



Liability and Traceability in Canada

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ABSTRACT

The interest in “farm to fork” traceability has caused agricultural producers to become concerned about liability. Currently, some producers believe they may not be held accountable for defects in their products because their identity may be unknown. In reality, individual farmers and corporate producers can be found liable for the quality of their product under Canadian law.

Anonymity is not the same as not being liable, and traceability can provide previously unavailable safeguards to producers. While traceability may make producers more visible to be named as defendants in legal actions, it also can make them less vulnerable. If producers use a traceability program as a part of their good management practices and due diligence, then plaintiffs will have fewer grounds on which to base litigation.

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Overview

The movement to make food traceable from “farm to fork” has caused agricultural producers to become more concerned about the issue of liability. Within the current system, producers believe they may not be held accountable for contamination in their products because their identity is rarely known to consumers. In reality, producers can be found liable for the quality of their product under Canadian law.

It is possible that traceability of farm products may allow consumers to identify and sue producers; however, traceability can also provide previously unavailable safeguards. As an example, participation in a traceability program will help producers establish defences against claims by demonstrating due diligence and reasonable farming practices. Furthermore, traceability can help protect producers from losses arising from the unnecessary culling of animals or crops if an outbreak can be traced back beyond the processing facility. Finally, traceability can help reduce the impact of international trade restrictions that close borders to exported Canadian products. The overall benefits to individual producers and their industry related to the traceability of farm products outweigh the risks of not having traceability.

1.0 Understanding Legal Responsibility & Liability

To properly examine the benefits and risks related to traceability, one must first understand the legal responsibilities and liabilities producers face in relation to their products. Under current Canadian law, producers are liable for their products under two separate categorizations: *Tort Liability* and *Statutory Liability*. Producers would most likely face a tort liability claim if a

consumer were to claim that the contaminated product was caused by the producer’s negligence. Producers can also face liability issues raised by the government in statutory offences. Statutory liability is found under both provincial and federal law, specifically the *Sale of Goods Act*¹ in Ontario and the *Food and Drugs Act*² federally.

Tort Liability

A producer may believe that without the transparency inherent in traceability, the resulting anonymity will hold a producer harmless. It is important to remember that anonymity is not equivalent with protection from liability. At this time, there are no recorded cases of producers facing civil suits, from consumers, because of contaminated farm products. This may support the anonymity theory, but it does not mean that producers will never be found liable. Will traceability increase the likelihood of a producer being named in a lawsuit? Assuming the traceability program permits access to where a product originated and information is not used strictly for emergency management, then yes, the chances of being named in a lawsuit are enhanced.

In tort liability, it is likely that a producer’s liability would arise as a claim of negligence, either through acts or omissions. Negligence is based in common law. This means the law has developed over time through decisions made by various levels of courts in Canada and the United Kingdom. The plaintiff (consumer or other person) in a negligence action needs to prove two basic things:

- They were owed a duty of care by the defendant; and,

¹ R.S.O. 1990, c. S.1.

² R.S. 1985, c. F-27.

- The defendant breached that duty of care through their actions.

Currently, the typical defendants in food related negligence suits are processors or retailers. This is for a number of reasons, of which one could be the anonymity of producers. Traceability can allow consumers to determine where something was produced, it will not establish a guaranteed case against the producers. Potential plaintiffs will still need to prove legal causation; they will need to be able to show that it was the producer that breached the duty of care. The most common defence to a negligence claim is that the producer (or employees in the case of a corporate producer) acted in a reasonable manner at all times during the production of the contaminated product. Since it is typical in these cases that contaminated product is entirely consumed prior to the illness developing, it can be extremely difficult to test the product and determine if the contamination was from the preparation methods used by the consumer, the processing or the production.

Finding a producer liable will be a difficult task for various reasons, such as the product passing through various hands before the consumer leading to many sources potentially contaminating a product and there can be strong defences by simply adopting or continuing with reasonable farming practices. Regardless of liability, there will be costs associated with defending any such action, which may well be covered under a producer's insurance under commercial general liability. Being named in a lawsuit does not necessarily mean that a producer will be tied up in courts for years with legal bills piling up. A court can dismiss an action against a defendant early if there is little evidence against the defendant, but there remains the fact that an individual may incur costs; especially if insurance coverage is not available.

Regardless, such costs to defend will be far less and much more unlikely, than a scenario where suspect product is introduced to the market without traceability. In such an event, whether there is a lawsuit or not, there is a greater likelihood of an individual producer suffering economic loss due from a mandated culling of animal or crop and the tainting of the industry. Currently, a producer is susceptible to loss not only from the risk of supplying suspect product from his or her farm, but if the source cannot be identified; the producer is currently at risk for contaminated products supplied by his neighbour or any other producer in the industry. This risk must outweigh the potential for loss associated with being named in a lawsuit if a contaminated product could be traced.

