Journal of Food Law & Policy

Volume 4 | Number 2 Article 8

2008

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Recommended Citation

Farnese, P. L. (2021). Canadian Food Law Update. *Journal of Food Law & Policy, 4*(2). Retrieved from https://scholarworks.uark.edu/jflp/vol4/iss2/8

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CANADIAN FOOD LAW UPDATE

Patricia L. Farnese[1]

INTRODUCTION

Provided below is an overview of developments in Canadian food law and policy in 2008.[2] This update primarily analyzes regulatory and policy developments by the federal government. This focus reflects the significance of federal activities in the food policy realm. As this is the first Canadian update to appear in the *Journal of Food Law & Policy*, it is appropriate to include a brief summary of the Canadian regulatory framework for food. The regulatory framework provides the necessary context to identify trends driving recent changes in Canadian food law and policy.

REGULATORY FRAMEWORK OVERVIEW

All levels of government are involved in monitoring how food is produced, processed and made available to consumers in Canada because agriculture, and thus food, is designated as an area of shared jurisdiction in s.95 of the Constitution Act, 1867.[3] When provincial and federal regulatory activities conflict, the doctrine of

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2. This update is current to November 30, 2008.

3. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s.95, which provides:
In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

paramountcy applies.[4] Provincial regulations give way to the federal regulations to the extent of the conflict.[5] Moreover, regulatory activities addressing human health concerns have been held to be within federal jurisdiction.[6] As a result, federal departments and agencies dominate the food policy realm in Canada.

The main purpose of Canada's federal regulatory framework for food is consumer protection, although facilitating trade in food products is also an important policy driver in Canada. The federal government's consumer protection efforts in the food sector are principally targeted at food safety, as it relates to human health and infectious disease control, and consumer fraud. The Food and Drugs Act (FDA)[7] and the Consumer Packaging and Labelling Act (CPLA)[8] are the key federal statutes regulating food in Canada, thus warranting specific mention.

The FDA has broad application. The FDA defines food as including "any article manufactured, sold or represented for use as food or drink for human beings, chewing gum, and any ingredient that may be mixed with food for any purpose whatever."[9] The FDA prohibits the sale of food that:

(a) has in or on it any poisonous or harmful substance;

(b) is unfit for human consumption;

(c) consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance;

(d) is adulterated; or

(e) was manufactured, prepared, packaged, or stored under unsanitary conditions.[10]

Furthermore, the FDA makes it an offense to "label, package, treat, process, sell, or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."[11] Food nutrition, composition and safety standards are contained in the volumes of regulations published pursuant to the FDA.

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4. Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization), 258 Sask. R. 243 (2004).

5. *See id.* ¶31.

6. RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Hydro-Quebec, [1997] 3 S.C.R. 213.

7. R.S. 1985, c. F-27 [hereinafter *FDA*].

8. R.S., 1985, c. C-38 [hereinafter *CPLA*].

9. FDA, *supra* note 7, §2.

10. *See id.* at §4.

11. *See id.* at §5(1).

The CPLA standardizes the packaging and content of labels required on pre-packaged food products sold in Canada. By standardizing this information, consumers are better able to compare the attributes and value of like products on the supermarket shelf. Moreover, consumers are protected against deliberate or inadvertent fraud by processors and retailers. Under the CPLA, it is an offense to make false or misleading representations on a food label[12] or to sell products that do not meet the packaging requirements or net quantity requirements outlined in the legislation.[13]

Food safety and quality standards, including nutritional standards, are established by Health Canada and enforced by the Canadian Food Inspection Agency (CFIA).[14] The CFIA also works with the recently created, federal Public Health Agency of Canada (PHAC) and provincial and local public health authorities to prevent, monitor, and respond to the food-borne infectious disease in Canada. In addition, the CFIA enforces food labeling and packaging standards established pursuant to CPLA. Finally, the CFIA is administered through Agriculture and Agri-Food Canada (AAFC) in recognition of the central role agriculture plays in food policy.[15]

FOOD SAFETY, INFECTION DISEASES AND OTHER HEALTH RISKS

The regulatory amendments to Canada's food safety regime introduced in 2008 are primarily a reaction to concerns arising from infectious diseases and other health risks potentially threatening the safety of Canadian food. Some of these changes have been responses to immediate health risks while others are a component of a plan of comprehensive reforms to Canada's food and consumer safety regime introduced by the current federal government.

