

Complacency About Food Safety Can Be Costly

The Lawyers are coming... the lawyers are coming

By Ronald L. Doering

Except for maybe the Income Tax Act, it's hard to imagine any area of the law that is more intimately pervasive in the daily lives of Canadians than food law. It is also the law that regulates the agriculture and food industry, the second largest sector of the Canadian economy. And yet, surprisingly, in this country, food law has not been widely recognized as a distinct area of law, as it has been in the United States and Europe. We do not have a modern comprehensive text in food law. We do not have a regular legal reporting service. We don't teach it in our law schools.

But it is a very large and rapidly growing field of law. For reasons of health, trade and consumer protection, the food industry is highly regulated. There are over a dozen specific federal statutes and many more provincial ones that bear directly on the food sector, and these form the basis of thousands of pages of regulations. The food regulations under the Food and Drugs Act alone are over 400 pages long. The nine sets of regulations under the Canadian Agricultural Products Act are much longer. A simplified, plain-word guide to food labelling takes up more than 250 pages.

While the food industry has to deal with this massive body of law every day, it is mostly invisible to the average consumer. Canadians spend over \$1 billion every week at the grocery store, and generally take the safety and quality of their food for granted. Unlike the situation in many countries, Canadians trust our regulatory system for food. In a recent poll, over 80 per cent of Canadians had a high or very high confidence in the Canadian Food Inspection Agency (CFIA) to protect the safety of their food.

There are several reasons why food law is now gaining greater recognition. Enhanced enforcement is one of them. The CFIA has been more aggressive in applying a wide range of enforcement actions in order to address non-compliance by the food industry. Products may be detained, denied importation to Canada, ordered revoked, quarantined or destroyed. Establishments not complying with regulatory standards can have their licences to operate revoked, or lose their status to export. Food products may be ordered recalled and public warnings issued.

And, increasingly, in the more serious cases, the CFIA is taking offenders to the criminal courts and seeking fines or a jail sentence. In all cases, the offences are strict liability offences – that is, the Crown need only prove that the prohibited acts were committed; there is no need to prove that the company had any guilty intent or, for that matter, was even aware

that an offence had been committed. Defences are limited to the narrow one of due diligence.

Enhanced international trade in food has also contributed to the growth of food law. Last year, we sold meat to 98 countries. We imported produce from 145 countries. We get 6,000 truckloads of food from the U.S. every day. We now have huge trade in ethnic foods that were unheard of in Canada just a decade ago. All this increased trade has had very significant regulatory implications both for lawyers helping Canadian companies to increase their exports, and for the facilitation of imports. Food trade law is a booming area of practice, particularly now that sanitary and phytosanitary measures are increasingly being used as technical barriers to trade, replacing tariffs as the conventional means for protectionism. International trade fights, such as those over hormones in beef, and genetically modified food, have taken food law to the courts and front pages.

Perhaps the most significant development in the practice of food law in Canada in recent years has been the emergence of major claims for damages for food-borne illness. Most companies have not yet fully appreciated what is happening already, and that far worse is on the horizon. Consider the case of Bill Marler. This Seattle lawyer is the Wayne Gretzky of plaintiff's lawyers for food-borne illness lawsuits. He made his name, and considerable fortune, successfully suing food manufacturers and retailers for hundreds of millions of dollars US over the last 13 years. He got his start in 1993 by negotiating a \$15.6-million-US settlement for Brienne Kiner, with the Jack-in-the-Box restaurant chain, arising from E-coli poisoning (hamburger disease). After that, he took on the organic juice maker, Odwalla, and settled for \$12 million US, for five children who were severely injured from drinking apple juice. As he says: "It's my life. It's 13 years of representing primarily little kids who get poisoned by big corporations."

