

CROWN IMMUNITY IN A FOOD CRISIS: A CONSIDERATION OF THE 2008 LISTERIOSIS OUTBREAK IN CANADA

SHELLEY L MILLER^{*} AND SHAUNA N FINLAY^{**}

Tell me what you eat, and I will tell you who you are.

Jean Anthelme Brillat-Savarin

In Canadian law, the question of whether agents for federal and provincial governments can be liable to consumers in negligence has traditionally been resolved in the negative. However, when many Canadians suddenly fell ill and others died due to exposure to listeria-infected meat products in mid-2008, the ensuing public health crisis and criticism of the government agency that handled it obliged the Prime Minister to call for an investigation and report upon the conduct of the Canadian Food Inspection Agency. In the context of the unfolding investigation, the authors examine the underlying rationale and policy reasons for the Canadian courts' doctrine of Crown immunity and whether the time might be ripe for policy change in circumstances like those which gave rise to the losses caused by listeriosis.

I INTRODUCTION

In the summer of 2008, 57 Canadians were confirmed with listeriosis, and 22 of those infected ultimately died, in each case from eating processed meat from a Canadian food supplier. This caused public concern across the nation. Before this outbreak, there had been no widespread concern among ordinary

^{*} QC, Partner of Fraser Milner Casgrain LLP, Edmonton, Alberta, Canada.

^{**} Partner of Fraser Milner Casgrain LLP, Edmonton, Alberta, Canada.

citizens as to whether food products they purchased were accurately labelled, nor whether, prior to purchase, the government had properly verified food safety for consumption, nor how the food inspection agency would protect consumers from the risk of illness or death in the event of contamination.

While no food inspection system is perfect, the public expects incidents involving contaminated food to be rare in urban centres. This expectation arises, firstly, from public trust in government to actively regulate the conditions surrounding the sale and distribution of foods and beverages for public consumption and, secondly, from the assumption that suppliers have an interest in maintaining consumer confidence in their products. Both government and suppliers have incentives to maintain public confidence in food production by ensuring the reasonable safety of the consumption of food products. When confidence in either government or suppliers is shaken, the political and economic responses can be serious and swift.

Economic fallout for a supplier following a food contamination or safety incident can be severe because of a rapid loss of consumer confidence in a product – and a corresponding drop in product sales. The heaviest economic consequences also include the need to settle or defend lawsuits which now include class actions. Political fallout for a government can be manifested by loss of voter confidence resulting in punishment at the next election. However, the question of whether governments and their agents may also be liable to victims is not well understood.

The severe aftermath of a listeriosis outbreak in Canada in 2008 has now raised the question of whether government or the applicable government agency can be made liable in a court of law if the regulatory regime and its enforcement were found to be inadequate, if inspection agents were found to have failed in their statutory duties, or if it were determined that the proper functioning of the food safety system was stymied because of a lack of organisation and protocols on the part of the government or its responsible agents.

In Canada in recent years plaintiffs have not had much success in claims against governments where negligence is alleged on the basis of the failure of government to enforce regulations or comply with its statutory duties.¹ However, the listeriosis outbreak and another Canadian incident involving contaminated milk² have now raised questions about the competence of the

¹ Lewis Klar, 'Syl Apps Secure Treatment Centre v. B.D.: Looking for Proximity within Statutory Provisions' (2007) 86(2) *Canadian Bar Review* 337, 339.

² See Doug Schmidt, 'Milk Lawsuit: Windsor man says his family became ill after drinking milk; company says metal in milk wasn't hazardous', *The Windsor Star*, 17 October 2008.

Canadian Food Inspection Agency (the 'CFIA'). Both incidents have given rise to class actions, neither of which named the CFIA as a defendant, despite allegations from the lead plaintiff in the latter case that the CFIA was 'lackadaisical' in its response to his complaints.³

This paper will examine the circumstances surrounding the listeriosis crisis in Canada in light of the prevailing Canadian judicial authority with a view to determining whether a cause of action might lie against the CFIA for breach of public duty, whether there might be any basis upon which the CFIA could be held liable to the victims of listeriosis, and the policy reasons, if any, for so finding.

II THE INCIDENT – MAPLE LEAF, LISTERIOSIS AND THE CFIA

A *What is Listeriosis?*

According to the website of the CFIA, listeriosis is caused by contamination from *Listeria monocytogenes* (commonly called *Listeria*):

Listeria monocytogenes (commonly called *Listeria*) is a type of bacterium often found in food and elsewhere in nature. ... Unlike most bacteria, *Listeria* can survive and sometimes grow on foods being stored in the refrigerator. Moreover, foods that are contaminated with this bacterium look, smell and taste normal. *Listeria* can be killed by proper cooking procedures.

Listeria is more likely to cause death than other bacteria that cause food poisoning. In fact, 20 to 30 percent of foodborne listeriosis infections in high-risk individuals may be fatal. However, it should be noted that listeriosis is a relatively rare disease in Canada ...

Symptoms may start suddenly and include:

- Vomiting;
- Nausea;
- Cramps;
- Diarrhea;

³ Ibid.

- Severe Headache;
- Constipation; or
- Persistent fever.

