

Policy Brief No. 125 – March 2018

Making Agricultural and Food-based Geographical Indications Work in Canada

Marsha Simone Cadogan

Key Points

- Premium pricing, favourable consumer demand, mutual geographical indication (GI) recognition in export markets and local interest in sustaining the product are integral to the success of agricultural and food-based GIs in Canada.
- GIs can be solid intellectual property (IP) assets for product diversification and in the creation of innovative IP-oriented businesses.
- Integrating GIs with tourism initiatives may produce spillover economic benefits to communities and regions in proximity to GI regions.
- Agricultural and food-based GIs should be key components of a national IP and innovation policy.
- Both legal reciprocity in GI markets and climate change affect the viability and sustainability of GI products.
- Without a GI strategy in place to take the product from a registration stage to scale-up, a registered GI has minimal value to its rights holders.

Introduction

Ontario peaches and nectarines and Quebec's ice cider have gained an international reputation for their value and quality. What connections might product-place relationships have on the food industry in Canada? Canada's new legislation to protect GIs creates new opportunities and challenges for those seeking to develop and commercialize local and indigenous agricultural and food-based products in domestic and global markets. These changes were brought about by Canada's ratification of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, in which a high point of the agreement was the expansion of GI rights to certain types of agricultural and food-based products. To this end, the Trade-marks Act¹ was amended to include the protection of GIs for these agricultural and food-based products. This policy brief addresses GIs in a domestic context and examines what it will take to move the dialogue from an abstract to a more practical focus on how GIs can be successful IP forms in Canada. Although amendments to the Trade-marks Act allow agricultural and food-based GIs to be registered in Canada, a full understanding of GIs as drivers of economic growth is lacking.

¹ *Trade-marks Act*, RSC 1985, c T-13, ss 11.11–11.24.

About the Author

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Marsha's broader research interests are in intellectual property (IP) rights and international trade, IP rights and innovation, and international law and development in a global context. Her expertise is multijurisdictional and includes the IP jurisdictions of the European Union, the United States, Switzerland, Japan, Canada and the Caribbean. She has an LL.M. and a Ph.D. in IP rights law from Osgoode Hall Law School at York University. Marsha is a board member of the International Law Association Canada and is also called to the bar of Ontario.

State of Affairs: Protection of Agricultural and Food-based GIs in Canada

Since the start of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1995, wine and spirit GIs are treated differently from other categories of GIs.² The extension of GI rights to agricultural products and foodstuffs remains contested among countries that share contrasting views on its recognition. The position in Canada has only recently changed because of CETA and the related changes to the Trade-marks Act, which have made possible the registration of agricultural products and foodstuffs as GIs. GIs are signs or symbols on products that convey unique product characteristics that are directly traceable to their geographic origin and cannot be replicated elsewhere. GIs for agricultural products and foodstuffs have become a multi-billion dollar industry for the European Union. The success of GIs for the European Union lies in its ability, cross-continently, to influence the direction of laws pertaining to the protection of EU-based GIs in foreign jurisdictions. The use of GIs as economic drivers of product diversification, nation branding and socio-development tools is still in the infancy stage in Canada. Quebec, which enacted legislation on food-based GIs before Canada's changes to its Trade-marks Act, has used its legislation to provincially register sweet corn, cheese, lamb, ice wine and ice cider as GIs.³ For GIs to be envisaged as integral aspects of an IP and innovation policy, their distinct function within an IP ecosystem and their potential contribution to the Canadian economy need to be evaluated.

2 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 197 art 22 (entered into force 1 January 1995) [TRIPS Agreement]. The TRIPS Agreement contains three distinctions in the level of protection: a minimum standard of protection for all GIs, whatever the nature of the good; an additional protection for both wines and spirits; and an extra additional protection for wines in the case of homonymous indications.

3 *Conseil des appellations réservées et des termes valorisants*, "Nouvelles", online: <<https://cartv.gouv.qc.ca/>>.

