



LEGISLATIVE SUMMARY



Bill S-11: Safe Food for Canadians Act

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Legislative Summary of Bill S-11

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL S-11: SAFE FOOD FOR CANADIANS ACT

1 BACKGROUND

Bill S-11, An Act respecting food commodities, including their inspection, their safety, their labelling and advertising, their import, export and interprovincial trade, the establishment of standards for them, the registration or licensing of persons who perform certain activities related to them, the establishment of standards governing establishments where those activities are performed and the registration of establishments where those activities are performed (short title: Safe Foods for Canadians Act), was introduced by the Honourable Claude Carignan, Deputy Leader of the Government in the Senate, on 7 June 2012 during the 1st Session of the 41st Parliament.

The bill consolidates the *Meat Inspection Act* (MIA), the *Fish Inspection Act* (FIA), the *Canada Agricultural Products Act* (CAPA) and the food provisions of the *Consumer Packaging and Labelling Act*. It also aligns inspection and enforcement powers across all food commodities.

The government has identified several advantages of the new bill for industry. These include the following:¹

- consistency in inspectors' powers, inspection procedures and regulations for all types of food (rather than separate statutes dealing with different food industries) since the bill will consolidate the inspection powers and procedures currently contained in the legislation governing the food industries affected by the bill;
- the availability of official certification for exported foods, which is becoming increasingly desirable to Canada's international trading partners; and
- a review mechanism that would apply to all foods inspected by the Canadian Food Inspection Agency (CFIA).

The government has also identified several advantages of the bill for consumers, including the following:²

- prohibitions on food-tampering that could make food dangerous for human consumption;³
- increased traceability requirements, important in the event of a recall;
- authority to license food importers; and
- authority to prevent imports of food that may pose a health risk.

1.1 FEDERAL JURISDICTION OVER FOOD SAFETY

Authority to legislate in relation to food safety falls under two main federal heads of power, or powers assigned to the federal government under section 91 of the *Constitution Act, 1867*. Section 91(27) grants Parliament jurisdiction over criminal

law, and section 91(2) provides Parliament with exclusive legislative authority over the regulation of trade and commerce. Health can itself fall under different heads of power depending on the specific topic.⁴ Courts have accepted, however, that food safety legislation may be properly enacted under the criminal law power.⁵ Agricultural statutes, on the other hand, have been enacted under the federal power over trade and commerce.⁶ Responsibility for federal food safety is shared by Health Canada and Agriculture and Agri-Food Canada through various legislation under their respective authorities.

Bill S-11 reflects a reliance on federal authority under both the criminal law power and the trade and commerce power. There is a strong focus on trade and commerce in the bill, with its regulation of imports and exports, and selling and advertising, and with food being categorized as a commodity. However, the bill also refers to health-related matters; it contains provisions on recalls, and the regulation of standards of composition and labelling. In general, the dual reliance on trade and commerce in addition to the criminal law power does not present any jurisdictional problems, as the federal government is entitled to enact a single piece of legislation under multiple heads of power.⁷ In fact, the Supreme Court of Canada has specifically recognized that federal food safety legislation may be enacted under both the criminal law power and trade and commerce.⁸

1.2 THE EXISTING FOOD SAFETY FRAMEWORK

The *Food and Drugs Act* is the foundation of Canada's food safety system. Jointly administered by Health Canada and the CFIA, this Act requires that all food sold in the country be fit for human consumption.⁹ Some products (dairy products, shell or processed eggs, fresh or processed fruits and vegetables, honey, maple syrup, beef, pork, poultry and fish) are also covered by other Acts such as MIA, FIA and CAPA, and are administered by Agriculture and Agri-Food Canada.

Under the *Food and Drugs Act*, Health Canada is responsible for establishing regulations and standards relating to the safety and nutritional quality of food sold in this country. The CFIA, which reports to the minister of Agriculture and Agri-Food, is responsible for enforcing the standards set by Health Canada and for ensuring compliance with trade and commerce laws applicable to certain food products.¹⁰ The CFIA conducts all *federal* food inspection activities. It is also responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act*, which applies to select food products sold in Canada. The CFIA has further responsibilities for animal health and plant protection. It is one of the few agencies in the world with responsibilities that cover the whole food continuum (both before and after agricultural production).

The CFIA's legislative base currently consists of a patchwork of acts. These Acts were introduced by different departments over a considerable span of years, and in some cases are becoming outdated.¹¹ CFIA inspectors presently derive their inspection and enforcement authority from the FIA, MIA, CAPA and *Consumer Packaging and Labelling Act* (as it relates to food), in addition to these federal statutes.¹²

- *Agriculture and Agri-Food Administrative Monetary Penalties Act (AAFAMPA);*
- *Canadian Food Inspection Agency Act;*
- *Feeds Act;*
- *Fertilizers Act;*
- *Food and Drugs Act;*
- *Health of Animals Act;*
- *Plant Breeders' Rights Act;*
- *Plant Protection Act;* and
- *Seeds Act.*

1.3 ATTEMPTS AT LEGISLATIVE CHANGE

The federal government has made several attempts in past decades to consolidate and renew its legislative control of food safety and inspection. Some of these reform efforts have emphasized health protection, while others have been more agriculture-based.

