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## Food Safety in Canada and the United States

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## FOOD SAFETY IN CANADA AND THE UNITED STATES

*Session Chair – Robert Strassfeld*

*Canadian Speaker – Stephanie Lariviere*

*Canadian Speaker – Cyndee Todgham Cherniak*

### INTRODUCTION

*Robert Strassfeld*

MR. STRASSFELD: Good afternoon. I am Robert Strassfeld, a member of the faculty here at Case Western Reserve.<sup>1</sup> I eat, teach torts, and do some work on national security as well. I suppose that is what qualifies me to chair this panel.

I can speak best from the American perspective, but I suspect that this has crept over the border to Canada, as well. We are a society that seems to be obsessed with food. We have a cable television network that is dedicated solely to the subject of food.<sup>2</sup> We supersize our meals, and then hope that we do not also supersize ourselves. This past year, one of the hit movies was about a woman who worked her way through Julia Child's *Mastering the Art of French Cooking*.<sup>3</sup> We care about food a lot. This is also an age of increased anxiety, so we are worried about what we eat.<sup>4</sup> Julia Child used nothing more threatening than butter, lots and lots of butter.

We worry about other things in regard to food as well. Most recently, we worry about bioterrorism and adulteration of the food supply.<sup>5</sup> Food adulteration is a remote but real risk that we have to worry about. A generation ago,

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<sup>1</sup> *Faculty*, CASE W. RES. U. SCH. L., <http://law.case.edu/FacultyResearch/MeetOurFaculty.aspx> (follow "Strassfeld, Robert" hyperlink) (last visited Oct. 6, 2010).

<sup>2</sup> *About Us: Food Network*, FOODNETWORK.COM, <http://www.foodnetwork.com/home/about-foodnetworkcom/index.html> (last visited Oct. 6, 2010).

<sup>3</sup> *JULIE & JULIA* (Columbia Pictures 2009).

<sup>4</sup> Paul Rozin, *Why We Eat What We Eat, and Why We Worry About It*, 50 BULL. AM. ACAD. ARTS & SCI. 26, 26 (1997) (discussing Americans' concern with body image).

<sup>5</sup> See generally CALUM G. TURVEY ET AL., FOOD POLICY INST., RUTGERS UNIV., IMPACT OF THE 2002 BIOTERRORISM ACT ON THE NEW JERSEY FOOD INDUSTRY 17 (2003), available at <http://ageconsearch.umn.edu/bitstream/18173/1/wp030010.pdf> (discussing the effect of New Jersey's 2002 Bioterrorism Act on the food industry).

after the Tylenol tampering scare,<sup>6</sup> it was more a concern about people adulterating the food supply, either because of bearing a grudge or with extortion in mind. For those of you who read the newspaper from time to time or a book like *Fast Food Nation*,<sup>7</sup> you know that whatever those risks are, the far greater risk we face today is food-borne illnesses from careless handling, careless processing, and inadequate supervision of the food supply.<sup>8</sup>

The problems and risks are very real, and the need to get a handle on these risks is also very real. We are fortunate to have two speakers today who know a great deal about this subject, and I will introduce them both briefly.

Stephanie Lariviere is the regulatory manager for both Erie James Limited and Sunsation Acres Incorporated.<sup>9</sup> She is also a member of the Food Safety Board Committee of the Ontario Greenhouse Vegetable Growers in Leamington, Ontario.<sup>10</sup> Are they in Leamington, or are you in Leamington?

MS. LARIVIERE: We are all in Leamington.

MR. STRASSFELD: Everybody is in Leamington. And, this is not to carry the food metaphor too far, but this is actually a second helping, because Cyndee Todgham Cherniak is on the program tomorrow as well. She is filling in as a last minute substitute for a speaker who was unable to make it to Cleveland to speak at this conference. She is counsel of groups including international trade law, environmental, energy, and emissions trading at Lang Michener's Toronto office.<sup>11</sup> I will now sit down and let them speak.

MR. CRANE: You left one thing out. Leamington is also the home of the world's largest tomato.<sup>12</sup>

MR. STRASSFELD: The world's largest single tomato?

MR. CRANE: Yes. A concrete tomato painted bright red.

MR. STRASSFELD: I will have to pay it a visit.

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<sup>6</sup> Judith Rehak, *Tylenol Made a Hero of Johnson & Johnson: The Recall that Started them All*, N.Y. TIMES (Mar. 23, 2002), [http://www.nytimes.com/2002/03/23/your-money/23iht-mjj\\_ed3\\_.html](http://www.nytimes.com/2002/03/23/your-money/23iht-mjj_ed3_.html).

<sup>7</sup> ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (2001) (examining the local and global influence of the United States fast food industry).

<sup>8</sup> *Bacteria and Foodborne Illness*, NAT'L DIGESTIVE DISEASE INFO. CLEARINGHOUSE, <http://digestive.niddk.nih.gov/ddiseases/pubs/bacteria> (last visited Oct. 6, 2010).

<sup>9</sup> *Inquiry Form*, ERIE JAMES LIMITED, <http://www.eriejames.com/contact.shtml> (last visited Oct. 6, 2010); see also *Conferences and Events: Conference Program at a Glance*, CAN.-U.S. L. INST., [http://cusli.org/conferences/annual/annual\\_2010/program\\_at\\_a\\_glance.html](http://cusli.org/conferences/annual/annual_2010/program_at_a_glance.html) (last visited Jan. 5, 2011) [hereinafter *Conference Program*].

<sup>10</sup> *Conference Program*, *supra* note 9.

<sup>11</sup> *Cyndee Todgham Cherniak*, MCMILLAN, <http://www.mcmillan.ca/CyndeeTodghamCherniak> (last visited Jan. 6, 2011). Effective January 1, 2011, Lang Michener LLP merged with McMillan LLP and is now known as McMillan LLP.

<sup>12</sup> *Leamington's Top Tomato* (CBC television broadcast Nov. 1, 1986), available at <http://archives.cbc.ca/lifestyle/travel/clips/17060>.

## CANADIAN SPEAKER

*Stephanie Lariviere* \*

MS. LARIVIERE: Good afternoon, everyone, my name is Stephanie Lariviere. I am very delighted that I could join you today. I am here to represent the Ontario Greenhouse Vegetable Growers (OGVG) and give you an inside look at food safety in our industry.<sup>13</sup> We are the tomato capital of Canada down in Leamington, and we are very south.<sup>14</sup> We are very often called the “Sun Parlor of Canada” for our southern location.<sup>15</sup>

I would like to give you a little bit of background. OGVG was formed in 1967 and represents over 227 producer members.<sup>16</sup> We are the leader in Ontario.<sup>17</sup> And Ontario is the leader in greenhouse vegetable production with more than 1824 acres devoted to tomatoes, English cucumbers, and sweet bell peppers.<sup>18</sup> OGVG is involved in a variety of initiatives for its Ontario

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\* Stephanie Lariviere is the regulatory manager for both Erie James Ltd. and Sunsation Acres Inc. Her responsibilities for both companies encompass the bio-security and food safety programs. She also is a four-year serving member of the Ontario Greenhouse Vegetable Growers (OGVG) Food Safety Committee and recently joined the Canada Produce Marketing Association Food Safety Committee in 2010. She has also been nominated to serve on the Canadian Horticultural Council's On Farm Food Safety Technical Working Group Committee for 2011.

Ms. Lariviere obtained her honours bachelor of commerce in management and a bachelor of arts in English from the University of Windsor, Ontario in 2001. She has been working in the food industry for over ten years. Her roles began in administration where she was exposed to most elements of this integrated greenhouse and vegetable marketing company. She has been responsible for inventory and production records, and her expertise presently includes managing the compliance of all regulatory programs.

Ms. Lariviere's role includes overseeing both food safety and food security, through the C-TPAT program that has been verified by U.S. Homeland Security for the past five years. She is certified in Hazard Analysis Critical Control Points-based programs. These food safety programs that their companies utilize are globally recognized under the Global Food Safety Initiative. Stephanie personally has become a certified Safe Quality Food Practitioner in 2008. She is the driving force behind her company's long-standing commitment to improving processes to ensure the supplies of fresh produce are safe and consistently meet their customer's requirements. In 2009, Ms. Lariviere's company and the OGVG received the Ontario Premiers Award for Agri-food Innovation and Food Safety Excellence.

<sup>13</sup> *Conference Program, supra* note 9.

<sup>14</sup> MUNICIPALITY OF LEAMINGTON,  
[http://www.learmington.ca/municipal/edo\\_demographics.asp](http://www.learmington.ca/municipal/edo_demographics.asp) (last visited Nov. 11, 2010).

<sup>15</sup> *Id.*

<sup>16</sup> ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com> (last visited Oct. 6, 2010) [hereinafter OGVG].

<sup>17</sup> *Vegetable Trivia*, ONT. GREENHOUSE VEGETABLE GROWERS,  
<http://www.ontariogreenhouse.com/documents/show/749> (last visited Oct. 6, 2010).

<sup>18</sup> ONT. GREENHOUSE VEGETABLE GROWERS, 2010 JANUARY FACT SHEET (2010), *available*

producers, such as lobbying the government, regulatory efforts, food safety initiatives, and research.<sup>19</sup> The OGVG Marketing Committee puts on trade shows and events which showcase our products.<sup>20</sup> They also address the media, provide demos and educational materials to the consumer, and collect and track data information for our growers.<sup>21</sup>

Here are a few interesting facts about the size of our industry. Ontario holds over sixty percent of total greenhouse acreage in Canada, and over seventy percent of all Ontario greenhouse produce is exported to the United States.<sup>22</sup> In 2009 alone we produced over 390 million pounds of tomatoes, over 110 million pounds of peppers, and over 240 million pounds of English cucumbers.<sup>23</sup> Our consumers want fresh, quality produce year-round, and we are steady through the year with English cucumbers, which are available from January straight through to December.<sup>24</sup> OGVG is currently working on various initiatives to make a year-round production cycle more feasible for our tomatoes and sweet bell peppers.<sup>25</sup>

Greenhouse growing is very unique. It eliminates many of the environmental vulnerabilities that the field crops are subject to.<sup>26</sup> The greenhouse is a controlled environment. We can adjust its temperature, humidity, food, and water, all at the touch of a button.<sup>27</sup> We use a hydroponic growing method.<sup>28</sup> Our integrated pest management allows us to use insects found in nature to keep the good pests in and the bad ones out.<sup>29</sup> Essentially, these good bugs eat the bad bugs and protect the plants from harmful pests.

