

## AG-GAG LAWS, ANIMAL RIGHTS ACTIVISM, AND THE CONSTITUTION: WHAT IS PROTECTED SPEECH?

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*This article examines the constitutionality of ag-gag legislation that has recently been adopted by two Canadian provinces and is on the horizon in others. Ag-gag legislation prohibits activities such as trespass onto agricultural animal operations, gaining entry onto agriculture operations using false pretences, and interfering with the transport of farmed animals to slaughter. The analysis draws on case law and literature interpreting section 2(b) of the Canadian Charter of Rights and Freedoms and engages with scholarship related to animal rights activism, American ag-gag legislation, and feminist animal studies to argue that ag-gag laws violate the fundamental freedoms protected by the Charter. The article contends that Canadian ag-gag legislation prevents the communication of messages related to seeking truth, participation in the political system, and individual human flourishing, which limits freedom of expression.*

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### I. INTRODUCTION: SHARING INFORMATION ABOUT INDUSTRIAL FARMING

On 1 September 2019, approximately 90 animal rights activists staged a “sit-in” at a southern Alberta turkey farm to protest what they viewed as inhumane treatment of the resident birds.<sup>1</sup> Some of the protestors, members of a group called Liberation Lockdown,<sup>2</sup>

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<sup>1</sup> Michael Franklin, “Agriculture Minister Strikes Back at Protesters of Southern Alberta Turkey Farm,” *CTV News* (5 September 2019), online: <calgary.ctvnews.ca/agriculture-minister-strikes-back-at-protesters-of-southern-alberta-turkey-farm-1.4579643>.

<sup>2</sup> *Ibid.*

locked themselves inside the barn, while others protested outside.<sup>3</sup> Their demands included “that the media be allowed to film inside the turkey pens” and that some turkeys be liberated from confinement.<sup>4</sup> Although the owner of the farm disputed any claims of mistreatment, stating that the farm “follows the standards set out by the Alberta Turkey Producers Association,”<sup>5</sup> the protestors’ ultimate objective was “to start exposing the reality of what’s going on in Canadian farms.”<sup>6</sup>

On 7 December 2019, 11 animal rights activists occupied a pig farm south of Montreal, in an attempt to “push the Quebec and Canadian governments to end industrial pork production.”<sup>7</sup> The activists, members of the Montreal branch of Direct Action Everywhere<sup>8</sup> — an “international grassroots network of animal rights activists”<sup>9</sup> — broadcast footage of the occupation on Facebook, “denouncing the conditions [in which the animals were kept, and] saying the animals didn’t have enough room to turn around.”<sup>10</sup> In response to the protest, the president of Quebec’s pork breeders’ association stated that “Canadian animal welfare standards are among the highest in the world.”<sup>11</sup>

On 18 February 2020, a main roadway was closed when animal rights activists occupied a duck farm in Newmarket, Ontario.<sup>12</sup> The company’s website states that it is a leader in animal care:

King Cole has long been heralded for its leadership and stewardship in the area of animal care. Ducks are raised free run in large spacious barns with plenty of fresh air ventilation, unlimited water and natural feed. The barns are bedded down with recycled fresh wood shavings daily and washed out for maximum sanitary conditions.<sup>13</sup>

But the activists, who streamed their activities on Facebook, found ducks that were “injured, sick and dying or already dead in the dark ‘free run’ barn. Others had legs, wings or beaks stuck in the wire flooring they were standing on.”<sup>14</sup>

<sup>3</sup> Stephen Hunt, “Animal Rights Activists Occupy Turkey Barn to Protest Treatment,” *CTV News* (3 September 2019), online: <calgary.ctvnews.ca/animal-rights-activists-occupy-turkey-barn-to-protest-treatment-1.4576885>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Franklin, *supra* note 1.

<sup>6</sup> Hunt, *supra* note 3.

<sup>7</sup> The Canadian Press, “Animal Activists Arrested at Quebec Pork Facility Vow to Continue Fight,” *The Montreal Gazette* (8 December 2019), online: <montrealgazette.com/pmn/news-pmn/canada-news-pmn/animal-activists-arrested-at-quebec-pork-facility-vow-to-continue-fight/wcm/1fc58d23-382e-42ef-b745-376eedf1d0f6>.

<sup>8</sup> *Ibid.*

<sup>9</sup> “Direct Action Everywhere,” online: <en.wikipedia.org/wiki/Direct\_Action\_Everywhere>. See also online: <www.directactioneverywhere.com>; Andy Greenberg, “Meet the Activists Risking Prison to Film VR in Factory Farms,” *Wired* (5 December 2019), online: <www.wired.com/story/direct-action-everywhere-virtual-reality-exposing-factory-farms/>; Ezra Klein, “When Doing the Right Thing Makes You a Criminal,” *Vox* (5 December 2019), online: <www.vox.com/podcasts/2019/12/5/20995117/wayne-hsiung-animal-rights-the-ezra-klein-show>.

<sup>10</sup> The Canadian Press, *supra* note 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> Debora Kelly, “Animal Rights Protest at King Cole Ducks Temporarily Closed Warden (UPDATE),” *Newmarket Today* (18 February 2020), online: <www.newmarkettoday.ca/police-beat/warden-closed-for-animal-rights-protest-at-king-cole-duck-2099766>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Becky Robertson, “Vegan Activists Just Saved Ducks from an Ontario Farm in Dramatic Rescue,” online: <www.blogto.com/city/2020/02/vegan-activists-saved-ducks-ontario-farm-dramatic-rescue/>. Note further that following this investigation, the legal advocacy group Animal Justice filed a false advertising complaint with the Competition Bureau of Canada and the Canadian Food Inspection

On 22 June 2015, “[a] number of animal rights protestors gathered on [a Toronto] traffic island”<sup>15</sup> beside a truck carrying 190 pigs to an adjacent slaughterhouse — a “fairly routine event at that intersection.”<sup>16</sup> The activists, members of the Save Movement,<sup>17</sup> regularly gather outside of industrial slaughterhouses in order to “bear witness” to the suffering of industrially farmed animals, and to bring them some comfort,<sup>18</sup> in the form of water or gentle words and gestures, before they enter the facility to be slaughtered. The practices of the Save Movement, which began in Toronto in 2011 and has expanded to more than 165 groups around the world,<sup>19</sup> include: “making visible the spaces where killing takes place and the structural means by which consumer cultures aid and abet that killing ... [and sharing] audio and visual recordings from the vigils via social media to broader audiences.”<sup>20</sup> Following a verbal confrontation between one of the protesters (Anita Krajnc, the founder of the Save Movement) and a truck driver that day, Krajnc was subsequently charged with the criminal offence of mischief. After a week-long trial in 2016, Krajnc was eventually acquitted of the charge,<sup>21</sup> confirming the group and its supporters’ mantra, “compassion is not a crime.”<sup>22</sup>

In June 2014, CTV Vancouver aired “shocking video” of “horrific animal abuse”<sup>23</sup> at “the largest dairy barn in Canada.”<sup>24</sup> The video showed “cows being whipped and beaten with chains and canes, as well as punched and kicked” and “cows suffering from open wounds and injuries, and being lifted by their necks with chains and tractors.”<sup>25</sup> The footage was shot by a former employee of the farm, on behalf the animal rights advocacy group, Mercy For Animals.<sup>26</sup> In addition to criminal charges against the perpetrators of abuse,<sup>27</sup> the investigation and resulting media coverage led to boycotts<sup>28</sup> and hastened industry reform.<sup>29</sup>

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Agency. See “Animal Justice Files False Advertising Complaint Against King Cole Ducks for Animal Cruelty Cover-Up,” online: <[www.animaljustice.ca/blog/animal-justice-files-false-advertising-complaint-against-king-cole-ducks-for-animal-cruelty-cover-up](http://www.animaljustice.ca/blog/animal-justice-files-false-advertising-complaint-against-king-cole-ducks-for-animal-cruelty-cover-up)>. See also Letter from Kaitlyn Mitchell, Staff Lawyer, Animal Justice to the Canadian Food Inspection Agency and the Competition Bureau of Canada re: King Cole Ducks Ltd’s False, Deceptive and Misleading Advertising Claims Contrary to the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act*, and the *Competition Act* (16 April 2020), online: <[animaljustice.ca/wp-content/uploads/2020/04/2020-04-14-King-Cole-Ducks-False-Advertising-Complaint-FINAL.pdf](http://animaljustice.ca/wp-content/uploads/2020/04/2020-04-14-King-Cole-Ducks-False-Advertising-Complaint-FINAL.pdf)>.

<sup>15</sup> *R v Krajnc*, 2017 ONCJ 281 at para 2 [*Krajnc*].

<sup>16</sup> *Ibid* at para 3.

<sup>17</sup> *Ibid* at para 91.

<sup>18</sup> See Anita Krajnc, “Bearing Witness: Is Giving Thirsty Pigs Water Criminal Mischief or a Duty?” (2017) 23:2 *Animal L* 479 at 494.

<sup>19</sup> *Ibid* at 481.

<sup>20</sup> Maneesha Deckha, “The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law” (2019) 5 *Can J Comparative & Contemporary L* 77 at 82.

<sup>21</sup> See *Krajnc*, *supra* note 15 at para 143.

<sup>22</sup> See *Krajnc*, *supra* note 18 at 493.

<sup>23</sup> “‘Horrific’ Abuse of Cows at B.C. Dairy Farm Caught on Video,” *CTV News* (9 June 2014), online: <[www.ctvnews.ca/canada/horrific-abuse-of-cows-at-b-c-dairy-farm-caught-on-video-1.1860892](http://www.ctvnews.ca/canada/horrific-abuse-of-cows-at-b-c-dairy-farm-caught-on-video-1.1860892)>.

<sup>24</sup> Kelsey Johnson, “Dairy Community Shocked by B.C. Abuse Allegations,” *iPolitics* (10 June 2014), online: <[ipolitics.ca/2014/06/10/dairy-community-responds-with-shock-to-b-c-abuse-allegations/](http://ipolitics.ca/2014/06/10/dairy-community-responds-with-shock-to-b-c-abuse-allegations/)>.

<sup>25</sup> “Chilliwack Cattle Sales to Fire 8 Workers Caught on Tape Abusing Cows,” *CBC News* (9 June 2014), online: <[www.cbc.ca/news/canada/british-columbia/chilliwack-cattle-sales-to-fire-8-workers-caught-on-tape-abusing-cows-1.2670098](http://www.cbc.ca/news/canada/british-columbia/chilliwack-cattle-sales-to-fire-8-workers-caught-on-tape-abusing-cows-1.2670098)>.

<sup>26</sup> *Ibid*.

<sup>27</sup> See *R v Blackwell and Larson*, 2017 BCPC 228; *R v Keefer, Vandyk and Visser*, 2017 BCPC 142.

<sup>28</sup> See Mike Clarke, “Chilliwack Cattle Sales Boycott Threatened over Animal Abuse Video,” *CBC News* (15 June 2014), online: <[www.cbc.ca/news/canada/british-columbia/chilliwack-cattle-sales-boycott-threatened-over-animal-abuse-video-1.2676340](http://www.cbc.ca/news/canada/british-columbia/chilliwack-cattle-sales-boycott-threatened-over-animal-abuse-video-1.2676340)>.

