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Chapter 11 - Compliance and Enforcement

11.1 Introduction

Ontario's meat regulatory system is designed to protect public health and the safety of animals. To varying degrees, every stage from on-farm production to retail sale is regulated. An outbreak of foodborne illness can cause enormous social and economic loss including widespread illness, death, the long-term loss of consumer confidence and irreparable damage to an entire industry.

The existing provincial system contains elements designed to prevent wrongful conduct and to identify and promptly respond to instances of non-compliance. Through a patchwork of legislation overseen by multiple ministries and bodies, the province prohibits certain activities unless conducted under the authority of a licence, specifies standards with respect to premises, equipment and business practices, requires independent monitoring of certain operations and establishes a variety of responses to non-compliant conduct. Many instances of non-compliant conduct are isolated, technical and unintentional. Food safety and animal welfare may not have been compromised. In such cases, identification, education and training may provide an easy and permanent solution. Unfortunately, serious breaches of the system do occur and require a fast and firm response. In this chapter, I review Ontario's present compliance and enforcement system and suggest ways it can be improved.

11.2 Current Compliance and Enforcement Issues

11.2.1 On-Farm

Records obtained by the Review show that in recent years prosecutions have been initiated and convictions obtained in respect of a number of non-compliant on-farm activities including:

- slaughtering animals for the purpose of harvesting and selling meat or meat products without obtaining a licence to do so and without

inspection contrary to the *Meat Inspection Act (MIA)*.¹ Those activities are commonly described as illegal slaughter;

- slaughtering animals in a way that subjected them to avoidable pain and suffering contrary to regulations under the *MIA*,² the *Ontario Society for the Prevention of Cruelty to Animals Act (OSPCA Act)*³ and potentially the *Criminal Code* of Canada,⁴
- failing to make adequate provision for the shelter or care of animals contrary to the *Criminal Code*;⁵
- failing to dispose of the carcasses of dead animals in a proper manner within 48 hours of death as required by the *Dead Animal Disposal Act (DADA)*⁶ and its regulation;⁷ and
- transporting non-ambulatory animals without a veterinary certificate contrary to the regulation under the *Livestock and Livestock Products Act (LLPA)*.⁸

On occasion, investigations and charges relate to multiple activities. In 2003, for example, the Ministry of Agriculture and Food (OMAF) received a complaint of an objectionable odour emanating from a hog operation. An investigation was initiated by OMAF and, for reasons outlined later in this chapter, the Ministry of Natural Resources (MNR) joined the investigation.

Investigators observed large numbers of dead animals that had not been dealt with either appropriately or in a timely fashion. They also observed a large number of abandoned animals that were malnourished and dying. Legislation overseen by OMAF and enforced on its behalf by MNR deals

¹ *Meat Inspection Act*, R.S.O. 1990, c. M.5, s. 3, O. Reg. 632/92, s. 2 permits producers to slaughter farm animals on the producer's own premises for consumption by the producer and the producer's immediate family.

² O. Reg. 632/92, s. 64.

³ *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, s. 13 does not create an offence but does permit an OSPCA inspector to order the owner or custodian of an animal to take such action as the inspector believes is necessary to relieve the animal of its distress.

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 444 and 446.

⁵ *Ibid.*, s. 446.

⁶ *Dead Animal Disposal Act*, R.S.O. 1990, c. D.3, s. 3.

⁷ R.R.O. 1990, Reg. 263, s. 6.

⁸ *Livestock and Livestock Products Act*, R.S.O. 1990, c. L.20 and Transporting Non-ambulatory Animals, O. Reg. 732/94, s. 5.

with dead animal disposal but not with the ongoing care of a producer's livestock. Consequently those provincial ministries requested the assistance of the Ontario Society for the Prevention of Cruelty to Animals (OSPCA) to care for, treat and either rehabilitate or, where necessary, euthanize ailing livestock.⁹

Similarly, an investigation into the sale of uninspected meat uncovered illegal slaughter activities resulting in charges and prosecutions under both animal welfare and food safety laws.¹⁰

11.2.2 During Transport

As indicated previously,¹¹ the federal government regulates the loading and transportation of farm animals. Prosecution bulletins of the Canadian Food Inspection Agency (CFIA) evidence convictions of animal transporters who failed to provide appropriate bedding, protection from the elements, rest, food or water or unloaded animals using inappropriate methods including whips or electric prods.¹²

At the provincial level, inappropriate handling of animals during unloading has resulted in a regulatory review of an operator's licence.¹³ Many non-ambulatory animals are transported short distances to provincially licensed abattoirs. Records provided to the Review demonstrate that in 2003 alone, 69 non-ambulatory animals arrived at abattoirs without required veterinary certificates or arrived with a veterinary certificate that did not match the animal it accompanied. While no charges appear to have been laid, a

⁹ Ontario Society for the Prevention of Cruelty to Animals, NewsRelease, *Pig Farm Investigation reveals thousands of animals dead and dying* (14 October 2003) available from www.ospca.on.ca/libr_pr_2003_Oct14b.html [accessed 2 March 2004].

¹⁰ Ontario Society for the Prevention of Cruelty to Animals, NewsRelease, *Whitchurch-Stouffville man pleads guilty to illegal slaughter* (31 March 2004) available from www.ospca.on.ca/libr_pr_2003_Aug01.html [accessed 28 May 2004].

¹¹ See Chapter 5.

¹² CFIA prosecution bulletins are found at www.inspection.gc.ca/english/corpaffr/projud. For a representative prosecution bulletin, see "Maritime livestock carrier fined \$2,500 for breach of *Health of Animals* regulations" (14 November 2002) www.inspection.gc.ca/english/corpaffr/parojud/2002/20021114e.shtml [accessed 16 March 2004].

¹³ The Director's decision of 13 May 2002 with respect to Aylmer Meat Packers Inc. dealt with, among other things, allegations that livestock had been dragged from trucks contrary to O. Reg. 632/92, s. 28.1.

number of animals were condemned and any economic value that otherwise might have been obtained from their meat lost.¹⁴

11.2.3 At Livestock Community Sales Facilities

While the Review has not received any evidence of the laying of charges or regulatory proceedings against livestock community sales facilities related to either animal welfare or food safety issues, records provided by OMAF establish that compliance and enforcement issues arise from time to time. Audits exposed the need for repairs to prevent animal injury. They identified failure to segregate animal species, to isolate unhealthy animals, to retain non-ambulatory animals on trucks pending veterinary inspection, to inspect every arriving animal and to forward to OMAF lay inspection reports as statutorily required. On occasion, the same deficiencies were noted year after year.

I have also heard, on an anecdotal basis, that livestock is, on occasion, purchased at public auction by persons who are neither producers nor licensed abattoir operators for the purpose of slaughter, processing and sale of meat without a licence and without inspection.

11.2.4 At Abattoirs and Connected Processing and Retail Facilities

A large number of documents have been provided to the Review concerning the activities of provincially licensed abattoirs including excerpts from inspectors' logs, audit reports, corrective action plans, compliance and advisory reports, non-ambulatory animal incident reports and regulatory hearing decisions. They evidence a consistently high standard of performance by most provincial operators and the pride with which their operations are conducted. To the extent issues in respect of premises, equipment or business practices are uncovered, the vast majority of Ontario's operators take corrective action quickly.

On occasion, less conscientious operators were identified. If efforts to resolve deficiencies were unsuccessful despite the efforts of meat inspectors, area managers, the field manager or veterinarian services provided by

¹⁴ OMAF provided copies of non-ambulatory incident reports to the Review.

regional veterinarians or veterinary scientists, licensing hearings were held. Almost thirty regulatory hearing decisions for the period 2001-2003 were delivered to the Review by OMAF. While the issues raised were varied, eleven involved deficiencies in required standards with respect to premises, equipment or business practices. Nine involved slaughter activities which were illegal because they were undertaken without a provincial meat inspector present. Five involved activities classified as obstruction because they either prevented an inspector from performing statutory duties or through confrontation, impeded the inspector's ability to do so. Three more involved allegations that unsafe product was offered for sale. The others related to animal welfare issues. OMAF's experience with one abattoir in 2003 is particularly illustrative of the range of food safety and animal welfare issues that have arisen at this stage of the farm to fork continuum.

A private citizen complained to the OSPCA that an abattoir operator was not treating animals humanely. After a brief, initial investigation, the OSPCA brought the complaint to OMAF's attention. OMAF initially attempted to address the concerns expressed through its compliance and advisory unit. However, a visit by compliance and advisory officers for the purpose of reviewing animal welfare issues ended in confrontation, a temporary suspension of the operator's licence and, less than 24 hours later, a regulatory hearing.

Animal welfare concerns at that location were not new. While poorly documented, compliance and advisory officers had visited the plant before. Earlier concerns had been expressed. After the initial visit and over a period of months leading up to the hearing, additional disturbing observations were recorded by several OMAF meat inspectors and by an independent auditor. A letter of concern was written to the operator by an OMAF program manager. Compliance and advisory officers re-attended with a veterinary scientist. The area manager visited the abattoir as did the regional veterinarian. All made disturbing observations which suggested that inappropriate practices had been ongoing for some time.

Despite its existence and apparent relevance, evidence in respect of animal welfare issues was not led at the regulatory hearing. Also, the fact that the

hearing was held so soon after the incident limited the ability of the parties to marshal evidence addressing that issue.

After listening to testimony from a number of witnesses, the Director of OMAF's Food Inspection Branch, who presently presides over licensing hearings, found that the operator's conduct was "the culmination of a series of incidents where inappropriate language and threats were level[le]d against" the compliance and advisory officers and concluded "[j]ust as ministry staff are expected to be professional and respectful at all times in the conduct of their duties, regulated clients must respond in kind."

A three month licence suspension was imposed and then immediately stayed on condition that the operator sign and adhere to an undertaking to avoid contact with ministry staff, meet corrective action plan dates for remedying audit deficiencies and fulfill all statutory animal welfare requirements on an on-going basis.¹⁵

The OSPCA was not content with the result. It continued its own investigation, obtained and executed a search warrant, obtained further details of animal abuse from OMAF employees in respect of incidents that predated the regulatory hearing, and laid a number of animal welfare charges. Ultimately, a guilty plea was entered in respect of a number of them and fines totalling \$3,250 were imposed.¹⁶

The operator was before the Director again less than a year later. Meat products had been detained due to adverse water results. The operator had, without authorization, removed the OMAF tags and shipped the products before the results of tests on the products were known, allegedly believing there was a "low risk" of contamination. The operator stated that the product was not to be unloaded at its final destination until the results were communicated. While product was under detention and being tested, the regional veterinarian allowed slaughtering activities to continue despite the area manager's refusal to do so.

¹⁵ Drawn from the October 22, 2002 decision of the Director in *Re Den Dekker Meats* 2001.

¹⁶ Ontario Society for the Prevention of Cruelty to Animals, News Release, *Slaughterhouse fined after pleading guilty to animal welfare charges under the Meat Inspection Act* (1 August 2003) available from www.ospca.on.ca/libr_pr_2003_Aug01.html [accessed 2 March 2004].

The Director held that the licensee was "very fortunate that subsequent water test results were negative, that no one became ill and there was no recall" and concluded that "breaking detention is a serious compliance issue." The Director imposed a one day licence suspension and warned that a more strict penalty "might" be imposed if the conduct was repeated.¹⁷

11.2.5 At Free Standing Meat Processors

If the processing of meat or meat products is undertaken on premises connected to an abattoir, the processing function is subject to the licensing and inspection systems imposed by the *MIA* and to the standards and requirements it establishes.¹⁸

However, the *MIA* has no application if the processing of meat is undertaken at premises where slaughtering does not take place. Those locations, commonly known as free standing meat processors (FSMPs), are subject to a different statutory regime.¹⁹

While operators of FSMPs may commence business without holding a licence, their premises, equipment and business practices are, once again, regulated in a manner designed to protect public health. The sale of uninspected meat, meat or meat products unfit for human consumption or a failure to adhere to statutorily required standards expose the operator to charges and prosecution by provincial authorities.²⁰

Certain business practices may expose the FSMP operator to federal sanction. The CFIA has conducted successful prosecutions under the *Food and Drugs Act* as a result of the sale of adulterated meat and re-labelling practices which mislead consumers in respect of such matters as ingredients or freshness.²¹ The CFIA has also obtained convictions against FSMPs

¹⁷ Based on the Director's October 6, 2003 decision in *Re Den Dekker Meats* 2001.

