

## **Multilevel Governance in Domestic Regulatory Conflict: Raw-Milk Cheese in Canada.**

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*The production and consumption of raw-milk cheese is a politically difficult issue in Canada. These cheese varieties are heavily regulated and consumption is largely discouraged by federal food safety and health agencies. However, the regulation of these types of cheeses has been subject to a tension between Health Canada and the Province of Quebec. The case of raw-milk cheese offers insight into how authorities might try to reconcile this shared prerogative and influence policy change proposals. The opportunity to engage in international standards setting is seen here as a chance for federal level officials to assert their preferred policy outcome and attempt to reduce the discretion typically available to provinces in policy implementation. Applying a Multilevel Governance (MLG) lens, the paper characterizes how international organizations like the Codex Alimentarius can be used as tools in contexts of domestic policy conflict to circumvent shared competency between provincial and federal governments and achieve the preferred policy outcome by the level of government responsible for international negotiations.*

In Canada the production of raw-milk varieties of cheese are regulated and consumption is largely discouraged by federal food safety and health agencies (Health Canada 2011). This is the converse to the EU where raw-milk cheeses are widely available and restrictions not so stringent, especially in France. In Canada, the regulation of these types of cheeses has been subject to a tension between the levels of government with Health Canada adopting strict production requirements and emphasizing the need to use pasteurized milk. In contrast, authorities in Quebec place more emphasis on the use of hygienic raw-milk collection practices as a means to prevent dangerous bacteria from being present in cheese varieties. The regulatory tension between the position of Health Canada and authorities in Quebec results from the shared competency that these two jurisdictions maintain over food safety and health regulations. The case of raw-milk cheese offers insight into how authorities might try to reconcile this shared prerogative and influence the discretion of a province to implement federal food safety regulations (Keleman, 2000). The opportunity to engage in international standards setting is seen here as a chance for federal level officials to assert their preferred policy outcome and attempt to impose it in contexts of shared competency.

The point is argued through a case study on the proposed Canadian restrictions on the sale of raw-milk cheese in 1996 (Government of Canada, 1996). In this case, Canadian officials at Health Canada sought to put in place a requirement that all cheese for

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commercial sale be produced from pasteurized milk (Government of Canada, 1996). This was after a series of food-borne illness outbreaks linked to raw-milk cheese. The proposed federal measure became a political problem in that it was subject to tensions between cheese producers, sensitivities over national unity and international trade relations. Internally, French-speaking Canadians in Quebec, whom had a tradition of consuming and producing raw-milk cheese, opposed the proposed regulation for cultural and economic reasons (Chidley, 1996). Industry was divided between large scale producers of cheddar cheese and raw-milk/artisanal cheese producers, and the EU was threatening to enter into a WTO trade dispute if Canada proceeded with the measure.

Rooted in the scientific evidence that consuming raw-milk cheese presents a human health risk, Health Canada officials faced with opposition from Quebec and the EU abandoned domestic efforts to reach a compromise and instead pursued an international standard that would have had the same effect, through the Codex Alimentarius Commission (Codex). By doing this, officials could build an international coalition of support and attempt to achieve the desired level of protection supported by the large scale cheddar cheese industry at the same time passing responsibility to an unaccountable international entity and avoid exacerbating external and internal political divisions and limiting Quebec's discretion to implement.

The present study seeks to characterize MLG in food safety regulation and how international standard setting organizations can be used as tools in contexts of domestic policy conflict to circumvent shared competency and achieve the preferred policy outcome by the level of government responsible for international negotiations. In Canada, this sets the desire by the Government of Quebec to have more responsibility for its own international affairs and representation in international negotiations in a new light (Gouvernement du Québec, 2009). As well, it contributes to the literature on multilevel governance in Canadian food safety regulation (Skogstad 2006:157).

### **Multilevel Regulatory Governance of Food Safety in Canada**

Under the Canadian constitution, both the federal and provincial governments maintain responsibility for setting standards and identifying risks associated with food products.<sup>2</sup> Indeed, Health Canada collects and analyses scientific data and utilizes risk assessments to determine when a regulatory intervention is required (Health Canada, 2000). Provinces and territories generally have to conform to regulations coming from federal statutes and regulations related to the Food and Drugs Act. However, they do maintain some discretion on implementing federal guidelines or policy recommendations. But the current regulatory environment emphasizes cooperation between federal and provincial/territorial officials on food safety regulations to ensure harmonization and efficiency in the regulatory environment.

