberate lies are expressive activity protected by s. 2(b) of the *Charter*.²⁵ In striking down the “false news” provision of the Criminal Code in *R v Zundel*,²⁶ the Supreme Court noted that “exaggeration -- even clear falsification” was still protected expression.²⁷ The Court used the following helpful example, among others:

A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., ‘cruelty to animals is increasing and must be stopped’. [...]

*[T]his expression arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the [...] above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.*²⁸

24. This reasoning is applicable here; there is high intrinsic value to the false statements prospective whistle-blowers will make under the *Act*. Using false pretences to document wrongdoing is closely connected to the underlying values of s. 2(b): any “false statements” captured by the *Act* are made in the process of the whistle-blower’s overarching pursuit of truth, as well as in the moral self-fulfillment of the prospective whistle-blower and the political and social decision-making of the public that the whistle-blower seeks to inform.

25. Section 2(b) explicitly protects false utterances made by whistle-blowers to gain or

²³ Affidavit of Camille Labchuk affirmed 30 June 2021 at paras 89, 103, Applicants’ Record, Tab B, p 72, 76.

²⁴ Brian Martin, *The Deceptive Activist* (Sweden: Irene Publishing, 2017), available [online](#), at p 114: as such, “it’s usually advisable for potential whistleblowers to collect as much information as possible before speaking out.”

²⁵ *R. v. Zundel*, [1992] 2 SCR 731 [“*Zundel*”] at p 753.

²⁶ *Zundel*, supra at p 778.

²⁷ *Zundel*, supra at p 754.

²⁸ *Zundel*, supra at pp 754-755

maintain consent to enter animal protection zones or to engage with farm animals. Prohibiting these statements is a clear infringement of s. 2(b) of the *Charter*. While s. 12 of the Regulation purports to provide relief from this harsh infringement on expression, this relief is illusory, applying to such narrow circumstances as to be virtually meaningless, as outlined further below.

E. The Act Compels Speech, Contrary to Section 2(b)

26. Just as s. 2(b) protects the right to disclose information to others, it *also* protects the right not to say anything, or the right not to say specific things.²⁹ As such, where legislation compels a whistle-blower to disclose wrong-doing, the legislation infringes on s. 2(b)'s protection of the right to say nothing.

27. The Ontario Court of Appeal in *McAteer v Canada (Attorney General)* sets out a three-pronged test to determine if government action amounts to compelled speech:

- a. Whether the compelled activity is expression.
- b. Whether the *purpose* of the law is aimed at controlling expression. If it is, then it is automatically held to be a violation of s.2(b).
- c. If the *purpose* is not aimed at controlling expression, then the applicant must show the law has an adverse *effect* on expression, and that effect is worthy of constitutional disapprobation.³⁰

28. The first prong of the *McAteer* test requires two definitional terms to be met: that the activity is *expressive*, and that the expressive activity is being *compelled*. If the impugned government action uses mandatory language, under threat of penalty, for the given expression,

²⁹ *CCLA v Attorney General of Ontario*, [2020 ONSC 4838](#) ["*CCLA*"] at para 42; citing *Slaight Communications Inc v Davidson*, [\[1989\] 1 SCR 1038](#) at para 95.

³⁰ *CCLA*, *supra* at para 45; *McAteer v. Canada (Attorney General)*, [2014 ONCA 578](#).["*McAteer*"] at para 69.

then it follows that the impugned law compels the expression.³¹ Section 12 of the Regulation forces whistle-blowers to disclose any wrongdoing they have learned of via false pretences to the police or an “authority” as soon as practicable, even if the whistle-blower has not decided they yet wish to disclose the wrongdoing. Failure to do so results in arrest and punishment. The provision therefore compels expression. This meets the first prong of the *McAteer* test.

29. The second prong of the *McAteer* test asks whether the purpose of the impugned law is to control expression.³² As explained by the Ontario Superior Court of Justice in a case about mandatory ‘gas tax’ stickers, this part of the test asks whether the law in question is “designed not so much to compel a specific message but to control any message the gasoline retailer might otherwise express.”³³ In this case, although the *Act* compels whistle-blower expression under the first prong of the *McAteer* test, the CFE concedes that the *Act*’s purpose is not to “control” the message a prospective whistle-blower might otherwise express, since a whistle-blower is not legislatively deprived of the ability to add to, clarify, or disavow the evidence they are compelled to disclose (though they may be in practice). As such, the analysis turns on the third prong.

