Blake, Cassels & Graydon LLP December 2010

Blakes Bulletin

Life Sciences

The Rules Change: Canadian Consumer Product Safety Act Enacted

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The *Canada Consumer Product Safety Act* (CCPSA), which represents a significant change to the way consumer products are regulated in Canada, will come into force within the next few months, according to the Minister of Health. The CCPSA became law on December 15, and in the press release announcing the new legislation, the Minister stated "[a]n accelerated implementation plan is being developed in order to facilitate the *Canada Consumer Product Safety Act* coming into force in the next few months. To make the transition [...] to the new legislation as smooth as possible, the Government will be actively communicating with industry to inform them of the coming-into-force date and their new obligations and requirements under the Act."

The CCPSA was introduced in June 2010 after previous attempts by Parliament to pass similar legislation were halted by the calling of a federal election in 2008 and the prorogation of Parliament in 2010 (see our June 2010 *Blakes Bulletin on Life Sciences: Third Time Lucky? Canadian Consumer Product Safety Bill Reintroduced*).

The CCPSA represents a radical change to consumer product regulation in Canada. In particular, the provisions that require mandatory incident reporting and record-keeping by manufacturers, importers and sellers, and those that give the Minister broad powers to order recalls and product testing, create significant changes in the regulation of consumer products in Canada. This legislation brings Canada's regulation of consumer products more in line with the regulatory regime in the United States and has the potential to result in significant monetary penalties and increased class action and other litigation.

The CCPSA applies to all consumer products except those specifically exempted from the Act. The term "consumer product" is defined broadly to include components, parts, accessories and packaging that may be obtained by an individual to be used for non-commercial purposes. The CCPSA does not apply to certain products regulated under other existing legislation, such as food, drugs (including natural health products), medical devices, cosmetics and pest control products. Nevertheless, the legislation still impacts otherwise exempt organizations (e.g., food or non-prescription drug companies) that distribute non-exempted products (e.g., in their packaging or via mail-in offers). Further, manufacturers, importers and distributors operating in these fields should be mindful of the provisions of the CCPSA as it is possible that amendments to the *Food and Drugs Act* and other legislation in the future could include similar provisions.

There are several key provisions in the new CCPSA that manufacturers, importers and sellers of consumer products should be aware of.

GENERAL PROHIBITION

There is a general prohibition in the CCPSA against the manufacture, importation, advertisement or sale of any consumer product that is a "danger to human health or safety" or is subject to a recall or certain other corrective measures. The term "danger to human health or safety" means any existing or potential unreasonable hazard posed by a consumer product during normal and foreseeable use that may reasonably be expected to cause death or an adverse effect on health.

In addition, the CCPSA repeals Part I and Schedule I of the *Hazardous Products Act* (HPA). As a consequence, the general prohibition on the sale of "prohibited products" listed in Part I of Schedule I of the HPA is re-enacted (with some revisions) in the CCPSA that prohibits any person from manufacturing, importing, advertising or selling a specific consumer product listed in the CCPSA. Health Canada has published a document entitled "Consumer Product Prohibitions and Regulations under the Proposed *Canada Consumer Product Safety Act*" that describes the way in which prohibitions and regulations related to consumer products currently

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regulated under the HPA are proposed to be transferred to the CCPSA. This document was published before the CCPSA had passed, but it likely still provides a useful resource to manufacturers or importers in industries that were regulated by specific provisions in the HPA.

PENALTIES

Under the CCPSA, compliance with the legislation can be enforced through a variety of measures, including product seizures, injunctions, criminal charges and administrative monetary penalties (AMPs).

The CCPSA provides for a wide range of penalties upon conviction for contravention of the Act. Fines upon summary conviction range from not more than C$500,000 for a first offence to not more than C$1-million for a subsequent offence and, on indictment, up to an unlimited amount, where a person is convicted of one of the following offences:

- the sale or advertisement of products that are a danger to human health or safety or subject to certain recall orders;
- the sale or advertisement of a product that is packaged or labelled in a manner that could be expected to create the erroneous impression that the product is not a danger to human health or safety;
- knowingly providing the Minister with false or misleading information; or
- knowingly obstructing, hindering, or misleading an inspector who is carrying out functions under the CCPSA.

