Right-to-Farm Legislation in Canada: Exceptional Protection for Standard Farm Practices

Laura Alford & Sarah Berger Richardson

RIGHT-TO-FARM LEGISLATION (RTF) emerged during the 1970s and '80s in response to concerns about land-use conflicts between a rapidly industrializing agricultural sector, developing residential and commercial peri-urban and rural areas, and rural communities. As the threat of nuisance suits exerted pressure on agricultural producers to discontinue operations with adverse off-site impacts, small farmers and agribusiness both turned to their legislatures for help. The primary function of RTFs is to create legislative protection for farmers against civil liability for nuisance. These statutes block litigation through the common law of nuisance in one of two ways: either the dispute must first be addressed to the administrative board of that province, or the statute directly bars liability if the practice in question conforms to a legislatively defined standard. In general, RTFs replace the civil fault standard of reasonableness with the standard of adherence to "normal" or "standard" farm practices.

This paper examines the authority and legitimacy of RTFs in Canada today. First, the paper describes how adherence to "normal" or "standard" farm practices has been legislatively defined and interpreted by administrative boards. Second, the paper raises normative concerns about how normalcy has been defined to date, especially when "standard" industry practices are increasingly understood to be unsustainable and harmful. Third, the

LA LÉGISLATION SUR L'EXPLOITATION agricole fait son apparition pendant les années 70 et 80, pour répondre aux préoccupations qui émergent par rapport aux conflits dans l'utilisation des terres, entre un secteur agricole en pleine industrialisation, les zones résidentielles et commerciales périurbaines et rurales en développement, et les communautés rurales. Alors que la menace de poursuites pour nuisance planait sur les producteurs et les productrices agricoles pour qu'ils cessent leurs activités ayant des effets négatifs hors site, les petits agriculteurs et les petites agricultures ainsi que l'industrie agroalimentaire se sont tournés vers des mesures législatures pour leur venir en aide. La fonction principale de la législation sur l'exploitation agricole est d'offrir une protection juridique aux agriculteurs et aux agricultrices contre la responsabilité civile en matière de nuisance. Ces lois évitent le litige en common law en matière de nuisance de deux façons : le litige doit d'abord être présenté au conseil d'administration de cette province, ou bien la loi exclut directement la responsabilité, si la pratique dont il est question est conforme à une norme définie par la loi. En général, les législations sur l'exploitation agricole remplacent la norme de mesure raisonnable en matière de responsabilité civile, par la norme de respect des pratiques agricoles « ordinaires » ou « standards ».

Le présent article examine l'autorité et la légitimité de la législation sur

paper raises issues of accountability and legitimacy as RTFs replace civil litigation with administrative procedures and mediation. It concludes with recommendations for addressing these normative and procedural concerns.

l'exploitation agricole au Canada de nos jours. Premièrement, l'article décrit comment les conseils administratifs ont défini et interprété le respect des pratiques agricoles « ordinaires » ou « standards ». Deuxièmement, l'article soulève des inquiétudes normatives quant à la manière dont le concept de normalité a été défini à ce jour, en particulier lorsque les pratiques « standards » de l›industrie sont de plus en plus considérées comme non durables et nuisibles. Troisièmement, l'article soulève des problèmes de responsabilité et de légitimité alors que les législations sur l'exploitation agricole remplacent les procédures civiles par des procédures administratives et la médiation. Enfin, il conclut par des recommandations visant à répondre à ces préoccupations normatives et procédurales.

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I. INTRODUCTION

In 1958, the Lisoway family purchased a parcel of land in the municipality of Springfield, a short distance from Winnipeg.[1] A few years later, the adjacent property was purchased by a hog farmer who began running a 2,000-head swine operation. The Lisoways were not farmers, and they were upset by the odours emanating from their neighbour's land. In 1971, the Lisoways successfully filed a complaint to the Manitoba Clean Environment Commission, which agreed that the odours were excessive. The Commission ruled that the hog farmer must reduce his operation from 2,000 animals to 800 and change his waste disposal system. The Lisoways' victory was short-lived, however, because in 1972 the Manitoba government exempted livestock operations from the *Clean Environment Act*.[2] When the situation did not improve, the Lisoways launched a civil suit in nuisance, claiming that the "smells, effluvia, and other noisome accompaniments" of the hog-farming operation next door prevented them from enjoying their home and property "beyond tolerable levels."[3] Justice Wilson found that the operation constituted a nuisance and awarded damages and injunctive relief to the family. The following year, the Manitoba

1 See *Lisoway v Springfield Hog Ranch Ltd*, [1975] MJ No 188 at para 2 (Man QB) [*Lisoway*]

2 SM 1972, c 76, as repealed by *The Environment Act*, SM 1987–88, c 26, CCSM c E125, s 56. See also Joel Novek, "Intensive Hog Farming in Manitoba: Transnational Treadmills and Local Conflicts" (2003) 40:1 Can Rev Sociology & Anthropology 3 at 10.

3 *Lisoway*, *supra* note 1 at para 1.

government introduced *The Nuisance Act*,[4] which restricts a person's right to sue a business in nuisance for odour-related disturbances.

The Nuisance Act was the first articulation of right-to-farm legislation (RTF) in Canada. It followed on the heels of the introduction of RTFs across the United States (US) during the 1970s.[5] Quebec was the second province to adopt RTFs, and within a few years, every Canadian province had its own version of RTF.[6] The primary function of RTFs is to create legislative protection for farmers against civil liability for nuisance and, in some cases, against the enforcement of municipal by-laws. In general, RTFs replace the civil fault standard with the standard of adherence to "normal" or "standard" farm practices.

While RTFs in Canada emerged as a relatively unsophisticated legislative response to nuisance lawsuits, they have transformed in the past 40 years to become complex balancing instruments that aim to reconcile the governments' simultaneous roles as promoters of economic growth, environmental regulators, and guarantors of food security.[7] During the same period, however, RTFs have failed to adapt to changing industry standards in agricultural production and to incorporate the level of public accountability required to ensure the continued sustainability of the industries and lands they exist to protect. At the turn of the century, RTFs were a subject of discussion at an agricultural law conference in Saskatchewan on pressing issues facing modern agriculture.[8] However, since then,

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4 SM 1976, c 53, CCSM c N120 [MB *The Nuisance Act*].

5 For an overview of RTFs in the US, see Alexander A Reinert, "The Right to Farm: Hog-Tied and Nuisance-Bound" (1998) 73:5 NYUL Rev 1694; Margaret Rosso Grossman & Thomas G Fischer, "Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer" (1983) 1983:1 Wis L Rev 95; Ross H Pifer, "Right to Farm Statutes and the Changing State of Modern Agriculture" (2013) 46:4 Creighton L Rev 707 at 707–12.

6 The following is a list of the first appearance of RTFs in each Canadian province, in chronological order: MB *The Nuisance Act*, *supra* note 4; *Loi sur la protection du territoire agricole*, LQ 1978, c 10; *Agricultural Operation Practices Act*, SNB 1986, c A-5.2; *Agricultural Operation Practices Act*, SNS 1986, c 2, as repealed by *Farm Practices Act*, SNS 2000, c 3, s 16; *Agricultural Operation Practices Act*, SA 1987, c A-7.7; *Farm Practices Protection Act*, SO 1988, c 62; *Agricultural Protection Act*, SBC 1989, c 19; *The Agricultural Operations Act*, SS 1995, c A-12.1; *Farm Practices Act*, RSPEI 1998, c 87 [PEI *FPA*]; *Farm Practices Protection Act*, SNL 2001, c F-4.1 [NL *FPPA*].

7 Note the inclusion of environmental regulations within various RTFs. See *Farming and Food Production Protection Act, 1998*, SO 1998, c 1, s 2(5) [ON *FFPPA*]; *Agricultural Operation Practices Act*, RSA 2000, c A-7, s 25(2)–(3) [AB *AOPA*]; PEI *FPA*, *supra* note 6, s 2(1)(b).

8 Contributions from this conference were subsequently published in a special issue of the *Saskatchewan Law Review*: see Donna Greschner et al, eds, *Saskatchewan Law Review*, vol 62:2 (Saskatoon: Houghton Boston, 1999). See e.g. Martin Phillipson & Marie-Ann Bowden,

the study of these statutes in the Canadian context has fallen into relative obscurity. A renewed interest in RTFs has emerged in the US in recent years;[9] however, important differences between the statutes in each country mean that lessons from one jurisdiction cannot be neatly mapped on to the other.

