Journal of Food Law & Policy

Volume 8 | Number 1 Article 8

2012

Canadian Food Law Update

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I. INTRODUCTION

Provided below is an overview of the developments in Canadian food law and policy in 2011.[1] This update considers 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 2011, the government concluded its formal implementation of the recommendations outlined in the *Report of the Independent Investigator into the 2008 Listeriosis Outbreak.*[2] Other noted activities include the launch of the Canadian Food Inspection Agency's (CFIA) Multi-year Regulatory Modernization Plan and the release of the Regulatory Cooperation Council's Joint Action Plan. Also in 2011, regulations were passed that will improve the labeling of food that contains allergens, gluten and sulphites. Finally, the prohibition of the sale of unpasteurized milk in Ontario was restored.

II. RESPONDING TO THE LISTERIA OUTBREAK

In December 2011, the federal government released the final report of its actions to improve food safety in Canada following the investigation of the 2008 *Listeria* outbreak.[3] Since 2008, the Government of Canada has committed more than $600 million to improve Canada's ability to prevent, detect, and respond to food safety risks in response to the investigation of

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1. This update is current to December 31, 2011.

2. *See generally*, SHEILA WEATHERILL, GOV'T OF CANADA, 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. *Action on Weatherill Report Recommendations to Strengthen the Food Safety System: Final Report to Canadians*, CANADA FOOD INSPECTION AGENCY (Dec, 2011), http://www.inspection.gc.ca/english/fssa/transp/prog/finale.pdf [hereinafter CFIA ACTION REPORT].

the 2008 *Listeria* outbreak.[4] Below is a description of the final actions taken by the federal government in 2011 to address the *Listeria* outbreak.

Health Canada finalized and released the *Priority Scheduling and Expedited Handling of Submissions that have the Capacity to Enhance Food Safety* policy.[5] The goal of this policy is to speed up approvals for food additives that contribute to overall food safety.[6] The policy assists investigators in assessing the weight of evidence gathered from microbiological, epidemiological and food safety investigations in their determinations of how to respond to a suspected outbreak.[7] It also describes a systematic approach to responding to food-borne illness outbreaks that aims to improve the effectiveness of the federal government's emergency response efforts.[8]

In February, a revised *Compliance and Enforcement Operational Policy* was released.[9] This policy explains the actions the CFIA can initiate in response to non-compliance with existing food safety legislation.[10] The policy aims to improve the consistency, effectiveness, and transparency of CFIA enforcement measures across the country.[11]

To respond to criticisms that the existing CFIA enforcement efforts lacked transparency, the CFIA began publishing information about its compliance and enforcement activities on the web.[12] The public now has access to information on:

- food imports that have been refused entry into Canada;
- federally registered food establishments whose licenses have been suspended, cancelled or reinstated;
- organics certificates that have been revoked;
- notices of violations with warnings and penalties, including identifying repeat offenders of animal transport regulations;
- prosecution bulletins; and

4. *Id.* at xi.

5. *Policy on Priority Scheduling and Expedited Handling of Substances that Have the Capacity to Enhance Food Safety*, Food Directorate, HEALTH CANADA (2011), *available at* http://www.hc-sc.gc.ca/fn-an/securit/addit/priority-priorite/index-eng.php.

6. *Id.*

7. *Id.*

8. *Id.* at 13.

9. *Compliance and Enforcement Operational Policy*, CANADA FOOD INSPECTION AGENCY (2011), *available at* http://www.inspection.gc.ca/about-the-cfia/accountability/enforcement-and-compliance/operational-policy/eng/1326788174756/1326788306568.

10. *Id.*

11. *Id.*

12. CFIA ACTION REPORT, *supra* note 3, at 21.

- food products that have been seized, detained or disposed of.[13]

In addition to investing in bolstering the existing capacity to investigate and respond to foodborne illness by investing in more staff and laboratory facilities, the federal government has undertaken two initiatives worth noting. The first involves exploring ways to develop an integrated network of public health and food safety laboratories that would be capable of a coordinated response to a foodborne illness outbreak or other public health emergency.[14] Effective coordination should reduce duplication and minimize potential gaps in emergency response that would lead to more timely and effective emergency management. The Public Health Agency of Canada (PHAC) is also piloting a Public Health Reserve where epidemiologists external to the Health Portfolio are identified and trained to offer surge capacity in the event of a food safety or other public health emergency.[15]

