

## Canada gets serious about consumer-product safety

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Manufacturers, importers, retailers and advertisers that sell products in Canada can expect to see a flurry of regulatory change relating to consumer products later this year. The activity — culminating in House of Commons Bill C-6, "An Act respecting the safety of consumer products" — stems from an increased focus by the Canadian government on the regulatory controls for consumer products.

Bill C-6, known colloquially as the Canada Consumer Product Safety Act (CCPSA), was introduced in Canada's House of Commons on Jan. 29. If enacted into law as drafted, the CCPSA will reconstitute the federal organization Health Canada as a powerful regulator of consumer products, providing it with unprecedented authority to inspect and influence the supply chain for consumer goods.

The legislation currently governing consumer product safety in Canada is the federal Hazardous Products Act (HPA). Health Canada, the country's public health agency, is responsible for administration and enforcement of the HPA and its regulations, through its Product Safety Program.

Under Schedule I of the HPA, as it relates to consumer products, are two distinctive parts: Part I identifies consumer products that are either restricted through regulation or outright prohibited (currently, there are around 30 products and product categories that are regulated and some 25 others that are prohibited). Part II identifies items to be regulated, specifically children's cribs and cradles, pacifiers, consumer chemicals and lighters.

Generally, the HPA gives Health Canada significant powers to regulate manufactured goods that are listed under Schedule I or the related regulations. Pursuant to its administration and enforcement provisions, the HPA stipulates that Health Canada or an inspector on behalf of Health Canada may enter any place where the inspector believes, on reasonable grounds, that any prohibited, restricted or controlled product is manufactured, prepared or processed and examine or seize that product.

Inspectors also may examine any books, records or other documents that the inspector believes to contain information relevant to enforcement of the HPA, or obtain technical information from a manufacturer to determine the safety of a product. Furthermore, the minister of health may make an interim order that contains "any provision that may be

contained in a regulation" if the minister believes that immediate action is required to deal with a significant risk, direct or indirect, to health or safety.

The regulatory tools conferred upon Health Canada by the HPA are limited because they apply only to the list of products that fall within the scope of the HPA, and the powers are reactive in nature. At present, the HPA does not confer upon Health Canada any legislated authority to compel parties in the supply chain to initiate product recalls. Therefore, Health Canada must rely on the cooperation of private parties with respect to consumer product recalls.

As the Canadian government's vehicle for delivering an overhaul of consumer product regulation in Canada, the new CCPSA will repeal and replace Part I of the HPA. The CCPSA will apply to all "consumer products," other than exceptional products prescribed by regulation.

#### INCREASED OVERSIGHT

The Canadian government plans to legislatively confer upon Health Canada enhanced regulatory powers to prohibit the manufacture, importation, advertisement and sale of consumer products that are, or are likely to be, a danger to the health or safety of the public regardless of whether they are listed in Schedule I or subject to product-specific regulations of the HPA. This is a clear deviation from the existing structure of the HPA, noted above, and as a result, a large number of consumer products not now subject to detailed regulation will be caught by the proposed legislative regime.

The CCPSA has been developed in response to a perceived need of the government of Canada to modernize Canada's health and food product safety regime to deal with new products, new technologies and increased global trade. The stated goal is to improve Canada's existing consumer protection and safety processes through a number of broad, general objectives:

- Active prevention — preventing problems in the first place.
- Targeted oversight — targeting the products that present the highest risks.
- Rapid response — providing rapid response to problems when they occur.

The changes are intended to be effected through sweeping amendments to food, health and consumer product legislation, as well as reorganization of the bodies that administer and enforce the relevant statutory powers, such as Health Canada, the Canada Border Services Agency and the Canadian Food Inspection Agency.

The CCPSA contains several broad prohibitions that build upon the prescribed products restricted by the HPA. The CCPSA provides the same prohibition against the products listed in Part I of Schedule I of the HPA, and also prohibits consumer products that do not meet the requirements set out in the regulations. Therefore, the CCPSA also adopts the product-specific regulations that currently exist under Part II of Schedule I of the HPA.

