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CANADIAN LEGAL AND POLICY MEASURES THAT COULD BE USED TO RESPOND TO A FOOT AND MOUTH DISEASE IN THE UNITED STATES

*Gloria Mintah & Carolyn Inch**

I. INTRODUCTION

This article arose out of a bioterrorism conference organized by Case Western Reserve School of Law on March 31, 2006. The hypothetical scenario developed by the law school is that terrorists had infected cattle with foot and mouth disease through an animal feed (FMD) on a farm in the state of Ohio. Before the diagnosis of the disease, relatives from the farm in Ohio travelled to the farm of their relatives in Southern Ontario, Canada, arriving in clothing and shoes that may have served as transport for the disease into Canada. This article explores Canada's possible response to the hypothetical outbreak of the disease in the United States.

In Canada, activities to control and eradicate animal diseases are within the mandate of the Government of Canada under the Health of Animals Act (Act).¹ The Act addresses diseases that may affect animals or that may be transmitted by animals to persons. It also aims to protect animals from disease. While the Act gives power to the Canadian Food Inspection Agency (CFIA) to regulate diseases and toxic substances in all species of animals in Canada, in policy the CFIA has restricted its mandate to food producing animals, in most cases. The mandate is further defined by listing certain diseases as reportable² or immediately notifiable under the Health of Animals Regulations.³ These diseases are generally serious foreign animal diseases, such as FMD, many of which are zoonotic and are the subject of eradication programs such as Bovine Brucellosis or Tuberculosis.

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¹ Health of Animals Act, 1990 S.C., c. 21 (Can.).

² Foot and Mouth Disease (FMD) is prescribed as a reportable disease in the Reportable Diseases Regulations (Health of Animals Act) SOR/91-2 (Can.).

³ Health of Animals Regulations SOR/91-25, s. 2 (Can.).

The CFIA, established as a body corporate by the Canadian Food Inspection Agency Act (CFIA Act),⁴ administers and enforces the Act.⁵ The CFIA is headed by a president who, as the chief executive officer of the CFIA, supervises and directs the agency's work and staff. The Minister of Agriculture and Agri-Food, Canada, is the Minister responsible for the CFIA.⁶ All the powers of the Minister under the Health of Animals Act, except for the declaration of a control area, may be performed by CFIA inspectors or officers.

The Government of Canada has concurrent jurisdiction in controlling animal diseases with the provinces,⁷ many of which have legislation equivalent to the Health of Animals Act. However, the federal mandate takes precedence over the provincial mandate for listed diseases. The provinces use their legislation to control diseases that the CFIA does not control. Furthermore, the pieces of provincial legislation are not enforced at the border even though they may be used by the provinces after an imported animal arrives at its destination and the animal does not meet provincial standards. While the provincial legislation does not play a role in CFIA control programs, for the most part, provincial departments of agriculture assist the CFIA in controlling diseases that are present in the country and are difficult to eradicate.

While the Act is the main piece of legislation under which FMD control and eradication measures could be handled in Canada, since the disease could also spread through animal feed, measures could also be taken by the CFIA pursuant to the Feeds Act⁸ to ban the importation of the contaminated feed from the United States into Canada. However, it must be noted that the Feeds Act cannot be used to control animal diseases.

II. TRADE IMPLICATIONS

Canada's economy is heavily reliant upon trade in animals and animal by-products. This trade is not only between Canada and the United States but also between Canada and its other trading partners, such as Japan. It is, therefore, important for Canada to maintain the high standard and reputation it has built with its trading partners. The essence of this was captured as one of the two objectives of Bill C-66, which later became the

⁴ Canadian Food Inspection Agency Act, 1997 S.C., c. 6 (Can.).

⁵ *Id.* § 11(1). The CFIA also administers and enforces the Feeds Act. *Id.*

⁶ *Id.* § 4.

