

# Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?

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*In Canada today, notwithstanding the existence of animal protection legislation at both the provincial and federal level, very few laws actually govern the daily treatment of animals on farms. Instead, the 'rules' explaining how these animals can be kept exist in the form of Codes drafted by a coalition of agricultural industry bodies and non-government organizations working under the aegis of an umbrella group: the National Farm Animal Care Council ("NFACC"). In this article, the author provides a preliminary examination of Canada's evolving experiment with industry self-regulation of animal protection standards. After outlining the legislative background that led to the development of the Codes, the author considers NFACC's institutional membership, the role the organization plays in creating national standards of animal welfare, how it drafts the Codes, and the legal status of these instruments. The strengths and weaknesses of Canada's code regime are then explored in detail.*

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## **I. Introduction**

To put the matter as charitably as possible, Canada has never been considered a world leader where animal protection law is concerned, especially insofar as farm animals are concerned. While its Commonwealth 'cousins' in the United Kingdom, Australia, and New Zealand were enacting dramatically enhanced animal protection laws through the 1990s and early 2000s, Canada's federal government stood pat, maintaining a 1950s-era framework that is normally referred to in uncharitable terms like 'outdated', 'antiquated', and 'woefully

inadequate'.<sup>1</sup> From 1999 through to 2015, a series of well-documented attempts to amend Canada's animal protection law in Parliament all met with failure, and there are no signs of anything changing in the immediate future.<sup>2</sup>

This is not to suggest that Canada's legislative situation is entirely stagnant, however. On the contrary, change is undoubtedly afoot for one of the world's biggest players in animal agriculture, and since 2005 new

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1. "Falling Behind: An International Comparison of Canada's Animal Cruelty Legislation" (2008), online (pdf): *International Fund Animal Welfare* <[3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/Falling%20behind%202008%20an%20international%20comparison%20of%20Canadas%20animal%20cruelty%20legislation.pdf](https://www.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/Falling%20behind%202008%20an%20international%20comparison%20of%20Canadas%20animal%20cruelty%20legislation.pdf)> (the last of these terms comes from a study undertaken by the International Fund for Animal Welfare, which ranked Canada near the bottom of Western nations with animal protection laws). See also John Sorenson, *About Canada: Animal Rights* (Halifax: Fernwood, 2010) who notes that Canada's anti-cruelty laws are "antiquated, remaining basically unchanged since the nineteenth century" at 154).
  2. In 1999, the federal government made a significant attempt to revamp the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] provisions governing crimes against animals. The proposed reforms were widespread and fairly ambitious, modernizing the language of the *Code*, imposing certain duties, and narrowing the mental elements required to establish a conviction. The initiative could not get through a divided Parliament and eventually died. See Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 87–96. The most recent attempt at reform was Bill C-246, a reasonably ambitious private member's Bill initiated by Liberal MP, Nathaniel Erskine Smith, in 2015. Facing vociferous resistance from the opposition Conservative party and many of Erskine-Smith's Liberal colleagues, the Bill was defeated at second reading. See Holly Lake, "Animal Cruelty Bill Defeated" (6 October 2016), online: *iPolitics* <[ipolitics.ca/2016/10/06/animal-cruelty-bill-defeated/](http://ipolitics.ca/2016/10/06/animal-cruelty-bill-defeated/)>. For a critique of the reasoning used to vote down the Bill, see Peter Sankoff, "Canada Still an Animal Welfare Laggard" (13 October 2016), online: *Policy Options* <[policyoptions.irpp.org/magazines/october-2016/canada-still-an-animal-welfare-laggard/](http://policyoptions.irpp.org/magazines/october-2016/canada-still-an-animal-welfare-laggard/)>. For an opposing view, see Robert Sopuck, "Animal Rights Bill Threatened Canadians' Way of Life" (7 November 2016), online: *Policy Options* <[policyoptions.irpp.org/magazines/november-2016/animal-rights-bill-threatened-canadians-way-of-life/](http://policyoptions.irpp.org/magazines/november-2016/animal-rights-bill-threatened-canadians-way-of-life/)>.

measures designed to limit some of the ways in which farm animals can be treated have been emerging on a fairly regular basis. But in contrast to the developments taking place abroad, most of this change is being driven by the agricultural industry. And here I speak not metaphorically, in the sense of suggesting that industry is *pushing* for reform. Instead, most of the new rules governing the treatment of farm animals are being created by a coalition of agricultural industry bodies and non-government organizations working under the aegis of an umbrella group: the National Farm Animal Care Council (“NFACC”). As is the case with most animal protection mechanisms, the extent to which the model ‘works’ for animals depends greatly upon your perspective. Still, one thing is undeniable: the NFACC is now a major player on the Canadian law-making scene, and it has seized control of the regulatory agenda in farmed animal welfare for the foreseeable future.

Though the choice to cede regulatory decision-making to a private body that is tasked with the job of creating rules its members must then live by is not entirely unique,<sup>3</sup> it raises many questions — questions that are especially pronounced when the organization at issue is tasked with enacting rules that help define how criminal and quasi-criminal legislation will be interpreted, a situation that *is* unique.<sup>4</sup> The NFACC’s process of decision-making also raises concerns about the moral validity of standards created by a group dominated by the very industries affected by those standards, and the overall democratic legitimacy of the process in light of the way public input is considered. The ambiguous legal status of the codes the NFACC creates is another matter to be apprehensive

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3. Many institutions that are mostly private — albeit usually with some government oversight — have the ability to create their own guidelines for conduct, with law societies, who create the rules of professional conduct that govern how lawyers operate, being a prime example.
  4. What is also different is that the power to self-regulate normally tends to be afforded to professional associations (*e.g.* lawyers, veterinarians, doctors) who have a clear and delineated group of members who are not permitted to operate their profession without adopting the set rules. The NFACC does not work that way. Farmers are not required to belong to any professional association, and the NFACC has no legal power to bind them.

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Despite the NFACC’s significant role in creating farm animal protection standards, this ‘delegation’ of legal power by the Canadian government has largely gone unstudied to date. In place for over 13 years, NFACC Codes appear now to be a permanent fixture on the Canadian landscape, and scrutiny of their scope and impact is very much needed. This paper is intended as an initial foray into this lacuna. Its primary objectives are to explain the importance of the NFACC’s role to animal protection law in Canada and demonstrate the need for further and deeper analytical inquiry. The NFACC refers to itself, not incorrectly, as the “national lead for farm animal care and welfare in Canada”,<sup>5</sup> notwithstanding an organizational framework that lacks many of the traditional checks and balances of a legislative body, and the fact that what the group produces is not actually law, in the strict sense of the word. What this means for Canada’s agricultural animals remains to be seen, but further analytical scrutiny of this organization is essential if the impact of relying upon the NFACC to effectively regulate protection standards in the animal farming industry is ever to be fully understood.

In this paper, I will provide a preliminary examination of Canada’s evolving experiment with industry self-regulation of animal protection standards. In Part II, I outline the legislative background that led to the development of the NFACC Codes, and attempt to situate these Codes within the Canadian legal framework for animal protection. Part III introduces the NFACC and explains its objectives and rise to prominence. It then examines the NFACC Code-drafting process, and explores how these instruments are developed. In Part IV, I highlight some strengths of the new regimes, while Part V addresses a number of concerns.

## II. Historical Background

In order to understand how the NFACC came to prominence in Canada, some historical background is required, as the farming industry’s involvement in Code drafting is, to some extent, a result of the legislative

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5. “About NFACC” (24 August 2018), online: *National Farm Animal Care Council* <[www.nfacc.ca/about-nfacc](http://www.nfacc.ca/about-nfacc)> [NFACC, “About NFACC”].

vacuum that existed before the organization's inception.

Animal protection is a matter of shared federal-provincial responsibility in Canada.<sup>6</sup> The federal government has exclusive responsibility over criminal law, which includes acts against animals that are regarded as being immoral in nature.<sup>7</sup> As a result, the *Criminal Code*<sup>8</sup> contains the standard sort of anti-cruelty offences that should be recognizable to anyone with even a basic familiarity in this area, prohibiting wilful acts of cruelty that cause unnecessary suffering and certain egregious acts of

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6. A constitutional challenge in Ontario heard in May 2018 suggests otherwise, contending that crimes against animals fall within the exclusive purview of the federal government, and that large parts of Ontario's *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, is unconstitutional as a result. See the Notice of Application in *Bogaerts v Attorney General of Ontario* (13 October 2013), Perth 749/13 (Ont Sup Ct), online (pdf): *Fix the Law* <[www.fixthelaw.ca/wp-content/uploads/2013/09/Notice-of-Application.pdf](http://www.fixthelaw.ca/wp-content/uploads/2013/09/Notice-of-Application.pdf)>. Though this application raises a number of interesting — and potentially meritorious — issues, this is not one of them, and the federalism challenge is likely to fail. The dominant theme in Canadian constitutional law over the past two decades has been a desire to leave coordinate provincial and federal schemes in place where it is possible to do so. See *e.g. R v Hydro-Québec*, [1997] 3 SCR 213 (use of federal criminal law power does not preclude provinces from exercising own power to regulate independently or supplement federal action). Animals legally qualify as property — a provincial area of responsibility. Given the high threshold required for the criminal act of cruelty against animals, there would seem to be plenty of room for the provinces to legislate to protect animals from distress and regulate in favour of their well-being.
  7. By virtue of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.
  8. *Criminal Code*, *supra* note 2.

neglect.<sup>9</sup> The provisions are not intended to address suffering of farmed animals,<sup>10</sup> but they do not exclude this either, which is problematic in its own right. The statute provides the *illusion* that animals are protected in every context, and is occasionally referred to as a safeguard when egregious farming practices are mentioned, often in response to complaints by animal advocates about there being no meaningful protection in place

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9. S 446(1)(a) of the *Criminal Code, ibid*, provides that every one commits an offence who wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird. S 446(1)(b) of the *Criminal Code, ibid*, is the “neglect” offence, punishing anyone who, “being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it”.
10. As Bisgould, *supra* note 2, puts it, while “there is no specific exemption, a *de facto* exemption is either presumed or effectively written in, because of the manner in which the provisions are interpreted” at 71. In *R v Pacific Meat Company* (1957), 24 WWR 37 (BC Co Ct), the court explicitly held that pain inflicted for the purpose of turning animals into food was always necessary, a decision that seemed to curtail the possibility of using the *Criminal Code* to prosecute farmers. As Bisgould, *supra* note 2, puts it, “since that time, criminal law has not generally been invoked in the context of the actual practices by which animals are used and much deference is given to those in industry to know best how to handle their animal property” at 74.

for farmed animals.<sup>11</sup> That said, it is generally understood by everyone involved that the *Criminal Code* is not the statute of choice where farmed animals are concerned.<sup>12</sup>

The *Criminal Code* is not the federal government's only contribution to animal management. Laws that address the handling and care of farm animals can be found in a variety of statutes addressing issues as diverse as food safety, disease prevention, and marketing of animal products.<sup>13</sup> However, there are very few statutes containing provisions that deal specifically with keeping farmed animals safe from harm. Only two pieces of federal law do this to any real extent: the *Health of Animals Regulations*,<sup>14</sup> enacted under the authority of the *Health of Animals Act*,<sup>15</sup>

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11. "A Summary Report on Farm Animal Welfare Law in Canada" (2013) at 2, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/resources/Farm\\_Animal\\_Welfare\\_Laws\\_Canada.pdf](http://www.nfacc.ca/resources/Farm_Animal_Welfare_Laws_Canada.pdf)> [NFACC, "A Summary Report"]; "How Do I Know Dairy Cows are Treated Humanely?" (29 August 2018), online: *Alberta Milk* <[albertamilk.com/ask-dairy-farmer/how-do-i-know-the-animals-are-treated-humanely/](http://albertamilk.com/ask-dairy-farmer/how-do-i-know-the-animals-are-treated-humanely/)> ("[w]e have zero tolerance for animal abuse or neglect... [A]nimal protection at the farm level is offered under both provincial and federal legislation. The two main laws protecting animals against abuse and neglect on the farm are the provincial *Animal Protection Act* (APA) and the federal *Criminal Code* of Canada"); "Animal Welfare" (29 August 2018), online: *Cara* <[www.cara.com/animal\\_welfare/](http://www.cara.com/animal_welfare/)> ("[w]e take animal welfare seriously and we do not tolerate animal cruelty in our supply chain. Animal abuse is a criminal act in Canada, and violators should be reported and prosecuted").
  12. See Sophie Gaillard & Peter Sankoff, "Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 307 at 318 (discussing reluctance of authorities to use criminal provisions in farmed animal context); NFACC, "A Summary Report", *ibid* at 3.
  13. See e.g. *Safe Food for Canadians Act*, SC 2012, c 24; *Canada Agricultural Products Act*, RSC 1985, c 20 (4th Supp). There are no provisions dealing with animal welfare in any of these pieces of legislation.
  14. CRC, c 296.
  15. SC 1990, c 21 [*Health of Animals Act*].

has a number of provisions designed to protect animals during transport; and, the *Safe Food for Canadians Regulations*,<sup>16</sup> enacted pursuant to the *Safe Food for Canadians Act*,<sup>17</sup> sets out a variety of standards respecting slaughter.