This paper attempts to address this gap in legal scholarship and to critically examine the justifications for and legitimacy of RTFs in Canada today. At a time when the field of food law and policy is establishing itself as an emerging discipline and all levels of government are responding to pressure to develop comprehensive food strategies, a better understanding of the effect of RTFs on the viability of sustainable Canadian food systems is needed. Although RTFs can serve to balance important agri-food policy goals, they trigger questions about accountability and legitimacy in administrative law. We argue that current formulations and applications of these statutes should be revised to address normative and procedural concerns.

Part II provides a brief history of the origins of RTFs and the land-use conflicts they were intended to address. Part III describes the legislative requirement of most RTFs that producers must adhere to "normal" or "standard" farm practices to benefit from legislative protection, and traces how the concept of "normal farm practice" has been legislatively defined and interpreted by administrative boards and reviewing courts. Part IV raises normative concerns about how this requirement of normalcy has been defined to date, especially in contexts where standard industrial practices are unsustainable or harmful. Part V raises additional issues of accountability and legitimacy as RTFs replace civil litigation with administrative procedures and mediation. Part VI concludes with recommendations for addressing these substantive and procedural concerns, particularly by distinguishing between the kinds of agricultural operations that should benefit from protection and those that should not.

"Environmental Assessment and Agriculture: An Ounce of Prevention is Worth a Pound of Manure" (1999) 62:2 Sask L Rev 415; Donald E Buckingham, "The Law of the Land: Agricultural Law and its Place in the Languages of Agriculture and Law" (1999) 62:2 Sask L Rev 363 at 367.

9 See e.g. Pifer, *supra* note 5; Sean McElwain, "The Misnomer of Right to Farm: How Right-to-Farm Statutes Disadvantage Organic Farming" (2015) 55:1 Washburn LJ 223; Cordon M Smart, "The Right to Commit Nuisance in North Carolina: A Historical Analysis of the Right-to-Farm Act" (2016) 94:6 NCL Rev 2097; Ariel Overstreet-Adkins, "Extraordinary Protections for the Industry That Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana" (2016) 77:1 Mont L Rev 85; Gina Moroni, "Mediating Farm Nuisance: Comparing New Jersey, Missouri, and Iowa Right to Farm Laws and How They Utilize Mediation Techniques" (2018) 2018:1 J Disp Resol 299.

II. RIGHT-TO-FARM LEGISLATION: ORIGINS

A. Conflicts Over Land Use

During the postwar period, agricultural production in North America underwent a period of significant industrialization. Fueled by postwar international food relief efforts, Cold War politics, and the Green Revolution, farmers were encouraged to use new and improved pesticides, irrigation techniques, synthetic nitrogen fertilizer, and hybrid seeds to maximize production.[10] In 1970, *National Geographic* captured North America's love affair with industrial agriculture in "The Revolution of American Agriculture," a feature article that extolled the virtues of modern advancements in technology and agriculture, while identifying the modern farmer as a business practitioner rather than manual labourer.[11] The article included an illustration entitled "Farm of the Future," drawn by David Meltzer under the counsel of the US Department of Agriculture.[12] It colourfully depicted a utopian industrial farm operation, gleaming with metal and promising wealth and productivity. Conveyor belts are shown transporting equipment and feed across the farm, while cattle are neatly stacked inside a series of vertical high-rise livestock holding pens. There are no people in sight, save the people driving the trucks—unless they too are mechanically operated. On the horizon lies a large city, existing in seeming harmony with its rural neighbour. Meltzer's painting reflected the industrial dream of agronomists at the time, a utopian "future-as-paradise" model of agriculture.[13]

In reality, however, farming was, and continues to be, a messy business. It is also a smelly one. As agricultural policies encouraged more large-scale operations to maximize industry productivity, the potential for conflict

10 See Michael J Troughton, "Industrialization of US and Canadian Agriculture" (1985) 84:6 J Geography 255; Grossman & Fischer, *supra* note 5; Helen E Parson, "Regional Trends in Agricultural Restructuring in Canada (1999) 22:3 Can J Regional Science 343; Allan W Gray & Michael D Boehlje, "The Industrialization of Agriculture: Implications for Future Policy" (2007) Department of Agricultural Economics, Purdue University Working Paper No 07–10.

11 See Jules B Billard, "The Revolution in American Agriculture" *National Geographic* 137:2 (February 1970) 147 at 147.

12 See Roger Epp, "Beyond Our Own Backyards: Factory Farming and the Political Economy of Extraction" in Alexander M Ervin et al, eds, *Beyond Factory Farming: Corporate Hog Barns and the Threat to Public Health, the Environment, and Rural Communities* (Saskatoon: Canadian Centre for Policy Alternatives, 2003) 179 at 181.

13 See Wendell Berry, *The Unsettling of America Culture & Agriculture* (San Francisco: Sierra Club Books, 1977) at 67.

between developing suburbs and established rural areas intensified.[14] Residential and commercial development in peri-urban and rural areas intensified during the late 1960s and early 1970s, and legal problems emerged.[15] The story of the Lisoway family, discussed in the introduction, is one such example of a dispute arising when the by-products of large-scale industrial farm production affect nearby residents.

Until the introduction of RTFs, nuisance suits provided legal recourse for neighbours, such as the Lisoways, to seek damages or injunctive relief for unreasonable interference with the use or enjoyment of their land. Unlike the attempts of environmental conservationists to reform agricultural laws based on principles of environmental justice and sustainability, nuisance suits were a highly localized, targeted, and contextualized recourse based on the well-established right of property owners to enjoy the full use of their land without interference. Unlike the tort of trespass, which required direct interference with the land of another, nuisance liability applied to both direct and indirect interferences provided that there was some kind of harm. Moreover, nuisance law during this period had been moving towards a system of flexible mediation by courts, in which decisions were based on the (un)reasonableness of the interference of the plaintiff's enjoyment of his or her land rather than whether or not the defendant was making a reasonable use of his or her own property.[16] In other words, nuisance law was moving away from fault-based evaluations of conduct and towards an emphasis on proof of damage.[17]

Given the increased emphasis on proof of damage, and the absence of a fault requirement, defendants could have been liable in nuisance for standard industry practices. As land-use conflicts persisted, agricultural operators (both small and large) turned to their legislatures for help.[18] The agricultural operators argued that nuisance law did not take into account the social value of farming or the unique nature of agri-food production. Invoking the image of self-entitled suburbanites who naively came to the

14 See Reinert, *supra* note 5 at 1697.

15 See Mark B Lapping & Nels R Leutwiler, "Agriculture in Conflict: Right-to-Farm Laws and the Peri-Urban Milieu for Farming" in William Lockeretz, ed, *Sustaining Agriculture Near Cities* (Ankeny, Iowa: Soil and Water Conservation Society, 1987) 209 at 209. See also Keith Burgess-Jackson, "The Ethics and Economics of Right-to-Farm Statutes" (1986) 9:2 Harv JL & Pub Pol'y 481 at 484–91.

16 See Jonathan J Kalmakoff, "'The Right to Farm': A Survey of Farm Practices Protection Legislation in Canada" (1999) 62:1 Sask L Rev 225 at 229–31.

17 *Ibid* at 232–33; Reinert, *supra* note 5 at 1699.

18 See Novek, *supra* note 2 at 11.

countryside in search of bucolic pastures, and environmental activists who were "anti-agricultural zealots who would deprive legitimate farmers of their right to earn a living," operators emphasized that these interest groups did not understand the realities of agricultural production and the necessary unpleasantness it entails.[19] Nuisance law, they argued, had evolved to a point where protection from liability no longer extended to practices that contributed to a broader societal goal. Farmers submitted that agricultural production should be exempt from such rules.[20]

B. Reframing the Debate

Rather than pit farmers against non-farmers, legislatures instead chose to reframe the debate to focus on the societal value of increasing production and the effect of urban sprawl on agricultural land and agricultural productivity. Between 1978 and 1983, a majority of US states passed a series of RTFs in order to protect farming operations from common law nuisance suits and municipal ordinances, such as zoning by-laws, that make certain practices a nuisance.[21] RTFs were also passed in Canada with, as mentioned above, the province of Manitoba taking the lead.[22] Legislative debates, which took place during the introduction of Manitoba's *The Nuisance Act*, drew attention to the urban-rural conflict arising from residential development, and the resulting strains upon assessment and threats towards feedlot operators and pork producers in that province.[23] Today, RTFs exist in each province under different names and slight variations, to protect farmers from civil liability in nuisance.[24] While the primary focus of this paper is on RTFs as they exist and have evolved in Canada, our

19 *Ibid* at 12.

