

# MANUFACTURE AND SALE OF GOODS

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*By Chris Hubbard*



## MANUFACTURE AND SALE OF GOODS

### Regulations and Product Standards

The *Canada Consumer Product Safety Act* came into force in 2011. This legislation prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” It also expands the federal government’s powers to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers and retailers need to comply with stringent requirements to maintain required records concerning their products and report incidents.

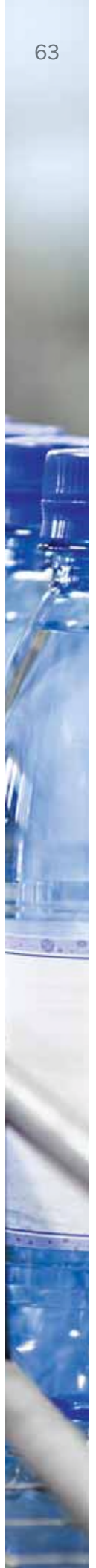
In addition, federal statutes such as the *Food and Drugs Act*, the *Hazardous Products Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* (and regulations made under them), as well as a range of provincial regulations, can directly affect business operations in Canada, since goods that fail to comply with the statutory and regulatory requirements may not lawfully be sold.

For example, regulations made under the *Hazardous Products Act* cover items as diverse as cellulose insulation, mattresses, booster cushions, tents, pacifiers and children’s sleepwear, and also describe product standards that must be met before such products can lawfully be sold in Canada. Regulations under the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act* contain detailed provisions concerning a wide range of goods and products.

Failure to comply with statutory or regulatory requirements can result in criminal prosecution, civil liability — or both. The Standards Council of Canada (SCC) is a federal Crown Corporation with a mandate to promote efficient and effective development and application of standards. It carries out a variety of functions designed to ensure the effective and co-ordinated operation of standardization in Canada. The SCC oversees Canada’s National Standards System, a network of more than 400 organizations and 15,000 volunteers involved in the development, promotion and implementation of standards.

The National Standards System does not itself develop standards or

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verify the conformity of products or services to standards, but accredits those organizations that do develop standards or verify the conformity of products or services to standards, such as the Canadian General Standards Board (CGSB), a federal government organization, and the Canadian Standards Association (CSA), an independent non-profit organization.

The CSA develops standards and tests products to certify that the products meet the CSA's published standards. CSA certification is mandatory under government regulation for some products (e.g., toys that are operated electrically) and voluntary for others. The CSA certification mark ensures that a product meets a basic level of conformity to the product features deemed essential by the published standard.

Once a standard is published by the CSA, product manufacturers may elect to have their products tested by either the CSA or another approved certification laboratory, in order to obtain CSA certification. After certification, CSA representatives conduct regular, unannounced, on-site visits to manufacturing locations to ensure that the products continue to meet CSA standards. Where CSA certification is mandatory, manufacturers may be required by inspectors appointed under the *Hazardous Products Act* to pull or recall non-conforming products.

### **Consumer Protection**

The *Canada Consumer Product Safety Act* gives the federal government authority to deal with products that may pose a danger to human health and safety. Any safety incidents involving the product must be reported. Manufacturers, importers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. The government also receives reports directly from consumers. Such reports can lead to inspections, requirements for product testing or product recalls. The government may also conduct an inspection in the absence of a report.

Federal and provincial governments have also enacted specific legislation that prohibits deceptive or unfair business practices (including misleading advertising), imposes sanctions on businesses engaging in such conduct and provides additional protection for Canadian consumers. Class actions, which are becoming increasingly popular as a consumer protection tool in Canada, are often based on alleged breaches of the *Competition Act* or provincial consumer protection statutes.

To ensure that consumers are not misled, the *Competition Act* contains important provisions concerning advertising of products and promotion of business interests. Making a representation to members of the public that is false or misleading in a material respect, and making this representation knowingly or recklessly, is punishable by substantial fines and even jail terms. False or misleading statements can also lead to liability to consumers for monetary damages. See [Competition Law](#).

Provincial statutes such as Ontario's *Consumer Protection Act, 2002* are also aimed at providing protection for consumers in their dealings with corporations and businesses. These statutes provide consumers who have been harmed by deceptive or unconscionable business practices with a variety of statutory remedies, including damages, punitive damages and rescission of agreements. Specific, consumer-friendly contract terms may be mandated. Other contract terms, such as waivers of implied statutory warranties or terms requiring any disputes to be submitted to binding arbitration or purporting to ban a consumer from initiating or participating in a class action, may be unenforceable against consumers.

For a discussion of the application of consumer protection laws to online commerce, See [Information Technology — Consumer Protection — Internet Agreements](#).

### **Product Liability**

Any business involved in the design, manufacture, distribution or sale of products is a potential defendant in a product liability claim. Claims may be based on breach of a contract or on negligence; sometimes they are based on both. Product liability claims are also popular subjects for class action litigation in Canada. See [Dispute Resolution — Class Actions](#).

Provincial statutes such as the Ontario *Sale of Goods Act* provide that warranties of fitness for purpose and of merchantable quality are implied in contracts between buyers and sellers for the sale of goods. Parties can contract out of the implied terms, except in the case of consumer or retail sales. A buyer of a product purchased from someone other than the product's manufacturer may not rely on the implied warranties under the *Sale of Goods Act* in a claim against the manufacturer. However, the buyer may be able to assert a contract claim against the manufacturer for breach of warranty if a collateral warranty was provided by the manufacturer and that warranty is found to be a representation inducing the sale.



Contract claims are strict liability claims. Absence of negligence is not a defence.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user, and as a result, many product liability claims are tort-based claims alleging negligence.

Claimants must prove that:

- a duty of care was owed to them;
- the product was defective;
- there was a failure to meet the applicable standard of care; and
- the claimants suffered damage caused by the defendant's negligence.

The mere presence of a defect in a product can justify an inference of negligence in the manufacturing process. Where a product is not necessarily defective, but is or could be dangerous, a product liability claim may be based on a failure to provide adequate warnings concerning the use of the product and/or a failure to warn of risks associated with use of the product. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use.

In defining the standard of care, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry standards. However, if the industry standard is inadequate, a defendant may be found negligent despite conforming to it. Although conformity with regulatory standards can be highly relevant to the assessment of reasonable conduct in a particular case, meeting those standards alone will not necessarily absolve a manufacturer of liability.

Generally, a manufacturer's duty is to take reasonable care to avoid causing either personal injury or damage to property. However, where a product has not in fact caused any physical injury or damage to property, a person may still recover damages for economic losses (e.g., the cost of repairing a defective product) where the failure to take reasonable care resulted in defects that pose a real and substantial danger of actual physical injury or property damage.

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