

The Legislative Environment for Canada's Food Labelling Laws: A Case Study from the "New World"

by Don Buckingham
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SYNOPSIS

A dynamic history underlies the legislative and policy environment mandating food labelling in Canada. From its origins in legislation predating Confederation to the present, food labelling legislation has been tossed between the ideals of food safety on the one hand and the demands of the marketplace on the other. A central concern underlying both ideals has been the prevention of fraudulent and injurious practices, practices that have detrimental consequences for consumers and traders both at home and abroad.

Six federal Acts and the Regulations promulgated under these Acts regulate food labelling in Canada. The *Food and Drugs Act (FDA)* as well as the *Consumer Packaging and Labelling Act (CPLA)* are of general application to food labels in Canada, although the latter regulates only food sold at the retail level. The *Meat Inspection Act (MIA)*, the *Fish Inspection Act (FIA)*, and the *Canada Agricultural Products Act (CAPA)* each contain additional labelling requirements for specific commodities. The *Trade-marks Act (TMA)* contains provisions that apply to all labels, including those on food products.

This paper is will be divided into four major sections. An introduction explores some of the basic questions of labelling--what are food labels and why do we have them? The first major section--Part I-- chronicles the historical development of the legislative and policy environment mandating food labelling in Canada. Mandatory food labelling in what is now Canada can be traced back to early 18th century regulations enacted by the government of La Nouvelle France which required bakers to mark their bread prior to its sale. This early foray into food labelling was the precursor of two distinct streams of food labelling regulation in Canada--one designed to ensure marketplace fairness and another to prevent food adulteration and fraud.

Attempts to regulate food labelling in order to regulate market fairness began in earnest in Canada with a collection of 19th century "Inspection Acts". These Acts were enacted either as general laws that applied to most traded commodities or as specific laws for the inspection and marking of selected commodities. The inspection of specific commodities became mandatory under *Meat and Canned Foods Act, 1906*. This Act and the specific commodity-based ones that would follow it (like the *MIA*, the *FIA* and the *CAPA*) were primarily designed to ensure Canadian produce was of high quality, both to protect international market access and to provide quality food to Canadians. Food labelling integrity was part of this quality assurance. Commercial considerations for a fair marketplace have also been enshrined in the *TMA*. Under this general commercial legislation, first enacted in 1868, it is illegal to label any product in a false or misleading way. Such protection was significantly enhanced for retail consumers in the 1970s with the coming into force of the *CPLA*.

The Inland Revenue Act, 1875 was the first attempt by Canadian legislators to prevent food adulteration and fraudulent practices including the misleading labelling of food. The *FDA*, first enacted in 1920, continued the objective of consumer protection from fraud by preventing false or misleading labelling and by establishing legislated food standards, the violation of which would result in prosecution under the Act.

The second part of this paper provides a schematic overview of the current legislative and policy environment mandating food labelling in Canada. The current legislative framework for food labelling is a product of its diffuse history and as such is relatively complex. The framework can

be understood as consisting of three nested layers of legislation. The first layer consists of provisions contained in the *FDA* that covers labelling for all foods and applies to all levels of trade in food products. The *FDA* contains three types of regulatory mechanisms. The first is labelling prohibitions. Labels must not claim to be curative of certain listed diseases (s.3). The second is labelling integrity. Section 5 prohibits any person from selling food that is labelled in a manner that is "false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety." The third is mandatory labelling requirements. The *FDA* contains in its regulations, both general requirements for food labelling (Part B-Division 1) and specific ones for standardized food products (see, for example, *FDA Reg. B.08.003. [S]. Milk or Whole Milk*) as well as ones for non-standardized foods (see, for example, *FDA Reg. Part B-Division 24 "foods for special dietary use"*). Standardized products that are not produced and labelled according to the *FDA* standards are deemed to violate s. 5 of the *FDA*.

A second layer of labelling regulation issues from two statutes of general commercial application, but which contain provisions relating to the labelling of products. The *CPLA* applies to all commodities sold at the retail level and sets out exacting standards as to how labels must appear on retail products, including food. The *CPLA* contains two major elements of regulatory control. Similar to the *FDA*, it contains provisions regarding labelling integrity. Section 7 prohibits labels that contain "false or misleading representation." As well, the *CPLA* outlines certain mandatory labelling requirements. The most significant focus of this mechanism within the *CPLA* is its requirement for labels to show net quantity information clearly (a minimum font size and label format is required), to show it in both official languages and to provide the name and contact points for the food's maker. A second statute, the *TMA*, on the other hand, creates liability for labelling containing prohibited symbols (ensigns, flags, national symbols, and obscene or immoral words for example). It also, in s.7, contains a provision regarding labelling integrity such that it prohibits anyone from using a product description that is "false in a material respect and likely to mislead the public".

A third layer of labelling regulation is found in the food trade family of acts--the *MIA*, the *FIA* and the *CAPA*. These Acts (and the Regulations made under them) vary in their content and specificity for different commodities. However, each sets out specific rules for the labelling of some products but not for others. For example, under the *Meat Inspection Regulations* (under the *MIA*) and the *Processed Products Regulations* (under the *CAPA*), labels must be pre-approved before they can be used in the marketplace. This is not the case for all other commodities although a practice has arisen in some sectors to seek a voluntary label review from government inspectors before the labels are used commercially.

All six of the Acts regulating food labelling contain compliance and enforcement provisions. Some, such as the *MIA* and the *CAPA*, require pre-approval of labels for some food products and as such, exercise an upstream control on labelling integrity. The rest of the Acts use downstream controls for enforcing compliance. Under the *FDA* and the *CPLA* for example, non-conforming labels are identified as a result of a consumer or competitor complaint, or the discovery by a government inspector. When voluntary compliance cannot be secured, non-conforming food dealers are prosecuted.

The third section of the paper reviews pivotal case law interpreting labelling legislation and its enforcement in Canada. There is a sparse case law arising from the six labelling Acts. Prosecutions under labelling integrity provisions are the most common. Food dealers may be

charged under the *FDA* alone or the *FDA* and one or more of other labelling statutes, or under the regulations of just one of the food trade statutes, such as the *FIA* or *CAPA*. Whatever the Act, where the accused is tried for using a false or misleading label, the offence requires the criminal law standard of proof "beyond a reasonable doubt". As well, the offence is one of strict liability which permits the accused to rely on the defence of due diligence. However, in none of the reported cases has the accused successfully argued such a defence. On the issue of label integrity for a standardized product under the *FDA*, *Labatt Brewing Co. v. Canada* [1980] held that the purchaser must be able to rely on the presence of the prescribed (i.e. standardized) common name as indicating a product prepared in accordance with *FDA* standardized products requirements. If it was not so prepared then, the food dealer is in violation of s. 6 of the Act.

A significant set of cases involving food labelling arises under the *TMA* where competitors challenge each other's ability to obtain a market advantage by securing a trademark for words to be used on a food label. Cases have examined whether "Picnic" could be used to describe fresh and processed meats, "Bordeaux" to describe cookies, and "Li'l Butterball" to describe turkey that were basted with coconut oil. Granting of a trademark will be refused if its use would be misleading. Opponents to trademark applications often allege that part of the problem with the proposed trademark is that the word or phrase would also likely offend the labelling integrity provisions of the *CPLA* or the *FDA*. Trademark Opposition panel members have held however, that a finding by them that the word or phrase does not mislead for the purposes of the *TMA* is determinative for them that it does not offend similar provisions in the *CPLA* or the *FDA*.

In the final section, pertinent constitutional issues arising from food labelling legislation and case law are reviewed. Three leading cases have reviewed the constitutionality of food labelling legislation in Canada--the 1933 case of *Standard Sausage Company v. Lee* (B.C.C.A.) which recognized the federal authority for the entirety of the *FDA* under the s. 91(27) criminal law power and the two 1980 cases of *Labatt v. Canada (Attorney General)* (S.C.C.) and *R. v. Dominion Stores Limited* (S.C.C.) which held that not all regulations under the *FDA* and related Act could not be grounded under s. 91(27), nor s.91(2) trade and commerce, nor under the Peace, Order and Good Government Clause of s. 91, nor under s. 95 shared power over agriculture.

The paper ends with some conclusions drawn from the history of food labelling legislation that may be relevant to labelling issues as they arise today and in the future as new label challenges confront Canadian regulators.

INTRODUCTION - SOME BASIC QUESTIONS ABOUT FOOD LABELLING

What is a food label?

Food labels are a means of communication. What they communicate, of course, depends on the intent of the label's creator and the interpretation of the label's reader. At a basic level though, labels are primarily meant to communicate information about the product to which they are attached. Current Canadian legislation has several definitions for the word "label". Below are a few of these definitions.

Under section 2 of the *Food and Drugs Act* ("FDA"), a "label" includes "any legend, word or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device or package." "Package" is also defined to include "any thing in which any food, drug, cosmetic or device is wholly or partly contained, placed or packed".

Under section 2 of the *Consumer Packaging and Labelling Act* ("CPLA"), a "label" means "any label, mark, sign, device, imprint, stamp, brand, ticket or tag".

The *Meat Inspection Act* ("MIA") defines "label" in section 2(1) to include "any legend, word, mark, symbol, design, imprint, stamp, brand, ticket or tag or any combination thereof that is or is to be applied or attached to or included in, or that accompanies or is to accompany, any meat product, package or animal." The MIA also defines "meat inspection legend" as "prescribed meat inspection legend" and "package" as "an inner or outer receptacle used or to be used in connection with a meat product."

Section 2 of the *Canada Agricultural Products Act* ("CAPA") defines a "label" as "a label, legend, word, mark, symbol, design, imprint, stamp, brand, ticket or tag or any combination thereof that is, or is to be, applied or attached to an agricultural product or a container or that accompanies or is to accompany the product or container". "Grade name" is defined as "a prescribed name, mark, or designation or a category and includes a standard prescribed for an agricultural product."

The FDA also defines "food". Under s. 2, food "includes any article manufactured, sold or represented for use as food or drink for human beings, chewing gum, and any ingredient that may be mixed with food for any purpose whatever". As well, the MIA defines "meat products", the FIA "fish" and the CAPA "agricultural products" respectively in section 2 of each Act.

To these definitions we can add the ordinary meaning of the words "food" and "label" as found in a dictionary. "Food" is defined in the *Oxford English Dictionary* as a "substance taken into the body to maintain life and growth". "Label", on the other hand, is defined as a "slip attached to an object to give some information about it".

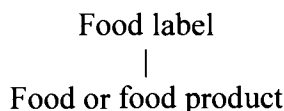
Based on an amalgam of the above definitions, it would appear then that a food label is anything attached to a food or food product that provides information about that product. Most food labels would be obvious as the written material printed on the wrapper of food and food products. Other than wrapping labels, some labels would be adhesives stuck to the food product giving information about that product. Still other examples, although perhaps less obvious, would be

grading, inspection and industrial marks that are stamped, inked or branded on the product itself, such as grading stamps on meat carcasses.

On the other hand certain information available about a food product would not usually constitute part of a "food label". Information contained in materials not attached to the food product itself, such as advertisements, website resources, and other promotional materials would not likely be included the ordinary meaning of "label" under Canadian food legislation.

The anatomy of a food label

A food label, by necessity, requires both a food product and a visible marking that is directly affixed to it. Schematically the relationship of food to food label might look like this:



Examining a typical food label today yields several kinds of information:

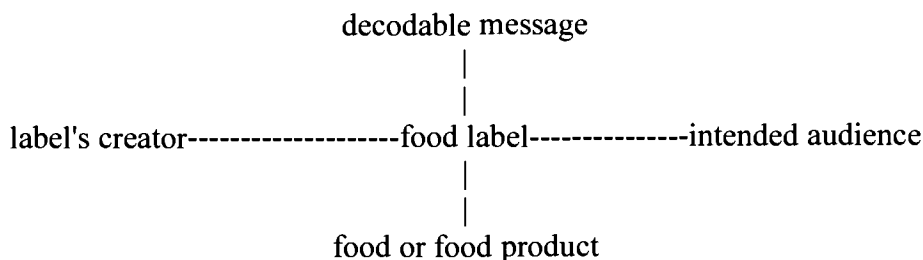
- (1) the product's common name
- (2) the products composition usually revealed by a list of ingredients including additives or in some cases a notation of the absence of certain ingredients
- (3) the volume or weight of the product;
- (4) claims about who produced the product, their address and other contact information;
- (5) the grading of the product;
- (6) claims about a production process that was used in preparing the product;
- (7) intellectual property claims for the names or trademarks of the product or the packaging;
- (8) serving instructions for the product;
- (9) promotional sentences or paragraphs about the product;
- (10) nutritional information about the product;
- (11) information on the country of origin of the product;
- (12) "best-before" dates stamped on the package;
- (13) information on the package concerning disposal of the packaging after the product has been consumed;
- (14) a bar code with lines and numbers in a white rectangle on the label or package as well as other numerical indicators for lot number or shipment for the product;
- (15) all of the above information presented in both of Canada's official languages; and
- (16) images, rather than words might be used to convey information about the product.