It would be wrong, thus, to say that the federal government and its inspectors play no role in setting and enforcing animal welfare standards in Canada. They do — but only during the processes of animal transport and slaughter.<sup>18</sup> Subject to the comments about the anti-cruelty law made above, and the possibility that it might eventually come to be used more

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16. SOR/2018-108 (until the summer of 2018, these regulations were enacted pursuant to the *Meat Inspection Act*, SNS 1996, c 6, and most animal law publications refer to the *Meat Inspection Regulations*, NS Reg 46/1990, as governing the slaughter process).
  17. SC 2012, c 24.
  18. Even here, there is plenty to be critical of. See Bisgould, *supra* note 2 at 181, who decries the problems of under-enforcement in this area. See also World Society for the Protection of Animals, “Curb the Cruelty: Canada’s Farm Animal Transport System in Need of Repair” (2010), online (pdf): *World Animal Protection* <[www.worldanimalprotection.ca/sites/default/files/ca\\_-\\_en\\_files/curbthecrueltyreport.pdf](http://www.worldanimalprotection.ca/sites/default/files/ca_-_en_files/curbthecrueltyreport.pdf)>, a detailed study on the shortcomings of the Canadian Food Inspection Agency (“CFIA”), which is responsible for enforcing these laws. The CFIA has conducted only one major prosecution involving farmed animals, resulting in a conviction of a major chicken processor on 22 counts of inhumane transport of chickens under the *Health of Animals Act*, *supra* note 15, a fine of \$80,000 and an agreement to spend \$1 million on improvements to its transport facilities as part of a probation order. See *R v Maple Lodge Farms*, 2014 ONCJ 212.

widely,<sup>19</sup> in just about every other area of a farmed animal's life, regardless of the species, federal law provides no guidance and no protection. Legally, farmers are free to do *whatever they like to their animals*, so long as their conduct complies with relevant agricultural law on food safety and other non-welfare related requirements.<sup>20</sup>

In recent years, the more significant legislative developments have come from the provinces, which have shown some willingness to strengthen their own animal protection standards, even though these

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19. See Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Sankoff, Black & Sykes, *supra* note 12 at 33, who has argued that the *Criminal Code* permits such an interpretation and that a greater number of criminal prosecutions in the farming context should take place if the law was applied correctly. Nonetheless, recent experience shows continued prosecutorial reluctance to use the *Criminal Code* for this purpose. One of the worst recent documented cases of animal abuse took place at a Chilliwack dairy farm, where three workers were videotaped using chains and other implements to viciously beat a number of dairy cows, including downed and trapped cows who could not escape the abuse. Notwithstanding what seemed like a clear case of criminal level abuse, the workers were only charged and convicted of provincial offences. See "Chilliwack Dairy Farm Workers Sentenced to Jail in 'Precedent-Setting' Ruling" (29 May 2017), online: *BC SPCA* <[spca.bc.ca/news/chilliwack-dairy-farm-workers-sentenced-jail-precedent-setting-ruling/](http://spca.bc.ca/news/chilliwack-dairy-farm-workers-sentenced-jail-precedent-setting-ruling/)> [BC SPCA]. But see also Keith Corcoran, "Cruelty case: Life-time Ban on Owning Animals for Farmer" (22 August 2018), online: *LighthouseNow* <[lighthouse.ca/article.php?title=Cruelty\\_case\\_Life\\_time\\_ban\\_on\\_owning\\_animals\\_for\\_f](http://lighthouse.ca/article.php?title=Cruelty_case_Life_time_ban_on_owning_animals_for_f)> (Nova Scotia farmer convicted of *Criminal Code* offence for starving animals).
  20. See Rachel Godley, *The Health of Animals Act and Regulations: An Example of How Canada Has Failed to Protect Farmed Animals* (Masters of Laws Thesis, University of Alberta, 2014) at 56–59, online: *Education & Research Archive* <[era.library.ualberta.ca/items/a694308d-8be6-48a1-b964-3c8aabf0fb4f](http://era.library.ualberta.ca/items/a694308d-8be6-48a1-b964-3c8aabf0fb4f)>.

efforts have varied in intensity by jurisdiction.<sup>21</sup> To be clear, farm animals are rarely a priority in these efforts, which are usually directed at specific issues involving companion animals such as puppy mills,<sup>22</sup> pet shop retailers,<sup>23</sup> catteries,<sup>24</sup> and the treatment of sled dogs.<sup>25</sup> Nonetheless, like the federal cruelty law, the legislation applies to *all* animals and extends beyond the protective, though hard-to-meet, standards of the criminal law, prohibiting anyone from causing ‘distress’,<sup>26</sup> necessary or otherwise. These laws also impose clear duties of care upon those responsible for animals. For example, Manitoba’s legislation,<sup>27</sup> which is representative of that found in most of the major provinces, sets out the following:

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21. See “2017 Canadian Animal Protection Laws Rankings” (July 2017), online (pdf): *Animal Legal Defense Fund* <aldf.org/wp-content/uploads/2018/06/2017-Canadian-Rankings-Report-1.pdf> (ranking the revamped legislation enacted in Prince Edward Island, Manitoba, Nova Scotia and New Brunswick as being the best provincial animal protection legislation in Canada).
  22. See Quebec, *Regulation respecting the safety and welfare of cats and dogs*, CQLR c P-42, r 10.1.
  23. *Animal Care Act*, CCSM c A84, ss 26–34 (setting out detailed standards for pet shops and licencing procedures) [*Animal Care Act*].
  24. See *Pet Establishment Regulation*, NB Reg 2010-74.
  25. In response to the horrific killing of sled dogs in 2011 (see Sam Cooper & Sean Sullivan, “Massacre Horrifies B.C.: Man Shoots 100 Sled Dogs ‘Execution-Style’ After Olympic Slowdown” (6 February 2011), online: The Province <www.theprovince.com/Massacre+horrifies+shoots+sled+dogs+execution+style+after+Olympic+slowdown/4197145/story.html>) British Columbia enacted strict guidelines regarding the treatment of sled dogs: *Sled Dog Standards of Care Regulation*, BC Reg, 21/2012.
  26. Though this term is still being defined by the courts, it does not refer to every level of discomfort endured by an animal. For example, the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 [*OSPCA Act*], defines it as “the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect” s 1. See also *R v Ryan*, 2017 ABPC 161, distress restricted to “great physical or mental strain or stress” at para 22.
  27. *Animal Care Act*, *supra* note 23 at s 2(1).

- 2(1) A person who has ownership, possession or control of an animal
- (a) shall ensure that the animal has an adequate source of food and water;
  - (b) shall provide the animal with adequate medical attention when the animal is wounded or ill;
  - (c) shall provide the animal with reasonable protection from injurious heat or cold; and
  - (d) shall not confine the animal to an enclosure or area
    - (i) with inadequate space,
    - (ii) with unsanitary conditions,
    - (iii) with inadequate ventilation or lighting, or
    - (iv) without providing an opportunity for exercise, so as to significantly impair the animal's health or well-being.

At first glance, these provisions unquestionably provide much stronger and clearer protection for farmed animals than the federal laws, and extend the potential to control improper or painful agricultural practices. Still, while provincial animal protection laws have undoubtedly proved useful in certain cases where animals are abused or the subject of extreme neglect,<sup>28</sup> they have not really affected the overall dynamic for farmed animals by guaranteeing better standards that can be applied universally. The reason is because of an additional clause, present

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28. Notwithstanding the deficiencies, to be discussed, these offences are prosecuted on a strict liability standard, and easier to prove as a consequence. There is no need, in contrast to the criminal provisions, to show any *intention* to cause distress. For this reason, leaving aside the worst cases of intentional cruelty or neglect, it is now common for most charges involving animals to proceed under the provincial legislation. See *e.g.* BC SPCA, *supra* note 19; Julien Gignac, “‘This is Not Normal’: Ontario Mink Farm Charged with Animal Cruelty After Activists Go Undercover” (12 May 2018), online: *The Star* <[www.thestar.com/news/canada/2018/05/12/undercover-investigation-behind-animal-cruelty-charges-at-ontario-mink-farm-us-based-rights-group-says.html](http://www.thestar.com/news/canada/2018/05/12/undercover-investigation-behind-animal-cruelty-charges-at-ontario-mink-farm-us-based-rights-group-says.html)> (investigation into mink farm results in provincial charges notwithstanding large scale deficiencies at farm).

in every jurisdiction, indicating that the causing of distress or breach of the standards of care is not punishable where it is the result of “an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry”.<sup>29</sup> As a consequence, a farmer is permitted, for example, to confine animals with ‘inadequate space’ — however that might be defined — so long as this is the common practice within the industry.<sup>30</sup>

It stands to reason that this clause, which exempts traditional farming practice from scrutiny even where such practices cause animals to suffer, limits the utility of provincial legislation in the agricultural context. It is worth noting, however, that the Ontario law set out above does say that the activity must be generally accepted *and* reasonable. This particular wording has given hope to some animal advocates,<sup>31</sup> who postulate that there might be room to bring prosecutions where a ‘generally accepted’ practice was nonetheless the cause of considerable harm to animals, by proving that the practice was not reasonable. This hope has been limited by unfavourable judicial interpretation of the provisions, however.<sup>32</sup> In the leading case of *R v Muhlbach*,<sup>33</sup> a farmer escaped conviction for mistreating cattle notwithstanding clear evidence that the animals

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29. *OSPCA Act*, *supra* note 26 at s 11.2(6)(c).

30. As it is, for example, in layer hen facilities, where hens are confined to small cages as a regular practice. See *Code of Practice for the Care and Handling of Pullets and Laying Hens*, Ottawa: NFACC, 2017 at 12, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/pullets\\_and\\_laying\\_hens\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/pullets_and_laying_hens_code_of_practice.pdf)> [NFACC, *Laying Hen Code*].

31. See “Interview with Anna Pippus” (7 November 2016), online: *Vegan Creative* <[vegancreative.ca/interview-with-anna-pippus/](http://vegancreative.ca/interview-with-anna-pippus/)>, who notes that “I think there’s a decent argument that even some of these standard industry practices ought not to comply with existing laws, because they aren’t ‘reasonable’ (the legislation requires this)”.

