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A Comparison of Canada's Proposed Consumer Product Safety Legislation (Bill C-52) and its American Counterpart

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1. Introduction

Recently, Canada has experienced an increased number of high profile consumer product recalls. Findings of lead in children's jewelry, skin irritations from mother's day gift tote bags, spinach contaminated with *Escherichia coli*, and contaminated toothpaste and pet foods have all called into question the adequacy of Canada's consumer protection legislation.

Because consumer product recalls and related product liability assessment and mitigation for a given product normally cover both Canada and the United States, clients naturally need to understand similarities and differences, both substantive and procedural, in the two countries' consumer product safety regulation schemes.

*The Hazardous Products Act*¹ is currently tasked with the regulation of consumer products in Canada; however, it was enacted in 1969 and is seen by many as outdated and inadequate to serve its purpose.

In April of 2008, the government of Canada introduced Bill C-52, *An Act respecting the safety of consumer products*² ("Bill C-52") as a means to modernize and expand Canada's approach to consumer product safety by repealing and replacing Part I of the *Hazardous Products Act*. Through Bill-C-52, the government of Canada is

¹ R.S.C. 1985, c. H-3.

² Bill C-52, *An Act respecting the safety of consumer products*, 2nd Sess., 39th Parl. 2008 (as passed at First Reading, April 8, 2008) ["Bill-C52"]

seeking the means to expand record keeping and reporting requirements, increase product inspection and testing powers, and mandate product recalls. Note: It is presently unclear what priority the government currently attaches to this Bill. The Bill has been referred to Committee but it has not yet been scheduled for House of Commons Health Committee hearings.

In the United States, the *Consumer Product Safety Act*³ (the "CPSA") has been largely unchanged since its enactment in 1977. It has provided a product safety regime that is more general and hands-on than the current *Canadian Hazardous Products Act*.

In some ways, the U.S. scheme is similar to that which the government of Canada hopes to achieve with Bill C-52. The Canadian government has stated that Bill C-52 is intended to get closer to the U.S. model. Nevertheless, a careful comparison of the two pieces of legislation shows a number of important and fundamental differences that consumer products manufacturers, importers, and retailers should be aware of in the event that Bill C-52 is ultimately enacted largely in its present form.

This report provides a comparison between Bill C-52 and the CPSA, identifying important differences between them with respect to their scope, and regulatory powers, prohibitions, positive obligations, administrative powers and penalties set out therein.

2. Scope

Both Acts list consumer goods that are either prohibited or otherwise restricted, or exempt from their respective applications (for example, the prohibited goods of Schedule 2 and exempted goods of Schedule 1 of Bill C-52, or the goods to which specific rules apply pursuant to the CPSA), and control consumer goods that are not specifically listed but may pose a danger to the

³ Consumer Product Safety Act, 15 U.S.C. 2051-2084 (1972) ["CPSA"]

general public. However, the scope of Bill C-52 appears to be wider in its scope than the CPSA.

First, "consumer product" is more broadly defined in Bill C-52 than in its U.S. counterpart. While the definition of "consumer product" in the CPSA is based on the *purpose for producing* the product, the definition in Bill C-52 is based on the *nature of the use* of the product. Furthermore, the CPSA specifically excludes articles that are "not customarily produced or distributed for sale to, use or consumption by, or enjoyment of, a consumer."⁴ On the other hand, Bill C-52 defines consumer products as including "product[s] [...] that can reasonably be expected to be obtained by an individual to be used for non-commercial purposes [...]"⁵.

Second, the proposed Canadian legislation sets a lower threshold at which a product is caught by consumer product safety legislation than does the CPSA. The definition of "risk of injury" under the CPSA requires, among other things, a risk of a "serious" illness⁶. In contrast, Bill C-52 merely requires an "adverse effect" on an individual's health to meet the definition of "a danger to human health or safety".⁷ Furthermore, Bill C-52 has been drafted to capture "potential" hazards and effects that may occur immediately or otherwise. The CPSA is silent on the issue of immediacy and it is conceivable that potential risks might not be captured.⁸

Third, unlike its U.S. counterpart, Bill C-52 can apply to products for export. Subject to certain exceptions, the CPSA does not apply to products manufactured for export from the United States.⁹ Bill C-52, however, does not distinguish between

⁴ CPSA, s. 3(a)(1)(A).

⁵ Bill C-52, s. 2.

⁶ CPSA, s. 3(a)(3).