<sup>29</sup> Jennifer Feinberg, “Dairy Industry Reacts to Animal Abuse Charges Against Massive Chilliwack Dairy Farm,” *Cloverdale Reporter* (4 March 2016), online: <[www.cloverdalereporter.com/news/dairy-industry-reacts-to-animal-abuse-charges-against-massive-chilliwack-dairy-farm/](http://www.cloverdalereporter.com/news/dairy-industry-reacts-to-animal-abuse-charges-against-massive-chilliwack-dairy-farm/)>; Susan Mann, “New Canadian Dairy Program Will Prohibit Tail Docking,” online: <[www.betterfarming.com/online-news/new-canadian-dairy-program-will-prohibit-tail-docking-61375](http://www.betterfarming.com/online-news/new-canadian-dairy-program-will-prohibit-tail-docking-61375)>.

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Farm occupations, covert rescues, protests, and undercover investigations by animal rights activists are neither novel nor isolated incidents. For years, animal rights activists (as well as journalists, novelists, and scholars) have entered industrial farms and slaughterhouses to document practices that cause immense physical and psychological suffering to animals and to expose those practices, and the associated suffering, to the broader public.<sup>30</sup> In the United States, “[s]ince at least the Industrial Revolution,” the products of undercover investigations and exposés “have played a central role in allowing the American public and the political branches of government access to the closed-door goings on of certain industries.”<sup>31</sup> In North America, “there have been more than 100 such undercover investigations of livestock farms conducted” since 1998.<sup>32</sup> Research from the US suggests that “the work of these investigative groups is emerging as the ‘primary information source’ about animal welfare for consumers,”<sup>33</sup> in large part because “[p]ublic relations campaigns by the industry tell only one side of the story.”<sup>34</sup> Thus, where public access to knowledge about food production is concerned, “there is no viable alternative to an undercover investigation of the commercial agricultural industry.”<sup>35</sup> In short, animal rights activism — in the form of farm occupations, protests, undercover investigations, and the resulting exposés — produces information that is otherwise kept hidden and that is crucial to public discourse on society’s treatment of animals and on the ethics and morality of meat consumption and food production methods. In recent months, however, following in the footsteps of the US, Canadian legislatures have begun to buckle down on these activities by prohibiting the conduct necessary to produce information about industrial farming and, in consequence, stifling the spread of the information that that conduct uncovers.

This article critically examines legislation that was recently adopted in two Canadian jurisdictions prohibiting activities such as trespass onto agricultural animal operations, gaining entry onto farms using false pretences, and interfering with the transport of farmed animals to slaughter. Known as ag-gag (agricultural gag) laws,<sup>36</sup> similar legislation has been adopted, and deemed unconstitutional, in a number of American jurisdictions.<sup>37</sup> This article sketches out part of the analytical framework for evaluating the constitutionality of ag-gag

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<sup>30</sup> See e.g. Ted Conover, “The Way of All Flesh: Undercover in an Industrial Slaughterhouse,” online: <harpers.org/archive/2013/05/the-way-of-all-flesh/>; Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (New Haven: Yale University Press, 2011).

<sup>31</sup> Alan K Chen & Justin Marceau, “High Value Lies, Ugly Truths, and the First Amendment” (2015) 68:6 Vand L Rev 1435 at 1455. See also Upton Sinclair, *The Jungle* (New York: Doubleday, 1906).

<sup>32</sup> JA Robbins et al, “Awareness of Ag-gag Laws Erodes Trust in Farmers and Increases Support for Animal Welfare Regulations” (2016) 61 Food Policy 121 at 121.

<sup>33</sup> Chen & Marceau, *supra* note 31 at 1468.

<sup>34</sup> See *ibid*: “Organized farm tours and carefully chaperoned visits will not produce the same accurate images or truthful information that has become the centerpiece of the American debate on farmed animal welfare.”

<sup>35</sup> *Ibid*.

<sup>36</sup> See Mark Bittman, “Who Protects the Animals?” *The New York Times* (26 April 2011), online: <opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

<sup>37</sup> See Amanda S Whitford, “Animal Welfare Law, Policy and the Threat of ‘Ag-gag’: One Step Forward, Two Steps Back” (2019) 3 Food Ethics 77; Meredith Kaufman, “The Clash of Agricultural Exceptionalism and the First Amendment: A Discussion of Kansas’ Ag-Gag Law” (2019) 15:1 J Food L & Policy 49; *Animal Legal Defense Fund v Wasden*, 878 F(3d) 1184 (9th Cir 2018) [*Wasden*]; *Animal Legal Defense Fund v Herbert*, 263 F Supp (3d) 1193 (D Utah 2017) [*Herbert*]; *Animal Legal Defense Fund v Reynolds*, 353 F Supp (3d) 812 (SD Iowa 2019) [*Reynolds*]; *Western Watersheds Project v Michael*, 353 F Supp (3d) 1176 (D Wyo 2018) [*Michael*]; *Animal Legal Defense Fund v Schmidt*, 434 F Supp (3d) 974 (Kan Dist Ct 2020) [*Schmidt*].

legislation in the Canadian context. The first part sets out the legislative background, breaking down the legislation in Alberta and Ontario, and describes the legal treatment of farmed animals in Canada. The next part then argues that the legislation constitutes a limit to the right to freedom of expression protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>38</sup> It suggests that the activities in question constitute protected expression of the highest magnitude and that the legislation accordingly limits expressive conduct, both with respect to entry onto farms and interference with transport vehicles. In consequence, the legislation merits careful scrutiny by legislators considering ag-gag legislation in their jurisdictions and, where legislation in force is challenged, by the courts.

The analysis draws on case law and literature interpreting section 2(b) of the *Charter* and engages with scholarship related to animal rights activism, American ag-gag legislation, and feminist animal studies to argue that ag-gag laws unequivocally constitute a violation of the fundamental freedoms protected by the Canadian *Charter*. The article is primarily doctrinal in nature, as it is based on case law and legislation. New in Canada, ag-gag legislation has not received significant scholarly attention. Thus, in addition to providing the analytical framework with which to approach Canadian ag-gag legislation, this article fills an important gap in Canadian constitutional literature by contributing to the discourse on the constitutional dimensions of animal rights advocacy. Importantly, the article does not weigh in on the second part of the constitutional analysis — that is, whether Canadian ag-gag legislation, assuming it does constitute a limit to fundamental freedoms, may be “justified in a free and democratic society,” pursuant to section 1 of the *Charter* and the *R. v. Oakes* test.<sup>39</sup> Before addressing that question in subsequent work, it is worth making explicit that the activities targeted by Canadian ag-gag are in fact protected; while the prohibition on entry under false pretences clearly engages section 2(b), the same is not immediately obvious regarding prohibitions on interacting with animals in transport — a fundamental feature of expression by members of the Save Movement. Thus, this article illustrates the capacity of animal rights activism, in a variety of forms, to promote democratic and constitutional values.

## II. CONTEXT: THE BACKGROUND AND LEGISLATIVE RESPONSE TO FARM OCCUPATIONS AND THE SAVE MOVEMENT

This part examines the current Canadian landscape where ag-gag legislation is concerned, looking closely at the recently adopted legislation. Further, it briefly explains the legislative context surrounding the welfare of farmed animals, insofar as that context forms part of the motivation behind animal rights activism in Canada. Lastly, it touches on the American situation, given that Canadian legislation mirrors legislation deemed unconstitutional in the US.

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<sup>38</sup> Section 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>39</sup> *Ibid*, s 1; *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

## A. ALBERTA

In November 2019, legislators in Alberta introduced Bill 27, the *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act, 2019*.<sup>40</sup> For present purposes, the most relevant effect of Bill 27 is to prohibit unauthorized entry onto private property, so that every person who enters “without the permission of the owner or occupier of the land if entry is prohibited ... or fail[s] to leave land immediately after being directed to do so by the owner or occupier of the land or a person authorized by the owner or occupier” is guilty of an offence.<sup>41</sup>

For an individual, regardless of whether any damage is caused to the premises, the penalty for a first offence is a fine of up to \$10,000, up to \$25,000 for a second offence, and imprisonment for up to six months or both.<sup>42</sup> For their part, corporations are subject to fines of up to \$200,000 for trespass itself, or for counselling or aiding in the commission of an offence, whether or not the offence takes place.<sup>43</sup>

From a constitutional division of powers perspective, Alberta is within its jurisdiction over “Property and Civil Rights in the Province” to enact fines for trespass onto private property.<sup>44</sup> But the division of legislative powers does not immunize legislation from *Charter* scrutiny, where it restricts or punishes the utterance of specific words or spoken messages. Bill 27 does precisely this where it states: “[f]or the purposes of [the trespass provision], a person who obtains by false pretences permission to enter on land from the owner or occupier of the land is deemed to have entered on the land without permission.”<sup>45</sup> Accordingly, an individual who lies or omits information in order to gain entry onto a farm, and is permitted to enter based on that lie or omission, is deemed to have trespassed and is subject to the applicable penalty. In other words, Bill 27 effectively prohibits the undercover investigation of a privately owned facility, whether by an animal rights activist, as was the case in Chilliwack, set out earlier, an undercover journalist, or anyone else.

Bill 27 progressed from first reading through third reading in a short nine days, receiving royal assent just eight days later, so it is difficult to uncover the motivations behind its adoption with any real certainty. But the *Hansard* does contain some explanations, including the intention to make “sure that property rights are respected in the province of Alberta [and] that landowners can feel safe in their homes knowing that law-abiding citizens are protected.”<sup>46</sup> Moreover, the introduction of Bill 27 was preceded by a discussion of “Animal

<sup>40</sup> 1st Sess, 30th Leg, Alberta, 2019 (assented to 5 December 2019), SA 2019, c 23 [Bill 27 (Alta)].

<sup>41</sup> *Ibid*, s 3(2)(a) (amending ss 2(1)(a)–(b) of the *Petty Trespass Act*, RSA 2000, c P-11). Section 5(2) of the Bill also amends the *Trespass to Premises Act*, RSA 2000, c T-7, ss 2–3 to similar effect.

<sup>42</sup> *Trespass to Premises Act*, *ibid*, s 3(1).

<sup>43</sup> *Ibid*, s 3(2).

<sup>44</sup> See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5. It is worth noting, however, that provincial legislatures may not, in the guise of regulating within their legitimate jurisdictions, adopt criminal legislation, which is the exclusive power of the federal government. See *R v Morgentaler*, [1993] 3 SCR 463. While this article is limited to the *Charter* implications of ag-gag legislation, future work might consider the constitutionality of provincial ag-gag laws pursuant to the constitutional division of legislative powers.

<sup>45</sup> Bill 27 (Alta), *supra* note 40, s 3(2) (amending *Petty Trespass Act*, s 2(2.4)). See also section 5(2) (amending *Trespass Premises Act*, s 2(4)): “a person who enters on premises having obtained by false pretences permission to enter on the premises from the owner of the premises or an authorized representative of the owner of the premises is deemed to have trespassed on the premises.”

