

# Product liability: Regulatory risk and litigation exposure

Businesses in the consumable product sphere face a host of challenges in an era of heightened consumer awareness, 24-hour news cycles, and increased demand for safety and accountability. Just as consumers are insisting on transparency, legislators are imposing increasingly strict regulatory regimes and granting progressively broad powers to regulatory and inspection agencies.



## **New and emerging products: The cannabis regulatory regime in Canada**

- On December 13, 2016, the Task Force on Cannabis Legalization and Regulation published a report containing 80 recommendations for the federal government to incorporate into the draft legislation legalizing the recreational use of cannabis
- Provinces and territories will have power over the distribution and sale of cannabis. Ontario has recently announced its plans to establish a cannabis control board
- Numerous recalls of marijuana products have been reported, including over mislabelled THC levels
- Banned pesticides found in marijuana have led to two class actions being filed against licensed producers: the *Mettrum* and *OrganiGram* class actions



## **The Safe Food for Canadians Act (SFCA): A state of the union on the development of regulations supporting the SFCA**

- *Safe Food for Canadians Regulations* (SFCR) were pre-published in the *Canada Gazette Part I* for public comments in 2017. 1,300 submissions were received from the industry in response
- The SFCR are expected to gradually come into force, beginning in 2018
- There are interim steps your business can take now to comply with the key food safety elements of the regulations
- Further amendments to keep an eye on: *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, *Food and Drug Regulations*



## Trends and risks associated with “problem” ingredients: Gluten, sugar, baby powder

- In addition to “copycat” litigation based on proceedings in the United States, product ingredients can give rise to litigation in a number of contexts.
- “Ingredient claims” have included allegations of: failure to warn, misrepresentation as to contents/ingredients, and misrepresentation as to positive health claims
- “Gluten free” claims have increased with the public’s general awareness of gluten allergies and Celiac disease
- Sugar content: the “soda tax” debate rages on, and meanwhile, there have been a spate of class actions regarding allegations that sugar content was misrepresented to consumers as “evaporated cane sugar”
- Baby powder: \$417 million was awarded in a class action tying *Johnson and Johnson’s* baby powder to cancer. A Statement of Claim has subsequently been filed against Johnson in Ontario.



## Considerations for foreign product manufacturers and suppliers

- Product liability claims in Canada have been described as the “ideal” claims for class certification
- The absence of a Canadian doctrine of pre-emption – regulatory approval does not insulate manufacturers and suppliers from liability
- Regulatory environment – the Canadian Food Inspection Agency’s (CFIA) expanded mandate and powers