

Food Labelling For Healthier Eating: Is Front-Of-Package Labelling The Answer?

B A R B A R A V O N T I G E R S T R O M

1. INTRODUCTION

In Canada and elsewhere, steadily increasing rates of obesity have become a serious public health problem. According to one study, the overall prevalence of obesity in this country increased from 10% in 1970 to 23% in 2004.¹ Approximately half of the Canadian adult population and a quarter of children and adolescents are either overweight or obese.² The prevalence of class III obesity (the most severe category) increased by 225% between 1990 and 2003. Most alarming are the rapid growth of childhood obesity in Canada³ and the significantly higher rates among Aboriginal children.⁴ Obesity is associated with a range of health consequences, including hypertension, type II diabetes, gallbladder disease, coronary artery disease, osteoarthritis, stroke, and certain cancers.⁵ It has been found to increase mortality, especially from cardiovascular disease and some cancers.⁶ The

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- ¹ Wei Luo *et al.*, "The Burden of Adult Obesity in Canada" (2007) 27:4 *Chronic Diseases in Canada* 135. Others have reported slightly different percentages but still show a steady and significant increase: see e.g. Kim D. Raine, *Overweight and Obesity in Canada: A Population Health Perspective* (Ottawa: Canadian Institute for Health Information, 2004) at 5-7 [Raine, *Overweight and Obesity in Canada*].
- ² Raine, *Overweight and Obesity in Canada*, *ibid.* at 7-8.
- ³ M.S. Tremblay, *et al.*, "Temporal Trends in Overweight and Obesity in Canada, 1981-1996" (2002) 26:4 *International Journal of Obesity* 538.
- ⁴ Canada, Standing Committee on Health, *Healthy Weights for Healthy Kids*, (Ottawa: Communication Canada - Publishing, 2007), at 1, online: House of Commons <<http://www.ccfm.ca/pdfs/HealthyWeightsForHealthyKids.pdf>> at 2 [Health Committee, *Healthy Weights for Healthy Kids*]; Raine, *Overweight and Obesity in Canada*, *supra* note 1 at 10.
- ⁵ Luo *et al.*, *supra* note 1.
- ⁶ Caren G. Solomon & JoAnn E. Manson, "Obesity and Mortality: A Review of the Epidemiologic Data" (1997) 66 *American Journal of Clinical Nutrition* 1044S at 1049S.

total economic cost of obesity in Canada has been calculated at \$4.3 billion annually, including health care costs and lost productivity.⁷

One of the challenges in addressing obesity as a public health issue is that it has multiple causes, determinants, and contributing factors.⁸ Since the direct cause of overweight and obesity is an imbalance of energy intake and expenditure, diet and physical activity are key factors, but these in turn are influenced by a range of complex individual and societal factors. A range policy options has been proposed to combat this problem at the population level in Canada and other countries.⁹ Governments can attempt to use education and public information campaigns to promote healthy eating and physical activity. Assuming that such measures may not be sufficient, they can be supplemented by regulatory strategies including limits on advertising of food products, introducing taxes or subsidies to influence the cost of food, restricting the availability of certain foods in particular environments such as schools, and regulating the content and characteristics of food products (such as limits on trans fats).

One way of encouraging healthier eating habits and thereby preventing or reducing obesity is to use food labelling to influence consumers' choices. Food labelling generally has several objectives, including consumer protection, encouraging the consumption of healthier foods, and giving producers an incentive to offer products with better nutrition profiles. Many jurisdictions have introduced mandatory nutrition labelling for prepackaged foods with the aim of allowing consumers to make better informed and healthier choices. In addition, health claims (claims regarding the health benefits of a food) and nutrient content claims (claims regarding the nutritional composition of a food) are regulated to ensure that they provide valid and reliable information to consumers.

If labelling achieves its objectives effectively, it could potentially contribute to the prevention and reduction of obesity at the population level.¹⁰ As part of their efforts against the obesity epidemic, Canada and other jurisdictions are examining ways to make their labelling schemes more effective to better fulfil this purpose. Reforms could include expanding mandatory nutrition labelling to foods that are

⁷ P.T. Katzmarzyk & I. Janssen, "The Economic Costs Associated with Physical Inactivity and Obesity in Canada: An Update" (2004) 29:1 *Canadian Journal of Applied Physiology* 90.

⁸ Scott M. Grundy, "Multifactorial Causation of Obesity: Implications for Prevention" (1998) 67 *American Journal of Clinical Nutrition* 563S [Grundy, "Multifactorial Causation"]; Raine, *Overweight and Obesity in Canada*, *supra* note 1.

⁹ Health Committee, *Healthy Weights for Healthy Kids*, *supra* note 4; Lawrence O. Gostin, "Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity" (2007) 297 *Journal of the American Medical Association* 87; EC, *White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues* (Brussels: EC, 2007) [EC, *White Paper*].

¹⁰ See e.g. EC, *White Paper*, *ibid.* at 5-6.

currently exempt such as restaurant foods or altering the content or format of mandatory nutrition information panels. This article will focus on potential reforms to labelling of prepackaged foods, and in particular the recent proposals to regulate front-of-package labelling. As will be seen below, the 2007 report on childhood obesity by the Parliamentary Standing Committee on Health recommended the introduction of mandatory front-of-package simple nutrition labels modelled on a voluntary scheme recently adopted in the United Kingdom.¹¹ Front-of-package labels have been promoted by industry, consumer and health organizations, and government actors as having potential benefits for consumer choice and public health, but there has been little agreement on the best regulatory scheme for such labels.

The first section of this paper will outline the current position in Canada with respect to nutrition labelling and related issues, and compare the Canadian approach with similar regulations in other jurisdictions. The following sections will then review the available evidence regarding the impact of nutrition labelling and discuss proposals for improving labelling regulation, focussing on front-of-package labelling schemes. The various regulatory strategies and formats for front-of-package labelling will be examined. Finally, potential *Charter* challenges and trade disputes will be analyzed as possible legal barriers to the regulation of front-of-package labelling.

2. THE LEGAL FRAMEWORK FOR FOOD LABELLING

a. Canadian legislation

According to Canada's *Food and Drugs Act*, no food may be labelled, packaged, or advertised in a way that is false, misleading, or deceptive, or that is "likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety".¹² Prepackaged food products (like other consumer products except regulated drugs and devices¹³) are also subject to the *Consumer Packaging and Labelling Act*, which prohibits, *inter alia*, use of labels "containing any false or misleading representation".¹⁴ Prohibitions on false or misleading representations in

¹¹ Health Committee, *Healthy Weights for Healthy Kids*, *supra* note 4 at 22-23.

¹² *Food and Drugs Act*, S.C. 1985, c. F-27, s. 5(1).

¹³ *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, s. 3(2).

¹⁴ *Ibid.*, s. 7(1). Examples of "false and misleading representations" include a representation "implying that a prepackaged product contains any matter not contained in it or does not contain any matter in fact contained in it" (s. 7(2)(b)) or "any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated" (s. 7(2)(c)).

the sale or promotion of consumer products are also found in the *Competition Act*¹⁵ and provincial consumer protection statutes.¹⁶

Any food that is not labelled or packaged in accordance with the Regulations is deemed to violate the *Food and Drugs Act*.¹⁷ With a few exceptions, prepackaged food must be labelled.¹⁸ The label must contain certain prescribed pieces of information, such as the common name of the food (which may be prescribed and must not be misleading), the identity of the manufacturer or dealer, the packaging or durable life (“best before”) date, and a list of ingredients (in descending order of proportion or by percentage).¹⁹

Nutrition labelling has been mandatory in Canada since 2003.²⁰ Most prepackaged food products must carry nutrition panels,²¹ the form and placement of which are prescribed by regulation.²² Tables in the Regulations indicate how each element in the label must be displayed, including the description, unit of measurement, and manner of expression to be used for each piece of information.²³ The “core information” required to be displayed is the serving size and the number of calories per serving; the amount of total fat, saturated fat, trans fat, cholesterol, sodium, carbohydrates, fibre, sugar, and protein (grams per serving, percentage of daily value, or both); and vitamins A and C, calcium, and iron (percentage of daily value).²⁴ Other information (e.g. other nutrients, energy values, or information

¹⁵ *Competition Act*, R.S.C. 1985, c. C-34, ss. 52, 74.01.

¹⁶ See e.g. *Consumer Protection Act*, S.S. 1996, c. C-30.1, ss. 5, 6; *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sch. A, s. 14; *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 4.

¹⁷ *Food and Drugs Act*, *supra* note 12, s. 5(2).

¹⁸ *Food and Drug Regulations*, C.R.C. c. 870, s. B.01.003. Prepackaged “one-bite” confections and packaged fresh fruits and vegetables are the exceptions to prepackaged products.

¹⁹ *Ibid.*, ss. B.01.006-008.

²⁰ S.O.R./2003-11. The regulations have been fully in force since December 12, 2007 (the end of an extended compliance period for small businesses).

²¹ *Food and Drug Regulations*, *supra* note 18, s. B.01.401(1). Exemptions include: certain foods, such as alcoholic beverages (with an alcohol content of more than 0.5%), fresh fruits and vegetables, raw meat or seafood, or milk; types of products such as individual servings for immediate consumption or products sold only at roadside stands, markets or similar places; and products for which all of the values in the nutrition facts table (except serving size) would be zero: s. B.01.401(2). However, these products are not exempt from the nutrition labelling requirement if certain ingredients are listed or added, or if certain claims are made on the label: s. B.01.401(3).

²² *Ibid.*, ss. B.01.450-467.

²³ See table in *ibid.*, s. B.01.401 for core information and table in s. B.01.402 for additional information.

²⁴ *Ibid.*, s. B.01.401 and table following s. B.01.401. The “daily value” used to calculate the percentage of daily value that is disclosed in the table is based on the “recommended daily intake” for vitamins and minerals, and the “reference standard” for other nutrients: *ibid.*, s. B.01.001. These values are set out in tables following ss. D.01.013, D.02.006 and B.01.001.01 respectively.

about serving sizes) is optional but must follow the prescribed format.²⁵ Serving sizes are not prescribed by the Regulations, but guidelines are provided by the Canadian Food Inspection Agency.²⁶

Both nutrient content claims and health claims are regulated under the *Food and Drug Regulations*. A nutrient content claim, which is “a representation, express or implied, that characterizes the energy value of a food or the amount of a nutrient contained in the food”, is only permitted on the label or in an advertisement if made in accordance with the Regulations.²⁷ The Regulations set out permissible claims, the conditions that must be met, and the wording to be used.²⁸ The conditions refer to the characteristics of the food, of the label, or both. For example, in order to make a claim that a food is low in fat, in most cases the food must contain 3 grams or less of fat per serving size or reference amount. Permissible wording includes “low fat”, “low in fat”, “low source of fat”, “little fat”, “contains only (number) g of fat per serving”, or “contains less than (number) g of fat per serving”.²⁹ Special conditions apply to comparative claims (such as “more”, “lower”, or “reduced”).³⁰ The Regulations also restrict the use of the word “light” (or “léger”) in food labels and advertising.³¹ If a food meets the conditions for certain claims relating to energy and sugar content, a representation that the food is for use in an energy-reduced diet is permitted.³²

Food products must not carry “drug claims” in their labels or advertisements – for example, claims that they can be used to prevent or treat a disease³³ – if they are

²⁵ *Ibid.*, s. B.01.402. In some cases otherwise optional information must be included, for example if a representation is made on the label about a nutrient or certain components are added to a product: *ibid.*, s.-ss. B.01.402(3)-(7).

²⁶ Canada, Canadian Food Inspection Agency, *2003 Guide to Food Labelling and Advertising* (2003) at Table 6-3, online: Canadian Food Inspection Agency <<http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml>> [CFIA, *2003 Guide*]. The regulations do set a “reference amount” for classes of foods to be used in determining whether foods meet the requirements for nutrient content or health claims, but these need not be used as the stated serving size in the nutrition label: *Food and Drug Regulations*, *supra* note 18, Schedule M.

²⁷ *Food and Drug Regulations*, *ibid.*, s. B.01.502.

²⁸ *Ibid.*, s. B.01.503(1). See the table following s. B.01.513.

²⁹ *Ibid.*, table following s. B.01.513, item 12.

³⁰ *Ibid.*, table following s. B.01.513.

³¹ This includes phonetic variations such as “lite”. “Light” or “lite” may also be used to describe a food light in energy or fat as a comparative nutrient content claim if the conditions in the table following s. B.01.513, item 45, of the *Food and Drug Regulations*, *ibid.*, are met.

³² *Ibid.*, s. B.01.507.

³³ A “drug” is defined in the *Food and Drugs Act*, *supra* note 12, s. 2 as: “any substance or mixture of substances manufactured, sold or represented for use in:

(a) the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state or the symptoms thereof, in man or animal;

to be regulated as foods rather than as drugs.³⁴ The *Food and Drugs Act* prohibits any food from being advertised or represented by its label as a “treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A”, which include obesity, diabetes, and heart disease.³⁵ However, health claims that comply with the Regulations will be exempt from this prohibition, as well as from the provisions of the Act and Regulations relating to drugs.³⁶ Two types of health claims are permitted and regulated by the *Food and Drug Regulations*: diet-related health claims and biological role claims. Diet-related health claims are statements that describe “the characteristics of a diet that may reduce the risk of developing a diet-related disease or condition, ... and the properties of the food that make it a suitable part of the diet.”³⁷ Biological role claims are “claims that refer to the generally recognized nutritional function of energy or nutrients as an aid in maintaining the functions of the body for the maintenance of good health, or for normal growth and development”.³⁸ As with nutrient content claims, diet-related health claims must use the prescribed wording and comply with the conditions on the food and the label that are set out in a table in the Regulations.³⁹ Labels and advertisements are also permitted, subject to certain conditions, to carry general biological role claims stating that the food’s energy value or a nutrient in the food “is a factor in the maintenance of good health”⁴⁰ or “is generally recognized as an aid in maintaining the functions of the body necessary to the maintenance of good health and normal growth and development.”⁴¹ Testimonials or guarantees regarding the results of adding a vitamin or mineral to one’s diet are specifically prohibited.⁴² A range of biological role claims for various nutrients have been approved for use by Health Canada and the CFIA, and other claims can be submitted for evaluation on a case-by-case basis.⁴³

(b) restoring, correcting or modifying organic functions in man or animal”.

³⁴ CFIA, *2003 Guide*, *supra* note 26 at 8-1.