1.3.1 BILLS C-80 AND C-27

The food inspection and food safety Acts currently in place vary considerably in the specific powers that they assign to CFIA inspectors. In 1997, the same year in which it was created, the CFIA began a review of its legislative base. The result was the introduction of Bill C-80, the Canada Food Safety and Inspection Act, in the House of Commons in April 1999. The bill subsequently died on the *Order Paper* when Parliament was prorogued in October 1999. CFIA officials have pointed out that there was some opposition to Bill C-80 at that time, which they note was based partly on a perception that the bill would have diminished the responsibility of the minister of Health for food safety.¹³ It was felt that more time was required to pursue additional consultations, and it was concluded that Bill C-80 in its original form was too ambitious and complex.¹⁴

Subsequently, the CFIA continued its efforts to develop new legislation, and Bill C-27, the Canadian Food Inspection Agency Enforcement Act, was introduced in November 2004. Bill C-27 was intended to create a uniform set of powers, rights and obligations for all CFIA inspectors that, at the time, were spread out over eight different Acts: three that dealt with food products (*MIA, FIA and CAPA*) and five dealing with animal health and plant protection (*Seeds Act, Feeds Act, Fertilizers Act, Health of Animals Act and Plant Protection Act*). Bill C-27 would also have given a number of new authorities to CFIA inspectors, such as the power to take photographs of any place or thing, and the power to stop operations in relation to the preparation of a regulated product.¹⁵ The bill subsequently died on the *Order Paper* with the dissolution of the 38th Parliament in November 2005.

While Bill S-11 shares some of Bill C-27's features with regard to CFIA inspectors' powers, some key differences between Bill S-11 and these two predecessors, Bill C-

80 and Bill C-27, are that Bill S-11 does not affect the legislation relating to animal health and plant protection, and only consolidates inspection powers as they relate to food products.

1.3.2 THE 2007 FOOD AND CONSUMER SAFETY AND ACTION PLAN

In December 2007, the Prime Minister announced the Food and Consumer Safety Action Plan, which was aimed at modernizing and streamlining the Canadian food safety system. The government stated that this five-year program – slated to end during the 2012–2013 fiscal year – was to allocate \$489.4 million to ensure the enhancement of Canada’s regulatory system by amending or replacing obsolete health and safety legislation.¹⁶ Some of the Action Plan’s objectives are equally pursued by Bill S-11, and focus on:

- providing the food industry with additional guidance to assist them in improving food safety throughout their supply chains; and
- improving oversight of imported food by making importers responsible for the safety of foods they bring into Canada.¹⁷

The CFIA oversees the food component of the Action Plan. The CFIA has already started to execute portions of the Action Plan, and some of these actions align with certain provisions of Bill S-11. For instance, the agency has already begun implementing a tracking system to increase oversight of food imports. Traceability is also a new feature of Bill S-11.¹⁸ The CFIA has also proposed new regulations to improve oversight of imported food products that “are not already regulated under commodity-specific regulations under the *Canada Agricultural (P)roducts Act*.”¹⁹ The CFIA notes that the proposed regulations would require food importers to comply with a licensing regime that includes implementing and maintaining a written preventive food safety control plan.

In addition, the Action Plan “includes both legislative amendments to the *Food and Drugs Act* to replace outdated states and expanded program measures to enhance Canada’s food safety system.”²⁰ The proposed legislative amendments formed the basis of Bill C-51, yet another predecessor bill that died on another *Order Paper*.

1.3.3 BILL C-51

In April 2008, Bill C-51 was introduced in the House of Commons, and although it never became law, many of the changes that were to be implemented through Bill C-51 were reintroduced in Bill S-11. It proposed extensive amendments to the *Food and Drugs Act*, which would have replaced some existing sections and added many new ones.

Bill C-51 faced a great deal of opposition because of concerns that it would over-regulate natural health products.²¹ While the government proposed amendments to the bill in response to these concerns,²² the bill died on the *Order Paper* with the dissolution of the 39th Parliament on 7 September 2008 before those amendments could be adopted.

Some of the changes proposed by Bill C-51 that appear in Bill S-11 in almost identical form include provisions relating to food tampering, the licensing of imported food and food to be transported interprovincially, the expansion of inspectors' powers, the power to seek an injunction, powers related to forfeiture, and offences and penalties.

