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JUNE 2011

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Product Liability

THE *CANADA CONSUMER PRODUCT SAFETY ACT*: ARE YOU READY?

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AFTER MORE THAN THREE YEARS OF DELAYS, STUDIES AND PUBLIC CONSULTATIONS, THE *CANADA CONSUMER PRODUCT SAFETY ACT* (THE "ACT") CAME INTO FORCE ON JUNE 20, 2011. THE ACT IMPOSES NEW OBLIGATIONS ON MANUFACTURERS, IMPORTERS AND SELLERS OF CONSUMER PRODUCTS AND GRANTS SIGNIFICANT POWERS TO HEALTH CANADA. IT WILL IMPACT THIS CRITICAL SECTOR OF OUR ECONOMY.

OBJECTIVES OF THE REFORM

Successive consumer products recalls over the past few years underscore a trend which makes it necessary to better protect the public against the dangers that consumer products may pose to human health or safety. The Canadian Government therefore initiated an in-depth reform which will reinforce its monitoring of public health and safety.

The purpose of the new Act is to improve the protection of the public against the dangers to human health and safety posed by certain products available on the Canadian market. Although parallel legislative frameworks exist, including the *Food and Drugs Act*, the *Canadian Food Inspection Agency Act*, the *Hazardous Products Act*, the *Explosives Act*, the *Pest Control Products Act*, the *Motor Vehicle Safety Act* and the *Tobacco Act*, the new regime governs any person or organization participating in the distribution chain of a consumer product not covered under a specific regime.

The manufacturer, importer, distributor and seller are therefore governed under the new regime. In Quebec, a parallel may be drawnwith the regimes of civil liability and the legal warranty of quality provided for under the *Civil Code*, which impose on the seller, the importer, the wholesaler, the distributor and the manufacturer the obligation to guarantee to the purchaser that the goods sold, including their accessories, are exempt from latent defects.

CONSUMER PRODUCTS

It is obvious from the definition of "consumer products", that the legislator targets a wider range of products:

> "consumer product" means a product, including its components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for noncommercial purposes, including for domestic, recreational and sports purposes, and includes its packaging."

The Act thus targets the widest possible range of products, without restricting itself to those that are specifically covered under a statute or regulations.

The Act also prohibits manufacturing, importing, selling or advertising certain consumer products. These prohibitions are set forth in three parts:

- Any consumer product listed in Schedule 2 to the Act, such as products for babies that are put in the mouth when used and that contain a filling that has in it a viable microorganism, kite strings made of a material that conducts electricity, polycarbonate baby bottles that contain bisphenol A, etc. These are mainly products subject of studies and of existing restrictions.

- No person may manufacture, import, sell or advertise a consumer product that does not comply with requirements set out in regulations.

  This prohibition seems to cover not only the regulations that will be adopted under this Act, but also the regulations already in force under existing legislation and that are not exempted from the application of this new Act.

- A more general prohibition, including manufacturing, importing, selling or advertising applies to consumer products that pose a danger to human health or safety.

The expression "danger to human health or safety" is defined as follows:

> "... any unreasonable hazard — existing or potential — that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual's health — including an injury — whether or not the death or adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health."

RECORDS RETENTION

To facilitate the traceability of products, the Act contains recordkeeping requirements. Any person who manufactures, imports, sells, tests or advertises a consumer product for commercial purposes must retain documents that indicate the name and address of the person from whom the person obtained the product and the name and address of the person to whom the product was sold.

The Act does not require a retailer to keep a record of each transaction carried out with a consumer or information respecting the consumer. However retailers' records must indicate the name and address of the person from whom they obtained the product and the location where and the period during which they sold the product.

The documents must be kept in Canada or at any location prescribed under regulations for a six-year period after the end of the year to which they relate or any other period prescribed in a specific statute or regulations.

