

A

D

A

N

A

C

C A N A D A
RECOMMENDATIONS
FOOD DONATION
LAW AND POLICY

JUNE 2020

Authors

This report was written by the following staff and students at the Harvard Law School Food Law and Policy Clinic: Emily M. Broad Leib, Ariel Ardura, Brian Fink, Julia Nitsche, Alex Harding, Jenna Welsh, and Taylor Dodson.

Acknowledgements

We are grateful to The Global FoodBanking Network whose input, ideas, and expertise informed much of our research. This report was also made possible with the advice and support of our on-site partners in Canada, with whom we discussed the ideas provided herein, including Food Banks Canada, as well as many other NGOs, businesses, and government agencies.

About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws around food donation in order to help address both food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe, in order to: help practitioners understand national laws relating to food donation; compare laws across countries and regions; analyze legal questions and barriers to donation; and share best practices and recommendations for overcoming these barriers. The project is a partnership between Harvard Law School Food Law and Policy Clinic and The Global FoodBanking Network. To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit www.atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic (FLPC) serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. Our focus is on increasing access to healthy foods, supporting sustainable food production and food systems, and reducing waste of healthy, wholesome food. For more information, visit www.chlpi.org/FLPC.



About The Global FoodBanking Network

The Global FoodBanking Network is an international non-profit organization that nourishes the world's hungry through uniting and advancing food banks in more than 40 countries. GFN focuses on combating hunger and preventing food waste by providing expertise, directing resources, sharing knowledge and developing connections that increase efficiency, ensure food safety, and help food banks reach more people facing hunger. For more information visit www.foodbanking.org.



Made Possible with Support from the Walmart Foundation

The research included in this report was made possible through funding by the Walmart Foundation. The findings, conclusions, and recommendations presented in this report are those of Harvard Law School Food Law and Policy Clinic alone, and do not necessarily reflect the opinions of the Walmart Foundation.



Report design by Najeema Holas-Huggins, with production support by Austin Wilder South End Digital.

TABLE OF CONTENTS

- About These Recommendations.....1**
- Summary of Recommendations.....2**
- Introduction.....3**
- Legal Challenges & Policy Recommendations.....4**
- Food Safety for Donations.....4**
 - Issue Overview.....4
 - Recommended Policy Actions.....4
- Date Labeling.....5**
 - Issue Overview.....5
 - Recommended Policy Actions.....5
- Liability Protection for Food Donations.....6**
 - Issue Overview.....6
 - Recommended Policy Actions.....7
- Tax Incentives and Barriers.....8**
 - Issue Overview.....8
 - Recommended Policy Actions.....9

ABOUT THESE RECOMMENDATIONS

This document is a product of The Global Food Donation Policy Atlas, a partnership between the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN).¹ The Atlas project is an innovative partnership designed to map the laws and policies affecting food donation in 15 countries over the course of two years and to provide a comparative legal analysis based on these findings. For each of these countries, the Global Food Donation Atlas project will produce a legal guide to identify the laws relevant to food donation in that country. While the landscape differs across geopolitical borders, the legal guides recognize universal issues that impact effects to reduce food loss and waste and increase food recovery. These issues include food safety, date labeling, liability, taxes and government grants or funding programs.

In-country interviews with relevant stakeholders, including food banks, food donors, government officials, and legal experts, further informed the content of the legal guide and revealed priority actions for law and policy change. Based on these findings, FLPC has developed specific recommendations for each country. These recommendations are intended to serve as a companion to the legal guides, though both documents may stand alone. The purpose of these recommendations is to highlight select actions for improving upon laws, policies and programs relevant to food loss, waste, and donation.

The present document sets forth recommendations focused on Canada, where over half of food produced is lost and wasted annually,² while an estimated one in eight Canadian households is food insecure.³ The discussion below provides a brief overview of the legal issues most pertinent to food donation, which are explained in more detail in the Canada legal guide. The recommendations included in this report are not exhaustive, but offer select best practices and policy solutions to reduce food loss and waste and combat food insecurity through stronger food donation laws and policies in Canada.



SUMMARY OF RECOMMENDATIONS

The recommendations contained in this document aim to provide a starting point for stakeholders in Canada to strengthen the legal and policy framework relevant to food donation. Food banks and other organizations whose mission is to reduce food waste and increase food donation (collectively referred to as “food recovery organizations”), donors, and policymakers should consider additional opportunities to advance food donation and reduce food waste. In summary, the recommendations are as follows:

To ensure that food is donated safely and does not pose risks to recipients, the federal government should:

- **Amend Canada’s food safety legislation, the Food and Drugs Act and the Safe Food for Canadians Act to feature donation-specific sections.**
- **Produce and disseminate clarifying guidance on food safety requirements relevant to donation.**

To ensure that quality-based date labels do not result in the disposal of food that is otherwise safe for consumption and donation, the federal government should:

- **Amend the Food and Drug Regulations to distinguish between safety-based and quality-based date labels for all food products on which food producers choose to place a date label.**
- **Promote consumer education and awareness on the meaning of date labels.**

To ensure concern for liability arising out of donating food does not deter potential donors, the federal government should:

- **Enact legislation that provides liability protection for food donations.**
- **Provide liability protection to allow food recovery organizations and other intermediaries to charge a nominal fee for donated food.**
- **Provide liability protection for past-date donation of foods if the label relates to quality rather than safety.**
- **Provide liability protection for donors who directly donate to final recipients.**

