COURT OF APPEAL FOR ONTARIO

CITATION: Animal Justice v. Ontario (Attorney General), 2026 ONCA 380
DATE: 20260603
DOCKET: COA-24-CV-0553

Roberts, Miller and Zarnett JJ.A.

BETWEEN

Animal Justice, Jessica Scott-Reid and Louise Jorgensen

Applicants (Respondents)

and

Attorney General of Ontario

Respondent (Appellant)

and

Animal Alliance of Canada*, Centre for Free Expression* and Regan Russell Foundation

Interveners (Interveners*)

Robin K. Basu, Yashoda Ranganathan and Elizabeth Guilbault, for the appellant

Kaitlyn Mitchell, Alexandra Pester, Andrea Gonsalves and Fredrick Schumann, for the respondent Animal Justice

Arden Beddoes, for the respondents Jessica Scott-Reid and Louise Jorgensen

Nicolas M. Rouleau and Vibhu Sharma, for the intervener Animal Alliance of Canada

Alexi N. Wood and Abby Deshman, for the intervener Centre for Free Expression

W. David Rankin and Ankita Gupta, for the intervener Canadian Civil Liberties Association

Christopher D. Pigott, Gillian Round and Rebecca Rossi, for the intervener Labour Issues Coordinating Committee

Heard: June 24-25, 2025

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated April 2, 2024, with reasons reported at 2024 ONSC 1753.

B.W. Miller J.A.:

I. INTRODUCTION

[1] The undercover exposé is a mainstay of journalism, deployed where suspected wrongdoing can be easily hidden or denied, frustrating public accountability. The impact of the exposé can be significant: galvanizing public opinion, flagging bad actors, prompting public authorities to take enforcement action, and provoking legislative change. Because of that potential impact, undercover exposés have also been used by advocacy groups seeking to expose what they consider to be scandalous or controversial practices in a variety of contexts.

[2] Germane to this case, undercover exposés have been used by animal care activists to target the practices of Ontario animal farms and processing facilities. The goals of animal care activists are various, but extend beyond better compliance with existing regulation to legislative reform and shifting public attitudes away from the consumption of animal products. The means employed by animal care activists are also various.

[3] In response to perceived threats to the integrity of farm operations posed by activists, the Ontario Legislature enacted the *Security from Trespass and Protecting Food Safety Act, 2020*, S.O. 2020, c. 9 (the Act) and the Minister as defined in the Act made an associated regulation, O. Reg. 701/20 (the Regulation). The stated purpose of the legislation is to combat threats to agricultural production and farm operations posed by farm trespassers including, and predominantly, those who pose as farm workers but are covertly documenting animal treatment or subverting farm operations or who otherwise pose a risk to agricultural food supply.

[4] The respondents are animal care activists who distance themselves from those that have engaged in destruction of property or harm to animals. They argue that the actual purpose of the Act and its associated Regulation is something different than its stated purpose: it is, at least in part, intended to prevent documentation of animal mistreatment and frustrate attempts to bring mistreatment to the attention of the public. It is therefore a direct attack on the *Charter*-protected freedom of expression of those who seek to publicize mistreatment of farm animals.

[5] The respondents were successful before the Superior Court and the application judge invalidated several sections of the Act and associated Regulation on the basis that these provisions intentionally limited the respondents' freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and that the limits are not justified.

[6] As I will explain below, I do not agree that the legislation violates the respondents' *Charter* rights. What the respondents claim is a right to access the property of others on their own terms and for their own purposes. Freedom of expression does not provide for this. I would allow the appeal.

II. BACKGROUND

A. THE PARTIES TO THE APPEAL

[7] This *Charter* challenge was brought by Animal Justice and two individual applicants. One of the goals of Animal Justice, according to its director, is to publicize instances of farm animal mistreatment for the threefold purpose of encouraging the public to change its behaviour, encouraging law enforcement officials to enforce animal protection laws, and promoting the reform of existing laws to better protect animal welfare. Animal Justice is joined by two individual applicants – Jessica Scott-Reid, a freelance journalist, and Louise Jorgensen, a graphic artist and animal protection advocate – who both share Animal Justice's goal of promoting animal welfare through publicizing the conditions and treatment of farm animals. Aligned with the three respondents in this court on the unconstitutionality of the impugned provisions are two interveners: Animal Alliance of Canada and the Centre for Free Expression. A third intervener, the Canadian Civil Liberties Association, takes no position on the outcome of the appeal but argues that the appellant's framing of the s. 2(b) liberty unduly narrows its scope. Finally, arguing that the legislation is necessary to protect farms, farm workers,

animals and the food supply chain is the intervener, the Labour Issues Coordinating Committee.

[8] The application judge accepted the respondents' claims that ss. 5(4) and 6(2) of the Act, which prohibit using false pretences to obtain access to a farm and farm animals, when read in conjunction with ss. 9-12 of the Regulation, limits freedom of expression under s. 2(b) of the *Charter* in a manner that is not justified and is therefore unconstitutional.

[9] The application judge further held that the parts of the Regulation carving out exceptions for journalists and whistleblowers – in ss. 11(1)(d)-(e), 12(1)(c)-(d), 12(2)(a)(i)-(ii) and 12(2)(c) – also violated the *Charter* on an independent basis. Amendments to the Regulation have attempted to address most of the findings related to ss. 11 and 12 of the Regulation, and the appellant (Ontario) does not appeal these findings: O. Reg. 374/24.

[10] Ontario appeals from the application judge's order with respect to ss. 9 and 12(1)(d) of the Regulation only. There is no cross-appeal.

B. THE STATUTORY FRAMEWORK

1. The Act and Regulation

a. Legislative purpose

[11] Ontario argues on appeal that the legislation was introduced in response to demands from industry stakeholders to address ongoing conflict with animal rights

activists. Industry stakeholders asked for legislative tools to prevent interference with farm operations by animal rights activists including trespass, unauthorized release of farm animals, disruption of transport and interference with animals that resulted in harm or a serious risk of harm both to animals and persons. Thus, the purpose clause at s. 1 provides:

> 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.

b. Trespass provisions

[12] The mechanics chosen to carry out these purposes are prohibitions against entering an "animal protection zone" of a farm or an animal processing facility or other prescribed premises without the prior consent of the owner or occupier: ss. 5(1)-(3). The Act also prohibits unauthorized interference with farm animals whether on the farm (s. 5(4)) or in transit (s. 6(2)), and the obstruction of transport

vehicles (s. 6(1)). Contravening these provisions constitutes an offence punishable by fine: ss. 14(1) and 15.