32. It is also limited by the way in which many of the provincial provisions are drafted, as not all of them require standards to be reasonable. For example, Manitoba’s *Animal Care Act*, *supra* note 23, exempts every person whose conduct was “consistent with generally accepted practices or procedures for such activity” s 2(2). See similarly *Animal Welfare and Safety Act*, CQLR, c B-3.1, s 7 [*Animal Welfare and Safety Act*].

33. 2011 ABQB 9 [*Muhlbach*].

had not been provided with water, that they suffered from untreated injuries, and that downed animals in a state of suffering were present on various parts of the farm. The trial judge and appellate court accepted anecdotal evidence from fellow farmers that the accused's actions were not particularly egregious in the circumstances. Nor were they out-of-line with what others would have done, which was enough to warrant an acquittal. Throughout, the trial judge drew favourable inferences in favour of the farmer, ignoring evidence of dead cows, injured animals, and empty water troughs.

Part of the problem, of course, lies in defining what constitutes a 'reasonable' practice in the abstract, combined with the fact that the accused's evidence, supported by that of his next-door neighbour farmer or other friends, is entitled to weight in the courtroom, especially since an accused person gets the benefit of the doubt.<sup>34</sup> These issues of proof have helped to limit the utility of provincial legislation with respect to harms caused by traditional, albeit painful, farming practices, and made prosecutors reluctant to bring cases forward unless the evidence of abuse or cruelty is overwhelming.

In short, while Canada has no shortage of federal and provincial laws designed to address the protection of animals, the fact remains that with the exception of certain aspects of transport and slaughter, there is no legislation that directly addresses the daily treatment and care of animals, unless that treatment was malicious in nature or grossly inconsistent with the way those animals are treated on other farms.

### **III. NFACC: Organization and Code Processes**

#### **A. The Creation of the NFACC**

Beginning in the late 1980s and accelerating through the next two decades, increasing public concern about the treatment of farm animals sparked significant legislative reforms in a host of countries around the globe. To take just three examples, Australia, New Zealand, and the UK

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34. Part of the problem lies in the difficulty of getting farmers to testify against one another, unless the practices are truly abhorrent.

all repealed their archaic animal protection laws — which, at the time, looked a lot like Canada’s laws do now — and enacted modern versions designed to provide better animal care standards and more effective methods for sanctioning those who ignored them.<sup>35</sup>

While Canadian legislators largely ignored this trend, farmers and other players in the agricultural industry showed a keen interest in what was happening. As had been the case in New Zealand, where a modern *Animal Welfare Act* was initiated by requests from the farming community,<sup>36</sup> Canada’s farmers recognized that something needed to change. Beginning as early as 1987, groups of farmers and collective associations began meeting for the purpose of creating clearer standards of care. Their aim was partially altruistic. Most farmers believe strongly that animals must be properly cared for, and are disgusted by incompetent or lazy farmers who let animals die of thirst or suffer from a lack of medical treatment. But there were economic concerns in play, as well. Farmers also understand that negative publicity in the form of stories about animal mistreatment is bad for business, and that it was important, as an early NFAACC publication made clear, to “delive[r] the message that

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35. *Animal Welfare Act 1993*, 1993/63 (Tas); *Animal Care and Protection Act 2001*, 2001/64 (Qld); *Animal Welfare Act 2002*, 2002/33 (WA); *Animal Welfare Act 1999*, 1999/142 (NZ) [*Animal Welfare Act 1999*]; *Animal Welfare Act 2006*, c 45 (UK).

36. See Peter Sankoff, “Five Years of the ‘New’ Animal Welfare Regime: Lessons Learned from the New Zealand’s Decision to Modernize Its Animal Welfare Legislation” (2005) 11:7 *Animal Law* 7 at 11–13 [Sankoff, “Five Years”].

farmers care for their animals and promot[e] responsible animal care”.<sup>37</sup> The existing law did not do this. The problem was the disconnect between consistently ‘winning’ — farmers avoiding punishment even in cases where there was clear harm and a questionable rationale for imposing it — and the growing discontent expressed by the media reporting on horrible incidents that were going unpunished. In a sense, one could make the case that the law was almost *too* favourable to the farmers. Few people really want to encourage enforcement and prosecution of their industry, but if everyone is ‘innocent’, it tarnishes the reputation of all farmers equally.

These trends eventually drove the agricultural community and the government into each other's arms. Though the federal government had no apparent interest in creating or monitoring new legislation, it was happy to support initiatives designed to encourage better welfare.<sup>38</sup> Farmers were also happy to push this objective, especially when it could be conducted on their terms. It allowed for “real progress on responsible farm animal care, while helping to ensure animal agriculture is viable in a climate of increasing market demands”.<sup>39</sup>

This desire for a national animal care organization led to the ‘birth’ of the NFACC in 2005, which launched with widespread involvement

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37. Gordon Coukell, “A Message from the Chair” in National Farm Animal Care Council, “Annual Report 2005–2006” (2006) at 3, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/nfacc/Annual%20Report%202006.pdf](http://www.nfacc.ca/pdfs/nfacc/Annual%20Report%202006.pdf)>. See also Sefecon Management Consulting Inc., *A Discussion Paper Setting out a National Approach to Animal Care*, June 2004 (provided by NFACC to the author) at 16, which clearly links the two objectives, noting that “a proactive, rather than emergency response, to farm animal care is preferred. Elevating the level of professionalism within farm animal industries by raising the skill and competency levels of livestock producers is a means of ensuring the continued and future sustainability of livestock agriculture. Basic planning on farm animal health and care will result in a pay off. It is also important to recognize that this is being driven by consumers who have a strong opinion about animal care”.

38. “A Message from the Chair”, *ibid.*

39. *Ibid.*

from the leaders of every significant agricultural sector in Canada,<sup>40</sup> and support from at least one major animal protection group — the Canadian Federation of Humane Societies — as well as the Canadian Veterinary Medical Association. From the start, the endeavour has been funded by Agriculture Canada, a federal agency, though the government has no voting seat at the table, and no official role in the direction of the coalition. It funds the project and has observer status — nothing more. Other provincial agriculture ministries have also been involved, though government agencies are not permitted to vote on NFACC matters.<sup>41</sup>

The organization has come a long way from its early beginnings. The NFACC has full-time support staff, an extensive website, and a detailed YouTube channel,<sup>42</sup> with numerous videos explaining its procedures, work, and processes. It has grown from 22 original members to 27, the vast majority of whom are national organizations, and added 15 additional associate members, mostly companies or groups that are not national organizations, including restaurants, retailers, processors, and feed companies.<sup>43</sup>

The NFACC’s Mission Statement is as good a place as any to gain an understanding of the group’s approach. It states that: “We believe that by striving for consensus, realistic and lasting improvements to farm animal care can be made”.<sup>44</sup> This statement of purpose is not just a guiding principle — it is an overarching theme discernible from every publication that emanates from the NFACC. As Edouard Asnong, Quebec Pork Producer and former Chair of the NFACC, has noted, “collaboration

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40. This includes organizations indirectly involved in the agricultural use of animals, like the Livestock Transporters Division and the Canadian Restaurant and Food Services Association.

41. “Membership” (23 August 2018), online: *National Farm Animal Care Council* <[www.nfacc.ca/membership](http://www.nfacc.ca/membership)> [NFACC, “Membership”].

42. “National Farm Animal Care” (2018), online (video): *Youtube* <[www.youtube.com/channel/UC9fpwxkNMqwNOd7SyGXNBHg](http://www.youtube.com/channel/UC9fpwxkNMqwNOd7SyGXNBHg)>.

43. NFACC, “Membership”, *supra* note 41.

44. See “Development Process for Codes of Practice for the Care and Handling of Farm Animals” (2018), online: *National Farm Animal Care Council* <[www.nfacc.ca/code-development-process](http://www.nfacc.ca/code-development-process)> [NFACC, “Development Process”].

amongst diverse stakeholder groups is the key to real progress".<sup>45</sup> This collaboration extends to support for the process. The NFACC's Code of Conduct<sup>46</sup> makes clear that all members must agree to support the Code development process and the Codes developed through it.<sup>47</sup>

## B. The Codes

The NFACC's core task is the creation of Codes of Practice, "nationally developed guidelines for the care and handling of different species of farm animals".<sup>48</sup> The Codes are designed to be used "as guides and extension tools in promoting sound animal care practices" and also "form the basis of animal care assessment programs".<sup>49</sup> Not surprisingly, though the Codes include a series of 'requirements', they do not read like statutes or regulations. Instead, they look more like handbooks, serving the NFACC's primary purpose of establishing standards for its member organizations.

NFACC materials are ambiguous with respect to the legal force of the Codes. At times, the wording loosely refers to the Codes as 'guidelines' or 'standards', and it is very unusual to see any discussion of lawmaking, non-compliance or the potential for sanction. Instead, the focus is on "providing information and education" and "serving as the foundation for animal care assessment programs".<sup>50</sup> But at other junctures, the NFACC stresses how important the Codes are, suggesting that animal care includes certain "fundamental obligations" and "requirements"<sup>51</sup> for agricultural producers. At another, the legal force of the Codes is

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45. "Advancing Animal Care and Addressing Market Expectations — Final Project Achievements Report — March 2014" (March 2014) at 6, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/nfacc/NFACC\\_Final\\_Report\\_2014.pdf](http://www.nfacc.ca/pdfs/nfacc/NFACC_Final_Report_2014.pdf)> [NFACC, "2014 Final Report"].

46. "Code of Conduct for NFACC Members, Partners, Directors and Support Personnel" (2018), online: National Farm Animal Care Council <[www.nfacc.ca/membership#conduct](http://www.nfacc.ca/membership#conduct)>.

47. NFACC, "Membership", *supra* note 41.

48. NFACC, "Development Process", *supra* note 44.

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*

recognized somewhat obliquely as “providing reference materials for regulations”.<sup>52</sup>

As will be discussed in greater detail in the section outlining the shortcomings of the Code process below, the actual binding force of the Codes is unclear — perhaps deliberately so, but in some provinces, they unquestionably have a certain degree of legal status. Saskatchewan’s animal protection legislation, for example, provides the following:

- (3) An animal is not considered to be in distress if it is handled:
- (a) in a manner consistent with a standard or *code of conduct*, criteria, practice or procedure that is prescribed as acceptable; or
  - (b) in accordance with generally accepted practices of animal management.<sup>53</sup>

Most of the NFACC Codes have been prescribed as acceptable and, as such, they constitute legal standards of conduct in Saskatchewan.<sup>54</sup> Nonetheless, even in jurisdictions with enactments along these lines there remains some uncertainty about how the Codes operate. To be sure, as the provision indicates, anyone acting in compliance with Code requirements possesses a valid defence to a charge of causing distress to an animal, regardless of the animal’s state. What is less certain is whether the Codes constitute a *comprehensive* guide to permissible conduct, as one might expect. The wording of the clause, which is fairly consistent with every province that uses this approach, suggests that one can escape liability *either* by complying with a Code or by acting in accordance with generally accepted practices of animal management.

As such, the Codes are not necessarily comprehensive, because the defences operate as alternatives. To put it another way, the prosecution in *Muhlbach* could have advanced the fact that an NFACC Code was not being complied with, but Muhlbach could legitimately respond that his action was nonetheless in accord with generally accepted practices in

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52. *Ibid.*

53. *Animal Protection Act 1999*, SS 1999, c A-21.1, s 2(3) [emphasis added] [*Animal Protection Act 1999*]. See similarly *Animal Care Act*, *supra* note 23 at s 2(2). Newfoundland and Labrador, Prince Edward Island and New Brunswick have taken this approach as well.

54. *Animal Protection Regulations, 2000*, Sask Reg 1/2000, s 3.

the community, securing an acquittal. Moreover, since compliance with a Code operates as a *defence* to charges of causing an animal distress in some manner, it is not clear that non-compliance means anything at all in terms of constituting an offence of any kind, so long as distress is not caused by the particular conduct at issue. In short, the Codes have some form of legal authority, but they are not — as the NFACC takes great pains to reiterate — regulatory standards that *must* be met by those in care of agricultural animals.

