

New Canadian Consumer Product Safety Act: What Policy Coverage Will it Trigger and When?

By Gary H. Luftspring and Sam R. Sasso¹

Part I – Introduction

1. The new *Canadian Consumer Product Safety Act* (“CCPSA”) is ripped from the headlines legislation: effective June 20, 2011, the CCPSA allows the Minister of Health to order a recall of consumer products like children’s goods, textiles and sports equipment that Health Canada considers hazardous; previously, the Minister of Health could only suggest that a company make a voluntary recall. The CCPSA further authorizes Health Canada to investigate and inspect companies and their products, requires companies to cooperate with any inspections, and permits Health Canada to make sweeping, even draconian, orders against companies while providing those companies with little or no initial recourse. The CCPSA authorizes the Minister of Health to act without delay on the first sign of trouble, regardless of whether that trouble is well-founded.

2. The powers granted to Health Canada by the CCPSA appear to be entirely prudent and justifiable: why wouldn’t the government have the ability to order a recall of potentially dangerous products whenever it sees fit? Isn’t that exactly the type of regulation and protection a government should be providing? However, the new powers granted to Health Canada should give companies that manufacture or sell consumer products in Canada pause. What if Health Canada orders a recall based on erroneous information? What will that do to consumer confidence for that product? Will class actions ensue *because* Health Canada orders a recall and would those class actions be

¹ Gary H. Luftspring is a partner, and Sam R. Sasso is an associate, of Ricketts, Harris LLP.

strengthened due to Health Canada's intervention? If a recall is ordered, will any loss that results be covered under any of the company's insurance policies?

3. This paper will discuss how the CCPSA will affect companies that sell or manufacture consumer goods in relation to its insurance policies and their exposure to class actions. Further, this paper will discuss ways a company which sells consumer goods can limit its risk by obtaining appropriate coverage and in limiting its exposure to class actions.

Part II – Background and the CCPSA

(i) 2007: The year of the recall

4. In 2007, there were several high-profile recalls of products such as pet food, cosmetics and children's toys. In August of 2007, toy manufacturer Mattel recalled nearly one million toys in Canada and over 19 million toys worldwide, the toys having been designed in the United States but manufactured in China. Many of the toys were recalled due to concerns over the content of lead, a flaw later determined to be a design defect not one of manufacturing. However, regardless of the source of the problem which led to the recalls, the need to take toys out of children's hands due to safety concerns is one that made a lasting impression.

5. Worldwide product safety reforms were either already in progress or followed shortly afterwards. Just prior to some of the higher profile recalls, China had implemented a new regulatory system which required toy manufacturers to be certified. In the year after the recalls, the United States passed the *Consumer Product Safety Improvement Act* which, among other things, regulated the amount of lead which could

be used in toys and required that every manufacturer provide a “General Conformity Certificate” to certify that the product conforms with all safety rules based on the company’s own testing. Similar regulations passed by the European Union provide for the recall of products from all member states once a problem is discovered.

6. Canada was not immune to being the source of a massive recall of products. In 2007, Menu Foods, a company based out of Ontario, was forced to recall over 60 million containers of pet food in the United States and Canada. The pet food products were prepared in the United States and Canada but contained ingredients from China thought to be contaminated with an industrial chemical. The products are thought to have contributed to the deaths of hundreds if not thousands of pets in the United States and Canada.

7. Class action lawsuits were commenced against Menu Foods in the United States and Canada immediately after the initial recall. A year-and-a-half after the initial recall, a \$24 million settlement was approved by courts in the United States and Canada which settled the more than 100 class actions which had been commenced. The economic impact of the recall and the class actions was devastating on Menu Foods: in 2010, Menu Foods was purchased by Arkansas-based Simmons Pet Food.

8. Although the CCPSA does not deal with the regulation of pet food, the 2007 pet food recall was very much part of the dialogue at the time and influenced the government’s decision to enact the CCPSA. Further, the 2007 pet food recall as it related to Menu Foods can be viewed as a cautionary tale for companies which must deal with

recalls – either voluntary or mandatory under the CCPSA – and class actions that result from the recalls.

9. During the 2007 toy recall, Health Canada was limited to only conducting an investigation into which safety standards had been breached; although at the time Health Canada could coordinate with companies, investigate and make recommendations, recalls could not be ordered by the government. The toy recall occurred one week before the leaders of Canada, the United States and Mexico were scheduled to meet; after hearing of the recall, prime minister Harper agreed to discuss the safety standards that governed the importation of products at that meeting. The CCPSA was introduced as Bill C-36 and received first reading on June 9, 2010.

(ii) The text of the CCPSA

10. As discussed in detail below, the CCPSA imposes substantial duties on companies and permits Health Canada to take drastic steps, the key provisions being:

- (i) The emphasis on “dangers to human health” in the preamble;
- (ii) The definition of consumer products and prohibited products (sections 4-11);
- (iii) Ordering tests and maintaining records (sections 12-13);
- (iv) The definition of an Incident (section 14);
- (v) The Minister of Health’s ability to disclose personal and confidential business information (sections 15-18);

- (vi) Inspections and seizures (sections 19-22);
- (vii) Recall orders (sections 31-33);
- (viii) Reviewing recall orders (sections 34-35);
- (ix) Injunctions (section 36);
- (x) Regulations and interim orders (sections 37-40); and
- (xi) Offences, defences and penalties (sections 41-43).

