

# An Analysis of Bill 16, *The Farm Practices Amendment Act*

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C H R I S T A I T

## I. BACKGROUND

In the past decade, all provinces except for Newfoundland have enacted some form of legislation to protect farm practices from nuisance litigation.<sup>1</sup> Such legislation is often referred to as 'right to farm' legislation. Manitoba enacted *The Farm Practices Protection Act*<sup>2</sup> in 1992 to protect farm practices from common law torts of nuisance. Under the *Act*, well-managed farms that do not pollute or threaten public health or safety are granted immunity from nuisance lawsuits. According to s. 2(1) of the *Act*, farm operations must not violate *The Environment Act*<sup>3</sup>, or *The Public Health Act*<sup>4</sup>, or a local land use control law. The *Act* also states that no nuisance action can commence until at least 90 days after the plaintiff has applied to the Farm Practices Protection Board for a ruling.<sup>5</sup> Since right to farm legislation emerged, there have been no agricultural nuisance cases reported in Canada.<sup>6</sup>

In a private nuisance case, courts would have to decide whether the defendant's use and enjoyment of his land interfered with the plaintiff's reasonable use and enjoyment of their property.<sup>7</sup> Such cases normally needed property damage, or non-material discomfort, annoyance, or

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<sup>1</sup> Jonathan Kalmakoff, "The Right to Farm: A survey of Farm Practices Protection Legislation in Canada" (1999) 62 *Saskatchewan Law Review* 225 at 226 [Kalmakoff].

<sup>2</sup> S.M. 1992, c. 41—Cap. F45, as am. by Bill 16, *The Farm Practices Protection Amendment Act*, 2d Sess., 37<sup>th</sup> Leg., Manitoba, 2001 (assented to 6 July 2001) [the *Act*].

<sup>3</sup> S.M. 1987-88, c. 26—Cap. E125.

<sup>4</sup> R.S.M. 1987, c. P210.

<sup>5</sup> The *Act*, *supra* note 2 at s. 9(5).

<sup>6</sup> Kalmakoff, *supra* note 1 at 226.

<sup>7</sup> *Ibid.* at 228.

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inconvenience of a substantial nature to succeed. According to common law, nuisance could be odours, flies, rodents, vibrations, dust, smoke, noise, lights, weeds or bees.<sup>8</sup> The court would examine the severity of the interference, the character of the location, the sensitivity of the plaintiff and the utility of the enterprise in making a decision. The frequency of the nuisance, and the intensity, duration and type of harm would also be considered.<sup>9</sup>

To find a public nuisance, interference with a public right common to all members of the community, such as navigation, fishing or public health and safety, or with private rights of an unusually large number of persons, would have to be found.<sup>10</sup>

In such cases, making reasonable use of your own property would not serve as a defence. Having agricultural property licensed or having obtained a certificate of compliance would not protect the operation either. Damages could be awarded, or an injunction issued. Such damages or restrictions on operations could be harmful to an operation.<sup>11</sup>

Most provinces have guidelines or codes of practice to allow a board, in Manitoba's case, the Farm Practices Protection Board, to determine what a normal or accepted practice is. These guidelines change the criteria from what a 'reasonable person' would do under common law to what an 'average farmer' does. As one commentator noted, "...it would appear that accepted agricultural practice is an inherently flexible notion that may vary according to context, granting tribunals and courts broad discretion in interpreting right to farm statutes."<sup>12</sup>

Section 1 of Manitoba's *Farm Practices Protection Act* defines a practice as 'normal' when it is conducted:

[I]n a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, including the use of innovative technology used with advanced management practices, and in conformity with any standards set out in the regulations.

'Normal farm practice' may be too narrow a definition to protect rural Manitobans from undesirable nuisance. An operation may be outmoded, unreasonable, inefficient or unnecessary but still 'normal' under the legislation. Some analysts have argued that farm practices protection legislation should only be used to authorize farm practices that are

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<sup>8</sup> *Ibid.* at 228–229.

<sup>9</sup> *Ibid.* at 229.

<sup>10</sup> *Ibid.* at 230.