RESPONSES TO IMMEDIATE THREATS

During 2008, the effectiveness of the Canadian food safety regime was tested a number of times. Interestingly, the threats came from both foreign and domestic sources. Policymakers were thus reminded of the importance of designing a food safety regime that is equipped to address local and global threats.

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12. CPLA, *supra* note 8, §7.
13. *See id.* at §§5,7.
14. CFIA, SCIENCE AND REGULATION WORKING TOGETHER FOR CANADIANS (2007), *available at* http://www.inspection.gc.ca/english/agen/broch/broche.pdf.
15. *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, §4.

Canada experienced its most acute food safety crisis in recent time during the summer of 2008. *Listeria monocytogenes* was found in ready-to-eat meat products distributed nationally. By the time the listeria outbreak had been contained, at least 20 people had been confirmed to have died as a result of consuming contaminated food.[16] Because the listeria outbreak is so recent, the effectiveness of Canada's food safety regime in responding to the crisis is still being evaluated. An independent investigation of the events contributing to the outbreak and the effectiveness of the government's response was ordered by Canada's Prime Minister and is expected to be released in the spring of 2009.

In the meantime, there is a report, confirmed by the CFIA spokesperson, that draft regulations concerning listeria testing protocols have been prepared by the CFIA.[17] It is believed that the new regulations would require that food plants begin to test surfaces, such as ceilings and floors near relevant food production lines for listeria as well as surfaces and equipment that come in contact with meat.[18] Positive tests can result in a quarantine of meat products, retesting of surfaces, random testing of food products, and the destruction of products if the presence of listeria is confirmed.[19] Meat processors would also be required to report recurring positive listeria tests to CFIA inspectors.[20] The same report also refers to the creation of a new food safety expert panel, although the CFIA has not yet confirmed the panel's creation.[21] It is unclear what the panel's role will be in the regulatory process governing food safety in Canada.

Similarly, the discovery of the chemicals melamine and cyanuric acid in milk products, especially infant formula, produced in China prompted a response from Health Canada and the CFIA. Health Canada and the CFIA responded to the melamine threat even though no contaminated products were known to have been imported into Canada. Based on current scientific understandings about the risk of melamine to human health, Health Canada imposed an interim standard of a maximum of 2.5 parts per million (ppm) for melamine and cyanuric acid in milk and milk-derived in-

16. Press release, PHAC, Listeria Outbreak (Oct. 17, 2008), *at* http://www.phac-aspc.gc.ca/alert-alerte/listeria/listeria_2008-eng.php.

17. *CFIA to launch new listeria testing protocols*, CBC News, Nov. 7, 2008 *available at* http://www.cbc.ca/canada/story/2008/11/06/listeria-regulations.html.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

gredients.[22] In addition, the acceptable level is reduced to 0.5 ppm for infant formula and sole source nutrition products such as meal replacement products.[23]

Furthermore, the CFIA began working with the Canada Border Services Agency to better monitor imported milk and milk products from China for the presence of excessive levels of melamine and cyanuric acid.[24] The CFIA also now requires all dairy ingredients and soybean meal imported for use in livestock feed from China, either directly or via a third country, to be tested for these chemicals.[25]

FOOD AND CONSUMER SAFETY ACTION PLAN

At the end of 2007, the Prime Minister of Canada announced the introduction of the Food and Consumer Safety Action Plan (FCSAP)[26] partly in response to increased food recalls.[27] The FCSAP outlined forthcoming changes to the existing food regulatory regime. These changes included new voluntary guidelines for labeling food as 'Made in Canada' or as a 'Product of Canada' and proposed amendments to the FDA, aimed at preventing food safety problems and better facilitating rapid responses to crises when they occur. In addition, the proposed amendments would increase penalties for contraventions of the Act.[28]

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22. Press Release, HC, The Government of Canada responds to reports of melamine in food products (Oct.3, 2008), *available at* http://www.hc-sc.gc.ca/fn-an/securit/chem-chim/melamine-eng.php.

23. Press release, CFIA, Notice to Industry: Food Products from China Containing Milk or Milk-derived Ingredients (October 6, 2008) *at* http://www.inspection.gc.ca/english/fssa/invenq/inform/chinmele.shtml.