30. The third prong of the *McAteer* test asks if the law has an adverse effect on expression, and whether that effect is worthy of constitutional disapprobation.

31. Section 12’s quick reporting requirement has adverse effects on the content and scope of a whistle-blower’s disclosure. Requiring a whistle-blower to disclose her collected evidence “as soon as practicable” to the police means that the whistle-blower will likely only be able to disclose evidence of a single instance of wrong-doing—if she manages even that given the other restrictions contained in s. 12—before the investigation is taken entirely out of her hands. At this point, the

³¹ *CCLA*, supra at para 47.

³² *CCLA*, supra at para 48.

³³ *CCLA*, supra at para 48.

whistle-blower may not have a fulsome view of the wrong-doing, and may well be compelled to disclose an incomplete picture. This limits the whistle-blower's ability to expose systemic and cumulative problems and increases the likelihood that the organization will be able to brush aside the instance of wrong-doing as a "one-off."

32. This effect of the *Act* warrants constitutional disapprobation under the third prong of the *McAteer* test. Whistle-blowers play a critical role in attaining and disclosing truth, *for* the common good, and usually at great personal expense. Demanding disclosure of evidence from an employee whistle-blower before she has had time to gather a complete picture of wrong-doing does not accord with the attainment of "truth and the common good,"³⁴ nor does it assist the public in engaging in appropriate political and consumer decision-making, pursuant to the "Canadian commitment to democracy."³⁵ The third prong of the *McAteer* test is therefore met. The *Act* amounts to compelled speech, contrary to s. 2(b).

F. The *Act* Chills Press-Like Activities, Contrary to Section 2(b)

33. In addition to the *Act*'s direct restriction on expression and direct engagement of compelled speech, the impugned provisions will also have a significant chilling effect on a much wider range of constitutionally protected activity. Whistle-blowers frequently collect evidence of wrong-doing by asking targeted questions, documenting answers, observing and taking notes of repeated practices, and taking videos or photographs.

34. This activity has constitutional protection in two ways: instrumentally, through application of the free press guarantee to whistle-blower expression, and individually, through specific constitutional protection afforded to taking videos, audio recordings, and photographs.

³⁴ *R v Keegstra*, [1990] 3 SCR 697 ["*Keegstra*"] at p 762.

³⁵ *Keegstra*, supra at pp 763-764.

35. First, whistle-blower activities and expression are protected by the right to a free press under s. 2(b). Freedom of the press is not granted to any specific class of individual.³⁶ Rather, it can be best understood as instrumental protection afforded to every individual engaged in expressive activities that fulfill a press-like function, “from the lonely pamphleteer or pajama-clad blogger to the institutional mainstream reporter.”³⁷ One of the instrumental protections afforded to a free press includes the right to gather information: “the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.”³⁸

36. Whistle-blowers are part of the “free press” protected in section 2(b) of the *Charter*. They engage in press-like functions—such as gathering information, making video and audio recordings, and taking photographs—in order to credibly and productively disclose wrong-doing related to matters of public interest. Constitutional protections for newsgathering are afforded to whistle-blowers, just as they are to traditional journalists, and to all others engaged in the pursuit of truth in furtherance of the public’s right to know.

37. Second, making audio or video recordings and taking photographs are independently protected under s. 2(b). In *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)* the Supreme Court of Canada held that recording and photographing individuals crossing a picket line were expressive acts, made to inform the public about the strike, deter people from crossing the picket line, and persuade individuals to support the union.³⁹ These acts were protected in and

³⁶ *National Post*, supra at paras 43, 57.

³⁷ Benjamin Oliphant, “Freedom of the Press as a Discrete Constitutional Guarantee,” (2014) 59 *McGill L.J.* 283, available [online](#), at page 302.