³⁵ *Food and Drugs Act*, *supra* note 12, s. 3, Schedule A.

³⁶ *Food and Drug Regulations*, *supra* note 18, s. B.01.601(1). A food is not exempt if it comes within the definition of a drug for a reason other than the making of a health claim: s. B.01.601(2).

³⁷ CFIA, *2003 Guide*, *supra* note 26 at 8-3.

³⁸ *Ibid.* at 8-10.

³⁹ *Food and Drug Regulations*, *supra* note 18, table following s. B.01.603.

⁴⁰ *Ibid.*, ss. D.01.006(a), D.02.004(a).

⁴¹ *Ibid.*, ss. B.01.311(3), D.01.006(b), D.02.004(b). Section B.01.312 requires disclosure of information about the energy value or nutrient that is the subject of the claim, if this is not already included on a nutrition label. Additional restrictions apply to claims regarding vitamins (ss. D.01.002-D.01.012) and minerals (ss. D.02.002-D.02.011).

⁴² *Ibid.*, ss. D.01.012, D.02.008.

⁴³ CFIA, *2003 Guide*, *supra* note 26 at 8-12.

b. International comparisons

Mandatory nutrition labelling has been implemented in a number of other countries, though it is far from universal. Nutrition labelling has been mandatory in the United States since the early 1990s under the Nutrition Labeling and Education Act of 1990 (NLEA).⁴⁴ Food that is offered for sale and is not exempt (e.g. most restaurant and ready-to-eat foods,⁴⁵ raw fruits and vegetables⁴⁶) must display the following information: the serving size or household measurement; the number of servings in a container; the number of calories per serving derived from any source and from fat; the amount of total fat and saturated fat, cholesterol, sodium, total carbohydrates and complex carbohydrates, sugars, dietary fibre, and total protein; any vitamin, mineral or other nutrient.⁴⁷ Labels must conform to specific requirements with respect to placement on the package as well as font type, font size and line sizing.⁴⁸ Australia and New Zealand also require nutrition labels to be carried on most prepackaged food products. The label must include energy content and quantities of protein, fat, saturated fat, carbohydrate, sugar, sodium, and any other biologically active ingredient in respect of which a nutrition claim is made.⁴⁹ Unlike in Canada and the United States, the quantities must be given both per serving and for a unit quantity (e.g. per 100 g) that is specified on the label. In Europe, nutrition labels are not yet required on all foods. According to the existing EC Directive, nutrition labelling is optional;⁵⁰ however, if a nutrition or health claim is made, certain nutritional information must be provided.⁵¹ A recent proposal would make it mandatory to show energy, fat, saturated fat, carbohydrates, sugar, and sodium (per serving and per 100g) on the front of the package.⁵²

All of these jurisdictions also regulate nutrition and health claims. In the United States, nutrient content claims describing the amount of a listed nutrient,⁵³ whether express or implied, are prohibited unless they conform to the regulations.⁵⁴

⁴⁴ *Nutrition Labeling and Education Act of 1990*, Pub. L. No. 101-535, 104 Stat. 2353.

⁴⁵ 21 C.F.R. §101.9(j)(2) (2006); 21 U.S.C. §343(q)(5)(A)(ii) (2006).

⁴⁶ 21 C.F.R. §101.9(j)(10) (2006).

⁴⁷ 21 U.S.C. §343(q)(1) (2006).

⁴⁸ 21 C.F.R. §101.9 (d) (2006).

⁴⁹ *Australia New Zealand Food Standards Code 1991*, (Cth.), Standard 1.2.8, Div. 2(5)(1) [ANZ Food Standards Code].

⁵⁰ EC, *Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs*, [1990] O.J. L. 276 at Article 2(1).

⁵¹ *Ibid.*, Article 4(1).

⁵² EC, Commission, *Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers* (Brussels: EC, 2008) [EC, *Proposal for Regulation on Food Information*].

⁵³ 21 C.F.R. §101.13(b) (2006).

⁵⁴ 21 C.F.R. §101.13(b) (2006).

For health claims, express or implied claims are limited to a list of permitted claims and must conform to the requirements set out for each claim.⁵⁵ In order to be included on the list of permitted claims, a health claim must meet certain criteria,⁵⁶ and must be validated by the Food and Drug Administration as being supported by publicly available scientific evidence and significant agreement in the scientific community about this evidence.⁵⁷ In Europe, both types of claims are subject to general requirements regarding substantiation by scientific evidence and the quantity of the nutrient contained in the food relative to the amount required to provide a significant benefit;⁵⁸ and general restrictions, for example claims must not question the safety or value of other foods or suggest that a varied diet cannot generally provide proper nutrition.⁵⁹ For nutrition claims, there are specific requirements with respect to comparative claims.⁶⁰ If health claims are made, they must be from the list of authorized claims and must include prescribed statements and information.⁶¹ Claims with respect to the reduction of disease risk or child development must be submitted to a committee and subjected to scientific scrutiny.⁶² Australia and New Zealand are in the process of developing standards with respect to nutrition and health claims. Certain nutrition claims are regulated in the Food Standards Code,⁶³ and a transitional standard is in place for health claims.⁶⁴ A new standard is under development that will regulate both nutrition and health claims.⁶⁵

⁵⁵ The current allowable health claims include: calcium and osteoporosis (21 C.F.R. §101.72); dietary lipids and cancer (21 C.F.R. §101.73); sodium and hypertension (21 C.F.R. §101.74); dietary saturated fat and cholesterol and risk of coronary heart disease (21 C.F.R. §101.75); fiber-containing grain products, fruits, and vegetables and cancer (21 C.F.R. §101.76); fruits, vegetables, and grain products that contain fiber, particularly soluble fiber, and risk of coronary heart disease (21 C.F.R. §101.77); fruits and vegetables and cancer (21 C.F.R. §101.78); folate and neural tube defects (21 C.F.R. §101.79); dietary noncariogenic carbohydrate sweeteners and dental caries (21 C.F.R. §101.80); soluble fiber from certain foods and risk of coronary heart disease (CHD) (21 C.F.R. §101.81); soy protein and risk of CHD (21 C.F.R. §101.82); plant sterol/stanol esters and risk of CHD (21 C.F.R. §101.83).

⁵⁶ 21 C.F.R. §101.14(b).

⁵⁷ 21 C.F.R. §101.14(c) (2006).

⁵⁸ EC, *Council Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods*, [2006] O.J. L. 404/9, as am. by: EC, *Corrigendum to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods*, [2007] O.J. L. 12/3 at Article 5(1).

⁵⁹ *Ibid.* Article 3.

⁶⁰ *Ibid.* Articles 9(1) and 9(2).

⁶¹ *Ibid.* Article 10(2).

⁶² *Ibid.* Articles 15-17, 19.

⁶³ *ANZ Food Standards Code*, *supra* note 49 at Division 3.

⁶⁴ *Ibid.* Standard 1.1.A.2.

⁶⁵ *Ibid.* Standard 1.2.7. See Food Standards Australia New Zealand, *Final Assessment Report: Proposal P293 Nutrition, Health & Related Claims* (FSANZ, 2008), online: FSANZ

3. Our existing approach to food labelling: room for improvement?

All of the jurisdictions reviewed above either already have mandatory nutrition labelling for prepackaged foods (Canada, U.S., Australia and New Zealand) or are contemplating its introduction (the EU). These requirements reflect an assumption that providing nutrition information will enable and encourage consumers to choose foods that meet certain nutritional criteria that are important to them. At the individual level, obesity is generally caused by an imbalance between the amount of energy consumed as food and expended through activity. In most cases of moderate obesity this imbalance is relatively small,⁶⁶ so if labelling were to influence even modest changes in consumption patterns, this could have a significant public health impact. Nutrition labels could provide benefits for public health if they encourage manufacturers to reformulate food products to improve their nutritional profiles, and there is evidence that this has in fact occurred in some cases.⁶⁷ However, most claims of public health benefits from food labelling rest on the premise that consumer behaviour will be influenced by labels. This impact presumes that labels will be noticed, read, and understood by consumers, and that they will have an influence on consumers' choices that is significant and consistent enough to affect dietary patterns. Since a wide range of factors influence consumption patterns,⁶⁸ isolating and quantifying the impact of food labels will undoubtedly be challenging. Nevertheless, the evidence that is available tends to suggest that our current nutrition labels are not as effective as might be hoped – hence the impetus for reform.

Although some studies have shown a correlation between nutrition label use and healthier diets,⁶⁹ evidence of the actual effect of labels on food consumption is

<http://www.foodstandards.gov.au/_srcfiles/P293%20Health%20Claims%20FAR%20and%20Att%201%20&%20%20FINAL.pdf>.

⁶⁶ Grundy, "Multifactorial Causation", *supra* note 8 at 568S.

⁶⁷ Leanne Young & Boyd Swinburn, "Impact of the *Pick the Tick* Food Information Programme on the Salt Content of Food in New Zealand" (2002) 17 Health Promotion International 13; Peter Williams, Anne McMahon & Rebecca Boustead, "A Case Study of Sodium Reduction in Breakfast Cereals and the Impact of the *Pick the Tick* food information program in Australia" (2003) 18 Health Promotion International 51; Pirjo Pietinen *et al.*, "Labelling the Salt Content in Foods: a Useful Tool in Reducing Sodium Intake in Finland" (2007) 11:4 Public Health Nutrition 335.

⁶⁸ See e.g. Kim D. Raine, "Determinants of Healthy Eating in Canada, An Overview and Synthesis" (2005) 96:S3 Canadian Journal of Public Health S8.

⁶⁹ Jayachandran N. Variyam, "Do Nutrition Labels Improve Dietary Outcomes?" (2008) 17 Health Economics 695; Andreas C. Drichoutis, Panagiotis Lazaridis & Rodolfo M. Nagaya, "Consumers' Use of Nutritional Labels: A Review of Research Studies and Issues" online: (2006) 2006:9 Academy of Marketing Science Review 1 at 14-15 <<http://www.amsreview.org/articles.htm>>; Center for Science in the Public Interest, "Petition for Advance Notice of Potential Rulemaking on the Use of Symbols on the Principal Display Panel to Communicate the Healthfulness of Foods" (Submitted to the U.S. Department of Health and Human Services, U.S. Food and Drug Administration, 30 November 2006) at 5, online: <http://www.cspinet.org/new/pdf/healthy_symbol_petition.pdf> [CSPI, "Petition"]; U.S., Food and Drug Administration, Center for Food Safety and Applied Nutrition, *Calories Count: Report*

rather scarce.⁷⁰ A large proportion of people report using labels when choosing food products, but actual rates of use appear to be significantly lower than self-reporting would suggest.⁷¹ Furthermore, for many individuals the “use” of food labels may simply involve looking at the label without processing or applying the information, so much of the reported use may not necessarily translate into an impact on food choices.⁷²

Studies have shown that many consumers do not understand the information provided in nutrition information panels.⁷³ Levels of comprehension vary significantly depending on label format,⁷⁴ age, and level of education.⁷⁵ Studies have shown that a significant proportion of consumers are unable to accurately perform calculations using nutrition information that would allow them to compare products, estimate nutrient and energy values for portion sizes, or assess the contribution of a particular product to their total consumption.⁷⁶ Lack of understanding is more common among low income, less educated, and some minority groups.⁷⁷ This is of particular concern given that these same groups also tend to be at higher risk for obesity.⁷⁸ Even among consumers who report that they

of the Working Group on Obesity, (2004), at part V.A.1, online: U.S. Food and Drug Administration <<http://www.cfsan.fda.gov/~dms/owg-toc.html>> [FDA, *Calories Count*].

⁷⁰ Gill Cowburn & Lynn Stockley, “Consumer Understanding and Use of Nutrition Labelling: A Systematic Review” (2005) 8 *Public Health Nutrition* 21 at 26-27; Ellen van Kleef, Hans C.M. van Trijp & Pieternell Luning, “Functional Foods: Health Claim-Food Product Compatibility and the Impact of Health Claim Framing on Consumer Evaluation” (2005) 44 *Appetite* 299 at 299; Cliona Ni Mhurchu & Delvina Gorton, “Nutrition Labels and Claims in New Zealand and Australia: A Review of Use and Understanding” (2007) 31 *Australian and New Zealand Journal Public Health* 105 at 111; A. Denny, “Stop, Think, Go? – Are Signposting Labelling Schemes the Way Forward?” (2006) 31 *Nutrition Bulletin* 84 at 86; Klaus G. Grunert & Josephine M. Wills, “A Review of European Research on Consumer Response to Nutrition Information on Food Labels” (2007) 15 *J. Public Health* 385.

⁷¹ Mhurchu & Gorton, *ibid.* at 110; Cowburn & Stockley, *ibid.* at 24, 26.

⁷² Mhurchu & Gorton, *ibid.*; Cowburn & Stockley, *ibid.*

⁷³ Cowburn & Stockley, *ibid.* at 23; George Baltas, “Nutrition Labelling: Issues and Policies” (2001) 35 *European Journal of Marketing* 708 at 712-13.

⁷⁴ Carol Byrd-Bredbenner, Angela Wong & Peta Cottee, “Consumer Understanding of US and EU Nutrition Labels” (2000) 102 *British Food Journal* 615; Baltas, *ibid.* at 713.

⁷⁵ Cowburn & Stockley, *supra* note 70 at 25; Baltas, *ibid.*; Russell L. Rothman *et al.*, “Patient Understanding of Food Labels: The Role of Literacy and Numeracy” (2006) 31 *Am. J. Prev. Med.* 391.

⁷⁶ See e.g. CSPI, “Petition”, *supra* note 69 at 6; Allen Pelletier *et al.*, “Patients’ Understanding and Use of Snack Food Package Nutrition Labels” (2004) 17 *Journal of the American Board of Family Medicine* 319 at 321-22; Cowburn & Stockley, *ibid.* at 25

⁷⁷ Pelletier *et al.* *ibid.*; Cowburn & Stockley, *ibid.* at 24-25; Mhurchu & Gorton, *supra*, note 70 at 110; Louise Signal *et al.*, “Perceptions of New Zealand nutrition labels by Māori, Pacific and low-income Shoppers” (2008) 11 *Public Health Nutrition* 1.

