

**DOOMED TO FAIL:
AG-GAG AND THE CANADIAN *CHARTER***

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ABSTRACT

In late 2019, ag-gag laws began being introduced in Canada. Ag-gag laws are named for their intended effect of gagging activists from exposing the realities of the animal agriculture industry. Animal activists seek to gather and publicly disseminate information using means of bearing witness, undercover investigations, and civil disobedience. Ag-gag laws originated in the US in the 1990s, but saw a revival in the 2010s. In the US, animal law organizations such as the Animal Legal Defense Fund have been successfully challenging the constitutionality of ag-gag laws, with courts in six states finding ag-gag laws to violate the First Amendment right to free speech. Despite the failures of ag-gag laws in US courts, various governments in Canada began introducing ag-gag laws to shield the animal agriculture industry from the growing activism in Canada. In drawing parallels between the US right to free speech and the Canadian *Charter's* s. 2(b) freedom of expression, this thesis argues that Canadian ag-gag laws must also be found to unconstitutionally violate the *Charter*. To be sure, ag-gag laws suppress important activist expression in a way that cannot be justified in a free and democratic society. This thesis seeks to capture the current picture of ag-gag laws in Canada as of June 2021 in anticipation of the impending *Charter* challenges by Animal Justice *et al.*

DEDICATION

For the over 3.7 billion farmed animal individuals who were killed in Canada during the course of my writing this thesis.

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CHAPTER 1: INTRODUCTION

Historically in Canada, the agriculture industry was dominated by family farms, owned and operated as small businesses. This is no longer the case. As food demand grew in society, many of the small family farms were erased in favour of larger corporate farms.

Industrialisation within the farming industry brought the adoption of techniques and practices which prioritize meat production often at the expense of animal welfare, labour standards, and environmental health. With this knowledge, activists have sought to expose the harms which have become the norm in factory farming. In an attempt to shield animal agriculture from public exposure, lobbyists have successfully sought protective legislation. These “ag-gag” laws are specifically designed to limit activist speech, thereby limiting information coming out of concentrated factory farms, overpacked transport trucks, and high-speed slaughterhouses.

The Supreme Court of Canada first recognized the shift toward industrial farming in its 2001 decision in *Dunmore v Ontario (AG)*.¹ In this case, Ontario had passed the *Agricultural Labour Relations Act, 1994* which allowed for the unionization of agricultural workers in Ontario. A year later, the legislation was repealed, and agricultural workers were then subjected to the *Labour Relations Act, 1995*, which explicitly terminated any certification rights of unionized agricultural workers. The agricultural workers claimed a violation of their s. 2(d) right to freedom of association under the *Charter*, and the Supreme Court agreed.

In writing for the 8:1 majority, Bastarache J commented on the trend shifting from the family farm model to industrial farms.² The Ontario government justified the exclusion of agricultural workers from unionization in claiming that there is no need for unionization on

¹ *Dunmore v Ontario (AG)*, 2001 SCC 94.

² *Ibid.*

small family farms, and that the flexible work environment is important.³ The Supreme Court rejected this justification, as “[t]he reliance on the family farm justification ignores an increasing trend in Canada towards corporate farming and complex agribusiness”; there was, moreover, no evidence that the family farm structure was jeopardized by the possibility of association.⁴ The Court concluded that exclusion from unionization was an unjustifiable violation of the s. 2(d) rights of agricultural workers.⁵

The importance of this decision is twofold. First, the Court acknowledges Canada’s shift away from the small family farm model to a corporate control model in agriculture. As of 2020, four corporations – Cargill, JBS, Maple Leaf, and Olymel – control nearly all of Canada’s meat production, and 80% of the retail grocery market is owned by five companies – Loblaws, Sobey’s, Costco, Metro, and Walmart.⁶ Although picturesque family farms may still exist in Canada, they are no longer the dominant model.

The Statistics Canada Census of Agriculture also reveals this trend of farming concentration.⁷ StatsCan collects information related to the number of farms, as well as the number of animals each farm reports every five years from 1951 to 2016. With this information, the average number of animals reported can be calculated. The table below contains the raw data from StatsCan of total animals reported and total farms reporting, as well as a calculation of the average amount of animals reported, all separated by year.

³ *Ibid* at para 54.

⁴ *Ibid* at Headnote, paras 52, 62, 65.

⁵ *Ibid* at para 70.

⁶ Ian Mosby & Sarah Rotz, “As Meat Plants Shut Down, COVID-19 Reveals the Extreme Concentration of our Food Supply” (29 April 2020) *The Globe and Mail*:

<https://www.theglobeandmail.com/opinion/article-as-meat-plants-shut-down-covid-19-reveals-the-extreme-concentration/>

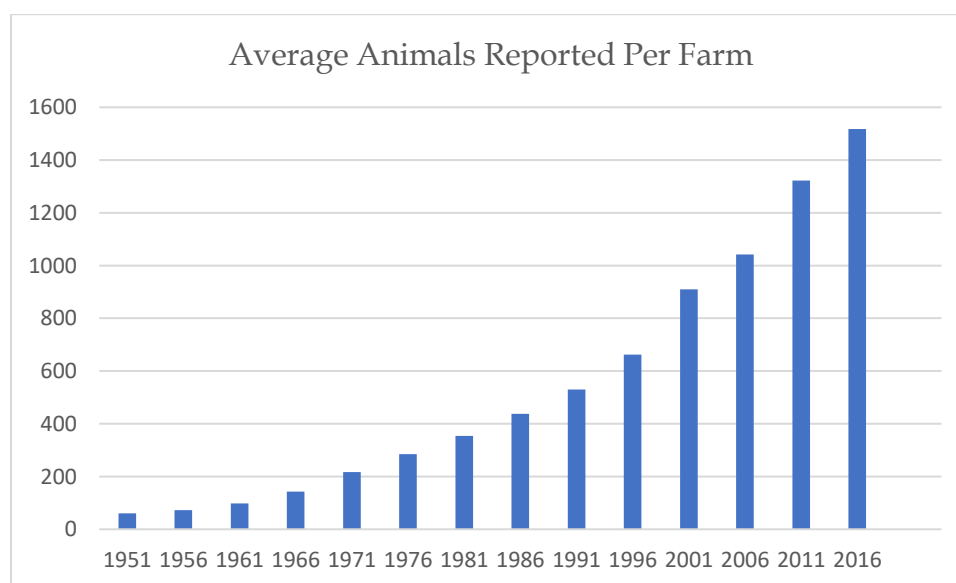
⁷ See Statistics Canada, “Selected Livestock and Poultry, Historical Data” Table 32-10-0155-01:

<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210015501>

Table 1: Concentration of Animal Agriculture 1951 - 2016⁸

Year	1951	1961	1971	1981	1991	2001	2011	2016
Total Animals	80.7 mil	88.4 mil	109.7 mil	125.6 mil	127.07 mil	165.0 mil	167.6 mil	181.6 mil
Total Farms	1,347,272	903,050	504,909	354,994	239,576	181,430	126,784	119,699
Average Animals Reported	59.91	97.94	217.42	353.85	530.41	909.70	1,322.12	1,517.30

The table above reveals that since 1951, the number of farms in Canada has consistently decreased, while the number of animals reported has consistently increased. Indeed, the average number of animals reported per farm in 1951 was approximately sixty animals per farm, but the average increased to approximately 1,517 per year in 2016. The figure below also illustrates this upward trend.

Figure 1: Concentration of Animals Per Farm 1951 - 2016⁹

⁸ *Ibid.*

⁹ *Ibid.*

The dramatic changes in Canada's farms reflect the trend toward factory farming, as fewer farms are processing higher numbers of animals. Indeed, the picture of the small family farm is dated, which was accurately addressed in the *Dunmore* decision.

The second important aspect of the *Dunmore* decision is the revelation of the agriculture industry's interest in violating the fundamental freedoms included in s. 2 of the *Charter* in the interest of worker exploitation. In this case, the Ontario government legislated for the suppression of agricultural worker unionization in violation of s. 2(d). Twenty years later, the agriculture industry continues to exploit workers, as was demonstrated by the recent Report by Migrant Workers Alliance for Change which details the persistent exploitation of temporary foreign workers in Canada during the early months of the global COVID-19 pandemic.¹⁰ The MWAC Report explains that the Canadian agriculture sector employs Mexican and Caribbean citizens through the Temporary Foreign Worker (TFW) Program: Seasonal Agricultural Worker Program.¹¹ In 2017, TFWs accounted for 27.4% of workers in crop production and 5.6% of workers in animal production and aquaculture.¹² The MWAC Report goes on to detail the relationship between TFWs and persistent workplace exploitation in the agriculture sector, as TFWs are not entitled to labour rights.¹³ Between March and June of 2020, MWAC conducted interviews, and received complaints on behalf of 1,162 TFWs.¹⁴ The complaints of labour and human rights abuses included: wage theft, COVID-19 safety noncompliance, lack of healthcare

¹⁰ Migrant Workers Alliance for Change, "Unheeded Warnings: COVID-19 & Migrant Workers in Canada" (2020): <https://migrantworkersalliance.org/wp-content/uploads/2020/06/Unheeded-Warnings-COVID19-and-Migrant-Workers.pdf> [MWAC Report]

¹¹ *Ibid* at p. 11.

¹² Yuqian Lu & Feng Hou, "Temporary Foreign Workers in the Canadian Labour Force: Open Versus Employer-Specific Work Limits" (2019) *Statistics Canada: Economic Insights*, Cat. No. 11-626-X No. 201.

¹³ MWAC Report, *supra* note 10 at p. 23.

¹⁴ *Ibid* at p. 7.

services for sick workers, inhumane housing conditions, increased surveillance and intimidation, and increased threats and racism.¹⁵

Of course, the agriculture industry does not only exploit workers, the industry is built on the exploitation of animals, as farmed animals are born, live, and die within the agriculture industry for human consumption. An analysis by Animal Justice reveals that in 2019, over 833 million land animals were killed in the animal agriculture industry in Canada.¹⁶ Populations that were killed the most were chickens bred for meat (747,506,691), egg-laying hens and breeding chickens (33,919,452), pigs (21,404,799), turkeys (19,804,087), and cows and calves (3,370,970).¹⁷ Unlike the MWAC Report, in which TFWs are able to detail their abuses on Canadian farms, of course the animals on the farms cannot call for help when they are abused.

When it comes to animal abuse in Canadian agriculture, animals are rarely protected by law and oversight agencies. In previous work, Katie Sykes and I discussed how animal protection laws and regulations at the federal, provincial, and industry level have failed to adequately protect animals from abuse at the hands of humans.¹⁸ Building upon Peter Sankoff's article exploring the ineffectiveness of the National Farmed Animal Care Council *Codes*,¹⁹ Professor Sykes and I drew attention to the ineffectiveness of both the *Criminal Code* provisions which generally are not applied to agriculture workers, and provincial animal welfare laws

¹⁵ *Ibid* at p. 8 – 9.

¹⁶ Animal Justice, "Canada Slaughtered 834 Million Animals in 2019" (13 May 2020): <https://animaljustice.ca/blog/canada-slaughtered-834-million-animals-in-2019> Note: aquatic animal deaths are measured in weight, not by the individual, therefore there is currently no way of knowing how many aquatic animals are killed per year in Canada.

¹⁷ *Ibid*.

¹⁸ Samantha Skinner & Katie Sykes, "Fake Laws: How Ag Gag Undermines the Rule of Law" (13 September 2020) *Canadian Animal Law Conference, Scholar's Track Series*.

¹⁹ Peter Sankoff, "Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?" (2019) 5:1 *Canadian Journal of Contemporary and Comparative Law* 299.

which often explicitly exclude animals in agriculture from welfare protections.²⁰ Because of the lack of legal and industry protections, animals in agriculture are vulnerable to abuse, which often goes unknown and unchecked.

The link between farmed animal abuse and the concentration of farming is not new. In 1987, the Animal Welfare Institute (US), collected articles and photographs which demonstrated that the concentration of farming practices also engenders an increasing risk of animal cruelty, over that of smaller farms.²¹ The collection posits factory farming as an international problem, scrutinizes the inherent farmed animal abuse, and looks specifically at criticisms with calves (veal), pigs, and egg-laying hens.²² As animal agriculture has only continued to concentrate into factory farms, problems of animal injury, cruelty, abuse, and inhumane conditions persist today.

Such problems were emphasized by Katherine Hessler and Tanith Balaban in an article describing common and harmful industry practices.²³ These practices include de-beaking chickens and docking pig tails without anesthesia and lack of attention to injuries or death.²⁴ In January 2020, Canadian journalist Jessica Scott-Reid also drew attention to legal-but-harmful practices such as the “use of ‘piglet thumping’ to kill baby pigs, chick grinding in the egg industry, and the separation of newborn [calves] from their mothers.”²⁵ These legal and cruel

²⁰ Skinner & Sykes, *supra* note 18.

²¹ Rachel Carson *et al*, *Factory Farming: The Experiment that Failed: A Compilation of Articles & Photographs* (Washington: Animal Welfare Institute, 1987).

²² *Ibid*.

²³ Katherine Hessler & Tanith Balaban, “Agricultural Animals and the Law” (2009) 26:5 *GPSolo*; Chicago 59.

²⁴ *Ibid*.

²⁵ Jessica Scott-Reid (13 Jan 2020) “I have concerns about the sanctioned use of ‘piglet thumping’ to kill baby pigs, chick grinding in the egg industry, and the separation of newborn cows from their mothers. I know these are all exempt from law, so who do I call about my concerns?”:

<https://twitter.com/JessLReid/status/1216875826962026496>

practices are often accompanied by outright acts of cruel sadism by farmers. Acts which have been recorded on Canadian farms are described at length in chapter 2, and include hanging cows by their necks, beating animals with weapons, ripping limbs off chickens, and leaving animals with injuries and untreated wounds.²⁶ These common harmful acts, coupled with a rampant lack of governmental oversight, has shielded animal agriculture from accountability measures.

Because of this, the last line of accountability has become animal rights activists who take it upon themselves to capture evidence of farmed animal abuse and disseminate their findings publicly.²⁷ Discussed more in chapter 2 of this thesis, animal advocates engage in several truth-seeking and truth-telling techniques in order to share the conditions of animals in agriculture to the public. These truth-telling techniques include witness-bearing, undercover documentation, and peaceful civil disobedience. When acts of egregious abuse are shared with the public, the resulting moral panic has led to cruelty investigations and charges laid against offending abusers and corporations. These techniques of exposing animal abuse and charges laid against offending agriculture enterprises have increased in the 2010s, and as chapter 2 details, have dramatically increased in Canada since 2019. Although techniques vary, the message remains the same: activists seek to gather and disseminate information on how animals are treated on farms, in transport, and during slaughter.²⁸

Faced with a growing problem of animal rights activism in agriculture, the industry sought to silence the activists who were exposing common exploitative practices.²⁹ In the US,

²⁶ See chapter 2 at 2.3.3.

²⁷ *Ibid.*

²⁸ Jodi Lazare, “Ag-gag Laws & the Public’s Right to Know” (12 March 2021) *Center for Free Expression* (Virtual Forum Series): <https://cfe.ryerson.ca/key-resources/podcasts/ag-gag-laws-public%E2%80%99s-right-know>

²⁹ Justin F Marceau, “Ag Gag Past, Present, and Future” (2015) 38 *Seattle University Law Review* 1317.

the agriculture industry successfully pressured several states to pass laws which gagged activists from exposing abuse in agriculture. The term “ag-gag laws” was not coined until 2011, but the early laws clearly sought a gag on exposing big animal ag.³⁰ In the 2010s, the Animal Legal Defence Fund, a US-based charity that advances the legal interests of animals, pursued litigation questioning the constitutionality of US ag-gag laws. Discussed more in chapter 4, the ALDF’s pursuits have resulted in six court decisions finding that state ag-gag laws violate the First Amendment right to free speech and struck down the ag-gag laws. In the midst of the continuing US litigation efforts by the ALDF, several Canadian jurisdictions have introduced ag-gag laws beginning at the end of 2019.

Outside of a purely legal application, many other scholars of various disciplines object to ag-gag laws. In researching public reactions to US ag-gag laws, Robbins, Franks, Weary, and von Keyserlingk studied whether ag-gag laws affect public trust in the agriculture industry.³¹ In surveying 716 people from the US, the researchers found that not only did the introduction of ag-gag laws decrease public trust in the agriculture industry, but also increased support for additional animal welfare protections on farms.³² This is a common criticism of ag-gag laws, as they send a message that the industry would rather silence activists than raise standards for animals. Will Potter also highlights how ag-gag laws “shoot the messenger” of animal abuse in order to “keep consumers in the dark” regarding industry practices.³³

³⁰ See Mark Bittnam, “Who Protects the Animals?” (26 April 2011) *New York Times*: <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>

³¹ J. A. Robbins, B. Franks, D. M. Weary, & M.A.G. von Keyserlingk, “Awareness of Ag-gag Laws Erodes Trust in Farmers and Increases Support for Animal Welfare Regulations” (2016) 61 *Food Policy* 121.

³² *Ibid* at p. 122 – 124.

³³ Will Potter, “Ag-Gag Laws: Corporate Attempts to Keep Consumers in the Dark” (2017) 5:1 *Griffith Journal of Law & Human Dignity* 1 at p. 8.

From an ethicist's perspective, Bernard Rollin has opined that ag-gag laws are "truly stupid."³⁴ He brings attention to the hypocrisy of the agriculture industry, who often claim they are concerned by farmed animal abuse and that animals are protected by strong industry standards.³⁵ Rollin claims that if this were true, the agriculture industry should be encouraging transparency and whistleblowing from employees.³⁶ Of course, ag-gag laws achieve the opposite, as they seek to ensure no information about animals leaves a facility. Caitlin Ceryes and Christopher Heaney have argued that ag-gag laws threaten whistleblowers with harsh penalties such that agriculture workers do not report animal abuse or poor working conditions for fear of legal punishment.³⁷ In addition to stifling activist and whistleblower speech, Joshua Frye has argued that ag-gag laws reflect the agriculture industry's political strategy of limiting public participation in meat production and oversight.³⁸ Using communication theory, Frye details how ag-gag uses different tools to prevent negative publicity and reinforce the boundary which keeps the industry out of the public eye.³⁹

One cannot separate ag-gag and animal abuse on farms from the recent public trend of ethical consumption. Zac Franklin discusses how modern animal agriculture practices do not match the moral preferences of consumers regarding animal welfare.⁴⁰ He details the consumer demand for humanely treated animals, and the willingness of consumers to pay more for ethical products. Ag-gag attempts to keep consumers uninformed about how their food is

³⁴ Bernard E Rollin, "An Ethicist's Commentary on 'Ag gag' Laws" (2014) 55:11 *Canadian Veterinary Journal* 1022 at p. 1022.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Caitlin A Ceryes & Christopher D Heaney, "'Ag-Gag' Laws: Evolution, Resurgence, and Public Health Implications" (2019) 28:4 *New Solutions: A Journal of Environmental and Occupational Health Policy* 664.

³⁸ Joshua Frye, "Big Ag Gags the Freedom of Expression" (2014) 48:1 *First Amendment Studies* 27.

³⁹ *Ibid.*

⁴⁰ Zak Franklin, "Giving Slaughterhouses Glass Walls: A New Direction in Food Labelling and Animal Welfare" (2015) 21:2 *Animal Law Review* 285.

produced.⁴¹ In this way, the industry is not subject to public scrutiny, and can keep some animal products cheap while increasing the price on products with 'humane' labels. Of course, there is no effective way for a consumer to know what is meant by labels such as 'cage-free,' 'free range,' and 'organic' which do not necessarily reflect what the consumer desires.⁴² He ends with arguing for giving slaughterhouses 'glass walls' instead of the 'brick walls' that ag-gag laws reinforce.⁴³

With an elaborate system of self-regulation, political power, and lack of public engagement, the agriculture industry remains comfortably immune from scrutiny.⁴⁴ It is from this background that animal rights activists become the last line of accountability for the agriculture industry.⁴⁵ From this position of ignorance, Rebecca Wrock highlights how ag-gag laws serve to further insulate the agriculture industry, this time by infringing the free speech of activists.⁴⁶ The overwhelming conclusion from the US litigation and scholarship is that ag-gag laws are counterproductive to societal interests, serve only to protect the agriculture industry's abusive practices, and are an unconstitutional suppression of animal rights activists' speech.⁴⁷

Despite the pushback to ag-gag laws in the US, ag-gag laws are taking hold in Canada. The proposal for this thesis was written and submitted two months after ag-gag laws crossed the border into Canada. In the year-and-a-half since then, ag-gag laws have progressed to varying degrees in various jurisdictions. Chapter 2 of this thesis discusses the legal history of

⁴¹ *Ibid*; Potter, *supra* note 33.

⁴² Franklin, *ibid*.

⁴³ *Ibid*.

⁴⁴ Rebecca Kristen Wrock, "Ignorance is Bliss: Self-Regulation and Ag-gag Laws in the American Meat Industry" (2016) 19:2 *Contemporary Justice Review* 267.

⁴⁵ Skinner & Sykes, *supra* note 18.

⁴⁶ Wrock, *supra* note 44.

⁴⁷ See Pamela Fiber-Ostrow & Jarret S Lovell, "Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-gag Legislation" (2016) 19:2 *Contemporary Justice Review* 230.

animal rights activism in the US and Canada. Chapter 3 reviews the development of Canadian ag-gag laws, including all those promised, proposed, and passed in legislatures. Chapter 4 then reviews the six current US findings of unconstitutionality, and explores the persuasive parallels between the US right to free speech and Canadian freedom of expression. Chapter 5 considers the establishment of a *prima facie* violation of the s. 2(b) freedom of expression, and chapter 6 argues that the violation cannot be justified by s. 1 of the *Charter*. Overall, this thesis provides important considerations for the inevitable *Charter* challenges to Canadian ag-gag laws.

CHAPTER 2: ACTIVISM IN THE US AND CANADA

This chapter will explore the recent historical backdrop which led to ag-gag laws being developed in the United States. As ag-gag is so new to Canada, exploring the US experience with ag-gag is critical to understanding how ag-gag may be treated in Canada. The chapter will then describe the background to the activism which engendered the eventual ag-gag laws in both countries. There are many parallels which can be drawn between the US and Canadian experience. Therefore, reviewing the US experience will lend insights into the potential experience in Canada.

This chapter does not attempt to recount humankind's long and problematic history of exploiting nonhuman animals. Rather, it will identify highlights from the last fifty years of animal activism in the agriculture industry. This will include a summary of animal welfare activism in the 1970s, 1980s, and 1990s (2.1). In response to journalism-driven activism on US farms, ag-gag laws were introduced in the 1990s along with companion meat label laws (2.2). Although meat label laws were not widely used, ag-gag grew in popularity. At the time of writing this thesis, the American Society for the Prevention of Cruelty to Animals (ASPCA) reports that twenty-nine states have engaged with ag-gag legislation in some form, which includes legislation that was defeated, passed, and ruled unconstitutional.⁴⁸

The second half of this chapter (2.3) will describe Canada's recent history of increased animal activism in the agriculture industry. In the last decade, activists in Canada have engaged in civil disobedience (2.3.1), bearing witness (2.3.2), and undercover investigations (2.3.3). Having described activism in the US and the retaliatory ag-gag laws, I will then explore the

⁴⁸ American Society for the Prevention of Cruelty to Animals (ASPCA), "What is Ag-Gag Legislation" retrieved from: <https://www.aspca.org/animal-protection/public-policy/what-ag-gag-legislation>

relationship between recent Canadian activism and newly introduced ag-gag laws in Canada (chapter 3).

2.1 Early Activism in the US

In his article “Ag Gag Past, Present, and Future,” Justin Marceau describes three waves of animal rights activism, and the legislative response from the US government for each wave.⁴⁹ Importantly, Marceau does not seek to describe the waves as monolithic, but rather highlights the salient acts of activism which engendered a legislative response. Marceau begins with the first wave, occurring from the late 1970s to the early 1990s, characterized by deliberate property crime, mostly against research facilities.⁵⁰ Activists chose to commit acts of civil disobedience with the dual intention of liberating captive animals as well as raising human awareness of the exploitation.⁵¹

Marceau recounts three specific instances of animal liberation through direct action. The first such act documented occurred at the University of Hawaii Institute of Marine Biology in 1977.⁵² There, a group of undergraduate students liberated two captive dolphins who were said to be held in “life threatening conditions.”⁵³ As a result of this action, Kenneth LeVasseur was arrested and convicted for first-degree theft.⁵⁴ In another instance of animal liberation in 1986, approximately 125 animals (including monkeys, rabbits, and hamsters) were liberated from the University of Oregon Psychology Department.⁵⁵ In this case, Roger Troen, who drove the

⁴⁹ Marceau, *supra* note 29.

⁵⁰ *Ibid* at p. 1319 – 1323.

⁵¹ *Ibid* at p. 1320.

⁵² *Ibid* at p. 1320; Laura G Kniaz, “Animal Liberation and the Law: Animals Board the Underground Railroad” (1995) 43:3 *Buffalo Law Review* 765 at p. 807. Kniaz explored appellate-level court decisions involving animal liberators.

⁵³ Marceau, *ibid* at p. 1320 – 1321; Gavan Daws, “Animal Liberation as Crime: The Hawaii Dolphin Case” in Harlan B Miller & William H Williams (Eds.), *Ethics and Animals* (New York NY: Springer, 1983).

⁵⁴ *Hawaii v LaVasseur*, 613 P. 2d (Hawaii Court of Appeal, 1980).

⁵⁵ Marceau, *supra* note 29 at p. 1321; Kniaz, *supra* note 52 at p. 812 – 814.

getaway vehicle, was tried and sentenced to five years probation and \$35,000 in restitution to the University of Oregon.⁵⁶ Finally, throughout the 1980s and 1990s, Rod Coronado was involved in several acts of illegal animal liberations at various research labs in state universities, including the Universities of Oregon, Washington, and Michigan.⁵⁷ Coronado was arrested for arson after a lab was burned down at the Michigan State University, and sentenced to fifty-seven months in prison.⁵⁸ Of course, these are just a few examples of liberators who were caught, arrested, and convicted for their actions.

Many other groups and individuals evaded arrest. In 1992, the US Federal government passed the *Animal Enterprise Protection Act (AEPA)*, which – among other things – demanded a descriptive report of property crimes on animal enterprises.⁵⁹ In 1993, the US Department of Justice and Department of Agriculture produced the *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises*.⁶⁰ The *Report* addressed acts of ‘terrorism’ on enterprises using animals for food or fibre production, agriculture, research, or testing.⁶¹

The *Report* began by explaining the transition away from traditional animal welfare activism towards animal rights liberation in the 1970s, and the following turn toward extremism.⁶² The *Report* went on to detail that between 1977 and 1993, a total of 313 acts of extremist animal activism had occurred in the US.⁶³ The top five targets identified in the *Report*

⁵⁶ *Oregon v Troen*, 786 P.2d (Oregon Court of Appeal, 1990).

⁵⁷ Marceau, *supra* note 29 at p. 1321.

⁵⁸ *Ibid.*, at p. 1321.

⁵⁹ *Ibid.* at p. 1322; *Animal Enterprise Protection Act of 1992*, Pub. L. No. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43 (2006)).

⁶⁰ US Department of Justice & Department of Agriculture, *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises* (October 1993). [Report]

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

were university research facilities (sixty-three incidents), fur retailers (forty-eight incidents), private residences (forty-three incidents), meat markets (thirty-three incidents), and agriculture/food production facilities (twenty-eight incidents).⁶⁴ The top five types of activities within the incidents were minor property damage (160 incidents), animal release (seventy-seven incidents), threats against individuals (twenty-nine incidents), major property damage (twenty-six incidents), and arson (twenty-one incidents). Overall, the *Report* justified the extreme measures taken by the *AEPA*, which criminalized the physical disruption of an animal enterprise as an act of terrorism punishable by imprisonment.⁶⁵ Such severe punishments proved effective at deterring activists from committing illegal property crimes, as many opted for legal forms of activism in the following years.⁶⁶ Thus ending the first wave of animal rights activism.

2.2 Introduction of Ag-gag and Meat Libel Laws in US

Rather than directly sabotaging facilities that exploited animals, activists turned to more traditional forms of activism with a focus on spreading knowledge about industries which abuse animals.⁶⁷ Marceau describes this second wave of activism as characterised by legal protests, public debate, and knowledge-sharing.⁶⁸ Although the *AEPA* protected animal facilities generally, two additional companion laws were promptly introduced in reaction to these effective forms of activism: food disparagement (“meat libel”) laws, and laws prohibiting agricultural investigations (“ag-gag” laws).⁶⁹

⁶⁴ *Ibid.*

⁶⁵ Marceau, *supra* note 29 at p. 1322.

⁶⁶ *Ibid* at p. 1322 – 1324; Dara Lovitz, *Muzzling a Movement: The Effects of Anti-Terrorism Law on Animal Activism* (New York NY: Book Light Inc. (now Lantern Publishing & Media), 2010).

⁶⁷ *Ibid* at p. 1324.

⁶⁸ *Ibid* at p. 1324.

⁶⁹ *Ibid.*

2.2.1 The Rise and Fall of Meat Libel

Meat libel laws were introduced following a legal battle between Washington State apple growers and the National Resources Defence Council (NRDC) and CBS.⁷⁰ In 1989, the NRDC published a report which was later the subject of an episode of “*60 Minutes*” produced by CBS. The NRDC report claimed that a chemical known as Alar, which was commonly used in apple growing, could harm children.⁷¹ Apple sales in Washington State fell drastically, and 4,700 Washington apple growers brought a class action against the NRDC and CBS for disparagement.⁷² Of course, a defence to any disparagement claim is that the statements made were true. In a summary judgment in favour of CBS, the court dismissed the action, as the apple growers failed to show sufficient proof that the statements made in the *60 Minutes* episode were false.⁷³ The court found that without sufficient evidence to prove the statements made were false, to let the action proceed would have a “chilling effect on speech.”⁷⁴

Beginning in 1992, despite the failure of the above lawsuit, agriculture lobbyists successfully pressured eleven states to enact libel laws specific to the agriculture industry, which animal rights activists termed ‘meat libel’ laws.⁷⁵ Meat libel laws sought to protect the agriculture industry from defamation from those who sought to damage the reputation of the

⁷⁰ *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 822 (9th Cir. 1995). Described by Marceau, *supra* note 29, and Megan W Semple, “Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws” (1996) 15 *Virginia Environmental Law Journal* 403.