We recycle, reuse, and reduce as much as we can to manage costs and be good stewards.<sup>30</sup> One example is the recycling of our water. In addition, we

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at <http://www.ontariogreenhouse.com/attachments/show/2116> [hereinafter FACT SHEET].

<sup>19</sup> OGVG, *supra* note 16; *How We Are Regulated*, ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com/folders/show/693> (last visited Oct. 6, 2010).

<sup>20</sup> *About OGVG*, ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com/folders/show/689> (last visited Oct. 6, 2010).

<sup>21</sup> *Id.*

<sup>22</sup> FACT SHEET, *supra* note 18.

<sup>23</sup> *See generally Fruit and Vegetable Production: Table 3-6*, STAT. CAN., <http://www.statcan.gc.ca/pub/22-003-x/2009002/t020-eng.htm> (last visited Oct. 6, 2010).

<sup>24</sup> Dave Harrison, *Year-Round Production*, GREENHOUSE CAN., <http://www.greenhousecanada.com/content/view/2241/38/> (last visited Oct. 6, 2010).

<sup>25</sup> Dave Harrison, *'Centre' of Research: North America's Largest Complex Showcases its Latest Projects*, GREENHOUSE CAN.,

<http://www.greenhousecanada.com/content/view/1186/132/> (last visited Oct. 6, 2010).

<sup>26</sup> *Growing Methods*, ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com/folders/show/170> (last visited Oct. 6, 2010).

<sup>27</sup> *Id.*

<sup>28</sup> FACT SHEET, *supra* note 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Energy & Environment*, ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com/folders/show/312> (last visited Oct. 6, 2010).

optimize our use of heat, and we recapture carbon dioxide before it is emitted into the atmosphere.<sup>31</sup> The carbon dioxide is actually released back into the plants to ensure optimal growth and development.<sup>32</sup>

I will tell you a little bit about how we are regulated. OGVG has authority under Regulation 417 of the Farm Products Marketing Act to set regulations for all of its producers and marketers of greenhouse vegetables.<sup>33</sup> These regulations cover things like licensing, fees, food safety and traceability, pricing and contracting, and dispute resolution, with regard to both producing and marketing the greenhouse products.<sup>34</sup> The OGVG Board of Directors reviews, amends, and improves the General Regulations annually.<sup>35</sup>

In Canada, our primary regulatory body of authority is the Canadian Food Inspection Agency, or the CFIA.<sup>36</sup> The CFIA monitors all imports and exports for food products.<sup>37</sup> CFIA conducts regulatory onsite visits to marketers and packers to ensure compliance,<sup>38</sup> and they perform inspections and resolve disputes over quality between buyers and sellers.<sup>39</sup> They are also responsible for the notification and investigation of food recalls.<sup>40</sup> Their responsibilities are very similar to those of the Food and Drug Administration (FDA), and we live so close to the border that many of our Canadian regulatory requirements parallel those established in the United States.

OGVG's Food Safety Program requires that all licensed marketers, packers, and growers of Ontario greenhouse produce have a third party Good Manufacturing Practices (GMP), Good Agriculture Practices (GAP), or House of Audit by an accredited certification body at least annually.<sup>41</sup> These audits explore a company's policies, procedures, and controls over their Pre-requisite Programs (PRPs).<sup>42</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See How We Are Regulated, supra* note 19.

<sup>34</sup> *See generally* Farm Products Marketing Act, R.S.O. 1990, c. F.9 (Can.); *see also id.*

<sup>35</sup> *How We Are Regulated, supra* note 19.

<sup>36</sup> *See generally* HEALTH CAN. & CANADIAN FOOD INSPECTION AGENCY, THE FOOD SAFETY REGULATORY SYSTEM IN CANADA (2005), *available at* <http://www.foodprotect.org/media/positionreport/8-07CanadaFoodSafetyPaper.pdf>.

<sup>37</sup> *See generally* Canadian Import, Export and Interprovincial Requirements for Fresh Fruit & Vegetables, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/fssa/frefra/cdnreque.shtml> (last visited Oct. 20, 2010).

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *See Evaluation of the Food Recall and Emergency Response System*, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/agen/eval/recarapp/recarappe.shtml> (last visited Oct. 20, 2010).

<sup>41</sup> *See generally* On-Farm Food Safety, ONT. GREENHOUSE VEGETABLE GROWERS, <http://www.ontariogreenhouse.com/folders/show/738> (last visited Oct. 20, 2010).

<sup>42</sup> *Id.*

Now, for those of you that do not know what some of these terms mean, I will try to explain. PRPs are the conditions that must be established throughout the food chain, in addition to the activities and practices that must be performed in order to keep and maintain a hygienic environment.<sup>43</sup> GMPs and GAPs are important contributors to the success of any PRP, and solid PRPs can reduce the likelihood of a risk or hazard occurring.<sup>44</sup> They are really the building blocks of a Hazard Analysis and Critical Control Points program.<sup>45</sup> We were the first in our industry to require third party audit certifications as a regulatory requirement.<sup>46</sup>

In addition to annual food safety audits, OGVG made traceability systems mandatory as well. All producers must identify themselves using their farm's identification code, which is registered on file with the OGVG. We have some close industry relationships. OGVG works in close cooperation with other partners in the industry, such as Canadian Horticultural Council (CHC) and the Ontario Greenhouses Marketer's Association (OGMA). CHC is a voluntary, not-for-profit association, which represents Canadian horticulture. They are responsible for establishing food safety and crisis management for their industry members. OGVG also works in collaboration with the OGMA, and together their goals are to increase awareness of the Ontario greenhouse sector and to increase aggregate demand for all of our greenhouse products.

One challenge that we faced in the last decade is that our products are perishable and move very quickly through the supply chain to the consumer for consumption. Time is of the essence when moving our products from farm to market, so that we can deliver the quality and freshness that our customers demand. We have been faced with post-September 11 challenges that have impacted our business. United States Customs and Border Protection and United States Homeland Security introduced the Customs Trade Partnership Against Terrorism Program (C-TPAT).<sup>47</sup> It is a voluntary program, which

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<sup>43</sup> *Id.*

<sup>44</sup> See generally Ronald H. Schmidt & Debbie Newslow, *Hazard Analysis Critical Control Points (HACCP) – Prerequisite Programs*, U. FLA. INST. OF FOOD & AGRIC. SCI. EXTENSION (2010), available at <http://edis.ifas.ufl.edu/pdf/FS/FS13800.pdf>.

<sup>45</sup> See *id.*

<sup>46</sup> About OGVG, *supra* note 20.

<sup>47</sup> U.S. CUSTOMS & BORDER PROTECTION, SECURING THE GLOBAL SUPPLY CHAIN: CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) STRATEGIC PLAN (2004), available at [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/ctpat/what\\_ctpat/ctpat\\_strategicplan.ctt/ctpat\\_strategicplan.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf).

many of our marketers have elected to join in an effort to strengthen and protect the supply chain from the threat of bioterrorism.<sup>48</sup>

Also, the Bioterrorism Act was introduced, which requires that anyone exporting food to the United States provide an FDA registration number and give prior notice each time a shipment crosses the border into the United States.<sup>49</sup> It requires access to records for all products in question, and trucks can be delayed, stopped, or even debunked at the border.<sup>50</sup>

In an industry where product is extremely perishable and the market can fall short unexpectedly, we have a logistical nightmare.<sup>51</sup> Ordered quantities can often change at the last minute prior to shipping. Sometimes orders can be unexpectedly cancelled. And, more often than not, buyers can call in at the very last minute with orders to replenish their falling inventory levels. Rapid, unpredictable changes in shipping quantities can make prior notice in crossing the border for timely delivery very difficult, and, sometimes, almost impossible.<sup>52</sup> Many revisions to customs documents can take place, sometimes two, three, or four times in the afternoon prior to loading a truck for crossing the border. The C-TPAT program requires detailed security profile questionnaires from all of its members, which outline physical premises, security, employee background checks, computer system and security protocols, trailer inspections for cargo, and proof that business partners are financially sound.<sup>53</sup> Verification visits are conducted by United States Customs and Border Protection to validate that the company's security program is functioning as they have outlined it in their profile.<sup>54</sup> And, to remain in good standing, one must demonstrate not only their own compliance, but also that suppliers have some knowledge of who their business partners are and that those partners are either C-TPAT members, themselves, or adhere to C-TPAT's minimum security requirements.<sup>55</sup> These programs have required us

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<sup>48</sup> See *C-TPAT Overview*, U.S. CUSTOMS AND BORDER PROTECTION, [http://www.cbp.gov/xp/cgov/trade/cargo\\_security/ctpat/what\\_ctpat/ctpat\\_overview.xml](http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml) (last visited Oct. 13, 2010).

<sup>49</sup> Public Health Security and Bioterrorism Preparedness and Response Act of 2002, H.R. Res. 3448, 107th Cong. (2002).

<sup>50</sup> *Id.*; see also *Protecting Our Borders*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/xp/cgov/about/mission/cbp.xml> (last visited Oct. 7, 2010) (stating CBP may cause delay or refusal of shipping vehicle entry).

<sup>51</sup> AM. TRUCKING ASS'N, WHEN TRUCKS STOP, AMERICA STOPS 1 (2006), available at <http://www.truckline.com/newsroom/pages/whitepapers.aspx> (follow "When Trucks Stop America Stops" hyperlink).

<sup>52</sup> See generally CHINA UNITED TRANSPORT, INC., <http://www.cutrans.com/Main.asp?lang=english> (last visited Oct. 24, 2010).

<sup>53</sup> See *C-TPAT Validation Process Fact Sheet*, U.S. CUSTOMS AND BORDER PROTECTION, [http://www.cbp.gov/xp/cgov/trade/cargo\\_security/ctpat/ctpat\\_validation/validation\\_fact\\_sheet.xml](http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/ctpat_validation/validation_fact_sheet.xml) (last visited Oct. 25, 2010).

