Court File No. 21-658393-0000

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, REGAN RUSSELL FOUNDATION

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TABLE OF CONTENTS

PART I: OVERVIEW

1. In 2020, Regan Russell, a passionate animal rights activist, was struck and killed while engaged in the protect activity of "bearing witness" outside Fearmans Pork Inc. At the time, she was actively protesting the *Act* currently under consideration by this court. Her death poignantly asks us to consider one of the issues at the heart of this Application: what level of risk to public or personal safety must be tolerated to ensure the maintenance of fundamental freedoms – including freedom of expression and the closely related right to freedom of association? The Regan Russell Foundation submits to this court that the answer is embodied by Regan's life, message and legacy: we must not be afraid to take meaningful action in the pursuit of change. Nor should we subvert or betray core democratic values to avoid speculative and unverifiable risks. Some risk to personal and public safety in the exercise of expression must be considered tolerable in a free and democratic society.

2. The Regan Russell Foundation will focus its submission on two issues: the use of Regan Russell's death in the development of and justification for the *Act*, and the balancing of activists' ss. 2(b) and 2(c) rights with objectives related to public and personal safety under the s. 1 analysis.

PART II: FACTS

3. The facts are thoroughly summarized by the parties. RRF takes no position on any contested facts.

PART III: LEGAL ISSUES

A. Regan Russell's death should not be used to justify the *Act*

4. On June 19, 2020, Regan Russell was attending an animal rights protest at Fearmans Pork Inc. in Burlington, Ontario, when she was tragically struck and killed by a transport truck. Bill 156 had received Royal Assent the day prior. Shortly after Regan's death, the Government of Ontario announced that the sections of the *Act* governing interactions between individuals and transport trucks were scheduled to come into force imminently.[1] Regan's death was used as justification for this decision, and continues to be invoked in support of sections of the *Act* which claim to protect protesters by limiting their rights to peaceful protest. RRF strongly opposes this use of Regan's death to bolster the legitimacy of the *Act*.

5. Regan Russell was a fierce animal rights advocate who dedicated her life to improving animals' living conditions. She believed in the inherent value of free speech, and she used peaceful protest and public education as tools to promote animal welfare. She regularly attended protests centred around the act of bearing witness to animals in transport to slaughter. Protesters bearing witness observe animals in transport trucks en route to slaughterhouses and take photographs and video footage of the last moments of the animals' lives, offering finals comforts like kind words. The documentation gathered by activists bearing witness is publicly shared so that Ontarians and Canadians may gain insight into the living and transport conditions of animals farmed for consumption.

[1] Affidavit of Scott Duff, affirmed December 6, 2021, Respondent's record, Volume 4, Tab 6, pp. 835-836; Exhibit J of same, Respondent's record, Volume 4, p. 1181.

6. Regan's purpose for attending the June 19, 2020 protest at Fearmans was twofold. First, she was there to bear witness to pigs in transport to the slaughterhouse, as she often was. Second, unique to that particular day, she was there to protest the passing of Bill 156. Regan was staunchly opposed to this legislation.

7. Unfortunately, on August 31, weeks after her death, the Government of Ontario sent out a News Release providing notice that sections 6(1), 7, 14(1)3 and 15(1) of the *Act* would come into force on September 2, 2020.[2] Section 6 prohibits people from interfering with motor vehicles transporting farm animals, while section 7 lists exceptions to this prohibition. Section 14(1)3 makes it an offence to contravene section 6, and section 15(1) outlines the corresponding penalties.[3] In essence, after Regan's tragic death, the provincial government moved quickly to significantly limit the exact peaceful protest activity in which Regan had been engaged.