11. (i) **“Dangers to Human Health” in the Preamble:** The intention behind the CCPSA can be found in the preamble, which is more detailed and comprehensive than most:

Preamble

Whereas the Parliament of Canada recognizes the objective of protecting the public by addressing dangers to human health or safety that are posed by consumer products;

Whereas the Parliament of Canada recognizes that the growing number of consumer products that flow across the borders of an increasingly global marketplace make the realization of that objective a challenge;

Whereas the Parliament of Canada recognizes that along with the Government of Canada, individuals and suppliers of consumer products have an important role to play in addressing dangers to human health or safety that are posed by consumer products;

Whereas the Parliament of Canada wishes to foster cooperation within the Government of Canada, between the governments in this country and with foreign governments and international organizations, in particular by sharing information, in order to effectively address those dangers;

Whereas the Parliament of Canada recognizes that, given the impact activities with respect to consumer products may have on the environment, there is a need to create a regulatory system

regarding consumer products that is complementary to the regulatory system regarding the environment;

Whereas the Parliament of Canada recognizes that a lack of full scientific certainty is not to be used as a reason for postponing measures that prevent adverse effects on human health if those effects could be serious or irreversible;

And whereas the Parliament of Canada recognizes that the application of effective measures to encourage compliance with the federal regulatory system for consumer products is key to addressing the dangers to human health or safety posed by those products;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

12. The specific sections in the CCPSA should be read in context with the intentions described in the preamble. It is no accident that “the objective of protecting the public” and “dangers to human health or safety” appear in the first sentence of the preamble. In fact, “danger” appears four times in the preamble.

13. **(ii) Consumer Products and Prohibited Products:** According to section 4 (1) of the CCPSA, the CCPSA applies to “consumer products” except those enumerated in Schedule 1; the types of products excluded from the CCPSA are explosives, cosmetics, food, drugs, vehicles and firearms. “Consumer product” is defined in the CCPSA as:

a product, including its components, parts or accessories, that may be 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.²

14. Sections 6-11 enumerate what is prohibited under the CCPSA:

PROHIBITIONS

Consumer products in Schedule 2

² CCPSA, s. 2.

5. No person shall manufacture, import, advertise or sell a consumer product listed in Schedule 2.

Products that do not meet regulatory requirements

6. No person shall manufacture, import, advertise or sell a consumer product that does not meet the requirements set out in the regulations.

Manufacturer and importer

7. No manufacturer or importer shall manufacture, import, advertise or sell a consumer product that

(a) is a danger to human health or safety;

(b) is the subject of a recall order made under section 31 or such an order that is reviewed under section 35 or is the subject of a voluntary recall in Canada because the product is a danger to human health or safety; or

(c) is the subject of a measure that the manufacturer or importer has not carried out but is required to carry out under an order made under section 32 or such an order that is reviewed under section 35.

Advertising and selling

8. No person shall advertise or sell a consumer product that they know

(a) is a danger to human health or safety;

(b) is the subject of a recall order made under section 31 or such an order that is reviewed under section 35 or is the subject of a voluntary recall in Canada because the product is a danger to human health or safety; or

(c) is the subject of a measure that has not been carried out but is required to be carried out under an order made under section 32 or such an order that is reviewed under section 35.

Misleading claims — package or label

9. No person shall package or label a consumer product

(a) in a manner — including one that is false, misleading or deceptive — that may reasonably be expected to create an erroneous impression regarding the fact that it is not a danger to human health or safety; or

(b) in a manner that is false, misleading or deceptive regarding its certification related to its safety or its compliance with a safety standard or the regulations.

Misleading claims — advertise or sell

10. No person shall advertise or sell a consumer product that they know is advertised, packaged or labelled in a manner referred to in section 9.

False or misleading information

11. No person shall knowingly provide the Minister with false or misleading information in relation to a matter under this Act or the regulations.

15. It should be noted that some of the banned items which cannot be manufactured, imported, advertised or sold in Schedule 2 include items like baby walkers with wheels, structural devices that allow baby bottles to be used unattended, kites made of material that conducts electricity, lawn darts with elongated tips and baby bottles made from bisphenol A.

16. **(iii) Ordering Tests and Maintaining Records:** Sections 12 and 13 of the CCPSA provide that the Minister of Health may order any person who manufactures or imports a consumer product to conduct tests or provide requested information and establishes the duties required in preparing and maintaining documents:

TESTS, STUDIES AND COMPILATION OF INFORMATION

Tests, studies and information

12. The Minister may, by written notice, order any person who manufactures or imports a consumer product for commercial purposes to

(a) conduct tests or studies on the product in order to obtain the information that the Minister considers necessary to verify compliance or prevent non-compliance with this Act or the regulations;

(b) compile any information that the Minister considers necessary to verify compliance or prevent non-compliance with this Act or the regulations; and

(c) provide him or her with the documents that contain that information and the results of the tests or studies in the time and manner that the Minister specifies.

PREPARING AND MAINTAINING DOCUMENTS

Requirement

13. (1) Any person who manufactures, imports, advertises, sells or tests a consumer product for commercial purposes shall prepare and maintain

(a) documents that indicate

(i) in the case of a retailer, 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, and

(ii) in the case of any other person, the name and address of the person from whom they obtained the product or to whom they sold it, or both, as applicable; and

(b) the prescribed documents.

Period for keeping documents

(2) The person shall keep the documents until the expiry of six years after the end of the year to which they relate or for any other period that may be prescribed.

Keeping and providing documents in Canada

(3) The person shall keep the documents at their place of business in Canada or at any prescribed place and shall, on written request, provide the Minister with them.

Exemption — outside Canada

(4) The Minister may, subject to any terms and conditions that he or she may specify, exempt a person from the requirement to keep documents in Canada if the Minister considers it unnecessary or impractical for the person to keep them in Canada.