<sup>54</sup> *Id.*

<sup>55</sup> See CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM, C-TPAT 5 STEP RISK



to invest more time in educating our employees and our management personnel to oversee these initiatives.<sup>56</sup>

Since it is a voluntary program, the challenge remains in the supply chain as a whole to adopt Best Security Practices to minimize biological threats to our food supply.<sup>57</sup> With the rising increase in food-borne illness and food safety recalls,<sup>58</sup> food safety audits are a key step in preventing products from becoming contaminated as they move from farm to fork.<sup>59</sup> Annual third party audit certifications are demanded by our customers and have become a necessary part of the way we do business.<sup>60</sup> But there is very little harmonization between the numerous audits, and depending on the request of our customers, some companies are forced to hold multiple audits. These audits can become very time consuming and costly and, sometimes, redundant as well.<sup>61</sup>

Suffice it to say, our supply chain management has become critical. Food security is the umbrella under which food safety must operate, and everyone in the supply chain must support food safety and security with a commitment to preventative measures that will detect and correct problems before they occur.<sup>62</sup> Knowing who our growers, packers, distributors, and retailers are, in addition to maintaining close interaction with members of a supply chain, helps to increase the effectiveness of food safety controls and reduce hazards to produce when in transit from one part of the chain to the next.<sup>63</sup> Recalls

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ASSESSMENT PROCESS GUIDE 6 (2010), available at

[http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/ctpat/supply\\_chain/ctpat\\_assessment.ctt/ctpat\\_assessment.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/supply_chain/ctpat_assessment.ctt/ctpat_assessment.pdf).

<sup>56</sup> See SECURING THE GLOBAL SUPPLY CHAIN, *supra* note 47, at 33-34.

<sup>57</sup> See generally Beth Peterson, President, BPE, Inc., Address for Compliance Online C-TPAT Revalidation Training: Preparing for a C-TPAT Revalidation (June 11, 2007), available at [http://bpeglobal.com/Documents/Insights/BPE\\_CTPAT\\_Revalidationv.pdf](http://bpeglobal.com/Documents/Insights/BPE_CTPAT_Revalidationv.pdf).

<sup>58</sup> *What You Should Know About Government Response to Foodborne Illness Outbreaks*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm180323.htm> (last visited Oct. 24, 2010) (stating that foodborne illness outbreaks appear to be on the rise).

<sup>59</sup> *On-Farm Food Safety*, *supra* note 41.

<sup>60</sup> Maki Hatanaka et al., *Third-Party Certification in the Global Agrifood System*, FOOD POLICY, June 2005, at 354-355.

<sup>61</sup> See *About GFSI*, GLOBAL FOOD SAFETY INITIATIVE, <http://www.mygfsi.com/about-gfsi/about-gfsi-main.html> (last visited Nov. 7, 2010).

<sup>62</sup> Rhona S. Applebaum, Address at the Ag Outlook Conference: Food Security Update: The Food Industry's Response to Ensuring Food Security and Safety (Feb. 22, 2002), available at <http://ageconsearch.umn.edu/bitstream/33506/1/fo02ap01.pdf>.

<sup>63</sup> See *Testimony of Michael R. Taylor, J.D., Senior Advisor to the Commissioner, Food and Drug Administration, Department of Health and Human Services Before the Subcommittee on Oversight and Government Reform, U.S. House of Representatives*, 111th Cong. 4-5 (2009) (statement of Michael R. Taylor, Senior Advisor to the Comm'r, Food and Drug Administration), available at <http://groc.edgeboss.net/download/groc/domesticpolicy/testimony.of.mr.michael.r.taylor.pdf>.

can severely impact production, disrupt the market, and cause irreparable economic losses.<sup>64</sup> We know that once consumer confidence is damaged, it is extremely difficult to recover. The world is shrinking around us, and our food supply is expanding to become a global supply.<sup>65</sup> It is a very competitive market, and the need for harmonization is an urgent one. The Global Food Safety Initiative (GFSI) has recognized that need.<sup>66</sup>

Major global retailer industry associations and several audit firms have united in an effort to create and adopt a set of uniform food safety standards.<sup>67</sup> They acknowledge that the future of food safety depends upon cooperation within the supply chain as a whole, from producer to consumer.<sup>68</sup> GFSI recognized that audits have been developed, and are already being demanded by buyers who desire suppliers that are fully committed to a higher level of food safety and food quality management.<sup>69</sup> Suppliers who complete a GFSI recognized audit certification hold a powerful marketing tool to attract new opportunities in the marketplace.<sup>70</sup> Traceability is already a mandatory requirement for our producers at OGVG,<sup>71</sup> but the diversity and size of the operations make it difficult to harmonize and standardize traceability practices throughout the entire chain. The costs associated are significant.<sup>72</sup> Implementation, processing, new hardware, new software, and staff training are tough expenses to sell as an investment, and many companies are not yet ready to adapt.<sup>73</sup> Some companies are small enough that they are still using manual record keeping systems. Others are keeping a mix of both manual and electronic records. Technology will play a key role in taking traceability to the next level, but total supply chain traceability remains the ultimate goal for our industry as we strive to prevent threats to consumer health.<sup>74</sup>

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<sup>64</sup> *Id.* at 5.

<sup>65</sup> *See id.* at 1-2.

<sup>66</sup> *See generally* GLOBAL FOOD SAFETY INITIATIVE, FREQUENTLY ASKED QUESTIONS (2010), available at [http://www.mygfsi.com/gfsifiles/GFSI\\_FAQs\\_June\\_2010.pdf](http://www.mygfsi.com/gfsifiles/GFSI_FAQs_June_2010.pdf).

<sup>67</sup> *See id.* at 3.

<sup>68</sup> GLOBAL FOOD SAFETY INITIATIVE, ONCE CERTIFIED, ACCEPTED EVERYWHERE: STANDARDS, HARMONISATION, AND CO-OPERATION IN THE GLOBAL FOOD INDUSTRY 10 (2008), available at <http://www.ciesnet.com/pfiles/programmes/foodsafety/2008-GFSI-Position-Paper.pdf> [hereinafter GLOBAL FOOD INDUSTRY].

<sup>69</sup> *See generally* FREQUENTLY ASKED QUESTIONS, *supra* note 66, at 3.

<sup>70</sup> *See* GLOBAL FOOD INDUSTRY, *supra* note 68, at 4.

<sup>71</sup> *On-Farm Food Safety*, *supra* note 41.

<sup>72</sup> DATAMAX, FULL TRACEABILITY FOR THE EUROPEAN FRUIT & VEGETABLE SUPPLY CHAIN 1 (2004), available at [http://www.logicode.ro/downloads/Traceability\\_whitepaper\\_Datamax.pdf](http://www.logicode.ro/downloads/Traceability_whitepaper_Datamax.pdf).

<sup>73</sup> *See* PRODUCE MKTG. ASS'N & CAN. PRODUCE MKTG. ASS'N, FRESH PRODUCE TRACEABILITY: A GUIDE TO IMPLEMENTATION 8 (2006), available at [http://www.producetraceability.org/pdfs/CPMA\\_PMA\\_Traceability\\_Guide.pdf](http://www.producetraceability.org/pdfs/CPMA_PMA_Traceability_Guide.pdf).

<sup>74</sup> *See id.* at 4.

A harmonized traceability system will also assist in protecting the producers in our industry from economic losses and erroneous information about whose products were affected or associated with a recall and whose were not.<sup>75</sup> The Produce Traceability Initiative (PTI) is one example of the efforts being made to standardize the produce industry's traceability practices.<sup>76</sup> Its goals are to improve food safety with internal and external track-and-trace programs.<sup>77</sup> In order for traceability to work properly, product must be able to be traced up and down the food supply chain.<sup>78</sup> At present, most companies have internal traceability systems in place. This means they are able to access their own internal traceability data and processes, but they lack external traceability programs, which is the data exchange process that takes place between the trading partners as product travels through the supply chain.<sup>79</sup>

PTI uses the GS1 system, which is an internationally compatible numbering and bar code system for identifying items.<sup>80</sup> It provides a common language of communication for trade and electronic commerce.<sup>81</sup> The system involves using bar coding to encode the necessary trace information on both inbound and outbound cases.<sup>82</sup> PTI has identified seven milestones in this transition to having supply chain traceability.<sup>83</sup> Their goal is that all suppliers will adapt this system by the year 2012.<sup>84</sup>

The bottom line is that food safety is fundamentally changing the produce industry. Government regulations, changes in legislation, buyer food-safety demands, and customer expectations have presented us with tremendous challenges in an increasingly competitive global marketplace.<sup>85</sup> We recog-

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<sup>75</sup> See *id.* at 8-9.

<sup>76</sup> See Ed Treacy, Produce Marketing Ass'n, Address: Produce Traceability Update Today and Tomorrow (Oct. 20, 2010), available at <http://www.producetraceability.org/pdfs/PTI%20Presentation%20102010.pdf>.

<sup>77</sup> See *Produce Traceability Initiative*, UNITED FRESH, [http://www.unitedfresh.org/newsviews/produce\\_traceability\\_initiative](http://www.unitedfresh.org/newsviews/produce_traceability_initiative) (last visited Nov. 7, 2010).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See generally *Products & Solutions*, GS1, <http://www.gs1.org/productssolutions/> (last visited Nov. 7, 2010).

<sup>81</sup> See GS1, *THE VALUE AND BENEFITS OF THE GS1 SYSTEM OF STANDARDS 24* (2010), available at [http://www.gs1.org/docs/GS1\\_System\\_of\\_Standards.pdf](http://www.gs1.org/docs/GS1_System_of_Standards.pdf).

<sup>82</sup> See generally GS1, *GS1 COMMENT 34-35* (May 2008), available at [http://www.gs1.org/docs/healthcare/FDA\\_Standards\\_Q&A\\_May\\_08.pdf](http://www.gs1.org/docs/healthcare/FDA_Standards_Q&A_May_08.pdf).

<sup>83</sup> *In-Depth Discussion of PTI Milestones a Key Feature of Traceability and Logistics Demo Center Roundtables*, UNITED FRESH (Apr. 8, 2010), [http://www.unitedfresh.org/news/955/In\\_Depth\\_Discussion\\_of\\_PTI\\_Milestones\\_a\\_Key\\_Feature\\_of\\_Traceability\\_and\\_Logistics\\_Demo\\_Center\\_Roundtables\\_](http://www.unitedfresh.org/news/955/In_Depth_Discussion_of_PTI_Milestones_a_Key_Feature_of_Traceability_and_Logistics_Demo_Center_Roundtables_).

