PRODUCT LIABILITY LAW

Presented by
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Litigation Partner

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LEGAL FOUNDATIONS OF LIABILITY

- Contract law
- Tort law
- Statutory law

CONTRACTUAL LIABILITY

- Contract required
- Warranty provisions
  - express
  - collateral
  - implied
- Proof of defect
- Causation and proof of loss
- Limitations on liability clauses
TORT LIABILITY
- Existence of legal duty of care with respect to product
- Standard of care: reasonable care in the circumstances
- Proof of defect
  - Negligent Design
  - Negligent Manufacture
  - Negligent Failure to Warn
- Vicarious liability for employees and agents
- Causation and proof of damages

DEFENCES
- Factual disputes
  - Proof of Defect
  - Proof of Loss
- Contributory Negligence / Negligence Act
- Compliance with government and industry standards
- Intervening cause / Intermediate examination
- Voluntary assumption of risk
- Statute of Limitations

STATUTORY LIABILITY
- The Ontario Sale of Goods Act
- The International Sale of Goods Act
- The Canada Consumer Product Safety Act
Ontario Sale of Goods Act

- General principle
  - no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale

Ontario Sale of Goods Act

- Exceptions
  - Buyer makes known to Seller the particular purpose for which the goods are required and goods are within Seller's usual business: implied warranty of fitness for the purpose
  - Goods are bought by description from a Seller who deals in goods of that description: implied condition that the goods will be of merchantable quality (except if Buyer has examined them)

Ontario Sale of Goods Act

- Exceptions (cont’d)
  - Possible implied warranty or condition as to quality or fitness for a particular purpose when annexed by the usage of trade
  - An express warranty or condition does not negate a warranty or condition implied by the Act unless inconsistent therewith
Liability is often disclaimed in commercial contracts.

Sample language:

"...The provisions of this paragraph represent the only warranty of the Seller and no other warranty or condition, statutory or otherwise, shall be implied."

Ontario Sale of Goods Act

- Act incorporates and enacts the U.N. Convention on Contracts for the International Sale of Goods
- Convention applies to trade between Signatory Countries including Canada and Germany
- Application of Convention depends on specific facts and is subject to numerous exceptions
- Convention does not apply to consumer sales

International Sale of Goods Act

- Convention establishes a variety of implied warranties
  - General principle:
    Seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract
International Sale of Goods Act

- Goods do not conform with the contract unless they:
  - are fit for the purposes for which goods of the same description would ordinarily be used
  - are fit for any particular purpose expressly or impliedly made known to Seller when entering into contract
  - possess the qualities of goods which Seller has held out to Buyer as a sample or model
  - are contained or packaged in the manner usual for such goods or in an adequate manner to preserve and protect them

International Sale of Goods Act

- No liability:
  - if Buyer knew or could not have been unaware of such lack of conformity
- Parties to a contract can expressly exclude Convention’s application

CANADA CONSUMER PRODUCT SAFETY ACT

- What is it?
  - in force June 2011
  - administered by Health Canada
  - meant to modernize Canada’s product safety regime
To whom does the CCPSA apply?
- manufacturers
- sellers
- importers
- advertisers
- testers
- packagers / labellers

How will it affect you?
- wide-ranging prohibitions
- onerous reporting requirements
- new record-keeping obligations
- broad regulatory powers
- increased penalties

Consumer Product
- any product reasonably expected to be obtained by an individual for non-commercial purposes
- includes components, parts, accessories, packaging

Exclusions for specific products
KEY DEFINITIONS

☑ Manufacture
  ➢ includes producing, formulating, repackaging, preparing, reconditioning for sale

☑ Sell
  ➢ includes leasing, distributing for nil consideration

KEY DEFINITIONS

☑ Danger to human health or safety
  ➢ an unreasonable hazard (existing or potential)
  ➢ posed during or as a result of normal or foreseeable use
  ➢ reasonably expected to cause death or have an adverse effect on health, whether immediate or long-term, acute or chronic

PROHIBITIONS

☑ The Act prohibits the manufacture, importation, advertising, and sale of a consumer product that:
  ➢ is listed in Schedule 2
  ➢ does not meet the requirements for that product set out in the regulations
  ➢ is a danger to human health or safety
  ➢ is the subject of a recall order or a corrective measure issued under the Act or a voluntary recall
No person shall advertise or sell a consumer product that they know:

