



## Wake-up Call

# Canada Introduces Bill for New Consumer Product Safety Act

By Teresa M. Dufort, Les Chaïet and Myriam Seers

**O**n January 29, 2009, the Canadian government introduced legislation that will dramatically increase the size and composition of the federal government's arsenal for dealing with "dangerous" consumer products. This article will discuss how the regulatory landscape for consumer products will change in Canada if and when Bill C-6, the Canada Consumer Product Safety Act (CCPSA), is passed into law.

The CCPSA is a key component of the Canadian government's Food and Consumer Safety Action Plan. The action plan is a comprehensive set of new measures intended to strengthen and modernize the regulatory framework in Canada for food, health and consumer products. Bill C-6 focuses on consumer products. Other types of products are addressed in other pieces of legislation.

With the proliferation of new products and technologies and the increase in international trade with countries with less rigorous product safety standards, the introduction of a new regulatory scheme for consumer products was seen as long overdue. Two critical aspects of the current regime that critics wanted to address were that most consumer product manufacturers and importers were not required to inform regulators if their products proved to be unsafe and regulators had no power to order recalls.

Before Bill C-6 becomes law, it must be reviewed and debated in the House of Commons and the Senate. A similar bill, C-52, was introduced in the House of Commons in April 2008, but it died with the dissolution of Parliament in September 2008. That dissolution was prompted by a federal election that resulted in a new, minority federal government, which introduced Bill C-6. Notwithstanding its status as a minority government, the federal government is not expected to face a lot of opposition to Bill C-6, given the number of highly publicized product safety incidents that have occurred in the past couple

of years. And while there is still opportunity to influence legislators to make changes to Bill C-6, bureaucrats have indicated that there is very limited appetite for it. So, unless the government does fall, bringing about the demise of the current bill, it is likely that the current version of Bill C-6, as first read in Parliament, closely predicts the face of things to come.

Intensive lobbying efforts after Bill C-52 was introduced in April 2008, and before Bill C-6 was introduced 10 months later, did result in some improvements to Bill C-52. Many of the obligations and powers in the bill depend on whether a product represents a "danger to human health or safety." The definition of that phrase now reads: "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..." The word "unreasonable" was not part of the definition in Bill C-52.

As noted, the CCPSA will apply to *consumer* products, whether manufactured in Canada or imported. If manufactured in Canada, the primary regulatory burden will fall on the manufacturer. If manufactured elsewhere and imported, the primary regulatory burden will fall on the importer.

"Consumer products" are defined as products designed to be used by individuals for non-commercial purposes, including their components, parts, accessories and packaging. The CCPSA, however, does not cover all consumer products. Schedule I of the CCPSA lists products that are exempted because they are regulated under other legislation. These include food products, drugs, cosmetics, explosives, feeds, fertilizers, motor vehicles, firearms and pest control products.

The key provisions of the CCPSA for manufacturers and importers:

- a general prohibition against the manufacture, importation, advertisement or sale of consumer products that pose an unreasonable danger to human health or safety;
- prohibitions on packaging, labelling or advertising that is false, misleading or deceptive, as it relates to health or safety;



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- authority for the Minister of Health to require manufacturers and importers to conduct tests or studies and/or compile information to verify compliance or non-compliance with the Act;
- requirements that anyone who manufactures, imports, advertises, sells or tests consumer products maintain records on where the products have come from and where they have gone in the supply chain;
- a requirement that importers provide “prescribed” documents, as yet undefined, at the time of importation, which are likely to be evidence of compliance with product standards;
- a requirement that manufacturers, importers and sellers notify Health Canada of “incidents” within a specified period; “incidents” include occurrences, defects or incorrect labelling or instructions that have a risk of death or serious adverse effects to health, or a recall wherever initiated;
- discretionary power permitting the Minister of Health to disclose confidential business information to another government without notice to or the consent of the company whose information it is;
- authorization for inspectors, for the purpose of verifying compliance or non-compliance with the Act, to undertake tests, examinations, searches, seizures, or the detention of products, and order activities to stop/start;
- authorization for inspectors to order mandatory recalls and other corrective measures to address unsafe consumer products;
- increased fines for some offenses to \$5,000,000, and fines with no upward limits (e.g., left to the discretion of the courts) if an offense is committed knowingly or recklessly; and
- an administrative monetary penalties scheme, with limited defenses, to deal with more minor offenses under the Act.

Bill C-6 as currently drafted is problematic in a number of respects for manufacturers and importers. The biggest issue is that it lacks safeguards to ensure that the

very broad powers regulators are given under the Act are exercised within reasonable limits. The following is an overview of some of the major, problematic issues that arise from the bill.