³⁸ *Canadian Broadcasting Corp v Lessard*, [1991] 3 *SCR* 421 at para 24. Note, however, that specific newsgathering techniques are not individually protected; see *National Post*, supra at para 38.

³⁹ *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 *SCC* 62 [“*United Food*”] at para 11.

of themselves, regardless of whether they were eventually distributed or disseminated.⁴⁰

38. As such, when whistle-blowers enter animal protection zones or interact with dead or alive farm animals to make recordings or take photographs of wrong-doing, they are engaging in expressive activity protected by s. 2(b)—regardless of whether they have accessed that location or engaged in those activities using consent obtained under false pretences.

39. The *Act* nebulous prohibition on “indirect physical contact” with a farmed animal could be interpreted to include indirect contact by way of a camera or recording device, therefore prohibiting constitutionally protected press-like activities.⁴¹ Regardless, prospective whistle-blowers who wish to engage in protected press-like activities are faced with an unfortunate choice: they can engage in constitutionally protected activities openly, and be at constant risk of exposure and reprisal, or of running afoul of workplace policies; or they can lie in order to engage in those constitutionally protected activities, and risk the penalties under the *Act*.

G. The Section 2(b) Violations are not Justified Under Section 1

40. A constitutional infringement may be justified under s. 1 of the *Charter* only where the impugned legislation has a pressing and substantial objective, and there is proportionality between that objective and the means used to achieve it. The impugned measure will not be proportionate if it is not rationally connected to its objective or if it impairs the constitutional right in question more than is reasonably necessary to accomplish its objective.⁴²

41. The stated purpose of the *Act* is to protect farm animals, the food supply, farmers, and others from risks that are created when “trespassers” enter places where farm animals are kept or

⁴⁰ *United Food*, supra at para 11.

⁴¹ See, e.g., Cross Examination of Camille Labchuk, pp 131-134, Joint Cross Examination Transcript Brief, Vol 5, Tab 16, pp 1839-1842, qq 288-289, 295.

⁴² *Keegstra*, supra at p 767.

when persons engage in unauthorized interactions with farm animals.⁴³

42. If this Court finds that this is the purpose of the *Act*, the CFE concedes that these health and safety objectives are pressing and substantial. However, the means chosen to achieve these objectives are not proportionate. Section 5 of the *Act* and s. 12 of the Regulation are not rationally connected to the *Act's* stated goals and are not minimally impairing.

43. Section 5 of the *Act* punishes all employee whistle-blowers who make false utterances in search of the truth, including whistle-blowers who may be trying to *expose* health and safety concerns, in *accordance* with the *Act's* purported health and safety goals. In other words, this prohibition captures expression that presents no risk to the government's objectives and captures expression that could help further the government's objectives. The Regulation provides one escape route to avoid this punishment, but this escape route has rigorous requirements that only serve to further deter whistle-blower expression in numerous and interlocking ways.

44. First, the exception applies to "employees", excluding other similarly situated individuals such as contractors, suppliers, or volunteers who witness wrongdoing in the course of their duties. There is no justifiable reason to exclude these individuals from protection.

45. Second, s. 12 insists that the whistle-blower disclose the wrong-doing as soon as practicable after obtaining the information or evidence. There is no justifiable connection between this requirement and the objectives of the *Act*. Instead, this quick reporting requirement has two significant chilling effects. First, it chills expression by decreasing the whistle-blower's own safety: 1) it prevents the whistle-blower from being able to gather further support for her allegations, increasing the risk of reprisal; and 2) it means there will be little, if any, time to seek guidance from third parties about the significance of the wrong-doing they have witnessed or the

⁴³ The *Act*, *supra* at s. 1.

steps they should take. Second, the quick-report requirement chills expression because it decreases the likelihood that the information obtained will be helpful to the public. The disclosed evidence may be incomplete in such a significant way as to not convey the true state of facts,⁴⁴ it is unlikely to capture repeated or persistent patterns of animal abuse, and it can more easily be swept away by the corporate entity as the actions of a single bad actor.