Such a regulatory culture stemmed out of the Mulroney governments recognition that greater harmonization between the provincial and federal levels in food safety would

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<sup>2</sup> Federal power in this area is derived from its 'trade and commerce power' (s.91[2]) and 'criminal law' powers (s.91[27]) whilst provincial responsibility in this area is taken from its 'property and civil rights' power (s.93[13]) and 'matters of a local or private nature' power (s.92[16]).

improve access to safe food for all Canadians and help the economic and trade competitiveness of Canadian food exporters (Skogstad 2006:162, Doering 1996:5). Indeed, prior to 1997 the Canadian food safety system was fragmented and maintained little coherence between the provinces and territories and the federal government. This has changed with the emergence of such entities as the Canadian Food Inspection Agency (CFIA) in 1997, which enforces regulations inter-provincially and internationally. In addition some responsibility for implementing food safety standards has been delegated to the private sector but standards within provincial borders are still the responsibility of provincial governments (Skogstad 2006:161). This means that provinces still maintain a great deal of discretion in complying with federal rules.

As a result, in Canada a regulatory environment that is a two level dynamic where federal and provincial actors share competence and play particular roles is evident. The fragmentation of the late 80's and early 90's has led the way to a context where federal and provincial officials try to cooperate more on food safety regulations attempting to reach consensus on policy positions and regulations. However, this relationship is still based on a division of power enshrined in the Canadian constitution. Keleman (2000) argues that divisions of power typically leave the national level responsible for policy development whilst provinces are key actors in implementation. How a policy is implemented is dependent on how centralized power is at the federal level. The more centralized power rests in the federal government, an aspect common of parliamentary systems where the executive and legislative branches are fused, generally the more discretion a province gets in implementing a policy (Keleman 2000:142). This is referred to as the *politics of discretion* where federal government develops the policy and allows the provinces to implement how they wish (Keleman 2000: 145). The reason for this is because federal governments seek to maximize their popularity and see risk to reputation if the regulation fails or costs too much, so are happy to provide discretion to provinces (Keleman, 2000:137-138).

The dynamic that Keleman (2000) describes is not disputed, but the assumption that the development of a regulation rests purely on a two level negotiation discounts the potential role for private and international actors. Indeed, Asara et al., (2009: 81,85) argues that regulations are the result of an indeterminate process of negotiation and exchange between multiple tiers of government: supra state, state and sub state. The focus on multiple levels of governance, shifts focus away from formal powers to the capacity to make and enforce decisions (Ibid: 84.). So it becomes about the balance of authority among multiple levels of government rather than just a struggle between two levels over things like the discretion for implementation (Ibid: 85, Marks 1993). As a result, Asare et al., (2009) advocate that an MLG lens is far more reflective of how regulations emerge, particularly in the European Union. Such a lens is also relevant in Canadian regulation making as well (Doern and Johnson, 2006).

Unlike Kelemans (2000) theory of Regulatory Federalism that suggests a governance dynamic that is top down between federal and provincial governments, an MLG lens considers that the policy process can be much more fluid (Asare et al., pg. 81). This suggests a context where policies can be forwarded and influenced by international, national and sub national actors. Indeed, in a European context MLG makes a great deal of sense given the legal and political authority that European institutions like the

Commission, Parliament and European Court of Justice maintain in regulatory politics amongst EU member states. So, how is such a lens also useful in understanding Canadian regulatory contexts where no explicit supra-national entity like a European Union exists? Well, the legal and political authority afforded to international standard setting organizations can create a context that has similar effect to a supranational entity. Skogstad (2006:158) argues that the Canadian food safety regulatory environment has taken significant steps to coordinate rules and to create an integrated food safety regulatory system domestically and with international institutions and trading partners and details this through two case studies on Bovine Spongiform Encephalopathy (BSE) and genetically modified organisms (GMO, Ibid).

The Codex Alimentarius Commission, the World Animal Health Organization (OIE) and the International Plant Protection Convention (IPPC) have been effective in promoting international cooperation through the harmonization of standards. Particularly in trade the so-called “Three Sisters” have created an international forum to deal with regulatory issues between states and to ensure harmonization. As well, these standards help reduced the use of food safety regulations as non-tariff trade barriers through setting basic health and safety standards for the production of goods. International standards coming from these organizations are held up as beyond judicial contestability by the Sanitary and Phytosanitary (SPS) Agreement and in the World Trade Organization (WTO) dispute settlement process (Scott, 2007:275).

The privileged position in international trade that Three Sister standards maintain has had two effects on domestic regulatory processes: first, it has created an international forum for states to develop common standards that all adopt as a means to promote harmonization and facilitate trade. Second, such a forum adds a new level of decision making that needs to be taken into account in domestic regulatory policy making because the standards coming out of the Three Sisters are privileged in international trade law (Scott, 2007:275). This means that food safety regulations are more than a federal dynamic, raising the profile and importance of international standards for states and in Canada.

