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# Ultimate Corporate Counsel Guide

## CONSUMER PRODUCT SAFETY – NEW REGULATORY REGIME IN CANADA

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Earlier this year, the Government of Canada introduced legislation as part of the Food and Consumer Safety Action Plan, an initiative designed to promote health and safety for Canadians. The regulatory regime created by the *Canada Consumer Product Safety Act*, once passed by the Senate and proclaimed in force, will have a significant impact on manufacturers, importers/exporters, advertisers and sellers (at wholesale or retail) of consumer products. The Act is not yet in force – it had its second reading in the Senate on October 7, 2009 – but the obligations it imposes on all participants in the consumer product supply chain should compel all consumer product manufacturers, importers/exporters, advertisers and sellers to initiate a careful review of each of its consumer products in the context of: (a) whether such product is a “danger to human health or safety” within the meaning of the Act; (b) whether any statutory recall orders by any domestic or foreign regulatory or governmental body or any province have been issued against the product; (c) whether any existing labelling or advertising would violate the Act; (d) what product records and documentation have been retained by it (base retention period is fixed at the usual 6 years); and (e) what procedures it should initiate to establish the basis for a due diligence defence for it, and for its directors, officers and agents, to the extent such defence is available under the Act. As noted below, penalties for breach of the Act can be severe, and include forfeiture of seized property, fines and/or incarceration.

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In response to recent consumer product failures (baby and sports products, in particular) and to the shift of consumer product manufacturing to places outside Canada, the Government of Canada is moving Canada's consumer product safety framework to one that is more far-reaching, regimented and punitive.

The Act will replace Part I of the existing federal *Hazardous Products Act*. In 2008, the Government had sponsored a second piece of legislation to amend the federal *Food and Drugs Act*. The 2008 bills were not brought into law when the Government was defeated.

## Purpose

The stated purpose of the Act is the enhancement of public health and safety through the modernization of the legislative framework that regulates the manufacture and importation of consumer products, and the advertising, packaging and sale of consumer products in Canada. A consumer product is defined as a product that may reasonably be expected to be obtained by an individual to be used for a non-commercial purpose. A product's components, parts, accessories and packaging are deemed to be part of the consumer product.

The Act seeks to regulate consumer products that represent a danger to human health or safety. For the purposes of the Act, a consumer product will cause danger to human health or safety if it creates an unreasonable hazard as a result of its normal and foreseeable use and which hazard would reasonably be expected to cause the death of an individual exposed to it, cause an injury to such individual or have an adverse effect on the health of that individual. The requirement that a hazard be "unreasonable" is intended to limit the Act from being so broad in its

application as to capture consumer products which pose a reasonable risk, such as knives or stovetops.

## Prohibitions

The Act contains an outright prohibition of the manufacture, importation, advertising or sale of any consumer product which poses a danger to human health or safety. Also, consumer products may not be packaged, labelled or advertised in a manner that creates an erroneous impression that the product is not a danger to human health or safety.

The Act does not apply to certain consumer products such as those that are regulated by other legislation – for example, cosmetics or natural health products (covered under the *Food and Drugs Act*) and ammunition or firearms (covered by the *Criminal Code*). Schedule 2 of the Act expressly prohibits the sale or importation into Canada of certain specified types of consumer products including certain baby walkers, baby pacifiers, certain products containing listed chemicals or compounds such as PCBs and urea formaldehyde-based foam thermal insulation.

## Testing and Reporting

The Minister of Health can order a manufacturer or importer of a consumer product to conduct tests on such product and to compile information and documentation necessary for the Minister to determine that the product is in compliance with the Act. Suppliers will also be required to maintain certain documentation relating to the identity of the person from whom the product was obtained and (except for retailers) the person to whom it was sold.

Under section 14 of the Act, manufacturers, importers or sellers of consumer products have duties regarding any incidents involving consumer products of which they become aware. An "incident" includes a recall of a consumer product by a regulatory body, or an occurrence or defect in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death, serious injury or other serious adverse effects on their immediate or long-term health. Note the higher standard arising out of the modifier "serious" in contrast to the words used to define the term "danger" above. Where a manufacturer becomes aware of an incident it must provide the Minister with all of the information in its control regarding the incident within two days of becoming aware of the incident. Manufacturers (or importers if the manufacturer is outside Canada) must provide a written report to the Minister setting out certain information relating to the incident, any other consumer product that could have

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been the subject of a similar incident and proposals for measures it proposes to take with respect to the product within 10 days of becoming aware of the incident, or within such other shorter or longer period as the Minister may specify. The mandated content of the said report and the time periods set out in section 14 would, in many circumstances, appear to impose an impossible compliance burden on consumer product sellers, importers and manufacturers in Canada, and on their directors, officers and agents.

## Confidential Information

Business owners may have concerns regarding how the Minister will handle sensitive or confidential information contained in documents or reports provided to the Minister in compliance with the Act. Under section 16 of the Act, the Minister may disclose confidential business information to “a person or government that carries out functions relating to the protection of human health or safety or the environment” – a broadly defined group and set of activities – without the consent of, or notification to, the person to whose business the confidential information relates, provided the recipient of the information enters into an agreement agreeing to keep the information confidential and only use it for the purposes of carrying out the functions noted above. Under similar conditions, the Minister may disclose personal information to such persons or governments regarding an individual without the individual’s consent and without notice to the individual before or after disclosure.