[13] The dispute in this appeal is largely focused on the operation of ss. 5 and 6, which together with associated regulations prohibit persons from interacting with animals in a designated protection zone and from entering an animal protection zone without prior consent. Of particular importance on this appeal are ss. 5(6) and 6(4), which provide that the use of false pretences to obtain consent to what would otherwise be a trespass or unauthorized interference with a farm animal invalidates the consent so obtained. Use of false pretences to obtain consent and by means of that consent do anything otherwise prohibited (such as entering an animal protection zone) is itself an offence under the Act: s. 14(2).

c. False pretences

[14] The Regulation stipulates what constitutes false pretences in ss. 9 and 10.

[15] Section 9 provides:

> 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.

[16] Section 10 further extends the definition of false pretences to apply to a person who falsely claims to possess necessary qualifications in order to obtain employment at a farm.

[17] It is important to note that making a false statement is not, in itself, prohibited. Entering an animal protection zone or interfering with a farm animal without consent are prohibited, and consent is not valid if it was obtained under false pretences.

d. Exception for journalists

[18] There are two exceptions provided in the Regulation for what would otherwise constitute false pretences: one exception for journalists in s. 11 and one for whistleblowers in s. 12. Following the release of the decision below, Ontario made several amendments to these provisions to clarify, alter or remove certain subsections that were found to be infringing by the application judge, including ss. 11(1)(d)-(e), 12(1)(c)-(d), 12(2)(a)(i)-(ii) and 12(2)(c). On appeal, the relevant version of the Regulation is the version considered by the application judge: *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R.

1148, at pp. 1159-60. The subsequent citations therefore refer to the Regulation as it stood when the application was decided.

[19] The exception for journalists is set out in s. 11(1). It provides that despite ss. 9 and 10, consent obtained by a false statement shall not be considered to have been obtained under false pretences if the person making the statement is a journalist and:

> (a) the false statement does not imply or express that the journalist 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 journalist does not possess those qualifications;
>
> (b) the journalist, while acting in a professional capacity and for a valid journalistic purpose, enters in or on an animal protection zone, or gains access to a motor vehicle transporting farm animals, in order to gather information and disseminate that information to the public;
>
> (c) the journalist complies with all 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;
>
> (d) the journalist does not cause or contribute to causing harm to a farm animal, harm with respect to food safety or harm to an individual; and
>
> (e) 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, does not ask the journalist 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, before the journalist has completed gathering information.

[20] Journalist is a defined term and, under s. 11(2), denotes a person who:

> (a) is employed or hired by, or works in connection with, the news media, a press association, news agency, wire service or post-secondary journalism course or program, and
>
> (b) contributes directly to the collection, writing or production of information for dissemination by the news media or other entity referred to in clause (a) to the public in the public interest;

News media is defined as “corporations or entities whose primary function is to disseminate information to the general public on a regular basis, whether in writing or by radio, television or similar electronic means.”

e. Exception for whistleblowers

[21] The further exception provided for employees acting as whistleblowers is set out in s. 12. Section 12 provides an exception to liability under ss. 9 and 10 where the person who gave the false statement is an employee and, as a result of the false statement and the consent obtained, “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”.

[22] Section 12(1)(d) sets out as a condition to exercising the whistleblower exception that the whistleblower must “disclos[e] the information or evidence ... to a police officer or other authority as soon as practicable after obtaining the information or evidence.” Further conditions are set out in s. 12(2).

2. The *Canadian Charter of Rights and Freedoms*

[23] The applicable provision of the *Charter* is s. 2(b), as limited by s. 1.

[24] Section 2(b) provides:

> Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[25] Section 1 provides:

> The *Canadian Charter of Rights and Freedom*s 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.

C. THE DECISION BELOW

1. Section 2(b)

[26] The respondents challenged the legislation under s. 2(b) of the *Charter*.

[27] Following the framework articulated in *Irwin Toy v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 and *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62, 3 S.C.R. 141, the application judge found, with respect to s. 5 of the Act, that the use of false pretences is expressive activity within the meaning of s. 2(b), that nothing in the location of expression ousted this protection, and that the Act – when considered in conjunction with the Regulation that completes it juridically – restricted expression both in purpose and effect.

[28] With respect to purpose, the application judge found that the Act penalizes misrepresentations that lead to access to premises, which "singles out meanings that are not to be conveyed." Further, it intentionally restricts a "form of expression" – that is, the production of undercover exposés, and their ultimate dissemination to the public.

[29] With respect to the effects of the provision, the application judge held that the Act limits expression by: (1) restricting what a potential employee can tell an employer without being subject to a fine, and (2) discouraging activists from carrying out exposés because of the fear of penalties.

[30] The application judge subsequently qualified his findings with respect to ss. 5 and 14(2), finding that they do not, independently of the operation of the Regulation, limit the exercise of freedom of expression. These sections, the application judge explained, are:

> more enabling provisions than they are operative provisions. That is to say, neither of them does the actual infringing. Section 5(6) merely says that consent to enter certain premises is vitiated in prescribed circumstances. Section 14(2) makes it an offence for a person to use false pretences in prescribed circumstances to do certain things on certain premises.

[31] Ultimately, the application judge understood that the Act and Regulation must be read and analyzed together. The Regulation completes s. 5, such that neither the Act nor the Regulation, considered independently of the other, creates

a fully-specified legal obligation. A proper analysis of the constitutionality of the legal obligations that the Act and Regulation impose requires addressing the two together, which is what the application judge ultimately did when he considered, under a s. 1 *Charter* analysis, whether the limit on the respondents' expression is justified.

2. Section 1

[32] Applying the analytical framework set out in *R. v. Oakes,* [1986] 1 S.C.R. 103, the application judge first characterized the objectives of the Act and Regulation. Working from the purpose provision of the Act, he summarized these as "preventing trespass, protecting animal safety, protecting biosecurity of the food supply chain, protecting those working with animals and preventing the adverse economic effects that these risks can create." He accepted that these are pressing and substantial objectives, as required under the first step of the *Oakes* test.

[33] Under the second step, the application judge found a rational connection between the purposes of the Act and "at least some of the situations to which ss. 5(6) and 14(2) of the Act are designed to apply."