III. MULTI-YEAR REGULATORY MODERNIZATION PLAN

The CFIA was created in 1997 to house the federal government's food, plant, and animal inspection activities into one central agency.[16] At the time, it was thought that centralizing inspection would create efficiencies and identify gaps in inspection services.[17] Since 1997, global consolidation of the food supply chains and large-scale production has changed the nature of risks the CFIA is required to address.[18] As a consequence, the CFIA has identified a need to develop a global focus.[19] In 2011, the CFIA initiated its first systematic review of the regulatory frameworks that structure its operations to determine whether it is effectively responding to this new global environment.[20]

As the review is at the beginning stages of a multi-year process, it is difficult to predict the changes that may be forthcoming with any certainty. The Modernization Plan Notice released to announce the review, however,

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13. *Id.*
14. *Id.* at 27.
15. *Id.* at 30.
16. Canadian Food Inspection Agency Act, S.C. 1997, c.6 at §4.
17. *1998 September Report of the Auditor General of Canada*, AUDITOR GENERAL OF CANADA (September, 1998), http://www.oag-bvg.gc.ca/internet/English/parl_oag_199809_00_e_9336.html.
18. CFIA ACTION REPORT, *supra* note 3, at 21.
19. *Id.*
20. *Notice of Multi-year Regulatory Modernization Plan for Consultation*, CANADA FOOD INSPECTION AGENCY (Dec. 20, 2011), at 1, http://www.inspection.gc.ca/english/reg/consultation/disce.shtml [hereinafter MODERNIZATION PLAN NOTICE].

does provide some insight into the objectives and drivers of the review that can suggest potential outcomes. The CFIA explicitly identifies the purpose of review process as creating:[21]

> . . .a regulatory system that fosters consumer choice and enables improved business opportunities by building flexible regulatory frameworks that are anticipatory and proactive in mitigating risks, facilitate innovation and support competitiveness, while maintaining the Agency's primary focus on safeguarding Canada's food supply and its animal and plant resource bases.

Given that the CFIA is overseen by the Minister of Agriculture and Agri-Food, it is not surprising that the review mandate has the dual goals of ensuring food safety and supporting industry competitiveness. The challenge for this process is to strike the appropriate balance between the two. Listing food safety as the CFIA's "primary focus," however, would suggest that, when in conflict, the food safety objective should be given effect.

Despite the primacy of the food safety objective, the Modernization Plan Notice provides more explicit detail of the competitiveness objective.[22] It is therefore reasonable to conclude that industry concerns have primarily precipitated the review. It does not necessarily follow, however, that the stated primary focus of food safety will be lost in the formation of the reform proposals resulting from the review. Rather, one could argue that Canada has achieved an effective food safety regime and only needs revision to the extent that it can improve competitiveness. Nonetheless, it will be important to follow this review to ensure that gains in competitiveness do not come at the expense of food safety.

With respect to competitiveness, regulatory frameworks will be assessed and reformed to ensure that they are transparent, flexible, participatory, and harmonized.[23] The emphasis on regulations that are transparent, flexible, and participatory flows from the government's desire to adopt results-based or outcome-based regulations.[24] Rather than mandating specific practices, the goal of the review is to have a regulatory framework that establishes "clear expectations regarding risk management

21. *Id.* at 2.
22. *Id.*
23. *Id.* at 3.
24. *Id.*

outcomes to be achieved."[25] CFIA acknowledges that having measurable targets are an essential feature of results-based regulation.[26]

The shift to results-based regulation is designed to give industry the flexibility to implement the method of achieving a specified outcome as it sees fit.[27] Likewise, by developing the risk management outcomes in partnership with industry, it is felt that a balance will more likely be achieved between food safety risks and the cost of compliance.[28]

The harmonization objectives are two-fold. First, the review is interested in reforms that will harmonize expectations across commodities within Canada.[29] There is a concern that the food industry is not operating at maximum efficiency where one enterprise faces differing rules for each product it markets. Therefore, to the extent possible, CFIA aims to harmonize regulations across commodities.

In addition, the review aims to harmonize Canadian regulations with those of our trading partners, especially the United States of America, to ensure Canadian goods are globally competitive.[30] Creating a harmonized regulatory regime for food safety with the USA is just one aspect of a larger movement towards greater cooperation between the two countries. In 2011, the US and Canada formed the Regulatory Cooperation Council (RCC) and released a Joint Action Plan "to remove unnecessary requirements and align standards" that impact the ease and profitability of trade between the two countries.[31] In addition to agriculture and food, the RCC has planned action in relation to transportation, health and personal care products, workplace chemicals, and the environment.[32] The harmonization objective of the CFIA Review will be driven by the RCC's Joint Action Plan.[33]

A. Regulatory Cooperation Council (RCC)

It may seem obvious why easing access to American markets is a priority to the Canadian government. Many may not realize, however, that Canada is the US's largest customer and, for 34 US states, their principal