¹⁸ *MIA supra* note 1, s. 3. Standards are outlined in O. Reg. 632/92, ss. 37-47 as amended.

¹⁹ Those premises are presently regulated by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (*HPPA*) and *Food Premises*, R.R.O. 1990, Reg. 562 (the *Food Premises* regulation).

²⁰ *HPPA, supra* note 19, ss. 17 and 103 and the *Food Premises* regulation, *supra* note 19, ss. 37-31.

²¹ CFIA, Prosecution Bulletin, *Jay's Food Market (Can-Na Foods Ltd.) Found Guilty of Selling Horse Meat Labelled as Beef* (16 August 2002) available from

under other federal statutes as a result of the misuse of federal meat inspection legends on meat products.²²

11.2.6 At Retail Locations

Many sell meat to the public without undertaking processing activities themselves. In an effort to ensure that food safety concerns are addressed, their activities are subject to requirements which are similar to those that apply to FSMPs concerning premises, equipment and business practices. Prosecutions have been conducted in respect of a similar range of matters to those involving FSMPs. For example, a number of retail stores were successfully prosecuted by provincial authorities for selling uninspected meat²³ and by federal authorities for mislabelling meat products, misrepresenting ingredients and original packaging dates and failing to store product at required temperatures.²⁴

11.3 Current Compliance and Enforcement Services and Recommended Changes

As I have already outlined, meat regulation is a task undertaken by both the federal and provincial governments. While the CFIA has been designated as a single agency to administer and enforce the federal statutory scheme, Ontario has not adopted that approach. At some stage of the continuum, one or more of OMAF, the MNR, the Ministry of Health and Long-Term Care (MOHLTC) and Ontario's 37 Boards of Health have responsibility for addressing breaches of statutory provisions relating to meat. On occasion,

www.inspection.gc.ca/english/corpaffr/parojud/2002/20020816e.html [accessed 16 March 2004].

²² CFIA, Prosecution Bulletin, *\$21,000 Fine for Illegal Use of a Federal Meat Inspection Legend* (5 February 2004) available

from www.inspection.gc.ca/english/corpaffr/parojud/2004/20040205be.shtml [accessed 16 March 2004].

²³ R. Cribb, *Meat Shops Often Cited*, Toronto Star (6 October 2003).

²⁴ CFIA, Prosecution Bulletin, *\$20,000 Fine For Adultering Meat with Sulphurous Acid* (26 March 2003) available from

www.inspection.gc.ca/english/corpaffr/parojud/2003/20030327e.shtml [accessed 16 March 2004]; *Westfair Foods Fined \$100,000 for Re-Labeling and Altering Meat Product Dates* 23 October 2003) available from

www.inspection.gc.ca/english/corpaffr/parojud/2003/20031031e.shtml [accessed 16 March 2004] and *Santa Maria Foods Corporation Violates the Meat Inspection Act and Canada Agricultural Products Act* (26 July 2001) available from

www.inspection.gc.ca/english/corpaffr/parojud/2001/200110726e.shtml [accessed 16 March 2004].

additional services have been provided by municipal, regional or provincial police forces and by the OSPCA. I will deal with each of the principal participants.

11.3.1 Ministry of Agriculture and Food

11.3.1.1 Statutory Authority

OMAF is the Ministry responsible for legislation relating to on-farm slaughter, the transportation of non-ambulatory animals, the licensing and regulation of abattoirs and connected processing and retail facilities. If the *Food Safety and Quality Act, 2001 (FSQA)*²⁵ is proclaimed, OMAF will also be responsible for overseeing the activities of FSMSPs.

The principal statutes administered by OMAF are the *MIA*, the *DADA*, the *Livestock Community Sales Act (LCSA)*²⁶ and the *LLPA*. Breaches of any of their provisions or regulations may result in enforcement proceedings. If the contravention involves a licensed operator, OMAF may initiate a regulatory process in the form of a licensing hearing which could result in the non-renewal, suspension or revocation of the operator's licence.²⁷ Alternatively, OMAF may take steps resulting in the operator being charged and prosecuted under the statute alleged to have been breached.²⁸ If the breach involves an unlicensed person, prosecution under the applicable statute is the only enforcement alternative available.

11.3.1.2 An Overview of OMAF's Role

OMAF has the largest part of the oversight role for meat safety. Under the leadership of the Director and through OMAF's Food Inspection Branch monitoring, compliance and enforcement activities are undertaken. The operations of abattoirs and any connected processing and retail activity are monitored by meat inspectors under the immediate supervision of area managers who report, in turn, to the field manager. OMAF's regional veterinarians, veterinary scientists and veterinarians in private practice appointed by OMAF provide additional assistance, guidance, advice and

²⁵ *Food Safety and Quality Act, 2001*, S.O. 2001, c. 20.

²⁶ *Livestock Community Sales Act*, R.S.O. 1990, c. L.22.

²⁷ *MIA*, *supra* note 1, ss. 3-5; *DADA*, *supra* note 6, ss. 3-5; and *LCSA*, *supra* note 26, ss. 4-6.

²⁸ *MIA*, *supra* note 1, s. 16; *DADA*, *supra* note 6, s. 17; and *LCSA*, *supra* note 26, s. 18.

direction in addressing issues relating to the health of animals and meat harvested from them. Annual audits are conducted by third party auditors retained by OMAF to review and assess each licensed operator's premises, equipment and business practices. Concerns are categorized by seriousness, a letter grade is assigned to indicate the extent to which the operation meets expected standards and a corrective action plan is developed to ensure that deficiencies are remedied.

The activities of livestock community sales yards are monitored by employees of the operators appointed by OMAF as lay inspectors under the periodic supervision of OMAF's weigh and trim inspector and a regional veterinarian. Once again, veterinarians in private practice are appointed by OMAF to address animal health and welfare concerns that arise during day-to-day operations. Operators are audited annually to facilitate identification and rectification of deficiencies.

Activities connected to dead animal collection, transportation and disposal are monitored by a dead animal disposal advisor with assistance, where required, from others including regional veterinarians. The dead animal disposal advisor assesses the operations of all licensed dead animal collectors, receivers and brokers. The federal government conducts audits of rendering operations.

On most occasions, a failure by licensed operators to comply with required standards is identified by those responsible for monitoring operations or by auditors. Observations of non-compliant conduct may be recorded in daily logs or communicated to a more senior person within OMAF if animals or carcasses are detained, an order to temporarily suspend slaughter activities is given or inspection services withdrawn.

A minor contravention identified and satisfactorily addressed during regular monitoring activities will not likely involve any other personnel dedicated to other functions. Where, however, the violation is significant, recurrent or unresolved, OMAF may involve its compliance and advisory personnel or refer the matter to enforcement. In 2001, OMAF created two compliance and advisory officer positions to provide important intermediate ground

between monitoring and enforcement. They report to the Enforcement Advisory and Liaison Officer (EALO). This small group comprises the compliance and advisory group (CAG). The CAG provides support to frontline personnel by periodically attending licensed plants in an effort to resolve outstanding compliance issues. In addition, compliance and advisory officers are, on occasion, able to deal with breaches of the statutory scheme by unlicensed persons through education and advisory visits.

Food safety or animal welfare concerns may require a more serious response. If animals or carcasses are detained, inspection services withdrawn or the entitlement of the operator to hold a licence is questioned, a regulatory hearing will be convened before the Director.²⁹

If OMAF decides that the conduct warrants a charge and formal prosecution, a different approach to enforcement is adopted. Until 2000, OMAF had its own investigation unit consisting of a chief investigator and a small staff of investigators. Since 2000, delivery of the enforcement function has been contractually transferred from OMAF to the MNR. As a result of the arrangement, MNR has established, at OMAF's cost, a small agricultural investigations unit. All requests for investigation and enforcement by MNR are initiated by the EALO. Aside from monitoring, compliance and advisory services and a screening, referral and consultative role, OMAF has contracted its non-regulatory enforcement function to the MNR.

11.3.1.3 Regulatory Responses to Non-Compliance

Under current legislation, livestock community sales operations, abattoirs, deadstock collectors, meat waste disposal operators and livestock dealers must be licensed.³⁰ Those involved in farming activities generally and in the transportation of live farm animals do not require a licence from OMAF.³¹ The licensing regimes outlined in the *MIA*, *DADA*, *LCSA*, and *LLPA* are

²⁹ O. Reg. 632/92, ss. 85(5), 86(4) and 94(2).

³⁰ Livestock community sales operations must be licensed under the *LCSA*; abattoirs under the *MIA*; deadstock collectors and meat waste disposal operators under the *DADA* and livestock and livestock product dealers under the *LLPA*.

³¹ Some farms must register with Agricorp under the *Farm Registration and Farm Organization Funding Act*, 1993, S.O. 1993, c. 21.

similar and require the Director to issue and renew a licence provided the basic requirements are met and absent good reason to believe that the regulated business will not be or has not been conducted properly.³²

The provincial government has recognized that meat inspectors may observe substandard premises, equipment or business practices that jeopardize meat safety and which require an immediate response to prevent or to contain the risk of harm to human health. For that reason, regulations under the *MIA* permit inspectors to detain and tag unhealthy animals and suspicious product,³³ to withdraw inspection services and inspection stamps³⁴ and to issue directions to the operator to cease using equipment or a portion of the plant's premises.³⁵ While any dispute over the exercise of an inspector's powers may be resolved informally, the appropriateness of any of these actions may be reviewed by the Director at a hearing.³⁶

Each of the *MIA*, *DADA*, *LCSA* and *LLPA* allow the Director to suspend an operator's licence on an interim or provisional basis if the Director is of the opinion that there is an immediate need for the protection of the health or safety of any person, animal or the public.³⁷ If the power is exercised, the Director is required to hold a hearing to determine whether a further suspension or revocation of the licence is warranted. Even absent grounds supporting a provisional suspension, a history of non-compliance, an unsatisfactory audit result, a failure to adhere to a corrective action plan, or other reasons, may result in the Director deciding that the operator's licence should not be renewed or should be suspended or revoked. In those instances, each statute requires that a hearing be conducted after the operator has been given a "reasonable opportunity to show or to achieve compliance."³⁸

³² *MIA*, *supra* note 1, ss. 4-5; *DADA*, *supra* note 6, ss. 6-7; *LCSA*, *supra* note 26, ss. 4-5; and *LLPA*, *supra* note 8, ss. 3, 5.

³³ O. Reg. 632/92, ss. 85 and 87.

³⁴ *Ibid.*, s. 94.

³⁵ *Ibid.*, s. 86.

³⁶ *Ibid.*, ss. 85(5), 86(3), 87(9) and 94(2).

³⁷ *MIA*, *supra* note 1, s. 5 (2); *DADA*, *supra* note 6, s. 7(2); *LCSA*, *supra* note 26, s. 5(2); and *LLPA*, *supra* note 8, s. 5(2).

³⁸ *MIA*, *supra* note 1, s. 6 (1); *DADA*, *supra* note 6, s. 8(1); *LCSA*, *supra* note 26, s. 6(1); and *LLPA*, *supra* note 8, s. 6(1).

Basic rules designed to ensure that the hearing process is fair are set out by statute.³⁹ The Director is given discretion in respect of the renewal, suspension or revocation of licences and the authority, either at the Director's own instance or at the request of the licensee, to vary or rescind an earlier decision.⁴⁰ If the decision of the Director is adverse to the licensee, an appeal may be taken to the Agriculture, Food and Rural Affairs Tribunal (Tribunal). Subject to statutory procedural rules, the Tribunal may confirm or alter the Director's decision.⁴¹ To date, no licensing decision of the Director under the *MIA*, *DADA* or *LCSA* has been appealed.⁴² Consequently, the further statutory right of appeal from the Tribunal to the Divisional Court has not been exercised.⁴³

Between 1998 and 2003, the Director presided over 77 hearings involving licensing issues, decisions of inspectors to detain product and the withdrawal of inspection services.⁴⁴ A wide range of dispositions were ordered, including 16 licence suspensions, 3 licence revocations, 3 refusals to grant an application for a licence, meat and meat product was ordered destroyed, warnings were given and the pool of inspection hours provided without charge by the provincial government to some non-compliant operators was reduced.