[34] With respect to the third step, minimal impairment, the application judge accepted that s. 10 of the Regulation was minimally impairing, but found that s. 9 went further than necessary to achieve the purposes of the Act. This is because a person who used false pretences to obtain consent to gain employment on a farm

or animal processing facility could nevertheless “in fact be a model employee who has adhered to all biosecurity protocols, treated animals with the highest degree of care and ensured the safety of their co-workers.”

[35] Furthermore, with respect to the whistleblower exception in s. 12, the application judge found the requirements of the section introduced additional s. 2(b) limitations on expression that were not minimally impairing.

[36] Similarly, the application judge found that the journalism exception in s. 11 was too narrow to survive a minimal impairment analysis, particularly s. 11(1)(d) and (e).

[37] Although not strictly necessary given his conclusion on minimal impairment, the application judge nevertheless continued to the fourth step in *Oakes*, a consideration of the overall proportionality of the deleterious and salutary effects of the legislation. The focus of the s. 1 analysis was on s. 9 of the Regulation. The application judge distinguished between two levels of expression in issue: the first is the deception used to gain access to the farm, and the second is the subsequent communication, such as recording a video, that communicates what the person witnesses. He found the value of both expressions to be high. The value of the lie is tied, in the application judge’s analysis, to the value of the exposé that it enables.

[38] Having concluded that the two expressions have high value, the application judge addressed the justifications taken from the Act’s statement of purpose:

biosecurity and animal safety, farmer safety and avoiding economic harm. As against each of these statutory goals, the application judge concluded that restrictions placed by s. 9 did not actually advance any of them. That is, s. 9 conferred no actual benefit, while at the same time preventing persons from exercising valuable expression. Accordingly, the limit on expression was found to be disproportionate. He also found – without further elaboration – that the infringement caused by s. 12(1)(d) (the requirement that a whistleblower immediately disclose evidence of wrongdoing to an authority), among other provisions, was likewise not justified under s. 1 of the *Charter*.

III. ANALYSIS

A. ISSUES ON APPEAL

[39] Ontario raises four issues on appeal:

(1) Did the application judge err in law or in fact by holding that one of the purposes of the Legislation was to reduce or eliminate exposés?

(2) Did the application judge err in law in finding that s. 9 of the Regulation infringes s. 2(b) of the *Charter*?

(3) Did the application judge err in law in concluding that s. 12(1)(d) of the Regulation restricts or compels speech in a manner that infringes s. 2(b) of the *Charter*?

(4) Did the application judge err in law in holding that the limits on s. 2(b) rights established by s. 9 or s. 12(1)(d) of the Regulation were not justified under s. 1 of the *Charter*?

[40] The issues raised by Ontario on appeal run more or less through each step in the *Charter* analysis, from the initial characterization of the legislation to the s. 2(b) analysis to the s. 1 analysis. Although each issue will be considered in turn, it is important not to lose sight that each step in a *Charter* analysis forms part of a single movement of thought, leading to the ultimate determination of whether a limit that legislation places on a person's purported exercise of a right is justified.

B. STANDARD OF REVIEW

[41] Although pure findings of fact attract a deferential standard in constitutional adjudication, correctness applies in *Charter* adjudication both to questions of law and mixed questions of fact and law where a court is required to determine "whether the facts satisfy the applicable legal tests": *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, 491 D.L.R. (4th) 385, at para. 94, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 38. This is because with mixed questions the analysis will require a court to decide the metes and bounds of one or more *Charter* rights and to make normative assessments of weight and priority of competing interests in the reasonable limits analysis under s. 1: *Société des casinos*, at paras. 93-97, 45; see also *Jacob v. Canada (Attorney General)*,

2024 ONCA 648, 172 O.R. (3d) 721, at para. 55, leave to appeal refused, [2024] S.C.C.A. No. 488; and *R. v. Pike*, 2024 ONCA 608, 173 O.R. (3d) 241, at para. 31.

C. LEGISLATIVE PURPOSE

[42] An important first step in understanding any legislative provision is to ascertain its purpose. What was the legislature trying to achieve in enacting the legislation it did? And by what means was it trying to do it?

[43] The law governing these inquiries is longstanding and stable. As recently articulated by the Supreme Court in *R. v. Sharma*, 2022 SCC 39, 3 S.C.R. 147 ("*Sharma (SCC)*"), at para. 88:

> The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can (subject to the caution we offer below) include Hansard, legislative history, government publications and the evolution of the impugned provisions [citations omitted].

[44] Explanatory priority is thus given to an express statement of purpose provided in the statute itself: see also *Delisle v. Canada*, [1999] 2 S.C.R. 989, at paras. 17-20. This is followed by consideration of the text, context, and scheme of the legislation, and finally extrinsic evidence. Although extrinsic evidence is permissible, it may be of little assistance where the meaning of a challenged provision is clear: *Delisle*, at para. 17. In any event, extrinsic evidence of legislative

purpose should always be approached with caution. This is for several reasons. The first is peculiar to statements made by members in the course of legislative debate, which can be "rhetorical and imprecise": *R. v. Safarzadeh-Markhali*, 2016 SCC 14, 1 S.C.R. 180, at para. 36; see also Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022), at pp. 669-70. "Decontextualized statements by members of Parliament can be poor indicators of parliamentary purpose": *Sharma (SCC)*, at para. 89, citing *Canada (Attorney General) v. Whaling*, 2014 SCC 20, 1 S.C.R. 392, at paras. 67-68 as an example.

[45] The second reason is structural. Legislation is not the product of a person. It is the product of an institution. Accordingly, the relevant purpose to be discerned is the purpose of that institution: *Sharma (SCC)*, at paras. 87-91; *Frank v. Canada (Attorney General)*, 2019 SCC 1, 1 S.C.R. 3, at para. 135, citing Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012); *R. v. Brar*, 2024 ONCA 254, 171 O.R. (3d) 321, at para. 77, leave to appeal refused, [2025] S.C.C.A. No. 71. That is why express statements of purpose adopted by the institution have explanatory priority. As the Supreme Court explained in *Sharma (SCC)*, at para. 89:

> What is to be identified is the purpose of *Parliament*, being that of its collective membership as expressed in its legislative act, and *not* the purposes of its individual members. As this Court has recognized in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 788, "the intent of particular members of Parliament is not the same as the

> intent of the Parliament as a whole". [Emphasis in original.]

[46] Turning to the application judge's reasons, he appropriately accepted the fourfold statement of purpose set out in s. 1 of the Act: (a) eliminate or reduce the risk of harms to farm animals and the food supply caused by trespass and interference with farm animals, (b) protect farm animals and the food supply chain from these harms, (c) protect the safety of farmers, their families, and impacted workers, and (d) prevent adverse effects to the economy. But when it came to ascertaining the purpose of s. 5(6) specifically (for the purpose of the s. 2(b) and s. 1 analyses), he fell into error.