25. *Id.*
26. *Id.* at 4.
27. *Id.* at 3.
28. *Id.*
29. *Id.*
30. *Id.*
31. Press Release, Office of the Prime Minister, United States-Canada Regulatory Cooperation Council (RCC) Joint Action Plan (December 7, 2011) *available at* http://pm.gc.ca/eng/media.asp?id=4511.
32. *Id.*
33. MODERNIZATION PLAN NOTICE, *supra* note 20, at 4.

export market.[34] Therefore, greater harmonization has the potential to benefit both economies. With respect to food and agriculture, harmonization goals are divided into three categories: food safety, agricultural production and marketing.[35]

With respect to food safety, the Joint Action Plan aims to:

- Develop common approaches to food safety systems in order to align efforts and minimize the need for each country to conduct inspection activities in the other country;
- Streamline requirements, and where possible, reduce duplicative regulatory activities under Canada and U.S. meat and poultry inspection systems;
- Ensure food safety testing in one country is acceptable to regulators in both countries and facilitate cross-border use of laboratory results; and
- Streamline export certification for meat and poultry, and simplify and reduce, where possible, import and administrative procedures.[36]

The Joint Action Plans goals with respect to agricultural production are to:

- Create an environment to allow for simultaneous submission and joint review of pesticide applications in order to facilitate equal access to crop protection products and minimize differences in maximum pesticide residue limits and tolerances;
- Further align approval processes for veterinary drugs, therefore promoting equal access to veterinary drug products and minimizing differences in maximum drug residue limits and tolerances;
- Develop a North American perimeter approach for plant protection in order to collectively protect plant resources and streamline certification for shipments across the Canada-U.S. border; and

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34. *What the Joint Action Plan Means for Agriculture and Food*, GOVERNMENT OF CANADA, http://actionplan.gc.ca/eng/feature.asp?mode=preview&pageId=371.

35. *Id.*

36. *Id.*

- Develop a common approach for zoning to help prevent the spread of foreign animal disease.[37]

Finally, the marketing objective is directs that efforts be made to:

- Create a common meat-cut nomenclature or naming system and a mechanism for maintaining that system; and
- Develop comparable approaches to protect Canada and U.S. fruit and vegetable suppliers from buyers who default on their payments.

IV. REGULATORY CHANGE

Allergens

Although not in force until August, 2012, amendments to the *Food and Drug Regulations*[38] were passed to require more information on the food labels of prepackaged food about food allergens that frequently cause severe allergic reactions.[39] The amendments also target people who have celiac disease[40] or sulphite sensitivities. It is estimated that 1.75 million Canadians have food allergies, celiac disease, or a sulphite sensitivity in Canada.[41]

The *FDR* has been amended to explicitly define a "food allergen" and "gluten." A food allergen is defined as any protein, modified protein or protein fraction derived from almonds, Brazil nuts, cashews, hazelnuts, macadamia nuts, pecans, pine nuts, pistachios, walnuts, peanuts, sesame seeds, wheat and triticale, eggs, milk, soybeans, crustaceans, shellfish, fish, and mustard seeds.[42] Gluten is defined as any gluten protein from the grain of barley, oats, rye, triticale, and wheat or any hybridized strain created from one of those cereals.[43]

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37. *Id.*
38. Food and Drug Regulations, C.R.C., c. 870 (Can.).
39. Press Release, Harper Government Strengthens Food Allergen Labelling Regulations, HEALTH CANADA, (Feb. 14, 2011), *available at* http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2011/2011_23-eng.php.
40. A common way to manage celiac disease is to remove gluten from one's diet.
41. *Regulatory Impact Statement: Project 1220 Enhanced Labelling for Food Allergen and Gluten Sources and Added Sulphites*, HEALTH CANADA (Feb. 14, 2011), http://www.hc-sc.gc.ca/fn-an/label-etiquet/allergen/project_1220_rias_eeir-eng.php [hereinafter ALLERGEN STATEMENT].
42. *Supra* note 38, at §B.01.010.1(1) (Can.).
43. *Id.*

Although, ingredients are required to be included on the food label in descending order of their proportion,[44] certain exemptions to this general requirement, are problematic for people with food allergies or sensitivities. For example, components of food listed in subsection B.01.009, including margarine, pickles, spice mixtures, some vinegars, alcohol, and prepared meats are not required to be labeled. After August 2012, if any food contains a food allergen or source of gluten, that fact must be explicitly stated on the food label.[45] The food allergen or gluten source must either be included in the ingredient list or the package must explicitly state that the food "contains" the food allergen or gluten.[46] Because some forms of sulphites can be created through manufacturing processes, such as fermentation, sulphites will only be required to be listed on the label if they qualify as a food additive and are present in an amount greater to 10 p.p.m.[47]

In addition, some of the common names currently used to describe ingredients do not provide sufficient notice of some food allergens.[48] For example, including "casein" in an ingredient list may not alert someone with a milk allergy to the fact that the food contains milk. Under the amended regulations, a food product containing casein will be required to indicate on the label that the product contains milk. Together these regulatory amendments will improve the information available to consumers with food allergies or sensitivities.

