

Legal Food Talk Podcast – Episode 26

Justin Prochnow ([00:00](#)):

This podcast episode reflects the opinions of the hosts and guests and not of Greenberg Traurig, LLP. This episode is presented for informational purposes only, and it is not intended to be construed or used as general legal advice nor a solicitation of any type.

([00:26](#)):

Hello and welcome to Legal Food Talk. I'm your host, Justin Prochnow, a shareholder in the Denver office of the international law firm, Greenberg Traurig. This is a podcast brought to you by our food, beverage and agribusiness practice to give you some insights and knowledge about the world of food, beverage and agribusiness.

([00:55](#)):

Welcome to another edition of Greenberg Traurig's Legal Food Talk. Again, I'm your host, Justin Prochnow, and as we start 2025, I have a special guest today, friend and colleague in the industry, Sara Zborovski, who is... I always say it, we'll have to hear if Sara agrees, my Canadian counterpart.

Sara Zborovski ([01:17](#)):

I'll take that.

Justin Prochnow ([01:18](#)):

A practice very similar to mine, but north of the border from here in the US. So welcome, Sara.

Sara Zborovski ([01:25](#)):

Thanks, Justin. Happy to be here.

Justin Prochnow ([01:26](#)):

I'm trying to think, we first met, my recollection is we met at an FDLI conference, maybe way longer than we would both like to-

Sara Zborovski ([01:38](#)):

100 years ago.

Justin Prochnow ([01:40](#)):

Exactly. And I think there was even some discussion about the Broncos at that time.

Sara Zborovski ([01:46](#)):

I'm looking at my Broncos mug. There was discussion about the Broncos.

Justin Prochnow ([01:49](#)):

So no better time than the Broncos now returning to the playoffs only nine years after winning the Super Bowl. I think the longest time between winning the Super Bowl and making the playoffs again, but-

Sara Zborovski ([02:01](#)):

Very exciting.

Legal Food Talk Podcast – Episode 26

Justin Prochnow ([02:04](#)):

Exciting times here in Denver. They're actually, I guess, going to be playing this weekend much closer to you than to me here in Buffalo and we're excited for it. Not sure what the chances are, but any chance is better than no chance.

Sara Zborovski ([02:21](#)):

I will not tell you who we are excited to watch in that game in my house.

Justin Prochnow ([02:25](#)):

I'm sure. Well, for those who don't know, Sara, you're still in Toronto, right?

Sara Zborovski ([02:30](#)):

In Toronto, yeah, yeah.

Justin Prochnow ([02:32](#)):

So a bit close to a certain town across the border there where the game is going to be played.

Sara Zborovski ([02:41](#)):

It may or may not be played with the MVP of the year. We'll see, we'll see.

Justin Prochnow ([02:44](#)):

That's right, we'll see. Although it was funny, I was looking at some stats and of course probably generated from the Broncos that the stats between Bo Nix and Josh Allen are not all that different for the year. I think Bo's thrown a few more interceptions, but the same amount of touchdowns within 100 yards passing and 60 yards rushing. But the Bills were also either, what are they? 14 and 3 and the Broncos were 10 and 7, so that might have a little difference. I think it's probably Lamar or Josh right now, but we'll see.

Sara Zborovski ([03:26](#)):

Let's just hope for a good game, that's what I like to say. Let's hope for an interesting game.

Justin Prochnow ([03:30](#)):

Admittedly, I'm not as up on my Canadian football to be able to discuss how the Toronto, was it the... Well, I think it's the Montreal Alouettes, the Toronto Argonauts?

Sara Zborovski ([03:42](#)):

Nice.

Justin Prochnow ([03:42](#)):

I at least know a few of the teams.

Sara Zborovski ([03:45](#)):

It's kind of a different sport, so I will admit I do not watch CFL. Don't hate me, Canadians.

Legal Food Talk Podcast – Episode 26

Justin Prochnow ([03:50](#)):

All right, well, I've been wanting to have you on the podcast for a while just so we could talk a little bit about some of the similarities and differences. I think one of the things that comes up a lot is we end up cross-referring people who are... when I have clients that need some advice in Canada, Greenberg being a large law firm, one of the few places we don't have offices is Canada. And similarly, I know when you have some questions, you looked me up for things in the US because we do have very similar, I know even I think a month or two ago we were working on a cross-border egg issue between Canada and the US and so these things come up more than you might think.

Sara Zborovski ([04:41](#)):

True, yes, the egg issue.