Considerations: Are GIs Sustainable in Canada?

If GIs are positioned as a law to protect distinct geographic products with no added foresight into how integration with the overall IP system is to be effectuated, then the innovative and economic benefits of GIs will not occur. Without effective governance of GIs, they become likely candidates for cancellation if they are not in use, and they will produce little or no economic benefits for rights holders.

Jurisdictions that have done well with GIs have created umbrella systems for their governance and operation.⁴ These umbrella systems are called GI schemes, which are managed either by the government or by collective groups that own the designation. GI schemes are designed to govern GI regulations, the product and GI producer groups. In addition, the schemes create linkages between the product, its place of production, the country of origin and its people.⁵ The schemes include directives, known as codes of practice, that stipulate how the product is produced. Codes of practice also demarcate the area of production of the GI products.⁶ Although an inclusive policy, it is also exclusionary in practice. There will be producers who are excluded from a GI scheme because their products are made outside the GI areas of production. Specifying an area of production instills integrity within a GI scheme. A GI conjures up images of a product closely associated with its local environment and generates consumer interest because of distinct differences between the GI and its competitors. Limiting the GI zone to areas that are most closely linked with the good's production has been used by many GI schemes internationally.⁷ However, these restrictive production zones may inadvertently

affect the economic welfare of firms that could have otherwise engaged in GI businesses.

Without a GI strategy in place to take the product from registration stage to scale-up, a registered GI has minimal value to its rights holders. The aim of a GI strategy is to solidify the product-place connection across sectors in domestic markets and within international consumer markets. A GI strategy is part of a GI scheme and focuses on producer remuneration, product diversification, sustaining the GI brand in international consumer markets and creating sustainable linkages between the GI product and its country of origin. Careful choice of products for GI registration is imperative to the success of GI schemes. GIs are lucrative ventures only in consumer markets with increasing and consistent product demand and reciprocity of GI protection. Even with these two factors in place, if there is no conducive GI ecosystem, pursuing the production of a GI is unlikely to be financially rewarding. Japan's Kobe beef is one of eight products that the jurisdiction now protects as GIs. There is a strong consumer demand for Kobe beef internationally, and the product also commands a premium price. These two factors — consumer demand and a favourable price in international markets — are essential to the success of GI strategies. In India, GI registration has increased in popularity, but a lack of GI knowledge among producers has led to registration of products with low potential for success.⁸

GIs are useful in forging and sustaining relationships between specific product brands and their countries of origin.⁹ Place and product connections are useful for several economic, social and cultural reasons. A GI that has gained popularity among international consumers conveys social and cultural perceptions of the product's territory, which can be integral aspects of nation-branding initiatives. Countries such as Mexico, France, Italy and Colombia have used GI product popularity to market GI regions as tourist enclaves. GI product-place branding is useful for increasing product revenues. In addition to product remuneration, the IP strategy can create business

4 France, Colombia, Japan, Greece and the United Kingdom.

5 Michael Blakeney, *The Protection of Geographical Indications, Law and Practice* (Cheltenham, UK: Edward Elgar, 2014) ch 3.

6 For example, see EU regulation on product specification in its GI regulation, *Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November on quality schemes for agricultural products and foodstuffs*, [2012] OJ, L 343 art 7, online: <www.eur-lex.europa.eu/eli/reg/2012/1151/oj>.

7 There are downsides to this strategy as its exclusionary principles restrict the number of producers that can participate in the production of the GI product.

8 Soumya Vinayan, "Geographical indications in India: Issues and challenges — An overview" (2017) 20:3–4 *J World Intellect Prop* 119.

