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Report on the Legal Framework for Animal Health in Canada

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Part 1 – Regulatory Framework

1. Introduction

This report outlines the allocation of powers and responsibilities relevant to animal health in Canada. It will review the relevant federal and provincial heads of power under the division of powers in the Canadian Constitution, the statutory framework relevant to animal health at the federal and provincial/territorial levels, the international legal framework, and a review of relevant case law and academic literature.

The key conclusions of this survey are:

- Under the Constitution, the federal and provincial governments share responsibility for animal health in the areas of agriculture, fisheries, and wildlife;
- A review of the statutory framework for animal health reveals that the authority to prevent, control and eradicate disease exists in duplication between the provinces and the federal government. Nothing, however, compels either the provinces or the federal government to act to preserve animal health.
- Canada has multiple, overlapping obligations relating to animal health under international law agreements, which require it to ensure effective surveillance, reporting, and control of animal disease, without unduly restricting trade;
- The courts have only begun to consider crown liability arising from government activities involving animal health, thus it is difficult to draw conclusions regarding crown liability in this area. One conclusion that can be reached is that the Crown's decision not to act, particularly in the event of an emergent disease threatening human or animal health is generally not actionable.
- There is relatively little academic literature that discusses the legal framework for animal health, but some articles highlight the significance of shared responsibility.

2. Division of Powers under the Canadian Constitution

Agriculture is only one of two areas explicitly identified in the Constitution under concurrent jurisdiction of the federal and provincial governments.[1] Under this concurrent jurisdiction, "[p]rovincial legislation is effective so long as it is not repugnant to federal legislation", and the two levels of government can create a harmonized program to deal with animal disease.[2]

Several other heads of power are also relevant to animal health. In determining which government has authority, it is necessary to characterize the "pith and substance" of a legislative provision in its context.[3] The federal power over the regulation of trade and commerce is relevant to international, interprovincial, and general trade in animals and animal products.[4] In the context of fisheries and aquaculture, the federal government has jurisdiction over seacoast and inland fisheries.[5] This power allows the federal government to regulate for the maintenance and preservation of fisheries, even if this regulation has an incidental effect on product sales.[6] The criminal law power enables the federal government to create offences for the protection of the public good.[7] It is a broad power that may be used when a law meets three criteria: a valid criminal law purpose; a prohibition; and penalties to enforce the

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s.95, which provides: "In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

[2] *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*, 2004 SKQB 478 [*Holland No. 1*] at para. 31.

[3] *R. v. Demers*, [2004] 2 S.C.R. 489; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.

[4] *Constitution Act, 1867*, *supra* note 1, s.91(2).

[5] *Ibid*, s.91(12).

[6] *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569.

[7] *Constitution Act, 1867*, *supra* note 1, s.91(27).

prohibition.[8] The purpose may include protection of health or of the environment.[9] Finally, the federal government's power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces"[10] (the "POGG" power) includes matters of "national concern" the impact of which extends beyond, and may be beyond the capacity, of a single province,[11] and emergencies.[12] This power has been recognized as a basis for environmental protection,[13] which could include wildlife. It also provides federal jurisdiction to enact emergency legislation,[14] which could be used to deal with a public health emergency arising from a zoonotic disease.

The provincial governments have power over municipal institutions,[15] to which they delegate powers through legislation. Provincial powers over management of public lands,[16] local works and undertakings,[17] property and civil rights in the province,[18] and matters of a local private nature in the province[19] may also be relevant to particular aspects of animal health, including the regulation of local food processing[20] and domestic animals. Jurisdiction over

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[8] *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

[9] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro-Quebec*, *ibid*.

[10] *Constitution Act, 1867*, *supra* note 1, s.91.

[11] See e.g. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

[12] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

[13] *R. v. Crown Zellerbach Canada Ltd.*, *supra* note 11.

[14] *Reference re Wartime Leasehold Regulations, P.C. 9029*, [1950] S.C.R. 124.

[15] *Constitution Act, 1867*, *supra* note 1, s.92(8).

[16] *Ibid*, s.92(5).

[17] *Ibid*, s.92(10).

[18] *Ibid*, s.92(13).

[19] *Ibid*, s.92(16).

[20] Ronald L. Doering, "Foodborne Illness and Public Health" in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, *Public Health Law and Policy in Canada* (Markham, Ont.: LexisNexis Canada, 2005) 409 at 413.

management of public lands has been held to include conservation and management of wildlife within those lands.[21]

Given the relationship between animal and human health, it is also relevant to consider jurisdiction over health more generally. Health or public health is not assigned as a single subject matter under the Canadian Constitution but is spread among several heads of power, both federal and provincial.[22] Relevant federal heads of power include trade and commerce, quarantine and marine hospitals, criminal law, and the POGG power; [23] provincial heads of power include hospitals, municipal institutions, property and civil rights, and local and private matters.[24] The federal government has enacted legislation to deal with food and drug safety,[25] and quarantine of goods and persons at border crossings.[26] Both levels of government have legislation relating to emergency management[27] and environmental hazards.[28] Provincial legislation covers most aspects of infectious disease surveillance and control,[29] and includes provisions to address health hazards, which may include disease in animals.[30]

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[21] *R. v. Patey*, [2007] N.J. No. 276.

[22] For general discussion, see e.g. Martha Jackman, "Constitutional Jurisdiction Over Health in Canada" (2000) 8 Health L. J. 95; regarding jurisdiction over public health matters see e.g. Nola M. Ries, "Legal Foundations of Public Health Law in Canada" in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, *Public Health Law and Policy in Canada* (Markham, Ont.: LexisNexis Canada, 2005) 7 at 11ff; National Advisory Committee on SARS and Public Health, *Learning from SARS: Renewal of Public Health in Canada* (Ottawa: Health Canada, 2003) at 166ff.

[23] *Constitution Act, 1867*, *supra* note 1, s.91(2), (11), (27).

[24] *Constitution Act, 1867*, *supra* note 1, s.92 (7), (8), (13), (16).

[25] *Food and Drug Act*, R.S.C. 1985, c. F-27.

[26] *Quarantine Act*, S.C. 2005, c. 20.

[27] See e.g. *Emergencies Act*, R.S.C. 1985, c. 22; *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9; *Emergency Measures Act*, S.N.B. 1978, c. E-7.1; *Emergency Planning Act*, S.S. 1989-90, c. E-81.

[28] See e.g. *Canadian Environmental Protection Act*, S.C. 1999, c. 33; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12; *Environmental Management Act*, S.B.C. 2003, c. 53.

[29] See e.g. *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; *Health Act*, R.S.B.C. 1996, c. 179; *Public Health Act*, R.S.A. 2000, c. P-37; *Communicable Diseases Act*, R.S.N.L. 1990, c. C-26; *Public Health Act, 1994*, S.S. 1994, c. P-37.1.

[30] See, e.g. *Public Health Act, 1994*, *ibid*, s.2(q), which defines a "health hazard" to include "an animal other than a human being … that is or may become harmful to health, that hinders in any manner the suppression of disease or the prevention of injury …".

Where the federal and provincial governments have concurrent jurisdiction, the doctrine of paramountcy provides that in the event of a conflict, the federal legislation will take precedence. This doctrine only operates where a true conflict or inconsistency exists in the sense that it would be impossible to comply with both laws, not merely where different and overlapping provisions on the same subject matter exist.[31] Otherwise, both levels of legislation will continue to apply concurrently.

Municipalities derive their powers from the delegation of authority by the provinces in municipal statutes. Their scope of authority will therefore be limited to that which can lawfully be delegated by the province (i.e. cannot encroach on federal jurisdiction), and is defined by interpretation of their enabling legislation. The courts have, however, shown a willingness to interpret quite generously provisions in municipal legislation giving them powers to make bylaws for health and welfare in their territories, though they will scrutinize the purpose of the bylaws.[32] In the event of a conflict between municipal and provincial or federal provisions on the same subject, the municipal provisions will yield to the higher authority; as in the case of federal paramountcy, however, this applies only where there is impossibility of dual compliance.[33] Municipalities may also have powers under specific provincial legislation, such as public health statutes.[34]

There is very little case law dealing specifically with the division of powers in the area of animal health. Although there are a number of earlier cases that are indirectly relevant (e.g. the cases referenced above regarding the criminal law power or environmental protection), the specific issue of jurisdiction to regulate animal health does not appear to have been litigated until relatively recently (i.e. in the last decade). It is not possible to determine why cases did not arise earlier, except perhaps to suggest that the increasing awareness and economic significance of animal health issues may have made litigation more likely in recent years.