⁷⁸ 2004 Canadian Community Health Survey: Nutrition, cited in Margot Shields & Michael Tjepkema, “Trends in Adult Obesity” Health report (2006) 17:3 *Statistics Canada* 53 at 57; Lisa N. Oliver & Michael V. Hayes, “Effects of Neighbourhood Income on Reported Body Mass Index: an eight year

understand nutrition labels, some research has shown that objectively measured understanding is weak.⁷⁹ Other barriers to the effectiveness of nutrition labels are lack of time, lack of knowledge about nutrition, and a significant level of mistrust on the part of consumers.⁸⁰

A range of reforms have been proposed that could address one or more of the perceived weaknesses of our current approach to nutrition labelling. For example, one suggestion that has gained prominence in recent years is to extend mandatory nutrition information to restaurant and other ready-to-eat foods which are presently exempt,⁸¹ given that these constitute a significant and growing proportion of the food that is consumed by typical households in North America.⁸² While some restaurants provide nutrition information on a voluntary basis, there have been calls for mandatory disclosure in Canada and elsewhere.⁸³ For prepackaged foods that already carry mandatory nutrition information panels, we could attempt to manipulate one or more of the determinants of label use and impact, with the most likely targets being consumer knowledge and label format. Educational initiatives are likely to increase consumers' understanding and use of existing nutrition labels.⁸⁴ It may also be possible to modify the mandatory nutrition information panels to make them more effective. For example, it has been suggested that these panels should use a dual-column format, listing values both per serving and per

longitudinal study of Canadian Children" (2008) 8:16 BMC Public Health; G.M. Torrance, M.D. Hopper & B.A. Reeder, "Trends in Overweight and Obesity among Adults in Canada (1970 – 1992): evidence from national surveys using measured height and weight" (2002) 26 International Journal of Obesity 797 at 802; Mark S. Tremblay *et al.* "Obesity, Overweight and Ethnicity" Statistics Canada Health Reports 16:4 (2005) 23 at 26-27.

⁷⁹ See e.g. Mhurchu & Gorton, *supra*, note 70 at 110.

⁸⁰ *Ibid.*; CSPI, "Petition", *supra* note 69 at 6-7; Cowburn & Stockley, *supra* note 70 at 24; Ann D. Sullivan, "Determining How Low-Income Food Shoppers Perceive, Understand, and Use Food Labels" (2003) 64 Canadian Journal Dietetic Practice and Research 25 at 26-27; Baltas, *supra* note 73 at 710-11; Health Canada, Food and Nutrition, *Research: Nutrition Label Message Testing*, online: <http://www.hc-sc.gc.ca/fn-an/label-etiquet/nutrition/res-rech/mess_testing-verification_mess_e.html>; Signal *et al.*, *supra* note 77 at 711.

⁸¹ *Food and Drug Regulations*, *supra* note 18, s. B.01.401(2)(b)(vii).

⁸² Canada, Trans Fat Task Force, *TRANSforming the Food Supply, Final Report of the Trans Fat Task Force* (2006), online: Health Canada <http://www.hc-sc.gc.ca/fn-an/nutrition/gras-trans-fats/tf-ge/tf-gt_rep-rap-eng.php>; Scot Burton *et al.*, "Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants" (2006) 96 Am. J. Pub. Health 1669 at 1669.

⁸³ The most recent bill in Canada was Bill C-283, *An Act to amend the Food and Drugs Act (food labelling)*, 1st Sess., 39th Parl., 2006, (negatived 8 November 2006). For legislative initiatives in the United States, see The Keystone Center, *The Keystone Forum on Away-From-Home Foods: Opportunities for Preventing Weight Gain and Obesity* (Washington: The Keystone Centre, 2006), at 74, online: <http://www.keystone.org/spp/documents/Forum_Report_FINAL_5-30-06.pdf> [The Keystone Center].

⁸⁴ Byrd-Bredbenner, Wong & Cottee, *supra* note 74 at 627; Mhurchu & Gorton, *supra*, note 70 at 108; Signal *et al.*, *supra* note 77 at 711-12.

100g.⁸⁵ This would better enable consumers to judge what a product contributes to their overall consumption (using the per serving information) and to make comparisons between products (using the per 100g information). Both of these uses have value for obesity prevention and healthier consumption patterns more generally. There have also been calls for stricter regulation and enforcement of the serving sizes used in nutritional information panels.⁸⁶ Since (in the U.S. and Canada at least) all information in the panels is presented per serving, serving sizes are crucial and it is important that they accurately reflect the amount of the product that is likely to be consumed. Of particular concern is the tendency of some food packages to be labelled as containing several servings when in fact the entire contents of the package is likely to be consumed at one sitting; evidence suggests that many consumers misunderstand how much they are consuming in this situation.⁸⁷ This may be important from the perspective of preventing or reducing obesity, since these miscalculations may lead to over-consumption of certain foods, thereby contributing to energy imbalance and weight gain.

The proposals on labelling of prepackaged foods that have received the most attention recently involve regulation of “front-of-package” (FOP) labels, which supplement the nutrition information panels that are typically placed on the back or side of the package rather than on the principal display surface.⁸⁸ The interest in FOP labels stems from the fact that they may have a greater impact on consumer choices by virtue of being more readily accessible and, in most formats, simpler and easier to understand. They therefore have potential to increase the public health benefits of food labelling. At the same time, FOP labelling schemes developed by industry and non-governmental organizations continue to proliferate, leading to concerns that consumers are being confused and even misled by FOP labels and logos. Therefore, in Canada as in other jurisdictions, some have proposed stricter regulation of FOP labelling, including the introduction of mandatory, standardized FOP labels. These proposals will be the focus of the remainder of this article.

⁸⁵ C.S. Higginson *et al.*, “How Do Consumers Use Nutrition Label Information?” (2002) 32 *Nutrition & Food Science* 145 at 150; Beth Antonuk & Lauren G. Block, “The Effect of Single Serving Versus Entire Package Nutritional Information on Consumption Norms and Actual Consumption of a Snack Food” (2006) 38 *Journal of Nutrition, Education and Behaviour* 365. As noted above, Australia and New Zealand already require dual column nutrition labels.

⁸⁶ FDA, *Calories Count*, *supra* note 69 at part V.A.3.

⁸⁷ Pelletier *et al.*, *supra* note 76 at 322. In Canada this is primarily a question of enforcement since the regulations do set out when a package’s net quantity should be the stated serving size: see *CFIA Guide*, *supra* note 26 at 6-11.

⁸⁸ This is sometimes also referred to as principal display panel (PDP) or point of purchase (POP) labelling.

4. FRONT-OF-PACKAGE LABELLING

a. Proposals for front-of-package labelling schemes

In March 2007 the Parliamentary Standing Committee on Health released a report on childhood obesity in Canada entitled *Healthy Weights for Healthy Kids*, discussing the seriousness of the problem, its causes, and possible strategies for addressing it.⁸⁹ It made thirteen recommendations to the federal government, addressing both food consumption and physical activity. Concrete policy recommendations include the establishment of regulations limiting trans fats in food and exploring restrictions on food advertising to children. Of particular interest here is the Committee's third recommendation, which was the adoption of an additional labelling requirement for prepackaged foods, consisting of mandatory FOP labels with nutritional information. The Committee recommended that the federal government:

- Implement a mandatory, standardized, simple, front of package labelling requirement on pre-packaged foods for easy identification of nutritional value;
- Apply a phased-in approach starting with foods advertised primarily to children; and,
- Promote the new labelling requirement to parents through an aggressive media campaign.⁹⁰

The rationale behind this recommendation was that although the mandatory nutrition information currently provided is useful, "labels may still be too complicated and require too much time to decipher." In addition, the Committee concluded that a "proliferation of unregulated, front of package logos" was creating "confusion and mistrust among consumers." Therefore, a "simple front of package approach" may help consumers "make better food choices."⁹¹ This simplified labelling could use information already included in the required Nutrition Facts table.⁹² The government's response to this report indicated that consultations and reviews of relevant research would be undertaken to determine whether this recommendation should be adopted.⁹³ The consultations on health claims launched by Health Canada in November 2007 include some consideration of FOP

⁸⁹ *Supra* note 4.

⁹⁰ *Ibid.* at 22-23.

⁹¹ *Ibid.* at 22.

⁹² *Ibid.*

⁹³ Canada, Government of Canada, *Government Response to the Seventh Report of the Standing Committee on Health: Healthy Weights for Healthy Kids*, online: Committees of the House of Commons <http://cmte.parl.gc.ca/Content/HOC/committee/391/hesa/govresponse/rp3067091/391_hesa_rpt07_gr-e.html>.

labelling.⁹⁴ This initiative fits into a larger effort under way to reform Canada's regulatory framework for food products.⁹⁵

The model for the Health Committee's recommended approach is a scheme recently implemented by the UK Food Standards Agency (FSA). This "signposting" or "traffic light" system uses FOP labels showing a red, amber, or green light to represent high, medium, or low values of fats, saturated fat, salt and sugars.⁹⁶ For example, a food product high in fats and saturated fats, low in sugar, and moderate in salt, will bear two red symbols, one green symbol and an amber symbol. The labels can be tailored to suit the design of a manufacturer's or retailer's existing packaging, provided they meet the core requirements and assign colours according to FSA criteria.⁹⁷ The signposting format was adopted following several years of consumer research, and the FSA continues to study the signposting labels and alternatives, with a view to promoting as a single consistent approach whichever scheme that appears to be most effective.⁹⁸ To date, however, the signposting scheme has been implemented on a voluntary basis, and has received a mixed response from the food industry. A number of retailers and manufacturers have adopted the traffic light system,⁹⁹ but others have rejected it in favour of a competing scheme based on "Guideline Daily Amounts" (GDAs), which shows the amount and percentage of GDA for a limited number of nutrients (typically energy, fat, saturated fat, sugar, and salt).¹⁰⁰ Some within the food industry promote the GDA approach as being more informative for consumers, and argue that the traffic light scheme may lead to a crude categorization of food as either "good" or "bad", rather than promoting the consumption of a range of foods in moderation.¹⁰¹

⁹⁴ Health Canada, Food Directorate, Health Products and Food Branch, *Managing Health Claims for Foods in Canada: Towards a Modernized Framework - Discussion Paper* (2007) at 65-70, online: Health Canada <http://www.hc-sc.gc.ca/fn-an/alt_formats/hpfb-dgpsa/pdf/label-etiquet/man-gest_health_claims-allegations_sante-eng.pdf> [Health Canada, *Managing Health Claims*].

⁹⁵ Canada, Health Products and Food Branch Health Canada, *Towards a Regulatory Modernization Strategy for Food and Nutrition Health Canada Discussion Document* (2007), online: Health Canada <http://www.hc-sc.gc.ca/fn-an/alt_formats/hpfb-dgpsa/pdf/consultation/rmsfn-smran-eng.pdf>.

⁹⁶ U.K., Food Standards Agency, *Front-of-Pack Traffic Light Signpost Labelling: Technical Guidance* (Issue 2) (2007), online: Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/frontofpackguidance2.pdf>>.

⁹⁷ *Ibid.* Examples of labels from various companies can be viewed Food Standards Agency, *Traffic Light Labelling*, online: Food Standards Agency <<http://www.eatwell.gov.uk/foodlabels/trafficlights/>>.

⁹⁸ See U.K., Food Standards Agency, *Signpost Labelling Research*, online: Food Standards Agency <<http://www.foodstandards.gov.uk/foodlabelling/signposting/signpostlabelresearch/>>.

⁹⁹ A list of companies currently using the signposting scheme can be viewed U.K., Food Standards Agency, *Retailers, Manufacturers and Service Providers that use Signpost Labelling*, online: Food Standards Agency <<http://www.foodstandards.gov.uk/foodlabelling/signposting/retailtraffic>>.

¹⁰⁰ Denny, *supra* note 70 at 86.

¹⁰¹ See e.g. Gaynor Bussell, "Nutritional Profiling vs Guideline Daily Amounts as a Means of Helping Consumers Make Appropriate Food Choices" (2005) 35:5 *Nutrition and Food Science* 337.

There have been proposals for FOP labels in the FSA model to be made mandatory in Australia,¹⁰² New Zealand,¹⁰³ and the United States.¹⁰⁴ Thailand proposed a mandatory traffic light label for snack foods in 2006, though it later modified its proposed regulation to remove the traffic light colours in response to pressure from its trading partners.¹⁰⁵ Food Standards Australia New Zealand is studying a possible FOP label requirement, and since November 2006 has adopted a voluntary scheme which resembles the competing GDA approach favoured by industry rather than traffic light labels.¹⁰⁶ Similarly, the proposed new European regulation on food labelling includes a mandatory GDA-style FOP label; unlike in other countries, however, the FOP label would generally be the only mandatory nutrition label, rather than a supplement to a full nutrition information panel on the back of the package.¹⁰⁷ The FSA traffic light scheme was rejected for this purpose as being “oversimplified”,¹⁰⁸ though the EC regulation would leave open the possibility of other formats being developed at the national level.¹⁰⁹

These developments highlight two key questions relating to the Health Committee’s proposal: first, is there sufficient justification for a mandatory FOP label or other FOP labelling regulation; and second, what form should such a regulation take, given the controversy surrounding competing FOP labelling schemes?

b. The rationale for regulating front-of-package labelling

There are two main rationales for regulating FOP labelling. The first is that FOP labels appear to be able to overcome some of the weaknesses of our existing

¹⁰² Trevor C. Beard, Caryl A. Nowson, & Malcolm D. Riley, "Traffic-Light Food Labels" (2006) 186:1 Medical Journal of Australia 19; Paul Z. Zimmer & W. Phillip T. James, "The Unstoppable Australian Obesity and Diabetes Juggernaut: What Should Politicians Do?" (2006) 185:4 Medical Journal of Australia 187.

¹⁰³ Signal *et al.*, *supra* note 77 at 711.

¹⁰⁴ CSPI, “Petition”, *supra* note 69; “FDA Ponders Symbol Simplification” Tufts University Health and Nutrition Letter (December 2007) 3.

¹⁰⁵ See below at notes 238ff and accompanying text.

¹⁰⁶ Food Standards Australia New Zealand, *Final Assessment Report: Proposal P293: Nutrition, Health & Related Claims* (2008), at 63, online: Food Standards Australia New Zealand <http://www.foodstandards.gov.au/_srcfiles/P293%20Health%20Claims%20FAR%20and%20Att%201%20&%20%20FINAL.pdf>.

¹⁰⁷ EC, *Proposal for Regulation on Food Information*, *supra* note 52 at 8-9.

¹⁰⁸ Rory Watson, "Europe Opts Against Traffic Light System for Food Labelling" (2008) 336 British Medical Journal 296 at 296, quoting the European Commissioner for Health, Markos Kyprianou.