In a sense, the WTO’s recognition of international standards coming from the Three Sisters has granted them similar legal and political authority to policies stemming from a supra-national entity like the European Union. Indeed, both are comprised of a collection of states that come together to negotiate agreements. They both use state and independent experts to influence policy outcomes and vote on the adoption of particular standards/policies. However, they differ in the sense that the EU derives its legal and political authority through the legal treaties that member states adopt. The international standard setting organizations are granted similar legal and political authority by the WTO which states maintain an interest in being apart of due to its position as the regulator and arbitrator of all things international trade.

The ramifications of a legally and politically relevant standard setting institution for regulatory policy making in Canada results in a shift from a purely federal dynamic to one where outcomes can be influenced by what is also occurring internationally. However, how this influence gets manifested can be different to an explicit supra national entity like the European Union. The EU maintains an individual identity and often advocates particular policy positions that differ from its member states as it has an

independent civil service to provide policy advice. International standard setting organizations do not operate in a similar fashion. Whilst, they maintain a civil service, their function is primarily to provide scientific advice to member states, not to advocate for a particular position. So, how then do these international institutions influence domestic regulatory policy outcomes? Primarily through the legal and political relevance that the standards maintain in international trade. That means that a country like Canada is more likely to negotiate and take up an international standard because it suits its trade interests to do so (Skogstad 2006: 174).

As a result Canada has taken steps to adapt its regulatory framework to a multilateral context. Skogstad (2006) highlights how provinces and territories have consolidated their food safety systems and now work closely with federal officials through such entities as the Canadian Food Inspection Agency (CFIA), the intergovernmental Canadian Food Safety Inspection Implementation Group and the Agricultural Policy Framework of 2001 to ensure a coordinated approach. In addition, private interests such as industries have been afforded space in regulatory implementation, particularly in food safety (Skogstad 2006: 164-166). These are helpful actions to ensure provincial-federal harmony when engaging in international negotiations over food safety regulations. But what is neglected in the current literature is a consideration of how Canada approaches food safety policy making in context of domestic discord. That is, a lack of agreement between the provinces/territories and the federal government over the appropriate positions/action to take.

In a context of domestic policy discord, it appears that international standard setting institutions can be used to try and assert the policy position of the level of government responsible for international negotiations. Indeed, in the case of raw-milk cheese, the Codex became the forum for Canadian federal regulators to assert their preferred policy position in the face of opposition from provincial counterparts. This means that state regulators seeking to implement politically difficult or unpopular health and safety regulations can limit the discretion available to provincial or territorial counterparts by deferring the policy solution until the development of an international standard. In effect, state food safety regulators under pressure to compromise on their negotiating position can pass the buck to one of the Three Sisters, claiming the resolution is out of their direct control, whilst still advocating for their preferred policy outcome.

Using an MLG lens allows for the complex interplay between sub-national, national and international actors in Canada to be highlighted. The succeeding case study describes an event where multiple actors were involved in developing the Canadian regulatory approach to raw-milk cheese. Such a case contributes to the literature by characterizing multilevel governance in Canadian regulation and how international standard setting institutions can be used as tools by federal officials to resolve domestic policy conflict over food safety standards.

### *Canadian Cheese Regulations and the Risks of Raw-Milk Cheese*

Outbreaks of food-borne illness are typically considered a result of contaminated meat (Willshaw *et al.*, 1994). However, such foodstuffs as raw-milk can also harbour harmful bacteria leading to illness (CDSC, 1998). Whilst, pasteurization is one method to

eliminate these pathogens and has long been a requirement for the sale of milk in Canada, the US and the EU, the necessity of pasteurized milk in cheese continues to be a matter of scientific debate. Many specialty cheeses are manufactured using raw-milk and there is growing concern that these products pose a threat to consumer safety.

Milk is an easily perishable material that can be contaminated by pathogens rendering it unsuitable for processing or for human consumption. The risks posed by the consumption of raw-milk cheese are dependent on the ability of pathogens existing in the milk to contaminate and/or resist inactivation during the production process. Unlike pasteurised milk, which undergoes heat treatment at a temperature of 63°C for thirty minutes or more, raw milk is not heat treated beyond 40°C, if at all (European Commission, 2004). This leaves the potential that pathogens present in the milk have not been inactivated.

Cheese is produced through the fermentation of milk, a process that is largely dependent upon bacteria. Donnelly argues that there is no inherent risk posed by raw-milk rather only when it gets contaminated with pathogens (Donnelly, 2005). The same risk is available to pasteurised milk, however, it is a matter of timing; most contamination occurs just before, during, or just after milking. Pasteurisation occurs a number of hours after milking has been finished and is conducted with the direct purpose of inactivating pathogens that have entered the milk during the milking process. Therefore, the likelihood of contamination persisting is much less in pasteurised milk.

