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**The Impacts of the Comprehensive
Economic and Trade Agreement on
Canadian Patent and Trademark Law**

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Abstract

The Comprehensive Economic and Trade Agreement (CETA) is a bilateral deal between the European Union and Canada that covers many fields including intellectual property. This paper analyses some of the major changes in patent and trademark law, which the Canadian legislator and government had to implement in order to comply with CETA. The first part of this paper concentrates on the protection and enforcement of pharmaceutical patents in Canada whereas the second part covers the country's compliance with international trademark treaties and the protection of geographical indications.

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Introduction

The government of Canada describes the Comprehensive Economic and Trade Agreement (CETA) as “a progressive free trade agreement which covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers.¹” It is, therefore, no great surprise that Cecilia Malmström, the current European Commissioner for Trade, has described it as “one of the most ambitious and progressive trade agreements the EU has ever concluded.²” Upon examining the CETA, one realizes that Commissioner Malmström is not exaggerating. The CETA’s scope is broad, its goals ambitious and its benefits already visible after a little over a year of provisional application; trade between Canada and the EU has reportedly already increased 6.1% over the equivalent pre-CETA period³.

In order to further strengthen the application of CETA, both the EU and Canada have to adjust their domestic laws on different issues. Accordingly, Canada saw Bill C-30⁴, entitled *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for*

¹ Government of Canada, *CETA: A progressive trade agreement for a strong middle class*, September 27th 2018, <<http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng>> accessed 27 December 2018

² European Commission, ‘Guide to the Comprehensive Economic and Trade Agreement (CETA)’, Luxembourg, Publications Office of the European Union, July 2017, 35 p., <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf> accessed 27 December 2018, p.

³ Government of Canada, *CETA benefits already visible a year after its entry into force*, September 21st 2018, <https://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/year_one-premiere_annee.aspx?lang=eng> accessed 27 December 2018

⁴ House of Commons of Canada, *Bill C-30 An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*, First reading, First Session, Forty-second Parliament, October 31st 2016, <<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-30/first-reading>> accessed 27 December 2018

certain other measures, introduced to its House of Commons on October 31, 2016, just one day after CETA was signed⁵. The Bill obtained the Royal Assent on May 15, 2017, making the implementation measures officially part of national Canadian law. The central purposes of the bill and its resultant statute⁶ are (1) to establish the free trade area in accordance with CETA⁷, and (2) to develop strong economic relations with the EU by promoting fair competition practices⁸ and investment⁹ and eliminating barriers in the trade of goods and services¹⁰.

Another aim of the *Canadian-European Union Comprehensive Economic and Trade Agreement Implementation Act* (hereinafter *Implementation Act*) is to “provide adequate and effective protection and enforcement of intellectual property rights in the territory where the Agreement applies.¹¹” Consequently, Canada had to modify some of its intellectual property (IP) rules in order to comply with the obligations it agreed to fulfill. Indeed, CETA deals with many issues relating to IP, namely data protection, patents, pharmaceuticals, plants, copyrights, industrial designs, geographical indications and trademarks¹². As these topics represent a considerable amount of material to cover, this

⁵ Andrew Montague, Kenneth Ma, ‘CETA bringing changes to pharma patents in Canada’, *Canadian Lawyer*, Thomson Reuters, April 24th 2017, <<https://www.canadianlawyermag.com/article/ceta-bringing-changes-to-pharma-patents-in-canada-3605/>> accessed 27 December 2018

⁶ *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act* (hereinafter *Implementation Act*), SC 2017, c 6, <<https://www.canlii.org/en/ca/laws/astat/sc-2017-c-6/latest/sc-2017-c-6.html>> accessed 27 December 2018

⁷ *Ibid.*, art. 7(a)

⁸ *Ibid.*, art. 7(c)

⁹ *Ibid.*, art. 7(d)

¹⁰ *Ibid.*, art. 7(e)

¹¹ *Ibid.*, art. 7(f)

