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### Canada Tables Consumer Protection Legislation

April 9, 2008

#### Attention Domestic Manufacturers, Importers, Advertisers and Sellers:

On April 8, 2008, Bill C-52 was tabled in the House of Commons by the Minister of Health. Bill C-52 is, "...an Act respecting the safety of consumer products." 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 which communicate to consumers in Canada must understand 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 adopted by manufacturers, importers, retailers, sellers, and advertisers which 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 the list below because they are covered by other statutory regimes.

- Explosives covered by the *Explosives Act*;
- Cosmetics, devices, drugs and food covered by the *Food and Drugs Act*;
- Pest control products covered by the *Pest Controls Act*;
- Vehicles and equipment covered by the *Motor Vehicle Safety Act*;
- Vessels covered by the *Canada Shipping Act*;
- Firearms, ammunition, cartridge,

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crossbows, and prohibited devices within the meaning of the *Criminal Code*;

- Plants covered by the *Plant Protection Act*;
- Seeds covered by the *Seeds Act*;
- Controlled substances covered by the *Controlled Drugs and Substances Act*; and
- Aeronautical products covered by the *Aeronautics Act*.

The proposed legislation applies to tobacco products, but only in respect of the ignition propensity of the products.

#### **Prohibitions:**

The proposed legislation prohibits manufacturers, importers, advertisers and sellers from:

- the manufacturing, importing, advertising and/or selling of consumer products listed in Schedule 2;
- the manufacturing, importing, advertising and/or selling of consumer products that do not meet the requirements set out in regulations (that are to be tabled at a future date); or
- the manufacturing, importing, advertising and/or selling of a consumer product that is:
  - a danger to human health or safety;
  - the subject of a mandatory recall order under the Act or a voluntary recall in Canada; or
  - the subject of a measure that the manufacturer or importer has not carried out under a mandatory order under the Act.

The proposed legislation 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;
- the subject of a mandatory recall order under the Act or a voluntary recall in Canada; or
- the subject of a measure that the manufacturer or importer has not carried out under a mandatory order under the Act.

In addition to other prohibitions under Canadian law regarding misleading advertising and consumer protection, the proposed legislation prohibits all persons from packaging or labelling 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 labelling a consumer product in a manner that is false, misleading or deceptive relating to its certification or compliance with a safety standard or regulations. Further, no person shall advertise or sell a consumer product that it knows or ought to know is advertised, packaged or labelled contrary to such prohibitions.

In addition, no person shall knowingly provide the Minister of Health with false or misleading

information in relation to a matter covered by the proposed legislation.

**Obligations:**

The proposed legislation imposes a number of new obligations on manufacturers, importers, advertisers and sellers of consumer products.

**(a) Tests, Studies and Compilation of Information**

The proposed legislation 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;
- compile any information that the Minister of Health considers necessary to verify compliance with the Act or the regulations; and
- provide the Minister of Health with documents that contain information and the results of tests or studies in the time or manner that the Minister specifies.

Failure to conduct such tests and provide such information would be an offence under the Act.

**(b) Preparing and Maintaining Documents**

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

- If the person is a retailer:
  - the name and address of the person from whom they obtained the product;
  - the location where they sold the product;
  - the period during which they sold the product; and
  - prescribed documents.
- All other persons;
  - the name and address of the person from whom they obtained the product;
  - the name and address of the person to whom they sold the product; and
  - prescribed documents.

The proposed legislation imposes an additional documentation requirement on importers of consumer products, which must provide the prescribed documents to the Minister at the time of importation.

All persons who are required to maintain such records must maintain the records at their place of business in Canada; or another prescribed place in

Canada. Such information must be provided to the Minister upon written request. Failure to provide such information will be an offence under the Act.

### **(c) Information about Incidents Involving the Consumer Products**

Any person who manufactures, imports or sells a consumer product for commercial purposes shall provide the Minister of Health with all the information in their control regarding any incident related to the product. The notification must occur within two days of the manufacturer, importer or seller becoming aware of the incident. In certain situations, the manufacturer, importer or seller may be required to notify their suppliers of any incident.

The term "incident" is defined in the proposed legislation to mean:

- an occurrence in Canada or elsewhere that results, or that could reasonably be expected to have resulted, in an individual's death or in serious adverse effects on their health, including serious injury;
- a defect or characteristic that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including serious injury;
- incorrect or insufficient information on the label or in instructions - or the lack of a label or instructions - that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including serious injury; or
- a recall or measure that is initiated for human health or safety reasons by specified persons.

The proposed legislation sets out certain requirements relating to the written report that must be provided concerning the incident.

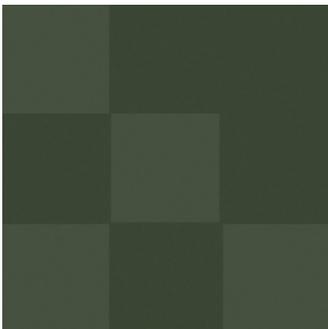
### **Penalties:**

#### **(a) Criminal Penalties**

The penalties imposed under the proposed legislation are 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.

If the prosecutors proceed by way of summary conviction, the fine for a first offence may be up to \$250,000 and/or individuals may be imprisoned for up to six months. For subsequent offences, the fine may be up to \$500,000 and/or individuals may be imprisoned for up to 18 months.

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 wilful 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. If the prosecutors proceed by way of indictment, an individual may also be imprisoned for up to five years. If the prosecutors proceed by way of summary conviction, the fine for a first offence may be up to \$500,000 and/or individuals may be imprisoned for up to 18 months. For subsequent offences, the fine may be up to \$1 million and/or individuals may be imprisoned for up to two years.

#### **(b) Directors, Officers, Agents**

If a corporation/partnership/trust or other business entity commits an offence under the Act or regulations, any of the directors, officers, agents, 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.

#### **(c) Employees**

A person may be prosecuted under the Act if there is sufficient proof that any employee, agent or mandatary committed the contravention. It is not necessary that the individual employee, agent or mandatary is identified or prosecuted for the contravention.

#### **(d) Administrative Penalties**

The proposed legislation (and the regulations that will follow) establishes 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.

#### **Conclusion:**

Given the fact that administrative penalties may add up to significant monetary amounts, 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 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 you of the law that will apply, update you when the regulations are published, conduct a

compliance audit of your operations, 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 and teach directors, officers, employees, agents, mandataries and others about their obligations.

We can refer you to our Government Relations team should you wish to make submissions to the Canadian Government concerning the effects of the proposed legislation.

*This article appeared in the International Trade Alert issued on April 9, 2008. To subscribe to the International Trade publication, please visit our [Publications Request page](#).*