### **The Definition of “Danger to Human Health and Safety”**

The key phrase in Bill C-6 is “danger to human health and safety” because its definition triggers most of the prohibitions and regulatory powers contained in the bill. There are two problems. First, it does not specify what constitutes an “unreasonable hazard,” which will make it difficult for companies to assess when reporting and other thresholds are reached. Also, there is no seriousness threshold for an “adverse effect on health and injury,” which may result in the inclusion in the definition of many relatively benign but, strictly speaking, adverse effects.

### **Incident Reporting Time Lines Are Unrealistic**

The bill requires businesses with knowledge of product safety incidents to provide an initial report to the Minister of Health within two days and a second, more comprehensive report within seven days. Given the global reach of many products, these deadlines will be unachievable in many instances. With respect to the second report, the content expectations are also unrealistic, given the short amount of time companies have to gather information.

### **No Reasonable Grounds or Belief Limitation on the Exercise of Powers under the Act**

Many of the powers given to the regulator are not subject to “reasonableness” limits. Regulators are given powers to require that tests or studies are undertaken or information is compiled. Regulators also have power to test, examine, search, seize and detain, and to order that activities stop or start. The trigger for the exercise of these powers is either that the Minister of Health considers their exercise necessary to verify compliance or prevent non-compliance, or that the purpose for their exercise is related

to verifying compliance or preventing non-compliance with the Act. Given the potential impact that these types of orders can have on businesses, Bill C-6 ought require a reasonable belief in non-compliance before these powers can be exercised.

The other problem is that regulators are not required to provide notice to the targets of these orders. Stop or start orders can completely shut a business down. Given the potential business impact, Bill C-6 should include a prior notice requirements, however brief, for stop, start and recall orders.

### **Search and Seizure Provisions without Warrant**

Under the CCPSA, government-appointed inspectors do not need to obtain warrants before conducting searches or seizing items or documents. Warrantless search and seizure should be prohibited if the purpose of a search or seizure is to gather evidence of non-compliance. Further, the Act does not establish a time limit on how long seized items may be held, even if violation proceedings have not commenced.

### **Inadequate Opportunity to Review Government Orders**

The Act provides for only limited opportunities for review of orders made under the Act. It would be preferable if the Act contained an explicit mechanism for the review of stop or start orders, the detention of articles, and orders requiring the removal or storage of articles at the owner’s expense. There should also be a process by which affected persons can seek recovery of detained articles. There should be an opportunity for an oral hearing to review recall and similar orders. As it stands now, one can request the review of administrative orders, but the review is conducted by one review officer only, there is no oral hearing and there is no express right of appeal to the Federal Court. It would be preferable to provide for a panel of three review officers who have the power to suspend the orders while the review is underway. There should also be an express right of appeal to the Federal Court of Canada.

**Canadian**, continued on page 82

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**Canadian**, from page 76  
**Confidential Business  
Information Not Protected**

As noted above, the Minister of Health is free to provide confidential business information to third parties, and especially foreign regulators. The CCPSA should establish a threshold level of threat or imminent danger before such action can be taken. The CCPSA should also require advance notice so that a company can make the first call to a foreign regulator or take emergency injunctive proceedings. Ideally, the consent of a company would also be required.

There is no explicit provision in the CCPSA that provides that confidential business information companies are required to provide under the Act will be treated as automatically exempt from disclosure under access to information legislation. There should be such a provision to encourage disclosure. This would place the onus on an information

seeker to show why the exemption should not apply, rather than putting the onus on a company to justify the exemption.

#### **Due Diligence Defenses**

Due diligence is not an available defense to companies faced with a CCPSA administrative monetary penalty. It is also not a defense for companies charged with knowledge-based offenses committed by directors, officers or employees. Due diligence should be available as a defense in both these scenarios under the CCPSA.

#### **Conclusion**

To conclude, if Bill C-6 is passed in its current form, the compliance, financial and reputational risks of dealing in consumer products in Canada will significantly increase. Manufacturers, importers, distributors and retailers who have become accustomed to the relatively unregulated environment that

currently exists for consumer products in Canada are going to have to adjust to a radically new way of doing business. Companies will have to both become familiar with the new requirements and make sure that they have in place the necessary policies and procedures to ensure compliance.

What we do not know is the devil that will be in the details. There are still some significant parts of the new regime that will have to be filled in at the regulatory level, including what prescribed documents importers are going to have to generate before they can import, what information incident reports are going to have to provide and what measurements the government will apply to assess hazard levels.

This is a wake-up call for all companies supplying consumer products in Canada. Bill C-6 is just around the corner, and it is a regulatory development that must be taken very seriously. 