Statutory Liability

The regulatory framework of agriculture in Canada is mostly based in federal law; however, Ontario producers and processors that sell their products in Ontario must also meet provincial standards. This is because agriculture and food is one of few areas of law that is shared between the federal government and the provinces under the Canadian constitution³. The Ontario traceability program has been developed in accord with an initiative led by Agriculture and Agri-food Canada (AAFC) and the Canadian Food Inspection Agency (CFIA)⁴.

In conjunction with the work carried out by the CFIA, the federal government has addressed issues of consumer protection through the *Food and Drugs Act*⁵ (FDA). The FDA prohibits the

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5 at s. 95.

⁴ “Livestock Traceability” (May 4, 2009), online: CFIA <
<http://www.inspection.gc.ca/english/anima/trac/trace.shtml>>

⁵ *Supra* note 2.

sale of food that is, *inter alia*, unfit for human consumption or was produced in unsanitary conditions⁶. Consumers are further protected in Ontario under the *Sale of Goods Act*⁷ (*SGA*). The *SGA* contains implied warranties that goods sold will be of merchantable quality⁸. That is to say, farm products sold to be consumed by humans cannot be of a quality that they would be harmful for human consumption.

There are three kinds of liability in relation to statutory offences. The Supreme Court of Canada has determined they are: *mens rea*, strict liability and absolute liability⁹.

To be convicted of a *mens rea* offence, the producer (or an employee of the corporate producer) must knowingly engage in the prohibited conduct. For *absolute liability* offences, there must only be proof that the producer or the employee committed the offence, regardless of intent or due diligence. Most offences under the statutory scheme of consumer protection are *strict liability* offences, and as such, they lie in between *mens rea* offences and *absolute liability* in the spectrum of liability.

Strict liability offences are made out by the prosecution finding that the act or omission occurred regardless of the offender's intent. They are separated from *absolute liability* offences because they allow the offender (producer in this instance) to raise the defence of due diligence. In terms of farm products, due diligence means that a producer who follows reasonable practices and still supplies a contaminated product to the consumer cannot be held responsible for unforeseeable outcomes

which they were taking reasonable steps to avoid. What constitutes unforeseeability and reasonableness are determined in each specific industry¹⁰.

Recently, the Supreme Court of Canada raised the threshold for reasonable foreseeability in *Mustapha v. Culligan of Canada Ltd.*¹¹. Foreseeability is determined by the objective reasonableness standard. Therefore the question courts will determine is, after following the practices of the industry, is it reasonably foreseeable that the plaintiff could have been harmed in the manner in which they were? A due diligence defence will protect producers against liability if it is not foreseeable that the injury suffered by the plaintiff could be an outcome of the production process.

2.0 Benefits of Traceability on Diminishing Liability

Traceability will have two beneficial effects for producers in relation to their liability for their products. First, traceability will allow government to trace offenders through the processing centres (where the liability chain currently ends in Canadian food production). While it may seem this will only lead to prosecuting producers for statutory offences, the greater likelihood is that it will protect producers from unnecessary losses. Currently, under the *Health of Animals Act*¹², the CFIA and the federal government can order any producer to cull their entire herd (or destroy crops) if there is suspicion that an outbreak originated on their farm. During the BSE crisis in 2003, Alberta cattle producers were forced to cull 2,700 head

⁶ *Ibid.* at s. 4(1).

⁷ *Supra* note 1.

⁸ *Ibid.* at s. 15.

⁹ *R. v. Sault Ste. Marie (City of)*, [1978] 2 S.C.R. 1299.

¹⁰ *R. v. Bata Industries Ltd.* (1992), 9 O.R. (3d) 329 at 358.

¹¹ 2008 SCC 27.

¹² S.C. 1990, c. 21.

of cattle. Over 2,000 of those culled animals were older than 24 months and none of them tested positive for BSE¹³. Cattle producers throughout Canada suffered from the trade restrictions implemented, especially by the United States, against importing Canadian beef. If more complete traceability had been in place, how much less the impact would have been felt by the individual producers? Had the authorities been able to immediately pinpoint the source with more assurance and speed, the impact on the industry could have been lessened. From the perspective of a producer supplying suspect product, if there were lawsuits, yes it is likely the producer would have been named. If the producer followed reasonable farming practices, the ultimate liability would likely have been minimal, if any at all; and it is possible insurance coverage would have covered any potential loss.

