Sue the **CFIA** for its negligence? Good luck

Ron Doering

For reasons of trade, consumer protection and public health, the food industry is one of the most highly regulated in the country. The Canadian Food Inspection Agency (CFIA) has extensive investigation and enforcement powers. But what if the CFIA is clearly negligent in its investigations? What if the CFIA's negligence causes economic loss, can the injured food company obtain compensation through litigation? Recently a client of ours was surprised to learn that the answer is probably "no": a food company has effectively no recourse to obtain compensation in a tort action against the CFIA. The latest case to confirm this law is *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency* (2013 BCCA 34).

In that case, the plaintiffs exported carrots to Canada where they were sold to the public by Costco. As a result of reports by four consumers of illness caused by the carrots, the CFIA inspected the carrots and then told the plaintiffs, Costco, and the public that the carrots might be contaminated with *Shigella* bacteria. Costco recalled the carrots from retail stores in Canada and the United States, and the recalled carrots in inventory were ordered destroyed. However, the CFIA's investigation was done negligently — the carrots were not contaminated with *Shigella* and did not cause the outbreak of *Shigellosis*. The plaintiffs suffered considerable economic loss as a result.

The plaintiffs sued the CFIA. The trial judge dismissed the claim by applying the old law known as the "Anns/Cooper test." On appeal, the British Columbia Court of Appeal (BCCA) also slavishly followed precedent. Leave to appeal to the Supreme Court of Canada was denied, so unfortunately this is our law for some time to come.

Fear not, dear reader, I will not subject you to the torturous reasoning of our courts to justify denying compensation. Suffice to say that, in my opinion, this is just another case of the courts citing "binding" jurisprudence to justify and disguise their policy decision.

Apart from the missed opportunity to develop a more coherent standard for liability for regulators like the CFIA, the most unsatisfactory aspect of the case is that both levels of court caused unnecessary confusion by consistently stating that the CFIA was not negligent in law but was "negligent" in fact (using the lay sense of the term), without disclosing or discussing in any way what the CFIA did. Just because the CFIA turned out to be wrong about the presence of the bacteria on the carrots doesn't mean it should be liable in law. Often, especially in urgent situations, the CFIA must make decisions with unclear facts and uncertain science. Of course, in these cases, sometimes the CFIA will be wrong, but that shouldn't make it liable in law. At the same time, the regulator shouldn't have to be worried about the possibility of economic losses. The issue shouldn't be whether the regulator made a mistake or whether the convoluted "Anns/Cooper test" was met. As long as the other elements of the classical tort of negligence are present, the decision for the court should be whether the agency's conduct met its duty to act as a reasonable regulator in the circumstances, and if it fails this test it should be held liable.

Of course, in many cases, not to act would be negligent. Moreover, in the years that I was president I oversaw hundreds of recalls, and I was always aware that I could even be charged personally with criminal negligence if a failure to act in a timely way led to injury or death (this is the result of the gross injustice caused by the naivety of the famous Krever Report, but that's a topic for another day).

Interestingly, there is a hint that Mr. Justice K. Smith of the BCCA was just a little uncomfortable with his decision. In the final paragraph of his Judgment, he makes this remarkable statement: "On a final note, the conclusion that a food seller who suffers losses as a result of the negligence of government authorities has no recourse to obtain compensation in a tort action may seem contrary to the currently popular demand for 'accountability' of all decision makers." You think?

The policy on when regulators should be held liable in law should be made by our legislatures, not the courts. It's good public policy to protect regulators from ever having to compromise their duty to protect the public; it is not good policy to give them carte blanche immunity from civil liability no matter how negligent they may be.

Ronald L. Doering, BA, LL.B. MA, LL.D., is a past president of the CFIA. He is counsel in the Ottawa offices of Gowling WLG. Contact him at Ronald.doering@gowlings.com

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