In *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*,[35] the applicants challenged the Minister's decision to change the status of their elk and deer herds under Saskatchewan's Cervid Chronic Wasting Disease Surveillance and Certification Program.

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[31] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188.

[32] See *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

[33] *Ibid.*

[34] The limits of such powers are currently being tested in the case of *Western Forest Products Inc. v. Sunshine Coast (Regional District)*, 2007 BCSC 1283; 2007 BCSC 1508.

[35] *Holland No.* 1, *supra* note 2. Another claim by the same plaintiff in relation to this matter is discussed below in part 5.

One of their arguments was that the provincial Minister had no authority to create the program because the federal government had assumed responsibility for the disease. Chronic wasting disease in cervids was a reportable disease under the *Health of Animals Act*.[36] The provincial Diseases of Domestic Game Farm Animals Regulations[37] provided that:

> Nothing in subsection 3(1) or section 4, 6, 7 or 8 of these regulations applies to diseases named pursuant to the Health of Animals Act (Canada), administered by the Canadian Food Inspection Agency.

However, the Court held that this provision was limited in its application (i.e., to "eliminate duplication in the areas of designating diseases; reporting diseases; disposition of animals; and payment of compensation where a disease is named pursuant to the Federal Act") and did not preclude all provincial activities with respect to chronic wasting disease, including the provincial program. It also noted that s. 95 gives the federal and provincial governments concurrent jurisdiction over agriculture, meaning that provincial legislation is "effective so long as it is not repugnant to federal legislation."[38] The two governments played complementary roles which could coexist.

In *R. v. Patey*,[39] the accused was charged with offences under provincial wildlife legislation, and argued that the legislation was beyond the authority of the Province because of the federal power over inland fisheries. The Province argued that fishing rights were a component of property rights and therefore within its authority under s. 92(13). The Court found that the purpose of the provincial legislation was the "protection, preservation and propagation of wild life [*sic*]",[40] and the fishing licence provisions applied only to fishing in provincial inland waters.[41] The purposes of the provisions were conservation and protection of economic interests.[42] The legislation was conceded to have an incidental impact on the regulation of inland fisheries.[43] However, the Court held that it was valid provincial law enacted

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[36] S.C. 1990, c. 21 [*HAA*]; *Reportable Diseases Regulations*, H-3.3 - SOR/91-2.

[37] c. D-30 Reg. 1.

[38] *Holland No. 1*, *supra* note 2 at para. 31.

[39] *R. v. Patey*, [2007] N.J. No. 276.

[40] *Ibid*. at para. 21.

[41] *Ibid*. at para. 28.

[42] *Ibid*. at paras. 29-30.

[43] *Ibid*. at para. 31.

under s. 92(5) (management of public lands) or 92(13) (property and civil rights).[44] The provincial regulation of fish processing has also been upheld under the property and civil rights power.[45]

3. Statutory Framework Review

As outlined in the previous section, agriculture, like immigration, is designated as an area of co-jurisdiction in s. 95 of the *Constitution Act, 1867*.[46] Moreover, jurisdiction related to the environment, which includes authority to regulate at least some matters related to wildlife, allows the federal government to legislate in areas that would otherwise be considered within exclusive provincial control. Consequently, the regulation of animal health necessarily involves cooperative efforts. This overview aims to provide an understanding of how the statutory framework for animal health operates with a key emphasis on disease ranking and ordering, disease prevention and disease eradication. The federal government's role in animal health will be outlined first. A discussion of provincial and territorial activities will follow to demonstrate their complementary role in the overall statutory framework for animal health in Canada. The discussion will conclude with a review of the implications for crown liability that arise from this shared jurisdiction over animal health.

Federal Animal Health Activities

Because animal health has economic, food security, and human health impacts, a number of federal departments and agencies oversee components of the federal government's regulation of animal health. Principal among these are Agriculture and Agri-Food Canada (AAFC) and the Canadian Food Inspection Agency (CFIA), both of which report to the Minister of Agriculture. The CFIA administers the *Health of Animals Act* (*HAA*). The *HAA* encompasses the majority of the federal government's animal health efforts. The *HAA* is primarily concerned with preventing and eradicating animal diseases in domesticated and game animals although some of the *HAA's* activities may also serve to minimize animal cruelty and suffering more generally.[47] The *HAA's* efforts are complemented by the *Feeds Act,* the *Fish Inspection Act* (*FIA*) and the *Meat Inspection Act* (*MIA*).

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[44] *Ibid*. at para. 55.

[45] *Port Enterprises Ltd. v. Newfoundland (Minister of Fisheries and Aquaculture)*, 2006 NLCA 36; *Dandy Dan's Fish Market Ltd. v. Newfoundland and Labrador*, 2007 NLCA 26.

[46] *Supra* note 1.

[47] Part XII of the *Health of Animal Regulations* dealing with animal transport is an example of these latter activities.

The Canadian Wildlife Service (CWS) of Environment Canada leads the federal government's efforts to manage disease in wild animal populations. By their nature, disease management in populations of wild animals, including migratory birds and marine species, demands a coordinated response among departments and agencies within the federal government as well as the provinces. The Canadian Wildlife Directors' Committee (CWDC), comprised of representatives from the CWS, the provinces, Fisheries and Oceans Canada and Parks Canada, establishes priorities for coordinated responses to wildlife disease management in Canada.[48] Moreover, it is not uncommon for federal efforts to manage disease in wild populations to involve collaboration with foreign governments, particularly the United States and Mexico. For example, the North American Waterfowl Management Plan (NAWMP)[49] originally adopted to protect habitat and conserve waterfowl has evolved to include disease management as one of its priorities.[50] Because many diseases readily move between wild and domestic animals and between wild animals and humans, managing disease in wild populations is an essential component of Canada's animal health framework.

Although principally charged with safeguarding human health, the relationship between animal health and human health necessarily engages Health Canada in activities within the federal government's animal health framework. Likewise, the recently created Public Health Agency of Canada (PHAC) has responsibilities to prevent, monitor and respond to the spread of infectious disease in Canada. To the extent that a targeted infectious disease may have an animal origin, it is expected that the PHAC will play an important role in the federal government's animal health framework.

Ranking and Ordering Disease

The *HAA* contains provisions for the ranking and ordering of animal disease. The *HAA* broadly defines disease as including any disease, or its causative agent, that may affect an animal or that may be transmitted between animal and humans.[51] The definition also makes

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[48] Canadian Wildlife Director's Committee. 2004. *Canada's National Wildlife Disease Strategy* at 2. Available online at: < http://www.cws-scf.ec.gc.ca/cnwds/draft11.pdf>.

[49] North American Waterfowl Management Plan, Plan Committee. 2004. North American Waterfowl Management Plan 2004. Implementation Framework: Strengthening the Biological Foundation. Canadian Wildlife Service, U.S. Fish and Wildlife Service, Secretaria de Medio Ambiente y Recursos Naturales. Available online at <http://www.fws.gov/birdhabitat/NAWMP/files/NAWMP.pdf>.

[50] North American Waterfowl Management Plan, Plan Committee. 2004. North American Waterfowl Management Plan 2004. Implementation Framework: Strengthening the Biological Foundation. Canadian Wildlife Service, U.S. Fish and Wildlife Service, Secretaria de Medio Ambiente y Recursos Naturales, at 17. Available online at: <http://www.fws.gov/birdhabitat/NAWMP/files/ImplementationFramework.pdf>.

[51] *HAA*, *supra* note 36, s.2

reference to a list of reportable diseases created by the Minister of Agriculture and Agri-Food. The federal government's animal health framework is centered on those diseases that are found on the reportable disease list thereby indicating a ranking of diseases in Canada. The list of reportable diseases is contained in the Schedule to the *Reportable Diseases Regulations*.[52] Currently, the reportable disease list includes thirty-two animal diseases of principal concern. The *HAA* broadly imposes statutory duties on any person who becomes aware that an animal in his care or control has a reportable disease. The *HAA*, however, does not specify how the Minister is to determine which diseases to include on the reportable diseases list. Therefore, the Minister of Agriculture and Agri-Food has unfettered discretion to rank diseases as the Minister sees fit.