In addition to those previously prescribed limits, the CCPSA provides a broad general prohibition against manufacturing, importing, advertising or selling a consumer product that:

- Is a danger to human health or safety.
- Is the subject of a recall order made under § 30 or reviewed under § 34 (reviewed by the federal minister of health) or is the subject of a voluntary recall in Canada because the product is a danger to human health or safety.
- Is the subject of a measure that the manufacturer or importer has not carried out but is required to carry out under an order made under § 31 (order of an inspector) or such an order if it is reviewed under § 34.

Section 8 extends this prohibition to any persons, other than a manufacturer or importer, from advertising or selling a consumer product that they know is a danger to human health, etc., as above.

As part of Health Canada's increased oversight, § 13 of the CCPSA will give Health Canada extensive powers to order a manufacturer or importer of a consumer product to compile information, and/or conduct tests or studies to determine whether a product is defective, noncompliant or otherwise unsafe, and to provide Health Canada with those documents.

The CCPSA also imposes upon suppliers of consumer products a duty to notify Health Canada and "if applicable, the person from whom they received the consumer product" of any "incident."

"Incident" is broadly defined. It includes occurrences involving any uses of the consumer product that result in a death or that could reasonably be expected to result in death or in serious adverse effects on health, including a serious injury; or a defect "or characteristic that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury; or incorrect or insufficient labeling information or instructions that may reasonably be expected to result in a death or serious adverse health effects; or a recall or measure that is initiated for human health or safety reasons."

The CCPSA imposes onerous, and arguably impractical, timing obligations for these reports. Section 14(2) will require the manufacturer, importer or seller to provide Health Canada with "all the information in their control regarding an incident related to a product" within just two days after they become aware of the incident. Section 14(3) then requires the manufacturer or importer to provide Health Canada with a written report containing information about the incident, the product or any other products that they manufacture that could be involved in a similar incident, and correcting measures they

plan to take. This report must be submitted within seven days after they become aware of the incident.

#### RECALL AUTHORITY

The CCPSA provides for the oversight function to be performed by inspectors. Pursuant to §§ 30 and 31, inspectors may make any order they consider necessary to remedy noncompliance with the CCPSA and its regulations. Among other things, if an inspector believes on reasonable ground that a consumer product is a danger to human health or safety, he or she may order the person who manufactures, imports or sells the product to recall it.

Furthermore, the inspector is empowered to order the time and manner in which the recall is to be conducted. If a person does not comply with such an order, the inspector is entitled to carry out the recall himself or herself at the expense of that person.

Contraventions of obligations imposed by the CCPSA may fall into one of two categories: "violations" or "offences." Failure to adhere to an inspector's order is a violation. A violation is addressed by the new Administrative Monetary Penalties Scheme (AMPS). The AMPS is a flexible process for sanctioning noncompliance, with penalty ranges set by regulation and the possibility of a reduced penalty if the party enters into a compliance agreement with Health Canada.

A person who contravenes a provision of the CCPSA, or an order made under it, may be found guilty of an "offence." On conviction, the person could potentially be liable for a fine of up to 5 million Canadian dollars or to imprisonment of up to two years, or both. Beyond that, § 40(3) authorizes the court to impose even more severe penalties for persons who willfully or recklessly contravene a provision of the CCPSA or an order made under it. A person in that circumstance is potentially liable to a fine "the amount of which is at the discretion of the court," or to imprisonment for a term of up to five years, or both.

Additionally, the CCPSA provides for recourse against officers and directors. Section 39 says that officers and directors who direct, authorize, assent to, acquiesce in or participate in the commission of an offence are a party to that offence and are liable to the same punishment as described above.

The CCPSA is not yet law in Canada, but it is expected to pass through Parliament without significant revision because it carries the support of all political parties in Canada. This new law will significantly fortify Health Canada's stature and power as a regulator of consumer products, and likely will fundamentally overhaul the entire nature of consumer product regulation in Canada. Companies, both Canadian and non-Canadian, that manufacture or sell consumer products in Canada will be affected by this new regulatory regime. Any such companies that do not already have comprehensive recall or information tracking systems in place should seriously consider developing and implementing such programs before the CCPSA becomes law in Canada.

The potential breadth of Health Canada's new investigative and recall powers under the CCPSA, the increased severity of the offence provisions under the CCPSA and the Canadian government's recent focus on product safety generally will mean a far greater risk for any company that does not have these systems in place whenever any product safety incident occurs in the future. Forewarned is forearmed.

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