<sup>46</sup> Alberta, Legislative Assembly, *Hansard*, 30-1 (19 November 2019) at 2336 (Doug Schweitzer).

Rights Activist Farm and Ranch Protests.”<sup>47</sup> That discussion referred to the need to protect business owners like turkey farmers and included the following statements by the Member of the Legislative Assembly for Banff-Kananaskis, where, just days before the introduction of the Bill, animal rights activists occupied a sled dog facility:

[I]llegal invasion of private property is dangerous to business owners and animals that live and work on these properties and it’s harassing to property owners and ... we cannot allow facilities like [the sled dog tour operator] to become unfair targets of radical activists.

...

[It] seems that protestors are feeling emboldened lately when it comes to demonstrating on and illegally occupying private property all the while slandering and spreading false narratives about innocent business owners.<sup>48</sup>

One other legislative development in Alberta merits attention. In May 2020, Alberta adopted Bill 1, the *Critical Infrastructure Defence Act*.<sup>49</sup> Similar to Bill 27, the *Act* aims to reinforce “public safety” and to “strengthen penalties against those who would lawlessly trespass or jeopardize public safety by seeking to block critical public infrastructure, including roadways, railways, and other important infrastructure.”<sup>50</sup> Like Bill 27, it too targets activism: “[i]t increases the dissuasive effect of law against those who would seek to hold us all jeopardy to their [referring to protestors and activists] radical demands.”<sup>51</sup> Instead of being limited to private property, however, Bill 1 prohibits the wilful obstruction, interruption, or interference with “any essential infrastructure”<sup>52</sup> — the definition of which includes highways and agricultural operations.<sup>53</sup> Bill 1 provides for the same maximum penalties as Bill 27, but also includes a mandatory minimum fine of \$1,000 for a first and subsequent offence on the same premises.<sup>54</sup> Although Bill 1 was introduced primarily in response to blockades by “green zealots and eco radical thugs” opposed to pipeline development and oil and gas extraction,<sup>55</sup> the breadth of the bill means that it could easily capture farm occupations and the types of activities carried out by the Save Movement, set out in the Introduction.

## B. ONTARIO

In December 2019, the Ontario Minister of Agriculture, Food and Rural Affairs introduced Bill 156, *An Act to protect Ontario’s farms and farm animals from trespassers and other*

<sup>47</sup> *Ibid* at 2335.

<sup>48</sup> *Ibid* (Miranda Rosin).

<sup>49</sup> 2nd Sess, 30th Leg, Alberta, 2020 (assented to 17 June 2020), SA 2020, c C-32.7 [Bill 1 (Alta)].

<sup>50</sup> Alberta, Legislative Assembly, *Hansard*, 30-2 (25 February 2020) at 4 (Premier Jason Kenney).

<sup>51</sup> *Ibid*.

<sup>52</sup> Bill 1 (Alta), *supra* note 49, s 2.

<sup>53</sup> *Ibid*, s 1.

<sup>54</sup> *Ibid*, s 3.

<sup>55</sup> Alberta, Legislative Assembly, *Hansard*, 30-2 (26 February 2020) at 12 (Michaela Glasgo).

forms of interference and to prevent contamination of Ontario's food supply.<sup>56</sup> Per the Minister's introduction of the legislation at first reading:

The bill is intended to protect farm animals, the food supply, farmers and others from risks that are created when trespassers enter places where farm animals are kept or when persons engage in unauthorized interactions with farm animals. The risks include the risk of exposing farm animals to disease and stress, as well as the risk of introducing contaminants into the food supply.<sup>57</sup>

With respect to trespass, Bill 156 is similar to Alberta's Bill 27, insofar as it creates offences and severe penalties for unauthorized entry and invalidates consent to enter based on false pretences.<sup>58</sup> In Ontario, entry under false pretences "in the prescribed circumstances or for the prescribed reasons" is deemed trespass.<sup>59</sup> Ontario's legislation is, in some respects, more limited than Alberta's, and in others, more far-reaching. On one hand, Bill 156 targets only the food supply; it prohibits unauthorized entry into an "animal protection zone," defined, "with respect to a farm, animal processing facility or prescribed premises," as "an area on the farm, facility or premises on which farm animals may be kept or located," whether or not the zone has been identified with specific signage.<sup>60</sup> It is also an offence to deface, damage, or remove a sign identifying an animal protection zone.<sup>61</sup> On the other hand, Bill 156 goes further than Alberta's law by creating prohibitions related to the transportation of farmed animals, thus covering the same activities as Alberta's Bill 1. These include prohibitions on "stop[ping], hinder[ing], obstruct[ing] or otherwise interfer[ing] with a motor vehicle transporting farm animals,"<sup>62</sup> and on "interfer[ing] or interact[ing] with a farm animal being transported by a motor vehicle without the prior consent of the driver of the motor vehicle."<sup>63</sup> In sum, by covering farms, processing facilities, and transportation, Ontario's legislation aims to put a stop to farm occupations and protests by animal rights activists, undercover investigations by activists and journalists, and the activities of the Save Movement.

In June 2020, Ontario's Standing Committee on General Government held two days of virtual committee hearings, where animal rights activists, animal rights lawyers, legal experts, and agriculture industry stakeholders testified.<sup>64</sup> Animal rights activists, lawyers, and legal experts were unanimous in their view that the legislation would stifle activists' ability

<sup>56</sup> 1st Sess, 42nd Leg, Ontario, 2020 (assented to 18 June 2020), SO 2020, c 9 [Bill 156 (Ont)].

<sup>57</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42-1, No 134 (2 December 2019) at 6522 (Ernie Hardeman).

<sup>58</sup> Importantly, however, the Ontario legislation does not provide for the possibility imprisonment or for an increased penalty where an organization or corporation is involved in a trespass.

<sup>59</sup> Bill 156 (Ont), *supra* note 56, s 5(6). Regulations setting out "prescribed circumstances" and "prescribed reasons" are expected by the end of 2020. See Allison Devereaux, "Livestock Truckers Express Safety Concerns Outside Ontario Meat Processing Plants," *CBC News* (9 August 2020), online: <[www.cbc.ca/news/canada/london/livestock-truckers-express-safety-concerns-outside-ontario-meat-processing-plants-1.5673362?\\_vfz=medium%3Dsharebar](http://www.cbc.ca/news/canada/london/livestock-truckers-express-safety-concerns-outside-ontario-meat-processing-plants-1.5673362?_vfz=medium%3Dsharebar)>.

<sup>60</sup> Bill 156 (Ont), *ibid*, s 2.

<sup>61</sup> *Ibid*, s 5(7).

<sup>62</sup> *Ibid*, s 6(1).

<sup>63</sup> *Ibid*, s 6(2).

<sup>64</sup> Ontario, Legislative Assembly, Standing Committee on General Government, "Security from Trespass and Protecting Food Safety Act, 2020" *Official Report of Debates (Hansard)*, 42-1, No G-25 (8 June 2020) [Ont Standing Ctee G-25]; Ontario, Legislative Assembly, Standing Committee on General Government, "Security from Trespass and Protecting Food Safety Act, 2020" *Official Report of Debates (Hansard)*, 42-1, No G-26 (9 June 2020).



to express themselves and undercover investigators' ability to gain entry onto farms,<sup>65</sup> while industry representatives expressed support for the legislation. Despite the concerns expressed, Bill 156 received royal assent on June 18. At the time of writing,<sup>66</sup> Bill 156 is not yet in force and the government plans to seek public input on regulations in late August 2020.<sup>67</sup>

Since the adoption of Bill 156, demonstrations have increased in frequency, as have tensions between animal rights activists and supporters of animal agriculture.<sup>68</sup> On 19 June 2020, Regan Russell, a long-time animal rights activist and member of the Save Movement, was struck by a transport truck and killed while bearing witness outside of a Toronto slaughterhouse.<sup>69</sup> Many have drawn connections between Russell's death and the adoption of Bill 156.<sup>70</sup> Since then, supporters of animal agriculture have held counter-protests alongside Save Movement vigils, confronting activists, alleging that Russell committed suicide, and barbecuing hot dogs next to the trucks transporting pigs to slaughter.<sup>71</sup> Tensions surrounding this issue are clearly running high.

### C. OTHER JURISDICTIONS

This article focuses primarily on the legislation recently adopted in Alberta and Ontario, given its obvious interactions with *Charter* rights. Nevertheless, it is worth briefly mentioning related legislative moves throughout the country, given that, taken together, these novel anti-trespass statutes constitute an unprecedented move in strengthening political protections of an already powerful Canadian industry to the potential detriment of informed popular discourse on a matter of fundamental public importance. Moreover, for legislatures currently contemplating similar bills, the analysis contained here might prove useful in highlighting the potential constitutional problems with ag-gag legislation.

As in Alberta and Ontario, strengthened anti-trespass legislation has been introduced in British Columbia and at the federal level. British Columbia's Bill M 227, *Trespass Amendment Act, 2019*, imposes strict penalties for trespassing on or contaminating a "food establishment," which is defined as "any place where, or any vehicle in which, in the ordinary course of business, food is grown, raised, cultivated, kept, harvested, produced,

<sup>65</sup> In the interests of transparency, I must disclose that I was among the participants expressing the view that the legislation would not survive a constitutional challenge. See Ont Standing Ctee G-25, *ibid* at G-606.

<sup>66</sup> August 2020.

<sup>67</sup> Devereaux, *supra* note 59.

<sup>68</sup> *Ibid.*

<sup>69</sup> Liam Casey & Nicole Thompson, "Animal Rights Activist Regan Russell Fatally Hit By Truck While Protesting Outside Pig Slaughterhouse," *Huffington Post* (19 June 2020), online: <[www.huffingtonpost.ca/entry/regan-russell-animal-rights-dead\\_ca\\_5eed3d5ac5b60982f6f5c1de](http://www.huffingtonpost.ca/entry/regan-russell-animal-rights-dead_ca_5eed3d5ac5b60982f6f5c1de)>.

<sup>70</sup> See e.g. Devereaux, *supra* note 59; Jessica Scott-Reid, "Animal Rights Activist Regan Russell, 65, Died Trying to Expose What Bill 156 Will Hide," *The Star* (23 June 2020), online: <[www.thestar.com/opinion/contributors/2020/06/23/animal-activist-died-trying-to-expose-what-bill-156-will-hide.html?fbclid=IwAR3xLiMQEoWyEs6oihIrVcrD-T6SMPatStFcZfvkNTtKaVVmcFL9KBqNZfg](http://www.thestar.com/opinion/contributors/2020/06/23/animal-activist-died-trying-to-expose-what-bill-156-will-hide.html?fbclid=IwAR3xLiMQEoWyEs6oihIrVcrD-T6SMPatStFcZfvkNTtKaVVmcFL9KBqNZfg;)>; Samantha Craggs, "'My Life Ended' Friday: Regan Russell's Supporters Want Justice, Bill 156 Overturned," *CBC News* (26 June 2020), online: <[www.cbc.ca/news/canada/hamilton/regan-russell-1.5627216](http://www.cbc.ca/news/canada/hamilton/regan-russell-1.5627216)>; Jon Wells, "The Idealistic Life and Violent Death of Hamilton Animal Rights Champion Regan Russell," *The Star* (2 August 2020), online: <[www.thestar.com/news/insight/2020/08/02/the-idealistic-life-and-violent-death-of-hamilton-animal-rights-champion-regan-russell.html](http://www.thestar.com/news/insight/2020/08/02/the-idealistic-life-and-violent-death-of-hamilton-animal-rights-champion-regan-russell.html)>.