<sup>11</sup> *Ibid.* at 231–232.

<sup>12</sup> *Ibid.* at 243.

‘sound’ rather than merely ‘normal’. Other values that might be incorporated into the guidelines could be greater emphasis on site location and maintaining ecosystem stability.<sup>13</sup>

According to Gord MacKenzie of the Farm Practices Protection Board, the idea for the amendments to *The Farm Practices Protection Act* came from within the Department of Agriculture and Food within the last year. The Department worried that orders under the *Act* could be fixed and unchangeable; “it seemed to us that even criminals who get a life sentence get out either in the faint hope clause or twenty-five years. Why should an agricultural operation be penalized from here to eternity?”<sup>14</sup> Mr. MacKenzie noted that the impetus for changes to the *Act*:

[W]as really triggered by the fact that when the board issues an order for an agricultural operation to modify its practice, that’s sort of like a life sentence, and then if you look under the definition of normal farm practice which involves the use of innovative technology with advanced management practices there’s no way of going back on that order.<sup>15</sup>

## **II. INTRODUCTION OF BILL 16, *THE FARM PRACTICES PROTECTION AMENDMENT ACT***

*The Farm Practices Protection Amendment Act* was sponsored by the Minister of Agriculture, Rosann Wowchuk, and was introduced in the Legislative Assembly for first reading on 2 May 2001. Although there has been steady coverage of issues surrounding intensive livestock operations in general, there was little or no media attention paid to the introduction of these amendments.

The amendments included the repeal of s. 3(4) of *The Farm Practices Protection Act* which had limited the terms of board members, the addition of a new section clarifying the board’s ability to manage its affairs and indicating that any officer of the board can sign board documents, and the addition of five parts to s. 13 allowing the board the authority to review, change, revoke or replace an order.

### **A. Second Reading**

During debate on second reading on 19 June 2001, *The Farm Practices Protection Amendment Act* stood in the name of the opposition member for Lakeside, Harry Enns. The opposition member for Emerson, Jack Penner, and Harry Enns were the only members to speak on the bill.

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<sup>13</sup> *Ibid.* at 244.

<sup>14</sup> Interview of Gordon MacKenzie (16 November 2001) [MacKenzie].

<sup>15</sup> *Ibid.*

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Government members were conspicuously absent from speaking on the bill throughout the debate.<sup>16</sup>

Mr. Penner, the opposition Agriculture critic, explained that *The Farm Practices Protection Act* was designed to “ensure that farmers would be able to operate in rural communities without undue intervention by those that have no interest in agriculture.”<sup>17</sup> He went on to outline the problem as he saw it:

If another person moved into that agricultural area without having any real interest in operations in that area, that they would make their living somewhere else, but they liked to live out in the country, that this legislation, this farm protection legislation as they called it, would be put in place to ensure that farmers, in fact, could do business as they must either to raise crops or livestock or whatever else farmers chose to do.<sup>18</sup>

Mr. Enns also framed the problem as one of overly sensitive urban migrants moving into rural communities and then complaining about the smell of farms. He suggested that “with a mobile population, people wishing to live in the countryside, and they are welcome if they want to come and live in the countryside, but not in a trivial way to seriously hinder agriculture.”<sup>19</sup>

The Conservatives seemed to be saying that the legislation was designed to fight off an influx of city folks who would inherently complain about farm odours. However, Gord MacKenzie, who works for the Farm Practices Protection Board, indicates that most of the complaints that the board deals with are from long-term residents—often other farmers who have lived in the area for generations—rather than recent arrivals from the big city. Mr. MacKenzie could only think of one case in which the complainants were recent arrivals to a community.<sup>20</sup> The concern Mr. Penner had about those without a real interest in rural areas meddling in those areas is legitimate, but the concern should apply equally to investors who help to establish large hog barns in communities where they do not live.

Mr. Penner praised The Farm Practices Protection Amendment Act, saying:

I think the fast-changing world that we live in and the fast-changing world that the agricultural community is forced into dealing is an indication, and the Minister needs to be congratulated in ensuring that there is a process put in place that will be different tomorrow than it was 10 years ago when this board

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<sup>16</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LI No. 49 (19 June 2001) [*Debates* (19 June 2001)] at 3058–3062.

