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PART III

ADMINISTRATION AND ENFORCEMENT

Inspectors and Analysts

21.(1) The Minister may designate as an inspector or analyst for the purposes of this Act any person who, in the Minister's opinion, is qualified to be so designated.

(2) The Minister shall furnish every inspector with a certificate of designation and, on entering any place pursuant to subsection 22(1), an inspector shall, if so required, produce the certificate to the person in charge thereof.

INTERPRETATION / DISCUSSION of SECTION 21

The Minister's authority to designate inspectors and analysts has been delegated to the Department.

Section 21 authorizes the Minister to designate inspectors and analysts for the purpose of enforcing the Act. Inspectors are provided with a certificate of designation and, if asked to do so, the inspector must show this certificate when seeking entry under the authority of subsection 22(1).

Under Memoranda of Understanding between the Minister and the provincial, territorial and federal, (Labour Program at Human Resources Development Canada), Ministers administering occupational safety and health legislation, responsibility for the inspection program for the WHMIS requirements set out in Part II of the *HPA* has been delegated to these jurisdictions. However, Health Canada remains ultimately responsible for the administration of the *HPA* and regulations established under this Act.

Please refer to the discussion under section 30 which deals with the use of a certificate of an analyst in court.

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Search, Seizure and Forfeiture

22.(1) An inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any hazardous product is manufactured, prepared, preserved, processed, packaged, sold or stored for sale, processing or packaging and

(a) examine any product, material or substance that the inspector believes on reasonable grounds is a hazardous product and take samples thereof, and examine any other thing that the inspector believes on reasonable grounds is used or is capable of being used for the manufacture, preparation, preservation, processing, packaging, sale or storage of a hazardous product;

(b) open and examine any receptacle or package that the inspector believes on reasonable grounds contains any hazardous product;

(c) examine any books, records or other documents that the inspector believes on reasonable grounds contain any information relevant to the enforcement of this Act and make copies thereof or of any portion thereof;

(d) where the inspector believes on reasonable grounds that any computer system on the premises contains data relevant to the enforcement of this Act or that such data is available to the computer system, use the computer system or cause it to be used to search any data contained in or available to the computer system, reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output and seize the printout or other output for examination or copying; and

(e) seize any product, material or substance, or any labelling advertising, material or other thing, by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or of any regulation made under this Act has been contravened or has not been complied with.

(2) The owner or person in charge of a place entered by an inspector pursuant to subsection (1) and every person found therein shall give the inspector such assistance and furnish the inspector with such information as the inspector may, for the purpose of exercising the powers referred to in paragraphs (1)(a) to (e), reasonably require them to give or furnish.

(3) All information that, pursuant to the *Hazardous Materials Information Review Act*, a supplier is exempt from disclosing under paragraph 13(a) or (b) or 14(a) or (b) and that is obtained by an



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inspector who is admitted to any place pursuant to the powers conferred on an inspector by subsection (1) is privileged and, notwithstanding the Access to Information Act or any other Act or law, shall not be disclosed to any other person except for the purposes of the administration and enforcement of this Act.

23.(1) No person shall obstruct, or knowingly make any false or misleading statement either orally or in writing to, an inspector while the inspector is engaged in carrying out any duties or functions under this Act or any regulation made under this Act.

(2) Except with the authority of an inspector, no person shall remove, alter or interfere in any way with any thing seized under this Act by an inspector.

24. Any thing seized under this Act may at the option of an inspector be kept or stored in the building or place where it was seized or be removed to any other proper place by or at the direction of an inspector.

INTERPRETATION / DISCUSSION of SECTIONS 22, 23 and 24

Sections 22 to 24 give inspectors the powers necessary to enable them to carry out their duties under the Hazardous Products Act HPA.

Section 22 describes the entry and the search and seizure powers of an inspector. It is important to remember that, legally, entry is a separate act from search and seizure. Accordingly, the criteria which justify entry are different from the criteria which justify seizure.

Legal entry can be made where the inspector reasonably believes that any of the processes described in the opening words of subsection 22(1) are occurring or where the product is being stored for sale, processing or packaging. Mere importation of a hazardous product is not sufficient. The hazardous product could simply be in transit.