<sup>84</sup> *Id.*

<sup>85</sup> Dennis Bingham, *Food & Beverage Companies Need to Integrate Information Enterprise-Wide*, BEVERAGE ONLINE (Dec. 16, 1999),

nize that our industry's continued success is dependent upon building and maintaining a strong, safe, and secure food supply chain.<sup>86</sup> This is a shared responsibility that can only be met through cooperative efforts. On behalf of OGVG, I thank you for allowing me to speak to you and be a part of these efforts. Step-by-step, we can overcome the hurdles that we face if we work together; a step forward is a step in the right direction. Thank you.

## CANADIAN SPEAKER

*Cyndee Todgham Cherniak\**

MS. TODGHAM CHERNIAK: I think my presentation is going to dovetail quite nicely with Stephanie's presentation. I am going to focus on Canada, because that is where I am from.

When looking at food safety laws in Canada, you have to look at the federal level, provincial level, and local level. Because we have food safety regulation occurring at all three levels,<sup>87</sup> it is quite complicated when we start talking about harmonization. At the federal level, we have regulations at the border, and Stephanie gave some examples of regulations at the border from a United States perspective. In Canada, the Canada Border Services Agency

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<http://www.beverageonline.com/article.mvc/Food-Beverage-Companies-Need-to-Integrate-Inf-0001>.

<sup>86</sup> See JOHN R. BRANDT & GEORGE TANINECZ, MPI GROUP, SUPERIOR SUPPLY CHAINS IN THE FOOD AND BEVERAGE INDUSTRY 1-2, available at <http://www.microsoft.com/en-us/dynamics/industries/manufacturing-food-beverage.aspx> (follow "Benchmark Report: Superior Supply Chains in the Food and Beverage Industry" hyperlink).

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<sup>87</sup> *Who is Responsible for Food Safety in Canada?*, CAN. PUB. HEALTH ASS'N, <http://cpha100.ca/12-great-achievements/who-responsible-food-safety-canada> (last visited Nov. 7, 2010).

enforces Canada's food safety laws at the border.<sup>88</sup> We have a number of import license requirements for dairy, eggs, cheese, and other similar goods for which you must have a quota; otherwise, there is an over-quota tariff rate that would apply.<sup>89</sup> In addition to there being food safety laws or regulations at the border, there are also regulations for activity inside the border, meaning inside Canada.<sup>90</sup> There is also regulation on interprovincial trade, because Canada is a federation of a number of provinces and territories.<sup>91</sup> On top of all that, you also have to look inside the provinces, as well, because each provincial government is regulating what is occurring within its provincial borders.<sup>92</sup>

In this presentation, I have provided a couple of examples of the governmental agencies and departments that are involved in food safety regulation in Canada. I would have pages and pages of slides if I were to go through all the various ministries and legislation that is involved in food safety regulation in Canada. But, in Ontario, the Ontario Ministry of Agriculture, Food, and Rural Affairs is the main body responsible for food safety laws in Ontario. This includes oversight of traceability from farm to fork (including inspections, complaints, the agricultural sector, the food processing sector, labeling of wine, organic labeling, and other related programs and activities).<sup>93</sup> We are even getting into some of the new age items now at the provincial level. At the local municipal level, there are also various requirements such as the inspection of restaurants, which is another food safety area.<sup>94</sup>

When you consider the issue of harmonization of food safety, there is a lot to harmonize. It is not just looking at one statute in Canada and a second statute in the United States to see how we can blend the two. It is a much

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<sup>88</sup> See FOOD SAFETY NETWORK, IMPORTING FOOD COMMERCIALY (2008), available at <http://www.foodsafetynetwork.ca/userfiles/file/Technical%20Summary%202008%20PDF/TS%20Importing%20Food%20Commercially%202008.pdf>.

<sup>89</sup> See *Guide to Importing Food Products Commercially*, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/fssa/imp/guide1e.shtml#g> (last visited Nov. 25, 2010).

<sup>90</sup> See Frédéric Forge, *Food Safety: An Overview of Canada's Approach*, SCI. & TECH. DIVISION, GOV'T CAN. (Oct. 16, 2002), <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0240-e.htm>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See *Government Roles and Responsibilities for Food Safety in Ontario*, GOV'T ONT. MINISTRY AGRIC., FOOD & RURAL AFF., <http://www.omafra.gov.on.ca/english/infores/foodsafe/rolesprov.html> (last visited Nov. 25, 2010).

<sup>94</sup> See *Restaurant and Food Service Inspection in Canada*, CAN. FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/fssa/concen/restaure.shtml> (last visited Nov. 25, 2010).

more complicated web of tasks. I will give you some examples of food safety laws at the federal level in Canada. We will start off with the Food and Drug Act, which has not really been updated in fifty years.<sup>95</sup> We are dealing with an antiquated system. We have the Food Inspection Agency Act,<sup>96</sup> the Food Safety and Quality Act of 2001,<sup>97</sup> the Consumer Packaging and Labeling Act,<sup>98</sup> the Canada Agricultural Products Act,<sup>99</sup> the Canadian Environmental Protection Act,<sup>100</sup> the Meat Inspection Act,<sup>101</sup> the Health of Animals Act,<sup>102</sup> and the list goes on and on.

However, I do want to focus on the fact that we have legislation that has been around for a while.<sup>103</sup> When I look at what we are going to be undertaking as far as harmonization, the United States may be a little bit further ahead than Canada. It is like getting on and learning to ride a bike. After a while, we will both be heading down the same road, and we will have to try to become accustomed to being on that bike. We are going to be banging into each other unless, of course, we find a way to go straight down that road side-by-side.

Most of my presentation is going to be about the complexities and obstacles that we will find on the way to harmonization. Stephanie has already covered the Canadian Food Inspection Agency (CFIA), so I will not reproduce her very informative presentation. The only thing I would like to point out is that the CFIA administers thirteen federal statutes and forty-two regulations,<sup>104</sup> so it is a good thing that I did not list everything on the first few slides. At the provincial level, the provinces establish and enforce health, safety, and quality standards, in addition to related provisions for interprovincial trade.<sup>105</sup>

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<sup>95</sup> Food and Drugs Act, R.S. 1985, c. F-27 (Can.); *see also* CANADA'S RES.-BASED PHARMACEUTICAL COMPANIES, THE PROPOSED CHANGES TO CANADA'S FOOD AND DRUG ACT AND HOW THEY WILL MODERNIZE CANADA'S DRUG REGULATORY PROCESS (2009), *available at* <https://www.canadapharma.org/en/difference/documents/OVERVIEWC-51Final170210.pdf> [hereinafter PROPOSED CHANGES].

<sup>96</sup> Canadian Food Inspection Agency Act, S.C. 1997, c. 6.

<sup>97</sup> Food Safety and Quality Act of 2001, S.O. 2001, c. 31 (Can.).

<sup>98</sup> Consumer Packaging and Labeling Act, R.S. 1985, c. C-38 (Can.).

<sup>99</sup> Canada Agricultural Products Act, R.S.C. 1985, c. 20.

<sup>100</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33.

<sup>101</sup> Meat Inspection Act, R.S.C. 1985, c. 25 (Can.).

<sup>102</sup> Health of Animals Act, S.C. 1990, c. 21 (Can.).

<sup>103</sup> *See* PROPOSED CHANGES, *supra* note 95.

<sup>104</sup> CAN. FOOD INSPECTION AGENCY, CFIA RENEWAL PLAN: 2008-2013 (2008), *available at* <http://www.inspection.gc.ca/english/hrrh/renpla/renplane.pdf>.

<sup>105</sup> FOOD SAFETY NETWORK, UNIV. GUELPH, CANADIAN FOOD SAFETY REGULATIONS (2008), *available at* [http://www.foodsafetynetwork.ca/userfiles/file/FACT%20SHEETS%20\(2008\)%20PDF/FS%20Canadian%20Food%20Safety%20Regulations%202008.pdf](http://www.foodsafetynetwork.ca/userfiles/file/FACT%20SHEETS%20(2008)%20PDF/FS%20Canadian%20Food%20Safety%20Regulations%202008.pdf).

Provinces are responsible for inspecting food-processing establishments that distribute products locally.<sup>106</sup> For example, provincial inspectors assist the CFIA in the development of national and regional sampling plants.<sup>107</sup> They have had increasingly more responsibility, so there really has been a push toward more regulation at the local level.

In early 2008, food safety hit the federal agenda, and Prime Minister Harper announced the Food and Consumer Safety Action Plan.<sup>108</sup> There is a second half to this, as well, which is the Consumer Safety Action Plan.<sup>109</sup> And, again, there is an announcement that we are going to modernize and strengthen Canada's safety system for food, health, and consumer products.<sup>110</sup> In addition, there was a report issued in January 2008 entitled *Strengthening and Modernizing Canada's Safety System for Food, Health, and Consumer Products*.<sup>111</sup> Building on that, we also had the joint statement out of the North American Free Trade Agreement Leaders Summit on April 22, 2008, in which all three leaders stated that one of their main priorities was improving North American citizens' access to safe food and consumer products.<sup>112</sup>

To accomplish this, the North American leaders said they would do the following: increase cooperation and information sharing in regard to the safety of food products;<sup>113</sup> work toward strengthening our respective regulatory and inspection systems to protect consumers while maintaining the efficient flow of food and products among the three countries;<sup>114</sup> make food and product safety standards more compatible;<sup>115</sup> and improve continental recall capabilities and, in the process, engage the private sector to ensure our efforts are complimentary.<sup>116</sup> This is the announcement that came out of the Summit, and then the marching orders went to various governmental organizations, such as Health Canada and the Canadian Food Inspection Agency, to make these things happen.<sup>117</sup> It did not take long before we actually had ta-

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *PM Announces Canada's New Food and Consumer Safety Action Plan*, PRIME MINISTER CAN. STEPHEN HARPER (Dec. 17, 2007), <http://pm.gc.ca/eng/media.asp?id=1941>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> HEALTH CAN., *STRENGTHENING AND MODERNIZING CANADA'S SAFETY SYSTEM FOR FOOD, HEALTH, AND CONSUMER PRODUCTS* (2008).

