

An Analysis of Legal Issues Arising from a National Organic Standard in Canada

Prepared by
Patricia Farnese
Senior Law Fellow
Centre for Studies in Agriculture, Law and the Environment

November 2003



Table of Contents

Overview of Existing National Organic Standards.....	5
USA.....	5
European Union (EU)	9
Australia.....	11
Canada.....	16
Legal Elements of a Canadian National Organic Program.....	18
The Constitutionality of the National Organic Program.....	20
Trade and Commerce	23
Peace, Order and Good Governance.....	26
Criminal Law	29
Spending Power	32
Coordination with Existing Canadian Legislation.....	33
Canada Agricultural Products Act	33
Food and Drugs Act.....	36
Consumer Packaging and Labelling Act.....	39
Conclusions.....	41

Introduction

Canadian regulators, supported by a large segment of the organic industry, are working towards the implementation of a national organic regulatory system. Except for Quebec, organic growers and producers are currently self-regulated through a network of independent certification bodies. Quebec is the only province that requires mandatory certification through a provincial certification agency.¹ On a national scale, the Standards Council of Canada has published the National Organic Standard of Canada (NOSC). The NOSC is designed to be acceptable across the country for a broad range of products. These standards, however, remain voluntary and only two certification bodies have completed the process to become NOSC compliant.

Proponents of a national organic regulatory system contend that it will establish uniform production and processing standards and control the use of the term “organic” on food labels thereby protecting the public from misleading or fraudulent use of the term. A national standard will also facilitate the international trade of Canadian organic products by forming one internationally acceptable accreditation body.

¹ Conseil d'Accreditation du Quebec.

International pressures to create a national organic regulatory system are likely the principle driving force behind the push to standardize organic regulation in Canada. The European Union (EU) has already provided notice that it will require national regulation by 2005 if Canadian organic products wish continued access to European markets. In addition to the EU, the United States (US), Japan, and Australia, among others, have already established mandatory national organic standards. Without an internationally recognised national standard, Canadian producers will have to verify, individually or as a part of a certification body, that their practices are compliant with those of each country to which they wish to export. By having one, internationally recognized standard, it is argued that trade in Canadian organic products will flow more easily into international markets.

This paper begins with a review of the organic standards of the United States, the European Union, and Australia. The regulation of the organic industry in these countries is representative of the legislative context of national organic standards in other jurisdictions. In addition, the NOSC is discussed. A review of these standards will assist in identifying the likely components of an effective national organic standard in Canada. Once these components are outlined, a number of legal issues are addressed concerning the design and implementation of a national organic program. Principal

among these issues is the constitutionality of a national organic program and how this program will fit within existing Canadian legislation. The paper concludes with a few recommendations about the content and implementation of the national organic system in order to minimize the legal barriers to its operation.

Overview of Existing National Organic Standards

USA

The Organic Foods Production Act (OFPA) of 1990² required the USDA to develop national standards for the marketing of organically produced agricultural products in order facilitate trade in these goods and to assure consumers that these products meet consistent, uniform standards. On December 21, 2000, these regulations were published as a final rule thereby creating the National Organic Program (NOP).³

The NOP requires that agricultural products labelled as organic originate from farms or handling operations certified by a State or private agency that has been accredited by the USDA. Producers and handlers are required to submit an organic system plan that outlines all elements of their

² 7 U.S.C. §§ 6501-6522.

³ The regulations became effective as of October 21, 2002 and are administered by the Agricultural Marketing Service (AMS) of the United States Department of Agriculture (USDA).

operation.⁴ Once certified, these operations have the option of displaying both the USDA Organic seal and the certification body symbol.⁵

The NOP is stand alone legislation that does not contemplate involvement by the various states. Interestingly, the U.S. chose not to create the organic program within the existing structure which regulates food production. While the USDA has overall authority for the OFPA and its regulation, its administration is the responsibility of the AMS rather than the Food and Drug Agency (FDA). This makes an unambiguous statement that the USDA sees differentiating organic products from others as merely a matter of marketing. The NOP is not a statement as to the health, safety, and nutrition of organic products. The USDA has made it clear that the procedure established under the FDA to evaluate health, safety, and nutrition of all agricultural products, including organics, is sufficient.

The NOP has broad applicability. A limited number of specific types of operations are either exempted from certification or excluded entirely. Of most significance is the exemption of operations with gross annual sales of \$5000 or less.⁶ This exemption was principally designed to benefit small farmers who sell directly to consumers.⁷ A number of factors may justify

⁴ 7 U.S.C. § 6513. See also 7C.F.R. §205.201.

⁵ 7 C.F.R. § 205.311(a).

⁶ 7 C.F.R. § 205.101(a)(1).

⁷ 65 Fed. Reg. 80,547, 80,552 (prefatory comments to final rule with request for comments).

this exemption including the belief that certification would create an unmanageable burden for such small farmers. Furthermore, because the farmers have direct contact with their consumers, the consumer is in a position to learn about the farmer's production system and does not need to rely on labels for that information. It is important to note that although the exempted operations need not certify, they are still required to comply with the labelling and record-keeping regulations as well as the co-mingling of organic and non-organic products provisions if they identify their products as organic.⁸

The certification of retail food establishments raised a great deal of public concern. Of concern was the content of potential standards, the capacity of certifiers to evaluate these operations, and the reality of trying to certify the sheer volume of applicable establishments.⁹ The NOP reflects these concerns. Those establishments that use products previously labelled as organic to process raw and ready-to-eat foods as well as those that sell only organic products that are pre-packaged elsewhere and remain so while in the handler's control are excluded from certification.¹⁰ The prefatory

⁸ 7 C.F.R. § 205.101(a)(4)(i)-(iii).

