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TO DINNER PLATE

Food law is a burgeoning area
as the industry continues to grow

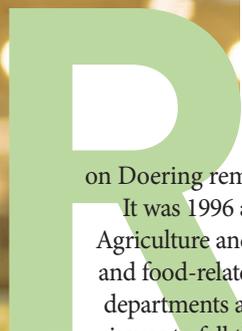


Food law is a burgeoning area
as the industry continues to grow



FROM
FARM GATE
TO **DINNER PLATE**

By Carolyn Cooper



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on Doering remembers the first time he heard the words food and law together.

It was 1996 and more than a year since he'd stepped into the role of assistant deputy minister at Agriculture and Agri-Food Canada, tasked with reviewing how Canada carried out food inspection and food-related activities. At that time, responsibility for food inspection was divided among federal departments as well as different levels of government — a fact critics said was causing food safety issues to fall through the cracks.

“There had been a very critical auditor general's report in 1994 that had taken on new importance because of BSE [mad cow disease] in Europe, and there had been a number of high-profile recalls in the U.S.,” says Doering, now counsel at Gowling WLG. “It was the year before the Canadian Food Inspection Agency was created, and I was at a conference in the EU explaining what Canada was doing,” he recalls. “I'd been a lawyer for about 20 years at that point, I'd been [assistant deputy minister] of Environment, I'd been at the Privy Council Office and I'd practised in the private sector. But I can honestly say that when this person said to me ‘Oh, so you're setting up a new system for food inspection and related activities in Canada, you must practise food law?’ that was the first time I'd ever heard the expression. So, I said, ‘I guess I do.’

“I started joking when I came back to Canada that I may be Canada's first food lawyer,” he says, adding, “that's not to say that there weren't lots of lawyers in government or in large food companies who did corporate commercial law and some regulatory food law, but they didn't see themselves as practising food law. You can imagine my surprise the next year when I was introduced at a conference in Toronto as Canada's first food law lawyer.”

Today, there are still only a handful of practitioners in Canada who identify themselves as food lawyers, even though food law as an area of practice is becoming an important and emerging field of specialization. As Canada's food industry continues to grow in economic importance, law firms are recognizing the value of building multi-disciplined food and beverage groups to meet the diverse needs of food system stakeholders. And as manufacturers are battered by another massive wave of regulatory changes this year, there will be increasing need for lawyers who understand the unique challenges facing the industry.

Canada's complex food system

When the CFIA opened its doors in April 1997 with Doering as president, it became Canada's largest science-based regulatory agency, consolidating all food safety, animal nutrition and plant health inspection programs. It was a significant shift in viewing the food industry as an interconnected system rather than a collection of disparate sectors. It was also the start of a federal modernization effort around agribusiness and food that continues today.

Doering left the agency in 2002 to join Gowling WLG and build a food law group with the late Joel Taller, who Doering says “was actually the first food lawyer.” Taller had originally been a pharmacist, so he knew the intricacies of the Food and Drugs Act and regulations unlike many private practitioners at that time.



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Catherine Bate,
Miller Thomson

In the two decades since the CFIA was created, the agriculture and food industry has become a vital source of economic growth, contributing \$111.9 billion, or 6.7 per cent, of Canada’s gross domestic product in 2016. Food and ingredients are now sourced worldwide, making our food supply chain increasingly interconnected. At the same time, interest in food in general has skyrocketed, ignited by the popularity of all-day food TV programming and propelled through social media. There has never been as much interest in how food is produced, processed and distributed, especially as issues such as foodborne illness, food fraud and misleading labelling claims continue to make headlines.

As a result, regulations and policy surrounding agribusiness and food have grown ever more complex, as regulators work to ensure oversight keeps pace with rapidly changing food science and technology.

“The reality is that, if you’re in the food business, you’re swimming in a sea of regulations,” says Doering. “That’s also why I think it’s a growing area of law.”

What is food law?