In some instances, these symptoms may be followed by meningitis encephalitis (an infection of the brain or its surrounding tissues) and/or septicemia (blood poisoning), either of which can result in death.⁴

B The 2008 Listeriosis Outbreak in Canada

As of April 2009, the 2008 outbreak of listeriosis in Canada connected to meat from a Maple Leaf Foods Inc food packing plant had resulted in 57 confirmed cases of listeriosis and had been determined to be the contributing cause of death in 22 cases.⁵ The CFIA had launched an investigation into the listeriosis outbreak but did not issue a notice to the public for a further three weeks, which media reports charged was too long.⁶ The same news reports also criticised the CFIA for issuing a notice with respect to only two products three days after finding evidence linking a ‘Maple Leaf’ meat plant with the listeriosis outbreak, and for delaying the issuance of a broader recall for a further two days after that. Given the criticism from the media over the handling of the outbreak and the rising concern of the Canadian public, Prime Minister Stephen Harper announced on 3 September 2008 that an investigation into the crisis would occur. On 6 September 2008 he announced the terms of reference for that investigation as follows:

(i) examine the events, circumstances and factors that contributed to the listeriosis outbreak;

(ii) review the efficiency and effectiveness of the response of the federal organizations, in conjunction with their food safety system partners, in terms of prevention, recall of contaminated products and collaboration and communication with its food safety system partners and consumers;

⁴ Canadian Food Inspection Agency, *Food Safety Facts on Listeria* (2008) <<http://www.inspection.gc.ca/english/fssa/concen/cause/listeriae.shtml>> at 14 October 2009.

⁵ Public Health Agency of Canada, *Listeria monocytogenes outbreak* (2009) <http://www.phac-aspc.gc.ca/alert-alerte/listeria/listeria_2009-eng.php> at 14 October 2009.

⁶ See David McKie, ‘Review points to holes in CFIA food safety system’, *CBC News*, 24 September 2008, <<http://www.cbc.ca/consumer/story/2008/09/23/f-cfia.html>> at 14 October 2009.

(iii) make recommendations, based on lessons learned from this event and from other countries in terms of best practices, as to what could be done to enhance both prevention of a similar outbreak occurrence in the future, and removal of contaminated product from the food supply;

(iv) perform his/her duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization;

(v) adopt procedures for the expedient and proper conduct of the investigation, including reviewing relevant records and documents and consulting as appropriate; and

(vi) submit to the Minister of Agriculture and Agri-Food, in both official languages, before 15 March 2009, a report on the matters listed in (i) to (iv) above.⁷

C *The Evidence against the CFIA in Respect of the Listeriosis Outbreak*

In September of 2008, news reporters from the Canadian Broadcasting Corporation ('CBC') and the *Toronto Star* newspaper obtained, through a request pursuant to Freedom of Information and Protection of Privacy legislation, an internal government document prepared in 2005 entitled *The CFIA Food Emergency Response Review* (the '2005 CFIA review'). In a 24 September 2008 news report the news reporters solicited and then summarised views on the contents of the 2005 CFIA review from informed commentators as follows:

The CFIA's corporate planning, reporting and accountability branch examined three areas that, at the time, were deemed to 'require immediate attention':

- 1) The need to clarify and communicate the responsibility for recall decisions.
- 2) The need to improve the risk/assessment process.
- 3) The need to improve follow up activities.⁸

⁷ Office of the Prime Minister, Media Release, Stephen Harper, *Prime Minister announces terms of reference for an independent investigation of the listeriosis outbreak*(2008) Prime Minister of Canada (September 6, 2008) <<http://www.pm.gc.ca/eng/media.asp?category=1&id=2268>> at 14 October 2009.

⁸ McKie, above n 6.

The news reporters noted that the 2005 CFIA review also drew the following conclusions:

- a) ‘...There is no clear policy on when a recall requires public warning.’
- b) ‘Within the CFIA there is no common understanding of what is meant by recall followup, more specifically for longer term followup.’
- c) ‘...processes and strategies do not appear to be in place for systematically dealing with repeat [recall] offenders.’
- d) ‘Concerns had been raised that that too much reliance is being placed on information provided by the establishment, or in the case of imports, the foreign country.’
- e) ‘[I]nspection staff [in some areas] may not be receiving sufficient hands-on experience in inspection activities and interview techniques.’
- f) ‘[Problems in the inspections and warning processes] [result] from confusion regarding who has the lead. It causes delays in obtaining required information, questions are raised about the laboratories concerning the appropriateness of taking additional samples and/or different advice [is] given to the area field staff on the need to expand the investigation to other projects or firms.’
- g) The way the CFIA conducts risk assessments is time consuming and at times inefficient.
- h) ‘Information on recalls could be shared more widely.’ In some countries (for example, the US and Australia) information on all recalls is publicly available.⁹

The news reporters stated that the Federal Government had been aware of the problems at the CFIA for years and that many of the concerns highlighted in the 2005 CFIA review had been made in two previous internal reviews in 1997 when the CFIA was first established. Moreover, they reported that in 2000 Canada’s Auditor General expressed similar concerns. CBC reported that the 2005 CFIA review also called for enhancement of the quality of food safety inspection. Although the 2005 CFIA review stated that ‘[m]ost findings

⁹ Ibid.

in this report have previously been identified by the various parties involved in food recalls',¹⁰ the news reporters noted that, in the aftermath of the outbreak public health, officials and politicians reassured Canadians that 'Canada has one of the best food safety systems in the world'.¹¹

The news reporters further reported that, prior to 1 April 2008, CFIA inspectors conducted actual tours of plants but, after that date, the CFIA implemented a compliance verification system which allowed corporations to conduct their own inspections and report the results to the CFIA. The CFIA inspectors would then simply review the corporation's paperwork. The news reporters stated that critics alleged that the new system resulted in fewer inspections. That allegation appeared confirmed in the spending estimates of the Canadian government released before the listeriosis outbreak, which indicated a decrease in food inspection spending by 12 per cent over three years as well as a decrease of 5 per cent for staffing.¹²

The *Globe and Mail*, one of Canada's national newspapers, reported on 27 September 2008 that the Canadian Auditor-General in 1999 had criticised the CFIA for not fully cooperating with provincial authorities about an outbreak of salmonella poisoning that had left 800 people ill.¹³ This report cited an examination of the role of the CFIA in regulating agricultural biotechnology by an expert panel of the Royal Society of Canada in 2001. This examination concluded that 'a significant conflict of interest' arose from the CFIA being charged with both protecting public health and promoting trade in biotechnology.