46. Third, the *Act* insists that disclosure be made to a police officer or other “authority”. There is no justifiable connection between this requirement and the objectives of the *Act*. It will also deter those who are already marginalized (including, for example, racialized employees or temporary foreign workers) and those who may be validly concerned that law enforcement or another recognized “authority” will not support them or properly address the wrong-doing.⁴⁵

47. Fourth, s. 12 insists that the whistle-blower be *successful*. The person must have succeeded in obtaining evidence of harm to animals, harm to food safety, or other illegal activity to escape punishment for a false statement under the *Act*. The person must avoid getting “caught” before they have completed obtaining this evidence to escape punishment for a false statement under the *Act*. They must also be sure that the area they are attempting to access will furnish the required evidence before they make any false statements. This creates an impossibly high bar for a prospective whistle-blower—who already has so much to lose, even if she *is* successful.

48. Fifth, the *Act* removes whistle-blower protection if the whistle-blower directly or indirectly caused or contributed to any harm to a farm animal or to food safety. Employee whistle-blowers will almost always be directly or indirectly contributing to such harms – that is likely the very reason they become motivated to witness, document, and ultimately speak out.

⁴⁴ *CCLA*, supra at para 59.

⁴⁵ See, e.g., Micah Toub, “Canada needs to get serious about whistleblower protections. Here’s why” (2020) *Chartered Professional Accountants of Canada*, available [online](#).

49. Finally, the *Act* also removes whistle-blower protection if an individual directly or indirectly caused or contributed to harm to any person, which includes emotional or psychological injury, undue stress, or monetary harm. As a result, even if a whistle-blower can meet every other requirement for protection under s. 12, the facility owner can step forward at any point and state that the whistle-blower's behaviour caused him (or any other employees) emotional or psychological injury, undue stress, or monetary harm—all likely outcomes where serious internal wrong-doing has been disclosed to the authorities.

50. These requirements impair whistle-blower expression more than is reasonably necessary (or necessary at all) to accomplish the *Act*'s objectives. Section 12 could have contained one requirement—that prospective whistle-blowers abide by any justifiable bio-security or health and safety measures—to ensure that the government's health and safety concerns were met. Instead, s. 12 includes numerous requirements that are unconnected to the health and safety goals of the *Act*. Indeed, impairing a whistle-blower's ability to convey helpful information to the appropriate audiences—particularly *about* health and safety concerns—not only does not meet the *Act*'s goals, but runs contrary to them. It already takes great courage to risk one's career and livelihood to make an ethical choice for the greater good. The *Act* dissuades even the most courageous.

IV. ORDER REQUESTED

51. The CFE takes no position on the disposition of the appeal. The CFE seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2023.



Alexi N. Wood



Lillianne Cadieux-Shaw



Abby Deshman

ST. LAWRENCE BARRISTERS PC

33 Britain Street

Toronto ON M5A 1R7

Alexi N. Wood (LSO# 54683F)

Tel: 647.245.8283

alex.wood@stlbarristers.ca

Lillianne Cadieux-Shaw (LSO# 74936H)

Tel: 647.245.3122

lil.cadieux.shaw@stlbarristers.ca

Abby Deshman (LSO# 56757T)

Tel: 647.245.2222

abby.deshman@stlbarristers.ca

Tel: 647.245.2121

Lawyers for the Intervener,
Centre for Free Expression

SCHEDULE “A”
LIST OF AUTHORITIES

Case-law

1. *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62.
2. *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421.
3. *CCLA v Attorney General of Ontario*, 2020 ONSC 4838.
4. *Denis v Côté*, 2019 SCC 44.
5. *McAteer v. Canada (Attorney General)*, 2014 ONCA 578.
6. *R v Keegstra*, [1990] 3 SCR 697.
7. *R v National Post*, 2010 SCC 16.
8. *R. v. Vice Media Canada Inc.*, 2018 SCC 53.
9. *R. v. Zundel*, [1992] 2 SCR 731.
10. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038.