Under section 17 of the Act, where the Minister determines that a consumer product poses a “serious and imminent danger” to health or safety or the environment and disclosure is essential to address the danger, the Minister may disclose confidential information regarding the consumer product without consent from, or prior notification to, the person whose information is disclosed and without obtaining a written confidentiality agreement from the recipient. Although section 17 does not describe the class of person to whom such information may be disclosed, it would appear that it could be disclosed to any person, any group of persons or to the general public, depending on the circumstances. The Minister must notify the person whose confidential information was disclosed on the first business day following disclosure.

## Inspection Authority

The Act confers broad discretionary powers upon inspectors appointed by the Minister to administer and

enforce the Act. Inspectors may for the purposes of determining compliance (or preventing non-compliance) with the Act “at any reasonable time” enter a place where they have reasonable grounds to believe that a consumer product is being manufactured, imported, packaged stored, advertised, sold, labelled, tested or transported. Other than in respect of a dwelling-house, no search warrant is required. The inspection powers granted by the Act are expansive and include seizure powers and the authority to review and copy information, including information stored on a computer located at the place of inspection. The term “place” specifically includes vehicles, and an inspector has the power to order the owner or operator of a vehicle to stop or move it for the purposes of inspection. An inspector cannot use force to gain entry to a place unless the inspector has a warrant, is accompanied by a peace officer and the warrant authorizes the use of force. In certain circumstances, the Crown has powers of forfeiture for seized property.

## Product Recalls

In addition to the investigatory powers noted above, an inspector has the authority to issue various orders, including an order requiring the manufacturer, importer or seller to recall a consumer product the inspector has reasonable grounds to believe poses a danger to human health and safety. An inspector may issue an order to stop the manufacture, importation or sale of a consumer product that the inspector has reasonable grounds to believe poses a danger to human health and safety. The effect of the foregoing would be, in certain cases, that an inspector could close a manufacturing, importation or distribution business.

The Act is not a wholesale departure from current legislation. The practice of voluntary product recalls such as that made on November 10, 2009 by Maclaren USA, Inc. regarding the single and double umbrella strollers sold by it over the last 10 years will continue. Maclaren advised that it had received 15 reports of children placing their finger in the stroller’s hinge mechanism, resulting in 12 reports of fingertip amputations in the United States. A second recent recall occurred on November 23, 2009, when Stork Craft, a Canadian manufacturer of cribs, issued a recall of 2.1 million drop-side cribs after four infant suffocations were attributed to the crib design and assembly issue.

If a person subject to an order to recall a consumer product does not comply with the order, the Minister may issue a recall order and manage the recall process at the expense of the non-compliant person. Ministerial orders are interim in nature and cannot exceed an effective term greater than one year. Ministerial orders must be published

in the *Canada Gazette* – inspector orders may be narrower in scope, but they do not have to be so published, and are not subject to any time limit.

The Act grants a limited right to persons affected by a recall order or other measure to have the action taken by an inspector or the Minister considered by a review officer appointed by the Minister. A request for review does not stay the order and the review is limited to questions of fact or mixed law and fact. Questions of law alone are not subject to review. The order remains in effect unless varied by the review officer.

## Offences and Penalties

Contravening a provision of the Act (except for certain provisions exempted) or its regulations or an order made under the Act is an offence which can result in significant sanctions, including fines ranging from up to \$250,000 for first offences and up to \$5,000,000 for second offences (or a fine at the court's discretion in the case of wilful or reckless contravention) and prison sentences of up to two years. Each day during which the offending activity continues is a separate offence. If the offending party is a corporation the punishment imposed on the corporation can be extended to the directors, officers or agents of the corporation who directed, authorized, assented to or participated in the commission of the offence. Other than for violations, a due diligence defence is available.

The Act also provides for lesser monetary penalties for non-compliance with orders issued by an inspector under either section 30 or section 31, known as “violations”. As with offences, directors, officers and agents of a corporation can be liable for violations committed by that corporation. In addition, an employer will be liable for violations committed by an employee acting in the course of their employment. Because the penalties for violations do not include incarceration, a due diligence defence is not available for violations.

The standard to be met for a conviction of a violation is one of the balance of probabilities, not beyond a reasonable doubt. Beyond a reasonable doubt is the standard which the Crown must meet for conviction of an offence under the Act.

Under section 43 of the Act, the Minister has two years from the time when the Minister became aware of an alleged offence to commence summary conviction proceedings. The limitation period for proceedings by indict-

ment (or serious offences) would be governed by the *Criminal Code*.

As a result, there are three possible approaches the Minister can take, listed in order of severity of the penalty as follows: (a) charge a person with a violation (lower fines, no threat of incarceration and no criminal record); (b) charge a person with an offence and proceed by summary conviction (lesser fines and shorter sentences); or (c) charge a person with an offence and proceed by indictment (greater fines and longer sentences).

## What You Should Do

The Act must still proceed through additional committee reviews and debates before coming into force, so it remains subject to amendment. No draft regulations have been published as yet, and as usual, the regulations will frame most of the compliance obligations.

Given the scope of the Act's authority and the onerous obligations it imposes on all parts of the Canadian consumer product supply chain, each consumer product manufacturer, importer, custom broker other agent and seller (at wholesale or retail) should immediately take steps to protect itself by reviewing all consumer products currently in its inventory and by initiating anticipated record-keeping and other procedures. All labels and advertising materials should be inspected and non-compliant inputs destroyed. Each of you should appoint a credible employee to develop appropriate procedures and to monitor employee compliance. Each of you should review your Directors and Officers Liability (D&O) insurance policy to ensure that it provides pay-as-you-go coverage for directors and officers.

The Act is going to change, in a material fashion, the way each of you now conduct your consumer product business in Canada.

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