⁹ 65 Fed. Reg. 80,547, 80,553 (prefatory comments to final rule with request for comments).

¹⁰ 7 C.F.R. § 205.101(b)(1)-(2)

comments to these regulations make it clear that excluded operations, however, may become subject to the NOP at a future date.¹¹

Similar to all other national standards reviewed, the NOP prohibits the use of all synthetic substances unless the substance appears on the National List.¹² The National List is compiled from recommendations submitted to the USDA by the National Organic Standards Board.¹³ The Board's is established pursuant to the OFPA and must include four organic producers, two organic distributors, one organic retailer, and three environmental protection and resource conservation experts.¹⁴ In general, the NOP imposes maximum rather than minimum production standards. Consequently, independent agencies are unable to impose stricter standards.

One unique feature of the NOP, however, is its inclusion of an adverse action appeals process. Producers and handlers who are denied certification or have certification revoked or suspended by a certifying agent can appeal the decision to the Administrator for the Agricultural Marketing Service, USDA or her agent.¹⁵

The NOP also includes extensive provisions dealing with investigating and enforcing NOP compliance by handlers, producers and

¹¹ 65 Fed. Reg. 80,547, 80,553 (prefatory comments to final rule with request for comments).

¹² 7 U.S.C. §§ 6504, 6510, 6517, & 6518

¹³ 7 U.S.C. § 6518.

¹⁴ 7 U.S.C. § 6518(b)(1)-(4).

¹⁵ 7 C.F.R. §§ 205.680 & 205.681.

certifying agents.¹⁶ Operations that violate NOP regulations but still label their food as organic can face penalties of up to \$10,000 per violation in addition to suspension or revocation of certified status.¹⁷

European Union (EU)

The European Union (EU) passed its organic standard in 1991.¹⁸ The standard provides a framework of production, labelling, and inspection rules that regulate unprocessed and processed livestock and crop products and feed labelled as organic within the Union.¹⁹ Each member country is charged with the implementation of the rules through national certification and inspection systems.²⁰ Each country is free to choose either a government-operated inspection system or a system operated by private inspection bodies.²¹

EU member countries have overwhelmingly chosen to operate their organic system with private certification bodies. Only Denmark and Finland have a state run certification process.²² Because each country is free to design its own system, the number of private certification bodies in any one

¹⁶ 7 C.F.R. 44 205.660 – 205.668.

¹⁷ 7 C.F.R. §§ 205.662(g) and 205.100(b).

¹⁸ Council Regulation (EEC) No. 2092/91 of 15 June 1991 [hereinafter EU Standard].

¹⁹ *Ibid.* at art. 1.1(a).

²⁰ *Ibid.* at art. 9.1.

²¹ *Ibid.*

²² Gunnar Rundgren, “Overview of the Implementation of the EU Organic Regulatory System” (2002) 9 Organic Standard 3.

country varies dramatically. For instance, there are 23 private certification bodies in Germany and only 1 in Norway, the Netherlands, and Spain.²³

Although organic production is not specifically defined in the EU Standard, only products that have been produced in compliance with the standard or have been imported from a third country can be labelled or advertised as organic.²⁴ The EU Standard requires operators who produce, prepare, or import organic products to notify the appropriate authority in their state of their activities and submit their undertaking for inspection.²⁵ They must provide the member country with the name and address of the operator, the location of the operation as well as a description of the nature of the operation and its products.²⁶ Because, the definition of “operator” is not provided in the EU standard, each member country must determine who is covered on its own. In addition, each member country can determine its own enforcement mechanism and penalties for non-compliance with the EU Standard.²⁷

To assist the member countries with the regulation of the organic industry, the EU Standard provides a comprehensive list of principles of

²³ *Ibid.* at 7.

²⁴ *Supra* note 18 at art. 5.5.

²⁵ *Ibid.* at art. 8.1.

²⁶ *Ibid.* at Annex IV.

²⁷ *Ibid.* at art. 10a.

organic production at the farm level²⁸ and farm inputs that can be used in an organic system.²⁹ The EU Standard also establishes minimum inspection requirements and precautionary measures that must be observed in order to label or advertise a product as organic within the EU.³⁰ The EU Standard also contains a specific community organic logo that can be used to identify products that conform with the standard.³¹ The logo is slightly modified for each member country.

Australia

Australia has regulated organic and bio-dynamic agriculture since 1992. The third draft of the *National Standard for Organic and Bio-Dynamic Produce*³² is expected to be fully implemented by December 1, 2003.³³ The standard is comprised of three distinct components. The first outlines general principles that govern organic and bio-dynamic production. The second component stipulates specific standards that operators of organic and bio-dynamic enterprises must satisfy. The Australian Standard also specifies acceptable derogations from the standards. Overall, the standard establishes “minimum requirements for products placed on the market with

²⁸ *Ibid.* at Annex I

²⁹ *Ibid.* at Annex II

³⁰ *Ibid.* at Annex III

³¹ *Ibid.* at Annex V

³² National Standard for Organic and Bio-Dynamic Produce, Third Edition December 2002. Available at <http://www.bfa.com.au/Pages/standards&marketaccess.htm> [hereinafter Australian Standard].

