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MANUFACTURE AND SALE OF CONSUMER GOODS

The manufacture, importation, distribution, and sale of consumer goods are the subject of heavy regulation in Canada. Various statutes impose often stringent obligations on manufacturers, distributors and retailers, and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. Goods that fail to comply with the statutory requirements may not lawfully be sold in Canada and may be subject to recall. Manufacturers are also potential defendants in individual and class action product liability litigation relating to allegedly defective or unsafe products.

Regulation of Consumer Products

The *Canada Consumer Product Safety Act* (CCPSA) came into force in 2011. It applies to “consumer products” and prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” The CCPSA gives the federal government the power 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 product safety “incidents” directly to Health Canada within short time frames.

“Consumer products” subject to regulation under the CCPSA are all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, with the exception of the products listed in Schedule 1 of the CCPSA. Generally, the excluded products are those covered by other specific legislation, including food, cosmetics, drugs, natural health products, medical devices, pest control products, firearms, and vehicles.

Regulations made under the CCPSA may also impose additional compliance requirements for many specific types of products, including: candles; carbonated beverage glass containers; carriages and strollers; cellulose and fibre insulation; charcoal; children’s jewelry; children’s sleepwear; consumer products containing lead; consumer chemicals and containers; cribs, cradles and bassinets;

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corded window coverings; face protectors for ice hockey and box lacrosse players; glass doors and enclosures; glazed ceramics; ice hockey helmets; infant feeding bottle nipples; kettles; lighters; matches; mattresses; pacifiers; phthalates; playpens; residential detectors; restraint systems and booster seats for motor vehicles; tents; textiles (flammability); toys; and vaping products.

The CCPSA grants Health Canada sweeping powers to audit businesses to assess compliance with their obligations under the legislation. Health Canada also conducts its own product testing and engages in a cyclical enforcement program in which products in various product categories are tested for compliance with various CCPSA regulations. Health Canada may also require a manufacturer or importer of a product to conduct testing on the product to confirm compliance with the CCPSA and regulations.

In addition to the CCPSA, federal statutes such as the *Food and Drugs Act*, the *Safe Food for Canadians 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 manufacturers whose consumer products are sold in Canada. For example, food, drugs, cosmetics, medical devices and natural health products are regulated by other legislation. Goods that do not comply with the statutory and regulatory requirements may not lawfully be sold.

A comprehensive regulatory review for all products is beyond the scope of this text, so manufacturers should familiarize themselves with the statutes and regulations applicable to the particular products they sell.

Consumer Protection

As noted above, Health Canada is a principal regulator of consumer product safety under the CCPSA, which prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” Manufacturers must report safety “incidents” to Health Canada within very strict timelines (two days for the initial report and 10 days for a follow up report). The definition of what constitutes a reportable “incident” is broad. Even if an event did not result in actual harm, it is a reportable incident under the CCPSA if the event did or “may reasonably have been expected” to cause a serious health effect or injury. Manufacturers, importers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. Health Canada also receives reports directly from consumers.

Health Canada has the power to conduct compliance inspections to verify that manufacturers and suppliers are, among other things, familiar and complying with their incident-reporting obligations. Inspectors have the power to inspect a company's place of business and documents to carry out a compliance audit. Health Canada compliance audits can be triggered by a consumer report or report from someone else in the supply chain, and the government may also conduct an inspection in the absence of a report.

Provincial governments have also enacted consumer protection statutes, such as Ontario's *Consumer Protection Act, 2002*, which are aimed at providing protection for consumers in their dealings with corporations and businesses. These statutes impose various obligations on businesses in their dealings with consumers and provide consumers who have been harmed by deceptive or unconscionable business practices a variety of statutory remedies, including damages, punitive damages and rescission of agreements. Consumer protection legislation can also mandate specific, consumer-friendly contract terms, or prohibit or make unenforceable 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. There are differences between the consumer protection statutes in each province, so businesses should ensure their practices comply with the statutes of all provinces in which their goods are sold.

Consumer protections are also contained in the federal *Competition Act*, which contains provisions prohibiting misleading advertising and concerning the 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](#).

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

Product Liability

The sale of products alleged to be defective or to have caused injury or damage can give rise to litigation against product manufacturers as well

as others in the supply chain. Common claims are claims for breach of a contract and in negligence but can also include other claims such as battery or unjust enrichment. Product liability claims are also popular subjects for class action litigation in Canada. See [Dispute Resolution — Class Actions](#).

Contract claims are strict liability claims, and the absence of negligence is not a defence. All provinces and territories have sale of goods legislation that imply warranties of fitness for purpose and of merchantable quality into contracts between buyers and sellers of goods (see, for example, Ontario's *Sale of Goods Act*, R.S.O. 1990, c. S.1.). Parties can contract out of the statutorily implied terms, except in the case of consumer or retail sales.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user. In such cases, a buyer of a product generally cannot rely on the implied warranties under sale of goods legislation in a claim against the manufacturer. As a result, many claims against manufacturers are framed in negligence, as discussed below. 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. As well, even where a consumer only has a breach of contract claim against the seller and not against the manufacturer, the seller may still seek contribution and indemnity from the manufacturer in relation to that claim.

Manufacturers and others may also be exposed to negligence claims arising from an alleged defect in a product. In order to succeed in a negligence claim, claimants must generally 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. Whether there is a "defect" in a product is a fact-specific inquiry with reference to the reasonably expected and foreseeable uses of the product. The mere presence of a defect in a product can justify an inference of negligence in the design or manufacturing process. Often, a product recall is used as a basis for alleging a defect and commencing litigation.

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 relevant to the assessment of reasonable conduct in a particular case, meeting those standards alone will not necessarily absolve a manufacturer of liability.

A manufacturer's common law duty of care is generally limited to taking reasonable care to avoid causing either personal injury or damage to property. However, in Canada, in some circumstances liability can still arise where there is no actual personal injury or damage to property caused. For example, consumers may be entitled to recover purely economic loss associated with avoiding the danger caused by an unsafe product, where a manufacturer's negligence resulted in defects that pose a real and substantial risk of actual physical injury or property damage.

In some circumstances, there may also be a common law duty on manufacturers or others to warn customers about a product defect or to initiate remedial action, such as a recall. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use. The existence and content of any duty to warn or take remedial action are fact-specific inquiries and depend on the circumstances of the case.

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