D The Legislated Mandate of the CFIA

The CFIA was established in 1997 by the *Canadian Food Inspection Agency Act*, SC 1997, C-16.5 (the 'Act'). The CFIA's mandate is set out in the preamble which states as follows:

¹⁰ Robert Cribb, 'Food alarms rang in '05', *Toronto Star/CBC*, 24 September 2008
< http://www.healthzone.ca/health/article/504671#_ > at 22 October 2009.

¹¹ Ibid.

¹² Ibid.

¹³ Karen Howlett and Caroline Alphonso, 'Agency waited 5 days to issue meat recall', *The Globe and Mail*, 27 September 2008, A8.

Preamble

WHEREAS the Government of Canada wishes to enhance the effectiveness and efficiency of federal inspection and related services for food and animal and plant health by consolidating them;

WHEREAS the consolidation of those services under a single food inspection agency will contribute to consumer protection and facilitate a more uniform and consistent approach to safety and quality standards and risk-based inspection systems;

WHEREAS the Government of Canada wishes to have that food inspection agency deliver those services in a cost-effective manner;

WHEREAS the Government of Canada wishes to promote trade and commerce;

AND WHEREAS the Government of Canada wishes to pursue a greater degree of collaboration and consultation between federal departments and with other orders of government in this area ...

The principal responsibilities of the CFIA are set out in section 11 as follows:

(1) The Agency is responsible for the administration and enforcement of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, *Canada Agricultural Products Act*, *Feeds Act*, *Fertilizers Act*, *Fish Inspection Act*, *Health of Animals Act*, *Meat Inspection Act*, *Plant Breeders' Rights Act*, *Plant Protection Act* and *Seeds Act*.

(2) The Agency is responsible for the enforcement of the *Consumer Packaging and Labelling Act* as it relates to food, as that term is defined in section 2 of the *Food and Drugs Act*.

(3) The Agency is responsible for

(a) the enforcement of the *Food and Drugs Act* as it relates to food, as defined in section 2 of that Act; and

(b) the administration of the provisions of the *Food and Drugs Act* as they relate to food, as defined in section 2 of that Act, except those provisions that relate to public health, safety or nutrition.

(4) The Minister of Health is responsible for establishing policies and standards relating to the safety and nutritional quality of food sold in Canada and assessing the effectiveness of the Agency's activities related to food safety.

(5) The Canada Border Services Agency is responsible for the enforcement of the program legislation referred to in paragraph (b) of the definition “program legislation” in section 2 of the *Canada Border Services Agency Act* as that program legislation relates to the delivery of passenger and initial import inspection services performed at airports and other Canadian border points other than import service centres.

The powers of the CFIA are set out in section 14 as follows:

(1) The Agency may enter into contracts, memoranda of understanding and other agreements with a department or agency of the Government of Canada or the government of a province and with any other person or organization in the name of Her Majesty in right of Canada or in its own name.

(2) In exercising its responsibilities, the Agency may negotiate and enter into arrangements for the implementation of technical requirements for the international movement of products or other things regulated under an Act or provision that the Agency enforces or administers by virtue of section 11.

Action may be taken against the CFIA in respect of any obligation incurred by it:

15. Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Agency, whether in its own name or in the name of Her Majesty in right of Canada, may be brought or taken by or against the Agency in the name of the Agency in any court that would have jurisdiction if the Agency were not an agent of Her Majesty.

The CFIA may issue recall orders:

19. (1) Where the Minister believes on reasonable grounds that a product regulated under an Act or provision that the Agency enforces or administers by virtue of section 11 poses a risk to public, animal or plant health, the Minister may, by notice served on any person selling, marketing or distributing the product, order that the product be recalled or sent to a place designated by the Minister.

2) Any person who contravenes a recall order referred to in subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding six months or to both.

(3) For greater certainty, a recall order is not a statutory instrument for the purposes of the *Statutory Instruments Act*, but no person shall be convicted

of an offence under subsection (2) unless the person was notified of the order.

The CFIA may enter into agreements with provincial governments to carry out activities within its responsibilities:

20. The Minister may, with the approval of the Governor in Council given on the recommendation of the Minister of Finance, enter into an agreement with one or more provincial governments for the provision of services or the carrying out of activities within the responsibilities of the Agency, in common with those governments.

In its short lifespan, the Act has not been the subject of any significant judicial consideration and, until the listeriosis outbreak, was not the subject of significant media attention.

III CANADIAN LAW AS TO GOVERNMENT LIABILITY FOR NEGLIGENCE

In Canada, the determination of whether a government will be liable in negligence consists of a two step legal test which was first articulated in the House of Lords decision in *Anns v Merton London Borough Council*¹⁴ ('*Anns*'). Despite the later rejection of this decision in 1991 by the House of Lords in *Murphy v Brentwood District Council*,¹⁵ Canadian courts have retained the test set out in *Anns* to determine whether a negligence claim against government can proceed or ultimately succeed.

The facts in *Anns* were that a Borough Council had approved plans for the creation of a two-storey block of apartments. The plans called for the foundations to be three feet or deeper according to the approval of local authority. In fact, the constructed foundations in the apartments were only two feet and six inches deep. A few years later, cracks appeared in the walls of the flats and the floors had begun to slope. The plaintiffs claimed damages against the Borough due to the negligence of the council surveyor in approving foundations that were inadequate.

In *Anns*, the builder was under a statutory duty to notify the local authority before covering up the foundations and the local authority had, at that stage, the right to inspect and to insist on any correction necessary to bring the work into conformity with the by-laws. In his reasons for decision on behalf of the

¹⁴ [1978] AC 728.

