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Submission to the Ministry of Agriculture, Food and
Rural Affairs

*Comments on The Proposed Regulatory Provisions:
Security from Trespass and Protecting Food Safety
Act, 2000*

Canadian Civil Liberties Association

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Canadian Civil Liberties Association (CCLA)

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national charity, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

Overview

The CCLA makes this written submission to the Ministry of Agriculture, Food and Rural Affairs regarding the proposed regulations for the *Security from Trespass and Protecting Food Safety Act, 2020* [the “Act”]. As highlighted in the CCLA’s previous submissions to the Standing Committee on General Government on Bill 156, the CCLA expresses concern that the *Act* - and now the proposed regulations - may have a chilling effect on freedom of expression and freedom of the press. CCLA has been a staunch defender of freedom of expression since its founding over fifty years ago, recognizing that robust protection for freedom of expression is the cornerstone of a free and democratic society.

We recognize the Government of Ontario’s efforts to mitigate concerns about restricting free expression by providing limited exemptions for journalists and whistleblowers from certain provisions of this law, and its acknowledgment of the important roles that both groups play within society. However, the CCLA is concerned that these exemptions, as currently drafted, are too narrow and do not sufficiently protect journalists and whistleblowers or enable them to carry out their important roles without facing the risk of penalties for contravening the *Act*.

The CCLA also notes that “harm” is so broadly defined that it could capture a variety of activities that do not fit within the government’s stated goals of protecting farm animals from exposure to disease and stress; preventing the introduction of contaminants into the food supply; and protecting the safety of farmers and drivers of vehicles transporting farm animals. This breadth will have a chilling effect on free expression, particularly for journalists, whistleblowers, activists and protesters, who play important roles in society by bringing attention to issues that might otherwise fly under the radar, such as unsafe working conditions and animal mistreatment.

A. Exemptions for Journalists and Whistleblowers are Too Narrow

The proposed definition of “journalist”, unlike the definition contained within the *Journalistic Sources Protection Act, 2017*, requires journalism to be the person’s primary means of earning a living and fails to explicitly include people who assist journalists. Whether journalism is a

person's primary means of earning a living does not appear to be relevant to protecting food safety and farmers. If two journalists working on a story complied with biosecurity measures and did not cause harm to obtain information for the story, but one was a part-time worker with an alternative means of earning a living, only the full time journalist would enjoy the exemptions from portions of sections 5 and 14(2). For example, if the two journalists conducted an undercover exposé on unsafe working conditions within an animal protection area and gained access to the area under false pretenses, one would be protected, while the other would be in contravention of the *Act*. This is an absurd outcome that does nothing to further the goals of the *Act*.

The proposed definition for "whistleblower" requires the person to be a *bona-fide* employee, but does not elaborate on what this means. What constitutes a *bona fide* employee, and how are such employees distinguished from other (presumably non *bona fide*) employees? Would this preclude an activist, who applied for a job with the intent of uncovering animal abuse and who did not directly or indirectly cause such abuse, from enjoying the whistleblower exemptions?

The requirement that whistleblowers "promptly" report issues to the appropriate authorities, in addition to being vague, fails to recognize the significant barriers to reporting that whistleblowers face and the fact that it may take some time for an individual to determine whether there is a problematic issue to report. Moreover, whistleblowers fear, and are often subject to, reprisals when they blow the whistle. They should not lose the protection of being exempt from this legislation because they spent time considering whether they could afford potential reprisals and, therefore, did not report the issue promptly enough. This point is particularly important in the context of the agricultural sector, which employs migrant workers, who are often vulnerable and who may fear speaking out against their employer.

The requirement for both journalists and whistleblowers to not cause "harm" to obtain the information is also problematic, as harm is defined very broadly. While this will be discussed in further detail below, the CCLA wishes to highlight the risk that whistleblowers and journalists will be excluded from the exemptions, due to the breadth of the definition. In addition, the requirement that the whistleblower not cause the harm that they are reporting fails to account for vulnerable workers who often have little choice but to comply with their employer's instructions and subsequently report an issue. This should be amended so that whistleblowers are only excluded from protection if they caused harm by acting on their own accord or contrary to the employer's instructions.

Finally, it is unclear why the journalist and whistleblower protections only apply to certain portions of section 5, and not section 6 regarding the transportation of farm animals. If a journalist took a photograph of animals in transport for a story, could it constitute prohibited indirect physical contact? If a whistleblower provided food or water to animals who were transported in inhumane conditions, should they not be protected?

The CCLA encourages the government to broaden the scope of the exemptions.

B. The Definition of “Harm” is too Broad

While the government has stated that it respects the rights of individuals to participate in lawful protests and advocacy activities so long as they do not have the potential to cause harm, “harm” is defined so broadly that it could capture many activities associated with protest and activism. The Ministry’s proposed definition of “interact” does little to address the concerns the CCLA raised in its previous submission to the legislative committee, as we believe that taking a photograph of an animal may still be construed as “interacting” with an animal, notwithstanding that it poses no risk to the animal’s safety or the safety of the food supply.

Because the Ministry is considering defining “interact” to include acting in a way that could be reasonably expected to create a situation in which harm is likely to occur, and because harm is defined to include emotional injury and undue stress, it is conceivable that a photograph of animal mistreatment could cause emotional injury or undue stress to someone viewing the photograph. Seeing an activist taking a photo of animal abuse could also cause emotional injury or undue stress to the farm owner or truck driver, as they may fear the consequences of such a photo being publicized. Finally, if an activist’s photograph exposed a contravention of food safety rules and the farm was subjected to regulatory fines, this could constitute financial injury and expose the activist to liability under the *Act*.

As noted above, in order for journalists and whistleblowers to enjoy the exemptions contained within the act, they must not cause any harm to obtain the information that is the subject of the story or report. The broad definition of harm will have a chilling effect on the exercise of free expression and the freedom of the press, which are fundamental freedoms in our society and entrenched in the Constitution. An owner of a farm or motor vehicle transport company, for example, may feel “undue stress” or “emotional injury” as a result of being the subject of a journalist’s investigation on unsafe labour practices. This would expose the journalist to liability under the *Act*.

Finally, the Minister is considering including “harm” as an aggravating factor that would increase penalties for a person found guilty of committing an offence under the *Act*. Because harm is so broadly defined, as illustrated by the examples above, not only could journalists, whistleblowers and activists face penalties under the *Act* for exercising their rights to free expression, such penalties may be increased, which will further chill expression. The definition of “harm” should be considerably narrowed.

Conclusion

The CCLA submits that the proposed regulation’s definition of harm is so broad that it will capture activity that does not impact the safety of farmers, drivers or the food supply, and that the exemptions for whistleblowers and journalists are so narrow that many journalists and

whistleblowers will be excluded from protection. This will have a chilling effect on freedom of expression and freedom of the press, both of which are protected pursuant to section 2(b) of the *Canadian Charter of Rights and Freedoms*. As highlighted in the CCLA's previous submission, the agricultural sector is increasingly the subject of interest and attention by Canadians who are concerned about its impact on climate, the working conditions of often vulnerable migrant workers, and the treatment of animals. The proposed regulations do not sufficiently protect journalists, whistleblowers and activists that do not compromise safety or biosecurity, who wish to shed light on these issues.