



More Questions for the Food Law Guy

DEAR FOOD LAW GUY:

Can food labelling laws override a trade-mark that our company has used for many years?

Martha in Montreal

DEAR MARTHA:

Yes. Trade-marks for food products go back a long way. One of the oldest Canadian registered trade-marks is for Lea & Perrins Worcestershire Sauce. There is a misconception that trade-marks give the holder rights to assert against the state. A trade-mark is a word, symbol or design that is used by a company to distinguish its goods or services from those of others in the market place. A trade-mark registration gives the holder a right to exclude others from using the same or a confusingly similar trade-mark in association with the same or similar services.

This issue is timely as a result of the release of the Canadian Food Inspection Agency's (CFIA) *Information Letter on Carbohydrate Claims on Foods Sold in Canada*. Because of the new *Nutrition Labelling Regulations*, effective Dec. 12, 2005, claims such as "low carbohydrate" or "reduced carbohydrate" are illegal. Terms such as "net carb" or "net effective carbohydrate" or "digestible carb" are not permitted according to the regulations, "due to a lack of scientific consensus on their definition and their potential to mislead consumers."

The *Information Letter* also specifically addresses the issue of trade-marks and states that: brand names and trade-marks used in food labels and advertisements are subject to the provisions of the *Food and Drugs Act and Regulations* (FDAR). Thus, any wording used in brand names and trade-marks is also required to comply with all applicable provisions in the FDAR. This means that the use of many brand names and trade-marks regarding carbohydrates are not permitted under the new regulations.

Many companies have applied to register carb related trade-marks. However, effective Dec. 12, these companies must ensure that they comply with the FDAR with respect to these products. (Those carb trade-marks that make no reference to quantity may still have an arguable case so not everyone should give in to the CFIA; each case is different.)

DEAR FOOD LAW GUY:

I understand that Bill C-27, *The Canadian Food Inspection Agency Enforcement Act*, was designed to modernize and consolidate the CFIA's inspection and enforcement powers. Now I learn that the Standing Committee has amended the Bill to provide for major new prohibitions relating to the use of dairy terms on food labels. What does this have to do with the original purpose of the Bill? What's going on here?

Kelly in Kitchener

DEAR KELLY:

The implications for the food industry are quite significant. The power of the dairy producer lobby combined with the weak minority government can result in these kind of random acts of food policy making. It's not the law yet. If Parliament isn't prorogued this summer, the debate in the fall will be interesting.

DEAR FOOD LAW GUY:

My company has developed leading edge irradiation technology that we would like to introduce to Canada. What is the Canadian regulatory regime? Should we invest in Canada?

Carl in California

DEAR CARL:

Do not invest in Canada. The World Health Organization endorsed food irradiation more than 20 years ago and it enjoys strong consumer acceptance in the U.S. where it has been approved for poultry since 1990 and for red meat since 1997. Health Canada finally announced its intention to amend the Table to Division 25 to allow additional irradiated foods to be sold in Canada in November 2002. Nothing has happened in three years and nothing is likely to happen for several more. This is another example where our sclerotic food regulatory system undermines innovation, investment and competitiveness. It may even be undermining our health by denying us timely access to new products and processes.

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