Which of these items are provided by the seller of a product upon his own initiative and which are required by law requires careful analysis of the matrix of legal regulation and departmental policy and practice. Such an analysis is the subject of Part II below. However, whether mandatory or voluntary, food labels and the information they contain share three important attributes if they are going to convey a meaningful message from label creator to label reader:

- (1) there must be a tangible form of message;
- (2) the message offered by the label creator must be decodable or understandable to the label reader; and

(3) the message on the label must have some direct co-relation to the product to which it is attached.

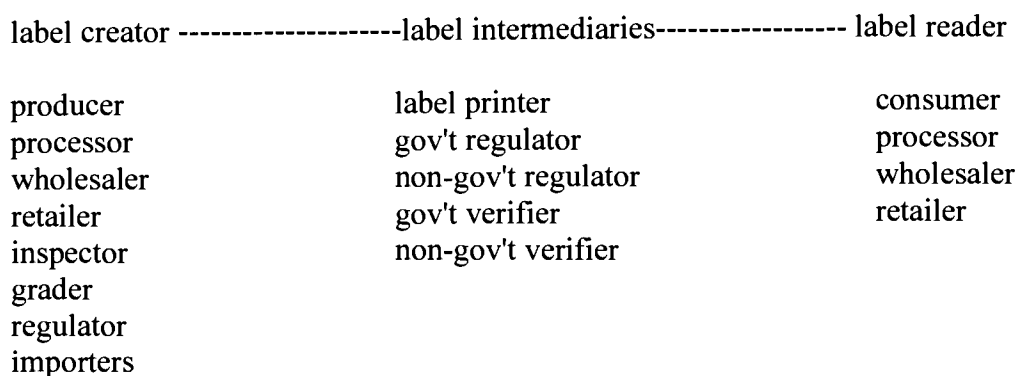
Pictorially, these three attributes of a label might look like this:



Another way to look at these characteristics is to think of the first as the physical form of the label itself, the second as the criteria of meaningfulness and the third as relating to the validity of the message. While it might be straightforward to prove the validity of a label's claim "Contains no salt", it is much more challenging to prove the validity of claim "Contains all natural ingredients". When the information contained on the label can be verified to correspond to the attributes of the food product and does in fact correspond to the information that has been produced and expressed in the label, we would say that the label truly represents the attributes of the food product. When it does not, we would say that the label falsely or misleadingly represents the attributes of the food product. However, as in the example "contains all natural ingredients", it may be difficult or even impossible in some cases to determine the validity of a label's claim.

Why do we label food?

Food has been labelled for centuries. By way of labels, information flows from seller to purchaser when the two cannot be physically present at the same time. As our food system becomes more complex, the need for food labels becomes more critical. Below one can see the multiple players in the market, each of whom may have different objectives or requirements in labelling food:



The seller in using a label hopes (1) to gain market share, and increase profits by making his product more attractive than his competitors'; (2) to comply with law; (3) to protect himself against liability claims; (4) to inform consumers about food composition including any possible additives, allergens, and human health advantages of the product; (5) to inform the consumer

about any other characteristics about the product that will make it more attractive to the consumer.

The consumer's objectives in labelling are to inform himself concerning: (1) the composition and nutritive qualities of the product; (2) how to store and prepare the product; (3) the amount, grade and shelf life of the product; (4) the comparative value of this product versus that of a competitor's; (5) how to maximize food safety by eating healthy foods, reducing his intake of toxins from pesticides, and avoiding allergens; or (6) the production methods used to produce the foods.

Intermediaries' objectives might include; (1) making sure that competition amongst sellers is fair; (2) making sure that labels accurately describe the product they are attached to; (3) investigating seller or consumer complaints; (4) intervening to adjudicate disputes arising from the use of food labels.

The creator of a food product wants to sell his product and the consumer wants to buy it. The creator of the food product has the best vantagepoint to know the composition of his food. The consumer may wish, or need, to know of this composition. The label becomes the means of communication.

Without government intermediaries would there still be food labels? Clearly yes. However, for several centuries now governments have intervened in the labelling of food to achieve any one of several objectives. Broadly stated the objectives of government intermediaries fall into three intersecting categories: (1) regulating the market amongst food sellers; (2) preventing fraud in the marketplace; and (3) ensuring the supply of safe food for consumers.

With these competing objectives in mind, we turn now to a history of the Canadian government's involvement in the regulation of food labelling.

PART I - REGULATING FOOD TRADE OR VIGILANCE AGAINST FOOD ADULTERATION: THE HISTORICAL DEVELOPMENT OF FOOD LABELLING LAW IN CANADA

1.1 First mandatory food "labels" in La Nouvelle France

The first recorded legislation requiring food labelling, in what would become Canada, was promulgated less than 100 years after the settlement of Quebec. In 1706, an Act (revised in 1715) of the Conseil Supérieur de Québec set out regulations governing the sale of bread in the region. Section 3 of the 1715 Act reads as follows:

III. Que conformément à l'article premier du règlement du premier février, mil sept cent six, et sous les peines y contenues, les dits boulangers seront tenus d'avoir toujours en vente dans leurs boutiques du pain de toutes qualités, bon et bien conditionné, et marqué de la marque particulière du boulanger qui l'aura fait.¹

Bakers were required in "la Nouvelle France", not only to produce all qualities of bread that were "good and well made" but also to "mark" it with that particular baker's mark. Thus began the labelling of food products in what would become Canada.

Although the legislation does not state the reason for the mandatory marking of bread by bakers in Quebec, several spring to mind. Perhaps reputable bakers wanted to be protected from unscrupulous ones who were selling inferior bread claiming it came from the reputable baker. Perhaps consumers wanted to be sure that the bread they were buying came from their favourite baker. At any rate, the legislators of Quebec thought it necessary to make mandatory such marking.

1.2 Labelling requirements in early "Canadian" Inspection Acts - the birth of the food trade family of statutes

Prior to the Union of Lower and Upper Canada in 1841, both Lower Canada and Upper Canada had enacted statutes regulating the inspection of specific foodstuffs.² In 1841, these Acts were repealed when the government of the new Province of Canada enacted four new Acts governing the inspection of basic foodstuffs. Each of the *Act for the Inspection of Flour and Meal*³, the *Act respecting the Inspection of Beef and Pork*⁴, the *Act respecting the Inspection of Fish and Oil*⁵,

¹ *Arrets et Règlements du Conseil Supérieur de Québec et Ordonnances et Jugements des Intendants Du Canada* (Quebec: La Presse à Vapeur de E.R. Fréchette 1855) at 169.

² For Lower Canada, see for example the 1801 statute for *An act to authorize the governor, lieutenant governor, or person administering the government, to appoint inspectors of flour, pot and pearl ashes, within the province*, c.7, 43 George III (1801) amended by c.5, 60 George III (1820). For Upper Canada, see for example, *An Act for the Inspection of Beef and Pork* 1834, c. 25, 3 Victoria (1840).

³ C. 45, 1 Victoria (1841) which was later amended by *An Act for the Inspection of Flour, Indian Meal and Oatmeal*, c.87, 19-20 Victoria (1856)

⁴ Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce, Chapter 48 (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859)

⁵ Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce, Chapter 50 (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859)

and the *Act respecting the Inspection of Hops*⁶, set out specific inspection, grading and marking requirements for its named commodity. For example, s. 16 of the *Flour and Meal Act* stated that:

All the said brand marks shall be neat and legible, and each Inspector of Flour and Meal shall govern himself, as far as may be possible by one uniform standard and shall brand or mark, within a space not exceeding fourteen inches long by eight inches broad, on every barrel or half barrel of Flour and Meal inspected by him, all brands and nails required by this Act under a penalty of twenty dollars for each barrel or half barrel inspected and branded, or inspected and marked, otherwise than required by this Act.

In addition, two of the Acts—those relating to Flour and Meal and to Beef and Pork, imposed the requirement of mandatory labelling of shipping crates to indicate qualitative aspects of the produce. For example, s. 15 of the *Flour and Meal Act* (with corresponding sections in the *Beef and Pork Act*)⁷ imposed additional grading requirements for flour found in poor condition:

(2) On each and every barrel or half barrel of Flour or Meal, which may on inspection be found sour, without any other damage or unmerchantable quality he shall brand the word “Sour” in letters as large as those upon the rest of the brand or mark, in addition to the brand or mark designating quality.

(3) In all cases where the Flour or Meal is found to be of unsound or unmerchantable quality from other causes, he shall brand the word “Rejected” at full length, and in plain legible characters, in addition to the brand or mark designating the quality.

These early acts had as their objective the inspection of foodstuffs to ensure that produce sent out into the market was of a minimum quality. Labelling was also a means to indicate to subsequent buyers that the produce had been inspected and met certain quality requirements. The label was, therefore, a mark, stamp or label which was both the minimum requirement for entry into the market place and a guarantee of quality to domestic and international buyers.

As little was known at that time about food pathogens, chemical residues and food toxicity, the inspection and eventual labelling of food products under the early Acts was primarily for market fairness. While “unsoundness” as a quality characteristic made its way into the *Flour and Meal Act*, food safety as an independent objective of labelling had not yet made its way onto the scene.

1.3 Food labelling to prevent food adulteration - birth of the food adulteration family of statutes

The individual inspection Acts were joined in 1874 by the *General Inspection Act*, S.C. 1874. This Act made the inspection of an increasing number of food products mandatory and continued the aim of regulating the market to ensure the delivery of quality goods to domestic and international markets.

⁶ Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce, Chapter 52 (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859)

⁷ The similar provision in the Meat and Pork Act are found in s. 10(2) “soft”, and s. 10(3) “rejected”.

During the 19th century, however, the Commonwealth was rocked by revelations of widespread food adulteration in England. The scandal was slow to break. It began with Accum, a chemist, who documented shocking cases of food adulteration his 1820 work called the "Treatise on Adulterations of Food, and Culinary Poisons."⁸ While his revelations were initially discredited by commercial interests, these egregious cases of food adulteration eventually provided the initiative for the medical journal *Lancet* to appoint an Analytical and Sanitary Commission in 1850 to report on food safety and adulteration. The Commission's early reports of 1851 and 1854 detailed food adulterations and by 1860, the first *British Food and Drugs Act* was passed as a direct result of the *Lancet* investigations.⁹ This Act was considerably amended in 1872 and would be the impetus for a similar act in Canada that would change the motivation for food legislation and consequently the reason for and content of food labels in Canada.

1.3.1 *The Inland Revenue Act (1875 and amendments)*¹⁰

As Canada rapidly expanded both in terms of political boundaries and economic activities, opportunities for fraudulent and dangerous food practices increased. Oddly enough, it was the adulteration of hard liquor that first caught the attention of elected officials in the Canadian government and catapulted the Canadian government into action. On January 1, 1875, when *The Inland Revenue Act, 1875*¹¹ came into force, the ambit of the new Act was, however, much broader than just regulating the production and sale of alcohol.

While the Act was largely silent on labelling issues *per se*, lurking beneath the surface of the Act's definition of "adulterated food or drink" was the germ of the idea that in later revisions of the Act would require labelling for the prevention of food adulteration and for the promotion of food safety.

The Inland Revenue Act, 1875 defined "adulterated food or drink" to "mean and include all articles of food or drink with which there has been mixed any deleterious ingredient, or any material or ingredient of less value than is understood or implied *by the name under which the article is offered for sale*" (emphasis added). The market place was probably during this period undergoing a considerable transformation from old-style stall marketing "what-you-see-is-what-you-get" to the sale of more packaged foodstuffs in markets and shops and thus the name under which the article was being offered was becoming more difficult verify by direct communication between buyer and seller. In 1878, an amendment was passed prohibiting the sale of articles of

⁸ Reay Tannahill, *Food in History – New, Fully Revised and Updated Edition* (London: Penguin 1988; first edition 1973) at 294. For example Accum's book documented early food adulterations including 'crusted old port' being new port with supertartrate of potash; pickles coloured with copper, sweets coloured with poisonous salts of copper and lead and the rich orange rind of Gloucester cheese coming from ordinary red lead.

⁹ Tannahill, *ibid.* at 294. See also, L.I. Pugsley, "The Administration of Federal Statues on Food and Drugs in Canada", (March 1967) 23(3) *Medical Services Journal Canada* 387 at 390-91. The full name of the Act was *An Act for Preventing the Adulteration of Articles of Food and Drink*. Section 1 of the Act stated: "Every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or material injurious to the health of persons eating or drinking such articles has been mixed, and every person who shall sell as pure or unadulterated any food or drink which is adulterated or not pure, shall for every offence ... forfeit and pay a penalty."

¹⁰ *Inland Revenue Act*, S.C. 1874, c. 8.

