



REDUCING WASTE AND RECOVERING FOOD IN CANADA

Food Donation and Civil Liability in Canada

Companion to the Guidelines to Minimize Wasted Food and Facilitate Food Donations





The National Zero Waste Council is a leadership initiative bringing together governments, businesses and non-government organizations to advance waste prevention in Canada.

VISION

Canada united in the achievement of zero waste, now and for future generations.

MISSION

To act collaboratively with business, government and the community, at the national and international level, as an agent of change for waste prevention and reduction in the design, production and use of goods

nzwc.ca

April 2018

Introduction

ABOUT THIS DOCUMENT

This document was developed as a companion to the National Zero Waste Council's *Guidelines to Minimize Wasted Food and Facilitate Food Donations* (see [nzw.ca](#)). Those Guidelines were developed to facilitate the donation of high quality, nutritious foods by providing information about donor-recipient relationships, food quality and health, brand protection, and sector-specific guidance.

PURPOSE

This overview of food donation and civil liability risk will address concerns that current and future industry food donors may have about the potential for legal liability, particularly when donating perishable food items.

AUDIENCE

The information included in this document will be relevant for:

- Food industry donors (and potential donors) such as grocers and other retailers, food service providers including caterers and restaurants, and food processors
- Organizations that receive food donations

OVERVIEW

This document begins with an overview of food donor protection laws in Canadian provinces and territories, and explains the types of civil law that may apply to food donations. It then provides a legal interpretation of the food donor laws in Alberta, Ontario, Quebec, and Nova Scotia, with a focus on circumstances in which food donors acting in good faith might be protected from liability. Food donor laws in British Columbia are described in separate [guidelines](#) from the British Columbia Centre for Disease Control ([BCCDC](#)). Collectively, these five provinces make up the major food production and processing hubs in Canada.

In addition to the general legal interpretation of food donor laws, there are hypothetical scenarios to illustrate situations in which liability questions may arise. Legal interpretation of the scenarios illustrates key issues likely to be relevant to in a civil suit.

Overall, this interpretation suggests that businesses and organizations that operate in good faith and exercise due diligence and attention to food quality and safety are unlikely to experience issues with liability.

This document applies to civil liability only. Federal, provincial, and territorial health regulations apply at all times, and businesses that do not follow health protection or other relevant regulations may be ticketed or fined for unsafe practices in accordance with those laws.

Food Donor Laws in Canada

The following discussion of the laws relating to food donor liability was provided by Mary Childs, of Ethos Law Group LLP.¹ The views expressed in this piece are the author's alone, and do not represent the views of any other parties. This discussion is intended to provide general information about the law and is not legal advice. If you need advice about your situation or specific provincial legislation, please consult a lawyer in your province.

In every part of Canada, the law provides protections for companies and individuals who donate food rather than throwing it away. The laws are worded in various ways, but they all provide food donors with a strong defence if a consumer sues because of illness caused by the donated food.

Alberta	Charitable Donation of Food Act, RSA 2000, c C-8
British Columbia	Food Donor Encouragement Act, SBC 1997, c 8
Manitoba	The Food Donations Act, CCSM c F135
New Brunswick	Charitable Donation of Food Act, RSNB 2011, c 124
Newfoundland and Labrador	Donation of Food Act, SNL 1997, c D-26.1
Northwest Territories	Donation of Food Act, SNWT 2008, c 14
Nova Scotia	Volunteer Services Act, RSNS 1989, c 497
Nunavut	Donation of Food Act, SNU 2013, c 8
Ontario	Donation of Food Act, 1994, SO 1994, c 19

Prince Edward Island	Donation of Food Act, RSPEI 1988, c D-13.1
Quebec	Civil Code of Quebec, CQLR c CCQ-1991 Art.1471
Saskatchewan	Donation of Food Act, 1995, The SS 1995, c D-32.01
Yukon	Donation of Food Act, SY 2012, c 11

WHO IS A FOOD DONOR?

In each case, the special protections are available to an individual or corporation that gives food without payment or distributes donated food to another person. That could be a producer or distributor that gives food to a food bank, or a charity that gives food to individuals. Some of the laws (those in Ontario and Alberta) also give express protection to directors, officers, agents or employees of corporate food donors. In each case, the food must be given without any compensation in return. If it is sold, even for a nominal price, that isn't considered a donation. Any individual or organization that distributes donated food for profit is not protected.

WHO CAN RECEIVE FOOD DONATIONS?