Because Canada’s food and beverage industry is so diverse, with so many different legal requirements, lawyers generally enter the field from a variety of professional backgrounds. “The thing with food law is that it really does touch on so many different areas that sometimes it is hard to find the common thread,” says Sarah Berger Richardson, a PhD candidate currently teaching at Dalhousie University’s Schulich School of Law. “Obviously, it’s all about food, but you can come at it from so many different levels of government and areas of expertise. There’s the producer angle, the consumer angle, the environment and the animal welfare angle — there’s a lot happening and it makes it really challenging.”

“I am a food lawyer, but I wouldn’t say that’s the only thing I do,” says Laura Weinrib, a partner at Blake Cassels & Graydon LLP in Toronto. “I actually call myself a regulatory and advertising lawyer, and I specialize in regulated products and bringing those products to market, as well as regulatory and compliance issues.” At the same time, says Weinrib, “if you ask someone what food law is you might get a blank stare back. If you describe what you do, I think people do understand it at a high level. Food law is really the legislation, legal issues and policies that regulate production, trade and handling of food. And it involves a very broad spectrum of actors. You’ve got the obvious big food manufacturers who sell pre-packaged food products at grocery stores, but then you’ve got a whole level of farmers, crop producers, processors and distributors, retailers and companies that make animal nutrition products, biotech orgs, feed companies, dairy farmers — there’s a lot there.”

Miller Thomson LLP has approximately 55 lawyers with a variety of legal backgrounds working in its vast agribusiness and food law industry group. “Being from Saskatchewan, agricultural and food law have always been an integral part of our economy,” says Eric Johnson, a partner in the firm’s Regina



office and co-leader of the agribusiness and food law industry group. “Science and technology is really pushing the boundaries of possibility in food law. In my view, this is particularly so with respect to the production of our food. This area tends to garner a lot of negative publicity, but really it has presented society with so many opportunities.”

Carol VandenHoek, co-leader with Johnson of Miller Thomson’s food law group, is a partner at its office in Guelph, Ont., a region with a wealth of food and agriculture businesses and research institutes. Food law “is an area of growth we see as a firm,” she says. “We see it in our practices, and I don’t see signs of it slowing down any time soon.” VandenHoek says there may still be misconceptions in the legal community about what food law is, particularly in regions that have not traditionally been as rich agriculturally. “I think perhaps sometimes people may not fully appreciate how multi-disciplinary the food law area is. When we look at agribusiness and food production, we see it as a whole — we look at all segments of the industry sector, from farmer-producer to manufacturer right to the end consumer. And there are so many facets along that value chain where there’s an opportunity to do agribusiness or food work.”

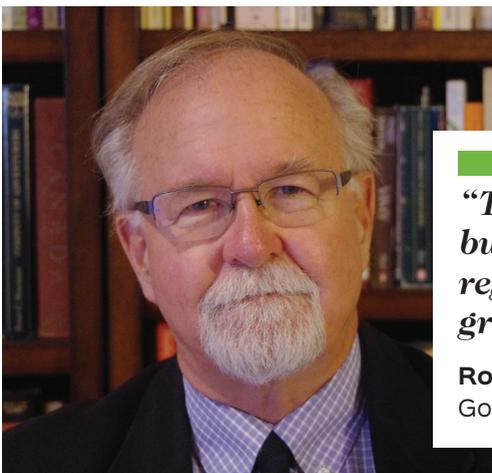
Variety is the spice of life

A significant part of food law involves interpreting regulations and policy, as well as working closely with the CFIA to help clients navigate the laws. “We cover a variety of issues,” says Laura Gomez, a partner at Gowling WLG in Ottawa, who specializes in product regulation, compliance and enforcement. “Some of our very sophisticated clients are large corporations who already have legal counsel, they have robust research and development departments, they have quality assurance people and usually an internal regulatory team as well. They tend to come to us with very specific, high-level questions with respect to where policy development is going and what will be coming in the future. Those tend to be the more difficult questions but also the most interesting.”