Secondary Sources

1. Brandeis, Louis, *Other People’s Money, and How the Bankers Use It*, “[Chapter 4: What Publicity Can Do](#)” (1914: Brandeis School of Law).
2. Haigh, Richard & Bowal, Peter “[Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis](#)” (2012) *Comparative Research in Law & Political Economy. Research Paper No. 1974982*.
3. Hutton, David, “[The Whistleblower’s Ordeal](#)” (2016) *Centre for Free Expression*.
4. Kassam, Abbas, “[Developing a Whistleblowing Culture in Canada](#)” (2018) *Centre for Free Expression*.
5. Martin, Brian, *The Deceptive Activist* (Sweden: Irene Publishing, 2017).
6. Oliphant, Benjamin, “[Freedom of the Press as a Discrete Constitutional Guarantee](#)” (2014) 59 McGill LJ 283.
7. Toub, Micah “[Canada needs to get serious about whistleblower protections. Here’s why](#)” (2020) *Chartered Professional Accountants of Canada*.

SCHEDULE “B”
RELEVANT STATUTES

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

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.

2. *Security from Trespass and Protecting Food Safety Act, 2020, SO 2020, c9*

Purposes

1 The purposes of this Act are to prohibit trespassing on farms and other properties on which farm animals are located and to prohibit other interferences with farm animals in order to,

- (a) eliminate or reduce the unique risks that are created when individuals trespass on those properties or interfere with farm animals, including the risk of exposing farm animals to disease and stress as well as the risk of introducing contaminants into the food supply;
- (b) protect farm animals and the food supply chain from the risks described in clause (a);
- (c) protect the safety of farmers, their families and persons working in or on farms, animal processing facilities and prescribed premises as well as the safety of drivers of motor vehicles transporting farm animals; and
- (d) prevent any adverse effects the risks described in clause (a) may have on Ontario’s overall economy.

[...]

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.

[...]

Consent under duress, false pretences

5(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.

[...]

Responses by owner, occupier

8 (1) The owner or occupier of a farm, animal processing facility or prescribed premises who finds a person in or on an animal protection zone on the farm, facility or premises, in contravention of subsection 5 (1), (2) or (3), or doing anything in contravention of subsection 5 (4) or (7) may, while the person is still located on the farm, facility or premises,

- (a) request that the person provide his or her name and address;
- (b) if the person is doing anything in contravention of subsection 5 (4) or (7), request that the person cease doing so;
- (c) request that the person leave the premises; or
- (d) arrest the person without a warrant.

Same, *Trespass to Property Act*

(2) For greater certainty, nothing in clause (1) (d) shall be construed as giving an owner or occupier a right or ability to make an arrest that is beyond, or otherwise greater than, what subsection 9 (1) of the *Trespass to Property Act* provides that a person may do.

Compliance with request

(3) A person who receives a request under clause (1) (b) or (c) shall comply promptly with the request.

Prohibition: false or misleading information

(4) No person shall provide false or misleading information in response to a request for the person's name and address made under clause (1) (a).

Arrest by other person

(5) An arrest under clause (1) (d) may be carried out by a person authorized by the owner or occupier of a farm, animal processing facility or prescribed premises, as the case may be, to do so on his or her behalf.

[...]

Consent under duress, false pretences

14(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.

3. [Ontario Regulation O Reg 701/20](#)

Interferences and interactions with farm animals

8. (1) For the purposes of subsections 5 (4) and 6 (2) of the Act, the following acts are considered interferences and interactions with farm animals if they are carried out without the consent required under those subsections:

- 1 Directly or indirectly having physical contact with a farm animal, whether the farm animal is dead or alive.
- 2 Providing any substance, whether in liquid or solid form, to a farm animal, including spraying or throwing any substance on or at a farm animal.
- 3 In the case of an interference or interaction for the purposes of subsection 5 (4) of the Act,
 - i. releasing a farm animal from an animal protection zone, or
 - ii. creating conditions in which a farm animal could escape from an animal protection zone.
4. In the case of an interference or interaction for the purposes of subsection 6 (2) of the Act,

- i. releasing a farm animal from a motor vehicle in which it is being transported, or
 - ii. creating conditions in which a farm animal could escape from a motor vehicle in which it is being transported.
5. Any other activity that causes or is likely to cause harm to a farm animal or harm with respect to food safety.