20 *Ibid*.

21 See Reinert, *supra* note 5 at 1696–97. For an overview of the general provisions contained in American RTFs, see Rusty Rumley, "A Comparison of the General Provisions Found in Right-to-Farm Statutes" (2011) 12:2 VJEL 327.

22 See Novek, *supra* note 2 at 11–12.

23 See "Bill 68, The Nuisance Act", 2nd reading, Legislative Assembly of Manitoba, *Debates and Proceedings*, 30-3, vol 131 (31 May 1976) at 4454–55 (Hon Howard Pawley) [MB *Hansard*].

24 RTFs currently in force in Canadian provinces are as follows: *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c 131 [BC *FPPA*]; AB *AOPA*, *supra* note 7; *The Agricultural Operations Act*, SS 1995, c A-12.1 [SK *AOA*]; *The Farm Practices Protection Act*, SM 1992, c 41, CCSM c F45 [MB *FPPA*]; ON *FFPPA*, *supra* note 7; *Act Respecting the Preservation of Agricultural Land and Agricultural Activities*, RSQ c P-41.1 [QC *ARPALAA*]; *Agricultural Operation Practices Act*, SNB 2011, c 107 [NB *AOPA*]; PEI *FPA*, *supra* note 6; *Farm Practices Act*, SNS 2000, c 3 [NS *FPA*]; NL *FPPA*, *supra* note 6.

discussion draws occasionally on American sources. American and Canadian RTFs share a broadly similar origin and structure, but have evolved in different ways since their enactment.

RTFs cover disturbances related to odour, noise, dust, smoke, or others arising from agricultural operations. Their primary function is to block civil litigation through the common law of nuisance in one of two ways: either the dispute must first be addressed to the administrative board of that province, or the statute directly bars liability if the practice in question conforms to a legislatively defined standard.[25] In the first instance, boards may recommend that the parties attempt to resolve their dispute through mediation before hearing their case,[26] and they may refuse to hear a case if they consider the application to be frivolous or trivial.[27] Parties may then appeal board decisions to the provincial court. In the second instance, the plaintiff has no recourse—neither administrative nor civil—if the respondent is engaged in a "normal farm practice" as defined by the legislation. While the former instance reflects a legislative attempt to balance the right to use and enjoy one's property with the right to farm, and to do so outside the costly and inflexible court system, the latter is very clearly a legislative alignment with the agricultural industry. For instance, the legislative history of Manitoba's *The Nuisance Act*, Canada's first RTF, makes it clear that its original purpose was to protect agricultural operators.[28]

The details of RTFs can vary considerably, however, they all generally attempt to do two things: limit the applicability of the common law of nuisance to agricultural activities, and favour agricultural uses of land above other uses in rural and peri-urban areas by limiting the ability of local governments to use by-laws to restrict "normal farm practices."[29] The scope of protection afforded by RTFs can be quite broad, extending beyond traditional conceptions of farming, and protecting a wide spectrum

25 See e.g. *MB FFPA*, *supra* note 24, s 9(5); BC *FFPA*, *supra* note 24, s 2(1)(a).

26 See e.g. SK *AOA*, *supra* note 24, s 16(1); QC *ARPALAA*, *supra* note 24, s 79.3; NB *AOPA*, *supra* note 24, s 21(1); PEI *FPA*, *supra* note 6, s 9(1). See also Moroni, *supra* note 9 (for the note that alternative dispute resolution mechanisms such as mediation have also been a feature of RTFs in the US).

27 See e.g. ON *FFPPA*, *supra* note 7, s 8(1); BC *FPPA*, *supra* note 24, s 6(2)(a)–(b).

28 See MB *Hansard*, *supra* note 23 at 4454–55. For an overview of the evolution of Manitoba's *The Nuisance Act*, see also Manitoba Law Reform Commission, *The Nuisance Act and the Farm Practices Protection Act: Report for Consultation* (Winnipeg: MLRC, 2012), online (pdf) <www.manitobalawreform.ca/pubs/pdf/additional/nuisance_act.pdf> [perma.cc/3DFF-WVUA] [MLRC].

29 See e.g. ON *FPPA*, *supra* note 7, s 6(1); NS *FPA*, *supra* note 24, s 12; NL *FPPA*, *supra* note 6, s 3(3). See also Lapping & Leutwiler *supra* note 15 at 210; Reinert, *supra* note 5 at 1705.

of agricultural activities of many types and sizes. For example, Quebec's *Act to Preserve Agricultural Land* applies to all activities relating to agriculture, including storage, packaging, processing, and sales, and extends as far as meat-packing plants and flour mills.[30] Most RTFs do not distinguish between small-scale and industrial agriculture.

It is important to note, however, that RTFs do not provide absolute immunity for all agricultural operations. First, the legislation only targets specific types of land use conflict: nuisance liability in private litigation and, in some cases, the application of municipal by-laws. Second, farming practices must conform to provincial or state and federal laws, including compliance with environmental regulations,[31] to benefit from the rebuttable presumption in their favour.

The following section outlines how the "normal" farm practice standard has been defined in context, and how the standard interacts with other sources of law including municipal by-laws. The section proceeds to outline some of the particularities of the right to farm in the province of Quebec, where the absence of a normalcy standard has resulted in what is perhaps the most radical RTF in the country.

III. ADHERENCE TO "NORMAL" OR "STANDARD" FARM PRACTICES

A. Normal Farm Practice

In general, RTFs operate to replace the civil fault standard of reasonableness with the standard of "normal farm practice."[32] The standard is evaluated by an administrative board and may operate within the parameters of certain other provincial legislation. For example, in Ontario "normal farm practice" is constrained by regulations made under the *Environmental Protection Act*, *Pesticides Act*, and others.[33] "Normal farm practice" refers to the

30 See QC *ARPALAA*, *supra* note 24, s 1(0.1). See also Kalmakoff, *supra* note 16 at 239.

31 See e.g. QC *ARPALAA*, *supra* note 24, s 79.17(1); MB *FPPA*, *supra* note 24, s 2(1)(iii).

32 "Normal farm practice" is the phrase used in the majority of RTFs: see e.g. BC *FPPA*, *supra* note 24, s 1; MB *FPPA*, *supra* note 24, s 1; ON *FFPPA*, *supra* note 7, s 1(1); NS *FPA*, *supra* note 24, s 2(a); PEI *FPA*, *supra* note 6, s 1(i). In Canada, "generally accepted agricultural practice" is used in Alberta and "normally accepted agricultural practice" is used in Saskatchewan: see AB *AOPA*, *supra* note 7, s 1(b.8); SK *AOA*, *supra* note 24, s 2(i). However, "acceptable" is used in New Brunswick and Newfoundland and Labrador: see NB *AOPA*, *supra* note 24, s 1; NL *FPPA*, *supra* note 6, s 2(a). The difference in terminology has not prevented courts from applying a consistent framework to the adjudication of disputes.

33 See e.g. ON *FFPPA*, *supra* note 7, s 2(5).

standard that an average farmer in the same circumstances would usually follow. The standard, however, is not what a reasonable person ought to have done; consequently, there is no guarantee that the practice will be reasonable.[34] The concept of normal farm practice allows the agri-food industry, which is driven by market forces, to set the standard for what is considered legal. However, normal farm practices may not reflect the same balancing of interests between economic growth, food security, and sustainability that would be expected from a legislatively defined standard.