¹⁵ [1991] 1 AC 398.

majority of the House, Lord Wilberforce noted that the local authority had statutory powers and duties that were owed generally to the public rather than private individuals, and that public duties were not subject to liability.¹⁶ In the United States, this principle is generally expressed by the statement that ‘a duty to all equals a duty to none’.¹⁷

However, Lord Wilberforce then considered whether there could be some circumstances in which the law *could* find that a private law duty was owed to individuals that would enable a suit against a government actor in negligence. Lord Wilberforce said that the first step is to analyse the powers and duties of the authority to determine whether they require the authority to make ‘policy’ decisions or ‘operational’ decisions. He said:

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this ‘discretion’ meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many ‘operational’ powers or duties have in them some element of ‘discretion.’ It can safely be said that the more ‘operational’ a power or duty may be, the easier it is to superimpose upon it a common law duty of care.¹⁸

Lord Wilberforce considered the argument that, where the local authority is under no *duty* but merely has a *power* to inspect, it can avoid liability for negligent inspection by simply deciding not to inspect at all. He pointed out that such argument overlooks the fact that local authorities are public bodies operating under statute with a clear responsibility for public health in their area. They must, therefore, make their discretionary decisions responsibly and for reasons that accord with the statutory purpose. They must at the very least give due consideration to the question of whether they should inspect or not and, having decided to inspect, they must then be under a duty to exercise reasonable care in conducting that inspection.

Lord Wilberforce rejected the notion that a distinction was to be made in this context between statutory duties and statutory powers, such that the former, but not the latter, would give rise to potential liability. His reason was that such a distinction would ignore the fact that there may co-exist with public

¹⁶ *Anns v Merton London Borough Council* [1978] AC 728, 754.

¹⁷ *South v Maryland* 9 US (18 How) 396 (1855).

¹⁸ *Anns v Merton London Borough Council* [1978] AC 728, 754.

law duties owed by local authorities parallel private law duties to avoid causing damage to other persons in proximity to them.¹⁹ He referred to the trilogy of House of Lords cases – *Donoghue v Stevenson*,²⁰ *Hedley Byrne & Co v Heller & Partners Ltd*,²¹ and *Home Office v Dorset Yacht Co*,²² – and noted that those authorities clearly established that in order to decide whether or not a private law duty of care existed, two questions must be asked:

(1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit

(a) the scope of the duty?²³

Lord Wilberforce concluded that, if a duty were to be found, it was then to be determined to whom the duty is owed or who is within the class of persons to whom it is owed and what damages might result from a breach of such a duty. These questions, in turn, had to be answered by an examination of the governing legislation.²⁴

Lord Wilberforce ultimately found that the defendant in *Anns* was under a private law duty to the plaintiff. This being the case, it had to exercise a *bona fide* discretion as to whether to inspect the foundations or not and, if it decided to inspect them, to exercise reasonable skill and care in doing so. He concluded that the allegations of negligence were consistent with the Council or its inspector having acted outside any delegated discretion either as to the making of an inspection or as to the manner in which the inspection was made.

The Supreme Court of Canada adopted the *Anns* analysis in *Kamloops (City) v Nielsen*,²⁵ and then reformulated the test in *Just v British Columbia*.²⁶ It then elaborated upon the test in *Cooper v Hobart* ('*Cooper*').²⁷

¹⁹ *Ibid* 756.

²⁰ [1932] AC 562.

²¹ [1964] AC 465.

²² [1970] AC 1004.

²³ *Anns v Merton London Borough Council* [1978] AC 728, 751-2.

²⁴ *Ibid* 752.

²⁵ [1984] 2 SCR 2.

²⁶ [1989] 2 SCR 1228.

²⁷ [2001] 3 SCR 537.

In *Cooper*, the plaintiff was one of a large number of investors who had used the services of the defendant, a registered mortgage broker who had misappropriated funds belonging to the plaintiff. The plaintiff argued that, by a certain date, the Registrar of Mortgage Brokers was aware of the defendant's serious violations of the governing legislation and should have acted more promptly in suspending its licence. The plaintiff sued the Registrar for the losses suffered by the investors which, he argued, could have been avoided or diminished had the licence been suspended. The Supreme Court of Canada stated that the issue on the appeal was whether the Registrar of Mortgage Brokers, a statutory regulator, owed a private law duty of care to members of the investing public for alleged negligence in failing to properly oversee the conduct of an investment company licensed by the regulator. It held that the Registrar did not owe a duty of care to the investors.

The Court summarised the applicable test:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.²⁸

The Supreme Court of Canada also made two important observations with respect to the second stage of the *Anns* analysis. It held that the need to proceed to the second stage generally arose only where the duty of care asserted did not fall within a previously recognised or analogous category of recovery. The exception to this general rule would be a case that involves the distinction between policy and operational decisions, regardless of whether they fall into established categories.

²⁸ Ibid 30.

In *Cooper*, the Supreme Court of Canada held that if the factors giving rise to proximity existed, they must be found in the statute under which the Registrar was appointed, as that statute was the only source of his duties. The Court went on to conclude that the enabling statute did not impose a duty of care on the Registrar with respect to those individuals who invested with the mortgage brokers regulated by the statute. The Supreme Court found that the Registrar's duty was to the public as a whole and, indeed, that a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.

The Supreme Court also articulated other policy reasons for rejecting the argument that a duty existed, namely that it would effectively be requiring the Registrar to be an insurer for the losses of the investors. Therefore, the spectre of unlimited liability to an unlimited class loomed large as an additional policy reason for denying liability.

A compelling criticism of the Court's reasoning has been made by Lewis Klar, a torts professor at the University of Alberta.²⁹ Professor Klar contends that the flaw in the approach in both *Anns* and *Cooper* was in searching for proximity within statutory provisions. This stance was inconsistent with the way Canadian negligence law approaches the issue of statutory breach, and fruitless in any event. His theory is that proximity derives from relationships which require a consideration of the interactions between the parties. He notes that while statutes might perhaps offer a rationale for the existence of a relationship between the parties, statutory duties would always, by their nature, reflect public duties owed at large. Professor Klar argues that such a focus would nearly always result in the finding that no private duty or proximity existed. He insists that an analysis of the actual circumstances and relationship between the parties using the common law principles of negligence would provide a superior analytical framework.