¹¹ The Acts long title is an *Act to Impose Licence Duties on Compounders of Spirits; to Amend the Act Respecting the Inland Revenue; and to Prevent the Adulteration of Food, Drink and Drugs*.

food and of drugs not of a proper nature, substance and quality, but with no specific reference to labelling.¹²

1.3.2 The Adulteration Act (1884 and amendments and revisions)¹³

An *Act to Amend and to consolidate as Amended the Several Acts Respecting the Adulteration of Foods and Drugs* came into force on July 1, 1884 ("*The Adulteration Act, 1884*"). This Act was a significant advancement in food regulation in Canada and indeed the common law world as it not only defined adulteration of foods more precisely than its predecessor Act, but also under a 1890 amendment, permitted the drawing up and dissemination of official standards for food through Orders in Council. Although the bulk of the standards would not be prepared until 1910,¹⁴ already the 1890 amendments tied the standards to the definition of adulteration. Any standardized food would be deemed to be adulterated "if its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability, fixed by the Governor in Council".

From a labelling perspective, the new Act carried forward the 1875 definition of "adulterated" food to include a food that "is an imitation of, or sold under the name of another article". As well the Act permitted sellers to use labelling to avoid liability under the Act. If, for example, a food might otherwise be deemed to be adulterated under the Act because of the addition of an ingredient or because a food was mixed with other ingredients, liability could be avoided by labelling the food as "mixture, stating the components of such a mixture and the proportions of each of such components".

In 1918 the Departments of Customs and Inland Revenue were combined and administration of the *Adulteration Act, 1884* was transferred to the Department of Trade and Commerce. The Act dealing with food adulteration and food safety was transferred to a department with a commercial mandate. While consumers were in need of protection, it is evident that fair-minded merchants were very interested in purging the marketplace of underhanded and undercutting competitors.

1.3.3 The Food and Drugs Act (1920 and its amendments and revisions)¹⁵

¹² Pugsley, *supra*, note 10 at 394-95.

¹³ *Adulteration of Food and Drugs Act (Can), 1884*, c.34.; *Adulteration Act*, S.C. 1885, c. 67.

¹⁴ The first binding standard in the form of a regulation would appear in 1894 with myriad more to follow in the period 1910-1919. These standards in the form of regulations would be consolidated for the first time in 1920 with the passing of the Food and Drugs Act. Bruce H. Lauer, "The Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920" (Ottawa, Carleton University unpublished Master's thesis, 1993) at 207. Only after extensive consultation with industry and with standards in force in other jurisdictions did the first Orders in Council appear in 1910. At the same time standards were enacted for milk and milk products, meat and meat products, grain and grain products, maple products and alcoholic and nonalcoholic products. By 1913, there were official standards for vegetable oils, fruits and fruit products, honey, flavouring extracts, glucose products and vinegar products. Official limits for permitted levels of arsenic in foods were established as well.. See Pugsley, *supra*, note 10 at 400.

¹⁵ *Food and Drugs Act*, S.C. 1920, c. 27. *Food and Drugs Act*, R.S.C. 1927, c. 76; *Food and Drugs Act*, R.S.C. 1952, c. 123.; *Food and Drugs Act*, S.C. 1952-53, c.38, *Food and Drugs Act*, R.S.C. 1970, c. F-27, *Food and Drugs Act*, R.S.C. 1985, c. F-27.

The transfer of responsibility for the Adulteration Act to the Department of Commerce was, however, short-lived. In 1919, the Federal government created the Department of Health which was immediately charged with the administration of the Adulteration Act.¹⁶ In 1920 a new Act, the *Food and Drugs Act, 1920*, was passed to replace the *Adulteration Act*.¹⁷

The *Food and Drugs Act, 1920* had several new features regulating food labelling. Although the Act did not contain a definition of "label" (that definition would not appear until 1952), ss. 5 and 6 specifically proscribed certain labelling activities. The Act adopted not only the adulteration definition of the Adulteration Acts but also the new concept of "misbranding" food. All but one of the parts of the definition related to the labelling (or more correctly the mislabelling) of food. Food was "misbranded" under s. 5:

- (a) if it is an imitation of, or substitute for, or resembles in a manner likely to deceive, another article of food or drug under the name of which it is sold or offered or exposed for sale and is not plainly and conspicuously labelled so as to indicate its true character;
- (b) if it is stated to be a product of a place or a country of which it is not truly a product;
- (c) if it is sold or offered for sale by a name which belongs to another article;
- (d) if it is so coloured or coated or powdered or polished that damage is concealed, or if it is made to appear better or of greater value than it really is;¹⁸
- (e) if false or exaggerated claims are made for it upon the label or otherwise;
- (f) if in package form, sealed by the manufacturer or producer, and bearing his name and address, the contents of each package are not conspicuously and correctly stated within limits of variability to be fixed by regulations as in this Act provided, in terms of weight, measure or number, upon the outside of the package...;
- (g) if sold as a compound, mixture, imitation or substitute, it is not labelled in accordance with the provisions of this Act;
- (h) if the package containing it, or the label on the package, bears any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device is false or misleading in any particular; or
- (i) if the package containing it, or the label on the package, bears the name of an individual or of a company, claimed to be the manufacturer or producer of the article, which individual or company is fictitious or non-existent.

¹⁶ In 1930 this Department would itself be amalgamated with the Department of Soldiers' Civil Re-establishment and be renamed the Department of Pensions and Health. Pugsley, *supra*, note 10 at 403.

¹⁷ The *Act Respecting Food and Drugs, 1920* did not contain any provisions regarding fertilizers, as did the 1884 Act, as these were carved off into the new *Fertilizers Act* which fell under the administration of the Department of Agriculture. Pugsley, *supra*, note 10 at 404.

¹⁸ This definition of "misbranding" was one that was brought over from the earlier *Adulteration Act* definition of adulteration.

As well, s. 6 of the 1920 Act required that "Every article of food which is a compound, mixture, imitation or substitute shall be plainly and correctly labelled as such; and the words 'pure' or 'genuine' or words equivalent to these terms, shall not be used on the labels or in connection with such articles, and such articles shall have been so packed, marked or labelled as not to be likely to deceive any person with respect to their true nature."

Under s. 22, "every person who attaches to any article or package of food or drug or offered or exposed for sale any label or mark containing an untrue or misleading name, device or statement, or who neglects or refuses to label or mark any article or package of food or drugs in accordance with the Act" was guilty of an offence.

The Food and Drug Act 1920 thus took a very aggressive legislative stance on the prevention of consumer fraud through its misbranding provisions. While it permitted compounds, mixtures and substitute products for the "real thing", the Act was influenced by the appearance of "pure food laws" emanating from the United States.¹⁹ The pure food laws as we will see below were not purely about food adulteration and food safety but were motivated by a particularly strong movement among some producers of "pure" goods who wished to maintain their markets in the face of an onslaught of cheaper mixed foods.

The FDA was amended several times after 1920 with consolidations in 1927, 1952, 1970 and 1985. Important legislative developments concerning labelling which took place over these several consolidations include the following:

(1) consolidation of the Regulations under the FDA. In 1949, the Department of National Health and Welfare completed a project to revise and organize the Food and Drug Regulations which were passed into law in 1949 with 5 parts, namely, Part A General Administration, Part B Foods, Part C Drugs, Part D Vitamins, and Part E Cosmetics. This common organization and nomenclature facilitated regulator and industry communications and is still the basis for the regulations under the Act;

(2) new definitions. For the first time under the *FDA 1952*, the Act included a definition of a "label" to mean "any legend, word, or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device, or package", a definition which has not materially change to the present;

(3) new offences. Under a 1934 amendment to the *FDA*, a new provision was introduced which had the effect of prohibiting labels from making claims that a product was a treatment for any of several listed diseases. The 1952 Act abandoned the "misbranding" offence. Instead that Act reworked the s. 22 offence of mislabelling into a new section 5 offence which makes sellers liable for false, misleading or deceptive labelling. A new offence was created under Section 6 which required that all standardized foods be labelled to conform to that standard, failing which the seller would be liable under the FDA.

(4) reworked offences provisions. The offence set out in section 6 would fall onto hardtimes in the decision of *Labatt Brewing Co. v. Canada* [1980] 1 S.C.R. 914 (Supreme Court of Canada) (examined in Parts III and IV below.) As a result, section 6 was amended in 1985 so that the interprovincial and international aspects of trade are highlighted in the wording of the offence for

¹⁹ Lauer, *supra*, note 15 at 72.

mislabelled standardized goods. For insurance, a new section 6.1 was also added whose authority could be clearly based on the federal government's jurisdiction over health, safety and consumer protection. It read:

(1) The Governor in Council may, by regulation, identify a standard prescribed for a food, or any portion of the standard, as being necessary to prevent injury to the health of the consumer or purchaser of food.

(2) Where the standard or any portion of a standard prescribed for a food is identified by the governor in Council pursuant to subsection (1), no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that food unless the article complies with the standard or portion of a standard so identified.

1.4 An adulteration of the food adulteration family - Acts to restrict trade in "impure products" - dairy, honey, and maple products

1878 amendments to the *Inland Revenue Act of 1875* required producers and marketers of oleo-margarine to specifically label their product as "oleo-margarine". Section 2 states:

Every person who shall manufacture for sale or who shall offer or expose for sale any article or substance in semblance of butter, but not the legitimate produce of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals not produced from milk enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall distinctly and durably stamp, brand or mark upon every tub, firkin, box or package of such article or substance, the word "oleo-margarine", and in the case of retail sale of such an article or substance in parcels, the seller shall, in all cases deliver therewith to the purchaser a written or printed label bearing plainly written or printed thereon the words "oleo-margarine".

There is strong evidence to suggest that this legislation, which would be converted into a total ban on the production and sale of oleo-margarine just eight years later with the passage of the "Oleomargarine Act" in 1886²⁰, was strongly motivated by the Canadian dairy industry and was a form of market protectionism by the industry against a cheaper substitute which was enjoying new market demand.²¹

A similar prohibition against the manufacture of "sugar honey and other honey substitutes" was enacted through an 1896 amendment to the *Adulteration Act* and then relaxed in 1914 amendments to the *Adulteration Act* which simply prohibited the use of the word "honey" for any products which were not pure honey or which resembled honey. It seemed open to manufactures after 1914 to market "sugar honey" or other sweeteners as long as they were

²⁰ *An Act to prohibit the Manufacture and Sale of certain substitutes for Butter*, (1886) 49 Vict. Ch. 42.

²¹ Lauer, *supra*, note 15 at 39.

labelled to reflect their sweetener qualities and did not mention the word "honey". "Honey" could only describe pure honey.

Another example of special requirements for the labelling of dairy products was a particular provision in the 1884 *Adulteration of Food Act* regarding skimmed milk. Section 16 (1) contained the following:

...skimmed milk may be sold as such if contained in cans bearing upon their exterior, within twelve inches of the tops of such vessel, the word "skimmed" in letters not less than two inches in length, and served in measures also similarly marked...

Maple products were another example of early pure food law under the *Adulteration Act*. Amendments to the *Adulteration Act* in 1914 required that:

The word "maple" shall not be used either alone or in combination with any other word or words on the label or other mark, illustration or device on the package (which was also for the first time defined) containing any article of food or on any article of food itself which is or which resembles maple sugar or maple syrup, and no package containing any article of food itself, which is not pure maple sugar or pure maple syrup, shall be labelled or marked in such a manner as is likely to make persons believe it is maple sugar or maple syrup which is not pure maple sugar or pure maple syrup, and any article of food labelled or marked in violation of this subsection shall be deemed to be adulterated within the meaning of this Act.

A 1915 amendment made it illegal to make or offer for sale any imitation of maple syrup or maple sugar or any product composed of partly maple syrup. Any maple syrup not meeting the standards in the regulations promulgated in 1911 and revised in 1914 was considered adulterated under the Act.

These provisions, along with new ones would be brought together under the *Maple Products Act* which remained in force until 1983 when it was repealed. The *Maple Products Regulations* under the current *Canada Agricultural Products Act* continue grading and standards provisions first set out in the 1914 amendments relating to maple products.

The above commentary on these Acts as being "adulterations" of the "adulteration Acts" is not meant to be a derogatory slur against these legislative provisions. Instead, it may be better to argue that these Acts, which allegedly were about protecting consumers from "impure" or adulterated food products, were much more about preventing market access to new synthetic compounds that were similar but not harmful to the consuming public. In this way, the *Maple Products Act* as well as the honey and oleo-margarine provisions fit less in the food adulteration family of statutes and more in the food trade family which we have already explored with the early inspection Acts and which become a forceful but separate branch of food regulation with the passing of the *Meat and Canned Foods Act* of 1906.

1.5 Rebirth of the food trade family - the *Meat and Canned Foods Act* (1906 and amendments and revisions)

As seen above in section 1.2, inspection laws for specific commodities were among the first statutes to contain labelling requirements for foodstuffs in Canada. A *General Inspection Act* passed by Parliament in 1874²² consolidated these statutes. The consolidated statute remained under the supervision of the Department of Agriculture which had had responsibility for the individual Acts prior to the consolidation.

