



## Criminal Law and Enforcement Newsletter

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### New Federal Consumer Protection Legislation in Force Soon

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The *Consumer Product Safety Act* ("CPSA") received Royal Assent in December 2010 and will be proclaimed into force on June 20, 2011.

Intended to protect Canadian consumers from consumer products which pose a risk to human safety or health, the CPSA repeals and replaces Part I and Schedule I of the Hazardous Products Act and creates new and substantial sources of regulatory liability for the manufacturers, importers, advertisers and retailers of consumer products.

#### Jurisdiction

"Consumer product" is defined widely in the Act to mean a product and its components which could reasonably be expected to be obtained by individuals for non-commercial purposes. Packaging is specifically included in the definition. The legislation also specifically exempts the products listed in its Schedule 1 (for example, ammunition and other products subject to regulation elsewhere) from the requirements of the Act, and specifically includes other products listed in Schedule 2 (for example, liquids containing PCBs).

#### New Sources of Penal Liability

The CPSA creates four key statutory duties of care/strict liability offences for business organizations, their directors, officers, employees and other representatives, preventing:

- the manufacture, import, advertisement or sale of consumer products listed in Schedule 2 (section 5);
- the manufacture, import, advertisement or sale of a consumer product that does not meet the requirements set out in the regulations (section 6);
- the manufacture, import, advertisement or sale of a consumer product which is a danger to human health, the subject of a recall order or voluntary recall, or the subject an order requiring remedial measures which remain outstanding (section 7); or
- the packaging or labelling of a product in a manner – including one that is false, misleading or deceptive – that may be reasonable expected to create an erroneous impression as to its safety or in manner that is false, misleading or deceptive as to its certification related to safety or its compliance with a safety standard or the Act (section 9).

The exercise of reasonable care or due diligence by the business organization is a full defence to breaches of any of these provisions.

The legislation also prohibits outright advertising or selling a consumer product if the business through its one of its senior officers knows the product is a danger to consumers, or the subject of a recall order, a voluntary recall, or other orders with which compliance is outstanding, and permits the advertising or sale (section 8/section 22.2 of the *Criminal Code*). Also prohibited is the sale of an improperly packaged or labelled product when one of its senior officers knows there is non-compliance with section 9 of the Act. It is also an offence to knowingly provide the Health Canada with false or misleading information relevant to the

CPSA (section 11).

Due diligence is not a defence to these charges in that the Crown would be required to prove beyond a reasonable doubt that the wrongful act was committed with the requisite guilty knowledge of a senior officer.

The theoretical liability for breaches is substantial. On summary conviction the strict liability offences are subject to maximum fines of \$250,000 for a first offence and \$500,000 for second and subsequent offences. Individual offenders are also subject to imprisonment for up to 6 months for a first offence and 18 months on a second or subsequent offence. If the Crown proceeds by way of indictment the maximum fine increases to \$5 million with the possibility of imprisonment of up to two years.

For the prohibitions, on summary conviction the maximum fines are higher (\$500,000 for a first offence/\$1 million for a second or subsequent offence) as are the maximum periods of imprisonment (18 months for a first offence/2 years for a second or subsequent offence). On indictment the fines are unlimited and the maximum period of imprisonment increases to 5 years.

### Documentation, Reporting and Recalls

Parallel to any applicable common law product liability duties of care, the effect of the statutory duties of care is to require manufacturers, importers, advertisers and retailers to take reasonable steps to ensure that their products do not pose a danger to consumers. Section 13 and the regulations are intended to scope out the level of required documentation that the manufacturers, importers, advertisers, retailers, and product testers will be required to maintain.

In the event there is an "incident" meaning that an unsafe product is available for sale or has been subjected to a recall in a foreign jurisdiction, documentation relating to the incident must be produced to Health Canada within two days of the incident having come to the attention of the holder. Within ten days manufacturers and importers must follow up this initial report with a written report about the details of the incident and the product involved.

Health Canada is empowered to issue recall orders for products that, on reasonable grounds, pose a danger to consumers. Health Canada may also make orders requiring "any measure" that it considers necessary to remedy non-compliance with the Act. Knowingly or recklessly breaching an order is an offence liable to the same sanctions available for breaches of the prohibitions. Less egregious breaches are subject to administrative monetary penalties.

Many of the compliance details will be contained in the regulations. Look to see these promulgated shortly after the Act comes into force.

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