Health Canada's Guidance on Preparing and Maintaining Documents indicates that the information must be written clearly and legibly in French or English in any format that can be understood by a person or read by a computer or any other device.

MANDATORY INCIDENT REPORTING

Prior to the Act being enacted, there was no legislative obligation to notify Health Canada of an incident related to the use of a consumer product. The new Act provides that in the event of an "incident" related to a consumer product, the person who manufactures, imports or sells this product and who becomes aware of such incident is required to notify Health Canada within two days from the date he or she becomes aware of the incident. The manufacturer or, if the manufacturer carries on business outside Canada, the importer, must, within ten days following the incident, provide a written report on the incident, the product and any product that he or she manufactures or imports which could be involved in a similar incident and the measures proposed to be taken in order to protect consumers.

This obligation raises questions as to what constitutes an "incident" and the computation of the time periods.

The Act provides that the term "incident" means:

(a) an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death or in serious adverse effects on his or her health, including a serious injury;

(b) a defect or characteristic that may reasonably be expected to result in an individual's death or in serious adverse effects on his or her health, including a serious injury;

(c) incorrect or insufficient information on a label or in instructions — or the lack of a label or instructions — that may reasonably be expected to result in an individual's death or in serious adverse effects on his or her health, including a serious injury; or

(d) a recall or measure that is initiated for human health or safety reasons by a foreign entity or government or public body.

According to Health Canada's Guidance on Mandatory Incident Reporting, the time period is computed from the time when a *responsible person* is made aware of an incident:

> "A *responsible person* is a directing mind of the organization who, through the exercise of due diligence, should become aware of an incident."

The specific circumstances of each organization will be used to determine who this (these) person(s) is (are). Certain factors such as the size of the organization, the decision-making structure, the number of responsible persons and the nature of the information may become relevant considerations when determining the moment when an organization becomes aware of an incident.

A business must therefore ensure that it implements policies, processes and procedures to ensure that any information received respecting an incident related to its consumer products is communicated to the responsible persons and that it is dealt with and assessed by them.

PACKAGING AND LABELLING

Beyond the product quality control measures, the Act also establishes rules respecting product packaging and labelling. No person may label or package a consumer product in a manner that is false, misleading or deceptive or that may create an erroneous impression as to its safety, certification or compliance with standards applicable to the product. Selling or advertising a product while knowing that it has been labelled or packaged in contravention of this prohibition is also prohibited.

INCREASED POWERS OF THE MINISTER OF HEALTH

This reform innovates particularly by granting new powers to the federal Minister of Health and the inspectors appointed in accordance with the Act. These powers include the right to visit production premises and inspect the products which are on site and the powers to order any person who manufactures or imports a consumer product to carry out tests or studies on the product, or to require that the manufacturing, importation, packaging, storage, sale, labelling, testing or transport of a product ceases.

The Act also enables a Health Canada inspector to order the recall of a product manufactured, imported or sold when he has reasonable grounds to believe that such product presents a danger to human health or safety. This power did not exist prior to the reform.

SANCTIONS

Lastly, various sanctions may be imposed for contraventions of the Act, the regulations or an order provided for under the Act, including fines of up to $5,000,000 and imprisonment. In the case of a contravention committed by a corporation, the officers, directors or agents who consented to or participated in the contravention will be considered as parties to the contravention and, on conviction, may incur similar penalties on a personal basis.

CONCLUSION

Regardless of your role in the distribution chain of a consumer product, the *Canada Consumer Product Safety Act* will impact your business activities. One cannot ignore the obligation to keep records or notify Health Canada of an incident involving a product.

One must, if it is not already done, ensure that rigorous processes are implemented to ensure compliance with the Act, particularly with respect to the recordkeeping and disclosure obligations. Moreover, compliance and risk management policies must take into account a multitude of impacts of the Act, particularly on relations with suppliers, manufacturers, importers and sellers. Businesses will have to establish a close collaboration with them and, if needed, with Health Canada.

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