In 1998 the Institute for Food Science and Technology released a report entitled *Food Safety and Cheese* suggesting that:

“Whilst pathogens can and do gain access to cheese after curd formation, it is clear that many food-borne pathogens are faecal in origin..., it not being possible to milk cows aseptically... In addition to potential faecal contamination, pathogens may be excreted into the milk directly from the udder...Correctly-controlled milk pasteurisation kills such bacteria... Pasteurisation..., provides the simplest means of ensuring the destruction of vegetative pathogens in raw milk (Institute for Food Science and Technology, 1998).”

Raw-milk is particularly susceptible to being contaminated by such bacteria as *Escherichia coli* (*E.coli*), *Staphylococcus*, *Salmonella* and *Listeria monocytogenes* (*Listeria*). When consumed by humans, these bacteria can cause flu-like symptoms such as headache, fever, abdominal pain, vomiting, and diarrhoea and can have a long term effect by causing colitis, crohn’s disease or Haemolytic Urinary Syndrome (HUS, Curnow 1994). In immunocompromised people such as infants, elderly or pregnant women, the risk is far greater as pneumonia, meningitis and encephalitis can develop and lead to death. In Pregnant women, infection can result in a miscarriage or even still birth.

The seriousness of contaminated milk and cheese have been long understood. However, the source of contamination and types of bacteria involved have only recently become

better known. It was not until 1973 that *E.coli* was detected for the first time in soft-ripened cheese (Wells *et al.*, 1973). This led scientists to focus on the relationship between the age, moisture content and bacterial content of cheese as a cause of food-borne illness. In 1996, Quinto and Cepeda (1996) published their findings regarding the ability of *E.coli* of bovine origin to survive in cheese beyond the sixty day threshold. Indeed, in 1996 when the issue over raw-milk cheese arose in Canada there existed no conclusive scientific evidence connecting pathogens in raw-milk to a the suspected source, faecal material. It would not be until 2000 when Beerens *et al.*, (2000) were able to conclusively trace back bacterial contamination in raw milk to natural intestinal microflora of a source cow.

Despite the lack of conclusive scientific evidence prior to the late nineties, Canada maintained regulations on the use of raw-milk in the commercial production of cheese as a means to reduce the risk from consumption. This focused on principles of hygiene, inspections and testing requirements as laid out in the 1969 Codex guide on hygiene. The guide required the development of hazard accounting contamination control protocols (HACCP) (Codex Alimentarius Commission, 1969). In addition, there existed international standards for the production of such raw-milk cheeses as Camembert and Brie that outlined moisture contents and hygiene requirements (Codex Alimentarius Commission, 1973a, 1973b). These principles were also embodied within the 1979 Canadian Dairy products regulation (Government of Canada, 1979). In the early nineties, Canada enhanced its regulations to better reflect the evolving science. In 1991, Division 8 section B.08.030 of the Canadian Food and Drugs Act provided that all raw-milk cheese be aged for a minimum of sixty days in order to ensure that the moisture content was sufficiently low (Government of Canada, 1991). This is considered a key step in the deactivation of pathogens although in 1996 such a belief was challenged in the scientific literature.

In Quebec, principles for the production and sale of raw-milk cheese were developed by the Ministère d'Agriculture, Pêcheries et Alimentation Québec (MAPAQ, 2008). These laws were updated in 2008 and permitted producers in Quebec to deviate from the sixty day aging requirement as long as hygiene, monitoring and inspection standards are maintained. Such a position deviates from the federal government regulations and has resulted in policy discord.

### **Multilevel Governance and Policy Conflict in Regulating Cheese**

In 1994, the threat to human health via contaminated raw-milk cheese continued despite regulatory policies to ensure food safety through hygienic and other practices. Between 1982-1994, in Canada over 2200 reported cases of illness that were associated with raw-milk cheese (De Buyser, *et al.*, 2001). Similar incidences existed in France and other European countries. Given the prevalence of food borne illness associated with raw-milk cheese consumption, the Codex took up the matter and began multilateral negotiations around an international standard for unripened cheese in late 1995. The purpose of the standard was to use the best available scientific information to set in place some

benchmarks that cheese producers in such states as Canada and France could use to verify the safety of their products and improve their marketability.

The beginning of the Codex process coincided with Health Canada proposing to enact a regulation that would mandate that all commercial cheese be made from pasteurized milk (Government of Canada, 1996a). This would in effect ban the sale and consumption of raw-milk cheese in Canada. The motivation for this measure stemmed from the belief by Health Canada officials that raw-milk cheese posed a threat to human health due to pathogens in raw-milk cheese. The Canadian proposal represented a change in policy as under the existing legislation, raw-milk cheese was allowed to be sold commercially as long as it had been aged for sixty days and met specific moisture and inspection requirements.