For a more detailed understanding of how normal farm practice is evaluated in context, the leading case is a 2001 decision from the Court of Appeal for Ontario. In *Pyke v Tri Gro Enterprises*,[35] a group of neighbours brought a complaint in negligence and nuisance against Tri Gro, which operated a mushroom farm that generated significant unpleasant odours during its composting process. All of the properties in question were located in an agricultural zone that permitted mushroom farming. In a procedural anomaly, the case bypassed the provincial farm industry review board and was heard in first instance at the Ontario Superior Court. The lower court dismissed the claim in negligence but concluded that the odours constituted a nuisance and that, since the nuisance was out of character for the area, did not constitute a normal farm practice. The Superior Court awarded damages to each plaintiff.[36]

The Court of Appeal affirmed the lower court's decision and, in ruling that the practice was not "normal" within the meaning of the *Farming and Food Production Protection Act* (*FFPPA*),[37] laid out the test for normal farm practice. The decision of Justice Sharpe for the majority is rooted in respect for private property rights and the principle of "no expropriation without compensation."[38] Where a RTF can operate to completely shield farmers from liability in nuisance, the result would unfairly prejudice the property rights of neighbouring residents. The need to balance the broad public purpose of RTFs with the individual rights of neighbouring residents

34 Legislative protection for practices that are generally acceptable, regardless of their reasonableness, is standard in the case of animal welfare laws. See e.g. Sophie Gaillard & Élise Desaulniers, "Traitement des animaux de ferme : le gouvernement doit prendre ses responsabilités" (16 August 2018), online: *La Presse* <plus.lapresse.ca> [perma.cc/9E3Z-ZCU5] (a recent editorial by the SPCA of Montreal on animal welfare protections for farmed animals).

35 (2001), 204 DLR (4th) 400, 55 OR (3d) 257 (ONCA) [*Pyke*].

36 See *Pyke v Tri Gro Enterprises Ltd*, [1999] OJ No 3217, 1999 CarswellOnt 2697 (Ont Sup Ct).

37 *Supra* note 7.

38 *Ibid* at para 75.

led Justice Sharpe to elucidate an "appropriately evaluative" approach to defining normal farm practice.

The evaluative approach to normal farm practice stands in contrast to a purely factual inquiry into the status quo of industry custom. Since the Ontario statute requires that practices be "proper and acceptable,"[39] the analysis considers a wide range of factors that bear upon the nature of the practice at issue and its impact or effect upon the parties who complain.[40] Justice Sharpe drew an analogy to negligence law to explain the place of custom within the contextual inquiry: while custom is an essential part of the analysis, it is not sufficient to determine what constitutes a normal farm practice in a particular case. In practice, the evaluative approach allows the board to consider not only custom but also fact- and site-specific factors including the proximity of neighbours and the use that neighbours make of their lands.[41] The *Pyke* approach has been followed in a wide range of cases by administrative boards and reviewing courts.[42]

B. Normal Farm Practice and Municipal By-Laws

A more recent case in British Columbia (BC) confirmed the centrality of the normal farm practice standard by clarifying its interaction with municipal by-laws, provincial guidelines, and community standards. In *Swart v Holt*,[43] the BC Farm Industry Review Board (BCFIRB) found that a farmer's positioning of a horse run-out, which resulted in odours and flies on the neighbouring property, was not a normal farm practice because it contravened the City of Kelowna's zoning by-law and provincial guidelines related to farm practices. Upon judicial review, however, the BC Supreme Court found the BCFIRB's decision unreasonable.[44] While the

39 ON *FFPPA*, *supra* note 7, s 1(1)(a).

40 *Pyke*, *supra* note 35 at para 81.

41 *Ibid* at para 71.

42 See e.g. *Holt v Farm Industry Review Board*, 2014 BCSC 1389 [*Holt*]; *Deavitt v Greenly*, 2014 ONSC 5069; *Ormston v Dogwood Fur Farms* (19 February 2014), online: British Columbia Farm Industry Review Board <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/farm-practices/complaint-decisions/propane-cannons/ormston_cross__v__dogwood_fur_farm_ltd_decision_feb19_14.pdf> [perma.cc/WMN2-BKP6].

43 See *Swart v Holt* (4 March 2013), online: British Columbia Farm Industry Review Board <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/farm-practices/complaint-decisions/dust/swart_v_holt_13_mar04_decision.pdf> [perma.cc/88NF-4Q4T].

44 See *Holt*, *supra* note 42 at para 236.

BCFIRB had given due attention to the municipal by-law and provincial guidelines, it had failed to consider the positioning of horse run-outs common among other farmers in the area. The BC Supreme Court—reviewing the BCFIRB's decision on the standard of reasonableness—declared the BCFIRB's decision unreasonable for failure to take into consideration statutorily mandated evidence, namely evidence of "proper and accepted customs and standards" followed by similar farm businesses in the area.[45] While acknowledging that review boards are to be owed "significant deference" in the interpretation of their home statute,[46] the omission of essential evidence justified court intervention. The case was remitted to the BCFIRB for reconsideration.

On reconsideration,[47] the BCFIRB balanced the municipal by-law and provincial regulations against aerial photographs of comparator farms to assess their placement of horse run-outs, and heard testimony from horse farmers in the area. While not determinative, the balancing exercise of farmers' custom alongside contextual factors, including the location of the complainants' residence and their use of the land, the slope of land and drainage, and the impact of the farm practice on the complainants, the BCFIRB overturned its original decision and declared the Holt farm a normal farm practice for the purposes of the statute. The *Holt* decision incorporates other sources of law into *Pyke*'s evaluative approach to "normalcy," including municipal by-laws and provincial guidelines.

C. The Right to Farm in Quebec

The Quebec version of RTFs enacts a similar purpose, but the regime is different from that of the common law provinces. These differences should be understood in light of the place of nuisance (« *troubles de voisinage* ») within the Quebec civil law. Distinct from fault-based civil liability, nuisance is defined by article 976 in Book Four, "Property": "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location

45 BC *FPPA*, *supra* note 24, s 1.

46 See e.g. *Lubchynski v Farm Practices Board*, 2004 BCSC 657 at para 16, cited in *Holt*, *supra* note 42 at para 40.

47 See *Swart v Holt* (12 January 2016), online: British Columbia Farm Industry Review Board <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/farm-practices/complaint-decisions/flies/16_jan_12_-_swart_v_holt_-_decision.pdf> [perma.cc/4MTA-HRBG].

of their land or local usage."[48] In accordance with article 976, which focuses more on harm suffered than a standard of conduct, Quebec's RTF does not refer to normal farm practice, but instead takes a geographical indication ("agricultural zone") as its starting point. Within agricultural zones, liability for "dust, noise or odours" is barred unless the activity is shown to contravene the province's *Environment Quality Act* (*EQA*)[49] or amounts to gross or intentional fault.[50]

There is little-to-no jurisprudence on the appropriate standard of conduct for farmers in Quebec. Instead, litigation focuses primarily on whether the practice in dispute qualifies as "dust, noise or odours" for the purposes of RTF protection, or whether the *EQA* applies in a particular circumstance.[51] Where no provision of the *EQA* specifically prohibits the activity in question, litigants have turned to the more general article 20, which reads:

> No one may release or allow the release into the environment of a contaminant in a quantity or concentration greater than that determined in accordance with this Act.
>
> The same prohibition applies to the release of any contaminant whose presence in the environment is prohibited by regulation or is likely to adversely affect the life, health, safety, welfare or comfort of human beings, or cause damage to or otherwise impair the quality of the environment or ecosystems, living species or property.[52]

Evidently, the second paragraph places a high burden for proof of likely damage, one which has been difficult for litigants to meet.[53] It should be noted that in 2000, a report commissioned by the Minister of Agriculture and supported in the National Assembly by the Barreau du Québec, recommended the introduction of a normal farm practice standard in Quebec, but it was ultimately rejected by the legislature.[54] Despite the intervention

48 Art 976 CCQ. For an overview of recent developments in the law of nuisance in Quebec, see David E Roberge, "Nuisance Law in Quebec (article 976 CCQ): 10 Years After *Ciment du Saint-Laurent*, Where Do We Stand?" (2017) 76 R du B 323.

49 QC *ARPALAA*, *supra* note 24, ss 79.17–18.

50 *Ibid*, s 17.19.1.

51 See e.g. *Plantons A et P inc c Delage*, 2015 QCCA 7 at para 71.

52 *Environment Quality Act*, RSQ c Q-2, s 20 [QC *EQA*].