In conducting hearings, the Director performs a quasi-judicial role. The process is an adversarial one with OMAF, represented by the EALO, often seeking to impose or continue actions which have significant economic consequences on the operator.

Under the *FSQA*, the existing role of the Director would continue⁴⁵ and be enlarged to include the power, and in some instances, the obligation to

³⁹ See, for example, *MIA*, *supra* note 1, s. 6 (2); *DADA*, *supra* note 6, s. 8(2); *LCSA*, *supra* note 26, s. 6(2); and *LLPA*, *supra* note 8, s. 6(2) and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3.

⁴⁰ *MIA*, *supra* note 1, s. 7; *DADA*, *supra* note 6, s. 9; *LCSA*, *supra* note 26, s. 7; and *LLPA*, *supra* note 8, s. 7.

⁴¹ *MIA*, *supra* note 1, s. 8; *DADA*, *supra* note 6, s. 10; *LCSA*, *supra* note 26, s. 8; and *LLPA*, *supra* note 8, s. 8.

⁴² As advised by OMAF.

⁴³ *MIA*, *supra* note 1, s. 10; *DADA*, *supra* note 6, s. 12; *LCSA*, *supra* note 26, s. 10; and *LLPA*, *supra* note 8, s. 10.

⁴⁴ Listings were provided by OMAF along with copies of most decisions.

⁴⁵ *FSQA*, *supra* note 25, ss. 5, 6, 7, 8 and 9.

impose an administrative monetary penalty.⁴⁶ Their amount may be significant and non-payment by a licensee may place a licence in jeopardy.⁴⁷ A right of hearing before the Director and appeal to the Tribunal in respect of such penalties would exist under the *FSQA*.⁴⁸

11.3.1.4 Non-Regulatory Responses to Non-Compliance

The *MIA*, *DADA*, *LCSA* and *LLPA* make it an offence to contravene their provisions or related regulations.⁴⁹ Conviction is punishable by a fine of up to \$2,000 for a first and up to \$5,000 for a subsequent offence. Under the *MIA* and *DADA*, a term of imprisonment may also be ordered. Prosecution must be initiated within 6 months of the commission of the offence.⁵⁰

If proclaimed, the *FSQA* will broaden the existing offence provisions. Existing legislation only applies to the legal entity engaged in the wrongful conduct. The *FSQA* would extend the reach of the offence provisions to those managing or conducting an operation and those who participated in or allowed the wrongful conduct to occur.⁵¹ Maximum monetary penalties have been substantially increased to \$25,000 for a first and \$50,000 for a subsequent offence for individuals and \$100,000 for a first and \$200,000 for a subsequent offence for corporations.⁵² In determining the amount of a monetary penalty, a conviction under related legislation will be treated as if it had occurred under the *FSQA*.⁵³ Non-monetary penalties would also be increased.⁵⁴ The limitation period would be extended to two years.⁵⁵

The *FSQA* would permit additional sanctions. Any monetary benefit derived from the wrongful conduct would be at risk of forfeiture to the

⁴⁶ *Ibid.*, s. 41. The *FSQA* leaves to regulation many details concerning administrative penalties.

⁴⁷ *Ibid.*, ss. 41(4) and 41(13).

⁴⁸ *Ibid.*, ss. 41(6) and 41(10).

⁴⁹ *MIA*, *supra* note 1, s. 16; *DADA*, *supra* note 6, s. 17; *LCSA*, *supra* note 26, s. 18; and *LLPA*, *supra* note 8, s. 17.

⁵⁰ *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 76(1). The six month period commences on the date the offence was or is alleged to have been committed.

⁵¹ *FSQA*, *supra* note 25, s. 44(2).

⁵² *FSQA*, *supra* note 25, s. 46(1) and 46(2).

⁵³ *FSQA*, *supra* note 25, s. 56(3).

⁵⁴ *FSQA*, *supra* note 25, s. 46(1).

⁵⁵ *FSQA*, *supra* note 25, ss. 41(3) and 45.

Crown⁵⁶ and costs incurred in respect of corrective action, food safety prevention or in undertaking investigations leading to successful enforcement action would be recoverable by the Crown.⁵⁷

11.3.1.5 Compliance and Enforcement Policy

Unlike some other provincial ministries,⁵⁸ OMAF has not developed a written compliance or enforcement policy which describes the roles and responsibilities of those involved in compliance or enforcement activities or the standard responses which will be occasioned by non-compliant or illegal behaviour.

OMAF has developed a personal security policy which is intended to provide a safe work environment and protect its staff from physical or verbal abuse.⁵⁹ OMAF employees are advised that services, including inspection services, may be withdrawn if physical or verbal abuse is encountered and that offending conduct is to be reported to more senior OMAF officials. On several occasions, licensing hearings have been conducted to address violations of the policy.

OMAF's meat inspector training manual includes a limited description and discussion of some compliance strategies and advises inspectors, investigators, and auditors to consider the public interest when planning and undertaking compliance activities. The manual also advises inspectors that there should be no tolerance of the inhumane treatment of animals at licensed abattoirs.

Contracts entered into between OMAF and MNR envision the two ministries collaborating to "outline and direct where enforcement effort should be expended," consulting "to determine [the] best method for deterrence" when dealing with non-compliant licensed operations and jointly deciding "the enforcement strategies related to licensed/unlicensed

⁵⁶ FSQA, *supra* note 25, s. 46(4).

⁵⁷ FSQA, *supra* note 25, s. 51 although the language utilized is somewhat unclear.

⁵⁸ For example, the MNR, the Ministry of the Environment and the Ministry of Labour. Perhaps this is part of the reason a survey conducted by OMAF in the 2002-2003 fiscal year revealed 57% of OMAF's targeted stakeholders had confidence in OMAF enforcement programs.

⁵⁹ A copy was provided to the Review by OMAF. It bears policy number 18.08.

facilities/ individuals operating outside of the" meat regulatory system.⁶⁰ However, written criteria, guidelines or policies do not exist and no discernible strategy has been identified.

Information provided to the Review establishes that OMAF prefers to deal with licensed operators through regulatory processes absent serious food safety concerns. Responses to unlicensed persons have ranged widely and included education and advice, warnings, the detention and destruction of meat or meat products and prosecution. The approach appears to be dictated by the particular facts of each case.

11.3.1.6 Role of the Compliance and Advisory Unit

OMAF supplied the Review with a short summary of each case handled by the CAG along with a sampling of reports prepared by compliance and advisory officers or by the EALO from 2000 until 2003. During that period the CAG addressed 355 complaints most commonly involving allegations of illegal slaughter and the sale of uninspected meat. Compliance and advisory officers made 426 advisory attendances including visits to actual and potential licensees to verify safe and appropriate business practices and delivered 74 presentations to public health inspectors, industry participants and the general public concerning various aspects of Ontario's meat regulatory system. Members of the CAG have broad experience on the monitoring side of the meat industry, having previously been meat inspectors and area managers and are well suited to providing educational and advisory services. However, they have limited, if any, investigative or enforcement training.⁶¹

All complaints of non-compliant conduct are directed to the EALO. To the extent that a complaint relates to a licensed facility, the EALO, in consultation with the program manager and other OMAF employees, decides whether to initiate a regulatory process which may adversely affect

⁶⁰ These phrases have been drawn from the unexecuted copies of the Cooperative Agreement dated February, 2002 and the Service Level Agreement amended June, 2002 between the MNR and OMAF provided the Review. I understand the executed versions are in the same form.

⁶¹ One of the current compliance and advisory officer positions is an interim one occupied by an area manager on an acting basis.

the operator's licence or whether some other response, ranging from advisory services to non-regulatory enforcement, is warranted.⁶²

In respect of complaints relating to unlicensed operations, the EALO decides the nature and extent of the involvement of compliance and advisory officers, receives and assesses their reports and recommendations and determines whether OMAF will request MNR to pursue further enforcement action.

In initially receiving, screening and assessing complaints, the CAG is an integral part of a graduated approach to enforcement and a means of dealing with those who have unwittingly, by way of an isolated occurrence and without serious consequence technically breached or failed to adhere to legislative or regulatory requirements. To the extent that compliance and advisory officers are able to readily determine that a complaint is without merit, the CAG ensures that limited investigative resources are not wasted.

11.3.1.7 Delegation of Non-Regulatory Enforcement

In 1999, when OMAF decided to reorganize its non-regulatory enforcement, it turned to the MNR. While the MNR has no statutory obligation in respect of the production, processing or sale of meat derived from farm animals, the MNR does have extensive involvement in the management of Ontario's natural resources including wildlife.⁶³ The management of those resources involves substantial regulation and the MNR has developed a recognized expertise in enforcement activities.

In February 2000, OMAF and the MNR entered into a Cooperative Agreement which remains in effect. It resulted in the termination of OMAF's investigative unit and to transfer, contractually, much of the delivery of the non-regulatory enforcement function to the MNR. The arrangement is further described in a Service Level Agreement which was originally executed in 2001 and amended in mid-2002.

⁶² This summary is based on the unexecuted copies of the agreements referred to in *supra* note 60.

⁶³ One of the principal statutes administered by the MNR is the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41.

While OMAF's role in enforcement is, by reason of the agreements, substantially reduced, it has not been eliminated in light of OMAF's continued receipt, screening, assessment and direction of complaints.

Once referred, the conduct of an investigation lies with the MNR, subject to its obligation to advise OMAF of their status from time to time. Save with respect to licensed abattoirs, the decision whether to lay charges lies with the MNR. If, however, the investigation involves a licensed abattoir, MNR is contractually obligated to consult with OMAF to determine whether to proceed under the regulatory or non-regulatory enforcement regime.

In 2002, a number of matters referred to the MNR by OMAF were returned to OMAF because the MNR investigators were simply unable to deal with them in a timely fashion due to limited human and financial resources.⁶⁴ While, on occasion, compliance and advisory officers have assisted MNR investigators in the performance of their duties, compliance and advisory officers and the EALO have also conducted investigations themselves. Allegations of significant and sophisticated illegal slaughter operations, the sale of uninspected meat and the mislabelling of meat and meat products have been investigated by compliance and advisory officers and by the EALO. These instances appear to be increasingly common.⁶⁵

11.3.1.8 Comments and Recommendations

11.3.1.8.1 Monitoring Activities

OMAF already devotes substantial resources to ensure that the food safety objectives of the meat regulatory system are fulfilled. An intensive inspection service by meat inspectors, supported by veterinarians, area managers, a field manager, external auditors and a Director provides, on its face, a formidable group to monitor and regulate the operations of licensees. Inspections and audits are part of a precautionary approach to food safety and are designed to ensure that unsafe meat does not enter the food chain. Those services are also essential to the early identification and correction of non-compliant conduct. Ensuring that premises, equipment and business

⁶⁴ The decision was communicated to MNR investigators in mid-December 2001.

⁶⁵ The statement is based on a review of the summary of Compliance and Advisory Unit cases and selected reports of its members provided by OMAF to the Review.

practices meet or exceed required standards requires an adequate number of inspectors, sufficient funding, and a well-qualified, properly oriented, continuously trained, and clearly directed inspectorate.