[47] The application judge's conclusion that a purpose of s. 5(6) was to eliminate undercover exposés – and thus limit expression – was said to be supported by evidence given by Scott Duff, a policy director with the Ministry of Agriculture, Food and Rural Affairs and a drafter of the legislation. In his affidavit, Mr. Duff stated that the purposes of the Act were to address risks posed by practices of some activists: acts of trespass, mischief and disruptive activities on farms and processing facilities. On cross-examination he elaborated that the legislation was intended "to ensure that the food supply was safe, that humans were safe, that animals were safe, and that undue financial implications from trespass were mitigated". Thus far his statements were consistent with the express statement of purpose contained in the Act.

[48] When asked specifically about issues raised by stakeholders in consultations with the Ministry prior to the introduction of the Bill in the Legislative Assembly, he agreed that the Ministry was asked to "regulate or … restrict undercover investigations at agricultural facilities". And he agreed when asked "was the impetus for these false pretences provisions the issue of undercover investigations that had been raised by stakeholders?"

[49] The application judge concluded from this evidence that, in addition to its stated purposes, "the Act also seeks to restrict a form of expression by eliminating undercover exposés."

[50] This conclusion was not open to the application judge on the evidence. First, as noted above, the reason courts have repeatedly sounded a note of caution regarding the use of extrinsic sources is not only because individuals may – whether in legislative debate or in court proceedings – speak imprecisely, but more fundamentally because the relevant purpose is that of the corporate body – the legislature – and not any individual, not even a Minister or Member of Provincial Parliament, let alone a civil servant employed in the drafting process. While an individual can, as in these proceedings, give evidence to assist the court in understanding what the corporate intention was, that evidence must be secondary to what the court is able to understand by reading the words of the statute themselves in context.

[51] Second, and in any event, the application judge misapprehended the evidence. The question posed to Mr. Duff was whether agricultural stakeholders had asked the Ministry "to regulate or, in any way, restrict undercover investigations at agricultural facilities". In his answer, he agreed that "that would be part of the topics that were covered". So far, this is evidence about what stakeholders wanted. He was further asked if the issue of undercover investigations that had been raised by the stakeholders was "the impetus for these false pretences provisions". He agreed that it was. But it was never suggested to Mr. Duff that the stakeholders' objective was adopted wholesale by the Ministry, rather than used as one input into the development of a legislative scheme that would balance competing interests. Mr. Duff never stated that the purpose of s. 5(6) was to restrict or eliminate undercover exposés and his evidence did not support the inference drawn by the application judge. Neither was the inference supported by a reading of the legislative text. As explained below, this mischaracterization of s. 5(6) carried throughout the reasons for judgment.

D. SECTION 2(B) FREEDOM OF EXPRESSION

1. False pretences – s. 9 of the Regulation

[52] Ontario argues that the application judge erred in holding that s. 9 of the Regulation – the false pretences provision – infringes s. 2(b) of the *Charter*.

[53] It will be helpful to reproduce that provision here. Operating as a further specification of the prohibition set out in s. 5(4) of the Act, s. 9 of the Regulation states:

> 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.

[54] This is a complex provision that deems certain false statements to constitute false pretences in specific circumstances. The details are important. The false statement must be given to the owner or occupier of the farm, etc. The false statement must be used to obtain consent to carry out an act that would be prohibited without the consent (for example, trespassing). Where a false statement is made to a farmer, etc. for a proscribed purpose, then s. 9 deems the consent to have been obtained under false pretences if: (1) the false statement was made for the purpose of obtaining consent; (2) consent was given in reliance on the false

statement; and (3) the declarant carries out an act that would have been prohibited under the Act if the consent had not been given.

[55] To recap, in his s. 2(b) analysis, the application judge applied the three inquiries from *Irwin Toy/Montréal (City)*: (1) is expressive activity engaged; (2) does the form or location of the activity remove s. 2(b)'s protection; and (3) is the purpose or effect of government action to restrict freedom of expression? As noted above, the application judge accepted that there are two expressions that are restricted by the legislation: (1) the false statement that is addressed by s. 9 of the Regulation, and (2) the production of the exposé. He found that s. 9 infringed s. 2(b) rights in both respects.

[56] With respect, he erred in doing so, particularly in characterizing the claim as a negative rights claim. The paragraphs below provide an overview of s. 2(b) doctrine, particularly the distinction between positive and negative rights claims in s. 2(b) adjudication, and explain how the doctrine applies in assessing the constitutionality of the Act and Regulation.

[57] Section 2(b) of the *Charter*, often referred to in shorthand as "freedom of expression", provides that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". It is understood broadly, such that very little action that can be characterized as communicative has been found to fall outside of its scope. In practice, this has

meant that comparatively little analytical work is done at the s. 2(b) stage, with the heavy lifting done in ascertaining what constitutes reasonable limits to this freedom under s. 1: see *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, 137 O.R. (3d) 161, at paras. 25-34.

[58] That said, s. 2(b) has internal limits and some scholars, such as Professor Dwight Newman have documented a trend towards greater juristic attention to developing those limits: *Halsbury's Laws of Canada,* "Constitutional Law – Charter of Rights," (Toronto: LexisNexis Canada, 2023 Reissue) at HCHR-16 and 39; see also *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 2 S.C.R. 845 ("*Toronto (City) (SCC)*"), at paras. 14-15. Thus the scope of s. 2(b) protection does not extend to acts of violence or threats of violence: *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Khawaja*, 2012 SCC 69, 3 S.C.R. 555. Additionally, in *R. v. National Post*, 2010 SCC 16, 1 S.C.R. 477, the Supreme Court rejected the argument that techniques of news gathering, being acts that are instrumental to the exercise of freedom of expression, would necessarily come within the scope of s. 2(b) themselves, simply because they facilitated the ultimate expression: at para. 38.

[59] The analytical framework of s. 2(b) also distinguishes between legislation whose purpose is to limit expression, and legislation that restricts expression as a side-effect of achieving some other purpose. Where the legislation fits into the latter category, there is an additional obligation on *Charter* claimants. Claimants must establish that the expression in question promotes one of three purposes of

expression: enabling democratic discourse, facilitating truth seeking, and contributing to personal fulfillment: *Montréal (City)*, at para. 83.