Legal search and seizure requires a belief on reasonable grounds that a violation of the HPA or the regulations made under that Act has occurred. This belief is in addition to a reasonable belief that the elements that support legal entry exist.

For example, the advertisement of a hazardous product may provide grounds for legal entry into the place the product is being stored for sale but, without more, the advertising of a hazardous product will not provide grounds for a search and seizure since there is no evidence on which to reasonably believe that the Act or the regulations have been violated.

Subsection 22(1):



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Subsection 22(1) sets out powers, not duties. For example, the words "may ... enter" do not imply an obligation to enter, but give the inspector the power to enter where the criteria for legal entry are met.

"Any reasonable time" means reasonable in the circumstances. It is generally interpreted to mean the normal business hours of the firm involved. This interpretation may be broadened under some circumstances - for example, if there is reason to believe that there is imminent danger of a hazardous product reaching the public.

"Any place" is generally interpreted as a place of business, including a warehouse, although it can also include a home. Entering a home is not advisable unless the home is being used as a place of business or unless there is a sufficient compelling reason. Subsection 22(1) permits entry into a vehicle in which goods are being transported where the vehicle is a place where hazardous products are undergoing any of the processes in the opening words of subsection 22(1) or are being stored for sale, processing or packaging.

"Reasonable grounds" means reasonable in the circumstances but does not require "certainty". Knowledge of test reports, or other information indicating that a product is a WHMIS controlled product, would constitute "reasonable grounds". Such knowledge does not have to be first hand knowledge, but can be based on information from a reliable person.

A "hazardous product" means a prohibited product (a product listed in Part I of Schedule I), a restricted product (a product listed in Part II of Schedule I) or a controlled product (a product that is included by the Controlled Products Regulations in any of the classes listed in Schedule II to the act). Where the product is listed as a general product category (e.g., matches) it carries with it a broader power of entry than where the product is specifically described in the item (e.g., textile fibre products having certain burning characteristics).

"Is manufactured, etc." is written in the present tense, but is not interpreted so literally as to mean that the action must be occurring just as the inspector is seeking entry. However, if the suspected manufacture, etc., occurred several years ago and is not still occurring, the inspector's right of entry would have to be based on a belief that hazardous products were being prepared, preserved, packaged, or stored for sale, etc..

"Preserved" could include products being preserved for private use and not for sale, and would, therefore, support the power to enter the premises but not to seize the product.

"Stored for sale" includes stored for distribution. The words "for sale" apply only to the word "stored" and not to the preceding words. Goods stored in a warehouse are usually goods stored for sale. Also see the definition of "sell" in section 2 of the Act.

"Examine" means to gather evidence, but does not mean to damage or destroy a product by such examination. Damage to packaging may be unavoidable but, if destructive examination of the product is required, it is Departmental policy to take samples for such examination.

"Take samples" is interpreted as the power to take sufficient samples for test purposes.



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If the inspector wants to take samples to determine whether the WHMIS MSDS or labelling requirements have been met, the inspector can seize samples under the seizure power set out in paragraph 22(1)(e).

The examination of "books, records or other documents" must be relevant to enforcement of the *HPA*. An inspector does not have the power to examine or copy documents which are clearly not relevant, such as documents relating to price, cost, or financial matters only. Invoices, shipping documents and information regarding product contents may be examined and copied. It appears that documents can be removed from the premises for copying, but it is preferable to obtain the trader's consent.

"Copies" can be made by hand if necessary or by photocopier. If a photocopier is available, and the inspector is unreasonably denied use of it, the refusal to give the inspector access to the photocopier could be construed as a violation of subsection

23(1). Any copies or extracts should be signed by the inspector and, preferably, by the owner or manager of the firm for identification and future use as evidence. Photography is also an acceptable method of obtaining copies.

"Seize" means to bring under the control but not the ownership of the inspector. Seizure is intended to procure the evidence for use in a prosecution or in order to determine whether to prosecute. Seizure for the purpose of removing hazardous products from the market is considered to be consistent with the intent of the Act.

The criteria which authorize seizure are more restricted than those authorizing entry, examination, etc. To justify seizure, the inspector must believe that a violation "has" occurred.