If proclaimed, the *FSQA* will substantially enlarge the powers of inspectors to act. The *FSQA* will give inspectors the right, without a warrant, to enter premises, to stop and inspect vehicles, to detain, seize and test products, to seize and copy information and records.⁶⁶

Importantly, inspectors would be given the power to issue orders designed to prevent, decrease, control or eliminate food safety risks or to ensure that non-compliant activity does not occur or, if identified after the fact, ends. Many of these additional powers are necessary and appropriate.⁶⁷

Unfortunately, the *FSQA* does not distinguish between the monitoring activities of inspectors and those which are aimed at investigation and enforcement. The *FSQA* includes within its description of inspectors all persons involved in monitoring, compliance and enforcement activities whether they be inspectors on a kill floor, inspectors performing a routine inspection at an FSMP or an MNR agriculture investigator conducting surveillance on an alleged illegal slaughter operation.⁶⁸

The importance of distinguishing between inspection and investigation wherever possible was addressed in Part Two of the *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water* (Walkerton Report). Associate Chief Justice Dennis O'Connor wrote:

The concern – which can be characterized as a breach of procedural fairness or an abuse of administrative discretion under . . . the Canadian Charter of Rights and Freedoms – comes down to a concern that routine inspections could be turned into covert investigations that would otherwise

⁶⁶ Such powers and the circumstances in which they may be exercised are set forth in the *FSQA*, *supra* note 25, ss. 15-29.

⁶⁷ *FSQA*, *supra* note 25, ss. 31-32.

⁶⁸ *FSQA*, *supra* note 25, s. 14 would permit limits to be placed on the powers of inspectors in the document appointing them. It would be possible, therefore, for OMAF to create categories of inspectors. However, it is unclear how operators or members of the public would know whether the powers of an inspector had been restricted. In the absence of an administrative restriction, all inspectors would be treated the same.

require the use of search warrants or other procedural protections. When inspectors are truly acting as investigators, they are required to adhere to the stricter procedural requirements of the investigation process.

Although the determination of whether an individual is acting as an inspector or an investigator can be factually difficult, the problem can be avoided by a clear separation of functions and personnel. So long as inspectors function solely as inspectors and do not also participate in the investigation process, and so long as investigators stick to investigations and do not improperly use inspection powers to assist, it is difficult to see how Charter or procedural fairness problems will arise. For these reasons, it is important that the investigation and enforcement function be kept separate from other functions . . . This does not mean that there cannot be communication between inspectors and investigators. So long as the lines of communication remain formal, so the functions of the two groups are not seen to meld, the procedural rights of those being regulated can be protected.⁶⁹

I agree with those observations.

I recommend that the *Food Safety and Quality Act, 2001* be amended to differentiate between the powers and duties of inspectors and investigators.

11.3.1.8.2 Location of the Investigation and Enforcement Function

The current system of compliance and enforcement is fragmented and confusing. Those responsible for regulatory enforcement at OMAF also have additional, non-enforcement duties. While presiding over regulatory enforcement hearings, the Director also has responsibility for formulating, evaluating and revising food inspection programs, forming partnerships and cooperative undertakings with industry in respect of inspection services and

⁶⁹ Ontario *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water* (Toronto, Queen's Printer for Ontario, 2002), Part II, pp. 450-451. See too *R. v Inco Limited* (docket C33137 and C33245, 6 June 2001) (Ont. C.A.) at www.ontariocourts.on.ca/decisions/2001/june/incoC33137.htm [accessed 19 February 2004].

participating in projects designed to review and improve industry performance.⁷⁰

The development and implementation of meat safety and inspection policies is vastly different from adjudicating an adversarial, legal process that may expose deficiencies in the very policies the adjudicator helped develop. Yet, as it now stands, the Director is asked to perform both functions.

The CAG does not have departmental status within OMAF⁷¹ and the scope of the responsibilities of its members is largely unarticulated. At times, the activities of the compliance and advisory officers are designed to verify or facilitate compliance. They may attend premises, whether licensed or not, to observe, to inform or advise and then simply depart. In those instances, their role is more closely akin to a monitoring function and is appropriately conducted by personnel not involved in investigation and enforcement.

At other times compliance and advisory officers undertake surveillance, conduct interviews and make observations in an effort to obtain evidence to support a regulatory or non-regulatory enforcement proceeding. In those instances, they are acting as investigators despite the contractual delegation of that function to the MNR.

The qualification and experience needed to educate and advise producers, operators and consumers about food safety programs and the steps necessary to comply with regulatory standards are different than those needed to properly investigate and respond to suspected illegal activity. Presently, the duties of the members of the CAG blend enforcement and regulation.

The role of the EALO is mixed as well. The EALO's responsibilities to conduct regulatory hearings, monitor MNR investigations, establish investigative priorities, review legislation administered by OMAF from a law enforcement perspective, and annually review the contractual relationship with MNR, are tied to enforcement. In overseeing compliance

⁷⁰ OMAF provided the Review with a copy of the job description for the Director, Food Inspection Branch and various other positions.

⁷¹ Organizational charts provided by OMAF show compliance and advisory officers as part of the Science and Advisory Program. The EALO is not shown as a member of any of the three existing programs, but reports directly to the Director.

and advisory officers the role is also educational and advisory. The position is contained within a Branch that promotes industry, provides inspection services and actively participates in regulatory and non-regulatory enforcement proceedings simultaneously.

By mixing enforcement with other services, OMAF has created an impression that enforcement is an afterthought and of low priority. While the objective of full compliance is laudable, it is not realistic. Investigation and enforcement services are and will continue to be necessary. OMAF's structure should recognize that fact. Structural separation of investigation and inspection within OMAF is overdue.

Given the extent to which the enforcement function has been delegated by OMAF, some may be tempted to suggest that OMAF should simply abdicate all responsibility for investigation and enforcement to the MNR. That is not appropriate.

OMAF has delegated much of the responsibility for the operational delivery of non-regulatory enforcement to the MNR. However, the extent of the involvement of the EALO shows the delegation is not complete. OMAF's contractual right to terminate agreements with the MNR also demonstrates that the arrangement is not permanent. Nor can it be. The existing statutory regime and the *FSQA* envision OMAF being accountable for the meat regulation system from licensing through enforcement. They do not allow OMAF to abandon its responsibility. While OMAF can and should continue to be able to delegate delivery of day-to-day investigative and enforcement services for reasons of efficiency and expertise, the location of the investigation and enforcement function should recognize that OMAF is, ultimately, accountable for them.

In the Walkerton Report, the Commissioner wrote:

There are many examples in Ontario of policy, abatement and enforcement functions existing successfully within the same ministry or entity. Having the various functions co-exist successfully within the same ministry requires both an

*assurance of the principle that strict enforcement is necessary and of procedural fairness.*⁷²

I agree and will address the concept of strict enforcement shortly. In my view, procedural fairness requires substantial structural and functional separation of investigators from persons not involved in enforcement.

Earlier I recommended the creation of a Food Safety Division within OMAF to be overseen by an Assistant Deputy Minister, with the title of Chief Veterinarian of Ontario (CVO) and outlined my reasons for doing so.⁷³ The delivery of investigation and enforcement services should be the responsibility of the Food Safety Division and the CVO. In order to ensure that the distinction between investigators and others is maintained, sufficient independence should be provided to ensure that a strict approach to enforcement can be adopted and which recognizes the importance of procedural fairness.

I recommend that a Food Safety Investigations and Enforcement Branch be created within the Food Safety Division of the Ministry of Agriculture and Food.

I recommend that the Director of the Food Safety Investigations and Enforcement Branch be appropriately qualified, trained and experienced in agricultural and food safety investigations and enforcement.

11.3.1.8.3 Food Safety Investigations and Enforcement Branch

While I will discuss a continued delegation arrangement with the MNR later in this chapter, establishing a Food Safety Investigations and Enforcement Branch (FSIEB) will eliminate confusion, promote efficiency and establish clear accountability if the FSIEB is given the authority, responsibility and human and financial resources to deliver all aspects of the investigation and enforcement service.

⁷² Ontario Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water (Toronto: Queen's Printer for Ontario, 2002), Part II, pp. 450.

⁷³ That recommendation was made in Chapter 6.

The day-to-day responsibility of the Food Inspection Services Branch will lie in the areas of licensing, monitoring, prevention, audit, education and advisory services. The usual activity of inspectors, area managers, the field manager, veterinarians, auditors and education and advisory staff will continue but once there is a suggestion that the ability to ensure compliance has been seriously compromised or that public health or animal welfare concerns have been ignored, assistance will be readily available from a separate FSIEB.

The responsibilities of the FSIEB should include:

- establishing and implementing a comprehensive, written compliance, investigation and enforcement policy;
- ensuring that all of its members have appropriate qualifications, education, experience and training;
- receiving and investigating complaints of non-compliant or illegal conduct;
- appropriately responding to complaints and developing guidelines and procedures to facilitate doing so;
- conducting preventative activities including intelligence activities;
- liaising with others both within and outside the provincial government including other Branches of the Food Safety Division, other ministries, the CFIA, the OSPCA and police forces;
- reporting to the CVO; and
- developing procedures for public communication including media releases, website postings and advisories to industry.

I recommend that the Food Safety Investigations and Enforcement Branch be given the authority, responsibility and resources necessary to enforce food safety legislation administered by the Ministry of Agriculture and Food.

11.3.1.8.4 Enforcement Principles

OMAF's internal documents direct that plant operations be immediately suspended, product detained and the status of an operator's licence

questioned in the event of slaughter without *ante mortem* inspection and that the mistreatment of animals not be tolerated. Such directions evidence the importance of public safety and animal welfare objectives and suggest an approach of strict enforcement.⁷⁴ Yet that has not been the experience.

Copies of licensing decisions rendered by the Director or acting Directors since 1991 have been provided to the Review. They suggest a conciliatory, rehabilitative and tolerant approach to regulatory enforcement. Between 1998 and 2003 ten incidents of illegal slaughter activities by licensed abattoirs were brought before the Director and proven. Only once was the licence revoked. Usually, short periods of suspension were ordered, warnings were given or operators were required to agree in writing to do that which the law already requires.

Excerpts from logs prepared by several inspectors during attendances at one abattoir were reviewed.⁷⁵ Of concern is the extent to which their observations varied over a short period of time. Inevitably relationships between plant operators and inspectors may vary and slight differences in the experience are to be expected. It seems unlikely however, that business practices and systems will change back and forth in significant respects and within days depending on which inspector is present. Yet log entries suggest that occurs.

Audit records revealed deficiencies in plants that ranged from a few to dozens, from mild to serious. As expected, some poor audit results related to plants which were the subject of negative comment from the day-to-day inspection services. On the other hand, some audit reports revealed serious deficiencies in plants where day-to-day inspection by meat inspectors revealed no history of concerns. This is difficult to reconcile.

Non-ambulatory animals are not to arrive at licensed plants unless accompanied by a veterinary certificate. The number of incidents where this

⁷⁴ Set forth in OMAF, *Meat Inspection Policy and Procedure Manual* (Revised, 1 June 2003), sections 2.03, 17.01 and 17.02.

⁷⁵ Log sheets for approximately eight and a half months of a twelve month period were obtained by the Review for the period from November 2001 until November 2002 in respect of an operator licensed under the *MIA*.

has occurred is high.⁷⁶ OMAF's response has been to hold such animals and to release them as if the veterinary certificate had been present upon receipt of satisfactory test results. In 2002, an OMAF program manager infrequently sent letters of concern to plants receiving non-ambulatory animals without veterinary certificates. If forwarded at all, the same letter was utilized no matter how often the deficiency had been identified. No other action was taken.

Despite dozens of such incidents in 2003 involving the same operator, not even a letter of concern or warning was forwarded. OMAF has attributed that fact to an "administrative change" and indicated, in response to the Review's inquiry, that corrective action had been taken.

OMAF has advised the Review that the number of occurrences involving non-ambulatory animals is in decline. Even so, it is unclear whether this is a result of extra vigilance or rather attributable to the fact that a large provincial plant specializing in "downers" ceased to operate in 2003. Further, the assertion ignores the fact that, to date, OMAF has barely enforced rules relating to non-ambulatory livestock in respect of regulated species other than cattle.⁷⁷

These examples demonstrate that there is, unfortunately, ample support for my conclusion that OMAF's performance in the area of compliance and enforcement is wanting.

In order to secure public confidence in the meat supply and confirm OMAF's commitment to the objectives of public safety and animal welfare, it is imperative that the principle of strict enforcement be adopted as the foundation upon which a compliance, investigation and enforcement policy will be developed and applied. Those who disregard the interests of public health or animal safety must clearly understand that serious adverse consequences will follow.