[60] Significantly for this appeal, s. 2(b) doctrine also distinguishes between positive and negative rights claims. As explained in *Baier v. Alberta*, 2007 SCC 31, 2 S.C.R. 673, a negative rights claim is one where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would be otherwise free to engage": at para. 35; see also *Toronto (City) (SCC)*, at para. 16. Conversely, a positive rights claim is one that requires government to legislate or otherwise act so as to support or facilitate freedom of expression: *Toronto (City) (SCC)*, at para. 18. Positive rights claims, which impose obligations on government to act in some way, face an elevated threshold. The claimant must satisfy the inquiry: "is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either *substantially interfered* with freedom of expression, or had the purpose of interfering with freedom of expression?": *Toronto (City) (SCC)*, at para. 25 (emphasis added). Substantial interference is key to the claimant's burden. The applicant must establish "a lack of access to a statutory platform [that] has the effect of radically frustrating expression to such an extent that meaningful expression is 'effectively preclude[d]':" *Toronto (City) (SCC)*, at para. 27.

[61] “Substantially interfered” is a much higher bar than that set by the *Irwin Toy/Montréal (City)* test for negative rights claims: “[w]hile meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases”: *Toronto (City) (SCC)*, at para. 27.

[62] Much turns, then, on whether the claim is more appropriately characterized as a positive or negative rights claim. The application judge concluded that it is properly characterized as a negative rights claim because, but for the Act and Regulation, persons would be “otherwise free to gain entry to other premises by using false pretence without punishment by the state … it is the penalization of the false pretences that the applicants object to.”

[63] The problem with this framing is that it entirely loses sight of the rights of the property owner/occupier and corresponding obligations of excluded persons. People are not free to do things – in the sense used in the jurisprudence – that others have a legal right that they not do, regardless of whether the source of that duty sounds in public or private law, and regardless of whether the breach attracts a state-imposed sanction or a private law remedy such as damages, injunctive relief or a declaration. Trespass is tortious wrongdoing, regardless of whether the tort is committed via fraud or otherwise. The respondents either misunderstand the law of trespass or the nature of legal obligation: they either believe that it is not trespass to obtain admission by fraud if one nevertheless leaves promptly when

found out, or they simply do not accept the law of trespass provides a reason to do or not do anything. With respect to the former – that it is not a trespass if one leaves when directed – this is not an accurate account of the law of trespass in Ontario. Consent to enter premises must be obtained freely and without fraud, and consent that is obtained by misrepresentation cannot shield a person from liability for trespass: Andrew Botterell *et al.*, *Fridman's The Law of Torts in Canada*, 4th ed. (Toronto: Carswell, 2020), at p. 30; see also *R. v. Gibson*, [1976] 6 W.W.R. 484 (Sask. Dist. Ct.), at para. 9; *Lee v. Hersh*, [1993] B.C.W.L.D. 1138 (S.C.), at para. 142.

[64] The existence of a legal right and corresponding duty (in this case, the farmer's right to exclude a person from a farm and that person's corresponding duty not to enter) is one thing; remedy for breach is another. Where consent to enter premises is necessary and it is obtained by deception, such that had the truth been known consent would not have been given, there is no valid consent and there never was. The wrongdoing is not negated by the trespasser's conditional willingness to leave the premises quietly if found out. People are simply not free, in the sense used by *Baier* and *Toronto (City) (SCC)*, to observe only those legal duties that are immediately enforceable by fine or imprisonment.

[65] The latter alternative – that the respondents do not accept they have an obligation to comply with the law of trespass, and only comply because of the penalty imposed by the Act and Regulation – cannot affect the analysis. The

respondents not only have no right to enter the premises, but have an obligation not to. What they are opposing is a sanction – the imposition of a fine – in order to reduce the cost of non-compliance. The complaint, so framed, is once again not that the government has limited expression, but that it is enforcing or supplementing the law of trespass. What the respondents frame as an objection to a penalty is in fact a wider objection to the entire edifice of trespass law. It is an assertion of entitlement to access the property of others for one's own purpose. This constitutes a positive rights claim.

[66] Furthermore, the focus on the Act's supposed penalization of false pretences is, in any event, misguided.

[67] It is true that there is an expression that is part of the substrata of the act proscribed by the operation of s. 9. But the expression itself is not a proscribed act, and the application judge erred in finding that it was. Notwithstanding s. 9, the respondents – like everyone else – are free to tell lies. What s. 9 does is assert the rights of the property owner against the trespasser. It deprives the deceiver of the practical benefit obtained by the deception – the permission to enter land from which they would otherwise have been lawfully excluded by the landowner. So far forth, the Act merely concretizes existing common law obligations. And because there are also public goods at stake, the Act creates a new set of rights and duties as between the trespasser and the Crown and therefore imposes public law sanctions for non-compliance. But lying *simpliciter* attracts no sanction of any kind.

The public sanction – the fine – is only imposed on those who use deception to obtain consent to enter a farm and *then* also carry out some further prohibited act such as entering the animal protection zone or interfering with an animal.

[68] In any event, the purpose of the *Charter* claim advanced by the respondents is not to safeguard a practice of lying to farmers. Lying to farmers is simply a modality to access a property in order to record how animals are treated. Its only value to the respondents is that it is a means to achieve the end of gathering information to be used in an exposé to further a political cause. As in *Toronto (City)*, it is not the expression that is of value to the respondents but the success of the enterprise: *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732, 146 O.R. (3d) 705 ("*Toronto (City) (ONCA)*"), at para. 41, aff'd *Toronto (City) (SCC)*, at paras. 38-39.

[69] The respondents must also confront the holding in *National Post*. As important as news reporting is, and as fundamental as it is to the health of a free society, its constitutional protection does not entail that any means used to gather information will also be constitutionally protected, or that any law that creates an impediment to news gathering is constitutionally suspect.

[70] The respondents' claim has to stand or fall on the basis of the ultimate expression. Telling a lie for the sole purpose of gaining access to property is no more a matter of self-constitution, or any of the other core aspects of freedom of

expression, than swiping a pilfered access card. It would be unreasonably technical and artificial to assess the s. 2(b) claim in any other way.

[71] To sum up, the respondents' claim must be understood as a positive rights claim. The "platform" the respondents seek – and what they are denied by common law as well as the Act and Regulation – is access to the property of others on their own terms and for their own purposes. The respondents remain unrestricted in how they choose to communicate their messages about farm practices to the public. They can say what they like to whomever they like. What they are restricted from doing is entering farms without informed consent.