- is a "danger to human health or safety"
- is the subject of a recall order or a voluntary recall
- is the subject of a corrective measure issued under the Act that has not been carried out

PROHIBITIONS

Misleading Packaging / Labels

- No person shall package or label a product in a manner that is:
  - misleading as the fact that it is not a danger to human health or safety
  - false, misleading or deceptive regarding its safety certification
- No person shall advertise or sell a consumer product that they know is advertised, packaged or labelled in a misleading, false, or deceptive manner (as per above)

PROHIBITIONS

False or Misleading Information

No person shall knowingly provide false or misleading information to Health Canada.
POWERS AND OBLIGATIONS

- Mandatory Incident Reporting
- Mandatory Record-keeping
- Tests and Studies
- Inspections
- Recalls
- Other Measures

MANDATORY INCIDENT REPORTING

Definition of “incident”

- an occurrence in Canada or elsewhere that resulted in or may reasonably have been expected to result in death or serious adverse health effects, including serious injury
- a defect or characteristic that may reasonably be expected to result in death or serious adverse health effects, including serious injury

Definition of “incident” (cont’d):

- incorrect or insufficient information on a label or in instructions that may reasonably be expected to result in death or serious adverse health effects, including serious injury
- a recall or measure initiated for human health or safety reasons by a foreign entity or a provincial or aboriginal government/institution or entity
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<th>Incident Report</th>
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<td>- within 2 days</td>
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<td>- to Health Canada and supplier</td>
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<td>- all information in party’s control</td>
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<th>Written Report</th>
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<td>- manufacturers and importers only</td>
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<td>- within 10 days</td>
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<td>- to Health Canada</td>
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<td>- information regarding incident, product, any other product involved in similar incident, measures taken or proposed</td>
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<th>“Confidential Business Information”:</th>
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<td>- not publicly available</td>
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<td>- reasonable measures taken to ensure information remains publicly unavailable</td>
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<td>- information has actual or potential economic value to person or their competitors because it is not publicly available and its disclosure would result in material financial loss to person or material financial gain to competitor</td>
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MANDATORY INCIDENT REPORTING

- Health Canada can disclose Confidential Business Information without consent or notice:
  - to a person or government with functions relating to the protection of human health or safety or the environment
  - they must agree in writing to maintain confidentiality and limit use

MANDATORY INCIDENT REPORTING

- Health Canada can disclose Confidential Business Information without consent or prior notice:
  - to the public if there is a serious and imminent danger to human health or safety or the environment
  - Health Canada must notify no less than following business day

MANDATORY INCIDENT REPORTING

- Health Canada can disclose Personal Information without consent:
  - to person or government with functions relating to the protection of human health or safety
  - if the disclosure is necessary to identify or address a serious danger to human health or safety
Retailers must keep records of:
- supplier name and address
- sale location
- period of sale
- prescribed documents (for specific products)

MANDATORY RECORD-KEEPING

All others must keep records of:
- supplier and/or purchaser name and address
- prescribed documents (for specific products)

MANDATORY RECORD-KEEPING

Documents must be:
- kept for 6 years
- kept at place of business in Canada (unless Health Canada grants exception)
- provided to inspectors or Health Canada upon request
**TESTS AND STUDIES**

- Health Canada has power to order manufacturer or importer to:
  - conduct tests or studies
  - compile information necessary to verify compliance or prevent non-compliance
  - provide test / study results

**INSPECTIONS**

- Health Canada will appoint inspectors to:
  - inspect locations
  - verify supplier familiarity with legal obligations
  - work with suppliers to correct or remove non-compliant products
  - verify records

**INSPECTIONS**

- In order to verify compliance or prevent non-compliance, inspectors may:
  - enter any "place", including "conveyance" (e.g. vehicle), at any reasonable time
  - upon reasonable grounds that consumer product is manufactured, imported, packaged, stored, advertised, labelled, tested, or transported there, or document relating to Act or regulations is located there
INSPECTIONS