Gomez says foreign food companies hoping to enter the Canadian market are also looking for advice on how to get products to retail, in addition to more technical

“The things that come across my desk are quite varied week to week — a novel food application, an investigation into food additives or companies looking for test market authorization for products. They all have different components to them, and that’s something that’s really satisfying.”

Glenford Jameson,
G.S. Jameson & Co.



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Ron Doering,
Gowling WLG

compliance help. “So, they’re asking how can we help them develop a compliant label or how can we help them review their food to make sure that they’re meeting Canadian regulatory requirements with respect to, for example, food additives. They’re also looking for information on what formula changes they might need to make and how they can most efficiently plan their business moving forward.”

Glenford Jameson says that level of diversity is the reason food law is such a dynamic area. “The problems are just fascinating generally,” says Jameson, principle at Toronto-based G.S. Jameson & Co., a private practice specializing in food law. “The things that come across my desk are quite varied week to week — a novel food application, an investigation into food additives or companies looking for test market authorization for products. They all have different components to them, and that’s something that’s really satisfying.” He adds that because his clients each have different and sometimes competing goals, “you have to be sensitive and understand what they’re looking for, what their concerns are, what their regulatory exposure is.”

What’s cooking?

In 2012, the federal government passed the highly anticipated Safe Food for Canadians Act, designed to make our food system safer and oversight more encompassing. That was followed this January by the Safe Food for Canadians Regulations, which again changes how Canadian food businesses operate. For the first time, many businesses are facing facility licensing, food safety compliance audits and the need for detailed traceability and recall plans. In addition, the new regulations are less prescriptive in some areas than in the past, leaving more room for interpretation in how food and beverage manufacturers reach compliance.

Jameson says these changes will require more lawyers with in-depth knowledge of food regulations. “Moving toward an outcomes-based process does lead to more discretion on the part of the regulator to determine what’s acceptable,” he says. “When you start to do that, it’s harder to reach the letter of the law, and it becomes a little subjective. That’s when lawyers show up.”

Katrina Coughlin, an associate at Gowling WLG, who focuses on commercial and regulatory law related to foods, natural health products and animal feeds, says the new regulations may mean more room for error. “I’m frankly interested to see if we will eventually get to a place where there’s more litigation,” she says. “We haven’t seen a lot of litigation up to this point, and I think the new regulatory changes won’t necessarily impact that trend, but we’re certainly keeping a pulse on things to see if there are any developments in that sense.”

“The pot has been simmering for a while in terms of there being the potential for more litigation in Canada related to food law,” says Catherine Bate, a partner in Miller Thomson’s Toronto office and leader of the marketing, advertising and product compliance group. “Certainly, in the area in which I practise, there’s been a lot more litigation in the U.S., right across the board. We see a lot of class actions arising in the U.S. on essentially misleading advertising but very specific to the food



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Laura Weinrib,
Blake Cassels & Graydon LLP

sector. I would imagine that we’ll see more of that coming to Canada in time.”

Law firms working in the food space are already gearing up for more demand, as food and beverage companies scramble to keep up with the regulatory changes. “All the regulatory changes create

a lot of uncertainty for companies, both as the government is introducing new legislation and then while waiting to see how it’s actually implemented and what it will mean in a practical sense,” adds Coughlin. “It creates a lot more questions than if we were operating in a steadier environment. And based on our experience as a team, there is a growing recognition among food and beverage companies of the role that food lawyers can play in terms of providing external guidance.”

Bate also supports Miller Thomson’s agribusiness and food group. The “new regulations will require more lawyers with specific knowledge about the food system,” she says. “Like any new regulatory development, and particularly ones such as this on the technical side, it’s an area to really roll your sleeves up and dive in to really understand the intersection of the industry and the whole food chain. So, I think it’s something that would be increasingly difficult for someone who touches a file from time to time in this area, as opposed to getting really immersed in the industry itself.”

