

Court of Appeal File No.:
Superior Court File No.: CV-21-658393-0000

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant (Respondent)

- and -

ANIMAL JUSTICE, JESSICA SCOTT-REID and LOUISE JORGENSEN

Respondents (Applicants)

- and -

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

Interveners

NOTICE OF APPEAL

THE APPELLANT, the Attorney General of Ontario (“Ontario”), **APPEALS** to the Court of Appeal for Ontario from the order of the Superior Court of Justice dated April 2, 2024 (the “Order”), holding that sections 9, 11(1)(d)-(e), 12(1)(c)-(d), 12(2)(a)(i)-(ii) and 12(2)(c) of Ontario Regulation 701/20 – General (the “Regulation”) passed under the *Security from Trespass and Protecting Food Safety Act, 2020*, SO 2020, c. 9 (the “Act”) (the Act and Regulation collectively referred to as the “Legislation”) unjustifiably infringe section 2(b) of the *Canadian Charter of Rights and Freedoms* and are therefore of no force or effect.

THE APPELLANT ASKS THAT the Order be set aside and an order be granted as follows:

- a) That the appeal be allowed and the Application be dismissed with costs to the Appellant in this Court and the Court below; and
- b) Such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL are as follows:

1. On April 2, 2024, the Superior Court rendered its decision, finding that sections 9, 11(1)(d)-(e), 12(1)(c)-(d), 12(2)(a)(i)-(ii) and 12(2)(c) of the Regulation unjustifiably infringe freedom of expression protected under *Charter* section 2(b) and are, therefore, of no force or effect.
2. The Court upheld the entirety of the Act. The Act secures against unlawful trespass on animal protection zones (as defined) on farms, slaughterhouses, and animal auctions, shows and competitions. It prohibits interference or interaction with animals on such premises and in transport. The Court accepted that *Charter* s. 2(b)'s guarantee of freedom of expression does not give persons the right to enter private property or to physically interact with another person's property without consent.
3. However, the Court held that s. 9 the Regulation, which deems that consent to trespass or to interact with a farm animal is invalidated if obtained by false pretences (the "false pretences provisions"), unjustifiably infringes *Charter* s. 2(b). It made this holding in reference to a very specific context – namely where persons affiliated with or employed by animal rights organizations make "harmless" deceptive statements to gain employment so they can make undercover recordings in facilities where farm animals are kept, raised or processed. For the Court, s. 9 of the Regulation impaired the freedom to make false statements in order to carry out

the deception.

4. The Court further held that certain requirements of the exemptions from the false pretences provisions for journalists in s. 11 of the Regulation and whistleblowers in s. 12 of the Regulation also unjustifiably infringe *Charter* s. 2(b).

5. In so holding, the Court made errors of fact and law, as set out below.

A. Palpable and overriding error of fact and error of law in finding that reducing or eliminating undercover exposés is a purpose of the Legislation

6. The Superior Court made a palpable and overriding error of fact in concluding that reducing or eliminating undercover “exposés” was a purpose of the Legislation. The finding was made in the absence of evidentiary support for such a conclusion. The Court cited the cross-examination of a single government affiant, but the evidence cited does not and cannot support the finding.

7. Moreover, the Court erred in law by concluding that the Legislation had the purpose of limiting expression based solely on the cross-examination of the government affiant, rather than by determining legislative purpose in accordance with the established jurisprudence. The Supreme Court has held that even statements of individual Cabinet Ministers (let alone a mid-level civil servant) are an insufficient foundation for a finding that legislation has an improper purpose, particularly when viewed with other evidence of legislative intent and the Court’s finding that the Legislation did in fact serve other important public policy objectives.

B. Errors of law in holding that ss. 9 and 10 of the Regulation infringe s. 2(b) of the *Charter*

8. The Legislation does not impede or limit *Charter* s. 2(b)-protected expression by activists, journalists, whistleblowers or anyone else, nor does it otherwise breach the *Charter*.

The Legislation protects animals and people from harm and the integrity of the food supply from

biosecurity risks by restricting access to and interaction with private property.