Paragraph 22(1)(e), authorizes seizure relating to violations of any provisions of the *HPA* or of the regulations; i.e., this authorization is not limited to violations of section 4, 13 or 14 of the *HPA*.

Subsection 22(2):

The "owner or person in charge" and the staff on the premises that has been entered under the power set out in subsection 22(1) must assist the inspector. Assistance includes help in moving boxes or other large items, and can involve minor expenses for the firm.

Specific reference to the "owner or person in charge" in addition to the reference to "every person found therein" means that the owner or manager, even if absent from the premises, is obliged to assist the inspector, and can be required to make a reasonable effort to come to the premises to provide that assistance. The amount of time which the owner or the staff would be "reasonably" required to devote to assisting the inspector will vary with each case.

The information that an owner or manager may be required to furnish can include the formulations of products if known. In the case of prohibited and restricted hazardous products it is not reasonable to require the owner or manager to obtain formulation information where it is not already known. A supplier would be expected to know the ingredients of its WHMIS controlled products.

Inspectors can only require the owner or manager to furnish information about a "hazardous product" as defined in section 2 of the Act or that is relevant to the enforcement of the Act. Information relating



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to all other products, (e.g. products of concern in regulatory development projects) can be requested by the inspector but the owner or manager cannot be compelled under subsection 22(2) to provide the requested information.

All assistance and information demanded by the inspector must be relevant to carrying out the powers set out in paragraphs 22(1)(a) to (e).

Subsection 23(1):

Obstruction of an inspector includes refusal to allow entry to premises where such entry is authorized under subsection 22(1) and any other Act which prevents the inspector from carrying out his or her duties.

Under subsection 23(1) it is also an offence to make false or misleading statements "knowingly"; i.e., intentionally.

Subsection 23(2):

Under subsection 23(2) it is an offence to remove, alter or interfere with a seized product without the authorization of an inspector. This subsection is intended to prevent tampering with seized products that are left in the care and control of the supplier.

Also under subsection 23(2), the inspector can authorize removal of the seized products to another location for storage or for re-working, re-labelling or recalling a product. Where a product is moved to another location the cost of transportation and insurance is borne by the firm or firms involved and the owner or manager may be requested to sign a form to this effect. Authorization for removal can also be given in cases where the firm involved wishes to have the products transferred to some other location for storage. Again, the firm bears the expenses.

Section 24:

Section 24 permits an inspector to leave the seized products where he or she has seized them or, where the inspector considers it appropriate to remove, or arrange removal of, the seized products to a different location. The probability that seized products may be tampered with would be a consideration in exercising this power. Where the probability of tampering is high, it is usual for the enforcing jurisdiction to bear the risks and costs of removal and storage.

A "proper place" includes warehouse space appropriate to the type of product, the premises of a manufacturer or distributor serving as a central location for storage of recalled goods, or the office of the inspector. Although removal to a private home is not necessarily advisable, there may be circumstances in which a private home could be considered a proper place for the storage of seized goods.

Release from Seizure by the Inspector: The Act does not expressly provide for releasing goods from seizure where the seized goods are no longer considered hazardous. This is because once a seized product is no longer hazardous (i.e. no longer in violation), there is no longer any authority to continue the seizure. In practice, where, within two months after the date of seizure, seized products are altered with the inspector's permission to bring them into compliance with the Act or regulations or for some



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other reason are no longer considered hazardous, the inspector can release the goods from seizure. Where products have been seized for longer than two months, the Minister must authorize the release of the goods. This is because two months after the date of the seizure care and control over the seized goods passes to the Minister under subsection 25(5) of the Act. Thereafter only the Minister has the authority to dispose of the seized goods.

Alternatives to Seizure: The inspector is not legally obliged to seize a hazardous product, and, in practice, seizure is used only as a final recourse. The less expensive and disruptive options of corrective action by the dealer to rework a product or voluntarily recall and destroy a hazardous product are often accomplished by agreement.

Since the export of hazardous products is not prohibited by the Act, the export or re-export of non-complying products is sometimes an appropriate solution. Refer to the discussion under section 25 and 26, i.e. "Restoration", for the policy on the export of seized goods.