8. The affidavit of Scott Duff, the Policy Director within the Ontario Ministry of Agriculture, Food and Rural Affairs responsible for the development of the *Act*, acknowledges that these provisions coming into force in September 2020 followed Regan's death. He states that Regan appeared to have been engaged in some form of protest resulting in her being very near a moving transport truck. This proximity resulted in the truck hitting Regan.[4]

9. During cross examination, Mr. Duff was questioned about the timing of the coming into force of certain sections of the *Act* in September 2020. He was directly asked whether

[2] Exhibit J to the Affidavit of Scott Duff, affirmed December 6, 2021, Respondent's record, Volume 4, p. 1181.
[3] The *Act, supra*, at ss. 6, 7, 14, 15.
[4] Affidavit of Scott Duff, affirmed December 6, 2021, Respondent's record, Volume 4, pp. 835-836.

the timing of the coming into force of those select provisions was in response to Regan's death. When prompted, he answered, "Yes, yes."[5]

10. Regan's death continued to be brought into issue in this Application through written and oral evidence. Eric Schwindt, a career hog producer and former Chair of the Ontario Pork Producers' Marketing Board, stated in his affidavit, "Prior to the passing of the Act, I was concerned that activists were becoming increasingly emboldened following protests in which they faced no repercussions for such conduct, and especially following the death of Regan Russell."[6] He noted that the *Act* has impacted the frequency with which activists engage in witness bearing protests.[7]

11. The Halton Regional Police Service attempted to coordinate a mutually agreeable witness bearing protocol between Fearmans, transport truck drivers, and activists, and called his proposal the "Regan Protocol".[8] Danial Dufour, Senior Director of Public Relations and Consumer Inquiries at Sofina Foods Inc., raised concerns about protesters' safety when they bear witness, specifically citing the risk of injuries to protesters. In his email to the coordinating Halton police officer, he referenced "many documented incidents" caused by bearing witness, saying, "more recently, it resulted in a terrible tragedy [Regan's death]".[9] He declined to agree to the "Regan protocol", citing assorted reasons, including safety risks to protesters.

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[5] Cross-examination of Scott Duff, held on June 2, 2022, Joint cross-examination transcript brief, p. 771, ll. 13-22.
[6] Affidavit of Eric Schwindt, sworn December 1, 2021, Respondent's record, Volume 8, p. 2134, para. 52.
[7] *Ibid*, para. 53.
[8] Exhibit O to the Affidavit of Eric Schwindt, sworn December 1, 2021, Respondent's record, Volume 9, pp. 2321-2322.
[9] *Ibid.*

12. His concerns were echoed by Eric Schwindt in cross examination, who claimed to have experienced "a severe problem with activism creating unsafe conditions for everybody, and obviously, that's a fact because, unfortunately, we've had one death [Regan's]."[10] In fact, he recalled that his involvement with Bill 156 began when he contacted the Minister of Agriculture at the time, Minister Hardeman, and raised this safety concern. He understood that the development of Bill 156 was the result of that conversation, along with other conversations with other stakeholders.[11]

13. RRF acknowledges that much of the development of the *Act*, and subsequently this Application, focuses on biosecurity, whistleblowing, and protecting farmers. Section 6 and the associated provisions are a relatively small part of the *Act*, and Regan's death is not heavily discussed in the record. However, Regan's legacy is important. Her death has been invoked as an example of the safety risks associated with witness bearing, and in turn used to support legislation which curtails peaceful protest rights in an effort to limit these risks.

14. Regan made a decision on June 19, 2020, informed by years of bearing witness, to exercise her constitutional rights and participate in that peaceful protest. She was protesting the treatment of animals, she was recording educational material for Ontarians and Canadians, and she was protesting Bill 156. One invocation of her tragic death to support the legislation that she died protesting is one too many. RRF respectfully, firmly, opposes the use of Regan's story in this context.

[10] Cross-examination of Eric Schwindt, held on June 2, 2022, Joint cross-examination transcript brief, p. 2825, ll. 12-15.
[11] Cross-examination of Eric Schwindt, held on June 2, 2022, Joint cross-examination transcript brief, p. 2825, ll. 16-22.

B. The *Act* infringes on the s. 2(b) and s. 2(c) rights of activists who participate in witness bearing protests

15. RRF's submissions focus specifically on the protest activity known as "bearing witness", and its restriction by portions of the *Act*. Bearing witness is a peaceful form of expression during which activists observe farmed animals in transport trucks outside of slaughterhouses to honour their lives, offer final comforts, and document their conditions.[12] Bearing witness is a form of social and political expression that lies at the heart of s. 2(b) and s. 2(c). It necessarily requires physical space near farmed animals in transport trucks, as this is the only way to connect with and document the animals in the trucks.