To ensure that food donors and food recovery organizations are sufficiently incentivized to engage in food donation, the federal government should:

- **Amend section 69(1)(b)(ii) of the Income Tax Act to allow food businesses to benefit from the deduction for donated food.**
- **Issue federal guidance establishing that the fair market value for unsaleable items is the same as for saleable items.**
- **Create federal tax credit for farmers who donate agricultural products.**

INTRODUCTION

Over half of food produced in Canada is lost and wasted annually, and almost one-third of such lost and wasted food is avoidable.⁴ Economically, 11 million metric tons of food every year – worth nearly \$50 billion – is estimated to be wasted in Canada⁵ and over \$100 billion is wasted in indirect costs, “including labor, infrastructure, and energy.”⁶ Meanwhile, an estimated one in eight Canadian households is food insecure.⁷ Although Canada’s two largest provinces, Ontario and Quebec, are slightly below this national average in food insecurity rates, the total number of food insecure individuals is greatest there due to the size of the population.⁸ Food insecurity is especially prominent in Nunavut, where estimates find that nearly half of households are food-insecure and over 60% of children live in food-insecure households.⁹ Yet the value of the food that is wasted nationally each year could feed everyone in Canada for almost five months.¹⁰

This food waste and loss negatively impacts the environment. An estimated 60% of Canada’s food industry “blue water footprint,” which represents fresh surface and groundwater utilized in food production, is ultimately used for food that is lost and wasted.¹¹ It is further estimated that 10% of Canada’s overall greenhouse gas emissions are from agricultural production.¹²

While some food waste and loss is inevitable, an estimated 86% of avoidable food waste is not rescued and redistributed in Canada.¹³ Avoidable food waste and loss occurs primarily at the manufacturing, processing, and household levels, with food waste in the home accounting for almost one-fourth of overall avoidable food waste and loss.¹⁴ According to Second Harvest’s The Avoidable Crisis of Food Waste 2019 report, some of the primary reasons for food waste and loss include conservative date code labeling and confusion over date codes, cosmetic standards for produce, perceived risk associated with food donation as well as technical issues relating to food donation such as cost and lack of infrastructure or ineffective communication between potential donors and recipient agencies.¹⁵

AN ESTIMATED 86% OF AVOIDABLE FOOD WASTE IS NOT RESCUED AND REDISTRIBUTED IN CANADA.

Canada is currently working on efforts to reduce food loss and waste. For example, Environment and Climate Change Canada, the department responsible for environmental policy, recently assembled and published a report addressing the issue of food loss and waste, outlining current efforts by provinces and nongovernmental organizations to address the issue, and identifying key action areas for future improvement.¹⁶ The department also recently created a strategy on short-lived climate pollutants that includes strategies for reducing methane emissions from landfills.¹⁷ Canada is also currently working with Mexico and the United States under the Commission for Environmental Cooperation to share resources on food loss and waste across country borders.¹⁸ Efforts are being made at the provincial level as well. For instance, every province has enacted liability protection legislation to protect food donors from civil liability arising from food-related injuries and four provinces have enacted tax incentives for food donations. In short, food loss and waste is a problem that is beginning to be taken seriously by Canadian policymakers.

Efforts to reduce food loss and waste are also occurring outside the government. Nongovernmental attempts to reduce food loss and waste have included efforts to bring second-grade produce to large supermarkets in Canada, guidance by Food Banks Canada for interpreting date labels in an effort to reduce food loss and waste due to date labelling confusion,¹⁹ creation of a food loss and waste strategy for Canada by the National Zero Waste Council,²⁰ and the formation of a working group by the Packaging Association of Canada to identify potential packaging solutions to reduce food loss and waste.²¹ Many other organizations are currently working on solutions to repurpose food that may otherwise be wasted or lost.²² Additionally, there are an estimated 4,140 food banks and food rescue organizations across Canada.²³

The following sections briefly summarize some of the most common and complex legal issues relevant to food donation, as identified and described in more detail in the Legal Guide, and offer policy recommendations to address these challenges.

LEGAL CHALLENGES & POLICY RECOMMENDATIONS

Food Safety for Donations

Issue Overview

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. Potential donors are often uncertain as to which food safety regulations apply to donated food, as opposed to purchased food, as well as the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills.

In Canada, federal food safety laws are largely contained within the Food and Drugs Act (FDA) and Safe Food for Canadians Act (SFCA), and are generally applicable to any person, commercial firm, or establishment that develops, divides, conserves, transports, sells, displays, or imports or exports food.²⁴ Health Canada is responsible for promulgating rules, policies, and regulations that establish food safety standards, while the Canadian Food Inspection Agency (CFIA) is responsible for enforcing such standards.

The FDA and SFCA do not explicitly discuss whether their provisions are relevant only to food that is sold, but not donated, and do not include separate procedures for food donation. Even though some of the food-related rules and regulations are not strictly related to safety (e.g. nutrition or net quantity information-related labeling requirements), there are no laws addressing whether such requirements apply to food donation. Therefore, in addition to being safe for consumption, it appears that all donated food must comply with applicable safety requirements contained in these statutes and the regulations promulgated under them, as well as with relevant local law. Food donors may therefore avoid donating surplus food, and food recovery organizations may refuse to accept certain donations that are otherwise safe for consumption.

Understanding which food safety requirements apply to donated food is important for minimizing potential harm to donation recipients, and ensuring that food safe for consumption is donated rather than discarded. However, the current system lacks clarity for food donors and food recovery organizations as to the applicable provisions.