24. *See id.*

25. Press release, CFIA, Imported Dairy Ingredients and Soybean Meal for Livestock Feed (Oct. 17, 2008) *at* http://www.inspection.gc.ca/english/anima/feebet/ind/chinmele.shtml.

26. GOVERNMENT OF CANADA, CANADA'S PROPOSED FOOD AND CONSUMER SAFETY ACTION PLAN (2007), *available at* http://www. healthycanadians.ca/alt_formats/pdf/01-P_440-ActionPlan_Pamphlet_eng_16.PDF.

27. Press Release, Prime Minister's Office, PM announces Canada's new Food and Consumer Safety Action Plan *at* http://www.pm.gc.ca/eng/media.asp?id=1941.

28. GOVERNMENT OF CANADA, CANADA'S PROPOSED FOOD AND CONSUMER SAFETY ACTION PLAN (2007), *available at* http:// www.healthycanadians.ca/alt_formats/pdf/01-P_440-ActionPlan_Pamphlet_eng_16.PDF.

Labeling

Canada does not have mandatory regulations requiring "Product of Canada" or "Made in Canada" labels on food products. Instead, voluntary guidelines are contained in the *2003* Guide to Food Labelling and Advertising.[29] Unlike the mandatory approach to country of origin labeling adopted in the U.S. Farm Security and Rural Investment Act of 2002,[30] recent amendments to Canada's labeling requirements have not changed their voluntariness. Instead, the Guidelines are intended as a reference guide for industry to ensure compliance with the FDA and the CPLA and will be used to assess the truthfulness of claims of Canadian origin on food labels and in other advertising.[31] Although the Guidelines are voluntary, misuse use of the terms "Product of Canada" or "Made in Canada" can result in a regulatory offense if the use of either term is misleading, as both the FDA and the CPLA prohibit false or misleading claims about food.[32] The Guidelines changes take effect on December 31, 2008.[33]

Under the new Guidelines, "Product of Canada" can be used to identify a food product when "all or virtually all major ingredients, processing, and labour used to make the food product are Canadian."[34] Ingredients comprising less that 2% of the food product will generally be viewed as minor or negligible ingredients and can be included in a food product labeled as a "Product of Canada."[35] The 2% threshold is consistent with regulations that generally allow ingredients comprising less than 2% of the final food product to be listed in any order at the end of the ingredient list on the food la-

29. CFIA, 2003 Guide to Food Labelling and Advertising, *available at* http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml [hereinafter *Guidelines*].

30. Farm Security and Rural Investment Act of 2002, *at* §282(a)(1).

31. *Guidelines, supra* note 29, §4.19.

32. FDA, *supra* note7, §5(1) and *CPLA, supra* note 8, §7(1).

33. CFIA, THE CANADIAN FOOD LABELLING INITIATIVE, *at* http://www. inspection.gc.ca/english/fssa/labeti/prodcan/prodcane.shtml (last modified July 15, 2008).

34. *Guidelines, supra* note 29, §4.19.1.

35. CFIA, Frequently Asked Questions on Product of Canada and Made in Canada Claims, *available at* http://www.inspection.gc.ca/english/fssa/labeti/prodcan/queste.shtml

bel.[36] Prior to this amendment, a 51% direct cost threshold governed "Product of Canada" claims.[37]

A "Made in Canada" claim is permitted when "the last substantial transformation of the product occurred in Canada" regardless of the origin of the product's ingredients.[38] The meaning of "substantial transformation" may be further defined in regulations such as the Meat Inspection Regulations.[39] The Guidelines also require the use of a qualifying statement to avoid consumer confusion, particularly when food products processed in Canada are primarily comprised of imported ingredients or a mix of domestic and imported ingredients.[40] In those circumstances, "Made in Canada with imported ingredients" and "Made in Canada from domestic and imported ingredients" claims must be used.

