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Canadian Food Law Update

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CANADIAN FOOD LAW UPDATE

*Patricia L. Farnese**

INTRODUCTION

Provided below is an overview of developments in Canadian food law and policy in 2010.** This update primarily analyzes the regulatory and policy developments and litigation activities by the federal government. This focus reflects the significance of federal activities in the food policy realm.

During 2010, the effectiveness of Canada's regulatory framework for food safety continued to be scrutinized in response to the deaths of twenty-three Canadians in 2008 from the consumption of ready-to-eat meat contaminated by *Listeria monocytogenes*.¹ The Canadian government spent much of 2010 implementing the recommendations outlined in the *Report of the Independent Investigator into the 2008 Listeriosis Outbreak*, released in July 2009.² Given the nature of the regulatory framework for food safety in Canada, Agriculture and Agri-Food Canada (AAFC), the Canadian Food Inspection Agency (CFIA), Health Canada (HC), and the Public Health Agency of Canada (PHAC) were all involved in responding to the *Weatherill Report* recommendations.³ These agencies report that action was taken in the areas of reducing food-safety risks, enhancing surveillance, and improving emergency response in the event of a food-safety incident.⁴

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** This update is current to December 31, 2010.

1. *Progress on Food Safety as of October 2010*, CAN. FOOD INSPECTION AGENCY (Oct. 21, 2010), <http://www.inspection.gc.ca/english/fssa/transp/prog/prog1010e.shtml>.

2. See generally, SHEILA WEATHERILL, GOV'T OF CAN., FINAL REPORT OF THE INDEPENDENT INVESTIGATOR INTO THE 2008 LISTERIOSIS OUTBREAK (Jul. 2009), available at http://www.listeriosis-listeriose.investigation-enquete.gc.ca/lirs_rpt_e.pdf [hereinafter WEATHERILL REPORT].

3. *Progress on Food Safety*, supra note XX.

4. *Id.*

In addition, consultations were undertaken to reform rules with respect to sodium reduction targets, non-federally registered food sector (NFRFS) imports, and § 92 of the *Meat Inspection Regulations*.⁵ HC also reported on its investigation, including public and industry consultations, into the safety of adding caffeine to non-cola soft drinks.⁶ New rules to protect the safety of the food supply were implemented for the seafood industry.⁷

Regulations concerning the pasteurization of milk continued to be a source of noteworthy prosecutions in 2010.⁸ Conflicting jurisprudence on the legality of cow-share agreements in Ontario and British Columbia has emerged. In addition, the decision in *Select Brand Distributors Inc. v. Canada (Attorney General)*, discussed in the 2009 Canadian Food Law Update, was set aside.⁹

RESPONDING TO THE LISTERIOSIS OUTBREAK

To begin, Canada's *Policy on Listeria monocytogenes in Ready-to-eat Foods (2004)* was updated in 2010.¹⁰ The new policy will take effect on April 1, 2011 and will apply to both food manufactured in Canada and food that has been imported.¹¹ The new policy divides ready-to-eat (RTE) foods into two categories based on *Listeria* risk,

5. BUREAU OF NUTRITIONAL SCI., FOOD DIRECTORATE, HEALTH PRODUCTS AND FOOD BRANCH, HEALTH CAN., STAKEHOLDER CONSULTATION ON SETTING SODIUM REDUCTION TARGETS (Jan. 2011), *available at* 1990 (SOR/90-288).http://www.hc-sc.gc.ca/fn-an/alt_formats/pdf/nutrition/sodium/strateg/index-eng.pdf [hereinafter STAKEHOLDER CONSTITUTION]; *Imported Food Sector Regulatory Proposal*, CAN. FOOD INSPECTION AGENCY (Oct. 26, 2010), <http://www.inspection.gc.ca/english/fssa/imp/lic/lice.shtml>; *Consultation on Section 92 of Canada's Meat Inspection Regulations 1990-Background*, CAN. FOOD INSPECTION AGENCY (Nov. 7, 2011).