Recommended Policy Actions

1.

AMEND CANADA'S FOOD SAFETY LEGISLATION, THE FOOD AND DRUGS ACT AND THE SAFE FOOD FOR CANADIANS ACT, TO FEATURE DONATION-SPECIFIC SECTIONS.

In order to eliminate the uncertainty around which FDA and SFCA provisions apply to the safety of donated food, these laws should be updated to feature donation-specific chapters. These chapters could clarify what provisions are necessary to ensure the safety of donated food and which provisions (such as certain labeling provisions) are not related to safety and thus do not apply to food donations. Creating donation-specific sections of the FDA and SFCA would significantly ease the burden on food donors and food recovery organizations seeking to ensure compliance with relevant food safety provisions and may increase food donation.

2. PRODUCE AND DISSEMINATE CLARIFYING GUIDANCE ON FOOD SAFETY REQUIREMENTS RELEVANT TO DONATION.

Clear guidance from food safety enforcement agencies on what FDA and SFCA provisions or other requirements apply to donated food would ease concerns of food donors and food recovery organizations, and likely lead to increased and safer donation. Health Canada is responsible for promulgating rules, policies, and regulations that establish food safety standards under these Acts, while the CFIA is responsible for enforcing such standards. Health Canada could offer guidance to clarify the FDA and SFCA provisions relevant to food safety. The benefit of guidance is that it can generally be more informal and detailed than legislation, which often makes it more useful to those using it. However, ideally donors and food recovery organizations would be able to look to both the FDA and SFCA and guidance from Health Canada in order to understand their food safety obligations with respect to donated food.

Date Labeling

Issue Overview

A major driver of food waste and obstacle to food donation is the general misconception about the date labels affixed to food products. Many donors interpret date labels that use phrases such as “sell by,” “use by,” or “best by” to indicate the safety of food. Despite this interpretation, for the vast majority of foods, date labels indicate freshness or quality rather than food safety, and few foods become more likely to carry foodborne illnesses over time. Donors and food recovery organizations, however, being cautious about food safety, may discard food once the date has passed even if the food is perfectly safe to donate and consume.

This cycle of confusion and waste occurs in Canada under the current date labeling regime. The Food and Drug Regulations (FDR) require a safety-related expiration date for only five types of food, listed in the legal guide.²⁵ The FDR requires quality-related dates (i.e., “best-before”) for perishable foods with a shelf life of 90 days or less.²⁶ The CFIA recognizes that these mandatory quality-related dates are not indicators of food safety. Foods which are past their quality date (“best by” and “packaged on”) are not necessarily unfit for consumption. As such, CFIA does not impose restrictions on selling or donating foods past their quality date.²⁷ This means that large food retailers are free to donate past-date foods that may no longer appeal to paying customers, but are still safe to consume. In addition to the date labels required by the CFIA, food businesses may choose to include date labels on other products, meaning that a wide range of products carry date labels in Canada.

This system of both mandatory and voluntary date labeling leads to confusion,²⁸ which may be a barrier to donation. When labeling voluntarily, manufacturers generally select dates that indicate peak freshness rather than dates after which the product is no longer safe to consume. Nevertheless, food donors perceive date labels as scientifically-determined to indicate the safety of the food and may assume that the donation of food is prohibited after the date has passed. This interpretation is reasonable in the absence of clear law or clarifying guidance, but leads to unnecessary waste of safe, edible food.

Recommended Policy Actions

1. AMEND THE FOOD AND DRUG REGULATIONS TO DISTINGUISH BETWEEN SAFETY-BASED AND QUALITY-BASED DATE LABELS.

With the exception of certain products, Canada’s existing date-labeling regime allows manufacturers to select from language that does not clearly convey whether the date refers to quality or safety. In order to provide clarity as to the meaning of the date label on food products, the Canadian federal government should amend the FDR to introduce a dual-labeling system with one standard label to be used for foods that are labeled as a quality

indicator, and one standard label for foods that are labeled in order to indicate that the produce may decline in safety after the date.

Many other countries, and the food industry itself, are moving towards this system of dual date labels. For example, the EU requires that the date label on any food products use only one of two standard labels: “best before” is required for those foods where the label is an indicator of quality, while “use by” is required for those foods that may increase in food safety risk after the date.²⁹ Several EU Member States have issued guidance clarifying the impact of these dates on food donation and others have introduced legislation that explicitly allows for donation after the “best before” date but not after the “use by” date.³⁰ The Consumer Goods Forum, a global network of 400 consumer goods companies across 70 countries has also called for the standardization and adoption of a dual date labeling system.³¹

Canada could adopt the EU’s recommended language of “best before” and “use by,” establishing one standard term to indicate safety concerns and one standard term to indicate quality concerns, and prohibiting the use of any other date labeling terms. These changes could be implemented through amendments to the FDR. This labeling scheme would provide greater certainty to consumers, as well as to food donors and food recovery organizations, as to the meaning of these dates and may reduce the amount of food that is thrown away.

2. PROMOTE CONSUMER EDUCATION AND AWARENESS ON THE MEANING OF DATE LABELS.

Given that potential food donors erroneously perceive “best before” dates and any other voluntary dates included on food products as indicators of safety, increasing the sale, consumption or donation of food after this date will require a change in behavior. National consumer education will be critical to inform donors, food recovery organizations, and consumers that these dates are not regulated to convey safety, but are more likely indicators of quality. Joint public and private sector initiatives may help to ensure that stakeholders understand that date labels should not stand as a barrier to donation. Any clarification or standardization to this regime, such as the introduction of a standardized dual date labeling requirement (as described in the previous recommendation), will also require campaigns to educate and increase awareness among donors, food recovery organizations, and consumers about the new interpretations.