Importation

(5) A person who imports a consumer product for commercial purposes shall, no later than at the time of the product's

importation, provide the Minister with those documents referred to in paragraph (1)(b) that are specified in the regulations.

17. (iv) **The Definition of an “Incident”**: Section 14 of the CCPSA defines the term “incident” – a definition that reflects the events of 2007 – and sets out duties in the event of an incident:

DUTIES IN THE EVENT OF AN INCIDENT

Definition of “incident”

14. (1) In this section, “incident” means, with respect to a consumer product,

(a) an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury;

(b) 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 a serious injury;

(c) incorrect or insufficient information on a 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 a serious injury;
or

(d) a recall or measure that is initiated for human health or safety reasons by

(i) a foreign entity,

(ii) a provincial government,

(iii) a public body that is established under an Act of the legislature of a province,

(iv) an aboriginal government as defined in subsection 13(3) of the Access to Information Act, or

(v) an institution of an entity referred to in subparagraphs (ii) to (iv).

Requirement to provide information

(2) A person who manufactures, imports or sells a consumer product for commercial purposes shall provide the Minister and, if applicable, the person from whom they received the consumer product with all the information in their control regarding any incident related to the product within two days after the day on which they become aware of the incident.

Report

(3) The manufacturer of the consumer product, or if the manufacturer carries on business outside Canada, the importer, shall provide the Minister with a written report — containing information about the incident, the product involved in the incident, any products that they manufacture or import, as the case may be, that to their knowledge could be involved in a similar incident and any measures they propose be taken with respect to those products — within 10 days after the day on which they become aware of the incident or within the period that the Minister specifies by written notice.

18. **(v) The Minister of Health’s ability to disclose personal and confidential business information:** Sections 15-18 of the CCPSA permits the Minister of Health to disclose personal and confidential business information without consent if deemed necessary to address a serious danger:

DISCLOSURE OF INFORMATION BY THE MINISTER

Personal information

15.(1) The Minister may disclose personal information to a person or a government that carries out functions relating to the protection of human health or safety without the consent of the individual to whom the personal information relates if the disclosure is necessary to identify or address a serious danger to human health or safety.

Privacy Act not affected

(2) For greater certainty, nothing in this section affects the provisions of the Privacy Act.

Confidential business information — agreement

16. The Minister may disclose confidential business information to a person or a government that carries out functions relating to

the protection of human health or safety or the environment — in relation to a consumer product — without the consent of the person to whose business or affairs the information relates and without notifying that person if the person to whom or government to which the information may be disclosed agrees in writing to maintain the confidentiality of the information and to use it only for the purpose of carrying out those functions.

Confidential business information — serious and imminent danger

17. (1) The Minister may, without the consent of the person to whose business or affairs the information relates and without notifying that person beforehand, disclose confidential business information about a consumer product that is a serious and imminent danger to human health or safety or the environment, if the disclosure of the information is essential to address the danger.

Disclosure of information — notification

(2) If the Minister discloses confidential business information under subsection (1), he or she shall, not later than the next business day following the disclosure, notify the person to whose business or affairs the information relates.

Definition of “business day”

(3) In this section, “business day” means a day other than a Saturday or a holiday.

For greater certainty

18. For greater certainty, the Minister may disclose to the public information about a danger to human health or safety that a consumer product poses.

19. **(vi) Inspections and Seizures:** Section 19 provides that the Minister of Health can appoint inspectors under the CCPSA and section 20 makes it an offence to obstruct or mislead inspectors; sections 21 and 22 of the CCPSA gives those inspectors broad powers of inspection (even in private homes) and seizure of products:

INSPECTORS

Number of inspectors

19. (1) The Minister shall decide on the number of inspectors sufficient for the purpose of the administration and enforcement of this Act and the regulations.

Designation

(2) The Minister may designate an individual as an inspector for the purpose of the administration and enforcement of this Act and the regulations.

Certificate to be produced

(3) An inspector shall be given a certificate in a form established by the Minister attesting to the inspector's designation and, on entering a place under subsection 21(1), the inspector shall, on request, produce the certificate to the person in charge of that place.

Obstruction and false statements

20. No person shall knowingly obstruct, hinder or make a false or misleading statement either orally or in writing to an inspector who is carrying out their functions.

INSPECTION

Authority to enter place

21. (1) Subject to subsection 22(1), an inspector may, for the purpose of verifying compliance or preventing non-compliance with this Act or the regulations, at any reasonable time enter a place, including a conveyance, in which they have reasonable grounds to believe that a consumer product is manufactured, imported, packaged, stored, advertised, sold, labelled, tested or transported, or a document relating to the administration of this Act or the regulations is located.

Powers

(2) The inspector may, for the purpose referred to in subsection (1),

(a) examine or test anything — and take samples free of charge of an article to which this Act or the regulations apply — that is found in the place;

(b) open a receptacle or package that is found in the place;

(c) examine a document that is found in the place, make a copy of it or take an extract from it;

(d) seize and detain for any time that may be necessary

(i) an article to which this Act or the regulations apply that is found in the place, or

(ii) the conveyance;

(e) order the owner or person having possession, care or control of an article to which this Act or the regulations apply that is found in the place — or of the conveyance — to move it or, for any time that may be necessary, not to move it or to restrict its movement;

(f) use or cause to be used a computer or other device that is at the place to examine a document that is contained in or available to a computer system or reproduce it or cause it to be reproduced in the form of a printout or other intelligible output and remove the output for examination or copying;

(g) use or cause to be used copying equipment that is at the place and remove the copies for examination;

(h) take photographs and make recordings and sketches; and

(i) order the owner or person in charge of the place or a person who manufactures, imports, packages, stores, advertises, sells, labels, tests or transports a consumer product at the place to establish their identity to the inspector's satisfaction or to stop or start the activity.