¹⁰⁹ EC, *Proposal for Regulation on Food Information*, *supra* note 52 at 9. European legislation would be required to make labelling mandatory, so national schemes would have to be voluntary: see House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 40 (19 February 2007) at 1040 (Deirdre Hutton).

labelling schemes, thereby making nutrition labels more effective. As noted above, two of the key barriers to effective use of the nutrition information panels are that consumers do not have time to read and process the information and many find them difficult to understand. A label on the front or principal display panel of a package would be seen and used more quickly and easily, and therefore is more likely to have an impact in the few seconds that consumers typically take to select a product.¹¹⁰ In addition, FOP labels typically contain a smaller amount of information, so that consumers can see certain key information at a glance. Some formats draw consumers' attention to information they might not otherwise have noticed or expected,¹¹¹ creating an opportunity to increase consumer awareness about particular nutrients. Depending on the format used, the label may contain a simple judgment or "profile" of the nutritional content of the product – for example, that the food is "healthy" or that it is "high" in fat – which eliminates the need for the consumer to make that assessment. These characteristics may be important to the impact of labelling, since it is theorized that the degree to which consumers seek and use label information depends on the marginal costs of searching for the information weighed against its marginal value or benefit.¹¹² If the costs can be reduced by minimizing the time and effort it takes to find and process the information, labels are more likely to affect consumer behaviour.

The second rationale for regulating FOP labels is that the recent proliferation of private labelling schemes may be confusing and even misleading to consumers, and therefore regulation is needed to ensure greater consistency and credibility. In Canada and other countries, there are many different FOP label formats in the marketplace designating "healthier" products according to various criteria. These include schemes designed by non-government organizations as well as manufacturers and retailers. Perhaps the best known is the Canadian Heart and Stroke Foundation's "Health Check" program. This program was first implemented in 1999, before nutrition labelling was mandatory in Canada.¹¹³ It is an example of

¹¹⁰ CSPI, "Petition", *supra* note 69 at 23; Tim Lobstein, Jane Landon & Paul Lincoln, *Misconceptions and Misinformation: The Problems with Guideline Daily Amounts (GDAs)* (London: National Heart Forum, 2007) at 13, online: National Heart Forum <<http://www.heartforum.org.uk/downloads/NHFGDAreport.pdf>>; Gerda I.J. Feunekes *et al.*, "Front-of-pack Nutrition Labelling: Testing Effectiveness of Different Nutrition Labelling Formats front-of-pack in Four European Countries" (2008) 50 *Appetite* 57 at 58.

¹¹¹ Navigator, "Front of Pack Signpost Labelling: Exploratory Research" (Report, April 2007) at 27, online: Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/singposteval.pdf>> [Navigator, "Exploratory Research"].

¹¹² Baltas, *supra* note 73 at 709.

¹¹³ See Shannon C. Smith *et al.*, "Food Information Programs: A Review of the Literature" (2002) 63:2 *Canadian Journal of Dietetic Practice and Research* 55; Robert D. Reid *et al.*, "The Heart and Stroke Foundation of Canada's Health Check Food Information Program: Modelling Programs Effects on Consumer Behaviour and Dietary Practices" (2004) 95:2 *Can. J. Public Health* 146.

what is known as a “food information program”¹¹⁴ or “endorsement program”.¹¹⁵ To receive authorization to use the Health Check trademark, a manufacturer applies to the Heart and Stroke Foundation with nutrition information for the relevant product, pays a licensing fee, and agrees to program requirements.¹¹⁶ The Health Check criteria are based on *Canada’s Food Guide*¹¹⁷ and the regulations for nutrient content claims.¹¹⁸

Many food manufacturers and retailers now also have their own FOP labelling schemes designating certain foods as healthier choices. For example, PepsiCo, which markets products under brand names including Quaker, Tropicana and Lays, uses the “Smart Spot” symbol to mark products “that meet nutrition criteria for contributing to healthier lifestyles”, based on U.S. Food and Drug Administration and National Academy of Sciences guidelines.¹¹⁹ Kraft has a program in which it places “Sensible Solutions” flags on the front of certain products. Its criteria are based on *Canada’s Food Guide* and the *Food and Drug Regulations*, as well as U.S. guidelines.¹²⁰ Kellogg’s recently introduced a program called “Get the Facts” which includes FOP labels similar to the GDA scheme used by some U.K. companies, showing the quantities of calories, fat, sodium, and sugar per serving.¹²¹ General Mills uses a “Goodness Corner” with icons representing various types of nutrition or health claims.¹²² In 2007, a global program called “Choices” was launched, which features a “simple tick logo” to indicate healthier choices as determined according

¹¹⁴ Smith *et al.*, *ibid.*; Reid *et al.*, *ibid.*; Young & Swinburn, *supra* note 67.

¹¹⁵ See Mhurchu & Gorton, *supra* note 70 at 106; Michael Rayner, Annette Boaz & Cathy Higginson, “Consumer Use of Health-Related Endorsements on Food Labels in the United Kingdom and Australia” (2001) 33 *Journal of Nutritional Education* 24.

¹¹⁶ Heart and Stroke Foundation of Canada, “How Health Check Works”, online: Health Check <<http://www.healthcheck.org/en/about-health-check/how-health-check-works.html>>.

¹¹⁷ Health Canada, *Eating Well with Canada’s Food Guide* (Ottawa: Health Canada, 2007), online: Health Canada <http://www.hc-sc.gc.ca/fn-an/alt_formats/hpfb-dgpsa/pdf/food-guide-aliment/print_eatwell_bienmang-eng.pdf>.

¹¹⁸ Heart and Stroke Foundation of Canada, “Nutrient Criteria”, online: Health Check <<http://www.healthcheck.org/en/nutritional-information/nutrient-criteria-grocery.html>>. The criteria have recently been revised; new products entering the program must meet the revised criteria immediately, while existing Health Check products have until the end of 2009 to comply.

¹¹⁹ PepsiCo, “How it Works: Smart Spot”, online: Smart Spot <http://www.smartspot.ca/how_it_works.aspx>.

¹²⁰ Kraft Canada, “The Sensible Solution Program”, online: Sensible Solution <<http://www.kraftcanada.com/en/ProductsPromotions/SensibleSolution/SensibleSolution.htm>>.

¹²¹ Kellogg Canada, News Release, “Nutrition Gets a Brand New Look” (4 October 2007), online: Kelloggs <http://www.kelloggs.ca/newsroom/pdfs/press_release100407.pdf>.

¹²² General Mills, “Goodness Corner”, online: General Mills <http://www.generalmills.com/corporate/health_wellness/your_health_detail.aspx?CatID=7780&SelectCatID=7780§ion=yourhealth>.

to criteria based on a compilation of national guidelines.¹²³ The Choices International Foundation, which will administer the program, was founded by a group of multinational food companies including Unilever, with the aim of providing a simple, unified approach to FOP labelling.¹²⁴ On the retail side, Canadian examples include the President's Choice "Blue Menu" program at Loblaws and Superstore grocery stores,¹²⁵ and Sobeys, which designates certain of its own-brand (Compliments) products with the "Compliments Balance" logo and coloured flags with the amount of calories and key nutrients (e.g. fat and protein) per serving,¹²⁶

Industry and endorsement programs are promoted as helping consumers make healthier choices and encouraging the development of healthier products.¹²⁷ Consumer demand for such programs seems to be strong: one study showed that food information program logos were three times more popular than full nutrition information panels.¹²⁸ However, the proliferation of these private schemes has raised concerns that they may confuse and mislead consumers. The sheer diversity of schemes makes it difficult for consumers to understand and compare them, since they use different logos and criteria, with varying levels of transparency.¹²⁹ Some critics believe these schemes are overly simplistic because they tend to suggest that certain foods are "healthy" (and others, by implication, "unhealthy"), and they fear that consumers will be encouraged to over-consume certain foods or believe that they can prevent or cure disease.¹³⁰ Given that the criteria are independently established by each organization, they may be inconsistent or flawed.¹³¹ Most of the schemes are also selective to some degree in the products to which they apply and in their criteria, which may emphasize some nutrients or characteristics over others. Consumers may mistakenly assume that products not carrying a logo are necessarily

¹²³ Mariska Dötsch-Klerk & Léon Jansen, "The Choices Programme: a Simple, Front-of-Pack Stamp Making Healthy Choices Easy" (2008) 17 *Asia Pacific Journal of Clinical Nutrition* 383 at 384.

¹²⁴ *Ibid.*

¹²⁵ Loblaws, "PC Blue Menu... Healthy Eating Made Easy", online: President's Choice <<http://www.presidentschoice.ca/FoodAndRecipes/HealthyLiving/AboutBlueMenu/>>.

¹²⁶ Sobeys, "Compliments Family of Products", online: Compliments <<http://sobey.compliments.ca/about/brands>>. Compliments Balance products also participate in the Health Check program.

¹²⁷ Rayner, Boaz & Higginson, *supra* note 115 at 24; Dötsch-Klerk & Jansen, *supra* note 123 at 384-85.

¹²⁸ Smith *et al.*, *supra* note 113 at 57.

¹²⁹ Health Canada, *Managing Health Claims*, *supra* note 94 at 67.

¹³⁰ Smith *et al.*, *supra* note 113 at 57.

¹³¹ Smith *et al.*, *ibid.*, at 57; CSPI, "Petition", *supra* note 69; Lobstein, Landon & Lincoln, *supra* note 110; Dietitians of Canada, "Evidence-Based Background Paper on Point-of-Purchase Nutrition Programs" (September 2006) at 17, online: Dietitians of Canada <<http://www.dietitians.ca/resources/resourcesearch.asp?fn=view&contentid=7017>>.

unhealthy.¹³² Furthermore, the payment of licensing fees affects the credibility of endorsement programs among consumers,¹³³ and there is some evidence that consumers mistrust industry schemes, which they view as self-serving.¹³⁴

Accepting that there may be at least some validity to these concerns, we need to consider whether existing legislation could be sufficient to address them, or whether further regulation is needed. Under the current legislative position in Canada, food manufacturers are generally free to choose the information and images they put on the front of a food package, provided they adhere to the regulations on health or nutrient content claims and the prohibitions on false, misleading and deceptive promotion. For example, if industry or endorsement labels include or amount to health or nutrition claims, they must conform to the prescribed criteria, format, and wording for the claims.¹³⁵ The labels may not state or give the impression that the food can prevent, treat, or cure a Schedule A disease, as this is contrary to s. 3(1) of the *Food and Drugs Act*.¹³⁶ This includes impressions that might arise indirectly, for example from a third-party name or logo in an endorsement program.¹³⁷ For this reason the Canadian Food Inspection Agency (CFIA) states that heart symbols or “heart healthy claims” are “generally not acceptable”.¹³⁸

An allegation that private FOP labelling schemes are misleading brings into play the prohibition in s. 5(1) of the *Food and Drugs Act* on labelling or advertising a food “in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.” As noted above, this prohibition is supplemented by similar provisions in the *Consumer Products Labelling Act*, the *Competition Act*, and provincial consumer protection legislation.¹³⁹ Vague positive statements or “exaggerated praise”, provided that they do not violate any specific provisions of the *Food and Drugs Act* or *Food and Drug Regulations*, may be considered “mere puffery” which

¹³² Dietitians of Canada, *ibid.*

¹³³ Smith *et al.*, *supra* note 113 at 57.

¹³⁴ Synovate, “Quantitative Evaluation of Alternative Food Signposting Concepts: Report of Findings” (November 2005) at 13, online: Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/signpostquanresearch.pdf>>; Navigator, “Concept Testing of Alternative Labelling of Healthy / Less Healthy Foods” (Research Report, November 2004) at 23-24, online: Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/alternlab.pdf>> [Navigator, “Concept Testing”]; Health Canada, *Managing Health Claims*, *supra* note 94 at 68.

¹³⁵ See above at notes 27ff and accompanying text.

¹³⁶ *Supra* note 12.

¹³⁷ CFIA, *2003 Guide*, *supra* note 26 at 8-17.

¹³⁸ *Ibid.* at 8-18.

¹³⁹ *Supra* notes 13, 15, and 16.

is tolerated in the promotion of consumer products.¹⁴⁰ However, labelling is misleading or deceptive if it would give a false impression regarding the labelled product or, by implication, regarding competing products. For example, labelling a product as “the purest possible” and with “no chemical additives” was found to imply that the competing product was not pure and contained chemical additives.¹⁴¹ Mislabelling a product as “pure” when it has been adulterated,¹⁴² or using the wrong description,¹⁴³ will offend the prohibition. The label wording may be misleading even if it is technically true,¹⁴⁴ and an omission may be misleading or deceptive.¹⁴⁵ The court’s assessment will take into account “the general impression conveyed by the representation as well as the literal meaning of the words used”,¹⁴⁶ looking at the label as a whole.¹⁴⁷ Case law on the analogous *Competition Act* provisions suggests that “whether or not a representation is misleading will be determined from a consideration of the representation in context and from the perspective of the average person to whom it was directed”.¹⁴⁸ Since misleading labelling is a strict liability offence,¹⁴⁹ it is not necessary to prove an intent to mislead, though a defence of due diligence can be raised.

It must therefore be considered whether private labelling schemes would be likely to mislead the average consumer, taking into account the words and symbols used and their context. The CFIA has stated, in relation to third-party endorsement programs, that they “may be considered misleading and deceptive when a food bearing an endorsement is perceived as being superior in terms of health, safety and/or nutrition to foods *not* bearing the endorsement.”¹⁵⁰ It suggests several measures to minimize the deceptive potential of such endorsements,¹⁵¹ which the

¹⁴⁰ *R. v. Stucky*, [2006] O.J. No. 4933 (Ont. Sup. Ct. Just.) at para. 76.

¹⁴¹ See e.g. *Church & Dwight Ltd. v. Sifto Canada Inc.*, [1994] O.J. No. 2139 (Gen. Div.) at para. 4.

¹⁴² *R. v. A.A. International Industries*, (1998) 224 A.R. 129 (Alta. Prov. Ct.), applying similar provisions in the *Canada Agriculture Products Act*, R.S.C. 1985, c. 20 (4th Supp.) and *Dairy Products Regulations*, SOR/79-840.

¹⁴³ *R. v. Steinberg’s Ltd.* (1977), 80 D.L.R. (3d) 741.

¹⁴⁴ *United States v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar*, 265 U.S. 438 at 443 (1924); *United States v. Watkins*, 278 F.3d 961 at 967 (9th Cir. 2002).