⁷ Bill C-52, s. 2.

⁸ CPSA, s.3(3); Bill C-52, s. 2.

⁹ CPSA, s. 18.

products manufactured for domestic use or exportation.¹⁰

Finally, in addition to the consumer product itself, Bill C-52 will apply to advertising, packaging and documents related to the consumer.¹¹ The CPSA contains no such provisions.

3. Administrative Powers

The administrative structure for Bill C-52 and the CPSA reflect the two countries' general traditions in relation to product regulation. In Canada, the favoured tradition is direct ministerial accountability, while in the U.S. an independent regulatory agency model is preferred.

The authority to oversee the administration of the CPSA lies with an independent regulatory commission, the Consumer Product Safety Commission (the "Commission"). The Commission is made up of five Presidential appointees, and the CPSA provides appointment criteria including rules relating to composition and political affiliation.¹² Bill C-52 will be overseen by the Governor in Council and the Minister of Health (the "Minister").¹³

The CPSA and Bill C-52 grant the Commission and Minister, respectively, authority to test consumer products and develop product safety methods, conduct research and studies, and collect data and information on consumer products or require the maintenance thereof. That being said, however, the administrative roles of the Commission and the Minister differ.

Unlike the CPSA, Bill C-52 is not structured to encourage a cooperative spirit between the Minister and industry. The CPSA speaks of what the Commission shall and may do with regard to

product testing and information gathering, and of the Commission providing assistance to public and private organizations with the development of product safety standards.¹⁴ In contrast, Bill C-52 speaks of the Minister issuing orders to persons to conduct tests, studies and collect and maintain documents.¹⁵

While both Bill C-52 and the CPSA permit the Commission or Minister to seek injunctive relief from the applicable courts, the availability and scope of that relief differs under each Act. The CPSA provides the courts with the jurisdiction to restrain violations of the key provisions of the Act and the consumer product safety rules.¹⁶ Bill C-52 provides broader jurisdiction to the courts. The injunctive relief permitted by Bill C-52 is not provision-specific. Rather, under Bill C-52, a court may grant injunctive relief against the commission of any offence under the Act.¹⁷ Bill C-52 will also allow the courts to act in relation to anticipated offences in addition to existing offences.¹⁸ Finally, Bill C-52 will allow the courts to order a person to "do an act or thing that....may prevent the commission of an offence" as opposed to simply restraining the person's conduct.¹⁹

a) Investigations

Bill C-52 sets out a broader investigative regime, and provides greater powers to inspectors than its U.S. counterpart.

Bill C-52 will allow inspectors to enter and search more places than permitted under the CPSA. Unlike Bill C-52, the CPSA restricts the types of places that can be searched as part of an inspection to factories, warehouses, establishments or conveyances where consumer products are held in connection with distribution

¹⁰ Bill C-52, s. 2. It should be noted that as part of the regulatory powers, the Governor in Council has the power to make regulations that exempt certain products from the application of the Bill C-52, including products to be exported.

¹¹ Bill C-52, s. 2.

¹² CPSA, s. 4.

¹³ Bill C-52, s. 2.

¹⁴ CPSA, s. 5(b); s. 5(a)(4).

¹⁵ Bill C-52, s. 12-13.

¹⁶ CPSA, s. 22.

¹⁷ Bill C-52, s. 37(1).

¹⁸ *Ibid.*

¹⁹ Bill C-52, s. 37(1)(b).

in commerce.²⁰ In contrast, the locations available for inspection under Bill C-52 are restricted only by the inspector's reasonable beliefs as to the place or conveyance's relationship to consumer goods, and the permission of the occupant or a warrant in lieu thereof when entering dwelling houses.²¹ Under Bill C-52, an inspector may even enter a premises on reasonable belief that a consumer product is being advertised at that location.²²

Further, the sampling, testing and analysis of powers differ under Bill C-52 and the CPSA. The CPSA speaks of investigatory powers but makes no mention of a general ability to seize or sample goods for the purpose of testing and analysis. The only mention of such power under the CPSA is specifically in relation to the certification of products,²³ and the importation of products manufactured outside of the U.S.²⁴ Bill C-52, on the other hand, will grant inspectors the authority to take samples or seize goods and have the goods examined or tested by a Minister appointed analyst, without limiting the exercise of those powers to specific circumstances.²⁵

The Acts further differ in relation to administrative powers of the investigative bodies. Under the CPSA, the Commission is permitted to make orders requiring notification, repair, replacement or refund of a consumer good, but only after first determining that there is a "substantial product hazard" (which includes in its definition a violation of the Act), determining that an order would be in the public interest, and affording interested parties an opportunity for a hearing.²⁶ The lack of any of these elements

would require the Commission to seek relief by way of the courts.