⁷¹ *Auvil*, *ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Semple, *supra* note 70 at p. 404. See Colo. Rev. Stat. § 12-16-115(c) (1992); Fla. Stat. ch. 865.065 (1994); Ala. Code § 6-5-620 (Supp. 1995); Ariz. Rev. Stat. Ann. § 3-113 (Supp. 1995); Ga. Code Ann. § 2-16-1 (Supp. 1995); Idaho Code § 6 2001 (1995); La. Rev. Stat. Ann. § 3:4501 (West Supp. 1995); Miss. Code Ann. § 69-1 253(a) (1995); S.D. Codified Laws Ann. § 20-10A-2 (1995); Ohio Rev. Code Ann. § 2307.81 (Anderson 1995 & Supp. 1996); Okla. Stat. Ann. tit. 2, §§ 3011-12 (West Supp. 1996); Tex. Civ. Prac. & Rem. Code Ann. § 96.001-.004 (West 1995).

agriculture industry.⁷⁶ However, once the laws were enacted, there was little use of them in the court system. In questioning why the laws were rarely used, Sara Lunsford Kohen found that journalistic outlets such as book publishers and television networks were reluctant to publish materials which criticized the ag industry because of the threat of legal action.⁷⁷ She also suggests that anti-SLAPP legislation may have prevented frivolous meat libel claims by the ag industry.⁷⁸

Perhaps the greatest deterrent to the agricultural industry's use of meat libel comes from the United Kingdom case *McDonalds Corporation v Steel & Morris*, commonly referred to as the *McLibel* case.⁷⁹ Beginning in 1991, the *McLibel* case was the longest libel case in English legal history and included 313 days of trial.⁸⁰ Ms. Steel and Mr. Morris were two environmental activists with London Greenpeace who distributed a factsheet titled "[w]hat's wrong with McDonald's: everything they don't want you to know" which included several malicious claims about McDonalds.⁸¹ In 1990, McDonald's launched the suit, claiming defamation.⁸² The 'David vs Goliath' case immediately became a media circus, highlighting the imbalance between the multimillion dollar corporation and the activists with pro bono representation. Given the nature of libel laws at the time, Steel and Norris were tasked with proving each claim made was true. Ultimately, Justice Bell found that some of the claims made were true; however, the defendants failed to prove a majority of the claims were true.⁸³ Despite the judgment in McDonalds's

⁷⁶ *Ibid*; Marceau, *supra* note 29 at p. 1324.

⁷⁷ Sara Lunsford Kohen, "What Ever Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes" (2011) 16 *Drake Journal of Agriculture Law* 261, at p. 273 – 276.

⁷⁸ *Ibid* at p. 277 – 278.

⁷⁹ *McDonalds Corporation v Steel & Morris (No.4)*, [1997] EWHC QB 366. [*McLibel*]

⁸⁰ David J Wolfson, "McLibel" (1999) 5 *Animal Law Review* 21.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *McLibel*, *supra* note 79.

favour, the millions of dollars spent on the lawsuit, coupled with the negative media coverage, may have had a chilling effect on the use of meat libel claims by the ag industry in both Europe and the US.

2.2.2 The Rise of Ag-gag in the US

As the meat libel laws sought to limit speech which would negatively impact the agriculture industry, ag-gag laws sought to limit the creation of such speech.⁸⁴ The first iteration of an ag-gag law was enacted in Kansas in 1990, which sought to enhance criminal penalties for trespassing onto animal facilities without consent to document the facility (as trespassing elsewhere was already criminalized).⁸⁵ In 1991, both Montana⁸⁶ and North Dakota⁸⁷ passed their versions of ag-gag laws. Early ag-gag laws served to enhance the already criminalized acts of trespass and theft of property.⁸⁸ The legal forms of activism, and the resulting meat libel and early iterations of ag-gag laws, complete the second wave of animal rights activism described by Marceau.

Without the widespread enactment of ag-gag laws, animal rights activists continued with their legal forms of activism. During the 2000s, with the growing accessibility of video recording devices and internet access, undercover investigations and farming exposés became a popular form of activism. Thus begins the third – and current – wave of activism.⁸⁹ As the pattern continues, these undercover exposés became popular and effective, leading the agricultural industry to pressure legislatures to criminalize the creation of the exposés. Indeed,

⁸⁴ Marceau, *supra* note 29, at p. 1332.

⁸⁵ KAN. STAT. ANN. § 47-1827 (West 2012).

⁸⁶ MONT. CODE ANN. § 81-30-103(2)(d) (West 2012).

⁸⁷ NORTH DAKOTA CENT. CODE (N.D.C.C.) Sec. 12.1-21.1-01 -05 (1991).

⁸⁸ Marceau, *supra* note 29 at p. 1334 - 1335.

⁸⁹ *Ibid* at p. 1332 – 1339.

two of the US ag-gag decisions described in chapter 4 specifically state that the ag-gag legislation was enacted in response to undercover investigations.⁹⁰

Therefore, in the 2010s, new ag-gag laws were introduced across various states. In addition to enhanced penalties for trespass and theft, new ag-gag laws introduced penalties for undercover recordings and whistleblowing.⁹¹ The first iteration of the anti-whistleblower ag-gag law was introduced in Iowa in 2012.⁹² Utah also passed its ag-gag law in 2012,⁹³ and was followed by Idaho in 2014.⁹⁴ Anti-whistleblower ag-gag laws criminalize gaining employment on a farm through false pretences (e.g., a journalist who lies on their resume to become employed), and prohibits documentation of facilities without the owner's consent. As stated at the beginning of this chapter, the ASPCA reports that twenty-nine states have had experience with ag-gag in some way, whether bills were defeated, became law, or have been struck down in court.⁹⁵ Chapter 4 will be an in-depth analysis of current ag-gag laws and the litigation which continues to challenge them.

At the end of his article, Marceau makes predictions about the future of ag-gag.⁹⁶ Of note, he addresses 'quick report laws,' which require witnesses of misconduct or animal abuse to report the abuse to authorities within a prescribed amount of time.⁹⁷ Failure to quick report can be a criminal offence, or can make any delayed report unusable in any subsequent prosecution.⁹⁸ Quick report laws were enacted in Missouri in 2012 (twenty-four hour report

⁹⁰ *Animal Legal Defence Fund et al v Otter et al* at p. 1 – 2. [ALDF v Otter]

⁹¹ Marceau, *supra* note 29 at 1335.

⁹² See IOWA CODE ANN. § 717A.3A(1)(a)–(b) (2012).

⁹³ See UTAH CODE ANN. § 76-6-112(2)(a)–(c)(iii) (West 2012).

⁹⁴ IDAHO CODE ANN. § 18-7042(1)(a)–(d) (West 2014).

⁹⁵ ASPCA, *supra* note 48.

⁹⁶ Marceau, *supra* note 29.

⁹⁷ *Ibid* at p. 1340.

⁹⁸ *Ibid* at p. 1340.

time)⁹⁹ and in Colorado in 2015 (forty-eight hour report time).¹⁰⁰ Quick report laws are particularly problematic, as they criminalize thorough investigation and evidence-gathering.¹⁰¹ Despite his article being published in 2015, ag-gag laws enacted since then have presented obstacles that Marceau did not address in this article. These novel aspects of ag-gag laws will likely be addressed in subsequent scholarship (such as this thesis) or litigation. Overall, in exploring the past, present, and future of ag-gag laws, Marceau illustrates how legislators have tried different and creative ways to suppress activist speech.

2.3 Animal Rights Activism in Canada

The ideals of animal welfare and ending the exploitation of animals has existed in Canada since the mid-to-late 1800s.¹⁰² Similarly to the US, the late 1900s saw an increase in animal rights activism and anti-farmed animal exploitation in Canada. For example, many will remember the backlash after Canadian musician k.d. lang partnered with PETA in their ‘Meat Stinks’ campaign in 1990, which resulted in boycotts of her music, and prompted then Alberta Minister of Agriculture to say it was “extremely unfortunate that she has decided to side with the animal rightists.”¹⁰³ Rather than detail the past thirty years of animal rights activism in

⁹⁹ MO. ANN. STAT. § 578.013 (West 2012).

¹⁰⁰ Colorado Senate Committee of Reference Amendment, S.B. 15-042 (Jan. 23, 2015).

¹⁰¹ Marceau *supra* note 29 at p. 1341.

¹⁰² As evidenced by the creation of various local Societies for the Prevention of Cruelty to Animals beginning in Halifax in 1864. See Darcy Ingram, “National Aspirations, Governance Networks and the Development of Canada’s Animal Welfare Movement” (2017) 30:1 *British Journal of Canadian Studies* 91.

¹⁰³ See Richard Harrington, “Stations Ban K.D. Lang Over Her Beef with Meat” (4 July 1990) *Orlando Sentinel*: <https://www.orlandosentinel.com/news/os-xpm-1990-07-04-9007040515-story.html#:~:text=LANG%20OVER%20HER%20BEEF%20WITH%20MEAT,-Richard%20Harrington%20The&text=A%20number%20of%20radio%20stations,the%20Ethical%20Treatment%20of%20Animals>; see also Brenda Shoepf, “Thank You K.D. Lang” (27 October 2017) *Canadian Cattleman: The Beef Magazine*: <https://www.canadiancattlemen.ca/straight-from-the-hip/k-d-langs-effect-on-the-beef-industry/>

Canada, this section will describe the past 10 years of activism, with notable victories and actions.

The decade of the 2010s highlighted how *Criminal Code* provisions prohibiting animal cruelty and provincial Societies for the Prevention of Cruelty to Animals (SPCAs) have not adequately protected animals from harm by humans.¹⁰⁴ Several notable events sparked media attention, including the legal battle regarding Lucy the Elephant,¹⁰⁵ claims of mistreatment at Marineland,¹⁰⁶ and the IKEA Monkey scandal.¹⁰⁷ Regarding the farming industry specifically, undercover operations such as the Chilliwack Cattle exposé in 2014 (discussed in detail below) sparked outrage due to the rampant and repeated animal abuse.

Following the spread of information regarding animal exploitation, several groups began to organize with an *ethos* of animal rights and welfare activism. Animal Justice is Canada's only national organization dedicated to the pursuit of animal welfare through law.¹⁰⁸ Animal Justice also supports activists, as will be discussed in section 2.3.3 below. The Save Movement (also discussed more below) is a Canadian organization that started organizing vigils in 2010 where humans gather outside slaughterhouses to bear witness to the incoming animals on trucks.¹⁰⁹ Mercy for Animals (MFA) is a prominent US organization, known for their undercover investigations, which began operating in Canada in 2012.¹¹⁰ Direct Action Everywhere (DxE), is a global grassroots network of activists which spread to Canada in 2014;

¹⁰⁴ See generally Sankoff, *supra* note 19.

¹⁰⁵ See *Reece v Edmonton (City)* 2010 ABQB 538; *Zoochek Canada Inc v Alberta (minister of Agriculture and Forestry)*, 2019 ABCA 208; more information at <http://www.savelucy.ca/>

¹⁰⁶ See *The Walrus and the Whistleblower*, dir. Nathalie Bibeau (Canada: Bunbury Films, 2020).

¹⁰⁷ See May J Shariff, "A Monkey in the Middle: Reflections on Darwin the Macaque and (R)evolutions of Wild Animals in Canadian Common Law" in Peter Sankoff, Vaughan Black, & Katie Sykes, eds., *Canadian Perspectives on Animals and the Law* (Toronto; Ontario: Irwin Law Inc, 2015) 83.

¹⁰⁸ See <https://animaljustice.ca/about-us>

¹⁰⁹ See <https://thesavemovement.org/about/>

¹¹⁰ See <https://mercyforanimals.org/about/>

their focus is direct action animal rescues and demonstrations.¹¹¹ As a final example, Anonymous for the Voiceless (AV) is another global grassroots organization which spread to Canada in 2017; their focus is public outreach displaying the horrors of animal exploitation.¹¹²

The increase of animal rights activism proved fruitful in June 2019 when the federal government passed three pieces of animal protection legislation. Activism against Marineland influenced the federal ban on the captivity of whales and orcas.¹¹³ Public outrage following the Supreme Court decision in *R v DLW* - where the accused was acquitted of bestiality because the sexual acts involving a dog were non-penetrative - led to criminalization of broader acts of bestiality.¹¹⁴ Finally, the documentary *Sharkwater* by Canadian photographer and filmmaker Rob Stewart partly influenced the eventual federal ban on shark fin importation.¹¹⁵ Despite the rise of activism toward animal agriculture, the federal government has not introduced legislation addressing farmed animal welfare in a similar way.

For analytical purposes, I will separate farmed animal activism into three categories.¹¹⁶ The first form of activism, similarly to Marceau's first wave involves deliberate nonviolent criminal acts. Common acts of civil disobedience include trespass, theft by animal liberation, and can result in charges of break & enter and mischief. The second type of activism explored is bearing witness, as practiced by the Save Movement. Involving no infiltration onto farming property, bearing witness often involves observing the conditions of farmed animals in transport. The third form of activism includes acts which are the targets of ag-gag, such as

¹¹¹ See <https://www.directactioneverywhere.com/about-us>

¹¹² See <https://www.anonymousforthevoiceless.org/about-us>

¹¹³ See *The Walrus and the Whistleblower*, *supra* note 106; *Ending the Captivity of Whales and Dolphins Act*, S-203 2019, c. 1; Received Royal Assent June 21st, 2019.

¹¹⁴ See *R v DLW* 2016 SCC 22; *An Act to Amend the Criminal Code (bestiality and fighting)*. Bill C-84 2019, c. 17; Received Royal Assent June 21st, 2019.

¹¹⁵ See *Sharkwater*, dir. Rob Stewart (Canada: Freestyle Releasing, 2006).

¹¹⁶ Similar separation was used for clarity in *Skinner & Sykes*, *supra* note 18.

undercover investigations, whistleblowing, and farming exposés. Such acts were traditionally legal (if they did not involve trespass), but may have become prohibited due to provincial ag-gag laws. Each form of activism will be described below with examples.

2.3.1 Civil Disobedience

Civil disobedience has long been a tool of activism used to expose injustice. Popularized by Henry David Thoreau's 1849 essay *Civil Disobedience* as well as his subsequent works, he endorsed breaking the law when the law contravenes one's conscience.¹¹⁷ Thoreau warned that legal systems and laws cannot always be taken as wise or just.¹¹⁸ Specifically, Thoreau opposed the legal slave industry, and blamed the American government as an agent of injustice.¹¹⁹ Thoreau's works went on to influence Mohandas Gandhi,¹²⁰ Martin Luther King Jr.,¹²¹ and importantly to this thesis, the present-day animal rights movement. Thoreau himself commented on the consumption of nonhuman animals, stating:

No humane being, past the thoughtless age of boyhood, will wantonly murder any creature which holds its life by the same tenure that he does. The hare in its extremity cries like a child... Is it not a reproach that man is a carnivorous animal? True, he can and does live, in a great measure, by preying on other animals; but this is a miserable way — as any one who will go to snaring rabbits, or slaughtering lambs, may learn — and he will be regarded as a benefactor of his race who shall teach man to confine himself to a more innocent and wholesome diet. Whatever my own practice may be, I have no doubt that it is a part of the destiny of the human race, in its gradual improvement, to leave off eating animals, as surely as the savage tribes have left off eating each other when they came in contact with the more civilized.¹²²

¹¹⁷ Henry David Thoreau, *On the Duty of Civil Disobedience* (London: Housmans 1963).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Mohandas K Gandhi, "For Passive Protesters" (26 October 1907) *Indian Opinion*.

¹²¹ Martin Luther King Jr., "Morehouse College" being chapter 2 of *The Autobiography of Martin Luther King Jr.*

¹²² Henry David Thoreau, "Higher Laws" being chapter 11 in *Walden* (Boston: Ticknor & Fields, 1854).

Certainly, the first wave activism described by Marceau follows the idealism of civil disobedience. However, present-day Canadian activists also proudly declare their civil disobedience. For example, the Meat the Victims activists (described immediately below) all wore matching t-shirts quoting Martin Luther King Jr.'s *Letter from a Birmingham Jail* "one has a moral responsibility to disobey unjust laws."¹²³ Additionally, Toronto-based activist Jenny McQueen openly endorses civil disobedience as a valid tactic to challenge unjust laws.¹²⁴ Below is a detailed list of six recent acts of civil disobedience by deliberate trespass (some of which include theft by animal liberation) across Canada.

*Meat the Victims, April 2019.*¹²⁵ On April 23rd 2019, the People for the Ethical Treatment of Animals (PETA) released an undercover video displaying horrendous conditions on Excelsior Hog Farm in Abbotsford, British Columbia.¹²⁶ The video documents dead and rotting bodies, large untreated wounds, and serious health concerns. Five days later, Amy Soranno led over 100 activists to the farm to deliberately trespass, further document the conditions, and demand media coverage.¹²⁷ Sixty-five activists got inside the barn before the employees blocked the entrance. The farm owners eventually met the activists' demands, and let a local news outlet inside; however, the farm's veterinarian admitted that owners cleaned up the barn and only let the media into certain areas.¹²⁸ To date, there have been no charges laid against Excelsior, but

¹²³ Martin Luther King, Jr, *Letter from a Birmingham Jail* (16 April 1963), online: https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

¹²⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, (8 June 2020) at 1520 (Testimony of J. McQueen).

¹²⁵ Described in Skinner & Sykes, *ibid*.

¹²⁶ See <https://headlines.peta.org/pigs-british-columbia/#video>; <http://excelsior4.org>

¹²⁷ Alleen Brown, "Testing the Line: As Animal Rights Activists Push the Legal Boundaries, Canada Considers What Makes a Terrorist" (12 May 2019) *The Intercept*, retrieved from <https://theintercept.com/2019/05/12/animal-rights-activism-canada/>

¹²⁸ *Ibid*.

Soranno and three other activists are currently facing twenty-one criminal charges of break & enter and mischief.¹²⁹

Maple Leaf Slaughterhouse Lockdown, August 2019. In August 2019, various animal rights organizations and activists converged in Toronto for the *Animal Liberation Toronto Conference*.¹³⁰ As part of the Conference, on August 19th 2019, attendees of the Conference took their activism to Maple Leaf Foods slaughterhouse.¹³¹ As part of the demonstration, activists trespassed onto the kill floor, liberated four chickens, and halted slaughter for hours during the lockdown. Protestors also bore witness to the conditions of the chickens awaiting slaughter, and protested on the street outside the slaughterhouse. Dozens of police officers attended to supervise and de-escalate the scene, and no arrests were made.

*Liberation Lockdown Alberta, September 2019.*¹³² Over the Labour Day weekend, on September 1st 2019, a group of ninety activists trespassed onto the Jumbo Valley Hutterite Colony turkey farm to protest the mass slaughter of turkeys for Thanksgiving and the unsanitary conditions turkeys experience beforehand.¹³³ During the 'Liberation Lockdown' thirty of the protestors trespassed into the barn for a sit-in, wherein they demanded a media tour of the facility and the liberation of five turkeys. The RCMP attended, and although the farm owner denied any wrongdoing, the activists were guided on a tour and five turkeys were

¹²⁹ Skinner & Sykes, *supra* note 18; <http://excelsior4.org>.

¹³⁰ Conference hosted by Liberation TO, and Toronto chapters of The Save Movement, Anonymous for the Voiceless, and Direct Action Everywhere.

¹³¹ Mira Miller, "Activists Rescue Chickens from Maple Leaf Foods Slaughterhouse in Toronto" (19 August 2019) *blogTO*, retrieved from: <https://www.blogto.com/city/2019/08/chickens-maple-leaf-foods-slaughterhouse-toronto/>

¹³² Described in Jodi Lazare "Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?" (2020) 58:1 *Alberta Law Review* 83 at p. 83 – 84.

¹³³ Elissa Carpenter, "Five Turkeys Spared After 'Liberation Lockdown' Descends on Commercial Farm in Southern Alberta" (2 September 2019) *CBC News*, retrieved from: <https://www.cbc.ca/news/canada/calgary/turkey-liberation-lockdown-alberta-1.5268214>

freed.¹³⁴ Although no arrests were made during the protest, four activists were subsequently arrested for their activity.¹³⁵

Liberation Lockdown Alberta 2, November 2019. Two months later, the activists of the Liberation Lockdown took to Howling Dog Tours and Mad Dog & Englishmen Tours to protest the dog sled kennels for their treatment and use of dogs.¹³⁶ They sought recognition of an animal's right to be free from harm and exploitation, and for a cessation of industries that exploit animals.¹³⁷ Of the thirty activists and protesters, fifteen were arrested for break & enter and mischief.¹³⁸

*Por Greg Farm Sit-In, December 2019.*¹³⁹ Continuing the civil disobedience by activists, eleven activists of DxÉ¹⁴⁰ trespassed onto the Por Greg Montreal pig farm for a sit-in.¹⁴¹ During the sit-in, activists live-streamed the conditions, noting the pigs as covered in filth, with no access to food, confined in small pens, and separated from their offspring.¹⁴² Their goal was to

¹³⁴ Carpenter, *ibid*; Lazare, *supra* note 132.

¹³⁵ Carly Stagg, "Activists Charged After Sit In at Southern Alberta Turkey Farm" (23 October 2019) *CTV News*, retrieved from: <https://calgary.ctvnews.ca/activists-charged-after-sit-in-at-southern-alberta-turkey-farm-1.4651993>

¹³⁶ Michael Franklin, "15 Arrested as 'Liberation Lockdown' Strikes Again in Alberta" (16 November 2019) *CTV News*, retrieved from: <https://calgary.ctvnews.ca/15-arrested-as-liberation-lockdown-strikes-again-in-alberta-1.4689052>

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

¹³⁹ Also described by Lazare, *ibid* at p. 84.

¹⁴⁰ See <https://www.directactioneverywhere.com/>

¹⁴¹ Lazare, *supra* note 132; Daniel J Rowe, "Animal Activists Occupy a Pig Farm in Saint-Hyacinthe and are Arrested" (7 December 2019) *CTV News*, retrieved from: <https://montreal.ctvnews.ca/animal-activists-occupy-a-pig-farm-in-saint-hyacinthe-and-are-arrested-1.4719827>

¹⁴² Lauren O'Neil, "Vegan Activists Swarm Pig Breeding Farm in Canada" (9 December 2019) *freshdaily*, retrieved from: <https://www.freshdaily.ca/news/2019/12/vegan-activists-swarm-pig-breeding-farm-canada/>

meet with the Quebec Premier to talk about pigs and pork production.¹⁴³ Twelve police officers attended and arrested the eleven activists.¹⁴⁴

*King Cole Duck Rescue, 2020.*¹⁴⁵ In February 2020, DxE conducted a rescue operation at King Cole Ducks in Stouffville Ontario.¹⁴⁶ Activists filmed ducks that were dead, dying, injured, sick, and stuck in the wired floor.¹⁴⁷ During the rescue, fifteen activists entered the duck barn and were able to liberate twenty-six ducks before police arrived.¹⁴⁸ The fifteen activists were arrested, but the charges were subsequently dropped by the crown prosecutor, citing no public interest in proceeding with the charges.¹⁴⁹

These examples of activism by civil disobedience were used by the agriculture industry to demand increased penalties for trespass onto their properties. For example, during the General Committee Hearing for Ontario's ag-gag legislation, supporters of the bill testified that current penalties for trespass did not effectively deter activists from violating their property rights.¹⁵⁰ In response, activists testified that they would not be deterred by increased trespass penalties.¹⁵¹ Perhaps increased penalties for trespassing may deter some activists, but those

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Also described by Lazare, *ibid* at p. 84 – 84.

¹⁴⁶ Jesse Harris, "King Cole Duck Rescue: Interview with Activist Jenny McQueen" (28 February 2020) *Sentient Media*, retrieved from: <https://sentientmedia.org/king-cole-duck-rescue-interview-activist-jenny-mcqueen/>

¹⁴⁷ Lazare, *supra* note 132 at p. 84.

¹⁴⁸ *Ibid.*

¹⁴⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, (8 June 2020) at 1520 (Testimony of J. McQueen).

¹⁵⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, (8 & 9 June 2020) at 1520 (Testimony of L. Sentineal, C. Colvin, E. Benjamins, R. Dougans, D. Conzelmann, C. Goriup, K. Currie, E. Schwindt, A. Thompson, M. Carere, S. Jain, N. Beal, K. Long, M. Campbell, J. Leblond, J. de Bruyn, K. Fox, and P. Bouilly).

¹⁵¹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, (8 & 9 June 2020) at 1520 (Testimony of A. Krajnc, and J. McQueen, and R. Finan).

activists committed to civil disobedience will continue to challenge perceived injustices no matter the punishment.¹⁵²

2.3.2 Bearing Witness

The Save Movement implements peaceful protest by bearing witness.¹⁵³ Without delving into the debate of the definition of what it means to ‘witness,’ this section adopts bearing witness as an elastic concept, with activism taking various valid forms.¹⁵⁴ With the easy availability of video-sharing devices and platforms, bearing witness seeks to motivate the audience to share responsibility for the suffering of the target, with a hope of inspiring action.¹⁵⁵ In this way, bearing witness seeks to illuminate suffering by encouraging empathy with the goal of shifting the emotion into resentment for the perpetrator.¹⁵⁶

Founders of the Save Movement began organizing vigils in 2010.¹⁵⁷ By 2011, the organization held weekly Save Vigils in Toronto Ontario, and the practice began to spread to other cities. Currently, the Save Movement has over 900 Chapters in seventy different countries.¹⁵⁸ The vigils involve activists gathering to “bear witness to animals in their actual experiences of suffering, typically in their last moments before death en route toward a

¹⁵² Skinner & Sykes, *supra* note 18.

¹⁵³ See Anita Krajnc, “Bearing Witness: Is Giving Thirsty Pigs Water Criminal Mischief or a Duty?” (2017) 23:2 *Animal Law Review* 479 at 485–86; Alex Lockwood, “Bodily Encounter, Bearing Witness and the Engaged Activism of the Global Save Movement” (2016) 7:1 *Animal Studies Journal* 104 at p. 109.

¹⁵⁴ Sue Tait, “Bearing Witness, Journalism and Moral Responsibility” (2011) 33:8 *Media, Culture & Society* 1220. Tait discusses the debate of definitions citing prominent works such as: John Durham Peters, “Witnessing” (2001) 23:6 *Media, Culture & Society* 707; Barbie Zelizer, “Finding Aids to the Past: Bearing Personal Witness to Traumatic Public Events” (2002) 24:5 *Media, Culture & Society* 697; Francis Guerin & Roger Hallas, *The Image and the Witness: Trauma, Memory and Visual Culture* (London: Wallflower Press, 2007); P Frosh & A Pinchevski, *Media Witnessing: Testimony in the Age of Mass Communication* (Basingstoke: Palgrave Macmillan, 2007).

¹⁵⁵ Tait *Ibid* at p. 1233.

¹⁵⁶ *Ibid* at p. 1233.

¹⁵⁷ Krajnc, *supra* note 153; Skinner & Sykes, *ibid*.

¹⁵⁸ More information available at <https://thesavemovement.org/>

slaughterhouse kill floor.”¹⁵⁹ The core practices of the Save Movement involve (1) bearing witness to animals trafficked to slaughter, (2) providing momentary solace with compassion, (3) making visible the hidden horrors of slaughter, and (4) sharing the information by audio and video recordings on social media.¹⁶⁰ The Save Movement’s goal of provoking emotion – whether empathy, shame, fear, anger – helps participants and viewers shift the perspective from animals as victims, to the agricultural industry as perpetrator.¹⁶¹

The Save Movement in the Greater Toronto Area has been linked to two prominent events which demonstrate the escalating conflictual relationship between activists and the agriculture industry.¹⁶² The first occurred in 2017 when co-founder Anita Krajnc was found not guilty of mischief after her arrest for feeding water to thirsty pigs in a truck outside Fearman’s Pork slaughterhouse in Burlington Ontario.¹⁶³ Known as the Pig Trial, the events attracted media attention from around the world, and cast a negative light on the agriculture industry for bringing the full force of the criminal justice system to bear on a person for simply giving water to a thirsty pig on a hot day.¹⁶⁴ Justice Harris acquitted Krajnc, as he was not persuaded that feeding the pigs interfered with the owner’s operation, enjoyment, or use of the pigs.¹⁶⁵ Although Justice Harris found her behaviour not criminal, the next chapter will reveal that Ontario’s ag-gag laws - which were passed after this incident - prohibit this type of activism.

¹⁵⁹ Maneesha Deckha, “The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law” (2019) 5:1 CJCCL at 77.

¹⁶⁰ Lockwood, *supra* note 153.

¹⁶¹ Lockwood, *ibid.*

¹⁶² Skinner & Sykes, *supra* note 18.

¹⁶³ *R v Krajnc*, 2017 ONCJ 281.

¹⁶⁴ *Ibid*, at para 131, Justice Harris noted that the trial “provided her and her movement with all of the publicity they could hope for.”

¹⁶⁵ *Ibid*; Skinner & Sykes, *supra* note 18.