The Guidelines do not prohibit the use of other claims, for example "Processed in Canada" or "Canned in Canada," provided they are truthful and not misleading.[41] The preferred claims, however, are "Made in Canada" with the appropriate qualifying statement and "Product of Canada,"[42] to allow consumers to identify food made in Canada. In addition, subsection 4.19.4 of the Guidelines reinforces that the use of either the Canadian Flag or Coat of Arms without permission violates subsection 9(1) of the Trade-marks Act.[43]

Bill C-51

Most of the reforms promised in the FCSAP were to be implemented through the passage of Bill C-51 into law.[44] Bill C-51, however, was not passed before the House of Commons was dissolved on September 7, 2008 for the recent federal election.[45] Therefore,

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36. *Food and Drug Regulations*, C.R.C., c. 870, §S.B.01.008(4) [hereinafter FDR].

37. Government of Canada, "The Canadian Food Labelling Initiative" "Defining "Product of Canada" and "Made in Canada" for Food Labels and Advertising" (Discussion Paper) May 2008. Available online: http://www.healthycanadians.ca/prrp/dp-dt_e.html

38. *Guidelines, supra* note 29, at §4.19.2.

39. *See id.*

40. *See id.*

41. *See id.* at §4.19.3.

42. *See id.*

43. *Trade-marks Act*, R.S., 1985, c. T-13.

44. Bill C-51, *An Act to amend the Food and Drugs Act and to make consequential amendments to other Acts*, 2nd Sess., 39th Parl., 2008 (2nd reading 30 April 2008) [hereinafter "*Bill C-51*"].

45. HOUSE OF COMMONS, ORDER PAPER AND NOTICE PAPER AT DISSOLUTION NO. 117B, (7 Sept 2008) at 35, *at* http://www2.parl.

the proposed amendments will not proceed unless the contents of Bill C-51 are reintroduced for passage into law. Nonetheless, it remains worthwhile to consider the reforms proposed by Bill C-51, as the governing party prior to the election was returned to power and has signaled in its recent "Throne Speech"[46] its intention to follow through with its plan for regulatory change of Canada's food safety regime.[47] It will be interesting to see if the government waits until the release of the findings and recommendations of the independent investigation into the listeria outbreak to reintroduce Bill C-51. Waiting until the report's release will permit the government to incorporate any identified reforms to Canada's food safety regime needed to prevent or minimize the impact of a similar outbreak in the future.

Bill C-51 proposed significant amendments to the FDA for the first time in 50 years.[48] Reforms to the FDA were designed to better regulate food imports and the interprovincial trade of food. Proposed amendments also addressed inspection powers, enforcement and administration measures and penalties for contraventions of the FDA.

In order to better regulate imported foods, it is proposed that section four of the FDA explicitly prohibit the "import for sale" of food that is unsafe or otherwise unfit for human consumption.[49] The existing section only prohibits "the sale" of this food.[50] It is suggested that the explicit inclusion of importing in section 4 will result in a substantial change to the scope of section 4's application to cover food at the "time of importation, rather than just at the point of sale."[51] This claim is arguable given the broad definition of "sell" already found in the FDA, which includes offering for sale and pos-

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gc.ca/HousePublications/Publication.aspx?Pub=status&Language=E&Mode=1&Parl=39&Ses=2&DocId=3610252&File=3.

46. In Canada, the Throne Speech is roughly equivalent to the American State of the Union Address.

47. Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, Speech from the Throne (Nov. 19, 2008), *at* http://www.sft-ddt.gc.ca/eng/media.asp?id=1364.

48. Ronald L. Doering, *Food Law Modernization: What's the Significance of Bill C-51?*, FOOD IN CANADA, May 2008, at 44.

49. Bill C-51, *supra* note 43, clause 4.

50. FDA, *supra* note 7, §4(1).

51. HC, STRENGTHENING AND MODERNIZING CANADA'S FOOD SAFETY SYSTEM FOR FOOD, HEALTH AND CONSUMER PRODUCTS: A DISCUSSION PAPER ON CANADA'S FOOD AND CONSUMER SAFETY ACTION PLAN (2008), *at* 10, *available at* http://healthycanadians.ca/alt_formats/pdf/Cons_ActionPlan_Paper_eng_06.pdf.

sessing for sale.[52] Imported food products that have not reached the point of sale are likely already encompassed by this broad definition of "sell."