The impetus behind the proposal from Health Canada appears to be twofold: first, there was emerging scientific evidence that pathogens could survive in raw-milk cheese beyond sixty days; second, three major outbreaks of food-borne illness occurred the year prior in Canada, California and France and were believed to be the result of contaminated raw-milk cheeses (Chidley 1996:63). This renewed concern about the safety of raw-milk cheese products amongst Health Canada officials who sought to take decisive action.

Indeed, on April 15<sup>th</sup> 1996, Canadian officials notified the SPS committee at the WTO that pasteurization of milk would be required for all commercially sold cheeses (Government of Canada 1996b). Canadian officials argued that:

“Research has shown, however, that some micro-organisms of public health significance may survive this aging process. Therefore, in the interest of enhancing the assurance of public health protection, it is proposed to amend the Food and Drug Regulations, Sections B.08.042 to B.08.044, to require that cheese offered for sale be heat processed so as to pasteurize it; be made from a pasteurized source of milk or other dairy products; or meet all of the following requirements which research has shown provides assurance of safety equivalent to pasteurization:

- (1) be made from milk that has been held at a temperature of not less than 63 degrees C for a time not less than 16 seconds;
- (2) have a pH equal to or less than 5.5 and a water activity equal to or less than 0.95 at the end of the manufacturing process, and
- (3) be stored at a temperature of 2 degrees C or more for a period of at least 60 days (Government of Canada, 1996b).”

Whilst, Canada was supportive of the Codex process the decision to take action before the standard process was complete appears to be the result of industry pressure. Commercial cheddar cheese producers in Canada lobbied the government to act based on the continuing outbreaks of bacterial infections believed to be as a result of consuming raw milk cheeses. Industry were motivated by fear that food scares would damage the

entire cheese sector's ability to sell their product locally and internationally (Personal Interview, 2008; West 2008:28). As a result, commercial cheese producers supported Health Canada's position to universalize the pasteurization requirement in order to ensure their product was not inadvertently harmed by the effects of producers using raw-milk (Chidley 1996:63).

On the surface it appears to be a logical requirement that only pasteurized milk is used in cheese production. Raw-milk can contain bacteria that results in severe illness and even death in immuno-compromised individuals when consumed. Indeed, most cheeses in Canada are made from pasteurized milk, unless otherwise labeled. However, pasteurization is not always necessary. The risk of transferring pathogens from raw-milk cheese can be offset by hygienic cheese production processes and aging requirements. However, cheeses produced using raw-milk can continue to harbour pathogens despite safety measures put in place in the production process.

The debate over the necessity of the pasteurization requirement proved to be particularly controversial within the Quebec where raw-milk cheese production and consumption is associated with cultural heritage (Chidley, 1996:63). Raw-milk cheese producers and officials in Quebec were concerned that the ban on the production of raw-milk cheese was not necessary and would adversely affect specialty cheese makers in the province. Quebec accounts for 56% of all specialty cheese production in Canada (Dairy Farmers of Canada, 2008). Provincial officials argued that the problem related to hygiene standards which could be resolved through greater inspections and testing rather than pasteurization. Members of Parliament (MP) from the Official Opposition at the time, the sovereigntist Bloc Quebecois party became quite vociferous in their opposition to Health Canada's claim. They questioned the Minister of Health in the House of Commons about the necessity of such a measure and the validity of the science. They even held a cheese tasting for other MPs and the Minister of Health to come and test raw-milk varieties produced in Canada (Chidley 1996:63).

For the Canadian government, the pressure coming from the province and the official opposition was quite pertinent. Not only is Quebec the largest manufacturer of cheese in the country producing 45% of all cheddar and 56% of all specialty cheese in the country, the period in which the pasteurization requirement was proposed was in the immediate aftermath of the 1995 Quebec sovereignty referendum (Cuthbert, 2008; Dairy Farmers of Canada, 2008). During this period, the sovereignty movement was popular and the referendum was narrowly won by the federalist camp. However, the result brought about a new emphasis on the Canadian federation and Quebec's role in it. Given that this issue was being characterized as a matter of Quebec culture, there was real sensitivity to ensuring that important economic contributions and cultural traditions in Quebec were respected. In particular, the federal government was intent on not giving the supporters of sovereignty a political rallying point to reinforce their position.

Externally, the proposed Canadian regulation also had a real trade effect for EU cheese producers. The concern was that the regulation would prevent much of EU cheese exports from entering Canada. As a result, the European Commission entered into

informal bilateral consultations with Canadian officials at the WTO to clarify the extent of the proposed regulation and to seek assurance that EU cheese could continue to enter Canada.

European Commission officials did not understand the necessity of the Canadian proposed measure as its own scientific opinions pointed to alternative means that were equally as effective in inactivating pathogens in raw-milk. The EU Scientific Committee on Food opinion in 1994 about the use of gamma rays for Camembert is but one example (European Commission, 1994). The Canadian government responded that the measure was scientifically justified, despite the findings of its own scientific committee, and would apply to all cheese domestically produced or imported. The Canadian position did not satisfy the EU which on May 1<sup>st</sup>, 1996 registered a specific trade concern (STC) at the WTO SPS Committee.