The second event occurred days after Ontario's ag-gag bill was passed, but before the accompanying regulations made the bill enforceable. In June 2020, the animal rights movement in Canada was shaken by the tragic killing of Save Movement activist, Regan Russell.¹⁶⁶ During a weekly Save Vigil outside Fearman's Pork slaughterhouse – the same slaughterhouse where Krajnc was arrested – Russell was fatally run-down by a truck carrying pigs into the slaughterhouse.¹⁶⁷ She was fatally struck while crossing the road in front of the slaughterhouse as a pedestrian exercising her right-of-way and obeying the traffic lights.¹⁶⁸ Rather than facing the full force of the criminal justice system, the truck driver was not charged with a criminal offence, but rather the provincial offence of careless driving causing death.¹⁶⁹ This means that even if the truck driver gets convicted, there will be no criminal record of the killing.¹⁷⁰ This tragic event serves as a culmination of the rising tensions between activists and exploiters, as this lawful and peaceful protester was violently killed in the course of her activism.

2.3.3 Undercover Investigations and Exposés

Activism such as the civil disobedience and bearing witness described above can expose the hidden animal cruelty of the agriculture industry. However, for the purpose of this thesis, undercover investigations and exposés refers to the legal secret gathering of media and

¹⁶⁶ Jessica Scott-Reid, "Animal Rights Activist Regan Russell, 65, Died Trying to Expose What Bill 156 Will Hide" (23 June 2020) *The Toronto Star*, retrieved from:

<https://www.thestar.com/opinion/contributors/2020/06/23/animal-activist-died-trying-to-expose-what-bill-156-will-hide.html>

¹⁶⁷ *Ibid*; See *There Was a Killing*, dir. Shaun Monson (2020), available online:

https://www.youtube.com/watch?v=kGESsgmOjr0&ab_channel=TorontoPigSave

¹⁶⁸ *Ibid*.

¹⁶⁹ Jon Wells, "Truck driver charged in death of Hamilton animal rights activist Regan Russell, but family 'disappointed by the lack of criminal charges'" (July 20, 2020) *The Spectator* online:

<https://www.thespec.com/news/crime/2020/07/20/truck-driver-charged-with-careless-driving-in-death-of-hamilton-animal-rights-activist-regan-russell.html>

¹⁷⁰ Individuals only receive criminal records once convicted of federal *Criminal Code* offences, not provincial offences under the *Highway Traffic Act*.

publication of evidence of animal abuse in agriculture facilities.¹⁷¹ Of course, the secret gathering of such information was legal before ag-gag laws were enacted. Evidence for an exposé can be obtained by an investigator who goes undercover as an employee of the facility to collect videos. Or the evidence can be gathered from a ‘true’ employee who seeks to become a whistleblower for the disturbing acts of their employer. Often, true employees turn into whistleblowers after reporting abuse through the ‘proper channels’ does not result in change.¹⁷²

Undercover investigations have been largely driven by the international organization Mercy for Animals (MFA). MFA states that since 2012, they have published thirteen exposés which document the poor and cruel conditions on agriculture facilities in Canada.¹⁷³ In 2018, the Vancouver Sun reported that “[e]very major investigation of cruelty at commercial animal-rearing operations in B.C. in recent years has been driven by the undercover work of Mercy for Animals.”¹⁷⁴ Below, two examples of MFA exposés are described, as well as one exposé by Animal Justice.

*Chilliwack Cattle Sales, 2014.*¹⁷⁵ Possibly the most famous undercover exposé in Canada comes from the 2014 MFA release of undercover footage from Chilliwack Cattle Sales dairy farm in Fraser Valley, BC. The disturbing video shows employees laughing while hanging live cows by their necks, beating them with whips and canes, kicking their heads, and other abusive

¹⁷¹ Skinner & Sykes, *supra* note 18.

¹⁷² Skinner & Sykes, *ibid.*

¹⁷³ Skinner & Sykes, *ibid.*; See <https://mercyforanimals.org/investigations>. Investigations included: Chilliwack Cattle Sales in British Columbia (2014); Western Hog Exchange in Alberta (2014); Puratone in Manitoba (2012); Maple Lodge Farms in Ontario (2015; 2018); Horizon Hatchery in Ontario (2014); Gray Ridge Farms in Ontario (2016); Creekside Farms and Kuku Farms in Alberta (2013); Lilydale in British Columbia (2016); Hybrid Turkeys in Ontario (2014); and Delimax Veal in Quebec (2014).

¹⁷⁴ Randy Shore, “Meat industry cruelty cases driven by volunteer undercover investigators” (20 January 2018) *The Vancouver Sun* online: <https://vancouversun.com/news/local-news/meat-industry-cruelty-cases-driven-by-volunteer-undercover-investigators> (emphasis added); Skinner & Sykes, *supra* note 18.

¹⁷⁵ Previously described in both Lazare, *supra* note 132 and Skinner & Sykes, *supra* note 18.

behaviour.¹⁷⁶ The shocking footage sparked public outrage, calls for charges, and agriculture reform.¹⁷⁷ As a result of the exposé, the owners and seven employees were charged with a combined 20 criminal charges, convictions were entered in December 2016, and sentences (including monetary fines and modest jail terms) were imposed by March 2017.¹⁷⁸ Without the exposé, the rampant animal abuse would have gone unchecked and unpunished.

*Lilydale Food Products, 2017.*¹⁷⁹ In another exposé by MFA, undercover footage from Lilydale Food in Port Coquitlam BC shows workers kicking and throwing chickens, slamming them against walls and crates, ripping limbs off live birds, and more.¹⁸⁰ The public outrage from this undercover exposé resulted in a year-and-a-half-long investigation and ended with thirty-eight Canadian Food Inspection Agency (CFIA) charges in December 2018.¹⁸¹ As of January 2021, the matter continues to be held up in pre-trial matters before the court.¹⁸² In its press release, MFA reiterated that the purpose of their exposés is to reveal the truth of agriculture facilities with far-reaching legal and social effects.¹⁸³

Paragon Farms, 2020. After Ontario's ag-gag laws were passed, but before the regulations were in place for the laws to become enforceable, a last legal exposé was filmed in Putnam

¹⁷⁶ Vandhana Bala, "Breaking! 20 Animal Cruelty Charges Filed After Undercover MFA Video Taken at Canada's Largest Dairy" (1 March 2016), online: <https://mercyforanimals.org/breaking-20-animal-cruelty-charges-filed-2>

¹⁷⁷ Lazare, *supra* note 132.

¹⁷⁸ Bala, *supra* note 176; Skinner & Sykes, *supra* note 18.

¹⁷⁹ Also described in Skinner & Sykes, *supra* 18.

¹⁸⁰ Skinner & Sykes, *ibid*; Mercy for Animals "Shocking video shows animals kicked, thrown, ripped apart by workers at Lilydale chicken supplier farms" (13 June 2017) *Cision*, online: <https://www.newswire.ca/news-releases/shocking-video-shows-animals-kicked-thrown-ripped-apart-by-workers-at-lilydale-chicken-supplier-farms-628130843.html>

¹⁸¹ See notification of charges laid at: <https://www.inspection.gc.ca/about-cfia/transparency/regulatory-transparency-and-openness/compliance-and-enforcement/notification-of-charges-laid/2018-12-11/eng/1544538991875/1544539154376>

¹⁸² Paul Henderson, "Fraser Valley Chicken Abuse Trial Delayed Until February" (25 January 2021) *Surrey Now-Leader*: <https://www.surreynowleader.com/news/fraser-valley-chicken-abuse-trial-delayed-until-february/>

¹⁸³ Retrieved from: <https://mercyforanimals.org/progress-canada-files-38-charges-against>

Farms in Ontario by undercover investigators at Animal Justice.¹⁸⁴ The footage shows workers “kicking, beating, and hitting pigs; pigs suffering from open wounds and serious injuries; baby piglets having their testes and tails sliced off without pain relief; and appalling conditions including feces, filth, maggots, and mould.”¹⁸⁵ Authorities are investigating and deliberating charges.¹⁸⁶ This is also not the first time Paragon Farms has been held accountable for neglect; in May 2017 the farm was fined \$55,000 for worker safety violations.¹⁸⁷ However, such small monetary fines are trivial compared to their annual revenue of \$1.2 million.¹⁸⁸ The exposé advises that Paragon was not targeted, but chosen randomly to suggest that such abuses are the norm, not the exception in the agriculture industry.¹⁸⁹

These three types of activism – civil disobedience, bearing witness, and undercover exposé – are functions of truth-telling which show that although animal cruelty is a crime, animal abuse is rampant in the agriculture industry which only serves to exploit animals for profit.¹⁹⁰ These types of truth-telling activism are the target of the ag-gag legislation described in the next chapter.

¹⁸⁴ See the exposé at <https://stopaggaglaws.ca/>; Animal Justice “Undercover Farm Investigation Outlawed As Ontario Brings Ag Gag Law into Force” (4 December 2020) <https://animaljustice.ca/media-releases/undercover-farm-investigations-outlawed-as-ontario-brings-ag-gag-law-into-force>

¹⁸⁵ Animal Justice, *ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Jennifer Jackson, “Pig Farm Fined After Worker Slip-Up” (31 May 2017) *Farms.com*, retrieved from: <https://www.farms.com/ag-industry-news/pig-farm-fined-after-worker-slip-up-445.aspx>

¹⁸⁸ See Dun & Bradstreet report at https://www.dnb.com/business-directory/company-profiles.paragon_farms.4dc4290f531b39fbbd5667f8e6e60ef8.html#financials-anchor

¹⁸⁹ Animal Justice, *supra* note 184.

¹⁹⁰ Skinner & Sykes, *supra* note 18.

CHAPTER 3: AG-GAG INTRODUCED IN CANADA

In response to the increased activism targeting farms, various governments in Canada began introducing and passing ag-gag legislation. Beginning in late 2019, some governments have passed ag-gag laws, some have proposed ag-gag laws, and some have promised ag-gag laws. This chapter explores each piece of ag-gag legislation with an emphasis on the relative effects on animal activism and agricultural impunity.¹⁹¹ As the ag-gag situation in Canada is developing, some information may have changed since the completion of this thesis.¹⁹² As this chapter progresses, the introduction of ag-gag in the provinces can be closely tied to the activism described in chapter 2.

3.1 Ag-gag Laws Promised

Since ag-gag laws began coming to Canada in late 2019, some governments have gone through the process of promising, proposing, and passing ag-gag laws. At the time of writing this thesis, there is still one province which has promised ag-gag laws, but not yet pursued any legislative action.

3.1.1 Quebec

After the December 2019 sit-in at Por Greg Farm in Saint-Hyacinthe,¹⁹³ the Quebec government formed a committee to prevent further action from “antispecieists” (being individuals who reject human superiority over animals).¹⁹⁴ Speaking on the issue of animal activism, the Minister of Agriculture, Fisheries, and Food, André Lamontagne (CAQ – Johnson

¹⁹¹ The theme of agricultural impunity was thoroughly explored in Skinner & Sykes, *supra* note 18.

¹⁹² Animal Justice regularly updates their blog “Fighting Canada’s Dangerous ‘Ag Gag’ Laws”: <https://animaljustice.ca/blog/fighting-canadas-dangerous-ag-gag-laws>

¹⁹³ Chapter 2.3.1.

¹⁹⁴ Daphne Cameron, “Antispécisme: un Groupe de Travail pour Empêcher d’Autres Infractions” (22 January 2020) *La Presse*: <https://www.lapresse.ca/actualites/2020-01-22/antispecisme-un-groupe-de-travail-pour-empêcher-d-autres-infractions>; Animal Justice, *supra* note 192.

QC), stated that the government is not ruling out passing legislation similar to Alberta and Ontario.¹⁹⁵ Lamontagne expressed in an interview with *La Presse* that the committee is open to several options which would take action to help insulate the farmers and restaurant owners from further activism.¹⁹⁶ He also noted that his Ministry is engaged in discussions with the Minister of Justice and Ministry of Public Security.¹⁹⁷

This is a direct example of how the activism near Montreal, in which the terrible conditions for pigs were exposed, resulted not in any charges for the farmers, but in the arrest of eleven activists and the promise of protective legislation for the farmers. Should Quebec pass any form of ag-gag laws, such laws will have been in direct response to the animal rights activism in December 2019.

3.2 Ag-gag Laws Proposed

Two legislative bodies have formally introduced ag-gag legislation in their respective legislatures. British Columbia introduced its version in October 2019, and the federal government's was introduced in February 2020. Ag-gag from both legislative bodies remain in the legislative process, but have not yet passed into law at the time of writing this thesis.

3.2.1 British Columbia

After the Meat the Victims actions in BC, in October 2019 MLA Laurie Throness (L – Chilliwack BC) introduced a private member's bill that would increase penalties for trespassing onto farms.¹⁹⁸ In introducing *Bill M 227 Trespass Amendment Act*, Throness referenced the

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Bill M 227, Trespass Amendment Act, 2019, 4th Sess, 41st Parl, 2019. [Bill M 227]*

undercover employee video from Chilliwack Cattle Sales, misrepresenting it as unlawful trespass.¹⁹⁹ He introduced *Bill M 277* in response to the allegedly increased biosecurity risk, noting increased penalties for trespass and organizations who encourage trespass.²⁰⁰

The text of the proposed bill is brief, giving a few definitions, a prohibition and increasing fines for trespass.²⁰¹ This prohibition is specifically for trespassing that results in contamination of a food establishment, being the introduction of poisonous substances, diseases, or toxins.²⁰² The bill also increases fines for general trespass onto a food establishment.²⁰³ For an individual, a court may impose a fine up to \$10,000 and a jail term up to one month for trespassing onto a food establishment.²⁰⁴ If the trespasser contaminates the establishment, the fine increases to \$25,000 and the jail term up to six months.²⁰⁵ For an individual or organization that counsels someone to trespass onto a food establishment, a court may order a fine up to \$50,000.²⁰⁶

Although *Bill M 227* passed its first reading in October 2019, after the British Columbia provincial election in October 2020, the Minister of Agriculture confirmed that they do not plan on amending the *Trespass Act* or enacting any other kind of ag-gag law.²⁰⁷

¹⁹⁹ Chapter 2.3.3.

²⁰⁰ British Columbia, Legislative Assembly, *Debate Transcripts (Hansard)*, 41st Parl, 4th Sess (28 October 2019): <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20191028pm-Hansard-n283>

²⁰¹ *Bill M 227*, *supra* note 198.

²⁰² *Ibid* at s. 1 – 2.

²⁰³ *Ibid* at s. 5.

²⁰⁴ *Ibid* at s. 5.

²⁰⁵ *Ibid* at s. 5.

²⁰⁶ *Ibid* at s. 5.

²⁰⁷ Animal Justice, *supra* note 192; It was also clear that the bill would not proceed when it was debated in July 2020, before the election, Hansard (16 July 2020): <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/5th-session/20200716pm-CommitteeA-n10>

3.2.2 Federal

On February 18th 2020, MP John Barlow (C - Foothills AB) introduced a private member's bill to amend the *Health of Animals Act*.²⁰⁸ After parliament took a break, the bill was reinstated for second reading on September 23rd 2020, passed second reading on March 10th 2021, and the Committee hearings were held in May and June 2021.²⁰⁹

The text of *Bill C-205*, as first introduced, was quite brief and created an offence for contravening the proposed s. 9.1, which read:

No person shall, without lawful authority or excuse, enter a building or other enclosed place in which 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.²¹⁰

From this wording, the proposed bill intended to address the biosecurity risks associated with trespassing, implying that trespassers may bring with them diseases or toxic substances which could affect animals. The use of the word 'could' was important to note, as this meant that a trespasser could be found guilty without actually harming any animals. The question which follows from this vague wording is whether the MP intended for all trespassing to be included as possibly being able to threaten biosecurity, or whether there must be a positive indicator of a biosecurity risk present. This question was live at the Committee Meeting, where MP Barlow stated that any trespasser on property where animals are kept would be subject to this

²⁰⁸ *Bill C-205 An Act to Amend the Health of Animals Act*, 1st Sess, 43rd Parl, 2019. [*Bill C-205*]

²⁰⁹ *Bill C-205*, 2nd Sess, 43rd Parl, 2020.

²¹⁰ *Ibid*, at s. 1.

provision.²¹¹ He seemed sure that the law would apply to trespassers on private property, as well as interferences with animals in transport trucks, zoos, exhibitions, and fairs.²¹²

The bill also states the available punishments for the contravention of s. 9.1. For individuals, a punishment upon summary conviction may lead to a fine of not more than \$50,000, and a jail term of not more than six months, or both.²¹³ If an individual is convicted of an indictable offence, the punishment increases to a fine of not more than \$250,000 and a prison term of not more than 2 years, or both.²¹⁴ Additionally, “every person, other than an individual” – which includes animal rights organizations such as MFA or DxE – may be punished on summary conviction with a fine not more than \$100,000, and on an indictable offence, not more than \$500,000.²¹⁵

During the reintroduction of *Bill C-205*, MP Barlow specifically noted that the *Liberation Lockdown* on the Jumbo Valley Hutterite Colony²¹⁶ occurred in his riding.²¹⁷ He stated that the proposed amendments to the *Health of Animals Act* was to protect the mental health of farmers, employees, and animals, and protect the integrity of the food supply.²¹⁸ In drawing attention to the biosecurity risks of activists, MP Barlow noted that almost two decades ago, the lack of biosecurity of Alberta farms resulted in an outbreak of bovine spongiform encephalopathy (BSE, also known as Mad Cow Disease), which cost Canadian agriculture \$10 billion.²¹⁹ He also drew attention to a 2004 outbreak of avian flu, which resulted in 300 million chickens being

²¹¹ Standing Committee on Agriculture and Agri-Food, 2nd Sess, 43rd Parl, May 6th 2021.

²¹² *Ibid.*

²¹³ *Ibid* at s. 2(2).

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Described in chapter 2.3.1; he also drew attention to the 2019 Meat the Victims action in BC.

²¹⁷ *House of Commons Debates (Hansard)*, 43rd Parl, 2nd Sess, No 37 (26 November 2020):

<https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-37/hansard>

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

killed without profit and cost the agriculture industry more than \$300 million.²²⁰ Of course, MP Barlow could not tie either of these outbreaks to animal activism. In fact, when asked by MP Kody Blois (L - Kings-Hants NS) about whether the actions of activists have ever led to biosecurity concerns, MP Barlow did not address the question.²²¹ *Bill C-205* was again debated in February 2021, where MP Pat Finnigan (L - Miramichi NB) noted that the legislation would overlap with existing federal and provincial legislation.²²²

Of important note, during the May 6th Committee meeting three representatives from the CFIA advised the Committee of several concerns regarding the Bill. Put succinctly by Dr. Mary-Jane Ireland, “CFIA staff have neither the legal authority nor the training to perform as peace officers which would be required with this bill nor is the CFIA structured in fact in a manner that would allow for the timely response to trespassing incidents.”²²³ The other witnesses from CFIA also emphasised that they are scientists concerned with the health of animals, and not police officers concerned with conflicts between farmers and activists.²²⁴

The ‘biosecurity’ justification for ag-gag is a relatively new development, one that was not foreseen by Marceau in his 2015 article.²²⁵ As noted above, although the legislators are concerned with biosecurity, they could not point to a single instance of animal illness because of activist presence. On the contrary, activists who enter agricultural facilities often wear personal protective equipment. For example, the activists at the Meat the Victims action in BC wore head-to-toe protective gear, including medical-grade masks, protective disposable suits, latex

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *House of Commons Debates (Hansard)*, 43rd Parl, 2nd Sess No 67 (26 February 2021): <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-67/hansard>

²²³ Standing Committee on Agriculture and Agri-Food, *supra* note 211.

²²⁴ *Ibid.*

²²⁵ Marceau, *supra* note 29.

gloves, and boot covers while in the pig facility. There remains a genuine question of whether there is a true biosecurity risk from protestors.

During the final days of my drafting this thesis, the Standing Committee on Agriculture and Agri-Food released their Seventh Report regarding *Bill C-205*.²²⁶ As the Committee meetings continued, animal advocates were not invited to testify before the Committee. However, MP Alistair MacGregor (NDP - Cowichan-Malahat-Langford BC) drew attention to two briefs, one submitted by Animal Justice and the other by Jodi Lazare. The Committee's Seventh Report returned *Bill C-205* with amendments, which change the bill to read as follows:

9.1 No person shall enter a building or other enclosed place in which animals are kept, or take in any animal or thing, knowing that or being reckless as to whether entering such a place or taking in the animal or thing could reasonably result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them. [additions underlined]

These amendments were immediately received positively by animal advocates.²²⁷ By removing the phrase “without lawful authority or excuse,” the bill no longer targets only trespassers. This new phrasing could capture anyone who poses a risk of spreading diseases to animals, including negligent farmers or other employees. The addition of the term “reasonably” also indicates that there must be some evidentiary basis that the individual was reckless with regards to the potential risk to animal health.

The amendments seem to suggest that *Bill C-205* started as an ag-gag bill, but is no longer so. If *Bill C-205* passes as currently written, it will not be an operational ag-gag law. However, third reading in the House of Common is likely to occur after Parliament's summer

²²⁶ Standing Committee on Agriculture and Agri-Food, “Seventh Report” 43rd Parl, 2nd Sess, June 21st 2021.

²²⁷ Animal Justice, “Federal ‘Ag Gag’ Bill Could Punish Negligent Farmers After Amendments at Committee” (22 June 2021): <https://animaljustice.ca/blog/federal-ag-gag-bill-could-punish-negligent-farmers-after-amendments-at-committee>

break. If the bill passes third reading, it will go to the Senate, which will have its own opportunity to amend the bill further. For now, it seems as though the federal ag-gag bill has been defeated, and transformed into a potential farmer accountability bill.

3.3 Ag-gag Laws Passed

There are currently four operational ag-gag laws in Canadian provinces. Legislation from Prince Edward Island, Alberta, Ontario, and Manitoba continue to reveal how ag-gag was introduced to target animal justice activists. Ag-gag laws from Alberta and Ontario include some traditionally problematic provisions as discussed in chapter 2.2.2. Ag-gag laws from PEI and Manitoba offer more distinct provisions which still target activists.

3.3.1 Prince Edward Island

In December 2020, PEI passed two bills, *Bill 120, An Act to Amend the Animal Health Act*,²²⁸ and *Bill 124, An Act to Amend the Animal Welfare Act*.²²⁹ Both bills were introduced on November 19th and received royal assent on December 4th, meaning that the entire legislative process for PEI's ag-gag bills took fifteen days.

Both pieces of legislation were introduced by MLA Robert L Henderson (L – O'Leary-Inverness PEI). During the second reading, MLA Michele Beaton (G – Mermaid-Stratford PEI) asked MLA Henderson if he could give an example of activist trespassing and contamination in

²²⁸ *Bill 120, An Act to Amend the Animal Health Act*, 1st Sess 66th General Assembly of the PEI Legislative Assembly. [Bill 120]

²²⁹ *Bill 124, An Act to Amend the Animal Welfare Act*, 1st Sess 66th General Assembly of the PEI Legislative Assembly. [Bill 124]

PEI.²³⁰ MLA Henderson could not offer any example of animal justice activism in PEI, but noted the growing issue in other provinces without specific examples.²³¹

The text of both bills is brief, but generally increases fines for trespassers on farm property, both individually and for a corporation, and alludes to biosecurity risks. *Bill 120* mimics the language of the first iteration of the federal ag-gag bill, stating:

No person shall, without lawful authority or excuse, enter a building or other enclosed place in which 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.²³²

Again, this wording is vague, prohibiting trespassing that *could* put an animal's health at risk. Punishments for an individual include a fine between \$200 and \$50,000 and a jail term not more than six months, or both.²³³ The punishments increase for a corporation (including animal rights organizations) to a fine up to \$100,000, and a possible six-month jail term for the directors of such corporations.²³⁴ *Bill 124* additionally prohibits entering an enclosed space where animals are kept where the entry could result in the release or escape of animals.²³⁵ If an animal is hurt or escapes, the individual is liable for the costs.²³⁶

The passage of these bills signifies that provinces are passing ag-gag legislation without any activist presence in the province. Additionally, the bills reaffirm PEI's interest in keeping

²³⁰ Prince Edward Island, Legislative Assembly, *Hansard*, 66th Parl, 1st Sess (24 November 2020) at 3701: <https://docs.assembly.pe.ca/download/dms?objectId=cdb80a02-67d2-46b0-a17d-222810492692&fileName=Hansard-24-November%202020.pdf>

²³¹ *Ibid.*

²³² *Bill 120*, *supra* note 228 at s.1.

²³³ *Ibid* at s. 1.

²³⁴ *Ibid* at s. 1.

²³⁵ *Bill 124*, *supra* note 229 at s. 1.

²³⁶ *Ibid* at s. 1.

animals under their control, and free from any biosecurity risks, no matter how many precautions the activists may take.

3.3.2 Alberta

In just one day more than the passage of the PEI ag-gag laws, Alberta's ag-gag laws were first read on November 19th 2019 and enacted on December 5th 2019, a total of sixteen days.²³⁷ Alberta's *Bill 27* amends several statutes, including the *Limitations Act*, *Occupiers' Liability Act*, *Petty Trespass Act*, *Trespass to Premises Act*, and *Provincial Offences Procedure Act*.²³⁸

Within the amendments to the *Petty Trespass Act*, individuals are specifically prohibited from trespassing on any farmlands, which includes land inhabited by animals as well as croplands (often used to grow vegetables to feed the animals).²³⁹ If an individual trespasses onto farmland and fails to leave when asked, the owner/occupier of the land is not liable to the individual for any personal injury that person incurs (unless it was disproportionately aggressive in the circumstances).²⁴⁰ This section both allows a farmer to use force to remove a trespasser from their property, and shields the farmer from criminal and civil liability.

Alberta's ag-gag laws also include provisions regarding false pretences. In amending the *Petty Trespass Act* and the *Trespass to Premises Act*, anyone who enters farmland under false pretences is deemed to have entered the premises without permission, in other words they are deemed to be trespassing.²⁴¹

²³⁷ See the Bill's progress at

https://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=027&legl=30&session=1

²³⁸ *Bill 27* 1st Sess, 30th Leg, Alberta, 2019; also discussed in Skinner & Sykes, *supra* note 18 and Lazare, *supra* note 132. [*Bill 27*]

²³⁹ *Bill 27*, *Ibid* at s. 3(4).

²⁴⁰ *Ibid* at s. 2(2).

²⁴¹ *Ibid* at s. 3(2) and 5(2).

Bill 27 gives several punishments under the *Petty Trespass Act* and the *Trespass to Premises Act*. A first-time trespasser may be fined up to \$10,000 and jailed up to six months.²⁴² For subsequent offences, the fine increases to \$25,000 while the jail term remains six months.²⁴³ When the trespassers are part of a corporation, the corporation may be fined up to \$200,000.²⁴⁴ Additionally, under the *Trespass to Premises Act*, a corporation that aids or counsels an individual to trespass is again liable to a fine of up to \$200,000.²⁴⁵

Legislators were clear that animal activists were becoming a problem that needed to be dealt with. Within the Hansard from November 19th 2019, the Legislative Assembly addressed “Animal Rights Activist Farm and Ranch Protests”²⁴⁶ and referred to the Liberation Lockdowns on dog sled kennels.²⁴⁷ Specifically, MLA Miranda Rosin (C – Banff-Kananaskis AB) stated:

Given that it seems that protesters 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 and given that we cannot allow this trend among activists to continue into the new year and beyond, especially when these protesters target property owners that care for their animals and exceed excellence in industry standards, to the same minister: what is being done to put a final end to this brazen behaviour?²⁴⁸

To this question, MLA Doug Schweitzer (C – Calgary-Elbow AB) introduced *Bill 27*.²⁴⁹

²⁴² *Ibid* at s. 3(2).

²⁴³ *Ibid* at s. 3(2).

²⁴⁴ *Ibid* at s. 3(2).

²⁴⁵ *Ibid* at s. 5(3).

²⁴⁶ Alberta, *Hansard*, 30th Parl 1st Sess (19 November 2019) at 2335:

https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_30/session_1/20191119_1330_01_han.pdf

²⁴⁷ Chapter 2.3.1.

²⁴⁸ Alberta *Hansard*, *supra* note 246 at 2335.

²⁴⁹ *Ibid* at 2336.

Although *Bill 27* seems to increase the property rights of law-abiding owners, the true target is to limit animal rights activists. Indeed, rather than simply targeting trespassers in general, *Bill 27* goes beyond to target anyone who lies or omits information to gain entry to property. In this way, an undercover investigator who lies to get a job or fails to disclose that they are an investigator is deemed a trespasser. Under *Bill 27*, previously legal investigations such as the Chilliwack, Lilydale, and Paragon exposés are prohibited and penalized.²⁵⁰

3.3.3 Ontario

Where other ag-gag laws are amendment bills, Ontario's ag-gag law is its own standalone piece of legislation, titled *Bill 156: Security from Trespass and Protecting Food Security Act*. Also, where Albert's ag-gag bill applies to any trespasser on any private property, Ontario's *Bill 156* specifically protects agriculture industry facilities.²⁵¹ Although *Bill 156* was passed on June 18th 2020, it was not fully in force until the accompanying *Regulations* were finalized on December 4th 2020.²⁵²

Ontario's *Bill 156* creates 'animal protection zones'²⁵³ – an unbelievably Orwellian term to describe the places where animals are raised in poor conditions, trafficked in cramped trucks, and violently slaughtered. Broadly, *Bill 156* defines animal protection zones as anywhere animals may be kept. *Bill 156* takes the place of the *Trespass to Property Act* when the trespass occurs in an 'animal protection zone.'²⁵⁴

²⁵⁰ Chapter 2.3.3. Undercover MFA's exposés in Alberta include the Western Hog Exchange (2014) and Creekside Farms and Kuku Farms (2013), *supra* note 180.

²⁵¹ *Bill 156, Security from Trespass and Protecting Food Security Act, 2020*, SO 2020, c 9.

²⁵² *Bill 156 Regulations*, O. Reg. 701/20: General. [*Ontario Regulations*]

²⁵³ *Bill 156*, *supra* note 251 at s. 2.

²⁵⁴ *Ibid* at s. 8.