Since *Cooper*, Canadian courts of appeal and the Supreme Court of Canada have had the opportunity to apply the *Cooper* analysis to cases where the government is named as a defendant due to alleged failures to protect the public or certain members of the public from harm resulting from a regulated activity or product. In some cases, the actions against government were dismissed summarily. However where other actions have proceeded through to trial, few have ultimately succeeded, as the following review will illustrate.

In the case of *Drady v Canada (Minister of Health)*,³⁰ the plaintiff was the recipient of a silastic device used in temporomandibular joints ('TMJ

²⁹ Klar, above n 1.

³⁰ (2008) 300 DLR (4th) 433 (Ontario Court of Appeal).

implant'). He alleged that the TMJ implant was unsafe because he had been left disabled and in pain. He was unable to identify the manufacturer of the implant because it was unlabelled, so he sued Her Majesty the Queen in Right of Canada ('Health Canada') in a proposed class proceeding, seeking to represent all Canadians, other than those in British Columbia and Quebec, who had suffered damage from TMJ implants. He asserted that Health Canada had breached a private law duty of care it owed to him and other recipients and had failed to properly regulate the TMJ implant industry, thereby failing to ensure the safety and regulatory compliance of the TMJ implant. He further alleged that Health Canada personnel knew of the danger posed by the TMJ implant, but failed to warn the public or prohibit the distribution or use of the same. The claims focused on the relationship of Health Canada with Vitek Inc, a manufacturer of the TMJ implant. Health Canada failed to obtain from Vitek a Notice of Compliance prior to the sale and use of their TMJ implant in Canada. Drady made no claim against any of the third parties joined to the action by Health Canada.

Health Canada brought a motion to dismiss Drady's action. The motions judge concluded that Drady's failure to name the manufacturer of his TMJ implant was fatal to his claim, as there was no causal connection between Drady, the TMJ implant and its manufacturer, and Drady's pleadings otherwise disclosed no cause of action in negligence against Health Canada for not establishing regulations or not regulating in a particular manner.³¹

Two months later, the same motions judge dismissed an application by Health Canada to strike the pleadings of Taylor, another TMJ implant recipient. In *Taylor v Canada (Health)*,³² the facts were that Health Canada had required, in 1983, a Notice of Compliance for certain medical devices sold in Canada. An American corporation, Vitek Inc, had been manufacturing and selling TMJ implants since 1968 and had informed Health Canada in May 1983 of its intention to export such TMJ implants to Canada, but it had never obtained a Notice of Compliance.

In 1988, Taylor, the representative plaintiff, received a Vitek implant, and claimed that it had subsequently deteriorated, causing her significant injuries. She alleged that Health Canada had failed to exercise its powers pursuant to the *Food and Drugs Act* and had been, or ought to have been, aware that the TMJ implant was prone to mechanical deterioration and disintegration when used, which caused severe and potentially catastrophic reactions. Taylor further alleged that Health Canada knew that no Notice of Compliance had been issued to Vitek, that it was aware that Vitek was distributing the TMJ

³¹ (2007) 159 ACWS (3d) 177 (Ontario Superior Court of Justice).

³² (2007) 285 DLR (4th) 296 (Ontario Supreme Court of Justice).

implant without a Notice of Compliance, that, after a request for a Notice of Compliance had been rejected, Health Canada had initially taken no steps to intervene, and that Health Canada had taken no action when its written requests for compliance were ignored. Taylor also alleged that Health Canada had erroneously recorded in its database that a Notice of Compliance had been issued and, when it discovered its error, had taken no steps to notify medical professionals of the same. She also alleged that, at this same time, Health Canada had received reports from health authorities in the United States that the TMJ implants were generally unsafe.

Justice Cullity of the Ontario Superior Court certified Taylor's class action, holding that it was incumbent upon Health Canada to enforce the requirement by ensuring that all devices met the necessary statutory standards. While his findings related only to certification of the class action and not the merits, he held that, where Health Canada takes steps to implement the policies in the *Food and Drugs Act* in a purported exercise of its statutory powers, it is acting operationally and could be liable for the manner in which it executes or carries out the policy. He noted that, from 1983 to 1994, Health Canada had failed to enforce its own policy regarding Notices of Compliance and thereby established the requisite proximity with the private individuals who received the implants.

Justice Cullity did not accept the argument of Health Canada that a finding in Taylor's favour could expose government to a torrent of litigation. Instead, he found that, in the unique circumstances of the case, the question of proximity and broader policy considerations should be left to the trial judge, and, given the particular facts, the spectre of unlimited liability, interference with the policy decisions of government and massive litigation seemed fanciful.

Justice Cullity explained that a result different from that in *Drady* had occurred because Taylor had raised the issue of negligent operational decisions on the part of Health Canada. Its alleged negligence lay in its having encouraged importers of TMJ implants to believe that they could ignore regulatory requirements for the devices with impunity. This allegation could reasonably support a finding that the acts or omissions of Health Canada increased the risk to the health of Taylor and other implant recipients.

In *Drady*, the plaintiff's appeal to the Ontario Court of Appeal was dismissed on the basis that it was plain and obvious that Drady's pleadings failed to establish that Health Canada owed him a private law duty of care. The legislative scheme in place when Drady received his implant did not involve a relationship between Health Canada and the consumer of medical devices. Health Canada had mechanisms to enforce compliance with labelling and other regulatory requirements, but enforcement was entirely discretionary,

rather than mandatory. The Ontario Court of Appeal further noted that any breach of the public law duty of care of Health Canada to other Canadian residents generally did not give rise to a private law cause of action. Health Canada had made no specific representations to Drady with respect to the safety of the implants. Finally, there was no allegation in Drady's case that Health Canada, in failing to follow its own policies, had increased the risk of harm to Drady. Leave to appeal to the Supreme Court of Canada was refused.³³