¹² Laurent Carrière, ‘Le projet de loi C-31 et ses implications sur la pratique en matière de marques de commerce: un survol et quelques réflexions très préliminaires’, (2014) 26 *Les Cahiers de la propriété intellectuelle* 655, <<https://www.lescpi.ca/articles/v26/n2/le-projet-de-loi-c-31-et-ses-implications-sur-la-pratique-en-matiere-de-marques-de-commerce-un-survol-et-quelques-reflexions-tres-preliminaires/>> accessed 27 December 2018, p. 659

study will concentrate on the two areas of IP that have seen, and will continue to see, the most significant changes in Canadian law. The first part of this essay will examine the modifications to the Canadian patent regime concerning pharmaceuticals, and the second part will focus on the new rules governing trademark law with a special emphasis on the geographical indications.

1. Patent Law

The *Implementation Act*, in its summary, states it is amending the *Patent Act*¹³ by:

“(i) creat[ing] a framework for the issuance and administration of the certificates of supplementary protection, for which patentees with patents relating to pharmaceutical products will be eligible, and
(ii) provid[ing] further regulation-making authority in subsection 55.2(4) to permit the replacement of the current summary proceedings in patent litigation arising under regulations made under that subsection with full actions that will result in final determinations of patent infringement and validity.¹⁴”

Pharmaceutical patent owners or seekers of such patents will be amongst the people witnessing the most important changes in the IP landscape. CETA aims to improve IP rights relating to pharmaceutical patents by ensuring that innovators have a right of

¹³ *Patent Act*, RSC 1985, c P-4, <<https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-p-4/latest/rsc-1985-c-p-4.html>> accessed 27 December 2018

¹⁴ *Implementation Act*, *supra* note 6, Summary (b)

appeal concerning a marketing authorization decision and by introducing a patent term restoration system¹⁵. We will now examine what these statements imply in practice.

1.1. Supplementary protection

The first notable modification to the *Patent Act* concerns the longevity of protection for pharmaceutical products. In order to comply with art. 20.27 of CETA concerning *sui generis* protection of pharmaceuticals¹⁶, Canada found a solution to the administrative delays of approval from Health Canada by introducing a patent term restoration system¹⁷. Before CETA, there were many occurrences where Health Canada could not deliver regulatory approval within the twenty year period of the patent validity¹⁸. In response to this marketing difficulty, a Certificate of Supplemental Protection was introduced. A CSP, coming into force at the expiration date of the patent, provides an additional two year protection period for the pharmaceutical product, given that it has not been invalidated or annulled within the timeframe of patent validity¹⁹. As the rights conferred by a CSP are mostly convergent with that of patent protection, it is important to note they differ on one important aspect: the rights conferred by a CSP “are enforceable only

¹⁵ ‘Guide to the Comprehensive Economic and Trade Agreement (CETA)’, *supra* note 2, p. 13

¹⁶ European Commission, ‘CETA chapter by chapter’, August 24th 2018, <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>> accessed 27 December 2018

¹⁷ ‘Impact of the Comprehensive Economic and Trade Agreement on Intellectual Property Law in Canada’, *Langlois lawyers LLP*, September 17th 2015, <<https://langlois.ca/impact-of-the-comprehensive-economic-and-trade-agreement-on-intellectual-property-law-in-canada/>> accessed 27 December 2018

¹⁸ *Ibid.*

¹⁹ Andrew Montague, Kenneth Ma, *supra* note 5; David Turgeon, ‘Les répercussions de l’AECG et du projet de loi C-30 sur le domaine de la propriété intellectuelle au Canada : Changements importants apportés aux lois canadiennes sur les brevets et les marques de commerce’, *Fasken LLP*, December 5th 2016, <<https://edoctrine.caij.qc.ca/publications-cabinets/fasken/2016/a80862/fr/PC-a97150>> accessed 27 December 2018

against one particular medicinal ingredient and cannot be used to block exports of drugs from Canada.²⁰ It is also worth noting that a CSP will not have a retroactive effect, therefore excluding medication that is already available for sale in Canada from its protection²¹. Canada's CSP is similar to the additional protection certificate offered by the European Economic Area²².

