Hazardous Products Act

An Act to prohibit the advertising, sale and importation of hazardous products.

Short Title

1. This Act may be cited as the *Hazardous Products Act*, R.S., c. H-3, s.1.

LEGISLATIVE JURISDICTION

Section 91 and 92 of the *Constitution Act, 1867* define the division of powers between Parliament and Provincial Legislatures. Criminal law is one of the areas designated as being under federal jurisdiction. Matters of property and civil rights are among those under provincial jurisdiction.

The *Hazardous Products Act* is criminal law and, therefore, under federal jurisdiction. Parliament's authority to make the *Hazardous Products Act* was challenged in *R*. v. *Cosman's Furniture (1972) Ltd.* (1977) 73 D.L.R.(3d) 312 (Man. C.A.). The Manitoba Court of Appeal held that the *Hazardous Products Act* constitutes a proper exercise of the legislative jurisdiction of the Parliament of Canada because it is in pith and substance criminal law within the meaning of Section 91(27) of the *Constitution Act*, 1867. The Court further ruled that the *Hazardous Products Act* does not infringe upon provincial jurisdiction over "property and civil rights".

Citation: "R.S., c. H-3" indicate that this Act can be found in the 1985 Revision of the *Statutes of Canada* at chapter H-3.

GENERAL CONCEPTS OF LAW

Law: A law is a binding rule made by a governing body that the governed have empowered to act on their behalf, such as Parliament or a provincial legislature. It is an offence to fail to comply with a law and penalties may be imposed on an offender.

Regulation: A regulation is a law made by a body or person to whom the power to make regulations has been delegated in an Act. Normally, as in the case of the *Hazardous Products Act*, the power to make regulations is delegated to the Governor in Council. Although regulations are not made by Parliament itself, they are laws.

Rule of Law: When a society is governed by rule of law, it is governed by known laws made by a properly constituted body, rather than by the whims of any person or group. Rule of law includes the concept that persons who make, administer and judge the law must also obey the law and act in good faith. Where a person administering the law acts contrary to the law, the administrator's actions will be without force and effect. For example, a seizure of goods by an inspector is proper only to the extent that the seizure is authorized by an Act of Parliament.

Administrative Discretion: Administrative discretion in administering and enforcing laws and regulations is an important consideration in ensuring reasonable application of an Act or regulation within its intent and purpose.

The Department has developed policies for the administration of the *Hazardous Products Act*. Those policies are based on the Department's understanding of the intent of the legislation, and on the concept of responsible administration. The Department's legal advisors have indicated that the use of such policies is proper and valid until the particular policy is found by a court of law to be incorrect.

Retroactivity: Laws take effect on the date that they are proclaimed in force and are not usually retroactive or retrospective. For example, in the *Hazardous Products Act*, a product, material or substance legally imported, manufactured and distributed before the effective date of an amendment that adds the product, material or substance to Part I of Schedule I, cannot be sold or advertised after the effective date of the amendment. This is not retroactive law. Rather, it is law that becomes effective on a specific date.

Functions of the Courts: The function of the courts is to settle disputes in a binding manner. Disputes can be civil or criminal in nature and can be between individuals or governments or both. Before the courts, the interpretation of a law argued by the government is neither more valid or more correct than that argued by an accused. In his or her defence, an accused may dispute any or all of the alleged facts of the case, the interpretation of the law, or the validity of the law itself.

In a prosecution, the duty of the Crown is not to "win" cases, but to place its evidence of an alleged violation before the court for a determination of whether a violation has occurred in fact and in law.

***Mens Rea* and Strict Liability:** Proof of guilt for most criminal offenses requires proof, not only that the prohibited action was committed (*actus reus*), but also that the action was committed with intent (i.e. guilty mind or *mens reus*), or with recklessness or negligence. However, there are many regulatory offenses for which it is not necessary to show intent or direct knowledge of the offence. Offenses that can be committed without intent or knowledge are called strict liability or absolute liability offenses. The offenses set out in the *Hazardous Products Act* are strict liability offenses. Therefore, in a prosecution, the Crown does not need to prove intent or knowledge of the offence, only that the offence occurred and its particular facts. With strict liability offenses, however, an accused will be acquitted where the accused establishes that he or she took all reasonable steps, or acted with due diligence, to ensure that the offence did not occur.

Absolute liability offenses are very rare because there are no defences to such offenses. Once the Crown has proven the facts of the offence beyond a reasonable doubt, guilt is established even where the offender had not intended to commit the illegal act or did not know about it. The absence of intent and of a due

diligence defence means that absolute liability offenses offend the right to security of the person in section 7 of the *Charter of Rights and Freedoms*. Absolute liability offenses, therefore, will survive only where they can meet a very high test of justification under section 1 of the *Charter*; that is, that the wrong they address is so grave that it is justifiable in a free and democratic society that the Crown not have to prove intent or knowledge.