Whatever their legal status, it seems clear that creation and revision of the Codes is intended to be a long-term, continuing process with the NFACC acting as a permanent oversight body.<sup>55</sup> The NFACC guidelines insist that Codes will be reviewed every five years.<sup>56</sup> This timetable requires resources, as the Code process is a significant endeavour. The Code for

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55. In the March 2018 report, “Market Relevant Codes and Communication Leadership — Project Achievements Final Report” (March 2018), online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/NFACC\\_AR\\_2017-18.pdf](http://www.nfacc.ca/pdfs/NFACC_AR_2017-18.pdf)>, NFACC Chairman Ryder Lee points out that “it’s hard to imagine managing farm animal welfare without NFACC [as] the processes and approaches that NFACC has developed to address farm animal welfare are now cornerstones of Canada’s animal welfare system and critical for maintaining public trust in how farmers care for their animals” at 2. Interestingly, NFACC’s continued role is dependent on federal government funding, which does not appear to be fully guaranteed. Funding has tended to be provided through the AgriMarketing Program under Growing Forward 2, a federal-provincial-territorial initiative. See National Farm Animal Care Council, News Release, “New Code of Practice for the Care and Handling of Veal Cattle” (27 November 2017), online: *National Farm Animal Care Council* <[www.nfacc.ca/news-releases?articleid=299](http://www.nfacc.ca/news-releases?articleid=299)>.
56. NFACC, “Development Process”, *supra* note 44. The review process is not as robust as drafting a new Code. Effectively, it involves a technical committee providing a report to the entire membership of NFACC, mainly about the continued relevance of the Code. Ultimately, the NFACC must then decide whether to reaffirm the Code, initiate amendments, or engage in a full review.

Beef Cattle<sup>57</sup> took two and a half years to create, while the Pig Code<sup>58</sup> took three and a half. There were 18 Committee members meeting on the Pig Code over that time period, and they came from different regions of the country. This must have been costly.

Still, in terms of timeframes, the NFACC must be commended for the progress it has made with the Codes thus far. After a trial run with dairy cattle that resulted in a 2009 Code,<sup>59</sup> the process of full-scale revision began in 2010. Since then, the NFACC has managed to complete and issue eleven new Codes covering: Beef Cattle (2013),<sup>60</sup> Equines (2013),<sup>61</sup> Farmed Foxes (2013),<sup>62</sup> Mink (2013),<sup>63</sup> Sheep (2013),<sup>64</sup> Pigs (2014),<sup>65</sup>

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57. *Code of Practice for the Care and Handling of Beef Cattle*, Calgary: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/beef\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/beef_code_of_practice.pdf)> [NFACC, *Beef Cattle Code*].
58. *Code of Practice for the Care and Handling of Pigs*, Ottawa: NFACC, 2014, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/pig\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/pig_code_of_practice.pdf)> [NFACC, *Pig Code*].
59. *Code of Practice for the Care and Handling of Dairy Cattle*, Ottawa: NFACC, 2009, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/dairy\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/dairy_code_of_practice.pdf)>.
60. NFACC, *Beef Cattle Code*, *supra* note 57.
61. *Code of Practice for the Care and Handling of Equines*, Ottawa: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/equine\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/equine_code_of_practice.pdf)>.
62. *Code of Practice for the Care and Handling of Farmed Fox*, Moncton: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/Farmed\\_Fox\\_Code.pdf](http://www.nfacc.ca/pdfs/codes/Farmed_Fox_Code.pdf)>.
63. *Code of Practice for the Care and Handling of Farmed Mink*, Rexdale: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/mink\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/mink_code_of_practice.pdf)> [NFACC, *Farmed Mink Code*].
64. *Code of Practice for the Care and Handling of Sheep*, Guelph: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/sheep\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/sheep_code_of_practice.pdf)>.
65. NFACC, *Pig Code*, *supra* note 58.

Handling of Poultry (2016),<sup>66</sup> Veal Cattle (2017),<sup>67</sup> Bison (2017),<sup>68</sup> Layer Hens (2017),<sup>69</sup> and Rabbits (2018).<sup>70</sup> In addition, the NFACC has adopted — presumably with plans to revise — three ‘voluntary’ Codes issued by the Canadian Agricultural Research Council, a predecessor agency, between 1996 and 2003.<sup>71</sup>

In terms of setting the standards themselves, the NFACC has enacted a number of guiding principles that, while not binding the group to any particular result, establish a few basic parameters. First, any Code instituted “should meet or exceed OIE standards”,<sup>72</sup> though this is not a mandatory requirement. Second, the Codes should be based on the “best

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66. *Code of Practice for the Care and Handling of Hatching Eggs, Breeders, Chickens, and Turkeys*, Ottawa: NFACC, 2016, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/poultry\\_code\\_EN.pdf](http://www.nfacc.ca/pdfs/codes/poultry_code_EN.pdf)>.
  67. *Code of Practice for the Care and Handling of Veal Cattle*, Guelph: NFACC, 2017, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/veal\\_cattle\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/veal_cattle_code_of_practice.pdf)>.
  68. *Code of Practice for the Care and Handling of Bison*, Regina: NFACC, 2017, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/bison\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/bison_code_of_practice.pdf)>.
  69. NFACC, *Laying Hen Code*, *supra* note 30.
  70. *Code of Practice for the Care and Handling of Rabbits*, Longueuil: NFACC, 2018, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/rabbit\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/rabbit_code_of_practice.pdf)>.
  71. These address Deer (1996), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farmed Deer*, Ottawa: NFACC, 1996, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/deer\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/deer_code_of_practice.pdf)> [NFACC, *Deer Code*]; Transport (2001), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farm Animals: Transportation*, Ottawa: NFACC, 2001, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/transport\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/transport_code_of_practice.pdf)> (plans to update this beginning in 2018); and Goats (2003), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farmed Deer*, Ottawa: NFACC, 2003, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/codes/deer\\_code\\_of\\_practice.pdf](http://www.nfacc.ca/pdfs/codes/deer_code_of_practice.pdf)> (plans to update this beginning in 2018).
  72. NFACC, “Development Process”, *supra* note 44.

available science and other acceptable knowledge sources”,<sup>73</sup> the latter of which includes “anecdotal evidence and industry experience”.<sup>74</sup> Still, the Codes require that sources for decisions be referred to whenever possible to provide a rationale for any standards imposed.<sup>75</sup>

Though science and international standards play a role, there is little question that another value of prominence in the Code process is taking things slowly, as a preference for gradual change — as opposed to any sort of radical one — is mentioned repeatedly. Codes should strive for “continuous improvement”, with recommendations that are “defensible” and “changed as new and improved information is brought forward”.<sup>76</sup> Not surprisingly, given the strong industry focus, there is also the mandate that “requirements should be defensible, practical, manageable and consider economic implications”.<sup>77</sup>

The Codes themselves are extremely detailed, with sections governing a variety of matters ranging from feed to housing to health. For lawyers, perhaps the most important sections are those that are likely to have legal force. These are what are defined as ‘Requirements’, which outline “acceptable and unacceptable practices”.<sup>78</sup> Given the somewhat uncertain legal status of the Codes, it is not surprising that the impact of a failure to comply with a requirement is not made clear by the NFACC, but it does note that a farmer who contravenes the Codes “may be compelled by industry associations to undertake corrective measures or risk a loss of market options”.<sup>79</sup> In a rare mention of sanctions, the NFACC Development Guide also notes that transgressions “may be enforceable under federal and provincial legislation”.<sup>80</sup> Every Code also includes a variety of Recommended Practices, but notes that these are

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73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

78. “Codes of Practice for the Care and Handling of Animals” (2018), online: *National Farm Animal Care Council* <[www.nfacc.ca/codes-of-practice](http://www.nfacc.ca/codes-of-practice)> [NFACC, “Codes of Practice”].

79. *Ibid.*

80. *Ibid.*

not obligations. Moreover, the NFACC makes clear that “a failure to implement them does not mean that acceptable standards are not being met”.<sup>81</sup>

### C. Process

The process of initiating or reviewing a new Code is fairly well-established. Once interest from the relevant commodity or industry group has been received, the NFACC will begin striking a Code Development Committee (the “Committee”).<sup>82</sup> Where this occurs, the public will be notified that a new or revised Code process is underway via the NFACC website, at least 30 days before the first meeting of the Committee takes place.

The Committee's first task is to establish an evidentiary record, specifically by canvassing the relevant science. The NFACC requires that the Committee assemble a separate Scientific Committee of relevant experts, with the objective of obtaining a fairly broad band of opinion. The Scientific Committee, once assembled, is asked to present three to six topics of interest it considers “to be particularly important for animal welfare in the species being considered”.<sup>83</sup> The relevant commodity group will then make a similar list, and the two groups will come together and “collectively identify a final list of priority welfare issues for the species”.<sup>84</sup>

The Scientific Committee then provides a detailed review of the scientific literature on the issues selected, and compiles a report for the

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81. NFACC, “Development Process”, *supra* note 44.

82. Review or initiation of the Codes is left entirely to the relevant industry, and its desire to have a Code developed. The NFACC, “Development Process”, *supra* note 44, suggests that “Codes are not developed without the industry group stepping forward first”. Though it is not a concern discussed below, it is strange that a body performing a government function of setting standards is so willing to defer to individual industry groups in this way. Some Codes are already well out of date. The NFACC, *Deer Code*, *supra* note 71, for example, was created in 1996 under the old Agri-Food Research Council, a government agency that no longer has responsibility for such matters. There do not appear to be any plans by the deer ranching community to press for change at the moment.

83. NFACC, “Development Process”, *supra* note 44.

84. *Ibid.*

Committee. Using this as a reference tool, the Committee will then begin drafting the Code. All of the Committee’s meetings are held *in camera*. Once a Code is completed, it is sent to the NFACC Executive, which has a limited oversight role. According to the NFACC Guidelines, “if the process was appropriately followed, NFACC will support the Code”.<sup>85</sup>

At this point, the Code moves to a public consultation process. The rules surrounding public consultation are somewhat loose, but the draft Code must be made available to the public in some fashion for at least 60 days. At the conclusion of this period, the Committee considers the feedback received and makes adjustments to the Code, if required. Some time after this process concludes, a final Code is issued.<sup>86</sup>

## **IV. Strengths of the Code Process**

### **A. The End of the Legislative Vacuum: The Start of Discourse**

Whatever else they may have accomplished, or failed to accomplish, the initiation of the Code process ended Canada’s dormant period of law-making in the area of farmed animal welfare. Advocates can debate the utility of these Codes at length and the extent to which they have made a meaningful change for farmed animals — as I will, below — but one thing is clear: having no governing standards in place is worse, for at least three reasons.

To begin with, in the absence of a strong government interest to develop clear legal standards for the treatment of animals, the primary alternative to Codes lies in hoping that beneficial standards will be developed through the common law, by considering whether conduct harmful to animals is ‘generally accepted’, ‘reasonable’, or ‘necessary’. Unfortunately, Canada’s experience with leaving open-ended standards to be advanced by prosecutors and interpreted by the judiciary has

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85. *Ibid.*

86. “Your Guide to the Public Comment Period” (28 August 2018), online: *National Farm Animal Care Council* <[www.nfacc.ca/public-comment-period](http://www.nfacc.ca/public-comment-period)> [NFACC, “Public Comment Period”].

been fairly dismal. Where animal protection is concerned, Canadian prosecutors have demonstrated little appetite for taking controversial or 'close to the line' cases forward.