¹⁴⁵ *R. v. Stars Trading Co.*, 2003 BCSC 833.

¹⁴⁶ *R. v. Stucky*, *supra* note 140 at para. 69.

¹⁴⁷ *United States v. Article of Food Consisting of 432 Cartons, More or Less, each Containing 6 Individually Wrapped Candy Lollipops of Various Flavors*, 92 F. Supp. 839 at 841 (S.D.N.Y. 1968).

¹⁴⁸ *R. v. Stucky*, *supra* note 140 at para. 71.

¹⁴⁹ *R. v. Rube* (1991), 54 B.C.L.R. (2d) 106 (C.A.), *aff’d* [1992] 3 S.C.R. 159 (S.C.C.).

¹⁵⁰ CFIA, *2003 Guide*, *supra* note 26 at 8-17.

¹⁵¹ See *ibid.* at 8-18. Similarly, a CFIA decision on third party logos stated that it was not acceptable to use the logo of the Canadian Dental Association on sugar-free gum, along with a statement “Recognized by the Canadian Dental Association to be safe for teeth” because this would “imply that the gum is superior health-wise to others”, unless “the reason for the appearance of the logo is given, it is clearly shown that

Heart and Stroke Foundation appears to be following. For example, the text accompanying the Health Check logo states that the manufacturer provides financial support to the Foundation and that the logo is not an endorsement. However, it still seems at least plausible that the average consumer would be likely to perceive that products bearing the logo are “superior in terms of health... or nutrition” to foods without the logo. Similar concerns could be raised in regards to manufacturers’ schemes.

If the criteria used are sufficiently flawed that consumers would believe that products carrying a logo are healthier than other products when in fact there is no appreciable difference between them, this would likely amount to misleading or deceptive promotion. More difficult, though – and more likely – is the case where there is some relevant difference between products but there is disagreement about whether the products carrying a logo are actually healthy, since this is a relative and variable concept. Take, for example, the criticisms that products qualifying for the Health Check program include some that are high in sodium. Critics say that consumers should not be led to believe that these are healthy products; the Heart and Stroke Foundation’s response is that the Health Check products are generally lower in sodium than others.¹⁵² Similarly, the criteria for PepsiCo’s Smart Spot program could be criticized on the basis that they include (as one eligible category) products that have been formulated to have less fat, calories, sodium, or sugar, regardless of the total amounts of those nutrients, which could still be quite high.¹⁵³ The company would likely defend its program by saying that these products are healthier than the previously formulated versions – even if many would argue they still should not be considered healthy. In either of these cases, while the program criteria may be open to criticism, it is difficult to characterize the labels as misleading or deceptive in the usual sense, since there may be many different interpretations of what constitutes a “healthy” or “healthier” product. The fact that labelling may induce consumers to make choices that are less than ideal on public health grounds does not in itself make it misleading.

the third party does not endorse the product, and dietary guidelines are mentioned.” Canadian Food Inspection Agency, “Decision: ‘Third Party’ Logo on Sugar-Free Gum” (2006), online: Canadian Food Inspection Agency <<http://www.inspection.gc.ca/english/fssa/label/decisions/logoe.shtml>>.

¹⁵² Amanda Truscott, “Checking Up on Health Check” 178:4 Canadian Medical Association Journal 386 at 386. It would also likely respond that the Health Check criteria are based on the *Food Guide*, so any flaws in the criteria really just highlight the need to revisit parts of that guide: see House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 41 (21 February 2007) at 1550 (Sally Brown).

¹⁵³ PepsiCo, “How it Works: Smart Spot”, *supra* note 119; PepsiCo, “How it Works: Beverages”, online: Smart Spot <http://www.smartspot.ca/how_bev_criteria.aspx>; PepsiCo, “How it Works: Foods”, Smart Spot online: <http://www.smartspot.ca/how_food_criteria.aspx>; PepsiCo, “How it Works: Snacks”, online: Smart Spot <http://www.smartspot.ca/how_snack_criteria.aspx>.

It seems likely, therefore, that the prohibitions on false, misleading, and deceptive promotion would not reach labelling schemes that have been criticized as failing to promote healthy diets. In any case, relying on existing regulations to address the concerns raised by private FOP labelling schemes would require increased oversight and enforcement, which may not be realistic. Given that the CFIA has limited resources and responsibility for a wide range of matters, it seems unlikely that stricter scrutiny of FOP labelling will be a high priority for the agency. Private enforcement through litigation by competitors or consumers is possible,¹⁵⁴ but cannot be relied on to provide consistent oversight or to advance public health objectives. Furthermore, the existing legislation does not provide any remedy for the confusion resulting from the proliferation of different schemes, or the consumer scepticism that undermines their effectiveness. As a result, specific provisions may be required to regulate FOP labelling adequately, just as they were deemed to be necessary to address potentially misleading health and nutrition claims. The next step, therefore, is to consider what additional regulation might be most helpful.

c. Options for regulation of FOP labelling

In order to address the concerns that have been raised about the limited effectiveness of nutrition labelling and potential confusion resulting from diverse FOP labelling schemes, a change to the regulation of FOP labelling would have several objectives. First, it should aim to enhance the credibility of labels, since mistrust and scepticism will undermine the effectiveness of any scheme. Studies have shown that consumers prefer official schemes or endorsements because they are more credible.¹⁵⁵ Second, it should increase the consistency of labelling schemes, so that consumers can more easily understand what the labels mean and compare products. Evidence suggests that labels will have the greatest impact if they are consistent and familiar to consumers.¹⁵⁶ Third, regulation should ensure that FOP labels are valid indicators of the nutritional value and health benefits of food products, as judged according to objective, consensus-based criteria. For example, they should not lead consumers to believe that a product is healthy when a majority of informed, objective observers would disagree with that designation. This third objective will likely be the most difficult to achieve given the diversity of views on what constitutes a healthy food, but all three present some challenges.

Canada's Parliamentary Committee on Health recommended a mandatory, standardized, simple FOP label as a way of advancing these objectives and thereby contributing to obesity prevention. Although this proposal is reasonable, it is just one of a number of regulatory options available. In choosing between policy options

¹⁵⁴ Section 36 of the *Competition Act*, *supra* note 15, allows any person injured by a competition offence (which includes false or misleading representations) to sue for damage suffered as a result of the offence.

¹⁵⁵ Feunekes *et al.*, *supra* note 110 at 69; Navigator, "Concept Testing", *supra* note 134 at 25.

¹⁵⁶ Cowburn & Stockley, *supra* note 70 at 24.

for achieving public health objectives, we should consider their likely effectiveness, the burdens they impose and the distribution of those costs, and the degree to which they intrude on the rights of members of society.¹⁵⁷ The costs and intrusiveness of measures should be proportionate to their public health importance and impact.¹⁵⁸ As will be seen below, constitutional and trade law principles favour the least intrusive means likely to be effective. It is therefore important to review the range of policy options available and assess the advantages and disadvantages of each.

The first option would obviously be to maintain the status quo position, but from the discussion in the previous section it seems apparent that this would not be desirable, since there are a number of concerns with the present situation that even better enforcement would not address. Providing further “guidance to industry on conditions and wording that would help to ensure that claims are not misleading” would be useful,¹⁵⁹ but insufficient. The position taken by the Heart and Stroke Foundation in its submissions to the Parliamentary Committee on Health,¹⁶⁰ that the federal government should endorse the Health Check program and work with the Foundation to refine the *Food Guide*, might provide some advantages in terms of increased consumer confidence. Allowing a reputable non-governmental organization to operate the program on a cost-recovery basis would also have obvious advantages in terms of minimizing costs for government. However, this approach would not solve the problem of confusion resulting from multiple labelling schemes, since even if the Health Check program became a *de facto* official scheme, many industry actors are likely to continue to use their own schemes in addition to or instead of the Health Check, just as they do presently. Furthermore, unless significant changes are made to the program criteria, they will likely continue to attract criticism and scepticism. As long as the program is run by a private

¹⁵⁷ Nuffield Council on Bioethics, *Public Health: Ethical Issues* (Cambridge: Cambridge Publishers, 2007) at 41-42, online: <http://www.nuffieldbioethics.org/fileLibrary/pdf/Public_health_-_ethical_issues.pdf>; Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2000) at 99-107.

¹⁵⁸ Nuffield Council on Bioethics, *ibid.*, at 36, 42; Gostin, *Public Health Law*, *ibid.* at 92, 103.

¹⁵⁹ Health Canada, *Managing Health Claims*, *supra* note 94 at 69.

¹⁶⁰ House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 41 (21 February 2007) at 1555 (Sally Brown). Note that the Heart and Stroke Foundation has since also stated that it supports the Health Committee's recommendation of a single mandatory FOP labelling requirement, though it also maintains that the Health Check should be “the iconic program for Canada”: Heart and Stroke Foundation, Press Release, “Heart and Stroke Foundation urges government to act on childhood obesity report” (28 March 2007), online: <<http://www.heartandstroke.com/site/apps/nlnet/content2.aspx?c=ikQLcMWJtE&b=3485819&ct=4512785>>; Bretta Maloff, Letter to the editor (2008) 178 Canadian Medical Association Journal 1187 at 1187.

organization, the government will have limited control over the criteria and their alignment with its public health objectives.¹⁶¹

In order to exercise this control, another option is to regulate the criteria that may be used by private labelling programs. This would most likely take the form of a set of minimum or core nutritional criteria that must be met by any food product carrying an FOP label suggesting that it is a healthy choice. U.S. legislation takes this approach to regulated health claims,¹⁶² and to general nutritional claims that suggest that a food product helps to maintain a healthy diet (using the term “healthy” and its variations).¹⁶³ Health Canada is considering the adoption of similar provisions as part of its consultations on health claims regulation, and this reform would have an impact on FOP labels, especially if it includes core eligibility criteria for foods carrying general or implied health claims.¹⁶⁴ A variation on this option is that any product with a “healthy choice” label that does not meet certain minimum criteria must also carry a label disclosing this fact (e.g. disclosing the fat or sugar content of the product). This is the approach taken under U.S. regulations for nutrient content claims.¹⁶⁵ It allows consumers to be alerted to potential negative aspects of the product’s nutritional profile that may outweigh some of the benefits claimed in the FOP label. It leaves the choice with the consumer, who can then decide whether, on balance, the product is one that she should consume given her particular needs, rather than disqualifying products from the FOP program altogether. Therefore it is less restrictive and paternalistic, but its effectiveness relies on the ability and motivation of consumers to make these assessments.

The core criteria to be used in such a regulation would be determined based on national public health priorities; for obesity prevention, energy density (e.g. number of calories per gram or per serving) and fat and sugar content would be important. Finding agreement on these priorities and the criteria that would best promote them is likely to be the most challenging part of this approach. It may also be possible to use one of the various measures that have been developed to give an overall profile of the nutritional quality of foods,¹⁶⁶ provided that these are aligned closely enough

¹⁶¹ Mhurchu & Gorton, *supra* note 70 at 109.

¹⁶² 21 C.F.R. §101.14(e) (2006). Any food carrying a health claim must not exceed the prescribed maximum level for each nutrient listed in §101.14(a)(4) and must contain 10 per cent or more of the reference daily intake of vitamin A, C, iron, calcium, protein or fibre.

¹⁶³ 21 C.F.R. §101.65(d).

¹⁶⁴ Health Canada, *Managing Health Claims*, *supra* note 94 at 70-71.

¹⁶⁵ 21 C.F.R. §101.13(h)(1) (2006). If the food carrying a nutrient content claim reaches a threshold amount of fat, saturated fat, cholesterol, or sodium then there must be a disclosure statement on the package.

¹⁶⁶ See e.g. Adam Drewnowski & Victor Fulgoni, “Nutrient Profiling of Foods: Creating a Nutrient-Rich Food Index” (2008) 66 Nutrition Reviews 23; Adam Drewnowski, “Concept of a Nutritious Food: Toward a Nutrient Density Score” (2005) 82 Am. J. Clinical Nutrition 721; C.A.J. Nijman *et al.*, “A

with national public health needs. These approaches focusing on core eligibility criteria would have the main benefit of increasing the validity and consistency of criteria used in FOP programs, aiming to ensure that consumers are not misled as to the nutritional profile of products carrying FOP labels. If they are accompanied by a system of voluntary or mandatory review of criteria by a public agency, this would increase consumer confidence in the schemes. However, they would not make labelling formats more consistent, so some potential for confusion would still exist.

The next strategy to consider would be the introduction of an official but voluntary FOP labelling scheme. One possibility would be a voluntary standardized approach, similar to the traffic-light labelling scheme in the U.K. The food industry is not required to use the FSA-sponsored scheme, but criteria and guidelines for a standardized scheme are provided by the government agency. This approach increases consistency in labelling, but only to a certain degree, since some companies still prefer to use their own competing schemes. Validity and credibility would be enhanced for those using the official scheme, but not for competing schemes. In the U.K., the coexistence of multiple schemes continues to generate frustration and confusion among some consumers.¹⁶⁷ Because the scheme remains voluntary, it does not impose costs on industry, and for those choosing to participate, costs are lower since the government has borne the burden of formulating the criteria and testing the format. The FSA's approach also allows additional flexibility by setting basic criteria for the label format (particularly the use of the traffic light colours) while leaving other aspects of label design up to the individual company. Alternatively, using a standardized label would increase consistency at the cost of flexibility for producers. The regulatory burden for government in this approach would be modest, since it would develop criteria and guidelines but not enforce them or engage in individual product assessments.

An official scheme could also be voluntary but exclusive, meaning that FOP labels are not mandatory, but if they are used, they must conform to the official criteria and format. This is the approach used in Sweden for its "Green Keyhole" program, which has been in existence since 1989 and uses a standardized logo to designate foods meeting prescribed nutritional criteria.¹⁶⁸ This approach has the same advantages of a non-exclusive voluntary scheme, such as allowing companies

Method to Improve the Nutritional Quality of Foods and Beverages Based on Dietary Recommendations" (2007) 61 Eur. J. Clinical Nutrition 461.

¹⁶⁷ Navigator, "Exploratory Research", *supra* note 111 at 11, 20.