Unlike Bill C-51, Bill S-11 does not amend the *Food and Drugs Act*. It does, however, include provisions relating to many areas that are currently addressed by the *Food and Drugs Act*, including standards of composition for foods, standards relating to food labelling and offences related to food. It is not clear what the effect will be of the potential overlap between Bill S-11 and the *Food and Drugs Act*. The government has noted that the *Food and Drugs Act* will continue to apply to foods marketed exclusively within a province and will provide "overarching protection for consumers from any foods that are unsuitable for consumption."²³

1.4 OTHER POSSIBLE FOOD MODERNIZATION INFLUENCES

1.4.1 THE WEATHERILL REPORT

Following an outbreak of listeriosis in Canada in 2008, the federal government commissioned an independent investigator, Sheila Weatherill, to examine the factors that contributed to the outbreak and to recommend a set of actions aimed at strengthening the Canadian food system and minimizing the risk of food-borne disease. In her 2009 report entitled *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (also known as the Weatherill Report), the independent investigator identified, among other factors, the need to:

- simplify and modernize federal legislation and regulations that significantly affect food safety;
- enhance the governance of food safety in Canada;
- enhance the federal governance of public health
- enhance proactiveness of the CFIA;
- ensure prompt response to food safety situations;
- improve how federal organizations collaborate on food safety; and
- demonstrate the Government of Canada's commitment to food safety.²⁴

1.4.2 THE U.S. *FOOD SAFETY MODERNIZATION ACT*

Another incentive for legislative change may have come from similar legislative renewal in the United States. The sponsor of Bill S-11, Senator Donald Plett, noted the value to the Canadian food industry of having legislation and inspection practices that are aligned with those of Canada's international trading partners in order to facilitate trade and be able to remain competitive in the global market.²⁵ The United States recently introduced new legislation to modernize its food safety framework; the American *Food Safety Modernization Act* came into effect in January 2012.²⁶ The Act is under the authority of the U.S. Food and Drug Administration (FDA).²⁷ According to the FDA, the new legislation will allow for a preventive, rather than

reactive, approach to food safety, with new provisions relating to inspection, response and imported foods.

2 DESCRIPTION AND ANALYSIS

Bill S-11 contains 111 clauses. Essentially, the bill consolidates the three inspection statutes administered by the CFIA – MIA, FIA and CAPA – as well as the food provisions of the *Consumer Packaging and Labelling Act*. The bill also introduces the prohibition of several activities and continues the board of arbitration established under CAPA as well as the review tribunal established under the AAFAMPA. The following description summarizes selected clauses contained in the bill.

2.1 INTERPRETATION (CLAUSE 2)

Clause 2 defines many terms as they are used in the bill. Most of these have appeared in existing legislation. One new and significant term used in Bill S-11 is “food commodity,” which is defined as any food that meets the definition of food under the *Food and Drugs Act*, any plant or animal or part of a plant or animal from which food, as defined by the *Food and Drugs Act*, may be derived, or anything “prescribed” to be a food commodity, which means defined as a food commodity through regulations.²⁸

2.2 PROHIBITIONS (CLAUSES 4 TO 19)

Clause 4 prohibits importing a food commodity that, in accordance with section 4 of the *Food and Drugs Act*, cannot be sold. Clause 5 prohibits the sale of food that is the subject of a recall order under section 19(1) of the *Canadian Food Inspection Agency Act* (CFIA Act). Clause 6(1) establishes a prohibition against manufacturing, preparing, packaging, labelling, selling, importing or advertising a food commodity in a manner that is false, deceptive, or misleading. Labelling, packaging or advertising food commodities in contravention of the regulations is a contravention of clause 6(1) (clauses 6(2) and 6(3)). Clauses 7, 8 and 9 introduce prohibitions against tampering, threats of tampering, and creating the false impression that a food may have been tampered with, with intent, to render a food commodity injurious to human health.

Tampering offences were not previously part of the Canadian food safety framework. Tampering offences were proposed in Bill C-51, but since that bill did not proceed past second reading, those offences did not become law.

Clauses 10 through 13 introduce prohibitions against possessing, sending, conveying, selling and advertising food commodities that have been or will be imported, exported and moved interprovincially, unless the person is authorized to do so by licence or registration, or the requirements of the regulations have been met.

Clause 14 prohibits the use of inspection marks or grade names not authorized by regulation, as well as the advertisement or sale of anything that uses such inspection marks or grade names (clause 14(1)). This prohibition extends to any mark that might be mistaken for an inspection mark or grade name (clause 14(2)).

Clauses 15, 16 and 17 create prohibitions against deceiving or hindering anyone performing their enforcement duties under the bill. Clause 15 prohibits anyone from making false or misleading statements, or providing false or misleading information, to anyone carrying out their duties and functions under this Act, including deception in licence and registration applications. Clause 16 prohibits anyone from hindering or obstructing these individuals from performing their duties. Clause 17 makes it an offence to alter, falsify or destroy documents that must be kept or provided under the bill, to alter a document issued under this Act, or to use or possess such an altered document. While obstruction of an official generally is prohibited under all of the existing food safety Acts, some of these specific prohibitions are new, including the prohibition against providing false or misleading information in licence applications (previously only featured in Bill C-51, which never passed into law), and the prohibitions on possessing and using falsified documents.

Clause 18 establishes the new prohibition against possessing or using a document that resembles an official document issued under the bill. Clause 19 stipulates that, subject to the regulations, the provisions of this Act do not apply to persons carrying out activities solely for personal use. Neither of these clauses is found in the core food safety and inspection statutes: the *Food and Drugs Act*, MIA, FIA, CAPA and the CFIA Act (collectively referred to here as the “food safety Acts”).