In *Holtslag v Alberta*,³⁴ in which leave to appeal was refused, the claim concerned pine shingles for the roofs of houses which were not chemically treated with a preservative to inhibit fungal growth.³⁵ As a result, the pine shingles turned black within four to five years after installation on roofs, and were extensively decayed within five to eight years after installation. Although the roofs to which they had been applied did not leak, the shingles disintegrated. A class action was commenced against the Government of Alberta for the cost of replacing the roofs and/or damages for loss in value of the plaintiffs' homes. The plaintiffs alleged that the provincial Director of Building Standards had breached a duty of care owed to them in issuing product listings authorising the use in Alberta of untreated pine shingles as a roof-covering material. The Government of Alberta successfully applied for a non-suit before the case management judge. An appeal from that decision to the Alberta Court of Appeal was dismissed on several grounds. First, the case involved a posited duty of care which, if found, would be novel. Second, there were no categories of proximate relationship analogous to the relationship between the Director and the appellants. When the judge applied the required legal analysis to determine whether a duty of care should be imposed, it was clear that there was no sufficiently proximate relationship between the parties and nothing in the statute to ground a duty of care. Moreover, the Director's decisions to issue product listings were policy decisions to which liability did not attach, and recognising a duty of care in this situation would give rise to unlimited liability to an unlimited class.

Attis v Canada (Health),³⁶ was a class action brought by claimants who had silicone breast implants which leaked or ruptured, resulting in alleged catastrophic medical consequences and permanent disabilities. Such implants were listed and regulated as medical devices under the *Food and Drugs Act* and regulations. The claim alleged that the respondent, Health Canada, was liable in negligence for breaching its duty to properly regulate the said

³³ (2008) 300 DLR (4th) 443.

³⁴ (2006) 265 DLR (4th) 518.

³⁵ (2006) 265 DLR (4th) 518.

³⁶ (2008) 300 DLR (4th) 415.

medical devices. On application for a non-suit, the motions judge concluded that, plainly and obviously, the claim disclosed no cause of action because the underlying legislative and regulatory scheme did not support the appellants' argument that the respondent owed them a private law duty of care.

On appeal from the dismissal of the motion for certification of the proposed class proceeding in *Attis*, the Ontario Court of Appeal denied the appeal on the basis that Health Canada acted within its mandate in exercising its discretion regarding the enforcement of its regulatory regime. It had no interaction with the appellants in the course of that role. The Court of Appeal agreed with the motions judge that it was plain and obvious that the appellants failed to allege facts capable of establishing the necessary proximate relationship. Further, the Court of Appeal found that the imposition of the duty of care was negated under the second stage of the *Anns* test by residual policy considerations reflecting the broad societal and legal implications of imposing a duty of care. These included the spectre of indeterminate liability which could result in the government becoming a virtual insurer of medical devices and the chilling effect of the imposition of a duty of care in the public health context.

At paragraphs 66 and 67 of its decision, the Ontario Court of Appeal articulated the sort of interaction that would create the necessary proximate relationship:

However, once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk. If, for example, a government decides to issue a warning about a specific danger, in this case medical devices, or to make representations about the safety of a product, the government may be liable for the manner in which it issues that warning, or the content of those representations, especially where the government disseminates the warning or representation knowing that the individual consumer will rely on its contents and the individual does so.

For example, Goudge JA found that a proximate relationship was pleaded in *Sauer* on the basis of specific public representations made by Canada that it was acting to protect the interests of the commercial cattle farmers. The Supreme Court in *Finney* also found a duty of care where a clearly identifiable complainant directly interacted with the Barreau in the context of its professional complaints process. Accordingly, a duty of care can be assumed and evidenced by the interaction between the parties, depending on the closeness of the relationship.

The Supreme Court of Canada had an opportunity to reconsider the *Anns* test and Crown liability in *Holland v Saskatchewan*.³⁷ There the plaintiffs, a group of farmers, had not registered in a federal program aimed at preventing chronic wasting disease in domestic cervids (elk, deer and reindeer), due to objections to the broad indemnification and release clauses in the registration form. Because of the failure to register, the farmers' herd status had been downgraded. As a result, their ability to sell and the price they could receive for the animals had diminished. Their application for judicial review of the decision to include the indemnification and release clauses succeeded, but, despite the successful ruling, the government took no steps to either reinstate the farmers' herd status or compensate them for lost revenue.

The farmers then sued the Saskatchewan government, claiming damages, in part, for negligence. A motions judge denied the government's application to strike but, on appeal, the Saskatchewan Court of Appeal agreed that the claim should be struck on the footing that no action for negligence could stand against the Crown for negligently acting outside its jurisdiction. On further appeal, the Supreme Court of Canada allowed the appeal in part, ruling that the negligence claim against the government for failure to implement the judicial decree could stand because it was an 'operational' decision rather than a 'policy decision' that the government was obliged to carry out. However, it declined to recognise a new category of negligent breach of statutory duty, finding that it agreed with the reasoning of the Saskatchewan Court of Appeal that such recognition would raise the spectre of indeterminate liability and result in a chilling effect on government discretion.

Based on the foregoing review, absent additional and specific representations or actions by government that bring a plaintiff into a closely proximate relationship with government, Canadian courts will not impose liability for negligence on governments or their regulatory agencies in cases of harm resulting from the use of defective products. This is so even when such agencies have regulatory responsibilities involving supervisory oversight. Accordingly, Canadian consumers of food products might well ask what legal requirements would be necessary to impose an actionable duty of care upon federal or provincial regulatory agencies.

In *Northern Goose Processors Ltd v Canadian Food Inspection Agency*,³⁸ the plaintiff had asked the CFIA for information about why its name had been removed from a certain export list and what it had to do to reverse the removal. The correct response to those inquiries involved the provision of information pertaining to certain European Union decisions and requirements.

³⁷ (2008) 294 DLR (4th) 193.

³⁸ (2006) 206 Man R (2d) 276.