53 See e.g. *Coulombe c Ferme Érital*, 2015 QCCA 6 at para 16; *Hilinski c Robert*, 2016 QCCS 574 at paras 65, 86.

54 See Québec, Bureau d'Audiences Publiques sur l'Environnement, *Rapport de consultation sur certains problèmes d'application du régime de protection des activités agricoles en zone agricole*, by Jules Brière, (25 octobre 2000) at p 27–28. See also Lorne Giroux, "Le droit

of the Barreau, the legislator refused to weaken the standard below gross or intentional fault.[55] Quebec's restrictive legislative regime has caused one scholar to declare it the country's most radical (« *la plus radicale* ») in terms of the immunity afforded to agricultural producers.[56]

This section has illustrated how the standard of normal farm practice has been evaluated in Canadian common law provinces and rejected in Quebec. While the "appropriately evaluative" approach of Justice Sharpe represents an attempt to reconcile RTF protection with site-specific and contextual factors, the *Holt* case illustrates the challenge faced by administrative tribunals in achieving the appropriate balance of multiple factors while adhering to the language and purpose of RTFs. The following section further develops our critique of normality by examining the capacity of RTFs to achieve the complex balancing exercise called for by the purpose of these statutes and the changing conditions of the industries they exist to protect.

IV. SUBSTANTIVE CONCERNS: THE PROBLEM WITH NORMALITY

A. Balancing Competing Values and Policy Objectives

RTFs are balancing instruments adopted by governments to reconcile their different roles as promoters of economic growth, environmental regulators, and guarantors of food security.[57] Ideally, these different objectives are complementary. Indeed, this is how they are portrayed by the federal government as it develops a national food policy for Canada:

> In order to make healthy eating choices, Canadians depend on *sufficient access to affordable, nutritious, and safe food*, and require information to make healthy food choices. In turn, having a reliable supply of affordable,

environnemental et le secteur agricole (prise 2): la Loi agricole de 2001" in Barreau du Québec, ed, *Développements récents en droit de l'environnement 2002*, vol 175 (Cowansville: Yvon Blais, 2002) 265 at 341–45.

55 See "Loi modifiant la Loi sur la protection du territoire et des activités agricoles et d'autres dispositions législatives", 3rd reading, *Journal des débats*, 36-2, vol 37 No 41 (20 June 2001) at 2531 (Maxime Arseneau).

56 Giroux, *supra* note 52 at 341.

57 Note the inclusion of environmental regulations within various RTFs: see e.g. ON *FFPPA*, *supra* note 7, s 2(5); AB *AOPA*, *supra* note 7, 25(2)–(3); PEI *FPA*, *supra* note 6, s 2(1)(c).

> nutritious, and safe food, depends on *maintaining Canada's natural resources* in a way that *supports and grows our agriculture and food sector*.[58]

These objectives can be mutually reinforcing, but they are not necessarily so. RTFs, although conceived long before discussions about a national food policy began, reflect a strategic attempt to reconcile tensions between competing agri-food policy objectives. Whether or not they have been entirely successful in this reconciliation is another matter.

RTFs, as they currently exist in Canada, contribute to the policy objectives of developing the agricultural sector and of increasing access to affordable food. However, RTFs are not designed to improve agricultural practices as they relate to public and environmental health or to encourage efforts to conserve our soil, water, and air. Indeed, local and central governments have been reluctant to impose costs or restrictions on agricultural operations due to concerns about the negative consequences this would have on economic growth.[59] In this sense, RTFs attempt to balance two policy objectives related to food system governance (access and economic growth) while avoiding those related to sustainability. The push for intensive agriculture and its associated productivity is consistent with policies that emphasize high-tech, free-market economic development. Within this framework, RTFs are instruments that maintain the status quo and thus privilege large-scale and industrialized methods of production.[60]

Underlying each RTF is the common legislative purpose "to create an environment conducive to *continued agricultural production* by restricting interference from those who object to the unavoidable effects of normal farming practices."[61] For example, the preamble to the Ontario legislation states:

> It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.[62]

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58 See "A Food Policy for Canada" (last modified 2 June 2017), online: *Government of Canada* <www.canada.ca/en/campaign/food-policy.html> [perma.cc/DZ6M-CRRV] [emphasis in original].

59 *Novek*, *supra* note 2 at 13.

60 *Ibid* at 9. See also McElwain, *supra* note 9; Austin Glascoe, "Genetically Modified Nuisance: Your Right to Recovery Is Barred, If You Catch My Drift" (2018) 6:2 LSU J Energy L & Resources 533.

61 Kalmakoff, *supra* note 16 at 227 [emphasis added].

62 ON *FFPPA*, *supra* note 7, Legislative History.

RTFs also embody some of the principles of agricultural exceptionalism, which is rooted in the idea that regulators should treat agriculture as an exceptional sector due to the specific needs of farmers and because the farming sector contributes to broader national interests.[63]

While RTFs may have been conceived in response to a particular kind of land-use conflict, in the long-term they have also been instrumental to legitimizing agricultural practices that require revisiting in the 21st century. In the name of farmers, RTFs shield a range of activities that ultimately have little to do with farming, farmers, or the exceptional qualities of agriculture, and in so doing allow agribusinesses to assert greater economic control over rural communities and resources.[64] RTFs are generally not concerned with protecting traditional conceptions of farming. In fact, there has been an explicit rejection of the inclusion of the kinds of bucolic and pastoral agricultural operations that most of us associate with farmers and farming by many legislatures. For example, in some cases in the US, state legislatures have limited the protections afforded by RTFs to commercial operations, while excluding hobbyists and non-commercial farmers from anti-nuisance protection.[65] In this sense, RTFs are less about ensuring the right to "farm" and more about ensuring the right to cheaply "produce" large quantities of food. The legislation is nevertheless framed as serving the broader purpose of ensuring an adequate supply of agricultural products—a social good from which everyone may benefit.

B. Revisiting Who and What Should Benefit From Protection

RTFs were first introduced to respond to a supposed need to protect producers from nuisance suits. However, it turns out this was unfounded. Claims about the threat and frequency of nuisance suits have been exaggerated, and the idea that farming has been endangered by urban sprawl is questionable.[66] Most importantly, nearly all perpetrators of alleged nuisances are not small crop growers, but large livestock operations, and most

63 See Michael Trebilcock & Kristen Pue, "The Puzzle of Agricultural Exceptionalism in International Trade Policy" (2015) 18:2 J Intl Econ L 233. See also Sonia Weil, "Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry" (2017) 10:1 Drexel L Rev 183 at 207.

64 See Laura B DeLind, "The State, Hog Hotels and the 'Right to Farm': A Curious Relationship" (1995) 12:3 Agriculture & Human Values 34 at 41.

65 See McElwain, *supra* note 9 at 243.

66 See e.g. MLRC, *supra* note 28 at 10–13.

complainants are themselves rural residents and local farmers, not suburban newcomers.[67]

If RTFs are meant to balance competing policy objectives, they are nevertheless a blunt tool to achieve the careful balancing of economic, social, and environmental interests that is necessary for good food system governance. In the American context, critiques of RTFs focus especially on property rights, arguing that RTFs are unconstitutional takings that unjustifiably forgive nuisances and undermine property rights.[68] This argument is significant in a country where property rights are protected under the Constitution.[69] However, in Canada, property rights are not enshrined in the Constitution, and so it carries less weight. Moreover, focusing on property rights fails to engage seriously with the reasons RTFs were adopted in the first place.

The discussion in Part II on the origins of RTFs explained that legislatures adopted these statutes to reconcile the legislatures' dual role as promoters of economic development and public health by focusing on increasing and protecting agri-food production. However, since their early beginnings, the intensification and industrialization of agri-food production in recent years has had two important effects on the continued justifications for, and legitimacy of, RTFs as a tool to regulate agriculture. The first relates to the idea of agricultural exceptionalism and the reasons a government can give to justify shielding agricultural producers from nuisance, when similar protections are not afforded to other industry actors. The second moves from purpose to form, and questions whether a justifiable legislative purpose is nevertheless extended to actors and practices that are not deserving of this protection. Reinert refers to these as "hollow justifications" and "overbroad structures," respectively.[70]

In terms of hollow justifications, one problem is the way that RTFs support a broad range of practices and operations that, in any other situation,

67 See Reinert, *supra* note 5 at 1714–15.

68 See Adam Van Buskirk, "Right-to-Farm Laws as 'Takings' in Light of Bormann v Board of Supervisors and Moon v North Idaho Farmers Association" (2006) 11:1 Alb L Envtl Outlook 169; Terence J Centner, "Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far" (2006) 33:1 Boston College Envtl Aff L Rev 87; Jennifer L Beidel, "Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking" (2005) 110:1 Penn St L Rev 163; Lisa N Thomas, "Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional" (2001) 16:2 J Envtl L & Litig 445.

