

On-farm Implications of Traceability Initiatives
in the Canadian Agri-food Sector:
A Guide for Farmers and their Legal Representatives

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1.0 Introduction

Farmers are increasingly being asked to participate in on-farm traceability programs. For instance, the *Agricultural Policy Framework* (APF) specifically identifies traceability as one of the key components of its food safety strategy and establishes ambitious goals in respect to the traceability component. Traceability programs in the food sector can be described as attempts to map the movement of raw farm products through the value-added chain¹ to their sale at the retail level.

To examine the on-farm implications of traceability, an understanding of what traceability aims to do is required. Traceability programs are primarily introduced to achieve one of three objectives, namely identity preservation, food safety and/or improving product quality and processes. Identity preservation is a means of distinguishing goods in the marketplace based on unique characteristics with the purpose of establishing a market niche. Identity preservation is employed in the Canadian agri-food sector to distinguish goods based on characteristics associated with product origin, production method, post-production attributes and product traits.

Traceability supports the prevention of food safety problems by inserting accountability into the value-added chain. Traceability also assists with containment when food safety is compromised. Additionally, traceability's role in communicating safety to consumers is perhaps equally important as its role in promoting food safety. While traceability does not guarantee food safety, its role in improving product quality and development processes may contribute to an overall safer product.

It can be expected that producers will remain hesitant about participating in traceability programs until the on-farm implications are more certain. Ongoing contact with the industry demonstrates three primary areas of concern, namely privacy, liability and costs. Producers recognize that participation in traceability programs may become mandatory but have little understanding of the on-farm consequences. The purpose of this paper is to identify some of the concerns producers have with traceability and to address the validity of their concerns.

2.0 The Agricultural Policy Framework

The *Agricultural Policy Framework* (APF), endorsed in 2004 by all levels of government, is the first comprehensive agricultural policy for Canada. The primary aim of the APF is “to enhance the profitability of the agriculture and agri-food sector.”² The APF also

¹ “Value-added chain” is a phrase that is used to describe the components of the food industry (including processors, distributors, transporters, and retailers) that participate in the transformation of raw farm products and the delivery of the final product to the consumer. The phrase “agri-food continuum” is often used interchangeably with “value-added chain.”

² Section 2.1.1 of the APF. The APF is available online at :http://www.agr.gc.ca/cb/apf/pdf/accord_e.pdf.

establishes the structural framework for all further funding arrangements in the sector between the various levels of government.³ The APF addresses five key components of the Canadian agriculture industry. The components include Business Risk Management, Environment, Renewal, Science and Innovation, and Food Safety and Quality. The Business Risk Management and Food Safety and Quality components are of particular interest with respect to on-farm implications of traceability.

The APF defines “business risk” as “the potential for income loss due to unanticipated or uncontrollable perils.”⁴ The definition appears sufficiently broad to encompass the traditional financial assistance provided to farmers, which has historically taken the form of crop insurance premium subsidies, income stabilization programs and disaster assistance. The definition would also seem to encompass financial assistance to address fallout from trade disputes as well as food safety crises. The Bovine Spongiform Encephalopathy (BSE) and Avian Influenza crises are prime examples of these latter “business risks” contemplated by the APF.

Although the APF is being implemented in stages, it is not unreasonable to speculate that access to farm assistance payments that respond to business risks will eventually become tied to participation and compliance with an APF endorsed on-farm food safety system. Indeed, Section 16.1 of the APF provides:

16.1 The Parties agree to use the following principles for the design and evaluation of risk management programs:

...

16.1.8 assisting in the management of risks related to environmental stewardship and food safety.

It is difficult to escape the conclusion that s.16.1 and s.16.1.8 operate together to link food safety and farm assistance payments.⁵ Admittedly, anticipating and relying on a state compensation in the event of a food safety crisis can be a management strategy. It is highly unlikely, however, that s.16.1.8 was drafted with state compensation in mind, particularly when one considers that the APF is aimed at producing a healthy and profitable agricultural sector. Therefore, the only other means by which a farm assistance payment can assist in managing risks is to have as a condition of receipt of assistance that the producer has a farm safety program in place.