A growing field

The number of self-identifying food lawyers may jump in the next few years, as interest among law students about food-related issues grows. Last fall, professor Heather McLeod-Kilmurray and PhD candidate Angela Lee introduced two seminar classes in food law at the University of Ottawa’s Faculty of Law, with great success. “Last year, we had about 18 students; this year, we have 23 registered,” says Lee. “So, the fact that this is a brand new course and we’re already seeing such enthusiasm

is telling of the fact that students are definitely keen to learn more about the emerging area of food law in Canada.”

Student food law societies have also begun appearing on campuses, often engaging in some of the social advocacy issues surrounding food and agriculture, including animal rights, food safety, environmental sustainability, food waste and labour. And while regulatory guidance remains the basis of food law, academics and practitioners are exploring wider systemic questions such as food security, food sovereignty, land use, agricultural practices, emerging science and other issues with much broader ethical implications.

McLeod-Kilmurray says student interest in food law is as diverse as the field is wide. “Some of the students were already interested in food law, but this year we have a chef, people who are interested in health law and in environmental law.” Although she acknowledges that food law is a multi-disciplinary practice, McLeod-Kilmurray says a dedicated food law course gives students a better perspective of the realities of the food and agribusiness industry. “I think it’s important to teach these courses that thread all those different areas together, because if you teach it in trade law as a commodity, you may not consider all the environmental or social or health impacts, whereas if you teach it in health law, you might not get all the economic aspects. So, I think it’s a really good case study of how real life works — you don’t just do one thing, all these different threads are interconnected. They’re not all silos like our old courses were 40 years ago in law school.”

“I think we’re recognizing more and more that a lot of problems in the 21st century are interdisciplinary — nothing fits the nice, neat little categories we use to ascribe to these things, and so it’s really challenging, but it’s also very much a reflection of reality that you can’t separate trade from health,

from environment, from socio-economic poverty challenges — they’re all connected,” says Berger Richardson, who focuses on issues surrounding food

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Katrina Coughlin,
Gowling WLG



safety and the regulation of slaughter and meat processing. “But I do feel a lot of enthusiasm and excitement about food law compared to 10 years ago.” Berger Richardson also notes that much of the academic work being done around our food system is working to build “a common language” around food conversations, given the wide variety of industry stakeholders.

Food for thought

“People have different theories about why food law and policy hasn’t taken off as a field or practice of law until recently,” says Nadia Lambek, an SJD candidate at the University of Toronto Faculty of Law, “but, just in terms of how people learn about the laws governing our food system in law school, [it] has been quite fragmented. I think that people haven’t begun to think across the system or to connect what we might think of as disparate areas of practice or study under the same kind of rubric or to think about them as addressing similar problems. Yet they are connected.”

Lambek is also chairwoman of the nascent Canadian Association for Food Law and Policy, and she hopes that the association’s fourth annual Food Law and Policy Conference will help practitioners build connections that will strengthen as the food law community grows. The conference takes place Nov. 7 to 9 at the University of Toronto, and it is open to lawyers, students and academics interested in all areas of food law.

If there is a common thread binding practitioners of food law together, it may be a genuine love for the industry. “The thing I enjoy most about working in this area are the clients,” says Johnson. “They tend to be very down-to-earth and appreciative of the legal advice we can offer. Food law is such a diverse area of practice, which is evolving rapidly, which makes for a very exciting area in which to practise.”

“It always keeps you on your toes and there’s always something new to consider. You never really feel like you’re stagnating,” says Lee. “There’s a lot of interesting developments going on; for example, the national food policy, Canada’s new food guide, labelling modernization. So, it’s a really exciting time to be doing this work because you really do feel like you can make a difference.”

Bate agrees. “At the fundamental level, it’s something that everyone understands. It can be very complicated, very nuanced, very sophisticated, but there’s something about getting food to the table that everyone can relate to.”