Of more significance, however, are new registration and licensing requirements for importing and trading food across provincial boundaries. Clause 6 of Bill C-51 proposes to add sections 5.1 to 5.4 to the FDA. These added sections require a person wishing to import food[53] or to move it across provincial boundaries[54] for sale to be authorized by registration or license. Likewise, the establishments where these activities occur will also require registration.[55] It is proposed that the authority to license and register persons and establishments be granted to the Minister of Health[56] pursuant to "terms and conditions that are prescribed from time to time."[57] Presumably, licensing will assist regulators in identifying the source of a problematic imported food to better ensure that timely measures can be taken to contain the problem.

Amendments are also proposed to enlarge the powers of inspectors and the Minister in relation to how the FDA is administered and enforced. If the proposals are adopted, inspectors will be able to enter, pass through or pass over private property to carry out their work without being liable for doing so.[58] Also, if an inspector has a reasonable belief that an imported food product does not meet FDA requirements, the inspector can order the food product removed from Canada at the owner or importer's expense.[59] Bill C-51 further proposes that the Minister have the authority to require persons who sell or import food to establish tracing systems of their product's origin and destinations to facilitate recalls in the event of a food safety concern.[60] This section will likely reinforce criticisms that the federal government is attempting to inappropriately shift food safety monitoring to industry at the expense of the safety of Canadian consumers.[61]

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52. FDA, *supra* note 7, at §2.
53. Bill C-51, *supra* note 43, clause 6, at §5.1.
54. *See id.*, clause 6, at §5.2.
55. *See id.*, clause 6, at §5.4.
56. *See id.*, clause 8, at §18.1(1).
57. *See id.*, clause 8, at §18.1(2).
58. Bill C-51, *supra* note 43, clause 10, at §23(4)
59. *See id.*, clause 10, §23.9
60. *See id.*, clause 11(1), §30(1)(f)
61. Roger Collier, *Shifting to food industry self-monitoring may be hazardous*, 179(8) Cdn. Med. Assn. J. 755 (2008).

Last, Bill C-51 proposes substantial increases to penalties for contravening the FDA. Currently, a first summary conviction for an offense related to food will attract a maximum $50,000 fine and/or 6 months in prison,[62] and a conviction for an indictable offense related to food may receive maximum of $250,000 fine and/or 3 years in prison.[63] Clause 14 proposes that penalties for a first summary conviction be increased to a $250,000 fine and/or 6 months' imprisonment and that subsequent summary conviction attract a maximum of double the fines and three times the jail time.[64] Likewise, for indictable offenses, penalties will be substantially increased to a maximum of $5,000,000 fine and/or 2 years in prison.[65] In addition, Bill C-51 creates new penalties, including the potential for 5 years' imprisonment, for willfully or recklessly contravening the FDA or disobeying an inspector's directions.[66]

OTHER REGULATORY CHANGE

In addition to change precipitated by concern over threats to Canada's food safety system, other regulatory change has occurred in 2008. Of most significance are the introduction of new standards for labeling organic foods, new management standards for shellfish harvest areas that are adjacent to waste water treatment plants, and new compositional standards for cheese. In addition, there are proposed requirements for labeling allergens in food.

ORGANIC REGULATIONS

Although the regulations were passed in 2006, the new Canadian organic regime becomes fully enforceable on December 14, 2008. After that date, any multi-ingredient product claiming to be organic or containing organic ingredients must be certified as complying with the National Standard for Organic Production Systems by an accredited certification body.[67] In addition, the Organic Product Regulations of the Canada Agricultural Products Act (CAPA)[68] outline when the labels "Organic" or "Canada Organic," and their

62. FDA, *supra* note 7, at §31.1(a).
63. *See id.*, §31.1(b).
64. Bill C-51, *supra* note 43, clause 14, §31(1)(b).
65. *See id.*, clause 14, at §31(1)(a)
66. *See id.*, clause 14, at §31(3).
67. *Organic Products Regulations*, SOR/2006-338, §15(1)(a) [hereinafter "OPR"].
68. *Canada Agricultural Products Act*, S.C, 1985, c. 20 (4th Supp.).

French equivalent, can be attached to products. Only multi-ingredient products with 95% or more organic content can be labeled as organic in Canada.[69] Products that are comprised of 70-95% organic content may declare the percentage of organic ingredients, but cannot use the more general labels of "Organic" or "Canada Organic" without the percentage declaration.[70] Finally, any product that falls below the 70% content threshold can only identify an ingredient as organic in its ingredient list.[71] In addition, organic products continue to be subject to the labeling requirements of the FDA and the CPLA.