- consent or a warrant is needed to enter a private home
- persons must provide inspectors with all reasonable assistance and information

Powers include:

- examine or test anything found in place
- take free samples
- examine / copy / take extract of documents
- seize or detain an article or conveyance
- use computer or photocopier
- take photos / recordings / sketches
- order person present to stop or start an activity

RECALL ORDERS

- Health Canada may issue recall order where there are reasonable grounds to believe a consumer product is a danger to human health or safety
- written notice is sent to the manufacturer, importer, or seller setting out reason for recall and time and manner of recall
- Health Canada can carry out recall at person’s expense upon failure to comply
CORRECTIVE MEASURES

- Health Canada may order a corrective measure if:
  - person fails to comply with an order to carry out tests or studies
  - product is the subject of a recall order
  - there are reasonable grounds to believe consumer product is subject of voluntary measure or recall
  - there are reasonable grounds to believe there is a contravention of Act or regulations

CORRECTIVE MEASURES

- Measures include:
  - stopping the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of product
  - any measure considered necessary to remedy non-compliance
- Health Canada can carry out corrective measure at person’s expense upon failure to comply

REVIEW OF ORDERS

- Person subject to recall or corrective measure order may submit a written request for review, which must:
  - set out grounds for review
  - include supporting evidence
  - be filed within 7 days of order
- A review officer must complete review within 30 days of request, subject to unlimited number of 30-day extensions
- Order continues to apply
VIOLATIONS

- Failure to comply with recall or corrective measure order constitutes a violation and is subject to penalty
  - Amount depends on risk associated with product and history of violations
  - Maximum fine (non-profit): $5,000
  - Maximum fine (commercial): $25,000
- Options:
  - Pay penalty
  - Enter compliance agreement
  - Request review
- In each case, person deemed to have committed violation

VIOLATIONS

- If breach compliance agreement:
  - Liable for twice the amount of penalty; or
  - Forfeit security
- No due diligence defence for violations

OFFENCES

- Contravention of Act (except for ss.8, 10, 11, 20), regulations, or an order issued under the Act:
  - Conviction on indictment:
    - Fine up to $5,000,000 and/or imprisonment for up to 5 years
  - Summary conviction:
    i) First offence: fine up to $250,000 and/or imprisonment for up to 6 months
    ii) Subsequent offence: fine up to $500,000 and/or imprisonment for up to 18 months
- Due diligence defence available
OFFENCES

- Contravention of ss. 8, 10, 11, 20, or knowing or reckless contravention of Act, regulations, or an order:
  - Conviction on Indictment: fine at discretion of court and/or imprisonment for up to 5 years
  - Summary Conviction:
    i) first offence: fine up to $500,000 and/or imprisonment for up to 18 months
    ii) subsequent offence: fine up to $1,000,000 and/or imprisonment for up to 2 years

OFFENCES AND VIOLATIONS

- Continuing offence / violation constitutes a separate offence / violation for each day
- Vicarious liability for acts of employees
- Limitation Period:
  - Offences: 2 years
  - Violations: 6 months

OFFENCES AND VIOLATIONS

- Directors and Officers Liability
  - any director or officer who directed, authorized, assented to, acquiesced in or participated in the commission of the offence / violation is a party to the offence / violation and subject to fine / imprisonment
REGULATIONS

- Exemption Regulations
- Administrative Monetary Penalties Regulations

BEST PRACTICES

- What should I do?
  - determine if Act applies
  - be familiar with obligations / definitions
  - assess current practices and policies
  - review product / packaging / labeling / advertising
  - implement compliance strategies
  - communicate obligations throughout supply chain
  - review insurance coverage

BEST PRACTICES

- Compliance Strategies
  - testing procedures and performance standards
  - contractual conditions regarding liability
  - reporting policies and procedures
  - record keeping policies and procedures
  - training programs
Consumer Product Incident Report: Form for Industry

1 Information about this report

Case Number: 
Submission Number: 
Purpose of report:

☐ 14(2) - Information regarding incident (Section 7 not required)
☐ 14(3) - Manufacturer/Importer report (Section 7 required)
☐ Notification - evaluated as not an incident

Product Type: 
Report Type: * New

NOTE: If you have received this report from a customer, you will find your information in area 6. If you want to report to Health Canada with no changes to the content of the report, go to section 6 and click the Confirmation Report button.