69 A constitutional challenge based on the Fifth Amendment's "takings" clause was successful in Iowa during the late 1990s. See *Bormann v Board of Supervisors*, 584 NW (2d) 309 (Iowa Sup Ct 1998).

70 *Supra* note 5 at 1714, 1717.

might be more accurately described as manufacturing. If farming is nothing more than producing large quantities of a particular commodity, why should it be treated any differently than other manufacturers, such as those in the textile industry or automotive industry?

Dramatic changes in the industrial composition of agri-business in North America have resulted in agricultural production becoming more concentrated over the past several decades.[71] In Canada, the number of agricultural operations decreased by 47.1% between 1971 and 2016.[72] As technological and structural changes have increased the volume of animals that a single production plant can handle, those processors best able to realize economies of scale have been able to drive out or take over weaker competitors through horizontal integration.[73] The result has been a decrease in the number of independent farmers engaged in agricultural operations. The related process of vertical integration and the use of production contracts further exacerbate these numbers. The integration of various agricultural sectors, "from patented seed and pesticide technology, to livestock and crop production, to meat and plant food processing,"[74] combined with the proliferation of mergers and acquisitions in agri-business, gives processors "tremendous power over producers, regulators, and public perceptions of the industry."[75]

Agricultural operations in Canada are becoming increasingly corporatized. According to Statistics Canada, the number of corporate agricultural operations increased from 2.2% to 25.1% between 1971 and 2016.[76] Meanwhile, the total number of agricultural operations and farm operators is declining, but agricultural operations are getting larger and using more land to grow crops and raise livestock.[77] Data from the 2016 Census of Agriculture shows a consistent trend in the livestock sector

71 See Novek, *supra* note 2; Reinert, *supra* note 5; Thomas F Pawlick, *The War in the Country: How the Fight to Save Rural Life Will Shape Our Future* (Vancouver: Greystone Books, 2009); Susan M Brehm, "From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production" (2005) 93 Cal L Rev 797; "Challenging Concentration of Control in the American Meat Industry" (2004) 117 Harv L Rev 2643 ["Challenging Concentration of Control"]; Phillipson & Bowden, *supra* note 8.

72 See "A Portrait of a 21st Century Agricultural Operation" (17 May 2017), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/95-640-x/2016001/article/14811-eng.htm> [perma.cc/4MMD-VYAK] [Statistics Canada, "Agricultural Operation"].

73 See "Challenging Concentration of Control", *supra* note 71 at 2644.

74 Brehm, *supra* note 71 at 802.

75 "Challenging Concentration of Control", *supra* note 71 at 2646.

76 Statistics Canada, "Agricultural Operation", *supra* note 72.

77 *Ibid*.

towards a lower number of total farms and a higher number of average animals per farm from the period of 1996–2016.[78] The rapid intensification and consolidation of agricultural operations in Canada has important ramifications on what constitutes a normal farming practice. Should the protections originally designed in the 20th century to support small-scale family-owned farms be extended to corporate operations? Should protections based on the uniqueness of agricultural activities be extended to what has become industrial manufacturing?

With respect to the idea of overbroad structures, a critique of RTFs is that they do not distinguish between the types of land or activities being protected. Focusing on normal farm practices rather than sustainable practices extends protection to industry norms that urgently need to change. Protecting generally accepted practices may extend protection to activities that are harmful to ecosystems, farmed animal welfare, and the viability of resilient rural economies.[79] In the face of changing industry standards, awarding protection based on compliance with generally accepted standards is backward-looking. The legal assumptions upon which RTFs operate are based on traditional notions of family farming, a relatively innocuous unit with low environmental impact.[80] Changing industry standards make the overbroad structures of RTFs ill-equipped to address the scope and scale of adverse off-site impacts of industrial agriculture.[81]

Furthermore, many agri-food operations that now benefit from RTF protection do little to promote sustainable agriculture. As mentioned previously, RTFs do not shield all kinds of farming practices, and they must conform to provincial and federal laws, including environmental regulations. However, we know that existing regulatory frameworks are far from adequate in addressing the environmental harms caused by agricultural production. Today, the industrialized system of segregating and increasing the concentration of crops and animals poses serious environmental challenges that require more thoughtful regulations. Moreover, assuming that preserving agricultural land and increasing the production of food are desirable policy objectives, the reliance of RTFs on normal farm practice as a threshold for what practices are sustainable is short-sighted. There

78 See "Selected Livestock and Poultry, Historical Data" (last modified 23 October 2018), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210015501> [perma.cc/L6D8-9QDQ].

79 See e.g. Novek, *supra* note 2; DeLind, *supra* note 64.

80 See Buckingham, *supra* note 8 at 367; Phillipson & Bowden, *supra* note 8 at 415.

81 See Reinert, *supra* note 5 at 1721.

is nothing normal about a 280-hectare mega-hog farm with 2,800 sows, an annual output of 65,000 pigs, and the generation of "as much waste as a town of 10,000 people."[82] RTFs were a measured response to what was coined the "urban shadow effect," during the 1970s,[83] which refers to the impact of arrival of incompatible land uses in a farming area which pressures farmers to cease their operations and results in the loss of productivity of farmland and the disintegration of necessary institutions that support farmers.[84] RTFs, however, are not equipped to respond to the "industrial" shadow of Big Agriculture on rural communities, whether from the perspective of remaining small-scale producers or other community members.

Finally, RTFs provide skewed incentives for innovation because farmers risk losing protection if they significantly change the nature of their agricultural activities.[85] While several statutes create space for innovative technology and advanced management practices within the definition of "normalcy,"[86] the analysis of custom is overwhelmingly backward-looking and conservative. This kind of legal framework discourages producers from developing more efficient and sustainable kinds of land use that might better internalize the costs of their activities. Instead, RTFs promote an inefficient allocation of resources based on the status quo of industrial standards.

V. PROCEDURAL CONCERNS: LEGITIMACY OF THE ADMINISTRATIVE PROCESS

RTFs replace civil litigation with administrative procedures and mediation. Each of the provincial statutes constitutes a review committee tasked with enforcing the standard of farm practice defined by the legislation. For example, the BCFIRB, constituted under section 3(1) of the *Natural Products Marketing Act*, is tasked with the interpretation of normal farm practice,[87] the yardstick according to which a civil action in nuisance is barred.

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82 See Konrad Yakabuski, "High on the Hog" (17 April 2018), online: *The Globe and Mail* <www.theglobeandmail.com> [perma.cc/SQQ4-Y3PQ].

83 Lapping & Leutwiler, *supra* note 15 at 209–10.

84 *Ibid* at 210.

85 See Reinert, *supra* note 5 at 1728.

86 See e.g. MB *FPPA*, *supra* note 24, s 1; ON *FFPPA*, *supra* note 7, s 1(1)(b); NS *FPA*, *supra* note 24, s 3(g)(iii).

87 BC *FPPA*, *supra* note 24, s 1.

Some of the benefits of an administrative process in this context include the expertise of the board and a more flexible range of powers with respect to remedies and dispute resolution. For example, the BCFIRB has not only an adjudicative function, in that it hears complaints for nuisance matters, but it also has a reporting role through which it investigates and makes recommendations to relevant levels of government on matters relating to farm practices. Canadian RTFs also provide for admissibility of evidence that would not be admissible in a court of law, and hearings may be conducted informally. Panels have a wide range of discretion in remedies, including ordering farmers to modify their practice in a specified manner, or to cease the practice completely.[88] As compared with injunctive relief for nuisance, administrative processes established by RTFs provide greater flexibility in resolving disputes.

However, RTFs also raise procedural and legitimacy concerns. For example, most of the boards constituted by RTFs do not have their decisions publicly reported and accessible. Thus, RTFs have largely driven land-based disputes concerning agricultural activities out of the public sphere and isolated them within hyper-local and custom-informed administrative review on the one hand, and the particular requirements of provincial environmental statutes on the other. One exception is the BCFIRB, whose decisions are made available online,[89] but in all other cases the lack of accessibility of most RTF decisions means that the debates about what constitutes a reasonable agricultural practice has been relatively absent from broader legal and societal debates about nuisance, reasonableness, and environmental welfare. To the extent that RTFs protect individual farmers from civil liability, they also shield certain concepts and values from broader societal scrutiny.