³³ Tim Marshall, “A National Mark for Australia” (2002) 20 Organic Standard 1.

labelling which states or implies they have been produced under organic or bio-dynamic systems.”³⁴

The Australian Quarantine and Inspection Service (AQIS) is responsible for the administration of the Australian Standard through the accreditation of private certification bodies. These certifiers ensure that those marketing their products as organic conform to the Australian standard. Only certifiers that have applied to and have become accredited by AQIS are permitted to operate in Australia. There are currently 7 accredited certifiers in Australia.³⁵ These certifiers are involved in various production sectors, commodities, and regions.

The specific identification of bio-dynamic production in the Australian standard is unique. Bio-dynamic is defined as:

...an agricultural system that introduces specific additional requirements to an organic system. These are based on the application of preparations indicated by Rudolf Steiner and subsequent developments for management derived from practical application, experience and research based on these preparations.³⁶

³⁴ *Supra* note 32 at Introduction.

³⁵ Rod May and Andrew Monk, *Organic and Biodynamic Produce* (Barton Act, Australia: Rural Industries Research and Development Corporation, 2001) at 2.

³⁶ *Supra* note 32 at art.2.

Notwithstanding the explicit distinction between organic and bio-dynamic production in the definitions, the Australian Standard does not contain specific requirements for bio-dynamic production. Instead, it specifically focuses on organic production. This suggests that the Australian government views all bio-dynamic production as organic therefore requiring bio-dynamic producers to conform to these standards. It is interesting, however, that the use of the term bio-dynamic is not explicitly restricted to those who meet uniquely bio-dynamic production methods.

The Australian Standard outlines that it regulates “operators.” Operators is broadly defines as meaning “a person, including any delegated person, or organisation who is certified for any stage of the supply chain.”³⁷ As a result of this broad definition, the Australian Standard covers the entire organic industry in Australia including importers and exporters. All operators are required to develop and maintain an Organic Management Plan.³⁸ This plan describes the processes an operator follows to ensure that the organic integrity of her products is maintained.

³⁷ *Ibid.*

³⁸ *Ibid.* at art. 3.1.2.

The Australian Standard also contains lists of acceptable farm inputs,³⁹ sanitation, storage, and handling substances,⁴⁰ and processing inputs.⁴¹ The standard contains a detailed list of criteria that must be used to evaluate any modification of these lists.⁴² The National Sub-committee of AQIS is responsible for evaluating applications to alter the Australian Standard including these lists.⁴³

The Australian Standard specifies three types of labels that can be used to identify products as organic. Products can be labelled as “100% organic or biodynamic” if they contain only organic ingredients.⁴⁴ They can be labelled simply as “organic or biodynamic” if 95% of the ingredients are produced in an organic or bio-dynamic system.⁴⁵ Products can also be labelled as “made with organic ingredients” if 70% of the ingredients were produce in compliance with the standard.⁴⁶ Products containing less than 70% organic ingredients are limited to listing the organic identity of individual ingredients in the ingredients list.⁴⁷ This identification must be in the same style and size as all other writing on the ingredients list.

³⁹ *Ibid.* at Appendix I.

⁴⁰ *Ibid.* at Appendix II.

⁴¹ *Ibid.* at Appendix III.

⁴² *Ibid.* at Appendix IV.

⁴³ *Ibid.* at Appendix V.

⁴⁴ *Ibid.* at art. 6.1.

⁴⁵ *Ibid.* at art 6.2.

⁴⁶ *Ibid.* at art. 6.3.

⁴⁷ *Ibid.* at art. 6.4.

The Organic Management Plan must be in place and the operation in compliance with the National Standard for three years prior to products being labelled as organic or bio-dynamic.⁴⁸ After complying with the standard for one year, a product can be labelled as “in-conversion.”⁴⁹ In addition to the specific plant and livestock production requirements, the Australian Standard outlines general principles and standards that relate to landscape management and biodiversity,⁵⁰ soil management,⁵¹ and water management.⁵² It also contains specific requirements for the transportation, storage, preparation and packaging of organic products to prevent contamination with or substitution of non-compliant products.⁵³

Unlike the NOP, the Australian Standard does not contain monetary penalties for violation of labelling laws. Instead, an operator who does not conform to the standard, but still labels her product as organic or bio-dynamic may face a compliance order,⁵⁴ suspension of certification,⁵⁵ or de-certification.⁵⁶ The Australian Standard only permits operators to appeal conditions contained in compliance orders.⁵⁷ In that instance, the operator

⁴⁸ *Ibid.* at art. 3.1.2.

⁴⁹ *Ibid.* at art. 3.2.2.

⁵⁰ *Ibid.* at art. 3.3.

⁵¹ *Ibid.* at art. 3.4.

⁵² *Ibid.* at art. 3.5.

⁵³ *Ibid.* at art. 4.

⁵⁴ *Ibid.* at art. 5.3.1.

⁵⁵ *Ibid.* at art. 5.3.3.

⁵⁶ *Ibid.* at art. 5.4.

⁵⁷ *Ibid.* at art. 5.5.

must submit a request for reconsideration in writing to the certifier. If the operator is not satisfied with the reconsideration, her private legal remedies are preserved. Interesting, the standard is silent as to decisions regarding suspension of certification or de-certification.