<sup>112</sup> *Joint Statement by President Bush, President Calderón, Prime Minister Harper – North American Leaders' Summit*, PRIME MINISTER CAN. STEPHEN HARPER (April 22, 2008), <http://www.pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=49&id=2074>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See id.* (discussing bilateral agreements for enabling local, state, provincial, and federal

bled legislation in the House of Commons in Canada. But, even with this recent announcement, food-safety regulation would not have happened had it not been for the perfect storm that had been brewing.

The perfect storm included the China melamine milk scandal and other international threats crossing into our borders.<sup>118</sup> For instance, we had bovine spongiform encephalopathy (mad-cow disease), the avian flu, and swine flu.<sup>119</sup> While these are not food-safety issues per se, there is the belief among consumers that the food we eat causes the illnesses we are suffering from. We also had the listeria problem in Canada with Maple Leaf Foods<sup>120</sup> and the situation with the Peanut Corporation of America, which involved rancid peanuts coming across the border into Canada.<sup>121</sup> In regard to the Peanut Corporation situation, the peanuts were actually stopped at the Canadian border, sent back, and, after a significant period of time, the facilities in Georgia were shut down.<sup>122</sup> It was actually our inter-cooperation at the border which brought that problem to light.<sup>123</sup>

These four things brought public concern to a head in both countries and around the world, and from that Bill C-51 was born.<sup>124</sup> I call it the perfect storm because, later on in this presentation, I am going to talk about the Canada-European Union Comprehensive Economic and Trade Agreement and the Canadian Border Services Agency Report, both of which complicate the situation in which we currently find ourselves in regard to food safety and harmonization.

The first thing I should tell you about Bill C-51 is that it was tabled in the Canadian government in the House of Commons a couple of sessions ago.<sup>125</sup>

authorities to respond more quickly to food safety needs).

<sup>118</sup> See Lisa Wade McCormick, *Melamine Triggers Recall of Cocoa from Canada*, CONSUMERAFFAIRS.COM, (Dec. 20, 2008), [http://www.consumeraffairs.com/news04/2008/12/melamine\\_cocoa.html](http://www.consumeraffairs.com/news04/2008/12/melamine_cocoa.html).

<sup>119</sup> Dawn Marshallsay, *Swine Flu, Bird Flu, and BSE: Three Legacies of Factory Farming*, ECOHEARTH (Sept. 18, 2009), <http://ecohearth.com/eco-zine/food-and-garden/865-swine-flu-bird-flu-and-bse-three-legacies-of-factory-farming-.html>.

<sup>120</sup> Press Release, Public Health Agency of Canada, *Link Between Listeriosis Outbreak Strain and Maple Leaf Foods Products Confirmed* (Aug. 23, 2008), available at [http://www.phac-aspc.gc.ca/media/nr-rp/2008/2008\\_13-eng.php](http://www.phac-aspc.gc.ca/media/nr-rp/2008/2008_13-eng.php).

<sup>121</sup> Lisa Stark & Kate Barrett, *Criminal Investigation Launched in Salmonella Outbreak*, ABC NEWS (Jan. 30, 2009), <http://abcnews.go.com/Health/story?id=6770594&page=1>.

<sup>122</sup> Gardiner Harris, *After Tests, Peanut Plant in Texas Is Closed*, N.Y. TIMES, Feb. 11, 2009, at A14.

<sup>123</sup> Stark & Barrett, *supra* note 121.

<sup>124</sup> See MARLISA TIEDEMANN, LAW & GOV'T DIV., PARLIAMENTARY INFO. AND RESEARCH SERV., LEGISLATIVE SUMMARY: BILL C-51: AN ACT TO AMEND THE FOOD AND DRUGS ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS 1 (2008), available at <http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/2/c51-e.pdf> (Stating that Bill C-51 responds to a perceived weakness in the federal health law regime).

<sup>125</sup> See generally *id.* (indicating that Bill C-51 was tabled in the 39th Parliament).



We have prorogued twice since then. Tabling legislation is good in Canada; in the United States, I understand that tabling is bad. Tabling means that you are putting a bill up for discussion. The bill will go through first, second, and third reading and committee review and report, and then be sent over to the Senate for first, second, and third reading and committee review and report.<sup>126</sup> However, when we prorogue, all of the bills that have been tabled fall off the order table, which means they will need to be re-entered and re-tabled in the next parliament.<sup>127</sup> Bill C-51 was tabled in the 39th Parliament,<sup>128</sup> during, I believe, the second session. But, it has not yet been re-tabled. Whether or not there was sufficient outcry at that point in time, and people are currently busy rewriting the provisions, I do not know. But I am going to raise a number of provisions that I hope will raise some red flags for my United States colleagues and make them ask whether that is really what Canada is thinking of doing, because this is our update to the Food and Drug Act.

Section 2.3 of Bill C-51 states the bill's purpose: "The purpose of this act is to protect and promote the health and safety of the public and encourage accurate and consistent product representation by prohibiting and regulating certain activities in relation to foods, therapeutic products and cosmetics."<sup>129</sup> For purposes of this presentation, I have actually removed "therapeutic products and cosmetics," and I will focus on food. However, there is some overlap in what we call therapeutic products and what others may call food, such as vitamins.

The bill contains a number of prohibitions.<sup>130</sup> If the number in the presentation is an even number, it is an update to a provision that is already in the act.<sup>131</sup> If there is a point one, point two, or point three afterwards, it is likely a new prohibition or a new provision that has been added to the act.<sup>132</sup>

There has been some modification in proposed Bill C-51 to the existing Section 3 for false or misleading information: "No person shall knowingly

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<sup>126</sup> See generally *The Legislative Process*, in HOUSE OF COMMONS PROCEDURE AND PRACTICE (Robert Marleau & Camille Montpetit eds., 2000) (discussing the stages of a legislative process and how a bill is finally passed).

<sup>127</sup> See generally *id.* (stating the effects of Prorogation – where all bills are entirely terminated and must be reintroduced).

<sup>128</sup> See Bill C-51, An Act to Amend the Food and Drugs Act and to make consequential amendments to other acts, 2nd Sess., 39th Parl., 2008 (Can.).

<sup>129</sup> *Id.* § 2.3.

<sup>130</sup> See generally *id.*

<sup>131</sup> Cyndee Todgham Cherniak, Int'l Trade Council, Lang Michener LLP, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: Food Safety in Canada and U.S. (Canadian Perspective) 5-8 (Apr. 9, 2010), available at [http://www.cusli.org/conferences/annual/annual\\_2010/presentations/Friday%20Session%204%20-%20Cherniak.pdf](http://www.cusli.org/conferences/annual/annual_2010/presentations/Friday%20Session%204%20-%20Cherniak.pdf).

<sup>132</sup> *Id.*

provide the Minister with false or misleading information in relation to a matter under this act or regulations, including a relationship to an application for a license, registration or authorization.”<sup>133</sup> That is not necessarily a bad thing. However, when we look at some of the other provisions, United States companies may have some cause for concern, especially if they have Canadian subsidiaries that process foods.

In regard to tampering, new proposed Section 3.1(1) provides the following: “No person shall tamper with food or its label or package with the intent to render the food injurious to human health or cause a reasonable apprehension in others that the food is injurious to human health.”<sup>134</sup> Again, that is not necessarily a bad provision to have. However, when you add it up with some of the other provisions, it may cause a concern for those that we do business with outside of Canada. For instance, new Section 3.1(2), Selling or Importing for Sale provides: “No person shall sell or import for sale a food that was tampered with in order to render it injurious to human health.”<sup>135</sup> If an American company has a product that unbeknownst to them has been tampered with and sends it into Canada, is there a possibility of prosecution under this particular provision when added up with some of the other provisions that are in the legislation?

In regard to threats, proposed Section 3.1(3) provides, “No person shall threaten to tamper with food in order to render it injurious to health.”<sup>136</sup> And in regard to hoaxes, it provides, “No person shall knowingly give information that is false or reckless.”<sup>137</sup> That is the definition of a hoax. Again, not that these provisions are wrong or ill-conceived, it is just how they will be used, especially in connection with some of the additions to proposed Section 4. For instance, one such addition provides, “No person shall sell or import for sale a food that has a poisonous or harmful substance in it or on it, is unfit for human consumption, is injurious to human health, is adulterated or was manufactured, processed, prepared, preserved, packaged, stored, or conveyed under unsanitary conditions.”<sup>138</sup> I should mention that the “import for sale” part of this provision is what is new. This is the first time we have a prohibition of an import for sale which puts a greater obligation on both the importer and the exporter of the food product to do some due diligence ahead of time (i.e., to make sure there are not one of these problems).<sup>139</sup>

Right now, we react when we find a problem. However, it seems we are beginning to take a more proactive approach, which may not necessarily be a

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<sup>133</sup> Bill C-51 §3.

<sup>134</sup> *Id.* § 3.1(1).

<sup>135</sup> *Id.* § 3.1(2).

<sup>136</sup> *Id.* § 3.1(3).

<sup>137</sup> *Id.* § 3.2.

<sup>138</sup> *Id.* § 4

<sup>139</sup> *See generally id.*

bad thing, but may create problems in our relationships with our American friends.

There are similar problems with proposed Section 5.1. In regard to deception, it states, "No person shall manufacture, process, label, package, import for sale, or advertise a 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, safety, or origin."<sup>140</sup> Again, that is not necessarily a bad thing. However, when you look at the fact that our regulations are different with respect to fortification, use of vitamins, and certain other claims, you realize that certain claims that are okay under United States law are not okay under Canada law.

In regard to packaging, there are different rules under United States law than under Canadian law.<sup>141</sup> This particular provision may become a problem. Someone not intending to do anything nefarious could, nonetheless, quite innocently fall under this provision. For instance, because of the addition of the "import for sale" clause, the provision could apply to an individual if he or she failed to undertake the necessary questions ahead of time. This would be true regardless of whether or not the individual was acting intentionally.