This is not entirely surprising. After all, on the rare occasions when Canadian judges have been given the chance to consider whether a standardized farming practice meets the grade, they have shown a consistent tendency to decide the question in favour of the defendant.<sup>87</sup> The need to prove beyond a reasonable doubt that a particular distress-causing practice was not generally accepted in the community, which rests upon the prosecution, seems a bridge too far to cross in most cases. Without clear standards one can point to as a means of showing that, in fact, the particular practice does not meet with industry approval, it is very difficult to secure a conviction.

Second, if the objective is to generate change over the long-term, a flawed reform process is likely better than no reform process at all. In an earlier work,<sup>88</sup> I suggested that Canada suffered from a 'discourse deficit' arising out of the country's failure to engage in a national discussion about animal welfare. In comparison, I applauded the New Zealand Code process for reform, notwithstanding its significant flaws, mainly because I believed it encouraged meaningful public dialogue to be raised about animal protection, suggesting that in Canada, by contrast:

[n]o issue seems capable of generating enough traction to provoke a sustained discussion of legal standards. Moreover, questions involving agricultural animals - are virtually never raised. In my view, this lack of discourse stems, at least in part, from the current state of Canadian animal protection law.<sup>89</sup>

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87. See *e.g.* *Muhlbach*, *supra* note 33; *Doyon v Canada (AG)*, 2009 FCA 152 (transportation of pig with severe leg fractures not unreasonable; relying upon evidence of producer with 29 years experience); *R v Chilliwack Sales Ltd*, 2013 BCSC 1059 (transportation of three cows with severe injuries not unreasonable; owner was "well qualified to decide whether a cow is fit for an expected journey without experiencing undue suffering" para 46).
88. Peter Sankoff, "The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?" (2012) 18:2 *Animal Law* 281[Sankoff, "The Animal Rights Debate"]. This paper was published shortly before the NEACC released its first revamped Codes for public consultation in late 2012.
89. *Ibid* at 297.

For reasons I will explore below relating to the Code process, the discourse on these issues remains less effective than it could be, but it has undoubtedly improved since 2012. The Pig Code,<sup>90</sup> first initiated in 2010, was released for public consultation in 2013. It generated over 4,700 submissions, representing 32,340 individual comments.<sup>91</sup> Newspapers covered several parts of the Code process, weighing in with editorials<sup>92</sup> — mostly about sow stalls — and Canadian actor Ryan Gosling even contributed to the debate through an opinion piece in the *Globe and Mail*.<sup>93</sup> This was unquestionably one of the most significant national discussions about a single agricultural animal welfare reform in the country's history.

Debates of this sort are important, particularly because they help to initiate a national dialogue on farm animal practices that is critically necessary if the suffering endured by these animals is ever going to change in any sort of meaningful way. As I suggested in a 2012 article on the importance of public discourse as a means of setting the groundwork for legal change,<sup>94</sup> regulatory mechanisms cannot be evaluated exclusively by the outcomes they produce. Instead, as Jürgen Habermas and others have suggested, legal mechanisms that allow for ‘deliberative democracy’ to take place help to ensure greater social legitimacy for any laws that are

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90. NFACC, *Pig Code*, *supra* note 58.

91. National Farm Animal Care Council, News Release, “Overwhelming Number of Responses Received to Draft Pig Code of Practice” (23 August 2013), online: *National Farm Animal Care Council* <[www.nfacc.ca/news-releases?articleid=205](http://www.nfacc.ca/news-releases?articleid=205)>.

92. See *e.g.* Laura Rance “Turning Point for Pig Producers: Must Adapt to New Code of Care” (10 August 2013), online: *Winnipeg Free Press* <[www.winnipegfreepress.com/business/turning-point-for-pig-producers-219088481.html](http://www.winnipegfreepress.com/business/turning-point-for-pig-producers-219088481.html)>.

93. Ryan Gosling “A Tiny Cage is Not a Life” (11 July 2013), online: *The Globe and Mail* <[www.theglobeandmail.com/globe-debate/a-tiny-cage-is-not-a-life/article13117337/](http://www.theglobeandmail.com/globe-debate/a-tiny-cage-is-not-a-life/article13117337/)>.

94. Sankoff, “The Animal Rights Debate”, *supra* note 88.

ultimately enacted.<sup>95</sup> As Alice Woolley put it, “laws can be understood as reflective of [a democratic will] when those laws arise from a democratic process of public reasoning—that is, from deliberation”.<sup>96</sup>

Though it does not apply anything close to the purest form of deliberative democracy, the NFACC Code process nonetheless encourages a certain amount of public participation on farm animal issues, and the ongoing review of Codes permits for consistent scrutiny and discussion about how Canada's farm animals are being treated. This is valuable in and of itself, for as Alice Woolley suggests:

[T]heoretical models of deliberative democracy assert the necessity for, and the importance of, determining the public will through a discussion in which participants identify a consensus view on legitimate reasons and on the state action that follows from those reasons. ...[D]eliberation may be a source of democratic legitimacy...But it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure and enhance information sharing, and thus lead to better decisions[.]<sup>97</sup>

As this excerpt suggests, public discourse is an essential aspect of encouraging positive democratic change in the law, and equally important in letting the law develop in a way that reflects a deeper societal consensus. In contrast to a static law that provides little more than that animals should not be harmed ‘unnecessarily’, which creates little dialogue, the refinement of Code standards over time allows for an ongoing discourse to evolve and be accepted as part of a wider social ethic through public discussion and debate. If Canada is ever going to take steps to make meaningful advances in farmed animal welfare, this discourse is essential, and the more that our ‘law-making’ process encourages debate of this kind, the better.

Finally, the consistent review of NFACC Codes has the added

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95. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Boston: MIT Press, 1998) at 296–7 (describing the importance behind the discourse theory of ideal procedure for deliberation and decision making).

96. Alice Woolley, “Legitimizing Public Policy” (2008) 58:2 *University of Toronto Law Journal* 153 at 166.

97. *Ibid* at 167, 169.

advantage of keeping animal protection for farm animals on the public agenda in perpetuity, and the opportunity to challenge a given practice or to end a particular type of suffering is never limited to one special occasion when legislators show a willingness to engage. In effect, the creation of a permanent system of review means that the ability to defer these issues to another day — a strategy common in many jurisdictions, and the Canadian approach to this matter for decades — has been abandoned in favor of a mandatory and consistent reform process.

## **B. Industry “Buy-in” to Certain Systemic Changes**

In the ‘concerns’ section below, I will discuss certain problematic aspects of a process that is driven and controlled by industry. Nonetheless, the NFACC is clearly right about at least one aspect of an industry-led process like this one: “any decisions made have the weight and support of its membership as a whole”.<sup>98</sup> By striving so strongly for a consensus-driven model that brings together every producer and player with a stake in the industry, it will be difficult — if not impossible — for dissenters to persist with unfavourable practices once a Code rebukes them.

This is not always the case where Codes are ‘imposed’ from above, no matter how much consultation with affected industries is undertaken. The notion of including industry in the regulatory development process is part of a strategy of ‘responsive regulation’ with the objective of investing industry with the incentive to comply. It was devised “in a bid to transcend the inflexible approach of adopting either ‘deterrence’ or ‘compliance’ as a stand-alone strategy [and] establish a synergy between punishment and persuasion”.<sup>99</sup> Unquestionably, consensus driven Codes like the NFACC model are likely to be less ambitious and err on the

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98. Gina Teel & Tracy Sakatch, “CCA in Action — Animal Care” *Canadian Cattleman’s Association Action News* 5:4 (4 July 2011), online: *CCA Action News* <[www.cattle.ca/action-news/07-04-11.html](http://www.cattle.ca/action-news/07-04-11.html)>.

99. Jed Goodfellow, “Animal Welfare Law Enforcement: To Punish or Persuade” in Peter Sankoff, Steven White & Celeste Black, eds, *Animal Law in Australasia: Continuing the Dialogue*, 2d (Sydney: Federation Press, 2013) 183 at 195.

side of caution, but what they achieve stands to be attained,<sup>100</sup> as every member has a stake in the outcome. It is no surprise that release of each Code has come with support and usually applause from the stakeholders most strongly affected by it.<sup>101</sup>

### C. Precision

A major strength of the Codes is that owing to a desire for the standards to be “clearly articulated to ensure easy understanding by all users”,<sup>102</sup> the NFACC has chosen to make them as precise as possible, and by and large has eschewed ‘outcome’ based standards that allow for arguments about interpretation on the enforcement end. It is easier to determine, for example, whether “a farrowing crate...allow[s] the sow enough room to move forward and backward, and to lie down unhindered by a raised trough or rear gate”,<sup>103</sup> than it is to decide whether the crate provides “adequate space”.<sup>104</sup>

The clarity of the Codes has other advantages. For critics of the status quo, precision is preferable to ambiguity — especially when it comes time to attempt to convince the public of the need for further

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100. Compliance will never be universal, of course, which is why proper oversight is so critical. See Maria Weisgarber & Kendra Mangione, “Egg Farm Decommissioned After Disturbing Video Prompts Investigation” (12 July 2018), online: *CTV Vancouver* <bc.ctvnews.ca/egg-farm-decommissioned-after-disturbing-video-prompts-investigation-1.4011480> (egg facilities not complying with Laying Hen Code of Practice, *supra* note 30).
101. See *e.g.* Canadian Pork Council, Press Release, “Updated Pig Code of Practice Announced” (6 March 2014), online (pdf): *Canadian Pork Council* <manitobapork.com/wp-content/uploads/2014/03/CPC-Code\_Release\_Final\_March\_6\_2014.pdf> (the new Code is a source of tremendous pride).
102. NFACC, “Development Process” *supra* note 44 at Appendix A.
103. NFACC, *Pig Code*, *supra* note 58.
104. This aim has not always been achieved, however. See *e.g.* NFACC, *Farmed Mink Code*, *supra* note 63 (“sheds must be designed to allow *adequate* space, light, and access for stockpeople to observe” at 8 [emphasis added]). Mink must have access to sufficient quantities of nutritional feed which meet their physiological needs (at 20).

change. While advocates working with Canadian law are well aware of the shortcomings of the basic cruelty law, and the nuances of the term ‘unnecessary suffering’, it is not always easy to explain these concerns as part of a public campaign advocating the need for legislative reform. The problem is that the wording of the law *sounds* reasonable, and it is only through a detailed exploration of case law and failed prosecutions that one discovers its flaws, and even in this context, many propositions remain contentious. It is arguably much easier to explain why a farrowing crate that barely permits enough room for a pig to move forward and backward and space to lie down is a form of torture against animals, especially when the Code permits this to occur for up to six weeks straight without interruption. To put it another way, the Codes provide clear reform targets and allow potential shortcomings to be identified with ease.<sup>105</sup> Clarity is a rare and welcome commodity in animal welfare law.

#### **D. Elimination of the Worst Practices**

As noted above in the discussion on process, the NFACC does not aim to be revolutionary. Still, the Codes at least take some much needed first steps towards bringing Canada closer to guidelines established in Europe, Australia, and New Zealand, by phasing out some of the very worst of the industrial agricultural practices that currently flourish here, with some hope of making real improvement in other areas as well.

The Pig Code offers a good example. There is nothing truly revolutionary about it, comparatively speaking, but for Canada, the changes were a needed improvement from the status quo. For the first time, use of analgesics for the common practices of castration and tail docking is mandatory.<sup>106</sup> Furthermore, the Codes recognizes that pigs are intelligent creatures in need of “multiple forms of enrichment... through the enhancement of their physical and social environments”.<sup>107</sup> Perhaps, most importantly, the use of sow stalls will be reduced, although

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105. To see the advantages of this for the prospects of long-term reform, albeit in the context of New Zealand’s more fulsome Code enactment process, see Sankoff, “The Animal Rights Debate” *supra* note 88 at 308–13.