Bill 156 then prohibits entering an animal protection zone without consent, and states that any consent given is vitiated if it was given under duress or false pretences.²⁵⁵ Uniquely, Ontario ag-gag creates a specific offence for giving such false pretences.²⁵⁶ Under the *Regulations*, false pretences include any false statement given for the purpose of obtaining employment, and includes lying about qualifications.²⁵⁷

However, there are small exceptions for journalists and whistleblowers, which seem to attempt to address concerns surrounding whistleblowers and undercover investigators.²⁵⁸ Under the *Regulations*, a journalist is exempted from the false pretence provisions, so long as the false statements were not about qualifications and the person is employed by news media.²⁵⁹ News media is defined as a corporation that is primarily focussed on disseminating information. A whistleblower is exempted from the false pretence provisions if they are a true employee whose false statements were not about qualifications, and they report any wrongdoing to a police officer or other authority as soon as practicable.²⁶⁰ The exceptions for both journalists and whistleblowers are further narrowed, as in order to fall into the exception, the person must follow all biosecurity measures, not contribute to the harm of an animal, and must not have been asked to leave by the owner.²⁶¹

In addition to false pretence provisions, the *Regulations* also include a quick-report provision for whistleblowers. The definitions and restrictions on who can fall into these exceptions are also so narrow that it would be difficult for anyone to achieve status as a journalist or whistleblower under them.

²⁵⁵ *Ibid* at s. 4(6), 5(4).

²⁵⁶ *Ibid* at s. 13(2).

²⁵⁷ *Ontario Regulations*, *supra* note 252 at s. 10(1)(a,c).

²⁵⁸ *Ibid* at s. 11.

²⁵⁹ *Ibid* at s. 11(1-2).

²⁶⁰ *Ibid* at s. 12(1).

²⁶¹ *Ibid* at s. 11 – 12.

Another notable distinction between Ontario's ag-gag laws and those from other Canadian jurisdictions is the inclusion of truck drivers being protected from interference.²⁶² This seems to be a direct attack against the Save Movement's peaceful protests.²⁶³ The *Regulations* also elaborate on what a prohibited interference is under *Bill 156*. Prohibited interferences include physical touch of any kind, providing water to animals, releasing animals from their 'zone.'²⁶⁴ In this way, where Anita Krajnc was acquitted of criminal mischief for feeding water to a pig, her actions would surely fall under the definition of interference with a truck under *Bill 156*.²⁶⁵

Section 8 lists possible responses the owner or occupier may take when trespassers are on their property. The possible responses escalate from asking the trespasser's name and address, to asking them to leave, and finally arresting them without a warrant by using as much force as is necessary in the circumstances.²⁶⁶ The bill also states that an owner/occupier is not liable to a trespasser for any injury or damages during the interaction unless the damage was wilful or reckless.²⁶⁷

Section 15 of the *Bill 156* lists punishments for the above offences as a fine of not more than \$15,000 for a first offence, and \$25,000 for subsequent offences.²⁶⁸ In addition to penalties for the trespasser and individuals who interfere with animals in trucks, if a vehicle was used to do either, the driver is guilty of an offence and liable for a \$15,000 or \$25,000 fine.²⁶⁹ Courts may also order restitution for any damages incurred by the owner.²⁷⁰

²⁶² *Bill 156*, *supra* note 251 at s. 6(2).

²⁶³ Chapter 2.3.2.

²⁶⁴ *Ontario Regulations*, *supra* note 252 at s. 8(1) 1 – 3.

²⁶⁵ *Ibid*.

²⁶⁶ *Bill 156*, *supra* note 251 at s. 8 - 10.

²⁶⁷ *Ibid* at s. 20.

²⁶⁸ *Ibid* at s. 15.

²⁶⁹ *Ibid* at s. 14(7)-(8).

²⁷⁰ *Ibid* at s. 16.

All of the above deals with the expected area of animals used in agriculture. However, the *Regulations* expand the definition of ‘farm animal’ beyond just animals bred for human commodity and consumption. Other ‘farm animals’ include animals that “provide labour,” are “ridden for pleasure,” are “shown publicly at an exhibition,” and are involved in “competitions.”²⁷¹ This expanded definition makes clear that *Bill 156* was never going to be limited to agricultural facilities, but any place in Ontario that exploits animals.

Just by looking at the text of *Bill 156* and the *Regulations*, one can see how problematic false pretence provisions, quick report provisions, overbroad definitions, and narrow exceptions work to ensure that animal activists are sufficiently prohibited from interacting with exploited animals in Ontario.

Beyond the text, comments made in the legislative debates display the seemingly oppositional interests in bolstering private property rights versus respect for constitutional rights. *Bill 156* was introduced by the Minister of Agriculture, Ernie Hardeman (C – Oxford ON), and he noted the balancing of rights early during the second reading in December 2019 when he stated “[t]he proposed bill balances the security of farmers, their families and food supply while protecting the right of people to participate in legal protests.”²⁷² As *Bill 156* developed, so did the concerns. In June 2020, the concerns were eloquently summed up by MPP Mike Schreiner (G – Guelph ON) when he remarked “I’m especially concerned about the bill’s potential infringement on people’s constitutional rights of free expression, investigative

²⁷¹ *Ontario Regulations*, *supra* note 252 at s. 5.

²⁷² Ontario, Legislative Assembly, *Hansard Transcripts* 42nd Parl 1st Sess (10 Dec 2020): <https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2019-12-10/hansard#para1155>

journalism and ability to protest on public property.”²⁷³ However, other MPPs relied on the apparent biosecurity risks of activism, with reference to the King Cole Duck Rescue.²⁷⁴

3.3.4 Manitoba

Manitoba has taken an interesting approach to introducing ag-gag laws.²⁷⁵ In March 2020, Premier Brian Pallister (PC – Fort Whyte MB) wrote a Mandate Letter to the Minister of Agriculture and Resource Development and the Minister of Justice asking them to work together to “review legislation and enforcement of policies related to on-farm trespassing.”²⁷⁶ In September 2020, the Manitoba government began public consultations regarding possible amendments to the *Petty Trespass Act* and *Animal Diseases Act*.²⁷⁷ Both the Mandate Letter and public consultation seemed to foreshadow ag-gag laws in Manitoba.

Then, on November 2nd 2020, the Progressive Conservatives introduced twenty-three pieces of legislation, nineteen of which were allowed to pass first reading without any circulation of drafts of the legislation.²⁷⁸ Within the nineteen bills without drafts were *Bill 62: The Animal Diseases Amendment Act* and *Bill 63: The Petty Trespass and Occupiers’ Liability Amendment Act*. Based on the names alone, it seemed Manitoba may have introduced two separate bills which will work together to achieve ag-gag, among other objectives. The Bills

²⁷³ Ontario, Legislative Assembly, Standing Committee on General Government, *Official Report of Debates (Hansard)* G-27, 42nd Parl, 1st Sess (12 June 2020): <https://www.ola.org/en/legislative-business/committees/general-government/parliament-42/transcripts/committee-transcript-2020-jun-12>

²⁷⁴ Chapter 2.3.1; Ontario, Legislative Assembly, *Hansard Transcript*, 42nd Parl, 1st Sess (16 June 2020): <https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2020-06-16/hansard#para633>

²⁷⁵ Discussed in Skinner & Sykes, *supra* note 18.

²⁷⁶ Mandate Letter from the Premier of Manitoba to Hon Blaine Pedersen, Minister of Agriculture and Resource Development (March 3, 2020), online: https://www.gov.mb.ca/asset_library/en/executivecouncil/mandate/2020/ard_mandate.pdf

²⁷⁷ Online public consultation available at <https://engagemb.ca/rural-crime-bio-security-metal-theft-legislation>

²⁷⁸ Carol Sanders, “Tories Introduce Stack of Bill to Legislature” (November 2nd 2020) *Winnipeg Free Press*, retrieved from: <https://www.winnipegfreepress.com/local/tories-introduce-stack-of-bills-to-legislature-572955422.html>

appear to address animal contamination, punishments for trespass, occupier liability, and interference with public highways.

In her article for the *Winnipeg Free Press*, Carol Sanders quotes opposition NDP leader Nahanni Fontaine (St. Johns MB): “[t]hat is pretty sneaky, to be honest – that you’re introducing bills to ensure their passage, but we have no ability to see them.”²⁷⁹ However undemocratic this tactic may seem, it is technically legal under the *Rules* of the Legislative Assembly of Manitoba.²⁸⁰ The *Rules* state that drafts of proposed bills do not need to be circulated until second reading. However legal the *Rules* are, the political move has been criticized as unprecedented and undemocratic.²⁸¹

Going forward with the mystery bills, on May 20th 2021, Manitoba became the fourth province to pass its form of ag-gag laws. *Bill 62: The Animal Diseases Amendment Act* creates ‘biosecurity zones’ (being areas where farmed animals are kept), and prohibits any interference with an animal in a biosecurity zone.²⁸² Interference with animals on farms and at slaughterhouses would be captured by the *Bill*. Additionally, the ag-gag law expressly prohibits interference with animals on transport trucks, including the prohibition of giving food or water to animals on trucks.²⁸³ *Bill 63: The Petty Trespass Amendment and Occupiers’ Liability Amendment Act* adds to the ag-gag law by reducing the steps to make out a trespassing offence.²⁸⁴ Whereas a

²⁷⁹ *Ibid.*

²⁸⁰ Manitoba, Legislative Assembly, *Rules, Orders, and Forms of Proceedings*, as amended November 20th 2018, at s. 135, 137.

²⁸¹ Darren Bernhardt, “Manitoba Government’s Tabling of 19 ‘Mystery’ Bills Call ‘Unprecedented, Undemocratic’” (2 March 2021) *CBC News*: <https://www.cbc.ca/news/canada/manitoba/secretive-legislative-bills-campaign-manitoba-1.5933053>

²⁸² *Bill 62: The Animal Diseases Amendment Act*, 3rd Sess, 42nd Legislature of the Legislative Assembly of Manitoba.

²⁸³ *Ibid* at s. 4.

²⁸⁴ *Bill 63: The Petty Trespass Amendment and Occupiers’ Liability Amendment Act*, 3rd Sess, 42nd Legislature of the Legislative Assembly of Manitoba.

verbal warning was previously necessary, the amendments allow for automatic offences where property is enclosed or has signage indicating property exclusivity.²⁸⁵ *Bill 63* also limits occupier liability for injuries sustained by persons over twelve years-old who trespass on agricultural lands.²⁸⁶

Both bills were passed May 20th 2021. In passing the ag-gag laws, the Minister of Agriculture and Resource Development, MLA Blaine Pedersen, stated that the law will “allow our farms and food processors to continue to produce food-or, to produce world-class, safe and healthy foods in a humane way with amendments that will enable law enforcement to protect the safety of food, livestock and people.”²⁸⁷ Responding to Pedersen, opposition MLA Diljeet Brar countered that the law “goes too far to target the rights of protesters, the people who care about animals, the people who care about fair treatment of animals, the people who raise their voices against animal cruelty at factory farms.”²⁸⁸ Brar went on to ask “why the government is targeting the whistle-blowers and attacking [animal rights activist] rights to protest?”²⁸⁹ Now in force, Manitoba has become the fourth Canadian province to pass a version of ag-gag laws.

3.4 Patterns in the Texts of Canadian Ag-gag

Through examining all the ag-gag laws in Canada (promised, proposed, and passed), there is a clear pattern: increased animal justice activism is being met by harsher penalties for activists, not increased protections for animals. Legislation from British Columbia, Prince Edward Island, Alberta, and Ontario all increase penalties for entering onto farms. The

²⁸⁵ *Ibid* at s. 3(1).

²⁸⁶ *Ibid* at s. 7.

²⁸⁷ Legislative Debates Vol. 67B May 20th 2021, Legislative Assembly of Manitoba: https://www.gov.mb.ca/legislature/hansard/42nd_3rd/vol_67b/h67b.html#top

²⁸⁸ *Ibid*.

²⁸⁹ *Ibid*.

legislation from PEI contains uncertain and confusing wording regarding actions that 'could' result in biosecurity risks. Both Alberta and Ontario ag-gag laws contain problematic false pretence provisions. Ontario's ag-gag law also includes a problematic quick-report provision. Both Manitoba and Ontario's ag-gag laws target activism with transport trucks.

Before considering how a Canadian court may address Canadian ag-gag, the next chapter will review the current jurisprudence from the United States on ag-gag laws. In the six current court decision on ag-gag, all court decisions have found ag-gag to be a violation of the constitutional right to free speech. In reviewing the reasons for enacting the state ag-gag, the textual provisions, and the impact of the provisions, there are many parallels to be drawn between ag-gag laws from the US and Canada. Therefore, an insight into the treatment of ag-gag laws in the US may also give an insight into the potential treatment of ag-gag laws in Canada.

CHAPTER 4: LESSONS FROM THE US

As the popularity of ag-gag laws grew throughout the US, animal rights organizations and environmental organizations have challenged the laws in the courts. As of writing this thesis, decisions from six different states have all found ag-gag laws to be unconstitutional. The states include Idaho,²⁹⁰ Utah,²⁹¹ Wyoming,²⁹² Iowa,²⁹³ Kansas,²⁹⁴ and North Carolina,²⁹⁵ Additionally, the Animal Legal Defence Fund [ALDF] is currently challenging the ag-gag law in Arkansas.²⁹⁶ This chapter will explore these six decisions to gauge how the constitutional challenges were treated by each court.

4.1 Constitutional Arguments

Since the ALDF has participated in all the constitutional challenges, there are certain common features which appear in every claim brought. Before describing each of the six decisions, I will first describe the common constitutional claims, and the elements needed to establish that a law is unconstitutional. I will not describe all the different claims brought by all the challenges, but instead rely on the claims common to all. The two claims featured in every

²⁹⁰ Idaho, declared unconstitutional August 3rd 2015 in *Animal Legal Defence Fund et al v Otter et al* ["ALDF v Otter"], No. 1:2014cv00104 (2015 D. Idaho), decision upheld by the appeal court of the Ninth Circuit January 4th 2018 in *Animal Legal Defense Fund et al v Wasden*, No. 15-35960 (9th Cir. 2018) ["ALDF v Wasden"].

²⁹¹ Utah, declared unconstitutional July 7th 2017 in *Animal Legal Defence Fund et al v Herbert et al*, No. 2:2013cv00679 (2017 D. Utah).

²⁹² Wyoming, declared unconstitutional October 28th 2018 in *Western Watershed Project et al v Michael et al*, No. 2:15-cv-00169-SWS (2018 D. Wyoming).

²⁹³ Iowa, declared unconstitutional January 9th 2019 in *Animal Legal Defence Fund et al v Reynolds et al*, No. 4:17-cv-00362-JEG-HCA (2019 S.D. Iowa).

²⁹⁴ Kansas, declared unconstitutional January 22nd 2020 in *Animal Legal Defence Fund et al v Kelly et al*, 2:18-cv-02657-KVH (2020 D. Kansas).

²⁹⁵ North Carolina, declared unconstitutional on June 1st 2020 in *People for the Ethical Treatment of Animals et al v Stein et al*, 1:16-cv-00025-TDS-JEP (2020 D. North Carolina).

²⁹⁶ *Animal Legal Defense Fund et al. v Vaught et al.*, 4:19-cv-00442-JM (appeal filed March 12th 2020 D. Arkansas).

challenge are (i) a claim that ag-gag violates the First Amendment right to free speech, and (ii) a claim that ag-gag violates the Fourteenth Amendment equal protection clause.

4.1.1 First Amendment

In the United States, the right to free speech is codified in the First Amendment of the US Constitution, being part of the 1791 Bill of Rights, and states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.²⁹⁷

It is important to note that the First Amendment safeguards the right to free speech by limiting state action, not action by a private property owner exercising their property rights.²⁹⁸ There are three steps to establishing an unconstitutional First Amendment violation as established in *Cornelius v NAACP Legal Def. & Educ. Fund.*²⁹⁹

The first step places a burden on the plaintiff or claimant to demonstrate that an activity which is the subject of the law is protected as expression under the First Amendment.³⁰⁰ In determining whether ag-gag targets protected speech, the courts turn to the US Supreme Court decision *United States v Stevens*.³⁰¹ The *Stevens* case created ‘historic and traditional categories’ where speech is acceptably limited, including fraud,³⁰² obscenity, real threats, defamation, and child pornography.³⁰³ In addition to the protection of verbal speech, the case of *United States v Alvarez* establishes that conduct which is essentially preparatory to speech is also protected by

²⁹⁷ US Constitution Bill of Rights (1791).

²⁹⁸ *Lloyd Corp. v Tanner*, 407 U.S. 551, 567 (1972).

²⁹⁹ *Cornelius v NAACP Legal Def. & Educ. Fund.*, 473 U.S. 788, 797 (1985).

³⁰⁰ *Ibid.*

³⁰¹ *United States v Stevens*, 559 U.S. 460, 468-69 (2010).

³⁰² The acceptable limitation of fraudulent speech directly relates to false pretence clauses in ag-gag.

³⁰³ *United States v Stevens*, *supra* note 301.

the First Amendment.³⁰⁴ Such conduct would include the creation of documentation through recording or taking pictures.³⁰⁵ Further, the dissemination of such documentation is speech for the purposes of the First Amendment.³⁰⁶ In all six decisions, the courts found that ag-gag laws do target speech which is protected by the First Amendment, including the restriction of false pretences and creation of audiovisual media.

If the First Amendment is sufficiently engaged, the court will then move onto the second step and determine which level of scrutiny is appropriate to analyze the ag-gag law.³⁰⁷ Where the laws restrict speech in a way that is viewpoint-based or content-based – meaning that the speech is restricted depending on what is said – the highest level of scrutiny must be applied.³⁰⁸ As ag-gag often targets speech that is content-based, most courts approach the analysis with strict scrutiny. Content-based restrictions of speech are presumptively unconstitutional.³⁰⁹ However, in one case, the judge found certain provisions of the ag-gag law to be content-neutral and applied an intermediate level of scrutiny.³¹⁰

The third step of the test is using the appropriate level of scrutiny to analyse the laws. In scrutinizing the laws, the burden shifts to the government to establish (1) that there is some pressing public need to suppress the speech, and (2) that the law is narrowly tailored to restrict

³⁰⁴ *United States v Alvarez*, 132 S. Ct. 2537 (2012). [*Alvarez*] The *Alvarez* decision also importantly decided that false statements are protected speech, and do not fall under the traditional ‘fraud’ limitation. For an excellent discussion of how *Alvarez* impacts ag-gag litigation, see Larissa U Liebmann, “Fraud and First Amendment Protections of False Speech: How *United States v Alvarez* Impacts Constitutional Challenges to Ag-gag Laws” (2014) 31:2 *Pace Environmental Law Review* 566.

³⁰⁵ *Alvarez*, *ibid*; *Fields v City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017).

³⁰⁶ *Fields v City of Philadelphia*, *ibid*.

³⁰⁷ *Turner Broadcasting System, Inc. v F.C.C.*, 512 U.S. 622, 680 (1994). [*Turner*]

³⁰⁸ *Ysursa v Pocatello Educ. Ass’n.*, 555 U.S. 353, 358 (2009).

³⁰⁹ *Reed v Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

³¹⁰ Such was the case in North Carolina; *supra* note 295; *Turner Broadcasting System, Inc. v F.C.C.*, *supra* note 307.

the speech as little as possible in pursuit of this goal.³¹¹ This has been referred to as an ‘exacting test’ where “content-based restrictions will generally be found unconstitutional unless they are narrowly tailored to a compelling state interest.”³¹² If a court finds no compelling state interest, or that the law is not narrowly tailored, the law will be found to violate the First Amendment, and will be invalidated.

4.1.2 Fourteenth Amendment

The second common constitutional issue raised in ag-gag litigation is a violation of the Fourteenth Amendment equal protection clause. This clause states that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” and has been interpreted to mean that all persons similarly situated ought to be treated alike.³¹³ In this way, the plaintiff organizations have brought additional claims that ag-gag laws unconstitutionally punish animal advocacy organizations.

In order to establish a violation of the Fourteenth Amendment, a plaintiff must establish that they have been treated differently from others with whom they are similarly situated and that this unequal treatment was intentional.³¹⁴ Whereas the Fourteenth Amendment has historically been used in cases addressing racism, sexism, and other immutable characteristics, the courts have held that “a congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.”³¹⁵ Such a claim is reviewed under a rational basis

³¹¹ *Turner supra* note 207: *Citizens United v Fed. Election Comm’n*, 558 U.S. 340 (2010).

³¹² *Turner, ibid.*

³¹³ *ALDF v Otter, supra* note 90 at p. 23; *Plyler v Doe*, 457 U.S. 202, 216 (1982).

³¹⁴ *King v Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016).

³¹⁵ *United States v Windsor*, 570 U.S. 744 (2013).

review, meaning that a judge must rationally decide whether there is enough evidence to establish that a law was passed with animus toward a certain group.³¹⁶

4.2 Litigation from Six US States

I will now break down each decision chronologically by state. As noted above, the ALDF was a litigant in every case. I will also note here that they were often joined by People for the Ethical Treatment of Animals [PETA], as well as other organizations and individuals advocating on issues of animal welfare, constitutional protections, and food safety.

4.2.1 Idaho

Idaho introduced ag-gag laws in 2014 as a reaction to a 2012 undercover operation by Mercy for Animals (MFA), which documented the violent abuse of cows on a dairy farm.³¹⁷ In his decision, Chief Judge Winmill noted the abuse captured on video at Bettencourt Dairies Dry Creek Dairy in Hansen, Idaho. The employees depicted in the video were shown to drag cattle using tractors, as well as repeatedly beating, kicking, and jumping on the cows. After the video received national attention, the Idaho Dairymen Association drafted and sponsored the ag-gag bill which sought to criminalize such undercover operations.³¹⁸ MFA released the undercover video to the public on October 9th 2012,³¹⁹ and the ag-gag bill was “quickly” signed into law on February 14th 2014.³²⁰ In support of the legislation, Senator James ‘Jim’ Patrick compared the

³¹⁶ *Lawrence v Texas*, 539 U.S. 558, 580 (2003).

³¹⁷ ALDF “Challenging Idaho’s Ag-Gag Law”, retrieved from: <https://aldf.org/case/challenging-idahos-ag-gag-law/>

³¹⁸ *ALDF v Otter*, *supra* note 90 at p. 1 – 2; See also Idaho Code § 18-7042.

³¹⁹ Mercy for Animals “Undercover Investigations”, Retrieved from: <https://mercyforanimals.org/investigations>

³²⁰ *ALDF v Otter*, *supra* note 90 at p. 2.

undercover operations to “terrorism, [which] has been used by enemies for centuries to destroy the ability to produce food and the confidence in food safety.”³²¹

Idaho Code § 18-7042 created the crime “interference with agricultural production”³²² which targeted the gathering of information by misrepresentation and trespass. Section 1 creates the offence that a person commits interference with agricultural production if they knowingly: (a) are not an employee and enter a facility; (b) obtain records from the facility by misrepresentation or trespass; (c) obtains employment with the intent to cause economic harm to the facility; (d) enters the facility and makes an audio or video recording; or (e) intentionally causes physical damage to the operation.³²³ Section 2 of the Code loosely defines “agricultural production.”³²⁴ Section 3 states the possible punishment for the misdemeanour as up to 1 year imprisonment, a fine of \$5,000, or both.³²⁵ Lastly, section 4 states that a person found guilty shall be ordered to pay restitution twice the amount of the damages resulting from the violation.³²⁶

ALDF filed its complaint on March 17th 2014.³²⁷ The complaint claimed that the ag-gag law violated the First Amendment right to free speech and the Fourteenth Amendment equal protection clause.³²⁸ The complaint specifically claimed violations of the constitution by criminalizing employment-based investigations and criminalizing investigative journalism, whistleblowing by employees, or expository documentation efforts.³²⁹ On August 3rd 2015, the

³²¹ *ALDF v Otter*, *Ibid* at p. 4; *Senator Patrick*, Wall Decl., Ex. A, p. 81, lns. 1–8.

³²² Idaho Code § 18-7042 at s. 1.

³²³ *Ibid*.

³²⁴ Idaho Code § 18-7042 s. 2.

³²⁵ Idaho Code § 18-7042 s. 3.

³²⁶ Idaho Code § 18-7042 s. 4.

³²⁷ The American Civil Liberties Union (ACLU) Idaho provided updates on the proceedings, including all documents filed, at <https://www.acluidaho.org/en/cases/aldf-v-wasden#:~:text=ALDF,Wasden&text=Over%20opposition%20from%20all%20across,is%20critical%20of%20industrial%20agriculture>.

³²⁸ *ALDF v Otter*, *supra* note 90 at p. 3.

³²⁹ *Ibid* at p. 3.

Idaho District Court granted the plaintiff's motion for summary judgement, finding § 18-7042 to be unconstitutional.³³⁰

Chief Judge Winmill found that the legislation specifically targets journalists, animal welfare activists, and employees of agricultural facilities.³³¹ He states that § 18-7042 “[strikes] at the heart of important First Amendment values” and that undercover investigations are “recognized and embraced as important political speech in Idaho.”³³² As the State respondents in the proceedings attempted to argue that § 18-7042 is meant to protect private property and privacy of agricultural operations, Winmill CJ reminded them that laws against trespass, fraud, theft, and defamation already exist in the state, and that those laws do so without infringing First Amendment rights.³³³

As this was the first ag-gag case to be decided, Winmill CJ first had to decide whether (1) gaining employment through communication of false pretences, and (2) creation of recordings was speech protected by the First Amendment. He found that both false pretences and the creation of documentation are speech that is protected.³³⁴ He found that the speech serves to advance core First Amendment values of exposing misconduct to the public and facilitating public dialogue.³³⁵ He specifically recognized that the gag law's underlying purpose was to silence animal activists.³³⁶ This further reinforces the claim that such laws restrict speech based on viewpoint and content, and therefore demands an analysis using the highest level of scrutiny.³³⁷

³³⁰ *Ibid.*

³³¹ *Ibid* at p. 6.

³³² *Ibid* at p. 6, 12.

³³³ *Ibid* at p. 9 – 13, 20.

³³⁴ *Ibid* at p. 9 – 18.

³³⁵ *Ibid* at p. 9 - 13.

³³⁶ *Ibid* at p. 9 – 18.

³³⁷ *Ibid* at p. 9 – 18.

In his analysis of the third step, Winmill CJ recognized that whistleblowing in the agriculture industry does not fall into any of the categories of acceptable free speech restrictions.³³⁸ He found that although there is a strong interest in property and privacy rights, that there are also compelling public interests in safety of the food supply, worker safety, and the humane treatment of animals.³³⁹ Therefore, shielding the agriculture industry from public scrutiny would violate the First Amendment.³⁴⁰ Further, Winmill CJ was persuaded that the agriculture industry is not a private matter, but a public matter; being that the industry is highly regulated and agricultural practices are of the “utmost public concern.”³⁴¹

Having found Idaho’s ag-gag law to violate the First Amendment, Winmill CJ turned to the claim that the law also violated the Fourteenth Amendment equal protection clause.³⁴² In determining whether the ag-gag law violated equal protection, Winmill CJ again drew attention to trespass and fraud laws which serve the same purpose without violating the Constitution.³⁴³ He went on to question why agricultural facilities deserved more protection from fraud and trespass than any other private business, and found that protecting one private industry against public scrutiny is not a legitimate government interest.³⁴⁴

Further, a legislative desire to harm a politically unpopular group cannot be legitimate under the Fourteenth Amendment.³⁴⁵ Winmill CJ concluded that § 18-7042 discriminates against animal activists and animal welfare organizations on “both its face and through its purpose.”³⁴⁶ Because of the targeted discrimination, the Court found that the law unconstitutionally violated

³³⁸ *Ibid* at p. 18 – 23.

³³⁹ *Ibid* at p. 19.

³⁴⁰ *Ibid* at p. 19.

³⁴¹ *Ibid* at p. 21.

³⁴² *Ibid* at p. 23 – 28.

³⁴³ *Ibid* at p. 24.

³⁴⁴ *Ibid* at p. 24.

³⁴⁵ *Ibid* at p. 25; *C.f. Moreno*, 413 U.S. at 534.

³⁴⁶ *ALDF v Otter*, *ibid* at p. 26.

the equal protection clause.³⁴⁷ Having found the ag-gag law violated both the First and Fourteenth amendments, the motion for summary judgement was granted in favour of ALDF, and a permanent injunction against enforcement of the ag-gag law was ordered.³⁴⁸

The summary judgment decision was later appealed.³⁴⁹ Within their decision, the Idaho Court of Appeals took notice that Idaho's ag-gag law was enacted following an exposé being released showing the operations of a dairy farm.³⁵⁰ The appellate decision upheld part and reversed part the decision of the lower court.

The panel upheld the findings that the false pretences and documentation clauses could not survive First Amendment scrutiny as they targeted the protected speech of journalists.³⁵¹ Therefore, journalists would be able to seek employment on a farm with the intention of reporting the conditions within. However, using the *Alvarez* precedent, the panel then found that the provisions prohibiting obtaining pre-existing records by misrepresentation and obtaining employment through misrepresentation with intent to cause economic or other injury were constitutionally valid.³⁵² The Court therefore ordered that the permanent injunction be modified to reflect the new findings.³⁵³

4.2.2 Utah

Similarly to the Idaho decision, Judge Shelby began his decision by acknowledging that the state government enacted ag-gag laws to target undercover investigations at agricultural facilities.³⁵⁴ The court quoted Senator David Hinkins, who sponsored the Bill and declared that

³⁴⁷ *Ibid* at p. 26.

³⁴⁸ *Ibid* at p. 28.

³⁴⁹ Appeal launched on April 20th 2016.

³⁵⁰ *ALDF v Wasden*, *supra* note 290 at p. 2 – 3.

³⁵¹ *Ibid* at p. 3, 15 – 26, 34 – 40.

³⁵² *Ibid* at p. 3, 27 – 34.

