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## FOOD PRODUCT LIABILITY IN CANADA

Five drivers of litigation and  
steps to minimize the risk





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The things we eat and drink can harm us as well as help us, a simple fact that has long made the food and beverage products industry a target for health and safety-related litigation. In recent years, however, food products have become subject to increasingly frequent and increasingly costly litigation, as both the industry's complexity and consumer awareness of health hazards (both real and apprehended) have grown significantly. This white paper seeks to untangle the thicket by identifying five of the most frequent triggers for such litigation, and the steps that companies can and should take to minimize their legal risks – and the risks to their customers.

**How much is a definition worth?** It's hard to say – but thanks to recent U.S. litigation we can at least tell how the lack of a definition might be valued. Naked Juice, a successful 30-year-old brand in the “super-premium juice” category, set the prospective value of a regulatory definition for the word “natural” (left undefined by the FDA) when it recently settled a class action suit that had been brought by customers who argued that the company's juices contain ingredients that are not “All Natural” or “non-GMO” (i.e., free of “genetically modified organisms”), as claimed by the product's labelling. The brand, owned by PepsiCo, agreed to set up a \$9 million settlement fund to: (i) repay customers, (ii) develop a product verification program estimated to cost \$100,000 per year for at least three years, (iii) hire a quality control manager to oversee the program for at least five years (at a cost of \$100,000 per year), (iv) implement a product ingredient tracking database (an estimated \$150,000), and (v) redesign labels, advertising, and marketing to eliminate references to “All Natural” and “non-GMO” – an undertaking estimated to cost an additional \$450,000.

North of the border, the food products industry has similarly become the focus of heightened scrutiny by plaintiffs' lawyers in recent years. In May 2013, for example, Danone Inc. settled a class action in Québec for approximately \$1.7 million. The Canadian case, which paralleled U.S. litigation, was grounded in an allegation that some of Danone's products improperly advertised certain positive health effects of probiotics in the absence of a scientific consensus. While Danone denied wrongdoing, the company said it agreed to settle to avoid further court costs.

The proceedings against Danone illustrate not only the increased exposure to litigation risk in the food products industry, but also the multi-jurisdictional nature of such risk. The phenomenon of “copycat” litigation has long characterized other areas of product liability in Canada, and has become an increasing source of concern for participants in the food products arena despite the unique regulatory landscape in Canada.

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Participants in the food and health products industry face heightened exposure not just from the perspective of the direct costs associated with increased litigation, but also the indirect costs – such as a loss of brand equity and share value – that arise due to the breadth, complexity, and high public profile of class action lawsuits.

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Food and beverage companies must evaluate their exposure not just from the perspective of the direct costs associated with increased litigation, but also the attendant indirect costs that arise due to the breadth, complexity, and high public profile of class action lawsuits. Class actions are often multi-jurisdictional – mirroring the geographic spread of a product’s consumers, which can span regions, countries, and even continents – and can thus be complicated and expensive to defend. Apart from the costs of adverse judgments and the fees charged by legal, public relations and other advisors, corporate defendants face the likelihood of intangible but very real declines in the value of their brand equity (through loss of reputation and trust) and, more concretely, a drop in share value. They also face the risk of having to make costly permanent changes to their business practices, as the Naked Juice settlement illustrates, not to mention the significant costs that a product recall or sustained consumer boycott could inflict.

Needless to say, prevention is far better than any cure.

The drivers of this trend toward increased exposure by food products manufacturers and distributors are several and long-lasting. In particular, consumer awareness of issues relating to food and beverages has been heightened by public debates over health regulations – consider the very public battle over New York City’s effort to ban the sale of large sugary drinks, or the Canadian Medical Association’s push to have provincial governments ban the sale of high-caffeine energy drinks to minors – and by popular, Oscar-nominated documentaries like Morgan Spurlock’s *Super Size Me* and Robert Kenner’s *Food, Inc.* As people become increasingly aware of the importance of diet to health, difficult questions emerge as to who should bear responsibility for an individual’s health problems. Perhaps unsurprisingly, food and beverages have become an increasing area of focus for plaintiffs’ firms that previously led legal proceedings against industries like asbestos and tobacco – a development that will raise the stakes for manufacturers, who should brace for a net increase in litigation involving food products.

To date, food and beverage litigation has focused primarily on five discrete aspects of the manufacturing and marketing process, each of which has generated a host of disparate claims in the United States. Canadian companies should not only consider the extent to which each situation may affect their own product exposures as this type of litigation creeps into Canada, but also how they can minimize the risk of litigation through sound management practices and well-considered marketing, business and legal strategies.

