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The Blame Game

In cases of criminal responsibility for non-compliance, it's up to the accused to prove due diligence

The food industry is quite aware of the sweeping enforcement powers regularly exercised by the Canadian Food Inspection Agency (CFIA). Without the necessity of going to court, the CFIA has broad powers of search and seizure, product detention and recall. Non-compliance can lead to de-registration or decertification, effectively putting a company out of business.

It usually comes as a surprise, however, to learn that food industry owners and managers can also be taken to criminal court to face huge fines or imprisonment, even if they didn't mean to do anything wrong, didn't know they were doing anything wrong or didn't know that an employee was unwittingly contravening some obscure regulation. This uncomfortable reality has taken on new seriousness – in my practice, I've come to learn of a more aggressive policy, recently adopted by the CFIA, which has led to a remarkable increase in criminal prosecutions for non-compliance with agriculture and food law. What is particularly disturbing is that the criminal courts are being used in cases of pure technical non-compliance, where there has been no threat to public health or any other significant implication.

Like thousands of other federal regulatory offences, all food and agriculture statutes enforced by the CFIA make it a criminal offence to contravene any provision of the Acts or their regulations. For example, section 33 of the huge *Canada Agricultural Products Act* provides that "every person who contravenes any provision of this Act or regulations is guilty of an indictable offence and is liable to a fine not exceeding $250,000 or to a term of imprisonment not exceeding two years, or both."

This and other offences are strict liability offences, which means that the Crown must only establish the criminal act; there is no need to prove that the accused intended or allowed the prohibited act to occur, even if the occurrence was totally accidental. And, of course, employers are vicariously liable if their employees violate the Act. Faced with the awesome power of the state in the case of strict liability offences, most companies have been pleading guilty and getting fines from the courts.

There is, however, a defence to strict liability offences that needs to become better known. In the leading case of *R. v. Sault Ste. Marie*, the Supreme Court of Canada recognized that in the case of strict liability offences "the accused can avoid liability by proving that he took all reasonable care; the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omissions innocent, or if he took all reasonable steps to avoid the particular event." Note that in both branches of the defence the onus is shifted to the accused, with the test being the notoriously vague legal standard of "reasonableness."

There are only a few reported cases to provide guidance. There is, however, an interesting exception in the case of *R. v. Ray's Seafood Market.* In that case, the CFIA charged the accused with seven counts under the *Fish Inspection Regulations* of importing fish into Canada without an import license. The trial judge and the Superior Court judge on appeal both found that Ray had exercised due diligence, and he was acquitted. However, at the Quebec Court of Appeal the acquittal was quashed and a new trial ordered on the basis that the Appeal judges seemed to conclude that Ray's due diligence was essentially a matter of ignorance of the law, something that is never a valid defence. While this case raises many questions, it confirms that at least one food company was able to rely on the defence at the trial and appeal level.

Like all businesses, agriculture and food companies should be punished for neglectful or harmful actions. Sometimes criminal prosecutions are warranted, especially if there are public health or serious international trade implications. But the food industry is highly regulated and subject to literally thousands of provisions. If the CFIA is going to increasingly resort to criminal prosecutions, even in cases where the company came into compliance as soon as it became aware of the breach, then more companies should plead not guilty if they have taken all reasonable care to avoid non-compliance. Are you ready for when the sheriff comes calling?

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