Justin Prochnow ([04:42](#)):

So here we are in 2025. I mean, we obviously here in the US have some big changes coming in the next couple of weeks. Before we get into some of those, because the FDA has been going crazy here to start out 2025 and even at the end of 2024, any big things on the horizon in Canada that you are really looking at here in 2025 to start out?

Sara Zborovski ([05:12](#)):

So news out of Canada this week is our prime minister advised that he'll be stepping down, which means that Parliament has been prorogued. So what that means is essentially it's been suspended until at least March 24th. And as a result of that, all of the business of Parliament has been terminated. So all the members are released from the parliamentary duties until Parliament is summoned and all unfinished business is dropped or essentially dies, which means any legislation that had been proceeding or making its way through is now essentially dead, and in order to be proceeded with in the new session has to be reintroduced as if it had never existed. So we too, were in a bit of a state of flux up here. Maybe less so on the CFIA/Health Canada side, but definitely from a what's coming down from a legislation perspective, I think it's safe to say that probably not much in the next little while.

Justin Prochnow ([06:16](#)):

Yeah, well for sure. And just for those people listening who maybe aren't as familiar, so Health Canada is kind of the FDA counterpart in Canada to the FDA here in the US?

Sara Zborovski ([06:32](#)):

Yeah, so Health Canada, when it comes to food, Health Canada has responsibility for nutritional and think the health elements of food. They make all the policies around health nutrition labeling and the CFIA or Canadian Food Inspection Agency, they're really the enforcement arm. So they're responsible for enforcing, ensuring compliance, they identify non-compliance. That's kind of who they are.

Justin Prochnow ([07:00](#)):

Okay. Well here in the US, obviously we have a new administration coming in here in just under two weeks, and there are a lot of changes expected as there were the last time President Trump was in office. And one of the big issues, or I guess cornerstones was less regulation from the government, less informal guidance documents from the FDA, just a slowdown a lot of those things. Apparently the FDA, understanding that might be the case, has decided to get everything that they had in the works out into

the market before January 20th because we have received six new guidance documents since Monday over a variety of topics.

[\(08:00\):](#)

And so I want to talk a little bit about some of those and then maybe again for the listeners' education, how some of those issues are treated in Canada as well. One of the big ones was actually just before the end of the year, and it was the definition of healthy here in the US. And previously we had this very kind of criteria-laden definition of healthy, whenever you're making a nutrient content claim, so not if you're saying, "Supports a healthy immune system," but if you're saying, "Drink this product for a healthy diet," or "Has three grams of protein for a healthy diet," something along those lines, then you had to meet very specific criteria.

[\(08:50\):](#)

And it was one of those sad statements of my life, I can tell you in my sleep and probably anywhere else that it's three grams or less per serving of total fat, one gram or less per serving of saturated fat, 480 milligrams or less of sodium per serving, 60 milligrams or less of cholesterol per serving, and then at least 10% or more of the daily value of one of vitamin A, vitamin C, calcium, iron, fiber or protein. So sugars was never a function of that definition of healthy.

[\(09:27\):](#)

So under the current definition or at least the current enforceable definition, you have a situation where you could have a soda that isn't going to have fat or cholesterol or sodium, and if it had a little bit of juice with vitamin C, enough to get to 10%, which is nine milligrams, you could call a soda with 38 grams of sugar healthy, but water that didn't have anything added to it because there's not 10% of the daily value of protein, fiber or vitamins or minerals was not considered healthy, which was the consternation of many that you could have a soda that's healthy but water that was not.

[\(10:13\):](#)

And there were a lot of other ingredients, things like avocados or nuts that because of their levels of saturated fat could never be called healthy. And yet you've got these other products, and I think even back, I mean this was a while ago, I remember one of the FDLI conferences was right after Kind Bars had received a warning letter from the FDA about the use of healthy in their product. And because they have nuts and other things, they couldn't do it. So this has been an ongoing thing. The FDA issued proposed guidance in September of 2022 and they finally issued this draft guidance or they finally issued now this final guidance just before Christmas here in 2024. And it's a fairly significant difference. It got rid of the cholesterol, it got rid of this 10% or more of fiber, protein, any of those things. And now it's really based on three different nutrients. It's based on added sugars, saturated fat and sodium.

[\(11:18\):](#)

And there's really a focus here in the US overall on added sugars being the villain of any food products, and certainly with RFK Jr. coming in who's been very open about his dislike for ultra-processed foods, added sugars are going to continue to be a target, but now we've got these kind of criteria and thresholds for certain added sugar limits, which are based on the type of product it is and the type of category. So one of the big changes here was that if you have single ingredient products that are from certain categories, they can be considered healthy regardless of their saturated fat or sugar content if they fall into one of these categories.