1.2. Litigation

The second aspect in which Canadian patent law has undergone major changes is the litigation process for patent disputes. In Canada, a generic drug manufacturer must obtain authorization from Health Canada according to the Patented Medicines Notice of Compliance Regulations (PMNOC) before becoming a player in the market²³. The patent holder for the original drug, via a summary proceeding in front of the Federal Court, can object to the delivery of such a certificate with a PMNOC Application²⁴. The problem, pre-CETA, arose when the initial innovator was unsuccessful before the Federal Court – for she or he had no right of appeal, whereas the generic manufacturer, if unsuccessful,

²⁰ David Turgeon, *supra* note 19

²¹ John Norman, Monique M. Couture, James Holtom, 'CETA: Impact On Canada's IP Regime', *Gowling WLG*, November 11th 2013, <<http://www.mondaq.com/canada/x/274142/international+trade+investment/CETA+Impact+On+Canadas+IP+Regime>> accessed 27 December 2018

²² Laurence MacPhie, Herman Cheung, 'Bilan 2017 sur le droit en matière de propriété intellectuelle dans le domaine des sciences de la vie', *Bereskin & Parr LLP*, March 15th 2018, <<https://edoctrine.caij.qc.ca/publications-cabinets/bereskin/2018/a99622/fr/PC-a111473>> accessed 27 December 2018; European Commission, 'Supplementary protection certificates for pharmaceutical and plant protection products', *Internal Market, Industry, Entrepreneurship and SMEs*, <https://ec.europa.eu/growth/industry/intellectual-property/patents/supplementary-protection-certificates_en> accessed 27 December 2018

²³ Andrew Montague, Kenneth Ma, *supra* note 19

²⁴ *Ibid.*

could appeal to the Federal Court of Appeal²⁵. The innovator had to start formal proceedings from the beginning on the grounds of patent infringement under the *Patent Act*, leading to dual litigation²⁶. Given the non-final nature of PMNOC decisions, even if the generic manufacturer was successful in the summary proceeding, he or she could still be the object of a patent infringement action, thereby not guaranteeing him or her the right to manufacture the generic drug until the decision was final²⁷.

Art. 20.28 of CETA states that patent linkage mechanisms relating to pharmaceutical products “shall ensure that all litigants are afforded equivalent and effective rights of appeal.” In response to this stipulation, art. 55.2(4) of the *Patent Act* concerning the powers of the Governor in Council to enact regulations regarding the prevention of patent infringement was modified. The provision now reads more broadly, giving the Governor the responsibility of making regulations that “*directly or indirectly, could result or results*” in infringement of patents described in art. 55.2(1). The regulations can cover anything from conferring rights of actions²⁸ to overseeing procedural aspects²⁹, therefore ensuring the Governor has enough discretion to comply with the obligations set forth in CETA by replacing the old-fashioned procedure with one that grants a right of appeal for the innovator with a possible counterclaim by the generic manufacturer³⁰.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ ‘Impact of the Comprehensive Economic and Trade Agreement on Intellectual Property Law in Canada’, *supra* note 17

²⁸ *Patent Act*, RSC 1985, c P-4, art. 55.2(4)(g)

²⁹ *Patent Act*, RSC 1985, c P-4, art. 55.2(4)(j)

³⁰ Andrew McIntosh, Michael Burgess, ‘Litiges en propriété intellectuelle : Revue de l’année 2017’, *Bereskin & Parr LLP*, February 20th 2018, < <https://edoctrine.caij.qc.ca/publications-cabinets/bereskin/2018/a99622/fr/PC-a111737> > accessed 27 December 2018