<sup>17</sup> *Ibid.* at 3059.

<sup>18</sup> *Ibid.* at 3060.

<sup>19</sup> *Ibid.* at 3061.

<sup>20</sup> MacKenzie, *supra* note 14.

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was first put in place, and that from time to time we need to make quick decisions and, even when orders change that the board be allowed to make those kinds of quick decisions.<sup>21</sup>

He noted that the original legislation did not foresee that circumstances could change and require changes in orders. Mr. Penner pointed out that environmental laws could change, or parameter distances protecting a yard site could change and there would be a need for orders under the *Act* to change as well. The Farm Practices Protection Board indicates that it is now the only 'right to farm' board with such a power.<sup>22</sup>

Mr. Enns, a former Agriculture Minister, suggested that the legislation and amendments were necessary to accommodate growth in the livestock sector in Manitoba. He argued that Manitoba had entered a new era after all grain transportation subsidies were ended in 1995. He noted that he would "envisage more dairy farming, more poultry farming, more livestock of all kinds and description, not just the beef and the pork that are the principal players."<sup>23</sup>

Mr. Enns also argued that the Farm Practices Protection Board's primary purpose is to protect farm operations: "[T]here should be no confusion about it. This is not a neutral board that comes to make a judgment on a quarrel that is taking place between two neighbours or something like that. If in doubt, this board sides with the farmer."<sup>24</sup> Mr. Penner worried that there may be a danger that the Minister of Agriculture and Food might appoint inappropriate board members "not always in sync with the agricultural community" or with improper agendas.<sup>25</sup>

### **B. Committee Stage**

At the Municipal Affairs Committee hearings on *The Farm Practices Protection Amendment Act* on 21 June 2001, two organizations made presentations, both supporting the existing legislation and the amendments being proposed. Commenting on the *Act* itself, the association representing Manitoba hog producers, Manitoba Pork, stated: "we believe the *Act* is fulfilling its purpose and doing it well."<sup>26</sup> The representative from Manitoba Pork argued that the *Act* was part of

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<sup>21</sup> *Debates* (19 June 2001), *supra* note 16 at 3059.

<sup>22</sup> MacKenzie, *supra* note 14.

<sup>23</sup> *Debates* (19 June 2001), *supra* note 16 at 3061.

<sup>24</sup> *Ibid.* at 3062.

<sup>25</sup> *Ibid.* at 3059.

<sup>26</sup> Manitoba, Legislative Assembly, *Standing Committee on Municipal Affairs*, Vol. LI No. 1 (21 June 2001) at 3.

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good environmental stewardship in the industry along with the annual manure management plans that larger operators are required to file under the *Environment Act*. Manitoba Pork supported the intention to give the Farm Practices Protection Board the authority to amend previously issued orders under the *Act*: “[I]t is our understanding that such amendments would take place to enable the farmer to improve his or her operation by adopting new technology or advanced management practices.”<sup>27</sup>

Manitoba Pork also suggested that the board use its good judgment in changing, replacing, or revoking orders to conform to the *Act* and argued that the economic impact of a change on an operation should be a fundamental consideration: “[H]og farmers are already being responsible stewards and need not be saddled with additional excessive expenses.”<sup>28</sup> In regards to other proposed amendments, Manitoba Pork indicated that it was in full support of the changes.

Don Dewar, president of Keystone Agricultural Producers, made a presentation in support of the *Act*.<sup>29</sup> Noting that Manitoba farmers have been encouraged by the province to diversify into livestock operations, Mr. Dewar observed that dissension has resulted in rural Manitoba. If requests for changes to an order came from the farm community, Mr. Dewar argued that they would be appropriate and would have a positive effect on their industry. However, the organization was concerned that the wording of the amendments could cause unwarranted complaints “by uninformed persons without any scientific basis.”<sup>30</sup> Mr. Dewar noted that a producer could be placed in a situation where he or she has adopted expensive technology only to be forced to replace the technology because an order was changed or revoked. In return for their support of the amendments, the organization asked that emphasis be shifted to protecting the producer and that a non-refundable application fee of \$500 for those asking the board to consider revoking or changing an order be put in place so that frivolous complaints could be discouraged. Presumably, such a fee would also apply to an operator, however, which could be a financial burden on a producer attempting to adopt new technology. The concept of such a fee was abandoned.