⁷ Constitution Act, 1867, 30, 31 Vict. Ch. 3 § 95 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

⁸ Feeds Act, R.S.C., c. F-9 (1985) (Can.). The actions that may be taken under the Feeds Act are beyond the scope of this article since adequate actions can be taken against the feed, as a thing, under the Health of Animals Act.

Health of Animals Act. On the introduction of the Bill, the Parliamentary Secretary, on behalf of the Minister of Agriculture, said, “[The Act] . . . must ensure that Canadian products continue their international reputation for high standards.”

With the importance and magnitude of the economic benefits of trade in mind, it is most likely that one of the first actions that Canada would take in the event of a presumptive or confirmed outbreak of FMD in the United States would be to halt trade in susceptible animals, animal products, and, if appropriate, animal feed between Canada and the United States. FMD can affect cattle, sheep, and pigs, as well as deer and other cloven hoofed animals. The scope and duration of such actions would fully consider the science based international standards of the Foot and Mouth disease Chapter of the Terrestrial Animal Health Code of the World Organization for Animal Health (OIE) and respect Canada’s obligations under the Sanitary and Phyto Sanitary (SPS) Agreement of the World Trade Organization. Actions would also be predicated on any pre-existing Memorandum of Understanding established to govern such a response within the terms, conditions and spirit of the Sanitary and Phyto Sanitary (SPS) provisions of the North American Free Trade Agreement (NAFTA).

The statutory scheme for the importation of animals is set out in the Health of Animals Regulations.⁹ Specifically, one can import cattle, sheep, or pigs, the species of concern for FMD, from the United States into Canada without a permit if they are accompanied by a certificate.¹⁰ In the event of an outbreak of FMD in the United States, the Minister would put in place a Ministerial import prohibition regulation to control the importation of animal products and live animals for such periods as the Minister considers necessary.¹¹ The effect of this would be to shut the Canadian border and place a total ban on the importation into Canada of the animals and their products pending an assessment of the outbreak and effectiveness of measures established in the United States. It is conceivable that initially, such a prohibition would affect all of the susceptible animals in the entire United States entering any part of Canada. As the situation unfolds further and the extent of the infestation in the United States is known, the measure could be scaled back.

With respect to countries other than the United States, if there were a reason for a high level of suspicion that FMD existed in any country exporting to Canada, it is within CFIA’s legislated mandate to ban the flow of animals and products into Canada by cancelling or suspending the issuance of permits to import susceptible animals into Canada, if there is a belief that

⁹ Health of Animals Regulations, *supra* note 4 §§ 10–16.

¹⁰ *Id.* § 12(2).

¹¹ Health of Animals Act, 1990 S.C., ch. 21 § 14.

failure to do so could result in the introduction of the disease into the country.¹²

In addition, there are provisions in the Health of Animals Act under which an inspector can act to prevent the entry of animals suspected of being or being infected with a disease.¹³ The Act imposes an obligation on a person who imports into Canada any animal, animal feed, or any other potentially harmful carrier of the disease to present the animal or thing, either before or at the time of importation, to an officer or inspector for inspection by the office or the inspector. The officer or inspector may detain the animal or the thing until it has been inspected. If the animal or thing is not declared or it was imported illegally, it shall be forfeited to the government and may be destroyed. In this circumstance, the importer would not be allowed to remove the animal from Canada, an option which, in lieu of forfeiture, is available if the animal is declared but is found not to meet the requirements of the Act or the Regulations.

Given the potentially serious impact of a border closure, Canada, the U.S., and Mexico have developed a communications strategy that includes trade actions expected in the event of FMD in one of the countries. This strategy is outlined in the section on communications.