⁷⁶ Non-ambulatory animal incident reports were provided to the Review by OMAF for 2003.

⁷⁷ As evidenced by the non-ambulatory incident reports and internal communications between MNR and OMAF.

I recommend that the Ministry of Agriculture and Food increase its commitment to the enforcement of its food safety legislation.

11.3.1.8.5 Compliance, Investigation and Enforcement Policy

Compliance, investigation and enforcement policies are common. Indeed, a simple reference to other ministries within the provincial government provides good, current and comprehensive examples. In addition, the Review was provided with others, including the Enforcement and Compliance Policy of the CFIA, Toronto Public Health's Enforcement and Legal Process Policies and Procedures, 2003 and portions of such policies utilized by the OSPCA.

Articulation of an enforcement policy by OMAF is overdue. Safe food is of critical importance. The regulatory system is, both legislatively and operationally, complex. Our state of knowledge, experience and the range of issues encountered are changing and evolving. For purposes of clarity, efficiency, uniformity, certainty and fairness, a comprehensive enforcement policy should be developed to provide a useful and ready reference for all members of the Food Safety Division whether involved in monitoring, education, advisory services, compliance, investigation or enforcement. The enforcement policy should:

- clarify and specify the roles and responsibilities of all staff in preventing, identifying, investigating and responding to instances of non-compliance;
- articulate objectives, underlying principles and guidelines;
- describe the standards to be enforced and their source, whether by statute, regulation, policy statement, guideline or protocol;
- describe and distinguish between monitoring, compliance and advisory, and investigation and enforcement functions;
- outline the range of responses and criteria to be applied in exercising any discretion conferred; and
- describe chains of command, approval processes and mandatory regulatory and non-regulatory responses to non-compliant activity.

The enforcement policy should be treated as evolving. It should be reviewed and updated based on experience, subsequent events and comments received both within and outside OMAF in an effort to ensure that the enforcement policy is current, relevant, practical, fair and consistent with the objectives of the Food Safety Division.

I recommend that the Ministry of Agriculture and Food develop and implement a comprehensive compliance, investigation and enforcement policy.

11.3.1.8.6 **The Existing Role of the Director and the Future Role of the Chief Veterinarian of Ontario in Enforcement**

Both in current and proposed legislation, the Director is given the power to make a licensing decision which is adverse to the applicant or operator. The power to refuse to grant or renew, to suspend or to revoke licences is not purely administrative. A decision which adversely affects a licence, except to the limited extent of a provisional suspension, may only be made after a licensing hearing has been conducted. The hearing is, essentially, a trial involving important issues and matters of public interest. Witnesses are called, including OMAF employees. Their evidence is critical to a determination of the underlying factual situation and often conflicts with testimony called by the operator. Circumstances are often emotionally charged since allegations may relate to alleged illegal slaughter activities, the sale of unwholesome product, animal welfare or physical or verbal abuse. The competence or integrity of various persons, including OMAF employees, may be questioned.

The Director is in an unenviable position. As the senior OMAF employee responsible for the delivery of food inspection services, there is an obligation on the Director to be intimately aware of the meat inspection program, its various components and the delivery of those services to the industry generally and to licensees specifically. The Director also knows the people in the industry. There is, inevitably, inside knowledge of the strengths and weaknesses of the program, its members and its operators.

As a quasi-judicial officer, the Director has an obligation, once an event which triggers or may trigger a hearing has occurred, to ensure that the expectation and requirement of impartiality is observed. In those instances, there is a continuing expectation of independence. The Director's decision should be based on the evidence before the Director at the hearing. The Director is in a difficult position no matter what order is made. If the decision is adverse to that sought by the EALO, OMAF employees may feel unsupported and embarrassed. Conversely, agreement with the position advocated by the EALO may lead to criticism that the Director is not sufficiently understanding and supportive of the industry. No matter the result, the Director has to return to work the following day and resume his position on the tightrope between the inspectorate and the operators.

In any event, despite the Director's best efforts, best intentions and integrity, hard feelings are bound to be created by reason of the Director's involvement in the hearing process. The system, to that extent, is flawed and should be changed.

If my earlier recommendation is implemented, a Food Safety Division will be created, headed by the CVO who will oversee the activities of the FSIEB, the Food Safety Inspection Services Branch and the Food Safety Science and Policy Branch. Given the recommended duties and the expertise of the CVO, the initial decision making power with respect to the granting of a licence, its renewal, suspension or revocation should be transferred from the Director of the Food Inspection Branch to the CVO.⁷⁸

However, transferring the hearing function from the Director to the CVO will not eliminate the conflict under which the Director currently labours in presiding over hearings but simply make the CVO the unfortunate recipient of an imperfect system. The solution lies in giving the CVO administrative

⁷⁸ A number of statutes provide useful examples. For example, in the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, s. 9 the registrar appointed under that statute is given the authority to notify an applicant or registrant of the registrar's intention to refuse to grant, refuse to renew, to suspend or revoke a registration. The applicant or registrant then has the statutory right to request a hearing by the Licence Appeal Tribunal within a specified number of days. While not proclaimed, the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42, s. 7 are similar.

licensing responsibility only and eliminating involvement in the regulatory hearing process.

While discretion should not be eliminated, circumstances permitting non-renewal, suspension or revocation should be established by regulation. They should include a history of non-compliant behaviour, poor audit results, a failure to fulfil the terms of a corrective action plan or participation in an earlier licensed operation where the licence was not renewed or suspended or revoked for non-compliance. Circumstances requiring the CVO to take action in respect of an issued licence should also be delineated, including instances of serious non-compliance which jeopardizes human health or animal welfare.

The CVO should have no jurisdiction to conduct hearings of any kind. The right of review of the CVO's licensing decisions and of orders granted by inspectors of a compliance or a preventative nature should, instead, be transferred to an independent body such as the Tribunal or to some other, as yet unestablished body with expertise in dealing with food safety and animal welfare issues.

If proclaimed, the *FSQA* would give the Director the authority, and in some instances the obligation, to impose administrative penalties and to conduct hearings related to them.⁷⁹ Once again, the power should be transferred to the CVO in light of the structural changes I have recommended but should be purely administrative with guidance provided by regulation. The hearing function should be transferred to the Tribunal.

I recommend that the *Food Safety and Quality Act, 2001* be amended to give the necessary authority for administrative licensing and imposition of administrative penalties to the Chief Veterinarian of Ontario.

⁷⁹ *FSQA, supra* note 25, s. 41(6). The powers should be broadly given to the CVO to address incidents of non-compliance by any person. Since a right to a hearing is given, consideration should be given to enhancing the means of collection presently set forth in s. 41(13) and to require, where the administrative penalty is assessed against a licensed operator, a suspension of the licence in the event the penalty is not paid within the permitted time. I have not recommended that investigators be appointed provincial offence officers because I believe the number of premises to be licensed and the number of complaints, whether relating to licensees or not, can best be managed by a firm and fair approach overseen by the CVO with assistance from the FSIEB.

I recommend that the *Food Safety and Quality Act, 2001* be amended to require that all hearings in respect of licensing matters, orders of inspectors or administrative penalties be conducted by the Agriculture, Food and Rural Affairs Tribunal or other tribunal created for that purpose.

Given the seriousness and formality of regulatory proceedings, operators are often represented by lawyers. Despite the fact that a regulatory hearing is, essentially, a trial involving substantial issues and matters of public importance, OMAF's interest is currently represented by a person who is not legally trained. That practice should not continue. The interests of OMAF at regulatory hearings should be represented by that Ministry's Legal Services Branch.

11.3.1.8.7 Agriculture, Food and Rural Affairs Tribunal

Given the fact that there has been no appeal from a decision of the Director under the *MIA*, *DADA*, or the *LCSA* to the Tribunal since 1991, the Tribunal may have limited expertise in respect of food safety matters.

Created by the *Ministry of Agriculture, Food and Rural Affairs Act*,⁸⁰ the Tribunal hears proceedings under a range of agricultural statutes including the *Milk Act*, the *Farm Products Marketing Act*, the *Crop Insurance Act*, the *Drainage Act*, the *Farm Registration and Farm Organizations Act* and the *Assessments Act*. The Tribunal has extensive rules of procedure in respect of a range of matters including licensing appeals.⁸¹ The Tribunal appears to be well-positioned to commence work in respect of matters relating to meat safety with the proclamation and amendment of the *FSQA*. Steps should be taken to ensure that the Tribunal includes members who have knowledge of food safety and animal welfare issues. Because of the nature of the meat industry, it is also important that operators have access to the Tribunal without delay.

⁸⁰ *Ministry of Agriculture, Food and Rural Affairs Act*, R.S.O. 1990, c. M.16.

⁸¹ The rules of procedure for the Agriculture, Food and Rural Affairs Tribunal are posted at www.gov.on.ca/OMAFRA/english/tribunal/rulesofprocedure/index.html [accessed 22 April 2004].

For reasons of deterrence, transparency, certainty, education and the integrity of the system as a whole, I believe it is important that the decisions of the Tribunal be generally available and that they be posted on the Tribunal's website. The public should not have to resort to freedom of information legislation to obtain access to decisions relating to regulated industries and which deal with issues affecting public safety.

11.3.1.8.8 Other Legislative Changes

The existing legislative scheme is out of date and in need of an overhaul as evidenced by the passage of the *FSQA*. The principal changes in respect of investigation and enforcement are:

- the introduction of administrative penalties as already found in other provincial and federal legislation;⁸²
- a broadening of offence provisions;
- more significant monetary and non-monetary penalties;
- increased court involvement in facilitating investigations, preventing non-compliant activity and minimizing its effects;⁸³
- conferring additional powers on inspectors including the ability to stop and inspect vehicles, to take samples, to conduct tests on meat and meat products and to have access to and to copy data from information systems; and
- permitting inspectors to issue orders designed to prevent, decrease, control or eliminate food safety risks or to ensure that non-compliant activity does not occur or, if identified after the fact, ends.

While the *FSQA* introduces a number of improvements to existing legislation, others are needed. They include:

⁸² *FSQA*, *supra* note 25, s. 41. For example, administrative penalties are available under the *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 182.1, the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s. 106.1 and the *Nutrient Management Act 2002*, S.O. 2002, c. 4, s. 40. Federally, such penalties are permitted by the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40. The latter statute's stated purpose is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of specified agrifood Acts.

⁸³ *FSQA*, *supra* note 25, ss. 17, 18, 20, 22, 36, 37, 41(13), 42, 43, 46(4).

- eliminating the automatic requirement that applicants or licensees be given a reasonable opportunity to show or to achieve compliance before licensing hearings. The requirement does not distinguish between conduct which is isolated or recurrent, minor or serious. While subsequent compliance should be considered in assessing the penalty or sanction to be imposed, a hearing should not necessarily be delayed to afford the operator an opportunity to comply.
- the *FSQA*, while ambitious, needs substantial editing, refinement and simplification. Part IV of the *FSQA* and particularly sections 15-26 are specific examples. While they purport to describe different situations, they are, in fact, variations on a common theme demonstrated by the extent to which certain sections incorporate others by reference.
- while the maximum monetary penalties have been substantially increased, they are low when compared with other pieces of provincial legislation dealing with health and safety issues and with legislation from other jurisdictions dealing with food safety.⁸⁴
- despite their broadening, offence provisions are still too narrow. An attempt to do anything that would be an offence under the *FSQA* should, itself, be an offence.⁸⁵
- the offence provision dealing with corporations is too restrictive. Any person who is concerned or takes part in the management of a corporation which commits an offence should also be guilty of the

⁸⁴ See for example *MIA*, R.S.C. 1985, c. 25 (1st Supp.) s. 21(1) which imposes a maximum fine of \$250,000 or imprisonment for a term not exceeding two years or both for selling any product upon which an inspection legend has been applied without authorization. Under the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.) s. 33, a contravention of the Act or its regulations constitutes an offence. If the Crown proceeds by way of indictment and obtains a conviction, the maximum fine is \$250,000 or imprisonment for a term not exceeding two years or both. Under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 68(2), the maximum time fine for corporations is \$500,000. The *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41 increases the penalty based on activity rather than the legal entity involved. The maximum penalty is increased from \$25,000 to \$100,000 if the activity is committed for commercial as opposed to private purposes.