However, a brand new kind of inspection act came under the control of the Department of Agriculture in 1906 with the coming into force of the *Meat and Canned Goods Act*. In response to a meat processing scandal in the United States, a new inspection act applying to all canned products and uncanned meat products was adopted. At least one author argues that this measure was done more to protect markets in Europe for Canadian products than for any obvious inspection or processing problems in the Canadian food system.²³ At any rate, it was the Department of Agriculture rather than the Department of Inland Revenue who oversaw the Act and would continue to do so with later members of the food trade family until 1997 when the Canadian Food Inspection Agency (CFIA) was created and supervisory authority was transferred from Agriculture to the new Agency.

As Bruce Lauer puts it:

The difficulty has always been reconciliation of Agriculture's mission of trade promotion of agricultural products and Health's mission of the protection of public health. The passage of the *Meat and Canned Foods Act* of 1907 marked the formalization of these seemingly irreconcilable solitudes.²⁴

Legislation under this family of statutes has been copious (See Appendix A). The major streams that have flowed from it are a Meat and Canned Goods stream (the last *Meat and Canned Foods Act* was repealed in 1985), a Meat Inspection stream (genesis for the current *Meat Inspection Act*), a Fish Inspection stream (genesis for the current *Fish Inspection Act*) and a general food product stream (including Acts like the *Canada Dairy Products Act* (repealed in 1980/81/82), the *Natural Products Marketing Act*, 1934 c.57, the *Fruit, Vegetables and Honey Act*, S.C. 1935, c. 62, the *Canada Agricultural Products Standards Act* (being the genesis of the current *Canada Agricultural Products Act* and its extensive sets of regulations - see Appendix A).

The intent of the legislation was to facilitate trade by exercising control at the production end of the food chain for all products destined for interprovincial and international markets. Inspection, the proper use of federal marks and grades and, in some cases, the pre-approval of labels leveled the playing field for traders in the domestic market and ensured a high quality product that would be accepted in international markets.

²² *General Inspection Act*, S.C. 1874.

²³ Lauer, *supra*, note 15 at 63. Lauer is also unconvinced that there was a need for this legislation as the *Adulteration Act* could have provided inspection and quality assurances, et seq. 63- 70. He is convinced that the legislation was rather a power grab by the Department of Agriculture.

²⁴ Lauer, *supra*, note 15 at 70.

From a labelling perspective, the food trade family of legislation has spawned a number of very detailed provisions for different products under different acts and regulations. Regulators and inspectors became specialists in their own particular commodity area based on the labelling rules under their act and regulations. However, over the years that the food trade acts and regulations have developed there has never been a successful comprehensive consolidation of the labelling regulation under these acts and regulations. Rather than go through the historical development of each of the acts, let alone the regulations promulgated under each act, the present labelling requirements under these acts will be explored in the Part II of this chapter.

1.6 Labelling requirements flowing from industry and consumer statutes of general application

1.6.1 Trade-Marks Act

Labelling requirements under the rubric of industry and consumer statutes of general application flow from two statutes. The first is from Canada's trademark legislation which was first enacted in 1868. Ss. 7, 9 and 10 limit the information that can be placed on a label. Section 7(d) states that no person shall:

- make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
 - (i) the character, quality, quantity or composition,
 - (ii) the geographical origin, or
 - (iii) the mode of the manufacture, production or performance of the wares or services.

Section 9 prohibits the use of marks such as those used by the Royal Family, flags, national symbols, the names of symbols of international organizations and any scandalous, obscene or immoral word.

Section 10 limits the appropriation of a mark which has "by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services". While merchants can use such words on labels they will not be able to claim exclusive use of it.

1.6.2 Consumer Packaging and Labelling Act

The *Consumer Packaging and Labelling Act* is the most recent piece of legislation affecting food labelling in Canada. Enacted in 1970, it has from its inception provided what its name suggests--extensive regulation for the labelling of consumer goods, including prepackaged foods. Sections 4, 7 and 10 set out general rules for labelling with more detailed provisions in the Regulations promulgated under the Act. The general sections of the Act read as follows:

- 4. (1) No dealer shall sell, import into Canada or advertise any prepackaged product unless that product has applied to it a label containing a declaration of net quantity of the product in the form

and manner required by this Act or prescribed and in terms of either

(a) numerical count, or

(b) a unit of measurement set out in Schedule I to the *Weights and Measures Act*,

as may be prescribed.

(2) A declaration of net quantity referred to in subsection (1) shall be located on the principal display panel of the label and shall be clearly and prominently displayed, easily legible and in distinct contrast to any other information or representation shown on the label.

7. (1) No dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product.

(2) For the purposes of this section, "false or misleading representation" includes

(a) any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be regarded as qualifying the declared net quantity of a prepackaged product or as likely to deceive a consumer with respect to the net quantity of a prepackaged product;

(b) any expression, word, figure, depiction or symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it or does not contain any matter in fact contained in it; and

(c) any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.

(3) Where a declaration of net quantity shows the purported net quantity of the prepackaged product to which it is applied, that declaration shall be deemed not to be a false or misleading representation if the net quantity of the prepackaged product is, subject to the prescribed tolerance, not less than the declared net quantity of the prepackaged product and the declaration otherwise meets the requirements of this Act and the regulations.

10. Each label containing a declaration of net quantity of the prepackaged product to which it is applied shall

(a) be applied to the prepackaged product in such form and manner as may be prescribed; and

(b) show, in such form and manner and in such circumstances as may be prescribed,

- (i) the identity and principal place of business of the person by or for whom the prepackaged product was manufactured or produced for resale,
- (ii) the identity of the prepackaged product in terms of its common or generic name or in terms of its function, and
- (iii) such information respecting the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture or production of the prepackaged product as may be prescribed.

These provisions which have remained largely unchanged since the inception of the Act in 1970 complete the review of the historical legislative backdrop for the current provisions for labelling food in Canada. The three streams--food adulteration, food trade and general commercial and consumer labelling provisions have to a large degree become completely intertwined with general provisions in several Acts and specific labelling provisions in several more. In the next Part, some general categories of labelling rules are extracted from the labelling legislation currently in force.

PART II - REGULATING THE FLOW OF INFORMATION ON LABELS - THE CURRENT LEGISLATIVE ENVIRONMENT FOR FOOD LABELLING IN CANADA

What labels would look like without any government intervention is anyone's guess. However, because of their important and primary function of transmitting information from seller to buyer, they would not disappear. The label remains a powerful communication tool and is capable of misuse. Consequently, government regulation in the area is pervasive.

From an analytical perspective, preparing a précis of the current regulatory framework of food labelling law in Canada is a formidable task and demonstrates how fragmented the area has become. Food labelling is directly affected by six statutes (Food and Drugs Act (FDA), Meat Inspection Act (MIA), Fish Inspection Act (FIA), Canada Agricultural Products Act (CAPA), Consumer Packaging and Labelling Act (CPLA) and the Trade-marks Act (TMA) the regulations promulgated under these Acts (see Appendix A).

It is not the objective of this chapter to describe, or to reproduce, in detail the statutory provisions of the above Acts affecting food labelling in Canada. Nor is the objective of the chapter to explore the administration of the entire set of six Acts, now that they fall almost entirely under the responsibility of the CFIA.²⁵ Instead, this chapter will provide a conceptual analysis of food labelling requirements that appear from a general review of the relevant acts and regulations.

2.1 Prohibited information on labels

There are very few absolute prohibitions on what may be written on labels under any of the labelling statutes. Two notable exceptions are s. 3(2) of the *FDA* and s. 9 of the *TMA*. Section 3(2) states that:

"No person shall sell any food, drug, cosmetic or device

(a) that is represented by label, ...
as a treatment, preventative or cure for any of the diseases,
disorders or abnormal physical states referred to in Schedule A."

Section 9 of the *TMA* prohibits the use of marks in a business, including on the labels of products it sells of several words and symbols such as those used by the Royal Family, flags, national symbols, and scandalous, obscene or immoral words.

²⁵ Health Canada retains responsibility for the administration of health and safety standards and the development of food labelling policies related to health and nutrition under the FDA. The CFIA inherited, however, its mandate from several former and existing departments including the Ministries of Agriculture, Health, Industry Canada, Consumer and Corporate Affairs, and Fisheries and Oceans. The CFIA also inherited the "Guide to Food Labelling and Advertising", a policy book now over 200 pages in length first produced in 1961 and regularly up-dated that attempts to provide a detailed recipe book on permissible label claims.

2.2 Mandatory information required on all food labels

Certain mandatory declarations are required on all food labels under the FDA. The FDA regulations set out both general requirements that apply to all foods and specific ones that apply to certain categories of foods (for the specific ones see section below). Part B Foods - Division 1 of the Regulations sets out detailed provisions regarding mandatory labelling requirements for all foods. Regulations under Part B require what information must be set out on every food label for retail sale and some of the attributes of the label itself. It must, for example, be easily read and prominently displayed with a minimum font size and in both official languages. The label must provide the common name of the product, the name and address of the party who packaged the food, a list of ingredients, durable life dates.

The CPLA also prescribes a uniform method of labelling food products at the retail level.²⁶ It requires that several attributes of the product be presented on the label including net quantity, manufacturer's name and contact points. As well, it requires that information on the label be produced in metric units of measurement and in both official languages (subject to some minor exceptions). Section 4 of the Act requires that all prepackaged products be labelled with the net quantity of the product either by count or by a unit of measurement set out in the *Weights and Measures Act*.

Section 10 requires all labels to show, along with net quantity, (1) the identity and place of business of the person by or for whom the prepackaged product was manufactured or produced for sale; (2) the common or generic name of the product; and (3) the other information required by the regulations.

Certain mandatory declarations are required on all food labels under the CPLA, if for example the product has a certain composition or characteristics such as containing artificial flavours or having previously been frozen.

2.3 Conditions attaching to all information on food labels - liability for false, misleading or deceptive labelling

All information which a seller is required, or chooses, to place on a food label must not be false, misleading or deceptive. Each of several pieces of legislation has provisions to protect against fraud in the marketplace.

Pursuant to section 5(1) of the *FDA*:

"No person shall *label, package*, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety." (emphasis added)

²⁶ The *Weights and Measures Act* and *Regulations* require a declaration of net quantity for foods that have not been prepackaged for retail sale.

Section 7 of the *CPLA* prohibits the sale or advertising of a product that has a label which contains any false or misleading representation relating to the product. "False or misleading representation" is defined in s. 7(2) to include:

- (a) any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be regarded as qualifying the declared net quantity of a prepackaged product or as likely to deceive a consumer with respect to the net quantity of a prepackaged product;
- (b) any expression, word, figure, depiction or symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it or does not contain any matter in fact contained in it; and
- (c) any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.

Both the *FDA* and the *CPLA* also contain provisions to the effect that if required information is not included on the label, then those labels will be deemed to be false and misleading. For example, Section 5(2) of the *FDA* states that:

"An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

Under section 7 of the *TMA*, no person shall:

- (d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
 - (i) the character, quality, quantity or composition,
 - (ii) the geographical origin, or
 - (iii) the mode of the manufacture, production or performance
 of the wares or services.

Section 52(1) of the *Competition Act* states that : "No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect." Section 52 (2) adds that

a representation that is

- (a) expressed on an article offered or displayed for sale or its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

...
is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1)."

Under s. 9(1) of the *Weights and Measures Act*:

No trader shall sell, offer for sale or have in his possession for sale any commodity the quantity of which has been determined on the basis of number or measure, unless the quantity of the commodity is stated accurately within prescribed limits of error and in the manner prescribed in terms of number or units of measurement of length, area, volume or capacity, or mass or weight

(a) on the commodity,

(b) on the package containing the commodity, or

(c) on a shipping bill, bill of lading or other document accompanying the commodity, as may be prescribed.

(2) Subsection (1) does not apply with respect to any commodity that has been packaged, on the basis of number or measure, or labelled, in terms of number or a unit of measurement, as required or authorized by or under any other Act of Parliament.

2.4 Conditions attaching to information on the food labels of certain foods and food groups

2.4.1 Standardized products

Both the food adulteration and the food trade families of regulations contain myriad rules for the labelling of specific products or groups of products. Thus under the *MIA*, the *FIA* and the *CAPA* and the *FDA*, labelling requirements are intertwined with the standards that have been enacted. Under the *FDA*, for example, most of the regulations regarding food concern the elaboration of standards for particular products. If a product is labelled as a particular product and it does not meet that standard then under s.6, the product and its label expose its creator to liability under the *FDA*.