<sup>71</sup> See Devereaux, *supra* note 59; Jenny McQueen, "Regan's Violent Death" (4 August 2020), posted on *Jenny McQueen*, online: <[www.facebook.com/photo?fbid=10164250207970615&set=pcb.10164250209750615](https://www.facebook.com/photo?fbid=10164250207970615&set=pcb.10164250209750615)> (showing signs held by counter-protestors).

manufactured, slaughtered, processed, prepared, packaged, distributed, transported or sold, or is stored or handled for any purpose.”<sup>72</sup> Bill M 227 was introduced for first reading in October 2019.<sup>73</sup> At the federal level, Bill C-205, was introduced for first reading in February 2020.<sup>74</sup> *An Act to amend the Health of Animals Act* creates the offence, punishable on summary conviction or indictment, of “exposure of the animals to a disease or toxic substance,” which prohibits entering a place where animals are kept, “knowing that or being reckless as to whether entering such a place could result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them.”<sup>75</sup> The motion to introduce the Bill referred specifically to the pig farm occupation south of Montreal, mentioned in the Introduction, and to the “numerous protests on farm property and process plants across this country.”<sup>76</sup>

In Manitoba, ministerial mandate letters to both the Minister of Agriculture and Resource Development and the Minister of Justice, issued in early March 2020, contained instructions to “review legislation and enforcement policies relating to on-farm trespassing.”<sup>77</sup> Finally, following the pig farm occupation detailed above, and at the urging of Quebec’s *Union des producteurs agricoles* (the province’s association of agricultural producers),<sup>78</sup> the Government of Quebec announced the establishment of a working group to study how other Canadian jurisdictions have approached animal rights activism on private property.<sup>79</sup>

## D. FARMED ANIMAL WELFARE IN CANADA

This article explores the *Charter* implications of ag-gag laws in Canada. It is not a study of animal welfare on Canadian farms. However, a basic understanding of the realities of industrial animal farming in Canada helps to illustrate why the messages of animal rights activists merit constitutional protection. In Canada, there is no federal law governing the conditions in which animals destined for consumption are bred, raised, or housed. While the *Criminal Code* contains prohibitions on animal cruelty,<sup>80</sup> it is well-known that the language of the *Criminal Code*, which applies to “wilfully [causing] unnecessary ... suffering,”<sup>81</sup> is

<sup>72</sup> 4th Sess, 41st Leg, British Columbia, 2019, s 1 (amending *Trespass Act*, SBC 2018, c 3, s 1(a)).  
<sup>73</sup> “Progress of Bills,” online: <[www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/progress-of-bills](http://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/progress-of-bills)>.

<sup>74</sup> *An Act to amend the Health of Animals Act*, 1st Sess, 43rd Parl, 2020 (first reading 18 February 2020).  
<sup>75</sup> *Ibid*, s 1 (amending the *Health of Animals Act*, SC 1990, c 21, s 9.1).

<sup>76</sup> *House of Commons Debates*, 43-1, Vol 149, No 18 (18 February 2020) at 1118 (Hon John Barlow).

<sup>77</sup> Letter from Premier Brian Pallister to the Honourable Blaine Pedersen, Minister of Agriculture and Resource Development (3 March 2020), online: <[www.gov.mb.ca/asset\\_library/en/executive\\_council/mandate/2020/ard\\_mandate.pdf](http://www.gov.mb.ca/asset_library/en/executive_council/mandate/2020/ard_mandate.pdf)>.

<sup>78</sup> See Daphné Cameron, “Occupation d’une porcherie: ‘Nos truies sont fiévreuses et malades,’” *La Presse* (29 January 2020), online: <[www.lapresse.ca/actualites/2020-01-29/occupation-d-une-porcherie-nos-truies-sont-fievreuses-et-malades](http://www.lapresse.ca/actualites/2020-01-29/occupation-d-une-porcherie-nos-truies-sont-fievreuses-et-malades)>.

<sup>79</sup> See Daphné Cameron, “Antispécisme: un groupe de travail pour empêcher d’autres infractions,” *La Presse* (22 January 2020), online: <[www.lapresse.ca/actualites/2020-01-22/antispecisme-un-groupe-de-travail-pour-empêcher-d-autres-infractions?fbclid=IwAR1S\\_zNbuKwD11IaltBuEm2-PQwoD14FcU-xL5Y6qppB6vIxMC6RDNpM96k%3E](http://www.lapresse.ca/actualites/2020-01-22/antispecisme-un-groupe-de-travail-pour-empêcher-d-autres-infractions?fbclid=IwAR1S_zNbuKwD11IaltBuEm2-PQwoD14FcU-xL5Y6qppB6vIxMC6RDNpM96k%3E)>. See also Alexia Renard, “As Vegan Activism Grows, Politicians Aim to Protect Agri-Business, Restaurateurs,” *The Conversation* (23 February 2020), online: <[theconversation.com/as-vegan-activism-grows-politicians-aim-to-protect-agri-business-restaurateurs-131184](http://theconversation.com/as-vegan-activism-grows-politicians-aim-to-protect-agri-business-restaurateurs-131184)>.

<sup>80</sup> RSC 1985, c C-46, s 445.1.

<sup>81</sup> *Ibid*, s 445.1(1)(a).

generally not interpreted to capture standard agricultural industry practices.<sup>82</sup> Accordingly, “[m]any standard practices in factory farming, including tail docking, castration, beak cutting, and confinement in extremely small spaces, [which] involve severe suffering for animals,” are not considered criminal offences in Canada, where they are carried out in the industrial context.<sup>83</sup>

The constitutional division of powers in Canada means that jurisdiction over animals is shared, so that each province has its own statute governing animal protection, which typically prohibits causing an animal to be in distress.<sup>84</sup> While the details vary from province to province, what the provincial statutes have in common is an exemption, either express or implied, for agricultural or farming practices.<sup>85</sup> In some provinces, the exemption refers to industry codes of practice.<sup>86</sup> This is a reference to the National Farm Animal Care Council (NFACC), a group of industry stakeholders that produces non-binding codes of practice across animal agriculture sectors.<sup>87</sup> While the codes are an improvement over a complete absence of oversight and regulation on farms,<sup>88</sup> they endorse the propriety of the standard practices listed above,<sup>89</sup> essentially “[c]odifying the *status quo*.”<sup>90</sup> Moreover, given their non-legislated character, the codes are of “ambiguous legal status.”<sup>91</sup> In short, for proponents of the humane treatment of animals, the NFACC codes are of little consequence when it comes to the ongoing suffering that industrially farmed animals are forced to endure. As Lesli Bisgould writes:

The use of codes and generally accepted practices allows an industry which has broad effects on all animals ... to regulate many important aspects of its own behaviour in accordance with its own priorities.... Codes are used not only as a defence to any charge that might be laid, but more broadly to deflect growing criticism of intensive handling systems. In perpetuating this state of affairs, corporations have normalized a state of disgrace, and both federal and provincial governments have abdicated their responsibilities.<sup>92</sup>

<sup>82</sup> See Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 71; *R v Pacific Meat Company Limited* (1957) 24 WWR 37; Katie Sykes, “Rethinking the Application of Canadian Criminal Law to Factory Farming” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 33 at 33.

<sup>83</sup> Sykes, *ibid* at 35. See also Lesli Bisgould, Wendy King & Jennifer Stopford, “Anything Goes: An Overview of Canada’s Legal Approach to Animals on Factory Farms,” online: <www.animalalliance.ca/wp-content/uploads/2016/04/Anything-Goes.pdf>.

<sup>84</sup> See e.g. *Animal Protection Act*, SNS 2018, c 21 [*Nova Scotia APA*]; *Provincial Animal Welfare Services Act*, 2019, SO 2019, c 13 [*Ontario PAWS Act*]; *The Animal Care Act*, CCSM c A84 [*Manitoba ACA*].

<sup>85</sup> See e.g. *Manitoba ACA*, *ibid*, ss 3(2), 4; *Nova Scotia APA*, *ibid*, s 28(b); *Ontario PAWS Act*, *ibid*, s 13(2).

<sup>86</sup> See e.g. *Nova Scotia APA*, *ibid*.

<sup>87</sup> See online: *National Farm Animal Care Council* <www.nfacc.ca/> [NFACC].

<sup>88</sup> See Peter Sankoff, “Canada’s Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?” (2019) 5 Can J Comparative & Contemporary L 299.

<sup>89</sup> See Sykes, *supra* note 82. It is worth noting that many of the practices carried out on farmed animals, such as tail docking and confinement in very cramped spaces, could garner a prison sentence in some Canadian jurisdictions if carried out on a companion animal like a dog or cat. See e.g. *Nova Scotia APA*, *supra* note 84, ss 2(2)(c) (defining “distress” as a “[deprivation] of adequate ... space”), 27(2) (prohibiting tail docking).

<sup>90</sup> Bisgould, *supra* note 82 at 199.

<sup>91</sup> Sankoff, *supra* note 88 at 331. See also *ibid* at 316: “NFACC materials are ambiguous with respect to the legal force of the Codes. At times, the wording loosely refers to the Codes as ‘guidelines’ or ‘standards’, and it is very unusual to see any discussion of lawmaking, non-compliance or the potential for sanction.” Further, Sankoff explains that the failure to meet the standard set out in a Code of Practice does not, in itself, constitute an offence under most provincial acts or the *Criminal Code*. Rather, for charges to be successful, the prosecution must prove that an animal was suffering, or in distress. However, where distress or animal cruelty is alleged, adherence to a Code constitutes an acceptable defence (see *ibid* at 317–18).

<sup>92</sup> Bisgould, *supra* note 82 at 199–200.