The APF also commits to “tracking the usage of private and public risk management tools and strategic planning practices by farmers in order to determine the extent to which

³ *Ibid.* at s. 2.1.4.

⁴ *Supra*, note 1 at s. 14.1.

⁵ Interestingly, it is also not unreasonable to also speculate that access to farm program payments will soon be tied to the completion and upkeep of environmental farm plans.

whole-farm risks are being covered.”⁶ While tracking can assist in evaluating program success by monitoring uptake, tracking will be needed to verify participation when food safety programs and farm assistance payments become linked. Considering the context of the clause, it is most likely tracking is a component of the APF to facilitate verification rather than to monitor uptake.

The APF establishes the direction of future agriculture policy in Canada. If financial assistance from government becomes contingent on participation and compliance with food safety programs, a key component of those programs will be traceability. The on-farm implications of traceability, however, remain unexamined.

3.0 Traceability Defined

Traceability programs in the food sector can be described as attempts to map the movement of raw farm products through the value-added chain to their sale at the retail level. Theoretically, trace-back could extend to the final consumption of the product, however, at this time, the steps between retail purchase and consumption have generally not been included in traceability programs for food. Instead, governments and the food industry generally rely on self-reporting by consumers to monitor concerns that arise post-retail.

The APF specifically defines traceability as “the ability to trace the history, application or location of an entity by means of recorded identifications.”⁷ Traceability does not necessarily begin at the farm-gate; it often involves suppliers of inputs such as feed, fertilizers, pharmaceuticals and pesticides in the farming system. Depending on its design, however, a traceability program can be rather limited in its scope. The program may only trace back to the previous step in the value-added chain. A trace-back program’s sole objective may be to track a consumer product to the farm. Alternately, a trace-back program may be a component of a broader scheme with a number of objectives.

Hazard Analysis Critical Control Point (HACCP) is a common example of a program where trace-back may be one component of a larger risk management program. Briefly, HACCP programs aim to manage risk by identifying where problems are likely to arise along the production chain. Once problem spots are identified, a system of safety protocols is established to avoid safety threats. HACCP also requires that compliance with the protocols be documented. In theory the end product will be safe if threats were avoided at each stage during the production process. Thus, under HACCP the final product is not tested for safety. HACCP has been widely implemented across the food

⁶ *Supra*, note 2 at s.16.3.3.

⁷ *Supra*, note 2 at 19.1.

processing sector and is increasingly being adopted at the farm level. The use of HACCP as a risk management strategy is endorsed in the APF.⁸

The APF specifically identifies traceability as one of the key components of its food safety strategy and establishes ambitious goals in respect to the traceability component. The federal and provincial governments have committed to “the development by industry of traceability components for all products/commodities within the food quality and food safety control systems.”⁹ Not surprisingly Canadian producers are anxious about the on-farm implications of the traceability objectives in the APF.

To examine the on-farm implications of traceability, an understanding of what traceability aims to do is required. Traceability programs are primarily introduced to achieve one of two objectives, namely identity preservation and/or food safety. The food safety objective includes animal and plant health and disease prevention.

3.1 Identity Preservation

Identity preservation is a means of distinguishing goods in the marketplace based on unique characteristics with the purpose of establishing a market niche.¹⁰ Identity preservation is narrowly defined in the APF as “a ‘closed loop’ channel that facilitates the production and delivery of an assured quality by allowing traceability of a commodity from the germplasm, or breeding stock, to the processed product on a retail shelf.”¹¹ The APF is facilitating the creation of a number of traceability programs. Farmers, however, are also participating in a variety of additional traceability programs, which have unexplored on-farm implications. Therefore, a broad definition of identity preservation is appropriate to gain a comprehensive understanding of the on-farm implications of traceability programs.