Liability Protection for Food Donations

Issue Overview

A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming the donated food. While there is no federal liability protection for food donation in Canada, in response to these concerns, each province as well as the Northwest Territories and Yukon Territory have passed laws to provide protection from civil liability to both companies and individuals who donate food.³² Liability protection is not absolute; in most of the provinces, acting with reckless disregard or an intent to injure can still result in liability.

In all jurisdictions besides Quebec, the legal landscape for food-related injuries is substantially similar. The basis of liability is typically tort law,³³ which involves civil litigation between private parties about wrongful acts; this can be distinguished from criminal law, in which the government brings suit against a defendant who commits a crime. Liability may also be possible through contract law.

Under most provincial statutes, “donors” can include anyone involved in donating food. For example, donors could be the individuals or corporations who provide the food to a food bank, someone who donates food directly to individuals, or a food bank itself. However, donors do not include people or entities that donate food

for profit.³⁴ “Profit” is not defined in the statutes, nor is “donate.” Most of the provinces do not expressly state whether liability protections extend if a nominal fee is charged to the end beneficiaries for the food.³⁵ Nova Scotia, however, explicitly states that the food must be given for free, making it clear that no fees can be charged.³⁶

Most of the statutes do not specify eligible recipients of the food. Thus, the food could likely be given to a charity or other intermediary, or directly to an individual person. However, Ontario’s legislation explicitly protects both donations to individuals as well as to intermediaries.³⁷ Quebec’s legislation appears to apply to food given to anyone so long as the food was given away out of “unselfish motives.”³⁸ Nova Scotia is different from the other provincial statutes in that it explicitly requires that the food ultimately be consumed by a person in need, though “in need” is not defined by the law.³⁹

These differences between the laws and areas of ambiguity within the laws may lead to confusion for donors and distributing organizations. In addition, the protections are limited, as they do not expressly extend to direct donations to final recipients, food recovery organizations and intermediaries that charge recipients a nominal fee for the donated food, or the donation of foods past their quality date. In fact, in some instances, the provincial laws make clear that liability protections do not apply if a nominal fee is charged for the donated food.

Recommended Policy Actions

1. ENACT FEDERAL LEGISLATION THAT PROVIDES LIABILITY PROTECTION FOR FOOD DONATIONS.

While each of the Canadian provinces and the Northwest Territories and Yukon Territory have passed laws to provide protection from civil liability for food donation, there exist differences between the laws as well as areas of ambiguity within the laws that may lead to confusion for donors and distributing organizations. In order to eliminate any confusion around liability protection for food donations, the Canadian federal government should enact legislation that provides comprehensive liability protection for food donations. While such a federal liability protection law could largely be modeled after those passed by the provinces, it should clarify any areas of ambiguity and expand the scope of liability protection. In addition, because all Canadian provinces and numerous territories now offer liability protection for food donation, it is clear that there is political will behind such protections. As such, it is incumbent upon the Canadian federal government to ensure that any federal action in this area is not out of line with this political will.

2. PROVIDE LIABILITY PROTECTION TO FOOD RECOVERY ORGANIZATIONS AND OTHER INTERMEDIARIES THAT CHARGE RECIPIENTS A NOMINAL FEE FOR DONATED FOOD.

As discussed previously, it is unclear whether liability protections extend under most of the provincial laws if a nominal fee is charged for the food. This lack of clarity may prevent organizations from attempting to innovate and secure sustainable revenue models by charging a nominal fee for donated food. Thus, federal liability protection for food donations should explicitly allow food recovery organizations to charge a nominal fee to final recipients.

Allowing the low price sale of food donations would support other offerings by food recovery organizations, such as social supermarkets (nonprofit grocery stores that sell donated food at a low cost and are popular throughout Europe) or other low-cost market-based opportunities to serve those in need. To better support innovative food recovery models, food recovery organizations and other intermediaries should be permitted to charge a reduced or nominal fee for donated food. This scheme would benefit both food insecure populations and the intermediary, which would be able to rely on a more sustainable funding source. Charging a deeply-reduced price for donated food would not compromise the integrity of food donation, but would provide small

revenue for food recovery organizations to transform so that they can better meet the needs of the community. Limiting this nominal fee permission to nonprofit food recovery organizations and intermediaries will ensure that any funds generated from the sale of food will be used in furtherance of the organization's charitable purpose to serve more individuals in need, rather than for commercial purposes.

3. EXPLICITLY PROTECT THE PAST-DATE DONATION OF FOODS IF THE LABEL RELATES TO QUALITY RATHER THAN SAFETY.

As previously explained, date labels relate more to quality rather than safety of pre-packaged food. However, many food donors and food banks interpret the date labels as indicators of safety, and as a result, do not donate or accept donated food once the affixed date has passed. The government should explicitly state that donating food after the affixed expiration date and accepting donations that are past-due will not disqualify donors and intermediaries from receiving liability protection. This could be carried out either by the federal government, if it chooses to pass a liability protection law, or by the provincial governments.