V. LITIGATION

R. v. Schmidt

Michael Schmidt is an organic dairy farmer from Ontario and a vocal advocate of the benefits of unpasteurized milk.[49] For a number of years, he has provided unpasteurized milk to consumers through a cow share agreement.[50] In 2010, he was acquitted under Ontario's *Health Protection*

44. *Id.* at §B01.008(3)(Can.).
45. *Id.* at §B.01.010.1(2) (Can.).
46. *Id.* at §B.01.010.1(2)(a) or (b) (Can.).
47. *Id.* at §B.01.010.2(3) (Can.).
48. ALLERGEN STATEMENT, *supra* note 41.
49. Nathanael Johnson, *The revolution will not be pasteurized: Inside the raw-milk underground*, HARPER'S MAGAZINE, Apr. 2008, at 71-78.
50. *See id.*

and Promotion Act[51] and the *Milk Act*[52] of 19 charges related to the sale, distribution and marketing of unpasteurized milk products.[53]

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.[54] By only providing milk to members of the cow share and not engaging in any advertising to gain cow share members, the court held that Schmidt's activities were not aimed at the general public.[55] 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.[56] Thus, Schmidt's cow share program was found not to be in violation of either the *Milk Act* or the HPPA.[57]

Soon after the decision in *Schmidt*, the British Columbia Supreme Court was asked to consider the legality of cow share arrangements.[58] 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.[59]

Jongerden was charged under § 15 of B.C.'s *Public Health Act* which prohibits a person from wilfully causing a health hazard. [60] Unlike Ontario, unpasteurized milk is deemed a health hazard by regulation.[61] Thus, by providing unpasteurized milk to members in her cow share, Jongerden knowingly created a health risk.[62] The issue of providing unpasteurized milk to members versus the public at large was not relevant given the regulatory regime in British Columbia.[63] The court held that it was in the public interest to have the law followed.[64] As a result, the trial judge

51. R.S.O. 1990, c. H.7.
52. R.S.O. 1990, c. M.12.
53. R. v. Schmidt, [2010] O.J. No. 223; 2010 O.N.C.J. 9.
54. *Id.* at ¶ 121.
55. *Id.* at ¶ 143.
56. *Id.* at ¶ 163.
57. *Id.* at ¶ 184.
58. 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.
59. *See id.* at ¶ 33.
60. Public Health Act, S.B.C. 2008, c. 28.
61. Public Health Act Transitional Regulation, B.C. Reg. 51/2009 at §7 (2010).
62. 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.
63. *Id.* at ¶ 29.
64. *Id.* at ¶ 30.

granted the petitioner's request for an injunction barring Jongerden from distributing unpasteurized milk.[65]

Thus, after *Jongerden* and *Schmidt* it appeared that the legality of cow share arrangements varied based on the specifics of each province's regulations. In 2011, however, the *Schmidt* decision, was reversed on appeal.[66]

On appeal, Tetley J. held that the lower court's narrow interpretation of marketing, selling and distributing was not justified as public health legislation should be interpreted broadly.[67] Moreover, Mr. Schmidt's right not to be deprived of his liberty except in accordance with the principles of fundamental justice as protected by the Canadian *Charter of Rights and Freedoms*[68] was not violated.[69] Even though, Mr. Schmidt potentially faced a jail sentence for his actions, Tetley J, did not feel that risk was unreasonable. The risks of unpasteurized milk are well document while the benefits are not.[70]

Interestingly, Tetley J. left it open for a member of Mr. Schmidt's cow-share program who had a specific health ailment remedied by raw milk to argue that their life or security of person, also protected by s.7 of the *Charter*, is affected by not being able to access raw milk.[71] Unless such an argument proves successful in court or a decision is made to repeal the statutory bans on the sale of raw milk, the general public will not have a legal source of raw milk in Canada.

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65. *Id.* at ¶ 34.
66. R. v. Schmidt, [2011] O.J. No. 4272; 2011 ONCJ 482.
67. *Id.* at ¶ 66.
68. Canadian of Charter of Rights and Freedoms, Part I of the Constitution Act, being Schedule B to the Canada Act 1982 (UK) 1982, c.11 [hereinafter the *Charter*].
69. *Id.* at ¶ 82.
70. *Id.*
71. *Id.* at ¶ 84.