In addition to reportable diseases, the *Health of Animals Regulations* creates reporting obligations on laboratories involved in animal disease diagnosis with respect to second and third categories of diseases.[53] The second category of diseases includes those diseases that are immediately notifiable to the Minister of Agriculture and Agri-food upon suspicion or diagnosis.[54] The suspicion or diagnosis of diseases in the third category requires annual notification to the Minister.[55] Unlike reportable diseases, the *HAA* only imposes a limited duty of notification on laboratories with respect to second and third category diseases. As a result of the narrow reach of the statutory duties associated with second and third category diseases, the following discussion will focus on reportable diseases.

Private Statutory Duties

The *HAA* establishes a multi-faceted strategy to prevent, contain, and eradicate reportable diseases. First, the *HAA* creates statutory duties and imposes penalties for non-compliance on those who become aware that an animal in their care or control has a reportable disease. Thus, an owner and those caring for, or in possession of, an animal with a reportable disease are required to immediately notify a veterinary inspector of the presence of a reportable disease.[56] The *HAA* also creates an offence to conceal the presence of a reportable disease[57] or to allow an animal known to have or been exposed to a reportable disease to come

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[52] SOR/91-2.

[53] C.R.C., c. 296 [*HAA Regs.*], ss.91.2(1) and(3).

[54] *Ibid.*, Schedule VII.

[55] *Ibid.*, Schedule VIII.

[56] *HAA*, *supra* note 36, s.5.

[57] *Ibid*., s.8.

in contact with other animals through unrestricted grazing.[58] Likewise, the animal cannot be shown[59] or sold without a license.[60]

Interestingly, the *HAA* appears to contemplate that any decisions regarding the need to dispose of, and the proper means of disposal of, diseased or suspected diseased animals will be made by the Minister and not the owner of the animal. If the Minister does not dispose of the animal himself, the *HAA* requires an owner or other person who has the animal in its charge to comply with disposal directions given by the Minister.[61] Other than to make it an offence to dispose of the animal in a watercourse[62] or to dig up a diseased animal that has been buried,[63]the *HAA* contemplates that the Minister alone will be responsible for determining when disposal is necessary and the appropriate means of disposing of diseased animals. Thus, it can be argued that the legislated responsibility to eradicate disease, as opposed to reporting or containing disease, does not extend to non-government actors.

The *HAA* also imposes private statutory duties with respect to animal identification and record keeping. Every bovine, ovine and bison is required to wear an ear tag that contains an identification number unique to that specific animal if it is moved off its farm of origin.[64] In the event that a disease is detected, the identification numbers are designed to facilitate eradication of the disease by locating possible origins of the disease and identifying animals that may have come in contact with the diseased animal. The *HAA* regulations also prohibit the movement of animals without an approved tag,[65] and removal[66]of, or tampering[67] with, ear tags prior to the slaughter.

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[58] *Ibid*., s.9.

[59] *Ibid*., s.10.

[60] *Ibid*., s.11.

[61] *Ibid*., s.48.

[62] *Ibid*., s.12.

[63] *Ibid*., s.13.

[64] *HAA Regs*., *supra* note 53, s.175.

[65] *Ibid*., s.176.

[66] *Ibid*., s.179.

[67] *Ibid*., s.181.

Inspection

Second, the *HAA* empowers inspectors to monitor the health of animals born in, exported from, and imported into Canada. Inspectors are authorized to conduct searches[68] and seize property[69] to detect diseases and order the quarantine[70] and destruction[71] of animals (or their by-products) where diseased animals or animals that are at risk of becoming diseased are located. For example, quarantine at the border to allow for the inspection of imported animals is a general requirement of the *HAA*.[72] Inspectors can also designate a place as infected and limit the movement of animals, people, and things from that place to prevent the spread of disease.[73] Moreover, the Minister can designate a control area if he believes that a disease exists in an area that expands beyond the infected place and similarly limit the movement of animals, people, and things in and out of the control area.[74] Alternatively, the Minister can designate an entire country or part of a country as disease free thereby easing import restrictions.[75] Thus, inspection is a significant component of the federal government's animal health regime as it encompasses not only the monitoring of the health of animals within Canada, but includes the oversight of the import and export of animals and their by-products in Canada.

In addition, both the *Fish Inspection Act* (*FIA*) and the *Meat Inspection Act* (*MIA*) prohibit the sale of fish and meat products that have become unfit for human consumption either through contamination, disease or spoilage.[76] These acts also provide inspectors with the authority to inspect meat or fish sold in or exported from Canada.[77] This inspection function is an important component of Canada's animal health framework. Inspection helps identify potential regulatory violations before the fish or meat product is made available for human or

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[68] *HAA*, *supra* note 36, s.38.

[69] *Ibid*., s.40.

[70] *Ibid*., s.25.

[71] *Ibid*., s.48.

[72] *HAA Regs*., *supra* note 53, s.58(3).

[73] *HAA*, *supra* note 36, s.22.

[74] *Ibid*., s.27.

[75] *HAA Regs*., *supra* note 53, s.7.

[76] *Fish Inspection Act*, R.S.C. 1985, c. F-12, s.10(1).

[77] *Ibid*., s.4.

animal consumption. Therefore, inspections undertaken pursuant to the *MIA* and the *FIA* contribute to both the containment and the prevention of animal disease in Canada.

The *FIA* and the *MIA* also require establishments engaged in the interprovincial sale of meat and fish products to be licensed. The license requirements are designed to safeguard the public from unsanitary operations and contaminated food by requiring such things as participation in quality management programs.[78] Although the *FIA* and the *MIA* are principally designed out of concern for human health, the obvious nexus between animal and human health necessarily requires meat and fish inspection be included in the regulatory framework for animal health.

Feed Composition

An important third component of the strategy to combat the transmission of animal disease outlined in the *HAA* is the regulation of animal feed and other supplements. The *HAA Regulations* prohibits the feeding of prohibited material, as defined,[79] to animals.[80] In addition to the *HAA*, the *Feeds Act* regulates the composition and sale of feed in Canada. In June 2007, Canadians were reminded of the role feed can play in the health of animals after a number of cats and dogs died after eating pet food contaminated with melamine. Similarly in 2003, part of Canada's response to BSE involved banning specified risk material in animal feed. Therefore, in so much as the composition of animal feed can impact animal health, the *HAA* and the *Feeds Act* form an important component of the federal government's strategy to prevent animal disease.

Wildlife

It is estimated that close to 70% of emerging diseases of significance to public health officials like Severe Acute Respiratory Syndrome (SARS) and HIV-AIDs originated in wild animal populations.[81] The *Canada Wildlife Act*[82] grants the Minister of the Environment the authority to take measures to conserve wildlife in Canada.[83] Prevention of disease in wildlife population not only serves wildlife conservation objectives, but also has a significant impact on the health of domestic animals and humans. Much of the Minister's authority in this area has been delegated to the Canadian Wildlife Service (CWS). Likewise, Fisheries and Oceans Canada (FOC) is involved in managing disease in populations of marine species. The CWS and the FOC,

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[78] *Fish Inspection Regulations*, C.R.C., c. 802, s.6(2.2)(a)

[79] *HAA Regs*., *supra* note 53, s.162.

[80] *HAA Regs*., *supra* note 53, s.164.

[81] *Supra* note 48 at 18.

[82] R.S.C. 1985, c. W-9.

[83] *Ibid*., s.3.

together with their provincial counterparts, participate in the Canadian Wildlife Directors' Committee (CWDC). The CWDC has drafted and is implementing Canada's National Wildlife Disease Strategy (the Strategy).

The Strategy was adopted by the CWDC in 2004 and establishes a framework for a coordinated response to wildlife disease. The Strategy contemplates the creation of action plans for targeted diseases and assigns lead agencies for the creation of these plans.[84] Therefore, the CWDC establishes its own wildlife disease priorities. The CWDC is assisted in this task by the Canadian Cooperative Wildlife Centre (the Centre). The Centre, primarily based at Canada's four veterinary colleges, offers scientific information that informs priority setting and the creation of action plans pursuant to the Strategy.