Mr. Dewar suggested that it may be preferable to have the amendments worded in such a way that only operators could request a change in an order, or so that other parties would be limited in their ability to request a change in an order. Gord MacKenzie of the Farm Practices Protection Board acknowledged that the amendment could allow opponents of an

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 5-6.

<sup>30</sup> *Ibid.* at 6.

operation to ask for a change in an order: “[P]roducers originally thought boy you’re opening up a Pandora’s box that will bring the complainants back again and we said yes, yes it will but the board still has the right to make that determination.”<sup>31</sup>

### **C. Third Reading and Royal Assent**

On 25 June 2001, the Municipal Affairs Committee reported to the Legislative Assembly on *The Farm Practices Protection Amendment Act*. No amendments to the *Act* were proposed. *The Farm Practices Protection Amendment Act* was passed on 27 June 2001 and received Royal Assent on 6 July 2001.

## **III. DEVELOPMENT OF THE HOG INDUSTRY IN MANITOBA**

In 1996, the Conservative government changed provincial legislation to assist in the expansion of the hog industry. The monopoly over sales that Manitoba Pork held was eliminated after 34 years. Under the monopoly system, smaller producers had an equal footing with large operations as all hogs of equal quality brought an equal price. Large operations were unable to work out special deals with processors. At the time, Mr. Harry Enns said “if we want to be a part of that growing opportunity in pork exports, and not simply leave it to the Americans, then we have to have the kind of conditions that can tap into the virtually insatiable demand for pork.”<sup>32</sup>

There were countless meetings of hog farmers in 1996 protesting the government’s decision to take away their marketing power. The decision was extremely unpopular. “We really need our marketing board because it doesn’t matter how small you are, you get paid on quality and you can have equal access to the market place,” producer Karl Kynoch complained at a meeting.<sup>33</sup> It was clear that the priority for farmers was market power, not protection from possible nuisance complaints.

As opposition Agriculture critic at the time, now Agriculture and Food Minister, Rosann Wowchuk, complained that the end of the Manitoba Pork monopoly “will open the door for a vertically integrated system like the one in the U.S. where large farms have displaced family farms, and producers who were once independent are now employees of large firms.”<sup>34</sup> The NDP had positioned itself against the rapid expansion of

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<sup>31</sup> MacKenzie, *supra* note 14.

<sup>32</sup> Ingeborg Boyens, *Another Season’s Promise: Hope and Despair in Canada’s Farm Country* (Toronto: Penguin, 2001) at 218 [Boyens].

<sup>33</sup> *Ibid.* at 226.

<sup>34</sup> *Ibid.* at 224.

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the hog industry. They said they opposed grants to corporations and mega barns. After gaining power in the next election, however, the party appeared to abandon its concerns.

Since the monopoly ended, hog prices are no longer disclosed so producers have no idea what the value of their product may be. Since 1990, the number of hog operations in Manitoba dropped off by 50 per cent from 3 150 to 1 450, and the operations that have emerged are much larger, having tripled to 1 300 hogs on average.<sup>35</sup>

In the late 1990s, Maple Leaf was promised \$11 million in subsidies from the province to open a slaughtering plant in Brandon, with the city promising to contribute an additional \$8.5 million to upgrade water and waste systems to accommodate the plant. The company was also promised that it would be exempted from Clean Environment Commission hearings in spite of the pollution threat to the Assiniboine River.<sup>36</sup> Once in power, the NDP promised \$9 million to Schneiders to establish a new slaughter plant in Winnipeg, with an additional \$4.6 million committed for sewer upgrades.<sup>37</sup>

The government wanted to double hog production to 5.2 million by 2000, and reached that goal. The ultimate dream was to double production again to 10 million hogs. In January 2001, however, Maple Leaf announced it was buying-out Schneiders, closing one of the Winnipeg plants and shelving plans for the major expansion.<sup>38</sup> The province went from monopoly selling in the hog industry to monopoly buying. The industry in Manitoba continues to move towards vertical integration.