6. Press Release, Health Can., Health Canada Contemplates Safety Assessment of Caffeine Use in Non-Cola Beverages (Mar. 19, 2010), *available at* http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2010/2010_41-eng.php.

7. *The Regulation of Imported Fish and Seafood Products in Canada*, CAN. FOOD INSPECTION AGENCY (Feb. 9, 2010), <http://www.inspection.gc.ca/english/fssa/fispoi/import/inspe.shtml>.

8. See Randy Shore, *Raw Milk Farmer Returns to Court with Constitutional Challenge*, VANCOUVER SUN (Jan. 24, 2011), <http://www.vancouversun.com/health/milk+farmer+returns+court+with+constitutional+challenge/4153380/story.html>.

9. [2010] C.C.S. No. 1851; [2010] F.C.A. 3 (Can. LII).

10. FOOD DIRECTORATE, HEALTH PRODUCTS AND FOOD BRANCH, HEALTH CAN., POLICY ON LISTERIA MONOCYTOGENES IN READY-TO-EAT FOODS (2004), *available at* http://www.hcsc.gc.ca/fnan/alt_formats/hpfbdgpsa/pdf/legislation/policy_listeria_mono_cytogenes_politique_toc-eng.pdf.

11. *Id.*

and tailors sampling frequency to risk.¹² The criteria used to categorize RTE foods will be reviewed by regulatory authorities to ensure that these foods are being assigned the accurate risk level.¹³ The new policy also requires that all facilities that manufacture RTE have an environmental monitoring protocol in place.¹⁴ More detailed rules about product sampling and new end-product compliance criteria based on International Codex Alimentarius Commission standards have been adopted.¹⁵ Finally, the new policy encourages RTE manufacturers to use post-lethality treatments and/or *L. monocytogenes* growth inhibitors.¹⁶

Concerns that the adoption of the new Compliance Verification System (CVS) by inspectors contributed to the scale of the 2008 *Listeria* outbreak prompted a review of the CVS in the *Weatherill Report*.¹⁷ Ultimately, the CVS was found to be an effective investigation system; however, criticisms were made about how CVS was implemented.¹⁸ Thus, the Canadian government hired PricewaterhouseCoopers (PWC) to review the amount of resources allocated to federally registered meat resources, including the number of investigators.¹⁹ PWC found that a minimum of 260 full-time inspectors were required to effectively implement CVS.²⁰ At the time of the outbreak, however, just over 150 inspectors were employed in Canada.²¹ To correct this shortfall, funding has been committed to hire an additional 170 inspectors.²² All inspectors have also been given new training, and plans are underway to make better use of wireless technology in the inspection process.²³

Another concern highlighted in the *Weatherill Report* was the lack of coordination and communication between the various agencies and governments responding to the *Listeria* outbreak.²⁴ Better

12. *Id.*

13. *Id.*

14. *Id.*

15. FOOD DIRECTORATE, *supra* note 10.

16. *Id.*

17. WEATHERILL REPORT, *supra* note 2, at 36-39.

18. *Id.* at 38-39.

19. PricewaterhouseCoopers LLP, *Results of the Independent Review of CFIA's Calculation of the Number of Inspectors Required to Deliver CVS*, CAN. FOOD INSPECTION AGENCY (Oct. 13, 2010), <http://www.inspection.gc.ca/english/fssa/transp/prog/pwce.shtml>.

20. *Id.*

21. *Progress on Food Safety*, *supra* note 1.