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## Product recalls routinely generate litigation



Product recalls routinely generate litigation. The very fact of a product recall is often a triggering event for subsequent consumer litigation. Indeed, this can occur even where the recall itself may not be attributable to the conduct of the product manufacturer or distributor. In April 2011, for example, Amira Enterprises Inc. (at the request of the Canadian Food Inspection Agency (CFIA)) issued a recall notice for walnuts distributed by the company following an E. coli outbreak that was thought, at the time, to have been possibly connected to the consumption of the products. Though the company publicly reported that its testing did not find the bacteria in its walnuts, a class action was nonetheless launched against Amira the following week for its alleged failure to reimburse customers who had purchased walnuts and thrown them away as directed by the recall. Similarly, a class action was filed against XL Foods Inc. two weeks after a recall was announced by the company in response to a warning by the CFIA that certain beef products produced by XL Foods may have been contaminated with E. coli. Although the claim was subsequently amended as additional facts came to light, the immediacy of the initial filing illustrates how quickly plaintiffs' lawyers react to the very fact of a product recall. Notably, public health authorities only require reasonable grounds for a belief that a product is a threat to health or safety to require a recall. Accordingly, they typically err on the side of safety when confronted with a possible health risk or outbreak. Indeed, although there must be some evidence to support the decision at the time that the recall is requested, products may be recalled that, in the final analysis, do not pose a risk or demonstrate a negative health effect. Recall costs, loss of brand confidence and litigation costs are inevitable, regardless of whether the company has had a spotty safety record or an unblemished history.

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## Perceived failures to warn about a product's harmful effects



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Perceived failures to warn about a product's harmful effects also often generate litigation, as is evidenced by the recent spate of class actions targeting products such as energy drinks and fast food. Vital Pharmaceuticals Inc., for example, is facing a class action in the United States based on claims that its Redline energy supplement causes heart racing, chest pain, and extreme nausea, and also uses difficult-to-read typography on its labelling. Until very recently, energy drinks in Canada were regulated as "natural health products" under the *Natural Health Products Regulations*, (and are transitioning to regulation under the *Food and Drug Regulations*), which may explain why litigation in Canada has not exploded over such products as it has in the United States. However, the fact that a limited number of claims have been filed in Canada reflects the reality that no amount of regulation offers immunity from litigation. Certainly, experience in the highly-regulated pharmaceutical industry suggests that litigation for perceived failures to warn is not deterred by the fact that a regulator approved the product or approved the language used to describe risks associated with its use. Meanwhile, the fast food industry in the United States has faced several class actions over the past couple of decades which, while frequently unsuccessful, highlight the controversial line between corporate and consumer responsibility for individual health outcomes. Notably, the existence of comprehensive public health care in Canada does not preclude the commencement of proceedings in respect of food products sold on the basis of adverse health claims. Rather, it simply means that companies have to deal with more claimants at the bargaining table due to subrogated claims by provincial health insurers.

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## Claims about a product's ingredients



Claims about a product's ingredients are based on express (and sometimes implied) representations by the manufacturer. Consider, for example, whole-product claims like Naked Juice's "All Natural" tag (which sparked the litigation discussed above), "GMO free" claims, and claims about reduced amounts of specific ingredients such as sugar, sodium, and fat. Although such health claims are prescribed by legislation in Canada (or, in the case of claims regarding GMOs, regulatory guidelines), misleading descriptions or pictures of ingredients can generate complaints, investigations and even litigation. Something as seemingly innocuous as the fruits and berries shown on a typical cereal box, or depictions of a bee hive when the product only contains honey substitutes, can give rise to claims. Religious definitions may also play a role: McDonald's settled a class action in the face of claims that its *halal* items were inconsistently prepared according to Islamic law. The risk of such litigation may be higher in the United States, because many claims have no regulatory standards against which they can be assessed. By contrast, the Canadian government imposes statutory standards explicitly regulating natural health products, as well as specific product claims like "low sugar." The need for ongoing compliance with this strict regulatory framework, however, may increase the up-front costs as well as risk associated with non-compliance.

Notably, misleading product ingredient claims may expose companies not only to potential regulatory proceedings and consumer litigation, but also to direct claims by market competitors. For example, the U.S. Supreme Court recently found the labeling of a Coca-Cola product called Pomegranate Blueberry Flavored Blend of Five Juices misleading, opening the way for Pom Wonderful to sue Coke directly. The product contains only 0.3 percent pomegranate juice and 0.2 percent blueberry juice, despite its label.

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## Claims about a product's positive effects on health



Claims about a product's positive effects on health are another common trigger. Generally speaking, products sold in Canada must have their health claims pre-approved by the regulator. If the claims are specific enough, Health Canada may decide to classify the item as a natural health product – in other words, as a low-risk drug. This does not prevent future litigation over the adequacy of information provided about a product, but again increases the onus on companies to consider up front how they market their products and make accurate disclosure. This onus may become all the more burdensome as the Supreme Court's recent articulation of the consumer standard in *Richard v. Time* – namely that of a “credulous and inexperienced” consumer – plays out in the food products arena, particularly as the application of this civil standard to common law jurisdictions remains a subject of debate.