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HPA Sections 25 and 26 - Restoration

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25.(1) Where any product, material, substance or other thing has been seized under this Act, any person may, within two months after the date of the seizure on prior notice having been given in accordance with subsection (2) to the Minister by registered mail addressed to the Minister at Ottawa, apply to a provincial court judge within whose territorial jurisdiction the seizure was made for an order of restoration under subsection (3).

(2) The notice referred to in subsection (1) shall be mailed at least fifteen clear days prior to the day on which the application is to be made to the provincial court judge and shall specify

(a) the provincial court judge to whom the application is to be made;

(b) the place where and the time when the application is to be heard;

(c) the product, material, substance or other thing in respect of which the applicant is to be made; and

(d) the evidence on which the applicant intends to rely to establish that the applicant is entitled to possession of the thing in respect of which the application is to be made.

(3) Subject to section 26, where, on the hearing of an application made under subsection (1), the provincial court judge is satisfied

(a) that the applicant is entitled to possession of the product, material, substance or other thing seized, and

(b) that the thing seized is not and will not be required as evidence in any proceedings in respect of an offence under section 28, the judge shall order that the thing seized be restored forthwith to the applicant.

(4) Subject to section 26, where, on the hearing of an application made under subsection (1), the provincial court judge is satisfied that the applicant is entitled to possession of the thing seized but is not satisfied as to the matters mentioned in paragraph (3)(b), the judge shall order that the thing seized be restored to the applicant

(a) on the expiration of four months after the date of the seizure if no proceedings in respect of an offence under section 28 have been commenced before that time; or

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(b) on the final conclusion of any such proceedings in any other case.

(5) Where no application has been made under subsection (1) for the restoration of any product, material, substance or other thing seized under this Act within two months after the date of the seizure, or an application therefor has been made but on the hearing thereof no order of restoration is made, the thing so seized shall be delivered to the Minister who may make such disposition thereof as the Minister thinks fit.

26.(1) Where a person has been convicted of an offence under section 28, any hazardous product seized under this Act by means of or in respect of which the offence was committed is forfeited to Her Majesty and shall be disposed of as the Minister directs.

(2) Where an inspector has seized a hazardous product under this Act and the owner thereof or the person in whose possession the product was at the time of seizure consents in writing to its destruction, the hazardous product is thereupon forfeited to Her Majesty and shall be destroyed or otherwise disposed of as the Minister directs.

INTERPRETATION / DISCUSSION of SECTIONS 25 and 26

Subsection 25(1) and 25(2):

The owner of seized products may make an application to a judge for restoration of the products within two months of the date of seizure. "Two months" means two calendar months, for example, from June 7 to August 8. Under section 28 of the *Interpretation Act*, the actual date of seizure is not counted, but all of the last day of the two month period is included. For example, if a product was seized at 9:00 a.m. on June 7, the two month period would expire at 12:00 midnight on August 8. If the last day of the two month period was a holiday, the time period would then expire at midnight on the next day that was not a holiday. If the month in which the time period expires does not have a calendar day corresponding to the specified expiry date, for example, February 31, then the time period expires at the end of the last day of that month, for example, midnight February (28 or 29, in a leap year).

The Minister must be notified of the restoration application at least fifteen days in advance. This notification must contain the information specified in subsection 25(2). "Fifteen clear days" does not include the first and last day of the fifteen day period. For example, if the application for restoration is to be made on July 31, the notice to the Minister must be mailed on July 15 or earlier.

Subsection 25(3) and 25(4):

At a restoration application, the judge does not rule on whether or not the product is hazardous, but only on who is entitled to possession of, or who owns, the seized products and whether or not the products are or will be required as evidence in court proceedings. This may have the effect of forcing the initiation

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of a prosecution to prevent restoration of seized goods.

Subsection 25(5):

After 2 months from the date of seizure, if no application for restoration has been made, or if such an application has been denied, the seized products must be delivered to the Minister for disposition. After the two month period, the things seized cannot be altered, removed, restored, exported, etc. without the Minister's authority.