22. *Id.*

23. *Id.*

24. WEATHERILL REPORT, *supra* note 2, at 75-78.

communication and coordination likely would have resulted in fewer people being exposed to the contaminated meat.²⁵ The *Weatherill Report* noted that although the Foodborne Illness Outbreak Response Protocol (FIORP) existed, it required updating in order for it to be more frequently used.²⁶ In 2010, multi-jurisdictional and agency consultations were undertaken and the FIORP was revised.²⁷ Key components to the update were a new communications plan and PHAC's designation as the lead agency for interprovincial food illness outbreaks.²⁸

An additional outcome of the *Weatherill Report* recommendations is a change to the governance structure overseeing food safety in Canada.²⁹ In 2010, the federal government created the position of Chief Food Safety Officer (CFSO) at the CFIA.³⁰ The CFSO is tasked with assisting CFIA in adopting a more holistic approach to food safety.³¹ In particular, the integration of human, animal, and ecosystem health priorities and responses is a key responsibility of the CFSO.³² As the new CFSO, Dr. Brian Evans, who is also Canada's Chief Veterinary Officer, is in a good position to promote this more integrated approach to food safety.³³

Finally, the creation of a Consumer Association Roundtable (CAR), to be chaired by the CFSO, attempts to address the concern raised in the *Weatherill Report* about consumers having the opportunity to raise concerns about food safety in Canada.³⁴ CAR's membership includes leading national consumer organizations and others concerned with the health and safety of Canada's food supply.³⁵

25. *Id.* at 75-76.

26. *Id.* at xii.

27. *Canada's Foodborne Illness Outbreak Response Protocol (FIORP) 2010: To Guide a Multi-Jurisdictional Response*, PUB. HEALTH AGENCY OF CAN. (June 1, 2010), <http://www.phac-aspc.gc.ca/zoono/fiorp-pritioa/index-eng.php>.

28. *Progress on Food Safety*, *supra* note 1.

29. WEATHERILL REPORT, *supra* note 2, at 88-90.

30. *Chief Food Safety Officer*, CAN. FOOD INSPECTION AGENCY (June 28, 2010), <http://www.inspection.gc.ca/english/fssa/cfsocsa/cfsocsaec.shtml>.

31. *Id.*

32. *Id.*

33. *See id.*

34. Press Release, Can. Food Inspection Agency, New Forum Gives Consumer Associations a Clear Voice in Food Safety (Dec. 8, 2010), *available at* <http://www.inspection.gc.ca/english/corpaffr/newcom/2010/20101208e.shtml>.

35. *Id.*

REFORM PROPOSALS AND CONSULTATIONS

A review of government proposals in 2010 to reform the regulatory and policy framework for food safety in Canada indicates a strong preference for voluntary initiatives by industry.³⁶ Time is necessary to determine whether these voluntary initiatives achieve their desired goals.

Sodium

Recently, HC has asked for comments on proposed sodium reduction targets aimed at reducing the average amount of sodium Canadians consume daily from an estimated 3,400 mg to 2,300 mg per day.³⁷ The targets are based on the *Sodium Reduction Strategy for Canada* prepared by the Multi-Stakeholder Working Group on Dietary Sodium Reduction (Sodium Working Group or SWG) and released in July 2010.³⁸ The strategy endorsed voluntary reductions in processed foods that will be phased in over four years beginning in 2012.³⁹ In addition, the strategy uses Sales-Weighted Averages (SWA) to determine the allowable sodium in a category of processed foods.⁴⁰ Targets have been set based on the average of the sodium levels of all products in a category weighted by their volume market share.⁴¹ Therefore, in the short-term, food processors are not being asked to meet the target for every food product.⁴² Rather, all products in the category will be averaged to determine compliance.⁴³ By 2016, however, the strategy proposes that each processor also meet a maximum target for each category of food.⁴⁴

Caffeine

The recent introduction of many non-cola caffeinated beverages, commonly marketed as energy drinks, into the Canadian mar-

36. See generally STAKEHOLDER CONSTITUTION, *supra* note 5.

37. *Id.* at 2.

38. SODIUM WORKING GROUP, SODIUM REDUCTION STRATEGY FOR CANADA (July 2010), available at http://www.hc-sc.gc.ca/fn-an/alt_formats/pdf/nutrition/sodium/strateg/index-eng.pdf.