Canada

As mentioned in the Introduction, the Standards Council of Canada published voluntary organic standards in 1999. The National Organic Standard of Canada⁵⁸ were developed by the Canadian General Standards Board's (CGSB) Committee on Organic Agriculture. The Committee's membership include representatives from across the country and across the organic industry. As a result, it has been suggested that these standards should form the basis of a mandatory national standard in Canada.

Rather than specifically identifying who the standard applies to, the NOSC establishes “minimum criteria that must be met when food products, inputs and other products used in organic production are defined as organic, or comparable wording.”⁵⁹ It contains specific crop⁶⁰ and livestock⁶¹

⁵⁸ Available at http://www.pwgsc.gc.ca/cgsb/032_310/standard-e.html [hereinafter NOSC].

⁵⁹ *Ibid* at s.1.2. The NOSC describes comparable wording as including bio-dynamic. Unlike the Australian Standard, the Canadian Standard makes no distinction between bio-dynamic and organic production.

⁶⁰ *Ibid.* at s.6.

⁶¹ *Ibid.* at s.7.

production requirements as well as storage, transportation and processing standards.⁶²

The NOSC requires all operators to submit an organic production plan that ensures the organic integrity of the enterprise in order to gain certification.⁶³ The plan needs to be prepared annually by “any person, firm or organization that produces, handles, or processes” products intended to be marketed as organic.⁶⁴ The period of conversion for livestock is 90 days.⁶⁵ Crops must comply with the standard for 24 months and prohibited substances must not have been used for 36 months before they can be labelled as organic for sale.⁶⁶ Prohibited substances are all substances that are not contained on the Permitted Substances List (PSL) contained in Appendix A of the NOSC. PSLs also exist for livestock production,⁶⁷ processing,⁶⁸ and sanitation and packaging.⁶⁹

The NOSC contains some obvious omissions as a consequence of its voluntary nature. For instance, the labelling of products as organic that are not certified under the NOSC is not prohibited. The NOSC does not contain enforcement or penalty provisions. There is also no established procedure

⁶² *Ibid.* at s.9.

⁶³ *Ibid.* at s.5.1.1.

⁶⁴ *Ibid.* at s.3.2.

⁶⁵ *Ibid.* at s.4.3.

⁶⁶ *Ibid.* at s.4.2.

⁶⁷ *Ibid.* at Appendix B.

⁶⁸ *Ibid.* at Appendix C.

⁶⁹ *Ibid.* at Appendix D.

for modification. Last, the NOSC does not prescribe a uniform logo or mark that can be used to identify the product as NOSC compliant.

Legal Elements of a Canadian National Organic Program

Canada can draw on the international organic standards discussed above to develop its own system. From the standards reviewed, the following issues will likely need to be addressed for an organic program to be comprehensive:

- Certification
- Production (including list of acceptable inputs)
- Processing (including list of acceptable additives)
- Transportation
- Storage
- Labelling (including a standard logo)
- Enforcement
- Inspection/Compliance
- Dispute Resolution
- Importation
- Exportation

The ultimate substance of the national organic program is beyond the scope of this paper. It is important, however, to be aware of these elements because their inclusion in a mandatory national organic standard raises numerous legal issues.

The American, European, and Australian standards also identify three main structures Canada can choose from when adopting its own system. The standards above outline three models of national regulation of the organic industry:

- American – Comprehensive federal regulation delivered by federal government agencies or accredited agencies with significant federal involvement.
- European – Minimum requirements provided in an EU Regulation. Each state determines appropriate delivery method.
- Australian – Minimum requirements provided in a national standard, program delivered by accredited certifying agencies.

Like the substantive elements of the national organic program, the structure Canada adopts raises interesting legal issues.

The principal legal concern facing the national regulation of the organic industry is its constitutionality. Other issues arise when one considers how a standard will fit with existing Canadian legislation. Of

particular concern are the *Canadian Agricultural Products Act*,⁷⁰ the *Food and Drugs Act*,⁷¹ and the *Consumer Packaging and Labelling Act*.⁷² The remainder of this paper will identify how these legal issues are influenced by the design and structure of a national organic program.

The Constitutionality of the National Organic Program

The final design of the national organic program will ultimately decide its constitutionality. It is possible that in the event of a legal challenge, some components of the program will be upheld while others will be struck down. As outlined above, a comprehensive organic program will likely contain the following parts: production standards, certification and monitoring procedures, labelling requirements, marketing regulations, importation restrictions, penalty and enforcement procedures, and a dispute resolution process. The following discussion will identify which of these components, the federal government has the authority to implement.

The *Constitution Act, 1867*⁷³ divides authority over different facets of Canadian society between the federal and provincial governments. Section 91 lists the areas where the federal government has exclusive authority while

⁷⁰ R.S., 1985, c.20 (4th Supp.).

⁷¹ R.S. 1985, c.F-27.

⁷² R.S. 1985, c.C-38.

⁷³ (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter the Constitution.].

s.92 outlines the areas of exclusive provincial jurisdiction. If a government legislates outside the authority granted to it in the Constitution, the law is unconstitutional.