[72] This may impair their ability to gather the type of evidence they believe would be especially persuasive to the intended audience, in order to create a maximally impactful visual presentation. But the impact on the expression, which is a matter of degree, is simply too remote from the limit imposed; freedom of expression does not guarantee conditions most optimal for the successful reception of one's message: *Toronto (City) (SCC)*, at paras. 38-39; *Toronto (City) (ONCA)*, at para. 41. Although information gathering from private sources can be an important precursor to some expression, it is not expression, and the good of expression cannot be reverse-engineered into constitutional protection of everything that precedes it.

[73] The respondents' claim is not a modest one. Indeed, it would be difficult to articulate a principled limit on what the respondents propose. The argument advanced, were it accepted, would similarly support a finding that legislative prohibitions on hacking phones and other electronic communications, or on other means of electronic surveillance, would also substantially burden the expression of other activists and journalists who need to find and disseminate compromising material from private platforms for their public campaigns.

[74] These conclusions follow without regard to the exceptions established in the Regulation for journalists and whistleblowers. When these exceptions are considered, the unsuccessful s. 2(b) argument is weakened further.

[75] For the purposes of the s. 2(b) analysis, s. 5(6) of the Act cannot be assessed independently of s. 9 of the Regulation, and the effect of s. 9 cannot be assessed in isolation from the exceptions set out in ss. 11 and 12. They constitute a single, though complex, proposition of law, and considering them piecemeal risks misconceiving them.

2. The journalist exception – s. 11

[76] The s. 11 exception for journalists must be understood as a qualification, or further specification, of the s. 5(6) prohibition, to be read together with s. 9. It allows for journalists to obtain access to a farm under false pretences if: (i) the false statement used does not express or imply that the journalist has qualifications to

do a job safely that the journalist does not have, (ii) the journalist does not cause harm to a person or animal, (iii) the journalist complies with biosecurity protocols, and (iv) the journalist is not asked to leave.

[77] A journalist is defined in the Regulation as someone who works for "news media". "News media" itself is defined expansively to include "corporations or entities whose primary function is to disseminate information to the general public on a regular basis, whether in writing or by radio, television or similar electronic means." The definition of news media, and thus of journalist, is not restricted to traditional legacy media. The essential restriction, then, is that the entity on whose behalf the individual is working must have as its primary function the dissemination of information to the general public on a regular basis. Effectively, this establishes a measure of accountability: the journalist is traceable to an ongoing entity whose reputation will be damaged if its journalists conduct themselves in an irresponsible manner. Nothing in the definition disqualifies niche online publications or newsletters. The audience must be general, but the media's range of interest need not be.

[78] The effect of this provision is to lessen the burden on the respondents' expression imposed by the Act. It would not seem to be a significant burden on an entity such as Animal Justice to establish a subsidiary whose sole or main purpose was, for example, making regular podcasts or disseminating visual or written content in some other medium. Neither would it be a significant burden on an

individual to contract with such an entity for the purpose of producing an undercover exposé. The journalist exception is not particularly exacting.

3. The whistleblower exception – s. 12(1)(d)

[79] Having found a s. 2(b) infringement by the combined operation of ss. 5(6) and 9, the application judge addressed the whistleblower exception, together with the journalist exception, as part of the s. 1 justification analysis, and found that the justification fell short. But the application judge also found that s. 12(1)(d) constitutes an additional, free-standing, infringement of s. 2(b). Ontario appeals the finding that s. 12(1)(d) violates s. 2(b).

[80] The whistleblower exception in ss. 12(1)(a)-(c) provides that a false statement shall not be considered to have been obtained under false pretences if, essentially, the person who gave the false statement is an employee of the farm or facility, the false statement does not lead to harm to the animals or others, and as a result of the false statement and the consent obtained, the person "was able to obtain information or evidence of harm to a farm animal" or harm with respect to food safety or some other individual or some other illegal activity. Additionally, s. 12(1)(d) must be satisfied, which provides:

> 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.

[81] The application judge found that the reporting requirement in s. 12(1)(d) was itself an instance of compelled speech and a violation of s. 2(b). The application judge reasoned that the provision not only compelled a statement to an authority, but also dictated the timing of the expression: “as soon as practicable”. The application judge accepted the respondents’ argument that by having to disclose more or less immediately, a person collecting the information would have to prematurely end an investigation and forego collecting evidence of a broad pattern of behaviour or of systemic abuse over time. This would weaken the force of the exposé and make it easier for a farm to counter the allegation with a denial or explanation that the recorded behaviour was only an isolated act of a rogue employee.

[82] Section 12(1)(d) does not constitute compelled speech. At its core, compelled speech entails forced expression of opinions one does not hold, or adherence to beliefs one rejects. It does not preclude regulatory reporting requirements such as this. It is not an infringement of s. 2(b).

[83] Following the test set out in *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 70, leave to appeal refused, [2014] S.C.C.A. No. 444, the respondent is required to establish that the provision has an adverse effect on expression and that the effect is worthy of constitutional disapprobation. In concluding that there is an adverse effect on expression and the compelled speech test is met, the application judge made several assumptions about the

operation of s. 12(1)(d) which are questionable. Nothing in the text of s. 12(1)(d) states that the person making the report cannot do so anonymously, notwithstanding that non-anonymous reporting may, as a practical matter, better secure the protection of the section. Nothing – other than the cessation of the activity complained of – prevents a whistleblower from reporting multiple incidents sequentially. The effect of the Regulation is that where abuse has been discovered, it must be reported to an authority so the authority can intervene to address the immediate harm: the suffering of animals or the threat to food safety. The public good that is served by the immediate disclosure of this information justifies the reporting requirement. The requirement does not merit disapprobation.

[84] A further concern of the respondents is that the whistleblower exception is not broad enough. Specifically, s. 12(1)(c) provides immunity to a person who obtained consent through a false statement and "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". The respondents interpret "another illegal activity" to mean that immunity is only provided to whistleblowers who have documented illegal activities. But, the argument goes, if the whistleblower believes a practice to be harmful to a farm animal, yet the practice is nevertheless legal, the whistleblower is not sheltered by this provision. This is significant because many of the practices that the respondents object to and wish to document are, we are told, common farm practices that are completely lawful.

The respondents hope that by confronting the public with images of lawful mistreatment, the public will forswear the consumption of animal products, or demand better regulation, or both.