39. STAKEHOLDER CONSTITUTION, *supra* note 5, at 2-3.

40. *Id.* at 3.

41. *Id.*

42. *Id.* at Appendix A.

43. *Id.* at 3.

44. STAKEHOLDER CONSTITUTION, *supra* note 5, at Appendix A.

ket prompted HC to review the safety of energy drinks. In March 2010, HC released its findings to the public.⁴⁵ HC concluded that if Canadians follow HC's guidelines for the daily maximum amounts of caffeine, non-cola beverages with less than 150 parts per million of added synthetic caffeine pose no safety concern.⁴⁶ Although HC has not initiated any new regulations to target these beverages, it is encouraging processors to voluntarily adopt front-of-the-package labeling.⁴⁷ Currently, additions of synthetic caffeine must be listed in the ingredients list.⁴⁸

Fruit and Vegetables

As they exist now, the *Licensing and Arbitration Regulations* (LAR) of the *Canada Agricultural Products Act* requires that fruit and vegetable dealers, excluding those who market products they have grown themselves, be licensed.⁴⁹ When these dealers have a dispute with a producer, wholesaler, or retailer about the condition of a product upon arrival at its destination, they are required to ask a CFIA inspector to undertake a destination inspection.⁵⁰ Article 707 of the North American Free Trade Agreement (NAFTA), however, created the Fruit and Vegetable Dispute Resolution Corporation (DRC) to which dealers can become members.⁵¹ Members of the DRC have the option of engaging a commercial quality inspection service provider to inspect the quality of the disputed product.⁵² The proposed regulations would remove the restriction on where dealers can obtain destination inspection services and would allow them to use private inspectors.⁵³ This proposed regulatory change would harmonize Canadian regulations with international practices.

45. See Press release, Health Canada, *supra* note 6.

46. *Id.*

47. *Id.*

48. Food and Drug Regulations, C.R.C., c. 870, B.01.008(b) (Can.).

49. Licensing and Arbitration Regulations, SOR/84-432 § 2.01 (Can.).

50. Fresh Fruit and Vegetable Regulations, C.R.C., c. 285, Part VII (Can.).

51. FRUIT AND VEGETABLE DISPUTE RESOLUTION CORP., BY-LAWS (July 2007), available at http://www.fvdrc.com/adx/asp/adxGetMedia.aspx?DocID=10,1,Documents&MediaID=9132&Filename=By_Laws_English_July_7_2009.pdf.

52. Can. Food Inspection Agency, *Regulatory Impact Analysis Statement*, CAN. GAZETTE (Feb. 6, 2010), <http://canadagazette.gc.ca/rp-pr/p1/2010/2010-02-06/html/reg1-eng.html>.

53. *Id.*

Other Consultations

In the later part of 2010, the CFIA initiated two other consultations related to food safety. First, § 92 of the *Meat Inspection Regulations* requires that meat packaging components be registered if they are used by federally registered processors.⁵⁴ Given that the *Food and Drugs Regulations* currently prohibit the use of harmful packaging,⁵⁵ industry is arguing that § 92 is unnecessary and burdensome.⁵⁶ A review has thus been undertaken to see if § 92 is required to ensure food safety.⁵⁷

The second consultation concerns a proposal to require all those in the Non-Federally Registered Sector who import food to be licensed.⁵⁸ Foods such as alcoholic and non-alcoholic beverages, spices, cereals, fats, oils, spices, coffee, tea and infant formula are examples of foods whose importers would now be required to be licensed.⁵⁹ It is argued that licensing will assist the CFIA in tracing unsafe products and removing them from the marketplace in the event of a food safety concern.⁶⁰

REGULATORY CHANGES

The most significant regulatory change in 2010 involved many aquatic foods. Although it is illegal to sell diseased food,⁶¹ the import or extra-provincial movement of live crustaceans, mollusks and finfish species are not regulated in Canada. The *Fish Health Protection Regulations*⁶² enacted pursuant to the *Fisheries Act*⁶³ merely regulated salmon and trout.⁶⁴ Consequently, the \$4.1 billion fresh fish, aquaculture, and seafood industries in Canada are vulnerable to the introduction of diseases.