[\(12:16\):](#)

So any vegetable, any fruit, any wholegrain, any seafood, eggs, beans, nuts, lentils and seeds that have no added ingredients, it's just those single ingredients, can be called healthy if they're from one of those

things, regardless of the saturated fat content. I mean they're not going to have added sugars because they're all naturally occurring sugars. But regardless of the saturated fat or sodium content, all of those things can be considered healthy. In addition, there is a specific exemption from the requirements for water, coffee, and tea are also considered healthy and don't have to meet any criteria.

[\(12:59\)](#):

Outside of those, it really becomes a combination of having to have a certain amount of an ingredient from one of the standard food groups, which are grains, dairy, vegetable, fruit, proteins, seafood, beans, peas and lentils or nuts, seeds and soy products. And then depending on those food groups, then there are certain thresholds. And for sodium, it's kind of the same for everyone, which is 10% daily value. You can't have more than 230 milligrams of sodium. Saturated fat varies between 5 and 10% depending on the type of product, which is one or two grams. And then added sugars, again, depending on the product, go anywhere from one gram to five grams for grain products.

[\(13:46\)](#):

And that's really the definition of healthy now, and it goes into effect fairly soon, although it's not enforceable until 2027. So I think what that means is that companies can avail themselves of calling themselves healthy under this new standard, but the FDA can't take enforcement action on it until 2027. So a big deal for many companies, it's a big deal for a lot of companies that might've fallen under healthy before, but because of that, so products that use added sugars like a kombucha type of product, like some of these prebiotic soda products now are going to have to probably re-look at things if they had started their marketing campaigns with healthy. So that was a long monologue about this new rule, but it's a big one for people in the industry so I want to make sure we got that out at the beginning, but tell us a little bit from the Canadian side of things, is there a formal rule or definition on healthy in its use in products in Canada?

Sara Zborovski [\(15:06\)](#):

It's one of my favorite things about working with US lawyers is learning how much detail you guys get in your laws. I bet it's a bit of a blessing and a curse at the same time. So no, we don't have anything like that. No definition of healthy. The general principle in Canada when it comes to making claims or any statements really on a label or in an advertisement is that anything you say about your food, including a health claim, is subject to this general requirement that the claim has to be truthful and not misleading and can't create an erroneous impression about the product including its health effect.

[\(15:43\)](#):

So that's sort of like the overarching thou shalt not, and it's in the Food and Drugs Act, it's also in the Competition Act, and it's in the Safe Food for Canadians Act. And that is essentially used by the regulator as the measure under which they then assess claims. So obviously there are certain claims, like you mentioned nutrient function claims and certain disease state claims that require pre-market authorization. And there are certain requirements that has to be met in order for you to make those claims. But aside from those kind of pre-authorized claims, really we fall under this. Just make sure whatever you're saying is truthful and not misleading.

[\(16:20\)](#):

So what does that mean, right? Yeah, I see you're laughing on the video. It's like, yeah, what does that mean? So I've seen, and we know that healthcare, we have a food guide as you do, and so if you're going to say that your food is healthy, in order to ensure that that statement is truthful and not misleading, it should fall within Canada's food guide. It should be one of the food groups. It probably shouldn't have

too much sugar, it shouldn't have too much fat, but what is too much sugar, what is too much fat? That is not defined.

[\(16:55\)](#):

Our recent development in this area is front of pack labeling. So our government recently introduced requirements that foods that are high in fat, sodium and added sugars have to, if they exceed certain limits as prescribed, then there has to be a notification on the front of the package stating high in sugar, high in fat, high in sodium. But that's sort of as far as we've gone in terms of a limitation, rather than it's not prescriptive, I guess is the main difference between US laws and Canadian, I'm not even going to call it laws, I'm going to call it guidance.

Justin Prochnow [\(17:40\)](#):

One of the bigger issues, and this is one of the few, this is the actual regulation that was changed by the FDA as opposed to a lot of these other guidances issued by the FDA are technically recommendations and not mandatory compliance. The big issue here, as you know, and one of the significant differences between the US and Canada is that the US tends to be a slight bit more litigious than Canada. And so our big issue is not that the FDA is all of a sudden going to start bringing all sorts of actions over the use of healthy, it's that of course, plaintiff class action lawyers are going to be all over this and the use of healthy on it. So here in the US, a lot of what companies do, and my role in reviewing packaging and labeling has really changed over the last 10 years and even a little bit before that.