106. NFACC, *Pig Code*, *supra* note 58 at 33.

107. *Ibid* at 18.

not eliminated. New housing facilities built since 2014 must use group housing, as opposed to crates, as a primary form of confinement, though sows can still be kept in crates at the producer's discretion for up to five weeks — a lengthy period.<sup>108</sup> From 2024, all piggeries will need to comply with these requirements.

It is a long way from a comprehensive removal of crate housing, but it is an improvement over what is currently in place, as today, most of Canada's sows stay in crates for virtually their entire lives. For this reason, the Code received modest approval, albeit with calls for 'more', from even some of the more vocal critics of the agricultural industry.<sup>109</sup>

## V. Concerns with the Code Process

### A. The Ambiguous Nature of the Codes

Though each of the other concerns discussed below warrants careful consideration, one currently towers above the rest in terms of impact and importance. Without question, a major disadvantage of setting up a 'private' legal process of this type — or advantage, depending upon your point of view<sup>110</sup> — is that notwithstanding all the time, effort, and money

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108. Furthermore, the Pig Code permits the use of farrowing crates for six weeks post-pregnancy. The five-week grace period is also troubling, for it will be incredibly difficult to monitor in practice in order to see whether producers are complying.

109. "More Humane Rules for Breeding Pigs are Welcome", Editorial (30 March 2014), online: *The Star* <[www.thestar.com/opinion/editorials/2014/03/30/more\\_humane\\_rules\\_for\\_breeding\\_pigs\\_are\\_welcome\\_editorial.html](http://www.thestar.com/opinion/editorials/2014/03/30/more_humane_rules_for_breeding_pigs_are_welcome_editorial.html)> ("Sayara Thurston of Humane Society International Canada says, '...it's not an end point. It's a first step.'"); Sophie Gaillard, "A Glimmer of Hope for Canadian Pigs" (10 March 2014), online (blog): *Animal Legal Defense Fund* <[aldf.org/article/blog-authors/a-glimmer-of-hope-for-canadian-pigs/](http://aldf.org/article/blog-authors/a-glimmer-of-hope-for-canadian-pigs/)>.

110. This is undoubtedly a cynical viewpoint, but I would argue that there is value to the farming industry to have Codes that 'may' or 'may not' be legal. This approach provides maximum utility to these industries. It permits the argument that standards are set, but does not actually bind individuals to the standards if they are breached.

that has been poured into Code development, no one can say with any certainty, for lack of a better phrase, ‘how legal’ the Codes actually are, and what function they perform in the justice system.

Of the many wonderful Code phrases utilized in the NFACC lexicon, the best undoubtedly relate to enforcement. One can scour the Codes and the many publications scattered throughout the extensive NFACC website without running across the word ‘prosecution’ once. What you find instead are a number of vague references to what the Codes do, and how they “*may* be enforceable under federal and provincial regulation”.<sup>111</sup> No one seems eager to specify the *legal* function that Codes provide, a fact exemplified well by a recent NFACC press release suggesting that:

Codes support responsible animal care practices and keep everyone involved in farm animal care and handling on the same page. They are our *national understanding* of animal care requirements and recommended practices.<sup>112</sup>

As a practicing lawyer, it would undoubtedly be interesting to apply the term ‘national understanding’ in court while attempting to use a Code as a means of establishing that some form of animal cruelty or distress was inflicted. Other NFACC publications refer to the Codes as ‘standards’, ‘guidelines’ and ‘requirements’.<sup>113</sup>

The ambiguous legal status of the Codes is complicated by Canada’s federal framework. For better or worse, animal welfare matters are now prosecuted separately in every Canadian jurisdiction and are the responsibility of a host of different agencies, non-governmental

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111. NFACC, “Development Process”, *supra* note 44 [emphasis added].

112. National Farm Animal Care Council, Press Release, “New Code of Practice for the Care and Handling of Sheep released” (18 December 2013), online: *National Farm Animal Care Council* <[www.nfacc.ca/news-releases?articleid=216](http://www.nfacc.ca/news-releases?articleid=216)> [emphasis added].

113. “Implementing Codes of Practice: Canada’s Framework for Developing Animal Care Assessment Programs” (2013) at 3, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/resources/assessment/animal\\_care\\_assessment\\_framework.pdf](http://www.nfacc.ca/resources/assessment/animal_care_assessment_framework.pdf)> [NFACC, “Implementing Codes of Practice”].

organizations, prosecutorial offices, and police forces.<sup>114</sup> The laws governing in each jurisdiction have distinctions, and each province uses Codes (or does not use them) in different ways.

As discussed above, some jurisdictions have incorporated the Codes explicitly, usually by recognizing that compliance with a Code constitutes a defence to charges of putting an animal in distress or failing to comply with certain duties of care.<sup>115</sup> This legitimizes the Codes, but it does so in a very unusual way, and, I would submit, an ineffective one. After all, compliance with the Codes is not the *only* way of escaping liability for putting an animal in distress, as the wording of the clause establishes that liability for causing distress can be avoided *either* by complying with a Code *or* by acting in accordance with generally accepted practices of animal management.

Given the way the courts have treated the latter phrase thus far — leaving a ‘residual’ defence available for ‘generally accepted practices’ that are not approved by a Code — has the potential to undermine the utility of the Codes entirely. To be sure, the most logical definition of Saskatchewan’s provision, which accepts compliance with a Code and adherence to generally accepted practices as alternative defences, would avoid this approach by requiring adherence to the Codes in any situation where a valid Code is in place, and restricting the ‘generally accepted practices’ defence to residual scenarios that are not covered by any Code.

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114. To learn more about Canada’s prosecutorial and investigative framework, see Canadian Federation of Humane Societies, “Prosecuting Crimes Against Animals” (2015), online (pdf): <d3n8a8pro7vhmx.cloudfront.net/cfhs/pages/106/attachments/original/1456761579/manual.pdf>.

115. *Animal Protection Act 1999*, *supra* note 53, s 2(3) [emphasis added]. See similarly *Animal Care Act*, *supra* note 23, s 2(2). Newfoundland and Labrador, Prince Edward Island and New Brunswick have taken this approach as well.

This interpretation is hardly guaranteed, however.<sup>116</sup>

In the jurisdictions that do not refer to the Codes, things are even murkier. Canada's four most populated provinces — and largest users of farmed animals — all take the same approach to this issue. Rather than refer to the Codes directly, they simply exempt any distress that was caused “in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry”.<sup>117</sup> There seems to be some sort of unexpressed expectation that clauses of this type will take strong notice of the NFACC Codes, and it is certainly logical to assume this will be the case.<sup>118</sup> But whether the Code standards will end up being *exhaustive* of what constitutes appropriate conduct remains anyone's guess at this stage.

How can this sort of ambiguity be good for farmed animals? Though the NFACC states quite emphatically that Code “requirements represent a consensus position that these measures, at a minimum, are to be implemented by all persons responsible for farm care”, and that they

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116. One thing working against this approach is the fact that most of these statutes were recently enacted, and achieving the result I propose would have been incredibly easy to do. Clause (b) should simply begin by stating: “in any situation where the handling was not addressed by a standard or code of conduct, criteria, practice or procedure that is prescribed as acceptable”.
117. *OSPCA Act*, *supra* note 26. See similarly *Animal Protection Act*, RSA 2000, c A-41, s 2(1)(2); *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372, s 24.02(c); *Animal Welfare and Safety Act*, *supra* note 32, s 7. There are slight variations. British Columbia has expressly adopted one Code — the Code for Dairy Cattle. See the *Dairy Cattle Regulation*, BC Reg 132/2015. Quebec's *Animal Welfare and Safety Act*, CSQ, c B-3.1, s 7 only refers to “generally recognized rule”.
118. A few lower court decisions have tentatively suggested this to be the case. See *R v Kowalik*, 2010 SKPC 58; *R v Tomalin*, 2011 NBPC 29. In contrast, see *R v Van Dongen*, 2004 BCPC 479 (Codes are voluntary guidelines and impose no legal obligation on farmers in Canada to comply with the recommended practices); *R v Hurley*, 2017 ONCJ 263 (industry standards may be proven to be the appropriate standard of care, but they are never automatic).

are “fundamental obligations”,<sup>119</sup> this sounds more like an aspirational statement than a firm rule, in light of the way the laws themselves are drafted. There may well be strong industry pressure for individual producers to comply, and individual agricultural organizations may be able to apply commercial sanctions to those who do not, but this is not the same as imposing a legal requirement for the purpose of protecting animals from harm or distress.<sup>120</sup>

Of course, this raises a larger policy question. Let's assume for the moment that the distinction between specific mention of the Codes in some provinces and the reference to ‘generally accepted practices’ is unimportant, and that the Codes have a similar legal status in all Canadian jurisdictions. Why are the Codes treated as providing farmers with defences instead of operating as regulated standards, with non-compliance operating as demonstrated evidence of a breach of a provincial law?<sup>121</sup> This is no trivial distinction. As it stands, an inspector who finds evidence of non-compliance with a relevant Code would not automatically have grounds to lay charges. He or she would still need to be able to prove that the animal was in some degree of ‘distress’.

This might not appear to be a significant problem, for proving that distress occurred requires satisfaction of a lower threshold than establishing that ‘unnecessary suffering’ occurred. Still, it is not always easy to do or even possible, and once again, the courts have made it challenging in this area. The *Muhlbach* case discussed above is an excellent example of the

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119. NFACC, “Development Process”, *supra* note 44 [emphasis added].

120. Commercial sanctions are useful, but they cannot substitute for legal oversight. Amongst other things, they allow the private industry to completely self-regulate, and ignore the public interest in ensuring that animals are properly cared for.

121. New Zealand comes close to this position, providing that “evidence that a relevant code of welfare was in existence at the time of the alleged offence and that a relevant minimum standard established by that code was not complied with is rebuttable evidence that the person charged with the offence failed to comply with, or contravened, the provision of this Act to which the offence relates”, see *Animal Welfare Act 1999*, *supra* note 35, s 13(1A).

distinction.<sup>122</sup> In that case, one of the charges was based on the fact that two cows had no access to water during the period of the inspector’s visit. The Court dismissed the charge, holding that distress required proof of dehydration, which had not been established on the facts. Were proof of non-compliance with a Code enough however, the accused would have been convicted upon proof that water was not available for the animals, as there would be no need to prove ‘distress’ in these circumstances.<sup>123</sup>

Given that these Codes are industry approved and endorsed, it is not clear why the agricultural community should not feel secure enough to stand behind them. If the Codes are truly the “national understanding of animal care requirements”<sup>124</sup> in Canada, they should operate as such. Breach of a Code should be enough to warrant conviction for a provincial regulatory offence, as is the case with non-compliance in other regulated areas, where punishment follows proof of the wrong, regardless of whether harm was caused.<sup>125</sup> By all means, sentencing for an offence of this type should take into account the absence of distress, but given the difficulties that exist in enforcing animal protection legislation, including

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122. In contrast, see *R v Dondale*, 2017 SKPC 58 (failing to follow the code of practice, in conjunction with other evidence, established that the animals were in distress for the purposes of the *Act*).

123. NFACC, *Beef Cattle Code*, *supra* note 57 (Requirement 2.2 states that operators must “ensure that cattle have access to palatable water of adequate quality and quantity to fulfill their physiological needs” at 13).

124. NFACC, “Codes of Practice”, *supra* note 78.

125. For those concerned that this is too harsh, keep in mind that Canada always permits access to a due diligence defence, which would allow a farmer to escape liability if he or she could show that they took reasonable precautions to avoid committing the offence: See Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5d (Markham: Lexis Nexis, 2015) at 278–83. My point here is that there is no need to add the additional element of proving distress where it can be established that a Code standard was not followed.

the difficulty of even getting access to farms in the first place,<sup>126</sup> it is undesirable to set up an oversight system that cannot impose sanctions for non-compliance unless additional elements of proof are first met.