Conveyance

(3) For the purpose of entering the conveyance, an inspector may order the owner or person having possession, care or control of the conveyance to stop it or move it to a place where the inspector can enter it.

Entering private property

(4) An inspector who is carrying out their functions and any person accompanying them may enter on or pass through or over private property.

Assistance and information to be given to inspector

(5) The owner or person in charge of the place and every person found in the place shall give an inspector who is carrying out their functions all reasonable assistance and provide them with any information that they may reasonably require.

Warrant or consent required to enter dwelling-house

22. (1) If the place mentioned in subsection 21(1) is a dwelling-house, an inspector may not enter it without the consent of the occupant except under the authority of a warrant issued under subsection (2).

Authority to issue warrant

(2) A justice of the peace may, on ex parte application, issue a warrant authorizing, subject to the conditions specified in the warrant, the person who is named in it to enter a dwelling-house if the justice of the peace is satisfied by information on oath that

(a) the dwelling-house is a place described in subsection 21(1);

(b) entry to the dwelling-house is necessary for the purposes referred to in subsection 21(1); and

(c) entry to the dwelling-house was refused or there are reasonable grounds to believe that it will be refused or to believe that consent to entry cannot be obtained from the occupant.

Use of force

(3) In executing a warrant issued under subsection (2), the inspector may not use force unless they are accompanied by a peace officer and the use of force is authorized in the warrant.

Telewarrant

(4) If an inspector believes that it would not be practical to appear personally to make an application for a warrant under subsection (2), a warrant may be issued by telephone or other means of telecommunication on application submitted by telephone or other means of telecommunication and section 487.1 of the *Criminal Code* applies for that purpose with any necessary modifications.

20. **(vii) Recall Orders:** Sections 31-33 of the CCPSA set out the Minister of Health's authority to recall consumer products if the Minister believes "on reasonable grounds that a consumer product is a danger to human health or safety":

ORDERS FOR RECALLS AND TAKING MEASURES

Recall

31. (1) If the Minister believes on reasonable grounds that a consumer product is a danger to human health or safety, he or she may order a person who manufactures, imports or sells the product for commercial purposes to recall it.

Notice

(2) The order shall be provided in the form of a written notice and must include

- (a) a statement of the reasons for the recall; and
- (b) the time and manner in which the recall is to be carried out.

Taking measures

32. (1) The Minister may order a person who manufactures, imports, advertises or sells a consumer product to take any measure referred to in subsection (2) if

- (a) that person does not comply with an order made under section 12 with respect to the product;
- (b) the Minister has made an order under section 31 with respect to the product;
- (c) the Minister believes on reasonable grounds that the product is the subject of a measure or recall undertaken voluntarily by the manufacturer or importer; or
- (d) the Minister believes on reasonable grounds that there is a contravention of this Act or the regulations in relation to the product.

Measures

(2) The measures include

- (a) stopping the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of the consumer product or causing any of those activities to be stopped; and
- (b) any measure that the Minister considers necessary to remedy a non-compliance with this Act or the regulations, including any measure that relates to the product that the Minister considers necessary in order for the product to meet the requirements of the regulations or to address or prevent a danger to human health or safety that the product poses.

Notice

(3) The order shall be provided in the form of a written notice and must include

(a) a statement of the reasons for the measure; and

(b) the time and manner in which the measure is to be carried out.

Recall or measures taken by Minister

33. If a person does not comply with an order made under section 31 or 32 within the time specified, the Minister may, on his or her own initiative and at that person's expense, carry out the recall or measure required.

21. **(viii) Reviewing Recall Orders:** Sections 34 and 35 of the CCPSA provides for the procedure for reviewing orders of the Minister of Health:

REVIEW OF ORDERS FOR RECALLS AND TAKING MEASURES

Review officer

34. The Minister may designate any individual or class of individuals that are qualified as review officers for the purpose of reviewing orders under section 35.

Request for review

35. (1) Subject to any other provision of this section, an order that is made under section 31 or 32 shall be reviewed on the written request of the person who was ordered to recall a consumer product or to take another measure — but only on grounds that involve questions of fact alone or questions of mixed law and fact — by a review officer other than the individual who made the order.

Contents of and time for making request

(2) The written request must state the grounds for review and set out the evidence — including evidence that was not considered by the individual who made the order — that supports those grounds and the decision that is sought. It shall be provided to the Minister within seven days after the day on which the order was provided or, in the event of a serious and imminent danger to human health or safety, any shorter period that may be specified in the order.

No authority to review

(3) The review is not to be done if the request does not comply with subsection (2) or is frivolous, vexatious or not made in good faith.

Reasons for refusal

(4) The person who made the request shall, without delay, be notified in writing of the reasons for not doing the review.

Review initiated by review officer

(5) A review officer — other than the individual who made the order — may review an order, whether or not a request is made under subsection (1).

Order in effect

(6) An order continues to apply during a review unless the review officer decides otherwise.

Completion of review

(7) A review officer shall complete the review no later than 30 days after the day on which the request is provided to the Minister.

Extension of period for review

(8) The review officer may extend the review period by no more than 30 days if they are of the opinion that more time is required to complete the review. They may extend the review period more than once.

Reasons for extension

(9) If the review period is extended, the person who made the request shall, without delay, be notified in writing of the reasons for extending it.

Decision on completion of review

(10) On completion of a review, the review officer shall confirm, amend, terminate or cancel the order.

Notice

(11) The person who made the request or, if there is no request, the person who was ordered to recall the consumer product or to take another measure shall, without delay, be notified in writing

of the reasons for the review officer's decision under subsection (10).