These penalties also apply to a person who knowingly or recklessly contravenes another provision of the Act, regulations or an order made under the Act.

Fines upon conviction of other offences range, for a summary offence, from not more than C$250,000 for a first offence, to not more than C$500,000 for a subsequent offence and, on indictment, to not more than C$5-million.

The Act also provides for the possibility of a term of imprisonment for conviction of any offence.

In addition, if a company commits an offence under the CCPSA, any of the company's directors, officers or agents who directed, authorized, assented to, acquiesced or participated in the commission of the offence is a party to the offence and is liable on conviction to the punishment provided for by the CCPSA, even if the company is not prosecuted for the offence. The Act also states that each day an offence under the Act continues constitutes a separate offence.

The CCPSA also provides for the imposition of AMPs against persons who contravene an order of the Minister to recall a product or implement other corrective measures. Specifics of AMPs will be provided in regulations that are not yet published.

MANDATORY RECORD-KEEPING AND REPORTING

Manufacturers, importers, advertisers, sellers and testers of consumer products must maintain documentation that allows consumer products to be traced through the supply chain. Retailers must keep records of the name and address of the person from whom they obtained the product and all others must keep records of the name and address of the person from whom they obtained the product *and* to whom they sold it. These documents must be kept for six years at the Canadian place of business of the organization to whom the provision applies.

Manufacturers, importers, advertisers and sellers of consumer products must notify the Minister and the person from whom they received a consumer product within *two days* of an "incident" related to the product. An incident is defined to include:

- an occurrence that resulted or may reasonably have been expected to result in an individual's death or serious adverse health effects;
- a defect that may reasonably be expected to result in an individual's death or serious adverse health effects;
- incorrect or insufficient labelling or instruction that may reasonably be expected to result in an individual's death or serious adverse health effects; or
- a recall or other measure initiated by a foreign entity, provincial government, public body or aboriginal government.

The manufacturer or importer must provide a written report of the incident within *10 days* of the incident.

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POWERS OF THE MINISTER

The Minister is granted broad powers under the CCPSA in several areas. The Minister has the authority to order manufacturers and importers of consumer products to conduct tests or studies on a product and to compile information to verify compliance with the CCPSA and regulations and to provide the Minister with that information within the time and in the manner the Minister specifies.

If the Minister believes on reasonable grounds that a consumer product is a danger to human health or safety, the Minister may order a manufacturer, importer or seller to recall the product or to implement other specified corrective measures. If a recall or corrective measure order issued by the Minister is not complied with, the Minister may carry out the recall at the expense of the non-compliant manufacturer, importer or seller. A review of the recall, if requested in writing by a manufacturer, importer or seller, must be completed within 30 days (or as extended by the review officer). The order of the Minister remains in effect while the review is ongoing.

The Minister also has broad powers to disclose personal and business information without consent to a person or government that carries out functions relating to the protection of health and safety.

IMPLEMENTATION

As noted above, government press releases announcing the passing of this legislation indicate that the Canadian government is seeking to implement the CCPSA in very short order. In preparation for the coming into force of this act, Health Canada conducted consultations on various aspects of the CCPSA soon after this legislation was introduced and well before it was passed. Specifically, Health Canada sought input regarding its interpretation of the legislation's mandatory reporting requirement, proposed product exemption regulations and proposed AMP regulations (see our September 2010 *Blakes Bulletin on Life Sciences: Consultation on Regulations Signals the Canada Consumer Product Safety Act is Moving Forward*).

Given the rapidity with which the government appears to be seeking to bring this legislation into force, manufacturers, importers and sellers of consumer products should consider, as quickly as possible, the ways in which this new legislation will impact their businesses and should take steps to bring their practices into compliance with the CCPSA.

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