While Bill C-52 similarly requires that there be a reasonable belief that a product is a danger to human health or safety or that there is non-compliance with the Act, there is no requirement for a hearing prior to the issuance of an order and inspectors are not limited in the type of order that they issue.²⁷ Under Bill C-52, inspectors can order a person to take "any measure that the inspector considers necessary".²⁸ Further, if a person fails to comply with the inspector's order, the inspector can carry out the order himself and impose the costs of doing so on the non-compliant person.²⁹

While each Act has checks and balances built into the exercise of authority by the Commission (CPSA) and inspectors (Bill C-52), there are fundamental differences in the way these safeguards operate.

The CPSA applies statutory safeguards prior to the exercise of the Commission's authority by requiring that the Commission hold a public hearing and allow interested parties to have a voice before the Commission directs a certain action.³⁰ In contrast, the safeguards of Bill C-52 will apply only after the exercise of enforcement and investigative powers, and do not include mandatory public consultations (although by policy some form of consultation will certainly occur for significant policy and regulatory proposals).

Upon written request of the person affected by an order of an inspector, Bill C-52 will allow for a review of the inspector's order by a Minister designated "review officer".³¹ The review officer will examine the order of the inspector and

²⁰ CPSA, s. 16(a)(1)-(2).

²¹ Bill C-52, ss. 21-22.

²² Bill C-52, s. 21(1).

²³ CPSA, s. 14.

²⁴ CPSA, s. 17.

²⁵ Bill C-52, s. 21; s. 30-31.

²⁶ CPSA, s. 15.

²⁷ Bill C-52, ss. 32-33.

²⁸ Bill C-52, s. 33(2)(b).

²⁹ Bill C-52, s. 34.

³⁰ See for example, CPSA, s. 15.

³¹ Bill C-52, s. 35.

confirms, amends, terminates or cancels the order.³² Bill C-52 does not provide for public consultation or input in relation to the order or a review of the order.

Finally, the Acts also differ to the extent that, unlike the CPSA, Bill C-52 provides specific rules relating to the treatment, release, forfeiture and disposal of goods seized by inspectors.³³

4. Regulatory Powers

While there are certain similarities in the regulatory authority provided by the Canadian and U.S. Acts, the procedural requirements of the CPSA contrast the discretionary nature of the regulatory authorities set out in Bill C-52.

For example, Bill C-52 would grant the Governor in Council wide discretion to make regulations to carry out the purpose and provisions of the Act.³⁴ Among other things, the Governor in Council will be able to exempt parties from the application of the Act, amend the schedules to the Act, mandate certain documentation and the use of information, prohibit certain consumer goods, and provide for the communication of health and safety information.³⁵ Furthermore, Bill C-52 gives the Minister authority to make interim orders that contain any provision that can be regulated by the Governor in Council.³⁶ These interim orders will expire within 14 days unless approved by the Governor in Council at which point they will expire no later than one year after being made.³⁷

In contrast to the relatively discretionary regulatory powers set out in Bill C-52, the CPSA incorporates substantial procedural requirements into the making of specific product standards and rules. Before creating a product safety rule, the Commission must provide public notice of the

proposed standard or rule, and allow an opportunity for interested parties to respond.³⁸ Interested parties are able to propose voluntary standards which, if established as being sufficient to rectify the hazard and likely to be complied with, *must* be accepted and adopted by the Commission.³⁹ The Commission would then be required to terminate the rule-making proceedings.⁴⁰ If no such voluntary standard is adopted, the text and details of the proposed rule are published and the rule created.⁴¹ Each step of this process has timing and notice requirements which can require a substantial amount of time before a rule comes into force. Throughout the process, there are specific considerations that the Commission must take into account in developing a rule, as well as an overarching statutory requirement that the rule must be useful to a purpose of the Act.⁴²

The potentially lengthy time required to promulgate a rule in accordance with the CPSA is especially notable when coupled with the fact that consumer product safety standards will only apply to consumer products manufactured after the standard's effective date.⁴³ In order to defeat attempts at stockpiling products subject to the standard, the CPSA also allows the Commission to make rules restricting increases in manufacturing or importation of consumer products when standards are being promulgated in relation thereto.⁴⁴

Finally, unlike Bill C-52, the CPSA provides a statutorily mandated window of opportunity for an affected party to have a rule judicially reviewed.⁴⁵

³² Bill C-52, s. 36.