4. EXTEND LIABILITY PROTECTION TO DONORS WHO DIRECTLY DONATE TO FINAL RECIPIENTS.

As discussed previously, it is unclear whether liability protections extend under most of the provincial laws if donated directly to the ultimate recipient. Extending liability protection to include direct donations that do not involve intermediaries will increase the likelihood that potential donors will donate rather than discard food that is otherwise safe for consumption. This is particularly true in the case of small-scale farmers and producers that may lack the infrastructure to store and transport perishable food items to intermediaries before the food spoils. Such a change could be made either by the federal government, if it chooses to pass a liability protection law, or by the provincial governments.

Tax Incentives and Barriers

Issue Overview

Food donation helps to mitigate the costs of hunger and stimulate the economy, but it can also be expensive, as food donors must allocate time and money to recover, package, store, and transport surplus food that otherwise would be discarded, usually at no cost. Taxes can either help to offset these expenses and create an incentive to donate, or they can create an additional barrier to donation, one which contributes to greater food loss and waste. With respect to tax incentives, corporate donors may be more likely to donate surplus food to food banks if they receive a charitable deduction to offset the cost of transportation and logistics. At the federal level, individual donors are eligible for a charitable donation tax credit and corporations are eligible for deductions.⁴⁰ The charitable donation tax credit or deduction apply to anyone who makes a donation, for which no consideration is received, to a registered charity, such as a food bank. Both the credit and deduction apply to goods, such as food,⁴¹ and are capped at 75% of total net income.⁴²

At the federal level, the tax credit for individual donors is equal to 15% of the first \$200 of total donations.⁴³ The tax credit increases in value to 29% of donations over \$200.⁴⁴ If an individual's total taxable income exceeds \$214,368, then the credit is 33% of donations over \$200.⁴⁵

By contrast, corporations can claim a deduction for the value of gifts they make to a registered charity, which can result in federal and provincial tax assistance generally ranging from 26% to 31% of the fair market value of these donations, depending on the province.⁴⁶ For purposes of goods such as food, the fair market value is used

in determining the total eligible donation amount. The fair market value is defined as the highest price that the good would sell for in the unrestricted marketplace.⁴⁷

While the federal and provincial charitable donation tax incentives are technically available for donations of food, many donors do not benefit from these incentives, for several reasons. First, claiming the tax incentives is practically burdensome due to the difficulties associated with calculating the fair market value of the food that is donated. Additionally, the fact that the fair market value of donated food derived from a donor's inventory will count as taxable income may make the charitable donation tax incentives unattractive and essentially valueless to the donor.⁴⁸

Donated food often is not the type of food that would sell in an unrestricted marketplace. For example, some donated food items may be past the "best before/meilleur avant" date indicating food quality, which otherwise may be thrown away by retailers. Further, donated food may also come from an operator's excess supply that they could not otherwise sell to retailers or consumers. Because these unsaleable food items do not have the same or similar fair market value as food items that would otherwise be sold in the marketplace, food banks may have difficulty in assessing their fair market value when issuing a donation tax receipt.

Even when assessing the fair market value is possible, businesses may still be incentivized to value their donation at zero because of the CRA's policy on donations of business inventory. Subparagraph 69(1)(b)(ii) of the Income Tax Act states that any person that disposes of something "by way of a gift" is deemed to have received the fair market value of that gift in return.⁴⁹ The CRA interprets this to mean that a business that donates inventory to a registered charity must include the fair market value of the donated inventory in computing its taxable income.⁵⁰ This means that there may not be a charitable donation tax incentive to donating food inventory as compared with throwing it away.

When adding in transportation and other costs associated with donating food, as well as administrative costs associated with claiming a charitable donation tax incentive, there may not be much of an incentive to donating food inventory as compared with throwing it away.

Each province also has its own charitable donation tax credit that can be applied in addition to the federal incentive.⁵¹ These tax credits generally apply to any goods that are donated to registered charities, including food goods.⁵²

In addition to the federal and provincial charitable donation tax incentives, which apply to any donated goods in general, four Canadian provinces (Ontario, Quebec, British Columbia, and Nova Scotia) offer tax credits specific to food donation.⁵³ All four are structured as non-refundable income tax credits applicable specifically to farmers who donate agricultural products⁵⁴ and may be claimed in addition to any other charitable donation tax incentives.⁵⁵ Ontario, Nova Scotia, and British Columbia's credits are worth 25% of the fair market value of the donated agricultural products, and apply to eligible persons who donate agricultural products to an eligible entity. Quebec, on the other hand, has a generous credit of 50% of the fair market value of the donated agricultural products. In addition, unlike Ontario, Nova Scotia, and British Columbia, Quebec's credit extends beyond agricultural products to processed and value-added products, such as "milk, baby formula, baby food, oil, flour, sugar, pasta, frozen vegetables, baby formula, and prepared meals.

Recommended Policy Actions

1. AMEND SECTION 69(1)(B)(II) OF THE INCOME TAX ACT TO ALLOW FOOD BUSINESSES TO BENEFIT FROM THE DEDUCTION.

Under Canada's current tax system, corporations that donate goods out of their inventory have to add the value of those goods to their income before deducting it, essentially eliminating any financial benefit of the deduction.