2.3 REGISTRATIONS AND LICENCES (CLAUSES 20 TO 22)

Clause 20 allows the minister of Agriculture and Agri-Food to issue registrations or licences, or both, that authorize persons to convey a prescribed food commodity interprovincially or to import or export it, or to conduct regulated activities in respect of that food commodity. Conditions of registration and licensing can be set in regulations and are subject to any additional conditions that the minister considers appropriate. For the first time, Bill S-11 makes such registrations and licences explicitly non-transferable (clause 20(5)).

The bill defines establishments as any place, including a conveyance, in which a food commodity is manufactured, prepared, stored, packaged or labelled. With respect to establishments, clause 21 authorizes the minister to issue registrations for carrying out prescribed activities for prescribed food commodities that have been imported, or that are to be exported or conveyed interprovincially, including registering establishments as locations where imported foods may be sent in order for inspectors to carry out their food-related duties. The applicant for an establishment’s registration is deemed the registration holder and is obligated to comply with the conditions that have been prescribed or that the minister deems appropriate (clauses 21(2), 21(3) and 21(4)). Registration is non-transferable (clause 21(6)) and all food commodities within a registered establishment are subject to the bill (clause 21(7)). Clause 22 allows the minister to amend, suspend, cancel or renew registrations or licences.

2.4 ADMINISTRATION AND ENFORCEMENT (CLAUSES 23 TO 45)

2.4.1 CERTIFICATE AND INSPECTION (CLAUSES 23 TO 27)

Clause 23 specifies that inspectors must be given certificates in a form established by either the president of the CFIA or the president of the Canada Border Services Agency. If requested, the inspector must show this certificate to the establishment's owner upon entry into an establishment.. Clause 24 establishes the authority for inspectors to enter a place and the powers they are given in order to verify compliance or prevent non-compliance with the bill. The list of inspector powers consolidates inspector powers from MIA, FIA and CAPA and their respective regulations. Additional inspector powers in Bill S-11 that are not part of the existing food safety Acts include the power to turn on computers and examine or copy data, or to have this done for them; the power to use copying equipment or to have copies provided to them; the power to take photographs or make recordings; the power to order a person to identify themselves; the power to order a person to start or stop an activity regulated under this bill; the power to prohibit or limit access to a place or thing in the place; the power to remove things from a place; and the power to order the person responsible for a conveyance to stop it or move it.

Finally, clause 24(4) permits individuals to accompany inspectors to help them perform their functions; allows inspectors and their aides to enter or pass through private property, other than a residential home, in order to get to a place for the purpose of inspection (clause 24(5)); and requires that every person in that place provide all reasonable assistance to the inspector (clause 24(6)). Clause 25 grants inspectors the authority to seize and detain anything that they have reasonable grounds to believe was used or obtained in contravention of the bill.

Clause 26(1) states that inspectors can only enter a dwelling-house with the occupant's consent or a warrant. For a purpose related to verifying compliance or preventing non-compliance with Bill S-11, clause 27 allows an inspector to order a person to provide any specified document, information or sample.

2.4.2 DEALING WITH SEIZED THINGS AND OTHER MEASURES (CLAUSES 28 TO 30 AND CLAUSES 32 TO 33)

Clause 28 states that persons are prohibited from removing, altering or interfering with anything seized under the bill. Clause 29 lays out the powers of inspectors with respect to seized items. These powers include storing or moving the thing seized to another place at the expense of the owner or the person in charge of the item seized (clause 29(a)), ordering the owner to store or move the item seized (clause 29(b)), or, if the thing seized is perishable or, in the inspector's opinion, presents a risk of injury to human health, disposing of it. Clause 30 specifies that the inspector must release the item seized if he or she is satisfied that the item is in compliance with the bill and regulations.

If an inspector has reasonable grounds to believe that an imported food commodity either does not meet the requirements of the regulations, or was imported in contravention of the bill or the regulations, clause 32(1) and (2) allows the inspector

to issue a notice either in person or by registered mail to the owner, importer or other person responsible for the imported food commodity to remove it from Canada if possible or otherwise to destroy it. Failure to comply within the specified timeframe results in forfeiture of the food commodity, which then may be discarded (clause 32(3)). The notice requirements regarding the removal or destruction of seized items were not part of the existing food safety Acts. Another new development is that an inspector may order forfeiture without application to a court or tribunal if the notice period elapses. Under the existing food safety Acts, only courts and tribunals have been empowered to order forfeiture upon finding a violation or upon conviction. The inspector's forfeiture order can be suspended (clause 32(4)) or cancelled (clause 32(5)) in certain circumstances.

Clause 33 empowers the minister of Agriculture and Agri-Food to apply to a court of competent jurisdiction for an injunction ordering a person to refrain from doing anything that may constitute or be directed toward the commission of an offence under the bill. The court may also order a person to take action to prevent an offence under the bill from being committed. Generally, 48 hours' notice is required before the order can be made (clause 33(2)). Prior to Bill S-11, only the CFIA Act had explicitly included the power to seek an injunction.