Identity preservation is required where a consumer is unable to readily ascertain a unique characteristic of a product on her own. These characteristics are commonly called credence attributes as opposed to experience attributes.¹² With an experience attribute a consumer can identify the characteristic a product claims to have just by using the product.¹³ If a label, for instance, indicates that the tin contains pitted cherries, the consumer can readily verify that the cherries are pitted once the can is opened. Similarly, a consumer who purchases an over-the-counter headache remedy that does not cure her

⁸ See Section B. *Ibid.*

⁹ *Ibid.* at s.21.1.5.

¹⁰ The APF distinguishes between “identity preservation” and “traceability,” however, the approach in this paper is that the first is a subset of the latter. This approach is not without precedent as no consensus has emerged as to the definition of traceability. (Hobbs 2005 at 1).

¹¹ *Supra*, note 2 at s.19.1.

¹² Hobbs, J.E., Bailey, D.V., Dickinson, D.L., et al., 2005. Traceability in the Canadian red meat sector: do consumers care? *Canadian Journal of Agricultural Economics*, 53 (1), 47-65.

¹³ *Ibid.*

headache will know from experience that the attribute ‘cures headaches’ was improperly claimed. It is clear, therefore, that a consumer can discern the accuracy of label claims with respect to experience attributes without the assistance of an identity preservation system.

In contrast, credence attributes cannot be verified through experience. Instead, consumers must rely on identity preservation, traceability systems to verify the attribute’s presence in the product.¹⁴ In order to preserve the identity of credence attributes, a system is needed that keeps products with these attributes apart from products without these attributes. In addition, the product usually contains a label to indicate the presence of the credence attribute. Without a label the consumer cannot discover such information. Credence attributes are often associated with a product’s origin, the production method employed in creating the product, the presence or absence of a specific trait in the product, and post-production characteristics associated with marketing the product.

There are four categories of credence attributes that employ identity preservation, traceability systems to communicate their presence in a product to consumers. These categories include product origin, production method, post-production attributes and product traits. Although presented as insular categories, it should be noted that there is often significant overlap in the objectives of the various identity preservation, traceability programs.

A. Product Origin

Country of Origin Labelling (COOL) is the most basic form of an identity preservation system. COOL is designed, of course, to distinguish location of production. Numerous countries, including Canada, require certain agricultural products to indicate the country of origin at the retail level. In Canada, the labelling of fresh fruits and vegetables is the most visible example of COOL. Canadian law requires that a consumer faced with a selection of produce at the supermarket be informed of the product’s country of origin either by a label on the product or on the bin where loose produce is displayed.¹⁵ Traceability systems that achieve identity preservation based on location of production provide consumers with specific information about the origins of the food they eat. Accordingly, a Canadian consumer may knowingly choose an apple from Washington or strawberries from Mexico when she purchases these products.

Where no regulation exists mandating COOL, manufacturers and producers can choose to provide consumers with information concerning the location of production. Much debate exists regarding the desirability of voluntary versus mandatory COOL. This debate is focused on the application of mandatory COOL to the American beef industry. Pursuant to the *Farm Security and Rural Investment Act of 2002*,¹⁶ mandatory COOL in the beef, pork and seafood sectors was required to be in place by 2003. This deadline has passed

¹⁴ *Ibid.*

¹⁵ *Consumer Packaging and Labelling Act*, R.S., 1985, c. C-38.

¹⁶ Pub. L. No. 107-171 § 10816, 116 Stat. 134, 533-35.

and yet mandatory COOL has only been implemented in the United States with respect to seafood. Opponents of mandatory COOL have successfully implemented a series of moratoria to delay its enforcement in the beef and pork industries in hope that the upcoming 2007 Farm Bill will not contain mandatory COOL provisions.