SHELLFISH MANAGEMENT STANDARDS

Amendments to the Manual of Operations of the Canadian Shellfish Sanitation Program (CSSP) now require that management protocols be implemented in shellfish harvest areas adjacent to wastewater treatment plants.[72] Processors in a given area are required to establish site-specific management plans that outline responsibilities in the event of a spill from the nearby waste water treatment facility.[73] Processors are also required to implement new Hazard Analysis Critical Control Point (HACCP) controls to reduce the likelihood that contaminated or unsafe food will reach consumers.[74] Because there are a large number of areas with waste water treatment plants that require management plants, the implementation of these new regulatory changes will be phased in over two years.[75]

CHEESE REGULATIONS

New compositional standards for cheese also take effect in December. The regulatory changes aim to address the perceived in-

69. OPR, *supra* note 66, at §2(1).
70. *See id.*, §15(1)(b).
71. *See id.*, §15(1)(c).
72. CFIA *et al.*, Canadian Shellfish Sanitation Program, *available at* http://www.inspection.gc.ca/english/anima/fispoi/manman/cssppccsm/shemolalle.pdf.
73. Press Release, Enhanced Measures for Management of Shellfish Harvest Areas Adjacent to Waste Water Treatment Plants (Nov. 6, 2008) *at* http://www.inspection.gc.ca/english/fssa/concen/specif/wateaue.shtml.
74. *See id.*
75. *See id.*

consistency between the Dairy Products Regulations (DPR)[76] and the Food and Drug Regulations (FDR)[77] regarding the minimum level of fresh milk that must be used for various cheeses.[78] Also, the new regulations now require cheese importers to be licensed, which previously was not required.[79]

Unlike many food products, cheese is subjected to two regulatory regimes. Compositional standards for cheese are found in both the DPR[80] and the FDR.[81] Before the amendments were made, there appeared to be an inconsistency between the two standards, as only the DPR permitted cheeses to be made from "other milk solids" while the FDR did not. Domestic dairy processors argued that the inclusion of "other milk solids" in the DPR permitted cheese to be made from a broader range of milk solids than those specifically listed in the FDR.[82] In contrast, Canadian dairy farmers argued in favor of restricting the meaning of "other milk solids" to those milk products listed in the FDR because a broader definition permitted the import of less expansive milk products which could be used in place of domestic fresh milk for cheese production.[83] With the corresponding loss in sales to the domestic cheese production market, dairy farmers must sell their fresh milk at a lower cost to alternative markets such as the animal feed market.[84]

Ultimately, the new regulations adopt a ratio approach whereby the acceptable minimum percentage of fresh milk is specified for each variety of cheese.[85] For example, Pizza Mozzarella cheese must have a fresh milk content of 63%.[86] In addition, the FDR and the DPR now contain identical definitions of "milk product" to eliminate any inconsistency.[87]

Although the regulatory inconsistency in the FDR and the DPR concerning compositional standards for cheese has been resolved, the disagreement between dairy farmers and producers is far from

76. *Dairy Products Regulations*, SOR/79-840 [hereinafter *DPR*].
77. FDR, *supra* note 35.
78. MATHIEU FRIGON, ECONOMICS DIVISION, LIBRARY OF PARLIAMENT, PRB 07-41E (DE. 26, 2007) at 1.
79. DPR, *supra* note 75, §26.01(1).
80. *See id.*, §2.
81. FDR, *supra* note 35, §B.08.001.1.
82. FRIGON, *supra* note 77, at 2.
83. *See id.*
84. *See id.*
85. FDR, *supra* note 35, §B.08.033(1)(a)(i.1).
86. FRIGON, *supra* note 77 at 4.
87. FDR, *supra* note 35, §B.08.001.1 and DPR s.2.

over. The three largest dairy processors in Canada, namely Kraft Canada Inc., Parmalat Canada Inc., and Saputo Inc., have initiated an action in federal court for judicial review of the new regulations.[88] From comments made to the media, it appears that the dairy processors believe that the new regulations were enacted as an income support mechanism for dairy farmers in violation of Canada's international trade agreements.[89] For their part, the dairy farmers have launched a publicity campaign to inform consumers of what the farmers see as the benefits of these new regulations for consumers.[90]