[\(18:41\)](#):

But when I review packaging and labeling now, for sure we want to be compliant with the FDA and everyone wants to be good corporate citizens, but it's less about, hey, it's compliant with FDA law and more about, hey, is this going to be at risk for some plaintiff lawyer sending a class action notice? And healthy is one of the... the nutrient content claims in general are lightning rods for a certain group of class action attorneys that also might follow around those little trucks with red and blue lights on that we call ambulances.

[\(19:19\)](#):

And I joke, but not really. It's just these types of claims are low hanging fruit for them because there's, as you said, very specific definitions that you either meet or you don't. And so it's much easier to bring an action, send a letter when it says, "Hey, you need to meet these criteria and you don't, so you're making an impermissible claim." For us, these types of changes not only are significant in FDA compliance, but probably more so significant in another item that companies have to be aware of when making claims or be at risk for some plaintiff who are taking a shot at them.

Sara Zborovski [\(20:08\)](#):

Yeah. So we're seeing more class action litigation, a lot of follow-on class action litigation. So our enforcement arm, the CFIA, I think they're probably more active maybe than the FDA when it comes to enforcing and policing themselves. It's almost like the Canadian government, our regulator Health Canada, CFIA, they don't think that we're capable of making any decisions for ourselves. They're super, super protectionist of us Canadians, and they really believe that it is their role to make sure that we are not being misled. Whereas you may get a letter from, or your clients would get a letter from plaintiff's counsel. Our clients up here are more likely to get a letter from the CFIA.

Justin Prochnow [\(20:53\)](#):

Legal Food Talk Podcast – Episode 26

And for us in the advertising side of things, much more likely to get a letter from the FTC, you know, for being false and misleading than technically the FDA also can enforce things as being truthful and not misleading, but they're more likely to leave that to FTC, which is a reason why, at least the plaintiff lawyers would certainly argue, their role has increased because the FDA really focuses on food safety and they're much more likely to take action over a recall situation or a disease claim, and they're less concerned about some of the more minor nutrient content claims and whether those have been properly addressed.

Sara Zborovski ([21:37](#)):

Yeah, it's interesting. Our Competition Bureau is, I'd say, way less active than the FTC, and a lot of it really falls to the CFIA. And if you make a complaint, if a consumer makes a complaint to the CFIA and says, "I was confused by something," they have to take action. Right?

Justin Prochnow ([21:56](#)):

Let's move into another category, and I'm curious again to hear how these are addressed in Canada, and that's food allergens. So here in the US, it was for many years eight major food allergens, and then they added sesame last year. So we have nine major food allergens. It's eggs, milk, soy, wheat, peanuts, sesame, and then three groups of foods, fish, tree nuts and crustacean shellfish. So very specific crustaceans. So shrimp, lobster-

Sara Zborovski ([22:35](#)):

We have that one too.

Justin Prochnow ([22:35](#)):

But not mollusks. So not oysters and clams, just the ones with legs I guess, that crawl around. Do you have those same allergens? Do you have any different allergens?

Sara Zborovski ([22:47](#)):

I just counted ours. We have 11. So eggs, milk, mustard, peanuts, crustaceans, fish, sesame seeds, soy, sulfites, tree nuts and wheat.

Justin Prochnow ([22:58](#)):

So sulfite, and I think I skipped wheat before. So sulfites and mustard I think are the two-

Sara Zborovski ([23:06](#)):

Mustard, yeah. We have mustard and we had soy before you did. We've had soy for a while. No sesame you just added, we've had sesame for a while.

Justin Prochnow ([23:15](#)):

And so is there a requirement to disclose those on the label? Do you have to do it separately? So in the US here, if those ingredients are clearly declared in the ingredients list, you are not required to have a separate statement. You can, but you're not required to have a separate statement. How are allergens addressed in Canada?

Sara Zborovski ([23:45](#)):

Legal Food Talk Podcast – Episode 26

So it's the same same. So if it's identified in the list of ingredients by the common name, milk, you're not required to have a separate statement, but if you do have a separate statement, like a contained statement, it has to be located immediately after the ingredient list. It has to use the common name of the allergen.

Justin Prochnow ([24:03](#)):

So pretty similar to ours. The FDA, again, has been working on some... we have a guidance document on allergens that interprets the federal Food Allergen Labeling Consumer Protection Act. FDA issues a lot of guidances, what's set in the guidance is not law, but it's certainly treated as... The way they phrase it is, "This is how the FDA is likely to interpret and enforce the law," but you can't find someone specifically in violation of the guidance document, but that's a pretty good indication of how they're going to operate.