### **A. Livestock Stewardship Panel Report**<sup>39</sup>

While refusing to hold Clean Environment Commission hearings into the expansion of the hog industry, the NDP government appointed a three-person panel to hold hearings and report on the economic, social and environmental aspects of the hog industry. Released in December 2000, the Livestock Stewardship Panel Report recommended that the province have a veto over the establishment of intensive livestock operations, rather than leaving decisions to municipalities.<sup>40</sup> The Panel

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<sup>35</sup> *Ibid.* at 240.

<sup>36</sup> *Ibid.* at 228.

<sup>37</sup> *Ibid.* at 230.

<sup>38</sup> *Ibid.* at 241.

<sup>39</sup> Ed Tyrchniewicz *et al.*, *Finding Common Ground: Sustainable Livestock Development in Manitoba* (Winnipeg: Livestock Stewardship Panel, 2000) [Panel Report].

<sup>40</sup> *Ibid.* at 24–25.

Report also proposed that adequate resources be put into monitoring and enforcement so that current legislation actually has some meaning.<sup>41</sup> The only response from the province was to reject the proposal that intensive livestock operations be required to post performance bonds to cover the cost of any environmental mishap, as is required in the U.S.<sup>42</sup>

In the late 1970s, the provincial government asked the Clean Environment Commission to investigate the pollution problems related to intensive livestock operations. The Commission noted that most complaints being received about intensive livestock operations were in regard to odours, which were a nuisance, but not a risk to human health. The Commission recommended that proper zoning and land use regulations and guidelines for operations could prevent many of the problems.<sup>43</sup> Although almost two decades have passed since the Commission made its recommendations, the Panel Report noted that “it is apparent that progress since the 1979 CEC report has been slow.”<sup>44</sup>

Some presenters to the Livestock Stewardship Panel suggested that intensive livestock operations might operate more responsibly if the owners were required to live on the same property as the barn.<sup>45</sup> Some of the intensive livestock operations being built in Manitoba are by investors from outside of the communities. A Dutch farmer recently opened an operation north of Brandon and Korean investors started an operation north of Winnipeg. A company from Quebec and Ontario is planning a dozen barns in the Brandon area.<sup>46</sup> Investors are setting up barns in communities where others will have to live with the consequences.

The Panel Report also noted that the panel had difficulty obtaining basic information from the province about intensive livestock operations. The panel was surprised by the lack of information on how the hog industry was concentrated in the province: “[G]overnment is hard pressed to shape policies for the future while it lacks an overview of the present.”<sup>47</sup>

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<sup>41</sup> *Ibid.* at 32.

<sup>42</sup> Editorial Staff “Fightin’ over pigs” *Manitoba Co-operator* (15 November 2001) 4.

<sup>43</sup> Panel Report, *supra* note 39 at 10.

<sup>44</sup> *Ibid.* at 11.

<sup>45</sup> *Ibid.* at 16.

<sup>46</sup> Helen Fallding “A look at pigs in a poke: Experts provide facts in propaganda war over Manitoba’s booming hog industry” *Winnipeg Free Press* (15 August 2000) A8 [Fallding].

<sup>47</sup> Panel Report, *supra* note 39 at 23.

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The government's prolonged study of the Panel Report has allowed the industry to continue expanding without proper planning or regulation. As noted in the *Winnipeg Free Press*:

Investors are attempting huge hog barn construction projects which may be economic blessings for Manitoba or may be environmental curses. The government has no scientific basis for judging which should proceed, which should be modified and which should be forbidden. The public relies on the government to balance judiciously the economic benefits with the environmental damage. The government should rise to the occasion and not wait passively for someone else to settle the tough questions. ... It can and should ensure that Manitoba hog barns, when they are built or expanded, are located and designed so that they do not stop other Manitobans from enjoying the land, the air and the water of the province. The hog industry should be free to expand, but not at the expense of its neighbours.<sup>48</sup>

### IV. CURRENT CONCERNS

Typical hog operations now being established represent investments in the range of \$1 million to \$5 million, with 3 000 to 4 000 sows per barn, producing approximately 70 000 weanlings per year.<sup>49</sup> An individual hog produces 50 per cent more solid waste than a human. To be economically viable, the liquid manure held in lagoons must be spread within three to four kilometres of the barn.<sup>50</sup> Municipalities currently approve or reject operations based on technical advice from the provincial government.

