

Client Alert

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Canadian Legislation Would Heighten Consumer Product Scrutiny: How the Canada Consumer Product Safety Act Could Significantly Affect Business Practice

The Canada Consumer Product Safety Act (CCPSA), if ratified, would substantially alter Canadian consumer product safety law and likely require adjustments to corporate business practice.¹ Passed by the House of Commons on June 12, 2009,² the CCPSA would repeal substantial portions of the Hazardous Products Act and embodies Canada's commitment to modernizing its product safety laws.³ The proposed Act (which still requires Senate approval and Royal Assent) would have a broad reach, regulating (a) all consumer products, (b) "anything used in the manufacture, importation, packaging, storing, advertising, selling, labeling, testing, or transportation of a consumer product," as well as (c) any documents related to those activities or to a consumer product.⁴ Under the Act, consumer products would be defined expansively as any article that "may reasonably be expected to be obtained by an individual to be used for non-commercial purposes."⁵ While certain items already regulated by other statutes would be exempted from CCPSA's coverage,⁶ a significantly larger number of products would be covered under the CCPSA than under the previous Hazardous Products Act.⁷

Consumer product businesses operating in Canada should be aware of the law's

pendency and the following significant changes that would take effect upon the CCPSA's ratification. First, the Act would create new substantive legal duties for businesses. Second, the Act would impose new compliance and reporting requirements for both domestic and foreign incidents. Third, the Act would grant extensive enforcement authority to government officers. Finally, the Act would increase potential liability while simultaneously instituting harsher penalties.

Substantive Legal Requirements

The CCPSA would create a general prohibition against the manufacture, import, advertisement or sale of any consumer product that is "a danger to human health or safety." The Act defines this term as,

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

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hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.⁸

This broad definition could be interpreted to cover injuries manifesting years later and may invite lawsuits and fines. The proposed Act would also ban the manufacture, import, advertisement or sale of certain items. These products include, but are not limited to, baby walkers, lawn darts and certain types of chemicals.⁹ Manufacturers, who were not covered under the Hazardous Products Act, should take special care to ensure that their products do not fall within this new expanded scope.¹⁰

The Act would also forbid any packaging or labeling that creates a “false, misleading, or deceptive” impression of the product’s safety.¹¹ This includes any packaging or labeling that hides a product’s status as a danger to human health or safety or creates an erroneous impression of the item’s compliance with safety regulations.¹²

Compliance and Reporting Requirements

If ratified, the CCPSA would create substantive compliance and reporting duties for businesses operating in Canada. Under the proposed Act, any person or entity that manufactures, imports or sells a consumer product in Canada would have to be prepared to inform the Canadian government if an “incident” occurs with the product. The corporation would be given two days to make a full disclosure of all information in their control relating to the incident.¹³ The Act defines an incident as:

- a) any occurrence (in Canada or elsewhere) that resulted or may reasonably have been expected to result in the death of an individual or have serious adverse effects on their health;
- b) the existence of a defect or characteristic that may reasonably have been expected to result in the

- death of an individual or have serious adverse effects on their health;
- c) incorrect or insufficient information on a label or instruction that may reasonably have been expected to result in the death of an individual or have serious adverse effects on their health; or
- d) a recall or measure initiated by a government or public body.¹⁴

In addition, any manufacturer or importer of the product would have to provide a separate written report to the government within 10 days. This report would have to contain detailed information about the product involved in the incident, any other products that could be involved in a similar incident, as well as any measures it intends to take regarding the product.¹⁵

In order to facilitate this swift and complete disclosure, the Canadian government would, upon the CCPSA’s ratification, require all corporations that manufacture, import, advertise, sell or test consumer products to prepare and maintain extensive records. These records would have to make an exacting account of the product’s chain of custody—both from whom the business received the product and also to whom it was sold.¹⁶

Enforcement Authority

The CCPSA, as currently drafted, would also increase the government’s power to enforce product safety regulation. Under the proposed Act, the Minister of Health would be able to empower inspectors to enter private property without a warrant or an owner’s consent so long as they have reasonable grounds to do so.¹⁷ While there, the inspector would be able to inspect or seize any item relating to the product.¹⁸ An inspector could also compel the full assistance of the owner or person in charge in carrying out his or her duties.¹⁹

Inspectors would also be given the power to issue product recall orders.²⁰ To issue the full recall of a product, an inspector would only need a belief on reasonable grounds that a consumer

product is a danger to human health or safety.²¹ The order would be in writing and could be given to a manufacturer, importer or seller of a product.²² Inspectors would also be empowered to make further orders to take measures if a person or company fails to comply with a previous directive.²³ Thus, while under the old law the government could not even order a mandatory recall for most consumer products, the CCPSA would allow deputized individual inspectors to do so.