³⁵³ *Ibid* at p. 40.

³⁵⁴ *Animal Legal Defence Fund et al v Herbert et al*, *supra* note 291, at p 1.

the legislation was “meant to address the ‘vegetarian people that [are] trying to kill the animal industry’ and ‘hiding cameras and trying to ... modify the films and stuff like that’.”³⁵⁵ The ag-gag bill criminalized four acts: (1) obtaining access to a farm under false pretences, (2) ‘bugging’ a farm, (3) filming an operation after applying for employment with intent to film, and (4) filming an operation while trespassing.³⁵⁶

The bill was passed in March of 2012 and the plaintiff, Amy Meyer, was the first person to be charged under the new laws in February 2013.³⁵⁷ Meyer had been on public property when she recorded a farm employee driving a bulldozer over a sick cow in a Utah slaughterhouse.³⁵⁸ She was arrested under the ag-gag laws, but the charges were later withdrawn, as Meyer was not on private property at the time. Although her criminal charges were withdrawn, Meyer, the ALDF, and PETA subsequently challenged the constitutionality of the ag-gag legislation.³⁵⁹

Following the success of the Idaho action, the plaintiffs claimed that the ag-gag law unconstitutionally violated the First and Fourteenth Amendment.³⁶⁰ In this action, the state not only rebutted the claims, but additionally claimed that the plaintiffs lacked standing to bring the action.³⁶¹ Judge Shelby quickly found that all three plaintiffs had standing, as they all had a genuine concern in the law based on their previous involvement with the type of speech targeted by the law.³⁶²

Judge Shelby began the First Amendment analysis with the threshold question of whether false pretences targeted by the ag-gag law are protected by the First Amendment.³⁶³ In

³⁵⁵ *Ibid* at p. 5.

³⁵⁶ *Ibid* at p. 5 - 6.

³⁵⁷ *Ibid* at p. 6.

³⁵⁸ *Ibid* at p. 6.

³⁵⁹ *Ibid* at p. 7.

³⁶⁰ *Ibid* at p. 7.

³⁶¹ *Ibid* at p. 7.

³⁶² *Ibid* at p. 7 - 9.

³⁶³ *Ibid* at p. 10 - 12.

reference to *Alvarez*, the state claimed that false pretences cause a legally cognizable harm to animals, employees, trespass (as a harm itself), and harm in offers of employment.³⁶⁴ Judge Shelby found that the ag-gag law criminalized lies which cause harm as well as those which do not.³⁶⁵ On the question of whether a lie vitiates consent to enter property, Judge Shelby relied on decisions from the Fourth and Seventh Courts to conclude that consent based on a misrepresentation is not itself a legally cognizable harm.³⁶⁶ For these reasons, the false pretences clause fell under First Amendment scrutiny.³⁶⁷ Judge Shelby also found that the recording provisions constituted speech which attracted First Amendment protection.³⁶⁸

Following the steps in the First Amendment analysis, Judge Shelby found that both of these acts of protected speech involve content-related speech which therefore attracts strict scrutiny.³⁶⁹ On the third step, he found that the State had not sufficiently established a compelling state interest in the law, nor sufficient establishment that the ag-gag law was narrowly tailored.³⁷⁰ The law failed the strict scrutiny of the First Amendment test, and was therefore unconstitutional.³⁷¹ Having found the law unconstitutional under the First Amendment, the court did not address the Fourteenth Amendment argument. Judge Shelby granted the motion for summary judgment in favour of ALDF, PETA, and Amy Meyer.³⁷²

³⁶⁴ *Ibid* at p. 12 – 19.

³⁶⁵ *Ibid* at p. 14 – 15.

³⁶⁶ *Ibid* at p. 15 – 18.

³⁶⁷ *Ibid* at p. 19.

³⁶⁸ *Ibid* at p. 20 – 22.

³⁶⁹ *Ibid* at p. 24 – 27.

³⁷⁰ *Ibid* at p. 28 – 30.

³⁷¹ *Ibid* at p. 30 – 31.

³⁷² *Ibid* at p. 31.

4.2.3 Wyoming

In 2015, the State of Wyoming passed two ag-gag statutes prohibiting individuals from entering open land for the purpose of collecting resource data without permission from the owner.³⁷³ The term ‘collecting’ included taking a sample or photograph or “otherwise preserving information in any form” and ‘data’ relates to “air, water, soil, conservation, habitat, vegetation, or animal species.”³⁷⁴ One of the statutes imposed criminal liability for such acts, while the other imposed civil liability.³⁷⁵ Violators faced fines of \$1,000 for first-time offenders with a possibility of a jail term up to one year, and for subsequent offenders, a \$5,000 fine with a mandatory 10-day jail term and a possibility of one year.³⁷⁶ Additionally, any information collected could only be used against the trespasser, and could not be used in any other proceeding.³⁷⁷

The statutes were challenged by the Western Watershed Project, the National Press Photographers Association, and the Natural Resources Defence Council, who claimed that the statutes violated the First and Fourteenth Amendment.³⁷⁸ However, during this litigation, Wyoming amended the statutes, changing the wording slightly, rendering the first action moot.³⁷⁹ The organizations amended their claim to address the 2016 revisions, but the action was dismissed, as the court found that the new legislation did not engage the First

³⁷³ *Western Watershed Project et al v Michael et al*, *supra* note 292 at p. 2, citing Wyo. Stat. §§ 6-3-414 (2015).

³⁷⁴ *Ibid* at p. 2, § 6-3-414(d)(iv) (2015).

³⁷⁵ *Ibid* at p. 2; § 6-3-414(c) (2015) [criminal], § 40-27-101(c) (2015) [civil].

³⁷⁶ *Ibid* at p. 2; § 6-3-414(c)(i - ii) (2015).

³⁷⁷ *Ibid* at p. 2; §§ 6-3-414(e) (2015); 40-27-101(d) (2015).

³⁷⁸ *Ibid* at p. 2 - 3.

³⁷⁹ *Ibid* at p. 3.

Amendment.³⁸⁰ This decision was reversed on appeal and sent back to the lower court to make a finding on the constitutional validity of the laws.³⁸¹

In the new decision on summary judgment, Judge Skavdahl separated his analysis into four sections: standing, validity of challenge, content-neutrality and forum analysis, and level of scrutiny.³⁸² On the question of standing, he found the organizations have standing, as they demonstrated the chilling effect on free speech is “an injury that is ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’”³⁸³

On the question of whether the constitutional challenge was valid, Judge Skavdahl found that the question would be answered within the discussion of the content focus of the legislation.³⁸⁴ He then found that the legislation engaged free speech in a content-based way, meaning the legislation was presumptively subject to the strict scrutiny of the *Alvarez* test.³⁸⁵ Additionally, he found strict scrutiny necessary to ensure that the legislation does not restrict speech simply because the lawmakers disagree with the speaker’s views.³⁸⁶

In strictly scrutinizing the legislation, the government could not “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”³⁸⁷ Although the government claimed that the legislation served to protect private property rights, Judge Skavdahl noted that the legislation did not simply address all trespassers, but

³⁸⁰ *Ibid* at p. 3.

³⁸¹ *Ibid* at p. 3; appeal decision *WWP et al v Michael et al*, No. 16-8083 (2017 D. Wyoming).

³⁸² *Ibid* at p. 5.

³⁸³ *Ibid* at p. 6, quoting *Monsanto Co. v Geertson Seed Farms*, 561 U.S. 139 (2010).

³⁸⁴ *Ibid* at p. 13 -15.

³⁸⁵ *Ibid* at p. 15 – 19.

³⁸⁶ *Ibid* at p. 19 – 22.

³⁸⁷ *Ibid* at p. 22; citing *Reed v Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015).

unacceptably penalized trespassers who subsequently engage in protected speech.³⁸⁸ To address the protection of property rights, he noted that “Wyoming could also more rigorously enforce its existing [trespassing] statutes.”³⁸⁹ Therefore, Judge Skavdahl concluded that Wyoming’s ag-gag legislation failed strict scrutiny, and was therefore unconstitutional and unenforceable.³⁹⁰

4.2.4 Iowa

The first iteration of Iowa’s ag-gag law was passed in March 2012, and mainly targeted undercover investigations, and criminalizing gaining employment under false pretences to collect information.³⁹¹ The law was first challenged in October 2017 by the ALDF, who brought a claim alleging unconstitutional violation of the First and Fourteenth Amendment.³⁹² In February 2018, the Court dismissed the Fourteenth Amendment claim, but not the First Amendment claim.³⁹³ Almost a year later, in January 2019, the District Court of Iowa granted ALDF’s motion for summary judgment, finding that the ag-gag law violated the First Amendment as a content-based restriction on free speech.³⁹⁴ The Court dismissed the Fourteenth Amendment claim as moot, given the ruling on the First Amendment.³⁹⁵ The state then filed a notice of appeal in February 2019, although no appeal was ultimately filed.³⁹⁶

Instead, the Governor for Iowa signed into law another piece of ag-gag legislation in March 2019.³⁹⁷ The new legislation reworded the previous iteration of the prohibition of false

³⁸⁸ *Ibid* at p. 22.

³⁸⁹ *Ibid* at p. 24.

³⁹⁰ *Ibid* at p. 24 – 25.

³⁹¹ *Animal Legal Defence Fund et al v Reynolds et al*, *supra* note 293 at p. 2, citing the *Agricultural Production Facility Fraud Law*, Iowa Code § 717A.3A.

³⁹² *Ibid* at p. 2.

³⁹³ *Ibid* at p. 2.

³⁹⁴ *Ibid* at p. 2 – 3.

³⁹⁵ *Ibid* at p. 3.

³⁹⁶ *Ibid* at p. 3.

³⁹⁷ *Ibid* at p. 3.

pretences to gain access to a facility.³⁹⁸ A new constitutional challenge was promptly brought in April 2019. Within the constitutional challenge to this new ag-gag legislation, Judge Gritzner reiterated that the legislation was introduced following a series of undercover investigations onto Iowa farms.³⁹⁹ He recounted the lawmakers describing the bill as responsive to the investigations, prioritizing facility security and protection from the harms of investigative reporting.⁴⁰⁰ This decision addressed the State's motion to dismiss and the ALDF's motion for preliminary injunction, which would make the new ag-gag unenforceable pending the court proceeding.⁴⁰¹ In his lengthy decision, Judge Gritzner considered the First Amendment claim, being the content-based restriction of protected speech,⁴⁰² and the potential for strict scrutiny.⁴⁰³ He also considered other factors that are specific to the issue of preliminary injunctions, including irreparable harm,⁴⁰⁴ balance of harms (First Amendment interests and the statute's interests),⁴⁰⁵ and the public interest.⁴⁰⁶ Judge Gritzner concluded that it was likely that the new ag-gag legislation would eventually be found unconstitutional, and granted the preliminary injunction, barring the State from enforcing the second ag-gag law.⁴⁰⁷

During the ongoing litigation above, in June 2020, Iowa signed into law a third ag-gag bill.⁴⁰⁸ The third version seemingly abandons the fight against false pretences, and instead targets whistleblowers and increases penalties for the new offence of 'food operation

³⁹⁸ *Ibid* at p. 3, citing the *Agricultural Production Facility Trespass law*, Iowa Code § 717A.3B (effective Mar. 14, 2019).

³⁹⁹ *Ibid* at p. 4.

⁴⁰⁰ *Ibid* at p. 4.

⁴⁰¹ *Ibid* at p. 5.

⁴⁰² *Ibid* at p. 7 – 22.

⁴⁰³ *Ibid* at p. 30 –

⁴⁰⁴ *Ibid* at p. 38 – 41.

⁴⁰⁵ *Ibid* at p. 41.

⁴⁰⁶ *Ibid* at p. 41 – 42.

⁴⁰⁷ *Ibid* at p. 42.

⁴⁰⁸ Iowa Senate File 2413, 88 General Assembly.

trespass.⁴⁰⁹ The first act of trespassing is classified as an aggravated misdemeanour, and subsequent offences are class 'D' felonies.⁴¹⁰ With the first two likely to fail, and now this third iteration of ag-gag, it seems that Iowa will continue to pass this legislation despite the court's clear message that such statutes are unconstitutional.

4.2.5 Kansas

Kansas's ag-gag law was passed in 1990, making it among the first of its kind in the US.⁴¹¹ Broadly, the ag-gag laws criminalized causing damage to an animal facility, stealing animals, entering a facility to create documentation, and remaining on the property against the owner's wishes.⁴¹² In 2012, Kansas amended the laws to vitiate consent to be on private property if that consent was gained by false pretences.⁴¹³ This amendment seemed to be a reaction to the growing popularity of undercover investigations in neighbouring states.

In December 2018, the ALDF filed their complaint against the Kansas ag-gag law, again claiming an unconstitutional violation of the First Amendment by restricting viewpoint-based and content-based speech.⁴¹⁴ In response, the State claimed that the ALDF has no standing to bring such a claim, and that if the court does find standing, that the law nevertheless does not violate the right to free speech.⁴¹⁵

In her January 2020 decision, Judge Vratil spent a great deal of time on this issue of standing. She ultimately found the ALDF to have standing to challenge several provisions of the

⁴⁰⁹ Iowa Senate File 2413, *Ibid* at s. 17.2.

⁴¹⁰ *Ibid* at s. 17.

⁴¹¹ *Animal Legal Defence Fund et al v Kelly et al*, *supra* note 294 at p. 2 – 3, citing the Kansas Farm Animal and Field Crop and Research Facilities Protect Act, K.S.A. §§ 47-1825.

⁴¹² *Ibid*, at p. 2 – 3.

⁴¹³ *Ibid*, at p. 4, see K.S.A. § 47-1826(e).

⁴¹⁴ *Ibid* at p. 7 – 8. It is noteworthy here that the ALDF did not bring a claim that the law also violates the Fourteenth Amendment.

⁴¹⁵ *Ibid* at p. 8 – 9.

ag-gag law.⁴¹⁶ She then turned to the merits of the claims. On the question of the First Amendment, the organizations claimed the law to be unconstitutional based on the content-based restriction as well as the overbreadth.⁴¹⁷ The State claimed in response that the First Amendment was not violated because the law was content-neutral and speech is not protected where the speech is meant to cause damage to a business.⁴¹⁸

In her analysis, Judge Vratil, reiterated the First Amendment analysis task of determining whether (1) the law regulates speech, (2) if the regulated speech is content-based or content-neutral, and (3) if the regulated speech is content-based, if the speech falls into a category of allowable government restriction (i.e., damage to a business).⁴¹⁹ On the first question, she found that the law limited speech with regard to the false pretences clause as well as the prohibition of taking pictures (both protected speech).⁴²⁰ On the second question, she found that the law was viewpoint- and content-based, as it only applied to persons who wish to damage the enterprise, as opposed to those who wish to benefit the enterprise.⁴²¹ On the third question, Judge Vratil applied the *Alvarez* test, and using strict scrutiny found that the State had not met their burden of proving the law serves a compelling interest and is narrowly tailored to further that interest.⁴²² Thus, Kansas's ag-gag law failed the strict scrutiny test, and violated the First Amendment.⁴²³

⁴¹⁶ *Ibid* at p. 10 – 29.

⁴¹⁷ *Ibid* at p. 29.

⁴¹⁸ *Ibid* at p. 29.

⁴¹⁹ *Ibid* at p. 31.

⁴²⁰ *Ibid* at p. 31 – 32.

⁴²¹ *Ibid* at p. 33 – 35.

⁴²² *Ibid* at p. 35 – 38.

⁴²³ *Ibid* at p. 38.

The decision from the Kansas court was predicted by Meredith Kaufman, who wrote about the probability of success of the action in her article.⁴²⁴ In discussing the previous decisions from Idaho and Iowa, Kaufman addresses the textual differences in Kansas's ag-gag law, but finds similar points of fault. She therefore concludes that the ALDF's challenge to Kansas's ag-gag law will also be successful. Kaufman then makes the important conclusion that where agricultural exceptionalism clashes with the First Amendment, the agricultural industry must comply with the Constitution.⁴²⁵ Of course, this was later supported by the actual court decision discussed here.

4.2.6 North Carolina

North Carolina's ag-gag laws were enacted in June 2015, and prohibited employees (1) from breaching their 'duty of loyalty to the employer,' (2) documenting non-public areas without the employer's permission, (3) placing an unattended recording device on the premises, (4) conspiring in theft, and (5) interfering with property.⁴²⁶ In January 2016, eight organizations, including PETA and ALDF, filed a complaint that the law violated both the First and Fourteenth Amendments as well as several provisions of the North Carolina Constitution.⁴²⁷ Their main concern with the ag-gag law is that it targeted and punished undercover journalists who publicly exposed improper or criminal activities on farms.⁴²⁸

The decision on the constitutionality of the ag-gag law was released in June 2020. Judge Schroeder began his analysis with the question of whether the organizations had standing,

⁴²⁴ Meredith Kaufman, "The Clash of Agricultural Exceptionalism and the First Amendment: A Discussion of Kansas' Ag-gag Law" (2019) 15:1 *Journal of Food Law & Policy* 49.

⁴²⁵ *Ibid* at p. 51.

⁴²⁶ *People for the Ethical Treatment of Animals et al v Stein et al*, *supra* note 295 at p. 3 - 5. Citing N.C. Gen. Stat. § 99A-2(a).

⁴²⁷ *Ibid* at p. 3 - 7.

⁴²⁸ *Ibid* at p. 6.

which the State argued they did not.⁴²⁹ He found that the organizations had established the two elements of standing, being injury-in-fact as well as causation and redressability; therefore, standing was established.⁴³⁰

Moving on to the First Amendment claim, the organizations claimed that the law restricted speech that is viewpoint- and content-based, and was unconstitutionally overbroad.⁴³¹ The State argued that the law prohibited conduct – not speech – and that any speech restricted is not protected speech.⁴³² Judge Schroeder then began the three-stage free speech analysis.⁴³³ He first found that the law did restrict speech, not simply conduct as the State argued.⁴³⁴ He then found that two of the challenged sections were viewpoint-based and content-based and demanded strict scrutiny, and the two other provisions were viewpoint-neutral and content-neutral and demanded an intermediate level of scrutiny.⁴³⁵ In applying the appropriate level of scrutiny for the challenged provisions, all provisions failed constitutional scrutiny and were therefore struck down.⁴³⁶

Judge Schroeder continued with his analysis despite this conclusion. He found the laws were not overbroad.⁴³⁷ He also continued with the Fourteenth Amendment analysis, finding the laws to not be vague,⁴³⁸ and that the laws did not specifically target animal rights advocates.⁴³⁹ Therefore, the ag-gag law was found not to violate the Fourteenth Amendment.⁴⁴⁰ He reiterated

⁴²⁹ *Ibid* at p. 8.

⁴³⁰ *Ibid* at p. 8 – 14.

⁴³¹ *Ibid* at p. 15.

⁴³² *Ibid* at p. 15.

⁴³³ *Ibid* at p. 21 -

⁴³⁴ *Ibid* at p. 21 – 35.

⁴³⁵ *Ibid* at p. 35 – 42.

⁴³⁶ *Ibid* at p. 42 – 54.

⁴³⁷ *Ibid* at p. 54 – 57.

⁴³⁸ *Ibid* at p. 57 – 64.

⁴³⁹ *Ibid* at p. 64 – 71. Judge Schroeder used the analogy that the laws would apply equally to animal activists as to those committing corporate espionage.

⁴⁴⁰ *Ibid* at p. 68.

the conclusions that the law violated the First Amendment, and was therefore struck down and unenforceable.⁴⁴¹

4.2.7 Arkansas

Arkansas's ag-gag law was introduced in 2017, and was promptly challenged by ALDF and other organizations. The ALDF stated that Arkansas's ag-gag laws are particularly problematic because they prohibit undercover investigations and whistleblowing in any private facility – not just farms.⁴⁴² In February 2020, Judge Moody dismissed the lawsuit, finding that the plaintiffs, including ALDF, did not have standing to challenge the law. The plaintiffs filed their appeal on March 12th 2020, claiming that Judge Moody made several errors in dismissing the case.⁴⁴³ At the time of writing this thesis, litigation in Arkansas continues.

4.3 Trends from the US Litigation

The first salient trend of the US cases is that in all but one of the cases, the ALDF and other plaintiffs were found to have standing to challenge the ag-gag laws. Where the States attempted to challenge the standing of the organizations, the courts found that the claimants had a genuine interest to challenge the chilling effect ag-gag laws have on investigative journalism, which serves the public interest. Where it was challenged, standing was established in Utah, Wyoming, Kansas, and North Carolina. In this way, animal welfare organizations have the legal capacity to bring constitutional challenges to ag-gag laws.

Another conclusion which flows from all six decisions is that laws that intentionally restrict the speech of animal welfare advocates on farmlands is unconstitutional on First

⁴⁴¹ *Ibid* at p. 72 – 73.

⁴⁴² ALDF Press Release, “Appeal Challenges Arkansas’s Unconstitutional ‘Ag-Gag’ Law” (12 March 2020): <https://aldf.org/article/appeal-challenges-arkansas-unconstitutional-ag-gag-law/>

⁴⁴³ *ALDF v Vaught*, *supra* note 296.

Amendment grounds. These decisions clearly establish that false pretences uttered to gain employment constitute protected speech, and so additionally does the creation of audiovisual media on farmlands. Indeed, the early decisions out of Idaho and Utah easily found that the ag-gag laws had been enacted specifically in reaction to damning exposés of farm operations, and that the laws sought to criminalize the acts which were common in the practice of creating those exposés, including gaining employment by false pretences and documenting the conditions on farmlands. Although other decisions did not specifically draw attention to the reactive nature of ag-gag, all decisions found that ag-gag laws unconstitutionally violate the right to free speech.

Turning to the claim that ag-gag unconstitutionally violates the Fourteenth Amendment right to equal protection, the jurisprudence is split. I find that the jurisprudence is split not on the nature or intention of ag-gag laws to silence animal welfare voices, but rather the specific wording of the laws of the state. Chief Judge Winmill found that Idaho's ag-gag law specifically sought to silence animal welfare organizations in a way that violated the Fourteenth Amendment.⁴⁴⁴ Judge Schroeder found that although North Carolina's ag-gag law affected animal welfare organizations, the law did not specifically target animal rights advocates and therefore did not violate the Fourteenth Amendment.⁴⁴⁵ The courts of Utah and Iowa avoided making any decision regarding the Fourteenth Amendment claims.⁴⁴⁶ Whereas the courts are consistent in their First Amendment findings, equality claims seem to have less certain outcomes.

The decision to constitutionally challenge ag-gag laws has proven to bear fruit, but an important note remains that ag-gag litigation in the US is far from complete. Such is exemplified

⁴⁴⁴ *ALDF v Otter*, *supra* note 90 at p. 23 – 28.

⁴⁴⁵ *PETA et al v Stein et al*, *supra* note 295 at p. 64 – 71.

⁴⁴⁶ *ALDF v Herbert*, *supra* note 291 at p. 31; *ALDF v Reynolds et al*, *supra* note 293 at p. 3.

by the ongoing litigation in Arkansas. Researchers such as Maggie Strong have also written about potential litigation in states such as Missouri, which has two ag-gag laws protecting both farms and puppy mills from journalistic exposure.⁴⁴⁷ In looking at the decided ag-gag cases available at the time, Strong anticipates that Missouri's ag-gag laws could similarly be found to unconstitutionally violate the First Amendment.⁴⁴⁸ The US's legal battles with ag-gag seem to be far from over. Although the American Society for the Prevention of Cruelty to Animals reports that most ag-gag legislation is defeated before becoming law, there are still outstanding ag-gag style laws either active or forthcoming in Alabama, Colorado, Montana, North Dakota, Texas, Washington, and West Virginia.⁴⁴⁹ Given the success of the above six decisions, and the predicted success of future litigation, I will move on to explore the similarities and differences between the US's First Amendment and Canada's s. 2(b) freedom of expression clause.

4.4 Similarities Between Canadian and US Ag-gag Laws

Both Canadian and US ag-gag laws were introduced in response to increased animal activism in the respective countries. Although each piece of legislation is different, there are salient common features, which follow Marceau's third wave of ag-gag laws.⁴⁵⁰ Ag-gag laws from both countries feature increased penalties for trespassing on animal agriculture facilities, and false pretence provisions which prohibit whistleblowing and undercover journalism. Marceau also looked toward the future of ag-gag, in which he described quick report laws, and such laws are included in the Ontario *Regulations*.

⁴⁴⁷ Maggie Strong, "The Show-Me State's Hidden Cruelty: How Missouri's Ag-gag Laws Unconstitutionally Silence Animal Welfare Whistleblowers" (2019) 63:4 *Saint Louis University Law Journal* 611.

⁴⁴⁸ *Ibid* at 628 – 635.

⁴⁴⁹ ASPCA, *supra* note 48.

⁴⁵⁰ Section 2.2.2.

As the false pretence provisions were the most prominent issues for the courts in the US, and advocates in Canada have already drawn parallels to Canadian ag-gag laws, the false pretence provisions will also likely be the focus of Canadian litigation. False pretence clauses were struck down as violating the right to free speech in Idaho, Utah, Iowa, and Kansas. The ag-gag laws from Wyoming and North Carolina did not contain false pretence clauses. Thus, all decisions which addressed the constitutionality of false pretence clauses found the clauses to violate the right to free speech, and were therefore unconstitutional.

In Canada, both Alberta's and Ontario's ag-gag laws include false pretence provisions. In both provinces, if a person gains entry to private property where animals are kept by using false pretences, the consent is vitiated, and the person is deemed to have been trespassing. Although Ontario's ag-gag law gives exceptions for journalists and whistleblowers – which were the main concerns for the US courts – the exceptions are so narrowly tailored that they do not cover all journalistic activity. Although the exceptions exist, expressive conduct by journalists and whistleblowers who do not meet the narrow exceptions will still be liable under Ontario's ag-gag law. It seems as though the Ontario government has attempted to guide journalists and whistleblowers on how to conduct themselves in their expressive activities, which, of course, is not the role of any government.

There are concerns with Canadian ag-gag laws which are not reflected in the previous US decisions. Those uniquely Canadian concerns will be discussed in chapter 5. Before beginning the exploration of potential *Charter* challenges in Canada, the weight of these US decisions will be discussed.

4.5 Persuasive Weight of US Decisions

When courts are tasked with *Charter* interpretation, it is generally accepted that the court may reference the interpretation of similar Canadian legislation to help inform their decision, such as the *Canadian Bill of Rights*, the *Quebec Charter of Human Rights and Freedoms*, the *Canadian Human Rights Act*, and more. Beyond Canadian borders, the courts may also look to the jurisprudence and constitutional texts of other democratic nations with similar human rights charters. Such countries include the United Kingdom, India, New Zealand, South Africa, and – most importantly for this thesis – the United States. In one empirical study, SI Bushnell found that Canadian appellate courts have been referencing jurisprudence from the US since 1867.⁴⁵¹ In fact, just before his appointment to the Supreme Court of Canada in 1995, Gérard La Forest JA wrote about Canada's use of foreign materials for the construction of better judgments.⁴⁵² Former Chief Justice Beverley McLachlin has also written about foreign law as a course of legal enrichment which can help inform Canadian jurisprudence.⁴⁵³

In an empirical study, Gianluca Gentili surveyed all the Supreme Court decisions from 1982 to 2013 for their use of foreign precedents.⁴⁵⁴ Of the total 2909 decisions, 943 (32.4%) contained citations to foreign precedents.⁴⁵⁵ When looking at constitutional cases specifically, of the total 1004 decisions, 400 (39.8%) contained citations to foreign legal precedents.⁴⁵⁶ In all Supreme Court decisions, there were a total of 4,500 separate precedents cited, and 1,972

⁴⁵¹ SI Bushnell, "The Use of American Cases" (1986) 35 *University of New Brunswick Law Journal* 157.

⁴⁵² Gérard La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46 *Marine Law Review* 211.

⁴⁵³ Beverly McLachlin, "The Use of Foreign Law: A Comparative View of Canada and the United States" (2010) 104 *American Society of International Law Proceedings* 491.

⁴⁵⁴ Gianluca Gentili, "Enhancing Constitutional Self-Understanding through Comparative Law: An Empirical Study of the Use of Foreign Case Law by the Supreme Court of Canada (1982-2013)" in Mads Andenas and Duncan Fairgrieve (Eds.), *Courts and Comparative Law* (Oxford University Press, Oxford, 2015).

⁴⁵⁵ *Ibid* Table 21.1 at p. 390.

⁴⁵⁶ *Ibid* Table 21.1 at p. 390.

(43.8%) of those appear in constitutional cases.⁴⁵⁷ Even further, of those 1,972 citations in constitutional cases, 1,183 (60.8%) were precedents from the United States.⁴⁵⁸ Gentili comments that after the *Charter's* enactment in 1982, the courts often looked to the US's civil rights jurisprudence for information and guidance.⁴⁵⁹ United States precedents were not limited to the Supreme Court of the United States, as Canadian decisions took persuasive authority from lower federal and state courts as well.⁴⁶⁰

In Canada, the Supreme Court has used jurisprudence from the US to help inform their decisions in matters relating to the s. 2(b) freedom of expression. In fact, the Supreme Court has considered and referenced decisions from the US in some of its landmark cases on s. 2(b). In *Ford v Quebec (AG)*, the unanimous court considered three cases from the US in deciding that the restriction from using English on commercial signs was unconstitutional.⁴⁶¹ On the question of whether speech for a commercial purpose was protected by freedom of expression, the Court considered a trilogy of First Amendment cases: *Valentine v Chrestensen*, *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, and *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*.⁴⁶²

In *Irwin Toy Ltd v Quebec (AG)*, both the majority and dissent referred to the US Supreme Court case of *Palko v Connecticut*.⁴⁶³ In emphasizing the importance of freedom of

⁴⁵⁷ *Ibid* Table 21.1 at p. 390.

⁴⁵⁸ *Ibid* Figure 21.4 at p. 395.