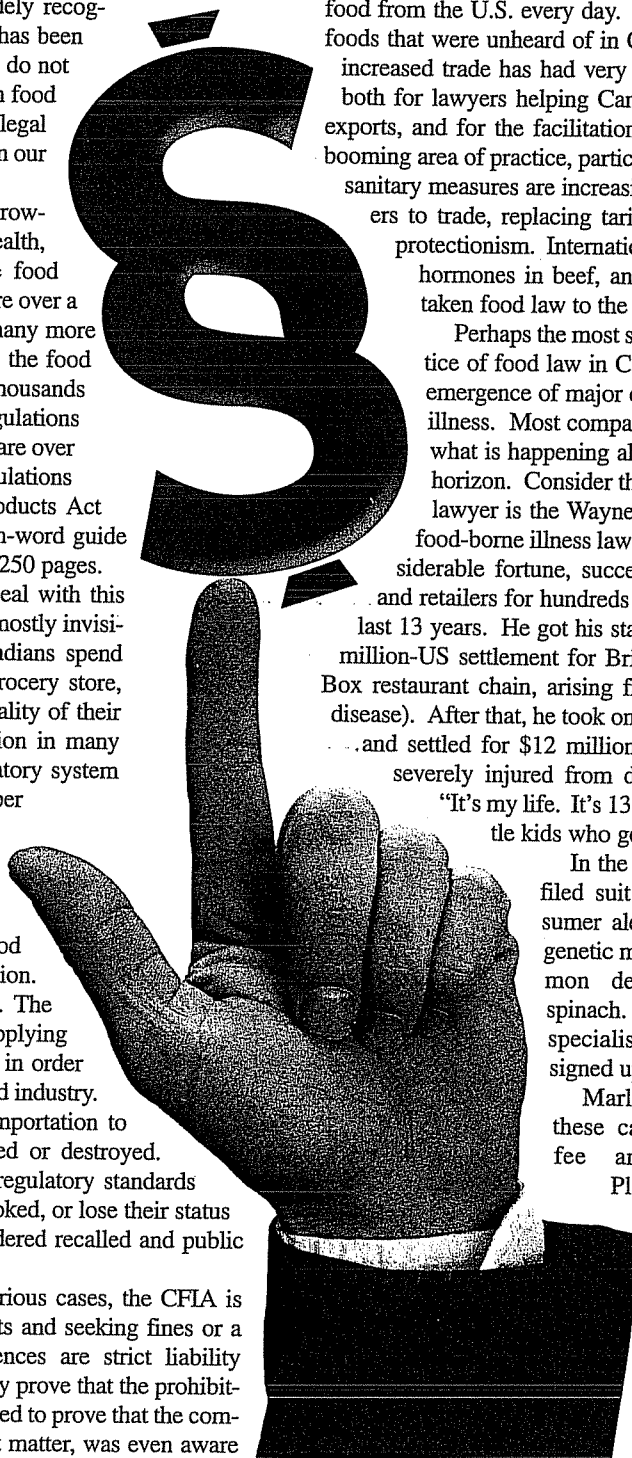
In the recent spinach recalls, he actually filed suit before the FDA issued its consumer alert, because he already had three genetic matches, and he knew that the common denominator was Dole bagged spinach. He has his own lab and science specialists. Within two weeks he had signed up 81 plaintiffs, and counting.

Marler makes a lot of money out of these cases by setting up contingency fee arrangements at the outset.

Plaintiffs have no up front costs, and all legal fees are taken as a percentage of settlement. I have heard Marler speak, and he is quite persuasive on the point that he helps change corporate behaviour because he hits companies where it hurts – in the pocketbook. He is

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unlikely market – Tucson, Ariz. Bakerzin’s concept as a mid-priced café, selling French-style cakes and pastries can be found in New York and Los Angeles, but it’s new to Arizona. The Tucson outlet is the first of 500 planned outlets in the U.S.

Saccharin ban under re-evaluation

Health Canada has been prompted to review its 30-year ban on saccharin, the artificial sweetener linked to bladder cancer, after new studies and information have raised questions about its reported carcinogenic nature. “We’re in the process of reviewing that information to see if we should allow it or keep it banned or change its regulatory status,” said HC spokesperson, Paul Duchesne.

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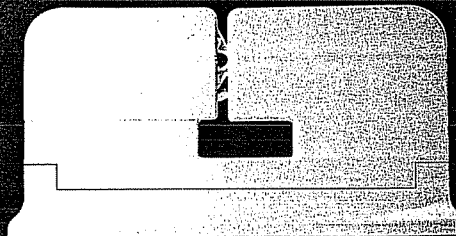
probably entitled to take some credit for many of the recent reforms in the American meat industry, the fresh juice industry, and changes now being made in the fresh produce sector.

Canada hasn’t yet seen the same kind of growth of these cases, but it is just a matter of time before we have our own Bill Marler. Health Canada estimates that one in three Canadians get sick from food poisoning every year. While we keep saying that our food has never been safer, and is among the safest in the world, we cannot deny that food-borne illness is a significant public health issue for Canada. In fact, it is now our largest class of emerging infectious diseases, with more than 250 different types of bacteria, parasites, viruses and toxins that are known to cause food-borne illness. That is more than five times the number of food-borne pathogens than were known just 60 years ago.

The baking industry of Canada has had a few allergen recalls, but generally has been relatively free of litigation, and major CFIA enforcement. This suggests that the industry takes food safety very seriously, but this is no time to be complacent. ♦

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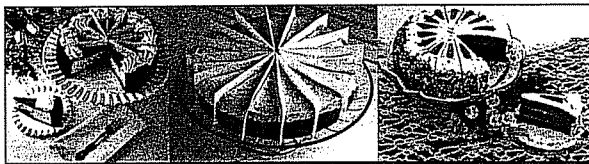
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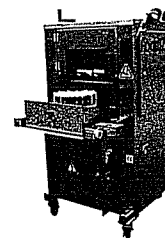
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