While it is impossible to gauge the precise effect of shifting debates about farm practices away from the common law of nuisance and into the sphere of administrative law, recent developments in the law of nuisance illustrate its potential for renewed relevance, especially in an environmental context. For example, in *St Lawrence Cement Inc v Barrette* (*St Lawrence Cement*),[90] the Supreme Court of Canada broadened the scope of the

88 See e.g. ON *FFPPA*, *supra* note 7, s 5(4)(b)–(c).

89 See "Farm Practice Complaint Decisions" British Columbia Farm Industry Review Board, online: < www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/boards-commissions-tribunals/bc-farm-industry-review-board/farm-practices/complaint-decisions> [perma.cc/ NW4T-9MBE].

90 2008 SCC 64.

concept of "neighbour" in the context of nuisance disputes in Quebec. The Court found that limiting the class of plaintiffs to individuals with a real right in an immoveable property (for example, ownership as opposed to a lease) was an unfair approach that would limit the rights of lessees or other occupants to obtain similar compensation for experiencing the same harms as property owners.[91] The Court concluded that, in order to bring a claim, a plaintiff "must prove a certain geographic proximity between the annoyance and its source" and that the word "neighbour" must be construed liberally.[92] While the degree to which *St Lawrence Cement* can inform future decisions outside of Quebec is unclear, the case illustrates that litigation may be an effective tool for creating new opportunities for concerned neighbours and citizens to challenge unsustainable farming practices on the basis that they cause unreasonable environmental disturbance.

In addition to substantive limitations of administrative review, there are procedural features which introduce additional barriers to litigants. Although most RTFs provide for judicial review to a civil court, sometimes within a narrow time limit,[93] civil courts have been hesitant to interfere with the determinations of farm-practice administrative boards: the standard of reasonableness combined with deference toward the administrative decision-maker has been repeatedly reinforced in the jurisprudence.[94]

The *Holt* case, discussed in Part III, highlights the interaction between the administrative review boards and the civil courts and clarified the interaction of municipal by-laws, provincial guidelines, and community standards within the normal farm practice analysis.[95] Even while concluding that the BCFIRB's decision was unreasonable, the BC Supreme Court refused to discuss the merits of the parties' positions and focused exclusively on the adequacy of the BCFIRB's reasons. As a first step, the Court

91 *Ibid* at paras 83–85.

92 *Ibid* at para 96.

93 See e.g. NS *FPA*, *supra* note 24, s 11 (30 days on questions of law in Nova Scotia); QC *ARPALAA*, *supra* note 24, s 21.1 (30 days, with appeal to the Tribunal Administratif du Québec in that province).

94 See especially *Hill and Hill Farms Ltd v The Municipality of Bluewater* (2006), 274 DLR (4th) 501, 82 OR (3d) 505 (CA); *Nauss v Nova Scotia (Farm Practice Board)*, 2013 NSSC 295; *RJ Farms & Grain Transport Ltd v Saskatchewan (Agricultural Operations Review Board)*, 2011 SKQB 185; *St-Pie (Municipalité de) c Commission de protection du territoire agricole du Québec*, 2009 QCCA 2397 at paras 82–83.

95 The Quebec Superior Court has also affirmed that Quebec's RTF shields farmers from civil liability, even if a municipal by-law has been violated. See *Simoneau c Marion*, 2005 CanLII 29457, AZ-50329639 (SOQUIJ) at paras 54–59 (CS Qc).

updated the standard of review analysis in a post *Dunsmuir v New Brunswick* context (the previous case of judicial review had been decided before *Dunsmuir*) and confirmed that reasonableness applies.[96] As a second step, the Court confirmed that "the normal farm practice definition cannot prefer provincial guidelines and zoning by-laws over 'standards as established and followed by similar farm businesses under similar circumstances'"[97] and, rather than making its own determination on the issue, remitted the decision to the BCFIRB for reconsideration. As a result of the Court's deferential posture, it is only in the rare case that the correctness standard is applied that civil courts can engage in a substantive discussion beyond the adequacy of the administrative body's reasons. The combined factors of insulated administrative adjudication, strict time limits for appeal, and judicial deference are procedural factors which insulate the farming industry from civil liability.

Beyond providing for the possibility that adherence to normal farm practice may override municipal by-laws or zoning requirements, several RTF statutes further empower farmers to challenge municipal by-laws that may restrict their practices. The *Holt* case illustrates that, in addition to a private-law function through which RTFs limit the liability in nuisance, they also have an important public-law function in relation to municipal by-laws and provincial policy guidelines. For example, section 6 of the Ontario *FFPPA* states that "[n]o municipal by-law applies to restrict normal farm practice carried on as part of an agricultural operation" and institutes a process through which farmers themselves may challenge the applicability of municipal by-laws.[98] In this way, residents concerned or negatively affected by neighbouring farm operations see their rights doubly restricted. Not only are they prevented from accessing the courts for economic or injunctive relief, but they are further silenced at the level of local policy-making.

96 See *Holt*, supra note 42 at paras 35–54. For those unfamiliar with Canadian administrative law, the result of mandating the reasonableness standard is that the reviewing court is deferential towards the administrative decision maker, rather than substituting its own conclusion or re-considering the issues. See also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48 (the reviewing court shows "respect for the decision-making process of adjudicative bodies with regard to *both the facts and the law*" and interferes in only a limited range of circumstances [emphasis added]).

97 *Holt*, *supra* note 42 at 240.

98 ON *FFPPA*, *supra* note 7, s 6. See also MB *FPPA*, *supra* note 24, s 2(2)(a) (protection against nuisance applies notwithstanding "the land use by-law of the municipality in which the agricultural operation is carried on changes or the agricultural operation becomes a non-conforming use").

The public-and private-law protections afforded by RTFs thus leave both individual neighbours and entire communities with little recourse against harmful practices that fall below the threshold of gross or intentional fault or direct contravention of provincial statutes. Where nuisance is likely to fail, collective action that might take the form of enacting municipal by-laws or regulations has also proven to be largely ineffective. Administrative procedures that encourage mediation and more flexible remedies tailor-made to a particular context may satisfy the parties in dispute. However, especially where these decisions are largely inaccessible to the public, the current regime is unlikely to incentivize sustainable practice or to spur modifications to existing environmental legislation to which even RTFs must comply.

VI. RECOMMENDATIONS

The previous sections outlined several normative and procedural shortcomings to RTFs. We conclude this paper with suggestions for their improvement. First is a redrawing of the categories of inclusion to determine *who* should benefit from nuisance-liability protection. Within a reform model, RTFs would create separate legal regimes for small-scale or artisanal agricultural activities and intensive agricultural operations. Second is a re-examination of what kinds of agricultural activities should be protected. Agriculture can no longer be treated as an innocuous and homogeneous activity. Current RTF standards that require conformity with accepted agricultural practices must be replaced with those of *reasonable* agricultural practices.

The industrialization of agriculture has been accompanied by the financialization and corporatization of agricultural operations.[99] The idea that some of the largest corporations in Canada and the US should and can benefit from the same kinds of protection from liability suits as individual subsistence farmers lacks currency. Early justifications for RTFs are reflective of the principles of agricultural exceptionalism. Exceptionalism, however, is inconsistent in an industrial context. If RTFs are to become more than a financial subsidy for industrial manufacturers, they will have

99 See Jennifer Clapp, "Financialization, Distance and Global Food Politics" (2014) 41:5 J Peasant Studies 797; Jennifer Clapp & Doris Fuchs, "Agrifood Corporations, Global Governance, and Sustainability: A Framework for Analysis" in Jennifer Clapp & Doris Fuchs, eds, *Corporate Power in Global Agrifood Governance* (Cambridge: MIT Press, 2009) 1.

to provide more—not less—protection to family farmers and residents over developers and commercial farmers.

