

# The Evolution of Food Regulation in Canada: Navigating the Safe Food for Canadians Act and Its Impact on Enforcement

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Historically, food in Canada has been regulated under an array of statutes, including the *Food and Drugs Act*, the *Fish Inspection Act*, the *Meat Inspection Act*, and so on.

In 2019, the federal government consolidated its food law regime by passing the *Safe Food for Canadians Act*, (“SFC”) S.C. 2012 c. 24.

The SFC was designed to streamline government coordination and make inspections more effective by upholding industry culpability. Safe food laws were subsequently arranged to not only address consumer concerns and industry standards but also establish Canada as a global leader in food inspection and public health.



Today, the federal legislative foundation for the regulation of food in Canada is the *Food and Drugs Act*, R.S.C. c. F-27, and the SFC. The SFC sets out a framework for a regulatory regime that consolidated 14 sets of food commodity regulations into a single overarching set of rules, the *Safe Food for Canadians Regulations* (“SFCR”), SOR/2018-108 (the “SFCR”).

Enforcement of the SFCR is carried out by the Canadian Food Inspection Agency (the “CFIA”), which was created in 1995 to enforce Canada’s food inspection regime. The CFIA has the power to, among other things:

- inspect and investigate;
- search, seize and detain; and
- oversee and implement recalls.

CFIA inspectors conduct food safety inspections and may do the following during on-site inspections:

- Review documented procedures;
- Obtain production and distribution records; and
- Gather information on unsafe food such as the brand name, product code, label, package, expiry or best before date.

Breaches of the SFCR are enforced under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* ("AMP Regulations"), SOR/2000-187, or alternatively, under the SFCA itself, which sets out more severe penalties for violations.

The CFIA will consider the following factors in deciding which route to take:

- The severity of the violation, including actual or potential harm;
- The regulated party's history of compliance; and
- The intent of the party at fault in violating the SFCA.

A number of consequences flow from this determination. Proceedings under the AMP Regulations will be quicker and likely cheaper than proceedings under the SFCA. This is because SFCA offences are enforced using the procedural sections in the *Criminal Code*, and these offences are tried in lower provincial courts. There is also no custodial penalty for violations prosecuted under the AMP Regulations, and the maximum fine is \$25,000. Conversely, offences prosecuted under the SFCR can result in a maximum fine of \$5 million or imprisonment of up to two years. This significantly raises the stakes for entities prosecuted under the SFCA.

On the surface, then, it appears that proceedings under the AMP Regulations would be more beneficial to the subject of a prosecution when compared to proceedings under the SFCA. However, it is important to recognize what is lost in a prosecution under the AMP Regulations. Due to the lower degree of jeopardy presented, certain procedural protections in place for more serious prosecutions may not apply in AMP Regulations proceedings. For example:

- The standard for liability in an AMP Regulations prosecution is not beyond a reasonable doubt. Rather, a conviction will follow if liability is established on a mere balance of probabilities, making a conviction much harder to avoid in a proceeding under the AMP Regulations.
- Subjects of penal investigations are typically protected by the *Charter of Rights and Freedoms*. If the CFIA conducts an inspection that results in a violation under the AMP Regulations, these protections may not apply or may apply to a lesser extent because there is no prospect of jail.
- The AMP Regulations limit the defences available to an accused when defending against a violation of the SFCA.
- Should the matter proceed to a hearing, there may be fewer procedural protections, including the right to disclosure of evidence or the right to reasons from an adjudicator.

The point is that criminal proceedings engaged by the SFCA, while more consequential, carry a degree of certainty regarding procedure and rights. Regulatory proceedings, on the other hand, carry less risk, but the process may be more fraught.

We can see this play out in the jurisprudence. For example, in *Mario Cote Inc. c. Canada (Procureur general)*, a pork production company was issued 12 notices of violation by the CFIA for transportation of sick animals. The company challenged the AMP Regulations under which the government had elected to proceed, because it eliminated some defences normally allowed for in a criminal prosecution, such as mistake of fact and due diligence. The

court found that the legislature was entitled to remove these defences in proceedings brought under the AMP Regulations because there was no chance of imprisonment.

This means that a defendant in a proceeding launched under the AMP Regulations cannot avoid liability even if they did everything that they could to avoid the violation, and even if they were labouring under a mistaken apprehension of the facts. In other words, proceedings under the AMP Regulations turn violations of the SFCR into absolute liability offences.

Fortunately, the SFCR imposes regulatory obligations on inspectors that may make up for the loss of certain protections due to the CFIA proceeding under the AMP Regulations. For example, there are requirements as they relate to cancellations and suspensions of certain licenses required under the SFCA. In *Cob Roller Farms Ltd. v. 9072-3636 Quebec Inc. (Ecole Canada)*, the court found that a certification body that suspended the accused had failed to provide a written report setting out the grounds for suspension and had also failed to offer a period of time for corrective action. The court rejected arguments that these requirements could be suspended due to public safety concerns and set aside the suspension and cancellation.

So, while this new regime eliminates a number of rights normally enjoyed by those prosecuted in criminal proceedings, all is not lost as it relates to less serious violations prosecuted under the AMP Regulations.

## **Conclusion**

The federal government has consolidated the legal food regime into a more efficient framework for the regulation of food in Canada. The hope is that these changes result in a consistent application of the law while reducing administrative burden. However, there remain inconsistencies, such as the differences between how the CFIA chooses to enforce compliance and the consequences that flow from those decisions.

The Minister of Agriculture and Agri-Food and the Minister of Health have launched a review to examine the efficacy of the regime launched under the SFCA and to evaluate whether any changes are warranted. They will be considering whether there are any gaps in the SFCA, and one would hope that some attention will be paid to the substantive difference in rights depending on how the CFIA chooses to enforce compliance.

The whole point of this consolidation was to bring a measure of consistency and predictability to the food inspection regime. The reason for using AMP Regulations to adjudicate violations was to efficiently dispose of less serious breaches. It should not be that entities at the mercy of CFIA investigations must sacrifice procedural rights and protections in order to have less serious allegations resolved without risking jail. This dual-track method of enforcement presents a meaningful gap in the way the Canadian food regime is enforced and should be addressed in this review by the Ministers.

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