9. The Legislation imposes penalties for trespass and interference with farm animals, including those being transported. Nothing in the Legislation impedes the ability of any person to publish or otherwise communicate footage or information obtained by way of an undercover operation whether on the premises of an animal protection zone or elsewhere.

10. Despite correctly concluding that there is no constitutional right to use another's private property to facilitate one's expression, the Court erred in holding that the false pretences provisions in s. 9 and 10 of the Regulation engage *Charter* s. 2(b). In particular: (1) as discussed above, the Court made a palpable and overriding error of fact and erred in law in holding that the Legislation limits expression in its purpose; and (2) the Court erred in law in concluding that the false pretences provisions infringe *Charter* s. 2(b) and must be justified under *Charter* s. 1: the false pretences provisions do not limit expression, but rather attach legal consequences to *trespass obtained* by way of false expression.

11. The Court erred in law in granting *Charter* s. 2(b) protection to a deception made privately to an owner/occupier of premises or employer to induce the owner/occupier or employer to waive a legal right to refuse entry to the premises or to decline to hire the person making the deception.¹ The Court's extension of *Charter* s. 2(b) to privately-made deceptions that cause third parties to waive their legal rights is unprecedented in the jurisprudence, unwarranted as a matter of constitutional interpretation, overshoots the purpose of *Charter* s. 2(b), and would cause significant adverse consequences if applied in future cases.

12. The Court erred in law in finding that the Legislation imposes penal liability for the mere

¹ Although not discussed in the Court's Reasons for Judgment, the deception in question could also include the deception of the operator of a vehicle transporting farm animals to induce the operator to permit an interaction or interference with the farm animals.

communication of a false statement when, on the contrary:

- (a) s. 14(1) of the Act imposes penal liability *only* for trespass on premises or interference with an animal or with animal transport, not for any false statement, and
- (b) s. 14(2) of the Act imposes penal liability *only* for “us[ing] duress or false pretences” *to obtain consent* to gain access to premises or interfere with an animal or animal transport, not for any false statement standing alone.

13. False statements, standing alone, are not penalized by the Legislation. Section 2(b) is not intended to insulate persons making the false statements that cause other people to waive their legal rights or change their legal position in reliance on the false statements from measures, including penal measures, enacted to protect those other people’s rights. Section 2(b) protects freedom of expression not freedom from the legal consequences of one’s successful deceptions.

14. The Court further erred in failing to consider the Applicants’ claim as, in substance, a claim to access private property or private spaces to gather information, which is not protected by *Charter* s. 2(b), even as a “positive rights” or “derivative rights” claim.

15. The Court also erred in failing to consider whether the availability of the exemptions from the false pretences provision in s. 9 of the Regulation, as set out in s. 11 for journalists and in s. 12 for whistleblowers – when properly construed – mean that s. 9 does not infringe s. 2(b). As set out below, the Court did not properly construe ss. 11 and 12 of the Regulation.

C. In the alternative, error in law in holding that s. 9 of the Regulation is not justified under *Charter* s. 1 and/or, in the further alternative, in declaring s. 9 of no force or effect

16. In the alternative, if the Superior Court was correct in holding that s. 9 of the Regulation infringes *Charter* s. 2(b), which is denied, the Court erred in holding that any infringement of s. 2(b) by s. 9 of the Regulation is not justified under *Charter* s. 1.

17. The Court held that s. 10 of the Regulation (which prescribes the circumstances in which overstating one's employment qualifications constitutes false pretences) *is* justified under *Charter* s. 1. Such misrepresentations could lead to the harms that the Legislation seeks to redress (i.e., harm to animal safety, harm to biosecurity, harm to the food supply chain, harm to those working with animals and adverse economic effects: Reasons for Judgment, para 105).

18. The Court erred in failing to consider whether the availability of the exemptions from the false pretences provision in s. 9 of the Regulation, as set out in s. 11 for journalists, and in s. 12 for whistleblowers – when properly construed – means that any infringement of s. 2(b) by s. 9 is justified under s. 1. As set out below, the Court did not properly construe ss. 11 and 12.