¹⁶⁸ Sweden, National Food Administration, "National Food Administration's Regulations on the Use of a Particular Symbol" (LIVSFS 2005:9), online: <http://www.slv.se/upload/nfa/documents/food_regulations/Keyhole_2005_9.pdf>; I. Larsson, L. Lissner & L. Wilhelmsen, "The 'Green Keyhole' Revisited: Nutritional Knowledge May Influence Food Selection" (1999) 52 Eur. J. Clinical Nutrition 776 at 776.

to implement the program according to their own timelines,¹⁶⁹ but eliminates the proliferation of competing schemes. It would make label formats consistent, which would increase consumer recognition and confidence, and ensure consistent and valid criteria. However, it may be resisted by industry as being too restrictive. With either of the voluntary approaches, there is a risk that the labelling scheme will be used selectively, with companies choosing to apply the label only to products or product categories that have favourable nutrition profiles. This may be misleading or confusing if consumers do not understand why some products carry the labels and others do not. Furthermore, research has shown that consumers mistrust labelling that they believe is applied only to products with positive nutrition profiles.¹⁷⁰

Finally, a more prescriptive mandatory approach could be taken, which requires food products to carry FOP labels using defined criteria and formats. Mandatory labelling could still allow for some flexibility in format, by setting guidelines that allow for companies to tailor the actual format to their packaging design, or it could have very specific regulations on content and format, similar to the nutrition facts panels. Moving from a voluntary to a mandatory scheme would address the problem of selective application and ensure consistency. Since the government would control the criteria, it could ensure that the labelling scheme provides valid indicators of nutritional value. The highest degree of consistency could be achieved by making the mandatory scheme an exclusive one, meaning that other labelling schemes would not be allowed to coexist with the official scheme. Though this has obvious advantages in terms of consumer recognition and understanding, it is also the most restrictive option and therefore would probably face significant resistance from industry. A mandatory scheme, especially an exclusive one, would likely best fulfill the objectives set out above, but whether that means it should be adopted will depend on the extent to which less intrusive schemes might also be effective. It may not be possible to determine this without further research to investigate the impact of labelling schemes and assess how important it is to the success of FOP labelling to ensure a high degree of consistency.

With either a voluntary or a mandatory scheme, a further decision would need to be made about the label format that should be adopted. There are many different kinds of FOP labels, which can be classified into three main types: labels with objective information only, such as the GDA scheme which essentially provides a simplified and selective version of the information in a full nutrition label for quick reference; simple positive symbols, like the Health Check or the Swedish Green Keyhole, which indicate healthier choices; and profiling labels, which provide an assessment of the product's nutritional characteristics (both positive and negative), such as the traffic light label. Each of these has its own proponents and set of

¹⁶⁹ House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 40 (19 February 2007) at 1050 (Rosemary Hignett).

¹⁷⁰ van Kleef, van Trijp & Luning, *supra* note 70 at 8.

advantages and disadvantages. Extensive research has been conducted in Europe and especially the U.K. to determine the best format for FOP labelling, though it has been recognized that measuring the effectiveness of FOP label formats is complex,¹⁷¹ and consumer preference cannot necessarily be equated with effectiveness.¹⁷² The choice of label format involves several different and even competing considerations, which must be weighed against each other.¹⁷³ For example, simple formats are useful and popular, but at the same time consumers also demand transparency (i.e., they want to know how the simple information was arrived at and what it means) and may reject labels that they see as too didactic or coercive.¹⁷⁴ Consequently, there is no single ideal format for FOP labelling, and the choice will be a compromise based on a judgment as to what factors are most important.

In the Canadian context, at least, an objective FOP label like the GDA scheme can be rejected at the outset in favour of one of the other two types. Although this was the preferred format for the new European labelling regulation,¹⁷⁵ in that context, the FOP labels are intended as alternatives rather than supplements to full mandatory nutrition labels. Since Canadian food products already carry nutrition facts panels, FOP labelling that duplicates some of that information would have the limited purpose of highlighting the information and making it easier to see. While this might have some marginal value, it does not really capture the benefits that FOP labelling is meant to provide. The GDA scheme has been criticized as flawed and misleading,¹⁷⁶ and in several U.K. tests, consumers found GDA labels to be confusing, redundant, and not much easier to use than nutrition information panels.¹⁷⁷ Adding colour coding to GDA labels significantly increased their test performance and popularity among consumers,¹⁷⁸ but this effectively transforms them into profiling labels, which will be discussed below.

A “healthy choice” type of mark has some advantages as a format for FOP labelling, but also some limitations. It is the simplest format, and provides only positive messages.¹⁷⁹ A recent industry-sponsored study found, not surprisingly, that the simplest formats allowed consumers to identify healthier products most quickly,

¹⁷¹ Feunekes *et al.*, *supra* note 110 at 69.

¹⁷² Baltas, *supra* note 73 at 714.

¹⁷³ Grunert & Wills, *supra* note 70 at 391.

¹⁷⁴ *Ibid.*; Navigator, “Concept Testing”, *supra* note 134 at 28, 31.

¹⁷⁵ EC, *Proposal for Regulation on Food Information*, *supra* note 52.

¹⁷⁶ Lobstein, Landon & Lincoln, *supra* note 110.

¹⁷⁷ Navigator, “Exploratory Research”, *supra* note 111 at 14, 20, 29; Which?, “Healthy Signs” (July 2006) at 10, online: <<http://www.which.co.uk/files/application/pdf/HealthysignsfinalJuly06-445-88449.pdf>>.

¹⁷⁸ Synovate, *supra* note 134 at 10-15.

¹⁷⁹ It would be possible to have a simple negative label, which would effectively be a warning label, but this does not seem to be under serious consideration as an option.

leading the researchers to conclude that they would be most effective in a supermarket environment where consumers face time constraints.¹⁸⁰ However, the simplicity of this format also brings with it some limitations: it may not be clear to consumers why certain products are considered healthy and what this means for them, and the scheme may only reinforce good habits that already exist, without prompting consumers to reconsider less healthy choices.¹⁸¹ Consumers may exaggerate or misinterpret the significance of the presence or absence of a logo, though this concern needs to be validated by further research.¹⁸²

The final category of FOP labelling schemes is nutrient profiling. Profiling aims to provide consumers with an assessment of the product's nutritional characteristics, with greater or lesser degrees of complexity. Simple profiling schemes would assign a single traffic light colour to the whole product based on an assessment of several criteria, or provide a score or rating (e.g. zero to five stars) for each product to reflect how healthy it is.¹⁸³ The U.K.'s multiple traffic light system is more complex, because it assigns a colour for each of the four targeted nutrients. Choosing between these different profiling schemes involves a trade-off between simplicity and ease of use, on one hand, and greater transparency and information, on the other. In U.K. studies, participants stated that the simple traffic light model was too simplistic, too didactic and more difficult to apply,¹⁸⁴ though some appreciated its simplicity and thought it would be likely to have an impact on consumption patterns.¹⁸⁵ From the regulator's perspective, it may be difficult to determine the criteria to be used for a simple profile rating.¹⁸⁶ The multiple traffic light format is seen by consumers as less prescriptive,¹⁸⁷ since it provides more information to facilitate the consumer's own choice about how to weigh the various components. However, the cost of this is that consumers may be less able to make consistent judgements about products using this information.¹⁸⁸ Where a product carries a mixture of traffic light colours, consumers may have difficulty deciding whether it is a good choice. Nonetheless,

¹⁸⁰ Feunekes *et al.*, *supra* note 110 at 67-68.

¹⁸¹ Navigator, "Concept Testing", *supra* note 134 at 38-39.

¹⁸² Dietitians of Canada, *supra* note 131 at 17, 24.

¹⁸³ See, for example, the 3-star rating scheme used by a U.S. supermarket as described in Centre for Science in the Public Interest, "Testimony of Bill Jeffrey, LLB, National Coordinator of the Centre for Science in the Public Interest, Before the House of Commons Standing Committee on Health on Measures to Reduce Rates of Childhood Obesity" (February 21, 2007) at 5, online: <http://www.cspinet.org/canada/pdf/healthcttee_oct2006_en.pdf>.

¹⁸⁴ Navigator, "Concept Testing", *supra* note 134 at 11-12, 27-28.

¹⁸⁵ *Ibid.* at 26-27.

¹⁸⁶ House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 40 (19 February 2007) at 1050 (Rosemary Hignett).

¹⁸⁷ Navigator, "Concept Testing", *supra* note 134 at 32.

¹⁸⁸ Feunekes *et al.*, *supra* note 110 at 64.

the multiple traffic light format has generally scored well in both performance and consumer preference in U.K. tests.¹⁸⁹ Other research has confirmed that consumers prefer colour-coded schemes.¹⁹⁰ The addition of verbal descriptors (e.g. high, low) has also been found to be helpful.¹⁹¹ For the more complex profiling schemes, it is crucial to choose the appropriate amount of information to include on the FOP label: a label with too little information may not serve adequately inform consumers, but including too much information will defeat the purpose of FOP labelling as a quick reference. For most purposes, limiting the profile to include fat, sugar, salt, and calorie content would best strike this balance. Though the U.K. multiple traffic light scheme does not include calories, these have been added by many companies using the scheme,¹⁹² and highlighting calorie content is believed to be important for promoting healthy weights.¹⁹³

Profiling approaches have been criticized, especially by industry, as unduly simplistic and subjective. As stated by a U.K. Food and Drink Federation representative, “[c]learly making a pre-judgment on food is subjective and cannot take into account all consumer needs.”¹⁹⁴ Signposting is said to provide a “narrow” and thus misleading picture of food products, and does not distinguish between individual needs.¹⁹⁵ It is feared that “red light” labels will cause consumers to avoid certain products altogether when that is not necessary or appropriate, or alternatively, that consumers will ignore these “over-simplistic” and “patronising” warnings.¹⁹⁶ However, in terms of the public health impact of FOP labelling, evidence suggests that consumers pay more attention to such negative signals than to positive ones,¹⁹⁷ so labels with “red flags” warning consumers of negative attributes might be more effective in altering consumption patterns. In order for these to be more widely used they would likely need to be mandatory, since manufacturers and retailers will understandably be reluctant to introduce labels that discourage consumers from buying some of their products. The corollary of this is that if mandatory FOP labelling is the preferred regulatory strategy, a profiling

¹⁸⁹ Navigator, “Concept Testing”, *supra* note 134 at 32-34; Synovate, *supra* note 134 at 10-15; Which?, *supra* note 177 at 4, 10.

¹⁹⁰ Grunert & Wills, *supra* note 70 at 392.

¹⁹¹ Cowburn & Stockley, *supra* note 70 at 24, 26; Baltas, *supra* note 73 at 713.

¹⁹² House of Commons Standing Committee on Health, *Evidence*, 39th Parl. 1st Sess., No. 40 (19 February 2007) at 1045 (Rosemary Hignett).

¹⁹³ Beard, Nowson & Riley, *supra* note 102 at 19; van Kleef, van Trijp & Luning, *supra* note 70 at 2; FDA, *Calories Count*, *supra* note 69 at part V.A.3.

¹⁹⁴ Bussell, *supra* note 101 at 338.

¹⁹⁵ *Ibid.* at 341.

¹⁹⁶ *Ibid.* at 341-42.

¹⁹⁷ Baltas, *supra* note 73 at 709-10, 711.

scheme would be the most suitable format, since the simple positive FOP logos will only apply to some products, and producers will likely use them voluntarily.

As should be clear from this discussion, the choice of an optimal regulatory strategy and format for FOP labelling is challenging, since it must balance several factors, and to be a well informed choice, would require more information than we have available about the relative impact of various schemes. In particular, there is a need for further research on consumer behaviour and responses to existing and potential FOP labelling schemes in the Canadian context, since studies from other jurisdictions with different population profiles and legislative environments may have limited value for Canadian policy decisions. The available information suggests that there are good reasons to introduce more stringent regulations, including, at a minimum, some controls on the criteria used in FOP labelling. There are also advantages to going further and prescribing exclusive or mandatory labelling, likely using some kind of profiling scheme. In order to make a fully informed decision, however, we should also consider the impact of potential legal barriers or challenges, which will be discussed in the following section.

5. POTENTIAL BARRIERS TO FRONT-OF-PACKAGE LABELLING PROPOSALS

a. Charter of Rights and Freedoms

Any mandatory labelling requirement or restriction on labelling could potentially be challenged as an infringement of the right to freedom of expression under the *Canadian Charter of Rights and Freedoms*.¹⁹⁸ Section 2(b) of the *Charter* provides that everyone has, as one of the fundamental freedoms, “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. When faced with a challenge under s. 2(b), the court will first look at whether the plaintiff’s activity falls within the sphere of conduct that is protected by that section, then determine whether the government’s action has restricted freedom of expression, either in purpose or effect.¹⁹⁹ The Supreme Court of Canada has interpreted “expression” broadly for the purposes of s. 2(b), to include any activity that conveys a meaning.²⁰⁰ It is by now well established that commercial speech is included within the scope of expression protected by s. 2(b).²⁰¹ However, the purpose of the expression and its relative value will affect the s. 1

¹⁹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹⁹ *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 40 [*Irwin Toy*].

²⁰⁰ *Ibid.* at para. 41.

²⁰¹ *Ibid.*; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232 [*Rocket*].

analysis if an infringement of s. 2(b) is established.²⁰² The Supreme Court of Canada has held that s. 2(b) also protects “the right to say nothing or the right not to say certain things”, and therefore may be infringed by compelled speech.²⁰³

Any of the regulatory strategies discussed above that involve restrictions on the use of FOP labels, such as exclusive official schemes (whether voluntary or mandatory) that prohibit the use of competing schemes, or provisions that restrict the use of FOP labels to products meeting core nutritional criteria, would *prima facie* infringe s. 2(b) by limiting expression. The prohibition on disease treatment and prevention claims in s. 3 of the *Food and Drugs Act* has been held to be an infringement of s. 2(b) since its purpose is “to control attempt to convey a meaning by directly restricting or prohibiting a particular content of expression in the name of protecting health”,²⁰⁴ the same reasoning would apply here.

A mandatory labelling requirement might also constitute a s. 2(b) infringement as a form of compelled speech. Whether or not compelled speech violates freedom of expression depends on whether the speaker has a meaningful opportunity to disavow the statement and whether the statement is publicly identified with the speaker.²⁰⁵ Under compelled speech, the essence of a violation is when people are forced to say something that they do not agree or associate themselves with. The Ontario Court of Appeal has held that a bylaw requiring restaurants to post the results of public health inspections (in the form of a notice attributed to the public health department) does not violate the restaurant owners’ freedom of expression, stating that “the Charter does not prohibit governments from communicating messages that contradict commercial messages.”²⁰⁶ However, a requirement to place unattributed messages on one’s packaging may violate s. 2(b), as did a provision requiring tobacco manufacturers to display unattributed health warnings on tobacco packaging in *RJR-MacDonald*.²⁰⁷ If the compelled speech also has the effect of restricting one’s ability to express one’s own view, this is likely to be seen as an infringement. For example, in *JTI-Macdonald* the Court held that “the requirement that manufacturers place the government’s warning on one half of the surface of [tobacco packages] arguably rises to the level of interfering with how they choose to express themselves. ...[therefore] s. 2(b) is infringed by the warning requirements in general, and specifically the requirement that 50 percent of the principal display

²⁰² *Rocket*, *ibid.* at para. 30; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] SCC 30 at paras. 68, 94, 115, 128 [*JTI-Macdonald*].