According to the provincial guidelines, an operation can be established within 200 metres of a residence, with manure lagoons within 400 metres. Intensive livestock operations can be located within 1 600 metres of a town. These guidelines can be exceeded if the municipal government decides to increase them.<sup>51</sup> Up until a few years ago, it wasn't 'normal' to have a 4 000 animal barn operating in a farm community. Rural residents expected to tolerate a level of nuisance from other operations, but it is doubtful that they ever expected the level of nuisance that such operations can create. As long as an operation complies with set back regulations, however, the operation is considered normal.

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<sup>48</sup> Editorial Staff "High-end hog barns" *Winnipeg Free Press* (6 September 2001) A12.

<sup>49</sup> Martin Cash "Dynamic Pork opens second sow barn" *Winnipeg Free Press* (4 April 2001) B4.

<sup>50</sup> Fallding, *supra* note 46.

<sup>51</sup> Manitoba, *Farm Practices Guidelines for Hog Production in Manitoba* (Winnipeg: Department of Agriculture and Food, May 2001).

The majority of the cases that the Farm Practices Protection Board deals with are in regards to hog operations, and that is likely to remain the key focus of the board. Thirty-three of the fifty-three complaints that the board has dealt with since it was founded have been in regards to hogs. Most of the complaints that the board has dealt with in regards to hogs have resulted in orders to modify operations. Four cases that the board heard were dismissed, two were mediated and one order to cease operations was issued.<sup>52</sup>

According to Dr. Eva Pip, a toxicologist at the University of Winnipeg, the province has allowed barns to be located in inappropriate areas. She notes that there have been improperly controlled waste lagoons and holding cells, rotting exposed hog carcasses, improperly disposed waste, spills from lagoons into surface water, failures to maintain waste storage containers, spreading more waste than allowed on a limited acreage, and contamination of wells. Dr. Pip suggests that at least a dozen small aquifers in the Portage la Prairie and Oakville regions have been spoiled by the leaching of hog waste, and half a dozen wells in the Interlake have been contaminated.<sup>53</sup> These kinds of problems would suggest that at least some of the intensive livestock operations aren't operating in 'normal' ways at all.

The Rural Municipality of Harrison (80 km north of Brandon) held a referendum in November 2001 in which residents voted to limit livestock operations to 400 animals.<sup>54</sup> This was the first such referendum in western Canada. The Alberta government is drafting legislation that will give a provincial board final say to approve barns in spite of what municipalities may decide.<sup>55</sup> Such legislation may eventually come to Manitoba to protect the industry.

## **V. CONCLUSION**

Until the province can properly monitor and enforce its regulations and plan for the development of the industry, protecting all intensive livestock operations from nuisance litigation may not be in the public interest. If such operations were held responsible for the nuisance that they create, they may locate and operate more responsibly. Since the province encouraged largely unregulated growth in the industry, it may be appropriate for the province to pay compensation to those affected,

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<sup>52</sup> MacKenzie, *supra* note 14.

<sup>53</sup> Val Werier "Watching over our water" *Winnipeg Free Press* (24 September 1998) A12.

<sup>54</sup> Bill Redekop "Not hog-wild on big barns? Voters get say" *Winnipeg Free Press* (28 August 2001) A1.

<sup>55</sup> *Ibid.*

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or compensation for operations to be moved to more appropriate locations.

*The Farm Practices Protection Amendment Act* garnered little debate or public discussion precisely because it represented an incremental change to existing legislation. Whether or not the amendments passed would not mean that the Manitoba environment was saved or destroyed. The larger issue of intensive livestock production will likely continue outside of the Legislature.