The process through which Canada's National Chronic Wasting Disease Control Strategy (CWD Strategy) was created and now functions highlights how the Strategy is designed to operate.[85] The CWD Strategy aims to eradicate Chronic Wasting Disease in wild populations of the deer family (cervids) in collaboration with eradication efforts in the domesticated animals.[86] Recognizing that both the federal and provincial government have the authority to regulate wildlife and that animal health expertise is often found outside of government, the CWD Strategy contemplates the use of formal agreements, arrived at collaboratively, to assign responsibilities for Chronic Wasting Disease management in Canada.[87]

Saskatchewan Environment (SE) was named the lead agency responsible for developing the CWD Strategy likely reflecting Saskatchewan's expertise arising from ongoing efforts aimed at managing the disease. To this end, SE has developed a Chronic Wasting Disease management program with herd reduction activities in known infected areas and ongoing surveillance of adjacent areas to monitor the disease's movement.[88] In herd reduction areas, SE has instituted the Earn-A-Buck program to encourage hunters to reduce the population of deer and elk in those areas. Hunters, by turning in the heads of animals killed for disease testing, receive additional hunting permits. SE has made it easy for hunters to turn in heads by designating drop-off spots throughout the province which include gas stations, general stores, and

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[84] *Supra* note 48 at 13.

[85] Saskatchewan Environment. 2005. *Canada's National Chronic Wasting Disease Control Strategy.* Available online at: <http://wildlife1.usask.ca/Publications/NCWDCS2005.pdf>.

[86] *Ibid*. at 6.

[87] *Ibid*. at 7.

[88] *2007 Chronic Wasting Disease Management Program.* Available online at: http://www.environment.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=1380,300,254,94,88,Documents&MediaID=681&Filename=2007+CWD+Management+Program.pdf.

community centres in addition to SE offices. The heads are then tested for Chronic Wasting Disease by Canadian Cooperative Wildlife Centre participants at the University of Saskatchewan. Hunters can use the tracking number they received when they turned in the head to receive the animal's test results online through the Centre's website. The Centre also coordinates the CWD Strategy's surveillance efforts.[89]

The design and implementation of the CWD Strategy reflects the nature of wildlife and the complexity of jurisdiction of its management. SE's designation as lead agency for the development of the CWD strategy was mutually decided. Management of disease in wildlife necessary requires a collaborative approach as no one agency or level of government can be said to have exclusive authority or responsibility to regulate.

Public Health

Health Canada's (HC) role in the regulatory framework for animal health is twofold. HC's Veterinary Drugs Directorate, located in the Health Products and Food Branch, is empowered to review and approve the sale of all veterinary drugs in Canada. The availability of safe and effective treatments to animal disease is an essential component of any animal health strategy. Once HC approves veterinary drugs, the CFIA inspects food to ensure that residue limits established by HC are respected.

The second role of HC in relation to animal health is less direct and arises out of HC's general authority to establish health policy for Canada. In establishing health policy, HC is primarily concerned with human health. However, as human and animal health can be related, HC's activities can have an animal health function. HC works with the Public Health Agency of Canada, provincial ministries of health, local health districts, and health practitioners to monitor and minimize the impact of both infectious and chronic diseases on human health. Instances of disease and illness having their origins in animals, such as Avian Influenza, are monitored by Health Canada.

The recently created Public Health Agency of Canada (PHAC) has the broad mandate of "assisting the Minister [of Health] in exercising or performing the Minister's powers, duties and functions in relation to public health."[90] It has taken on responsibility for much of the operational or program delivery components of Canada's emergency planning activities. Included in this are activities aimed at infectious disease surveillance, prevention, and response. To this end, the PHAC has established an Infectious Disease and Emergency Preparedness

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[89] PrioNet Canada.(2008) Webpage. Available online at: <http://wildlife1.usask.ca/cwd_research/index.php>.

[90] *Public Health Agency of Canada Act*, S.C. 2006, c. 5, s. 3.

Branch (IDEP) and now houses the Laboratory for Foodborne Zoonoses and Centre for Infectious Disease Prevention and Control (CIDPC).

The federal *Quarantine Act* provides for the diversion, detention and inspection of conveyances entering Canada that are carrying persons or cargo, and provides authority for an environmental health officer to order measures to be taken if a conveyance or anything on board a conveyance is suspected to be the source of a communicable disease.[91] These provisions supplement the *HAA* provisions on inspection of animals imported into Canada, referenced above.

Provincial and Territorial Animal Health Activities

Because no one level of government has been granted exclusive authority by the constitution to regulate animal health, provincial activities related to animal health complement, and sometimes duplicate, the federal statutory framework. Provincial legislation related to animal health, however, often mandates specific activities to be undertaken by municipalities. Municipalities are under provincial authority[92] and exercise powers that are delegated to them by provincial governments.

The extent and nature of the provinces' engagement in animal health activities reflects the particular circumstances of each province. For instance, Saskatchewan has taken a leadership role in managing Chronic Wasting Disease as the disease has presented itself in wild populations of deer and elk in that province.[93] Likewise, Alberta has recently passed and is awaiting proclamation of the new and more comprehensive *Animal Health Act*.[94] Alberta's new act was drafted after the province's experience with the discovery of BSE in its cattle herd.

Provincial Animal Health Acts

Each province, with exception of Ontario which has not centralized its animal health activities into one statute, has remarkably consistent animal health legislation with objectives similar to those found in the federal *Health of Animals Act*.[95] This legislation contemplates, *inter*

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[91] *Quarantine Act*, *supra* note 26, ss.35, 37, 39.

[92] *Constitution Act, 1867*, *supra* note 1, s.92(8).

[93] *Supra* note 85.

[94] *Animal Health Act*, S.A. 2007, c.A-40.2 (not proclaimed).

[95] *Animal Disease Control Act*, R.S.B.C. 1996, c-14 (BC); *Livestock Diseases Act*, R.S.A. 2000, c.L-15 and *Animal Health Act*, S.A. 2007, c.A-40.2 (not proclaimed) (AB); *The Diseases of Animals Act* R.S.S. 1978, c.D-30 (SK); *The Animal Diseases Act*, C.C.S.M. c.A85 (MB); *Animal Health Protection Act*, R.S.Q. c. P-42 (PQ); *Animal Health and Protection Act*, R.S.N.S. 1989, c.15 (NS); *Diseases of Animals Act*, S.N.B. C.D-11.1 (NB); *Animal Health and Protection Act,* S.P.E.I., c.A-11.1 (PE); *Livestock Health Act*, R.S.N.L. 1990, c.L-22 (NL). Ontario relies on a variety of statutes to provide authority for inspection, quarantine and disease

alia, inspection, quarantine, provisions for the destruction of diseased animals and private duties to report disease. As explained in the earlier constitutional analysis, federal animal health regulations will always be paramount to provincial efforts where a conflict arises. Provinces are permitted, however, to impose more stringent or far reaching regulations than the federal government.

For instance the reportable disease list is often expanded under provincial legislation to respond to particular health problems unique to the animal population in that province. For example, British Columbia has included Infectious Laryngotracheitis and Mycoplasma Gallisepticum of turkeys, diseases not required to be immediately reported by federal legislation, on its reportable disease list.[96] Such a distinction between provincial and federal reportable disease lists does not raise constitutional issues as complying with provincial reporting requirements does not cause one to violate a federal law. The dissimilar lists do raise the question of whether, in practice, less harmonization between federal and provincial reportable disease lists will lead to gaps in disease surveillance. Without mechanisms to share information between jurisdictions, an outbreak of a disease not on the federal reportable list may first appear as an isolated occurrence. As a result, efforts to contain the disease may be ineffective if the scope of the outbreak is not fully appreciated. Framing the incident as isolated may formulate the response in such a way as to preclude consideration of non-local sources of the disease and may limit the number and location of animals thought to be at risk of infection thereby undermining containment efforts.

Stray Animals

In addition, legislation to respond to stray farm animals is a common component of provincial animal health strategies. *The Stray Animals Act* (*SAA*)[97] from Saskatchewan is typical legislation. Subject to municipal bylaws to the contrary,[98] the *SAA* prohibits animals from running at large.[99] Allowing animals to run at large has the potential to spread disease between animals that otherwise would not come in contact. Moreover, tracking the people and animals that a diseased stray animal has come into contact with is problematic.

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reporting requirements such as the *Health Protection and Promotion Act*, *supra* note 29, and *Emergency Management and Civil Protection Act*, R.S.O 1990, c. E.9.

