



“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 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. And we don't teach it in our law schools.

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. The food component under just the *Food and Drugs Act* are over 400 pages long. The nine sets of reg-

ulations 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'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% 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. The CFIA applies 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 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. In July 2002, a company and its directors were fined a total of \$82,500 under the *Food and Drugs Act* after being found guilty of selling horse meat labelled as beef. Recently, a B.C. company entered guilty pleas to one count of violating the *Meat Inspection Act* and two counts of violating the *Canada Agricultural Products Act*. The company was fined \$100,000 for misusing the federal meat inspection legend on meat products, removing the manufacturer's batch numbers and changing the best before date on cheese.

In March 2003 alone, the CFIA reported seven successful criminal prosecutions for importing non-declared fish, mis-

labelling produce, interprovincial shipments of meat by a non-federally registered company and for adding sulphites to ground meat (to mislead the consumer by giving the product a bright red appearance to conceal bacterial growth).

Lawyer Susanne Frost is the director of enforcement and investigation services, the "food police" directorate of the CFIA. She is proud of the enhanced enforcement activity: "Over the last three years, we have brought the most serious cases before the court and provided comprehensive impact statements to assist the court to understand the serious implications of non-compliance in the food industries. As a result we were able to obtain fines in the five and six figure range, which attract wide publicity. This provides the general deterrence to the industry that enhances voluntary compliance."

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 costs to a food company out of all proportion to some minor alleged technical breach of one of the hundreds of "standards of identity" under the *Canada Agricultural Products Act*. This is one area of food law that needs a serious review but, in the meantime, this is a major legal issue for the food industry.

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ENHANCED PUBLIC AWARENESS

There is an unprecedented explosion of interest in food related issues with daily front page stories dealing with: genetically modified foods, major food recalls, manure management, natural health products, allergies, possible new food threats (such as acrylamide), pesticide residues, mad cow disease, and organic foods. Never mind the countless other stories (usually with conflicting information) on nutrition and diet. There are said to be over 20,000 nutrition/diet books on the North American market today.

These issues have brought pressure on governments to change existing laws or to bring in new regulations. Health Canada has recently introduced major amendments to the Nutrition Regulations that bring in new mandatory provi-

sions for food labelling and allowing for new diet related health claims that were formerly not allowed. Food companies are going to stretch these new rules to the limit to gain niche market advantage and their competitors will be demanding strict enforcement. The proposed new *Natural Health Products Regulations* will also be a fruitful area for legal enforcement and litigation.

Environmental concerns for the way food is produced have created whole new areas of legal business. London, Ont., lawyer Valerie M'Garry, for example, has a booming practice fighting large-scale hog operations. She practices "pig manure law" under the *Ontario Nutrient Management Act* and is proud of her title "The Princess of Poo".

ENHANCED TRADE IN FOOD

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.

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 phyto-sanitary 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.

ACTIONS FOR DAMAGES CAUSED

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 looms on the horizon.

Adolph Zarovinsky of Toronto based Tiffany Gate Foods Inc., knows. On the Friday before the Victoria Day weekend last year, he was advised by Public Health officials in Ottawa that they were dealing with a number of cases of *Shigella sonnei*. The first CFIA health alert went out on Saturday, May 18, initiating Tiffany Gate's voluntary recall. Tiffany Gate Greek-style pasta salad was being fingered as the culprit. By all accounts, Tiffany Gate, with the help of Allan Bonner from the Centre for Training in Risk and Crisis Management, did all the right things in handling the crisis.

But then along came the lawyers for Nikki Tourlos in Toronto and Peter Andrews in Ottawa, who have now joined forces to bring a class action law suit claiming damages for tens of millions of dollars. As close to 700 people tested positive for *Shigella sonnei* in Ottawa and Toronto during the outbreak, the scope of the claim is potentially very large. To make matters worse, the Ontario government has joined in the action to recover health costs. Ontario's Health Minister Tony Clement was quoted as saying "I believe the taxpayers do have a right to compensation."

Peter Cronyn of the Ottawa firm of Nelligan O'Brien Payne LLP is the lawyer for Peter Andrews. He sees the class action as "the great leveller between the individual and any large organization." Cronyn thinks that we will see

major growth of these kind of actions: "Canadian lawyers are only just starting to realize the potential of this tool and they will become more proficient in using it to serve their client's ends. At the same time, the average citizen has become much more knowledgeable and concerned about what he or she con-

sumes. It is inevitable there will be an increase in class actions seeking remedies for injurious effects arising from the consumption of food products."