The meat packing industry, the primary and most vociferous opponents of mandatory COOL, argues that mandatory COOL will be costly and overly burdensome.¹⁷ Canadian and Mexican beef is fully integrated into the American meat packing industry's production systems. The industry views any system of segregation of beef by origin as excessively costly and impractical.

Cattlemen and consumer groups are the major proponents of mandatory COOL, particularly with respect to beef, in the United States.¹⁸ These proponents contend that consumers want and have a right to know where the beef they are purchasing has been produced. Moreover, the proponents assert that consumers need mandatory COOL in order to make informed choices about their food purchases. COOL allows consumers to make decisions based on, for example, a belief that foreign food may be less safe than local food. COOL also enables consumers to decide to support local producers or to express patriotic sentiment by, for example, not purchasing French wine on the basis that France made the decision not to support the invasion of Iraq. The proponents of mandatory COOL stress that a voluntary regime is ineffective. Voluntary COOL is the status quo within the American beef industry. To date few COOL initiatives have emerged under the voluntary regime.

In addition to the basic COOL, the World Trade Organization, in the *Trade-related Aspects of Intellectual Property Rights*¹⁹ (TRIPS) agreement, has established geographical indications to protect the use of place names in association with the sale of distinct goods originating from protected regions.²⁰ Champagne and Dijon mustard from France and Charlevoix lamb from Quebec are examples of products marketed with the use of a geographical indication. Similar products produced outside protected regions are not permitted to use the names Champagne, Dijon or Charlevoix.

B. Production Method

The second type of identity preservation system is that which distinguishes the production method utilized to create a product. Such a system can specify the manner in which a product was made and by whom. In the agri-food sector traceability systems that indicate animal husbandry techniques are a common use of identity preservation. Labels

¹⁷ Opponents of mandatory COOL have developed a website that documents their views on the issue: <http://www.countryoforiginlabel.org/>.

¹⁸ Proponents of mandatory COOL have also developed a website on the issue: <http://www.americansforlabeling.org/>.

¹⁹ Annex 1C of the Marrakesh Agreement. TRIPs text available at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

²⁰ *Ibid.* at art. 22.

that identify free-range chickens or eggs are used to distinguish products from those that were produced in close confinement such as in an intensive livestock operation. It is hoped that consumers' concerns for animal welfare will translate into a willingness to pay more for products produced by less objectionable means. Identity preservation is also a means of delineating these products in the marketplace, which have been created using organic production methods. Products labelled 'Natural' or 'Pesticide-Free' communicate to consumers that the products were not produced using chemicals, antibiotics or other non-naturally occurring additives.

The use of identity preservation systems to distinguish production methods is not unique to the agri-food sector. For example, timber and agri-forestry industries have begun to use identity preservation systems to support labels that indicate their products were made from sustainably harvested and non-rainforest timber.

Identity preservation systems employed outside the agri-food sector have primarily been used to indicate who was involved in production and to identify their working conditions. The union 'bug' was perhaps one of the first identify preservation systems aimed at addressing working conditions. The 'bug' is a commonly recognized symbol included on products produced by unionized employees. In addition, labels have emerged, particularly in the textile sector, to distinguish products produced by workers who received fair wages and work in safe conditions from those products produced in 'sweatshops.'

C. Post-Production Attributes

Post-production attributes are characteristics associated with how the product reaches the consumer after production and manufacture. Identity preservation trace-back programs implemented to support a Fair Trade label are examples of programs aimed at preserving the identity of a post-production attribute. The Fair Trade label indicates that the producer received a fair price from the distributor for the product.²¹ Although most commonly associated with coffee, the Fair Trade label and the identity preservation system that supports it is increasingly being used to market handicrafts.

