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Legal Barriers to Increased Local Food Production and Distribution

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Environmental Law Clinic

UNIVERSITY OF VICTORIA

From: Kendra Milne, Environmental Law Centre

Re: Legal Barriers to Increased Local Food Production and Distribution

Date: June 6, 2007

I was asked to research existing legal barriers to increased local food production and distribution in British Columbia. I hope this memo will provide an information base to help identify possible areas for future law and policy reform to encourage regional food production and distribution systems. To summarize, this memo:

- (1) lays out a brief map of agricultural regulation relating to food production and distribution in Canada,
- (2) examines how the British Columbia supply management system may bar increased local food production and distribution, and
- (3) examines how interprovincial and international trade agreements may bar increased local food production and distribution.

(1) Agricultural Regulation Relating to Food Production and Distribution in Canada

Before moving on to identify legal barriers to local food production and distribution, I will briefly outline how food production and distribution is regulated in Canada. It is quite a complicated regulatory web, so it is useful to explore the broader scheme in which the supply management system and trade agreements discussed below are situated.

In Canada, the federal and provincial governments share jurisdiction over agriculture. This is explicit in section 95 of the *Constitution Act, 1867*.¹ The shared jurisdiction over agriculture flows from the constitutional division of powers between the federal and provincial governments: section 91(2) (jurisdiction over trade and commerce) is the foundation for the federal government's jurisdiction, and s. 92(10) (jurisdiction over local works and undertakings) is the foundation for the provincial governments' jurisdiction.² As a result, the production and marketing of agricultural products is regulated by both federal and provincial laws. The division of authority within this shared jurisdiction has been interpreted by the Supreme Court of Canada in the *Reference re Agricultural Products Marketing Act*,³ which was reaffirmed by the Court in 2005.⁴ The

¹ *Constitution Act, 1867*, available online at: <http://laws.justice.gc.ca/en/Const/index.html>.

² See note 1.

³ *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, available online at: <http://www.canlii.org/ca/cas/scc/1978/1978scc10009.html>.

⁴ *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20 at paras. 22-40, available online at: <http://scc.lexum.umontreal.ca/en/2005/2005scc20/2005scc20.html>.

Court broke agriculture down into production and marketing. It stated that the production of agricultural products, regardless of where the products will be marketed, is exclusively provincial jurisdiction.⁵ Interprovincial and international trade of agricultural products, regardless of where the products were produced, is exclusively federal jurisdiction.⁶ As a result, the marketing of agricultural products is a shared jurisdiction since provinces control intra-provincial trade and the federal government controls extra-provincial trade.

The result of these jurisdictional determinations is a complicated supply marketing system that is regulated by both federal and provincial governments.

(2) Barriers Created by the Supply Management System in British Columbia

In British Columbia, many agricultural products, including dairy products, many vegetables and some meat products, are regulated by a supply management system. To produce these products and sell them commercially (beyond sales at farm gates), farmers must hold a quota from a marketing board which specifies the amount they may produce. The goal of the quota management system is to ensure a balance between supply and demand and that the market is not flooded with excess product.⁷ Because production is the exclusive jurisdiction of the provincial government, quotas are distributed by provincial administrative marketing boards that are established under section 2(2) and the corresponding regulations of the *Natural Products Marketing (BC) Act*.⁸ There are currently eight boards regulating different products or classes of products under the *Act*. The *Act* also establishes the Farm Industry Review Board, which oversees the individual provincial regulatory boards and hears appeals of individual board decisions.⁹

For some agricultural products, there are also national regulatory boards established by the federal government under Part II and the corresponding regulations of the *Farm Products Agencies Act*.¹⁰ A national dairy commission is established under a separate *Act*.¹¹ As with the provincial system, the *Farm Products Agencies Act* also established an oversight and appellant board for these federal boards, the National Farm Products Council.¹² For the specific products that have national boards (not all do), the amount of product produced in Canada is determined by the federal board and then each corresponding provincial board is granted a specific amount of product to produce. The British Columbia regulatory board then decides how to distribute the production of the product, in quotas, to farms. If there is no federally established national board for a specific

⁵ See note 3 at page 1293.

⁶ See note 3 at page 1296.

⁷ *Reid v. British Columbia (Egg Marketing Board)*, 2007 BCSC 155 at para. 13, available online at: <http://www.canlii.org/bc/cas/bcsc/2007/2007bcsc155.html>.

⁸ *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c.330, available online at: http://www.qp.gov.bc.ca/statreg/stat/N/96330_01.htm.

⁹ See note 8 at sections 3, 7.1 and 8.

¹⁰ *Farm Products Agencies Act*, R.S. 1985, c.F-4, available online at: <http://laws.justice.gc.ca/en/F-4/index.html>.

¹¹ *Canada Dairy Commission Act*, R.S. 1985, c.C-15, available online at: <http://laws.justice.gc.ca/en/C-15/index.html>.

¹² See note 10 at Part I.

agricultural product or class of products, then the provincial regulatory board determines the amount of product to be produced and distributes the quotas.

Marketing of agricultural products is primarily done by the provincial regulatory boards. Although the federal government has jurisdiction over marketing of products for inter-provincial and international trade, that authority has mainly been delegated to the provincial boards under section 2(1) of the *Agricultural Products Marketing Act* and its corresponding regulations.¹³ Since provincial governments already have jurisdiction over marketing within the province, these boards market products both intra-provincially and extra-provincially.