⁴⁵⁹ *Ibid* at p. 397.

⁴⁶⁰ *Ibid* at p. 398.

⁴⁶¹ *Ford v Quebec (AG)*, [1988] 2 SCR 712.

⁴⁶² *Ibid* at paras 47 – 48 considering *Valentine v Chrestensen*, 316 U.S. 52 (1942); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 U.S. 748 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

⁴⁶³ *Irwin Toy Ltd. v Quebec (AG)*, [1989] 1 SCR 927, referring to *Palko v Connecticut*, 302 US 319 (1937). [*Irwin Toy*]

expression, the Court referred to Justice Cardozo's words, describing expression as "the matrix, the indispensable condition of nearly every other form of freedom."⁴⁶⁴

In *R v Keegstra*, the Supreme Court was asked whether the *Criminal Code* provision prohibiting the wilful promotion of hatred against an identifiable group was constitutional.⁴⁶⁵ The 4:3 majority found that the provision did infringe s. 2(b), but that the violation was saved by s. 1 of the *Charter*, as the suppression of hate speech was a reasonable limit on freedom of expression.⁴⁶⁶ Although not used in the consideration of the s. 2(b) analysis, Dickson CJ referred to three US cases.⁴⁶⁷ After examining the US decisions and ultimately disagreeing with their conclusions, Dickson CJ remarked "I have found the American experience tremendously helpful in coming to my own conclusions regarding this appeal, and by no means reject the whole of the First Amendment doctrine."⁴⁶⁸

Canadian courts have regularly looked outside Canadian jurisprudence for guidance on relevant issues, and the guarantee of freedom of expression is no different. Of course, the ag-gag decisions from the US are not binding on Canadian courts, but they can lend insight into the purpose and effects of ag-gag laws, and can be persuasive. Consideration for the treatment of ag-gag under First Amendment scrutiny may help guide a Canadian court in a *Charter* challenge to ag-gag legislation. As Dickson CJ discussed in *R v Keegstra*, although treatment of the US jurisprudence is helpful, it is possible to arrive at a different conclusion. Indeed, although hate speech is constitutionally protected in the US, the *Keegstra* decision held that hate speech is not protected by the *Charter* in Canada.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *R v Keegstra*, [1990] 3 SCR 697. [*Keegstra*]

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*, referring to *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁴⁶⁸ *Ibid.*

Both Canada and the US constitutions protect speech; however, the right is not absolute. Both countries have legislation and jurisprudence that constitutionally limit speech, such as defamation and libel laws. The major difference is the *Charter*'s s. 1, which serves to place 'reasonable limits' on *Charter* guarantees, including freedom of expression.⁴⁶⁹ Any limits on *Charter* guarantees must be 'demonstrably justifiable in a free and democratic society.' This has been viewed as an open invitation for the courts to canvass other 'free and democratic societies' when determining whether a right ought to be limited in Canada.⁴⁷⁰ Here, Canada differs from the US, as the constitutional limitation on speech is itself constitutionally entrenched in Canada.⁴⁷¹ A larger discussion of s. 1 and the reasonable limits of s. 2(b) takes place below in chapter 6.

The US's right to free speech and Canada's freedom of expression are not the same, and have not been treated the same by courts. However, Canadian courts have a long history of exploring jurisprudence from First Amendment cases to offer guidance on matters related to s. 2(b). As there are many similarities between the ag-gag laws in the two countries, it follows that any Canadian court tasked with a s. 2(b) challenge may seek guidance from the US decisions, and view their authority as persuasive.

⁴⁶⁹ Also discussed by Gentili, *supra* note NOTE at p. 401 – 402.

⁴⁷⁰ La Forest *supra* note 452 at p. 236; Claire L'Heureux-Dubé, 'Two Supreme Courts: A Study in Contrast' in MC McKenna (ed), *The Canadian and American Constitutions* (1993) at p. 164.

⁴⁷¹ For a thorough juxtaposition of the Canadian freedom of express and the US right to free speech, see Grant Huscroft, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" (2006) 25:1 *University of Queensland Law Journal* 181.

CHAPTER 5: VIOLATION OF FREEDOM OF EXPRESSION

The US litigation is clear in holding that ag-gag laws, in all forms currently challenged, violate the right to free speech. Although these decisions have no authoritative weight in Canadian courts, they certainly have persuasive value. However, because of the differences between the US and Canadian constitutional contexts, Canadian reactions have considered whether ag-gag laws can survive *Charter* scrutiny. This chapter begins by highlighting some Canadian reactions to ag-gag laws, both supporting and opposing views (5.1). The chapter then proceeds to engage with the established three-step test to determine whether a law infringes the s. 2(b) freedom of expression, as articulated by the Supreme Court (5.2).

5.1 Canadian Reactions to Ag-gag

Although ag-gag was a regular fixture in the United States, it has been asserted that animal agriculture is allegedly different in Canada. Such was the sentiment of Leslie Ballentine, long-time representative for animal agricultural industries. Writing for *Ontario Farmer* after the Idaho ag-gag decision in 2015, Ballentine stated “thanks to Canadian agriculture’s open-door approach [ag-gag is] something we don’t have to worry about.”⁴⁷² She detailed that the transparency on Canadian farms, such as open-houses, tours, and social media, as well as strict employee training and monitoring prevent animal abuse and ensure that any abuse is addressed in a timely manner.⁴⁷³ Ballentine reinforces the notion that “the public will come to realize that exposés by activist groups are the exception and that the farming community in

⁴⁷² Leslie Ballentine, “Lessons Learned from Ag-gag Ruling; Thanks to Canadian Agriculture’s Open-Door Approach It’s Something We Don’t Have to Worry About” *Ontario Farmer* (1 September 2015).

⁴⁷³ *Ibid.*

general delivers good animal care.”⁴⁷⁴ As a profit-driven industry, public and consumer attitudes towards agriculture are important.

On the question of whether consumers are worried about ag-gag, researchers from the Faculty of Land & Food Systems at the University of British Columbia surveyed 716 people from the United States to see whether awareness of ag-gag laws affects public trust in animal agriculture.⁴⁷⁵ Robbins *et al* told participants that some states were considering laws which (1) ban recording on farms without consent of the owner, (2) prohibit gaining employment under false pretences, and (3) require evidence of abuse to be reported within a short amount of time (two to five days).⁴⁷⁶ The researchers found that not only did learning about the laws decrease participant trust in livestock farming, but learning about the laws increased support for additional animal welfare regulations on farms.⁴⁷⁷ Robbins *et al* concluded that even proposing the laws can produce negative perceptions of animal agriculture, even if the proposals never actually become law.⁴⁷⁸ Unfortunately, this sample of reactions for individuals in the US did not dissuade legislators from introducing ag-gag in Canada.

When ag-gag successfully crossed the border into Canada, both supporters and opponents of ag-gag were quick to respond to the proposed legislation. Because Alberta’s ag-gag law was passed in just over two weeks, democratic discourse surrounding the proposed legislation was extremely limited. Alberta’s ag-gag laws were passed before the public had the chance to learn what they do, let alone make an informed opinion and consult their local representatives. To illustrate this point, Animal Justice was only able to publish one media

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Robbins *et al.*, *supra* note 31.

⁴⁷⁶ *Ibid* a p. 122.

⁴⁷⁷ *Ibid* at p. 122 – 124.

⁴⁷⁸ *Ibid* at p. 124.

release about the Alberta ag-gag bill before it was passed.⁴⁷⁹ Similarly, PEI's quick passing of its ag-gag laws also limited public discourse, as the process took only fifteen days.

Ontario's legislative process for *Bill 156* was more lengthy, which allowed for public input from both supporters and opponents. On December 2nd 2019, on the same day *Bill 156* was introduced in Ontario, *Ontario Farmer Magazine* quickly published an announcement of the bill, highlighting that the bill addresses farmer safety and biosecurity from trespassers.⁴⁸⁰ Animal Justice also quickly published a media release, claiming that the new Ontario bill would prohibit exposing cruelty on Ontario farms.⁴⁸¹

Two months later, on February 6th 2020, the Minister of Agriculture, Food and Rural Affairs, Ernie Hardeman met with local farmers in Brantford to discuss *Bill 156* and protections for farmers against activists.⁴⁸² While Hardeman was meeting with farmers, Animal Justice addressed a letter to Hardeman and Attorney General Doug Downey.⁴⁸³ The letter was signed by forty-three law professors and lawyers, and raises concerns about the constitutionality of *Bill 156* regarding the chilling effect on the speech of whistleblowers and peaceful public protesters.⁴⁸⁴ The letter directly calls attention to the importance of undercover investigations,

⁴⁷⁹ Animal Justice, "Draconian New Alberta Law Will Further Conceal Animal Abuse on Farms" (29 November 2019): <https://animaljustice.ca/media-releases/draconian-new-alberta-law-will-further-conceal-animal-abuse-on-farms>

⁴⁸⁰ Diana Martin, "Proposed Legislation Offers Trespassing Teeth" (2 December 2019) *Ontario Farmer*: <https://www.ontariofarmer.com/livestock/proposed-legislation-offers-trespassing-teeth>

⁴⁸¹ Animal Justice, "New Ontario Bill Would Make it Illegal to Expose Animal Cruelty on Farms & Transport Trucks" (2 December 2019): <https://animaljustice.ca/media-releases/new-ontario-bill-would-make-it-illegal-to-expose-animal-cruelty-on-farms-transport-trucks>

⁴⁸² Michelle Ruby, "Ag Minister Meets with Farmers Over Trespass Bill" (6 February 2020) *Ontario Farmer*: <https://www.ontariofarmer.com/news/local-news/ag-minister-meets-with-farmers-over-trespass-bill/wcm/6e665a3d-9457-492e-9f49-217f9bef7446>

⁴⁸³ Animal Justice, "Ontario's 'Ag Gag' Bill is Unconstitutional, Say Leading Legal Experts" (6 February 2020): <https://animaljustice.ca/media-releases/ontario-ag-gag-bill-is-unconstitutional-say-leading-legal-experts>

⁴⁸⁴ *Ibid.*

and the possible infringement of the s. 2(b) freedom of expression.⁴⁸⁵ In the months that followed, other organizations voiced their support or opposition to *Bill 156*.⁴⁸⁶ Constitutional issues were raised at the General Committee Hearing on June 8th and 9th 2020, and the bill was passed on June 18th.

Interestingly, two days before the bill was passed, Suzanne Atkinson wrote an article in *Ontario Farmer*, claiming that ag-gag laws are more likely to survive constitutional scrutiny in Canada than the US ag-gag laws.⁴⁸⁷ In the article, Atkinson quoted Patti Strand, founder of US-based National Animal Interest Alliance, who implies that the US ag-gag laws are struck down because US's First Amendment rights are stricter than Canada's protection of freedom of expression guarantee.⁴⁸⁸ Atkinson takes Strand's words to imply that since Canada's freedom of expression is less stringent, that ag-gag is more likely to be upheld in Canada.⁴⁸⁹

The legislative process for Manitoba's ag-gag laws also took longer, which allowed for some democratic discourse. Although there were issues with the 19 'mystery' bills being introduced without drafts, Manitoba still facilitated public consultation, Committee evaluation, and legislative debate. *Bills* 62 and 63 were both introduced November 2nd 2020, second reading was passed March 25th 2021, and the *Bills* passed third reading May 20th 2021. This longer period allowed legal experts to engage in the process. On April 8th 2021, ten legal experts and professors signed a letter to the Minister of Agriculture and Resource Development, MLA

⁴⁸⁵ *Ibid.*

⁴⁸⁶ For example, on February 18th 2020, the National Farmers Union shared a press relief in support of *Bill 156*. Sarah Bakker, "Response to *Bill 156 – Security from Trespass and Protecting Food Safety Act, 2019*" *National Farmers Union* (18 February 2020): <https://nfuontario.ca/new/response-to-bill-156-security-from-trespass-and-protecting-food-safety-act-2019/>

⁴⁸⁷ Suzanne Atkinson, "Canada's Ag-gag Laws More Likely to Hold Up Than US Version; Passing Such Laws is Much More Difficult South of the Border Where the First Amendment Protects All Forms of Speech" (16 June 2020) *Ontario Farmer*.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

Blaine Pedersen, and the Minister of Justice and Attorney General, MLA Cameron Friesen.⁴⁹⁰

The letter expressed concerns with the bills and their impact on freedom of expression.

At the time of writing this thesis, only one scholarly article has been published about the relationship between Canadian ag-gag laws and freedom of expression. In her article, Professor Jodi Lazare describes how ag-gag laws in Alberta and Ontario directly target and restrict the expression of activists and protesters.⁴⁹¹ In her words “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.”⁴⁹² Rather than engaging in a strict legal analysis of s. 2(b), Lazare goes on to highlight how ag-gag laws are a direct affront to the spirit of freedom of expression.⁴⁹³ Lazare’s arguments are persuasive, and support a s. 2(b) violation. She refrains from engaging in a s. 1 ‘reasonable limits’ analysis, which she saves for later work.⁴⁹⁴

The constitutionality of Ontario’s ag-gag law will soon be put before the courts. On March 8th 2021, Animal Justice, along with journalist Jessica Scott-Reid and activist Louise Jorgensen, filed a constitutional challenge to the law.⁴⁹⁵ The group of applicants are asking the Superior Court of Ontario to strike down provisions of *Bill 156* and the accompanying *Regulations* which limit the expressive speech and actions of advocates who seek to expose animal abuse in the agriculture industry.⁴⁹⁶ The Application claims the impugned provisions violate the s. 2(b) right to freedom of expression and the s. 2(c) right to freedom of peaceful

⁴⁹⁰ Animal Justice, “Manitoba’s ‘Ag Gag’ Bill is Unconstitutional, Say Leading Legal Experts” (8 April 2021): <https://animaljustice.ca/media-releases/manitoba-ag-gag-bill-is-unconstitutional-say-leading-legal-experts>

⁴⁹¹ Jodi Lazare, *supra* note 132 at p. 96 – 104.

⁴⁹² *Ibid* at p. 96.

⁴⁹³ *Ibid* at p. 96 – 104.

⁴⁹⁴ *Ibid* at p. 105.

⁴⁹⁵ Animal Justice, “Animal Justice Files Legal Challenge to Ontario ‘Ag Gag’ Law” (9 March 2021): <https://animaljustice.ca/media-releases/animal-justice-files-legal-challenge-to-ontario-ag-gag-law>

⁴⁹⁶ *Ibid*.

assembly, and neither violation can be saved by s. 1 of the *Charter*.⁴⁹⁷ Additionally, the Applicants claim that the provisions surrounding civil arrest of a trespasser violate the *Charter* s. 7 right to liberty, and s. 9 right to not be arbitrarily detained.⁴⁹⁸ Many of the sentiments expressed in the Application overlap with Lazare's arguments. Above all, both argue that exposing farmed animal suffering is in the public interest.⁴⁹⁹

Animal Justice *et al* argue that Ontario's ag-gag law infringes *Charter* ss. 2(b), 2(c), 7 and 9. These claims are specific to Ontario's ag-gag laws. There may be different *Charter* issues raised for each piece of enacted ag-gag legislation. Claims against Ontario may be different from potential claims against Alberta's, PEI's, or Manitoba's ag-gag laws. Recalling the US litigation, no matter how different the ag-gag legislation was between the states, the courts all found an infringement of the First Amendment right to free speech. Following this dominant theme, the remainder of this chapter will explore Canadian jurisprudence and scholarship addressing s. 2(b) and the potential application to ag-gag laws across Canada.

5.2 Section 2(b) Analysis

Within the *Canadian Charter of Rights and Freedoms*, just after the guarantee of the *Charter* rights, section 2 articulates the fundamental freedoms. The text of s. 2(b) specifically reads as follows:

2. Everyone has the following fundamental freedoms:

b. freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.

⁴⁹⁷ *Animal Justice et al. v Ontario (AG)*, Notice of Application (8 March 2021).

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid* at para 2; Lazare *supra* note 132 at p. 101.

After the *Charter* was enacted in 1982, many cases came before the Supreme Court of Canada seeking clarification on the purpose, meaning, interpretation, and application of the rights contained within the *Charter*. Section 2(b) was no exception, and the Supreme Court took several opportunities to clarify s. 2(b) in the late 1980s and early 1990s.

On the question of the purpose of s. 2(b), the Supreme Court found the purpose is to protect the values of freedom of expression, which include the search for attainment of the truth, participation in social and political decision-making, and self-fulfilment through expression.⁵⁰⁰ The Supreme Court has also maintained throughout its jurisprudence that freedom of expression connects directly with the political process in Canada's democratic society.⁵⁰¹

The Supreme Court has articulated a three-part test to establish a *prima facie* violation of s. 2(b).⁵⁰² Here, the burden is on the claimant to establish a violation of a *Charter*-protected right. Generally, this is not a difficult test to pass, and limits of expressive acts are generally found to breach the s. 2(b) freedom of expression.⁵⁰³ For example, the Supreme Court has found s. 2(b) violations in cases where laws sought to restrict hate speech,⁵⁰⁴ child pornography,⁵⁰⁵ and defamatory libel,⁵⁰⁶ as all of these are expressive activities protected by s. 2(b). The bulk of the *Charter* considerations came afterward during the s. 1 'reasonable limits' test. Discussed more in chapter 6, this test asks whether limiting a *Charter* right can be justified in certain circumstances. Regarding these examples, the Supreme Court found that the breaches of freedom of expression

⁵⁰⁰ *Irwin Toy* *supra* note 463 at 976; *Ford v Quebec*, [1988] 2 SCR 712 at 765 – 766.

⁵⁰¹ *Keegstra*, *supra* note 465.

⁵⁰² See a recent articulation of the three-step test in *Canadian Broadcasting Corp v Canada (AG)*, 2011 SCC 2 at para 38. [*Canada Broadcasting*]

⁵⁰³ *R v Sharpe*, 2001 SCC 2. [*Sharpe*]

⁵⁰⁴ *Keegstra*, *supra* note 465.

⁵⁰⁵ *Sharpe*, *supra* note 503.

⁵⁰⁶ *R v Lucas*, [1998] 1 SCR 439.

with regards to hate speech, child pornography, and defamatory libel were justified under s. 1 of the *Charter*.⁵⁰⁷ Despite the ease of engaging s. 2(b), it is worth exploring the three-part test, applying the test to Canadian ag-gag laws.

5.2.1 Step 1: Does the Activity have Expressive Content Protected by s. 2(b)?

For questions of s. 2(b), protected expression has been defined as “any activity of communication that conveys or attempts to convey meaning.”⁵⁰⁸ As demonstrated above, s. 2(b)’s protection is content-neutral, meaning that s. 2(b) protects expression no matter how offensive or disturbing,⁵⁰⁹ and protects both true and false statements.⁵¹⁰ Additionally, s. 2(b) protects speakers and listeners (or viewers) throughout the process of communication, including expressor, supplier, distributor, exhibitor and more.⁵¹¹ Freedom of expression also protects the right to not make expressions, including the right to say nothing and the right not to say certain things.⁵¹²

In raising questions surrounding ag-gag, for some pieces of legislation, expression is clearly engaged as the provisions address expressive acts. In Ontario, *Bill 156* addresses ‘false pretences’ at ss. 5(6), 6(4), and 14(2).⁵¹³ Further s. 9 of the *Bill 156 Regulations* prohibits a person from making a false statement to an owner or occupier of a farm or slaughterhouse.⁵¹⁴ Section 10 then goes on to engage false statements made for the purposes of gaining employment, including false statements about qualifications.⁵¹⁵ Alberta’s *Bill 27* also engages with false

⁵⁰⁷ *Supra* note 504 - 506.

⁵⁰⁸ *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 at para 81; *Irwin Toy*, *supra* note 463 at pp. 967 – 969. [*Thomson Newspapers*]

⁵⁰⁹ *Keegstra*, *supra* note 465.

⁵¹⁰ *Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30; *R v Lucas*, *supra* note 506. [*JTI-Macdonald*]

⁵¹¹ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *Irwin Toy*, *supra* note 463.

⁵¹² *Slaight Communications Inc v Davidson*, [1989] 1 S.C.R. 1038 at 1080.

⁵¹³ *Ontario Bill 156*, *supra* note 251 at ss. 5(6), 6(4), and 14(2).

⁵¹⁴ *Ontario Bill 156 Regulations*, *supra* note 252 at s. 9.

⁵¹⁵ *Ibid* at s. 10.

pretence provisions at ss. 3 and 4, vitiating any consent to enter property if the consent was obtained by use of false pretences.⁵¹⁶

For the purpose of this question in the s. 2(b) analysis, a ‘false pretence’ is an ‘activity of communication that conveys or attempts to convey meaning.’ Indeed, whether made orally (i.e., during a job interview) or in writing (i.e., on a resume or job application), a false statement is a communication made to convey a message to the receiver. This includes statements made about job qualifications, as well as false statements made about why a person is seeking employment. In this way, an undercover investigator could make a false statement about why they are seeking employment, as they would not want to be honest in disclosing their journalistic endeavours.

Further, Ontario’s ag-gag law also prohibits interference with the transport of animals, largely targeting Save Movement activists who protest outside slaughterhouses, record incoming trucks, and occasionally offer water to the animals onboard.⁵¹⁷ The activists conduct their activities in a public manner, with a goal to convey messages of compassion to the animals as well as passersby. To prohibit these activities suppresses these expressive acts, which are also deeply connected to the activist’s self-fulfilment. The provisions of Ontario’s ag-gag *Bill 156* regarding interference with transport vehicles may also engage s. 2(b), either as expressive acts, or as *Animal Justice et al* argue, s. 2(c) freedom of peaceful assembly.⁵¹⁸

Manitoba’s *Bill 62* also prohibits ‘interference’ with animals in transport vehicles, including the expressive activities performed by Save Movement activists.⁵¹⁹ In this way, ag-gag

⁵¹⁶ *Alberta Bill 27*, *supra* note 228 at ss. 3 – 4.

⁵¹⁷ *Ontario Bill 156*, *supra* note 251 at s. 6. Save Movement previous discussed in chapter 2 at 2.3.

⁵¹⁸ *Animal Justice et al. v Ontario (AG)*, *supra* note 497.

⁵¹⁹ *Manitoba Bill 62*, *supra* note 282.

laws from Ontario, Alberta, and Manitoba directly restrict expressive activity, which would likely satisfy this step of the s. 2(b) test.

Engagement with s. 2(b) is not as clear with the ag-gag legislation from PEI. Although PEI's *Bills 120* and *124* seem to target biosecurity threats on farms, the debates previously discussed reveal that the bill was introduced to reduce animal activism on farms.⁵²⁰ Recalling that the PEI ag-gag law was reflective of the first iteration of the federal bill, MP Barlow voiced assurances that any activist who interacts with any farmed animal would be captured by the law (including on farm lands, during transport, at rodeos, in zoos, and at exhibitions).⁵²¹ Legislators from PEI were also clear in stating that the bills were enacted to target and restrict activist activity. In this way, any activist who engages in expressive activities with farmed animals may be charged under this legislation. If an activist were charged under this version of ag-gag laws, they could certainly claim that they were engaging in expressive activities. This leaves s. 2(b) engagement dependant on the trespasser charged, and their reason for trespassing. A court may find that a trespasser charged under the PEI ag-gag laws was engaged in an expressive activity and seeking to convey a meaning, satisfying this step of the test.

5.2.2 Step 2: Does the Method or Location Remove s. 2(b) Protection?

Although many expressive acts attract s. 2(b) protection, the Supreme Court has found that certain methods and locations may remove the protection.⁵²² With regard to the method, simply put, expression that is violent (i.e., threats of violence⁵²³) removes the s. 2(b)

⁵²⁰ PEI *Bill 120*, *Bill 124*, *supra* note 228; chapter 3 at 3.3.1.

⁵²¹ Committee Meeting, *supra* note 226.

⁵²² *Canada Broadcasting*, *supra* note 502 at para 37.

⁵²³ *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component* 2009 SCC 31 at para 28; *R v Khawaja* 2021 SCC 69 at para 70.

protection.⁵²⁴ Apart from violence, the method of expression is generally considered as part of the protected expressive activity itself.⁵²⁵ With regards to method, false pretences, undercover investigations, whistleblowing, and Save Movement vigils are not inherently violent expressive acts. Conversely, these acts are peaceful, and do not involve any physical violence or threats of violence towards other humans. Further, there is nothing inherently violent about trespassing or entering private property without consent. Therefore, the method of the expressive acts should not remove the s. 2(b) protection.

With regards to the location, generally s. 2(b) does not apply on private property. However, s. 2(b) is engaged on private property where the government is attempting to limit speech in a private location.⁵²⁶ This means that when the government enacts a law which limits speech on private property, the law is subject to *Charter* scrutiny.⁵²⁷ This would include ag-gag laws from Alberta and Ontario that prohibit false pretences. This means that ag-gag laws which target expression on private property, such as farmed animal enterprises, would invite *Charter* scrutiny. Section 2(b) protection is further attached to private property where the expression in question does not conflict with the purpose which s. 2(b) intends to protect, being democratic discourse, truth-finding, and self-fulfilment.⁵²⁸ Here, ag-gag laws and the expression they seek to limit are closely tied. Discussed more in chapter 6's s. 1 analysis, activist expression on farms (which is self-fulfilling to the activist) is a truth-finding practice which serves to further democratic discourse.

⁵²⁴ *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, [2009] 2 SCR 295 at para 28.

⁵²⁵ *Weisfeld v Canada*, [1995] 1 FC 68 at para 30.

⁵²⁶ *Montréal (City) v 2592-1366 Québec Inc*, 2005 SCC 62 at para 72. Indeed, government action is necessary to engage any of the *Charter* guaranteed rights. [*Montreal City*]

⁵²⁷ *Ibid* at paras 61 – 62.

⁵²⁸ *Ibid* at para 74.

An example where the location – being private property – removed s. 2(b) protection comes from the 1990 case *R v Waters*. Here, a Greenpeace activist had been convicted of mischief after hanging a banner from the roof of an office building.⁵²⁹ The banner carried a message protesting the development of a uranium mine in Saskatchewan. He appealed the conviction, claiming the criminal charge of mischief violated his s. 2(b) freedom of expression.⁵³⁰ The appeal was unsuccessful, as Justice Wedge found that the manner of expression was not protected. Justice Wedge explained that s. 2(b) protections did not permit Mr. Waters from using the private property to display his expressive message.⁵³¹ There was no reasonable connection between the randomly chosen office building that the expressive message of the banner. The location was also not tied to any truth-finding or furthering of democratic discourse. Therefore, the location of the expression removed the s. 2(b) protection.

The above activism can be distinguished from the activism ag-gag limits. In *Waters*, the location had no connection to the expression. The expression of undercover investigators, however, is closely tied to the private facilities they target. False pretences uttered by the investigators are inseparably connected to the enterprises where they are seeking employment. Additionally, the location is tied to the values of the freedom of expression. The expressive activity is (1) self-fulfilling to the investigator, (2) an act of truth-finding, and (3) seeks to further democratic discourse about animal agriculture. Therefore, the location of undercover investigations – being private property – does not remove the s. 2(b) protection.

Ag-gag laws which include provisions that apply on public property also invite *Charter* scrutiny. This includes provisions from Ontario and Manitoba's ag-gag laws which seek to

⁵²⁹ *R v Waters*, 1990 CarswellSask 216.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid* at paras 22 – 27.

prohibit interference with animal transport vehicles by limiting expression on public sidewalks. As previously discussed, activism by the Save Movement involves activists waiting on the sidewalks outside slaughterhouses for animal transportation vehicles to approach. When the vehicles stop at a red stoplight, the activists offer the animals kind words and water, and record inside the vehicle for illegal activity (such as overcrowding, conditions causing injury or suffering, etc.⁵³²).

With regards to expression on public property, the Supreme Court has articulated the considerations for whether the expression attracts s. 2(b) protection in certain locations. In *Montréal (City) v 2952-1366 Québec Inc* the owner of a strip club was charged for violating a city by-law which prohibited noise produced by sound equipment.⁵³³ The 6:1 majority found that the noise was expressive, and was protected by s. 2(b), as (1) the method was non-violent, (2) the location did not impede the function of city streets, and (3) the expression promotes the values of self-fulfilment and human flourishing.⁵³⁴ The Court found that the expressive act of playing of amplified music was protected by s. 2(b), but then found the limit was saved by s. 1. The Court highlighted the importance of the historic and actual purposes of the public property being used for expression within their analysis, as well as whether the values of s. 2(b) are undermined by the location of the expression.⁵³⁵

With regards to Save Movement activism, the organization has been using the public sidewalks outside slaughterhouses as the locations for their activism for over 10 years. The activists do not attempt to indiscriminately stop moving traffic on public roadways or

⁵³² Or other violations of the *Federal Health of Animals Regulations*, C.R.C., c. 296.

⁵³³ *Montreal City*, *supra* note 526.

⁵³⁴ *Ibid* at paras 84 – 85.

⁵³⁵ *Ibid* at para 74.

highways. The activity is limited to those trucks where their expression is self-fulfilling, truth-seeking, and furthering democratic discourse. For the purposes of s. 2(b), activists do not substantially impede traffic, and the location of their activism is focussed to those sidewalks outside slaughterhouses. Consistent with *Waters*, the location is not random. Therefore, the location should also not remove the s. 2(b) protection from the expression of Save Movement activists in Ontario and Manitoba.

For this consideration of step 2 of the s. 2(b) engagement, the ‘government action’ doctrine invites s. 2(b) scrutiny on private property where the limits on expression are imposed by the government.⁵³⁶ Additionally, the expression on public property is closely connected to the location where that expression occurs. This is all to say that neither the method nor the location of expression should remove s. 2(b) protection from the expressive acts of activists on farms or outside slaughterhouses.