"Delivered" means physically transporting the goods to the Minister or to a delegated person. In practice, physical delivery does not occur. The important aspect of subsection 25(5) is the delegation to the Minister of the authority to dispose of seized goods owned by another person. The goods are not forfeited, and do not become the property of the Crown under subsection 25(5). In practice, this authority is not always exercised immediately on the expiration of the 2 month period. For example, if seized goods are in the process of being altered by a dealer acting in good faith with the inspector's authority, it is likely that the alterations will be allowed to continue. When the products have been brought into compliance, the Minister will exercise his authority and restore the products to their owner as a "fit" disposition. Other circumstances, such as pending prosecution, or attempts to arrange export, can also result in a delay in the Minister exercising his authority of disposition.

In cases where no attempt to alter the seized products is being made or no other circumstances warrant delay, the Minister can exercise his authority at anytime after 2 months from the date of seizure. When the Minister orders the removal and destruction of a product, it is usual for the enforcing jurisdiction to bear the costs of such removal and destruction. If, however, the disposition involves restoration of the seized goods to their owner, or their export, the owner must bear all costs.

The practice of allowing a delay in the exercise of the authority given to the Minister in subsection 25(5) is neither expressly allowed by the Act nor is it prohibited. Such delays are consistent with both the intent and the reasonable administration of the Act.

Subsection 26(1):

After a conviction, the hazardous products are forfeited to and become the property of the Crown. They are then disposed of as the Minister directs, with the costs of removal and disposal paid by the enforcing jurisdiction.

Subsection 26(2):

The owner may consent to the destruction of the seized products. The products are then forfeited to the Crown for disposal under the direction of the Minister. The consent to destruction must be in writing and must be given by the legal owner of the goods or by the person in whose possession they were at the time of seizure.

Since forfeiture means that the right of property in the goods has been transferred to the Crown, the cost of removal and destruction becomes the responsibility of the enforcing jurisdiction. Even when products have not been seized, the owner may wish to forfeit the products to the Crown for disposal or destruction. As subsection 26(2) does not apply to products which have not been seized, written consent to the disposal is not required by law. However, consent in writing to the forfeiture and disposal



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or destruction of the products must always be obtained by the inspector to avoid any lawsuits for unauthorized disposal. Costs of removal and disposal are the responsibility of the enforcing jurisdiction.

Export of Seized Goods: The Act does not prohibit the export or re-export of hazardous products or seized goods, and there are some cases in which export or re-export may be a suitable method of disposition. Within 2 months after the date of seizure, the inspector may authorize the export of seized products under subsection 23(2). After the two months after

the date of seizure, the Minister must approve any export of the seized products as a suitable method of disposition. In both cases, the goods are not released from seizure and thus remain under the control of the inspector or the Minister until they have left the country.

The appropriate authority in the receiving country must be advised of the nature of the hazard involved and of the fact that the product is not acceptable for sale in Canada. That authority must indicate by a notice of agreement that the products involved are acceptable for sale in the receiving country, before the export of the seized products is permitted. This authority is not required where the product is being returned to the country where it was manufactured. Policies regarding export of non-complying products that have not been seized are set out in the discussion under sections 22, 23 and 24 Search, Seizure and Forfeiture.



Act, section, title/subject:

HPA Section 27 - Regulations

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Regulations

27. The Governor in Council may make regulations

(a) respecting the powers and duties of inspectors and analysts and the taking of samples and the seizure, detention, forfeiture and disposition of products, materials, substances and other things; and

(b) generally for carrying out the purposes and provisions of this Part.

INTERPRETATION / DISCUSSION of SECTION 27

To date, no formal regulations have been established under the authority of this section of the Act.

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Offence, Punishment and Procedure

28. (1) Every person who contravenes or fails to comply with any provision of this Act or of any regulation made under this Act is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding six months or to both; or

(b) on proceedings by way of indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding two years or to both.

(2) Where a corporation commits an offence under subsection (1), any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

(3) Proceedings by way of summary conviction in respect of an offence under paragraph (1)(a) may be instituted at any time within but not later than twelve months after the time when the subject matter of the proceedings arose.

INTERPRETATION / DISCUSSION of SECTION 28

Section 28 outlines the scope of the penalties for a violation of any provision of the *HPA* or the regulations made under that Act.