In general, these protections apply to all food donors regardless of whether the food is donated directly to consumers or given to an intermediary such as a food bank or social enterprise. It doesn't matter whether the intermediary is a charity, a not-for-profit entity, a public body, a profit-making social enterprise or even an individual. The question that matters is whether the food is donated, not to whom it is donated. That is the

¹ As of February 1, 2018, Mary Childs is with the firm of Miller Thomsom LLP.

case under the laws of Alberta, Ontario and Quebec.

The law of Nova Scotia is different, because its protection applies when the food is consumed by “a person in need”. That term isn’t defined in the food donor law.

LIABILITY FOR FOOD-RELATED ILLNESS OR INJURIES IN COMMON LAW PROVINCES

In all Canadian jurisdictions other than Quebec, the law of liability for food-related injuries is essentially the same. Someone who believes that they were harmed by unsafe food can go to court and seek a remedy either based on a contract they have with the seller of the food, or based upon the fault of whomever caused, or failed to prevent, the problem.

The basis of liability is in one of two areas: contract law or tort law.

Contract law says that a buyer of food may, if the food is bad, sue the seller. Contract law is based upon the idea of the law enforcing bargains – if you make a deal to buy food, part of the deal is that the food should be safe. Most of the time, contract law will not apply to a claim against a food donor. If the food is given to a food bank or other agency, there is no a contract with the donor because a gift is not a contract.

In the case of food received from a food bank, there may not be a contract because the food is given, not sold. But if the food is purchased, even if it is purchased for a very low price, there will be a contract. This would be the case if the food was purchased from a food security organization that sells food at below-market prices. Only the party who made the contract can enforce it, so only the buyer can sue. Others who may have eaten the food, such as friends or family, cannot sue because it was not their contract. In contract law,

² S.O. 1994, Chapter 19.

it makes no difference why the contract was breached, even if it was due to no fault of the seller. All that matters is that the bargain was not kept.

Tort law allows people to sue if they have been damaged due to the fault of another, as long as it was foreseeable that someone might be harmed by that sort of fault. It does not matter whether the person suing and the one being sued had a contract. Under tort law, a manufacturer who failed to take proper care in their processing plant could be sued if the consequence was that a consumer of the food was made ill, regardless of whether the two parties had any contract or not. The most common sort of tort claim is a claim that the fault was caused by negligence, which is failure to take the care expected of a reasonable person in the circumstances of the defendant.

OVERVIEW OF FOOD DONOR LAWS IN AB, ON, QC, AND NS

Food donation statutes – Ontario and Alberta

In these two provinces, very similar statutes provide protection for food donors and those who distribute donated food.

Ontario legislation, the [Donation of Food Act](#)² states that a person who donates food is not liable for damages resulting from injuries or death caused by the consumption of the food unless:

- (a) The food was adulterated, rotten or otherwise unfit for human consumption; and

(b) In donating the food, the person intended to injure or to cause the death of the recipient of the food or acted with reckless disregard for the safety of others.

That is a very high degree of protection. For a claim to succeed, a court would have to conclude not only that the food was unsafe but also that the food donor either intended to cause injury or acted recklessly. For someone to have acted with “reckless disregard” means they acted with a marked and substantial departure from the norm³. Ordinary negligence, which would otherwise be sufficient for a successful claim, would not be enough.

The Alberta statute, the [Charitable Donation of Food Act](#)⁴, uses identical wording. It says that a food donor is not liable for damages caused by the consumption of the food unless:

- (a) The food was adulterated, rotten or otherwise unfit for human consumption, and
- (b) In donating the food, the donor
 - (i) intended to injure or to cause the death of the recipient of the food, or
 - (ii) acted with reckless disregard for the safety of others.

The reference to food which is “rotten, adulterated or otherwise unfit for human consumption” makes it clear that the food has to be something that could not legally be sold in Canada, under s.4 of the *Food and Drug Act*. As long as the food is safe and of sellable quality, the donor is protected from liability. If sellable food is donated for reasons of oversupply, aesthetic

variations, packaging errors, short shelf life or simple generosity, the donor should be completely protected from potential liability.

Nova Scotia – The Volunteer Services Act⁵

This statute, also known as the “Good Samaritan” Act, provides that a food donor is not liable for damages incurred as a result of injury, illness, disease or death resulting from the consumption of food by a person in need unless it is established that:

- (a) the injury, illness, disease or death was caused by the gross negligence or the wilful misconduct of the donor; or
- (b) the donor knew that the food was contaminated or otherwise unfit for human consumption at the time of donation.