⁸⁵ As found in the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, s. 97(2). A useful example is found in the State of Victoria's *Food Act 1984*, (Vic), s. 51. That section provides that if a corporation is guilty of an offence "any person who is concerned or takes part in the management" of the company is also guilty of the offence unless that person proves "that the offence was committed by the body corporate without his consent or knowledge and that he exercised due diligence to prevent the commission of the offence." The *FSQA* is more limited in requiring involvement in the offending activity itself.

offence unless that person proves the offence was committed without that person's consent or knowledge and that due diligence was exercised to prevent its commission;⁸⁶

- an offence by an employee during the course of employment should expose the employer to prosecution unless the employer can satisfy the court that the offence was committed without the employer's knowledge and could not have been prevented by the exercise of due diligence.⁸⁷
- the FSQA limits the power of arrest to instances involving fish.⁸⁸ That limitation is illogical. The possibility of egregious conduct warranting arrest exists in respect of all commodities and the power should be conferred accordingly.
- common sense presumptions should be established. By way of example, the *FSQA* should expressly provide that it is presumed that food on-site at food premises is intended for sale and for human consumption absent proof to the contrary.⁸⁹
- unlike other pieces of provincial legislation, the *FSQA* does not confer upon the Crown the ability to require that prosecutions be heard by a justice of the Ontario Court of Justice. An appropriate amendment should be made.⁹⁰

I recommend that the *Food Safety and Quality Act, 2001* be amended to eliminate any automatic period for compliance before a licensing hearing, to simplify its enforcement provisions, increase monetary penalties, revise offence provisions to address issues of attempts,

⁸⁶ In the *Food Act 1984*, (Vic), s. 52A, if an employee commits an offence, the employer is deemed to have done so as well unless "it is established that the employer could not, by the exercise of due diligence have prevented the contravention."

⁸⁷ *FSQA*, *supra* note 25, s. 30.

⁸⁸ Based on the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, s. 93. There is no comparable provision in the *MIA*, *DADA*, *LCSA* or *LLPA*. That deficiency should be rectified. Similarly, under the existing Cooperative Agreement, p. 19, MNR investigators are prohibited from carrying firearms, batons or pepper spray. Given the nature of the activities investigated, the instruments utilized to slaughter animals and to process meat, the wisdom of prohibition should be reconsidered.

⁸⁹ Such a presumption is found in the *Food Act 1984*, (Vic), ss. 50(1)(a) and 50(1)(b).

⁹⁰ Such a right is granted by the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 68(2); the *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 185 and the *Nutrient Management Act, 2002*, S.O. 2002, c. 4, s. 47.

employer and management responsibility, create rebuttable presumptions, and to permit prosecution before a Justice of the Ontario Court of Justice.

11.3.1.8.9 Reporting

To date, OMAF has been reticent to publicize successful prosecutions or the results of regulatory hearings. Such information promotes awareness, educates the public about the meat regulatory system and its rationale and has a role to play in deterring or uncovering similar activity. OMAF's reluctance is not widely shared by other enforcement bodies. I believe publication is important and should be undertaken.

In order to ensure that the enforcement and compliance mandate is transparent and accountable to the public, the FSIEB should prepare and publish an annual report concerning investigation and enforcement activities. The annual report should, at a minimum, summarize the number of complaints, their nature, by statute and section, the investigations undertaken, the steps taken by way of compliance and regulatory or non-regulatory enforcement, and their results. The report should be posted on OMAF's website.

I recommend that the Food Safety Investigations and Enforcement Branch publicize the results of prosecutions and regulatory hearings, and deliver an annual public report of investigation and enforcement activities.

11.3.2 Ministry of Natural Resources

11.3.2.1 Authority

While the MNR is presently charged, by statute, with the responsibility for overseeing the regulation of commercial fish processing activities,⁹¹ it has no corresponding statutory obligation in respect of the production, processing or sale of meat derived from farm animals.

⁹¹ *Fish Inspection Act*, R.S.O. 1990, c. F.18.

Since the role of the MNR in the meat regulation system is non-statutory, the contractual documents entered into with OMAF determine its nature and extent. The relationship is one that either ministry can terminate at any time.

As I have already said, the transfer of the non-regulatory enforcement function to the MNR is a partial one. OMAF has retained accountability and financial responsibility. OMAF continues to exercise decision making authority in respect of human and financial resources, responsibility for the formulation of policy, legislation and supporting regulations, chooses cases to assign, has a right of access to information concerning MNR's investigations and has the right to influence the path enforcement action will take insofar as licensed operators are concerned.

Subject to those limitations, once referred, the conduct of investigations lies with the MNR.

The MNR is also contractually obligated to:

- prosecute charges through its Legal Services Branch;
- train agriculture investigators;
- regularly report to OMAF concerning investigations, intelligence activities and prosecutions;
- consult with OMAF in order to establish a strategic plan and priorities;
- implement and maintain an electronic enforcement tracking system;
- generate reports on enforcement program statistics as required by OMAF; and
- monitor legislation administered by OMAF and recommend changes or improvement.⁹²

11.3.2.2 Organizational Structure

In order to perform its contractual mandate, the MNR has established an Agriculture Investigations Unit (AIU) comprising a supervisor, three

⁹² As set forth in the unexecuted Cooperative Agreement and Service Level Agreement provided to the Review.

agriculture investigators employed by MNR and an OMAF compliance and advisory officer who has been temporarily seconded to the MNR to serve as an agriculture investigator. They devote their full time and attention to matters referred to the MNR by OMAF.

The AIU is part of MNR's Intelligence and Investigations section which is overseen by a manager. That section is, in turn, part of MNR's Enforcement Branch. The activities of the AIU are funded by OMAF and while the budget for the AIU has increased somewhat from approximately \$470,000 to \$700,000 annually, it is still a modest one.

If circumstances require, the AIU may draw upon other MNR resources to facilitate or complete a task.⁹³

11.3.2.3 Comments and Recommendations

Prior to 2000, when OMAF looked after non-regulatory enforcement internally, very few charges appear to have been laid. A review of the enforcement statistics shows a substantial increase in the number of charges, convictions and fines since the Cooperative Agreement and Service Level Agreement were executed. According to the MNR, during its tenure of approximately four years, 276 meat related charges have been dealt with by the courts resulting in total fines exceeding \$165,000.⁹⁴

Originally, it was envisioned that MNR's role would be in the fields of intelligence and enforcement. I have been told by the MNR that it has been unable to pursue proactive intelligence activity in any meaningful way. There has simply been no available time.

OMAF has entrusted MNR with much wider responsibility than the regulation of meat. MNR could, potentially, be required to provide services under more than forty statutes, many of which have little or nothing to do with meat safety regulation. For example, MNR investigators have been utilized by OMAF to determine the validity and amount of claims asserted

⁹³ In dealing with Wallace Beef Inc., for example, the services of two conservation officers were utilized.

⁹⁴ Statistical information was provided to the Review by the MNR.

under the financial protection provisions of the *Beef Cattle Marketing Act*⁹⁵ in the aftermath of the economic failure of an agricultural dealer. In 2002, the MNR estimated that over 45% of its investigators' time was utilized in investigations unrelated to meat safety.⁹⁶

As I indicated earlier, in 2002, MNR's agriculture investigators were overloaded by the number and range of matters received. Many cases were returned to OMAF. During the Review, I was advised that there are many cases at OMAF waiting to be assigned to MNR investigators when there is capacity to accept them.

Representatives of OMAF and the MNR have told me that the relationship is an effective and evolving one. They want it to continue and acknowledge there is room for improvement. Despite increased enforcement activity, the statistics are still modest. For example, in 2003 a total of 10 charges were laid under the *MIA*, *DADA* and the *LCSA* and a number of previously laid charges were resolved, resulting in a total of 57 convictions and aggregate fines slightly in excess of \$70,000.

While those numbers would be of little concern if I was satisfied they reflected the level of illegal activity, the information I received suggests otherwise. The reality is that there are insufficient resources, both human and monetary, to adequately enforce existing legislation and proclamation of the *FSQA* will only exacerbate the problem by shifting responsibility to OMAF for the regulation of FSMPs.

While I am not in a position to say how prevalent illegal activity is, I was told by law enforcement bodies, regulators and a range of stakeholders that illegal slaughter and the sale of uninspected meat is a real problem in the province of Ontario.

Allowing illegal activity to continue is unfair to those who are compliant. Compliance with regulation results in economic costs. It is unfair that others carry on business without having to bear that cost. But more

⁹⁵ *Beef Cattle Marketing Act*, R.S.O. 1990, c. B.5.

⁹⁶ Based on an estimate contained in documentation provided to the Review.

importantly, public health and safety is jeopardized. Despite the breadth of existing regulation, over the years, a small number of licensees have undertaken practices which place the wholesomeness of their product in doubt. One can only imagine the extent to which those concerns are magnified when dealing with those who have avoided regulation entirely. Unlicensed operations ignore the entire legislative and regulatory scheme. Unsuspecting consumers have no idea of the risks they may be taking in the pursuit of inexpensive meat.

11.3.2.3.1 Future Delegation

Effective enforcement requires the application of resources to statutes and regulations that are relevant to food safety. While financial protection legislation is undoubtedly important, the task of verifying claims is more akin to that performed by insurance adjusters.. Such duties should not be assigned to MNR investigators who offer policing services. If the relationship between OMAF and the MNR is to continue, responsibility for statutes unrelated to the mandate of the Food Safety Division should be removed from the ambit of services to be provided by the AIU.

While inadequately resourced, the MNR offers services through a well-established, well-organized and substantial infrastructure extending beyond the AIU. The AIU is a specialized unit devoted to the enforcement of agricultural legislation but is governed by the same policies, training programs and information systems as other elements of MNR's Enforcement Branch except to the extent constrained by the contracts with OMAF.

In my view, the FSIEB should be staffed through a continuation of OMAF's relationship with the MNR. Details of the arrangement can be settled either by a new or amended Cooperative Agreement and Service Level Agreement. While the MNR would, under such an arrangement, have operational responsibility for delivery, OMAF would retain ultimate accountability and provide oversight. Since continued delegation involves adapting an existing strong and established relationship between the two ministries, this possibility seems sensible and achievable. Given the broad

power of delegation which will be conferred upon OMAF if the *FSQA* is proclaimed, this option also appears to be legislatively permissible.⁹⁷

11.3.2.3.2 Resources

The enforcement function must be adequately resourced. Even if some agricultural statutes are eliminated from its contractual duties, the number of investigators is simply insufficient. The *FSQA*, if proclaimed, will require OMAF to exercise oversight in respect of several hundred FSMPs and likely result in additional need for compliance and enforcement activities. The insufficiency of existing resources has been recognized for some time. MNR's frequent requests for additional funding to facilitate the hiring of additional agriculture investigators have not, for the most part, been approved.

The MNR has suggested to the Review that the number of investigators should be increased from four to twelve. It appears to me that this estimate is a reasonable one. The MNR has also suggested that an intelligence analyst is needed who would have responsibility for gathering information from multiple sources to assist in determining trends, successes, failures, areas of concern and to facilitate planning, prioritization and delivery. I agree that such a position should be created. Information gathered by an intelligence analyst may also be of assistance in determining appropriate staff levels on an ongoing basis. The FSIEB must be adequately staffed and funded.

11.3.2.3.3 Training

It is, and will be, important for investigators to have a working understanding of the food safety system, its rationale, the risks which the system is designed to control or eliminate and the appropriate methods of doing so in order to facilitate the identification and investigation of non-compliant or illegal activities.

⁹⁷ *FSQA*, *supra* note 25, ss. 48 and 49. Section 48 authorizes the Minister of Agriculture and Food to enter into a broad range of agreements. Section 49 outlines the circumstances in which the Minister of Agriculture and Food may designate provisions of the *FSQA* or a regulation and delegate administration or enforcement of the designated provisions to others. While s. 50(4) of the *FSQA* attempts to insulate those connected with OMAF from personal liability in certain situations, it would not appear to assist employees of the MNR acting as investigators if proclaimed in its present form.