19. The Court erred by failing to recognize that s. 9 of the Regulation covers false pretences outside the employment context, which could lead to the same harms the Court recognized as justifying s. 10 of the Regulation. Section 9 covers false pretences regarding the overstatement of qualifications by non-employees, impersonations of persons with lawful authority or others, to gain access to premises or farm animals, which could lead to the real harms the Court acknowledged in its consideration of s. 10 of the Regulation.

20. In the further alternative, the Court erred in holding that the entirety of s. 9 of the Regulation is of no force or effect. If the Court's concern was that s. 9 captures "harmless" false pretences, its remedial order of declaring s. 9 of the Regulation invalid is overbroad. Remedial orders for *Charter* violations should be limited to the extent of the *Charter* violation to ensure that the public has the benefit of constitutional laws.

D. Errors in statutory interpretation of ss. 11 and 12 of the Regulation and in holding that certain requirements of ss. 11 and 12 unjustifiably infringe *Charter* s. 2(b)

21. The Court's conclusion that a purpose of the Legislation was to reduce or eliminate undercover exposés caused it to err in law and, contrary to the principles of statutory

interpretation, to construe the requirements for the exemptions in s. 11 and 12 incorrectly and unreasonably as intended to “chill” expression rather than provide genuine exemptions. The Court failed to resolve any ambiguities in the text of s. 11 and s. 12 of the Regulation in favour of constitutionality.

22. As a result of its error in interpreting ss. 11 and 12 of the Regulation, the Court erred in law in holding that the requirements for the journalist exemption in s. 11(1)(d)-(e) and the requirements for the whistleblower exemption in ss. 12(1)(c)-(d), 12(2)(a)(i)-(ii) and 12(2)(c) unjustifiably infringe *Charter* s. 2(b).

a. Error of law in holding that “harm to animals” includes “harm” occasioned by generally accepted agricultural practices

23. The Court erred in law in failing to construe the words “harm to farm animals” in ss. 11 and 12 in a manner consistent with the legislative intent of providing a genuine exemption from the false pretences provisions for journalists and whistleblowers.

24. Under ss. 11(1)(d) and 12(2)(a)(i)-(ii), a person seeking to rely on the journalist or whistleblower exemptions to the false pretences provisions must not have caused “harm to a farm animal”, “harm to an individual” or “harm with respect to food safety”. Section 12(1)(c) provides that the information a whistleblower collects must be about harm to a farm animal (or illegal activity).

25. Relying on its erroneous holding that a purpose of the Legislation was to reduce or eliminate undercover exposés, the Court incorrectly and unreasonably construed “harm to a farm animal” in ss. 11 and 12 as including generally accepted husbandry practices (Reasons for Judgment, para 123). Construing the Regulation in this manner meant that journalists or whistleblowers could not avail themselves of the exemptions if they performed standard husbandry practices while working undercover with farm animals (Reasons for Judgment, paras

113-114, 120, 134).

26. The Court’s interpretation of “harm to a farm animal” renders the exemptions for journalists and whistleblowers in ss. 11 and 12 meaningless because the intended beneficiaries of the exemptions – journalists and whistleblowers – would necessarily be engaged in generally accepted husbandry practices while working undercover with farm animals. The Court erred in law by failing to follow the established principle of statutory interpretation that the Legislature is not to be taken as having enacted provisions that are meaningless or have no application.

27. Any ambiguity should be construed in a manner that is consistent with *Charter* values. Instead, the Court took the opposite approach, construing the words of ss. 11 and 12 in a manner that yielded an outcome inconsistent with what the Court regarded as *Charter* requirements.

b. Palpable and overriding error of fact and error in law in holding that the requirement that whistleblowers report harm “as soon as practicable” limits or compels expression protected under *Charter* s. 2(b)

28. The Court made palpable and overriding errors of fact and errors of law in holding that s. 12(1)(d) of the Regulation infringes *Charter* s. 2(b) by compelling and/or limiting the expression of whistleblowers.

29. Section 12(1)(d) requires that a person seeking to rely on the whistleblower exemption to disclose evidence or information of harm to farm animals, harm with respect to an individual or harm with respect to food safety to an authority “as soon as practicable.”