However, the inspectors at the CFIA gave the plaintiff conflicting and incorrect information. As a result, the plaintiff sustained considerable economic losses from entering business obligations under the mistaken belief that it could continue to export to the European Union. It then sued the CFIA to recover damages for the losses. In this instance, the Court imposed liability on the CFIA because there had been sufficient interaction between the CFIA and Northern Goose that the plaintiff was entitled to rely on the representations made by the CFIA's inspectors and because the CFIA had continually failed to provide the requisite information to it.

In *Adams v Borrel*, four plaintiffs were involved in the farming and marketing of seed potatoes in New Brunswick.³⁹ They and many other such farmers suffered economic loss as a result of a potato virus that originated with seed potatoes grown in and marketed from the province of Prince Edward Island. The plaintiffs, for themselves and in a representative capacity, sued Agriculture Canada ('AgCan'), for economic loss suffered, alleging that it had negligently mishandled the potato virus problem in respect of the 1990, 1991 and 1992 crop years.

The trial judge dismissed the action on the ground that all the impugned actions of AgCan qualified as operational decisions and therefore it was immune from any liability for damages flowing from any *prima facie* duty of care that might exist. In the alternative, the trial judge held that none of the impugned conduct of AgCan qualified as negligence.

In *Adams*, the New Brunswick Court of Appeal allowed the plaintiff's appeal in part, by finding that once the decision to investigate had been made, AgCan owed the appellants a *prima facie* duty of care to conduct a timely investigation with respect to identifying the source of the virus. Further, the Court found that that duty was not negated either by overriding policy considerations, such as the prospect of an unlimited liability to an unlimited class, or by the application of the policy/operational dichotomy. Citing the decision of the Supreme Court of Canada in *Ingles v Tutkaluk Construction Ltd*,⁴⁰ Robertson JA, writing for the Court, found that 'negligent inspections' were an established circumstance in which courts had found government authorities to be liable. He stated:

In deciding whether the municipality owed the homeowner a duty of care, the Court distinguished between policy and operational decisions at page 311:

³⁹ (2008) 297 DLR (4th) 400.

⁴⁰ (2000) 1 SCR 298.

Inspection schemes fall within the second type of legislation identified by Lord Wilberforce. To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, the court must determine whether the scheme represents a policy decision on the part of the authority, or whether it represents the implementation of a policy decision, at the operational level. True policy decisions are exempt from civil liability to ensure that governments are not restricted in making decisions based upon political or economic factors. *It is clear, however, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy*; see, for example, *Just v British Columbia*, [1989] 2 SCR 1228, at p 1243, per Cory J; *Rothfield v Manolakos*, supra, [1989] 2 SCR 1259, at p 1266, per La Forest J.

[Emphasis that of Robertson JA]

It is the last sentence of the above quote that is of precedential significance to this case. That sentence states that once the government agency makes a policy decision to inspect, a duty of care will arise unless the circumstances dictate otherwise. The parallel between the present case and *Ingles* is self-evident. Both involve a government actor deciding to carry out an investigation.

There are other reasons why I am convinced the present case falls within an existing or analogous category of case in which a duty of care has been recognized. A key determinant in that inquiry is the nature of the statutory scheme under which the government actor is performing and, in particular, the identity of those whom the scheme is meant to protect. If one turns to the legislative framework from which AgCan derives its mandate, notably s. 2 of the Plant Protection Act, AgCan's statutory obligation is clear: '... to protect plant life and the agricultural ... [sector] of the Canadian economy by preventing ... the spread of pests' through the adoption of either control or eradication measures.

One cannot escape the reality that an immediate purpose of the legislative scheme is to protect the agricultural sector of the economy by protecting the interests of farmers. In these circumstances, it would be disingenuous to hold that no prima facie duty of care was owed to this group of entrepreneurs. In this case, AgCan exercised its statutory authority and mandate to detect 'pests', in the form of plant disease in crops, and took steps toward control or eventual eradication. AgCan specifically decided to conduct an investigation in order to address a potential risk of harm, in the same way a municipality might decide to implement a scheme of road maintenance or building inspection for the purpose of minimizing personal harm or damage to property and the resulting economic loss. One might go further and equate the role of plant inspectors appointed under the federal legislation with building or road inspectors appointed under municipal

legislation. In both cases, an inspector who performs his or her obligations in a negligent manner would normally be held liable for his or her misfeasance. For these reasons, I am prepared to hold that the present case falls within an existing or analogous category of cases in which a duty of care has been previously recognized. It follows that AgCan owed the appellants farmers a prima facie duty of care to carry out its investigation with respect to the identity and source of the pathogen affecting the tobacco crop in the Port Bruce area of southwestern Ontario. That duty was owed to both tobacco and potato farmers alike.⁴¹

Leave to appeal in *Adams* was subsequently refused by the Supreme Court of Canada.⁴²

The finding by Robertson JA in *Adams* that negligently conducting an investigation was an established duty of care category has potential ramifications for plaintiffs who may suffer harm similar to that caused in the listeriosis outbreak and who may contemplate action against the CFIA. Recently, the CFIA has been sued in connection with two different incidents on the basis that the CFIA acted negligently in its investigation and thereby caused damages.⁴³ In the second of these suits, the *Los Angeles Salad Co* case, an application to strike the negligence action was unsuccessful. Arguably, these cases suggest that a transition may be under way in the judicial consideration of this issue.

However, Robertson JA also opined in *Adams* (in *obiter* at paragraph 74) that the Supreme Court of Canada had made 'recent efforts to limit the ambit of government liability'. This was reflected in the *Holland* decision. So it would appear that the issue of what circumstances will give rise to Crown liability may remain unresolved in Canadian jurisprudence for some time.

It is appropriate now to examine whether the foregoing developments suggest that the Canadian courts may now reconsider whether there are policy reasons to hold the CFIA liable to the victims of listeriosis or similar food contamination cases.

⁴¹ (2008) 297 DLR (4th) 400, [41]-[44].