9 Doris Estelle Long, "Branding the Land: Creating Global Meanings for Local Characteristics" in Irene Calboli & Edward Lee, eds, *Trademark Protection and Territoriality Challenges in a Global Economy* (Cheltenham, UK: Edward Elgar, 2014) ch 6.

and job opportunities for individuals living in or near GI production areas. A spillover of successful GI product marketing is that individuals who are not GI rights holders are able to engage in business ventures related to the registered GI product. The aim of this strategy is to form economic linkages using the product-place concept that engages community, municipal and provincial networks in the workings of the GI scheme.

Economies that focus on creating sustainable linkages between the GI product and tourism have invested in entrepreneurial conglomerates that bear a degree of connection with the GI product, its place of production and its people. Furthermore, it is a means for revenue and employment to remain in GI communities. Across jurisdictions, this strategy has achieved varying levels of success.¹⁰ Factors that account for the failure of GIs include corruption, exclusionary producer networks, loose connections between the product and its geographic origin, and lack of cooperation between regulatory bodies, GI groups and communities.

Additional important considerations are environmental concerns that may affect the very existence of the product on the market. This issue is specific to GIs that use the land, water or specific climatic conditions as the basis for forging the prerequisite relationship between the product and its place of origin. Examples of GI products that are affected by their local environment include coffee, cherries, wine, and fishery and forestry products. Japan's puffer fish, India's Darjeeling and Assam teas, and Colombia's café de Colombia are all representative of GI products that are vulnerable to environmental disasters, including climate change. The implications of climate change and other environmental hazards on agricultural and food-based GIs are significant. In some jurisdictions, natural disasters, such as droughts, hurricanes, forest fires and increases in crop infestations have affected crop yields of products that would otherwise have been strong candidates to benefit from investments in GI protection. In this context, the detriment that results from environmental problems is worsened by inadequate support from government bodies to farmers who have no means of re-establishing their business ventures

without outside assistance. In other jurisdictions, GI producers are witnessing the results of climate change on the quality and quantity of their produce. In India, for example, Assam tea producers have complained that rising sea temperatures affect the distinct taste of their tea and yields.¹¹

Canada's IP Strategy: Scale-Up of GIs in the Domestic Economy

A Canadian approach to GIs should be centred on building sustainable linkages between products, geographic origins, communities, cultures and economic sectors. The inclusion of a GI strategy as part of a provincial or national IP strategy is an effective policy choice to make. Hallmarks of a sound GI strategy include appropriate product choices for registration, an inclusive producer group, building relationships with key international consumer markets, and the use of offensive and defensive IP considerations in protecting GI products.

Most Canadians are not knowledgeable of food-based GIs. Policy makers should consider using public awareness platforms to increase GI knowledge among agri-food businesses and consumers. The benefits of GI public awareness platforms are twofold. First, increased awareness may foster the growth of GI-based businesses and the proliferation of GI culture in Canada. Second, although there is no decisive positive correlation between IP knowledge and levels of infringement, there is still the likelihood that GI awareness among Canadians may reduce infringements in domestic markets.

Because the market for trademarked consumer foods in North America is more established than it is for GIs,¹² the choice of products for GI registration impacts the success of GI schemes. In the world of GIs, there is a distinction between having a product on the market and one that performs well in consumer markets. GI registration may safeguard

10 Irene Calboli, "Geographical Indications of Origin at the Crossroads of Local Development, Consumer Protection and Market Strategies" (2015) 46:7 IIC 760.

11 Associated Press, "Tea off: India's farmers say climate changing brew", *Arkansas Democrat-Gazette* (31 December 2010), online: <www.arkansasonline.com/news/2010/dec/31/tea-indias-farmers-say-climate-changing-brew/>.

12 For example, Campbell's soup is a trademarked consumer product.

against infringement in selected consumer markets, but this likely will not scale up the product or produce spillover benefits in Canadian communities. Where economic incentives influence interest in GI registrations, the registrant should be cautious of registering products that lack strong consumer demand. Lacklustre consumer demand for GI products is an Achilles heel in positioning GIs as IP assets in an IP and innovation strategy. Registering GI products without conducting market analysis to determine the brand's strength in targeted domestic and international markets is an unsound practice.