5.2.3 Step 3: Does the Law Infringe the s. 2(b) protection in purpose or effect?

This question asks whether a law’s purpose or effect infringes a protected expressive act. Within this step, the purpose and effect of a restriction on expression are treated separately. With regards to the purpose of a law, an infringement of s. 2(b) will be found where the purpose is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person to make expressions.⁵³⁷ Even if a law’s purpose does not infringe s. 2(b), an individual may demonstrate that the effect of the law limits their expression in violation of s.

⁵³⁶ See, for example, *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139; see also Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto ON, University of Toronto Press, 2000) at p. 171 – 175.

⁵³⁷ *Irwin Toy*, *supra* note 463; *Keegstra*, *supra* note 465.

2(b).⁵³⁸ If a court finds infringement either in purpose or effect, a violation of s. 2(b) is established.

On this question, it is clear that the purpose of Ontario's, Alberta's, and Manitoba's ag-gag laws is to infringe s. 2(b), and PEI's ag-gag law – which mirrors the early language of the federal *Bill C-205* – infringes s. 2(b) in effect. All ag-gag laws in Canada seek to suppress activist voices, as they were introduced in response to increased protesting, undercover operations, whistleblowing, and civil disobedience in Canada. Recall that legislators supporting all four operational ag-gag laws referenced the need to protect farmers and farms from animal activists. Although these intentions and effects may not be expressly stated in the legislation, the regulations and Hansard from the legislative debates make apparent the infringement of s. 2(b).

In Ontario, the purpose of limiting journalistic and whistleblowing speech is contained in the *Regulations* themselves. Sections 11 and 12 of the *Regulations* offer exceptions for individuals who fit within the government's narrow definitions of journalist and whistleblower.⁵³⁹ In this way, although the government attempts to carve out exceptions for journalistic and whistleblowing activity, they are instead acknowledging that the ag-gag law affects these expressive activities and tries to define valid journalistic and whistleblowing activity. These narrow exceptions do not address all forms of valid journalistic and whistleblower expression, and it seems odd for the Ontario government to limit what activity can be considered as validly journalistic. Further, s. 12(d) of the *Regulations* is a quick-report law which demands that a whistleblower must report abuse 'as soon as practicable' in order to fall within the exception.⁵⁴⁰ This section pressures whistleblowers to report quickly, or risk losing

⁵³⁸ *Irwin Toy, ibid.*

⁵³⁹ *Ontario Regulations* at ss. 11 – 12.

⁵⁴⁰ *Ibid* at s. 12(d).

their whistleblower status and being punished as a trespasser under *Bill 156*. These quick report provisions could be considered as forced speech, which would also violate s. 2(b) as it also protects from forced speech. This is all to illustrate that the Ontario ag-gag law violates s. 2(b) by limiting activist and journalistic behaviour, attempting to carve out exemptions for deemed acceptable behaviour, but in doing so highlights the violation of s. 2(b).

For the ag-gag laws from Alberta, the legislative debates illustrate that the purpose of *Bill 27* is to restrict animal rights activism and protests.⁵⁴¹ Before *Bill 27* was introduced, Alberta Premier Jason Kenney attended the Jumbo Valley Colony after the Liberation Lockdown.⁵⁴² Kenney stated:

Some people call these activists, I call them anti-farming militants. Not protesters, but trespassers and bullies.⁵⁴³

Kenney then announced that Alberta will introduce legislation to protect farmers. In introducing *Bill 27*, legislators referred to activist activity, including ‘spreading false narratives’ about farms and the need to increase property rights.⁵⁴⁴

Outside of farm property, Manitoba’s ag-gag law restricts the types of expression activists can perform with regards to transport trucks.⁵⁴⁵ In deliberately restricting Save Movement activists, Manitoba’s ag-gag law prohibits activists from interference with, stopping, hindering, or obstructing transport trucks, as well as expressly prohibits interacting with animals, including giving food and water to animals on trucks. In doing so, whereas Save

⁵⁴¹ Previously discussed in chapter 3 at 3.3.2.

⁵⁴² Previously discussed in chapter 2 at 2.3.1.

⁵⁴³ Derek Craddock, “UCP Introducing Legislation, Harsher Penalties for Farm Trespassers” (3 October 2019) *Edmonton CityNews*: <https://edmonton.citynews.ca/2019/10/03/ucp-introducing-legislation-harsher-penalties-for-farm-trespassers/>

⁵⁴⁴ *Supra* note 287.

⁵⁴⁵ Previously discussed in chapter 3 at 3.3.4.

Movement activists were previously able to engage in self-fulfilling expression by engaging in acts of compassion with animals on their way to slaughter, Manitoba's ag-gag law has severely restricted expression for those who wish to bear witness.

In Ontario, Alberta, and Manitoba, suppressing activism was sought by bolstering 'property rights' and redefining who can be prosecuted as a trespasser. In this way, Ontario, Alberta, and Manitoba prohibit expression which is necessary for activists to achieve their true desired expression – dissemination of information about the conditions for animals in the agriculture industry. Here, Ontario, Alberta, and Manitoba restrict specific acts of expression which are essential for journalists and whistleblowers to achieve their ultimate expression goals, whether an article, documentary, photobook, etc.

Taking a different route, PEI ag-gag laws suppress activism in the name of biosecurity. In the PEI ag-gag law, suppression is achieved in effect rather than in purpose. Recall that the law was enacted due to increased animal rights activism in Canada.⁵⁴⁶ The PEI ag-gag law creates an offence for anyone who trespasses on a farm knowing that doing so could breach biosecurity. In this way, anyone trespassing on a farm, even for journalistic purposes, would be captured by this law. The increased fines for trespassing on farms serve as a deterrent for would-be trespassers. As a result, the goal of trespassers – to express to the public the conditions for animals on farms – is suppressed in effect by such large financial penalties.

This effect is commonly referred to as a law having a 'chilling effect' on expression. In a recent Supreme Court case, Moldaver J defined the term 'chilling effect' as "the stifling or discouragement of the media's legitimate activities in gathering and disseminating the news for

⁵⁴⁶ Previously discussed in chapter 3 at 3.2.2. and 3.3.1.

fear of legal repercussions.”⁵⁴⁷ The Supreme Court often considers possible chilling effects on expression in cases involving s. 2(b).⁵⁴⁸ Individuals in opposition to ag-gag laws have long described how the laws effectively cause a chilling effect on speech in the US.⁵⁴⁹ In Canada, ag-gag laws which prohibit or narrow expressive acts of bearing witness, undercover investigation, whistleblowing, and trespassing, plus the addition of extreme penalties, raise a serious concern with the chilling effect on expression. This chilling effect is also discussed during the s. 1 balancing analysis in chapter 6.

Establishing a violation of freedom of expression in both purpose and effect satisfies this third step of the test. Having satisfied all three steps of the test, it is clear that Canada’s ag-gag laws violate the s. 2(b) freedom of expression. As stated above, this is a fairly easy test to satisfy. The bulk of the argument turns to the s. 1 question of whether limiting activist speech in this way can be justified in a free and democratic society. Chapter 6 will explore possible considerations within a s. 1 analysis.

5.3 Not a Claim for ‘Statutory Platform’

Before discussing reasonable limits on freedom of expression, a consideration remains. This consideration asks whether opponents of ag-gag claim not that the government is restricting expression, but rather claim that activists have a positive right to government-facilitated activism. If opponents of ag-gag are claiming that activists have a right to statutory platforms for the activism, the approach to the s. 2(b) analysis changes.

⁵⁴⁷ *R v Vice Media Canada Inc*, 2018 SCC 53 at para 26. Moldaver J writing for the unanimous Court.

⁵⁴⁸ For a summary of the Supreme Court’s history with ‘chilling effects’ see Kent Roach & David Schneiderman, “Freedom of Expression in Canada” (2013) 61 *Supreme Court Law Review* 430.

⁵⁴⁹ Marceau, *supra* note 29 at p. 1332.

The three-step test analysed above addresses the negative obligation on governments to not restrict expression. The 2007 Supreme Court case *Baier v Alberta* considered the relationship between s. 2(b) and a claim of positive rights to expression.⁵⁵⁰ In this case, amendments were made to the *Local Authorities Election Act, 2000* which prohibited school employees from running for school board trustees across the province of Alberta. Members of the Alberta Teacher's Association challenged the constitutionality of the amendments, claiming a s. 2(b) violation of their freedom of expression.

In writing for the majority, Rothstein J quoted L'Heureux-Dubé from *Haig v Canada*, reiterating that "the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of microphones."⁵⁵¹ This describes a phenomenon where individuals will occasionally claim that the government ought to provide 'statutory platforms' to facilitate expression.⁵⁵² If such a claim arises, a court must ask whether the activity is a form of expression (similar to Step 1 above), and whether the claim seeks a positive entitlement to government action, or seeks to be free from government action.⁵⁵³ If claim is a positive rights claim, the court must then consider the three factors from *Dunmore*.⁵⁵⁴ The Court found that the statutory platform exception for the agriculture worker in *Dunmore* did not apply in the present case for the school employees, and therefore the amendments were not unconstitutional.⁵⁵⁵

In a discussion about Canadian ag-gag, defenders of ag-gag may allege that activists are attempting to claim a positive right to engage in protesting, undercover investigations,

⁵⁵⁰ *Baier v Alberta*, 2007 SCC 31. [*Baier*]

⁵⁵¹ *Ibid* at para 21, citing *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at p. 1035.

⁵⁵² See Robert E. Charney, "The Shaky Foundation of 'Statutory Platforms': A Comment on *Baier v Alberta*" (2008) 42 *Supreme Court Law Review* 115.

⁵⁵³ *Baier*, *supra* note 550 at para 30.

⁵⁵⁴ *Ibid* at para 30, citing *Dunmore v Ontario (AG)*, 2001 SCC 94.

⁵⁵⁵ *Ibid*.

whistleblowing, and trespassing. However, this is not the case. There has been no assertion from activists that the government is required to facilitate activism in Canada's agricultural facilities. Rather, opponents of ag-gag claim instead that the ag-gag laws are an act of governments which restrict expression. As stated in *Baier*, a positive rights claim seeks to require the government to act to support or enable the expressive activity.⁵⁵⁶ There have been no claims by opponents of ag-gag that the government is required to act in support of the expressive activism. Indeed, no such claim is included in *Animal Justice et al.*'s Application challenging Ontario's *Bill 156*.⁵⁵⁷

This is not to suggest that any claim that the government ought to enable socially-positive activism in agriculture facilities would fail. Indeed, the notion that activists seek a 'microphone' from governments is often conflated with a social demand for more transparency in the agriculture industry. However, demands for transparency must be separated from critical legal analyses of ag-gag laws as a governmental gag.

This section is included merely to address this concern, and indicate that this is not a positive rights claim. As established in this chapter, ag-gag laws restrict expression, either in purpose or effect, in violation of s. 2(b). Chapter 6 will then engage in the reasonable limits analysis, and balance societal concerns regarding property rights and freedom of expression in activism.

⁵⁵⁶ *Ibid* at para 35.

⁵⁵⁷ *Animal Justice et al.*, *supra* note 497.

CHAPTER 6: AG-GAG NOT A REASONABLE LIMIT ON EXPRESSION

This chapter will explore the question of whether ag-gag laws, which violate s. 2(b) freedom of expression, could be justified through a s. 1 reasonable limits analysis. Within the four considerations of the s. 1 analysis, this chapter argues that ag-gag laws: do not advance a pressing and substantial objective (6.2), have no rational connection between the objectives and the means used to achieve them (6.3.1), do not minimally impair expression (6.3.2), and cannot be justified as the negative effects cannot outweigh any potential benefits (6.3.3).

6.1 Section 1 Reasonable and Justifiable Limits

Section 1 of the *Charter* serves two important functions.⁵⁵⁸ The first is that s. 1 guarantees the rights and freedoms contained within the *Charter*. The second is that s. 1 also places a limit on those *Charter* rights. The text of s. 1 reads:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The inclusion of s. 1 within the *Charter* signifies the rights within it are not absolute and may be limited in the interests of society.⁵⁵⁹ When a violation of a *Charter* right is established, a court will then turn to s. 1, asking whether the violation can be reasonably justified. When a question of reasonable limits arises, Canadian courts will be guided by the values and principles of s. 1. Chief Justice Dickson has articulated these values and principles as including the inherent dignity of the person, commitment to social justice and equality, accommodation of a wide

⁵⁵⁸ As established in *R v Oakes*, [1986] 1 SCR 103. [Oakes]

⁵⁵⁹ *JTI-Macdonald*, *supra* note 510.

variety of beliefs, respect for group identities, and faith in social and political institutions which enhance individual participation in society.⁵⁶⁰

No similar ‘reasonable limits’ clause exists in the US’s *Bill of Rights*.⁵⁶¹ In the US, it is largely the common law jurisprudence to which the courts must look to decide if violations of a right can be justified. This explains the reliance on cases such as *Stevens* and *Alvarez* in the US ag-gag litigation described in chapter 4. As Canada’s ‘reasonable limits’ are included within the *Charter*, this may be the flexibility that supporters of ag-gag believe will lead to a finding of constitutionality.⁵⁶² However, Professor Grant Huscroft (before he was appointed to the Ontario Court of Appeal) has argued that any differences in decisions regarding free speech or expression are not structural.⁵⁶³ Huscroft attributes variations in the protection of expression between Canada and the US to the difference in the political cultures as perceived by the courts.⁵⁶⁴ He argues that the cultural underpinnings – as opposed to the constitutional underpinnings – prevail in the courts of Canada.⁵⁶⁵ Despite different underlying rationales, Hogg holds that American jurisprudence is not irrelevant in exploring limitations on rights in Canada.⁵⁶⁶

It follows that another salient aspect of s. 1 is that the section does not limit what can be demonstrably justified to purely Canadian contexts. The section stipulates for limitations which can be justified in a free and democratic society – not only in Canada. As previously discussed in chapter 4, Supreme Court justices have interpreted this wording as an invitation to survey

⁵⁶⁰ *Oakes*, *supra* note 558.

⁵⁶¹ Huscroft, *supra* note 471 at p. 188 – 189.

⁵⁶² Atkinson, *supra* note 487.

⁵⁶³ Huscroft, *supra* note 471 at p. 190 – 191.

⁵⁶⁴ *Ibid* at p. 191.

⁵⁶⁵ *Ibid* at p. 191 – 193.

⁵⁶⁶ Peter W Hogg, *Constitutional Law of Canada*, vol. 1, 5th ed. Supp. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 1) at 38.1.

other free and democratic societies in the court decision-making process.⁵⁶⁷ This is where the US jurisprudence on ag-gag gains persuasive weight, as the Supreme Court's most cited foreign free and democratic society.⁵⁶⁸

Because infringements of s. 2(b) are easily established, the constitutionality of expression-limiting legislation often turns on s. 1. The courts have routinely found freedom of expression to be of high importance. As discussed in Section 4.5, the Supreme Court has held freedom of expression to be "the matrix, the indispensable condition of nearly every other form of freedom."⁵⁶⁹ Canadian cases which discuss reasonable limits on freedom of expression have established that "any attempt to restrict the right must be subjected to the most careful scrutiny."⁵⁷⁰

Despite this careful scrutiny, limits on freedom of expression can be justified when the value of the expression is low and can be outweighed by the value of the government's objective.⁵⁷¹ For example, hate speech is expression with low social value and is acceptably limitable.⁵⁷² In another case, the government's public health objectives for limiting marketing of tobacco products outweighed the interest in corporate marketing expression.⁵⁷³

This approach has mostly been articulated within the Supreme Court's jurisprudence on s. 2(b) and related s. 1 analyses. However, the Court developed the framework for the s. 1 analysis in a separate scenario. In the 1986 case *R v Oakes*, the Court was tasked with answering whether a 'rebuttable presumption' clause in the *Narcotics Control Act* violated the *Charter* s.

⁵⁶⁷ Previously discussed in chapter 4 at 4.5, *supra* notes 470.

⁵⁶⁸ *Ibid*, *supra* note 454.

⁵⁶⁹ *Irwin Toy*, *supra* note 463.

⁵⁷⁰ *Sharpe*, *supra* note 503.

⁵⁷¹ *Thomson Newspapers*, *supra* note 508.

⁵⁷² *Keegstra*, *supra* note 465.

⁵⁷³ *JTI-Macdonald*, *supra* note 510.

11(d) presumption of innocence.⁵⁷⁴ The court found that Oakes had established a *Charter* violation, and that the burden moved to the Crown (government) to establish that the violation was justifiable under s. 1. In this case, the Court found that the provision could not be saved under s. 1. In doing so, they articulated a section 1 analysis, consisting of a two-branch test, with the second branch containing a three-step *Oakes* test. In any s. 1 analysis, the *Oakes* test is analyzed in order, and each of the four requirements must be satisfied. If one requirement is not met, a court may stop the s. 1 analysis upon the first failure, and does not have to analyse the remaining requirements.

Since the test was first articulated in 1986, many subsequent cases have applied the test, adding important jurisprudence to s. 1 analyses. In a given *Charter* challenge to an ag-gag law, after the applicant(s) establish a s. 2(b) violation, the burden then shifts to the government to establish ag-gag as a reasonable limit on expression. This means that in the *Animal Justice et al* case, if *Animal Justice* successfully establish the s. 2(b) violation, the Ontario government will have to persuade the court that the violation is reasonable. In anticipation of a s. 1 analysis, this chapter will proceed to discuss potential considerations within all four aspects of a s. 1 analysis of ag-gag laws.

6.2 Pressing and Substantial Objective

The first branch of the s. 1 analysis asks whether the legislative objective is sufficiently important to limit a *Charter* right. The legislative objective is taken from the time the legislation was adopted and generally does not shift over time.⁵⁷⁵ Within this consideration, the importance of an objective must be consistent with principles integral to a free and democratic society.⁵⁷⁶

⁵⁷⁴ *Oakes*, *supra* note 558.

⁵⁷⁵ *R v Zundel*, [1992] 2 SCR 731.

⁵⁷⁶ *Vriend v Alberta*, [1998] 1 SCR 493.

Objectives generally ought to be specific, but occasionally broader objectives are appropriate alongside narrower sub-objectives.⁵⁷⁷ The Supreme Court has found that in order to satisfy this step of the test, the majority of cases will require the government to adduce evidence to support the objective.⁵⁷⁸

The stated objectives of ag-gag legislation are clear: ag-gag laws seek to deter trespassing onto farm property and other places where animals are kept, and to limit biosecurity risks which flow from trespassing on farms and interference with animals. Although each piece of ag-gag legislation is different, they all address similar themes concerning biosecurity risks to food production (6.2.1), and increased trespassing on farms (6.2.2). Although these objectives are stated or inferred from the text of the legislation, the Supreme Court has held that the statement of the goals and objectives should be related to the infringement of the *Charter* right.⁵⁷⁹

Indeed, in *RJR-MacDonald*, two tobacco companies challenged federal *Tobacco Products Control Act* (TPCA). Among other things, the TPCA sought to regulate advertising, promotion, and labelling of tobacco products. The companies claimed that the TPCA violated their freedom of expression and should be declared unconstitutional. In finding that certain provisions unjustifiably violated s. 2(b), McLachlin J (as she then was) articulated that: “the objective relevant to the s. 1 analysis is the objective of the infringing measure.”⁵⁸⁰ In *RJR-MacDonald*, the TPCA was “but one facet of a complex legislative and policy scheme to protect Canadians from the health risks of tobacco use.”⁵⁸¹ For the purpose of the s. 1 analysis, it was prudent of the

⁵⁷⁷ *JTI-Macdonald*, *supra* note 510 at para 38.

⁵⁷⁸ *Canada (AG) v Hislop*, 2007 SCC 10 at para 49.

⁵⁷⁹ *Hogg*, *supra* note 566 at 38.9.

⁵⁸⁰ *RJR-MacDonald Inc. v Canada (AG)*, [1995] 3 SCR 199 at para 144. [*RJR-MacDonald*]

⁵⁸¹ *Ibid* at para 144.

Court to narrow the focus of the analysis to the objectives of the provisions that infringed s. 2(b).

Therefore, a court that reviews an ag-gag law will need to identify the objectives of the law. However, they cannot separate the articulated objectives of the legislature from the objectives that achieve the s. 2(b) violation. A court will have to consider the objectives of biosecurity and trespassing, but must also consider the true objective of silencing animal rights activists within the question of pressing and substantial objectives (6.2.3).

6.2.1 Biosecurity Risks from Trespassing in Agricultural Facilities

To first address the biosecurity issue, recall that no trespass by an animal activist in Canada has ever led to the introduction of an illness in the farmed animals involved. Although PEI's legislation seemingly addresses biosecurity and trespassing, MLA Henderson could not point to a single event of farm trespass or biosecurity breach from animal rights activists in the province.⁵⁸² This immediately undermines the pressing and substantial objective of PEI ag-gag law. At the federal level, during the reintroduction of the ag-gag bill, MP Barlow cited biosecurity breaches which were not caused by activists, but by inherent flaws in the farmed animal agriculture industry.⁵⁸³ When asked, MP Barlow could also not point to a single event where trespassing by animal rights activists resulted in illness or harm to farmed animals. In this way, the objective to protect biosecurity is immediately questioned at the federal level as well. These considerations are inherent in the legislative debates about the respective ag-gag laws. Biosecurity concerns were also prevalent in the General Committee when discussing

⁵⁸² Discussed in chapter 3 at 3.3.1.

⁵⁸³ Discussed in chapter 3 at 3.2.2.

Ontario's ag-gag bill, as the term 'biosecurity' was mentioned 147 times by both witnesses and MPs.⁵⁸⁴

Of course, in none of these jurisdictions, nor in Alberta, could anyone describe an event where trespassing, undercover investigations, or whistleblowing resulted in animal illness. A recent report by Animal Justice titled "Animals Advocacy or Animal Agriculture? Disease Outbreaks & Biosecurity Failures on Canadian Farms" explored animal disease outbreaks on Canadian farms reported by the CFIA.⁵⁸⁵ The Report states that out of 877 incidents of farmed animal disease outbreaks, not one was tied to animal activism. Rather, the prevalence of disease outbreaks on Canadian farms since 2003 reveals the biosecurity risks that are inherent in the agriculture industry, and that biosecurity threats do not come from activists. This is perhaps why the federal ag-gag bill was amended to additionally capture farmers who pose biosecurity risks to the food system.

There are two additional considerations on this point which further undermine this objective. The first is that whistleblowers and undercover investigators are employed by the property owner/operator, and therefore are trained and follow the biosecurity measures prescribed by the owner/operator. In this way, the legislation claims a biosecurity concern for properly trained employees, who may eventually become whistleblowers. Indeed, in deeming an employee as a trespasser, the legislation claims a biosecurity concern where there ought to be none in properly operated facilities. Therefore, legislation from Alberta and Ontario which targets trained employees cannot logically advance a biosecurity risk concern.

⁵⁸⁴ Ontario, Legislative Assembly, Standing Committee on General Government, *supra* note 273.

⁵⁸⁵ See Animal Justice, "New Report Questions Biosecurity as Justification for Ag Gag Laws" (21 May 2021): <https://animaljustice.ca/blog/new-report-questions-biosecurity-as-justification-for-ag-gag-laws>

Another consideration arises where trespassers take biosecurity measures before entering onto farm property. As many activists post their trespassing on social media, a viewer can easily discern whether a trespasser has taken biosecurity measures or not. During the *Meat the Victims* action,⁵⁸⁶ activists are shown wearing disposable face masks, protective suits, gloves, and shoe coverings when entering the barn.⁵⁸⁷ The same can be seen in photos from the *Liberation Lockdown*,⁵⁸⁸ the *Por Greg Farm Sit-In*,⁵⁸⁹ and the *King Cole Duck Rescue*.⁵⁹⁰ Although a question remains whether an activist who takes biosecurity measures could be subjected to the biosecurity-driven PEI ag-gag law, these examples also bring into question whether biosecurity is truly a pressing and substantial objective. This is amplified by MP Barlow's certainty that any trespasser, regardless of precautions taken, will be subjected to the ag-gag law.

6.2.2 Trespassing in Agricultural Facilities

The other salient purpose of ag-gag laws, especially in the PEI legislation (as well as the early iteration of the federal bill) is to denounce, deter, and penalize trespassing on animal agriculture property. In scrutinizing whether this objective is pressing and substantial, the courts have repeatedly stated that the objective must be consistent with the principles in a free and democratic society. Although trespassing on private property in general may be sufficiently important to warrant anti-trespassing legislation, the issues raised by ag-gag demand scrutiny as to whether increasing penalties for trespassing in the agriculture industry warrants its heightened prohibitions and penalties.

⁵⁸⁶ Discussed in chapter 2 at 2.3.1.

⁵⁸⁷ Brown, *supra* note 127.

⁵⁸⁸ Discussed in chapter 2 at 2.3.1; Carpenter, *supra* note 133.

⁵⁸⁹ Discussed in chapter 2 at 2.3.1; Rowe, *supra* note 141.

⁵⁹⁰ Discussed in chapter 2 at 2.3.1; O'Neil, *supra* note 142.

In reviewing the legislative debates regarding ag-gag in the various jurisdictions, the legislators justified the ag-gag laws with anecdotal events of trespassing by animal rights activists. Despite the anecdotal evidence, no governmental body has researched the phenomenon. Often, research will illuminate an issue in Canadian law, and the legislators will attempt to remedy the issue with legislation.⁵⁹¹ Such research is based on evidence that is available to all and allows one to form an opinion about whether the issue is important to address. However, no such research occurred on the topic of farm trespassing in Canada. Without concrete research which finds trespassing on Canadian farms to be a significant issue in Canada, ag-gag legislation can appear to be a pre-emptive strike against individuals who wish to engage in protected s. 2(b) expressive activities.

With no evidence of biosecurity risks, and only anecdotal evidence of increased trespassing, there is little evidence to support the pressing and substantial objectives of ag-gag legislation. The objectives of the legislation are further minimized when recalling that every jurisdiction has existing anti-trespass laws in place. This aspect is discussed in more detail below in considering ‘minimal impairment.’

6.2.3 Silencing Animal Rights Activists

In addition to the diminished importance of the articulated objectives of ag-gag legislation, consideration ought to be given to the hidden but intended purpose of ag-gag – to silence animal rights activists. In passing ag-gag laws, the legislators were careful not to state that the purpose of the laws was to silence activists, as this would be a clear unjustifiable

⁵⁹¹ For example, the Canadian Department of Justice will conduct research and release reports on legal issues through their Research and Statistics Division, see examples here: <https://www.justice.gc.ca/eng/rp-pr/index.html>. Other times, independent bodies, although they may be funded by the government, will also research a legal issue and draft reports and recommendations, such as the work of the Law Commission of Ontario: <https://www.lco-cdo.org/en/publications-papers/>

violation of s. 2(b). One major reason for this is that such an objective is not in accordance with the principles of a free and democratic society, which values political speech, transparency, and informed decision-making.

Katie Sykes and I have argued that activists are the last method of accountability in the animal agriculture industry.⁵⁹² Both Jodi Lazare⁵⁹³ and Maneesha Deckha⁵⁹⁴ have also highlighted the important service provided by activists in informing the public about the sources of animal products. In seeking to record the truth and sharing information, activists serve an important function of keeping Canadians informed about their consumer choices. Indeed, the Federal Court has recently highlighted that where ethical consumption choices arise, the public has a right to true and accurate information about the origins of products, which is protected by s. 2(b).⁵⁹⁵

In *Kattenberg v Canada*, Dr. Kattenberg filed a complaint with the CFIA alleging misleading labeling of wine products from Israeli settlements in the West Bank (Occupied Palestinian Territories) which were labelled as ‘Products of Israel.’⁵⁹⁶ The Federal Court found that in addition to content and safety information, the country of origin also allows consumers to ‘buy consciously’ and make informed and rational decisions about their purchasing choices. More specifically, Justice Mactavish concluded that “[o]ne peaceful way in which people can express their political views is through their purchasing decisions” and that in order to do so “consumers have to be provided with accurate information as to the source of the products in question.”⁵⁹⁷ Justice Mactavish found that ‘conscientious buying’ engages s. 2(b). In this way,

⁵⁹² Skinner & Sykes, *supra* note 18.

⁵⁹³ Lazare, *supra* note 132.

⁵⁹⁴ Deckha, *supra* note 159.

⁵⁹⁵ *Kattenburg v Canada (AG)*, 2019 FC 1003 at para 117; appeal to Federal Court of Appeal pending.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid* at para 126.

the *Charter* not only protects the activists' interest in creating the expression, but also the public's interest in receiving the information in order to make informed consumer choices.

The *Kattenberg* decision was appealed to the Federal Court of Appeal; however, the Supreme Court then released its landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, which revised the standard of review in Canadian administrative law.⁵⁹⁸ As the *Kattenberg* case dealt with review of the CFIA's decision regarding misleading labelling, Chief Justice Noël of the Federal Court of Appeal sent the matter back to the CFIA for reconsideration. Chief Justice Noël stated that the Agency is not bound by Justice Mactavish's reasons, and may decide for themselves whether the *Charter* freedom of expression applies.⁵⁹⁹ In this way, Justice Mactavish's reasons were not expressly rejected at the Federal Court of Appeal, but the new Supreme Court decision changed the legal landscape which demanded reconsideration by the CFIA. It remains to be seen what the CFIA decides with regards to Dr. Kattenberg's labelling complaint in light of the court decisions and possible live freedom of expression issue regarding ethical consumer decision-making.

There is an inseverable tie between animal rights activism and the desire to disseminate information about the farmed animal industry so consumers can make informed purchasing decisions. In reaction to the truth-seeking activities of animal rights activists, ag-gag laws serve to penalize activists for their expressive activities. In his article, Will Potter specifically criticizes ag-gag laws for "shooting the messenger" and keeping "consumers in the dark" instead of reforming industry practices.⁶⁰⁰ Within the context of justifiability, the silencing of animal rights

⁵⁹⁸ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

⁵⁹⁹ *Canada (AG) v Kattenberg et al*, 2021 FCA 86 at para 19.