III. DOMESTIC CONTROL AND ERADICATION MEASURES

A. *Suspicion of the Disease in the United States*

As the CFIA deals with the trade issue and tries to prevent the disease from entering Canada, it will simultaneously take domestic measures to prevent it from spreading if there is a suspicion that the disease has already been transmitted to the country. As soon as Canada becomes aware that there is an FMD outbreak in the United States and that it might have been carried to Canada by travellers from the United States, CFIA inspectors or officers may, for the purpose of detecting diseases, "at any reasonable time, enter and inspect any place or stop any conveyance, in which the inspector or officer believes on reasonable grounds there is any animal or thing to which the Act or the Health of Animals Regulations apply . . ." ¹⁴ With this authority, the inspector may enter the farm or place where the travellers from the United States visited. The inspector or officer may enter the premises without consent or a warrant unless it is a dwelling house, in which case the consent of the occupant of the house or a warrant is a precondition for entry.¹⁵ The inspector or officer may, among other things, open any recep-

¹² Health of Animals Regulations, *supra* note 4 § 160(3)(c).

¹³ Health of Animals Act §§ 16–18.

¹⁴ *Id.* § 38(1)(a).

¹⁵ *Id.* § 39(1).

tacle or cage, examine any animal or thing, and require any person to produce any record or document for inspection and copying.¹⁶ In addition to these actions, the inspector or officer may “require any person to present any animal or thing for inspection in such a manner and under such circumstances as the inspector or officer considers necessary to carry out the inspection”¹⁷ The inspector may also “conduct any tests or analyses or take any measurements.”¹⁸ The Act also places an obligation on an owner or person with the possession, care, and control of an animal or of any other thing that is capable of being affected or contaminated with a disease to supply a sample in a prescribed manner.¹⁹ While no regulations have been made to prescribe the manner in which samples may be submitted, it is arguable that such regulations may not be necessary since an inspector would likely use the authority under paragraph 38(1)(d) of the Act to collect samples.

The exercise of the powers under paragraphs 38(1)(b), (d), and (e) is limited by a reasonable belief on the part of the inspector or officer that the Act or regulations apply to the animal or thing in respect of which the action is being taken. However, one does not see the same limitations in respect of the powers under paragraph 38(1)(c). One may be inclined to argue that an inspector or officer may require any animal to be presented, whether or not the animal is susceptible to FMD, whether it is found in the place of entry, or whether or not the animal has been in contact with another animal suspected of having the disease. It would also appear that an entry on premises is not even necessary; the inspector may request the animal to be presented at any place. This seems to be a very broad power and it is not clear, should this be challenged in court, to which extent the court would curtail this power. Also, the CFIA may, by itself decide, by policy, not to wield such a broad authority as seems to have been conferred under paragraph 38(1)(c).

The policy instruments that would guide activity within CFIA during this time are emergency response plans. An emergency is defined as an event that requires the mobilization of resources beyond those that are required to discharge responsibilities under normal circumstances. The CFIA’s “Emergency Response Plan” outlines the general conditions for an emergency and defines the roles and responsibilities in the event of an animal, plant, feed, or food related emergency. In the circumstances of a suspected foreign animal disease in Canada or the United States with possible links to Canada, the emergency respondents would be guided in their ac-

¹⁶ *Id.* §§ 38(1)(b), (d)–(e).

¹⁷ *Id.* § 38(1)(c).

¹⁸ Health of Animals Act, § 38(1)(f).

¹⁹ *Id.* § 6(2).

tions by two additional documents. The "Animal Health Functional Plan" outlines the roles and responsibilities at the national, area, regional, and field level and is developed using an Incident Command Structure. This is a widely recognized command and control structure for emergency response and provides clear lines of responsibility. Science-based policy decisions that are disease specific are contained in the various hazard specific plans, in this case the "Foot and Mouth Disease Hazard Specific Plan". This document outlines the actions related to aspects of premises investigation, control, testing and tracing in the event of an FMD outbreak.