54. STAKEHOLDER CONSTITUTION, *supra* note 5.

55. Food and Drug Regulations, C.R.C., c. 870, B.23.001 (Can.).

56. *Consultation on Section 92 of Canada's Meat Inspection Regulations, 1990-Background*, CAN. FOOD INSPECTION AGENCY, (Nov. 7, 2010), <http://www.inspection.gc.ca/english/fssa/meavia/sec92/bge.shtml>.

57. *Id.*

58. *Imported Food Sector Regulatory Proposal Background Information*, CAN. FOOD INSPECTION AGENCY (Oct. 26, 2010), <http://www.inspection.gc.ca/english/fssa/imp/lic/bge.shtml>.

59. *Id.*

60. *Id.*

61. Food and Drugs Act, R.S.C.1985, c. F-27 at §4.

62. C.R.C., c.812 (Can.).

63. R.S.C. 1985, c. F-14.

64. C.R.C., c.812, Schedule 1 (Can.).

Without a regulatory framework for the health of aquatic species, Canada fails to meet its international obligations pursuant to the OIE.⁶⁵ To meet these obligations, Canada requires the reporting of diseases that threaten the health of aquatic animals, a means to certify the health status and origin of seafood exported from Canada, movement-control programs, and a “component authority” to oversee compliance.⁶⁶ The new regulations aim to meet these international standards.

The new regulations for aquatic species mirror the regulatory framework for other animals in Canada. In fact, the regulations are enacted pursuant to the *Health of Animals Act*⁶⁷ rather than the *Fisheries Act*. First, a list of susceptible species, or aquatic animals particularly vulnerable to disease, has been created.⁶⁸ Next, the requirement under the *Health of Animals Regulations* (HAR) that a permit be obtained to move animals has been extended to aquatic species and their products on the susceptible species list.⁶⁹ It is important to note, however, that the regulations are concerned with minimizing risk to the fish and seafood industry. As a result, aquatic species destined for home aquariums, even if they are on the susceptible list, are exempt from the permit requirements.⁷⁰ The new permit requirements came into force on March 1, 2011.⁷¹

The new regulations also significantly expand the list of diseases that should be immediately reported to federal authorities.⁷² These additional diseases represent the most important threats to the fish and seafood industries and include:⁷³

- abalone viral mortality (abalone mortality virus)
- bonamiosis (*Bonamia exitiosa*)
- brown ring disease (*Vibrio tapetis*)

65. Regulations Amending the Health of Animals Regulations, SOR/2010-296 (Can.), available at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-12-22/html/sor-dors296-eng.html>.

66. *Id.*

67. S.C. 1990, c. 21 (Can.).

68. Health of Animal Regulations, C.R.C., c. 296, Schedule III (Can.).

69. *Id.* at §§ 191, 194 and 198.

70. Regulations Amending the Health of Animals Regulations, SOR/2010-296 (Can.), available at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-12-22/html/sor-dors296-eng.html>.

71. *Id.*

72. Health of Animal Regulations, C.R.C., c.296, Schedule VII (Can.).

73. Regulations Amending the Health of Animals Regulations, SOR/2010-296 (Can.), available at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-12-22/html/sor-dors296-eng.html>.