³³ Bill C-52, ss. 24-29.

³⁴ Bill C-52, s. 38.

³⁵ *Ibid.*

³⁶ Bill C-52, s. 39.

³⁷ *Ibid.*

³⁸ CPSA, s. 9.

³⁹ CPSA, s. 9(b)(2).

⁴⁰ *Ibid.*

⁴¹ CPSA, s. 9.

⁴² CPSA, s. 9(e) and s. 9(f)(3).

⁴³ CPSA, s. 9(g)(1).

⁴⁴ CPSA, s. 9(g)(2).

⁴⁵ CPSA, s. 11.

5. Prohibitions

Bill C-52 and the CPSA further differ with respect to their statutory prohibitions.

Section 19 of the CPSA provides a list of prohibitions that are generally applicable to all persons and includes, among others, prohibitions relating to the manufacturing for sale, offering for sale, distribution in commerce or import of consumer goods that have been banned or otherwise do not conform to the Act. The CPSA contains exemption for certain of these prohibitions where the person either a) holds a certificate issued by the manufacturer of the product stating that the product conforms to the consumer protection rules, or b) relies in good faith on the representations of the manufacturer or distributor of the product.⁴⁶

Although Bill C-52 contains similar prohibitions, the exemptions to them are much more narrow.⁴⁷ Bill C-52 distinguishes between a) manufacturers and importers, and b) persons other than manufacturers and importers. Prohibitions relating to persons other than manufacturers or importers are applicable when "they know or ought to know" that the product is a danger or has been subject to a recall, etc.⁴⁸ For manufacturers and importers, the prohibitions apply at all times and do not contain a knowledge-based exemption.⁴⁹

Furthermore, unlike the CPSA, Bill C-52 contains prohibitions in relation to false or misleading packaging, labeling and advertising of consumer goods.⁵⁰

6. Positive Obligations

In addition to the prohibitions noted above, both Acts impose positive obligations on persons in certain circumstances. For example, the Acts

require that certain records be maintained by persons dealing in consumer products.⁵¹ While the record keeping requirements under each Act are similar, Bill C-52 specifies that the documents be kept at the person's place of business in Canada (unless otherwise exempted by the Minister).⁵² Furthermore, this document maintenance requirement will apply equally to manufacturers, importers and advertisers of consumer products.⁵³

Both Acts also impose positive obligations with regard to an "incident" (Bill C-52) or a "substantial product hazard" (CPSA).⁵⁴ While both of these terms generally describe circumstances that violate the respective Acts, or circumstances where a consumer product becomes or is discovered to be dangerous, the definitions of these terms, as well as the required responses to the triggering events, differ.

Notable among these differences is that Bill C-52 would appear to provide a lower threshold with regard to the severity of the circumstance required to trigger the obligations. While an "incident", as defined in the Bill C-52, includes an occurrence that "could reasonably be expected to have resulted in" harm, the CPSA requires that there be a "substantial risk of injury to the public".⁵⁵ Further, while Bill C-52, as it is currently worded, would apply to incidents that happen outside of Canada, the CPSA is silent on this issue.⁵⁶

Finally, the timing and scope of the obligation itself differs between the Canadian and U.S. legislation. Under Bill C-52, upon the happening of an "incident", the person who deals commercially with the consumer products must provide the Minister and the manufacturer of the consumer

⁴⁶ CPSA, s. 19(b).

⁴⁷ Bill C-52, ss. 5-11.

⁴⁸ Bill C-52, s. 8.

⁴⁹ Bill C-52, s. 7.

⁵⁰ Bill C-52, ss. 10-11.

⁵¹ Bill C-52, s. 13; CPSA, s. 16(b).

⁵² Bill C-52, s. 13(2)-(3).

⁵³ Bill C-52, s. 13 (1).

⁵⁴ Bill C-52, s. 14; CPSA, s. 15.