16. The *Act* directly targets witness bearing protests in s. 6(2), which prohibits "interference or interaction" with animals in transport "without the prior consent of the driver of the motor vehicle".[13] Section 6(4) makes it an offence to obtain consent from the driver under "false pretences".[14] Section 8 of the Regulation lists activities that constitute "interferences and interactions", which include direct or indirect physical contact, providing food or water, or any activity that causes or is likely to cause harm to animal safety or food safety.[15] Because activists cannot observe or document farmed animals in transport without risking direct or indirect contact, contrary to these provisions, the *Act* restricts the only actions that make their expression effective.[16] In turn, as articulated by the Applicants, the *Act* limits activists' ability to engage in witness bearing (infringing activists' free speech and freedom of association),[17] it restricts activities that provide

[12] For a detailed description of the act of bearing witness, see the factum of the Applicants at paras. 26-31.
[13] *Security from Trespass and Protecting Food Safety Act*, 2020, SO 2020, c 9 ["the *Act*"] at s. 6(2).
[14] *Ibid* at s. 6(4).
[15] Ontario Regulation O Reg 701/20 at s. 8.
[16] See the factum of the Applicants at para. 96, 109.
[17] See the factum of the Applicants at paras. 79, 93, 95-96, 98.

important information to the public (infringing the rights of listeners),[18] and it threatens newsgathering activities that are integral to news dissemination (infringing the freedom of the press).[19]

C. The Relationship Between Safety Objectives and Constitutional Rights and Freedoms

17. The stated purpose of the *Act* is to protect farm animals, biosecurity, farmers, and others from risks that are allegedly created when animal rights activists enter places or otherwise engage in unauthorized interactions with farm animals. As such, the *Act* purports to have a public safety objective, thus bringing into issue the proper balancing between competing objectives of protecting public safety versus the protection of fundamental freedoms. In addition, the personal safety of activists has been invoked by government as an additional purpose for the *Act*. As such the tension between the voluntary assumption of risk to personal safety by protestors, on one hand, and the Charter-protected rights of those same protestors, on the other, is also at issue in this Application.

a. Public Safety as an Objective of State Action that Limits a *Charter* Right

18. Some risk to public safety for the purpose of upholding *Charter* rights and freedoms is tolerable in a free and democratic society. As Justice Doherty has poignantly observed, albeit in a different context, when it comes to balancing security against constitutionally

[18] See the factum of the Applicants at para. 101.
[19] See the factum of the Applicants at paras. 82-83.

protected interests, we must acknowledge the governing hierarchy of core interests: "we want to be safe, but we need to be free."[20]

19. The complex relationship between public safety and fundamental freedoms often arises in constitutional jurisprudence surrounding the use of police powers, such as criminal sanction, police detention, and arrest. While the limits on unauthorized use of police powers may be contextually distinguished from the determination of whether the limits imposed by an offence provision are justifiable, the principles that animate these two areas of law share common features. Both are focused on the balancing between legitimate public safety objectives and the rights and freedoms protected by the *Charter*.

20. In the police powers context, courts have identified "a real risk of imminent harm," as the point at which proactive measures to maintain the public peace justify interference with liberty.[21] This inflection point is premised on the imperative that "any interference with individual liberty must be justified as necessary."[22] State intrusions upon liberty, through the use of police powers "should be a measure of last resort."[23] Courts must guard against countenancing state action which permits significant liberty restrictions, so long as they constitute effective tools to achieve safety-oriented objectives. [24] As the Supreme Court has observed, to do otherwise, " is a recipe for a police state, not a free and democratic society."[25]

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[20] *Brown v Regional Municipality of Durham Police Service Board*, [1998] OJ No 5274 (ON CA) at para. 79 ["*Brown"*]
[21] *Brown, supra.*, at para. 78; see also, *Figueiras v Toronto (Police Services Board),* 2015 ONCA 208.
[22] *Brown, supra.*,, at para. 78; see also, *Dedman v. The Queen,* [1985] 2 SCR 2
[23] *Fleming v Ontario*, 2019 SCC 45, at para. 98.
[24] *Fleming v Ontario*, supra., at para. 98
[25] *Fleming v Ontario*, supra., at para. 98

21. The law around police power demonstrates that speculative, generalized, or nebulous concerns regarding public safety cannot trump other democratic ideals – only safety concerns which have manifested to the threshold of demonstrating a real risk of imminent harm, can justify intrusion on individual liberties and other protected interested.

