IN FACT AND IN LAW

Product Liability

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Manufacturers, Importers, Distributors and Retailers: the Public's Safety is your Business

By Louis Charette

The increasing number of recalls of consumer products in recent years is indicative of a trend that has raised concerns for governmental authorities. In response, the Canadian government announced, on April 8, 2008, a reform of the existing legislation to strengthen the protection of human health and safety. The first step was the introduction of the ***Canada Consumer Product Safety Act*** *(Bill C-52) and the second, the reform (Bill C-51) of the* ***Food and Drugs Act*** *(R.S.C. 1985, c. F-27).*

Both elements of this reform may have considerable impact on this critical sector of our economy. The ***Canada Consumer Product Safety Act*** *is ambitious and may have serious repercussions on the activities of any number of businesses, and so it warrants particular attention.*

Objective of the reform

The reform seeks to increase the protection of the public against the dangers to human health and safety presented by certain consumer products available in Canada. Although parallel legislation exists, including the *Hazardous Products Act*, the *Explosives Act*, the *Pest Control Products Act*, the *Motor Vehicle Safety Act* and the *Tobacco Act*, the proposed regime imposes a heavy burden on those covered by it and grants more powers to the Minister of Health.

Bill C-52 is aimed at all those involved in the chain of distribution of a consumer product. The manufacturer, the importer and the vendor are therefore subject to its provisions. Although the Bill does not refer expressly to persons who act only as distributors, the provisions of the Bill are sufficiently broad that it is reasonable to believe that distributors will be assimilated to sellers and thus be subject to the new regime. We can indeed draw a parallel with the civil liability regime and the legal warranty of quality provided for by the *Civil Code of Quebec* which imposes on the vendor, importer, distributor and manufacturer a guarantee in favour of the buyer that the product and its accessories are free from latent defects.

Consumer product

Bill C-52 covers "consumer products" in general:

> **"consumer product" means a product, including its components, parts or accessories, that can reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes its packaging.**

The Bill contains prohibitions against manufacturing, importing, selling or advertising certain consumer products. The prohibitions are of three kinds:

1. Certain prohibited products are listed in Schedule 2 to the Bill including such items as jequirity beans or derivative products, baby products that are put in the mouth when used and that contain a filling that has in it a viable micro-organism, kite strings made of a material that conducts electricity, etc. These are essentially products which have already been the subjects of studies and certain restrictions;
2. The Bill provides the Minister of Health with the power to regulate the manufacturing, importation, packaging, storage, sale, labeling, testing, transportation and advertising of consumer products. The manufacturing, importation, sale or advertising of a product that fails to respect the requirements imposed by the regulations which have yet to be published, will be prohibited.

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It is foreseeable that this prohibition will cover not only the products for which regulations will be adopted pursuant to the Bill when it becomes law, but also products prohibited by regulations already in force under existing legislation that will not be exempted from the application of the Bill.

3. A more general prohibition of the manufacturing, importation, sale or advertising of a "consumer product" which is a **"danger to human health or safety"** which is defined as follows:

> **"danger to human health or safety" means any existing or potential hazard 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 hazard, and includes any exposure to a consumer product that it likely to have a chronic adverse effect on human health.**

Thus, the Bill covers the broadest variety of products possible and is not limited to those that are specifically covered by a statute or regulation.

Maintenance of documents

Aside from these prohibitions, the Bill provides for the imposition of new obligations. Any person who manufactures, imports, sells, tests or advertises a consumer product must prepare and maintain documents showing the name and address of the person from whom they obtained the product and the person to whom they sold it. Retailers must maintain documents that state the name and address of the person from whom they obtained the product and the location where, and the period during which, they sold the product.

Duty to inform

Where an "incident" involving a consumer product occurs, any person who manufactures, imports or sells the product and who has knowledge of such incident, is required to notify the Minister of Health within two days of becoming aware of the incident. The manufacturer or, if the manufacturer carries on business outside Canada, the importer, is required to provide the Minister of Health, within seven days of becoming aware of the incident, with a written report with respect to the incident, the product involved, any products it manufactures or imports which could be involved in a similar incident, and any measures it proposes to protect consumers.

Packaging and labeling

In addition to the measures with respect to quality control, the Bill sets out rules for the packaging and labeling of consumer products. Hence, it is prohibited to package or label a consumer product in a false, misleading or deceptive manner or in a manner that it is likely to create an erroneous impression as to its safety, certification or compliance with the standards that apply to it. The sale or advertising of a product that one knows to be packaged or labeled in contravention of such prohibition is also prohibited.

Increased powers of the Minister of Health

The reform is innovative in that it grants new powers to the federal Minister of Health and the inspectors to be named under the Bill when it becomes law. These powers include, for example, the authority to enter premises and inspect products, the power to order any person who manufactures or imports a consumer product to conduct tests or studies on the product, and the power to require that the manufacturing, importing, packaging, storing, sale, labeling, testing or transportation of a product be stopped.

Recall campaigns

However, the most notable innovation involves recall campaigns. Contrary to existing legislation pursuant to which recall campaigns are done solely on a voluntary basis (subject to certain exceptions), the Bill would allow a Health Canada inspector to order the recall of a product manufactured, imported or sold if there are reasonable grounds to believe that the product is a danger to human health or safety.

Although the Bill does not specify the measures to be taken in the context of a recall campaign, it is reasonable to believe that they will be similar to those already recommended by Health Canada.

Sanctions

A contravention of the provisions of the Bill (if it becomes law), its regulations or an order issued pursuant to it may lead to sanctions, including fines and imprisonment. Where a corporation contravenes the Bill, its directors, officers, agents and representatives who acquiesced or participated in the commission of the offence will be considered parties to the offence and be liable on conviction to the punishment provided for by the Bill.

Conclusion

Although Bill C-52 is making its way through the legislative process, the government has already made it clear that the current regime does not provide consumers with sufficient protection and that it intends to clamp down on manufacturers and importers. Although the proposed legislation will in all likelihood be adopted, much of the detail will be contained in the regulations which have yet to be published.

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