2. Trademark Law

The other major change in Canadian IP law concerns trademark regulations. The *Implementation Act* states it is amending the *Trade-marks Act*³¹ to:

- “(i) protect EU geographical indications found in Annex 20-A of the Agreement,
- (ii) provide a mechanism to protect other geographical indications with respect to agricultural products and foods,
- (iii) provide for new grounds of opposition, a process for cancellation, exceptions for prior use for certain indications, for acquired rights and for certain terms considered to be generic, [...]”³²

Notwithstanding these legislative modifications, more actions must be taken by Canada in order to fully achieve the aims of CETA. In addition to the procedural requirements found in subsection (iii) and the recognition of EU geographical indications in subsection (i), Canada must also align itself with the international community regarding trademark protection and regulation.

³¹ *Trade-marks Act*, RSC 1985, c T-13, <<https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-t-13/latest/rsc-1985-c-t-13.html>> accessed 27 December 2018

³² *Implementation Act*, *supra* note 6, Summary (c)

2.1. Compliance with international treaties

The CETA states: “Each Party shall make all reasonable efforts to comply with Articles 1 through 22 of the Singapore Treaty on the Law of Trademarks [...] and to accede to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.³³” It is clear this was aimed to force Canada to accede to the international treaties regulating IP practices. Indeed, as a result of a combination of different circumstances, Canada has yet to join many important treaties regulating IP law. As it has now modified its trademark framework, Canada will be able to accede to three major treaties regulating trademark by June 17, 2019³⁴, namely the Singapore Treaty and the Madrid Agreement (as is encouraged by CETA) and the Nice Agreement^{35,36}. Even though CETA only requires both parties to accede to the Madrid Agreement and “make all reasonable efforts to comply with Articles 1 through 22 of the Singapore Treaty”, it is commendable Canada is finally aiming to align its trademark, and more broadly IP, management with the rest of the world. The three international agreements aforementioned were submitted to Parliament on January 27, 2014³⁷.

³³ ‘CETA chapter by chapter’, *supra* note 16, art. 20.13

³⁴ That is, when the legal modifications come into force: Government of Canada, ‘Joining the Singapore Treaty, the Madrid Protocol and the Nice Agreement, and Modernizing Canada’s Trademarks Regime – An overview’, November 14th 2018, <<https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04260.html>> accessed 27 December 2018

³⁵ *Ibid.*

³⁶ Similar measures have been taken to accede to the Patent Law Treaty: Government of Canada, ‘Connecting Canada to the World: Intellectual Property Treaties’, September 26th 2017, <<https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04258.html>> accessed 27 December 2018

³⁷ Laurent Carrière, *supra* note 12, p. 660

The World Intellectual Property Organization (WIPO) has announced that Canada is expected to join the Madrid System, currently composed of 103 other countries, in early 2019³⁸ (confirming Canada's claim that it will be able to do so by June 17, 2019)³⁹. This will permit Canadian businesses and innovators to file trademark protection requests in numerous countries at once by applying through WIPO with one single document. As for the Nice Agreement, since September 28, 2015, trademark applicants have the possibility of using the Nice classification, but this procedure remains entirely voluntary as the legal modifications, as previously mentioned, have yet to come into force⁴⁰. Details regarding the accession to the Singapore Treaty and how it will likely affect Canada remain scarce to this date.

2.2. Geographical indications

No consensus has yet been reached in the worldwide legal community as to the status of geographical indications (GIs). A GI is “a sign that indicates a product is from a specific geographic area, [...] and that the product has distinct qualities, a reputation or characteristics that are directly traceable to its geographic origin.”⁴¹ Should GIs be

³⁸ World Intellectual Property Organization (WIPO), ‘Canada Announces Plan to Accede to Madrid Protocol’, August 3rd 2018, <https://www.wipo.int/madrid/en/news/2018/news_0009.html> accessed 27 December 2018