- crayfish plague (*Aphanomyces astaci* [EU strain])
- epizootic ulcerative syndrome (*Aphanomyces invadans*)
- gyrodactylosis (*Gyrodactylus salaris*)
- infectious hypodermal and haematopoietic necrosis (infectious hypodermal and haematopoietic necrosis virus)
 - infectious myonecrosis (infectious myonecrosis virus)
 - marteiliosis (*Marteilia sydneyi*)
 - mikrocytosis (*Mikrocytos roughleyi*)
 - necrotizing hepatopancreatitis
 - Oncorhynchus masou virus disease (*Oncorhynchus masouvirus*)
 - red sea bream iridoviral disease (red sea bream iridovirus)
 - white tail disease (white tail virus)
 - withering syndrome of abalone (*Xenohaliotis californiensis*)

Similarly, six diseases have been added to the Annually Notifiable Diseases List:⁷⁴

- bacterial kidney disease (*Renibacterium salmoninarum*)
- enteric red mouth disease (*Yersinia ruckeri*)
- furunculosis (*Aeromonas salmonicida*)
- streptococcosis (*Streptococcus iniae*)
- seaside organism (*Haplosporidium costale*)
- QPX disease (Quahog parasite unknown)

The annually reportable diseases are considered manageable, thus notification is primarily for informational purposes and not to initiate eradication measures if found.⁷⁵ These notification requirements took effect on December 10, 2010.⁷⁶

LITIGATION

Select Brand Distributors Inc. v. Canada (Attorney General)

As first reported in 2009 Canadian Food Law update, the Select Brand successfully brought an application to the Federal Court for judicial review of CFIA's refusals to allow non-standardized size jars of Gerber brand baby food to be test marketed in Canada.⁷⁷ Al-

74. Health of Animal Regulations, C.R.C., c. 296, Schedule VIII (Can.).

75. Regulations Amending the Health of Animals Regulations, SOR/2010-296 (Can.), available at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-12-22/html/sor-dors296-eng.html>.

76. *Id.*

77. *Select Brand Distributors Inc. v. Canada (Attorney General)*, [2010] C.C.S. No. 1851; [2010] F.C.A. 3 (Can. LII).

though the *Processed Products Regulations* of the Canadian Agricultural Products Act only permit baby food to be sold in two sizes,⁷⁸ § 9.1 creates a process wherein one can apply for approval to sell a product in a non-standardized size for the purpose of testing the market.⁷⁹ Nonetheless, Select Brand's request was refused on the grounds that it had failed to establish that non-standardized sizes would not disrupt normal trading patterns as required by § 9.1(5)(a).⁸⁰ On first hearing, the court found that regulating the marketplace fell within activities prescribed pursuant to the *Competition Act*,⁸¹ thus its inclusion in the PPR was *ultra vires*.⁸² Section 9.1(5)(a) was struck down and the CFIA was ordered to allow the CFIA to test market baby food for up to twenty-four months.⁸³

In early 2010, the Federal Court of Appeal (FCA) reversed the lower court's decision.⁸⁴ The FCA rejected the trial court's interpretation that § 9.1(5)(a) was *ultra vires* because it attempted to regulate the marketplace.⁸⁵ Rather, the FCA held that discretion under § 9.1(5)(a) to refuse test marketing if it would disrupt "normal or usual trading patterns" is merely preserving status quo.⁸⁶ The FCA also found that the trial judge erred in concluding that the CFIA had no basis on which to conclude that Select Brand's test marketing of non-standardized sizes of baby food would disrupt the normal and usual trading patterns.⁸⁷ As a result, the order directing CFIA to allow Select Brand to test market its new baby food was set aside.⁸⁸

PASTEURIZATION

Every jurisdiction in Canada has a prohibition on the marketing and sale of unpasteurized milk because of concern for potential bac-

78. C.R.C., c. 291, Schedule III, Table III, Section 2 (Can.).

79. *Processed Products Regulations*, C.R.C., c. 291 (Can.).

80. *Select Brand Distributors Inc. v. Canada (Attorney General)*, [2010] C.C.S. No. 1851; [2010] F.C.A. 3, ¶ 1 (Can. LII).