Sara Zborovski ([24:47](#)):

We have the same, yeah.

Justin Prochnow ([24:48](#)):

So the FDA has kind of been working on some updates to the food allergen labeling, especially with adding sesame last year. And so the big one, they released an updated guidance and the big one here was they addressed tree nuts, which is always a little bit fuzzy because there's no official definition of tree nuts, but they included a table that basically said, there's a few mentioned specifically in the Food Allergen Labeling Act, and it's like almonds and walnuts, I forget, there's a third, that they specifically identify in the regulations.

([25:29](#)):

And then the rest, they have included a table of the various tree nuts, and they've always had that table. But interestingly in this new guidance, and it's always been one that's been a little bit iffy, is coconut, which was previously in that table, was omitted from the new guidance document. And so it's interesting because the FDA did not... they have 20 frequently asked questions in this document, but did not address the now omission of coconut in any way. It's just not on the table or list anymore. And it's always been a weird one because nut is in the name coconut, but it's typically considered a fruit. And here in the US, coconut water is treated as juice for the purposes of labeling. So where you have to declare the percentage juice statement, you have to declare the percentage of coconut water as juice.

([26:39](#)):

So on one hand it was addressed as juice, but then on the hand as a treatment for the food... And so they've essentially said, "We don't believe coconut is a food allergen anymore," which is kind of a big deal for a lot of companies here because coconut is a fairly common flavor in a lot of things. It's in a lot of bars and most of the time coconut is going to be declared in the ingredients list anyway, but where we were really seeing it is in some natural flavors where we're allowed to just state natural flavors in the ingredients list. But if coconut was one of those, and if your flavor is coconut and some of that flavor was derived from coconut, then you have to include that in a allergen statement. And essentially now coconut is no longer an allergen. So for those of you listening and then have coconut products, you have one less food allergen to worry about because coconut is no longer a food allergen.

Sara Zborovski ([27:36](#)):

And for your Canadian audience, coconut was never considered a tree nut for food allergen labeling purposes. So it's all good. We're aligning on something.

Legal Food Talk Podcast – Episode 26

Justin Prochnow ([27:44](#)):

We are coming closer to the middle on these things. So again, for those listening, all of these guidances were issued, they're available on the FDA website. If you end up needing them, you can reach out afterwards and take a look at these, but it's kind of a good idea to look through these some night when you have trouble falling asleep or something, you can pull out the food allergen guidance and just make sure. The other big deal here in the US, we get this more and more, are these voluntary statements about potential cross-contamination.

Sara Zborovski ([28:24](#)):

May contain, yeah.

Justin Prochnow ([28:26](#)):

A product may contain peanuts or wheat or a lot of times it's with wheat because of people with celiac disease and things, and our law does not address these types of voluntary statements. The FDA and their guidance has said, "You can make them, but they shouldn't be used as a substitute for good food allergen and health hazard assessment practices." And under the Food Safety Modernization Act, companies are required to have an allergen protocol to ensure that they're making sure that food allergens aren't being cross-contaminated.

([29:07](#)):

One of the kind of other updates to this guidance is saying that you should not have a statement that says may contain, let's say wheat on a product that also says gluten-free or wheat-free. It's either one or the other. It's not wheat-free, but "Oh, it might contain some of this." You can say it might contain some of the other allergens, but they said it's not really appropriate. And vice versa, if you have a specific contains wheat on there, you shouldn't be having a may also contain tree nuts, wheat in there because someone might look at the may contain and say, "Oh, it doesn't really," when in fact it actually does have it. So you shouldn't have something in both the may and the contains here, which sounds actually somewhat logical and reasonable, but I always say the reason why both the FDA and the FTC issue these guidances is not because... it's because enough people have been doing it that they feel like a guidance is necessary for it.

Sara Zborovski ([30:15](#)):

I've had to work with a client through a recall on that very, very same issue because again, not truthful and definitely misleading. In that case, it was sesame and on one part of the box said does not contain sesame, and on the other part of the box it said may contain sesame. And so there you go.

Justin Prochnow ([30:39](#)):

I guess first you, but just in general, how often are you doing recalls in Canada? And obviously you probably don't do every recall in Canada, but is that something that happens on a frequent basis, both in terms of just overall and in terms of what you do in your practice?