Because GI protection in foreign jurisdictions will not always be the same as in Canada, registrants should consider a "bundled" approach to GI protection in foreign consumer markets. With the right domestic governance model, GIs do best in foreign consumer markets that offer protections that go beyond unfair competition and against the likelihood of the consumer being misled by false designations. Even in these settings, market access may be challenged by those that are similar in established markets. It will be difficult for Canadian GIs to thrive in US consumer markets, as only limited levels of protection are available for agricultural and food-based GIs in the United States. GIs are protected in the European Union on a more substantive level than in Canada. GI producers will find that they may have more ease of market access for their products in the European Union, Japan, Switzerland and China than in the United States. In consumer markets that offer only trademark or unfair competition grounds for protecting GIs, registrants should consider other strategies for legal protection. Seeking registration of the product as a trademark might be the next best choice, although it is not guaranteed that registration will be granted in foreign jurisdictions.

The collective rights of GI holders are exercised through producer groups. As diversified as GI schemes and strategies are, it is recommended that the same approach apply to the composition and operation of producer groups. Producer groups that limit their base only to GI rights holders diminish prospects of integrating the product into major consumer markets and risk losing out on cross-sectoral economic integration with related products and services. Canadian GI owners should be receptive to the use of inclusive producer groups that offer membership to stakeholders who are either involved in the development of GI regions or engaged in services that are related to the GI product. Public-private partnerships with specific

government sectors are advisable for GIs seeking cultural and economic integration with their geographic origin and in global consumer markets.

One of the major differences between GIs and trademarks is that GI rights holders are more likely to need policy makers' help to scale up the product in domestic and international consumer markets. Inconsistencies in global GI protection and lack of cohesion among domestic stakeholder groups make it difficult to establish successful new GIs. Absent an international agreement, limited protection of GIs in foreign jurisdictions can only be counteracted by a push to bilaterally or regionally protect GIs in foreign consumer markets. Lack of capital by GI rights holders may call for the intervention of government stakeholders. Nonetheless, government sectors should be cautious about micromanaging GI schemes and losing sight of what is in the best interest of GI producers and their communities. In Canada, besides the federal role in creating GI laws, provinces and territories could help local communities develop strategies for new GI governance and protection. Quebec pioneered GI protection in Canada and has, so far, registered five products under its legislation. In Ontario, federal legislation may inform the development of local and municipal GI schemes for potential products, such as Ontario peaches and nectarines. Because of their established presence in world markets, Canadian maple syrup and mustard are also strong candidates for GI protection. These products are produced cross-provincially in Canada. For example, mustard is produced mainly in Alberta and Saskatchewan, and the major maple syrup-producing provinces are Quebec, Ontario, Nova Scotia and Newfoundland. However, the development of interprovincial GI schemes will need significant stakeholder involvement, as interprovincial trade issues will need to be considered and balanced.

As Canada becomes acclimatized with GIs, policy makers may find it necessary to revisit domestic laws by considering the use of a *sui generis* system for the protection of GIs. Provisions in the amended Trade-marks Act that are limiting to GIs may overshadow the ability of GIs to be successful in domestic markets.¹³

¹³ See *Trade-marks Act*, *supra* note 1, c T-13, s 11.11(3), 4.

Conclusion

It is the receptiveness of the Canadian economy to GIs that will make the difference between a law that is simply an added provision to the Trade-marks Act and one that is integrated into IP, cultural and economic sectors as an IP asset. For GIs to become mainstream forms of IP, it will take a collaborative effort among diverse stakeholders with an interest in scaling up GIs. As inadequate market access, low pricing, environmental conditions and GI legal reciprocity all affect the viability of the product, careful legal and market analysis should be conducted before registering GIs.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, Indigenous law and constitutional law.

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Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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