There are also corporate structures that can be implemented at a reasonable cost to further reduce potential liability. There may be costs associated with defending a legal action; but weigh this against the costs and losses suffered by all the other individual producers that did not have suspect product. Arguably, in the event the producer knew a contaminated product came from a specific producer's farm, the producer would have been in a position to quickly identify and remedy the cause. Once resolved, the producer would be able to re-enter the market in an 'unaffected' industry. If an individual producer is a repeat offender, or fails to remedy the source of contamination, then perhaps that producer will be forced out of the industry. The question to ask is, would it really matter to the other producers who follow reasonable practices? Traceability will allow issues to be pinpointed and resolved without

affecting the industry as a whole, which means the vast majority of the individual producers will be unaffected by erosion of confidence in the industry.

The second beneficial legal effect traceability will have is to help producers establish due diligence defences to strict liability offences and negligence claims. Potential liability typically results in better practices. As individual producers adapt or document their farming practices, it only benefits the producer and the industry as a whole. Participating in a traceability program shows the producer is committed to protecting and promoting consumer health and safety. Further, if a producer ever becomes aware of a problem with their product, notification through the traceability system can facilitate recalling product from retailers and possibly tracing back the problem to the source. The faster a specific product can be removed from the consumer chain, the fewer chances there are that a consumer will purchase the goods. This could mean the statutory offences may be avoided entirely.

3.0 International Treatment of Traceability

Canada is not the only nation that has recognised the benefits found in traceability programs. The European Union has a regulation that requires that all farm products sold in the EU must be traceable, no matter what their country of origin¹⁴. In Europe they are currently more concerned about the potential adverse effects of genetically modified organisms (or GMOs) and possible cross-contamination between GMOs and non-modified farm products. They require that all plants and

¹³ "Facts about BSE" (available online on October 9, 2009): Alberta Beef: < <http://albertabeef.org/res/cp-FactsAboutBSE.pdf>>.

¹⁴ Regulation (EC) No 178/2002 (in force since January 1, 2005).

animals be registered and traceable especially so they can find and prosecute producers of GMOs if there is a contamination.

The United States has a similar statutory regime as Canada. Their laws impose a strict liability on producers to provide the general consumer only with contamination and defect free products. Some producers in the United States feel that they are also protected by their anonymity, but the 2007 outbreak of *E-coli* and the resulting international restrictions on American spinach (and on hot peppers in 2008) demonstrate that a single producer's error can have devastating effects on an entire industry¹⁵.

The United States Department of Agriculture recognised the benefits of traceability programs. They have already introduced the National Animal Identification System (NAIS)¹⁶. Like most Canadian programs, the NAIS is currently voluntary which USDA hopes will be adopted by all livestock and poultry producers in the United States. The NAIS website boasts that as of October 13, 2009, there are 533,473 premises registered in its system.

Currently in the US, participation in traceability programs is not mandated at a federal level; however, individual states may require traceability under their laws¹⁷. As with Europe, it is reasonable to assume that once traceability is statutorily required in the United States, the USA will require all imported farm products (including those from Canada) to be similarly traceable. By proactively participating in a traceability system, Canadian producers can

ensure there will be less disruption to their business if new requirements for traceability are introduced by any of Canada's trading partners.

4.0 Conclusion

On its surface, signing up for a traceability program may appear to have risks that counteract the benefits for agriculture producers in Canada. Upon closer inspection however, traceability actually helps producers legally defend their products and business reputations. Under Canadian law, producers are already liable for the products they produce and deliver. Although producers are rarely named as defendants in product liability suits, anonymity is not the same as not being liable. Producers remain liable for their products.

While the transparency inherent in traceability may make producers more available to be named as defendants in legal actions, it can also make producers less vulnerable. If producers use a traceability program as a part of reasonable management practices and due diligence, then plaintiffs will have fewer grounds on which to base litigation.

Without traceability, a notable risk to a producer is in having their business affected by another producer supplying suspect product and damaging the entire industry's reputation. With traceability, a producer may experience additional costs in the short term. In fact the cost may individually occur; but the collective of producers in a sector need not suffer and the industry as a whole may continue to operate effectively if it has a relevant and reliable traceability system.

¹⁵ "E. coli outbreak linked to California spinach field" (March 23, 2007) available online: CNN Money <<http://money.cnn.com/2007/03/23/news/companies/ecoli/index.htm>>

¹⁶ "National Animal Identification System (NAIS)" (October 13, 2009) available online: USDA <<http://animalid.aphis.usda.gov/nais/>>.

¹⁷ *Ibid.*