Offences punishable under section 28 include, in addition to the offenses set out in section 4, 13, and 14, obstruction of an inspector or knowingly making a false or misleading statement to an inspector as per subsection 23(1); removing altering or interfering with seized goods as per subsection 23(2); disclosure of privileged information, subsection 10(3); and refusal to supply information as required by section 30 of the *Controlled Products Regulations*.

The penalties stated in subsection 28(1) are the maximum penalties. The actual penalty is determined by the courts.

The term "person" means any legal entity. It includes individuals and corporations. Normally a business or corporation will be charged with an offence in the name of the business or corporation. The President or principal shareholder would not be charged unless he or she were directly involved in the alleged offence.

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Summary Proceedings and Indictment:

Subsection 28(1) sets out two procedural options for prosecuting offenders. The choice is made by the Crown prosecutor when the alleged offender is charged and the choice normally depends upon the gravity of the offence and whether it is a repeat offence.

A summary proceeding is one in which a minor crime or misdemeanour is dealt with by a judge relatively quickly and without a jury. The magistrate has the authority to deal summarily ("at once", "without ceremony") with these charges, for which the maximum penalty is a \$100,000 fine and/or six months imprisonment. The Act permits laying summary conviction charges at any time within twelve months after the time when the subject matter of the prosecution arose. If, for some reason, the prosecution cannot be initiated within the twelve month period, the charge must be laid by indictment. There is no time limit on proceedings by way of indictment.

The "time when the subject matter of the prosecution arose" refers to the time that the violation occurred; that is, took place. The enforcing jurisdiction may not become aware of the non-complying nature of the sale, etc., until a later date; for example, after a laboratory analysis of a sample of the product. Under section 28 of the *Interpretation Act*, if the offence occurred on June 1, 1996 the twelve month period would expire at midnight on June 2, 1997. If June 2, 1997 were a holiday, then the time period would expire at midnight of the next day that is not a holiday. If the month in which the twelve month period expires does not have a calendar day corresponding to the specified expiry date (e.g., September 31), then the time period expires at midnight of the last day of that month (e.g., midnight September 30).

An indictable offence is more serious than a summary offence and carries with it more severe maximum penalties. A person convicted of an indictable offence under the Act can be imprisoned for up to two years in addition to or instead of a fine in an amount determined at the discretion of the court but not to exceed one million dollars. Where the offender is a corporation, there is no individual to be imprisoned so the corporation can only be fined.

An accused charged with an indictable offence under the *HPA* has the right to choose to be tried before a provincial court judge, a justice of the superior court, or, unless the accused is a corporation, a judge and jury. If the accused does not elect to be tried by a provincial court judge, a preliminary hearing is held before a provincial court judge to determine whether there is a *prima facie* case against the accused; that is, whether the prosecution has sufficient evidence which, if believed, would establish that the offence had been committed. If the provincial court judge decides that the evidence is sufficient, he or she will commit the accused for trial. If the evidence is not considered sufficient, the case will be dismissed.

An example of where a violation might appropriately be prosecuted as an indictable offence is where the accused had been previously convicted of the same offence or where there are numerous apparent violations. In addition, where an accused has failed to cooperate with an investigation, a prosecutor may decide to proceed by way of indictment.

Most cases brought to prosecution under the *HPA* should be treated as summary offenses in view of the less lengthy and less complicated procedure involved.



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HPA Section 29 - Exception, etc., Need Not be Mentioned and Burden of Proof

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29. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under section 28 of this Act or under section 463, 464 or 465 of the Criminal Code in respect of an offence under section 28.

(2) In any prosecution for an offence mentioned in subsection (1), the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused and the prosecutor is not required except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

INTERPRETATION / DISCUSSION of SECTION 29

The "information" or "indictment" referred to in subsection 29(1) is the court form containing the wording of the actual charge being laid against the accused. In the wording of the information, 29(1) indicates that it is sufficient to state that the importation, advertisement or sale of a prohibited product, or a restricted product that does not accord with the applicable Regulations under the HPA, or the importation or sale of a WHMIS controlled product which does not comply with the Controlled Products Regulations, has occurred. Elaboration by the Crown of the possible exceptions, exemptions, etc. is not required. For example, a charge involving a restricted product need only set out the fact of the sale of the item. The charge need not make reference to a regulation that would have permitted the sale of the item had the requirements of that regulation been met. In actual practice, however, the information will likely state that the conditions of a regulation that would have permitted a legal sale of the product were not met by the accused.