To be clear, the welfare of industrially farmed animals is not entirely unregulated. The *Health of Animals Regulations*,<sup>93</sup> adopted under the federal *Health of Animals Act*,<sup>94</sup> set out the conditions in which animals are to be transported to slaughter. These regulations, which were amended in 2019, provide maximum intervals during which animals may be transported without food, water, and rest.<sup>95</sup> For all farmed animals aged eight days or younger, the maximum time is 12 hours.<sup>96</sup> The same goes for all “compromised” animals.<sup>97</sup> For ruminants, like cows and sheep, the maximum time is 36 hours without food, rest, or water.<sup>98</sup> For monogastric animals, such as horses and pigs, the maximum is 28 hours.<sup>99</sup> Hatchling birds may be transported for a maximum of 72 hours from the time they are hatched.<sup>100</sup> For “broiler chickens,”<sup>101</sup> “spent hens,”<sup>102</sup> and rabbits, the maximum is 24 hours without water and 28 hours without food.<sup>103</sup> Further, the regulations do not contain any concrete requirements with respect to temperature and weather conditions — a serious omission given the extreme temperatures experienced in Canada, in both summer and winter. Instead, the regulations prohibit transport “if the animal is likely to suffer, sustain an injury or die due to inadequate ventilation or by being exposed to meteorological or environmental conditions.”<sup>104</sup> Given the lack of material guidance as to what kind of exposure is enough to lead to suffering or death, it is difficult to seriously maintain that animals do not suffer when exposed to extreme weather while being transported long distances for extended periods of time in open-sided vehicles.<sup>105</sup> Indeed, 1.59 million animals per year “are reported as dead on arrival at their final destination.”<sup>106</sup> For these reasons, Canada has become notorious for

<sup>93</sup> CRC, c 296 (2020) [*Regulations*].

<sup>94</sup> SC 1990, c 21.

<sup>95</sup> *Regulations*, *supra* note 93, s 136–59.

<sup>96</sup> *Ibid*, s 141(1)(e).

<sup>97</sup> *Ibid*, s 152.2(1)(a). For the definition of “compromised animal,” see *ibid*, s 136(1):

[C]ompromised ... means an animal that (a) is bloated but has no signs of discomfort or weakness; (b) has acute frostbite; (c) is blind in both eyes; (d) has not fully healed after a procedure, including dehorning, detusking or castration; (e) is lame other than in a way that is described in the definition *unfit*; (f) has a deformity or a fully healed amputation and does not demonstrate signs of pain as a result of the deformity or amputation; (g) is in a period of peak lactation; (h) has an unhealed or acutely injured penis; (i) has a minor rectal or minor vaginal prolapse; (j) has its mobility limited by a device applied to its body including hobbles other than hobbles that are applied to aid in treatment; (k) is a wet bird; or (l) exhibits any other signs of infirmity, illness, injury or of a condition that indicates that it has a reduced capacity to withstand transport.

<sup>98</sup> *Ibid*, s 152.2(1)(d).

<sup>99</sup> *Ibid*, s 152.2(1)(c).

<sup>100</sup> *Ibid*, s 152.2(2).

<sup>101</sup> Broiler chickens are chickens who are raised for meat. See “Trade: Chicken Imported as Spent Fowl,” online: <[www.chickenfarmers.ca/spent-fowl/](http://www.chickenfarmers.ca/spent-fowl/)>.

<sup>102</sup> Spent laying hens are hens whose egg-laying productivity has declined and who are usually killed and processed for meat. See *ibid*.

<sup>103</sup> *Regulations*, *supra* note 93, s 152.2(1)(b).

<sup>104</sup> *Ibid*, s 146. In other words, Canada’s regulations are “outcome-based.” Instead of providing firm guidance on density and environmental conditions, they allow animals “to be transported based solely on predicted compatibility of the animals so as not to cause death or injury during transportation.” See Maureen Harper, “Legalized Cruelty: The Gaps in Canada’s Animal Transport Laws,” *iPolitics* (26 May 2017), online: <[ipolitics.ca/2017/05/26/legalized-cruelty-the-gaps-in-canadas-animal-transport-laws/](http://ipolitics.ca/2017/05/26/legalized-cruelty-the-gaps-in-canadas-animal-transport-laws/)>:

[I]t can be extremely difficult to predict the compatibility of animals prior to them being transported. There are no prescribed measures for loading densities of animals, required ventilation, temperature, etc. Outcome-based regulations serve to allow industry more leeway and make it very difficult for the CFIA [Canadian Food Inspection Agency] to admonish the parties responsible for injuries and deaths of animals being transported.

<sup>105</sup> See e.g. *R v Maple Lodge Farms*, 2013 ONCJ 535 (detailing the deaths of more than 25,000 birds from exposure to cold temperatures or improper ventilation).

<sup>106</sup> Regulatory Impact Analysis Statement, (2019) C Gaz II, 285 at 289 (published following *Regulations Amending the Health of Animals Regulations*, SOR/2019-385).

having the worst industrial animal transport regulations in the developed world.<sup>107</sup> It is easy to appreciate both the desire of animal rights activists to share this information as a means of garnering support for the goal of effecting change to society's use and treatment of farmed animals and the political dimensions of animal rights activism, elaborated on below.

## E. AG-GAG IN THE UNITED STATES

Ag-gag laws are not unique to Canada. Legislation aimed at protecting industrial animal agriculture goes back decades, at least, in the US.<sup>108</sup> The term "ag-gag" was coined by *New York Times* columnist Mark Bittman in 2011.<sup>109</sup> More recently, American legal scholar Justin Marceau described ag-gag legislation as "anti-animal rights and anti-food justice laws," that can be broken down into three distinct waves or eras, going back to the mid-1990s,<sup>110</sup> all of which "share a common purpose: incapacitating an increasingly influential movement — the animal rights movement."<sup>111</sup> Indeed, since its inception, American ag-gag legislation has functioned as a response to undercover investigations of animal-use facilities and their consequences, such as boycotts and animal-friendly legislative reforms.<sup>112</sup> Most relevant to the Canadian context are laws that criminalize what Marceau and Alan Chen refer to as "investigative deceptions," defined as "intentional, affirmative misrepresentations or omissions about one's political or journalistic affiliations, educational backgrounds, or research, reportorial, or political motives to facilitate gaining access to truthful information on matters of substantial public concern."<sup>113</sup> Investigative deceptions are, in other words, the types of statements targeted by the "false pretences" provisions of the Canadian legislation that is the subject of this article.<sup>114</sup>

<sup>107</sup> See Holly Lake, "New Animal Transport Regulations Panned by Advocates," *iPolitics* (20 February 2019), online: <ipolitics.ca/2019/02/20/new-animal-transport-regulations-panned-by-advocates/> (citing a veterinarian with thirty years' experience working for the CFIA, the agency responsible for creating and monitoring animal transport regulations, calling the regulations, amended in 2019, "a huge disappointment" aimed at placating the animal agriculture industry). See also Harper, *supra* note 104:

In my opinion, Canada has the worst animal transport regulations amongst developed nations. This is based on current allowable maximum transport times for all animals. And unfortunately, the proposed changes will still leave Canada in this unenviable position. Canadians expect far more of their government with respect to protection of animal welfare, and our animals deserve far better.

See also Holly Lake, "Advocates Call on CFIA to Get Moving on Animal Transport Regulations," *iPolitics* (6 February 2019), online: <ipolitics.ca/2019/02/06/advocates-call-on-cfia-to-get-moving-on-animal-transport-regulations/> (comparing Canada's regulations with the shorter maximum transport times in the European Union, New Zealand, Australia, and the US).

<sup>108</sup> See Howard F Lyman, "Free Speech, Animal Law, and Food Activism" (1999) 5 *Animal L i* (tracing early ag-gag laws in the US, and their precursors, known as food disparagement laws); Justin F Marceau, "Ag Gag Past, Present, and Future" (2015) 38:4 *Seattle UL Rev* 1317.

<sup>109</sup> Bittman, *supra* note 36.

<sup>110</sup> Marceau, *supra* note 108 at 1318. (The three waves are: (1) food disparagement laws, a form of anti-defamation legislation aimed specifically at protecting agricultural producers; (2) ag-gag laws, which "[criminalize] the acts of recording or the conduct preparatory to producing truthful speech about the production of our food" (*ibid*); and (3) what Marceau calls "Ag-Gag 2.0," consisting of further limits to suppressing activism, such as "the rise of quick report laws and the creative use of trespass laws to suppress information about public harms" (*ibid* at 1319). Quick report laws require any footage of animal cruelty on farms to be turned over to authorities immediately. They are thought to provide an air of enforcement, or condemnation of animal abuse, and, more troublingly, they prevent activists and journalists from collecting the footage needed to demonstrate repeated patterns of neglect and abuse.)

<sup>111</sup> *Ibid* at 1344.

<sup>112</sup> See *Herbert*, *supra* note 37 at 1196 for a judicial summary of the background to and history of American ag-gag legislation.

<sup>113</sup> Chen & Marceau, *supra* note 31 at 1438.

<sup>114</sup> See Bill 27 (Alta), *supra* note 40, ss 3(2), 5(2); Bill 156 (Ont), *supra* note 56, s 5(6).

As of 2019, at least 11 American jurisdictions had adopted some form of ag-gag legislation.<sup>115</sup> At least five of those laws have been ruled unconstitutional in whole or in part,<sup>116</sup> with at least four cases successfully challenging prohibitions on gaining entry onto a farm under false pretences as violations of the First Amendment right to free speech.<sup>117</sup> Moreover, while the constitutional analysis of the Canadian legislation may draw inspiration from American case law and scholarship, given the repeated challenges in the US, ag-gag is not limited to North America. Similar legislation exists in Australia, where “undercover surveillance has been used by animal protection agencies as a tool to improve animal welfare since at least the 1970’s,”<sup>118</sup> and 2019 saw an attempt to introduce a form of ag-gag legislation in France.<sup>119</sup>

Ag-gag legislation is a growing phenomenon, with clear implications for Canadian constitutional freedoms. Moreover, and beyond that primary concern, its associated harms may very well outweigh any purported benefits. Qualitative research in the US demonstrates that public awareness of ag-gag laws reduces trust in farmers.<sup>120</sup> Indeed, whereas trustworthiness depends in large part on “the extent to which individuals or organizations are perceived to be transparent about their practices,”<sup>121</sup> ag-gag legislation, by “criminalizing investigative deceptions,” aims to “shield from public scrutiny matters that are indisputably of public concern,”<sup>122</sup> thus completely limiting transparency where the treatment of industrially farmed animals is concerned. Moreover, as Amanda Whitfort writes, the case law in the US demonstrates that these laws are more of a risk to policy-makers than a solution to any perceived threat to the animal agriculture industry.<sup>123</sup> As explained, this article does not deal with justification under section 1 of the *Charter*. But the fact that ag-gag legislation limits transparency around the practices of industrial animal agriculture and, consequently, activists’ ability to obtain and share information is relevant to the idea that ag-gag legislation constitutes a limit to the kind of expression protected by section 2(b).

### III. AG-GAG LAWS VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION

This part draws on Canadian case law and scholarship to demonstrate that ag-gag laws not only violate the Canadian right to freedom of expression, but that they also strike at the very heart of the reason the Constitution protects free speech. Canadian scholarship on freedom of expression suggests that the *Charter* provision serves multiple interconnected purposes. On the one hand, its purposes are instrumental: the right to speak and listen freely is

<sup>115</sup> See Whitfort, *supra* note 37 at 78.

<sup>116</sup> See Kaufman, *supra* note 37, discussing four successful legal challenges: *Wasden*, *supra* note 37; *Herbert*, *supra* note 37; *Reynolds*, *supra* note 37; *Michael*, *supra* note 37. More recently, ag-gag legislation was struck down in Kansas. See *Schmidt*, *supra* note 37.