81. R.S.C. 1985, c. C-34.

82. *Select Brand Distributors Inc. v. Canada (Attorney General)*, [2010] C.C.S. No. 1851; [2010] F.C.A. 3, ¶ 35 (Can. LII).

83. *Id.*

84. *Select Brand Distributors Inc. v. Canada (Attorney General)*, [2010] F.C.A. 3; 80 C.P.R. (4th) 337; 400 N.R. 76 (Can.).

85. *Id.* at ¶ 1.

86. *Id.* at ¶ 31.

87. *Id.* at ¶ 47.

88. *Id.* at ¶ 59.

terial and viral contamination.⁸⁹ It is not illegal, however, to consume unpasteurized milk.⁹⁰ Thus, despite the contamination risks, there is a segment of consumers that wants to consume unpasteurized milk for either the perceived health benefits or improved taste.⁹¹ Unless they happen to also be dairy farmers, these consumers have no obvious legal means to obtain unpasteurized milk.

To circumvent the prohibition on the sale or marketing of unpasteurized milk, cow share arrangements have emerged in Canada.⁹² In a typical cow share agreement, the consumer takes a partial ownership interest in the cow or cows from whom the milk is obtained.⁹³ It is argued that this agreement is not unlawful as the partial ownership interest negates the need for a “sale” of unpasteurized milk by the farmer as the consumer is merely obtaining milk from a cow she owns.⁹⁴ In 2010, two cases—*R. v. Schmidt* and *Fraser Health Authority v. Jongerden (c.o.b. Home on the Range)*—have considered the legality of cow-share/lease agreements.⁹⁵

R. v. Schmidt

Michael Schmidt is an organic dairy farmer from Ontario and a vocal advocate of the benefits of unpasteurized milk.⁹⁶ For a number of years, he has provided unpasteurized milk to consumers through a cow share agreement.⁹⁷ In 2006, he was charged under Ontario’s *Health Protection and Promotion Act*⁹⁸ and the *Milk Act*⁹⁹ with a total of

89. See *R. v. Schmidt*, [2010] O.J. No. 223; 2010 O.N.C.J. 9; see also *Fraser Health Auth. v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480; 2010 BCSC 355; 6 B.C.L.R. 5th 293.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See *R. v. Schmidt*, [2010] O.J. No. 223; 2010 O.N.C.J. 9; see also *Fraser Health Auth. v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480; 2010 BCSC 355; 6 B.C.L.R. 5th 293.

95. *R. v. Schmidt*, [2010] O.J. No. 223; 2010 O.N.C.J. 9; *Fraser Health Auth. v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480; 2010 BCSC 355; 6 B.C.L.R. 5th 293.

96. Nathanael Johnson, *The revolution will not be pasteurized: Inside the raw-milk underground*, HARPER’S MAGAZINE, Apr. 2008, at 71-78.

97. See *id.*

98. R.S.O. 1990, c. H.7.

99. R.S.O. 1990, c. M.12.

20 charges related to the sale, distribution and marketing of unpasteurized milk products.¹⁰⁰

Relying on the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*,¹⁰¹ and *R. v. Chapin*,¹⁰² Kowarsky J.P. held that each of the offences Schmidt was alleged to have committed were strict liability offences.¹⁰³ Therefore, to be found guilty, the Crown needed to prove that Schmidt committed the *actus reus* of each offence beyond a reasonable doubt.¹⁰⁴ If the Crown had succeeded in this task, the onus would have shifted to Schmidt to establish on a balance of probabilities that he either exercised reasonable care to avoid committing the offences or that he held an honest, but mistaken, belief that he was acting lawfully.¹⁰⁵ The onus never shifted to Schmidt, however, as the Crown did not convince the court that Schmidt had committed the offences.¹⁰⁶