Interestingly, agriculture is one of two areas of law, the other being immigration, expressly placed under concurrent federal and provincial jurisdiction.⁷⁴ The federal government's authority to regulate agriculture, however, is paramount to that of the provinces. Paramountcy does not mean that the federal government has an unrestricted right to make laws in relation agricultural matters. Instead, in the event of conflicting federal and provincial laws, the federal government's law will be struck down if it unjustifiably intrudes into an area of exclusive provincial jurisdiction. An intrusion will only be justified if it is deemed necessary and incidental to action taken by the federal government under another head of federal power. The federal power to make laws in relation to agriculture can therefore be limited by the areas of exclusive provincial jurisdiction listed in s.92 of the Constitution.

Of particular concern to any federal initiative in agriculture is the provincial power to make laws in relation to "property and civil rights in the

⁷⁴ *Ibid.* at s.95.

province.”⁷⁵ The courts have defined this to include the power to regulate, among other things, contracts,⁷⁶ labour relations,⁷⁷ professions,⁷⁸ and trades.⁷⁹ Provincial regulation of agricultural production has also been upheld as constitutional pursuant to this power. In fact, the Supreme Court of Canada decision in *Re Agricultural Products Marketing Act* outlines that, on first glance, the provinces’ power to regulate production is exclusive:

In my view, the control of production, whether agricultural or industrial, is prima facie a local matter, a matter of provincial jurisdiction. Egg farms, if I may use this expression to designate the kind of factories in which feed is converted into eggs and fowl, are local undertakings subject to provincial jurisdiction under section 92(10) B.N.A. Act, unless they are considered as within the scope of "agriculture" in which case, by virtue of s. 95, the jurisdiction is provincial subject to the overriding authority of Parliament. In my view the *Carnation* case [[1968] S.C.R. 238] is conclusive in favour of provincial jurisdiction over undertakings where primary agricultural products are transformed into other food products.⁸⁰

Because the regulation of organic agriculture necessarily involves the regulation of agricultural production, it can not be assumed that the federal government has the legal authority to regulate this area. As a consequence,

⁷⁵ *Ibid* at s.92(13).

⁷⁶ *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96.

⁷⁷ *Toronto Electric Commissioners v. Snider* [1925] A.C. 396

⁷⁸ *A-G. Can. v. Law Society of B.C.* [1925] A.C. 396.

⁷⁹ *Re Board of Commerce Act* [1922] 1 A.C. 191 at 198.

⁸⁰ [1978] 2 SCR 1198.

the federal government must look to one of its exclusive powers to find the authority to institute a national organic program. This is because the program would infringe the provinces' exclusive right to make laws in relation to property and civil rights. As will be shown, this may prove to be a difficult task.

Trade and Commerce

Section 91(2) of the Constitution confers jurisdiction over laws in relation to “the regulation of trade and commerce” to the federal government. Although, on its face, trade and commerce would appear to encompass a broad range of activities, this branch of federal power has been interpreted quite narrowly by the courts. The federal trade and commerce power is confined to interprovincial or international trade and commerce and general trade in commerce that affects the entire country.⁸¹ Notwithstanding this narrow interpretation, the claim for national regulation pursuant to the trade and commerce power is assisted by the fact that many Canadian organic products are destined for international markets.

Historically, the courts have not been willing to uphold federal marketing legislation because of its effect on local transactions and

⁸¹ *Supra* note 76 at 113.

contracts. Federal regulation of the oil⁸² and grain⁸³ trade are exceptions to this general rule. With both of these commodities, the products tend to be produced in one province and then transferred to another either for consumption or export. As a consequence, federal regulation of grain and oil is designed to address interprovincial and international trade in these goods. The incidental effect on local transactions is justified in order to ensure the proper administration of the extra-provincial marketing plan.

An element of Canada's national organic standard will include marketing regulations. Specifically, the standard will address when a product can be labelled and advertised as organic. On its face, this would not appear to be different than the labelling restrictions outlined in the *Canada Agricultural Products Act*.⁸⁴ This Act contains extensive regulations concerning grade names and standards for a variety of agricultural products. It can be argued that the use of the term organic can be controlled by the federal government in a similar manner as 'Canada Extra Fancy' apples. The arguments should fail, however, if one considers what the label in both instances identifies. In the apple example, as with all other grade names and standards under *Canada Agricultural Products Act*, the grade indicates a post-production quality identification. In order to have

⁸² *Caloil v. A-G Can.* [1971] SCR 543.

⁸³ *R v. Klassen* (1959) 20 DLR (2d) (Man CA).

⁸⁴ *Supra* note 70 [hereinafter CAPA].

her apples designated 'Canada Extra Fancy,' the apple producer does not need to establish that she produced the apples in a manner specified by the federal government. The apples are simply evaluated for quality post-harvest.

An organic apple, on the other hand, will have to meet the specific organic standards in addition to being graded for quality under *Canada Agricultural Products Act* standards. As mentioned above, the organic standard necessarily requires detailed production regulations to be satisfied. If those regulations are implemented at the federal level, the regulation of production significantly changes the nature of an organic label thus raising the issue of constitutionality. Unlike the grain or oil example provided, it will be difficult to argue that the regulation of production is incidental to the overall regulation of interprovincial or international trade in organic products. The regulation of production is fundamentally the aim of a national organic program.

The trade and commerce power, however, can be relied on to uphold importation restrictions and prohibitions that do not conform to a national organic standard.⁸⁵ This component of a national organic standard is clearly

⁸⁵ Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto, Carswell, 1998) at 471.

within the federal government's authority to regulate matters in relation to trade and commerce.