B. *Infected Place and Quarantine*

As soon as an inspector or an officer suspects or determines that FMD exists in Canada and forms an opinion that the disease could spread or that animals or things entering that place could become affected, the inspector may, in writing, declare that place to be an infected place. "When the declaration is delivered to the occupier or the owner of the place to which it relates," that place and all contiguous lands, building and other place occupied or owned by the owner would constitute an infected place.²⁰ In order to prevent the further spread of the disease, the inspector or officer may also declare as infected all farms within five kilometres of the first infected place. Presumably, the farms that might be declared infected within the five kilometres would be those that have susceptible animals. In both instances, the declaration will identify the disease.²¹ A declaration of an infected place may be lifted when the inspector or officer declares that the disease in the declaration does not exist in the place, will not spread from the place, or the disease is not injurious to the health of persons or animals.

While a declaration of an infected place is effectively a quarantine of a place, it is possible to quarantine only an animal or a thing without imposing a quarantine on the place as a whole. This authority is exercised where an inspector finds or suspects that any animal or thing is a disease agent, an animal or thing is affected by or contaminated with a communicable disease (defined as an infectious or contagious disease), or any record or document required to be produced by or under the Act or the Health of Animals Regulations is not produced.²²

When a place is declared an infected place or an animal is quarantined at a place, movement restrictions come into place. With the former, subject to any regulations, there is a prohibition against removing or taking into the infected place any animal or thing without a licence issued by an

²⁰ *Id.* § 22(2).

²¹ *Id.* § 23.

²² Health of Animals Regulations, *supra* note 4 § 6; *see also id.* § 9 (providing similar provisions for the quarantine of imported animals).

inspector or officer, and where the inspector or officer has reasonable grounds to believe that a thing or animal has been removed from or taken to the place, they may order its return to or removal from the place²³ With respect to the latter, as soon as the quarantine is ordered and a notice thereof is served by personal delivery on the owner or person who has possession, care, or control of the quarantined article or animal, the animal or thing may not be removed from the place of quarantine, may not be allowed to come into contact with the an animal or thing that is not quarantined under the same order, and may not be destroyed, treated or tested for a communicable disease without the consent of an inspector. The inspector who issued the quarantine “may specify the manner, condition, place or places and time of quarantine”²⁴

One may ask why a declaration of an infected place or a quarantine order, not to mention some import measures can be made only on suspicion which, by definition, is “[t]he apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly even no evidence.”²⁵ The courts have also recognized that suspicion sets a relatively low standard that only requires the presence of certain indicia on which the inspector bases his decision, and not a reasonable belief or a firm belief in the existence of a communicable disease.²⁶ It is possible that the law makers saw these measures as immediate and temporary to stop the spread of the disease and its devastating impact as the authorities conduct more investigations. Also, it is possible that these actions would be taken in extreme measures or in respect of catastrophic diseases. This rationale would seem to be supported by statements made at the introduction of the Act. In answering a question by a Parliamentarian during Parliamentary Committee hearings, a technical advisor, then of the Department of Agriculture and Agri-Food, Canada said, in respect of the extension of the five kilometres zone in the event of a declaration of an infected place:

An inspector has the right to increase the quarantine from the original farm to all the surrounding farms as an initial thing instantly, and it would only be used in the event of a foreign animal disease like foot and mouth. Basically, at that point in time, that only allows control of the movement of animals . . . that would spread disease. . . . [T]he five kilometre area . . . is basically a quarantine of the farms in that area and a temporary measure normally.

²³ Health of Animals Act, § 25(1)–(2).

²⁴ Health of Animals Regulations, *supra* note 4 § 91.4(1).

²⁵ BLACK’S LAW DICTIONARY 1487 (8th ed. 2004).

²⁶ *E.g.*, *Wadarcerc International Inc. v. R.*, No. T-2990-92, (Fed. Ct. Apr. 20, 2000), 2000 Fed. Ct. Trial LEXIS 1495, at 7–8. 199 F.T.R. 161, [2000] F.J.C. No. 517 (Trial Div.), appeal allowed on other grounds, [2001] F.C.J. 1918 (Fed. C.A.).