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## Third-party certifications



Third-party certifications are another potential source of litigation. By way of example, Campbell Soup Co. and the American Heart Association were confronted with a lawsuit alleging that the AHA has been ignoring its own guidelines in order to collect fees from the soup manufacturer for issuing “Heart-Check” certifications on products with sodium levels significantly higher than the association's defined “low sodium” threshold (though just below the Heart-Check program's preserving guideline). Because of the sponsoring organization's perceived independence and expertise, a third-party certification can have a powerful impact on consumer trust and on sales, which can give rise to disappointed expectations and potential complaints. Notably, the Heart & Stroke Foundation of Canada recently chose to disband its “Health Check” program. The initiative, which awarded a seal of approval to products with predetermined nutrition criteria, had received some criticism for allowing products to qualify despite significant amounts of fat, sugar and sodium.



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**IMPROVE** your risk management capabilities

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**ENSURE** your supply chain and distribution channels have strong controls

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**BOOST** employee training

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**ADOPT** best practices for testing and monitoring

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**BE ALERT** to changing legislation and rules

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**WIDEN** recall readiness protocols

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**EDUCATE** and engage your board and investors

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**LOOK** for ways to turn costs into new revenues and into better branding

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Food product litigation is an evolving arena in which social trends, media attention, enterprising lawyers, and consumer concerns interact in complex and often self-reinforcing ways. Additional trends and new areas of focus will no doubt emerge. New angles may include, for example, demands to prohibit marketing or sales of certain product categories to vulnerable groups like children, an argument made frequently in the context of other “high risk” products and one that has already emerged in recent debates over energy drinks and the healthiness of school lunches.

More broadly, it is clear that North America’s “warning culture” will only grow more rigorous and comprehensive in the coming years. Food and beverage companies are adjusting to this reality, learning to operate effectively by addressing product liability risks systematically across their enterprises. Companies can boost their resilience by, for example, improving their risk management capabilities, paying closer attention to arrangements made with external vendors and distributors, boosting employee training (and ensuring partners do the same), and applying best practices to testing and monitoring procedures. They should be alert to changing legislation and rules in each of the jurisdictions in which they operate – such as the *Safe Foods for Canadians Act*, the CFIA’s new ingredients labelling guidelines (see Osler’s recent Update<sup>1</sup> for more details on this), and Health Canada’s decisions as to how certain foods are categorized. Recall readiness protocols should not only address consumer safety issues, but also mitigate the overall impact of a voluntary or involuntary recall and potential litigation.

As public or private enterprises, of course, companies must face trade-offs. Risk minimization does not come for free, and investors are often reluctant to give up short-term returns in the cause of reducing the longer-term risk from events that might never occur. Management must educate and persuade the company’s board, and its investors, that it is a strategic priority to address product liability risk thoroughly to ensure that the enterprise will continue to create long-term value and fulfill its responsibilities as a good corporate citizen.

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<sup>1</sup><http://www.osler.com/NewsResources/Canadian-Food-Inspection-Agency-Releases-Guidelines-for-Highlighted-Ingredients-and-Flavours/>

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By virtue of the regulatory environment in Canada, product recalls may arise even in the absence of wrongdoing on the part of the food manufacturer or distributor. Accordingly, recall costs, loss of brand confidence and litigation costs are inevitable, regardless of whether the company has had a spotty safety record or an unblemished history.

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Indeed, the most far-sighted enterprises will find ways to turn their risk-minimization investments into marketplace differentiators, enhancing their brands, their relationships with consumers, and perhaps even their pricing power. In the wake of a serious listeria outbreak in 2008, Maple Leaf Foods spent \$20 million on a product recall and full-scale plant shutdown. While its share price initially dropped from \$10.97 to \$7.10 (a loss of roughly \$500 million in equity value), Maple Leaf and its CEO endeavoured to provide a transparent, rapid, and thorough response to the crisis. The company has worked diligently to become a leader in food safety, hiring a Chief Safety Officer and making a public commitment to improve safeguards and procedures. Six years after the crisis, Maple Leaf shares have far exceeded their value before the recall and more than doubled their lowest value. This example clearly illustrates the value that can be achieved by effectively managing the increasing risk exposure that confronts all participants in the contemporary food products environment.

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Osler's Food Products team advises clients in the food, beverage, pharmaceutical and natural health product sectors to identify and mitigate potential risks and, when necessary, defend against claims. Our multidisciplinary team – comprising members of Osler's Class Action, Product Liability, Food and Drug Regulation, Corporate and Competition/Antitrust groups – develops procedures to reduce risk and exposure, engage with regulators and vigorously defend claims in an increasingly litigious consumer market.

For more information on Osler's Food Products Group, visit [osler.com/food-products](http://osler.com/food-products)



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