Peace, Order and Good Governance

The opening words of s.91 of the Constitution gives the federal government power to regulate matters for the “peace, order, and good government of Canada”.⁸⁶ The POGG power is residuary in nature and permits the federal government to regulate in three instances. Federal regulation is permitted where the Constitution is silent as to the issue,⁸⁷ if the matter is a national concern,⁸⁸ or if the regulation addresses a national emergency.⁸⁹ Of these three, the national concern branch of the POGG power may provide the federal government with the authority to mandate an national organic program.

The scope of the national concern branch of POGG was first outlined in the *Canada Temperance* case:

[T]he true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole...then it will fall within the competence of the Dominion Parliament as a matter affecting

⁸⁶ *Supra* note 73 at s.91 [hereinafter POGG].

⁸⁷ *Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304.

⁸⁸ *A-G Ont. v. Canada Temperance Federation* [1946] A.C. 193 [hereinafter *Canada Temperance*].

⁸⁹ *A-G Can. v. A-G AB.* (1921) 60 D.L.R. 523.

the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to provincial legislatures.⁹⁰

Since that time, the definition of the national concern branch has become more refined. An issue becomes a national concern if it is a new matter not existing in 1867 that is not local in nature or a local matter that has extended beyond the provincial ability to regulate.⁹¹ This provincial inability test was outlined in *R v. Crown Zellerbach Canada Ltd.*:⁹²

In determining whether a matter has attained the required degree of singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with control or regulation of the intra-provincial aspects of the matter.⁹³

This test clearly outlines that for a matter to qualify as one of national concern, its impact on provincial jurisdiction must also be ascertainable and controllable by reasonable limits. Essentially, this requirement of distinctiveness is a safeguard against POGG absorbing all provincial powers where the subject matter is very broad.⁹⁴

⁹⁰ Canada Temperance, *supra* note 88 at 205.

⁹¹ Mark Walters, "Ecological Unity and Political Fragmentation: The Implications of the Bruntland Report for Canadian Constitutional Order" (1991) 29 *Alta. Law Rev.* (no.2) 420 at 443.

⁹² [1988] 49 D.L.R. 161.

⁹³ *Ibid.* at 184

⁹⁴ *Supra* note 85 at 417.

As explained above, the federal government can rely on the national concern branch of POGG if the matter at issue was not existing in 1867 and therefore not addressed in the Constitution. While the organic agriculture industry may be “new,” agriculture, in general, was expressly dealt with in s.95 of the Constitution. As a consequence, the federal government will only be able to legislate a national organic standard if the provinces are unable to do so themselves.

The fact that Quebec has an internationally recognized organic standard undermines the provincial inability test. If one province has established such a system, there is no reason that the remaining provinces should not be able to do so. The key to the provincial inability test, however, is not only the provinces’ ability to regulate this area, but also the effect of one province failing to do so.

Consider the current effect on Quebec of the remaining provinces failure to regulate organic agriculture. Presently, all products sold in the province that are labelled as organic must meet the provincial standard. This includes products from the other Canadian provinces and international imports. Therefore, the failure of any other province to regulate in this area has no effect on the integrity of Quebec’s system. The lack of a federal standard really only affects the products destined for the export market. It

does not make export impossible, but requires Quebec to negotiate for international acceptance of its organic standard on behalf of its producers. Without a national standard, each province, or private certifier, as the case may be, must conduct similar negotiations in order to gain access to foreign markets. This results in multiple efforts aimed at the same task and places the onus on the individual certifier to justify the integrity of its system to each potential export market. Presumably if a national standard was in place, a certifier would only have to prove to the Canadian government that it was compliant with the national standard. It would then be up to the federal government to promote the standard globally.

Unfortunately, a legislated, national organic standard will likely not be authorized under the national concern branch of the POGG power. Inconvenience and duplication of efforts is not a justification for discarding the Constitution. The experience in Quebec shows that the provinces are fully capable of regulating organic agriculture.

Criminal Law

The last power the federal government may be able to rely on to initiate a national organic program is its criminal law power.⁹⁵ The mere addition of a prohibition and penalty is not sufficient to bring a matter within

⁹⁵ *Supra* note 73 at s.91(27).

federal authority under the criminal law power. The matter must also have a “a public purpose which can support it as being in relation to criminal law.”⁹⁶ The health and safety of the public have been viewed as valid public purposes that can justify federal regulations.⁹⁷ The *Food and Drugs Act*⁹⁸ is therefore constitutional as it has the protection of the public as its primary objective.⁹⁹ The same can be said for the federal regulation of pesticides under the *Canadian Environmental Protection Act, 1999*¹⁰⁰ because the misuse of pesticides poses significant health and safety issues of concern to the entire nation.

In order to rely on the criminal law power, there must be a clear link between the intent of the legislation and the protection of the public. The courts struck down federal legislation banning the sale and manufacture of margarine in *Can. Federation of Agriculture v. A-G. Que.*¹⁰¹ The court held that the legislation was aimed at protecting the dairy industry and in no way was designed to protect the public.

The analysis of the scope of the criminal law power in the *Margarine Reference* (1951) poses a significant barrier to the federal government’s ability to rely on this power to institute a national organic standard. The

⁹⁶ *Reference Re: Dairy Industry Act Canada s.5(a)* [1949] S.C.R. 1 at 50.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 71.