Section 6(3) of the *FDA* reads:

Where a standard for a food has been prescribed, no person shall *label, package*, sell or advertise any article that:

(a) has been imported into Canada,

(b) has been sent or conveyed from one province to another, or

(c) is intended to be sent or conveyed from one province to another

in such a manner that is likely to be mistaken for that food unless the article complies with the prescribed standard. (emphasis added)

2.4.2 Use of federal marks, legends and stamps

Section 5 of the *MIA* prohibits the use of a meat inspection legend unless it has been authorized by the regulations. Section 6 prohibits the use of any legend, mark, symbol or design that resembles a meat inspection legend and is likely to be mistaken for a meat inspection legend.

Section 16 of the *CAPA* prohibits the use of a legend, word, symbol or design that resembles an agricultural product legend or grade name.

2.4.3 Specific labelling requirements within the regulations for certain products

Sometimes specific labelling provisions exist within each food division of the *FDA* regulations. For example, see Division 8 - Dairy Products - B.08.008 "No person shall sell sterilized milk unless the label carries the statement "This milk is not a concentrated product, but has only the food value of normal milk". Under the food trade statutes, many commodity-specific labelling requirements exist. Sections 46, and 89-123 of the *Meat Inspection Regulations* set out specific rules for labelling meats. Sections 25-33 of the *Fish Inspection Regulations* set out specific rules for labelling fish and fish containers. Under the *CAPA*, egg labelling regulations are contained in ss.14-22.1 of the *Egg Regulations*; dairy product labelling under ss.17-23 of the *Dairy Products Regulations*; fresh fruit and vegetable labelling under ss.4-26 of the *Fresh Fruit and Vegetable Regulations*; honey labelling under ss.35-37 of the *Honey Regulations*; livestock and poultry grading rules and corresponding marks under ss.5-12 of the *Livestock and Poultry Grading Regulations*; maple products labelling under ss.11-12 of the *Maple Products Regulations*; processed egg labelling under ss.12-14 of the *Processed Egg Regulations*; and processed products labelling under ss. 31-44 of the *Processed Products Regulations*.

2.5 Label verification and enforcement

Together, the food adulteration family and the food trade family of statutes create elaborate labelling requirements for virtually all foods destined for the retail market. Some provisions are excruciatingly exact (ie. font size on the labels for example) while others are more general such as liability for false, misleading or deceptive labelling.

Although not readily apparent from the above overview, the three families of acts also create very different regimes for the implementation and enforcement of labelling requirements.

2.5.1 Verification and implementation of provisions under the FDA and the CPLA

The *FDA* contains provisions that apply to all foods. Under s. 3 (prohibited claims for listed diseases) and s. 5 (false, misleading or deceptive labelling, including failure to adhere to the general labelling requirements for all foods contained in Part B Division 1 of the *Food and Drugs Regulations*), all food products must comply. Similarly, provisions on labelling arising from the *CPLA* for foods sold at the retail level (and the *Weights and Measures Act* for foods sold at other levels of trade) are applicable to all food products.

As there is no authority for the mandatory pre-approval of labels under the *FDA* and the *CPLA*, alleged offences under these Acts are brought to light by consumer complaints, competitor complaints or government field inspectors. Compliance is based on a reactive approach. As a preventative measure, companies may, however and often do, consult with CFIA personnel for opinions on the acceptability of prospective labels. CFIA staff base decisions on the CFIA manual called the "Guide to Food Labelling and Advertising". This Guide provides seven chapters of detailed guidelines for CFIA field staff to determine potential compliance and non-compliance of food labels. The Guide moves from a consideration of the basic labelling requirements contained in the *FDA* and the *CPLA* for which fairly detailed legislative authority is reference to more and more detailed labelling requirements for particular foods. One notes that as the interpretive provision on labelling become more detailed, the Guide offers less in the way of reference to legislative authority for its guidance.

2.5.2 Verification and implementation of provisions under the food trade acts

Under the *MIA*, the *FIA* and the *CAPA*, persons wishing to engage in the preparation of foods for interprovincial or international trade must be licenced. As licenced establishments, they are entitled to use federal grading standards and marks, are subject to federal inspection and may be subject to special labelling requirements. In the case of meats and processed products, all labels for prepackaged food must be pre-approved by the CFIA. Labelling decisions based on this pre-approval process are available for public and industry review on the CFIA website. Thus unlike the mechanism under the *FDA* and the *CPLA*, the process under label pre-approval for meats and processed products is proactive and requires a permanent staff of label reviewers.

For other violations of the food trade acts, the process is similar to the reactive approach under the *FDA* and the *CPLA* explored above. Alleged offences for deception and non-compliance for products that do not require pre-approved labels are brought to light by consumer complaints, competitor complaints or government field inspectors.

2.5.3 Enforcement of the food adulteration and food trade acts

Until very recently, enforcement of food labelling law was not a centralized function. Before 1997, food labelling regulations were under the purview of at least three separate departments--Health, Agriculture and Consumer and Corporate Affairs, each with its own process for bringing an alleged labelling offence to a resolution. The CFIA inherited this decentralized mechanism for enforcement in 1997 with regional offices and a new central office having differing cultures for enforcement. This situation was rationalized in 1999 with the formation of the CFIA Office of Enforcement & Investigation Services. This office is now responsible for the coordination and initiation of all enforcement proceedings under food labelling statutes. When an alleged offence is discovered by field inspectors or reported to the Office by the CFIA Bureau of Food Safety and Consumer Protection (which receives consumer and industry complaints), the Director decides whether the case warrants documentation. If a negotiated settlement is possible that will be pursued. If not then a recommendation for prosecution will be prepared, evidence gathered and the file transferred to Department of Justice lawyers who decide whether to proceed with a prosecution.

PART III - CASE LAW INTERPRETING LABELLING LEGISLATION IN CANADA

There is a very sparse body of case law interpreting Canada's food labelling law (see Appendix C). This is somewhat surprising considering the large number of statutes and regulations that govern labelling and the long history of several of these legislative measures. Below is a review of cases that interpret provisions in the six Acts which lie at the heart of the current regulatory framework for labelling in Canada.

3.1 Interpretation of the *FDA*

Three types of labelling cases have arisen under the *FDA*--those involving the interpretation of s.5 (labelling which is false, misleading or deceptive); those involving the interpretation of s.6 (non-conforming labelling on a standardized food product); and cases that challenge the constitutionality of parts of the *FDA* regarding labelling. The first two kinds of cases are examined below while the constitutional cases are dealt with in Part IV.

3.1.1. *S. 5 cases - sale of foods with labels that are false, misleading or deceptive*

Prosecutions under s. 5 of the *FDA* for false, misleading or deceptive labelling are more common than s. 6 prosecutions. As the terms in s. 5 are not defined, courts have provided some guidance on what will be considered "false, misleading or deceptive". Several of the cases however, have involved quite egregious cases of false labelling in which one would have expected a conviction, even when applying the criminal law standard of proof "beyond a reasonable doubt".

In *R. v. Ray Williams* (2000) (Docket No. 97809) (unreported decision of the Supreme Court of British Columbia), the accused was charged with 13 counts under s. 5 of the *FDA*, four of which related to labelling violations. The accused operated a meat shop and during its operation labelled foreign lamb as "Saltspring Island lamb", beef liver as "calf liver" and as "baby beef liver", and sold previously frozen turkeys as free range turkeys with no indication that they had ever been frozen. The prosecution was initiated when former employees of the company alerted government field staff that the accused was engaging in practices that were "ripping-off the consumer". Much of the evidence to substantiate the charges was supplied by the former employees.

With respect to the interpretation of a label such as "free range" the judge held that it was possible to attach a commonly understood meaning, even if no official definition existed. In paragraph 16, Wilson J states:

"Turkeys may be called "free-range" or "free-run" because they are not confined to cages with the food brought to them, but rather are entitled to range at large about a barn or a yard and get their own food. I am satisfied however, that although there may be no prescribed definition of "free-range", there is an understanding by people who work in the industry, such as Ms. Grue, of a quality distinction between free-range and Canada Grade A. And I find that Mr. Williams, as well, knew that there was such a distinction.

And as I say, s. 5 of the *Food and Drugs Act* imposes the risk on the retailer to get it right. It was misleading and deceptive for the company to have notified members of the consuming public that it was selling "free-range" turkeys when the company knew, as did Mr. Williams, that what the public was really buying was a Canada Grade A turkey."

The case also supports the proposition that separate offences can occur for mislabelling and for the sale of mislabelled products. Wilson J. states at para 12:

"It seems to me that there are two different ways in which an offence can be committed. It is possible, in my judgment, to sell, under the definition of expose for sale, without labelling. It is also possible to label an item without exposing it for sale. There are two evils the statute is apparently directed to, and therefore, there are two separate offences."

The constitutionality of S.5 of the *FDA* was also considered. This is examined below in Part IV.

In *R. v. A. & A. Food Ltd.* [1997] B.C.J. No. 2720 (*British Columbia Supreme Court*), the company and its director were convicted on two counts of violating s.5(1) of the *FDA* by being in possession of unlabelled Monterey cheese packed in bulk. The director was found guilty because he failed to set up a system and to take precautions to prevent the occurrence of a foreseeable offence relating to the non-labelling of the product. The case supports the contention that a s.5(1) violation can include non-labelling as the basis for "creating an erroneous impression" of the character of the product. It would appear, however, that s. 5(2) could also be used to support a conviction on similar facts.

R. v. Rube (1991), 63 C.C.C. (3d) 47 (*British Columbia Court of Appeal*) concerned an accused who had allegedly mislabelled cuts of beef prior to sale. The evidence was clear that the offered beef was not what the label purported it to be. Rube was convicted. The issue on appeal concerned the application of the Charter to the public welfare offence outlined in s. 5 of the *FDA*. Was the offence one of absolute or of strict liability to which the accused could argue the defence of due diligence? The Court held that s. 5 is a strict liability offence to which the defence of due diligence is available. Unfortunately for the accused, there was insufficient evidence to support his claim that he was duly diligent. The Court of Appeal decision was affirmed by the Supreme Court of Canada (75 C.C.C. (3d) 575)

The decision in *Burns Foods Ltd. v. Canada* [1982] F.C.J. No. 1026 (*Federal Court - Trial Division*) contains interesting dicta by Mahoney J. concerning the interplay between label pre-approval under the Meat Inspection Act and prosecution under s. 5 of the *FDA*. The case was not a s. 5 prosecution but an application by Burns Foods for damages against the government of Canada after the former had been directed by the federal Department of Agriculture to change its labels for a meat product called "Bacon Grill". The label had been initially approved under the meat label pre-approval process. However, when a competitor complained to the Department of Consumer and Corporate Affairs ("CCA"), (which was then responsible for enforcement of the *FDA* labelling provisions), CCA threatened to prosecute Burns under s. 5(1) if it did not remove the label. Burns complied but suffered losses in so doing. In refusing to find liability on the part of the government of Canada, Mahoney J. found that the product labelled "Bacon Grill"

contained no bacon and could likely have been impugned under s. 5 of *FDA*. Mahoney J. stated that it "is perhaps unnecessary to say it but there was, of course, no suggestion that the granting of approvals were, *per se*, binding predeterminations that the display of the commercial and the containers would not contravene the law [prescribed by the *FDA*]."

3.1.2 S. 6 cases - sale of goods improperly labelled in violation of standards

The pivotal case interpreting s. 6 of the *FDA* is *Labatt Brewing Co. v. Canada* [1980] 1. S.C.R. 914 (Supreme Court of Canada). In that case Labatt began marketing a new brand of beer which it labelled "Labatt's Special Lite". The new beer contained 4% alcohol. A standard existed under the *FDA* regulations that "light beer" must contain no more than 2.5% alcohol. Two issues arose. One was whether the beer was labelled in violation of s.6. The other issue was whether the regulations regulating the production of malt liquor which set standards for the making and eventual labelling of beer were constitutional. The constitutional issue will be examined in Part IV.

The first issue, however, was whether the standard for "light beer" applied to a product labelled "Labatt's Special Lite". Labatt argued that the difference in spelling and the absence of the word "beer" alongside the word "lite" was sufficient for the label not to be misleading or disceptive. The Court found that "Special Lite" must be read in conjunction with the product to which the label was attached, namely beer. The court concluded that the label was indeed misleading as the consumer would think it was a light beer, and this beer did not conform to that standard. Writing for the majority, Estey held that :

"The test established in s. 6, however, is 'likely to be mistaken for such food' (in this case by definition in the statute, "light beer"). It is not necessary to go to the standards applied in other laws [ie. the regulations] to apply this statutory [sic] test. The purchaser must be able to rely on the presence of the prescribed common name as indicating a product prepared in accordance with the specifications established under the Act."

3.2 Interpretation of labelling provisions under the CPLA

3.2.1 Section 4 prosecutions: not providing mandatory information about net quantity

Mandatory labelling requirements concerning the declaration of net quantities as set out under s. 4 of the CPLA have been considered in two Manitoba cases: *R. v. Econo-Mart Ltd.* [1995] M.J. No.396 (Manitoba Provincial Court - Criminal Division) and *R. v. Westfair Foods Ltd.* [1996] M.J. No. 290 (Manitoba Court of Queen's Bench).