Sara Zborovski ([31:03](#)):

So yes to what I do in my practice for sure. And overall, again, our regulator's super protectionist. So you take a protectionist regulator and you put even a minor noncompliance. So let's take like L. mono and salmonella and razor blades and that off the table and think about just sort of other minor noncompliance like this type of a mislabeling issue or potential for something maybe in the product. And

Legal Food Talk Podcast – Episode 26

they are quite quick to say, "You know what? We'd like you to recall that product." I think their inclination, because again, Canadians need to be protected by the regulator, that they just would ask you to do it even in situations where you and me and probably most of the people listening would think, "Really? Do we really have to do that in this case?" I think our regulator would say yes.

Justin Prochnow ([32:01](#)):

What is from the CFIA and Health Canada, can they mandate recalls? Do they have mandatory recalls?

Sara Zborovski ([32:09](#)):

They do. It's super rare here because our culture is just very, I don't want to say submissive, but cooperative. So what all of the CFIA's guidance and Health Canada's guidance says is we want to work with industry to bring you into compliance. Let's all get in a room and sing Kumbaya. And so that approach kind of permeates all of our interactions. So when the CFIA says, "Hey, we think you should recall," generally like 99.99% of the time, our advice will be, "Let's do what they want us to do. They can do it anyway, and so let's just get it done."

Justin Prochnow ([32:49](#)):

Similar here, maybe a little bit, all recalls initiated by companies are technically voluntary, but the FDA can make it seem very involuntary by the time they get done, especially when it's... I would say when it's a food pathogen outbreak, salmonella, listeria, E. coli, or a failure to declare a food allergen, they'll get pretty aggressive.

Sara Zborovski ([33:18](#)):

Same.

Justin Prochnow ([33:18](#)):

When it's other items, especially if it's like a labeling, it's supposed to say 200 calories and it says 20 calories, and even more so the other way, if it's supposed to be 20 and it says 200, the FDA would probably look at... I mean that's more you, are you going to sell a product when it's declared? But if it's a safety issue, then they're pretty aggressive and they'll basically say, "Well, if you're not going to do it, I'll send it back to the center and we'll see. But what we might do..." And typically they're less likely to initiate a voluntary recall and more likely to issue an advisory statement that says, "Hey, so-and-so has some positive test results for salmonella. They have opted not to do a recall so we advise everyone to stay away from this product." And once that's in the works, the outlook from the company is very quickly changed to, "Yeah, I guess we'll do that recall."

Sara Zborovski ([34:21](#)):

We'll do that. Right. You don't want that out there. And it's the same when there's a health and safety risk, our regulator will be quite aggressive. And again, undeclared allergens, if it's a improper net weight statement or improper translation of the common name, they're a little more lenient. Let's stick her over, let's sort of figure out a way to make product in the market as correct as possible, as quickly as possible.

Justin Prochnow ([34:50](#)):

Legal Food Talk Podcast – Episode 26

We, of course, again, have the other component, which is the second you issue a recall, you're also going to get at least one or more class action lawsuits over that.

Sara Zborovski ([35:04](#)):

We're seeing more of that. It's surprising. Yeah.

Justin Prochnow ([35:10](#)):

We're already, we could do this podcast for four hours, but I think people, that would be hard, that would be a long Peloton ride so we'll-

Sara Zborovski ([35:18](#)):

There you go.

Justin Prochnow ([35:22](#)):

One of the other ones I want to get to, and this is kind of an interesting one, and I know it's changing in a lot of countries around the world, is plant-based foods and the naming of plant-based food alternatives. And so very common, I have a lot of clients in this area, I know you do as well. With products like vegan mac and cheese or meatless meatballs, and this has been an ongoing thing, and then you have things like almond milk, and so the FDA kind of out of nowhere issued this guidance about naming of plant-based alternatives with standards of identity already in place. So it's kind of a different story, if you have a milk, if you say almond milk, the FDA has essentially said, "As long as you provide enough information, that's going to be okay." That ship kind of sailed on the dairy industry being able to really go after that.

([36:27](#)):

We've had some states try to pass laws about saying you can't call something that's not from a cow meat, and all of those laws have been challenged on first amendment grounds and are up in the air. But what's interesting in this guidance is the FDA said, if you have something that has a standard of identity like macaroni or yogurt or something, and it's the plant-based alternative, you can't just say plant-based mac and cheese or vegan mac and cheese. That they again recommend, because it's guidance, but say you should include the source of that because it's not just... If you say vegan mac and cheese, that doesn't give you any indication as to what it actually is, what it's made out of. Or you'll see plant-based, like taco meat, but there's a lot of companies that make it from jackfruit because it has the same texture. So the FDA's guidance basically says it should say plant-based or meatless jackfruit-based taco meat.