Effect of amendment

(12) An order that is amended is subject to review under this section.

22. **(ix) Injunctions:** Injunctions ordered by court to prevent or discontinue an offence under the CCPSA are provided under s. 36:

INJUNCTION

Court

36. (1) If, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do an act or thing that constitutes or is directed toward the commission of an offence under this Act, the court may issue an injunction ordering the person who is named in the application to

(a) refrain from doing an act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or

(b) do an act or thing that it appears to the court may prevent the commission of an offence under this Act.

Notice

(2) No injunction shall be issued under subsection (1) unless 48 hours' notice is served to the party or parties who are named in the application or the urgency of the situation is such that service of notice would not be in the public interest.

23. **(x) Regulations and Interim Orders:** Regulations are permitted under sections 37-39 of the CCPSA and the Minister of Health has the ability under section 40 to make immediate changes to the regulations if the Minister "believes that immediate action is required to deal with a significant danger – direct or indirect – to human health or safety":

INTERIM ORDERS

Regulations

40. (1) The Minister may make an interim order that contains any provision that may be contained in a regulation made under this Act if he or she believes that immediate action is required to deal with a significant danger — direct or indirect — to human health or safety.

Cessation of effect

(2) An interim order has effect from the time that it is made but ceases to have effect on the earliest of

(a) 14 days after it is made, unless it is approved by the Governor in Council,

(b) the day on which it is repealed,

(c) the day on which a regulation made under this Act that has the same effect as the interim order comes into force, and

(d) one year after the interim order is made or any shorter period that may be specified in the interim order.

Exemption from Statutory Instruments Act

(3) An interim order is exempt from the application of sections 3 and 9 of the Statutory Instruments Act.

Deeming

(4) For the purpose of any provision of this Act other than this section, any reference to regulations made under this Act is deemed to include interim orders, and any reference to a regulation made under a specified provision of this Act is deemed to include a reference to the portion of an interim order containing any provision that may be contained in a regulation made under the specified provision.

Tabling of order

(5) A copy of each interim order must be tabled in each House of Parliament within 15 days after it is made.

House not sitting

(6) In order to comply with subsection (5), the interim order may be sent to the Clerk of the House if the House is not sitting.

24. While the CCPSA sets out rules for a wide variety of products, the current regulations to the CCPSA set out in technical detail specific requirements for the following products:

- (i) Children’s jewellery, sleepwear, toys and car restraint systems and booster seats;
- (ii) Hockey helmets and face protectors;
- (iii) Candles; and
- (iv) Textiles.

25. As an example, note one of the following technical requirements for children’s sleepwear³:

Loose-fitting sleepwear — other tests

4. (2) Loose-fitting sleepwear that is treated with a flame retardant, any component that is extracted or broken down from such treated sleepwear, and any flame retardant that is used to treat the sleepwear must not cause any of the following consequences:

(a) acute lethality as a result of oral exposure to a dose of 500 mg/kg body weight or less or as a result of dermal exposure to a dose of 1000 mg/kg body weight or less when tested for acute oral toxicity or acute dermal toxicity in accordance with section 1 or 2, respectively, of Schedule 2;

(b) an effect graded at a mean greater than 1 for erythema formation or for edema formation measured at any specified time when tested for dermal irritation in accordance with section 3 of Schedule 2;

(c) when tested for dermal sensitisation in accordance with section 4 of Schedule 2, a response in greater than 15% of the

³ *Children’s Sleepwear Regulations*, (SOR/2011-15).

test animals when using the Draize Test or the Buehler Test or in greater than 30% of the test animals when using one of the five other tests, in which an adjuvant is incorporated, that are specified in the OECD Test Guideline No. 406 that is referred to in that section;

(d) gene mutation or chromosomal aberration when tested for mutagenicity in accordance with section 5 of Schedule 2; or

(e) tumors when tested for tumorigenicity in accordance with section 6 of Schedule 2.

26. **(xi) Offences, Defences and Penalties:** Sections 41-43 of the CCPSA set out the penalties for offences under the CCPSA; take note of the potential personal liability of individuals who participated in an offence committed by a company in section 42, the specific inclusion of due diligence as a defence, and the proof required under section 43:

OFFENCES

Offence

41. (1) A person who contravenes a provision of this Act, other than section 8, 10, 11 or 20, a provision of the regulations or an order made under this Act is guilty of an offence and is liable

(a) on conviction on indictment, to a fine of not more than \$5,000,000 or to imprisonment for a term of not more than two years or to both; or

(b) on summary conviction, for a first offence, to a fine of not more than \$250,000 or to imprisonment for a term of not more than six months or to both and, for a subsequent offence, to a fine of not more than \$500,000 or to imprisonment for a term of not more than 18 months or to both.

Defence of due diligence

(2) Due diligence is a defence in a prosecution for an offence under subsection (1).

Offence — fault

(3) A person who contravenes section 8, 10, 11 or 20 or who knowingly or recklessly contravenes another provision of this

Act, a provision of the regulations or an order made under this Act is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in an amount that is at the discretion of the court or to imprisonment for a term of not more than five years or to both; or

(b) on summary conviction, for a first offence, to a fine of not more than \$500,000 or to imprisonment for a term of not more than 18 months or to both and, for a subsequent offence, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years or to both.

Sentencing considerations

(4) A court that imposes a sentence shall take into account, in addition to any other principles that it is required to consider, the harm or risk of harm caused by the commission of the offence and the vulnerability of individuals who use the consumer product.

Offences by corporate officers, etc.

