



The federal government's ability to set cheese standards has been upheld

# Cheese decision backed

**Cheese standards are maintained following a recent Federal Court of Canada decision**

MR. JUSTICE ROBERT MAINVILLE'S sweeping dismissal of the attack on Canada's cheese regulations by transnationals Saputo, Kraft (and, at its inception, Parmalat) is a big win for Canadian consumers. And a big relief for Canadian dairy farmers.

One third of Canada's milk is destined for cheese production. The regulations, which came into effect December 2007, set compositional standards for four classes of Canadian cheese, requiring minimum percentages of milk protein derived from whole milk: 100 per cent for Canadian cheddar, 95 per cent for fine cheeses, 83 per cent for cheddar, Colby, brick and others and 63 per cent for pizza mozzarella.

Saputo challenged the new regulations almost immediately. Within weeks, Parmalat Kraft and Saputo asked the Federal Court of Canada to undertake a Judicial Review, arguing the regulations were constitutionally and administratively flawed and should be struck down.

Thanks in part to the strong testimony of the two interveners — tiny, independent cheese makers Saint Albert's Cheese Cooperative and Toronto's International Cheese — the October 2009 decision of Justice Martineau was unequivocal: Canada's cheese regulations are within the federal trade and commerce powers of the Constitution Act and represent a valid exercise of regulation-making authority under Canada's Agricultural Products and Food and Drugs acts.

Nuff said? Not quite.

In November 2009, Saputo and Kraft again launched litigation — this time an appeal of Martineau's decision. Again, stalwart Saint Albert's Co-op and International Cheese stepped up as interveners. Again, in his Feb. 28 decision, Mainville (with concurrence of Justices Letourneau and Nadon) was unequivocal: no errors of judgment were made by Martineau and consequently there are no grounds for appeal. The action was dismissed; Saputo and chums get to pick up the legal tab.

[ The writer is an award-winning agrologist and columnist living in British Columbia ]

Mainville's ruling knocked every one of Saputo's complaints out of the park, and that is hopefully the end of it. But a quick review of the highlights is prudent...

The attack on Canada's cheese regulations was twofold: The big three cheese makers argued that the dominant purpose of the new cheese standards was to effect an economic

transfer in favour of dairy farmers at the expense of processors, had little to do with interprovincial and international trade, and were consequently beyond the constitutional and legislative purpose of the federal government.

They also argued that the production of cheese was provincial not federal jurisdiction, therefore the

regulations are ultra virus of federal enabling statutes and also failed to set objective and uniform standards.

In his Reasons for Judgment, Mainville argues the "pith and substance" of regulation - what the legislature wishes to accomplish by enacting them - defines its "dominant purpose" and to discover this, regulation must be evaluated within the context of its legislative framework.

Finding the new regulations add to compositional standards already in place, Mainville upholds Martineau's findings that they are fully consistent with the federal trade and commerce powers under the Constitution Act.

He notes they were necessary to harmonize regulations to resolve existing conflicts (Dairy Products Regulations, Food and Drug Regulations) and to conform to international CODEX standards requiring the whey/protein/casein ratio of cheese does not exceed that of milk.

He also notes they were necessary to ensure: "...cheese available to consumers has a consistent composition and characteristics so as to provide a system through which consumer interests are protected and consumer expectations are met".

To underscore his assertion, Mainville repeats Regulatory Analysis Impact Statement warning: "...with the technological advances in cheese making, allowing for the inclusion of higher levels of other milk solids in the manufacture of cheese... the varietal name of the cheese was at risk of losing the organoleptic, chemical and physical properties typical for the variety."

He also gives weight to testimony by St. Albert's master cheese maker and cheese judge Walthier that "... even small quantities of milk

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derivatives (up to five per cent) could affect the taste, texture, and consistency of cheese compared to cheese made with fresh milk. The process of converting fresh liquid milk into a powdered milk derivative has an immediate impact on the taste, which is one of the reasons why, for example, consumers gravitate away from skim milk powder. “

Mainville agrees with Martineau that there is no evidence for the assertion that the dominant purpose of the regulations was to carry out an economic transfer to dairy farmers, suggesting Saputo et al are “confusing pith and substance” with “incidental economic effects” and that is the “true nature and character of the Legislation - not its ultimate economic results - that matters.”

Mainville dismisses as “absurd” the suggestion that the federal government lacks authority to regulate provincial cheese production. “...the Regulations... may incidentally affect production, but not more than any other compositional standard.

Product standards almost always invariably incidentally affect how the concerned product will be produced, yet this does not mean that the standard is directed to production rather than to trade and commerce. To decide otherwise would result in an absurd proposition...”

Rejecting the allegation that the regulations fail to set objective and uniform standards, Mainville agrees with Martineau that the new regulations are “clear and unambiguous”.

With respect to assertions that the regulations are unenforceable, Mainville observes this is not within the courts jurisdiction, but “insofar as it is useful to answer this question” expert testimony has convinced him that there are a number of objective ways to test for casein and whey

ratios, so ensuring compliance is not an issue.

Hopefully, an end to it.

Thanks to St. Albert's Cheese Cooperative and International Cheese for standing up to the big boys and helping to win an important one for Canada dairy farmers.

Isn't it ironic, though, that Canada's dairy farmers are under attack by

processors they once shipped to as co-op members. How did this happen? And why? Dairyland and Agropur are toe to toe in international markets. How did shippers to Dairyland lose their cooperative while members of Agropur grew theirs? Send me your thoughts and we'll make this the topic of my next column! wendy@theholmteam.ca ☎



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