STC is part of an informal process that states can use to signal displeasure with a proposed regulation prior to entering into a formal WTO trade dispute (Hornsby 2010, Scott and Lang 2009). Registering an STC at the SPS Committee is considered a rallying call for other members to voice their opposition to the proposed measure. It also represents the fact that informal bilateral negotiations at the margins of the SPS Committee are failing and there exists a serious potential of a formal dispute emerging (Hornsby, 2010). The EU officially protested noting that “its measures, including production requirements, safe and correct sourcing and subsequent supervision in the various production stages from farm to consumer, provided at least equivalent guarantees in terms of food safety (SPS Committee, 1996).” Above all, the EU position was consistent with international standards that were in existence.

Prior to the inception of the WTO in 1995, Canadian cheese producers were protected by a range of measures which placed import limits on dairy products. This was part of the effort to maintain stability of the Canadian milk supply and ensure consistent and affordable access to safe dairy products (Canadian Dairy Commission, 2011). However, with the agreement to establish the WTO, the market place was liberalized with import quotas giving way to tariff and tariff rate quotas. This worked in Canada’s favour as the trade in cheese, butter and ice cream led to trade surpluses until 1999 (Ibid).

Since 1980, Canada and the EU have maintained a special arrangement for trade in cheese products. Each assign a special access quota that gives preferential treatment to cheddar and specialty cheeses in each other’s markets. In 1995, the EU accounted for over 39% of foreign cheese coming into Canada with the majority being specialty cheeses which included a number of raw-milk varieties (United States Department of Agriculture, 1997). The proposed Canadian measure threatened this special arrangement and would have effectively halted EU cheese exports to Canada. This created a political and economic context that was ideal for a formal trade dispute to emerge had the Canadian regulation come into force.

In 1996, the EU was considered to be a leading cheese exporter (WTO Secretariat, 1997). This is largely due to the political importance cheese maintains in a number of member

states. France is the largest EU exporter of cheese to Canada followed by Italy, Denmark and Norway. Each have strong agrarian traditions that include traditional forms of cheese-making using raw-milk. In particular, France stood to lose the most from the pasteurization requirement which likely placed real pressure on the European Commission to take action against the Canadian measure.

Responding to the EU pressure and sensitivities from Quebec, the Federal Minister of Health, David Dingwall asked Health Canada officials to undertake an evaluation of the necessity of the proposed measure. He set up an independent expert scientific committee to look into the safety of raw-milk cheeses. “I’m going to have an expert advisory committee examine this very closely and make sure the appropriate decision is made based upon scientific evidence (Montreal Gazette, 1996; Government of the United Kingdom and Northern Ireland, 1996).” The creation of the expert committee suggested that government policy would be determined based on the best scientific evidence available. This created the perfect opportunity for the federal government to resolve the disagreement with Quebec.

By the end of 1996, the Canadian Scientific Expert Advisory Committee on Raw-Milk Soft Cheese reported back on the health risks and whether the pasteurization requirement was necessary (Government of the United Kingdom and Northern Ireland, 1996). To the surprise of federal officials, the Committee did not advocate for the pasteurization requirement, instead advocated for a five-step process to ensure that raw-milk cheese for human consumption did not get contaminated with pathogens and when it did, that the source could be traced (Personal Interview, 2008). Indeed, the expert committee even suggested that Health Canada’s existing sixty day aging requirement was unnecessary as long as the five step process was in place. With the release of the expert committee’s report, the Canadian proposal as a domestic measure was considered no longer defensible against Québécois objections.

In light of the report, the Minister of Health pulled the proposed pasteurization requirement, giving the appearance that the issue was resolved. However, the Minister did not pursue implementing the expert committee’s recommendations either, preferring to maintain the existing policy where raw-milk cheese had to be aged for sixty days before it could be sold commercially. Again, this maintenance of the *status quo* suggests a resolution to the issue. But again, this was not the case. Whilst, the pasteurization proposal no longer existed as a matter for the Canadian Parliament, it appears that it was still part of Health Canada’s strategy for regulating cheese. Indeed, in looking to Canada’s role in the Codex process for an international standard on unripened cheese, the pasteurization position was still very much part of Canadian policy.

#### *International Standard Setting Institutions in Canadian Regulation*

Facing a challenge on multiple fronts, the Canadian Government shift to a multilateral context makes sense; a multilateral problem should be dealt with in a forum where all concerned parties can be heard. A multilateral forum that can definitively address tensions in trade, regulation and cultural dynamics. The Codex process for a standard on

unripened cheese started in 1995 but had not made much progress since then. It provided the perfect context to avoid the domestic and international problems that Canadian officials faced.