It is also clear that the impact on trade of any foreign animal disease, as well as the need to maintain Canada's international reputation for high standards, is another reason why the standard has been set so low.

Whatever the rationale may be, it is our belief that the function cannot be discharged on flimsy grounds, capriciously or without any credible basis. Indeed, *Wadarcercf International Inc.* established that there should be certain indicia upon which actions might be taken.

C. Control Area

While the authority to declare an infected place or order a quarantine of an animal or thing can be made on suspicion (as well as on the existence of a disease), certain measures can be taken only on the existence of, or on belief, that a disease exists. The Minister cannot delegate the authority to declare a control area and must do it himself or herself.²⁷ One of these measures is the Minister's discretion to declare an area to be a control area, describe the area and identify the disease when they believe that a disease exists in an area.²⁸ While the statutory threshold for the exercise of this authority, being a "reasonable belief," is higher than a "suspicion" of a disease, but still lower than absolute certainty,²⁹ the declaration of a control area would be based upon laboratory results confirming that transmission has occurred and the FMD virus is in Canada.

The control area can be any size and can even cover a whole province or two provinces if marketing patterns would indicate that a disease would have been spread between the provinces in the normal course of commerce. This is how the technical advisor appearing before the Parliamentary Committee hearings captured the essence of the size of the control area stating, "This is a 'biggy' where in essence some kind of a disaster has happened. A foot and mouth outbreak is a normal one. . . . It is where you want to control a large area."

The size will take into account several factors such as the presumed rate of spread, the husbandry and marketing practices, and the length of time the disease has been in the country. The principle of control area declaration is that the largest area likely to be infected is declared to contain the disease. Factors such as having provisions for feeding, slaughtering, marketing and consuming product within the control area are also taken into ac-

²⁷ Health of Animals Act §§ 27, 33.

²⁸ *Id.* § 27(1).

²⁹ See *Cervinus Inc. v. Canada*, No. A-34-01, 117 A.C.W.S. (3d) (Fed Ct. Oct. 22, 2002), available at 2002 A.C.W.S.J. LEXIS 6959, at 20. [2002] F.J.C. No. 1461, (2002), F.C.A. 398, reversing [2006] F.J.C. 2116 (Trial Division). Application for leave to appeal to the Supreme Court dismissed [2002] S.C.C.A. No. 537.

count as it is very difficult to remove product from the control area, except under permits and licences issued by CFIA inspectors.³⁰

After declaring a control area, the Minister may take all reasonable steps, consistent with public safety, to remedy any dangerous condition or mitigate any danger to life, health, property, or the environment that results or may result from the existence of the disease. The Minister may also make regulations prohibiting or regulating movement of persons, things, or animals, including conveyances from the control area, create zones and authorize the disposal or treatment of animals and things that might have been in a control area.³¹ While the authority to establish zones within the control area has not been entrenched in regulation as required by the *Act*, in practice the CFIA creates infected and restricted zones within the control area.

We believe that the reasonable measures that the Minister may take pursuant to subsection 27(2) of the *Act*, on the declaration of a control area, may be done administratively. However, given that the Canadian Charter of Rights and Freedoms³² (the Charter), which guarantees not only mobility rights,³³ but also the right to liberty and security of the person,³⁴ any restrictions on the movement of persons cannot be so made and having it done by regulations respects the principles of the Charter.

D. *Notice Forbidding Entry*

Where a disease exists that is capable of affecting animals, reasonable steps have been taken by the Minister to bring the disease to the attention of the person having care and control of animals in the area and make those persons aware of the law. Every person who owns or has care and control of an animal in the area is required by law to affix a notice forbidding entry to the entrance where the animal is kept, and unless a person has a right of entry, there is a prohibition against entry to the place without the authority of a CFIA officer or inspector.³⁵

There are two conditions for the exercise of this power: there must be an existence of a disease and the minister must have taken reasonable steps to bring the existence of the disease to the attention of the people in the area. Thus, until there is a confirmation of an outbreak of a disease, this provision cannot be invoked. As for notifying people about the disease, it would not be necessary for the CFIA to issue individual notices, it can

³⁰ See Health of Animals Regulations, *supra* note 4 §§ 80, 161.