Subsection 29(2) clearly states that the accused has the onus of proving that an exception, exemption, etc. operates in the accused's favour. This means that once the Crown prosecutor has proved that the accused sold, for example, a controlled product that could only be sold as authorized by a regulation, the accused has the onus of proving the defence that an exception or exemption in the regulation applies to the accused and, hence, that the sale of the product in question was legal. The Crown is not required to prove a negative; that is, that the exceptions or exemptions do not operate in favour of the accused.

Again, in practice, the Crown prosecutor would anticipate the defence set out in Section 29. As part of his or her case, the Crown prosecutor would present evidence (e.g., laboratory test results) that the product in question did not fall within any exception or exemption set out in a regulation. By proving that the product was non-complying, the Crown prosecutor prevents the accused from raising a defence of exception or exemption.

The regulations made under the authority of the HPA are not the only exceptions that an accused can raise. Some items in Schedule I to the HPA include express exceptions: See Part I, items 7, 16, 17(2) and 26 and Part II, items 13(k), 27, 29 and 30. In these cases also, the Crown should provide evidence that the product



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Amendment No.:

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Act, section, title/subject:

HPA Section 29 - Exception, etc., Need Not be Mentioned and Burden of Proof

Manual updated:

2000/10/31

does not fall within any of the exceptions listed in the item.

The regulations specify that every product must comply. Consequently, if ten articles are seized, all ten must pass the tests for compliance. If any fail to pass those tests, then an offence has occurred and a prosecution can be commenced. If the prosecution fails and the accused is acquitted, it is not possible to lay a second charge in respect of these same ten seized articles. However, an inspector can return to the accused's establishment and seize more of the same articles (same lot, etc.) and have them tested again. Should any of this second sample fail the tests, then a second prosecution can be commenced. This latter situation is not "double jeopardy"; that is, prosecuting twice for the same offence. The second testing failure is a second offence involving a separate and different set of facts. It is, as a result, a completely new offence.

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Act, section, title/subject: HPA Section 30 - Certificate of Analyst			Manual updated: 1996/03/31

30. (1) Subject to this section, a certificate of an analyst stating that the analyst has analyzed or examined a product, material or substance and stating the result of the analysis or examination is admissible in evidence in any prosecution for an offence mentioned in subsection 29(1) and in the absence of any evidence to the contrary is proof of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(3) No certificate shall be received in evidence pursuant to subsection (1) unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

INTERPRETATION / DISCUSSION of SECTION 30

An analyst's certificate that verifies that a product does not comply with the *Hazardous Products Act* or its regulations is, by itself, evidence that is sufficient to prove an offence. Unless counsel for the accused, with the court's permission, requires that the analyst appear in court for a cross-examination of the certificate, the analyst does not need to testify. In practice, the Department is usually prepared for the analyst, or some other qualified expert, to testify in person.

However, before an analyst's certificate can be used as evidence, the Crown must notify the accused of the Crown's intent to submit an analyst's certificate into evidence and must give the accused a copy of the certificate. The copy is given to the accused to permit his or her counsel to examine the certificate and to prepare a defence, if one is available.

"Reasonable notice" means that the notice of intention to use the certificate must be given within a reasonable length of time in advance of the trial date. The length of time that is considered "reasonable" is a question of fact and will vary with the circumstances of each case. While in some cases a two days notice period has been found to be "reasonable", it is preferable to give at least two weeks notice.



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HPA Section 31 - Trial of Offence

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1996/03/31

31. A complaint or information in respect of an offence under section 28 may be heard, tried or determined by a provincial court judge or a justice if the accused is resident or carrying on business within the territorial jurisdiction of the provincial court judge or justice, although the matter of the complaint or information did not arise in that territorial jurisdiction.

INTERPRETATION / DISCUSSION of SECTION 31

This section permits a choice of the place in which the charges will be laid and the trial will occur: the place the offence occurred or the place in which the accused resides; i.e., it provides for court proceedings to occur near the residence or place of business of the accused, rather than where the alleged offence occurred.