²⁰³ *Slaight Communication Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 92.

²⁰⁴ *R. v. Thomas Lipton Inc.* (1989), 26 C.P.R. (3d) 385 at 399-400 [*Lipton*].

²⁰⁵ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at para. 131.

²⁰⁶ *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)* (2005), 258 D.L.R. (4th) 447 at para. 11.

²⁰⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 124 [*RJR-MacDonald*].

surfaces of the package be devoted to the warnings.”²⁰⁸ Therefore, whether mandatory FOP labelling on its own would infringe s. 2(b) would depend on how prominent the labels were required to be in relation to the rest of the package, and whether manufacturers are permitted to attribute the messages on the label to a government body such as Health Canada. It is also possible that a mandatory label that includes only objective information generated by the manufacturers themselves (such as the amount of certain nutrients, for example), rather than a subjective characterization or profile of the product, might not infringe s. 2(b).²⁰⁹

Assuming, for the sake of analysis, that all of these types of regulations would be found to infringe s. 2(b), the outcome of a *Charter* challenge would depend on the s. 1 justification analysis. There should be no real difficulty in establishing that the public health basis for increased regulation of FOP labelling constitutes a pressing and substantial objective under s. 1, given the seriousness of obesity and diet-related chronic diseases as threats to public health in Canada. Preventing harms to human health that might result from consumers being misled as to the health benefits of food products has specifically been held to be a pressing and substantial objective.²¹⁰

The proportionality analysis, however, may present some challenges. At this stage the *RJR-MacDonald* and *JTI-Macdonald* cases, among others, have highlighted how important it is for the government to have and bring forward adequate evidence to justify its chosen measures. In particular, evidence of effectiveness (whether from experience in Canada or with similar provisions in other jurisdictions) will help to establish a rational connection between the measures and the objective. Such evidence, and ideally evidence comparing the effectiveness of various alternative approaches, will also help to persuade the Court that the government has chosen minimally impairing measures. As in many *Charter* cases involving public health, the outcome of the s. 1 analysis will depend partly on how strict the courts will be in demanding evidence of efficacy and a scientific basis for the regulations to satisfy the rational connection and minimal impairment tests.²¹¹

Provided that the regulation of FOP labelling is reasonably well designed, it should not be difficult to establish that it is rationally connected to the objective of promoting healthier diets. A complainant might argue that labelling regulation is

²⁰⁸ *JTI-Macdonald*, *supra* note 202 at para. 132.

²⁰⁹ See a similar argument by LaForest J. in *RJR-MacDonald*, *supra* note 207 at para. 115, though the majority in that case did not agree with his characterization of the tobacco warning label requirements (at para. 124, 190).

²¹⁰ *Lipton*, *supra* note 204 at 401-402.

²¹¹ See generally Barbara von Tigerstrom, “Healthy Communities: Public Health Law at the Supreme Court of Canada” in J. Downie and E. Gibson, eds., *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007) 81.

not rationally connected to public health objectives because, as discussed above, the evidence that labelling influences dietary patterns is relatively weak. However, there is at least some evidence to suggest a potential impact on public health, which should be sufficient to establish rational connection. The Supreme Court has accepted that in complex matters involving social science evidence, definitive proof of a causal relationship is not necessarily required;²¹² logic and common sense can be sufficient to establish a rational connection where the evidence is inconclusive.²¹³ Another risk at this stage of the analysis would be if the regulations were not targeted carefully enough, leaving them open to a charge of arbitrariness. For example, if the regulations prohibit certain FOP labelling messages on the basis that they undermine public health objectives while allowing or requiring others that are not substantially different, a complainant could assert that they are arbitrary and thus not rationally connected to their objective. McNaughton and Goodridge have argued that the Canadian regulations on health claims are arbitrary “in allowing only [certain prescribed] statements to be made, and not allowing others that may be equally supportable by the current state of medical evidence.”²¹⁴ In upholding the prohibition on treatment and prevention claims, the Court in *R. v. Thomas Lipton Inc.* emphasized that the list of diseases to which the prohibition applies was not chosen arbitrarily.²¹⁵ It will be important to consider carefully the criteria and format used in any FOP labelling regulation to ensure that the distinctions they draw can be justified on public health grounds.

As is often the case, the minimal impairment test is where the government is most likely to encounter difficulties in the s. 1 analysis, depending on the measures chosen. The 1995 Supreme Court of Canada decision in *RJR-MacDonald* struck down a provision requiring tobacco manufacturers to display unattributed health warnings on the packaging of tobacco products.²¹⁶ A major concern in that case appeared to be that the legislation required that the warnings be unattributed; both of the majority judges questioned whether this was a minimal impairment of the right to freedom of expression as required under s. 1 of the *Charter*, speculating (in the absence of evidence to the contrary from the government) that attributed warnings might be just as effective.²¹⁷ McLachlin J. also questioned whether it was necessary to “prevent the appellants from placing on their packaging any information other than that allowed by the regulations”.²¹⁸ This suggests that

²¹² *RJR-MacDonald*, *supra* note 207 at paras. 67, 127, 137, 184.

²¹³ *Ibid.* at paras. 85, 154, 184-85.

²¹⁴ Elizabeth L. McNaughton & Christopher M. Goodridge, “The Canadian Approach to Freedom of Expression and the Regulation of Food and Drug Advertising” (2003) 58 Food & Drug L.J. 521 at 534.

²¹⁵ *Lipton*, *supra* note 204 at 404.

²¹⁶ *Tobacco Products Control Act*, S.C. 1988, c. 20, s. 9.

²¹⁷ *RJR-MacDonald*, *supra* note 207 at paras. 172-74, 190.

²¹⁸ *Ibid.* at para. 173-74.

regulatory options that involve limiting companies' ability to add their own FOP labels (i.e. voluntary exclusive or mandatory exclusive schemes) will be more vulnerable to challenge. In the later case of *JTI-Macdonald*, however, the Supreme Court of Canada upheld a requirement that tobacco products carry prescribed health warnings covering 50 per cent of the principal display surface of the package. There was evidence suggesting that larger warnings may be more effective, and Parliament was not required to choose a less effective alternative if its chosen measure fell within a range of reasonable alternatives.²¹⁹

A key difference in the outcomes of these two cases was the evidence brought forward by the government to justify its measures. Just as in the rational connection analysis, a court is unlikely to insist on scientific certainty here. In relation to health claims, McNaughton and Goodridge have suggested that in the minimal impairment analysis, the courts would likely take a deferential approach "to the government's evaluation of scientific evidence and permit the government to make the determination as to those health claims that can be substantiated by scientific evidence and those health claims that require more proof."²²⁰ The minimal impairment analysis does not require conclusive proof that the means chosen are the only ones that will be effective, nor does it demand that less intrusive measures have been tried unsuccessfully. However, the government should at least be able to show that it has considered alternative means of achieving its objectives, and has some reasonable basis for concluding that they will not be effective.²²¹ In order to justify the more intrusive options reviewed above (such as mandatory or exclusive official labelling schemes), the government should have some evidence substantiating the concerns that have been raised about consumers being misled or confused by private schemes and the impact this may have on consumption patterns. At present, these concerns are largely based on assumptions and anecdotal evidence, so the evidence base may not be strong enough to justify the most prescriptive approaches. Though a sympathetic court applying a flexible minimal impairment analysis might uphold such measures, in order for the government to be confident in this outcome, it would be advisable to seek further evidence and carefully review all of the regulatory options before undertaking any reform.

In the final step, assessing the proportionality of the beneficial and detrimental effects of the legislation, it is possible that economic harm to manufacturers from a restrictive FOP labelling scheme could be considered as a relevant harm.²²² However, unless this harm is demonstrated to be significant, and the public health

²¹⁹ *JTI-Macdonald*, *supra* note 202 at para. 137.

²²⁰ McNaughton & Goodridge, *supra* note 214 at 535.

²²¹ The lack of such evidence was emphasized as a key difficulty in *RJR-MacDonald*, *supra* note 207 at paras. 152, 155, 163, 165, 167, 191.

²²² See *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, *supra* note 206 at para. 15 (though in that case there was insufficient evidence of such harm).

benefit from the labelling provisions appears to be marginal, it is likely that a court would find that the health benefits outweigh the potential economic harms. The other potential harm would be interference with the complainant's expressive interest. The proportionality analysis will take into account the nature and purpose of the expression, and weigh its value against the purpose of the infringing measure.²²³ In *JTI-Macdonald*, the infringement was held to be proportional to the objective since there were clear benefits from the warning labels whereas the "detriments to the manufacturers' expressive interest in creative packaging [were] small".²²⁴ The Court stated that when commercial expression was allegedly being used "for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous."²²⁵ However, commercial expression is generally seen having some value, since it plays an important role in informing consumers, and this is especially so where its purpose has a significant element of public interest as well as profit.²²⁶ It has been suggested that this the case for health claims,²²⁷ and the same would arguably apply to other FOP labelling that claims to inform consumers of health benefits. A measure restricting this type of moderately valuable expression is still likely to be seen as proportionate to its objectives if it furthers an important public health purpose.

To summarize, any restriction on labelling would infringe s. 2(b), and a mandatory labelling requirement likely would as well, though this is less certain. The government should be able to successfully defend any of the regulatory strategies reviewed above as justified under s. 1 of the *Charter*. However, poorly targeted or excessively restrictive measures could be vulnerable at the rational connection or minimal impairment stages of the analysis. By analogy with the tobacco legislation cases, a requirement for unattributed information to be placed on labels or exclusivity provisions preventing companies from supplementing prescribed labels with their own are most likely to be seen as overly intrusive. The government should be prepared to justify its chosen measures as being supported by the available evidence and more effective than less restrictive alternatives.

b. International trade issues

Another potential barrier to regulating front-of-package labels may be Canada's commitments under international trade law, in particular the WTO Agreement on Technical Barriers to Trade (TBT Agreement).²²⁸ These obligations are designed

²²³ See e.g. *Rocket*, *supra* note 201 at para. 30.

²²⁴ *JTI-Macdonald*, *supra* note 202 at para. 139.

²²⁵ *Ibid.* at para. 47.

²²⁶ *Rocket*, *supra* note 201 at para. 30-31.

²²⁷ McNaughton & Goodridge, *supra* note 214 at 536.

²²⁸ *Agreement on Technical Barriers to Trade*, Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 [*TBT Agreement*]. The *General Agreement*

to ensure that product regulation does not restrict trade any more than is necessary to achieve legitimate policy objectives like health, safety, or consumer protection. As part of this, they encourage the harmonization of technical regulations.

The TBT Agreement is binding on all WTO members and applies to technical regulations and standards. A “technical regulation” is defined as a “[d]ocument which lays down product characteristics or their related processes and production methods ... with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”²²⁹ “Standards” are similar to technical regulations except that they are not mandatory; they are subject to less stringent obligations focusing on the process by which they are developed, adopted and applied.²³⁰ A purely voluntary, non-exclusive labelling scheme would fall into this category and thus not be subject to any substantive rules. However, it is clear that any mandatory legislation regarding labelling of food products would fall within the definition of technical regulations. Decisions from the WTO dispute settlement process have stated that labelling provisions are technical regulations, regardless of their content,²³¹ and that it does not make any difference for the purposes of the application of this Agreement whether the regulation is presented in positive or negative terms (i.e., a requirement or a prohibition).²³²

Member states must comply with a set of requirements regarding both the content of technical regulations and the processes used to develop, monitor, and enforce them. The first substantive requirement is that of non-discrimination: technical regulations must give equally favourable treatment to imported and domestic products, and to products of all member states.²³³ Governments must

on *Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187, incorporated into WTO Agreement as the *General Agreement on Tariffs and Trade 1994*, Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3, would also be applicable but the disciplines of the *TBT Agreement* are more rigorous and therefore more critical to assess. Similar issues could also arise under Part 3 of the *North American Free Trade Agreement*, 27 December 1992, 32 I.L.M. 289 [NAFTA], but since the *NAFTA* provisions on this point are generally similar to those in the *TBT Agreement*, this discussion focuses on the latter to give an indication of the issues that are likely to arise.

²²⁹ *TBT Agreement*, *ibid.*, annex I, para. 1.1

²³⁰ *Ibid.*, art. 4. Both technical regulations and standards are subject to obligations with respect to the manner in which compliance with them is assessed (arts. 5-8) and the provision of information and assistance to other states (art. 10).

²³¹ *European Communities – Trade Description of Sardines (Complaint by Peru)* (2002), WTO Doc. WT/DS231/AB/R at paras. 189-192 (Appellate Body Report) [*EC – Sardines*]; *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)* (2005) WTO Doc. WT/DS290/R at paras. 7.449-7.450 (Panel Report) [*EC – Trademarks and Geographical Indications*].

²³² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc. WT/DS135/AB/R at para. 69 (Appellate Body Report) [*EC – Asbestos*].

²³³ *TBT Agreement*, *supra* note 228, art. 2.1.

ensure that technical regulations are not “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade” and are not “more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create.”²³⁴ The TBT Agreement encourages international harmonization of technical regulations through two key provisions. First, Article 2.4 provides that where relevant international standards exist, members must use them as “a basis for” their technical regulations unless they would be ineffective or inappropriate. Second, Article 2.5 creates a rebuttable presumption that where technical regulations are “in accordance with” international standards, they do not “create an unnecessary obstacle to international trade” (i.e. they are consistent with Article 2.2).