⁵⁵ *Ibid.*

⁵⁶ Bill C-52, s. 14(1)(a).

good with all of the information in their control relating to the "incident" within 2 days.⁵⁷ Within 7 days of the "incident", the manufacturer must submit to the Minister a detailed written report regarding the incident.⁵⁸ Under the CPSA, the happening of a "substantial product hazard" requires only that the Commission be notified of the hazard with no mention of the extent of the information that must be provided to the Commission from the person notifying.⁵⁹

7. Penalties

Bill C-52 will create wider statutory liability than its U.S. counterpart.

First, unlike the CPSA, Bill C-52 does not require that a person "knowingly" violated the legislation.⁶⁰

Second, while the CPSA creates criminal liability for "knowingly and wilfully" violating section 19 of the Act⁶¹, Bill C-52 contains no criminal provisions.

Third, Bill C-52 provides that where a violation or offence continues⁶² for more than one day, it constitutes a separate violation or offence for each day that it is continued.⁶³ Pursuant to subsection 20(a) of the CPSA, only violations of certain prohibited acts listed in section 19 the CPSA constitute a separate violation for each action. These violations are subject to a monetary limit of \$1, 250,000.

Finally, decision-makers are not bound by the same considerations in determining liability under the different Acts. Under the CPSA, in

determining the amount of penalty, the Commission shall consider the nature of the product defect, the presence and severity of any injury, the number of defective products distributed and the appropriateness of the penalty in relation to the size of the business of the person being charged, and may adjust the penalty accordingly.⁶⁴ Bill C-52, however, requires only that a court that imposes a sentence for an offence consider the harm or risk of harm caused by the commission of the offence, and the vulnerability of individuals who use the consumer product, as well as "any other principles that it is required to consider". The court need not consider the nature of the product defect.⁶⁵

With respect to violations (i.e., a contravention of an order made under sections 32 or 33, or reviewed under section 36), Bill C-52 does not contain a similar list of considerations. Rather, section 49 provides that the Governor in Council may make regulations, inter alia, fixing a penalty or range of penalties in respect to each violation (to a maximum of \$5,000 for non-profit organizations and for persons with a non-commercial purpose, and of \$25,000 in any other case),⁶⁶ and respecting the circumstances under which the criteria by which and the manner in which a penalty may be increased or reduced, including the reduction of a penalty pursuant to a compliance agreement.⁶⁷

8. Conclusion

A comparison of Bill C-52 and the CPSA reveals that although both seek to provide the means of protecting the public from dangerous consumer goods, the legislative schemes created by Bill C-52 and the CPSA differ in both their nature and application.

⁵⁷ Bill C-52, s. 14(2).

⁵⁸ Bill C-52, s. 14(3).

⁵⁹ CPSA, s. 15(b).

⁶⁰ CPSA, s. 20.

⁶¹ CPSA, s. 21.

⁶² Bill C-52 distinguishes between offences and violations. An offence arises out of a contravention of the Act, regulations or an order made under the Act (s. 40). A violation arises out of a contravention of an order of an inspector issued under sections 32 or 33, or reviewed under section 36 (s. 48).

⁶³ Bill C-52, s. 43-63.

⁶⁴ CPSA, s.20(b) and (c).

⁶⁵ Bill C-52, s.40(4).

⁶⁶ Bill C-52, s.49(2).

⁶⁷ Bill C-52, s.49(1).

Notably, unlike the CPSA which diverts the responsibilities set out in the legislative scheme to an arm's length body, the responsibility for managing the scheme set out by Bill C-52 remains with the Minister and his or her direct appointees. In this sense, Bill C-52 provides a direct link between elected officials and the political consequences arising from the administration of the scheme that is not provided by the CPSA.

Furthermore, the CPSA incorporates an element of cooperation between the administrator of the scheme and industry members which is not provided by Bill C-52. While the CPSA provides for public consultation and voluntary standards, the authority created by Bill C-52 is essentially provided solely to the Minister to be used at his or her discretion. Bill C-52 does not seek to create a mechanism through which government and industry work together to achieve product safety in a way that minimally impairs industry participants, rather it is a mechanism through which the Minister can, at its discretion, create rules and issue directives which industry participants will be required to follow.

Finally, in addition to the differences in the nature of the CPSA and Bill C-52, the application of the schemes is also quite different. As set out above, Bill C-52 is consistently broader in application than the CPSA in relation to its scope, regulatory powers, prohibitions, positive obligations, administrative powers, and penalties.

As a result of this broad applicability, those who deal with consumer products in Canada will want to be intimately aware of how the Bill C-52 scheme applies in their circumstance and what measures they may be required to undertake to ensure they are protected from liability.

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