(2) For greater certainty, the acts described in subsection (1) are considered interferences and interactions with farm animals being transported by a motor vehicle for the purposes of subsection 6 (2) of the Act whether the acts occur while the motor vehicle is moving or while it is stationary.

False statement resulting in contravention of Act

9. A person who gives a false statement to the owner or occupier of a farm, animal processing facility or prescribed premises or to the driver of a motor vehicle transporting farm animals and who obtains the consent of the owner, occupier or driver to carry out an act that, without the consent, is prohibited under subsection 5 (1), (2), (3) or (4) or 6 (2) of the Act, is considered to have obtained the consent under false pretences for the purposes of subsections 5 (6), 6 (4) and 14 (2) of the Act if,

- a) the statement is made either orally or in writing;
- b) the false statement is given for the purpose of obtaining the consent;
- c) the owner, occupier or driver provides the consent in reliance on the false statement; and
- d) as a result of the consent being given, the person making the statement carries out an act that would otherwise be prohibited under the Act.

[...]

Exception, whistle-blowers

12. (1) Despite sections 9 and 10, a consent to carry out an act that is otherwise prohibited under section 5 or 6 of the Act given by the owner or occupier of a farm, animal processing facility or prescribed premises or by the driver of a motor vehicle transporting farm animals to a person who gave a false statement shall not be considered to have been obtained under false pretences for the purposes of subsections 5 (6), 6 (4) and 14 (2) of the Act if,

- a) the person who gave the false statement is,
 - i. an employee of the owner or occupier of the farm, animal processing facility or prescribed premises,
 - ii. an employee of the owner of the motor vehicle company responsible for transporting farm animals,
 - iii. an employee of the owner of the farm animals being transported by a motor vehicle company, or
 - iv. the owner of a company that is allowed on the farm, animal processing facility or prescribed premises or that is allowed to accompany or have access to the motor vehicle transporting farm animals, or any employee of such a company;
- b) the false statement does not imply or express that the person possesses the 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, when in fact the person does not possess those qualifications;

- c) as a result of the false statement and the consent obtained from the owner or occupier or the driver, the person who gave the false statement was able to obtain information or evidence of harm to a farm animal, harm with respect to food safety or harm to an individual, or another illegal activity, being carried out on a farm, animal processing facility or prescribed premises or in or near a motor vehicle transporting farm animals; and
- d) the person who gave the false statement discloses the information or evidence described in clause (c) to a police officer or other authority as soon as practicable after obtaining the information or evidence.

Same

(2) Subsection (1) does not apply to a consent given to a person described in clause (1) (a) if,

- a) the person directly or indirectly,
 - i. caused or contributed to the disclosed harm to a farm animal, harm with respect to food safety, harm to an individual or illegal activity, or
 - ii. caused any harm to a farm animal, any harm with respect to food safety or any harm to an individual in order to obtain the information that is disclosed to the police officer or other authority;
- b) the person failed to comply with any biosecurity measures relating to farm animals being kept in animal protection zones on the farm, animal processing facility or prescribed premises or being transported by the motor vehicle; or
- c) before the person completed gathering information, the owner or occupier of the farm, animal processing facility or the prescribed premises or the driver of the motor vehicle, as the case may be, asks the person to leave the farm, facility or premises or the area where the motor vehicle is located, or to stop interfering or interacting with farm animals.

ANIMAL JUSTICE et al.
Applicants

-and-

THE ATTORNEY GENERAL OF ONTARIO
Respondent

-and-

CENTRE FOR FREE EXPRESSION et al.
Interveners

Court File No. 21-658393-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF INTERVENER,
CENTRE FOR FREE EXPRESSION**

ST. LAWRENCE BARRISTERS PC

33 Britain Street
Toronto ON M5A 1R7

Alexi N. Wood (LSO# 54683F)

alex.wood@stlbarristers.ca
Tel: 647.245.8283

Lillianne Cadieux-Shaw (LSO# 74936H)

lil.cadieux.shaw@stlbarristers.ca
Tel: 647.245.3122

Abby Dushman (LSO# 56757T)

abby.dushman@stlbarristers.ca
Tel: 647.245.2222

Tel: 647.245.2121

Lawyers for the Intervener, Centre for Free Expression