22. This limit find its counterpart in the jurisprudence around justifiable limits to freedom of expression, particularly those which are prescribed through penal sanction. In the criminal context, freedom of expression is limited through the criminalization of hate speech and other types of related speech.[26] In this context, the Supreme Court has focused the inquiry on the "substantial harm" or "serious threat" caused by speech which is intentionally designed to promote hatred or incite violence.[27] Notwithstanding the substantial harm which flows from this type of prohibited speech, the Supreme Court is clear that hate speech prohibitions limit s. 2(b) of the *Charter*.

23. The Supreme Court has held that the limit to freedom of expression created by hate speech legislation is justified pursuant to s. 1 of the *Charter*. In so doing, the Supreme Court has struck a balance between the harm caused by the prohibited speech (which is exceedingly high) and the value of the speech to society (which is exceedingly low). Hate speech prohibitions have a legitimate government objective of preventing demonstrable, direct and identifiable substantial harm. Conversely, the speech itself has little, if any, value, and exhibits, at best, a "tenuous link" with the values underlying freedom of

[26] Sections 318 – 320.1, *Criminal Code of Canada,* R.S.C., 1985. c. C-46 ["*Crimianl Code"*]; s. 83.221, *Criminal Code*
[27] *R. v. Keegstra,* [1990] 3 SCR 697 at pp. 918-919; Canada (Human Rights Commission) *v.* Taylor, [1990] 3 S.C.R. 892 at p. 919.

expression.[28] In stark contrast to the protected speech at issue in this Application, "hate propaganda contributes little to the aspirational "quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."[29]

24. At the opposite end of the 2(b) spectrum lies speech associated with protest – which advances values of self-fulfilment, participation in social and political decision-making, participation in the communal exchange of ideas, and constitutes a method of advocating for change. This includes expression through physical demonstrations of dissatisfaction, which have protected, expressive force.[30] The unqualified guarantee of freedom of expression in s. 2(b) of the *Charter,* protects "free and uninhibited speech," the lifeblood of true democracy, and a value which "permeates all truly democratic societies and institutions."[31]

25. The balancing exercise undertaken when applying the s. 1 analysis to the hate speech context, yield a different result when applied to the case at bar. The protest activities associated with bearing witness – the value of which is well-summarized by the Applicant – lie at the core of the *Charter* protection. The speculative security concerns raised by the Respondent cannot overpower the duty of the courts to protect this form of expression.

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[28] Canada (Human Rights Commission) *v.* Taylor, [1990] 3 S.C.R. 892 at pp. 939-940; see also, *R. v. Zundel,* [1992] 2 S.C.R. 731 at pp. 827-828
[29] *R. v. Keegstra, supra.* at p. 766
[30] *RWDSU, Local 558 v Pepsi-Cola Beverages (West) Ltd*, 2002 SCC 8 at para. 30-32; *RWDSU v Dolphin Delivery Ltd,* [1986] 2 SCR 573 at paras. 17-20
[31] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at p. 1336; see also, *R v Keegstra*, *supra.* at pp. 763-764.

b. Personal Safety of the Rights Holder as an Objective of State Action that Limits a *Charter* Right

26. The act of bearing witness may be said to pose a personal safety risk to those engaging in this form of protest. In this way, bearing witness is not unique. Many forms of protest carry with them a personal decision to accept some risk to personal safety in order to advocate for change, including hunger strikes, non-violent civil disobedience, occupation protest, and so-called "stunt activism."

27. RRF submits that some appropriation of risk to personal safety by the individual exercising their expressive rights is tolerable in a free and democratic society. Our society sees value maintaining the freedoms associated with far riskier activities of lesser intrinsic value (e.g., smoking, smoking cannabis, poor eating habits, participation in dangerous sports). How much more so must we tolerate some personal risk in the name of freedom of expression – the lifeblood of our democracy?