[96] *Animal Disease Control Act*, R.S.B.C. 1996, c-14 at Schedule 1.

[97] R.S.S. 1978, c.S-60.

[98] *Ibid*. at s.4.

[99] *Ibid*. at s.3.

The *SAA* further contemplates that municipalities will establish or designate pounds and appoint a poundkeeper to capture animals running at large.[100] The *SAA* specifically assigns liability to municipalities for any loss or damage that occurs as a result of negligent acts or omissions of municipal poundkeepers.[101] By granting municipalities the authority to designate animals as strays and the ability to restrict the movement or order the destruction of stray animals who potentially carry disease, the *SAA* is an example of the role of municipalities in animal health.

Finally, the *SAA* also contemplates the destruction of stray animals that are viewed as "valueless and dangerous."[102] Animals may be designated as a "dangerous stray" by a veterinarian if it is likely to "harm, endanger or pursue any person, livestock or wildlife."[103] Although provinces already have the authority to order the destruction of diseased animals under their comprehensive animal health legislation, the *SAA* specifically authorizes municipalities to act.

Pest and Nuisance Legislation

Legislation to control pests that are a nuisance to agricultural production is often a component of a province's animal health strategy. Alberta's *Agricultural Pests Act* (*APA*),[104] is a typical example of this type of legislation. The *APA* defines a pest to include diseases, and correspondingly the animals that carry them, that the Minister of Agriculture designates as such.[105] To be declared a pest, the disease must be harming or destroying or likely to harm or destroy land, livestock or property.[106] Once something is declared a pest, the Minister has broad power to take steps to prevent, control and eradicate the pest.[107] The *APA* also imposes duties on municipalities[108] and individuals[109] to do the same. Although a province will likely rely on its

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[100] *Ibid*. at s.8.

[101] *Ibid*. at s.11.

[102] *Ibid*. at s.25.

[103] *Ibid*. at s.2(c).

[104] R.S.A. 2000, C.A-8.

[105] *Ibid*. at s.1(1)(m).

[106] *Ibid*. at s.2(1).

[107] *Ibid*. at s.3.

[108] *Ibid*. at s.6.

[109] *Ibid*. at s.5.

animal health legislation to respond to an immediate animal health crises, provincial legislation aimed at controlling pests may also be used to implement longer-term strategies to manage disease.

Livestock Sales

Provinces also include some measures to prevent and control animal disease in legislation governing the public sale of livestock. Licensing requirements and the stipulation for facility inspection are characteristic provisions of this type of legislation.[110] In order to prevent the movement of a diseased animal to a new herd or a new area previously unaffected by the disease, livestock usually require inspection for signs of ill health or disease before they are sold.[111] Operators of community livestock sales are also required to keep records tracking buyers and sellers of all livestock and the dates they moved through the operator's facility.[112] In the event that an animal is later found to have a contagious disease, these records will help identify animals that may be at risk of having contracted that disease.

Game and Fur Farms

Provinces that have game or fur farm industries regulate these industries separately from general livestock operations. Targeted surveillance of game and fur farms is likely justified as these operations are potential conduits of disease between wild and domestic species. Thus, fur and game farm regulations are designed to better ensure that animals in captivity do not escape or come in contact with wild animals of the same species.[113] In the event of an escape, operators of these farms are often required to report the incident to the Minister responsible.[114] Moreover, game animals, like all livestock, are required to be tagged with a unique identifying number so they can be tracked to their farm of origin.

Furthermore, regulations often require owners to report incidents of diseases as designated by the Minister responsible.[115] The Minister also is given broad authority to regulate these operations to prevent disease including the provision of extra inspections of the operations and the animals.[116] With respect to fur farms, regulations are commonly concerned

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[110] See for example ss.3 and 16 of Ontario's *Livestock Community Sales Act*, R.S.O. 1990, c.L-22.

[111] *Ibid*. at s.14.

[112] *Ibid*. at s.15.

[113] See for example Saskatchewan's *The Diseases of Domestic Game Farm Animals Regulations*, D-30 Reg. 1 and Alberta's *Fur Farm Act*, R.S.A. 2000 c.F-30.

[114] See for example British Columbia's *Game Farm Regulation*, B.C. Reg. 227/94 at s.5.

[115] *Ibid*. s.4.

[116] *Ibid.* at s.5.

with the humane treatment of the captive animals.[117] In addition, inspections monitor treatment of the animals.

Provincial Public Health Legislation

All provinces and territories have public health legislation that aims to protect human health but may become relevant to animal health where animal disease poses a risk to humans.[118] This legislation requires the reporting of listed diseases occurring in humans, some of which may be zoonotic in origin. It also confers broad powers on medical officers and Ministers of Health to deal with public health risks, including the authority: to require individuals to submit to testing or treatment, to order the quarantine or isolation of individuals, to inspect premises and order them to be closed or disinfected, to require the production of information, and to require persons to take measures to prevent transmission of disease.[119] Additional powers may be exercised during an epidemic or public health emergency including the power to limit travel, to close public places, to procure or confiscate essential supplies, take possession of premises, or any other necessary measure.[120] The health risks which can be dealt with under this authority include risks of animal origin,[121] therefore the scope of this legislation potentially overlaps with animal health legislation. Information from mandatory reporting of human and animal diseases, respectively, could assist in surveillance of the other, though the statutory framework does not appear to formally provide for this exchange of information.

Implications of Shared Jurisdiction for Crown Liability

As outlined, the statutory framework for animal health includes initiatives by all levels of government. Responsibility for these initiatives is found in many different government departments and ministries including those responsible for agriculture, health, emergency

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[117] *Fur Farm Regulation*, B.C. Reg. 310/59 at s.4.04.

[118] See for example *Health Protection and Promotion Act*, *supra* note 29; *Health Act*, *supra* note 29; *Public Health Act*, *supra* note 29; *Communicable Diseases Act*, *supra* note 29; *Public Health Act, 1994*, *supra* note 29.

[119] See e.g. *Health Protection Act*, S.N.S. 2004, c. 4, s.32; *Health Protection and Promotion Act*, *supra* note 29, ss.22, 41; *Public Health Act*, *supra* note 29, ss.29-52; *Public Health Act 1994*, *supra* note 29, s.38; *Health Act*, *supra* note 29, ss.8, 11.

[120] See e.g. *Health Protection Act*, *ibid*., s.53(2); *Public Health Act*, *supra* note 29, ss.29(2.1), 52.6; *Public Health Act 1994*, *supra* note 29, s.45; *Health Act*, *supra* note 29, s.16.

[121] For example, the *Public Health Act, 1994*, *supra* note 29, s.2(q), defines a "health hazard" to include "an animal other than a human being … that is or may become harmful to health, that hinders in any manner the suppression of disease or the prevention of injury …". The *Public Health Act*, *supra* note 29, s.1 defines a "contact" to include both humans or animals suspected of being infected, and "isolation" and "quarantine" to include the separation of animals as well as humans.

preparedness and the environment. A review of this framework does not indicate gaps in the authority to prevent, control and eradicate disease. In fact, this authority almost entirely exists in duplication between the provinces and the federal government as well as the various ministries and departments mentioned above. Nothing, however, compels either the provinces or the federal government to act to preserve animal health. As explained in the following section on crown liability, the decision not to act, particularly in the event of an emergent disease, is generally not actionable. Therefore, a coordinated animal health framework is not only advisable to prevent wasteful duplication; it can better ensure that a response occurs if coordination results in the designation of a lead agency to respond. Without a designated lead agency, the potential exists for each level of government to delay a response to an animal health crisis as a consequence of a mistaken assumption that another agency is responding. To this end, the recent efforts to negotiate Foreign Animal Disease Emergency Support Plans (FADES) between the provinces and the federal government, is an important component of Canada's animal health framework.[122]

It is important to note that this analysis was limited to Canada's animal health framework particularly as it related to animals involved in agricultural production. As an initial review, this limitation is rational as the disease prevention activities of governments in Canada for animals significant in agriculture occur in isolation from human and wildlife health. Further analysis, however, is needed to identify the implications of this isolated approach to health on the effectiveness of the regulatory frameworks for health and crown liability. Of particular interest is whether a more holistic animal health framework, one that integrates human, wildlife and domesticated animals used in agricultural production, would improve the overall effectiveness of disease eradication and prevention in Canada.