³¹ Health of Animals Act § 27(2)–(3).

³² Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.).

³³ *Id.* § 6.

³⁴ *Id.* § 7.

³⁵ Health of Animals Act § 7.

do so by television or other media releases or mail out or any other reasonable means.

This is what was said during the Parliamentary Committee hearings as to when this authority would normally be invoked:

This would be used, for instance, in the case of a foot and mouth disease outbreak to control people who are going up and down the road—drug salesmen, people like that - people who are going into each barn and might inadvertently carry manure and thus the disease from place to place. . . . This would be done in a smaller area where the risk was higher. But both would basically be foreseen in the event of an outbreak of foot and mouth or some rapidly spreading and serious disease.

This excerpt seems to identify the target of the notice; it was not meant to restrict the movement of the farmer and anyone with right of entry, for example, his/her family and presumably, his/her employees.

E. Disposal and Treatment

Whether or not there is proof that the outbreak of FMD in the United States has spread to Canada, the Minister may dispose of or treat any animal or thing or require its owner to dispose of it or treat it if the animal or thing is, or is suspected of being affected or contaminated by disease; has been in close proximity to an animal or thing that was or is suspected of having been affected or contaminated by a disease, or is suspected of being a vector.³⁶

The order to dispose of an animal or thing usually comes in the form of a destruction order. On infected premises, infected and exposed animals would be ordered destroyed. It is possible to order destruction based on clinical signs in advance or receiving a laboratory confirmation as FMD virus is highly contagious and the continued presence of animals producing virus is likely to spread disease. It is also within the Animal Health Functional Plan to pre-emptively slaughter animals on premises that have not shown sign of disease if there is a direct epidemiological link to an infected farm.

The disposal of the destroyed animals is at the discretion of an inspector, exercising the delegated authority of the Minister. By policy, the CFIA would require the owner to dispose of the animals under the direction of the CFIA and where the owner would not carry out the disposal, the CFIA would do it. The CFIA would first attempt to have the animals disposed of or would do so on the farm by burial, or if the animals were small, composting in order to minimize the risk of transmission of disease by moving carcasses off of the farm. The method of disposal would be in accor-

³⁶ *Id.* § 48.

dance with environmental requirements of the province where the farm is situated.

F. *Compensation*

The Minister may order compensation to be paid for all animals ordered destroyed. Compensation for a destroyed animal could include costs related to the disposal of the animal as are permitted by regulations.³⁷

Compensation may also be paid for a thing that is ordered destroyed,³⁸ as well as by regulations, the cost related to its disposal.³⁹ In addition, compensation may be paid for the treatment of an animal or a thing.⁴⁰ There are also provisions governing the withholding or forfeiture of compensation in the event of a violation or an offence under or a contravention of the *Act*.⁴¹

The amount of compensation for a destroyed animal is the fair market value,⁴² “as determined by the Minister, that the animal would have at the time of its evaluation by the Minister if it had not been required to be destroyed minus the value of the carcass, as determined by the Minister” up to a maximum amount prescribed by regulations.⁴³ The Compensation for Destroyed Animals Regulations prescribes the maximum amounts for listed animals.⁴⁴ If a destroyed animal is not listed, there is a default amount established in the Compensation for Destroyed Animals Regulations.⁴⁵ The compensation amount for a thing ordered destroyed is the fair market value, less any amount received for it, up to a prescribed maximum amount. No regulations have been made to cap the maximums for destroyed things.

“Fair market value” has been defined by the courts as “the highest price available in an open market between informed and prudent parties, acting at arm’s length and under no compulsion to act, expressed in terms of cash. Lost net income and costs resulting from the interruption in the production line are not elements of ‘fair market value.’”