2.4.3 FORFEITURE AND ANALYSIS (CLAUSES 34 TO 36 AND CLAUSE 38)

Clauses 34 and 35 set out the minister's powers of forfeiture and disposal of seized things. These powers may be exercised as long as proceedings have not begun for a related violation or offence. In certain circumstances, the minister may elect that a seized item be forfeited to the Crown (clause 34(1)). Clause 36 states that an item may be seized by the Crown and disposed of as directed by the minister, if a person is found by the court or by the review tribunal established under AAFAMPA to have committed a violation or offence. If the review tribunal or court does not order the item's forfeiture, it must be returned pending payment of fine or penalty, if applicable.

Clause 38 authorizes inspectors to send samples for analysis.

2.4.4 OFFENCES (CLAUSES 39 TO 40 AND CLAUSES 44 TO 45)

The bill substantially increases the penalties for contraventions from those provided in MIA, FIA and CAPA. The penalties for contravening a provision of the bill are consolidated and increased for a summary conviction offence from a maximum \$50,000 fine and/or six months' imprisonment (MIA, section 21(4), CAPA, section 33(1)(a)) or \$20,000 fine and three months' imprisonment (FIA, section 17.1(a)(i)), to a maximum \$250,000 fine and/or imprisonment of not more than six months. For a subsequent offence, this is increased to a maximum of \$500,000 and/or imprisonment of not more than 18 months (clause 39(1)(b)).

For an indictable offence, the penalty has been increased from a maximum \$250,000 fine and/or two years' imprisonment (MIA, section 21(1), CAPA, section 33(1)(b)) or \$100,000 fine and/or five years' imprisonment for a person or \$250,000 fine for a corporation (FIA, section 17.1(b)) to a maximum \$5-million fine and/or two years' imprisonment (clause 39(1)(a)). Due diligence is, however, an available defence,

which means that if the person committing the offence can demonstrate that he or she exercised the level of judgment, care, prudence or activity that a person would reasonably be expected to exercise to avoid committing the offence in question, he or she might be found not guilty under the bill (clause 39(2)).

The bill also establishes penalties for knowingly or recklessly contravening the provisions of the bill. In the case of a summary conviction offence, the penalty for a first offence is a maximum \$500,000 fine and/or 18 months' imprisonment; for a subsequent offence, the penalty is a maximum \$1 million and/or imprisonment of two years (clause 39(3)(b)). In the case of an indictable offence under this section, the amount of the fine is at the court's discretion, or the offender can be sentenced to no more than five years' imprisonment, or both (clause 39(3)(a)).

Clause 39(4) allows for the prosecution of an entity's directors, officers, agents or "mandataries" (persons acting under a mandate) even if the entity itself is not prosecuted.

Clause 39(5) allows for the prosecution of an entity for an offence committed by one of its directors, officers, agents or mandataries unless the entity can establish that it had no knowledge of the commission of the offence and it exercised due diligence to prevent it.

Clause 40 states that an offence committed under the bill, if committed or continued for more than one day, constitutes a separate offence for each day it was committed.

Clauses 44 and 45 establish presumptions based on information available on the labels or packaging of food commodities. Under clause 44, if a label permits the identification of a person who manufactured, prepared, stored, packaged, labelled or imported a food commodity, this is considered proof, in the absence of evidence to the contrary, that the person in question in fact manufactured, prepared, stored, packaged, labelled or imported the food. Clause 45, similarly, makes it proof that a food commodity was produced in an establishment if its package bears the name or address of that establishment.

2.5 GENERAL PROVISIONS

2.5.1 DISCLOSURE OF INFORMATION (CLAUSES 46 AND 47)

Clauses 46 and 47 outline conditions for the disclosure of personal information and confidential business information. The minister may, under prescribed circumstances, disclose to the public personal and confidential information obtained under the bill. The minister may also disclose such information to a person or government where there is a risk of injury to human health or in the event of a recall.

2.5.2 EXPORT CERTIFICATES, SAMPLES AND INTELLECTUAL PROPERTY (CLAUSES 48 TO 50)

Clause 48 introduces the use of export certificates, which had not been available under existing legislation. Clause 51(1)(r) sets out the authority to make regulations

on the issuance of these certificates. Another new power is introduced in clause 49, which sets out the minister's right to dispose of any samples in a manner that the minister deems appropriate. Clause 50 sets out the Crown's intellectual property rights in its inspection mark and grade name in a manner similar to the relevant sections of MIA and CAPA.