⁶⁰⁰ Potter, *supra* note 33 at p. 8.

activists is not a pressing and substantial objective which can be supported in a free and democratic society.

On this question of whether the goals of ag-gag laws are pressing and substantial, neither the articulated nor the hidden objectives can be justified. There is no evidence as to the necessity for ag-gag legislation to combat biosecurity threats or increased trespassing. These stated objectives serve to hide the true purpose of silencing activists, which cannot be accepted as a pressing and substantial legislative goal.

6.3 Proportionality

If the goal of the impugned legislation is found to be pressing and substantial, the next question asks whether the goal is proportional to the means used to achieve the goal. As articulated by the Supreme Court in *Oakes*, this branch of the s. 1 analysis contains three elements which must be satisfied in order to justify a *Charter* violation.⁶⁰¹ First, there must be a rational connection between the goal and the measures used to achieve that goal (6.3.1). Second, the legislation must violate the right in a way that minimally impairs the right (6.3.2). Third, a court must engage in a final balancing, where there must be proportionality between the harmful effects and the benefits of the legislation (6.3.3). The *Oakes* test analysis is not approached in a mechanical way, the test is flexible, and takes into account the factual and social context of each case.⁶⁰² This step of the test asks whether the provisions of ag-gag laws and the violation of the s. 2(b) freedom of expression are proportional to achieve the goals of protecting biosecurity, deterring trespassing, and silencing activists.

⁶⁰¹ *Oakes*, *supra* note 558.

⁶⁰² *RJR-MacDonald*, *supra* note 580 at para 63; *Keegstra*, *supra* note 465.

6.3.1 Rational Connection

This step demands that there must be a rational connection between the legislative goals of ag-gag laws and the means chosen to achieve them contained within the provisions of the laws. Here, the burden is on the government to demonstrate on a balance of probabilities that the measures used in ag-gag laws are not “arbitrary, unfair, or based on irrational considerations.”⁶⁰³ A causal relationship between limiting speech and the goals should be proven by scientific evidence; however, sometimes a reasonable apprehension of harm can be established by reason and logic.⁶⁰⁴ Here, it is not necessary for the government to prove that the means chosen will result in achievement of the goals, only that the means will reasonably further the goals.⁶⁰⁵

With regards to the goal of protecting biosecurity, the rational connection step asks whether ag-gag laws will further the goal of decreasing biosecurity risks on farms. In their 2019 article, Caitlin Ceryes and Christopher Heaney explore ag-gag’s chilling effect on reporting concerns related to animal welfare issues, as well as employee working conditions and food safety in agricultural settings.⁶⁰⁶ They discuss how workers in industrial farms are subjected to poor hygienic conditions, associated pollution, hazardous working conditions, and zoonotic diseases.⁶⁰⁷ As ag-gag laws are introduced to limit investigation in agricultural facilities, the biosecurity risks related to filth in barns, pollution, disease, and contamination are not reported.

This issue has been further highlighted by the COVID-19 pandemic. In June 2020, the Migrant Workers Alliance for Change released a Report titled “Unheeded Warnings: COVID-19

⁶⁰³ *Oakes*, *supra* note 558, at para 70, at paras 51 – 52 citing *Tot v United States*, 319 US 463 (1943); *Leary v United States*, 395 US 6 (1969).

⁶⁰⁴ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 132 – 135.

⁶⁰⁵ *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 95.

⁶⁰⁶ *Ceryes & Heaney*, *supra* note 37.

⁶⁰⁷ *Ibid* at p. 669 – 672.

& Migrant Workers in Canada.”⁶⁰⁸ The Report details the pitfalls of the corporate-controlled and profit-driven agricultural system in Canada.⁶⁰⁹ By interviewing temporary foreign workers in Canada, the Report explains how the current system facilitates employee abuse through lack of labour rights, healthcare, protective equipment, as well as inhumane housing, racism, and pay violations.⁶¹⁰ Despite the federal government giving nearly one billion dollars to Canadian agriculture industries from March to June of 2020 under the guise of protecting small farms and workers, the 1,162 workers represented in the Report revealed that working conditions were worse than ever on Canadian farms.⁶¹¹ The Report reveals that the industry is not interested in improving conditions on farms, even when they are given taxpayer money to do so. Instead of implementing health and food supply protections, during this time, the agriculture industry continued to lobby for ag-gag laws and stifling dissenting voices.

Additionally, recent jurisprudence also addresses arguments related to biosecurity risks from activists. In the US, Justice Gritzner discussed biosecurity in his decision in finding the ag-gag law in Iowa unconstitutional.⁶¹² He alluded to legislators who claimed the Iowa ag-gag law’s purpose included protecting biosecurity. Justice Gritzner then highlighted that the ag-gag law only addressed biosecurity risks from individuals who engage in acts of free speech which the laws prohibit.⁶¹³ In applying the law, the only individuals captured and penalized by the law are those who engage in false pretences, meaning that individuals who do not engage in false pretences may pose a biosecurity risk without threat from the ag-gag law.⁶¹⁴ In this way,

⁶⁰⁸ MWAC Report, *supra* note 10.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid* at p. 11.

⁶¹² *ALDF et al. v Reynolds et al.*, *supra* note 293.

⁶¹³ *Ibid* at p. 35.

⁶¹⁴ *Ibid* at p. 35 – 36.

the limits on free speech were not connected to biosecurity, as those who do not engage in the free speech could also pose a biosecurity risk without repercussions under the ag-gag law.

In Canada, specifically in Ontario, two of the activists criminally charged for actions taken during their activism disputed their charges at trial. In both cases, prosecutors drew attention to the potential biosecurity risks associated with the activism. These arguments were not successful in either of the decisions, and both activists were acquitted. In the 2017 ‘pig trial,’ the Crown argued that Anita Krajnc’s giving the pigs water posed a biosecurity risk, as the liquid could have contained an unknown contaminant.⁶¹⁵ Justice Harris quickly found no merit in this argument, as Anita had no intent to contaminate the pigs, nor did the truck driver or the slaughterhouse workers demonstrate concern about possible contamination.⁶¹⁶ More recently in 2021, Justice Parfett recognized that Malcolm Klimowicz took biosecurity precautions before trespassing on a mink farm.⁶¹⁷ In Justice Parfett’s words, “a harm that might have occurred, but did not, cannot constitute mischief.”⁶¹⁸ In both of these cases, Ontario court justices found the activism not to be criminal and acquitted the activists.

In both the US litigation and Canadian criminal jurisprudence, biosecurity concerns were not associated with activists who interacted with animals on trucks or were trespassing to film inside a barn. This is consistent with the literature, which also suggests that there is no connection between activism and biosecurity threats. In this way, limiting activist expression cannot be logically connected to any biosecurity or food safety goals. To further illustrate this point, ag-gag attempts to illustrate trespassers as potential carriers of disease and ignores other

⁶¹⁵ *R v Krajnc*, *supra* note 153 at paras 58 – 76.

⁶¹⁶ *Ibid* at paras 58 – 76.

⁶¹⁷ *R v Klimowicz*, 2021 ONSC 2589 at para 17.

⁶¹⁸ *Ibid* at para 17.

individuals who may carry disease and give diseases to animals. Other individuals who may unknowingly transfer diseases could include: farmers, employees, inspectors, tourists of farms, attendees of exhibitions (i.e. the Farm at the annual Canadian National Exhibition where attendees can shear sheep and milk cows), and any other person who comes into contact with farm animals. There is no rational connection between singling out trespassers from all other who could spread diseases to farm animals. This disconnect was remedied by the federal bill amendments, which as of June 23rd 2021 no longer only targets trespassers, but anyone who creates a reasonable danger of spreading animal diseases (including farmers).

The rational connection between the ag-gag laws and deterring trespassing on farms is also tenuous. As has been previously stated, most ‘trespassers’ are only deemed to be trespassers when it is discovered they engaged in *Charter*-protected expressions of false pretences. Many trespassers who are captured by ag-gag laws had consent to be on the property (hired as employees), but the ag-gag laws remove the consent (false pretence provisions deem them trespassers). If the goal of ag-gag laws is to deter trespassing, the question remains of whether there is a rational connection in capturing persons who work and have consent to be on agricultural property.

The rational connection between farm anti-trespassing goals and the ag-gag laws can be questioned when recalling that Ontario’s ag-gag laws apply to many animals who are not part of the food system. The Ontario *Regulations* prohibit interactions with animals who are bred to propel vehicles, to be ridden for pleasure, to be shown publicly, or to undertake competitions.⁶¹⁹ In this way, activism for horses is chilled, as activists cannot meaningfully engage with horse-drawn carriages, racehorses, or show horses. The inclusion of horses has no connection to

⁶¹⁹ *Ontario Regulations*, *supra* note 252 at s. 5.

protecting the agri-food system, as horses are not commonly consumed as food in Canada, and the activities listed above are not food-related. The above practices are not limited to horses, as many other animals are shown publicly (in zoos or aquariums) and undertake competitions (such as rodeos or dog shows). Here, the rational connection between these new anti-trespass laws and protecting agriculture facilities is doubtful.

6.3.2 Minimal Impairment

Despite the doubtful importance of the legislation's objectives, and the tenuous rational connection to those goals, the minimal impairment considerations are likely to be the downfall of ag-gag legislation in any s. 1 analysis. As Hogg describes, the minimal impairment requirement "has turned out to be the heart and soul of s. 1 justification" as "nearly all the s. 1 cases have turned on the answer to this inquiry."⁶²⁰ This step of the *Oakes* test requires that the limit of the *Charter* right must be impaired in a minimal way. This is not a requirement of the least minimal impairment as possible,⁶²¹ but that the means used to achieve the goals must fall within a range of acceptable options that are minimally impairing.⁶²²

The burden remains on the government to demonstrate that to achieve the goals there are no other acceptable alternatives that impair the right less than the ones chosen.⁶²³ In consideration of this step, governments should justify why other, less intrusive measures, were not chosen.⁶²⁴ Hogg explains this requirement as the "least drastic means" and that "[t]he idea is that the law should impair the right no more than is necessary to accomplish the desired objective."⁶²⁵ Within this consideration, the Supreme Court favours other available laws which

⁶²⁰ Hogg, *supra* note 566 at 38.8, 38.11.

⁶²¹ *R v Edward Books and Art Ltd*, [1986] 2 SCR 713.

⁶²² *RJR-MacDonald*, *supra* note 580 at para 160.

⁶²³ *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at para 55. [*Hutterian Brethren*]

⁶²⁴ *Thomson Newspapers*, *supra* note 508 at paras 118 – 119.

⁶²⁵ Hogg, *supra* note 566 at 38.11.

would accomplish the important legislative goals but impair the *Charter* right less than the enacted law.⁶²⁶

A major pitfall of ag-gag legislation in this step is the legislation which already exists and prohibits contamination in bio-secure areas and trespass on private property. On the prohibition of contamination, s. 445.1(1)(c) of the *Criminal Code* prohibits the administration of poisonous or injurious substances to captive animals.⁶²⁷ A person who commits this offence may be punished by a prison term up to 5 years and a fine not more than \$10,000. Here, the *Criminal Code* prohibits contamination of the food supply and harming farmed animals, as well as other captive animals. More importantly, this *Criminal Code* provision protects the Canadian food supply nation-wide in a way that does not infringe the s. 2(b) freedom of expression. This criminal law allows important and expressive investigations in agricultural facilities, while maintaining integrity in Canada's food system.

With regards to animals in transport, the *Criminal Code* s. 446(1)(a) criminalizes causing damage or injury to animal or birds while they are being driven or conveyed.⁶²⁸ Punishment for doing so includes a possible jail term up to two years. Similar to the above, this provision meaningfully protects animals in transport as part of the food supply, and does so in a way that does not infringe on the s. 2(b) freedom of expression. Under this law, animals are protected, and Save Movement activists may still engage in their expressive activities.

In addressing trespassing, each province protects private property with anti-trespass laws. Generally, trespass laws exist to prohibit individuals from entering private property without consent, and to punish those who do. In Ontario, the *Trespass to Property Act* prohibits

⁶²⁶ *Ibid*

⁶²⁷ *Criminal Code* at s. 445.1(1)(c).

⁶²⁸ *Ibid* at s. 446(1)(a).

trespassing and provides a punishment of a fine up to \$10,000.⁶²⁹ In Alberta, the *Trespass to Premises Act* and *Petty Trespass Act* prohibit trespassing and provides punishment of a fine up to \$2,000 for a first offence and up to \$5,000 for subsequent offences (punishments were changed by ag-gag amendment legislation).⁶³⁰ In PEI, the *Trespass to Property Act* prohibits trespass and provides punishment as a mandatory fine between \$500 and \$2,000.⁶³¹ Finally, Manitoba's *The Petty Trespasses Act*, also prohibits trespassing and provides punishment as a fine not exceeding \$5,000.⁶³² All of these anti-trespass laws protect property rights by prohibiting presence on private property without consent.

The effect of ag-gag law generally increases the penalties for trespassing, above the fines noted here. The other effect of ag-gag laws, particularly in Alberta and Ontario, is to subject individuals to heightened trespass laws when they engage in *Charter*-protected speech. Ag-gag laws vitiate consent where individuals had obtained valid consent to be on the property, usually as an employee (recalling that in Ontario consent is deemed to not have been given if false pretences are used). It is only when an employee attempts to engage in *Charter*-protected speech, they are deemed a trespasser and subjected to ag-gag's penalties. Legitimate employees are at risk of being deemed a trespasser if they voice concerns about the conditions in an agricultural facility. These provisions target and limit important political speech from activists in a severely impairing way.

The exceptions for journalists and whistleblowers in Ontario's *Regulations* may be considered as an attempt to minimally impair the infringement of expression. However, as

⁶²⁹ *Trespass to Property Act*, RSO 1990 c. T.21 at s. 2.

⁶³⁰ *Trespass to Premises Act*, RSA 2000, c T-7 at ss. 2 – 3; *Petty Trespass Act* Ch. P-11 at s. 2.

⁶³¹ *Trespass to Property Act*, Ch T-6 at s. 2.

⁶³² *The Petty Trespasses Act*, CCSM c. P50 at s. 1.

discussed earlier, the exceptions are extremely narrow, and valid journalistic activities are still captured by the ag-gag law in a way that is more than minimally impairing. For example, s. 11(1)(d) of the *Regulations* states that in order for a journalist to fall under the journalist exception, they cannot bring harm to an animal.⁶³³ This requirement is difficult to satisfy, as animal agriculture necessarily leads to an animal's death, therefore being an employee may require a journalist to harm an animal. Therefore, journalists who participate in the work necessary of agriculture workers are captured by the ag-gag law. For whistleblowers, the quick report provision of s. 12(1)(d) requires the individual to disclose evidence of wrongdoing as soon as practicable, or risk not falling within the exception.⁶³⁴ In this way, the ag-gag law captures whistleblowers who simply wait to disclose information of wrongdoing. These narrow exceptions are more than minimally impairing for journalists and whistleblowers in agricultural facilities.

When considering existing legislation which addresses the objectives of ag-gag laws, the goals are achieved without impairing expression, and without targeting activist speech. Here, the means used to achieve the goals of biosecurity and deterring trespassing are severely impairing, and are intentionally overbroad so as to capture and limit expression from animal rights activists. The overbreadth is exacerbated in Ontario's *Regulations*. By expanding ag-gag laws beyond agricultural facilities, Ontario's ag-gag law stifles activism in all places where animals may be, including horse-drawn carriages in the streets, animals in zoos, and animals used in competitions such as rodeos. In this way, Ontario's ag-gag laws capture activism far removed from farmed animals and the food supply, severely impairing activist expression.

⁶³³ *Ontario Regulations*, *supra* note 633 at s. 11(1)(d).

⁶³⁴ *Ibid* at s. 11(1)(d).

Finally, in addition to existing legislation regarding anti-trespass, the common law tort of trespass continues to apply in private property settings. In the landmark Supreme Court Case *Harrison v Carswell*, the majority of the Court upheld the property rights of the owner/occupier and restored the convictions against the accused under the *Manitoba Petty Trespass Act, 1970*.⁶³⁵ In this case, Ms. Carswell was an employee at a business located in a shopping centre when she began engaging in striking and picketing against her employer. The manager of the shopping centre, Mr. Harrison, after repeated attempts to ask her to stop picketing on the shopping centre property, brought a private prosecution laying four charges under the *Manitoba Petty Trespass Act, 1970*. As the Supreme Court restored the conviction, it reinforced the property owner/occupier's right to bring private prosecutions to seek redress for trespassing.⁶³⁶

The Supreme Court reiterated the role of private prosecutions after the *Charter* was enacted in the 2002 case *RWDSU Local 558 v Pepsi-Cola Canada Beverages*.⁶³⁷ In another picketing case, employees were engaged in picketing outside their employer's plant, but also picketed in 'secondary locations' including retail outlets to prevent delivery of products, outside a hotel where replacement workers were staying, and outside the homes of management personnel. An injunction was granted preventing picketing in the three secondary locations, but later was quashed except for the injunction against picketing outside the homes of management. The Supreme Court held that secondary picketing is lawful and protected by s. 2(b), except when it becomes tortious or criminal. In addition to the criminal law, the Court stated that "[k]nown torts will also protect property interests" when wrongful action occurs.⁶³⁸

⁶³⁵ *Harrison v Carswell*, [1976] 2 SCR 200.

⁶³⁶ *Ibid.*

⁶³⁷ *RWDSU Local 558 v Pepsi-Cola Canada Beverages West (Ltd.)*, 2002 SCC 8.

⁶³⁸ *Ibid* at para 103.

This is all to say that there are many laws which existed before ag-gag and continue to exist and are aimed at achieving the protection of biosecurity and protection from trespassing. These laws existed without limiting valuable activist expression. The introduction of ag-gag only serves to suppress animal rights activist activity by suppressing expression. This chapter has argued that the goals of ag-gag are not pressing and substantial, and that there is no rational connection between the goals and the means used to achieve them. Even if a court is not persuaded by those arguments, there is enough evidence of greater than minimal impairment to freedom of expression for ag-gag laws to fail on this step of the *Oakes* test.

6.3.3 Final Balancing

This final step of the *Oakes* test requires that the salutary effects of a law outweigh the deleterious effects of infringing the right.⁶³⁹ If all other requirements of the s. 1 analysis are satisfied, this step allows for a final balancing of whether the benefits of the law outweigh the negative impact of infringing the *Charter* right.⁶⁴⁰ Where the previous steps focus on the legislation's goals and means, this step focusses instead on the effects of the law on individuals and groups within society.⁶⁴¹ In Hogg's words, this step "asks whether the *Charter* infringement is too high price to pay for the benefit of the law."⁶⁴²

Hogg also explains that although courts often engage in this final balancing, the question is similar to the previous question of whether legislation has a 'pressing and substantial objective.'⁶⁴³ He states that if the effects of a law are too severe (final step), then the objective must not have been sufficiently important.⁶⁴⁴ Of course, Hogg's conclusions here have

⁶³⁹ *Oakes*, *supra* note 558 at para 71; *Frank v Canada*, 2019 SCC 1 at paras 38, 76.

⁶⁴⁰ *Carter v Canada (AG)*, 2015 SCC 5 at para 122.

⁶⁴¹ *Hutterian Brethren*, *supra* note 623 at para 76.

⁶⁴² Hogg, *supra* note 566 at 38.12.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

not been adopted by the courts, as the courts still engage in this step. Specifically, Chief Justice McLachlin took the time in *Hutterian Brethren* to reinforce the importance of this final step.⁶⁴⁵

This step then revisits the importance of animal rights activism in Canada. Considerations important in this final step include the fact that there is no evidence that an animal right activist has breached biosecurity and harmed animals in Canadian agriculture facilities. Activists who engage in false pretenses often uncover and disseminate important information relating to farm filth, unsanitary working conditions, and animal harm and abuse. Contrary to the goals of ag-gag laws, stifling dissenting voices of investigators and whistleblowers can reinforce poor health conditions in agricultural facilities and increase the risk of spreading diseases.⁶⁴⁶ To infringe s. 2(b) in this way seeks to silence and punish potential undercover journalists and whistleblowers who collect and share important information regarding agriculture operations. Ag-gag's supposed protection of biosecurity cannot outweigh the effect of silencing dissenting voices who routinely expose unsanitary conditions in agriculture.

Concerns related to biosecurity extend beyond undercover investigators and whistleblowers, and extend to trespassers. There is a real concern with trespassing, which is why anti-trespass laws exist. However, in agricultural facilities, trespassers also seek truth-telling and exposing harmful conditions, merely without the guise of employment. Recall the example of the *Meat the Victims* action,⁶⁴⁷ where PETA had released an undercover exposé which showed serious animal neglect, and Meat the Victims activists trespassed to further document the harmful conditions on the farm. The farm faced no charges for the harmed

⁶⁴⁵ *Hutterian Brethren*, *supra* note 623 at para 76.

⁶⁴⁶ Such as the spread of COVID-19 among farm employees. MWAC Report, *supra* note 10.

⁶⁴⁷ Previously discussed in chapter 2 at 2.3.1.

animals, but the activists continue to face criminal charges. Such expressive acts serve an important function of highlighting agricultural exceptionalism in Canada, where the agriculture industry acts with impunity in direct contravention of the rule of law.⁶⁴⁸

These trespassers serve an important role in both illuminating harmful conditions and the persistent lack of accountability, as well as informing consumers about the sources of their food where agriculture fails to do so. In a recent panel, Toronto Star journalist Robert Cribb, who has engaged in undercover investigations in the food system, also describes how ag-gag laws suppress important journalistic efforts to investigate Canada's food supply.⁶⁴⁹ Here, the industry's animosity for trespassers ought not outweigh the function of truth-telling and information dissemination of the realities of Canadian agriculture.

There are also important concerns with regards to the safety of animal rights activists in Canada. The introduction of ag-gag laws has fuelled divisiveness between animal advocates and individuals in the agriculture industry. Provisions of Alberta's, Ontario's, and Manitoba's ag-gag laws provide enhanced powers and limit liability for an individual who injures or kills an activist in attempting to defend their property. The limiting of liability and emboldening of power has already resulted in the death of one animal rights activist. Recall that in June 2020, just after Ontario's ag-gag law was passed, Regan Russell was struck and killed by a pig transport truck while lawfully crossing the street during a Save Vigil in Ontario.⁶⁵⁰ Increased powers and limiting liability for agricultural workers has already killed one activist, and may

⁶⁴⁸ Skinner & Sykes, *supra* note 18.

⁶⁴⁹ Robert Cribb, "Ag-gag Laws & the Public's Right to Know" (12 March 2021) *Center for Free Expression* (Virtual Forum Series): <https://cfe.ryerson.ca/key-resources/podcasts/ag-gag-laws-public%E2%80%99s-right-know>

⁶⁵⁰ Previously discussed in chapter 2 at 2.3.1.

injure more if ag-gag laws are found to be justified. This is a real consequence of ag-gag laws, and must weigh against justification.

Finally, it must be remembered that the United States, another ‘free and democratic society,’ has unequivocally rejected the constitutionality of ag-gag laws. The jurisprudence from various US states agrees that ag-gag laws are introduced to silence animal rights activists, which infringes the right to free speech. As the ALDF and others continue to challenge ag-gag laws in the US, their six successful constitutional challenges hold persuasive weight in Canada. If ag-gag laws in the US cannot pass constitutional scrutiny, Canadian courts ought to take this into consideration during any s. 1 analysis of ag-gag in Canada. As two free and democratic societies, ag-gag laws which are unconstitutional in the US should also be found unconstitutional in Canada.

To conclude this chapter, potential considerations are explored in a question of whether the violation of the s. 2(b) freedom of expression can be justified by s. 1 limitation. Here, it is argued that ag-gag laws do not advance any pressing and substantial objectives, and the laws themselves are not proportional. There is no rational connection between the goals and means used to achieve them, the provisions are not minimally impairing on the s. 2(b) right, and the negative effects of ag-gag on Canadian society far outweigh any potential benefits. For these reasons, ag-gag laws in Canada should fail *Charter* scrutiny, and therefore should be found unconstitutional, and should be of no force and effect pursuant to s. 52 of the *Constitution*.

CHAPTER 7: CONCLUSION

Ag-gag laws are an unconstitutional and problematic addition to the laws in Canada which isolate the animal agriculture industry from legal accountability and public discourse. Animal welfare laws only apply in the most sadistic of circumstances, and there are no regular inspections of farms which are publicly available. Animal agriculture is free to conduct business in a legal vacuum, with impunity, and without public scrutiny.

Animal rights activists are the last line of accountability for agriculture workers, as they seek to document and publicly disseminate the reality for animals on farms, in transport, and at slaughter. Credit must be given to the activists on the front lines for witnessing and recording in the interests of the animals, as they do so at great personal sacrifice. No animal lover enjoys watching animals grow in harsh conditions on farms, waiting hours on sidewalks to receive animals on transport trucks, or working in the slaughterhouses where animals are killed. Activists do so in the hopes that others may be informed about the lives of farmed animals, and make informed decisions about the foods they choose to consume.

Commendation must be given to those activists who have suffered personal harm as a result of their activism. We honour Regan Russell who was killed during her activism. We also appreciate the many activists who have faced criminal charges and have been subjected to the criminal legal system. As much as the governments and agriculture industry have attempted to silence animal rights activists and shield the industry, activism persists. The Save Movement continues to hold vigils outside slaughterhouses.

However, notably since ag-gag was first introduced in November 2019, undercover investigations and farm trespass seems to have slowed in Canada. It is unclear whether this has been due to ag-gag's chilling effect on activism, or the COVID-19 protocols which have largely

prohibited public gatherings since March 2020 and continue as this thesis is being written in June 2021. Save movement vigils continue to take place as they are held outside, and attendees are able to safely socially distance. However, group trespass seems to have entirely stopped, and the only undercover investigation published since March 2020 was Animal Justice's Paragon Farms exposé from December 2020. Researchers such as myself are particularly interested in observing how animal rights activism will resurface once pandemic protocols are fully lifted across Canada.

Before the pandemic protocols, and before the introduction of ag-gag laws, animal rights activism had been on the rise. In 2019, Save Vigils, undercover investigations, and civil disobedience made headlines like never before. Animal rights activists were committed to exposing the animal agriculture industry for its hidden animal abuses. In reaction, at the end of 2019, various Canadian governments drafted and introduced legislation which sought to silence activists and protect the industry from public scrutiny.

Although ag-gag laws are different in each jurisdiction, they all seek to chill animal rights activism on farms, during animal transport, and at slaughter. Ag-gag laws that have passed in Alberta and Ontario contain usual provisions against false pretences, which prohibit undercover investigations. Ontario's ag-gag law also includes a quick-report provision, which prohibits thorough investigations and capturing patterns of abuse. Legislation from PEI assumes that activists are biosecurity threats that endanger animal health. Manitoba's ag-gag law reinforces biosecurity zones and prohibits activist contact with animals. All four pieces of legislation which have become law increase penalties for anyone who interferes with animals on private property.

There are still other pieces of ag-gag legislation which have not yet become law at the time of submitting this thesis. Ag-gag law may soon be introduced in Quebec and Saskatchewan. The door remains open for other provinces and territories to introduce other versions of ag-gag legislation.

Despite the industry and government support for ag-gag laws, animal rights organizations continue to denounce them as unconstitutional. As the ALDF *et al* in the US has successfully had six pieces of ag-gag legislation struck down for violating the First Amendment right to free speech, Canadian activists believe that ag-gag laws in Canada will similarly be found to unconstitutionally violate the *Charter* freedom of expression. This will soon be put to the test, as Animal Justice *et al* have filed their constitutional challenge against Ontario's ag-gag laws, and challenges to other ag-gag laws are expected to follow.

This thesis has surveyed applicable Canadian s. 2(b) jurisprudence, and argues that ag-gag laws, in all current forms, will likely fail a *Charter* challenge. All operational ag-gag laws seek to suppress *Charter*-protected speech, either outright by limiting expressive acts or in effect by chilling expression. Activist freedom of expression is infringed both in purpose and in effect by ag-gag laws.

Ag-gag is not a reasonable limit which can be demonstrably justified in a free and democratic society. Ag-gag laws do not advance any pressing and substantial objective, as silencing would-be whistleblowers will not increase biosecurity on farms, trespassing on agriculture facilities has not been linked to any animal illness, and silencing activists cannot be justified as an objective. Further, ag-gag laws are not proportional. There is no rational connection between increasing biosecurity by punishing activists. Ag-gag laws are not

minimally impairing, as they apply to any property where animals are kept (including outside the agriculture industry) and cover a wide range of expressive acts.

Finally, ag-gag laws which seek to suppress activist expression cannot be balanced when considering that activists serve an important role in disseminating information to the public to which they would not otherwise have access. The agriculture industry and ag-gag legislators claim that activists are a threat to biosecurity and animal health, when in reality they are responsible for exposing filthy and unsanitary conditions as well as injured and sick animals who do not receive medical care. This is, of course, in addition to activists who expose unfortunately common sadistic animal abuse and cruelty within the agriculture industry. Contrary to any claims that activists threaten biosecurity, activism exposes the lack of biosecurity inherent in the industry, and demands for better conditions and increased healthcare for animals.

This thesis has argued that ag-gag laws in their current forms in Canada must be found unconstitutional by the courts. Further, this thesis elaborates on how ag-gag legislation which has not yet passed into law may, if passed, also be found unconstitutional. The ALDF has been challenging US ag-gag laws since July 2013, and continues to fight new and renewed ag-gag laws in various states. If Canada continues to follow the US's example, ag-gag laws will continue to be introduced, and will eventually be struck down.

Future research will continue scholarly updates to the litigation of US ag-gag laws, follow the current litigation in Ontario, observe the passing of additional Canadian ag-gag legislation, and explore the possible findings of additional *Charter* challenges. Additional research may engage in political theory (such as interest-convergence theory) which would

interrogate the agriculture industry's power to push governments to legislate ag-gag laws which are doomed to fail in Canada.

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