D. Product Traits

Product traits are, quite simply, specific characteristics of food some consumers desire. Identity preservation traceability systems are used to communicate to consumers that their food contains specific product traits. Product traits can overlap with the production method category as many product traits result from the production method. For instance, food not containing pesticide or pharmaceutical residues is a direct consequence of the manner in which the food was produced. These systems warrant a separate category, however, because many of the consumers who desire products with certain product traits do so without an understanding that the trait is connected to a production method. These

²¹ For more information see: <http://www.fairtrade.net/>.

consumers merely want verification, for example, that their milk is free of bovine growth hormones or that their pork chops do not contain antibiotics or that their apples are free of pesticides.

3.2 Food Safety

The promotion of food safety is the second goal of traceability initiatives in the Canadian food sector. It is not surprising that interest in traceability has peaked since the discovery of BSE in Canada. As witnessed by many Canadian cattlemen a perceived food safety crisis can have devastating effects upon the industry involved. To avoid the effects of a BSE-like incident, the Canadian food industry is striving toward improved food safety practices and to communicate those improvements to consumers. Traceability programs are a key component of many industry-specific food safety strategies. Traceability assists with two elements of food safety namely prevention and containment.

Traceability supports the prevention of food safety problems by inserting accountability into the value-added chain. If a food safety problem, such as contamination, can be traced back to where the contamination occurred, the operator of that establishment may be liable for any harm that results from the contamination. To avoid liability operators are given an incentive to take steps to avoid the contamination in the first place.

Traceability assists with containment when food safety is compromised. If a product that poses a safety risk was produced in a system with traceability, the product can be traced back through the value-added chain to identify the origin of the food safety concern. If the source of the concern can be readily ascertained, an effective recall can be initiated for all products that came in direct contact with the contaminated product during and after the problem arose. Traceability allows the recall to be precise so as to avoid the unnecessary recall of products that pose no safety risks.

Traceability's role in communicating safety to consumers perhaps is equally as important as its role in promoting food safety. The ability to trace a product back to its source may instil consumer confidence, particularly if the product has been produced in an industry where food safety has proven to be problematic. From an industry perspective, it is interesting to note, however, that at least one study finds that consumers are likely to value traceability initiatives supported by quality verification higher than those that merely trace the product back to its farm of origin.²² It may be that, while bare traceability may result in safer food by making those in the value-added chain more vigilant, consumers may not be willing to pay more for that improvement without additional quality assurances.

²² *Supra* note 12.

4.0 On-Farm Implications of Traceability

Traceability in the Canadian agri-food sector is in its infancy. It can be expected that producers will remain hesitant about participating in traceability programs until the on-farm implications are more certain. Ongoing contact with the industry demonstrates three primary areas of concern namely privacy, liability and costs.

4.1 Privacy

Record keeping requirements will be an obligation of producers participating in traceability programs regardless of the scope or nature of the traceability program. Record keeping raises privacy issues, particularly if government delivers or audits the food safety program. It should also be emphasized that records required by private or industry-led programs may raise privacy issues for producers.

A. Government Programs

The first privacy concern associated with government operated or verified programs is how the information collected will be used. If full participation is desired, protocols must be established to ensure that a producer's personal information collected in the context of a food safety program is not shared with other government agencies or departments. For instance, information concerning the number of cattle located on a farm should not be shared with the Canada Revenue Agency to verify income tax submissions. Likewise, information concerning the number of people working on the farm, which has been collected to track who has come in contact with the food product, should not be used to confirm that the producer is accurately submitting Employment Insurance or Canada Pension Plan amounts. Without adequate assurances that information collected in a government operated or verified food safety program will not be used for alternate purposes, producers may be unwilling to participate.

The capacity of third parties to gain access to personal information or information about a private farm business through the various Access to Information Acts throughout the country is the second privacy concern arising from state operated or verified food safety programs. Information about a producer's operation or other personal information may be of interest to a third party for any number of reasons, including a desire to gain the competitive advantage or, perhaps, to assist with litigation between the third party and the producer.