([37:46](#)):

I mean, that's a mouthful, but meatless soy-based meatballs, vegan garbanzo-bean-based macaroni and cheese, something like that so that people know what the actual ingredient is. And it's not just sufficient to misspell cheese with a Z instead of an SE to make it clear. So I think this is what in particular, the point of lawyers are going to really go after. This kind of falls more into what you were saying about the false and not misleading. Is there enough information? So it's maybe even more of an FTC or state things, but I think that one is going to be one of the bigger ones for companies in the plant-based industry. What type of things have you been seeing plant-based-wise in Canada?

Sara Zborovski ([38:42](#)):

So we could literally do an entire podcast on this one I think. We have a lot of action on plant-based. The regulations actually create a category of food called, wait for it because it's super winning, simulated meat, and if you sell a product that resembles meat or poultry, you have to fortify it. So there's composition requirements, because again, Canadians, they need to make sure that we're getting the right amount of fortification. And you have to call it simulated meat or simulated poultry, which is a terrible, terrible name for a product. So there's that, and then recently the CFIA issued guidance, they're sort of trying to move off of like, "Well, if it just is a veggie burger, for example, and you don't design it to look like meat, you don't have to fortify it and you don't have to call it simulated, you can call it plant-based, but don't be confusing or misleading."

[\(39:40\)](#):

Then we got some guidance on what we're going to do with plant-based eggs. So similar, again, how can we name a plant-based egg product just in guidance? They consulted on guidance, we don't have anything specific. And then plant-based beverages are subject to fortification requirements that are set out in an interim policy, which requires you to call it a certain thing, so like almond-based beverage, and requires fortification and doesn't have any of the sort of wiggle room. It's almost like they treat it like a simulated meat with no wiggle room like we're seeing with eggs and like we're seeing with non-simulated plant-based meat products, if that makes sense. So it's a little bit of a, it's a show, I'll just say that. And I think if you were to say, "Where are we going to see traction in the next year or two?" I think the plant-based segment is ripe for some additional new fresh guidance and a new fresh look.

Justin Prochnow [\(40:44\)](#):

We talked a little at the beginning about RFK Jr. coming in and he's been pretty vocal about two things that are kind of in his sights of things he doesn't like. One is vaccines, which is great, but just pharmaceutical drugs in general and then highly ultra-processed foods, but he's very pro-natural organic, so it'll be interesting to see how much further he goes on some of the plant-based food things.

[\(41:18\)](#):

Again, the end of the day, I always tell people it's as you said, it's about being upfront and not misleading. So if you're disclosing what the main ingredients are in your disclosure, you shouldn't have a problem. It's when some of the companies are trying to pass it off as the real thing where we run into more of the issues. We did have another guidance earlier last year that went into a little bit about when you have some of these plant-based alternatives that are replacing things like milk or others, that if they don't have the same nutrients recommending some sort of disclosure that it doesn't have those same nutrients, which again, no one wants to be making, but again, a recommendation from the FDA similar to what you're talking about, not a requirement to fortify them, but if you don't, making it clear that it doesn't have the same nutrition as those.

Sara Zborovski [\(42:28\)](#):

I think we would take that. I think I would be so happy with that, right? Let's tell people what it is, but don't make me create something and figure out how to fortify something while maintaining taste and shelf life and appearance when I can just tell Canadians what it isn't as opposed to trying to make it match what it isn't. Yeah.

Justin Prochnow [\(42:52\)](#):

We probably have time to get to today, and I'm sure we can cover it all in five minutes, is lead and just heavy metals in general. We're not even going to get to PFAS, which I know you've done a lot on as well.

I saw an article on your website about that, and that's becoming a huge deal. So maybe that's a whole separate podcast for us.

Sara Zborovski ([43:17](#)):

Let's do lead and PFAS.

Justin Prochnow ([43:20](#)):

But quickly on lead just because, I mean, it's becoming obviously a huge focus. We have bloggers and alleged industry experts on all these posting about levels of lead, even though as of right now, there aren't any requirements by federal law regarding heavy metal content in products. Of course, you're familiar with California's Prop 65 and the heavy metal requirements for lead, mercury, arsenic, cadmium, almost obviously never intentionally added, usually absorbed through the soil, which was supposed to be an exception to Prop 65, but really hasn't turned out to be one, and it's just becoming a bigger and bigger focus.