This likely stems from the language of section 69(1)(b)(ii) of the Income Tax Act, which states that any person that disposes of something “by way of a gift” is deemed to have received the fair market value for that gift in return.⁵⁶ As noted above, the CRA has stated that it interprets this to mean that companies that “gift” items out of their inventory must first add that value to their total taxable income, before deducting it for the tax incentive. The federal government should amend the language of section 69(1)(b)(ii) to eliminate the requirement that food businesses add the value of the inventory items to their total taxable income before deducting that value for the tax deduction. This would enable businesses to benefit from the deduction and ensure that the deduction is not rendered completely ineffective when applied to food donations.

2. ISSUE FEDERAL GUIDANCE ESTABLISHING THAT THE FAIR MARKET VALUE FOR UNSALEABLE ITEMS IS THE SAME AS FOR SALEABLE ITEMS.

In order for any amendment to section 69(1)(b)(ii) to be successful in allowing food businesses to benefit from the deduction, it is also important that the CRA issue guidance establishing the fair market value for unsaleable items. Under the current system, food banks may have difficulty in assessing this value when issuing a donation receipt to the donor because donated food items are often considered unsaleable and thus no longer have the value they would have had on the market.

The United States, for example, allows donated food to be given the same fair market value as saleable food for purposes of claiming a tax deduction for food donation.⁵⁷ The CRA could implement a similar approach to calculating the fair market value of donated food in Canada.

3. CREATE FEDERAL TAX CREDIT FOR FARMERS WHO DONATE AGRICULTURAL PRODUCTS.

While an increased tax deduction may incentivize food donation among certain corporate donors, offering a tax credit for food donations is more likely to encourage donation among farmers and smaller donors who may not generate a lot of income during the year. Compared with a tax deduction, which reduces a taxpayer’s taxable income and is then used to determine the amount of taxes that must be paid, a tax credit is a direct dollar-for-dollar subtraction from the taxes owed.⁵⁸ Tax credits are also applied evenly across tax brackets and would therefore have a greater impact for small, low-income businesses than a tax deduction. Further, in addition to the credit already available at the federal level, more targeted tax credits can serve to incentivize farms that are not incorporated.

While certain provinces already offer tax credits for donations by farmers, a tax credit could be offered at the federal level, modeled after one of the provincial tax credits. All four provincial tax credits are structured as non-refundable income tax credits applicable specifically to farmers who donate agricultural products.⁵⁹ Ontario, Nova Scotia, and British Columbia’s credits are worth 25% of the fair market value of the donated agricultural products, whereas Quebec has a generous credit of 50% of the fair market value of the donated agricultural products.⁶⁰ All four provinces allow the credit to be applied in addition to any other claimable charitable tax credits.⁶¹ However, because of its higher value and broader definition of eligible food products and donors, the Quebec tax credit is considered “the most generous of its kind in Canada.”⁶² According to Food Banks Canada, in the first year of the Quebec credit’s enactment, food banks were able to recover an additional over 460,000 kg of food for those in need, while also encouraging over 100 new farms to generously donate to their local food banks.⁶³

CONCLUSION

While these policy recommendations are intended to help strengthen food donation in Canada, they are not exhaustive. Those committed to reducing food loss and waste and promoting food recovery should seek the advice of legal experts, policymakers and other stakeholders to identify the most effective and feasible policy interventions.