<sup>117</sup> See *Wasden*, *ibid*; *Herbert*, *ibid*; *Reynolds*, *ibid*; *Michael*, *ibid*.

<sup>118</sup> Whitfort, *supra* note 37 at 79. See *Biosecurity Act 2015* (NSW), 2015/24; *Biosecurity Act 2014* (Qld), 2014/7; *Surveillance Devices Act 2016* (SA), 2016/2.

<sup>119</sup> In France, a group of representatives at the National Assembly tabled an amendment to an Internet hate speech bill to include wording that would have included content critical of agricultural activity as a category of restricted speech. The amendment was ultimately unsuccessful. See France, *JO*, Assemblée nationale, *Amendement N°131 (Rect), Lutter haine internet, N° 2062*, 28 June 2019 (Rejeté), online: <[www.assemblee-nationale.fr/dyn/15/amendements/2062/AN/131](http://www.assemblee-nationale.fr/dyn/15/amendements/2062/AN/131)> (Amending projet de loi N° 2062).  
<sup>120</sup> Robbins et al, *supra* note 32.

<sup>121</sup> *Ibid* at 122.

<sup>122</sup> Chen & Marceau, *supra* note 31 at 1475.

<sup>123</sup> See Whitfort, *supra* note 37 at 78.

fundamental to a healthy democracy and the promotion of truth.<sup>124</sup> It is for this reason that political expression is said to lie “at the very heart of the values sought to be protected by ... [section] 2(b) of the Canadian *Charter*.”<sup>125</sup> On the other hand, expression has value for its own sake as it promotes the development of the autonomous individual.<sup>126</sup> Further, freedom of expression might be understood as fundamental to social life and community; without a listener, speech risks becoming meaningless.<sup>127</sup> “[D]eeply social in character,”<sup>128</sup> it is through expression that individuals are able to meaningfully participate in public discourse.<sup>129</sup> Moreover, the Supreme Court of Canada has identified three underlying values that freedom of expression is said to promote. Writing for a majority of the Supreme Court in the leading decision on the subject, Chief Justice Dickson summarized them as follows:

(1) [S]eeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.<sup>130</sup>

In *Irwin Toy*, the Supreme Court set out a framework for demonstrating a limit to section 2(b). Where the purpose of a limit is to restrict a particular message from being expressed — a content-based restriction — freedom of expression is *prima facie* limited and the burden shifts to the government to justify that limit.<sup>131</sup> Where a restriction is content-neutral — that is, where it is aimed at the physical consequences of the expression and not its specific message — a claimant must demonstrate that the effect of the impugned law is to prevent them from engaging with the underlying values of freedom of expression.<sup>132</sup> In other words, a claimant must demonstrate that the restriction has the effect of preventing them from seeking or attaining the truth, participating in social or political decision-making, or pursuing individual self-fulfillment and human flourishing.<sup>133</sup> The following parts break down the legislation to demonstrate that in both of its significant elements — prohibiting vigils or demonstrations outside of slaughterhouses and prohibiting entry based on false pretences — Canadian ag-gag legislation constitutes a *prima facie* (purpose-based) restriction on freedom of expression. Moreover, the kinds of speech targeted by ag-gag — speech by animal rights activists and those who seek to expose the violence of industrial animal agriculture — fulfill all of the underlying purposes of section 2(b) and accordingly merit the most robust constitutional protection.

<sup>124</sup> *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*].

<sup>125</sup> *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at para 29. See also *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 31, McLachlin CJC & Major J, dissenting (“political expression ... is the epitome of speech that furthers the aspirations of a democratic society”).

<sup>126</sup> See *Keegstra*, *supra* note 124 at 763; Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 3–4.

<sup>127</sup> See Richard Moon, “The Social Character of Freedom of Expression” (2009) 2:1 *Amsterdam L Forum* 43.

<sup>128</sup> *Ibid* at 43.

<sup>129</sup> *Ibid* at 44.

<sup>130</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 [*Irwin Toy*].

<sup>131</sup> *Ibid* at 974–75.

<sup>132</sup> *Ibid* at 974.

<sup>133</sup> *Ibid* at 976.

## A. SLAUGHTERHOUSE PROTESTS AND INTERFERENCE WITH A MOTOR VEHICLE

Ontario's Bill 156 makes it an offence to interfere with a motor vehicle transporting animals to slaughter. For its part, Alberta's revised anti-trespass statute, together with Bill 1, creates the same effective prohibition on protests by animal rights activists on public roads outside of slaughterhouses. It seems straightforward that restricting protest activities constitutes a *prima facie* limit to the *Charter* right to freedom of peaceful assembly, set out in section 2(c) of the *Charter*.<sup>134</sup> What is less clear is the relationship between the activities of protestors — bearing witness through vigils by members of the Save Movement — and the protection of freedom of expression. However, bearing witness to the suffering of industrially farmed animals is precisely the type of activity that section 2(b) is meant to protect.

The purpose of the transport-related provisions is to restrict a particular type of protest — vigils outside of slaughterhouses, regularly organized by the Save Movement. It is not, in other words, a content-neutral restriction. Indeed, in Ontario at least, the restriction is specific to spaces outside of animal-use facilities and to vehicles transporting animals; it does not extend to demonstrations on public roads more generally and it is clearly aimed at suppressing the expressive activity of members of the Save Movement. Whereas bearing witness involves speaking to, petting, and “[coming] as close as possible to the suffering of the animals,”<sup>135</sup> the legislation explicitly prohibits interactions with animals in transport.<sup>136</sup> This kind of targeted restriction on a specific expressive meaning is enough to make out a *prima facie* limit to freedom of expression. However, a government defending the constitutionality of the legislation might successfully argue that the limit is content-neutral and that it is aimed at protecting against the physical consequences of the expression — threats to biosecurity, contamination of the food system, and threats to the safety of animal transporters.<sup>137</sup> But while the purpose may be construed as constitutionally legitimate, the effects of the legislation impede activists' abilities to pursue the underlying values of freedom of expression.

As explained in the Introduction, the Save Movement, which organizes regular vigils outside of slaughterhouses around the world, has a number of core practices. Among them are the act of “making visible the spaces where killing takes place and the structural means by which consumer cultures aid and abet that killing ... [and sharing] audio and visual recordings from the vigils via social media to broader audiences.”<sup>138</sup> For members of the Save Movement, then, bearing witness to animals headed to slaughter is “an exercise in

<sup>134</sup> *Charter*, *supra* note 38, s 2(c) (“Everyone has the following fundamental freedoms ... (c) freedom of peaceful assembly”).

<sup>135</sup> *Krajnc*, *supra* note 15 at para 96.

<sup>136</sup> Bill 156 (Ont), *supra* note 56, s 6(2).

<sup>137</sup> See e.g. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42-1, No 144 (20 February 2020) at 7021 (Jim McDonell).

<sup>138</sup> Deckha, *supra* note 20 at 82.



truth-telling,<sup>139</sup> as well as information-sharing. Maneesha Deckha explains that bearing witness has the power to stimulate criticism of the food system and catalyze change among consumers of farmed animal products.<sup>140</sup> It is a form of “social signalling” — a means of “expressing *publicly visible compassion*” to “humans who have never questioned the animal agricultural system, but who are eyewitnesses to, for example, Toronto Pig Save’s protest in person or online.”<sup>141</sup>

The Save Movement, in other words, carries out the exact type of truth-seeking activity that the *Charter* is understood to protect. In the context of political speech and election spending limits, former Chief Justice McLachlin and Justice Major wrote: “[f]reedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public — as viewers, listeners and readers — have a right to information on public governance.”<sup>142</sup> By making visible the realities of industrial agriculture as it affects animals, members of the Save Movement share their truth with the broader public. They enable viewers and listeners to make informed choices about their food and about their consumer habits. Indeed, in the US, animal rights investigations and video recordings, as “a manner of revealing broader truths,”<sup>143</sup> have been “critical to advancing public discourse and influencing policy reforms” related to the treatment of farmed animals.<sup>144</sup> Further, as Marceau and Chen point out, “the widespread dissemination of these and other similar videos [like those of the Save Movement] importantly informs moral debates about the manner in which we relate to nonhuman animals, including whether people should reduce or eliminate animal products from their diets.”<sup>145</sup> Significantly, the majority of Americans who convert to a vegan or vegetarian diet are influenced by what they have learned about “commercial farming and animal treatment” in recent years.<sup>146</sup>

Similar data is not yet available in Canada. But doctrinally, the Canadian public’s right to information, as corollary to the speaker’s right to free expression and truth-seeking, is constitutionally protected, as it is in the US. Significantly, in Canada, that right was recently interpreted to extend to consumer choices around ethical food consumption. In *Kattenburg v. Canada (Attorney General)*, the Federal Court determined that food product labelling requirements relating to the ethical dimensions of a product’s creation engage the “Charter Values” of freedom of conscience and freedom of expression.<sup>147</sup> Justice Mactavish reasoned: “[i]n order to be able to express their political views [through their purchasing choices], consumers need to have accurate information as to the origin of the products under consideration.”<sup>148</sup> Indeed, the failure to disclose the kind of information that might influence a person’s purchasing choice constitutes a “[limit to] their Charter-protected right to freedom

<sup>139</sup> *Ibid* at 83 citing Fuyuki Kurasawa, “A Message in a Bottle: Bearing Witness as a Mode of Transnational Practice” (2009) 26:1 *Theory, Culture & Society* 92 at 94. See also Justin Marceau & Alan K Chen, “Free Speech and Democracy in the Video Age” (2016) 116:4 *Colum L Rev* 991 (“Photography is truth. The cinema is truth 24 times per second” at 1008) citing *Le Petit Soldat* (Les Productions Georges de Beauregard, 1963).

<sup>140</sup> Deckha, *ibid* at 93.

<sup>141</sup> *Ibid* at 100 [emphasis in original].

<sup>142</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 17.

<sup>143</sup> Marceau & Chen, *supra* note 139 at 1006.

<sup>144</sup> *Ibid* at 1008.

<sup>145</sup> *Ibid*.

<sup>146</sup> *Ibid* [footnotes omitted].

<sup>147</sup> 2019 FC 1003 at para 113 [*Kattenburg*].

<sup>148</sup> *Ibid* at para 117.

of expression.”<sup>149</sup> In other words, freedom of expression, where ethical consumption is concerned, protects the right to seek out the true information that is necessary to that expression. As an “exercise in truth-telling,”<sup>150</sup> one that enables members of the public to express their consumer preferences, the activities of the Save Movement are precisely the sort of thing that section 2(b) protects; restricting members of the Save Movement from carrying out their activities undoubtedly has the effect of limiting freedom of expression.