³⁹ World Intellectual Property Organization (WIPO), ‘Samoa Joins the Madrid System’, *Madrid System-News*, December 4th 2018, <https://www.wipo.int/madrid/en/news/2018/news_0015.html> accessed 27 December 2018

⁴⁰ Government of Canada, ‘Nice Classification, September 28th 2015, <<http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03977.html>> accessed 27 December 2018

⁴¹ Bassem Awad, Marsha S. Cadogan, ‘CETA and the Future of Geographical Indications Protection in Canada’, *Center for International Governance Innovation*, CIGI Papers No. 131, Waterloo, Ontario,

perceived as part of IP law? Are competition and commercial law better suited to regulate them? What is certain is that a GI cannot be registered as a trademark, but they certainly influence trademark law.

GI regulations in Canada are contained in articles 11.11 through 11.2 of the *Trademark Act*. These articles, before the legislative modifications, were not very constraining, and they rendered it fairly easy to use GIs as trademarks. Furthermore, few GIs were recognized in Canada as compared to in the EU. In Canada, potential GIs are published in the *Canada Gazette*⁴², and any third party may oppose them within three months of publication. However, the only possible ground of opposition is that “the GI was not really a GI.”⁴³ Exceptions to opposition of the use of GIs are generic names, common name and trademarks⁴⁴. GIs were not framed effectively under the old regime and were not very well known⁴⁵. CETA now defines a GI as

“an indication which identifies an agricultural product or foodstuff as originating in the territory of a Party, or a region or locality in that territory, where a given

Canada, May 2017, 14 p.,

<https://www.cigionline.org/sites/default/files/documents/Paper%20no.131_WEB_0.pdf> accessed 27 December 2018, referring to *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, art 22.1 [*TRIPS Agreement*], <https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm> accessed 27 December 2018, p. 1

⁴² Government of Canada, ‘Canada Gazette’, <<http://www.gazette.gc.ca/accueil-home-eng.html>> accessed 27 December 2018

⁴³ Isabelle Jomphe, ‘Un nouveau paysage à l’horizon : les indications géographiques’, (2017) 29-1 *Les Cahiers de la propriété intellectuelle* 75, <<https://www.lescpi.ca/articles/v29/n1/un-nouveau-paysage-a-lhorizon-les-indications-geographiques/>> accessed 27 December 2018, p. 79

⁴⁴ *Ibid.*, p. 81

⁴⁵ On an anecdotal note, an IP law course at University Laval in winter 2018 completely skipped articles concerning GIs from the trademark segment of the lecture. This can be explained by the lack of jurisprudence and therefore importance attributed to this topic in Canada (see Jomphe, *supra* note 43, p. 78).

quality, reputation or other characteristic of the product is essentially attributable to its geographical origin.⁴⁶”

Canada’s modified definition in art. 60 of the *Implementation Act*, replacing the older definition of the *Trademark Act*, mirrors the CETA definition almost perfectly⁴⁷.

One hundred and seventy one new GIs were added to the Canadian list to comply with CETA, including many varieties of cheese (e.g., Parmagiano Reggiano and Roquefort), cold meats (e.g., Prosciutto di Parma, Prosciutto di Modena, Jambon de Bayone) and oils (e.g., Kalamata Olive Oil)⁴⁸. It is therefore not permissible to use these new GIs in Canada unless the labeled products actually meet the required standards of these appellations⁴⁹, and it is furthermore impossible to register these names as trademarks. These new GIs entered the list on September 21, 2017⁵⁰.

As was the case prior to these additions, some exceptions remain. For instance, art. 7.6(5) of CETA states that an established trademark before the entry into force of the modifications are not affected by them⁵¹. Manufacturers using the terms Feta, Gorgonzola, Asagio, Fontina and Munster before October 18, 2013 can therefore continue using these names; their use is also permitted when combined with “in the style

⁴⁶ *Trade-marks Act*, RSC 1985, c T-13, art. 20.16

⁴⁷ “an indication that identifies a wine or spirit, or an agricultural product or food of a category set out in the schedule, as originating in the territory of a WTO Member, or a region or locality of that territory, if a quality, reputation or other characteristic of the wine or spirit or the agricultural product or food is essentially attributable to its geographical origin; (*indication géographique*).”