4. International Law Review

A range of international organizations in which Canada participates undertake activities relevant to animal health, including:

- World Organisation for Animal Health (known by the acronym of its former name, OIE [Office International des Epizooties])
- World Health Organization (WHO)

[122] See for example the FADES agreement with British Columbia available online at: <http://www.al.gov.bc.ca/ahc/pdf/FADES%20Plan%20-%202007%20-%20with%20Jpeg%20Signatures.pdf>.

- Food and Agriculture Organization (FAO)
- Codex Alimentarius Commission
- World Trade Organization (WTO)

Canada's commitments as a member of these organizations and under relevant international treaties have implications for the legal framework for animal health in Canada. These various organizations and treaties contain related and overlapping commitments dealing with different aspects of animal health. For example, the OIE is the primary organization focusing specifically on animal health, while the WHO has primary responsibility for human health but may encompass animal health matters that affect human health (such as zoonoses). The WTO's focus is on the potential trade implications of animal health protection measures. Canada is bound by its obligations under all of the agreements outlined below, which are generally complementary. The organizations work together to deal with common issues and their agreements may explicitly provide for such cooperation and interaction, as explained below.

International legal instruments set principles and limits applicable to domestic disease control measures, and require Canada to report certain disease events. Canada as a state will be held accountable for any breach of its obligations under these instruments, regardless of whether the measure that infringes international law is a federal or provincial act.[123] Although this cannot change the allocation of powers under our Constitution,[124] it does create an incentive for harmonization and coordination led by the federal government, to the extent possible within the existing jurisdictional framework.

World Organisation for Animal Health

The World Organisation for Animal Health (known by the acronym of its former name, OIE [Office International des Epizooties]) is the international organization with responsibility for the protection of animal health. The OIE was created by the *International Agreement for the Creation of an Office International des Epizooties*, concluded in 1924. Although not one of the original signatories to this agreement, Canada is a member of the OIE.

The governing Statutes of the OIE (*Organic Statutes of the Office International des Epizooties*, Appendix to the *Agreement*) set out, in Article 4, the objectives of the organization:

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[123] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 31., art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[124] *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326 (P.C.).

a. To promote and coordinate all experimental and other research work concerning the pathology or prophylaxis of contagious diseases of livestock for which international collaboration is deemed desirable.

b. To collect and bring to the attention of the Governments or their sanitary services, all facts and documents of general interest concerning the spread of epizootic diseases and the means used to control them.

c. To examine draft agreements regarding animal sanitary measures and to provide signatory Governments with a means of supervising their enforcement.

The Statutes also provide that member Governments shall notify the OIE of cases of specified diseases, and inform the OIE of measures, especially border measures, implemented to control epizootics (article 5). Disease notifications are now governed by the OIE *Terrestrial Animal Health Code* (formerly *International Animal Health Code*) and *Aquatic Animal Health Code*. These Codes list diseases that must be notified to the OIE (*Terrestrial Animal Health Code*; *Aquatic Animal Health Code*, chapter 1.1.3). The information that is required and timing of notification is set out in the *Terrestrial Animal Health Code* article 1.1.2.3 and *Aquatic Animal Health Code* article 1.2.1.3. For the purposes of notification and other information sharing, the OIE's Central Bureau communicates directly with each member state's Veterinary Administration. (*Terrestrial Animal Health Code* article 1.1.2.1; *Aquatic Animal Health Code* article 1.2.1.1).

The Codes also contain standards, guidelines and recommendations for health measures to be used by national veterinary authorities when animals are being imported or exported. These are recognized as international standards for the purposes of international trade agreements (discussed below).

The OIE's relationships with other organizations, including those mentioned below, and the allocation and sharing of responsibilities among them are set out in a series of cooperation agreements.

World Health Organization

The World Health Organization (WHO) is the primary international organization with responsibility for the protection of human health. It is governed by the *Constitution of the World Health Organization*, concluded in 1946 and in force from 1948. Canada has been a member of the WHO since its inception.

The *International Health Regulations (2005)*, a substantial revision of earlier Regulations, were adopted by the World Health Assembly and came into force in June 2007. As regulations adopted under article 21 of the WHO *Constitution*, they are binding on all WHO member states. They set out obligations for member states and establish powers and responsibilities for the WHO. The *International Health Regulations (2005)* are focused on protecting human

populations but their scope extends to animal health in some respects. For example, states are required to assess events occurring within their territory and report to the WHO any potential "public health emergency of international concern" (a public health risk that may spread internationally or require a coordinated international response, determined according to four factors set out in Annex 2: serious public health impact, unusual or unexpected event, significant risk of international spread, and significant risk of travel or trade restrictions). A "public health risk" is defined as "a likelihood of an event that may affect adversely the health of human populations", and thus may include risks from zoonotic diseases that have potentially serious consequences for human health. As set out in Annex 1, member states are also required to meet certain core capacity requirements for surveillance, response, and international entry points. These require states to be able to detect, confirm, and report disease events, and implement timely control measures throughout the national territory. Again, since public health risks may extend to epizootics with human health implications, measures to detect and address such epizootics are included within the scope of required core surveillance and control capacities.

Insofar as they do relate to epizootics, these surveillance and control obligations would overlap with commitments under the OIE legal instruments. The OIE has been identified as one of the organizations with which the WHO will cooperate and coordinate its activities in the implementation of the *International Health Regulations (2005)*. According to the cooperation agreement between the WHO and the OIE, the two organizations will share reports and other information about zoonotic disease outbreaks, and coordinate responses to outbreaks of "recognized or potential international public health importance (*Agreement between the World Health Organization and the Office International des Epizooties*, article 4.1). Along with the Food and Agriculture Organization (discussed below), the WHO and OIE have recently agreed to collaborate on an initiative to coordinate and enhance surveillance and response through the "Global Early Warning and Response System for Major Animal Diseases, including Zoonoses" (GLEWS).[125] Under this initiative, each of the three organizations will continue to carry out their respective mandates, but agree to share information and collaborate where there is an occurrence of one of the designated priority diseases of common interest that has potential international importance.[126]

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[125] WHO, OIE and FAO, "Global Early Warning and Response System for Major Animal Diseases, including Zoonoses" (2006), available online: <http://www.fao.org/docs/eims/upload//217837/agre_glews_en.pdf>.

[126] *Ibid*. at 14, 17.

Other Organizations

Food and Agriculture Organization

The central mandate of the Food and Agriculture Organization (FAO) focuses on food security, but within this context the FAO undertakes some activities relevant to animal health, primarily through its Animal Production and Health Division. For example, the Emergency Prevention System for Transboundary Animal and Plant Pests and Diseases facilitates international cooperation to contain and control serious transboundary livestock diseases.[127] The FAO has also been active, in collaboration with the OIE, in supporting responses to avian influenza,[128] as well as activities to control foot and mouth disease worldwide.[129] Though the FAO and OIE are engaged in addressing some of the same problems (either separately or in collaboration), the FAO's focus is on assisting developing countries and countries in transition to improve their agriculture and fisheries industries.

Codex Alimentarius Commission

The Codex Alimentarius Commission is a joint FAO-WHO body dealing with food standards. Some Codex standards are indirectly relevant to animal health, for example those setting maximum residue limits for veterinary drug residues in foods. Work is also proceeding under the auspices of Codex on other potentially relevant issues such as antimicrobial resistance. Codex standards are significant given that they are recognized as international standards in international trade agreements (discussed below). However, Codex focuses on food standards including food safety issues such as the storage, packaging, and preparation of food products, and does not directly address animal diseases.

World Trade Organization

The World Trade Organization (WTO) is the main multilateral organization dealing with international trade. It oversees a group of agreements that address various types of potential trade barriers with the aim of promoting free trade. One of these agreements is the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement),[130] which governs the measures that states can take to protect human, animal or plant health. These measures can act as barriers to

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[127] See FAO, "EMPRES: About Us", available online: <http://www.fao.org/ag/againfo/programmes/en/empres/about.html>.

[128] FAO, "FAO's Response to Avian Flu", available online: <http://www.fao.org/avianflu/en/response.html>.

[129] Yves Leforban, Guillaume Gerbier & Mark Rweyemanu, "Action of FAO in the Control of Foot and Mouth Disease" (2002) 25 Comparative Immunology, Microbiology & Infectious Diseases 373.