2.5.3 REGULATIONS (CLAUSE 51)

Clause 51 sets out the Governor in Council's authority to make regulations on several topics. Many of the regulation-making powers included are similar to those set out in the statutes to be repealed; for example, those related to inspection marks and grade names (clause 51(1)(d)), and to equipment, sanitation and operation standards (clause 51(1)(h), (i) and (j)). The requirement that holders of licences and registrations post bonds or provide suretyships (clause 51(1)(l)) comes directly from CAPA. Some of the listed regulation-making powers are very similar to several powers outlined in the *Food and Drugs Act*, which will continue to be in force. It appears that there could potentially be duplication of powers if regulations are in fact promulgated under these related sections. For example, the provisions relating to the authority to prescribe the composition, purity or quality of a food are found in both Bill S-11 (clause 51(1)(b)) and the *Food and Drugs Act*.

Some regulation-making powers are new. Some examples include the power to define false or misleading information (clause 51(1)(a)) (although it was included in Bill C-51), the power to specify criteria for determining what may be considered personal use (clause 51(1)(f)), the power to issue export certificates and certificates confirming that an establishment meets the requirements of the regulations (clause 51(1)(q) and (r)), the power to recognize various systems related to food safety and inspection ((clause 51(1)(t)), and the power to grant certification of food commodities (clause 51(1)(u)).

2.5.4 INCORPORATION BY REFERENCE (CLAUSES 52 TO 55)

In another new aspect of the bill, clause 52 permits other documents to be incorporated by reference into the regulations. Requirements imposed under clauses 53 to 55 deal with the accessibility of such documents to the public. Although they do not have to be separately published in the federal government's *Canada Gazette* (clause 55), any documents incorporated by reference must be accessible (clause 53), and no person may be found guilty of an offence or receive an administrative sanction on the basis of such documents unless they were accessible at the time of the alleged contravention (clause 54).

The *Jobs, Growth and Long-term Prosperity Act*, which received Royal Assent on 29 June 2012, amended the *Food and Drugs Act* to allow for incorporation by reference under that legislation as well.

2.5.5 INTERIM ORDERS AND COSTS (CLAUSES 56 AND 57)

Another new power the minister is granted under this bill is the authority to make interim orders where he or she believes immediate action is required to deal with a

significant direct or indirect risk to health, safety or the environment. According to clause 56, an interim order can only deal with the types of provisions the minister could otherwise make through the regulations. The order can last no more than a year, and less than 14 days if not approved by the Governor in Council. It will also cease to have effect on the day that any regulation with the same effect came into force. The possibility of conviction under an interim order not published in the *Canada Gazette* is limited to situations where that order was brought to the attention of the person who allegedly committed the offence, or reasonable steps were taken to notify those likely to be affected.

Clause 57 sets out the Crown's authority to apply to a court to recover costs associated with inspection, moving, seizure and detention, forfeiture, disposal, return or release of anything in the bill. The existing food safety Acts only contemplate the recovery of fines.

2.5.6 LIMITATION ON LIABILITY (CLAUSES 58 AND 59)

Clause 58 limits the Crown's liability for expenses incurred in the administration of the bill, including loss or damage and fees. Clause 59 exempts from liability any person carrying out their duties under the bill in good faith.

2.6 BOARD OF ARBITRATION

Bill S-11 carries forward the board of arbitration set out in CAPA. Specifically, section 4(1) of CAPA, which continued an existing board, is itself maintained by Bill S-11. Bill S-11 does not directly continue the review tribunal as established under CAPA, but rather relies on the tribunal that was in place as a result of the amendments to CAPA made through the AAFAMPA. The bill refers to the outgoing CAPA tribunal as the "former Tribunal" and the tribunal continued by the AAFAMPA as the "new Tribunal" – the review tribunal continued by section 27(1) of the AAFAMPA.

2.6.1 COMPOSITION, CHAIRPERSON, AND REMUNERATION AND EXPENSES (CLAUSES 60 TO 64)

These provisions mirror those in CAPA, with the exception of CAPA's references to its review tribunal. Members of the existing board of arbitration may be reappointed in the same or another capacity. The composition, chairperson, tenure, duties, remuneration and expenses remain the same as under the CAPA framework.

2.6.2 STAFF, ROLE AND REGULATIONS (CLAUSES 65 TO 67)

The provisions relating to the board of arbitration's staff again are identical to those in CAPA, with the exception of references to the review tribunal. The role of the board of arbitration under this bill is to hear complaints about violations of the bill or violations of regulations established with respect to the performance of the tribunal's role, to be set by the Governor in Council.

2.7 REVIEW (CLAUSE 68)

The minister must review the provisions and operation of Bill S-11 five years after it comes into force, and every five years after that. That report must be presented to each House of Parliament (clause 68(2)).

2.8 TRANSITIONAL PROVISIONS (CLAUSES 69 TO 75)

The bill sets out a number of transitional provisions, most of which relate to the AAFAMPA review tribunal, discussed here in section 2.10, “Related and Consequential Amendments.” Essentially, the transitional provisions for the review tribunal (clauses 69 to 72) maintain the existing chairperson and members from the continued tribunal that resulted from the amendments to CAPA made through the AAFAMPA. Any proceedings that were before the former tribunal will be taken up by the new review tribunal as soon as the provisions come into effect.

Clause 73 deals with licences and registrations obtained, suspended or sought under the existing legislative framework. It allows all such licences and registrations to be treated as though they were issued under the new provisions of Bill S-11.