Roadside vigils are also political in nature; prohibiting them prevents activists and listeners alike from participating in social and political discourse and decision-making. The political value of animal activism, and the sharing of information by activists, has been confirmed in more than one jurisdiction. The majority of the High Court of Australia, for example, has held that “the discussion of animal welfare is a legitimate matter of public concern.”<sup>151</sup> In the US, investigations by animal rights activists are understood as “[relating] to a matter of great political significance or public debate.”<sup>152</sup> In Canada, as noted, the Federal Court has reasoned that personal consumer choices are a means of expressing political views, as protected by freedom of expression.<sup>153</sup>

Animal studies scholars have written extensively about the “politics of sight” at work in the act of revealing the suffering of industrially farmed animals. Timothy Pachirat, for example, in his ethnography of industrialized slaughter, describes “what [he terms] a politics of sight, defined as organized, concerted attempts to make visible what is hidden ... in order to bring about social and political transformation.”<sup>154</sup> This is precisely what members of the Save Movement try to do in drawing attention, through roadside vigils and demonstrations, to what most members of the public do not typically see: industrially farmed animals as sentient individuals, and not as food. Members of the Save Movement also approach vehicles stopped in traffic and hand out literature about industrial farming and animal suffering to passersby.<sup>155</sup> In this sense, the Save Movement, like other successful animal advocacy initiatives, understands that “seeing alone is not enough.”<sup>156</sup> The political impact of slaughterhouse protests depends not only on members of the public seeing “the horrors that befall animals,” but on their understanding “the contexts that make those horrors

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<sup>149</sup> *Ibid.* See also Marie-Claude Desjardins & Sabrina Tremblay-Huet, “The Consumers’ Right to Information about Animal Welfare: The Canadian Framework for Labelling of Food Products of Animal Origin” in Heather McLeod-Kilmurray, Angela Lee & Nathalie Chalifour, eds, *Food Law and Policy in Canada* (Toronto: Carswell, 2019) 287.

<sup>150</sup> Deckha, *supra* note 20 at 83.

<sup>151</sup> Whitfort, *supra* note 37 at 79, referring to *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, [2001] HCA 63.

<sup>152</sup> Chen & Marceau, *supra* note 31 at 1471.

<sup>153</sup> Kattenburg, *supra* note 147 at para 117.

<sup>154</sup> Pachirat, *supra* note 30 at 15.

<sup>155</sup> See Alex Lockwood, “Bodily Encounter, Bearing Witness and the Engaged Activism of the Global Save Movement” (2018) 7:1 *Animal Studies J* 104.

<sup>156</sup> Anat Pick, “Animal Rights Films, Organized Violence, and the Politics of Sight” in Yannis Tzioumakis & Claire Molloy, eds, *The Routledge Companion to Cinema and Politics* (Abingdon: Routledge, 2016) 91 at 95.

unnoticeable”<sup>157</sup> — that is, the dynamics of the animal industrial complex,<sup>158</sup> and the “structural means by which consumer cultures aid and abet [in killing animals].”<sup>159</sup>

There is a clear connection between animal rights activism outside of slaughterhouses and participation in broader social and political discourse. Kathryn Gillespie writes: “the act of witnessing animals’ predicaments, and then sharing their stories, is a political act that resists the erasure of individual animal lives, suffering, and deaths.”<sup>160</sup> But bearing witness means “more than just watching.”<sup>161</sup> Witnessing invites “recognition of the animal subject that attends to the ways in which our conception of ourselves — as observers, consumers, humans — is characterized by grave power imbalances.”<sup>162</sup> Bearing witness, in other words, by “undermining the effects of oppression and domination,”<sup>163</sup> both requires and facilitates a political response.<sup>164</sup> Moreover, the feminist ethic-of-care theoretical tradition, home to much scholarship on our ethical relationships with animals,<sup>165</sup> holds that attention to animal suffering necessarily involves “attention to the political and economic systems that are causing the suffering.”<sup>166</sup>

Public demonstration is “a mode of political expression.”<sup>167</sup> The “freedom to assemble ... in an alternative public sphere ... is essential to the vitality of the democratic institutions themselves.”<sup>168</sup> Public demonstrations, like the activities targeted by the legislation in Ontario and Alberta, “allow for a framing of political discourse in the terms of those concerned”<sup>169</sup> — that is, animal rights activists and members of the public interested in listening. Public demonstrations involve a “‘repoliticization’ of areas of life previously consigned to bureaucratic silence by making them topics of public discourse and, thus, subject to collective decision making.”<sup>170</sup> As highlighted above, the treatment of industrially farmed

<sup>157</sup> *Ibid.*

<sup>158</sup> See Fiona Probyn-Rapsey, “Anthropocentrism” in Lori Gruen, ed, *Critical Terms for Animal Studies* (Chicago: University of Chicago Press, 2018) 47 at 51, citing Barbara Noske, *Beyond Boundaries: Humans and Animals* (Montreal: Black Rose Books, 1997): “[Noske] uses ‘animal industrial complex’ to describe the meshing of animal life with global capital, a shift from the small farm to the vertically integrated intensive factory farm that controls all aspects of an animal’s life.” See also David Nibert, *Animal Rights/Human Rights: Entanglements of Oppression and Liberation* (Lanham: Rowman & Littlefield, 2002) (on the “mechanization and industrialization” of American agriculture and the “rapid increase in farm production known as the ‘Green Revolution’” at 102, 103 and the general negative impacts on humans and animals alike).

<sup>159</sup> Deckha, *supra* note 20 at 82 (describing the “core practices” of the Save Movement).

<sup>160</sup> Kathryn Gillespie, “Witnessing Animal Others: Bearing Witness, Grief, and the Political Function of Emotion” (2016) 31:3 *Hypatia* 572 at 576 [Gillespie, “Witnessing”]. On the “politics of food production” more generally, see Kathryn Gillespie, *The Cow With Ear Tag #1389* (Chicago: University of Chicago Press, 2018).

<sup>161</sup> Gillespie, “Witnessing,” *ibid* at 576.

<sup>162</sup> *Ibid.*

<sup>163</sup> Deckha, *supra* note 20 at 85, citing Kelly Oliver, “Witnessing and Testimony” (2004) 10:1 *Parallax* 78 at 81.

<sup>164</sup> See Deckha, *ibid* at 86; Gillespie “Witnessing,” *supra* note 160 at 576.

<sup>165</sup> See e.g. Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory*, 20th Anniversary ed (New York: Continuum International, 2010); Josephine Donovan & Carol J Adams, eds, *The Feminist Care Tradition in Animal Ethics: A Reader* (New York: Columbia University Press, 2007); Lori Gruen, *Entangled Empathy: An Alternative Ethic for Our Relationships with Animals* (Brooklyn: Lantern Books, 2015); Jessica Eisen, “Feminist Jurisprudence for Farmed Animals” (2019) 5 *Can J Comparative & Contemporary L* 111.

<sup>166</sup> Josephine Donovan & Carol J Adams, “Introduction” in Donovan & Adams, *supra* note 165, 1 at 3.

<sup>167</sup> Roman Stoykewych, “Street Legal: Constitutional Protection of Public Demonstration in Canada” (1985) 43:1 *UT Fac L Rev* 43 at 43.

<sup>168</sup> *Ibid* at 45.

<sup>169</sup> *Ibid* at 46.

<sup>170</sup> *Ibid.*

animals, during their short lives and en route to their deaths, has not been a political priority in Canada. The activities of the Save Movement, then, by documenting and sharing videos, images, and information on the kind of suffering involved in Canadian animal agriculture, force the subject into public discourse. Indeed, “the public visibility [of bearing witness] contributes to the emergence of an alternative animal-friendly discourse on how humans and corporations should treat animals.”<sup>171</sup> It can also generate “an alternative legal discourse on animals that highlights the intensities in violence of what the law currently permits in animal-use industries.”<sup>172</sup> In short, there is little doubt that where participation in political life is concerned, the prohibition on street protests and interference with motor vehicles transporting animals constitutes a clear limit to freedom of expression.

Finally, the activities of animal rights activists outside of slaughterhouses are a means of pursuing individual self-fulfillment and human flourishing. Of the three underlying reasons that the *Charter* protects freedom of expression, individual self-fulfillment and human flourishing may have garnered the least amount of attention, either scholarly or judicially, perhaps because the connection is so clear. Canadian scholar of fundamental freedoms Richard Moon suggests all expression, regardless of content, relates to human flourishing: “[w]e become individuals, capable of thought and judgment, and we flourish as rational and feeling persons when we join in conversation with others and participate in the life of the community.”<sup>173</sup> Where the courts are concerned, it is well-known that the threshold for finding that an individual’s pursuit of self-fulfillment and human flourishing has been limited is not high. For example, “engaging in lawful leisure activities,” such as an erotic dance show, “promotes such values” and prohibitions on doing so constitute a limit to section 2(b).<sup>174</sup> The same is true with regard to the distribution of “hard core” pornography and “sexual paraphernalia.”<sup>175</sup> It stands to reason that engaging in protest activities as an expression of one’s deep moral and ethical commitments would necessarily involve the pursuit of individual self-fulfillment and human flourishing. Further, in addition to truth-seeking, the ability of individuals to make informed consumer choices, one of the objectives of the Save Movement, is also understood as “an important aspect of individual self-fulfillment and personal autonomy.”<sup>176</sup> But even aside from the informational function of slaughterhouse protests, sharing one’s deep moral convictions about animal use and exploitation, whether in the hopes of persuading others or simply as a means of personal fulfillment, surely promotes individual autonomy and human flourishing.

## B. ENTRY UNDER FALSE PRETENCES

As seen above, Canadian ag-gag legislation prohibits entry onto farms under false pretences by deeming such entry trespassing.<sup>177</sup> False speech and intentional deceit may not relate to the fundamental values underlying freedom of expression as clearly as the content of protests on public roads outside of slaughterhouses, but as non-violent speech acts with

<sup>171</sup> Deckha, *supra* note 20 at 109–10.

<sup>172</sup> *Ibid* at 110.

<sup>173</sup> Richard Moon, “Limits on Constitutional Rights: The Marginal Role of Proportionality Analysis” (2017) 50:1 *Israel LR* 49 at 54 [Moon, “Limits”].

<sup>174</sup> *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at para 84.

<sup>175</sup> *R v Butler*, [1992] 1 SCR 452 at 461.

<sup>176</sup> *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 767.