⁴⁸ Isabelle Jomphe, *supra* note 43, p. 84; Government of Canada, ‘Text of the Comprehensive Economic and Trade Agreement – Annex 20, October 24th 2016, <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/20-A.aspx?lang=eng#a>> accessed 28 December 2018

⁴⁹ *Ibid.*

⁵⁰ Canadian Intellectual Property Office, ‘List of Geographical Indications’, August 12th 2016, <<http://www.ic.gc.ca/cipo/listgiws.nsf/gimenu-eng?readForm&sort=all&ord=3>> accessed 27 December 2018

⁵¹ Isabelle Jomphe, *supra* note 43, p. 86

of”, “type”, or another comparable designation⁵². Jambon de Bayonne, Fromage Roquefort and Nürnberger Bratwurst, if they had been used for a certain period before October 18, 2013 are also amongst the exceptions⁵³. Other terms are also permitted, on the condition that they are not used in a way that deceives consumers⁵⁴. For example, translations of GIs are permitted; Black Forest Ham can therefore be used in French and English, but not in German⁵⁵. Customary names for plants and animal breeds are not affected⁵⁶. The “common name” exception to opposition remains and art. 11.18(4.1) of the *Implementation Act* provides an exhaustive list of GIs in agricultural products or foods that can still be registered even if they do not meet the required standards⁵⁷. These exceptions clearly illustrate that the protection of GIs in Canada, even following the legislative modifications, is not as effective as it is in the EU. This brief overview of the modifications demonstrates the effectiveness of GI protection is still at an embryonic stage in Canada.

Conclusion

This note demonstrates that CETA will have great impacts on the future of pharmaceutical patents and geographical indications in Canada. Patent seekers, companies, and legal advisors will therefore need to align their practice with the new

⁵² *Ibid.*

⁵³ *Ibid.*, p. 86, 87

⁵⁴ *Ibid.*, p. 87

⁵⁵ *Ibid.*; John Norman, Monique M. Couture, James Holtom, *supra* note 21

⁵⁶ *Ibid.*

⁵⁷ “(a) Valencia Orange; (b) Orange Valencia; (c) Valencia; (d) Black Forest Ham; (e) Jambon Forêt Noire; (f) Tiroler Bacon; (g) Bacon Tiroler; (h) Parmesan; (i) St. George Cheese; (j) Fromage St-George; and (k) Fromage St-Georges.”

requirements regarding pharmaceutical patents and GIs. Other impacts of CETA will also become noticeable. For instance, CETA requires thorough compliance with WIPO internet treaties regarding copyright law, increased protection for plant varieties, and more aggressive border measures against counterfeits goods⁵⁸. Additionally, Canada has begun the process of acceding to other international treaties regulating IP⁵⁹, such as the Hague Agreement⁶⁰ on industrial design rights and the Patent Law Treaty⁶¹. These remain important tasks for the Canadian legislature. CETA represents an instrument of growth for Canadian IP and is proof that Canada is willing to strengthen its IP protection regime in order to align with that of the EU.

⁵⁸ Guide to the Comprehensive Economic and Trade Agreement (CETA), *supra* note 2, p. 12

⁵⁹ ‘Connecting Canada to the World: Intellectual Property Treaties’, *supra* note 36

⁶⁰ World Intellectual Property Organization (WIPO), ‘Hague Agreement Concerning the International Registration of Industrial Designs’, <<https://www.wipo.int/treaties/en/registration/hague/index.html>> accessed 27 December 2018

⁶¹ World Intellectual Property Organization (WIPO), ‘Patent Law Treaty (PLT)’, <<https://www.wipo.int/treaties/en/ip/plt/index.html>> accessed 27 December 2018