The current supply management system creates serious barriers for the local production and distribution of food in British Columbia. Farms producing sustainable food for local distribution tend to be smaller in scale, but they struggle to be commercially viable. Although the supply management system has exemptions to the quota requirements for farmers producing less than a certain volume of product, the exemption levels are typically too low to be commercially sustainable. Production under the exemption level also may not fill the market for local food. This means that, to survive, farms that produce market regulated products require quotas to produce them for commercial distribution, or else they are limited to directly selling their products at their farm gates. Although quotas do not cost anything to obtain from the provincial board, they rarely become available.¹⁴ Typically, quotas are obtained by trading or purchasing them in large blocks from producers that already hold them. This system has made it very expensive for new farmers to enter a market, and smaller farms often cannot compete with large corporate producers that can buy larger quantities at higher prices. Again, because farms intending to produce and distribute locally are usually small-scale and use sustainable farming techniques, the cost of quotas makes it nearly impossible to survive financially. In British Columbia, it is an offence to fail to comply with provincial marketing board regulations,¹⁵ so local farmers are in a difficult position. They cannot survive financially operating at the quota exemption level of production, they cannot afford to purchase quotas, and they require quotas to produce their product.

The obstacles that the supply management system can create for small-scale farmers are illustrated by examining the effect of the system on organic farmers.¹⁶ Although organic farms are certified under a provincial act, their production is still regulated by the provincial boards along with non-organic producers of the same product. Organic egg production is a prime example. To be exempt from the quota requirement, farmers must have less than one hundred egg producing birds, which is not financially viable. Egg production quotas rarely become available, and in 2007, the cost of acquiring quota is approximately \$225 per egg producing bird. That cost, and the fact that quotas are

¹³ *Agricultural Products Marketing Act*, R.S. 1985, c.A-6, available online at: <http://laws.justice.gc.ca/en/showtdm/cs/A-6>.

¹⁴ See note 7 at paras. 37 and 38

¹⁵ See note 8 at section 18.

¹⁶ This example is based in a recent BC Supreme Court case concerning organic egg production. See note 7 for the case citation.

typically sold in large blocks, makes purchase unrealistic for small-scale farmers. There is already literature that examines the possibility of establishing a separate marketing board for specialty products with a higher level of production allowed under the quota exemption.¹⁷ A separate board would eliminate the competition for quotas with large-scale corporate producers that currently control the provincial market.

(3) Barriers Created by Trade Agreements

Trade agreements also create barriers to local food production and distribution, although these are primarily market barriers and not legal barriers. Liberalized trade makes it difficult for small-scale producers to compete since, with the market leveled and becoming cleared of import barriers, the largest, most efficient producer can offer the lowest price to the consumer.

Canada is signatory to many international trade agreements, although the World Trade Organization *Agreement on Agriculture*¹⁸ and the *North American Free Trade Agreement*¹⁹ have the greatest impact on local food production. Both agreements liberalize trade by eliminating non-tariff levies like quotas on imported products, which previously guaranteed a segment of the market for domestic producers, and also reduce tariffs on imports.²⁰ This results in increased amounts of imported agricultural products in the market at a lower price. Not only does this make it difficult for local, sustainable producers to compete, but it also encourages importing food, which has its own environmental costs due to transportation requirements. Imported food may also be produced with more lenient environmental regulations, making it cheaper and creating environmental costs. Both the WTO agreement and *NAFTA* have exceptions that may apply to local food production. The second information memo will explore those possibilities. British Columbia has also signed the *BC-Alberta Trade, Investment and Labour Mobility Agreement*.²¹ This agreement has similar impact as the international agreements in that goods must be treated in a non-discriminatory way whether or not they are local.

Within all three trade agreements, a hurdle for local food distribution is the government procurement provisions that require the government have open and non-discriminatory practices when procuring a contract for goods.²² This means that the government cannot favour local food producers when procuring contracts for food purchases. Again, this is not an actual legal barrier to the production and distribution of local food, but it is a barrier that makes it difficult for local food producers to compete with cheaper, imported products. Each agreement covers different governmental bodies and

¹⁷ See for example, the BC, *Recommendations for Managing Specialty Agri-Food Products in B.C.'s Supply Managed System*, prepared for Minister of Agriculture Food and Fisheries (2004), available online at: <http://www.al.gov.bc.ca/polleg/regulaterdmrkt/index.htm>.

¹⁸ *WTO Agreement in Agriculture*, available online at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹⁹ *NAFTA*, available online at: <http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp>.

²⁰ See note 18 at Articles 4 and 6; see note 19 at Ch.3, sections A and B.

²¹ *BC-Alberta Trade, Investment and Labour Mobility Agreement*, available online at:

http://www.gov.bc.ca/ecdev/popt/media_room/bc_ab_trade_investment_mobility_agreement.htm.

²² See note 19 at Ch.10; see note 18 at Annex 4; see note 21 at Article 14.

each has exception amounts in dollars, below which the minimum procurement requirements do not apply. All of the agreements also have exceptions to the procurement requirements that may be explored in the context of local food production. More research is required in this area to determine the extent of the effect on local food producers.

(4) Summary

To summarize, the supply management system in BC creates legal barriers for local food production and distribution because small-scale, local producers cannot afford or obtain quotas to produce their goods, particularly when competing with large, corporate producers. Trade agreements entered into by both the provincial and federal governments do not necessarily create legal barriers to local food production and distribution, but they can make it difficult for small-scale producers to compete with corporate imports. The trade agreements also bar subsidies to support the development local food production. Possible exceptions, challenges and areas for reform will be explored in the second memo produced on this issue.