<sup>177</sup> Subject, in Ontario, to the content of the forthcoming regulations.

a particular content, restrictions on them nevertheless constitute prima facie limits to freedom of expression.<sup>178</sup> Moreover, as speech precedent to the kind of animal rights activism that is clearly protected by section 2(b)—similar to the activism carried out by the Save Movement—lies by animal rights activists seeking entry onto farms in order to film the treatment of animals and disseminate their footage constitute protected speech.<sup>179</sup> In other words, “investigative deceptions” are “preparatory to speech” that clearly relates to the underlying values of freedom of expression.<sup>180</sup>

Pointing to the work of novelist Upton Sinclair, and to his undercover investigations of the meat-packing industry in early twentieth century America,<sup>181</sup> Chen and Marceau suggest that without investigative deceptions of the sort targeted by Canadian ag-gag legislation, “much information critical to public discourse would have remained secret.”<sup>182</sup> But investigative deceptions, and the lies necessary to their success, have revealed knowledge of industries outside of agriculture as well:

Since at least the Industrial Revolution, lies have played a central role in allowing the American public and the political branches of government access to the closed-door goings on of certain industries. From prisons, to mental hospitals, to schools, to the meatpacking industry, lies have facilitated award-winning journalism, prompted changes in public behavior, and led to major legislative reforms.<sup>183</sup>

In the Canadian context, then, prohibitions on gaining entry onto agricultural premises under false pretences might be seen as paving the way for limiting access to any kind of information that an industry might prefer to keep out of public view. In constitutional terms, the prohibition on investigative deceptions of factory farms restricts freedom of expression both in purpose and in effect.<sup>184</sup>

Canadian ag-gag laws constitute a clear limit to section 2(b). The targeted activities, grounded in the belief that the public should be made aware of the harmful practices of industrial farming and food production, promote the underlying values of freedom of expression. Indeed, the message of animal rights activists does not represent the marginalized or radical view of a few dissenting voices—although those views would nevertheless benefit from constitutional protection. Rather, as suggested, the ideas being stifled by ag-gag laws are questions “of grave public concern.... Issues regarding food safety, consumer protection, and the environment are of public concern because they can be ‘fairly considered as relating to any matter of political, social, or other concern to the community.’”<sup>185</sup> Ultimately, whereas freedom of expression “protects the individual’s freedom to communicate with others,”<sup>186</sup> Canadian ag-gag legislation prevents the communication of

<sup>178</sup> See *Irwin Toy*, *supra* note 130 at 974–76.

<sup>179</sup> See Chen & Marceau, *supra* note 31.

<sup>180</sup> *Ibid* at 1472–73.

<sup>181</sup> See Sinclair, *supra* note 31.

<sup>182</sup> Chen & Marceau, *supra* note 31 at 1456.

<sup>183</sup> *Ibid* at 1455–56.

<sup>184</sup> See *Irwin Toy*, *supra* note 130 at 973–77.

<sup>185</sup> Nicole E Negowetti, “Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws” (2015) 38:4 Seattle UL Rev 1345 at 1384, citing *Connick v Myers*, 461 US 138 at para 146 (1983).

<sup>186</sup> Moon, “Limits,” *supra* note 173 at 53.

messages related to seeking truth, participating in the political system, and individual human flourishing.

#### IV. CONCLUSION

Ag-gag legislation, with its effective prohibitions on undercover investigations and roadside demonstrations, aims to inhibit the spread of fundamental information relating to food production in this country. The targeted messages do not only bring to light the brutal abuses inherent in industrial animal agriculture, but they also force listeners to grapple with the ethics of animal exploitation and consumption. Accordingly, the legislation in Alberta and Ontario (and on the legislative horizon elsewhere in the country), targets the kind of expression that sits at the heart of section 2(b) of the *Charter* and the right to freedom of expression. Truth-seeking exercises that are political in nature and fundamental to the self-actualization of animal rights activists, bearing witness and exposing the practices of industrial animal farming, are “social [interventions],”<sup>187</sup> vital to the enlightened dialogue and discourse that characterize liberal democracies.

The introduction of ag-gag legislation is a legislative response to seemingly increased hostilities between animal rights activists and industrial stakeholders, as a result of the types of activities detailed in the Introduction to this article. Indeed, it is likely not a coincidence that the legislation comes at a time of shifting norms related to meat consumption and increased knowledge of the harms associated with industrial animal agriculture. While firm numbers are difficult to come by, vegetarianism and veganism seem to be on the rise,<sup>188</sup> evidenced, for example, by the increased and widespread availability and consumption of plant-based meat substitutes.<sup>189</sup> Moreover, the connection between industrial animal agriculture and climate change, stemming from the fact that industrial animal farms are among the most significant sources of greenhouse gas emissions, continues to attract attention.<sup>190</sup> And, most recently, in light of the COVID-19 global health pandemic,<sup>191</sup> the public is becoming increasingly aware of the connections between industrial farming, animal cruelty, and exploitation,<sup>192</sup> and the spread of zoonotic diseases.<sup>193</sup> Given the circumstances,

<sup>187</sup> Deckha, *supra* note 20 at 104.

<sup>188</sup> See Matthew B Ruby, “Vegetarianism. A Blossoming Field of Study” (2012) 58:1 *Appetite* 141; “How Many Adults in the U.S. are Vegetarian and Vegan?,” online: *The Vegetarian Resource Group* <[www.vrg.org/nutshell/Polls/2016\\_adults\\_veg.htm](http://www.vrg.org/nutshell/Polls/2016_adults_veg.htm)> (National poll conducted by Harris Poll); Valéry Giroux & Renan Larue, *Le Véganisme* (Paris: Presses Universitaires de France, 2017).

<sup>189</sup> See Angela Lee, “The Stakes in Steak: Examining Barriers to and Opportunities for Alternatives to Animal Products in Canada” (2018) 41:1 *Dal LJ* 219; Laura Brehaut, “More and More Canadians Are Limiting the Amount of Meat They Eat or Cutting It Out Entirely,” *The National Post* (11 March 2019), online: <[nationalpost.com/life/food/more-and-more-canadians-are-limiting-the-amount-of-meat-they-eat-or-cutting-it-out-entirely](http://nationalpost.com/life/food/more-and-more-canadians-are-limiting-the-amount-of-meat-they-eat-or-cutting-it-out-entirely)>.

<sup>190</sup> See Trevor J Smith, “Corn, Cows, and Climate Change: How Federal Agriculture Subsidies Enable Factory Farming and Exacerbate U.S. Greenhouse Gas Emissions” (2019) 9:1 *Washington J Environmental L & Policy* 26; Heather McLeod-Kilmurray, “Does the Rule of Ecological Law Demand Veganism?: Ecological Law, Interspecies Justice, and the Global Food System” (2019) 43:3 *Vermont L Rev* 455.

<sup>191</sup> See The Food Professor, “Well, no one was talking about vegans, until we started to dump milk, and euthanizing farm animals. Let’s face it, I’m no vegan, but COVID-19 is delivering powerful case studies to animal rights activists ... on a silver platter” (28 April 2020 at 5:26), online: <[twitter.com/FoodProfessor/status/1255096061816963072](https://twitter.com/FoodProfessor/status/1255096061816963072)>.

<sup>192</sup> See Sylvain Charlebois, “We Always Needed Farmers. Now, with COVID-19, They Need Us” (25 April 2020), online: <[www.linkedin.com/pulse/we-always-needed-farmers-now-covid-19-need-us-dr-sylvain-charlebois/](http://www.linkedin.com/pulse/we-always-needed-farmers-now-covid-19-need-us-dr-sylvain-charlebois/)> [emphasis omitted] (“Last week Bloomberg reported that thousands of pigs have been euthanized over the last few weeks, and more are likely to suffer the same fate. Some reports suggest more than 90,000 pigs are likely to be disposed of by farmers, with no other option”). See also Tom Polansek & PJ Huffstutter, “Piglets Aborted, Chickens Gassed as Pandemic Slams Meat Sector,”

it is not surprising that the industry would seek ways to insulate itself from further public scrutiny or critique, as it has done in successfully lobbying provincial governments to adopt, or introduce, ag-gag legislation. However, as this article has sought to demonstrate, ag-gag legislation amounts to “government and corporate interference on the free exchange of information that can contribute to greater understanding of the food system.”<sup>194</sup> In other words, ag-gag constitutes an attack, by government, on constitutionally protected speech and the public’s right to know. The effect of the legislation is to shield private corporations from scrutiny of their routine practices that cause untold suffering. Ag-gag legislation prevents speech that seeks to spread truth about animal agriculture, enable participation in democratic discourse, and promote self-fulfillment for both speaker and listener alike. This should not be taken lightly, either by legislators or by courts.

This article has addressed only one part of the constitutional analysis. It remains to be considered whether Canadian ag-gag legislation may be justifiable “in a free and democratic society.”<sup>195</sup> I will address this question in later work, but in short, it is difficult to argue that the limits to freedom of expression set out here meet the requirement for a rational connection between the legislative objective and the means chosen to achieve it, as well as the requirement that the means chosen are the least impairing way of achieving the objective, assuming that the objective itself is valid. While protecting biosecurity and the safety of farmers and the food system are laudable goals, justification requires the government to bring persuasive evidence that these things are threatened by farm occupations and slaughterhouse protests. With that in mind, future work will query whether these stated objectives are in fact pressing and substantial, as interpreted in the relevant case law. Moreover, the justification analysis will draw on the relevant legislative debates, the Canadian case law and literature on proportional balancing,<sup>196</sup> and the case law out of the US,<sup>197</sup> to suggest that there is no rational connection between prohibiting either entry under false pretences or slaughterhouse protests and the goal of protecting farmer safety, biosecurity, and the food system. Indeed, one Canadian judge, citing the absence of evidence, has already rejected the suggestion that members of the Save Movement threaten food safety.<sup>198</sup> Further, drawing on examples from Canada and beyond, future work will suggest that neither Ontario nor Alberta’s legislation is minimally impairing in light of the legislative objective. There are ways to protect biosecurity and farmer and food safety without limiting freedom of expression. This article, then, in addition to highlighting the ability of animal rights activism to promote the values underlying freedom of expression, has laid the groundwork for the remainder of the constitutional analysis, by setting out the issues at stake and attempting to enhance our understanding of the constitutional dimensions of animal rights advocacy in Canada.

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*Reuters* (27 April 2020), online: <[www.reuters.com/article/us-health-coronavirus-livestock-insight/piglets-aborted-chickens-gassed-as-pandemic-slams-meat-sector-idUSKCN2292YS](http://www.reuters.com/article/us-health-coronavirus-livestock-insight/piglets-aborted-chickens-gassed-as-pandemic-slams-meat-sector-idUSKCN2292YS)>.

<sup>193</sup> See Paul Shapiro, “One Root Cause of Pandemics Few People Think About” (24 March 2020), online: <[blogs.scientificamerican.com/observations/one-root-cause-of-pandemics-few-people-think-about/](http://blogs.scientificamerican.com/observations/one-root-cause-of-pandemics-few-people-think-about/)>; Kate Brown, “The Pandemic is Not a Natural Disaster,” *The New Yorker* (13 April 2020), online: <[www.newyorker.com/culture/annals-of-inquiry/the-pandemic-is-not-a-natural-disaster#](http://www.newyorker.com/culture/annals-of-inquiry/the-pandemic-is-not-a-natural-disaster#)>.

<sup>194</sup> Negowetti, *supra* note 185 at 1398.

<sup>195</sup> *Charter*, *supra* note 38, s 1; *Oakes*, *supra* note 39.

<sup>196</sup> See e.g. Sujit Choudhry, “So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1” (2006) 34 *SCLR* (2d) 501; Moon, “Limits,” *supra* note 173.

<sup>197</sup> See e.g. *Reynolds*, *supra* note 37 at paras 27–28 (in finding that Iowa’s ag-gag legislation violated the First Amendment right to free speech, the Court reasoned that there was no connection between the protection of biosecurity and farmers’ private property and the prohibition on using false pretences to gain access to a farm).

<sup>198</sup> See *Krajnc*, *supra* note 15.

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