The concern that third parties may gain access to personal information stems from the decision in *Piller Sausage and Delicatessens Ltd. v. Canada (Minister of Agriculture)* where the court held that audit reports created during a government-funded audit at the plaintiff's slaughtering and processing facilities could be released to the requesting third

party.²³ Although the plaintiff alleged that it would suffer financial loss if the reports were released, the court ruled that the plaintiff did not meet the burden required to deny release pursuant to s.20(1)(b) of the federal *Access to Information Act*.²⁴

Pursuant to the *Access to Information Act*, the federal government reserves the right to release personal information if it is deemed in the public interest to do so, notwithstanding the potential for harm to the individual whose information is released.²⁵ Although the circumstances where it is in the public's interest to release a producer's personal information may be rare, producers should be aware that the possibility exists.

B. Private Sector Programs

Similar privacy concerns arise under private sector traceability programs. A processor may use information gathered for trace-back purposes to gain an advantage in future dealings with the producer. Additionally, when a processor is also a producer, as is sometimes the case in the Canadian cattle industry, sharing information about the age, size and profitability of a herd with a competitor may be undesirable. A producer who is not also a processor may, therefore, be hesitant to participate in traceability programs that allow the processors to access their records.

With respect to record keeping requirements, documents may be subject to subpoena in judicial proceedings. Although not unique to private sector programs, the potential for records to be subpoenaed is a legitimate fear. In litigation between a processor and a producer over, for example, a bad debt, a processor who participates in the same traceability program as the producer can use his knowledge of the producer's record keeping requirements to subpoena records to strengthen the processor's case.

4.2 Liability

If products can be readily traced back to the farm of origin, the potential for producer liability arises in the event of a food safety concern. Liability may arise as a consequence of a violation of a food safety regulation. A producer may also be liable for damages as a consequence of contract breach. Additionally, there is the potential for a civil claim for damages in the event that a person is harmed or suffers a loss as a consequence of something that can be linked to the farm. For instance, if a person consumes beef that is contaminated with *e.coli* and becomes ill, the producer may be found responsible if it can be shown that the contamination occurred while the product was in her control.

In the alternative, traceability can assist in avoiding liability when problems arise. As will be explained, traceability can provide the necessary evidence to establish that a producer exercised due diligence and reasonable care.

²³ [1988] 1 F.C. 446. Aff'd [1989] 1 F.C. 47.

²⁴ R.S. 1985, c .A-1.

²⁵ *Ibid.* at s19(6).

A. Regulatory

Food safety regulations in Canada are vast and violations can result in a range of penalties from fines to imprisonment. The possibility of linking a product to its farm of origin may increase the number of on-farm food safety prosecutions. While prosecutions may increase, existence of a food safety program may be sufficient to establish a due diligence defence with respect to some offences.

In *R. v. City of Sault Ste. Marie*, Dickson J., defined three categories of regulatory offences in Canadian law.²⁶ Offences in the first category are properly categorized as criminal offences. To be convicted of a criminal offence, the prosecutor must establish that the producer knowingly engaged in the prohibited conduct or that she was reckless in the sense that she should have known her conduct was prohibited.

The second category of offences is strict liability offences. Strict liability offences permit a defence of due diligence. Any offence whose penalty may include imprisonment but does not explicitly permit a due diligence defence will be interpreted by the courts as allowing such a defence. Any other interpretation runs afoul of s.7 of the Charter.²⁷ The availability of the defence of due diligence was discussed in *SSM*:²⁸

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

A review of prosecutions involving food safety offences provides some insight into what a producer must do to establish due diligence if faced with a similar prosecution.

In *R. v. Can-na Foods 2 Ltd. (c.o.b. Jay's Supermarket #3)*,²⁹ the defendants were accused of mislabelling and selling packages of meat as containing beef when they, in fact, contained horsemeat in contravention of s.5 of the *Food and Drug Act*.³⁰ The decision in *Jay's* suggests that when participating in a regulated industry, producers, as a component of due diligence, have a responsibility to familiarize themselves with the applicable legislation.³¹ In addition, the court stressed that when alerted to a potential violation, due diligence requires that a producer undertake the steps necessary to ascertain if she is in compliance with the regulations.³²

*R. v. Steinberg's Ltd.*³³ supports the assertion that a food safety program, while facilitating on-farm food safety prosecutions, may also establish a defence of due

²⁶ 40 C.C.C. (2d) 353 at 373 [hereinafter "SSM"].