## B. The Players at the Table: Making Value Decisions

The ambiguity of its output is not the only concern about Canada's chosen model for 'regulating' farmed animal welfare. Another questionable aspect of the framework is how it grants the industries who are the subjects of these standards an incredible level of control over the process. The decision of governments, the traditional representative of the public interest, to mostly opt-out of the process is troubling.<sup>127</sup> The NFACC Code process is a long way from the 'co-regulated' model favoured in jurisdictions like Australia and New Zealand, in which "government and

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126. National Farmed Animal Health and Welfare Council, "A National Farm Animal Welfare System for Canada" (2012) at 30, online (pdf): *National Farm Animal Care Council* <[www.ahwcouncil.ca/pdfs/animal-welfare-statement/NFAHWC%20animal%20welfare%20vision\\_cover%20page\\_2012.pdf](http://www.ahwcouncil.ca/pdfs/animal-welfare-statement/NFAHWC%20animal%20welfare%20vision_cover%20page_2012.pdf)>; Terry Whiting, "Policing Farm Animal Welfare in Federated Nations: The Problem of Dual Federalism in Canada and the USA" (2013) 3:4 *Animals* 1086, online: *National Center for Biotechnology Information* <[www.ncbi.nlm.nih.gov/pmc/articles/PMC4494357/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4494357/)>.

127. It is not entirely clear why government has chosen to play such a limited role in governing this area, though it is quite possible that the concept of 'regulatory capture', provides the best explanation. See Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29:1 *Journal of Environmental Law & Practice* 111 (MacLean has examined a similar decision by governments to abdicate in the environmental sphere and goes so far as to conclude that "[s]ystemic corruption — regulatory capture [by industry] and its corollary, irresponsible government...blocks principled reforms and fuels unprincipled reforms in Canadian environmental law — it is at the root of every identifiable systemic weakness infecting Canadian environmental law today, both federally and provincially. We all know this, more or less. But we tend to ignore it. Or, to be fair, we tend to lament systemic corruption as a kind of analytical afterthought, something that is regrettable but seemingly insoluble" at 113–4. MacLean's conclusions about industry's impact on environmental law seem fully transposable to concerns about animal protection).

industry develo[p] cooperative arrangements where both play a formal role in regulatory processes to ensure compliance”.<sup>128</sup> The absence of official oversight is no small matter. It stands to reason that no government representative — federal or provincial — is responsible for any aspect of the Code-making process. Questions in Parliament about choices made with respect to particular Codes can easily be deflected away, on the grounds that the value judgments being made were simply not of the government’s doing.

Instead of government control, the NFACC is run by an executive committee, furthering the organization’s objective of creating a “collaborative partnership of diverse stakeholders [to] facilitat[e] and coordinat[e] a consistent approach to farm animal welfare in Canada”.<sup>129</sup> That said, the NFACC’s view of relevant ‘stakeholders’ probably differs somewhat from that of the hard-core animal advocate. The goal is not a wide engagement with ordinary Canadians or people from across the animal welfare spectrum,<sup>130</sup> but rather, engagement with a diversity of stakeholders *within the industrial agricultural complex and the food supply chain*. This is not to say that welfare groups are excluded. Suffice it to say, however, that they constitute a small part of the overall NFACC organization.

Consider the NFACC executive, which has the following members:

- Chair — this has exclusively been a member of one of the larger agricultural industries. The current chair is from the Saskatchewan Cattleman’s Association;
- Two members of National Commodity Associations (*e.g.* Chicken Farmers, Dairy Farmers, etc.);
- One member from a National Meat/Poultry Processor Association;
- One member of National Retail, Restaurant and Food Service

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128. Goodfellow, *supra* note 99 at 192.

129. NFACC, “About NFACC”, *supra* note 5.

130. The NFACC does not permit anyone to participate who takes the view that the use of animals in agriculture is morally wrong. Organizations that wish to be on NFACC Committees must agree as a precondition that the use of animals for this purpose is legitimate and acceptable.

Association;

- One member from a National Veterinary Association;
- One member of a National Animal Welfare Association;
- One member of a Provincial Farm Animal Care Council;<sup>131</sup>
- The federal government — *ex officio* (non-voting member); and
- A researcher — *ex officio*.

Depending upon how one views members of the veterinary profession,<sup>132</sup> that makes one voting member (or two) out of eight whose primary focus is animal protection. In a 2005 article, I considered the New Zealand Code-making process and expressed some skepticism about the assortment of voices around the Code table.<sup>133</sup> Let's just say that New Zealand's Code committee provided a rainbow of diversity in comparison to its Canadian counterpart.

The Executive Committee does not actually draft the Codes, but it runs the organization, establishes strategies for the future, and sets relevant policies to guide the drafting process. Moreover, NFACC procedures make clear that the same sort of 'balance' should be applied to committees tasked with writing the Codes themselves. Once again, the search for consensus that is so essential to the endeavour appears to involve a fairly limited inquiry amongst stakeholders from across the production chain, along with a few outsiders. Committees are ideally limited to fifteen, and the NFACC recommends the following balance:

- At least four producers from the affected industry;
- Transporter with expertise in the affected industry;
- Veterinarian;
- National animal welfare associations;

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131. To be clear, this is not a body whose primary concern is animal welfare. It refers to the representative of a provincial farm animal association that promotes trade in these products. See *e.g.* Farm & Food Care Ontario (2018), online: *Farm & Food Care* <[www.farmfoodcare.org/](http://www.farmfoodcare.org/)>, an association whose objective includes promoting the consumption of animal products.

132. The veterinary bodies selected tend to have very close ties to industry, as discussed below.

133. Sankoff, "Five Years", *supra* note 36 at 20–21.

- Processors;
- Retail and food service organization;
- Provincial animal protection enforcement authority; and
- Researcher/academic.<sup>134</sup>

It is arguably a broader variety of viewpoints than one is likely to obtain on the NFACC Executive, but again, the structure seems designed to keep industry very firmly in control, with a strong majority position at all times. The 2013 Pig Code Committee offers an instructive example. There were eighteen members on the Committee.<sup>135</sup> Ten had direct economic interests in the use of pigs, being members of the Canadian Pork Council, a provincial board of a similar type, transport groups, or processors. The other eight included four members of government, including two enforcement officers, one agricultural engineer, a scientist, a veterinarian, and one member of the Canadian Federation of Humane Societies.

The 2017 Layer Hen Committee was similarly constructed. A committee of eighteen had five representatives from the Egg Farmers of Canada, three members of the Canadian Poultry and Egg Processors Council, one from Maple Lodge Farms, one from Pullet Growers of Canada, and one from a chicken breeder. The lone veterinarian on the Committee worked exclusively with egg farmers, and was committed to “...cur[ing] the misinformation on egg farming”.<sup>136</sup> In total, twelve of the eighteen members on the Committee were people whose livelihood was directly tied to the use of layer hens. Five members of the Committee came from government agencies, the Retail Council of Canada and the

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134. See NFACC, “Development Process”, *supra* note 44 (the problem of Committee representation is not unique to Canada, though it is arguably worse here given the lack of government oversight). See Arnja Dale & Steven White, “Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Facade?” in Sankoff, White & Black, *supra* note 99 at ch 7, 163–65.

135. One member of the Canadian Pork Council did not have voting rights, however.

136. See Mike the Chicken Vet, “About” (2018), online (blog): *Wordpress* <mikethechickenvet.wordpress.com/about/>.

scientific community.<sup>137</sup> The final representative was appointed by the Canadian Federation of Humane Societies.

This unbalanced membership is a matter of real concern. To begin with, the composition of NFACC Committees is bound to have an impact on the overall legitimacy of any output produced. After all:

[W]hen people perceive a governance process as fair they are more likely to obey the law and support government policies (Tyler 2006)—even when the outcomes are not in their interest (Miles 2014). Conversely, when people perceive a governance process as clearly unfair, prior attitudes are more likely to determine whether they support or oppose a decision (Doherty & Wolak 2012).<sup>138</sup>

Not surprisingly, a key aspect in determining whether a particular process was 'fair' involves the extent to which the collaborative decision-making that took place allowed for a sufficient degree of representation by affected stakeholders, and an equal chance for those involved to participate. As Chrislip and Larson have suggested, "the first condition of successful collaboration is that it must be broadly inclusive of all stakeholders who are affected by or care about the issue".<sup>139</sup> Moreover, it must "provid[e] for equal and balanced opportunity for effective participation of all

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137. Tina Widowski, a Professor at the University of Guelph, was the chair of the Scientific Committee. She is a director of the Campbell Centre for the Study of Animal Welfare at the University of Guelph and holds the Egg Farmers of Canada Chair in Poultry Welfare Research.

138. Jim Sinner, Mark Newton & Ronlyn Duncan, "Representation and Legitimacy in Collaborative Freshwater Planning: Stakeholder Perspectives on a Canterbury Zone Committee" in Cawthron Institute, Report No 2787 (November 2015) at 2, online (pdf): *Cawthron Institute* <[www.cawthron.org.nz/media\\_new/publications/pdf/2015\\_12/CawRpt\\_2787\\_Representation\\_and\\_collaborative\\_freshwater\\_planning\\_Canterbury.pdf](http://www.cawthron.org.nz/media_new/publications/pdf/2015_12/CawRpt_2787_Representation_and_collaborative_freshwater_planning_Canterbury.pdf)>.

139. David D Chrislip & Carl E Larson, *Collaborative Leadership: How Citizens and Civic Leaders Can Make a Difference*, 1d (San Francisco: Jossey-Bass, 1994) at 24. It is worth noting that the NFACC refuses to engage with all affected stakeholders as a matter of policy. , see NFACC, "About NFACC", *supra* note 5, committee members must "accept the use of farmed animals in agriculture".

interested/affected stakeholders”.<sup>140</sup> In the absence of these factors, it is difficult to be convinced that any decisions reached possess a real democratic legitimacy.<sup>141</sup>

But this is not simply about ensuring public legitimacy. The search for the ‘correct’ answer of what constitutes a viable standard of animal protection through consensus and compromise — the core of what the NFACC does through the Code-making process — is undoubtedly affected by the way in which the drafting committees are composed. After all, determining the appropriate level of animal protection that should be afforded to a specific farm animal is not something that allows for an indisputable answer. NFACC materials sometimes try to suggest otherwise, indicating that the search for ‘balance’ is really the product of “a credible, science based-approach”,<sup>142</sup> that focuses on treating animals humanely by “support[ing] approaches that are scientifically informed”.<sup>143</sup> But anyone involved in animal welfare knows that matters are not this simple. In attempting to draw lines with respect to particular practices or procedures, there is often a clash of interests, a point at which choices need to be made about whether the animals’ needs outweigh the need to use or treat the animals in a particular way. Though many of the NFACC’s materials try to gloss this over — preferring to highlight the fact that its Codes are created by “taking into account the best science available for each species, compiled through an independent peer-reviewed process, along with stakeholder input”<sup>144</sup> — if one looks hard enough, it is possible to find clear recognition of the value-balancing that is, ultimately, at the heart of the process. A press release highlighting

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140. Nick Cradock-Henry, “Evaluating a Collaborative Process” in Landcare Research Manaaki Whenua Policy Brief No 2 (October 2013), online (pdf): *Landcare Research Manaaki Whenua* <[pdfs.semanticscholar.org/e414/16ddd0af0c9e206e44ebb993736459bf69f6.pdf](https://pdfs.semanticscholar.org/e414/16ddd0af0c9e206e44ebb993736459bf69f6.pdf)>.

141. See Sinner, Newton & Duncan, *supra* note 138 (a study that considered the public’s view of a particular collaborative decision-making exercise, concluding that committee composition was a key factor in reducing public comfort with the decisions reached).

