

BIOTECHNOLOGY LAW

Food law: pervasive yet not widely recognized as a distinct area of law

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 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. It is true that much of what we now call food law in Canada has historically been covered under agriculture law. But that nomenclature was historically limited to various laws related to farming, and not related to food delivery.

But it's a very large and rapidly growing field. 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.

While the food industry has to

deal with this massive body of law every day, it's mostly invisible to the average consumer. Canadians spend \$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.

But several recent factors have served to significantly raise the profile of food law in Canada. More rigorous enforcement, for example, has highlighted the wide range of powers that the CFIA uses to deal with non-compliance. Products may be detained, denied importation to Canada, ordered revoked, quarantined or destroyed. Establishments not complying with regulatory standards can have their licence 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. For example, recent successful criminal prosecutions have resulted in major fines for importing non-declared fish, mislabelling produce, interprovincial shipment of meat by non-federally registered companies and for adding sulphites to ground meat



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(to mislead the consumer by giving the produce a bright red appearance to conceal bacterial growth).

But criminal prosecutions are

just the tip of the iceberg of enforcement action. For less serious cases, where recall is not warranted because there is no public health threat, the CFIA's enforcement tool of choice is product seizure.

There is no administrative appeal mechanism to this extraordinary power and it can often have devastating economic cost to a food company out of all proportions to some minor alleged technical breach of one of the hundreds of "standards of identity" under the *Canada Agricultural Products Act*.

The major growth in trade in food products has also raised many legal issues. Last year we sold meat to over 130 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 varieties of foods that were unheard of in Canada just a decade ago.

This increased trade has had very significant regulatory implications both for lawyers helping Canadian companies to increase their exports and to facilitate 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 con-

ventional 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.

The most recent situation to dramatically raise the profile of food law was the May 2003 discovery of BSE in Canada. It is a testament to the credibility of the food regulatory system that beef sales have actually gone up since the BSE discovery but economic losses of over \$5 billion (to say nothing of the tragic personal implications for Canadian farmers) have graphically demonstrated the vulnerability of an economy so reliant on exports.

While the initial American response was appropriate, the continued delay in opening the border to live animals is due to pure protectionism. The U.S. and Canadian meat inspection systems have been equivalent for many years.

We'll know later this month whether law and science will open the door or protectionism will keep it shut; it is never easy to keep politics out of food law.

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