This Act is similar to the Ontario and Alberta legislation, but one difference is that these two requirements are alternatives. If a court finds either one to be established, it can impose liability on a food donor. In other words, a food donor may be held responsible if the damage was caused by their gross negligence or wilful misconduct, OR when they donated the food, they knew it was contaminated or unfit for human consumption. That means a food donor could be liable based on their knowledge that the food was contaminated, even if they did not intend to cause harm and were no more negligent than the ordinary person in that situation.

The Supreme Court of Canada⁶ has said that “wilful misconduct” includes not only intentional wrongdoing but also conduct exhibiting reckless indifference. A person wilfully misconducts themselves if they know and appreciate that it is misconduct on their part in the

³ R. v. J.F., [2008] 3 SCR 215, 2008 SCC 60 (CanLII)

⁴ R.S.A. 2000, Chapter C-8.

⁵ R.S.N.S. 1989, Chapter 497.

⁶ in *Peracomo Inc. v. TELUS Communications Co.*, [2014] 1 SCR 621, 2014 SCC 29 (CanLII)

circumstances to do or to fail or omit to do something and yet acts with reckless carelessness, not caring what the results of this carelessness may be. “Gross negligence” means a very marked departure from the standards by which responsible and competent people in the circumstances habitually govern themselves.⁷

Quebec – Liability Under the Civil Code

In Quebec liability for food comes from the [Civil Code](#)⁸ and the [Consumer Protection Act](#)⁹. The rules applied under those statutes are different from those in other provinces, but the result is usually the same. Generally, the law of Quebec is more favourable to consumers than the law of other Canadian provinces.

A buyer of a defective item has a contract-based right to sue, which in Quebec may be relied upon to sue manufacturers or distributors as well as the person who sells the item to the consumer. If the person claiming damages purchased the food, that person must bring a claim based upon the contractual warranty of quality. If the claimant is not a buyer, but was given the item, the claim must be based upon the extra-contractual liability arising from Article 1468 of the *Civil Code*.

Under the *Civil Code*, contractual liability applies whenever the injured party has purchased the item, regardless of whether they purchased it directly from the party they are suing. Article 1726 of the Code requires every seller (or manufacturer or distributor) to promise to the buyer that the item sold is, at the time of sale, free of latent defects. Such defects include safety defects, whether caused by manufacturing problems or design problems. Safety defects include failure to provide proper labelling or information about safe use, if the failure to inform creates a safety hazard. In the context of food safety, that could include labelling which is dangerous because it doesn't list a known allergen.

The only time a consumer in Quebec can make a claim based on extra-contractual liability is when that consumer did not purchase the faulty item. Extra-contractual liability applies when the claimant has been given the item.

Under either basis of liability, a person injured by food in Quebec may be able to claim damages against a manufacturer, importer, wholesaler or other supplier of defective food.

Quebec has no separate statute setting out additional protections specific to food donation. In Quebec, the *Civil Code* offers protection to food donors in Article 1471.

That article, sometimes referred to as Quebec's Good Samaritan provision, states: “Where a person comes to the assistance of another or, for an unselfish motive, gratuitously disposes of property for the benefit of another, he is exempt from all liability for injury that may result, unless the injury is due to his intentional or gross fault.” Similar to the Nova Scotia legislation, this protection applies to all who act voluntarily and for unselfish motives, whether in donating food or otherwise. It does not apply to anyone who sells food, regardless of the price at which they sell the item.

Article 1471 is shorter and more general in its wording than the Ontario or Alberta statutes, but its apparent effect is much the same. As in those provinces, a food donor will be protected from liability unless they either intended harm or were blameworthy to a high degree. The sort of careless error which might give rise to liability where a food product is sold to consumers in the ordinary way will be insufficient for a claim where the food has instead been donated.

⁷ *McCulloch v. Murray*, [1942] SCR 141, 1942 CanLII 44 (SCC)

⁸ CQLR c CCQ-1991.

⁹ CQLR c P-40.1.

SCENARIOS

In the following hypothetical scenarios, the position of the food donor will be discussed according to the food donor laws of each of the four provinces discussed above (ON, AB, NS and QC). *These scenarios relate to civil liability only. Federal, provincial, and territorial health regulations apply at all times, and food donors who do not use due diligence may be ticketed or fined for unsafe practices.*

Scenario A

A large manufacturer is discontinuing a product and donates its remaining stock to a food bank, which distributes it for free to patrons. Unfortunately, the item has been stored incorrectly at the food bank and some consumers fall ill as a result.