³⁷ *Id.* § 51.

³⁸ *Id.* § 52.

³⁹ *Id.* § 55(c); *see also* Compensation for Destroyed Animals Regulations, SOR/2000-233 (Can.).

⁴⁰ Health of Animals Act § 53.

⁴¹ *Id.* § 54.

⁴² *See id.* § 55(a) (allowing the Minister to make regulations “respecting the method of calculating market value of animals for which the Minister considers there is no readily available market . . .”).

⁴³ *Id.* § 51(2)–(3).

⁴⁴ SOR/2000-233 § 2.

⁴⁵ *Id.* § 2(b).

A person who is dissatisfied with the amount of compensation may appeal to an assessor, within 3 months after the claimant receives notification of the disposition of the claim.⁴⁶ The assessor may extend the time for appeal.⁴⁷ Grounds for the appeal are that the amount awarded is unreasonable or that the refusal to award is unreasonable.⁴⁸ The decision of the assessor is final.⁴⁹

IV. EXCHANGE OF INFORMATION

There cannot be an effective disease control and eradication without provision of information from the Government of Canada to the Canadian public, including industry, between the Canadian Government and Governments of the Provinces, and an exchange of information between the Government of Canada and the Government of the United States. In Canada, the disclosure of information is based on the principle that Canadian citizens and permanent residents have a right of access to information under the control of a government institution (defined as "any department or ministry of state of the Government of Canada" as listed in a schedule to the Access to Information Act).⁴⁶ The CFIA is listed in the schedule.

However, there are exemptions, which allow the head of a government institution to hold back certain information. For example, the head of a government institution cannot disclose a third party's confidential information, information that may prejudice the competitive position of the third party or information the disclosure of which may interfere with the contractual or other negotiations of the third party. The head of a government institution is also prohibited from disclosing personal information.⁵⁰ Despite the prohibitions, the head of institution may disclose third party information and personal information with consent or if the disclosure would be in the public interest.⁵¹

A request for government information may also be made under common law. This would be of benefit to those who are not Canadian citizens or permanent residents of Canada and/or those who might not want to hire a Canadian agent to make the request on their behalf.

When it comes to an exchange of information between the two governments, it is unclear, at least, at the initial outbreak of the disease in the United States, what information the United States Government would re-

⁴⁶ Health of Animals Act § 56.

⁴⁷ *Id.* § 56(2).

⁴⁸ *Id.* § 56(1).

⁴⁹ Access to Information Act, R.S.C., ch. A-1 §§ 3-4 (1985) (Can.).

⁵⁰ Privacy Act, R.S.C., ch. P-21 § 8 (1993) (Can.). The Privacy Act also defines "personal information." *Id.* § 3.

⁵¹ Access to Information Act § 20(6); *see also* Privacy Act § 2.

quire from the Canadian Government, or conversely, what information the latter can or should provide to the former. Rather, the flow of information would need to come from the United States. For example, the Government of Canada might need information about shipment of products from the affected areas to Canada as well as information about the travellers from the infected farm in the United States and, where in Southern Ontario they visited and whether or not they were still in Canada. As investigations into the disease progress in Canada, the Canadian government would be expected to advise the Government of the United States about the status of these investigations.

The United States law that would allow information to be disclosed to Canada is outside the scope of this paper. However, under Canadian law some information could be disclosed, if, among other grounds, the disclosure would be in the public interest or if the two governments have signed an information-sharing agreement or a memorandum of understanding.

It would appear that there is no such bilateral agreement or memorandum of understanding between the Governments of Canada and the United States for the sharing of information on FMD. However, there is a tripartite agreement between the United States, Canada and Mexico, related to the North American Foot-and-Mouth Disease Vaccine Bank (NAFMDVB). This agreement is based on the 1982 NAFMDVB MOU between the three countries; World Organisation for Animal Health (OIE) Terrestrial Animal Health Code; and September 2003 European Union (EU) Council Directives 2003/85/EC on Community measures for the control of foot-and-mouth disease. The NAFMDVB, mandated under the North American Free Trade Agreement between the three countries, is organized under the North American Animal Health Committee, a group comprised of the countries' Chief Veterinary Officers (CVOs). An updated version of the 1982 NAFMDVB MOU is in being negotiated between the three countries.