ALLERGIES AND SENSITIVITIES

New labeling requirements have been proposed to ensure that known allergens and problematic foods, such as gluten and sulphites, are accurately listed on product labels. Current FDR regulations require that ingredients be listed in descending order of their overall proportion of the food product.[91] In some circumstances, however, components of some mixtures and preparations are not required to be specifically included on the label, thereby effectively hiding their presence in the food product.[92] Therefore, consumers with food allergies or sensitivities cannot ascertain whether a given product poses a risk. Likewise, the name used on a label may make it difficult for a consumer to understand that it may pose a potential allergy or sensitivity risk. For example, many consumers may not be aware that casein is a milk ingredient and ovalbumin is an egg derivative.

Proposed amendments to the FDR are designed to ensure that labels clearly relay information about ingredients that are known to cause allergic reactions or other effects as a consequence of food

88. Saputo Inc. and Others v. The Attorney General of Canada, petition filed(Oct. 20, 2008) (File T-1621-08).

89. *New Cheese Regulations Challenged in Federal Court,* BuisnessWeek (Oct. 20, 2008), *at* http://investing.businessweek.com/research/stocks/news/article.asp?docKey=600-200810201715CANADANWCANADAPR_C7770-0VTDIOLRQ841DCAQN9KLACJ0BK&params=timestamp%7C%7C10/20/2008%205:15%20PM%20ET%7C%7Cheadline%7C%7CNew%20Cheese%20Regulations%20Challenged%20in%20Federal%20Court%7C%7CdocSource%7C%7CCanada%20NewsWire%7C%7Cprovider%7C%7CACQUIREMEDIA; Kristen Shane, *Producers say new cheese standards are no gouda,* Capital News Online, (Oct. 31, 2008), *at* http://www.carleton.ca/Capital_News/31102008/n1.shtml.

90. *See* http://www.realcheese.ca/en/.

91. FDR, *supra* note 35.

92. *See id.*, §§B.01.009(1), (2).

sensitivities. Thus, the proposed amendments define a food allergen as:

any protein from any of the following foods or any modified protein, including any protein fraction, that is derived from any of the following foods:

(a) almonds, Brazil nuts, cashews, hazelnuts, macadamia nuts, pecans, pine nuts, pistachios or walnuts;
(b) peanuts;
(c) sesame seeds;
(d) wheat, kamut, spelt or triticale;
(e) eggs;
(f) milk;
(g) soybeans;
(h) crustaceans;
(i) shellfish; or
(j) fish.[93]

The proposed definition for gluten is:

(a)..any gluten protein from the grain of any of the following cereals or the grain of a hybridized strain created from at least one of the following cereals:

(i) barley,
(ii) oats,
(iii) rye,
(iv) triticale, or
(v) wheat, kamut or spelt; or

(b) any modified gluten protein, including any gluten protein fraction, that is derived from the grain of any of the cereals referred to in subparagraphs (a)(i) to (v) or the grain of a hybridized strain referred to in paragraph (a).[94]

If any quantity of a defined food allergen or gluten is present in the product, the proposed regulations require that it be declared on the label either in the list of ingredients[95] or in a separate statement beginning with "Allergy and Intolerance Information - Contains:."[96]

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93. *Regulations Amending the Food and Drug Regulations (1220-Enhanced Labelling for Food Allergen and Gluten Sources and Added Sulphites)*, Canada Gazette 142/30 (July 26, 2008), clause 4 amending §B.01.010.1(1) *available at* http://canadagazette.gc.ca/partI/2008/20080726/html/regle1-e.html, [hereinafter Labelling Proposal].

94. Labelling Proposal, *Supra* note 92,at clause 4 §B.01.010.1(1).

95. *See id.*, clause 4 amending §B.01.010.1(2)(a).

96. *See id.*, clause 4 amending §B.01.010.1(2)(b).