42. If a person other than an individual commits an offence under this Act, any of the person's directors, officers, agents or mandataries who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to the offence and is liable on conviction to the punishment provided for by this Act, even if the person is not prosecuted for the offence.

Offences by employees, agents or mandataries

43. In a prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by any employee, agent or mandatory of the accused, even if the employee, agent or mandatory is not identified or is not prosecuted for the offence.

27. As discussed above, the powers granted to Health Canada under the CCPSA are substantial. To put the new powers in perspective, if the CCPSA had been in force at the time of the toy recall in 2007, *without consultation with the company* Health Canada could have:

- (i) Recalled any products it saw fit;
- (ii) Charged the company and its directors and officers with an offence with the potential of fines and imprisonment; and
- (iii) Inspected the company and its records, seize products, required that tests be done, and disclosed confidential business information.

28. Even though the particular facts of the toy recall suggest that a mandatory recall and the other measures discussed would not have been necessary, Health Canada will have significant powers after June 20, 2011 if similar facts present themselves. How would it have looked to have an officer of a toy company charged under the CCPSA? What would that do to the public's perception of the safety of the toys produced by that company? How would the public view images of Health Canada seizing toys from the company or store shelves? It is one thing to allow a company to recall its own products when it has concerns; it is quite another for a government to order a recall to protect against "dangers to human safety."

Part III – The Difference between Voluntary and Mandatory Recalls of Products

29. Prior to the enactment of the CCPSA, companies within a particular industry would recall their products voluntarily when necessary. Health Canada could recommend a recall based on regulations in place but could not impose one: Health Canada could bark but not bite. Similarly, pressure from other sources such as the media, consumers and the threat of class action litigation could influence a company's decision on whether or not to recall a product. However, prior to the enactment of the CCPSA, a company's decision to order a recall was based more on protecting its own interests from

a business standpoint, rather than being obligated to act on a direction from Health Canada.

30. Now, the CCPSA permits Health Canada to strip a store of a company's product with little or no warning or recourse. Instead of industries regulating and policing themselves, industries must now comply with the powers of Health Canada and regulations imposed on those industries.

31. The difference between a voluntary recall and a recall ordered by the government is not one of mere optics: a recall ordered by the government implies that a company has not only sold hazardous goods to people, that company has also failed to act quickly enough to remedy the problem or recall the goods itself. A mandatory recall suggests that a company has failed in its duties in making and selling the products, but has also failed to eliminate the dangers it created.

32. Voluntary recalls are commonplace and not necessarily an event of great significance from a safety or brand reputation standpoint. Virtually every car manufacturer has recalled a vehicle at one point or another; however, the recent recalls of Toyota products over brake pedal and unexplainable acceleration concerns – there is an argument that both are of little or no merit – demonstrate how a relatively commonplace and accepted occurrence, a recall, can become a public relations nightmare if handled poorly.

33. Time will tell whether there will be a stigma attached to having a product recalled. Whether a stigma will develop will largely be a function of the quality of the recalls ordered by Health Canada. If Health Canada orders recalls it cannot later justify,

confidence in Health Canada's decisions will diminish and companies may not be automatically seen in a bad light if their products are recalled. Conversely, however, if Health Canada is seen as ordering reasonable and timely recalls, *any* company ordered to recall their products may be viewed poorly.

Part IV – Class Actions

34. One aspect of the CCPSA which remains unclear is whether a recall ordered by Health Canada will, in and of itself, act as the catalyst for the commencement of class actions or make the test for certification under the *Class Proceedings Act* easier to satisfy.⁴

35. The first two parts of the test for certification under the *Class Proceedings Act* is that the pleadings must disclose a cause of action and that there is an identifiable class.⁵ Under this test, the statement of claim, which will be read generously, will only be struck if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot proceed.⁶ This leads to a question: will a recall under the CCPSA create, or validate, a viable cause of action?

36. In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.), Strathy J. considered whether a class action regarding sunscreen passed the certification test under the *Class Proceedings Act*. The plaintiff's claim dealt primarily with the labeling and advertising of the sunscreen in that it was alleged that the effectiveness of the

⁴ For a further discussion on this point, see F. Dupuy, S. Lavaillee, R. Roddey, L. Cooper, M. Sheehan, "Bill C-36 – Act regarding the Safety of Consumer Products," Fasken Martineau LLP website.

⁵ *Class Proceedings Act, 1992*, R.S.O. 1992, c.6, s. 5(1)(a).

⁶ *Hollick v. Toronto (City)*, above; *Cloud v. Canada (Attorney General)* 2004 CanLII 45444 (Ont. C.A.), (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.) at para. 53, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698 (Div. Ct.); see also *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para.62 (Ont. S.C.J.).

products had been misrepresented. Strathy J. stated that recalls can provide authenticity to some claims: “in many products liability cases, the link between the class and the common issues will be obvious, and will be reflected by recalls, public safety alerts and complaints.” It should be noted that Strathy J. denied certification on the basis that there was no valid cause of action but also found that there was no common class; there was no recall of the sunscreen products in question.

37. In *Singer*, Strathy J. discussed *Chartrand v. General Motors Corp.* 2008 BCSC 1781 (B.C. S.C.) where Martinson J. denied certification regarding allegedly defective parking brakes, partly on the basis that there had been no recall or government complaint regarding a violation of regulations:

In this case, there have been no complaints in British Columbia to GM or Transport Canada about the alleged defective parking brake system. No regulatory body in Canada or the United States has expressed concern over the safety of the parking brake system on the automatic proposed class vehicles.

Chartrand v. General Motors Corp. 2008 BCSC 1781 at para. 67 (B.C. S.C.).