This historical overview of RTFs is not meant to suggest that the traditional diversified family farms that preceded industrialization were harmless. Nevertheless, large-scale concentrated crop or intensive livestock operations have the potential to cause more widespread environmental and health hazards, while disrupting the vitality of local rural economies. Moreover, the cost of this damage is borne not by the industry but by the rural communities and ecosystems that host these developments. One early example of drawing legislative distinctions between corporate and family operations was the development of a series of anti-corporate farming statutes in the US during the 1980s. In total, nine Midwestern states prohibited most corporations from the ownership of farms and agricultural land.[100] Oklahoma and Nebraska were perhaps the most extreme examples, for they actually amended their constitutions in such a way that they forbade corporations from owning farms.[101] The idea behind anti-corporate farming statutes is that corporatized and industrial farming has negative cultural consequences and contributes to the loss of traditional rural culture.[102]

The ability of legislatures to draw distinctions between agricultural activities on the basis of modes of ownership, and the size and scale of the operations, suggests that it would also be possible for similar distinctions to be made to RTFs in Canada. Further support can be found in Australia, where the legislature recognized that the strong "existing use" provisions in their legal system wrongly afforded equal protection to the fundamentally distinct methods of traditional and intensive agriculture. In light of the more serious environmental impacts of intensive agricultural production, legal changes were mandated at the municipal and state levels resulting in the creation of a separate legal regime for intensive agricultural operations.[103]

One design question that remains unanswered is whether the creation of parallel regimes is sufficient, or if the solution is really to eliminate all forms of liability protection for intensive operations. In order to reconcile

100 Brian F Stayton, "A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes" (1991) 59:3 UMKC L Rev 679 at 679.

101 Phillipson & Bowden, *supra* note 8 at 418.

102 *Ibid* at 417. This distinction between large-scale and small-scale farming is one that Reinert sees as being between groups with a fungible interest in the property and those with a property-for-personhood interest. See Reinert, *supra* note 5 at 1736.

103 Phillipson & Bowden, *supra* note 8 at 419.

the policy goals of protecting agricultural production and the actual needs of agricultural actors, it may be that rather than fully excluding industrial actors from the realm of protection of RTFs, these actors should instead be held to a higher standard of care under nuisance liability. Under this model, small-scale and artisanal farmers would be shielded from liability using a fault-based approach to the law of nuisance, while larger commercial operations would be held to the lower standard of unreasonable interference.

The creation of parallel regimes for traditional and industrial agriculture is based partly on the reality that agricultural activities are now composed of a wide range of actors who may be more or less in need of the protections offered by RTFs. However, beyond the identity of the different actors, the concerns of Australia and the Midwestern states that enacted anti-corporate farming statutes emphasize that any effective reforms to RTFs must also address the nature of the agricultural activities that are being protected. Currently, farmers enjoy protection under RTFs unless they are in breach of industry standards. These standards are not "what a 'reasonable person' in the circumstances *ought* to have done" but rather "what the 'average farmer' in the circumstances would *usually* do."[104] Given the negative consequences of current modes of agricultural production, a more appropriate standard for shielding farmers from liability might be a focus on sound, sustainable, or reasonable agricultural practices.[105]

Limiting the scope of RTFs on the basis of *what* farmers are doing rather than *who* is engaging in the agricultural activity would ensure that only reasonable methods of production are shielded from nuisance liability. For example, in 1997, the Kentucky Attorney General, Albert Chandler, issued an opinion on whether the *Kentucky Right to Farm Act* prohibited counties from regulating industrial-scale hog operations.[106] The purpose of the statute was "to protect existing farms from being regulated or litigated out of existence by encroachment of suburban areas."[107] Commenting on the value of such a legislative purpose, Chandler stated:

> We are in total sympathy with the motives that impelled the original adoption of the act in 1980. Throughout the recorded history of Kentucky, and indeed even before that, the word "farm" has been synonymous with

104 Kalmakoff, *supra* note 16 at 243 [emphasis in original].

105 *Ibid* at 244.

106 See US, Kentucky Attorney General, *Whether KRS 413.072 Prohibits Counties from Regulating Industrial-Scale Hog Operations*, (OAG 97-31) (Frankfort, KY: 1997).

107 *Ibid* at 2.

> "small farm" or "family farm." Like ancient heirlooms our farms deserve protection from the forces tending to break that which is irreplaceable. If a farm was begun far from the madding crowd, its inhabitants should be allowed to keep the noiseless tenor of their way though a city spring up around them.[108]

However, according to the state law, agricultural operations had to be performed in a reasonable and prudent manner customary among farm operators. Chandler's opinion was that the practice of industrial-scale hog farming was not reasonable, prudent, or customary—a conclusion supported by significant community opposition coming just as much from farmers as other residents. He concluded that an intensive hog operation is not an agricultural resource to be protected; it is an industrial process that generates industrial waste and should be regulated as such.[109]

In the US, RTFs have evolved in recent years to consider non-traditional farming activities such as direct marketing,[110] have become more amendable to the utilization of alternative dispute resolution,[111] and have seen their protections strengthened in a movement to constitutionalize the right to farm at the state level in several jurisdictions.[112] Canadian RTFs, over the same period, have evolved from a relatively blunt nuisance-barring instrument to a more complex administrative regime that aims to resolve nuisance and land-use conflicts with a more flexible set of procedures and remedies than the traditional common law provided. In the current Canadian context, given the importance of the environmental, economic, and social interests engaged by right to farm, greater transparency in these decision-making processes is warranted. Public reporting of administrative decisions related to RTFs would increase public confidence in these procedures and would contribute to a body of knowledge surrounding current farm practices.

108 *Ibid* at 5.

109 *Ibid* at 9.

110 See Pifer, *supra* note 5 at 712–17.

111 See Moroni, *supra* note 9.

112 Constitutional amendments have been passed in North Dakota (ND Const art XI, § 29) and Missouri (MO Const art 1, § 35), while similar efforts have been defeated in Nebraska, Indiana, and Oklahoma: see Overstreet-Adkins, *supra* note 10; Weil, *supra* note 63 at 207.

VII. CONCLUSION

RTFs emerged in an era when policies promoting intensive agricultural production were clashing with social and environmental concerns about what constitutes sustainable farming practices. There are certainly advantages to moving land-use conflicts out of the court system and towards administrative boards that have greater expertise in agricultural disputes and a more flexible range of powers with respect to remedies and dispute resolution. However, this paper has highlighted several normative and procedural concerns with RTFs in Canada as they currently exist.

According to Gary Blumenthal, president and Chief Executive Officer of World Perspectives Inc., a consulting firm specializing in the food industry, countries with fewer farmers and more large-scale industrial operations are better off, and government policy should provide agricultural subsidies on the basis of productivity, not romantic views of what agriculture once was.[113] Nostalgia for a pastoral model of agriculture, he argues, should not interfere with development, especially when the latter brings with it increased productivity, quality control, and economies of scale. However, agricultural policies intent on maximizing production at any cost are equally flawed. The "Farm of the Future" illustration in the 1970 issue of National Geographic was simply another utopic vision of agriculture that failed to materialize. The true costs of agricultural industrialization have been much more unpleasant.

When RTFs were introduced in Canada, neither the federal nor provincial governments recognized a formal distinction between agri-business and intensive livestock operations on the one hand, and farming on the other.[114] Even today, as the federal government develops its national food policy, little attention has been given to the question of who should be producing our food and according to what methods.[115] We are not the first to flag some of the problems underlying RTFs and the barriers they pose to the development of more sustainable methods of agricultural production

113 Pawlick, *supra* note 71 at 6.

114 Phillipson & Bowden, *supra* note 8 at 425.

115 See e.g. Food Secure Canada, *Building a Healthy, Just and Sustainable Food System: Food Secure Canada's Recommendations for A Food Policy for Canada*, (Policy Brief), (Montreal, FSC, 2017), online (pdf): *Food Secure Canada* <www.foodsecurecanada.org/sites/foodsecurecanada.org/files/attached_files/policy_brief_a_food_policy_for_canada_sept_28_by_fsc.pdf> [perma.cc/E4ZD-HZ2F]; Canadian Federation of Agriculture, "A Food Policy for Canada: Finding Common Ground" (7 July 2017), online (pdf): *Canadian Federation of Agriculture* <www.cfa-fca.ca/wp-content/uploads/2018/01/CFA-NFS-Discussion-document_FINAL2.pdf> [perma.cc/8UDD-ZGP7].

in Canada. Given the complexity and public interest inherent in legislation that aims to reconcile food production, land use, and environmental welfare, not only greater attention, but also greater transparency regarding the meaning of the right to farm in Canada ought to be essential components in the development of Canada's national food policy.