[85] For good reason, courts are reluctant to offer definitive interpretations of statutory provisions in the absence of a factual matrix. We do not have the necessary factual matrix to answer the interpretive question definitively. Nevertheless, even if the respondents' interpretation is correct and the exception is as narrow as they claim, the documentation of lawful practices would be protected under the journalistic exception. This makes sense as whistleblowing and journalism, though they may be complementary, serve different functions. Whistleblowing, at least as conceived in the legislation, is primarily a matter of reporting abuses to authorities that are empowered to remedy them. Journalism is a matter of communicating to the public. Whistleblowers may work together with journalists, but the fundamental difference in the two missions makes sense of the different treatment in the Regulation. The concept of a whistleblower requires there to be a misdeed that is capable of remedy by an authority, and it requires that the whistle actually be blown. Neither requirement would necessarily apply, conceptually, to a journalist. Taken together, the two exceptions provide a broad range for gathering the type of images that the respondents say are essential to the production of exposés.

[86] None of this may be ideal from the perspective of a person who hopes to provoke greater reform by assembling the maximally complete dossier and to do so without any personal risk. But conditions for communicating a message – and communicating it through the chosen means of disseminating images – are made available. It cannot be said that there has been substantial interference with the respondents' chosen expression as required by *Baier*.

4. Conclusion on s. 2(b)

[87] To sum up, the application judge erred in assessing the constitutionality of the impugned provisions using the negative rights framework of *Irwin Toy/Montréal (City)*. What the respondents claim is access to the property of others in circumstances where others are not willing to give it to them. The impugned provisions supplement existing common law rights and remedies, both to enforce private property rights and to advance the public interest in protecting the integrity of the food supply chain. The respondents complain that the sanctions they now face make the cost of disregarding the law higher than what they are willing to pay. But there is no entitlement to a legal framework that permits one to trespass on terms one finds acceptable. A fine issued to secure compliance with a law is not to be understood as a licensing fee. What the respondents seek is a different legal platform.

[88] The purpose of the impugned legislation is not to prevent expression, although it imposes limits on activities that bear on expression. The effect of the

legislation, when read as a whole, including the exceptions created for journalists and whistleblowers, does not substantially interfere with the respondents' intended expression, as would be required by *Baier* to establish a positive rights claim.

[89] That is sufficient to dispose of the appeal. A section 1 analysis is therefore not required. However, the following provides guidance on how a s. 1 analysis is to be conducted.

E. SECTION 1

1. The framework

[90] The two-step division of reasoning between the substantive rights provisions of the *Charter* and s. 1's limitation clause was articulated in *Oakes*. The first step, which asks whether an exercise of a right or freedom has been limited by state action, is followed by the second inquiry: is the limit demonstrably justified in a free and democratic society? It is important to note that the finding that freedom of expression has been limited is thus an intermediate conclusion: "(i)t is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*:" *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1079, *per* Lamer J. (dissenting, but not on this point). As this court stated in *Bracken v. Fort Erie*: "(t)he violation of a *Charter* right is thus established at the conclusion of the s. 1 analysis, after taking into account the reasons for the limit imposed by government, responding to the needs and circumstances of others living in community in a free and democratic

society:" at para. 61. See also *Hillier v. Ontario*, 2025 ONCA 259, 175 O.R. (3d) 241, at footnote 16; *McKitty (Litigation guardian of) v. Hayani*, 2019 ONCA 805, O.J. No. 5134, at para. 81; *R. v. Sharma*, 2020 ONCA 478, 152 O.R. (3d) 209 ("*Sharma (ONCA)*"), at paras. 262-65, *per* Miller J.A. (dissenting), rev'd 2022 SCC 39, 3 S.C.R. 147. The reason for this, as I stated in *Sharma (ONCA)*, at para. 263, is that:

> [w]ere it otherwise, courts would be in the scandalous position of being invited to sanction rights violations. Canadian legislatures, in carrying out even the most ordinary and banal functions ordering the exercises of expression or liberty would thereby be chronic and deliberate "violators" of rights. They would even in many cases -- as with the case of criminal prohibitions on making child pornography -- be morally obligated to violate rights: Grégoire Webber, "Rights and Persons" in G. Webber, et al., eds., *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018), 27, at pp. 37-39. Such a conception of s. 1 reasoning would distort our understanding of the nature of rights, and how to reason using rights.

[91] The division of reasoning between s. 1 and the substantive provisions of the *Charter* is governed by doctrine that has proven more clear cut and stable in some applications than others. The division between the s. 1 analysis, on the one hand, and the substantive rights analyses under ss. 7 and 15(1) have proven especially difficult: *Sharma (ONCA)*, at para. 245, *per* Miller J.A. (dissenting). With respect to the fundamental freedoms in s. 2, particularly freedom of expression, the balance has been different, and the preponderance of the work tends to be done at the s. 1

stage. In both cases, the challenge remains to ensure that however the division is managed, it does not result in some relevant consideration becoming lost somewhere between the two steps.

[92] Turning, then, to the *Oakes* framework, it first characterizes the purpose of the legislation in question and asks whether that purpose is pressing and substantial. This is followed by the proportionality test that is the heart of the *Oakes* analysis. It was summarized by Karakatsanis J. in *R. v. K.R.J.*, 2016 SCC 31, 1 S.C.R. 906, at para. 58:

> A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law... The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups" (*Oakes*, at p. 139).

2. Pressing and substantial

[93] The first step, then, is to identify the purpose of the impugned measure and assess whether it is pressing and substantial. As noted above, the application judge erred in his s. 2(b) analysis in finding that one of the purposes of the Act and Regulation was to prevent undercover exposés. But he did not repeat the error in his s. 1 analysis, where he characterized the purpose as "preventing trespass, protecting animal safety, protecting biosecurity of the food supply chain, protecting

those working with animals and preventing the adverse economic effects that these risks can create." He accepted that these are pressing and substantial legislative objectives. I agree, although the purpose would be better stated at a less granular level as simply "protecting against threats to the biosecurity of the food supply chain caused by trespass". The other purposes are secondary to these.

[94] The respondents argue that the stated purpose of the legislation is "colourable", drawing on a concept developed in division of powers jurisprudence. But as explained in the section addressing s. 2(b), there is no internal basis in the legislation to conclude that its purpose is anything other than what it purports to be. And with respect to the external evidence, which recent *Charter* cases have re-emphasized is subordinate to the text, the evidence of Mr. Duff on which the argument hinges does not support this conclusion.

