



## Fettering discretion

A cautionary reminder for regulators and their ministers

By Ron Doering

If you're in the food business, for reasons of public health, trade and consumer protection, you're always swimming in a sea of regulations. This regulatory environment is characterized by broad delegated bureaucratic discretion; a central feature of Canadian food law is that most of the law is made, interpreted and enforced by officials, not by legislatures and the courts. Sure, legislation goes to legislatures and regulations go to Cabinets for decision, but guidelines, directives, interpretation letters, certifications, pre-market approvals, letters of no objection, waivers, decisions to prosecute, detention orders, product seizures, recalls, import bans, HACCP approvals and withdrawals, import bans, warnings, rulings, and border controls all come from your friendly food regulator, sometimes acting in the name of the minister. These rules are often called soft laws in the sense that they are not formal legislation or regulations. But if you're on the wrong side of a bureaucratic decision, they can feel pretty hard.

So the Canadian Food Inspection Agency (CFIA) and Health Canada have immense discretion, discretion that their thousands of employees exercise every hour of every day. What can you do if they make a decision or take action that was wrong, or arrived at through a process that denied basic procedural fairness such as providing adequate notice or an opportunity to be fully heard? Internal review by CFIA's Appeal Office is now possible, but by its very nature it has significant limitations. What about seeking Judicial Review by the Federal Court?

Historically, very few food companies have sought relief from the Federal Court. In addition to the cost and time involved, companies know how hard it has been in the past to get the Federal Court to set aside CFIA actions. The Court has consistently displayed a high degree of deference to the regulators, citing the need to exercise judicial restraint when reviewing decisions involving complex decision-making processes, deep expertise and rules designed for the protection of the public. This is why there is so little jurisprudence in Canadian food law. This could all be changing.

In a recent decision (*Apotex Inc. vs Minister of Health*, 2015 FC 1161), Mr. Justice Manson quashed an Import Ban on Apotex companies on the basis that the minister had denied the company procedural fairness as she had not provided adequate notice, depriving it of a meaningful opportunity to be fully heard before the ban was imposed. Moreover, the Court held that the minister acted on an improper motive: "The above facts suggest that the Import Ban was motivated by the minister's desire to ease pressure triggered from the media and the House of Commons — a purpose falling outside her delegated authority." The Court provided a blunt conclusion: "The minister implemented an Import Ban that was motivated by an improper purpose, and without affording Apotex the procedural protections required by law. This is neither a reasonable decision nor a correct one — it is an action taken without legal authority and thus must be quashed." Apotex is now



suing the federal government for \$500 million for damages sustained because of the unlawful ban.

It may be that the Court was influenced by the fact that the evidence showed there was no urgent need to protect public health, so the scope of the precedent may prove to be limited to those situations. Nevertheless, litigation lawyers may now be more inclined to seek judicial review. Gowling WLG partner and seasoned litigator Rick Dearden provides a caution to public servants: "Justice Manson's decisions in the Apotex cases are a strong reminder that the rules of natural justice and fairness really matter. Government officials are not above the law and these rulings will embolden persons dealing with bureaucrats to assert their administrative law rights in the Federal Courts. Officials who fail to act fairly do so at their own peril."

Even when ministers and their officials seem to have been accorded near unfettered discretion, their behaviour and decisions cannot deny basic procedural fairness to regulated parties. ●

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