Similarly, a provision regarding labeling or packaging that is contrary to regulations could also lead to problems, as it states, "A food that is not labeled or packaged as required by, or is labeled or packaged contrary to the regulations is deemed to be labeled or packaged contrary to Subsection 1."<sup>142</sup> There is also a deeming provision, which indicates how to determine whether something is wrong with the labeling.<sup>143</sup> We have some funny labeling rules up in Canada, especially in regard to what goes on in Quebec with the French and English labeling, in addition to what needs to be on the labels concerning content. It could very well be that a United States product could fall offside and therefore be deemed to be deceptive under this legislation, which would lead to getting caught by the "imports for sale" rule and also Section 4.<sup>144</sup>

The Unsanitary Conditions section now has words that were not there previously and which now read, "No person shall manufacture, process, prepare, preserve, package, store, or convey for sale any food . . . under unsanitary conditions."<sup>145</sup> That is an example of yet another change to the legislation.

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<sup>140</sup> *Id.* §5(1).

<sup>141</sup> See *generally* Fair Packaging and Labeling Program, 15 U.S.C. §1452 (stating that it is unlawful for anyone engaged in packaging to not conform to fair packaging laws).

<sup>142</sup> Bill C-51 §5(2).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* §4.

<sup>145</sup> *Id.* §7.

We also proposed a new licensing requirement in the proposed legislation that has not been re-tabled, which states: “No person shall import a proscribed food for sale unless they are authorized by a registration or license to do so.”<sup>146</sup> I wish I could tell you what the proscribed foods are; however, since the legislation has not passed, we do not currently have the regulations promulgated to say what is proscribed and what is not proscribed. Also, interprovincial trade without a license is also covered by the new proposed provision.<sup>147</sup> New proposed Section 18.1 is the licensing provision.<sup>148</sup> The Minister is able to make various regulations with respect to licensing.<sup>149</sup> Again, the legislation passes first, and then regulations are created after the fact.

At the time this legislation was tabled, we did not necessarily know what the Minister was going to require on the application. However, this would be new from a United States perspective. Most United States companies are not currently required to be in the system to the same extent they will be after this legislation is passed.<sup>150</sup> This all relates to what Stephanie was speaking about in regard to traceability.

There are some selective information provisions that have raised concerns for one constitutional lawyer in Canada, Shawn Buckley.<sup>151</sup> If you ever google Shawn Buckley, he has a lot of materials on the consumer safety legislation which was Bill C-52, re-tabled as Bill C-6.<sup>152</sup> These provisions also fell with the last prorogation, but we expect that they will be back on. However, just before it was prorogued, I testified before the Senate with Shawn Buckley. After that Senate testimony, and it was mainly based on what Shawn was speaking about, Senator Day tabled some changes to the proposed legislation on the consumer protection side.<sup>153</sup> It has not gone through the Senate, so I cannot say that those changes are going to be integrated.

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<sup>146</sup> *Id.* §5.1.

<sup>147</sup> *Id.* §5.2.

<sup>148</sup> *Id.* §18.1.

<sup>149</sup> *Id.*

<sup>150</sup> *See generally id.*

<sup>151</sup> *See Team, NHPPA.ORG*, [http://nhppa.org/?page\\_id=36](http://nhppa.org/?page_id=36) (last visited Jan. 27, 2011).

<sup>152</sup> *See LEGISinfo 40th Parliament – 2nd Session: Bill Reintroduced*, PARLIAMENT CAN., <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=22&Type=0&Scope=I&query=5655&List=aka> (last visited Oct. 3, 2010) (stating that Bill C-52 was reintroduced as Bill C-6). This bill was passed into law in December 2010.

<sup>153</sup> *See Canada, Legislative Assembly, Senate Debates (Hansard)*, No. 52 (16 September 2009) at 1367 (Hon. Joseph A. Day), available at [http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/052db\\_2009-09-16-e.pdf](http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/052db_2009-09-16-e.pdf) (Senator Day stating that Senator Martin gave an outline of the amendments proposed).

However, there was enough concern that it elicited a reaction from some of the senators.<sup>154</sup>

New Section 20.5 is similar to a provision that was in Bill C-6: If the Minister is of the opinion that a food may present a serious risk to human health, the Minister may direct a person to provide the Minister with information that is in the person's control that is necessary for the Minister to determine whether it presents a risk.<sup>155</sup> There is also a new requirement for companies to hand over information, and the Minister may also disclose that personal information to another person as he carries out his or her functions.<sup>156</sup>

I also voiced concern at the Senate hearing in regard to the following provision: "The Minister may disclose confidential business information to a government or to the following persons without the consent of the person to whose business or affairs the information relates and without notifying that person, for purposes as related to the protection or promotion of health or safety of the public, or if the government or person agrees in writing to maintain confidentiality of the information."<sup>157</sup> If there was some concern about how Caramilk gets the caramel inside the Caramilk Bar, and that confidential business information is in the hands of the government, it is possible that the government may release that confidential business information if they feel it is necessary to do so; in addition, they do not have to ask for consent to reveal that particular secret.<sup>158</sup> Or, if it becomes necessary to release the secret formula of Kentucky Fried Chicken, which is confidential business information, the Minister is given the power under the legislation to do so without asking for permission.<sup>159</sup>

In proposed Section 23(4), which is a new provision, "The inspector who is carrying out their functions may enter or pass through or over private property without being liable for doing so, and without the owner of the property having the right to object to the use of that property."<sup>160</sup> This is one of the items with which Mr. Buckley had significant problems, especially if the government is not required to get a warrant. In fact, inspectors are not liable for failing to get a warrant unless they engage in some activity that causes damage.<sup>161</sup> Mr. Buckley is particularly concerned about this provision.

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<sup>154</sup> See *id.* at 1370. (Senator Grafstein mentioning several clauses in the bill as unconstitutional).

<sup>155</sup> Bill C-51 §20.5.

<sup>156</sup> *Id.* §20.6.

<sup>157</sup> *Id.* §21.1.

<sup>158</sup> *Id.* §21.2.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* §23(4).

<sup>161</sup> *Id.*

The final addition to the Bill that I will discuss is, “If the inspector believes with reasonable grounds that a food that was imported for sale does not meet the requirements established under the Act, or was imported for sale in contravention of a requirement of the Act, [he or she] may direct the importer or the person having possession, care, or control to remove it from Canada at their expense, even if the inspector does not see it.”<sup>162</sup> This gives the inspector a rather broad authority, especially given the fact that his belief must merely be based on reasonable grounds. In other words, he is not required to have actual scientific proof that there is a problem.<sup>163</sup> It could very well be that an inspector will get it wrong. When you are dealing with food, if some of the food is perishable, this provision could create a problem. An inspector may prohibit the owner or person having possession or care of an article to which the act applies from moving the article. If it is in that individual’s possession, either it has to stay in his or her possession, or go back to the factory to rot. That may be something an inspector could ask for, and, under the language of the new legislation, the individual would have to comply.<sup>164</sup>

So, we have Bill C-51, and, although it is not yet back on the table,<sup>165</sup> there are a number of provisions that may create friction, especially in regard to harmonizing Canadian and United States rules. Of course, I do not want to suggest for one minute that an effort to harmonize is all bad. It is not necessarily all bad. Primarily, I am concerned with the potential effects of this legislation if it is used improperly. In my opinion, it simply needs to be altered to better reflect international trade obligations.

The other thing we are going through in Canada, that the United States might not be aware of, is that Canada and the European Union are negotiating a Comprehensive Economic and Trade Agreement (CETA).<sup>166</sup> In a week, we are going to have the third round of negotiations.<sup>167</sup> The intellectual property and government procurement chapters are currently getting out in the news. We have not yet talked about food safety. What is important for me to communicate about the Canada-European Union CETA negotiations is

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<sup>162</sup> *Id.* §23.9.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* §23.8(1).

<sup>165</sup> *LEGISinfo 39th Parliament – 2nd Session: Status of the Bill*, PARLIAMENT CAN., <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=15&Type=0&Scope=1&query=5420&List=stat> (last visited Oct. 23, 2010).

<sup>166</sup> *Canada-European Union: Comprehensive Economic and Trade Agreements (CETA) Negotiations*, FOREIGN AFF. & INT’L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx> (last visited Oct. 17, 2010).

<sup>167</sup> *Canada*, EUR. TRADE COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada/> (last visited Oct. 23, 2010).

that the European Union required that the Canadian provinces participate.<sup>168</sup> Up to this point in time, the provinces have not been invited to the table for any of Canada's free trade agreement negotiations. The European Union is going to require harmonization of certain provincial laws including sanitary and phytosanitary laws and technical barriers to trade laws.<sup>169</sup> They are going to ask the provinces to agree amongst themselves to some harmonized form of interprovincial trade laws and provincial laws. The European Union hopes that, by doing this, the provinces will then be able to come to the table with a harmonized set of laws. This would enable the European Union to negotiate changes, not only to federal law, but also to provincial law as well.<sup>170</sup> One of the reasons they are asking the provinces to be at the table is to remove the interprovincial trade barriers that have been a problem in Canada.<sup>171</sup> This has been a major problem for exporters and sellers in both the United States and European Union, and, quite frankly, it has been a problem for interprovincial trade in Canada as well.<sup>172</sup>

The question is whether the European Union's efforts to harmonize with Canada are intended to influence United States law? Does the European Union want to be the first out of the gate? The first party to harmonize with Canada will, of course, have greater bargaining power than the second party to do so. Once an agreement to harmonize is reached between the European Union and Canada, the United States—if it chooses to harmonize with Canada—would be required to negotiate with not only Canada, but also *de facto* with the European Union. If the Canada-European Union negotiations move forward faster than the Canada-United States discussions, the United States might fall behind in regard to setting the terms for harmonization.

The last thing I wanted to bring to your attention is that the Canada Border Services Agency released a report on February 22, 2010,<sup>173</sup> which indicated more changes on the Canadian side of the border are coming in regard to border enforcement of food safety laws.<sup>174</sup> The report was entitled the

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<sup>168</sup> CAN. & EUR. UNION, JOINT REPORT ON THE EU-CANADA SCOPING EXERCISE (2009), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-EUJointReport2009-03-05.pdf>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Press Release, Foreign Affairs & Int'l Trade Can., Minister Day Announces Crucial Step Forward on Canada-EU Comprehensive Economic Agreement (Mar. 5, 2009), available at [http://www.international.gc.ca/media\\_commerce/comm/news-communiqués/2009/386908.aspx?lang=eng](http://www.international.gc.ca/media_commerce/comm/news-communiqués/2009/386908.aspx?lang=eng).