²⁷ *Reference re s.94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 515.

²⁸ *Supra*, note 26 at 374.

²⁹ [2002] A.J. No. 970 [hereinafter "Jay's"].

³⁰ R.S. 1985, c. F-27.

³¹ *Supra* note 29 at para. 44.

³² *Ibid.* at para. 46.

³³ 80 D.L.R. (3d) 741 [hereinafter *Steinberg's*].

diligence. In *Steinberg's*, the defendant was charged mislabelling the cut of beef in a pre-packaged product thereby violating s.7 of the *Consumer Packaging and Labelling Act*.³⁴ The court held that the defendant exercised due diligence by designing:³⁵

...an elaborate scheme of employee training and education as to governmental regulations and requirements, and compliance therewith – this included manuals, oral expositions, direct discussions with affected personnel both as individual and at group meetings; an on the job site inspection scheme, designed to accustom every employee concerned with the marketing of meat to inspect the meat counter at regular and irregular intervals – even directors and senior “head office” personnel of the company were instructed as to this, as of course were store managers, meat managers and meat packers.

Depending upon the program’s design a traceability program that addresses food safety may do many of the same things including familiarizing everyone involved with the operation with the governing rules and regulations, training employees to implement the program, and regular monitoring and inspection of the system. In the event of a prosecution for a strict liability offence a food safety program that includes a traceability component may establish due diligence.

Unfortunately, traceability programs will be of little assistance to a producer who is charged with an absolute liability offence. Absolute liability offences are the third category of offences from the *SSM* case outlined above. Mere proof of commission of the offence, regardless of intent or due diligence exercised, is sufficient to find liability. As a consequence of the inflexible nature of these offences, absolute liability offences are most likely to attract fines. Producers should be aware that the record-keeping obligations of traceability might increase the likelihood of financial penalties as a result of on-farm prosecutions of absolute liability food safety offences. If records show the commission of an absolute offence, liability will necessarily follow where the government chooses to prosecute.

B. Contract

In addition to regulatory offences, traceability may facilitate contractual liability if a producer sells her product under contract. A producer may be found to have breached a contract if a food safety problem arises with her product. Because what will constitute breach will be unique to the specific contract in question, it is difficult to make generalized comments about how a producer may be found liable as a consequence of a traceability program. Instead the discussion that follows emphasizes the importance of ensuring that the contractual parties have a clear understanding how the contract allocates risk between the parties.

³⁴ S.C. 1970-71-72, c.41.

³⁵ *Supra* note 33 at 748-9.

To avoid liability producers should be careful not to warrant things beyond their control. For instance, an organic producer should avoid warranting that her products are free from either GMOs or pesticide residues. Notwithstanding the care and attention paid by the farmer, GMOs and pesticides are known to drift across property boundaries. Thus, an organic producer may find that her product has been contaminated through no fault of her own. To avoid liability for things beyond her control, the organic producer should only warrant that she and her employees did not plant GMO seeds or use uncertified pest control products.

Likewise, producers should negotiate for the inclusion of a limitation of liability clause in contracts. Consider the example of the organic producer provided above. If a shipment of organic wheat was rejected by the Japanese government because wheat from her crop was found to have pesticide residues, would she be responsible for the losses suffered by the rejection of the entire shipment? If the contract does not specifically limit liability, damages of the magnitude described could be awarded against a producer. Ideally, producers should aim to limit their liability to the value of the crop sold under contract and they should not agree to indemnify the other party for losses above that amount.