ENDNOTES

- ¹ The Global Food Donation Policy Atlas project would not be possible without support from the Walmart Foundation. The Walmart Foundation is not responsible for the content of this document or the views contained herein. The content of this document should not be interpreted as legal advice; those seeking legal advice should speak to an attorney licensed to practice in the applicable jurisdiction and area of law.
- ² The term “lost” applies to food that is discarded “during the production, processing, and manufacturing of food or beverages” prior to consumption while “waste” applies to food discarded “during distribution, retail, foodservice, households and during redistribution.” SECOND HARVEST, THE AVOIDABLE CRISIS OF FOOD WASTE: TECHNICAL REPORT, 12 (Jan. 17, 2019), <https://secondharvest.ca/wp-content/uploads/2019/01/Avoidable-Crisis-of-Food-Waste-Technical-Report-January-17-2019.pdf> [hereinafter THE AVOIDABLE CRISIS OF FOOD WASTE].
- ³ *Household Food Insecurity in Canada*, PROOF (Feb. 22, 2018), <https://proof.utoronto.ca/food-insecurity/> [hereinafter *Household Food Insecurity in Canada*].
- ⁴ THE AVOIDABLE CRISIS OF FOOD WASTE, *supra* note 2 at 26; SECOND HARVEST, THE AVOIDABLE CRISIS OF FOOD WASTE: THE ROADMAP 5 (2019) <https://secondharvest.ca/wp-content/uploads/2019/01/Avoidable-Crisis-of-Food-Waste-The-Roadmap-by-Second-Harvest-and-VCMI.pdf>.
- ⁵ *Food Policy for Canada*, GOV’T OF CANADA (June 2, 2017), <https://www.canada.ca/en/campaign/food-policy.html> [hereinafter *Food Policy for Canada*].
- ⁶ SECOND HARVEST, THE AVOIDABLE CRISIS OF FOOD WASTE, <https://secondharvest.ca/research/the-avoidable-crisis-of-food-waste/> (last visited Sept. 19, 2019); see also VALUE CHAIN MANAGEMENT, “\$27 BILLION” REVISITED: THE COST OF CANADA’S ANNUAL FOOD WASTE 6 (Dec. 10, 2014), <https://vcm-international.com/wp-content/uploads/2014/12/Food-Waste-in-Canada-27-Billion-Revisited-Dec-10-2014.pdf>. The \$100 billion figure was arrived at by using the United Nations’ Food and Agricultural Organization’s estimate that the “accumulative cost of associated wastes” is about “two and a half times greater than the ‘face value’ of wasted food.”
- ⁷ *Household Food Insecurity in Canada*, *supra* note 3.
- ⁸ See, e.g., Valerie Tarasuk et al., *Household Food Insecurity in Canada*, 2014, PROOF 16 (2016), <https://proof.utoronto.ca/wp-content/uploads/2016/04/Household-Food-Insecurity-in-Canada-2014.pdf>.
- ⁹ *Household Food Insecurity in Canada*, *supra* note 3.
- ¹⁰ THE AVOIDABLE CRISIS OF FOOD WASTE, *supra* note 2 at 26.
- ¹¹ *Id.* at 35-36.
- ¹² *Id.* at 6.
- ¹³ *Id.*
- ¹⁴ *Id.* at 25.
- ¹⁵ *Id.* at 32, 38-44.
- ¹⁶ ENV’T AND CLIMATE CHANGE CANADA, TAKING STOCK: REDUCING FOOD LOSS AND WASTE IN CANADA (June 2019), <https://www.canada.ca/content/dam/eccc/food-loss-and-waste/Taking%20Stock%20Report%20EN%20Final.pdf>.
- ¹⁷ See ENV’T AND CLIMATE CHANGE CANADA, STRATEGY ON SHORT-LIVED CLIMATE POLLUTANTS 1 (2017), http://publications.gc.ca/collections/collection_2018/eccc/En4-299-2017-eng.pdf.
- ¹⁸ *Food Loss and Waste*, GOV’T OF CANADA, <https://www.canada.ca/en/environment-climate-change/services/managing-reducing-waste/food-loss-waste.html> (last visited Sept. 19, 2019).
- ¹⁹ COMM’N FOR ENVTL. COOPERATION, CHARACTERIZATION AND MANAGEMENT OF FOOD LOSS AND WASTE IN NORTH AMERICA, 55, 61 (2017), <http://www3.cec.org/islandora/en/item/11774-characterization-and-management-food-waste-in-north-america-foundational-report-en.pdf>. [hereinafter FOOD LOSS AND WASTE IN NORTH AMERICA].
- ²⁰ See NATIONAL ZERO WASTE COUNCIL, A FOOD LOSS AND WASTE STRATEGY FOR CANADA, <http://www.nzwc.ca/focus/food/national-food-waste-strategy/Pages/default.aspx> (last visited Feb. 26, 2020).
- ²¹ FOOD LOSS AND WASTE IN NORTH AMERICA, *supra* note 19, at 63 (2017).
- ²² *Id.* at 70.
- ²³ *Id.* at 86.
- ²⁴ See Food and Drugs Act, R.S.C. 1985, c. F-27; Safe Food for Canadians Act, S.C. 2012, c. 24.
- ²⁵ Food and Drug Regulations, B.24.001-B.25.001.
- ²⁶ Food and Drug Regulations, B.01.007(1.1)(b).
- ²⁷ See Canada Food Inspection Agency, *Food Safety Standards and Guidelines*, GOV’T OF CANADA, <http://inspection.gc.ca/food/requirements/food-safety-standards-guidelines/eng/1526653035391/1526653035700>.
- ²⁸ Bob Weber, *Canadians Don’t Understand Best-Before Dates, Which Leads to More Food Waste: Report*, GLOBAL NEWS (May 30, 2018), <https://globalnews.ca/news/4243521/best-before-date-food-waste/>.
- ²⁹ Commission Regulation No. 1169/2011 (EU).
- ³⁰ See *Market Study on date marking and other information provided on food labels and food waste prevention: Final Report*, EUROPEAN COMM’N (January 2018).
- ³¹ *Release: Companies Commit to Simplify Food Date Labels Worldwide by 2020, Reducing Food Waste*, WORLD RESOURCES INT’L (Sept. 20, 2017) <https://www.wri.org/news/2017/09/release-companies-commit-simplify-food-date-labels-worldwide-2020-reducing-food-waste>.
- ³² See *Food Donation and Civil Liability in Canada: Companion to the Guidelines to Minimize Wasted Food and Facilitate Food Donations*, NATIONAL ZERO WASTE COUNCIL, (2018), <http://www.nzwc.ca/focus/food/guidelines-for-food-donations/Documents/18-064-FoodDonation-LiabilityDoc-v7WEB.pdf>.
- ³³ Under Canadian law in all jurisdictions besides Quebec, torts derive from the common law system and can include intentional and unintentional torts. See generally G.H.L. Fridman, *THE LAW OF TORTS IN CANADA* (1989). In cases of food-related injury, the cause of action would likely be negligence, which requires plaintiffs to demonstrate that the donor owed them a duty of care, that the donor’s standard of care fell beyond what a reasonable person would have done in a similar circumstance, that the injury was proximately caused by the donor, and that the plaintiff sustained recoverable damages. See generally *id.*; R v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45 (Can.). Because Quebec follows the civil law system, liability would derive from the Civil Code of Quebec. Specifically, article 1457 of the Code dictates that “[e]very person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature. He is also bound, in certain cases, to make reparation for injury caused to another by the act, omissions or fault of another person or by the act of things in his custody.” Civil Code of Quebec, S.Q. 1991, c. 64 art. 1457 (Can.).
- ³⁴ See, e.g., Donation of Food Act, 1994, SO 1994, c 19.
- ³⁵ See generally *Food Donation and Civil Liability in Canada: Companion to the Guidelines to Minimize Wasted Food and Facilitate Food Donations*, NATIONAL ZERO WASTE COUNCIL 1 (2018), <http://www.nzwc.ca/focus/food/guidelines-for-food-donations/Documents/18-064-FoodDonation-LiabilityDoc-v7WEB.pdf>.
- ³⁶ Volunteer Services Act, RSNs 1989, c 497.
- ³⁷ Ontario Donation of Food Act (1994).