142. NFACC, “About NFACC” *supra* note 5.

143. *Ibid.*

144. NFACC, “Development Process”, *supra* note 44.

results from the Scientific Committee tasked with examining the Poultry Code, which, not surprisingly, reached some troubling conclusions about the way many of Canada's chickens are kept, is revealing:

The reports focus on research conclusions; they do not make recommendations because science tells us what "is" but does not tell us what "ought to be." Value-based decisions reside with the Code Development Committees, whose multi-stakeholder composition allows for broad discussions of what is possible, when it is possible and how it is possible.<sup>145</sup>

The statement is both transparent and accurate. It also shows why some observers are so apprehensive about the fact that these value-decisions are being made by a group overwhelmingly dominated by people with a distinct financial interest in the outcome. To be sure, industry should have a place at the table. Its concerns are important, and the goal of ensuring 'buy-in' is admirable. Nonetheless, NFACC Codes will continue to lack real legitimacy until the organization widens the scope of its inquiries and is willing to loosen the grip on the Code writing process.

### C. Public Input: Democratic Legitimacy

Since the NFACC is effectively a private entity that has no law-making authority, it technically owes no obligation to the wider public. Nonetheless, the NFACC is very interested in obtaining public input upon its work, viewing its interaction with the public as a "vital component" of the Code drafting process.<sup>146</sup> The public is engaged twice, first when work on a new Code begins through an announcement process, which alerts the public that a Code is being revised or initiated.<sup>147</sup> Later, once a draft Code is completed, there is a formal public submission period of 60 days, when anyone is permitted to submit comments regarding any

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145. National Farm Animal Care Council, *Press Release*, "Poultry Scientific Committee Reports Released" (4 June 2014). See also NFACC, "Development Process", *ibid*, which notes that its way of drafting Codes "promises to bring real progress on responsible farm animal care, while helping to ensure animal agriculture is viable in a climate of increasing market demands".

146. NFACC, "Public Comment Period", *supra* note 86.

147. *Ibid* (this includes a "multi-component communication effort to support awareness of the Public Comment Period and encourage participation").

aspect of the Code.<sup>148</sup>

It is somewhat difficult to assess the validity and effectiveness of the public comment process when the entire point of having this type of input is so nebulous. The NFACC's explanation is that feedback of this sort "plays a vital role in providing a check and balance to the Code development process and in determining the direction set in the final document".<sup>149</sup> The organization reiterates that comments it receives have a real impact on the process:

[Do the public comments matter?] The answer is an emphatic "Yes".

No-one knows this better than the individuals who have served as Code Secretaries on each of the Code Development Committees that have been formed to carry out the development of the updated Codes of Practice.

It is the Code Secretaries who are charged with receiving all of the feedback from the Public Comment Period and organizing and providing this to the Committee members they facilitate. Here is a small sampling of their comments on this process:

"All of the comments we received were handled very carefully to make sure they were considered as part of the process. In the case of a Code with lots of feedback, such as the Pig Code, this involved a lot of painstaking work to organize, including categorizing and sub-categorizing the comments so they could be accessed and reviewed by the committee as efficiently as possible. Our commitment was to make sure all of the comments were considered as part of the process and I can unequivocally say that is what happened." – Betsy Sharples, [P]ig Code Secretary.<sup>150</sup>

Comments of this sort are difficult to unpack. At a basic level, the primary point being made is indisputable, as there is little reason to doubt that NFACC Committee members review the public comments provided and treat them seriously. Certain comments may indeed have an impact, in terms of providing useful information or insight to the Committee. But it is difficult to believe that relying on the public to 'improve' the Codes is the main objective of having the public comment process ("PCP"). In

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148. Though it is not a major point, the 60-day period seems too short given the dense and somewhat controversial nature of the material that the Committee will have spent as much as two years pouring over.

149. NFACC, "Public Comment Period", *supra* note 86.

150. *Ibid.*

fact, other statements from the NFACC suggest a different purpose: that a process of this sort helps provide a degree of public legitimacy to the Codes and the Code development process. In a 2017 review designed to analyze the effectiveness of the NFACC PCP, Jeffrey Spooner commented that “[t]he main purpose of the review was to address...questions...about the transparency, and hence, legitimacy of the PCP process as it relates to public input”.<sup>151</sup> Spooner’s conclusion was that “[the] evidence indicates a high degree of integrity of the people and the process responsible for the management and administration of public feedback”,<sup>152</sup> and that “there is reason to conclude that NFACC’s PCP has been consistently managed in a highly impartial, thorough, and democratic manner”.<sup>153</sup>

This conclusion is unlikely to convince everyone. Leaving aside the study’s intrinsic limitations,<sup>154</sup> there are reasons to be skeptical about the public comment process and the extent to which it confers democratic legitimacy on the Codes themselves. To begin with, there is no specific requirement that Committees use or even *address* the feedback that is provided. All that the studies show is that the commentary is to be ‘considered’. The comments are not public, as they would be if made, for example, to a parliamentary committee, and the NFACC does not release the commentary to public scrutiny, discuss why particular requests were accepted or denied, or even provide a summary of the commentary’s overall gist and tone. The NFACC is very fond of speaking about the importance of public commentary on its website and in press releases,

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151. Jeffrey Spooner, “National Farm Animal Care Council Public Comment Period Review Final Report” (December 2017) at 1, online (pdf): *National Farm Animal Care Council* <[www.nfacc.ca/pdfs/NFACC%20-%20PCP%20-%20%20Final%20Report%202018%20EN\(1\).pdf](http://www.nfacc.ca/pdfs/NFACC%20-%20PCP%20-%20%20Final%20Report%202018%20EN(1).pdf)>.

152. *Ibid* at 3.

153. *Ibid* at 4.

154. *Ibid* (Spooner’s conclusions do not really analyze the structure of the process and compare it to any other forms of democratic engagement. Instead, the sources for his very short report were restricted to a review of NFACC material and interviews with Code Managers. Spooner was not exactly an independent expert either. He has a long history of working with NFACC, and actually acted as a Code Manager for the review of the Bison Code).

perhaps as a way of justifying the ‘inclusive’ nature of the process, but no mention of this feedback seems to find its way into the Codes themselves. This is not to suggest that the feedback is ignored, and Committees undoubtedly discuss it during the deliberative process, but in the absence of any directives regarding its use, it is almost impossible to guess whether it plays any significant role in the decision-making process, beyond providing a veneer of public legitimacy.

In a detailed study of the Australian Code drafting process, Bethany Hender, an LL.M. candidate at the University of Sydney, expressed numerous concerns about the public consultation process in place there, suggesting that it failed to provide sufficient opportunities for democratic engagement.<sup>155</sup> Her work identified ten key features for effective public consultation drawn from the relevant academic literature, and considered the extent to which the Australian process measured up. The work is far too detailed to perform a similar analysis here, but it is worth noting that many of the criticisms raised in Hender’s work apply with equal or greater force to the NFACC public commentary process.

Amongst other things, Hender was concerned that the scope and potential impact of Australian public consultation was not adequately explained, noting that “the facilitators must be honest about how the public’s input will be used, and how it may influence the resulting regulation, if at all”.<sup>156</sup> The NFACC guide on public commentary is anything but clear on this point. Is it trying to obtain public opinion? Is it looking for matters that might have been missed? The expectations are unclear and explained in a very broad and vague manner.

Hender’s research indicated that other factors were also essential to ensuring a democratically legitimate exercise. Amongst these was the fact that public consultations should be run by neutral and independent facilitators who have no vested interest in the final outcome, and should occur early in the process, noting that “if consultation occurs too late ...

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155. Bethany Hender, *The Treatment of Farm Animals in Australia: Are Legal Standards Set in Accordance with Democratic Principles?* (Masters of Laws Thesis, University of Sydney, 2015).

156. *Ibid* at 109.

the outcomes are often too narrowly defined or predetermined".<sup>157</sup>

Again, it is simply not possible to conduct the same sort of fulsome analysis that Hender performed in Australia, though this sort of analysis should be undertaken eventually. Suffice it to say that the NFACC's internally run comment period, which occurs very late in the process, does not seem to satisfy the majority of the requirements Hender identified as being essential to a legitimate democratic process of public input. In her study, she concluded that the Australian process, which was partly run by government, and far more robust than the NFACC equivalent, nonetheless failed eight of the ten criteria for effective public consultation.<sup>158</sup>

#### **D. The Legal Branding Exercise: Controlling the Conversation**

If animal welfare reform is truly a matter of creating societal pressure and helping to develop a new ethical imperative,<sup>159</sup> then establishing a conversation about animal use is an important part of that process. The NFACC appears to be well aware of the importance of controlling this conversation. The pages of its well-crafted documents are replete with a desire to "get the message of good welfare across", to make use of "opportunities", and to help "engag[e] with people outside of agriculture and [tell] our story".<sup>160</sup>

Ultimately, though the NFACC is not a government body, it takes great pains to look and sound 'official', like a body that is akin to, or operates with the approval of, government, which, in a sense, it does. Its publications are government financed and designed to allow the affected agricultural industries to put their message forward in a very positive way. Every aspect of the process talks with positivity about 'collaboration', 'engagement', and 'progress'. In contrast, words like 'non-compliance',

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157. *Ibid* at 152.

158. *Ibid* at 175.

159. Jerry Anderson, "Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement" (2011) 4:1 *Stanford Journal of Animal Law & Policy* 1 at 1.

160. NFACC, "2014 Final Report", *supra* note 45 at 3.

‘prosecution’, and ‘lawmaking’ are stridently avoided.<sup>161</sup> Everything is about gradual development, meeting consumer expectations, and making animal lives better.

On a certain level, it is hard not to think that the NFACC endeavour is as much about who gets to tell the story as it is about the story that is being told. To be clear, this is not to say there are not some good things happening here, or that animal welfare is not a priority; but, it does mean that sifting through the animal welfare narrative has in many ways become a more difficult endeavour than before. The industry has learned that engaging and narrating the claims of animal welfare is easier and more effective than rejecting these claims altogether, or fighting them tooth and nail.

## VI. Conclusion

The Canadian experience with industry leading the way in defining the country’s animal welfare standards is now well into its second decade, and there is nothing on the horizon to suggest that a replacement model is in the cards. As noted above, there are merits to the NFACC Code process. Engagement with industry brings certain advantages that cannot be achieved through a process of imposing standards from above, even if that were somehow regarded as a politically viable option. Nonetheless, the Canadian model has plenty of warning signs as well. For engagement to be effective for animals in any real way it must come with some degree of oversight and control. Experience in Canada and abroad has shown

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161. To keep this paper to a manageable size, I have avoided providing a detailed analysis of NFACC’s next endeavour: setting up a universal assessment framework that will minimize the traditional role of investigation and enforcement by government authorities. To ensure compliance with Codes, NFACC proposes a wide-scale ‘verification framework’, with internal assessment designed to proactively address animal welfare concerns and “provide assurances to buyers and consumers that animal care standards are being met”. See NFACC, “Implementing Codes of Practice”, *supra* note 113. This is a matter of some concern. Studies of similar self-regulating models in other jurisdictions have raised alarm, especially in the absence of government oversight, as is the case here. See Goodfellow, *supra* note 99; MacLean, *supra* note 127.

that simply trusting industry to 'do the right thing' is not an effective strategy where animals are concerned,<sup>162</sup> and raises problems from the regulatory process right through to enforcement. Hopefully, over time, the Canadian code making process will be regarded not as an end, but as a mechanism that also needs to evolve, in order to ensure that its core function — protecting the needs of the most vulnerable creatures in society — has a real chance of being fulfilled.

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162. For an American example, see David J Wolfson & Mariann Sullivan, "Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable" in Cass R Sunstein & Martha Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 191 at 205.