<sup>172</sup> *Id.*

<sup>173</sup> See CAN. BORDER SERVS. AGENCY, AUDIT OF THE ADMINISTRATION OF PERMIT, LICENSE AND OTHER REQUIREMENTS FOR COMMERCIAL GOODS (2009), available at <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2009/aplorcg-cplaemc-eng.html> [hereinafter AUDIT].

<sup>174</sup> *Id.*

Audit of the Administration of Permit, License, or Other Requirements for Commercial Goods (OGD is a term used by the Canadian government for Other Governmental Departments).<sup>175</sup> For instance, the Canadian Food Inspection Agency is an OGD.<sup>176</sup> Other OGD authorizations are used as a control to protect Canadians in their environment and ensure only approved goods are imported.<sup>177</sup> The Canadian Border Services Agency manages about twenty-four commercial import programs on behalf of the fourteen other government departments.<sup>178</sup>

The audit concluded that the control framework for the administration of import permits and licenses with respect to commercial goods, which includes agricultural goods and food products, was partially adequate and effective.<sup>179</sup> However, some improvements were still necessary. For instance, there was not adequate communication between the departments. Improvements are needed in the application of border controls for the program areas that rely on reviews by Border Services officers and manual paper-based processes, for example, in the performance of measurement, monitoring, and information sharing.<sup>180</sup> The report basically indicated we are not doing an adequate job at the border right now, so we have to make changes. When you have a Management Action Plan, and I have listed a number of their goals for this action plan,<sup>181</sup> it means that changes are coming soon. I believe enforcement will increase at the Canadian border to an extent that we have not yet seen before. There is going to be greater communication of policies internally, and greater discussion about getting to know one another internally within the Canadian government.<sup>182</sup>

There are a number of completion dates, but I will not go through each of them. Suffice it to say that there are changes on the way at the Canadian border with respect to food safety. In closing, there are a couple of hot issues to talk about. First, traceability is one of those hot topics in terms of harmonization, our discussions with the European Union, and what is happening at the border. Stephanie did a good job covering this issue, so I will not say too much about it. I will say, however, that everyone is working towards tracea-

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<sup>175</sup> *Id.*

<sup>176</sup> See *About the CFIA*, CAN. FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/agen/agene.shtml> (last visited Oct. 23, 2010) (stating that the agency is linked directly to the Canadian Government and reports to the Minister of Agriculture).

<sup>177</sup> AUDIT, *supra* note 173.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Todgham Cherniak, *supra* note 131, at 12.

<sup>182</sup> *Id.*



bility. Since September 11, supply chain security has become very important, and traceability is the next step in that process.<sup>183</sup>

The other hot issue is sweet-salty taxes and tax exemptions. I know this is something that is near and dear to Mr. Crane's heart, and I think that some of our concerns with respect to food safety, health issues, and child obesity are going to turn themselves into health taxes, such as taxes on foods with high sodium content. We want to reduce health care costs. Both the Canadian and United States governments are starting to realize that our health costs are spiraling out of control.<sup>184</sup> How do we reduce those costs? We make our population healthier. How do we do that? We stop doing some of the things that are bad for us. I envision there being sodium taxes, so that goods with high sodium content will have a special premium tax, which will encourage manufacturers to reduce the amount of sodium in their products. Also, with the obesity concerns, there will likely be sweet taxes. We have also heard about soda taxes in the United States being offered as an idea to combat obesity.<sup>185</sup>

We also have a big issue in Canada with fortified food claims. There are different regulations in Canada as to the fortification of foods.<sup>186</sup> One of the main concerns of Health Canada is that if it says a candy bar has Vitamin A, Vitamin C, and Vitamin D, will people buy these poor food choices because they believe they are getting their vitamins? Or will people buy vitamin water now because it has Vitamin B in it, and it is supposed to reduce stress? Will they drink pop, instead of water, because they think they are making a good food choice?

The last issue is just the opposite of the first two taxes I discussed. As of July 1, the Ontario government is harmonizing its provincial sales tax with the federal Goods and Services Tax (GST).<sup>187</sup> We got an exemption from Harmonized Sales Tax (HST) for prepared foods that are under \$4.00.<sup>188</sup> So, if I buy a burger and a soda at McDonald's, I get to save the HST. If I buy a

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<sup>183</sup> Maureen Irish, *Supply Chain Security Programs and Border Administration*, 3 WORLD CUSTOMS J. 79, 79-82 (2009), [http://www.worldcustomsjournal.org/media/wcj/-2009/2/WCJ\\_V3N2\\_Irish\\_\(web\).pdf](http://www.worldcustomsjournal.org/media/wcj/-2009/2/WCJ_V3N2_Irish_(web).pdf).

<sup>184</sup> Claire Sibonney, *Soaring Costs Force Canada to Reassess Health Model*, CANADA.COM (June 1, 2010), <http://www.canada.com/health/Soaring+costs+force+Canada+reassess+health+model/3098603/story.html>.

<sup>185</sup> Truman Lewis, *Senate Studies Soda Tax*, CONSUMERAFFAIRS.COM (May 12, 2009), [http://www.consumeraffairs.com/news04/2009/05/senate\\_sugar.html](http://www.consumeraffairs.com/news04/2009/05/senate_sugar.html).

<sup>186</sup> *Food and Nutrition: Vitamins and Minerals*, HEALTH CAN., <http://www.hc-sc.gc.ca/fn-an/nutrition/vitamin/index-eng.php> (last visited Oct. 23, 2010).

<sup>187</sup> *Harmonized Sales Tax (HST)*, CAN. REVENUE AGENCY, <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/hst-tvh/menu-eng.html> (last visited Oct. 23, 2010).

<sup>188</sup> *What's Taxable Under the HST and What's Not?*, ONT. MINISTRY REVENUE, <http://www.rev.gov.on.ca/en/taxchange/taxable.html> (last visited Oct. 23, 2010).

doughnut at Tim Horton's and an iced cappuccino, which is full of sugar, I get a point of sale exemption. This policy kind of goes against the grain in terms of promoting healthy eating habits. It is designed to help those who have less money to spend on food, but it actually encourages bad food choices the way that it is currently implemented.<sup>189</sup>

I think that is all I have. I would be happy to answer any questions.

#### DISCUSSION FOLLOWING THE REMARKS OF STEPHANIE LARIVIERE AND CYNDEE TODGHAM CHERNIAK

MR. CRANE: David Crane. First of all, thank you both speakers for very interesting presentations. I am grateful to the greenhouse growers for giving us better tomatoes in the winter time. I grew up in a time when you got those awful plastic things in the supermarket, which had dye injected in them and were just awful.

I am glad that Cyndee has picked up on this issue of health. I was at the Liberal Party Thinkers Conference in Montreal a few weekends ago, and we had a very interesting presentation by a woman from the Faculty of Medicine at the University of Montreal dealing with the social determinants of health. She reported that at the teaching hospital, which is affiliated with the University of Montreal, they are now identifying preteens with all the early symptoms of Type II Diabetes. This is directly related to poor nutrition choices and the fact that the food processing industry, soft-drink industry, and fast food industries are really in a sense poisoning our kids.<sup>190</sup> Health care workers in Montreal are treating conditions of obesity, hypertension, and various other obesity-related conditions. From a public health point of view, and from the issue of addressing health care costs, we have to do something. However, this is potentially a source of disagreement between Canada and the United States. If one country decides to get serious and strictly regulate salt, sugar, and fat content in processed foods and fast-food chains, and the other does not, how then do you have harmonization?

I wanted to ask Cyndee a question, because I noted in the amendments to the Food and Drug Act that there is a prohibition on selling or importing for sale food products that are injurious to human health. What is the test for injurious to human health? Because all the things I have described, I would

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<sup>189</sup> See generally Robert Benzie, *No New Sales Tax on Fast Food*, THESTAR.COM (Nov. 12, 2009), <http://www.thestar.com/news/ontario/article/724751--fast-food-coffee-to-escape-new-blended-tax> (stating that not applying the tax would save money for Ontarians).

<sup>190</sup> See generally *Type 2 Diabetes in Children*, MAYO CLINIC, <http://www.mayoclinic.com/health/type-2-diabetes-in-children/DS00946> (last visited Dec. 23, 2010).

argue, are injurious to human health. Can you apply that act to all those products? How is that going to work?

MS. TODGHAM CHERNIAK: "Can" and "will" are two separate things. I cannot say for sure whether or not there is a definition for injurious to human health in that legislation, because I do not remember off the top of my head whether or not there is an answer. But, I agree with you that there is an issue there, and the whole question will be whether or not there is the political will to use the legislation in that manner. However, I do not see Canada going there any time soon. I think the first cases to enforce the "injurious to human health" provision will be the easy cases, for instance, cases like the Peanut Cooperation of America where rancid peanuts could not be imported and sold in Canada. If food has been rejected under United States law, you cannot then ship it up to Canada to sell it. But you are absolutely right that down the road, perhaps when there is a greater political will, this type of legislation may be used to force food processors to make their food products healthier.

MR. CRANE: Now, you mentioned taxes, but you can also use regulation that simply sets up a limit.

MS. TODGHAM CHERNIAK: Oh, absolutely.

MR. CRANE: It seems like that would be a simpler way of dealing with the problem than trying to have a complicated system of differential taxes and so forth.

MS. TODGHAM CHERNIAK: The truth is that the reason I added that slide this morning is that Seth Godin, marketer extraordinaire in the United States,<sup>191</sup> actually had a blog post this morning about soda taxes.<sup>192</sup> And, as a result, I thought I should add that in.

MR. STRASSFELD: Your folks only produce healthy foods.

MS. LARIVIERE: That is right. We produce greenhouse tomatoes, seedless English cucumbers, and sweet bell peppers, for the most part.<sup>193</sup> In addition, getting things like healthy snacks into schools is something we are also involved in. We are trying to get our youth to eat better. I know many in the United States are looking at putting salad bars into the schools.<sup>194</sup> I think that is a fantastic idea to encourage healthier eating.