While the primary focus of the Bank is the provision of FMD vaccine in the face of an incursion in any of the three countries, the Committee has also elaborated details of the proposed response in a document entitled *The North American Foot and Mouth Disease Vaccine Bank (NAFMDVB) Program, February 2004*. Chapter 12 of the document, dealing with Outbreak Communications, states:

Communication between the *presumptive* positive and the *confirmed* diagnosis is restricted to confidential internal risk. The following sequence of events may be anticipated:

- (1) The CVO of the infected country would initiate communication with his/her domestic government officials and per national communication plan.
- (2) The CVO of the infected country will notify the CVOs of the other two tripartite countries of the presumptive diagnosis. At the discretion of the CVO, this notification may be made even if all of the criteria of a presumptive diagnosis are not met.

- (3) There would be no communication with the OIE or the public until a confirmation is obtained.

This policy document does not make reference to sharing information about travelers, which is a crucial piece of information that Canada would need in order to trace the Southern Ontario farm. Given that trading partners do exchange information about potentially infected animals that have been exported from a country that became aware of the presence of disease after the exportation, it is anticipated that particulars about the travelers would be provided by the United States to Canada to facilitate finding tracing the potential incursion.

With respect to communication with industry and the provinces, the CFIA would make a decision to inform them, based upon the information that Canada would receive from the United States. This would be a necessary first step if the farm location had not been conveyed by the United States, potentially due to privacy constraints.

V. PARTNERS IN RESPONSE

There might be a brief period in which there is public suspicion that FMD is communicable to humans. While it is unlikely that this fear would translate into a response in Canada by the time of the FMD diagnosis, if there were a period of uncertainty about the zoonotic potential of the disease, the CFIA would assume its role as outlined within the Non-Enteric Zoonotic Disease Memorandum of Understanding (MOU) that has recently been drafted between the CFIA and the Public Health Agency of Canada, Health Canada and other involved federal departments. This MOU establishes which federal department takes the lead in the event of a disease that could be transmitted to humans.

As well, the "Foreign Animal Disease Emergency Support Plans" would be activated in each province and would outline the roles and responsibilities for response between the federal government and the provincial government ministries of agriculture, emergency planning, health and the municipal governments.

VI. CANADIAN POLICY AND RESPONSE TO POTENTIAL TERRORIST ACTIVITIES

The Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP) and Public Safety and Emergency Preparedness Canada (PSEPC) use an intelligence-led approach to prevent, detect, and disrupt terrorist activities in Canada. PSEPC maintains Canada's National Counter-Terrorism Plan (NCTP) which outlines a coordinated policy and operational response to terrorist incidents by government and law enforcement agencies. If it is suspected that an act of terrorism has taken place

in Canada, the NCTP would be invoked and the RCMP would lead a criminal investigation into the incident. The CFIA would provide technical and laboratory expertise in the areas of animal health and be responsible for control and eradication of any animal or plant disease found in Canada, and even if there was no direct attack on the Canadian agri-food system, CSIS, and RCMP, with assistance from the CFIA, would increase the country's level of readiness.

VII. CONCLUSION

The response to a foreign animal disease incursion in Canada would, in effect, be the same as that in the United States in that regulatory officials would isolate and contain the disease using similar techniques. The primary difference in Canada is the pre-eminent role of the federal agriculture agency, the Canadian Food Inspection Agency, and the Health of Animals Act. While provincial governments will be intimately involved in providing assistance, the responsibility and legislative authority for movement restriction, destruction, and containment rest with the federal government.