Indeed, placing on hold the domestic proposal and continuing the scientific debate through working towards an international standard on the matter prevented the trade issue with the EU from spilling over into a trade dispute and cooled concern coming from industry and Quebec. Focusing on this process allowed the federal government to defer any decision-making on the matter until the standard was ready. However, despite the concerns raised by Quebec and the EU, Health Canada officials did not reconsider their position on raw-milk cheese (Government of the United Kingdom and Northern Ireland, 1996).

At the 29<sup>th</sup> meeting of the Codex Committee on Food Hygiene held on October 25-26<sup>th</sup> 1996, Canada supported the US submitted draft standard that explicitly called for the pasteurization of milk used in cheese production. Canadian and American federal officials formed a united front claiming the most effective and necessary means to inactivate pathogens in raw-milk was through pasteurization (Ibid.). This proposal at the Codex set Canada and the US against the EU which was advocating for a loose set of requirements that primarily focused on a monitoring and inspection process and emphasized hygienic aspects of cheese production instead of pasteurization (Ibid).

The transatlantic divide resulted in deadlock between the parties and in 1997 the proposed standard for unripened cheese was abandoned on the provision that raw-milk cheese would be included in the development of a standard on milk and milk products (Codex Alimentarius Commission, 1997). This started a new process that was broader than the previous attempt to focus on unripened cheese. The strategy on the part of the Codex was to refocus the debate on milk as a means of bringing together parties that were so polarized. However, the raw-milk cheese issue remained divisive amongst North American and EU negotiators. Both the US and Canada continued to advance pasteurization as a requirement for cheese production and appearing unwilling to compromise (Personal Interview, 2008). Canadian officials, primarily made up of representatives from Health Canada were convinced that pasteurization was necessary for health and safety reason. The opposite view was held by negotiators for the EU which threatened to result in another deadlock moment. Fearing this, officials from the Codex sought to find a compromise between the European and North American positions.

In drafting the proposed standard, Codex officials were careful to acknowledge the differing food safety systems that exist for raw-milk cheese regulation and sought to insert as much flexibility as possible. Such a sentiment is captured in the existing text for the standard: “A wide range of food safety approaches exist for the production of raw-milk products...the approach taken in this section is intended to be flexible enough to take into account the different approaches used in different countries regarding the manufacture and marketing of raw-milk products (Codex Alimentarius Commission, 2004:13).” However, this flexibility appears not to extend to mandating pasteurization requirements in cheese production. Rather, emphasizing a hygienic approach to raw-milk

cheese and products regulation that can include aging requirements as a means to alleviate pathogen persistence (Codex Alimentarius Commission, 2004).

Whilst, pasteurization did not feature in the new standard, both sides appeared satisfied that raw-milk cheeses could be regulated in the way that recognized domestic perceptions of risk. Whilst, the US and Canada were advocating for pasteurization, they supported the new standard as it entailed more than the previous attempt to develop a standard on unripened cheese, it focused on milk and milk products. In addition, enough flexibility existed to permit the maintenance of the *status quo* through the sixty day aging requirement that both countries had in place. As a result, the new standard was accepted by all parties and came into effect in 2004.

The Codex standard for milk and milk products almost ended in deadlock similar to the process for unripened cheese. The main reason for this related to the differences held between parties that advocated pasteurization versus not. As a means to achieve consensus, Codex officials advanced a standard that allowed Canada, US and the EU to maintain the *status quo*. For Canadian officials, this ensured that a more relaxed regulation to raw-milk cheese would not be forced upon them nor could a trade dispute emerge from the EU. Indeed, regulations pertaining to raw-milk cheese production at the federal level in Canada remain unchanged.

### **Policy Conflict and Multilevel Governance**

What is interesting to consider in this case is how despite the push for a regulatory culture that promoted federal-provincial cooperation and compromise, Health Canada officials continued to advocate for their preferred policy position in international standard setting. This suggests that there was never any intent of abandoning the pasteurization proposal at home, rather to try and achieve its objective via an international standard setting organization that is disconnected from Canadian political dynamics. Indeed, the Codex became a forum where Canadian officials sought alliances with other states (namely the US) to try and secure a pasteurization requirement for cheese production globally. Such an approach suggests that where there is policy conflict in a federal system that international standard setting institutions can be used by the federal government to advance a preferred policy outcome regardless of whether there is domestic consensus. This not only undermines the intent of having a division of powers between federal and provincial levels, but can also serve to limit the discretion and influence that provinces have in implementing food safety regulations.