In both cases, the vendors labelled processed meat products with the phrase "minimum net weight" but did not provide an exact weight on the product. In some instances, up to 100% additional weight of product was included. Charges were laid under both s. 4(1) of the CPLA and s. 9(1) of the *Weights and Measures Act*, although these latter charges were stayed after a conviction was entered on the CPLA charges. Swail J. in *Econo-Mart Ltd.* found that "providing a minimum net weight and the total price was not equivalent to providing a 'declaration of net

quantity' of the product in the form and manner required by the Act, even if more than the minimum was provided to the consumer."

Steel J. in *Westfair Foods Ltd.* in paragraph 14 sets out the objectives of the CPLA:

"The *Consumer Packaging and Labelling Act* has two primary purposes. The first purpose is to ensure that any information provided to a consumer on prepackaged product is not false or misleading in any way. However, there is a second purpose and that is to provide information to consumers so they could make informed choices. That is the mischief which s. 4 is intended to prevent."

He concludes in paragraphs 18 and 19 that the crux of the case was that "the consumer did not receive [...] accurate, complete and meaningful information. I adopt the finding of the learned trial judge when he found that the intent of the requirement for a declaration of net quantity is to provide consumers with as much information as possible and that a simple declaration of "minimum net quantity" does not fulfil that intention".

Both the *Westfair* and the *Econo-Mart* cases were prosecuted under s. 4 of the CPLA and as such the courts held that the accused could not rely on a s.7(3) defence of "otherwise not less than the declared net quantity of the pre-packaged product". Steel J. in *Westfair* held that the accused was convicted of not providing mandatory information, not of providing false or misleading information.

3.2.2 Section 7 prosecutions: false or misleading representation on the label

No cases were found which considered the judicial interpretation of this section.

3.2.3 Section 10 prosecutions: not providing mandatory information other than net quantity

No cases were found which considered the judicial interpretation of this section.

3.3 Interpretation of labelling provisions under the food trade acts (MIA, FIA and CAPA)

3.3.1. Sale of goods improperly labelled under the FIA Regulations

In *R. v. Eastern Fish Markets Ltd.* [1990] N. J. No. 155 (Nfld. S.C. - Trial Division), the accused was charged with violations of sections 26(1)(a) and (b) and 31 of Fish Inspection Regulations for shipping salmon that was improperly labelled. The accused was charged when his salmon which was destined to be shipped by air for export was found packaged in boxes marked with code dates, but with no indication of origin, ownership or processor. .

Like the *Rube* case, this case is authority for the proposition that labelling offences under the food trade acts are strict liability offences. Barry J. articulated the principle this way:

"...it is not necessary that the Crown prove that the accused intended to commit an offence in acting as it did. It is only required to show that the salmon were delivered to the freight shed for shipment in a condition contrary to the Regulations. In other words, to establish the guilt of the accused for commission of this type of offence it is not necessary to establish that there was mens rea on the part of the transgressor as in most criminal offences. In this instance the mere commission of the forbidden act and the identification of the offender is sufficient to constitute an offence."

3.3.2 Sale of goods improperly labelled under the Dairy Products Regulations

Several reported cases have proceeded under s. 72 of the *Dairy Products Regulations*. This section states:

A dairy product for which standards are prescribed pursuant to this Part shall not be described or presented on any label in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding the product's value, quantity, composition, quality, identity or nature.

In *R. v. A. & A. International Industries Inc* [1998] A.J. No. 748 (Alberta Provincial Court-Criminal Division), the accused was found guilty of 3 offences of labelling grated cheese products as Parmesan cheese when that claim was indeed false, misleading and deceptive. The accused had blended about 2000 pounds of cheese product which actually contained no parmesan cheese. The court levied a fine \$9,000 per charge to encourage individual and general deterrence. One can question how effective these fines are to deter this type of corporate behaviour: the company had been convicted and fined for a similar offence in 1995. Furthermore in paragraph. 4 Daniel J. states:

"Companies in the food and dairy industry must accept that the greatest possible care must be taken to ensure products are accurately labelled. Consumers rely on labels to disclose honestly and accurately, the product's contents, especially those with allergies and those concerned about their intake of certain ingredients. The public wants to know and has the right to know, whether the product they purchase is 100% pure, or whether other ingredients, preservatives, colour, additives, adulterants, fillers or contaminants are present. This material disclosure is essential to a product's value, quality, composition, identity and nature. Less than a full material disclosure is misleading, deceptive and likely to create an erroneous impression. It may result in irreparable harm to an unwitting consumer with serious allergies to non-disclosed ingredients. Without all the information, the consumer cannot make a fully informed purchase."

Daniel J. assessed a significant fine to encourage general deterrence. In para. 6, he set out his reasons:

"The risk is that the honest producer might be tempted to follow the dishonest producer's lead, simply to compete and survive in a difficult market. The economic advantage of mislabelling must be curtailed. A clarion message to the industry must be sent: the courts take these sorts of offences very seriously and penalties for mislabelling will be such as to minimize or obliterate the otherwise expected profits. Any other result, and companies will simply accept prosecution and fines as a cost of doing business."

In *R. v. Salerno Dairy Products Ltd.* [1995] A.J. No. 790 (Alberta Provincial Court - Criminal Division), the accused was charged under s. 72 of the *Dairy Regulations* for selling "grated parmesan cheese" which contained 9.4% lactose. This information was not declared on the label. Evidence showed that true parmesan cheese costs about \$25/kg while the lactose in skim milk powder cost \$3.70/kg. The case turned on whether the accused was required by the regulations to make a "grated parmesan cheese" with a certain maximum level of lactose. Delong J. found that while the Regulations for parmesan cheese set out standards for the amount of milk fat and moisture, they were silent with respect to lactose. Expert evidence was admitted that showed that industry guidelines for parmesan cheese permitted less than 1% lactose. On that basis, the judge found the label to be in violation of s. 72.

This case is one of the few discovered that grapples with the meaning of the general phrase "false, misleading, or deceptive or likely to create an erroneous impression" and whether a product's label fits within that meaning. The case is authority for the proposition that when a standard for a product does not list all possible ingredients, a label may be misleading if it does not identify an ingredient which the consumer might not expect to be in the food. The court rejected the argument of officially induced error.. Delong J. stated in paragraph 32 :

"A review of the label by an inspector is only a partial answer to the process involved, the ingredients of the product going into the package as labelled is obviously far more critical. A defence of officially induced error can not be fashioned from periodic inspections, particularly in light of this letter [send to the accused] which specifically raises the quality of the product and not the label used."

In *Baxter Foods Ltd. v. Canada (Minister of Agriculture)* [1988] F.C.J. No. 410 (Federal Court - Trial Division)), Baxter Foods sought an injunction to stop the Department of Agriculture from detaining Baxter "Nice'n Light" light ice cream because of non-compliance under s. 72 of the *Dairy Products Regulations*. The trial judge found that approval of the wording "Light ice cream" on the Baxter Foods product had been tacitly approved by the by Consumer and Corporate Affairs. When the company tried to ship the product out of the province of production, the Department of Agriculture intervened, claiming that the new product was in violation of labelling provisions for a standardized product. Baxter succeeded in obtaining an injunction against Agriculture Canada on the basis that the new ice cream product was not covered by any standard. The new product contained less than 7% butterfat. There was a standard for ice milk (under 5% butterfat) and for ice cream (over 8% butterfat), but no standard for anything in between. Baxter had chosen to label the product "light ice cream", a product for which there was no standard. S.72 of the regulations did not apply. S. 3(2) of the Canada Agricultural Products

Standards Act (then the Regulations' enabling statute) also did not apply. That section provides that no one may label a dairy product in such a manner as to mislead the public into thinking it is a standardized product. Rouleau J. held that:

"The Baxter product is clearly labelled: "light ice cream, contains 30% less fat than our regular ice cream". In this diet conscious era, this labelling carries a very clear and obvious message to the consumer. Since this product is not labelled in a manner so closely resembling "ice cream" as to mislead the consuming public, as provided for in Subsection 3(2) of the Act, the product is not one over which the defendant's servants have any authority."

While this case does not interpret the phrase "false, misleading or deceptive" it does suggest that a new food item will be scrutinized to determine if it fits within an existing standard. If the manufacturer/producer can successfully argue that it does not and there is obvious consumer demand for the product as in the *Baxter Foods* case, s. 72 will not be applicable. Nor would it appear that any of the FDA or CAPA provisions against "false and deceptive" labelling would apply to a new product which is labelled clearly to differentiate it from an existing standardized product.

3.4 Interpretations under the *Trade-marks Act*

It is surprising perhaps to discover that a significant amount of judicial activity is devoted to labelling issues under the *TMA*. Under this legislation private companies attempt to establish a market advantage by obtaining a trademark for their products that will ensure the seller exclusive use of a descriptive term. When new trademarks are sought, new names are often opposed under the Trade-marks Act by competitors. The trademark, which invariably is part of the marketing and labelling strategy for the product, is usually opposed on the basis of the Act's sections 7, 10 or 12. Parties will often also allege that the trademark sought would contravene s. 5 of the *FDA* or s. 7 of the *CPLA*. Four cases are illustrative of the arguments and decisions made under the *TMA*.²⁷

In *Principle Marques Inc. v. Sara Lee Corp.* (1997) 82 C.P.R. (3d) (Trade Marks Opposition Board), Sara Lee wanted to register "PICNIC" for its "fresh and processed meats". The application was denied because the opponent provided evidence to establish that a consumer seeing the mark "PICNIC" on a package of pork would assume it was a picnic cut or picnic shoulder cut. This violated s. 12 of the *TMA* because it deceptively misdescribes a character or quality of the applied-for wares. The Board also found a s. 10 violation in that the term "picnic" had an ordinary and *bona fide* commercial usage used by butchers and retailers to indicate a shoulder cut of pork.

In *Institut National des Appellations d'Origine v. Pepperridge Farm, Inc.* (1997) (Trade Marks Hearing), Pepperridge Farms wanted to register BORDEAUX COOKIES. The Board held that such a mark was not misdescriptive under the *TMA*. BORDEAUX has by ordinary and commercial usage become recognized in Canada as designating a type of wine in France.

²⁷ The Trade Marks Opposition Board, the body that decides these cases, is not a court, but as an administrative tribunal with specialized expertise, its opinion has significant legal importance.

However, cookies and wine are not in the same class. The use of BORDEAUX on a cookie is not likely to mislead customers into making a connection with Bordeaux wines. The Institut was unsuccessful in demonstrating that the mark would mislead or deceive consumers so as to contravene s. 7 of the TMA, s.52 of the Competition Act ("CA"), s. 5 of the FDA or s.7 of the CPLA. The Board held that:

"...the proper test to be applied to the determination as to whether a trade mark in its entirety is deceptively misdescriptive must be whether the general public in Canada would be misled into the belief that the product with which the trade mark is associated had its origin in that place of a geographic name in the trade mark....

In my view, the determination about whether any or all of these provisions [s. 7 of TMA, s. 52 of the CA, s. 5 of the FDA, and s. 7 of the CPLA] have been violated turns on the determination of whether the applicant's use of the mark BORDEAUX in association with cookies would mislead or deceive the public in some material way."

In *Pizza Pizza Ltd. V. Haynen* (1997) 77 C.P.R. (3d) 273 (Trade Marks Opposition Board), Haynen wished to register HEALTH-SMART "vitamins, minerals, herbs and health food supplements". The opposition to the trademark was not sustained as Pizza Pizza did not prove that the mark was deceptively misdescriptive of the wares with which it was proposed to be used. However the Board disallowed the registration because it held that the mark "health" describes an intrinsic quality of the wares that others would also want to use. The applicant should not be entitled to monopolize use of the words "health" or "smart" and so the trade-mark was refused.

In *Dairy Bureau of Canada v. Swift & Co.* (1988) 22 C.P.R. (3d) 144 (Trade Marks Opposition Board), Swift & Co sought to register "LI'L BUTTERBALL" for its pre-basted turkeys which were basted with coconut oil rather than with butter. The Board held that the issue was whether the first impression of the average consumer to a L'il Butterball turkey would be that it contains butter as the basting ingredient, notwithstanding the fact that the label on the turkeys clearly stated that they were "deep basted with vegetable oil".

The Board held that "an average purchaser, seeing as a matter of first impression the trade mark "L'il Butterball" used in association with dressed poultry, would not be deceived or misled into thinking that it contained butter or that butter was used as the basting agent". The trademark was allowed.

As in the *Pepperridge Farms* case, the Board in *Swift*, held that a finding by the board that the trademark does not deceive is determinative that it would not deceive under the CPLA or the FDA. Such a finding makes the pursuit of a trademark a very attractive route to secure a market advantage over competitors. When a company successfully registers a trademark it is granted exclusive use of the name and also receives at least some assurance that the name will not be a violation of the "false, misleading, or deceptive" provisions of the TMA, the CAPA, the FDA or s.7 of the CPLA.