I recommend that the Ministry of Agriculture and Food develop and implement introductory and continuing education courses for investigators pertaining to meat safety and its regulatory scheme.

11.3.2.3.4 Joint Task Force

During the Review, the OSPCA asked me to recommend that the provincial government establish a fully funded joint task force or combined special enforcement unit involving OMAF, MNR, OSPCA, the Ontario Provincial Police and local health units to address illegal slaughter activities in the province. The recommendation was designed to formalize an informal organization which has been coordinated by the EALO involving representatives of OMAF, MNR, local health units in Toronto, Durham, Halton and York, the OSPCA and the CFIA.⁹⁸ Although not appropriate for a recommendation, the request merits comment.

The recommendation by the OSPCA reflects a concern arising from the limited human and financial resources devoted, to date, by the provincial government to meet the need for food safety investigations and enforcement. I am hopeful that those concerns have been addressed in my recommendations and that their implementation will enable OMAF, through the MNR, to quickly address the backlog which has built up over many years. However, if that does not occur, the provincial government should give consideration to the establishment of a joint task force involving representatives of various enforcement agencies for the purpose of addressing significant or long outstanding food safety or animal welfare concerns within OMAF's mandate. Since illegal slaughter activities and the sale of uninspected meat may involve aspects of interprovincial or even international trade, an invitation to the CFIA to participate in such an endeavour may be warranted.

⁹⁸ Documents relating to meetings of the members of the group were provided to the Review.

11.3.3 Ministry of Health and Long-Term Care (MOHLTC) and Boards of Health

11.3.3.1 Authority

By virtue of their office, all medical officers of health and local health inspectors are appointed as meat inspectors under the *MIA*.⁹⁹ Despite that fact and the application of the *HPPA* to all food premises, the inspection of abattoirs, and related processing and retail facilities is left to OMAF and its inspectors.¹⁰⁰

The MOHLTC and Ontario's 37 public health units presently exercise regulatory control over FSMPs and retail food premises.¹⁰¹ The frequency of routine inspections of FSMPs and retailers varies depending on a risk assessment and are conducted no more than three times per year for high risk premises.¹⁰² Non-routine inspections are conducted on a complaint basis or to determine if a problem identified during a routine inspection has been rectified.

11.3.3.2 Organizational Structure

As outlined in an earlier chapter, the MOHLTC has published Mandatory Health Programs and Services Guidelines¹⁰³ which establish food safety and frequency of inspection standards. While the MOHLTC provides oversight and policy direction, inspection and enforcement services are provided by local Boards of Health.

Through routine, unannounced or complaint-based inspections, the extent to which FSMPs or retail food premises maintain their premises and equipment and adhere to business practices which assure public safety is monitored and critically reviewed.¹⁰⁴

⁹⁹ *MIA*, *supra* note 1, s. 15.

¹⁰⁰ *Ibid.*, s. 15(2).

¹⁰¹ A memorandum of understanding was entered into between OMAF and the MOHLTC in 1994 detailing the arrangement.

¹⁰² Pursuant to the *HPPA*, *supra* note 19, ss. 4, 5 and 61 and *Food Premises*, R.R.O. 1990, Reg. 562.

¹⁰³ MOHLTC, Mandatory Health Programs and Service Guidelines (December 1997). The Mandatory Guidelines are discussed in more detail in Chapter 9.

¹⁰⁴ Discussed in more detail in Chapter 8.

11.3.3.3 Regulatory Responses to Non-Compliance

Where instances of non-compliance are identified, public health inspectors and medical officers of health may issue a variety of orders including ordering corrective action, either immediately or within a specified period of time,¹⁰⁵ the removal and destruction of unwholesome product,¹⁰⁶ or, if necessary, closure of the food premises until the concerns have been addressed.¹⁰⁷ If required to address immediate concerns, such orders may be made orally.¹⁰⁸

While orders made by public health inspectors or medical officers of health may be appealed, within 15 days of their making, to the Health Services Appeal and Review Board (Review Board),¹⁰⁹ the order remains in effect until the appeal is heard.¹¹⁰ Further rights of appeal to the court are given to any party to the initial hearing before the Review Board.¹¹¹

Some public health units provide the results of inspections to the public either upon request or by posting on their websites.¹¹²

11.3.3.4 Non-Regulatory Responses to Non-Compliance

Public health inspectors have been designated as provincial offence officers¹¹³ for the purposes of enforcing the *HPPA* and consequently can initiate a charge under the *Provincial Offences Act* by issuing a summons or

¹⁰⁵ *HPPA*, *supra* note 19, s. 13(3) and 13(4).

¹⁰⁶ *Ibid.*, s. 13(4)(e) and 13(4)(g).

¹⁰⁷ *Ibid.*, s. 13(4)(a) and 13(4)(b).

¹⁰⁸ *Ibid.*, s. 13(7).

¹⁰⁹ *Ibid.*, ss. 44-45.

¹¹⁰ *Ibid.*, s. 44(3).

¹¹¹ *Ibid.*, s. 46.

¹¹² See, for example, Toronto Public Health's Dine Safe website at www.app.toronto.ca/food2/DineSafeMain [accessed 10 June 2004] and The Region of Waterloo Public Health food premise inspection disclosure site at www.region.waterloo.on.ca/web/foodinspection.nsf/paDisclaimer?OPage [accessed 10 June 2004]. The posting of such information can be an important incentive to comply. Few operators would want a poor inspection result made public. However, care should be exercised to ensure that information posted is accurate and amended if appropriate corrective action is taken.

¹¹³ Appointed by the Minister of Health as permitted by the *Provincial Offences Act*, *supra* note 50, s. 1(2) & 3.

offence notice stipulating a fixed fine ranging from \$50 to \$375.¹¹⁴ The recipient has the option of paying the fine voluntarily or disputing the charge in court.¹¹⁵

The contravention of certain sections of the *HPPA*, any order or any regulation made under the *HPPA*, constitutes an offence.¹¹⁶ Upon conviction, a fine of up to \$5,000 for every day or part of a day on which the offence occurs or continues may be imposed on individuals and is increased to \$25,000 for corporations, municipalities or Boards of Health.¹¹⁷

The *HPPA*'s offence provisions are wide. Those who may be charged include persons involved in the overall management or day-to-day control of the offending activity.¹¹⁸ Courts are empowered to order that any non-compliant activity cease and to prohibit its repetition.¹¹⁹

11.3.3.5 Compliance, Investigation and Enforcement Policy

The MOHLTC has not established a provincial compliance and enforcement policy. While local public health inspectors have the same broad statutory rights of entry, examination, investigation, testing and enquiry within their boundaries across the province, each local health unit is left to its own devices to develop and implement a compliance and enforcement strategy.¹²⁰ There is no consistent approach.

At one end of the spectrum is Toronto Public Health's substantial and current Enforcement and Legal Process Policies and Procedures Manual. At the other end are health units with no written policy. Most health units have developed some policies which address limited aspects of a compliance or enforcement strategy.

¹¹⁴ Proceedings commenced by Certificate of Offence, R.R.O. 1990, Reg. 950, Schedules 39-42. It should be noted, however, that Schedule 42 is based on R.R.O. 1990, Reg. 571, which has been repealed.

¹¹⁵ *Provincial Offences Act*, *supra* note 50, ss. 3-13.

¹¹⁶ *HPPA*, *supra* note 19, s. 100.

¹¹⁷ *Ibid.*, s. 101.

¹¹⁸ *Ibid.*, s. 101(2).

¹¹⁹ *Ibid.*, s. 102.

¹²⁰ The summary of practices is based on questionnaires provided by the Review to all 37 Boards of Health and the 29 responses received.

11.3.3.6 Comments and Recommendations

11.3.3.6.1 Distinction between Inspectors and Investigators

When dealing with OMAF, I recommended that inspection and investigation be kept separate structurally and functionally. I did that because of the nature of the inspection services. Meat inspectors not only ensure compliance with the regulations but in the case of abattoirs facilitate their operation. There is no slaughter if the inspector is not present. This relationship creates the potential problems I alluded to earlier when I recommended a separation of inspection and investigation services within OMAF.

The relationship between public health inspectors and retail food premises is not the same. It is, in fact, the inspector's job to investigate the activities of food premises and take appropriate action if they identify an infraction. The issues of potential violations of the Charter of Rights and Freedoms and problems of procedural fairness that could arise with meat inspectors acting as investigators do not apply to public health inspectors.

11.3.3.6.2 Development of a Province-Wide Compliance Investigation and Enforcement Policy

The proclamation of the *FSQA* would see OMAF assume responsibility for the regulation of FSMPs.¹²¹ While that would reduce the existing role somewhat, the MOHLTC and local health units would retain jurisdiction and responsibility over retail food premises.

Service delivery and standards are not uniform throughout Ontario's local health units. The frequency of inspection of FSMPs and retail food premises varies widely and depends on the number of establishments, geographical area, human and financial resources, the needs of other programs, unexpected events and emergencies.¹²²

Enforcement statistics vary widely across the province as well. In some areas of Ontario, public health inspectors often exercise the power to issue

¹²¹ While it will be left to regulations under the *FSQA* to delineate what businesses will require a licence to commence or continue operation, it is clear that the current plan is for FSMPs to be overseen by OMAF.

¹²² OMAF outlined the criteria to the Review.

offence notices or summons in respect of statutorily specified non-compliant activities and in the prescribed amount. In other areas of Ontario, the power is exercised infrequently, if at all. Some local health units compile statistical information concerning incidents of non-compliant activity, charges laid and convictions. Others do not. Where such information is compiled, the frequency of enforcement proceedings varies, even allowing for differences in population.

MOHLTC's 2003 Food Safety Audit Report¹²³ suggested that there were, province-wide, almost 67,000 consumer complaints relating to food and food premises, resulting in over 1,500 investigations of foodborne illness and foodborne outbreaks and over 1,300 food recalls. Toronto Public Health reported over 3,600 complaints within its jurisdiction alone resulting in almost 800 charges and over \$100,000 in fines.¹²⁴ Clearly and appropriately, many health units have adopted the principle of strict enforcement to laws designed to protect public health. Elsewhere, that guiding principle has not been embraced.

Public health risks associated with FSMPs and retail food premises are no different than those which exist in processing or retail facilities connected to abattoirs. The risks in one part of Ontario are the same in another. The entire province is entitled to the same protection, to the same commitment to food safety and to a standardized approach to investigating and/or responding to non-compliant or illegal conduct.¹²⁵

I recommend that the Ministry of Health and Long-Term Care, with assistance from Boards of Health, develop, implement and require adherence to a comprehensive province-wide investigation, compliance and enforcement policy extending to all food premises.

¹²³ MOHLTC, *2003 Food Safety Audit Report*.

¹²⁴ Statistical information was provided to the Review in response to a questionnaire.

¹²⁵ Under the *HPPA*, *supra* note 19, s. 7(1), the Minister of Health may publish guidelines for the provision of mandatory health programs and services and every Board of Health shall comply with the published guidelines.

11.3.3.6.3 Legislative Changes

In modernizing the *MIA*, *DADA* and other provincial statutes, drafters of the *FSQA* appear to have obtained assistance from the breadth of the *HPPA* provisions dealing with investigations and enforcement. The *FSQA* contains provisions which are analogous to those in the *HPPA* but has, to some extent, expanded upon, modified and modernized them. For example, unlike the *FSQA*, the *HPPA* does not increase monetary penalties for a second offence, provide for the forfeiture of monetary benefits derived from non-compliant activity or extend the limitation period for the initiation of prosecutions. Rights of entry and powers of inspectors in the *HPPA* are more restrictive than in the *FSQA*. Many of the identified deficiencies in the *FSQA* apply to the *HPPA* as well.

Since the objectives of the *FSQA* and the *HPPA* are the same, the investigative and enforcement powers in the two statutes should be consistent. Amendment of the *HPPA* to improve the enforcement tools, to revise the offence and penalty provisions to deal with issues of attempts, employer and management responsibility, rebuttable presumptions and increased penalties should all be made. As suggested in respect of the *FSQA*, the Crown should also be given the discretion to require that offences be tried by a justice of the Ontario Court of Justice.