[130] *Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 [*SPS Agreement*].

trade and therefore the SPS Agreement aims to ensure that member states use measures that are justified and do not restrict trade unduly. The SPS Agreement applies, *inter alia*, to measures "to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs" and measures "to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests".[131] These measures can include, for example, inspection, certification procedures, and quarantine of animals or plants.[132] With respect to these measures, the SPS Agreement imposes both substantive and procedural requirements. Measures that conform to the SPS Agreement provisions are also presumed to be consistent with General Agreement on Tariffs and Trade (GATT).[133]

Article 5.6 of the SPS Agreement states that measures must not be "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection"; a note to this provision states that this means there must be no other "reasonably available" measure that would be "significantly less restrictive". The SPS Agreement requires measures to be based on "scientific principles", supported by "sufficient scientific evidence", and based on a risk assessment that takes into account "available scientific evidence" (Articles 2.2, 5.1-5.2). The SPS Agreement requires that measures be transparent (Article 7)[134] and non-discriminatory (Articles 2.3, 5.5). Generally, a WTO member state claiming that another member state's measures do not meet these requirements bears the burden of establishing that fact, though the state defending its measures will bear the burden of establishing elements of its defence. Measures that conform to international standards are deemed to be consistent with the SPS Agreement and the GATT (Article 3.2), and the Agreement limits the circumstances in which Members can depart from international standards (Articles 3.1, 3.3). The relevant standards set by the OIE and Codex Alimentarius are recognized as international standards for this purpose.[135] This means that following the OIE Codes should give states some assurance that their measures will not be successfully challenged under the SPS Agreement.

Similar obligations are also contained in other trade agreements such as the North American Free Trade Agreement (NAFTA).

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[131] *Ibid*., Annex A, para. 1(b), (c).

[132] *Ibid*., para. 1.

[133] *Ibid*., art. 2.4.

[134] See also *ibid*., Annex B.

[135] *Ibid*., Annex A, para. 3.

5. Case Law Review

As reviewed above in part 2, a few cases have considered the jurisdictional issues relating to animal health in Canada. However, the majority of Canadian jurisprudence related to animal health addresses the amount of compensation awarded after a farmer has been required to cull his flock or herd and/or destroy animal products in response to an animal health concern. Specifically, farmers have appealed compensation awarded pursuant to the *Health of Animals Act*[136]or its predecessor the *Animal Disease and Protection Act*.[137] Although the power to award compensation is discretionary under the *HAA*, a framework for determining eligibility and the quantum of awards is outlined in the *Compensation for Destroyed Animal Regulations.*[138] The *HAA* also contemplates appeals on the grounds that a Minister's decision either refusing compensation or regarding the amount of compensation is unreasonable.[139]

Even though the compensation appeals are an overwhelming majority of cases related to animal health, a detailed discussion of the compensation appeals is not provided as it adds little to the understanding of governmental responsibilities for animal health. Because compensation is discretionary, the crown can limit the extent of its liability in this regard. For example, the crown can alter the maximum amount of compensation available for a destroyed animal prescribed in s. 2 and outlined in the Schedule to the *Compensation for Destroyed Animal Regulations* to minimize liability.

The emphasis on compensation in existing jurisprudence is not surprising given the fact that impacts of animal health have rarely been felt off the farm in Canada. Generally only the farms where disease is detected or farms deemed to be at risk of contamination, either through proximity or through known contact with animals originating from the farm with the disease, have experienced a loss that could give rise to a liability claim as a result of government action in responding to the animal health concern. Typically that loss involves the destruction or removal of animals; the government has established a framework for compensating farmers for this kind of loss.

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[136] *HAA*, *supra* note 36.

[137] R.S.C. 1985, c. A-13.

[138] SOR/2000-233. The *HAA*, *supra* note 36, contemplates compensation for the owners of animals (s.51) and things (s.52) destroyed pursuant to the operation of the *HAA* as well as the costs of treatment required by the *HAA* (s.53).

[139] *HAA*, *supra* note 36, s.56.

However, the reach of animal health crises in Canada has broadened in the last decade. The economic impact of the discovery of Bovine Spongiform Encephalopathy (BSE) in Canada and the ensuing export crisis in the Canadian cattle industry is just one example of this broadening reach. Moreover, it is likely only a matter of time until Canadians begin to experience the human health impacts of animal diseases such as Avian Influenza. Crown liability in this regard is not addressed by the existing regulatory regime for animal health.

The courts have only just begun to consider whether the crown may be liable for injuries or loss that have resulted from the government's action or inaction to prevent and respond to an animal health concern, outside of those cases involving compensation for the destruction or removal of animals and their products. In 2008 the Supreme Court of Canada heard the appeal in *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization),* [140] the Plaintiff brought a claim of negligence, misfeasance and intimidation against the government of Saskatchewan for the Minister's actions in determining the health status of his elk herd, which significantly affected the herd's value. The Minister successfully applied to have the claims in intimidation and negligence struck,[141] and the plaintiff appealed the striking of the negligence claim to the Supreme Court of Canada, an appeal which was successful in part.[142]

In *Sauer v. Canada (Attorney General)*[143], the Crown unsuccessfully argued to strike the claims of Canadian cattlemen who suffered financial loss after the discovery of BSE in Canada and the subsequent closure of key international borders to Canadian cattle and their products. Specifically, the plaintiffs argued that the federal government was negligent when it failed to enact a regulatory ban on the inclusion of ruminant meat and bone meal (RMBM) in cattle or other ruminant feed prior to 1997.[144]

The issue of crown liability generally is not new. The courts have wrestled with this issue and a threshold test has emerged to determine when an action to ultimately find the crown liable can proceed. Canadian courts have adopted the British approach to assessing this

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[140] *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*, 2006 SKQB 99.

[141] The Saskatchewan Court of Queen's Bench struck the intimidation claim but allowed the negligence claim to proceed. The Court of Appeal reversed the decision on the negligence claim and ordered it to be struck: *2007 SKCA 18*.

[142] 2008 SCC 42. The Supreme Court agreed that all claims of negligence against the Crown should be struck except the claim based on the allegation that the Crown had failed to implement an earlier judicial decree.

[143] 2008 SCC 42.

[144] The Crown's application for leave to appeal was dismissed by the Supreme Court of Canada on July 17, 2008. The class action in this case was certified in Ontario in September 2008.

threshold question first outlined in *Anns v. Merton London Borough Council*.[145] In *Cooper v. Hobart*,[146] the Supreme Court describes the threshold test for crown liability as having two stages:[147]

> At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word.
>
> If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

Simply put, an action can proceed against the crown if: (1) the harm suffered was reasonably foreseeable and was suffered by someone whose interests the government ought to have taken care not to impair; and (2) no policy reason exists that would justify relieving the crown of that liability. If this threshold test is met, liability does not necessary follow. The plaintiff is still required to establish the cause of action. For example, if negligence on behalf of the crown is alleged, the plaintiff must still establish that the crown's actions were negligent.

As mentioned, the courts have only begun to consider crown liability arising from government activities involving animal health. Thus, it follows that the *Anns/Cooper* test has not been employed in the animal health context. However, it has been applied in cases dealing with public health, notably *Eliopoulos Estate v. Ontario (Minister of Health and Long-term Care)* and *Williams v. Canada (Attorney General)*, where it has been found that statutory duties under public health legislation did not create sufficient proximity between the Minister and the plaintiff to establish a duty of care sufficient to ground a claim in negligence.[148] One can expect that claims of negligence against the crown in the animal health context, will receive similar

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[145] [1978] A.C. 728 (H.L.) [Hereinafter *Anns*].

[146] [2001] 3 S.C.R. 537 [Hereinafter *Cooper*].

[147] *Ibid.* at 551.

