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NEW LABELS AND GEOGRAPHICAL INDICATIONS: WHAT IMPLICATIONS FOR THE MARKETING OF YOUR FOOD PRODUCTS IN CANADA?

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Innovation, authenticity, differentiation... these are just some of the food industry stakeholders' concerns with regards to the marketing of their products. However, these stakeholders must also remain aware of legislative and regulatory requirements in this area. Indeed, significant amendments have recently been made to the *Food and Drug Regulations* ("FDR")¹ and the *Trade-marks Act* ("TMA")², amendments which will certainly have an impact on the marketing of food products.

1. New labels

In response to scientific advances and changes in Canadians' food consumption habits, the *Regulations Amending the Food and Drug Regulations (Nutrition Labelling, Other Labelling Provisions and Food Colours)*³, which primarily has the effect of facilitating the understanding and use of the Nutrition Facts Table and the list of ingredients appearing on food labels, has recently been adopted by Health Canada. This regulation came into effect on December 14, 2016, but food industry stakeholders are entitled to a five (5) year transition period (until December 14, 2021) to comply with such regulation (except for the requirements concerning food colour specifications).

In particular, the following changes have been made to the Nutrition Facts Table:

- the percentages of recommended daily values for consumption by Canadians have been updated, in particular to help consumers identify products that are high in sugars.
- the portion sizes shown are no longer left to the discretion of the manufacturers; in order to facilitate comparisons between similar food products and to make the portions shown more consistent with the amount of food usually consumed on one occasion, the indicated portion should now be based on the reference quantity of

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¹ C.R.C. 1978, c. 870

² R.S.C. 1985, c. T-13

³ SOR/2016-305

the food product concerned (the reference quantities are established by Health Canada and may be found in the FDR; for example, the reference quantity for milk is 250 mL).

- the list of ingredients has undergone structural changes to group sugar ingredients and to designate food colours by their common name.

Health Canada also proposes to establish nutrition labelling requirements on the front of the packaging of foods high in sodium, sugars and/or saturated fats. For example, a logo (to be chosen by Health Canada in the near future) in which “élevé en / high in” will appear must be displayed on the front of the package of a food product containing fifteen percent (15%) or more (or thirty percent (30%) or more for prepackaged meals) of the recommended daily value of sodium, sugars and/or saturated fats.

2. New geographical indications

The *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*⁴, which had the effect of amending the geographical indications provisions of the TMA, came into force on September 21, 2017.

As such, the concept of “geographical indications” now also covers food and agricultural products of a category listed in the schedule of the TMA as originating from the territory of a member of the World Trade Organization, where a quality, reputation or other characteristic of the designated product is essentially attributed to that geographical origin. Before the entry into force of these new provisions, the application of the concept of geographical indications was limited to wines and spirits.

In principle, it is therefore prohibited to adopt or to use, as a trade-mark or otherwise, a protected geographical indication designating a food of a category listed in the schedule of the TMA (or any trade-mark causing confusion with such an indication), for a food belonging to the same category, whose place of origin is not in the territory covered by the protected geographical indication, or if that food product has not been manufactured in accordance with the law applicable to that territory. Under the TMA, an indication designating a food product creates confusion with a trade-mark where the use of both expressions in the same region could lead to the conclusion that the product designated by the indication is from the same source as the goods and services covered by the trade-mark.

Some examples of the new geographical indications recognized for food and agricultural products since September 21, 2017 include Feta, Gorgonzola, Roquefort and Bayonne Ham, as well as Espelette peppers and lavender essential oil from Haute-Provence. Some names, already considered too generic to be used as a geographical indication, are also

⁴ S.C. 2017, c. 6.

included in the new provisions of the TMA (for example, the use of the names Parmesan and Black Forest Ham will remain permitted).

3. Conclusion

Stakeholders in the food industry have until December 2021 to comply with most of the new requirements of the FDR, allowing them to spread over time the inevitable costs of creating compliant labels. It is important to keep in mind that an offence under the FDR could not only result in a fine of up to \$250,000, but also the withdrawal or recall of a product, if it is determined that compliance could likely have a significant impact on the health of Canadian consumers. Such a withdrawal or recall, in addition to being potentially very expensive for a company, may create permanent damage to a brand image!

New geographical indications recognized by the TMA should also be reviewed by food marketers, since it is now forbidden to use a trademark or trade name that includes a recognized geographical indication or that may cause confusion with such an indication, in connection with a food or agricultural product, except where such product originates from the geographical area covered by the geographical indication and fulfils the criteria required for the use of that indication in relation to the type of product concerned.

For more information on the measures to be taken to comply with the legislative and regulatory requirements for food marketing and geographical indications, do not hesitate to contact a member of our team.