([44:20](#)):

The FDA started a program a number of years ago called Closer to Zero, where they're trying to get all products close to zero in these heavy metals, and they have these action levels that they have proposed for various types of products. They have to go through a process where they first propose them and then open them for comment and then issue some draft final, and none of them have been finalized. And then here again, along with the guidances and everything else, the FDA finalized their first action levels for lead, and this is for products intended for infants and children, and they established specific action levels, which are 10 parts per million or 10 parts per billion for fruits, vegetables, yogurts, custard, single ingredient meats, 20 parts per billion for single ingredient root vegetables and 20 parts per billion for dry infant cereals.

([45:28](#)):

And again, these are not in and of themselves enforceable by law, but certainly again, plaintiff lawyers are going to look at those. And these are fairly low level. So again, it depends on the serving size, but a typical serving size for a kid's product that's let's say 30 grams, that means you can't have more than 0.3 micrograms of lead in a single serving. Even California's Prop 65 is half a microgram, so it's actually below the California limits for Prop 65.

([46:06](#)):

And while from a federal standpoint, it might not impose a lot of things, California passed the law last year, it's called AB-899, that says if there are any federally published action levels, then companies need to test to those levels and provide that information on their website with a QR code on the product linking to those test results. So all of a sudden now, there are some published action levels that companies are now required to test to and if it's anything above zero, even if it's below those levels, companies are required to provide that information on their website.

Sara Zborovski ([46:54](#)):

Yeah, yeah. That's a lot.

Justin Prochnow ([46:59](#)):

And to me, it's just an indication. Again, right now it's just for those with baby food and products for infants, but we have bloggers out there that are testing adult products that kids might use and disclosing

Legal Food Talk Podcast – Episode 26

the levels from their test results and then saying, "I know that there's no law, but I wouldn't give this to my kids." And there's some ulterior motives in some of those too. I won't get into it now, but they may or may not have some connections with plaintiff lawyers that then follow up with some letters on those things. And so I just think this issue of heavy metals, and we've seen it in cadmium and chocolate, and you'll get companies like Consumer Reports or the Clean Label Project or others who will release reports on levels and immediately those will be jumped on by advocates and by plaintiff lawyers. And so I think heavy metals is going to be a big part of 2025 and other things moving forward.

Sara Zborovski ([48:14](#)):

And I think we can always assume that whatever's big in the US one year will become big in Canada in a year or two from then.

Justin Prochnow ([48:19](#)):

Like I said, if it's anything like the first nine days here of 2025, it's going to be an interesting year. And I'm sure based on both what you had said, was it prorogue, did you say, between the prorogue in Canada and the new administration here in the US? I suppose if nothing else, we will not be short of work for either one of us.

Sara Zborovski ([48:44](#)):

There you go. There you go.

Justin Prochnow ([48:47](#)):

So Sara, remind everyone again, I'm not sure if even I said at the beginning, you're at Stikeman Elliott?

Sara Zborovski ([48:54](#)):

Sure. Stikeman Elliott. I'm in the Toronto office and happy to help anyone who has any questions relating to Canadian food laws.

Justin Prochnow ([49:03](#)):

And are you the only Z person?

Sara Zborovski ([49:07](#)):

Yeah, you can find me by Z-B. Yes. Z-B is how my last name starts,

Justin Prochnow ([49:15](#)):

Probably similar to, I get a lot of Prochnow, I get a lot of... I'm sure Zborovski never gets mangled at all. Right?

Sara Zborovski ([49:25](#)):

Never, never, never. Yeah. I often just say big curly hair and glasses and that's my identifier. There you go.

Justin Prochnow ([49:32](#)):

Sara Z.

Legal Food Talk Podcast – Episode 26

Sara Zborovski ([49:32](#)):

Sara Z. Big curly hair and glasses.

Justin Prochnow ([49:36](#)):

Well, thank you so much for joining today. I hope everyone got a good kind of look at some of the similarities and differences between Canada and the US. If you need a good Canadian lawyer, locate Sara, I'm sure she'll be happy to help and hopefully we get to do this again sometime.

Sara Zborovski ([49:54](#)):

I would love that. Thanks for having me today. This was really fun.

Justin Prochnow ([49:57](#)):

All right, well great. Thanks everyone for listening. If you liked it, please like it on any of your social media platforms. If you didn't do as my mom always said, if you don't have something nice to say, don't say anything at all. Thank you.