38. *Singer* and *Chartrand* appear to support the principle that recalls are significant in establishing a cause of action and a link between the class and the common issues. It is likely that a mandatory recall ordered under the CCPSA, as opposed to a voluntary recall, would only strengthen the plaintiff’s allegations in class action proceedings.

39. In the *Menu Foods Ontario* class action, the plaintiffs relied on the significance of the recall itself in establishing liability, as stated by Lax J.:

[28] The Whiting action advances causes of action in negligence and strict liability against the defendants who manufactured and sold the tainted food. While the claim based

on strict liability presents challenges, it is not fanciful or frivolous. To succeed in the negligence claim requires the proposed class members to establish that the conduct of the Menu Food defendants fell below a reasonable standard of care, causing loss. It is submitted that in view of the Recall, liability will be easily established. [Emphasis added]

Whiting v. Menu Foods, 2007 CanLII 43903 at para 28 (Ont. S.C.J.).

40. Regarding the toy recalls of 2007, class actions were commenced in the U.S. and Canada; those class actions were recently settled and the actions certified. Van Rensberg J. set out the claims made against the manufacturer:

The action relates to recalls in 2006 and 2007 by Mattel Inc. and its subsidiaries Mattel Canada Inc. and Fisher-Price Inc. (together, “Mattel” or the “Defendants”), of certain toys containing excessive amounts of lead or small magnets that might become loose (the “Recalled Toys”). The statement of claim seeks damages for negligence, breach of contract, breach of express or implied warranty and failure to warn, damages for payments for lead testing of children exposed to the Recalled Toys, restitution of the cost of replacement of the Recalled Toys and the disgorgement by Mattel of all benefits accruing from the sale of the Recalled Toys.

Wiggins v. Mattel, 2011 ONSC 2964 at para. 2 (Ont. S.C.J.).

41. In finding that the criteria for certification had been met, van Rensberg J. stated:

The statement of claim discloses a cause of action. This is a claim in negligence and breach of warranty against a manufacturer for an alleged product defect. There is an identifiable class in which all settlement class members have an interest in the resolution of a proposed common issue. The proposed class definition is set out in objective terms, such that membership in the class proceeding is readily ascertainable. The issue “Were the Defendants, or any of them, negligent in the manufacture, distribution, sale and/or recall of the Recalled Toys?” is appropriate as a common issue. A class proceeding, together with the proposed settlement, is the preferable procedure as it provides an efficient and expeditious plan to resolve the claims of the class members, the prosecution of which would otherwise be time-consuming and uneconomical for individual litigants. Finally, there is an adequate

representative plaintiff, with no apparent conflict of interest, and the settlement provides a workable plan.

Wiggins v. Mattel, 2011 ONSC 2964 at para. 19 (Ont. S.C.J.).

42. One difference between the U.S. settlement and the Canadian settlement was the U.S. requirement for immediate quality control and safety testing:

Another important difference is the absence of injunctive relief in the Canadian settlement. The U.S. settlement specifically required Mattel to implement and maintain a Quality Assurance System with respect to the testing of “children’s products” (as that term is defined in section 3(a) of the *Consumer Product Safety Act*, 15 U.S.C., section 2052(a)(16) and as amended by section 235 of the *Consumer Product Safety Improvement Act*). No injunctive relief was sought in the Canadian proceedings. This court was advised that the Quality Assurance System Mattel put in place following the recalls and as mandated by the U.S. settlement, applies to Mattel’s sales in Canada of children’s products manufactured by Mattel or for Mattel by a third party manufacturer. In these circumstances, Plaintiffs’ counsel were satisfied that it was unnecessary to provide for injunctive relief as part of the Canadian settlement.

Wiggins v. Mattel, 2011 ONSC 2964 at para. 12 (Ont. S.C.J.).

43. Note that with the enactment of the CCPSA, under sections 12 (Testing), 31-33 (Recall Orders), and 36 (Injunctions), the Minister of Health has the authority to order testing and recall products without court intervention and can apply to the court for an injunction when necessary: therefore, the injunctive relief obtained in the U.S. but not sought in Canada, is now within the authority of the Minister of Health with the enactment of the CCPSA.

44. Further, van Rensberg J. found that the settlement terms to be appropriate in compensating those affected by the recall:

I am satisfied that the proposed settlement is fair, reasonable and in the best interests of the settlement class. An important feature of the settlement is that it effectively provides full compensation to settlement class members for the purchase price of Recalled Toys, as well as reimbursement of the cost of lead testing. Further, the Defendants are obliged to cover all costs associated with the claims administration process as well as the costs of all notices to the class. The amount sought for class counsel fees is on the basis that such fees will be payable without any reduction of the amount payable to class members. Further, the Settlement Agreement does not provide for the release of any personal injury claims, which can be pursued through individual actions.

Wiggins v. Mattel, 2011 ONSC 2964 at para. 23 (Ont. S.C.J.).

45. A recall ordered under the CCPSA is a gift to class action counsel. Even though class actions are extremely difficult to prosecute and certify, an order under the CCPSA may provide prima facie validation to an action. Conversely, companies that have not been subject to an order under the CCPSA could use that fact in its defence, as in *Chartrand*. However, it is difficult to contemplate a situation where a major recall of a consumer product under the CCPSA would not lead to the commencement of a class action.

Part V – Insurance Policies, Obtaining Adequate Coverage and Limiting Risk

46. From an insurance coverage standpoint, there are specific aspects of the CCPSA that should be considered, namely:

- (i) The personal liability of a company's directors, officer or agents for offences committed even in circumstances where the company itself is not prosecuted for the offence under section 42 and how that relates to defence costs;

- (ii) Whether an insurance policy covers all jurisdictions where the company does business;
- (iii) The type of exclusions set out in any policy which may conflict with being covered for offences under the CCPSA.