⁹⁹ *R. v. Wetmore* [1983] 2 S.C.R. 284

¹⁰⁰ S.S. 1999, c.33.

¹⁰¹ [1951] A.C. 179 [hereinafter *Margarine Reference* (1951)].

federal government has not endorsed organic production and its products as safer or healthier than their conventional counterparts. The motivation for the standard is to provide uniformity in order to assist the organic industry in marketing their products. As a result, it will be difficult to argue that regulation of organic foods, separate from the standards applicable to all foods under the *Food and Drugs Act*, has a valid criminal purpose justifying additional federal regulations. Without a change in policy, the criminal power likely can not be relied upon for federal authority to regulate organic production.

Notwithstanding the federal government's inability to rely on the criminal law power to establish authority for establishing a national organic standard, it may still provide some assistance in preventing misbranding of organic products. Offences under the *Food and Drugs Act* for deceptive labelling have been upheld as a valid exercise of the criminal law power.¹⁰² If a national consensus emerges as to what is meant by the term organic, the federal government may be able to prohibit and enforce the use of the term organic in a deceptive manner. This will be addressed further in the next section when the *Food and Drugs Act* is discussed in greater detail.

¹⁰² *Supra* note 99.

Spending Power

As outlined, the adoption of national legislation mandating production and processing standards for the organic industry is likely unconstitutional. This does not mean, however, that the federal government can not play a role in the harmonization of organic standards across the country. It can rely on its spending power to influence the regulation of matters within exclusive provincial authority.

The federal government is free to attach conditions and stipulations to money it forwards to the provincial governments in cost-share programs. The most striking example of this is in the provincially administered healthcare system. The transfer of federal funds for healthcare is conditional on provincial systems meeting the requirements of the federal government.

There is no reason why a national organic standard can not be facilitated through the use of the federal spending power. The federal government, if it desires, can aid the implementation of harmonized standards across the country by assisting the provinces with the cost of implementation. The federal government can insist that support will only be forthcoming if a specific set of standards are adopted.

As a national consensus has not emerged as to what these standards should be, it is in the provinces best interests to become apart of building

this consensus to ensure that the national organic standard reflects the needs of the organic industry in each province.

Coordination with Existing Canadian Legislation

Unfortunately, the three models of a national organic standard displayed by the United States, the EU, and Australia are not useful within a Canadian context. Canada's constitution prevents the adoption of national legislation aimed at regulating the organic industry. In addition to the federal government using its spending power to influence the design and operation of a national standard, existing federal legislation may have an impact. Of particular relevance are the *Canada Agricultural Products Act*,¹⁰³ the *Food and Drugs Act*,¹⁰⁴ and the *Consumer Packaging and Labelling Act*.¹⁰⁵

Canada Agricultural Products Act

The *Canada Agricultural Products Act*¹⁰⁶ is concerned with the marketing of agricultural products as well as the grading of these products in import, export, and interprovincial trade. It permits the marketing of agricultural products only when such an activity is consistent with the Act

¹⁰³ *Supra* note 70.

¹⁰⁴ *Supra* note 71.

¹⁰⁵ *Supra* note 72.

¹⁰⁶ *Supra* note 70 [hereinafter CAPA].

and Regulations.¹⁰⁷ The Canadian Food Inspection Agency (CFIA) is responsible for the enforcement of CAPA and its regulations.¹⁰⁸

National standards and grades are outlined in industry specific regulations and passed pursuant to CAPA. These regulations include:

- Dairy Products Regulations
- Egg Regulations
- Fresh Fruit and Vegetable regulations
- Livestock and Poultry Carcass grading Regulations
- Maple Products Regulations
- Processed Egg regulations
- Processed Products Regulations

Under CAPA, the definitions of “agricultural product” and “marketing” are extremely broad. Agricultural product means:

- an animal, a plant or an animal or plant product
- a product, including any food or drink, wholly or partly derived from an animal or plant, or
- a product prescribed for the purposes of this Act.¹⁰⁹

¹⁰⁷ *Ibid.* at s.17.

¹⁰⁸ *Ibid.* at s.19.

¹⁰⁹ *Ibid.* at s.2.

Marketing is defined as “the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural products available for consumption or use.”¹¹⁰ Consequently, organic producers, like any other producer, are subject to CAPA and its regulations including its offences and penalties.

It will be important that any labelling or grading requirements be consistent with the general CAPA requirements for each agricultural commodity. If there is discrepancy between organic standards and the general CAPA regulations, the appropriate general regulation will need to be amended to ensure that organic producers are not violating CAPA.

CAPA also establishes that every agricultural legend and every grade name is a national trademark in which the federal government holds exclusive property.¹¹¹ It also prohibits the use of legends, marks or other symbols that resemble national trademarks.¹¹² It is possible that a national organic label or mark will emerge through a joint effort by the federal government and the provinces. The use of this mark or symbol may be enforced as a national trademark under CAPA provided that its use is purely aimed at controlling the marketing of organic products and not the production. As explained above in the discussion of the constitutionality of

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at s.15.

¹¹² *Ibid.* s.16.

national organic standard, the substantive regulation of organic production must be contained in provincial legislation. A national organic trademark enforced by CAPA can only be used to recognize the provincial schemes as equivalent to one another.