2 Information about who is reporting

Business Name (Full legal name - no abbreviations):

Address: 
City: Province / Region: Postal Code:
Country: Website:

Who are you? *
Name: * Title:
Email: Telephone: Fax:

3 Information about the incident

If more than one person was affected, please report on the worst case

Date of the Incident: Number of people affected: Sex: Age (years)
Incident Type: * Pick worst case Injury Type: * Pick worst case
Body Part: Treatment: *

Describe the incident: *

* - denotes mandatory
**4 Information about the product**

- **Product Brand and Name:**
- **Model Number:**
- **Serial Numbers:**
- **Date Codes:**
- **Universal Product Code / UPC / Bar Code:**
- **Certification / Standards: (e.g. CSA, ULC stickers):**
- **Batch Number:**
- **Product Description:** (for example: colour, packaging, warnings on the label)

**5 Information about the manufacturer from the product label or package**

- **Business Name (Full legal name - no abbreviations):**
- **Address:**
- **City:**
- **Country:**
- **Postal Code:**
- **Province / Region:**
- **Website:**
- **Email:**
- **Telephone:**
- **Fax:**

**6 Information about where you got the product**

If you are not the manufacturer or importer, you must notify the person from whom you received the product, of this incident, within 2 days. CCPSA 14(2).

- **When was the product acquired? (may be approximate):**
- **From whom did you get the product?**
- **Business Name (Full legal name - no abbreviations):**
- **Address:**
- **City:**
- **Country:**
- **Postal Code:**
- **Province / Region:**
- **Website:**
- **Contact Person:**
- **Title:**
- **Email:**
- **Telephone:**
- **Fax:**

- **Quantity of Product involved:**
- **Country of Origin:**
- **Production / Importation began:**
- **Ended:**
- **Distribution began:**
- **Ended:**
- **Retail Sale began:**
- **Ended:**

* denotes mandatory
7 Information about measures and other products

<table>
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<tr>
<th>In your opinion, are corrective measures required?</th>
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<tbody>
<tr>
<td>Enter explanation of why corrective measures are not required OR enter details of corrective measures:</td>
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8 Documents and Pictures

<table>
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<tr>
<th>File Name:</th>
<th>Document Type:</th>
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<tr>
<td>Title:</td>
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Attachment #: 1

* - denotes mandatory
Health Canada invites you to subscribe to our consumer product safety newsletter so you can receive the latest news and information.

How were you made aware of the incident?

How to submit your incident report:

- Save the report and submit it online.
- Save the report, burn to CD/DVD and submit by post.
- Save the report, print and submit by post.
Non-compliance to the CCPSA

Voluntary Negotiation

Enforcement Letter

Compliant?

Issue Order for Recall/Order for Taking Measures

Compliance with the Order?

Closure in System

Notice of Violation (NoV) Issued

OPTIONS

1. Pay Penalty

   - Yes: Closure in System

2. Compliance Agreement?

   - Yes: Agreement Fulfilled?

   - Yes: Closure in System

   - No: NoV Amended OR NoV Cancelled OR NoV Confirmed

3. Review Requested?

   - Yes: Accepted?

   - Yes: Options: Pay penalty - Compliance Agreement

   - No: NoV Amended OR NoV Cancelled OR NoV Confirmed

Penalty Paid?

   - Yes: Closure in System

   - No: Sent for Collection

NOTE:
1. Each day after the issuance of the NoV constitutes a new violation, and a new NoV can be issued if non-compliance to the Order continues.

2. All penalty money is paid to the Receiver General of Canada.
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<th>Country</th>
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<th>Phone Numbers</th>
<th>Email</th>
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<tr>
<td>CANADA</td>
<td>LETTE LLP</td>
<td>+1 (416) 971-4848</td>
<td><a href="mailto:montreal@lette.ca">montreal@lette.ca</a></td>
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<tr>
<td></td>
<td>20 Queen Street West</td>
<td>+1 (416) 971-4849</td>
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<td>Suite 3300, Box 33</td>
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<td>TORONTO ON M5H 3R3</td>
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