I recommend that the provincial government ensure that the enforcement tools and offence and penalty provisions of the *Health Protection and Promotion Act* are consistent with those in the *Food Safety and Quality Act, 2001*.

Absent consent from the owner or occupant, or a warrant, public health inspectors may not enter, examine or take samples from private residences.¹²⁶ The *HPPA* and the *Food Premises* regulation do not specifically address structures which house both a private residence and a retail food business. It is unclear, therefore, whether public health inspectors have authority, absent consent or a warrant, to exercise any of their powers in respect of residences which also include catering operations,

¹²⁶ *HPPA*, *supra* note 19, s. 1(1) defines food premise in a manner which excludes a private residence. See too ss. 41(7) and 42(2) of the same statute.

or retail food stores. Once again, these businesses pose the same food safety risks whether included within or separate from a private residence. They should be required to meet the equivalent food safety standards and be subject to inspection.

I recommend that the provincial government amend the *Health Protection and Promotion Act* and its *Food Premises* regulation to ensure that they apply to food businesses which are attached to or form part of a private residence.

11.3.4 Other Bodies

11.3.4.1 Ontario Society for the Prevention of Cruelty to Animals (OSPCA)

11.3.4.1.1 Current Approach

The authority of the OSPCA comes from the *OSPCA Act*. Its object is to facilitate and provide for the prevention of cruelty to animals and their protection.¹²⁷ OSPCA inspectors are expressly authorized to exercise the powers of a police officer for the purpose of enforcing any law in force in the province pertaining to the welfare of or the prevention of cruelty to animals.¹²⁸

While the OSPCA is often associated with the investigation of the mistreatment of pets, its activities are much broader and include farm animals. The OSPCA has been involved in investigations and prosecutions relating to the raising, handling, transportation and slaughtering of farm animals. Those activities are now overseen by a livestock inspector and pursuant to a cooperative pilot project with OMAF, four OSPCA investigators have been appointed as inspectors under the *LCSA*.

In 2002 alone, the OSPCA investigated over 1,100 complaints relating to the treatment of farm animals. Charges laid by its inspectors included charges under the *MIA*, the *DADA* and the *Criminal Code* of Canada. Convictions in respect of activities of animal neglect, rough handling, inhumane slaughter and illegal slaughter were obtained.

¹²⁷ *OSPCA Act*, *supra* note 3, s. 3.

¹²⁸ *Ibid.*, s. 11(1).

Successful prosecutions are the subject of media releases prepared and distributed by the OSPCA to inform the public of the OSPCA's activities, facilitate fundraising,¹²⁹ deter similar activity and encourage heightened awareness of and concern for animal welfare issues.

11.3.4.1.2 Comments and Recommendation

The guiding concern of the OSPCA for animal welfare results in the OSPCA treating violation of required standards seriously and firmly.

The OSPCA's concerns in respect of illegal slaughter, humane slaughter at abattoirs and the humane transportation of animals has resulted in the OSPCA laying charges under the *MIA* and the *DADA* despite the fact those statutes lie within the responsibility of OMAF and receive much attention from OMAF's compliance and advisory officers and MNR investigators.

While I have been told that the level of cooperation between OMAF and the OSPCA is excellent, it is clear that the OSPCA intervenes whenever it chooses. My concern is that the efforts of the OSPCA may overlap or even conflict with the efforts of OMAF and the MNR acting on its behalf.

OSPCA's dedication and initiative are commendable, but a cooperative and complementary approach is required to ensure efficiency and avoid activities that could jeopardize investigative or enforcement initiatives and the safety of investigators.

The line between animal welfare issues which are within OSPCA's mandate and food safety concerns which are not, is imprecise. There is no question that the humane treatment of animals in the production of meat is an important issue. I have visited an abattoir where standards exceeding the minimum required have been developed and are in place. They were designed to make animals more comfortable, simply because the operator believes that the quality of the meat is, as a result of those practices, improved. The view that additional stress will adversely affect the quality of the meat and result in adverse economic consequences is shared by many.

¹²⁹ The OSPCA is a charity and receives only a modest contribution from the provincial government in respect of its activities. The rest of the OSPCA's funding comes from charitable donations. Press releases may be found on the OSPCA website www.ospca.on.ca.

However, the suggestion that animal welfare issues jeopardize food safety is not as widely held.¹³⁰ Consequently, while the OSPCA's work in respect of animal welfare issues should continue to be regarded as essential, it is important that the OSPCA not regard its role as identical to that of OMAF and the MNR. It is not.

The OSPCA, OMAF and the MNR should act cooperatively. Recognition that OMAF and MNR, if the contractual relationship between the two ministries continues, carry the lead role in respect of violations of the *MIA*, the *DADA*, the *LCSA*, the non-ambulatory regulation under the *LLPA* and, if proclaimed, the *FSQA*, should be recognized, respected and supported. There should be frequent, formalized communication, a documented understanding which ensures that their respective goals and responsibilities are articulated and the extent to which their operations should be separate or joint clearly understood.

I recommend that the Ministry of Agriculture and Food, the Ministry of Natural Resources and the Ontario Society for the Prevention of Cruelty to Animals reconcile their roles and responsibilities with respect to the enforcement of food safety and animal welfare issues.

11.3.4.2 Police

Local police forces and the Ontario Provincial Police assist the MNR and the OSPCA by providing investigative support and a physical presence to maintain the peace during the execution of search warrants. Occasionally, the police conduct their own investigations in respect of possible criminal behaviour relating to allegations of the illegal sale of meat or the abuse of animals.¹³¹

The role of the police may be more significant in the future since the *FSQA* contemplates the police rendering assistance to inspectors where needed to

¹³⁰ For a more detailed discussion see Chapters 3 and 4 .

¹³¹ *Criminal Code*, *supra* note 4, ss. 445-447 delineate criminal offences involving the mistreatment of animals. Such investigations have been undertaken with respect to Aylmer Meat Packers Inc. and Wallace Beef Inc. In light of the terms of the order in council constituting this Review, their status is unknown.

facilitate the exercise of various powers whether undertaken with or without a warrant.¹³²

Regular communication with Ontario's police forces should be undertaken by the FSIEB in order to ensure that activities in the field and the potential for assistance to be requested are generally known and to ensure that any needed assistance can be provided quickly.

11.3.4.3 Canadian Food Inspection Agency (CFIA)

11.3.4.3.1 Current Practice

The CFIA is responsible for the enforcement of federal requirements having general application to the meat industry whether the participant is part of the federal or provincial system including:

- federal legislation prohibits the labelling, packaging, treating, processing, selling or advertising of food in a misleading or deceptive manner;¹³³ and
- federal legislation requires the safe and humane loading and transportation of farm animals.¹³⁴

While not as visible in the provincial meat regulation system, the CFIA is, nonetheless, an important participant. The CFIA maintains a small Enforcement and Investigations Services Unit in Ontario staffed by an area manager and three investigation specialists.

The CFIA has developed a lengthy and comprehensive Enforcement and Compliance Policy which outlines essential activities, the roles and responsibilities of its personnel, possible non-compliant behaviour, and the regulatory and non-regulatory consequences of violation. A wide range of responses is described including written warnings, in limited cases administrative monetary penalties and formal charges requiring court proceedings. The policy deals with regulatory responses as well, including seizure, detention, forfeiture, condemnation or disposal of product, and

¹³² *FSQA*, *supra* note 25, ss. 15(8), 16(3), 17(4), 18(2), 19(4), 20(2), 21(5), 22(2), 23(4), 24(4), 25(3), 26(5), and 36(6).

¹³³ *Food and Drugs Act*, R.S.C. 1985, c. F-27, ss. 4-7.

¹³⁴ *Health of Animals Regulations*, C.R.C., c. 296, ss. 136-159.

actions in respect of licences or registrations ranging from suspension to cancellation.

Successful prosecutions are featured in bulletins which are posted on the CFIA's website and CFIA compliance and enforcement activities are described in detail in its annual report.

In 2002-2003, the CFIA conducted 347 active investigations under five statutes including the *Meat Inspection Act (Canada)*, the *Fish Inspection Act (Canada)* and the *Food and Drugs Act*. The 86 prosecutions it undertook resulted in convictions on 93 counts and fines totalling \$212,300.¹³⁵

11.3.4.3.2 Comments

The development of a comprehensive compliance, investigations and enforcement policy, posting of information concerning successful prosecutions and an annual performance report are all areas which OMAF should emulate and which I have recommended. In addition, the FSIEB should communicate regularly and formally with the CFIA. A sharing of experiences and practices will not only be useful in identifying instances where cooperative action may be necessary and appropriate but also in ensuring that the adequacy of established policies and procedures is regularly evaluated and improvements made.

All OMAF¹³⁶ personnel should be encouraged to promptly report to the CFIA instances of non-compliant conduct which appear to be within CFIA's jurisdiction including the inhumane transportation of animals and misleading or deceptive practices in respect of meat including false labelling and the adulteration of meat products. CFIA's activities in these areas are

¹³⁵ CFIA, *Performance Report for the Period Ending March 31, 2003*, available from www.tbs.sct.gc.ca/rma/dpr/02/03/CFIA/acia/CFIA/acia03do1_e.asp [accessed 16 March 2004].

¹³⁶ Whether involved in monitoring, compliance or enforcement activities and including the MNR if the contractual relationship continues. Such information could be stored by the intelligence analyst. I was surprised to learn that the MNR was unaware of the theft of federal meat inspection stamps. While the theft was reported in *Meat Inspection Stamps Stolen*, The Toronto Star (18 March 2004), the information had not been communicated by the CFIA to the MNR directly. Yet, such information is of importance to all involved in enforcement activities as illustrated in August and September 2003. See R. Cribb, *Ottawa probes federal labels at meat plant*, The Toronto Star (3 September 2003).

an important part of the overall meat regulatory system and should not be ignored.

11.3.5 Information Management

The information systems utilized by those involved in the investigation and enforcement of meat safety laws is fragmented.

OMAF has developed, implemented and frequently improved a computer software system known as the Food Safety Decision Support System (FSDSS) which contains a large volume of information concerning licensees and their activities. While information generated during monitoring activities is maintained, it appears from my review that limited entries are made relating to enforcement. In fact, compliance and advisory officers and the dead stock disposal advisor do not have a method to store their activities and reports in the FSDSS. While OMAF agreed to give MNR investigators access to the FSDSS on a read-only basis, that has not yet occurred.

The MNR utilizes a computer software system known as the Compliance Activity and Violation Reporting Service (CAVRS). Information contained in CAVRS is inputted by the MNR from the time of receipt from OMAF until completion. It is not linked to or otherwise accessible by any OMAF employee with the exception of the EALO. I was advised during the course of the Review that the EALO has not made use of CAVRS. No existing provincial-wide system is used consistently by all public health units. The Food Premises Inspection Information System and the computerized inspection services system implemented and utilized by the MOHLTC is, itself, fragmented and not accessible to all local public health units. Each public health unit maintains its own electronic information system and the data entered with respect to monitoring, compliance and enforcement activities varies widely. The public health systems are not accessible by either OMAF or the MNR.

The protection of confidentiality should not hinder the vital communication of data in the food safety context. Material provided to me has evidenced that OMAF and local health units have exchanged information with respect to complaints of non-compliant conduct, but those efforts have not been

facilitated by any shared information system. Further, province-wide initiatives are needed.

Delivery of compliance and enforcement services should be supported by an integrated, province-wide information system accessible by all personnel involved in that endeavour. The necessity of approaching the problem of identifying, preventing or containing activity at the earliest possible moment cannot be overemphasized. The problems which unwholesome product or improper practices spawn are not confined to one locale. Meat and meat products may be widely distributed and create serious harm in distant locations. It is essential that there be linkages between enforcement bodies to ensure that relevant information is collected, stored and accessible by those who may be dealing with the results of non-compliance in many areas.

I recommend that the provincial government develop an integrated province-wide information system to support food safety compliance, investigation and enforcement services.