47. We suggest that companies subject to the CCPSA take the following steps to obtain adequate insurance coverage and limit the exposure to class actions in the event of a mandatory recall:

- (i) **Obtain adequate coverage for damages:** Discuss with the company's broker the specific coverage needed under the CCPSA including quantum on a primary policy and any necessary excess policies. The CCPSA is a statute which requires compliance and the company should ensure that any exclusions in the policies are spelled out clearly and are appropriate for the nature of the business: there should not be exclusions to the effect that non-compliance with the CCPSA in general will cancel any coverage, although there will likely be recourse by the insurer under the policy in the event of a finding of fraud or other criminal conduct; any knowledge exclusions should be, as they are in most policies, in fact determinations which means that the insurer must reimburse defence costs – where defence costs are covered in the policy – at least to the point where a court makes findings of fact. In some policies, the definition of loss is only with regards to monetary

relief and an insured does not want to find itself in a position where an insurer denies coverage on the basis that a recall does not fit within the definition of loss. The company should obtain a CGL policy that explicitly covers a recall and sets out the extent of that coverage including geographical limits and quantum of damages.

- (ii) **Obtain D&O insurance and establish an allocation of defence costs clause:** Determine whether a separate directors and officers policy is necessary – it is difficult to contemplate when it would not be – and, if so, determine the proper terms of any endorsements, including an allocation of defence costs. Section 42 of the CCPSA provides for personal liability of officers and directors in certain instances. Allocation of defence costs cases are complicated and expensive lawsuits on their own: as only two examples, see *Hanis v. Teevan*, 2008 ONCA 678 (Ont. C.A.) and *Dunn v. Chubb*, 2009 CanLII 7083 (Ont. S.C.J. (Commercial List)), 2009 ONCA 538 (Ont. C.A.), 2010 ONSC 2166 (Ont. S.C.J. (Commercial List)), 2011 ONCA 36 (Ont. C.A.). The company should know at all times, under what circumstances, and in what percentage insurance will cover the defence costs of directors and officers. Further, the policy should contain non-rescissionary language which prevents an insurer from rescinding the policy due to alleged wrongful acts of the directors and officers and/or require

the insured to make all payments due under the policy until there is an in fact finding by a court regarding allegations of wrongful acts by the directors and officers;

- (iii) **Establish internal protocols in the event of a recall:** Have internal protocols in place with regards to public relations, insurance and litigation in the event of a recall ordered under the CCPSA. Previously, a company would have more time to prepare for a recall since it was the company itself which was responsible for that recall. Now that recalls can be ordered by Health Canada with little or no prior consultation, a company must be ready to act without hesitation. The recent public relations problems with Toyota and Sony are cautionary tales of what can happen to companies which are unprepared for the sudden scrutiny of their products. Who will prepare a press release or chair a press conference? Who will give notice to the company's insurer of a recall? Is there a public relations firm familiar with the specific company on retainer? Is there a law firm or in-house team in place who can advise as to any recall under the CCPSA and how to limit exposure to potential class actions? Unless a company has addressed these questions *before* a recall, then the company will be unprepared in the event of a recall; a company that appears to be unprepared increases any perception of negligence and raises the exposure to litigation;

- (iv) **Establish internal protocols to show constant compliance with the CCPSA:** Have an internal protocol in place to demonstrate compliance with the CCPSA regarding record keeping and other CCPSA protocols. These compliance protocols need to be discussed with employees, the duties from which may be specifically included in individual employment contracts. This is an issue which would likely be part of any litigation stemming from a recall – Did you train your employees on the requirements of the CCPSA? Are there any written guides of the company to show how to comply with the CCPSA? – and being able to demonstrate due diligence (a defence under section 41(2)) is critical. In fact, insurers will likely start looking for these protocols before providing indemnity;

- (v) **Check your suppliers' compliance with the CCPSA:** Enquire of companies with whom clients do business as to their protocols for compliance under the CCPSA and whether they have adequate insurance coverage. Again, this is the type of issue which will likely be raised in any litigation;

- (vi) **Cover all jurisdictions:** Make sure that the company is prepared for a recall anywhere business is done. A recall in a foreign jurisdiction – notice of which to Health Canada being required under section 14(2) – can quickly domino to other jurisdictions. In fact, if a recall is ordered in a foreign jurisdiction, an argument can

be made that Health Canada would have, from a public perception standpoint at least, the onus of showing why there should not be a similar recall in Canada; from a political standpoint, it is much more likely that Health Canada would order some form of recall if there has been a similar recall in a foreign jurisdiction. Being prepared in all jurisdictions – extinguishing the fire at its source – is critical to limiting the exposure in Canada.

48. Adequate insurance coverage in relation to the CCPSA will be a critical component to how a company deals with a recall ordered under the CCPSA. A company that does not have adequate coverage, or coverage that is denied under an exclusion or rescission clause, will have a significantly more difficult time of weathering the storm of a recall under the CCPSA.

Part VI – Conclusion

49. The CCPSA provides significant and wide ranging powers to Health Canada, the exercise of which powers can have a profound and permanent effect on a company. A mandatory recall ordered under the CCPSA can eliminate a company's ability to sell its product, raises the potential for costly and lengthy class action litigation, and can permanently damage its reputation. Adequate insurance coverage can lessen the sting of a recall under the CCPSA, especially from a class action defence costs standpoint. While the CCPSA imposes substantial and potentially onerous requirements on a company, there are many steps a company can take now to limit its exposure from a recall ordered under the CCPSA.