28. Like public safety objectives, the use of state action aimed at limiting rights to protect the personal safety of the right's holder has been considered in the police powers context. For example, the use of proactive policing to protect the safety of individuals exercising their protected right to protest was recently considered in *Fleming.*[32] Fleming was arrested during his participation in a counter protest regarding an Indigenous land claim in Caledonia, Ontario, after he approached a group of Indigenous protestors. In *Fleming,* the Supreme Court considered the use of police powers against individuals who might themselves be targets of anticipated violence – in other words, those perceived by authorities as ""provocateurs" whose lawful actions or words are feared to be prompting

[32] *Fleming v Ontario*, 2019 SCC 45.

others to respond violently."[33] In that context, the court was concerned that use of police power would "have a direct impact a constellation of rights that are fundamental to individual freedom in our society."[34] State action to proactively police protest activities would "directly undermine the expectation of all individuals, in the lawful exercise of their liberty, to live their lives free from coercive interference by the state" – notwithstanding the fact that the police in *Fleming* claimed a public safety objective.[35]

29. Again, in this context, the principles that animate the law around limitations of police powers find their counterpart in the jurisprudence considering the fundamental freedoms protected in ss. 2(b) and (c) of the *Charter*.

30. In *UAlberta Pro-Life,*[36] the University of Alberta put in place a cost-prohibitive hurdle to protest action by a pro-life student group, which had the effect of constituting a "complete suppression" of their freedom of expression. The University argued that the cost barrier was necessary to protect the safety of the protestors, following clash with a counter-protestors in a previous year. The University also pointed to the provocative nature of the protest, which was "designed to be controversial," to "evoke a vigorous and emotional response," and to seek "public controversy".[37] The Alberta Court of Appeal held that, even if the content was designed to be provocative, that would not constitute a "compelling consideration to justify complete suppression of the event by a costs barrier as imposed."[38]

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[33] *Fleming v Ontario*, 2019 SCC 45, at para 62. ["*Fleming*"]
[34] *Fleming, supra.* at para. 67.
[35] *Fleming, supra.* at para. 67.
[36] *UAlberta Pro-Life v Governors of the University of Alberta,* 2020 ABCA 1. ["*UAlberta Pro-Life*"]
[37] *UAlberta Pro-Life, supra.* at para. 185.
[38] *UAlberta Pro-Life, supra.* at para. 185.

31. A free and democratic society is premised, in part, on the belief that its citizens are free to make their own decision – even those that carry with it a tolerable level of risk to their own safety. The act of bearing witness falls within this paradigm. The personal safety concerns of right bearers cannot justify curtailing their s. 2(b) and 2(c) rights.

D. Safety Objectives and the *Oakes* Test

32. Appropriate balancing between public / personal safety objectives and the values enshrined by ss. 2(b) and 2(c) of the *Charter* is an important consideration that will underlie this court's application of the *Oakes* test. In so doing, RRF asks the court to be mindful of the guidance gleaned from appellate jurisprudence analyzing the interplay between these interests.

33. In the context of bearing witness, public safety and personal safety are adequately protected by the legal framework which preceded the *Act*, including public law protections around trespass, biosecurity, and safe driving under the *Provincial Offences Act, Criminal Code,* and *Highway Traffic Act,* as well as private law remedies for unsafe protest behaviour.[39]

34. Far from an example that justifies the *Act*, Regan's story is a good example of how our law already operates to prohibit behaviours associated with bearing witness which pose a real risk of imminent harm to protestors or others. On March 28, 2023, the truck driver who struck and killed Regan Russell pleaded guilty and was convicted of Careless Driving Causing Death, under the *Highway Traffic Act*. Ironically, the *Act,* had it been in place at the time, would have only served to distort the illegality of his actions which led to her

[39] See, e.g., *Hudson Bay Mining & Smelting Co, Limited v Dumas et al,* 2014 MBCA 6.

death, potentially shifting blame from the illegal driving behaviour of the truck driver who struck her to the victim herself. Where the act of bearing witness intersects with real, identifiable risk to public safety, the conduct – whether it be by truck drivers or protestors – is already prohibited. The *Act* only serves to limit the majority of the activity associated with bearing witness – lawful, non-dangerous forms of valuable public expression. In this way, the *Act* is not rationally connected to its objective, nor is it minimally impairing of rights.

35. The speculative safety risks assumed by protestors who bear witness or posed by their activities are within tolerable limits, that must be maintained in a free and democratic society. This type of risk is a small price to pay for the maintenance of our freedoms, the fostering of civic participation and pursuit of advocacy in the name of change.