Health Canada maintained a choice in this context on which policy to pursue in international negotiations over a standard. Choosing to move forward with its preferred policy position of pasteurization suggests that in contexts of policy discord with the provinces that federal officials, those who hold the responsibility for international negotiations, hold a great deal of power in the regulatory system. Whilst this example did not see Health Canada successfully advance its case of pasteurization to completion, the *status quo* was maintained and government policy could theoretically ensure that no laxer policies be implemented whilst at the same time preventing a trade dispute with the

EU. Such a context can be considered a successful outcome for Health Canada as it gave away no policy ground. Or did it?

*Discretion Limited or Expanded?*

The new standard appears to have limited the discretion available to Quebec officials to implement regulations on raw-milk cheese production. The new international standard permitted states to maintain a sixty-day aging requirement because it is open and flexible to differing food safety systems (Codex Alimentarius Commission, 2004:13). Indeed, in the immediate aftermath officials in Quebec did not attempt to deviate from the federal regulation despite the new international standard that also laid out specific hygienic steps. This was due to the fact that MAPAQ and Health Canada officials were negotiating how Canadian raw-milk cheese regulations would take shape given the flexibility of the new international standard. MAPAQ officials advocated for the implementation of a hygienic production, monitoring and inspection process without an aging requirement. Health Canada officials maintained that an aging requirement was required at a minimum to ensure consumer confidence and safety. Discussions over this issue finally came to a head in July of 2008, when MAPAQ announced that it would no longer enforce the sixty day aging requirement but rather implement a hygienic production, monitoring and inspection system in the province similar to the existing steps in the international standard (MAPAQ, 2008; Peritz, 2008). MAPAQ, sympathetic to the views of raw-milk cheese producers, did not see the scientific sense in the sixty day aging requirement and were frustrated that the discussions with Health Canada were going no where (Personal Interview, 2008). As a result, they took unilateral action and relied on the international standard for milk and milk products to support their position (MAPAQ, 2008).

For Quebec officials, the new international standard did not limit their discretion in regulating raw-milk cheese, rather it expanded it. Given the international standard laid out specific steps for hygienic production, officials at MAPAQ felt that they could use it to negotiate a policy that was more flexible. Officials at Health Canada and the Canadian Food Inspection Agency agreed that a hygienic production, monitoring and inspection process was required but maintained that the sixty-day aging requirement needed to be continued as a further step to ensure harmful pathogens were inactivated. The disconnect between MAPAQ, the raw-milk cheese industry, the federal government and large scale cheddar cheese producers came to a head in 2008. Politically and legally, MAPAQ officials there felt they had the discretion available to deviate from the Health Canada regulation in large part because the international standard could be used to support their position in the instance of a legal challenge. So, in the context of raw-milk cheese, the new international standard appears to have expanded the discretion available to Quebec in regulating the production and selling of raw milk cheeses. Whilst, the Federal Government has not changed its policies towards raw-milk cheese, it has also not taken any legal action nor challenged the scientific basis of the Quebec position to date.

Reverting back to Keleman's Regulatory Federalism thesis, this is likely due to the fact that federal officials seek to maximize their popularity and risk adverse and can now pass responsibility onto provincial officials for any risks manifested as a result of eating raw-

milk cheese (Keleman, 2000: 137-138). Health Canada can maintain that they have a policy in place that is meant to protect Canadians from the risks of eating raw-milk cheese and it was the choice of the Quebec authorities not to follow it.

## **Conclusion**

So here, the role of international standard setting institutions can be influential in determining Canadian food safety regulatory outcomes. Whilst such a statement is nothing novel in and of itself, it is interesting to consider what role they can play in contexts of domestic regulatory conflict. To date, much of the literature on the Canadian regulatory environment in light of multilevel governance, has pointed to contexts where domestic consensus has been achieved before an international negotiation has taken place (Doern and Johnson, 2006). As a result, the contribution of this paper focuses on multilevel governance when domestic discord persists. Here international standard setting institutions can either limit or expand the discretion available to governments to set or implement food safety regulations. Thereby acting as an arbiter in federal-provincial disagreements over food safety regulatory approaches. The case of raw-milk cheese reinforces that the Canadian food safety regulatory dynamic can be more than a simple federal-provincial discussion, it can be a multilevel experience that takes into account trade imperatives, science, industry preferences, as well as international relations between states.

The case of raw-milk cheese also suggests that the federal government maintains a great deal of power as it is responsible for international negotiations and can advance its preferred policy position at an international standard setting organizations. Such a power needs to be utilized carefully and with sensitivity to political dynamics that exist in the Canadian federation, especially in international negotiations over matters pertaining to an area like food safety, where competency is shared and perceptions of risk, science, economic imperatives, and culture intersect. Whilst, one case of policy discord is hardly enough to suggest a concerning trend in federal-provincial relations, it is still a helpful illustration of what can and has taken place in contexts of policy discord over food safety regulation. This contributes to building a richer understanding of the politics of food safety regulation that exists in Canada.

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