If we want to know where Canada may be going, take a look at www.marlerclark.com Seattle lawyer William Marler got his big start when he acted

for the plaintiff Brianne King in her historic US\$15.6 million settlement with Jack in the Box in 1993, the first big *E. coli* hamburger case. Since then, Marler Clark have resolved over a thousand food borne illness cases with total recoveries exceeding US\$77 million. They have hundreds of ongoing cases involving *E. coli*, *Salmonella*, *Shigella*, *Listeria*, *Campylobacter* and Hepatitis A. The defendants include many of the best known American food companies and restaurant chains. Big companies have recognized the new reality. ConAgra Foods recalled 18.6 million pounds of meat in July 2002, in one of the largest meat recalls in U.S. history. By April 2003, Marler had settled 21 cases out of court. He applauds ConAgra's approach: "It's never happened to me in my career. Unlike most companies I've dealt with, ConAgra has stepped up for these kids and their families." Marler estimates that the final bill for ConAgra could approach \$50 million in damages.

CONTINGENCY FEES

As a result of the recent *McIntyre v. Attorney General of Ontario*, Ontario has joined the rest of the English-speaking world to permit contingency fees in nearly all cases. This will be a further inducement for individual plaintiffs to bring consumer actions for food borne illnesses.

Rising consumer concern over their health has been a boom for the food industry, providing manufacturers with many opportunities to create new food products, especially for the baby-boom generation. On the other hand, this is a litigious group and there have been several actions against the food industry claiming, for example, that fast-food restaurant chains are causing health problems. In the U.S. recently, the parents of two teenage girls sued McDonald's, blaming the fast-food chain for the girls' obesity. While some people laugh at these actions, other food company executives remember the early tobacco cases and since then companies have paid billions to compensate consumers and states for the costs of cigarette-related illnesses.

Canada is not the U.S. It will probably be a while before some of these more extreme cases take root in Canada. But more rigorous enforcement, enhanced public awareness and new laws, the globalization of the food marketplace and the growth of civil actions for food borne illnesses are all with us now and have fundamentally changed the legal environment for the Canadian food industry.

IS THE CANADIAN INDUSTRY PREPARED?

The big food companies have gone through major adjustments in recent years to protect their brands and market-share and to meet due diligence requirements. Quality control systems like HACCP are commonplace. Big companies take food safety very seriously. Loblaw's, Canada's largest food retailer, has for many years had comprehensive risk management strategies and highlights food safety in its annual report. Maple Leaf Foods is an industry leader in food safety with a world-class

food safety assurance system. It's president, Michael McCain, promotes the idea that food safety is the key to developing global brand identity for Canadian food products. Both companies have large and knowledgeable legal departments with specialists in food law. But Bob Weaver, general manager of the Canadian Meat Council, cautions that while most companies have come a long way to respond to the new regulatory environment, "they also know that this is no time to be complacent."

It's not so easy for small and medium sized manufacturers and retailers to cope with the complexity of today's regulatory system. While most food companies have made great strides in improving quality control systems, it's not clear how many of them could survive a major recall or action for food borne illness.

Do the majority of them have insurance for the new liabilities? Do they realize how much their liability has increased now that enhanced traceability systems could trace the problem back to their door? Many processors know little about many of the ingredients they use and yet they and their brands may have the most to lose.

Are producers ready? No, says Steve Osselton senior vice-president, in the Toronto office of Marsh Risk Consulting. He is currently working with seventeen commodity groups to implement risk management strategies under the Canadian On Farm Food Safety program that is trying to develop a consistent approach to food safety on farms. He has been explaining the increased potential for liability with the growth of traceability systems. Osselton is clear: "Farmers are just not aware that their liability has increased drastically but, I have to say, the directors and officers of the commodity groups are concerned about their liability. This new legal environment has huge implications for everyone all along the food chain."

As food law permeates every aspect of the industry, lawyers have become a

necessary evil. As Bob Weaver puts it, "For most people, dealing with lawyers is right up there with going to the dentist. But if you're in the food industry, this is a pain you can't live without." We'll take that as a compliment. We've been called worse.

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