PART IV - CONSTITUTIONAL ISSUES ARISING FROM PERTINENT LEGISLATION

The *Constitution Act, 1867*²⁸ divides legislative competences between the federal and provincial governments. A detailed discussion of interpretation of these powers in relation to agriculture has been discussed in detail elsewhere.²⁹ However, with respect to food labelling, constitutional issues have not been systematically explored in the legal literature.

The federal government's ability to intervene in food safety and market regulation, the dual objectives of food labelling, is derived from the constitutional division of powers contained in s. 91. These powers are, of course, limited by provincial powers under s. 92. The impact of the shared s.95 power over agriculture for food labelling is enigmatic at best but in light of existing case law likely to be of minimal support for federal intervention.

4.1 Section 91 Federal Powers

Sections 91 and 92 make no specific or direct reference to agriculture or food. The federal government under section 91 may, and has on a number of occasions, used any of several heads for the substantiation of food labelling law. They include s.91(27) the criminal law, s.91(2) the regulation of trade and commerce, and the "Peace, order and Good Government" power.

The constitutional basis for the food adulteration statutes has been debated from presentation of the first Adulteration Act in 1884. During Parliamentary debates of the Bill, members debated whether the legislation was grounded in the federal powers over criminal law or the trade and commerce power or in the provincial powers over property and civil rights and the administration of justice in the provinces.³⁰ In Parliament, Liberal David Mills said:

This is regulation of a civil right; it is interfering with the rights of the Provinces, and the hon. gentlemen might just as well take charge of all these municipal and local affairs in every town and city of this Dominion, as undertake to deal with this particular question. It is not part of the criminal law...³¹

Prime Minister MacDonald on the other hand, stated that:

The Bill is not one for the protection of public health, but it is to prevent adulterated articles from being sent from one Province to another, or from Canada, as a whole, to a foreign country.... Chalk and water, for instance, have been very extensively used to

²⁸ 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.

²⁹ Fuller, R. and D. Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths 1999)

³⁰ Bruce H. Lauer, "The Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920" (Ottawa, Carleton University unpublished Master's thesis, 1993) at 42.

³¹ House of Commons Debates, Vol. 16 (2nd Session, 5th Parliament, March 12-April 19, 1884), pp. 1246-1248 as found in Bruce H. Lauer, "The Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920" (Ottawa, Carleton University unpublished Master's thesis, 1993) at 42-43.

adulterate milk, the mixture containing, perhaps, a very little sprinkling of milk. Such adulteration is considered to be an offence, not only against morals and society, but an offence of the character of a crime. It is not enough to limit proscription to adulterated articles that won't poison, that won't kill, but we must include articles unwholesome in themselves.³²

4.1.1 Grounding the FDA (or at least parts of it) under s. 91(27) the criminal law

The leading case for the grounding of the *FDA* under the federal government's criminal law powers is *Standard Sausage Company v. Lee* (1933) 60 C.C.C.265 with additional reasons at (1934) 61 C.C.C. 95 (B.C.C.A.). In that case, a meat merchant mixed sulphur dioxide with sausage meat to extend its shelf life. The quantity of sulphur dioxide used was not found to be injurious to health. The product was treated and sold as fresh sausage. The constitutionality of s. 23 of the *FDA 1927* (the misbranding and adulteration provision) was found by the Court of Appeal to be valid legislation as a matter of criminal law. The offence in that case was adulteration but the court also opined that the offence of "misbranding" was a valid exercise of federal power under s. 91(27).

Macdonald J., at 268, held as follows; "We start with the fact that the selling of food, not only unfit for human consumption but *dangerous*, was a criminal offence at common law." He continued, at 269:

"Nor is it any less a crime because it may be shown scientifically that some of the ingredients prescribed may not, if used in proper quantities, be deleterious at all. It is not a *sine qua non*, as many provisions of the *Criminal Code* show that injury to property or to the person must necessarily follow the commission of the unlawful act. This contingency is recognized inasmuch as the penalty is less severe if injurious results do not follow....

So to if the Federal Parliament, to protect health against actual or threatened danger, places restrictions on, and limits the number of preservatives, that may be used, it may do so under s. 91(27) of the *B.N.A. Act*. This is not in essence an interference with property and civil rights. That may follow as an incidental but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all the inhabitants of the Dominion."

Macdonald J. concluded at 271: "The primary object of this legislation is public safety... [but]

³² House of Commons Debates, Vol. 16 (2nd Session, 5th Parliament, March 12-April 19, 1884), pp. 1246-1248 as found in Bruce H. Lauer, "The Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920" (Ottawa, Carleton University unpublished Master's thesis, 1993) at 42-43.

I think too, if further support is required, the Act may be upheld because its purpose is not only to protect the consumer, but also to suppress fraud, in its criminal aspect, in the distribution of food products."

This case has been cited as still being good law in Canada in the case of *R. v. Kripps Pharmacy Ltd.*³³ In *R. v. Kripps*, Berger J. of the B.C. Supreme Court said: "In *Standard Sausage v. Lee*, the Court of Appeal of this province addressed this very question. It was a case where federal power to pass the *Food and Drugs Act* was challenged. The court held that the Act was *intra vires*, as an exercise of federal legislative power under s.91, subsection 27.

At the B.C. Court of Appeal, McFarlane J. stated that: "like Wetmore, County Court Judge, and Mr. Justice Berger, I am bound to follow the judgment of this court in *Standard Sausage Company v. Lee*, unless there be good reason which requires me to reject that authority...I also find nothing in *Labatt v. Canada (Attorney General)*, which requires me to depart from the ratio of the *Standard Sausage Co. v. Lee* judgment."

At the Supreme Court of Canada, Laskin C.J. in the *Kripps* case stated at 167: "It is well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to the criminal law. *Standard Company v. Lee* is a long standing application of these principles."

Most recently, in the case of *R. v. Ray Williams* (2000) (Docket No. 97809) (unreported decision of the Supreme Court of British Columbia) the constitutionality of s. 5 of FDA was challenged as not being a federal power but rather as a provincial one to regulate front counter retailing by local merchants in the province and in pith and substance consumer protection. Wilson J. found in para. 29 as follows:

"Furthermore, although the regulation founding the charge in Count 11 of this indictment, may be described as descending to the minutia of labelling, it cannot be described, in my view, as a "licencing" scheme. The Act under review in *Standard Sausage v. Lee* prescribed conduct deemed to be misbranding. The present regulations are more detailed than prescribed in the prior legislation. Nevertheless, in *Standard Sausage v. Lee*, the court held that, if the legislature had the constitutional authority to legislate in the matter, then that legislature may define particulars of implementation."

The seemingly unequivocal endorsement by Laskin C.J. and the other lower court judges of the grounding of the FDA in the federal government's criminal law power must however be read in light of the majority decision in *Labatt Brewing Co. v. Canada* [1980] 1 S.C.R. 914 (Supreme Court of Canada). In that case, Labatt began marketing a new brand of beer which was labelled as "Labatt's Special Lite" which contained 4% alcohol whereas standard proscribed by the FDA

³³ (1981), 54 C.C.C. (2d) 195 (County Court of Vancouver) and 57 C.C.C. (2d) 113 (Supreme Court of British Columbia) and (1982) 64 C.C.C. (2d) 25 (B.C. Court of Appeal) and (1983), 38 C.R. (3d) 161 (Supreme Court of Canada).

Regulations for a "light beer" was that it must not contain more than 2.5% alcohol. The accused challenged the constitutionality of the FDA's s.6 and the Regulations for malt liquors.

The majority dismissed the possibility that all of the Regulations under the *FDA* enjoyed a blanket coverage under s. 91(27). Estey J. found while there is clearly federal authority in the field of criminal law for promulgating regulations in respect of trade practices contrary to the interest of the community such as misleading, false or deceptive advertising and misbranding, there was no basis for detailed regulation of brewing industry in the production and sale of beer under 91(27), either as it related to criminal law or the protection of health.

Although there appears to be no case authority on point, one could, by extrapolation from dicta in the *Standard Sausage* case, argue that those provisions of the CPLA, and of the food trade statutes that are specifically drafted to prevent commercial fraud might also be grounded under s.91(27).

4.1.2 Grounding food trade statutes, consumer and industry statutes (and parts of the FDA) under section 91(2) the regulation of trade and commerce

With much of Canada's agricultural production destined for interprovincial and international trade, the food trade could be governed by the federal government's power under s. 91(2). Much of the legislation in the area of food labelling (in fact all of the food trade statutes and even s. 6.1 of the FDA after the *Labatt* decision) contains clear wording to the effect that the products covered are those destined for interprovincial or international trade.

It is now settled law that there are two streams of jurisprudence under s. 91(2) — the "interprovincial or international trade and commerce" branch and the "general trade and commerce" power³⁴. One or both branches of the s. 91(2) have been offered to support federal legislation dealing with food labelling when it has come under attack.

Until the *Labatt* case, the *FDA* was not grounded in s. 91(2). This changed after the decision so that with the 1985 amendment of s. 6, the Act now explicitly refers to the creation of an offence for a standardized product that has entered interprovincial or international trade. The other pieces of food labelling legislation have always relied on s. 91(2) as the bedrock of their constitutional validity. Grading marks, stamps, and labelling standards have been outlined in the *MIA*, *FIA*, *CAPA*, and the Regulations for products that are traded interprovincially or internationally. The provisions of these Acts seemed, before 1980 at least, to be beyond constitutional attack.

Two leading cases from the Supreme Court of Canada have proved this not to be the case. Delivered within a few weeks of one another, *Labatt Brewing Co. v. Canada* [1980] 1. S.C.R. 914 (Supreme Court of Canada) and *R. v. Dominion Stores Limited* [1980] 1. S.C.R. 844 (Supreme Court of Canada) put into question the federal government's authority to regulate in the area of food labelling under the s. 91(2) power.

In *Labatt*, the majority held that there was no jurisdiction under 91(2) to regulation the standards for "light beer" because the s. 91(2) cannot be applied to a single trade even on a national basis. Estey J. found that the main purpose of the FDA standards was to create a legal recipe. Such a recipe for one or many industry products cannot be considered a regulation of trade and

³⁴ P. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 1997), p. 20-2 (chapter 20.1).

commerce in under the "general trade and commerce" branch. As the production of beer in the *Labatt* case took place wholly within each of the provinces individually, the *FDA Regulation* had its effect on the production of the good rather than on the consumer and thus could not be supported by powers held by the federal government under s.91 (2). Estey J. writes:

"Essentially, labelling is, where obligatory, for the purpose of preventing deception or the gaining by the vendor of unfair advantage over the purchaser in the marketplace. Here the food must be produced to certain standards and then sold with prescribed nomenclature. Ordinarily, in labelling legislation, the legislator prescribes no standard for the production or marketing of the article, but only requires the revelation of the contents and conditions of maintenance, etc."

For this reason Estey J. found that the pith and substance of the impugned legislative instrument fell within s. 92(13) rather than s. 91(2).

Laskin J., in a strong dissent, held that there was a sufficient basis under the "general trade and commerce" branch to support the *FDA Regulation* in question. Laskin J. argues that:

"Whereas the predecessor Act [*1920 Food and Drug Act*] was limited to protection of the public against adulteration and misbranding, the new Act [1952] more clearly addressed itself, by the regulation making power conferred under s. 25 upon the Governor-in-Council, to standards of strength and quality as well as labelling.

...

I do not press any perfect analogy to the prescription of common standards for an article of food which is produced throughout the country and which is also imported from abroad, but it does appear to me that if Parliament can set up standards for required returns for statistical purposes, it should be able to fix standards that are common to all manufacturers of foods, including beer, drugs, cosmetics and therapeutic devices, at least to equalize competitive advantages in the carrying on of businesses concerned with such products."

In *Dominion Stores*, there was an admission from the outset by the parties that the impugned transaction that was the subject of the proceeding was a wholly intraprovincial transaction involving the grading, marking and sale of apples in Ontario. The accused was charged with a violation of section 3 of the *Canada Agricultural Products Standards Act*, R.S.C. 1970, c. A-8. Section 3 provided for voluntary use of the federal grades and grade labels, but if the names and label were used, the product had to meet the standards of the federal act. In this case the evidence showed that the labelled products did not meet the federal standards.

Estey J., again for the majority, found that the federal regulations under the *Canada Agricultural Products Standards Act* were *ultra vires* because they infringed s.92(13) and 92 (16) provincial powers. Estey J. found as follows:

"I approach the issue raised in this appeal on the basis that the Parliament of Canada may not, in the guise of regulating trade and commerce, reach into the fields allocated to the provinces by s. 92(13) and s.92(16) and regulate trading transactions occurring entirely within the provinces.

...