Moreover, the product would have to be declared using the appropriate name listed as either the definition of a food allergen or gluten.[97] Sulphites will need to be labeled in a similar manner if they are present in a food product in a quantity greater than 10 ppm.[98]

As mentioned, the FDR amendments for food allergen and sensitivity labeling are proposals. The opportunity to submit public comment on the proposals is now over.[99] After the comments are considered by Health Canada, a final version will be published.[100] Industry will then have one year to comply with the new regulations unless the "Allergy and Intolerance Information - Contains:" statement is used before that year expires. In that circumstance, compliance with the new regulations will be immediately required.[101]

LITIGATION

In addition to the pending litigation regarding changes to the compositional standards for cheese discussed above, two cases deserve mention in this update. The first case involves the appropriate damages in a product liability case. The second case deals with the provincial prohibition on the sale of unpasteurized milk.

MUSTAPHA V. CULLIGAN OF CANADA

In this case, two plaintiffs found a dead fly and parts of another fly in a sealed bottle of water.[102] The first plaintiff alleged he had recurring nightmares about flies and could not sleep for more than four hours at time. As a result, he reported losing his sense of humor and being overly sensitive in his dealings with others. He also reported that he was afraid to take showers and to drink water. He claimed that he required psychological care for his trauma and was prescribed medication which left him unfocused. He subsequently

97. *See id.*, clause 4 amending §B.01.010.1(5).

98. *See id.*, clause 4 amending §B.01.010.2(2).

99. Press Release, HC, Food Allergies - New Labelling Requirements for Foods: Regulations to Enhance the Labelling of Food Allergens, Gluten Sources and Added Sulphites (July 22, 2008), *at* http://www.hc-sc.gc.ca/fn-an/label-etiquet/allergen/index-eng.php.

100. *See id.*

101. Press Release, HC, Health Canada urges food manufacturers to label priority food allergens, gluten sources and added sulphites in the pre-publication period of the Food Allergen Labelling Regulatory Amendments (July 22, 2008), *at* http://www.hc-sc.gc.ca/fn-an/label-etiquet/allergen/index-eng.php.

102. [2005] O.J. No. 1469.

lost 60 percent of his clientele at his hair salon. The second plaintiff alleged recurring nausea and vomiting. Ultimately, the trial court accepted that, although it was an unusual and bizarre response, the flies were partially the cause of the first plaintiff's nervous shock. The court awarded general damages of $80,000, damages for past economic loss of $122,400 and damages for future losses of $115,200.

When compared with the damages awarded for injury suffered in other Canadian product liability cases, the quantum of damages awarded by the trial judge appeared excessive. It was not surprising, then, that the decision was ultimately appealed to the Supreme Court of Canada where the court upheld the Ontario Court of Appeal's decision to reverse the trial judge's finding.[103] While the court held that the defendant owed a duty of care to the plaintiff and that the defendant had breached that standard when the plaintiff was given contaminated water, the plaintiff failed to establish that the severity of his injury was foreseeable.[104] While the court acknowledged that the plaintiff did suffer a debilitating psychological injury that had a significant impact on his life as a result of seeing the flies in the water bottle, his injury was unusual or excessive and, thus, ultimately not a type of injury for which the court would hold the defendant liable.[105] Had the trial judge's decision been upheld, the *Mustapha* case would have signaled a significant departure from the quantum of damages generally awarded in product liability cases involving food safety issues.

YORK (REGIONAL MUNICIPALITY) V. SCHMIDT

On October 20, 2008, Michael Schmidt was found to be in contempt of court for contravening a court order to comply with section 18 of Ontario's Health Protection and Promotion Act[106] and to refrain from selling or distributing unpasteurized milk.[107] To avoid the prohibition, Mr. Schmidt sold shares of partial ownership in specific cows to his customers and presumably delivered unpasteurized milk to customers from the specific cow in which they held

103. Mustapha v. Culligan of Canada Ltd., [2008] S.C.J. No. 27 appealed from [2006] O.J. No. 4964.
104. *See id.* at ¶18.
105. *See id.*
106. Health Protection and Promotion Act, R.S.O. 1990, c. H.7.
107. York (Regional Municipality) v. Schmidt [2008] O.J. No 4562.

shares.[108] Unfortunately, the court did not need to address whether the cow-share scheme violated the section 18 prohibition because Mr. Schmidt gave an interview to a newspaper reporter where he admitted his continued sale of unpasteurized milk despite the court order.[109] As a result, the sale and/or distribution of unpasteurized milk remain prohibited in Canada. Moreover, the legality of using cow-share agreements to avoid these prohibitions has yet to be determined.

108. *See id.* at ¶20.
109. *See id.* at ¶27.