Liability and Penalties

The CCPSA would create new categories of offenses and add new penalties for violating consumer product law. Section 38 of the CCPSA would make it an offense to contravene any relevant provision of the CCPSA or an order made under the Act.²⁴ A defendant found guilty after indictment under this section could be sentenced to up to two years imprisonment, up to \$5 million in fines, or both.²⁵ Significantly, any multi-day offense committed under the proposed Act would be punishable as a separate offense for each day.²⁶ It is therefore possible for persons to be sentenced to multiple fines or prison terms for continued illegality under the CCPSA.

The proposed Act would also allow for administrative monetary penalties for failures to comply. These penalties would give the government a mechanism to deal with less serious violations of the statute without having to resort to a criminal trial. The maximum penalty for a for-profit entity is \$25,000.²⁷ This fine may be waived if the actor and the government enter into a compliance agreement.²⁸

Finally, the CCPSA would allow the government to hold parties liable that are only tangentially involved in an illegal act. For example, a person or entity could become liable for an offense if its employee, agent or mandatary committed the action.²⁹ Similarly, any directors, officers, agents or mandataries of an entity who committed an offense

could also become a party to the offense and would be "liable on conviction to the punishment provided for by this Act, even if the person is not prosecuted for the offence."³⁰

Best Practices

If ratified, the CCPSA would dramatically alter the state of Canadian consumer product law. Businesses ought to act proactively to avoid future liability.

- First, businesses should be aware of the substantially broader powers given to the government and the probability that practices ranging from manufacturing to imports to sales will come under increased scrutiny if the Act is made law.
- Second, businesses should stay abreast of the new and potentially demanding legal requirements.
- Finally, the best method of avoiding liability is developing comprehensive internal oversight, documentation and reporting mechanisms. A compliance audit is recommended for companies with products falling within the proposed law if it is passed.

Latham & Watkins LLP has one of the world's leading international product safety practices with attorneys in the United States, Asia and Europe. An international team of Latham & Watkins attorneys has managed worldwide recalls that have been implemented in more than 50 countries and that have involved numerous regulatory authorities around the world. Latham & Watkins attorneys counsel clients and handle regulatory and investigative actions, litigation, worldwide recalls, product liability lawsuits and class actions.

Endnotes

¹ **Disclaimer:** Please note that Latham & Watkins LLP does not practice law in Canada. No information or recommendation found within this document should be considered or taken as legal advice.

² While the bill has been passed in the House of Commons, it must still receive Senate approval and Royal Assent before it becomes law.

³ The Canada Consumer Product Safety Act, 2009 S.C. (Can.) (hereinafter CCPSA) repeals substantial portions of the Hazardous Products Act, 1969 R.S.C., ch. H-3, § 1 (Can.), the previous law covering consumer products.

⁴ CCPSA § 2.

⁵ *Id.*

⁶ See e.g., Explosives Act, R.S.C., ch. E-17 (1985); Food and Drugs Act, R.S.C., ch. F-27 (1985); Canada Shipping Act, 2001 S.C., ch. 26; Criminal Code, R.S.C., ch. C-46 (1985); Seeds Act, R.S.C., ch. S-8 (1985); Controlled Drugs and Substances Act, 1996 S.C., ch. 19.

⁷ See section 3 of the Hazardous Products Act

⁸ CCPSA § 2.

⁹ See CCPSA, Schedule 2.

¹⁰ CCPSA § 2.

¹¹ *Id.* § 9.

¹² *Id.*

¹³ *Id.* § 14(2).

¹⁴ *Id.* § 14(1).

¹⁵ *Id.* § 14(3).

¹⁶ *Id.* § 13.

¹⁷ *Id.* § 20(4).

¹⁸ *Id.* § 20(2).

¹⁹ *Id.* § 20(5).

²⁰ *Id.* § 30.

²¹ *Id.*

²² *Id.*

²³ *Id.* § 31. All inspectors' orders can be challenged and subsequently reviewed by a review officer other than the inspector who made the order. *Id.* § 34.

²⁴ *Id.* § 38.

²⁵ *Id.*

²⁶ *Id.* § 41.

²⁷ *Id.* § 47(2).

²⁸ *Id.* § 50(2)(a).

²⁹ *Id.* § 40.

³⁰ *Id.* § 39.

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