The court engaged in a detailed statutory interpretation exercise which led to the conclusion that both the *Milk Act* and the HPPA were concerned with protecting the public at large.¹⁰⁷ The prohibitions on the sale, distribution, and marketing of unpasteurized milk were established to protect an uninformed public from the risks associated with unpasteurized milk products.¹⁰⁸ By only providing milk to members of the cow share and not engaging in any advertising to gain cow share members, Schmidt's activities were not aimed at the general public.¹⁰⁹ Thus, his actions were not in violation of either the *Milk Act* or the HPPA.¹¹⁰

Likewise, there was no evidence that anyone had become ill from Schmidt's products or that his products were somehow unsafe or unfit for human consumption.¹¹¹ The court noted that Schmidt's evidence about the safety practices followed on his farm to avoid contaminating the milk was uncontested.¹¹² Neither the general pub-

100. *R. v. Schmidt*, [2010] O.J. No. 223, ¶¶ 6-7; 2010 O.N.C.J. 9. One charge was withdrawn by the Crown leaving 19 charges considered by the trial judge in this case. *Id.*

101. [1978] 2 S.C.R. 1299 (Can.).

102. [1979] 2 S.C.R. 121 (Can.).

103. *R. v. Schmidt*, [2010] O.J. No. 223, ¶ 24; 2010 O.N.C.J. 9.

104. *Id.* at ¶ 25.

105. *Id.*

106. *R. v. Schmidt*, [2010] O.J. No. 223, ¶ 184; 2010 O.N.C.J. 9.

107. *Id.* at ¶ 121.

108. *Id.* at ¶¶ 139-140.

109. *Id.* at ¶ 143.

110. *Id.* at ¶ 184.

111. *R. v. Schmidt*, [2010] O.J. No. 223, ¶ 163; 2010 O.N.C.J. 9.

112. *Id.*

lic, nor his members, were found to have been put at risk.¹¹³ As a result, Schmidt's cow share arrangement did not contravene the HPPA or the *Milk Act*.¹¹⁴

Soon after the decision in *Schmidt*, the British Columbia Supreme Court was asked to consider the legality of cow share arrangements.¹¹⁵ Given the decision in *Schmidt*, it would be reasonable for Alice Jongerden to have expected that her cow share arrangement would be found to not contravene B.C.'s prohibition against the sale, distribution, and marketing of unpasteurized milk. She was mistaken.¹¹⁶

Jongerden was charged under § 15 of B.C.'s *Public Health Act* which prohibits a person from wilfully causing a health hazard.¹¹⁷ Unlike Ontario, unpasteurized milk is deemed a health hazard by regulation.¹¹⁸ Thus, by providing unpasteurized milk to members in her cow share, Jongerden knowingly created a health risk.¹¹⁹ The issue of providing unpasteurized milk to members versus the public at large was not relevant given the regulatory regime in British Columbia.¹²⁰ The court held that it was in the public interest to have the law followed.¹²¹ As a result, the trial judge granted the petitioner's request for an injunction barring Jongerden from distributing unpasteurized milk.¹²²

In Canada, unpasteurized milk is regulated through provincial public-health regulatory regimes. As *Jongerden* and *Schmidt* have shown, the legality of cow share arrangements will depend on the specifics of each province's regulations.

113. *Id.*

114. *Id.* at ¶ 184.

115. *Fraser Health Auth. v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480, ¶ 12; 2010 BCSC 355; 6 B.C.L.R. 5th 293

116. *See id.* at ¶ 33.

117. *Public Health Act*, S.B.C. 2008, c. 28.

118. *Public Health Act Transitional Regulation*, B.C. Reg. 51/2009 at §7 (2010).

119. *Fraser Health Auth. v. Jongerden (c.o.b. Home on the Range)*, [2010] B.C.J. No. 480, ¶ 30; 2010 BCSC 355; 6 B.C.L.R. 5th 293.

120. *Id.* at ¶ 29.

121. *Id.* at ¶ 30.

122. *Id.* at ¶ 34.

