



Reducing Liability Exposure

Canada and the Recall of Consumer Products

By Mark A. Kinzie and Gerald R. Gardner

Consumer product recalls are voluntary under existing Canadian law, but several tools provide for effective recalls. The Consumer Safety Branch of the Department of Health of Canada (Health Canada) may examine or seize products, issue public warnings, and prosecute regulatory violations for products not recalled. Under a sharing agreement, the U.S. Consumer Product Safety Commission (CPSC) and Health Canada may jointly recall a product. Further, new legislation proposes to give Health Canada authority to invoke mandatory recalls for noncompliant or defective consumer products.

Canadian Recalls Are Voluntary

No formal recall procedure exists under the Canadian Hazardous Products Act, (HPA) R.S., c. H-3, s. 1–31, 1996. Consumer product recalls in Canada are company actions to correct or remove noncompliant or defective products from the market. Occasionally, Health Canada may ask an importer, manufacturer, distributor, or retailer to initiate a recall, but ultimately that company must implement the recall.

If a company fails to recall or inadequately recalls a product, Health Canada may protect health and safety by inspecting any place where a hazardous product is manufactured, packaged, stored, or sold and obtaining records, computer data, packaging, or the product itself. *Id.* at s. 22(1). Seizure of hazardous products may occur when products do not comply with existing regulations. *Id.* at s. 22(1) (e). Health Canada may monitor recall effectiveness, issue public warnings, and prosecute regulatory violations after a recall if unsafe products remain on the market. *Id.*

However, this authority extends only to “hazardous products” designated under the HPA, classified under the act in two parts. *Id.* at s. 6(1) (a)–(b). Part I identifies products banned from import, sale, and advertisement in Canada, such as asbestos, certain baby walkers,

lawn darts, toys and ice hockey helmets that do not meet industry standards, and other items. R.S., c. H-3, Schedule I. Part II identifies controlled products that must meet certain Canadian regulations to be imported, sold, or advertised, such as ceramics, children’s jewelry and sleepwear, workplace chemicals, tents, mattresses, toys, and other items. *Id.*

New Consumer Product Legislation

Canadian law is changing. This year, the Canadian Parliament began to consider a new Consumer Product Safety Act, Bill C-6 (Safety Act), which gives authority to Health Canada to require the recall of a consumer product by the manufacturer, importer, or seller. The Safety Act provides that

if an inspector believes... that a consumer product is a danger to human health or safety, they may order a person who manufactures, imports, or sells the product for commercial purposes to recall it.

Safety Act at s. 32(1).

Further, Health Canada will have authority to stop certain business functions, such as product manufacturing, advertising, selling, labeling, testing, and transporting. *Id.* at s. 33(2) (a). Other regulations, including additional classifications of hazardous products, including lead reductions, are also controlled by the proposed Safety Act. *Id.*

The Safety Act is expected to become law this year. The bill was introduced in the Senate of Canada on June 9, and the Canadian House of Commons passed the bill on June 12.

Joint United States-Canada Recalls

Since June 22, 2005, a Memorandum of Understanding (MOU) between the CPSC and Health Canada has provided for joint recalls of consumer products between the two jurisdictions. Generally, the MOU facilitates information sharing between the two agencies on a broad range consumer product safety issues. Joint recalls under the MOU invoke a collaborative process in which data sharing, a simultaneous release date, a joint press release, and effectiveness monitoring occur between the CPSC and Health Canada.

Think Globally, continued on page 86



■ Mark A. Kinzie and Gerald R. Gardner are lawyers with Averture in St. Louis, Missouri, a law firm that provides regulatory compliance, product recall, and warnings for product manufacturers. In 2009, they represented a manufacturer in one of the first CPSC-Health Canada joint product recalls. Mr. Kinzie is a member of DRI’s International Law, Aerospace Law, Drug and Medical Device, and Product Liability Committees.

Think Globally, from page 82

As of June 1, 2009, five joint recalls have occurred invoking the MOU. Because existing Canadian law has not provided a formal recall procedure, CPSC regulations typically govern the reporting deadlines and data requirements for these joint recalls. 16 C.F.R. §1115.13(c)–(d).

Initiating a Canadian Recall

The absence of mandatory recall provisions under existing Canadian law does not remove a manufacturer's duty to recall noncompliant or defective products. Failing to recall or ineffectively recalling a product may still expose a company to product liability claims. The following four initial steps will reduce this exposure.

First, analyze the product to determine if a potential defect creates a safety or health

hazard. Include an engineer, toxicologist, or industrial hygienist in this analysis, and always work from scientific data about the product itself, including product testing. Verify that the product complies with existing Canadian regulations.

Second, when a product does present a health or safety hazard or violates existing regulations, make a company decision to recall the product. Record the precise basis for the recall and cite the scientific data revealing the defect or noncompliance.

Third, determine the scope of the recall. Establish the models, styles, or product lines containing the defect or noncompliance and the jurisdictions where these products were sold.

Fourth, notify Health Canada in writing. If the product was also sold in the United States, begin Section 15(b) reporting to

the CPSC. 15 U.S.C. §2064(b); 16 C.F.R. §1115.13(c), Initial Reports.

After notification, a company must take more detailed steps that are unique to the product and company. These steps are locating marketing data that describes the product, identifying the number and location of product units with retailers and consumers, preparing a press release and store posters, determining the release date, and monitoring recall effectiveness. In Canada, review Health Canada's guide, *Recalling Consumer Products, A Guide for Industry* (April 2005), and the existing Hazardous Product Act. In the United States, review Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. §2064, and the CPSC regulation, Substantial Product Hazard Reports, 16 C.F.R. §1115.13(d).