

## New Consumer Protection Legislation

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In April of this year, Bill C-52, "respecting the safety of consumer products," was tabled in the House of Commons by the Minister of Health. This proposed legislation protects consumers by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada (whether manufactured domestically or imported into Canada).

Canadian manufacturers, importers of consumer products into Canada, retailers in Canada and/or advertisers that communicate to consumers in Canada must, however, fully appreciate the limitations that are being legislated and their new obligations. The potential for severe penalties is intended to ensure that persons dealing with Canadian consumers take the health and safety of Canadian consumers seriously. The negative effects of a public accusation of harming consumers can destroy the reputation of a manufacturer, importer and/or retailer. This proposed legislation increases the risk of manufacturers, importers, retailers, sellers and advertisers that fail to:

- adopt a compliance mentality;
- conduct proper due diligence;
- implement risk management policies and procedures; and
- maintain proper books, records and reporting procedures.

### Scope

The proposed legislation applies to most manufacturers, importers, advertisers and sellers of consumer goods. The proposed legislation is very broad and applies to all consumer products with the exception of certain products covered by other statutory regimes such as explosives, firearms, vehicles, vessels, aeronautic products, food and drugs and controlled substances.

### Prohibitions

The proposed legislation has a number of prohibitions including the manufacturing, importing, advertising and/or selling of a consumer product that is a danger to human health or safety, and it prohibits all persons (other than manufacturers and/or importers) from advertising or selling a consumer product that they know, or ought to know is a danger to human health or safety.

In addition to other prohibitions under Canadian law regarding misleading advertising and consumer protection, the proposed legislation prohibits all persons from packaging or labeling a consumer product in a manner that is false, misleading or deceptive, or that is likely to create an erroneous impression regarding whether it is a danger to human health or safety. The proposed legislation also prohibits all persons from packaging or labeling a consumer product in a manner that is false, misleading or deceptive relating to its certification or compliance with a safety standard or regulation. Further, no person shall advertise or sell a consumer product that it knows or ought to know is advertised, packaged or labeled contrary to such prohibitions.

### Obligations

The proposed legislation imposes a number of new obligations on manufacturers, importers, advertisers and sellers of consumer products. For example, it empowers the Minister of Health to order any person who manufactures or imports a consumer product for commercial purposes to conduct tests or studies on the product in order to obtain information that the Minister considers necessary to verify compliance with the Act or regulations. Failure to conduct such tests and provide such information would be an offence under the Act.

As further example, every person who manufactures, imports, advertises, sells or tests a consumer product for commercial purposes must prepare and maintain a number of records to enable tracking of the product in the event of a problem.

The proposed legislation imposes an additional documentation requirement on importers of consumer

products as they must provide the prescribed documents to the Minister at the time of importation.

## Penalties

The penalties imposed under the proposed legislation can be extremely severe. The punishment for the commission of an offence is determined at the Court's discretion. If the prosecutors proceed by way of indictment, the fine may be up to \$5 million. In addition, individuals may be imprisoned for up to two years.

Persons who are prosecuted for contravening the Act may present a due diligence defence. As a result, it is very important for all manufacturers and importers to engage in compliance practices and implement internal processes and procedures to ensure compliance with the Act and regulations.

However, if a person engages in willful or reckless conduct and is prosecuted for contravening the Act or regulations, the due diligence defence is not available, and if convicted, could be fined an amount established at the discretion of the court. In other words, there is no statutory cap to the fine. And if the prosecutors proceed by way of indictment, an individual may also be imprisoned for up to five years.

Furthermore, directors, officers, agents and employees may also be pursued. For example, if a corporation, partnership, trust or other business entity commits an offence under the Act (or regulations), any of the directors, officers, agents or mandataries who direct, authorize, assent to, acquiesce in or participates in the commission of the offence will be considered to be a party to the offence and will be liable upon conviction for the punishment provided for by the Act.

In addition, the proposed legislation and the regulations that will follow establish an administrative penalty system for contraventions similar to the existing administrative monetary penalty system for customs, import and export controls, antidumping/countervailing duty and other border measures. The Canadian Cabinet may enact regulations fixing penalties and/or ranges of penalties for each form of infraction under the Act and/or regulations. The maximum administrative penalty will be \$5,000 for not-for-profit organizations and other non-commercial activities and \$25,000 for all other organizations and activities.

## Manufacturers and Importers Can/Should Prepare

Given the fact that administrative penalties may add up to significant monetary amounts, it is very important that all manufacturers and importers engage in compliance practices and implement internal processes and procedures to ensure compliance with the Act and to hold the protection of consumers as paramount in importance. It is not wise to wait for problems to arise. The assistance of legal counsel should be sought to advise as to the law that will apply; provide timely updates when the regulations are published; conduct a compliance audit; prepare a compliance report; develop internal compliance programs, policies and procedures; develop document retention and reporting procedures; structure internal reporting to an internal or external compliance officer; develop lines of communication for concerned employees/whistle-blowers; and develop training manuals that teach directors, officers, employees, agents, mandataries and others about their obligations.

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*The unabridged version of this article appeared in the International Trade Alert issued on April 9, 2008. To subscribe to the International Trade publication, please visit the Publications Request page of our website. Anyone wishing to make submissions to the Canadian Government concerning the effects of the proposed legislation may contact our Government Relations team.*

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