PART IV: ORDER REQUESTED

36. The Regan Russell Foundation takes no position on the disposition of the application. The Regan Russell Foundation seeks no costs and asks that no costs be awarded against it.

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

Stephanie DiGiuseppe
Heather Gunter

SCHEDULE A: AUTHORITIES

Case Law

Brown v Regional Municipality of Durham Police Service Board, [1998] OJ No 5274 (ON CA).
Figueiras v Toronto (Police Services Board), 2015 ONCA 208.
Dedman v The Queen, [1985] 2 SCR 2.
Fleming v Ontario, 2019 SCC 45.
R v Keegstra, [1990] 3 SCR 697.
Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892.
R v Zundel, [1992] 2 SCR 731.
RWDSU, Local 558 v Pepsi-Cola Beverages (West) Ltd, 2002 SCC 8.
RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573.
Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326.
UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1.
Hudson Bay Mining & Smelting Co, Limited v Dumas et al, 2014 MBCA 6.

SCHEDULE B: LEGISLATION

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

Prohibition re transportation of farm animals

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

No interaction with farm animals

(2) No person shall interfere or interact with a farm animal being transported by a motor vehicle without the prior consent of the driver of the motor vehicle.

No implied consent

(3) For the purposes of subsection (2), prior consent of the driver of a motor vehicle transporting farm animals shall not be inferred by a person seeking to interfere or interact with a farm animal being transported solely on the basis that the driver has not specifically prohibited the person from doing so.

Consent under duress, false pretences

(4) For the purposes of subsection (2), consent to interfering or interacting with a farm animal is invalid if it is obtained from the driver of the motor vehicle transporting the farm animal 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.

2. 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.

3. *Criminal Code*, RSC, 1985, c C-46.

Advocating genocide

318 (1) Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

(2) In this section, *genocide* means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, *identifiable group* means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2.1) Everyone who, by communicating statements, other than in private conversation, wilfully promotes antisemitism by condoning, denying or downplaying the Holocaust

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

(3.1) No person shall be convicted of an offence under subsection (2.1)

(a) if they establish that the statements communicated were true;

(b) if, in good faith, they expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds they believed them to be true; or

(d) if, in good faith, they intended to point out, for the purpose of removal, matters producing or tending to produce feelings of antisemitism toward Jews.

(4) If a person is convicted of an offence under subsection (1), (2) or (2.1) or section 318, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 199(6) and (7) apply, with any modifications that the circumstances require, to subsection (1), (2) or (2.1) or section 318.

(6) No proceeding for an offence under subsection (2) or (2.1) shall be instituted without the consent of the Attorney General.

(7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means; (communiquer)

Holocaust means the planned and deliberate state-sponsored persecution and annihilation of European Jewry by the Nazis and their collaborators from 1933 to 1945; (Holocauste)

identifiable group has the same meaning as in section 318; (groupe identifiable)

public place includes any place to which the public have access as of right or by invitation, express or implied; (endroit public)

statements includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (déclarations)

Warrant of seizure

320 (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section,

court means

(a) in the Province of Quebec, the Court of Quebec,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c) in the Province of Newfoundland and Labrador, the Supreme Court, Trial Division,

(c.1) [Repealed, 1992, c. 51, s. 36]

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the Northwest Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice; (tribunal)

genocide has the same meaning as in section 318; (génocide)

hate propaganda means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319; (propagande haineuse)

judge means a judge of a court. (juge)

Warrant of seizure

320.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material that is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

(a) give an electronic copy of the material to the court;

(b) ensure that the material is no longer stored on and made available through the computer system; and

(c) provide the information necessary to identify and locate the person who posted the material.

(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the

location where the material was previously stored and made available, until the time set for the appearance.

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

(4) If the person who posted the material does not appear for the proceedings, the court may proceed ex parte to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

(8) Subsections 320(6) to (8) apply, with any modifications that the circumstances require, to this section.

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

Court File No.: 21-658393-0000

ANIMAL JUSTICE et al.	-and-	THE ATTORNEY GENERAL OF ONTARIO	-and-	REGAN RUSSELL FOUNDATION et al.
Applicants		Respondent		Interveners

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

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