A number of issues relating to food labelling have been raised under the TBT Agreement. The two major disputes decided under this Agreement to date have involved food labelling: the *EC – Sardines* case, dealing with the names used on sardine labels, and the *EC – Trademarks and Geographical Indications* case, dealing with labelling countries of origin on agricultural and food products.²³⁵ In meetings of the Committee on Technical Barriers to Trade (TBT Committee), which oversees the Agreement, numerous issues regarding food labelling have also been discussed. The TBT Committee provides a forum for member states to discuss issues and raise concerns about proposed regulations of other members.²³⁶ In recent meetings of the Committee, the United States has taken issue with proposed regulations by Thailand regarding the labelling of snack foods. In 2006, Thailand proposed to require snack foods (e.g. potato chips or biscuits) to carry special labels advising that “Children Should Take Less” and including traffic light symbols for energy, sugar, fat and sodium.²³⁷ The proposal was amended in 2007 to remove the traffic light symbol component and change the message (“Should consume less, and exercise for better health”), apparently in response to pressure from the United States and other trading partners.²³⁸ At the March 2007 meeting of the TBT Committee, the United States requested clarification of the criteria used to identify

²³⁴ *Ibid.*, art. 2.2.

²³⁵ *EC – Sardines*, *supra* note 231; *EC – Trademarks and Geographical Indications*, *supra* note 231.

²³⁶ According to art. 2.9 of the *TBT Agreement*, *supra* note 228, members are required to notify each other of technical regulations that may have a significant effect on trade if the regulations are not in accordance with international standards or no relevant international standards exist; they are also required to provide further information upon request and receive and consider comments from other members.

²³⁷ WTO, Committee on Technical Barriers to Trade, *Notification*, WTO Doc. G/TBT/N/THA/215 (2006), online: WTO <http://docsonline.wto.org/gen_home.asp?language=1&_=1>.

²³⁸ U.S., United States Trade Representative, *2008 National Trade Estimate Report on Foreign Trade* (2008) at 546, online: <http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_NTE_Report/Section_Index.html?ht=>>.

foods to which the requirement would apply, and the scientific basis for the ranges used to designate low, medium, and high levels for the colour grades. It also expressed concern that the traffic light labels could mislead consumers, in particular that a food carrying the label “would be ‘demonized’ whereas this food could be part of a healthy diet if eaten in moderation.”²³⁹ In November 2007, the United States continued to express concerns about the proposed snack food labels, despite the fact that the proposal had been modified to remove the traffic light colours. It argued that the regulation would not be an effective way of promoting a healthy lifestyle, and continued to question the criteria used to identify foods subject to the labelling requirement.²⁴⁰

This experience indicates that Canada should be prepared for some resistance from its trading partners, and in particular the United States, if it moves ahead with a new FOP labelling regulation before other jurisdictions. It is therefore important to assess whether a proposed regulation could withstand a challenge under the TBT Agreement. Assuming that any labelling requirement would be applied uniformly to domestic products and to imports from any country of origin, the non-discrimination obligation does not appear to be an issue. More likely arguments are that a regulation prescribing or restricting FOP labels is not based on international standards, and that it is more trade restrictive than necessary to accomplish its objectives.

For the purpose of food labelling, the most relevant international standards would be those of the Codex Alimentarius Commission (Codex), a joint Food and Agriculture Organization (FAO) and World Health Organization (WHO) body responsible for developing food standards. The Codex *General Standard for the Labelling of Prepackaged Foods* contains general requirements such as the name of the food, a list of ingredients, and the country of origin;²⁴¹ it also proscribes food labelling that is “false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect.”²⁴² This standard is supplemented by the *Guidelines on Nutrition Labelling*.²⁴³ According to these Guidelines, nutrient declarations (such as the nutrition facts panel) should be voluntary unless

²³⁹ WTO, Committee on Technical Barriers to Trade, *Minutes of the Meeting* (held on 21 March 2007), WTO Doc. G/TBT/M/41, at para. 14, online: WTO <http://docsonline.wto.org/gen_home.asp?language=1&_=1>.

²⁴⁰ WTO, Committee on Technical Barriers to Trade, *Minutes of the Meeting* (held on 9 November 2007), WTO Doc. G/TBT/M/43, at paras. 76-77, online: WTO <http://docsonline.wto.org/gen_home.asp?language=1&_=1>.

²⁴¹ Codex Alimentarius Commission, *General Standard for the Labelling of Prepackaged Foods*, Codex Stan 1-1985, Rev. 1-1991, (1991) at ss. 4.2-4.8, online: FAO <<ftp://ftp.fao.org/docrep/fao/005/y2770E/y2770E00.pdf>>.

²⁴² *Ibid.* at s. 3.1.

²⁴³ Codex Alimentarius Commission, *Guidelines on Nutrition Labelling*, CAC/GL 2-1985, Rev. 1-1993, (1993), online: FAO <<ftp://ftp.fao.org/docrep/fao/005/y2770E/y2770E00.pdf>>.

a nutrition claim is made.²⁴⁴ The Guidelines do not directly address FOP labelling, but do state that “supplementary nutrition information” should be optional and should be used in addition to rather than in place of the nutrient declaration, except for populations with low rates of literacy or knowledge of nutrition, where the use of symbols or colours without the nutrient declaration might be appropriate.²⁴⁵ By requiring mandatory nutrition labelling Canada (among others) is already exceeding the Codex Guidelines; making FOP labels mandatory as a supplement to the nutrition information panels would also go beyond what is currently recommended. The Guidelines are presently under review, with proposed changes under consideration including making nutrient declarations mandatory.²⁴⁶ However, any amendments may be years away, and there does not seem to be any consensus favouring mandatory or even standardized FOP labels.²⁴⁷

A departure from the Codex Guidelines may make it difficult for Canada to defend a FOP labelling regulation if it is challenged on the grounds that it is not based on relevant international standards and that it is more trade-restrictive than necessary. On the first point, there is a threshold question as to whether the Guidelines have the status of an international standard for the purposes of the TBT Agreement. Codex adopts both “standards” and “guidelines”, and at present the legal distinction between them, if any, is unclear.²⁴⁸ Assuming that the Guidelines are a relevant international standard, Canada is required under Article 2.4 to use it as the basis for its technical regulations. This has been interpreted as meaning that there must be a “strong and very close relationship” between the international standard and the regulation, and that the standard must be used as the fundamental principle underlying the regulation.²⁴⁹ Canada could argue that the same principles

²⁴⁴ *Ibid.* at s. 3.1.

²⁴⁵ *Ibid.* at s. 4.2.

²⁴⁶ Codex Alimentarius Commission, Codex Committee on Food Labelling, “Matters Referred by the FAO and WHO: Implementation of the WHO Global Strategy on Diet, Physical Activity and Health” Codex Doc. CX/FL 08/36/3 36th Sess., (2008).

²⁴⁷ *Ibid.* at 7.

²⁴⁸ This issue is under consideration by the Codex Committee on General Principles, but has yet to be resolved: Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Report of the Twenty-fourth Session of the Codex Committee on General Principles*, ALINORM 07/30/33 30th Sess., (2007) at Appendix XII. The committee overseeing the Agreement on Sanitary and Phytosanitary Measures, *Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 [SPS Agreement], which contains similar language, has apparently taken the position that there is no difference between standards, guidelines, and recommendations for the purpose of that agreement: Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Report of the Thirteenth Session of the Codex Committee on General Principles*, ALINORM 99/33, 32nd Sess., (1998) at para. 50.

²⁴⁹ *EC – Sardines*, *supra* note 231 at paras. 240-45. See also *EC – Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States and Canada)* (1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R at paras. 163-166 (Appellate Body Report) interpreting similar language in the *SPS Agreement*, *ibid.*

and objectives (consumer protection and public health) underlie the Codex Guidelines and its regulation. However, WTO jurisprudence has also made clear that where a domestic regulation actually contradicts the content of an international standard, it cannot be said to be based on that standard.²⁵⁰ If Canadian regulations prescribe a mandatory FOP label while the Codex Guidelines state that any supplementary nutrition information should be optional, this may be found to violate the Article 2.4 obligation.²⁵¹

Article 2.4 provides an exception whereby members are not required to use relevant international standards as the basis for domestic regulations where those standards would be “ineffective or inappropriate” to fulfill legitimate objectives. Examples given include where international standards are ineffective or inappropriate due to “fundamental climactic or geographic ... or technological factors.” It is unlikely that Canada could point to any such factors to argue that the Codex Guidelines on Nutrition Labelling would not be effective or appropriate; it could, however, use evidence regarding nutrition labelling, FOP labelling, and their potential impact to challenge the effectiveness of the Guidelines in addressing the serious public health objectives of preventing obesity and diet-related disease. The fact that the member complaining about its regulation would bear the burden of showing that the Guidelines *are* appropriate could work in Canada’s favour on this point,²⁵² but if Canada plans to argue that the position taken in the Codex Guidelines was not sufficient to address the problem of consumers being confused or misled by industry FOP labelling schemes, it should be able to bring forward some evidence regarding consumer understanding and behaviour.²⁵³

Even if the measure were accepted as being based on international standards, it is unlikely that it would be considered to be in conformity with an international standard so as to benefit from the presumption that is a least trade-restrictive measure under Article 2.5. There is no real question that the public health and consumer protection objectives of FOP labelling regulations would be considered legitimate objectives for the purposes of the TBT Agreement. Examples of legitimate objectives listed in the Agreement itself include both “the prevention of deceptive practices” and protection of human health and safety.²⁵⁴ The more

²⁵⁰ *EC – Sardines*, *supra* note 231 at para. 250-58.

²⁵¹ It should be noted that WTO dispute resolution panels are not bound by the interpretations and positions of panels in previous cases, though these will clearly have persuasive value.

²⁵² *EC – Sardines*, *supra* note 231 at para. 275. See Michael Ming Du, “Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization” (2007) 6:2 Chinese Journal of International Law 269 at 296; Jan McDonald, “Domestic Regulation, International Standards, and Technical Barriers to Trade” (2005) 4:2 World Trade Review 249 at 263.

²⁵³ An analogy could be drawn with the *EC – Sardines* case, *supra* note 231, in which the EC attempted to make an argument regarding misleading labelling, in the absence of any evidence of consumer expectations: see McDonald, *ibid.* at 265.

²⁵⁴ *TBT Agreement*, *supra* note 228, art. 2.2.

difficult question is whether the measure would be considered more trade-restrictive than necessary to achieve its objectives. Other countries could argue that the need to place a special FOP label on food products destined for the Canadian market acts as a barrier to trade, and that the labelling regulation is not really necessary because there are other means available to encourage healthier diets. Jurisprudence interpreting other WTO agreements has held that a measure is necessary if it contributes to an important objective and there is no less trade-restrictive measure reasonably available that would achieve the same objective effectively.²⁵⁵ Therefore it could be argued, for example, that the status quo position or a voluntary standard for FOP labels would be equally effective, with a lesser impact on trade. Moving up the ladder of increasingly stringent regulatory approaches, regulating the criteria for FOP labels would be easier to justify than mandatory or exclusive labelling schemes, which are most vulnerable to an argument that they are unnecessarily trade-restrictive.

As the global consensus, as reflected in the Codex Guidelines, continues to evolve in favour of mandatory nutrition labelling and greater use of labelling regulations for public health purposes, it will become easier for states to implement more extensive labelling schemes. As is always the case, states that take the lead in developing new regulatory approaches will bear the burden of defending measures that depart from the status quo. If the evidence in favour of FOP labelling regulation is sufficiently strong to justify a policy change at the domestic level and to survive a *Charter* challenge, however, Canada should also be able to defend its position internationally. Therefore, while there is some risk of a trade dispute if a new regulation is developed, this need not deter the government from acting, but should merely provide an additional incentive to scrutinize carefully the evidence supporting any action that is taken.

6. CONCLUSION

The controversy surrounding FOP labelling schemes reflects the complexity of the regulatory options and the range of interests that are at stake. In an area where simplicity seems the key to effective communication, choosing the policy that best achieves public health objective while minimizing costs is anything but simple. At a minimum, there seems to be sufficient justification to abandon the status quo position and begin imposing some basic criteria for FOP labelling schemes that

²⁵⁵ See e.g. *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by Australia and the United States)* (2000), WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R at paras. 159-162 (Appellate Body Report); *EC – Asbestos*, *supra* note 232 at paras. 170-74; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua)* (2005), WTO Doc. WT/DS285/AB/R at paras. 304-311 (Appellate Body Report); *Australia – Measures Affecting Importation of Salmon (Complaint by Canada)* (1998), WTO Doc. WT/DS18/AB/R at para. 194 (Appellate Body Report).

purport to signal healthier products. The status quo position is not adequate to address the range of concerns that have been raised in response to the proliferation of competing labelling schemes. Prescribing minimum core criteria would give consumers some confidence in the validity of those schemes. In order to ensure consistency in labelling, however, it will be necessary to take additional steps and introduce either an exclusive voluntary scheme or a mandatory scheme. Although such schemes are more restrictive, and therefore more vulnerable to challenge under the *Charter* or international trade agreements, they can more fully achieve the objectives of consistency, credibility, and validity. It seems, therefore, that a good case can be made for introducing more extensive regulation, though it would be helpful to have better evidence to support this initiative. In particular, we should seek to determine the extent and significance of the confusion that is believed to exist among Canadian consumers who are confronted with an array of different symbols and claims.

The choice of criteria and format for any proposed labelling scheme will also require careful consideration. Given the difficulty of defining a healthy diet for individuals, let alone at the population level, getting consensus on criteria that are appropriate to use for a national FOP labelling scheme is bound to be challenging. It is also quite clear that there is no single ideal format for FOP labels, though Canada can take advantage of consumer testing and analysis undertaken elsewhere to narrow the field. On the basis of this research, a simple positive symbol or some type of profiling scheme seems most promising. Profiling offers some advantages but further effort will be required to determine the format that best balances simplicity and transparency and complements our nutrition facts panels. It will be essential to collect evidence on this issue that is specific to the Canadian context, since studies conducted with different populations in different regulatory environments may not be fully applicable.

Whatever approach is taken to FOP labelling, it is also important to keep this issue in perspective and consider how it fits into our overall approach to obesity and diet-related health conditions. These complex problems demand long-term, multifaceted solutions, requiring us to make judicious use of our time, energy, and resources. In order to be most effective, any labelling scheme will need to be accompanied by extensive public awareness and education campaigns, so we must be prepared to invest in these. We should also not abandon efforts to make mandatory nutrition information labels more effective, for example by regulating portion sizes or adopting a dual column format. Reforms to labelling laws must be part of a coordinated strategy to address the range of barriers to healthy eating. Unrestricted advertising may undermine the effectiveness of a new labelling scheme, and encouraging healthier choices through labelling will be useless if those choices are beyond the means of many individuals who are most at risk. Food labelling, even at its most effective, can have only a limited impact, and must be part of a systematic effort to facilitate healthier eating and more active lifestyles for all Canadians.