[148] *Eliopoulos Estate v. Ontario (Minister of Health and Long-term Care)* (2006), 276 D.L.R. (4th) 411; *Williams v. Canada (Attorney General)* (2005), 257 D.L.R. (4th) 704. In the latter case, however, the court struck the claims against the federal government but allowed the negligence claims against the provincial government to proceed, leaving open the possibility of a duty and liability arising in the implementation of provincial public health policy.

treatment by the courts as was seen in Eliopoulos and Williams. The fact that a statute, namely the HAA, empowers the Minister to manage animal disease prevention and containment in Canada likely does not impose a statutory duty on the federal crown beyond that which is owed to the public as a whole. However, once the crown engages in activities aimed at protecting the interests of specific individuals, as in Williams, a private duty to those individuals may arise. Nonetheless, the Anns/Cooper test remains a difficult obstacle for plaintiffs to overcome. Even if the government's impugned action is deemed to attract a private duty of care, there are strong policy reasons that argue against finding the crown liable. As articulated in Eliopoulos, the fear of lawsuits may unreasonably interfere with sound decision-making and unnecessarily burden those responsible for Canada's animal health regime. Moreover, even if the threshold test to establish a duty of care is overcome by a plaintiff, the plaintiff must still establish the other elements of the cause of action, namely that the duty was breached and that this breach caused compensable damage to the plaintiff.

Finally, there is some jurisprudence in the area of administrative law that relates to animal health, involving applications for judicial review of compensation decisions,[149] as mentioned above, or of orders, for example orders to destroy an animal or herd. These challenges may be on the grounds of procedural fairness – arguing that the authority did not follow proper procedures in making its decision.[150] Of more direct relevance to this review, decisions may also be challenged on the basis that the authority did not have jurisdiction to make the order.[151] This is one way in which the allocation of responsibilities between various governmental authorities might be questioned by affected individuals.

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[149] See for example *Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2005 FC 1468.

[150] See for example *Archer (c.o.b. Fairburn Farm) v. Canada (Canadian Food Inspection Agency)*, [2001] F.C.J. No. 46.

[151] See for example *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] F.C.J. No. 314.

Part 2 – Literature Review

6. Literature Review

Bearing in mind the overall objective of the project to analyze the roles, responsibilities, mandates and jurisdiction of the federal and provincial governments, and individual producers relating to animal health in Canada, secondary literature was sought to inform the following questions:

- What is the range of powers, responsibilities, and functions that are generally recognized as required in order to ensure animal health?
- How are these powers, responsibilities, and functions identified with or allocated among public and private actors, both in the Canadian context and in other countries by way of comparison?
- What is the role of international organizations and agreements relating to animal health and how does this affect the powers, responsibilities, and functions of actors in the Canadian legal framework?

A range of legal, social science, and science databases[152] were searched using combinations of search terms including "animal health", "animal disease", "agriculture" (in some databases), "law", "legal", "regulation", and "regulatory", in the full text, title, subject, and/or keywords. For databases with large numbers of hits for these terms, the terms were combined and a date restriction was added to search for articles in the last 15-20 years. A limited list of journals that were considered likely to contain relevant articles was also searched issue by issue. The library catalogue at the University of Saskatchewan was searched using the same combinations of terms to identify relevant books or other materials.

The searches yielded relatively few sources that directly address the main question in this project, i.e. the allocation of roles and responsibilities for animal health in the Canadian context. Sources containing some discussion of any of the subsidiary questions set out above were included. Articles focusing on animal welfare (as distinct from animal health), the use of animals in research, and the regulation of veterinary drugs were excluded unless they contained some discussion directly relevant to the central topic of the project. Articles discussing scientific

[152] The databases searched were: Quicklaw; Westlaw; LegalTrac; LexisNexis; Expanded Academic ASAP; Academic Search Premier; Ingenta; JSTOR; ProQuest; Web of Science; PubMed; CISTI Source.

aspects of animal diseases were included if they had clear implications for the responsibilities and functions of public authorities. Articles that appeared to be relevant were saved in electronic form and then reviewed to assess their content and relevance. Those articles ultimately selected for inclusion are set out in the bibliography.[153]

A few articles were found that directly address the Canadian legal framework for animal health. Mintah and Inch provide an overview of federal and provincial jurisdiction over animal health and a detailed review of functions and powers under the federal *Health of Animals Act* and its regulations that would apply in the case of a foot and mouth disease outbreak. Stanford et al. and Farnese review the legal framework for traceability in Canada. McNamara, focusing on food safety and protection from bioterrorism, briefly discusses traceability as well as on-farm food safety programs recognized by the CFIA under an agreement between the Federal and Provincial Ministers of Agriculture. Attaran and Wilson's analysis of federal authority in public health emergencies focuses on human health, but briefly discusses the federal *Health of Animals Act* by way of comparison. The article by Kuiken et al. contains a very brief discussion of Canada's National Wildlife Disease Strategy. The articles by Valiante and Koltun discuss public health powers and immunities of municipal officials, though not specifically in the context of animal health. Finally, the first part of the two-part article by VanderZwaag, Chao and Covan contains an overview of federal and provincial law relating to aquaculture.

Other articles analyze similar issues in other federal states, which are useful by way of comparison though their value is limited due to the differences in federal structures. For example, articles were found reviewing identification and traceability legislation in Australia (Schembri et al.), the United States (Grossman; Adams; Guerra), and the EU (van der Meulen and Freriks). The articles by Hopper and Nelson discuss the legal framework in Ohio and North Carolina, respectively.

There is a substantial body of literature analyzing current and proposed approaches to control of bovine spongiform encephalopathy (see e.g. Abramson; Berlowitz; Briley; Cummins et al.; de Waal and Vegosen; Kline; McGarity; Taylor and Geyer; see also Opsahl regarding chronic wasting disease). Several articles (King, Marano and Hughes; Kuiken et al.; Karesh and Cook; Wanjura; Zinsstag) discuss the need for greater coordination between animal health and human health frameworks.

Our searches also yielded a significant number of articles discussing the international framework for animal health and animal disease control (see e.g. Atwell; Ben Jebara; Ben Jebara and Shimshony; Cooper and Rosser; Forge; Leforban, Gerbier and Rweyemamu; Lubroth; Slorach; Vallat; Vallat, Pinto and Schudel; Wanjura). A number of works also discuss the international trade law issues that may arise in the context of animal health and food safety (see

[153] Appendix.

e.g. Button; Josling, Roberts and Orden; Brosch; Forge; Looney; Martin; Steward and Johanson; Wilson and Beers; Young).

Part 3 – Conclusions and Recommendations for Further Research

7. Conclusions and Recommendations for Further Research

It is evident that the federal government, the provinces, and the territories have broad jurisdiction to address animal health. Nothing, however, compels either level to act to safeguard animal health despite the obvious human health, environmental and economic consequences of failing to do so. The existing distribution of responsibilities is, to a large extent, not due to constitutional imperatives, but rather the product of cooperative relationships as they have developed in practice. That said, if a decision is made to act, provincial initiatives cannot conflict with federal strategies. Therefore, there is a strong incentive for provincial and federal efforts to be coordinated. Harmonization prevents duplication and is more likely to avoid gaps in disease surveillance.

This is particularly important given Canada's international commitments in relation to surveillance and control of animal disease. Canada is obligated under international law to report cases of designated diseases or events to the OIE and WHO in a timely manner. This requires that we have effective surveillance measures in place and mechanisms for information sharing. Where various levels of government are involved in surveillance, efficient communication between them is essential to allow for timely and accurate reporting. The federal government will ultimately be responsible for compliance with international commitments and therefore will need to ensure that it is able to comply, either through its own legislative authority or by entering into stable cooperative arrangements with the provinces. Furthermore, given that the national focal points for the OIE (Canadian Food Inspection Agency) and the WHO (Public Health Agency of Canada) are separate, communication and coordination between them is also required to ensure that reporting obligations to both organizations are fulfilled.

This preliminary survey has identified a number of areas where further investigation may be productive. Since Canada is not alone in facing the challenge of effectively ensuring animal health in a federal state, a comparative analysis examining other federal systems may be useful. Like animal health, public health is an area where the federal and provincial/territorial governments have concurrent jurisdiction under several heads of power. This has raised some challenges in disease surveillance and response which are of particular concern in the implementation of Canada's new obligations under the International Health Regulations. Since

the complexities of regulation in this area are similar to the area of animal health, further examination of these issues may be useful. Coordination between animal and human health surveillance and control measures may also require further investigation and development.

Likewise, the report highlights that animal health strategies aimed at wildlife and domesticated animals are not fully integrated. Rather, coordination is structured around individual diseases. Whether this approach results in gaps in disease surveillance and thus compromises animal health in Canada warrants further investigation. Experiences in other jurisdictions may inform this analysis and should be considered.

Appendix

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