Clause 74 states that any goods seized under any of the existing food safety legislation that have not yet been returned, released forfeited, or removed from Canada will be dealt with under Bill S-11’s “seized goods,” “other measures” and “forfeiture” provisions in clauses 28 through 37.

Clause 75 grants power to the Governor in Council to enact regulations relating to transitional measures.

2.9 REPEALS (CLAUSES 76 TO 78)

The bill repeals MIA, FIA and CAPA.

2.10 RELATED AND CONSEQUENTIAL AMENDMENTS (CLAUSES 79 TO 108)

The bill makes related and consequential amendments to 14 federal statutes. Most of these amendments relate to the establishment of the review tribunal under the AAFAMPA.

2.11 COORDINATING AMENDMENTS (CLAUSES 109 AND 110)

Clause 109 deals with the coordination of the bill’s coming into force with sections of *An Act to amend the Canada Grain Act and the Agriculture and Agri-Food Administrative Monetary Penalties Act and to repeal the Grain Futures Act*. Clause 110 deals with the coordination of the bill’s coming into force with that of the Jobs, Growth and Long-term Prosperity Act.

2.12 COMING INTO FORCE (CLAUSE 111)

This bill, except for clause 73 (related to permits, licenses and registration), clause 94 (amendments to the *Health of Animals Act*), clause 109 (coordinating amendments) and clause 110 (relating to the Jobs, Growth and Long-term Prosperity Act), comes into force on a day to be fixed by order of the Governor in Council.

3 COMMENTARY

Public response from industry to Bill S-11 has been very positive. Major stakeholders, including the Canadian Cattlemen's Association, the Canadian Federation of Agriculture, the Canadian Meat Council, the Canadian Poultry and Egg Processors Council, and the Canadian Supply Chain Food Safety Coalition, among others, expressed their support for the bill soon after its tabling.²⁹

A major focus in media reports on Bill S-11 was the significant increase in the maximum available fine, which represents a 20-fold increase over fines available under the existing framework.³⁰ When he appeared before the Standing Senate Committee on Agriculture and Forestry during hearings on Bill S-11, James Laws, executive director of the Canadian Meat Council, expressed reservations about the magnitude of the increase.³¹

Bill S-11's provisions relating to incorporation by reference received a mixed response from stakeholders appearing before the Standing Senate Committee on Agriculture and Forestry. Two witnesses indicated that incorporation by reference would streamline the often cumbersome process of recognizing new regulations related to food additives, standards of composition and health claims.³² Another was concerned that incorporation by reference would mean less consultation with industry.³³

The bill's traceability requirements also got a mixed response from stakeholders. The Canadian Federation of Agriculture praised the government's initiative on the topic in the media, saying that traceability can "enhance food safety and increase the competitiveness of our industry."³⁴ Meanwhile, some other witnesses before the Senate committee were concerned about the implications for their respective industries. One suggested a voluntary approach to traceability is appropriate, since mandatory traceability requirements present challenges in relation to systems integration and information sharing.³⁵ Another noted that meeting traceability requirements in the grain industry, where producers commingle their crops, could be a significant burden.³⁶

Despite frequent mention in the media in the months leading up to the tabling of Bill S-11³⁷ and discussion among the opposition in the Senate,³⁸ stakeholders did not raise any significant concerns about budget cuts to the CFIA or the possibility of job losses among inspectors.

Finally, a number of witnesses expressed concern about the fact that the bill will modernize federally inspected meat production, but will have no effect on provincially

inspected facilities. This, they warned, could create two tiers of food safety as it relates to meat inspection.³⁹

NOTES

1. Canadian Food Inspection Agency [CFIA], [Safe Food for Canadians Act: What it means for Canadian industry](#).
2. CFIA, [Safe Food for Canadians Act: What it means for Consumers](#).
3. Note that the *Food and Drugs Act* includes an offence relating to the sale of unsafe or adulterated food, but includes no offences relating either to performing the adulteration or tampering with food.
4. See, generally, Marlisia Tiedemann, [The Federal Role in Health and Health Care](#), Publication no. 2008-58-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 October 2008.
5. *R. v. Wetmore*, [1983] 2 S.C.R. 284 [*Wetmore*].
6. Office of the Auditor General of Canada, Chapter 25, "[Canadian Food Inspection Agency – Food Inspection Programs](#)," in *2000 December Report of the Auditor General of Canada*, December 2000, para. 25.18.
7. See, for example, *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 350.
8. *Wetmore*.
9. *Food and Drugs Act*, R.S.C., 1985, c. F-27, s. 4.
10. The CFIA administers 12 federal Acts, as well as the food provisions of the *Food and Drugs Act*, and regulations under several other federal Acts. For a complete list, see CFIA, [Acts and Regulations](#).
11. CFIA, [Safe Food for Canadians Act: An Overview](#) [CFIA Overview].
12. CFIA, [Acts and Regulations](#).
13. David Johansen, [Legislative Summary of Bill C-27: Canadian Food Inspection Agency Enforcement Act](#), Publication no. LS-500E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 January 2005.
14. *Ibid.*, p. 2.
15. House of Commons, Standing Committee on Agriculture and Agri-Food, [Evidence](#), 1st Session, 38th Parliament, 10 February 2005, 1610 (Mark McCombs, Head and General Counsel, Legal Services, Canadian Food Inspection Agency).
16. Treasury Board of Canada Secretariat, "[Health Canada: Horizontal Initiatives 5](#)," 2011–2012 RPPs [Reports on Plans and Priorities] – *Horizontal Initiatives*.
17. CFIA, [Canadian Food Inspection Agency: The Food Safety Action Plan \(FSAP\) ... Building on the present/Strengthening the future](#).
18. *Ibid.*
19. CFIA, [Imported Food Sector Regulatory Proposal](#).
20. Government of Canada, Listeriosis Investigative Review, [How Does Canada's Food Safety System Work?](#).