MR. MANSON: I am Bill Manson. One of the things that you see with labeling, as we now have a movement to have healthier eating habits, is to

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<sup>191</sup> See *Bio*, SETH GODIN, <http://www.sethgodin.com/sg/bio.asp> (last visited Nov. 8, 2010).

<sup>192</sup> Seth Godin, *Rights and Responsibilities*, SETH GODIN'S BLOG (Apr. 9, 2010), [http://sethgodin.typepad.com/seths\\_blog/2010/04/rights-and-responsibilities.html](http://sethgodin.typepad.com/seths_blog/2010/04/rights-and-responsibilities.html).

<sup>193</sup> *Product List*, ERIE JAMES LIMITED, <http://www.eriejames.com/products.shtml> (last visited Oct. 23, 2010).

<sup>194</sup> Eric Louie, *Salad Bars Offer Students a Fresh Option*, CONTRA COSTA TIMES, Feb. 6, 2006, at F4.

add a whole range of health claims associated with certain products. I guess it has led to some litigation. To what extent do you see a harmonization developing in regard to these various health claims (e.g., pro-biotic health and cholesterol reducing claims)? What is the legislation going to do with respect to that, if anything?

MS. TODGHAM CHERNIAK: At the present time, the Canadian and United States legislation is divergent in terms of what can be on the label and what claims can be made.<sup>195</sup> I know I have recently looked at a memo which indicates that, despite several changes in the way Health Canada has approached this issue, we still have not done anything about it.<sup>196</sup> Currently, we are very divergent in our views.

That being said, I think it is going to be easier to harmonize labeling requirements than some of the other issues we face. Traceability, for instance, is a very difficult issue. I think it is relatively easy to get a group of scientists, medical officers, and government negotiators in a room, and to come up with a list of labeling requirements. However, we do have two different opinions right now on that issue, and I do not think that Canada will simply agree to adopt the United States rules as they currently stand. One of the main concerns Canada has is that putting fortification claims on certain food products can give the impression that a product is healthy when, in fact, it is not.<sup>197</sup> We will have a stumbling block in regard to that issue, but it is not an insurmountable hurdle. I think it can be dealt with.

MR. FUNG: David Fung here. I am concerned about different labeling requirements; these differences simply cause the costs of doing business to go up.<sup>198</sup> Do you foresee a day when we would be able to use Radio Frequency Identification (RFID) chips on all food items? As you probably know, any information you want can be stored on the RFID chip; in addition, it provides traceability as it goes through the processing chain?

MS. TODGHAM CHERNIAK: I do not see us heading in that direction. But, I am not with the government, but rather a law firm. However, if I were to guess, I think we would not have Radio Frequency Identification chips for some time yet; there is a large segment of the population that could not af-

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<sup>195</sup> See generally Clifford Krauss, *Canada Seeks Redress on Food-Labeling Law*, N.Y. TIMES, Oct. 12, 2009, at B3 (stating that US labeling Laws require country of origin for food products which Canada is opposing).

<sup>196</sup> HEALTH CAN., ADDITION OF VITAMINS AND MINERALS TO FOODS, 2005: HEALTH CANADA'S PROPOSED POLICY AND IMPLEMENTATION PLANS (2005), available at [http://www.hc-sc.gc.ca/fn-an/nutrition/vitamin/fortification\\_final\\_doc\\_1-eng.php](http://www.hc-sc.gc.ca/fn-an/nutrition/vitamin/fortification_final_doc_1-eng.php).

<sup>197</sup> HEALTH CAN., FOOD FORTIFICATION PROPOSED POLICY QUESTIONS & ANSWERS (2005), available at <http://www.hc-sc.gc.ca/fn-an/nutrition/vitamin/faqs-eng.php>.

<sup>198</sup> DAN IKENSON, UNCOOL RULES: SECOND THOUGHTS ON MANDATORY COUNTRY OF ORIGIN LABELING, CENTER FOR TRADE POLICY STUDIES FREE TRADE BULLETIN 1 (2004), available at <http://www.cato.org/pubs/ftb/FTB-007.pdf>.

ford the equipment required to read the labels on the food products.<sup>199</sup> Lobbyists would argue it would not be fair to exclude such a large segment of society from accessing this information. My gut reaction is that it is not going to happen soon for the reason I just stated. But I think it is a great idea, and I think there are things that can be done to move us in a direction where information is communicated more efficiently.

MR. CRANE: When you go into the supermarket in Japan, and you pick up a steak, you can find out right there on the package which cow it came from. How do they do that? Do you know?

MR. FUNG: I do not know how the Japanese do it, but as an engineer, this is what we are doing for all of our component parts. We use Radio Frequency Identification chips that allow us to follow parts through the manufacturing process.<sup>200</sup> In terms of the consumer's ability to read about the product, it is just as easy to develop a process similar to that at Walmart. You can place a reader at the end of an aisle where consumers can scan the product and learn everything there is to know about it.<sup>201</sup> Consumers can listen in German, Japanese, and any other language. You can include any information that you want.<sup>202</sup>

MR. CRANE: The Hong Kong Airport is probably the best in the world at getting the right suitcase onto the right plane. That is because every baggage tag has a Radio Frequency Identification chip in it, and when a suitcase is going down all the conveyor belts, the system will not allow a suitcase to go on the wrong belt.<sup>203</sup> It is just another example of how this technology is being used in a very simple way.

MR. FUNG: Hong Kong is the world's largest international air cargo airport. It started using the Radio Frequency Identification chip system because of the chaos they had when they were using a bar code system.<sup>204</sup> The bar

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<sup>199</sup> See *Frequently Asked Questions*, RFID J., <http://www.rfidjournal.com/faq/20> (last visited, Nov. 7, 2010) (stating that RFID readers will cost \$500-2000).

<sup>200</sup> Katariina Penttilä et al., *Radio Frequency Technology for Automated Manufacturing and Logistics Control. Part 2: RFID Antenna Utilization in Industrial Application*, 31 INT'L J. ADV. MANUF. TECH. 116, 116-24 (2005), available at <http://www.springerlink.com/content/f7553611437v01nn/fulltext.pdf>.

<sup>201</sup> Andrew Nusca, *Nano RFID Tags could replace barcodes; smart groceries, bandages coming*, SMARTPLANET (Mar. 29, 2010), <http://www.smartplanet.com/business/blog/smart-takes/nano-rfid-tags-could-replace-barcodes-smart-groceries-bandages-coming/5481/>.

<sup>202</sup> See *What is RFID?*, ASS'N FOR AUTOMATIC IDENTIFICATION & MOBILITY, [http://www.aimglobal.org/technologies/RFID/what\\_is\\_rfid.asp](http://www.aimglobal.org/technologies/RFID/what_is_rfid.asp) (last visited, Nov 7, 2010) (stating that storage capacity is up to 2 kilobytes of data).

<sup>203</sup> Clarie Swedberg, *Hong Kong Airport Says It Now Uses Only RFID Baggage Tags*, RFID J. (May 12, 2009), <http://www.rfidjournal.com/article/print/4885>.

<sup>204</sup> EVA LIU ET AL., MATTERS RELATING TO THE OPENING OF THE NEW AIRPORT AT CHEK LAP KOK 4-5 (1998), available at <http://www.legco.gov.hk/yr98-99/english/sec/library/989rp01.pdf>.

code reader would cover over with a layer of dust and could not read the bar codes. I was shipping crabs, and an enormous amount of my crabs were killed because they could not be moved quickly enough. Radio Frequency Identification, in my mind, has to happen; it overcomes the line of sight issues when you move something through a portal. You can read 100,000 items in an instant, and everything can be followed as you move through the value chain because it is a two-way labeling system.

MR. STRASSFELD: Other questions?

MS. LUSSENBURG: Selma Lussenburg. My question is for Stephanie. I wanted to ask whether you ever run into the expedited dispute settlement process under Chapter 7 of the North American Free Trade Agreement, which deals with quantity and quality issues for fruits and vegetables coming across the border? If you have, what has your experience been? Secondly, do you think that is something we should adopt more broadly in order to move goods across our borders in a more effective manner?

MS. LARIVIERE: Well, it is a very good question. I, myself, have not been directly involved with that. However, our organization is a member of the dispute resolution body. I would encourage you to contact the Board directly with your question. I can provide you with the email address, and I am sure our general manager can answer that question much better for you than I can.

MS. LUSSENBURG: Thank you.

MR. STRASSFELD: I have a question for you, Cyndee. If the European Union harmonizes first with Canada, what does that look like, and how is that different? What are the significant differences between their approach to food-safety issues and that of the United States?

MS. TODGHAM CHERNIAK: That chapter has not been leaked yet. The intellectual property (IP) chapter has leaked. However, the sanitary and phytosanitary, technical barriers to trade, and customs chapter have not been leaked, and it is difficult to get information about the negotiations.<sup>205</sup> I am constantly writing about the fact that we do not have any information. We do not know what is going on. It is not leaking out yet, even after a round is finished, where the problems are. We know that the European Union has a problem with Ontario's Green Energy Act.<sup>206</sup> We know about there being extensive changes in the IP chapter.<sup>207</sup> We know that the European Union

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<sup>205</sup> DRAFT CONSOLIDATED TEXT: CANADA-EU COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (Jan. 13, 2010), *available at* <http://filesadmin.cfsadmin.org/file/tradejustice/db545c3975345be421bf650291a7b9d4601a9a51.pdf> [hereinafter, CAN-EU DRAFT AGREEMENT].

<sup>206</sup> Shawn McCarthy, *U.S., EU Join Fight Over Ontario's Green Energy Plan*, GLOBE & MAIL (Oct. 1, 2010, 3:00 AM), <http://www.theglobeandmail.com/news/politics/us-eu-join-fight-over-ontarios-green-energy-plan/article1736573/?cmpid=rss1>.

<sup>207</sup> See generally CAN.-EU DRAFT AGREEMENT, *supra* note 205.

and the Canadian government have accused Ontario of dragging its feet with respect to tabling government procurement concessions.<sup>208</sup> That is what has leaked out so far, but we do not have anything yet on food safety.

MR. STRASSFELD: Thank you. Any other questions?

Once again, I would like to thank our speakers and those that have participated. We are scheduled now for a short break. Bon appétit.

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<sup>208</sup> McCarthy, *supra* note 206.