3. Rational connection

[95] At the next step, the government is required to establish a rational connection between the impugned provision and the purposes of the Act. The application judge found that there is a rational connection between the prevention of the spread of pathogens within or between farms and restrictions against trespass. Again, I agree. It cannot be assumed that trespassers – whether entirely strangers to the farm enterprise, or pursuing objectives unaligned with those of the farm – can be relied on to observe farm biosecurity and animal welfare protocols.

4. Minimal impairment

[96] Minimal impairment is meant to be a primarily technical inquiry. Holding the objective of the legislation more or less constant, it asks if there are less rights-impairing – more efficient – means to achieving it. The legislature does not need to choose the least intrusive means conceivable. As the Supreme Court explained in *Montréal (City)*, at para. 94:

> The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the [legislature] establish that it has tailored the limit to the exigencies of the problem in a reasonable way.

[97] As this court has recently stated, although the provision of some legislative exceptions may help satisfy this inquiry and provide some reassurance that the legislature turned its mind to the question, the absence of exceptions does not necessarily entail the conclusion that the provision is not minimally impairing: *Hillier*, at para. 56; *Sharma (ONCA)*, at para. 275, *per* Miller J.A. (dissenting).

[98] At this stage of the inquiry, the application judge focused specifically on s. 9 of the Regulation – the false statement provision – together with the exceptions carved out by ss. 11 (journalists) and 12 (whistleblowers). He concluded that the s. 9 restriction was not minimally impairing. He gave three reasons: (1) the restrictions are not reasonably tailored to the objectives of the Act; (2) the

whistleblower exception is unnecessarily narrow; and (3) the journalist exception is unnecessarily narrow.

[99] The application judge reasoned that the s. 9 restriction on false statements captured persons who would pose no threat to biosecurity of a farm:

> [A]n undercover activist who obtains a job at a farm … by denying any affiliation with an animal rights group or by understating their qualifications and denying they have a university degree automatically becomes a trespasser although they have done nothing to increase any of the risks that the Act is aimed at reducing. The person could in fact be a model employee who has adhered to all biosecurity protocols, treated animals with the highest degree of care and ensured the safety of their co-workers.

[100] I would conclude that the Act and Regulation are minimally impairing, essentially for the same reasons that I found the Act and Regulation do not limit the respondents' s. 2(b) rights. The scenario posited by the application judge is of course possible. It is not indefeasibly true that someone who uses false pretences to gain employment on a farm to conduct an exposé will inevitably be a bad employee, cause harm to animals or spread pathogens by not observing proper protocols. Although Ontario provided examples of particular cases where activists had accessed farms and caused significant harm to animals through incompetence, negligence and sheer irresponsibility, the application judge discounted these examples on the basis that some of them involved conventional trespass without deception, by persons who were not acting as employees.

[101] Really, though, the distinction is irrelevant. Farm operators are entitled to know whom they are dealing with so they can assess what risks they are willing to accept. Conventional farm employees are presumptively aligned with the purposes of their employer. Such employees are incentivized to learn and follow policies. If they do not, they will lose their employment, which is something of at least some value to them. Undercover activists have no such alignment of purpose. They have another employer, their primary allegiance is elsewhere and they would prefer a world in which the farm operator is not in business. They may well be conscientious in performing the tasks they are assigned, but they may not. The question is whether this is a risk that farm operators – and government acting in the public interest – must be required to accept.

[102] The irony is that in crafting the legislation that it did and allowing some scope for undercover exposés, the government is then faced with having to justify why the line was not drawn elsewhere. The minimal impairment requirement does not demand that a government defending legislation demonstrate that the line drawn could not have been drawn any place else. What it has to do is establish that the scheme chosen falls within a reasonable range of solutions. It has done so in this case.

[103] In any event, the argument becomes much more difficult for the respondents when the exceptions set out in ss. 11 and 12 are considered.

[104] Section 12 sets out the exception for whistleblowers. The application judge found the exception had an adverse effect on expression because it compelled reporting to a person in authority and required the report to be made as soon as practicable. He found this to be a further infringement of s. 2(b). Presumably for that reason he found the whistleblower exception not to support the argument that ss. 5(6) and 9 are minimally impairing. However, my reasons above for concluding that s. 12 does not infringe s. 2(b), also negate any obstacle to characterizing it as supporting the conclusion that it further tailors the Regulation to the purpose of the Act, and support the conclusion that the Act is minimally impairing.

[105] With respect to the journalism exception in s. 11, the application judge found it to be so narrow as to not be of any practical benefit. Again, I do not agree. The exception provides that a journalist can obtain consent by deceit and can remain on the farm provided that the journalist does not harm animals and is not subsequently directed to leave the premises. It takes away the liability for trespass. This provision narrows the scope of s. 9. It ought to have supported the finding that s. 9 was minimally impairing.

5. Overall proportionality

[106] The final step in the *Oakes* analysis requires an evaluation of the benefits of the legislation considered with the harm caused to persons whose actions have been limited. Although it is conventionally expressed using the empirical language of weighing and balancing, the metaphor can be misleading if it is taken to imply a

utilitarian cost-benefit analysis, such that it is a question of whether harm to some is justified by a sufficient quantity of good to others. The two sets of interests are, in reality, incommensurable and there is no scale on which to weigh them. Instead, the nature of the analysis at this stage is a normative assessment. It requires a reviewing judge to consider what limits on the freedom of individuals are truly necessary for the flourishing of a free and democratic society, which is itself a good held in common by all.

[107] I would not assess the value of the respondents' expression in the manner of the application judge. Even if I were to consider the value of the first instance expression – the deception of the farmer – I could only find that it is of instrumental value. No one has claimed otherwise. The application judge's conclusion inflates the Supreme Court's holding in *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 754-755 – rejecting the argument that deliberate lies can *never* have value because they could serve socially desirable ends – to the conclusion that lies in this context must therefore be high value expression.

[108] In any event, any value the lies have on this theory is subsumed entirely in the value of the production of the exposé. I have no difficulty in finding the production of exposés about the treatment of farm animals to be high value expression. However, given the minimal degree of impairment with the production of this expression, compared against the benefits of the legislation, I have no hesitation in finding that the limits placed on the respondents' exercise of their

freedom of expression are proportionate to the public goods served by the legislation.

IV. DISPOSITION

[109] I would allow the appeal. I would make no order of costs of the appeal.

Released: June 3, 2026 “L.B.R.”

“B.W. Miller J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. B. Zarnett J.A.”