The Canada Standards legislation [of 1935] was approached and validated by the Privy Council as legislation in relation to trade marks. The pith and substance of the Canada Standards statute was clearly a trade mark creation and licencing plan which the Privy Council found to be valid based on s. 91(2) of the *British North America Act*. Because the Privy Council were not there concerned with legislation whose pith and substance was the regulation of the local marketing of agricultural products, the application or extension of that decision to our circumstances is necessarily attended with great risk."

Estey J. found that the Regulation infringed s. 92(13) provincial powers and struck down s. 3 of the Act and thus found that the Regulations made under it were of no force or effect.

Like in the *Labatt* case, Laskin J. wrote for the dissenting minority. He found the legislation to be *intra vires* under s. 91(2). Laskin J. states:

"So here too, and it seems to me that it was quite logical that the Parliament of Canada, having enacted compulsory grading requirements for agricultural products moving in export and interprovincial trade, should complement those provisions by giving an opportunity to dealers in such products to avail themselves, if they so wished, of the same grade prescriptions for local transactions. It could be a convenience for them and for consumers as well. The Court of Appeal had found the section of the act in question to be "necessarily incidental to the effective operation of the scheme established by maintaining the integrity of national standards grade and to prevent a misuse of the grade and confusion".

Interestingly, the learned constitutional lawyer Professor Peter Hogg sides with the Laskin dissent in the *Dominion Stores* cases, opining that the case was wrongly decided by the majority.³⁵ While the Court held that this was an infringement on provincial property and civil rights and thus *ultra vires* the federal Parliament, Professor Hogg argues that the minor incursion into provincial trade was necessary to protect the credibility of the federal standards. "Surely, such a modest intrusion into local trade has a 'rational, functional connection' with the regulation of interprovincial and international trade".³⁶

Concerning the constitutionality of the federal government's development and use of marks and trademarks for grading and identification purposes, the leading case is *Dominion Trade and Industry Commission Act 1935* [[1937] A.C. 405, sub. *Nom. Att. Gen. of Ontario v. Att. Gen. of Canada*] which holds that the federal government has such a power under 91(2).³⁷

³⁵ P. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 1997) p. 20-9 (chapter 20.2(b)).

³⁶ Hogg, at 20-9 (chapter 20.2(b)).

³⁷ *R. v. Brodsky et al.* (1936) 65 C.C.C. 4 (Manitoba Court of Appeal) held however that the mandatory marking and grading of eggs required by the Regulations under the federal *Livestock and Livestock Products Act* was *ultra vires* the federal government as it regulated a wholly provincial transaction. Again, there was a strong dissent that the

"If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91(2), the Regulation of trade and commerce, referred to by the Chief Justice. There could hardly be a more appropriated form of the exercise of this power than the creation and regulation of a uniform law of trade marks. But if the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce--a national mark.... The substance of the legislation in question is to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants."

4.1.3 The "Peace, Order and Good Government" clause

The federal government has also attempted to justify food labelling through reference to the Peace, Order and Good Government ("P.O.G.G.") clause, but with mixed success. In the reasons for judgment in the *Standard Sausage* case, Martin J. at 112 states as follows:

"The unusual element herein is that the subject matter of public health is an "un-enumerated head" and is only indirectly and partly "covered" by both sections [s.91 and s.92] and therefore, in my opinion, the "general powers ... committed to the Dominion Parliament" may be invoked to fortify its position... I recognize, after giving it some, but not final consideration, that there is much to be said in favour of it herein because the facts and wide circumstances before us, ie. the general regulation of a National pure food supply, "affecting the whole Dominion", in the field of public health already preponderantly open to the authority of National Parliament, are essentially different from those considered [to be provincial powers] in eg. *Citizens Ins. Co. V. Parsons* (1881), 7 App. Cases 96.

Thus it would appear that there is some basis for arguing for the validity of federal labelling requirements under P.O.G.G.. Estey J in the *Labatt* case appears to have significantly restricted the ambit of this argument however. He states:

"Parliament may make laws in relation to health for the peace, order and good government of Canada: quarantine laws come to mind as one example. The Privy Council hinted that legislation enacted by Parliament to deal with an "epidemic of pestilence" would be valid in *Toronto Electric Commissioners v. Snider* [[1925] A. C. 396]."

Estey J. held, however, that the brewing and labelling of beer, at least, has not given rise to national emergency or a new problem at did not exist at Confederation, nor to a matter of national concern that would justify supplanting provincial authority over property and civil rights so as to be justified under the P.O.G.G. power.

4.2 Federal powers with little judicial consideration as bases for supporting federal labelling laws

4.2.1 Section 91(17) weights and measures

The *Weights and Measures Act* and portions of the *CPLA* would appear to be grounded under this head of federal authority. No case law has been found that judicially considers this proposition.

4.2.2. Section 91(22) patents of invention and discovery

It appears that the *Trade-marks Act* is grounded in s. 91(2) but as the field of intellectual property rights continues to expand, it might be argued that this head of power could also be considered for the support of intellectual property claims that appear on food labels.

4.2.3 Section 95 power over agriculture and immigration

Section 95 powers have been significantly curtailed since the 1925 Supreme Court of Canada decision in *King v. Eastern Terminal Elevator*.³⁸ Mignault J. in that case drew a line between measures which are for the "encouragement or support of agriculture" and those which are not has been maintained with only the former being supportable under s. 95. This section has been recognized, however, as the head of jurisdiction to support federal legislation relating to the standardization of production inputs and the protection of animal husbandry practices but not production outputs once they leave the farm gate. At least two cases specifically deny the federal government's ability to regulate food products, including the labelling of them, beyond the farm gate under the authority of s. 95. In *Reference re Importation of Margarine*,³⁹ the Supreme Court of Canada held that the regulation of margarine under the federal *Dairy Industry Act*⁴⁰ was not a law in relation to agriculture under s. 95. In the *Dominion Stores* case, the majority held that the regulations made under the *Canada Agricultural Products Standards Act* pertaining to apple grade names were held not to be "in relation to agriculture". Estey J. wrote: "I say no more than to point out that these apples clearly form no part of the process of agriculture once they have entered the commercial marketing conduits and therefore I believe the fate of these proceedings in no way turns upon the availability of s. 95 of the *British North America Act*."

³⁸ [1925] 3 D.L.R. 1 at 21 (S.C.C.). For a detailed discussion of this case, see Fuller and Buckingham, *Agriculture Law in Canada*, supra, pp142-44.

³⁹ [1949] S.C.R. 1, [1949] 1 D.L.R. 433; affd [1950] 4 D.L.R. 689, [1951] A.C. 179 (P.C.).

⁴⁰ R.S.C. 1927, c. 45.

CONCLUSIONS

Drawing conclusions from such a large body of law is a somewhat daunting task. However, several trends are notable.

1. Objectives of Food Labelling - Regulating the Marketplace a Priority

An historical review of food labelling legislation in Canada reveals that the major objective of the legislation is to regulate the marketplace. Food labelling legislation levels the playing field between competing food dealers and between food dealers and consumers. Preventing unfair competitive advantage and securing access to international markets for goods of consistently high quality products was the genesis for early marking and inspection Act and continues to be an important motivation for the commodity-specific food trade Acts (*MIA*, *FIA* and *CAPA*). The Trade-marks Act is also used by industry players to secure recognition for trademarks that will assist them in obtaining a competitive advantage for their product.

In the 1970s, with the coming into force of the *CPLA*, attention to marketplace considerations for consumers was heightened in the legislative regime. These provisions with those in the *FDA* to protect consumers against misleading and deceptive labelling, brought new provisions into place so as to provide consumers with basic standardized information on all food products.

2. Objectives of Food Labelling - Food Safety Secondary

Although one hears that one of the primary motivations for food labelling in Canada is to promote food safety, very little of the history of the legislation and even very little of the present legislation specifically addresses issues of food safety such as labelling for toxicity or allergens. This is perhaps understandable as labels list and promote what is in the product and allergens and toxins are not supposed to be in products. Although, this chapter does not specifically document the legislative basis for the labelling of foods to identify ingredients that may cause allergic reactions, it is difficult to determine whether the action by the *CFIA* to remove mislabelled products containing undeclared allergens proceeds on the basis of enacted regulations or simply on policy. The *CFIA* has the ability to secure voluntary or mandatory recalls of such products under the *Canadian Food Inspection Agency Act*. Yet it seems odd that with all the other detailed provisions for food preparation and food standards in the regulations of the *FDA*, there is no specific chapter of the regulations that would deal with the topic of allergens. The issue of labelling for foods which contain allergens could also be addressed in the *CPLA*.

3. The Overall Complexity and Duplication of Requirements for Food Labelling

The six Act and the Regulations promulgated under them are unduly complicated. As the historical development of the legislative framework indicates, the legislation grew up organically and now provisions of several Acts must be adhered too for some products while other products' labels are subjected to far less legislative hurdles. With respect to the basic requirement of prohibited claims on labels, the legislation is quite clear and even though the prohibitions issue from two Act, the *FDA* and the *TMA*. With respect to labelling integrity, is it really necessary or helpful to have enforcement provisions for "false and misleading" labels under several Acts? Finally, when it comes to mandatory label requirements, the legislation becomes so detailed and so convoluted that only food labelling consultants, food marketing experts, and seasoned

bureaucrats can penetrate the labyrinth of the FDA Regulations, commodity Act Regulations and the CPLA Regulations. This latter complexity creates the possibility for several unwanted consequences. The rules to be applied are difficult to discern and so those administrations asked to apply them will be faced with uncertainty. With such uncertainty, inconsistent rulings are likely across both horizontal and vertical horizons.

The horizontal horizon is represented by the decentralized manner in which label reviews take place. All meat label inspectors are in the CFIA office in Ottawa, the regional all have officers which as part of their duties look at food labels and the Bureau of Food Safety and Consumer Protection in Ottawa handles centrally consumer complaints on labelling issues. The administrators who made the initial decisions usually are guided by their own experience and the "Guide to Food Labelling and Advertising" which itself may or may not mirror the legal requirements of the provisions of the six Acts and their Regulations. Many of the decisions on labelling issues are therefore taken before the CFIA Office of Enforcement and Investigation Services (EIS) ever hear of a labelling problem. By the time EIS receives the file, it is probably an egregious case but that case will still be review and a decision made whether or not to have Department of Justice lawyers prosecute.

Finally, the overall complexity and duplication of requirements for food labelling makes it difficult to train new staff within the CFIA to carry out its mandate. Therefore, as experienced label reviewers leave the CFIA, new personnel become hard to recruit and adequately train.

4. Limited Judicial Interpretation of Labelling Provisions

Reported cases under the labelling provisions of the FDA, the CPLA, and the Regulations of the food trade acts (FIA, MIA, CAPA) demonstrate almost perfect record of convictions for food labelling offences. Unfortunately there are very few reported cases. This could mean several things. First, that there are very few instances of labelling non-compliance. Second, that it is difficult to determine if there is non-compliance given the lack of clarity of some of the labelling requirements. Third, that it is difficult to obtain convictions for labelling non-compliance and so non-compliance cases are settled or dropped before coming to trial. Finally, perhaps there has not been an active programme in the government departments for enforcement to pursue convictions based on the criminal law "proof beyond a reasonable doubt" for food labelling offences.

Whatever the reason, after more than 100 years of food labelling legislation, there is precious little jurisprudence on the circumstances under which a food dealer will be convicted for a mislabelling offence under Canada's food labelling laws.

5. Unsatisfactory state of the law from a constitutional law perspective

The 1980 cases of *Labatt* and *Dominion Stores* have left some doubt as to the extent that the federal government can intervene in issues of food standards and labelling. If one believes Prof. Hogg that the Laskin dissent in both of these cases is the better legal direction to follow, then it is perhaps time for the federal government to actively pursue its role for a comprehensive scheme for food labelling and food safety. If challenged, a new constitutional precedence might well grant the federal government power under one of its heads of power to regulate in this important area of vital concern to all Canadians.

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5. Interviews conducted

1. Cameron Prince, Acting Executive Director, Operations Coordination, Operations Branch, CFIA (interviewed 4 March 2002)
2. Richard Robinson, Chief, Livestock Identification and Legislation, Food of Animal Origin, Programs Branch, CFIA (interviewed 5 March 2002)
3. Greg Orriss, Director, Bureau of Food Safety and Consumer Protection, Programs Branch, CFIA (interviewed 5 March 2002)
4. Mark McCombs, General Counsel, Head Legal Services, CFIA (interviewed 7 March 2002)
5. Debra Bryanton, Director, Foods of Plant Origin, Programs Branch, CFIA (interviewed 7 March 2002)
6. Suzanne Frost, Director, Enforcement and Investigation Services, Operations Branch, CFIA (interviewed 28 March 2002)
7. Moyra Nicholson, Senior Counsel, Legal Services, CFIA (interviewed 4 April 2002)
8. Ronald Doering, President, CFIA (interviewed 4 April 2002)
9. Robert Carberry, Acting Vice-President, Programs Branch, CFIA, (interviewed 8 April 2002)