If a national organic trademark emerged, existing Canadian organic trademarks may run the risk of resembling the national trademark thereby violating CAPA. In the national standard, Canada would be advised to phase-out private organic trademarks and delay enforcement of this section of CAPA to allow for the transition from private trademarks to the national trademark. The European Union's organic regulation contains provisions for this transition.¹¹³ If such a phase-out is not desired, then CAPA must contain a section that clearly outlines the intent to maintain private organic labels.

Food and Drugs Act

The *Foods and Drugs Act*¹¹⁴ has as its primary purpose the protection of the public from harmful substances and deceptive advertising. To this end, the legislation has been designed to have broad application. It prohibits anyone from selling food that:

¹¹³ *Supra* note 18 at art. 5 (3a).

¹¹⁴ *Supra* note 71 [hereinafter FDA].

- has in or on it any poisonous or harmful substances;
- is unfit for human consumption
- consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance;
- is adulterated; or
- was manufactured, prepared, preserved, packaged or stored under unsanitary conditions.¹¹⁵

These prohibitions clearly apply to those involved in the production, processing, and sale of organic products. They also apply to importers of food into Canada regardless of whether that food is organic.¹¹⁶

In addition, an enormous amount of regulations have been passed pursuant to the FDA. The FDA regulations that specifically relate to food, as opposed to drugs, concern three main topics. The first is the content and composition of labels placed on the final product. The second set of regulations address compositional standards of food sold in Canada. The last set of regulations outlined acceptable additives for various food products. Organic producers and processors must also satisfy these requirements if they wish to sell their products to Canadians.

Because organic standards are expected to be more stringent than the FDA regulations concerning compositional standards and acceptable

¹¹⁵ *Ibid.* at s.4.

¹¹⁶ *Ibid.* at s.6.

additives, compliance with the FDA should not be an issue for the organic industry. The FDA poses no barriers to the implementation of a national organic standard.

Instead, the FDA may be relied on to control the use of the term organic when a national consensus emerges as to what is meant by the organic. The FDA provides that:

No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.¹¹⁷

Character is not defined in the FDA, but it can be argued that organic status is an issue of character. If that interpretation is accepted, it may be an offence to label a product as organic if it does not comply with the national standard.

The integrity of a national standard will be enhanced if mislabelling food as organic is recognized as an offence under the FDA. The FDA contains significant penalties for violations relating to food. On summary conviction, a person found guilty of an offence under the FDA is subject to either a maximum fine of \$50,000, 6 months in prison, or both. For indictable offences that fine can

¹¹⁷ *Ibid.* at s.5(1).

increase to \$250,000 and 3 years in prison. These penalties can serve as a deterrent to the misuse of an organic label.

Consumer Packaging and Labelling Act

The *Consumer Packaging and Labelling Act* (CPLA)¹¹⁸ is primarily concerned with standardizing the containers and labels consumer products are sold in. It contains extensive regulations addressing representations by dealers of the content and weight of a product. Because dealer is broadly defined in CPLA as “a person who is a retailer, manufacturer, processor or producer of a product, or a person who is engaged in the business of importing, packing or selling any product,” the organic industry must comply with CPLA in addition to any standard that specifically relates to organic products.¹¹⁹

Like the FDA, CPLA can potentially control the use of the term organic when food is sold. Section 7 provides that:

No dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product.¹²⁰

¹¹⁸ *Supra* note 72 [hereinafter CPLA].

¹¹⁹ *Ibid.* at s.2(1).

¹²⁰ *Ibid.* at s.7(1).

The section goes on to define “false or misleading representation” as including:

[A]ny description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.¹²¹

A misleading representation as to the method of production is an offence under CPLA. If a consensus emerges as to what organic production entails, CPLA may also be relied on to enforce misleading statements as to how a product was produced.

Like the FDA, CPLA permits significant penalties in the event an offence is committed in relation to a food product.¹²² The act allows, on summary conviction either the imposition of a fine of up to \$50,000, up to 6 months imprisonment, or both. For indictable offences, the fine can increase to \$250,000 and the term of imprisonment can increase to up to two years. Enforcement of misleading and deceitful labelling may assist in protecting the integrity of a national organic label.

¹²¹ *Ibid.* at s.7(2)(c).

¹²² *Ibid.* at s.20(2.1).

Conclusions

The Canadian Constitution poses significant challenges to the adoption of a national organic standard. Unlike the United States, the federal government does not have the power to legislate organic production standards. The authority for such action rests solely with the provinces notwithstanding the current jurisdiction over agriculture. As a result, a national organic standard will only be achieved if all of the provincial governments become involved in the process.

The federal government, however, can still facilitate the establishment of harmonized organic standards across the country through its spending power. It can encourage provinces to legislate in this area by providing funds to assist with the costs of implementing such a program. Once provincial schemes are in place, the federal government may be able to control the use of a national organic mark that signifies that the equivalency of each provinces' organic standards. The national mark may be incorporated into CAPA and the use of the term organic may be regulated through either the FDA or the CPLA.

Provincial and federal cooperation in a manner necessary to institute a national organic standard is not unprecedented in Canada. A lot can be gained from past experiences with cooperative legislative efforts. Particular

attention should be paid to cooperative efforts in the health sector. The same commitment to achieving a national organic standard will be required by the federal and provincial government if it is to be.