38 Civil Code of Quebec, S.Q. 1991, c. 64 art. 1471 (Can.).
39 See Volunteer Services Act, RSNs 1989, c 497.
40 See Income Tax Act, R.S.C. 1985, c. 1 §§ 110.1; 118.1 (5th Supp.); GOV'T OF CANADA, CHARITABLE DONATION TAX CREDIT RATES (Jan. 24, 2017), <https://www.canada.ca/en/revenue-agency/services/charities-giving/giving-charity-information-donors/claiming-charitable-tax-credits/charitable-donation-tax-credit-rates.html> [hereinafter CHARITABLE DONATION TAX CREDIT RATES].
41 See Income Tax Act, R.S.C. 1985, c. 1 §§ 110.1; 118.1 (5th Supp.); CHARITABLE DONATION TAX CREDIT RATES, *supra* note 40.
42 See CANADA REVENUE AGENCY, TAX ADVANTAGES OF DONATING TO CHARITY, https://www.cchwebsites.com/content/pdf/tax_forms/ca/en/rc4142_en.pdf [hereinafter TAX ADVANTAGES OF DONATING TO CHARITY].
43 Income Tax Act R.S.C., 1985, c. 1 (5th Supp.) § 118.1; *Amended Legislation For the Charitable Donation Tax Credit*, GOV'T OF CANADA (Jan. 24, 2017), <https://www.canada.ca/en/revenue-agency/services/charities-giving/giving-charity-information-donors/claiming-charitable-tax-credits/amended-legislation-charitable-donation-tax-credit.html> [hereinafter *Amended Legislation*]; see also *Charitable Donation Tax Credit Calculator*, CANADA REVENUE AGENCY (Feb. 11, 2018), <https://www.cra-arc.gc.ca/chrts-gvng/dnrs/svngs/clmng1b2-eng.html>.
44 *Id.*
45 *Id.*
46 TAX ADVANTAGES OF DONATING TO CHARITY, *supra* note 42, at 10.
47 *Id.* at 8-9.
48 According to the CRA, donations of items from a donor's inventory must be counted toward their taxable income for purposes of the tax credit. See TAX ADVANTAGES OF DONATING TO CHARITY, *supra* note 42, at 18-20.
49 See Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) §69.
50 See TAX ADVANTAGES OF DONATING TO CHARITY, *supra* note 42, at 18-20; *Gifts out of Inventory: Policy Commentary*, CANADA REVENUE AGENCY, (Mar. 29, 2000), <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-commentary-018-gifts-inventory.html>; *Interpretation Bulletin IT-297, Gifts in Kind to Charity and Others*, CANADA REVENUE AGENCY, (Mar. 21, 1990), available at <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/it297r2/archived-gifts-kind-charity-others.html>.
51 See CHARITABLE DONATION TAX CREDIT RATES, *supra* note 40.
52 See, e.g., TAX ADVANTAGES OF DONATING TO CHARITY, *supra* note 42.
53 See Local Food Act, 2013, S.O. 2013, c. 7 (Ontario); Food Bank Donation Tax Credit for Farmers Act, as enacted in R.S.N.S. 1989, c 217 § 50A (Nova Scotia); Farmers' Food Donation Tax Credit Regulation, BC Reg 113/2016 (British Columbia); see also FOOD BANKS CANADA, *Fresh Food Tax Credit: An Agricultural Tax Credit for Fresh Food Donations* 1 (Aug. 2016), https://www.foodbanksCanada.ca/getmedia/cee1bcc2-2353-4ffd-95c5-5aeffe50b955/Fresh-Food-Tax-Credit-Food-Banks-Canada_Aug2016.pdf.aspx?ext=.pdf [hereinafter FRESH FOOD TAX CREDIT].
54 FRESH FOOD TAX CREDIT, *supra* note 53.
55 *Id.*
56 See Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) §69.
57 See I.R.C. § 170(e)(3)(B); 26 C.F.R. § 1.170A-4A(b)(4) (2017).
58 HARVARD LAW SCHOOL FOOD LAW AND POL'Y CLINIC, KEEPING FOOD OUT OF THE LANDFILL: POLICY IDEAS FOR STATES AND LOCALITIES 19-20 (2016) https://www.chlpi.org/wp-content/uploads/2013/12/Food-Waste-Toolkit_Oct-2016_smaller.pdf.
59 See Local Food Act, 2013, S.O. 2013, c. 7 (Ontario); Food Bank Donation Tax Credit for Farmers Act, as enacted in R.S.N.S. 1989, c 217 § 50A (Nova Scotia); Farmers' Food Donation Tax Credit Regulation, BC Reg 113/2016 (British Columbia); see also FRESH FOOD TAX CREDIT, *supra* note 53.
60 *Id.*
61 *Id.*
62 FRESH FOOD TAX CREDIT, *supra* note 53, at 4.
63 *Id.* at 6.



© JUNE 2020



**THE GLOBAL
FOOD DONATION
POLICY ATLAS**