21. See, for example, Carly Weeks, "Consumer Safety: Progressive Licensing; Experts sound alarm on drug-approval plan," *The Globe and Mail* [Toronto], Metro Edition, 9 April 2008; Karen Gram, "Natural health products unfairly hit, critics say," *The Vancouver Sun*, 10 May 2008; Carly Weeks, "Bill C-51: Regulating herbs and vitamins," *The Globe and Mail* [Toronto], Metro Edition, 23 May 2008; Susan Zielinski, "Takin' it to the streets; Protesters oppose natural health products bill," *Red Deer Advocate*, 2 June 2008; André Picard, "Second Opinion; Bill C-51: Natural health products," *The Globe and Mail* [Toronto], Metro Edition, 12 June 2008.
22. Marlisa Tiedemann, [*Legislative Summary of Bill C-51: An Act to amend the Food and Drugs Act and to make consequential amendments to other Acts*](#), Publication no. LS-602E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 24 July 2008.
23. CFIA Overview.
24. Government of Canada, Listeriosis Investigative Review, "[List of All Recommendations](#)," 2009.
25. Senate, [*Debates*](#), 1st Session, 41st Parliament, 11 June 2012, p. 1950.
26. U.S. Food and Drug Administration, [*The New FDA Food Safety Modernization Act \(FSMA\)*](#).
27. U.S. Food and Drug Administration, [*Background on the FDA Food Safety Modernization Act \(FSMA\)*](#).
28. [Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on Marcy 29, 2012 and other measures](#), which received Royal Assent on 29 June 2012, amended the definition of food under the *Food and Drugs Act*.
29. Canadian Meat Council, Canadian Poultry and Egg Processors Council, and Further Poultry Processors Association of Canada, "[Canada's Meat, Poultry and Egg Processors Welcome Bill S11 – Safe Food for Canadians Act](#)," News release, 8 June 2012; Canadian Cattlemen's Association, "[CCA welcomes proposed new Safe Food for Canadians Act](#)," News release, 7 June 2012; Canadian Federation for Agriculture, "[CFA Welcomes the Safe Food for Canadians Act](#)," News release, 8 June 2012 [Canadian Federation for Agriculture].
30. See, for example, Joanna Smith, "Tories put food safety rules on one plate: Update of regulations follows deaths in 2008 due to listeriosis," *Toronto Star*, 8 June 2012; Sarah Schmidt, "Food-safety bill to be tabled today raises maximum fine to \$5 million," *The Gazette* [Montréal], 7 June 2012; Meagan Fitzpatrick, "[Food safety laws to be streamlined in overhaul](#)," *CBC news*, 7 June 2012.
31. Senate, Standing Committee on Agriculture and Forestry, [*Minutes of Proceedings*](#), 1st session, 41st Parliament, 28 June 2012, p. 1000-31 [AGFO].
32. Ibid, p. 1000-28 (Gordon Harrison, President of the Canadian National Millers Association), and p. 1000-25 (Rory McAlpine, Vice President of Government and Industry Relations at Maple Leaf Foods).
33. Ibid., p. 1000-5 (James Laws, Executive Director of the Canadian Meat Council).
34. Canadian Federation for Agriculture (8 June 2012).
35. AGFO, p. 1000-34 (Rory McAlpine, Vice President of Government and Industry Relations at Maple Leaf Foods).
36. AGFO, p. 1000-35 (Gordon Harrison, President of the Canadian National Millers Association).

37. Sarah Schmidt, "Food inspection agency budget cut by \$56.1 million: Web-based tool will encourage consumers to take concerns to companies," *The Vancouver Sun*, 30 March 2012; Bill Curry, "Food-safety workers among hardest-hit by Harper budget cuts," *The Globe and Mail* [Toronto], 11 April 2012; Bill Curry, "Minister muddling impact of food-inspection cuts, union warns," *The Globe and Mail* [Toronto], 24 April 2012.
38. Senate, [Debates](#), 1st Session, 41st Parliament, 20 June 2012, p. 1650.
39. AGFO, pp. 1000-6, 1000-8 and 1000-40.