Liability: under any system of law, the manufacturer is not liable as the damage was not caused by their fault. The fault, if any, and any liability, would be that of the food bank. It could be required to compensate the affected consumers if it had caused the problem by failing to take reasonable care. There is no need to rely upon any of the laws protecting food donors.

Scenario B

A producer of pickles and preserves produces a batch which is unsafe due to a problem with the canning process. Unbeknownst to the manufacturer, the thermometer they used was malfunctioning and the jars were not sterile. Some of the jars are sold to consumers and some are donated to a food bank. Several consumers become ill.

Analysis: if the jars are sold, even at a nominal price, none of the food donor protection laws would apply. The ordinary rules of contractual liability allow the buyers to sue even if the jars are defective through no fault of the maker. Tort or extra-contractual liability applies to other consumers of the purchased jars. If the

maker had not taken reasonable care to prevent the danger of unsafe food, then the maker may be legally liable for damages suffered by those consumers. For consumers who acquired the jars from a food bank, however, their claims against the food donor will be unsuccessful unless there is very serious fault on the part of the maker. As the maker did not know of the defect, they did not intend to cause harm. Unless they were very seriously at fault (exhibiting reckless disregard for safety) in, for example, neglecting to conduct safety checks or not following up on consumer complaints, they will not be liable to those consumers who became ill. Assuming the food bank had no reason to suspect there was a problem, the food donor protection laws should protect it from all liability, whatever the province. The manufacturer could still be fined or ticketed if they did not meet health protection regulations.

Scenario C

A retailer donates to a charity a quantity of canned goods which are marked with “best before” dates which have just passed. The retailer is not aware of any problem with the food. The cans sit in a storage facility for three months before they are distributed. One client reported that the food in the cans smelled funny and tasted bad. They say that one of their children felt ill after eating some of the food.

Analysis: The fact that the food was marked with “best before” dates that had passed does not mean that the food was unfit for human consumption because best before dates are not a guarantee of product safety. The donor would not be liable for any problems which arose while the cans were in storage. The key question is whether the retailer was seriously at fault either before or at the time of the donation.

Scenario D

A food bank is given various fresh vegetables and other ingredients which it uses to make large batches of soup. Some of the batch is distributed for free at a soup kitchen; some of it is packaged and sold to raise funds for the food bank. Some of the volunteers making the soup don't observe safe food handling practices and the soup makes a number of people ill.

Analysis: the people who fell ill after consuming soup they had purchased will be able to sue the food bank for breach of contract; anyone with whom they shared the soup may sue the food bank in tort, claiming that it was negligent. The fact that the soup was made from donated ingredients doesn't affect the liability of the food bank as it was not donating the soup to these consumers. But the people who fell ill after consuming free soup at the soup kitchen will be unable to recover any compensation from the food bank unless they can prove a very high degree of fault caused the problem.

Summary

In all four provinces, anyone who acts in good faith when donating food is given a very high degree of protection against liability if something goes wrong. This protection applies to companies and to individuals: to manufacturers, importers, distributors and retailers, as well as to private individuals who donate food. They have a degree of protection much higher than they would enjoy if someone became ill as a result of consuming food which had been sold in the usual way. This is probably why there is no reported case in Canada of anyone (whether a food bank or a food donor) being sued as result of illness or damage caused by consumption of donated food.

If the donated food is sold to consumers, even at a very low price, then these extra protections will not apply to the seller. If donated food is resold to consumers, the seller has no greater protections than they would if they were reselling food the seller had bought from a producer or wholesaler.

This document was prepared for the National Zero Waste Council. It is an accompaniment to the *Guidelines to Minimize Wasted Food and Facilitate Food Donations*. The development of both documents was overseen by the National Zero Waste Council **Food Working Group**. Members of the Food Working Group include representatives from: Metro Vancouver, Township of Langley, Metro Richelieu Inc., Nature's Path, Halifax Regional Municipality, SWANA, A&W Food Services of Canada, City of Toronto, City of Montreal, City of Edmonton, the Province of British Columbia, Second Harvest, and Food Banks Canada.

The National Zero Waste Council thanks the following organizations for input and review:*

This document is intended to provide general information about the law and is not legal advice. If you need legal advice, please consult a lawyer. The legal interpretation was provided by Mary Childs, Ethos Law Group LLP (with Miller Thomson LLP as of February 1, 2018).

Please cite this document as:

National Zero Waste Council (2018). Food Donation and Civil Liability in Canada. National Zero Waste Council. Available at nzwc.ca.

This document is also available in French.

Ce document est également disponible en français.