⁴² See [2009] SCCA No 470 (Unreported, Supreme Court of Canada, McLachlin CJ, Abella and Rothstein JJ), 23 April 2009).

⁴³ See *Cheticamp Packers (1991) Ltd v Canada (Canadian Food Inspection Agency)* (2005) 238 NSR (2d) 84 and *Los Angeles Salad Co v Canadian Food Inspection Agency*, 2009 BCSC 109.

IV CFIA LIABILITY IN CONNECTION WITH LISTERIOSIS

The news reports mentioned above suggest that the CFIA launched an investigation into the listeriosis outbreak at the beginning of August 2008. The CFIA determined about two weeks later that the probable cause was contamination at the Maple Leaf Foods Inc meat plant. The CFIA then conducted further tests and waited for absolute certainty before issuing a public notice and requesting the recall of potentially affected Maple Leaf products.

There is no question that the tortfeasor legally responsible for the listeriosis outbreak in Canada was Maple Leaf Foods Inc, the owner and operator of the meat plant where the bacteria were discovered to have contaminated the meat products. Further, there is no question that the courts will provide legal recourse against entities directly responsible for food contamination causing personal injuries and economic losses. Indeed, a class action launched against Maple Leaf Foods Inc on behalf of the victims of the listeriosis outbreak has already been settled. That action did not name the CFIA for the reason that, in the experience of those plaintiff lawyers, class action suits against the federal government have been, typically, painfully long and expensive, and the federal government does not have the same motivation to settle as do private corporations.⁴⁴

As noted from the foregoing review, there are valid and important policy reasons for limiting the ambit of government liability. First, the courts ought not to usurp the roles of the federal or provincial legislatures. Second, government policy decisions often involve a balancing of economic, social, moral and political considerations. Third, public duties owed to the citizenry at large are not intended to found private actions and remedies; otherwise there would be unlimited liability on the part of governments to an unlimited group of citizens. Finally, it is not the role of government to stand as an insurer for the risks and liabilities incurred or caused by others.

Further, the reasoning of the New Brunswick Court of Appeal in *Adams* could create a foundation for a reasonable cause of action for damages for negligence against the CFIA. While in *Adams* the most likely and foreseeable damages were economic, in the case of food safety it is evident that, given the nature of the potential harm demonstrated by the listeriosis outbreak, it is now foreseeable that negligent inspections can have potentially fatal consequences.

⁴⁴ Shauna N Finlay, Interview with Mr Robinson, Counsel for the Plaintiffs Merchant Law Group LLP (Saskatchewan, 5 January 2009).

V RECENT DEVELOPMENTS

Two recent developments since the initial presentation of this paper may provide opportunities for review and revision of the current legal regime for determining Crown liability and the responsibilities of the CFIA.

First, the independent investigation into the listeriosis outbreak ordered by the Prime Minister concluded in July of 2009, with the publication of the *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (the 'Report').⁴⁵ The Report found that critical failures in the CFIA contributed to the listeriosis crisis. In particular, the Report noted the CFIA's implementation of a new system of inspection, called the Compliance Verification System ('CVS'), was not properly implemented and resulted in inspectors not being adequately trained in how to deal with their new inspection duties. The Report observed that the CVS requires critical improvements to its design if it is to be effective in protecting consumers.⁴⁶ The Report also found that among federal and provincial bodies that are responsible for public health, there was insufficient knowledge about even existing policies and protocols dealing with foodborne illness outbreaks and public health emergencies. Overall, the Report concluded that the CFIA failed to properly respond to the risks presented to the public by consuming processed meat products containing listeria. The Report called for significant, although not legislative, re-evaluation of the operations of the CFIA and of other public bodies.

The second development has been the launch of an appeal to the Supreme Court of Canada in an action against the CFIA where both lower courts concluded that the CFIA owed no duty to the plaintiff.⁴⁷ The appeal will afford an opportunity to revisit the traditional analysis of Crown liability in light of the reasoning of the New Brunswick Court of Appeal in *Adams* and the scholarly commentary offered by Professor Klar. Each of these developments could allow for consideration of a modification of the current

⁴⁵ *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (2009) <http://www.listeriosis-listeriose.investigation-enquete.gc.ca/index_e.php?s1=rpt&page=tab> at 9 November 2009.

⁴⁶ *Ibid* 88, note 45.

⁴⁷ The case of *River Valley Poultry Farm Ltd v Attorney General of Canada*, (2009) 95 OR (3d) 1 (CA) is a decision of the Ontario Court of Appeal wherein the Court dismissed a claim against the CFIA for negligent investigation of a potential salmonella infection of the eggs of a chicken egg producer. The plaintiff claimed that, due to the length of time taken to complete the investigation, he was forced to destroy an entire flock of chickens instead of a more limited number. The lower court and the Court of Appeal both concluded that the CFIA owed no duty to the plaintiff and therefore there could be no liability for the conduct of the investigation.

trend to restrict Crown immunity where actions of government agents carrying out inspection and regulatory duties amount to ordinary or gross negligence.

VI CONCLUSION

The listeriosis outbreak in 2008 dramatically illustrated to Canadians the risks of inadequately inspected food and the importance of swift and accurate public notification and product recall procedures. As a result of the crisis, more Canadians are likely to be questioning whether, given the high risk of harm, there is a valid reason for providing legal immunity to agencies such as the CFIA. At this time it is unclear whether reaction to the recent Report will result in a public demand for legislative changes that would increase the level of the Crown's legal responsibility to ensure the safety of foods sold to consumers. However, the Report has called for significant re-evaluation of the operations of the CFIA and of other public bodies. The Report may provide the impetus for a judicial consideration of whether increased legal responsibility on the part of the Crown is now necessary for Canadians. If the Canadian courts do not provide the requisite relief, legal reform will then only come about if Canadians appeal to their Members of Parliament to introduce an acceptable legislative solution.