30. The Court erred in holding that as a result of this requirement that “any delay in providing the information to a police officer or other authority removes the whistleblower exemption”, that “[a]s a result, any whistleblower would be restricted to recording and disclosing only a single act or perhaps a single day of acts or risk beings subject to prosecution” and that “[t]his prevents whistleblowers from recording systemic patterns of abuse or wrongdoing”

(Reasons for Judgment, para 115). There was no evidence to support the Court's conclusions in this regard. The Court erred in law by finding *Charter* s. 2(b) was infringed in a factual vacuum.

31. The Court further confused the s. 2(b) infringement it did find in connection with s. 9 (i.e., penalization of the freedom to deceive) with a different issue, namely an inability to continue recording secret videos on private property. There is no s. 2(b) right to remain on private property without the informed consent of the owner/occupier for the purpose of recording secret videos.

32. The Court further erred in law by concluding that it is compelled speech contrary to *Charter* s. 2(b) to require a person seeking an exemption as a whistleblower to have disclosed information or evidence of harm to an authority. A whistleblower, by definition, is not a person who wishes *not* to speak. Providing an *exemption* from the false pretences provisions of the Legislation to whistleblowers does not compel speech. No one is compelled to be a whistleblower. Promptly informing the authorities in a position to take remedial or enforcement action is wholly compatible with the decision to become a whistleblower.

33. In the alternative, the Court erred by failing to find that the requirement that evidence or information of harm be disclosed as soon as practicable is justified under *Charter* s. 1. Requiring that information or evidence of harm be disclosed as soon as practicable furthers the purpose of reducing harm to animals, harm to an individual and harm with respect to food safety.

c. Error in law in holding that the requirement that a person seeking to rely on the whistleblower or journalist exemptions leave the premises when asked to do so furthers the restriction on *Charter* s. 2(b) and is not minimally impairing

34. The Superior Court erred in law in concluding that ss. 11(1)(e) and 12(2)(c) of the Regulation infringe s. 2(b)-protected freedom of expression and are not minimally impairing.

The Court erroneously held that these provisions remove the journalist and whistleblower

exemptions if a person was (at any time) asked to leave the premises while gathering information.

35. The only reasonable interpretation of the requirement to leave the premises is that it requires that the journalist or whistleblower comply with a request to leave the premises when and if the request is made. The Court's conclusion that if a journalist or whistleblower were asked to leave the premises and did so, they would nonetheless be deprived of the exemptions in ss. 11 and 12 is an unreasonable interpretation, driven by the Court's prior erroneous conclusion that the requirements of ss. 11 and 12 should be interpreted in a manner than chills expression.

36. The Court erred in not finding that the purpose of ss. 11(1)(e) and 12(2)(c) was to confirm that a journalist or whistleblower must leave the premises if asked. The exemption only ceases to apply if they are asked to leave and fail to do so. In concluding that Ontario's interpretation was "unnecessary" the Court incorrectly relied on the fact that "[t]he *Trespass to Property Act* "already makes [it] clear" that a journalist or whistleblower must leave the premises if asked to do so (Reasons for Judgment, para 130). On the contrary, ss. 11(1)(e) and 12(2)(c) *are* necessary to ensure that a journalist or whistleblower leave the premises when directed by an owner as the application of the *Trespass to Property Act* to the premises covered by the Legislation is expressly removed by s. 5(8) of the Act.

d. Error in law in failing to uphold ss. 11 and 12 of the Regulation as reasonable limits under *Charter* s. 1

37. The Superior Court erred in law in holding that any infringement of *Charter* s. 2(b) arising from ss. 11 and 12 of the Regulation provisions is not justified under *Charter* s. 1. The exemptions for journalists and whistleblowers are carefully tailored to protect their ability to covertly obtain information on conditions on farms and in slaughterhouses and the ability of whistleblower employees, including "undercover" activists, to expose animal abuse.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

- 38. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- 39. The appeal is from a final order of a judge of the Superior Court of Justice from which no appeal lies to the Divisional Court;
- 40. Leave to appeal is therefore not required for this appeal.

May 2, 2024

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COURT OF APPEAL FOR ONTARIO

(Proceedings commenced at Toronto)

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