C. Civil Claims

Traceability may also attract civil claims arising from injury caused as a consequence of food safety problem linked to a producer's farm. Negligence is one possible civil claim a farmer may face. A person will be found negligent if she does not take reasonable care to avoid injuring those she ought reasonably be able to foresee as likely to be affected by her conduct.³⁶ The reasonableness standard necessarily involves an objective evaluation of the surrounding circumstances. An artificial analysis of what a reasonable person would have done in the circumstances is used to determine if there has been a breach of the reasonableness standard.

Notwithstanding the objective nature of the reasonableness test, the standard of care required in negligence parallels the requirements of due diligence. Both strict liability and negligence require some analysis of appropriate conduct in the circumstances. The sole difference is that the first considers the actual knowledge and skills of the defendant while the latter measures the defendant's conduct against a constructed "reasonable person." In this way implementation and ongoing monitoring of a food safety program may also assist in avoiding liability in a civil claim. The food safety program, particularly if there is widespread adoption across the industry, can become evidence of what a reasonable person would do in similar circumstances.

³⁶ *Donoghue v. Stevenson* [1932] A.C. 562 (H.L.) at 580.

4.3 Cost

The implementation and on-going monitoring costs of on-farm food safety programs will depend on the nature and the extent of the program. In all likelihood most producers already keep most of the records required for an effective traceability program. If that is the case, the costs of participating in a program can be quite minimal. Costs will increase, however, with the complexity of the program. The costs associated with a third party, independent audit or verification are of particular concern.

It is suspected that costs associated with traceability will be borne by the producer and will not flow through the value-added chain to the consumer. Producers remain price-takers in the market for farm products. Most primary agricultural products are easily substituted for other farm products. In addition there are few buyers and many suppliers of raw farm products. Consequently, if a producer is unwilling to assume the costs of a food safety program, a buyer will likely find someone else who is willing. In that way the costs of implementation and ongoing compliance with food safety programs will merely become the entry fee to participate in the market. Producers should not be under the misconception that the costs associated with traceability programs designed to address food safety concerns will be recovered from the consumer. Canadians generally perceive their food as safe. This perception may explain why consumers are unwilling to pay more for the ability to trace food back to the farm of origin in the event of a food safety concern.³⁷

The APF is supporting the development of industry-led traceability initiatives. The goal is to create sector specific food safety programs with consistent protocols throughout the country. Presumably a consistent uniform standard will foster consumer confidence with respect to the safety of Canadian products and will minimize participation costs. Unfortunately, APF traceability programs are not the only programs attracting producer participation. In addition to programs designed to promote food safety, traceability can be a component of programs aimed at identity preservation. The ease with which producers are able to participate in multiple programs at one time will depend on the recognition of equivalency between the various programs. Without recognition of equivalency costs borne by producers will escalate as duplicate records and perhaps independent audits are required.

5.0 Conclusions

Traceability programs are primarily introduced to achieve one of three objectives namely identity preservation, food safety and/or improving product quality, and processes. As an information management tool traceability can benefit all stakeholders by contributing to improved consumer confidence in the safety of the food produced. Increased consumer confidence can lead to new markets and increased sales.

³⁷ *Supra* note 12.

Relatively little is known for certain, however, about the on-farm implications of traceability initiatives in the Canadian agri-food sector. The on-farm impact of traceability will differ depending on the origin and design of the traceability system adopted. Producers may face increased regulatory prosecutions, contractual liability and civil claims if a problem is traced-back to the farm. Traceability, however, does not create a new form of liability. Instead it becomes easier to find the source of a product and expands the list of possible responsible parties if a problem arises. Without traceability many farmers are protected by the anonymity afforded by co-mingling of products during processing.

At the same time, however, a traceability program has the potential to provide exculpatory evidence that a problem's origin was not on the farm. Traceability may also be an important tool to improve crisis planning and management. Ideally, a producer should evaluate the benefits and risks associated with the various systems before a decision to participate is made.