Burden of Proof: Unless a law states otherwise, the burden of proof in any action falls on the person bringing the suit. In a civil action, the plaintiff must prove his or her case to the degree that a court can conclude that it is more probable that the plaintiff's version of the facts and law is correct rather than that the defendant's version is correct. In criminal law, which includes the *Hazardous Products Act*, the Crown must prove beyond a reasonable doubt that the accused is guilty. The accused is not required to prove innocence nor even to testify.

However, subsection 29(2) of the *Hazardous Products Act* places the burden on the accused of proving that he or she falls within an exception, exemption, excuse or qualification that provides a defence under the Act. But this burden of proof only arises **after** the Crown has proven beyond a reasonable doubt that the accused committed the illegal act.

Benefit of Doubt in Interpretation: Under the *Charter*, an accused is innocent until the Crown proves his or her guilt. As a consequence, in criminal law the accused is given the benefit of any doubt. Not only must the Crown prove the facts of its case beyond a reasonable doubt but also in that there is no ambiguity in the interpretation of the law. Where the interpretation of a statute or regulation is unclear or in doubt, the *Charter* requires that the statute or regulation be interpreted "restrictively"; that is, to the benefit of the accused.

However, ambiguity does not automatically work to the benefit of the accused. When interpreting a law, the court will also look to the purpose of the law and will not interpret it so restrictively as to defeat the purpose of the Act. In other words, if the interpretation that benefits the accused would defeat the purpose of the law, the court will reject the accused's argument. This principle is found at section 12 of the *Interpretation Act*, which states that:

> "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

where "remedial" means that a problem was perceived and a law was passed to remedy it.

Powers of Officers and Functionaries: The powers of inspectors under the *Hazardous Products Act* are set out in section 22 of the Act. In addition, subsection 31(2) of the *Interpretation Act* applies:

> "Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given".

2. In this Act,

"advertise", in relation to a prohibited product or restricted product, includes any representation by any means whatever for the purpose of promoting directly or indirectly the sale or other disposition of the product;

"analyst" means any person designated as an analyst under the *Food and Drugs Act* or pursuant to subsection 21(1);

"controlled product" means any product material or substance specified by the regulations made pursuant to paragraph 15(1)(*a*) to be included in any of the classes listed in Schedule II;

"hazardous product" means any prohibited product, restricted product or controlled product;

"import" means to import into Canada;

"inspector" means any person designated as an inspector pursuant to subsection 21(1);

"Minister" means the Minister of Health;

"prohibited product" means any product, material or substance included in Part I of Schedule I;

"restricted product" means any product material or substance included in Part II of Schedule I;

"sell" includes offer for sale, expose for sale and distribute.

INTERPRETATION / DISCUSSION of SECTION 2

Note: Responsibility for the *Hazardous Products Act* was transferred to the Minister of National Health and Welfare on June 25, 1993 by P.C. 1993-1491, published as SI/93-145, dated July 14, 1993; ["Minister of Health" as of May 29, 1996].

The definitions in section 2 apply to Parts I, II and III of the *Hazardous Products Act* (*HPA*). Section 11 of the *HPA* also has definitions that apply specifically to the WHMIS requirements of Part II of the Act. The words defined in an Act of Parliament always have the same meaning in the regulations made under the

Act. Any word that is not specifically defined in an Act should be given its ordinary meaning after considering the context in which it appears and the purpose of the Act.

Advertise: The word "advertise" appears only in section 4 of the Act which sets out the prohibitions on prohibited products and restricted products. The prohibitions on controlled products, set out in sections 13 and 14 of the Act, refer only to the sale and importation of such products.

The use of the verb "includes" means that the definition is not complete; that is, the meaning of the word "advertise" in all its grammatical forms is not restricted only to the particular meaning set out in the definition. Under the *HPA*, therefore, to "advertise" a product, a statement would have to be aimed at "promoting" the sale or other disposition of the product. "Other disposition" includes giving the product away or leasing or renting it.

A distinction is made between "advertising" and "publishing an advertisement". The violation of section 4 of the *HPA* is committed by the person who places the illegal advertisement; that is, the person selling the product who pays for the advertisement. The person or firm that publishes the advertisement, or the radio or television station that broadcasts it, is usually not in a position to know that the product violates the Act or its regulations. Accordingly, it is the advertiser that is charged, not the owner of the medium in which the advertising appears.

A statement that is purely informational, as opposed to promotional, is not considered to be advertising for the purposes of the *HPA*. For example, instructions for the use of a product are not generally considered to be a form of advertising. Accordingly, instructions that include a recommendation of a hazardous product do not constitute an advertising violation, unless the hazardous product is being promoted and is made available for sale at the same time.

Controlled product: A "controlled product" is any product, material or substance that meets any of the criteria listed in Part IV of the *Controlled Products Regulations*.

Hazardous product: A "hazardous product" means a prohibited product (a product listed in Part I of Schedule I) to the *HPA*, a restricted product (a product listed in Part II of Schedule I) to the *HPA* or a controlled product (a product that is included in any of the classes listed in Schedule II) to the *HPA*. Restricted products and prohibited products are covered in Part I of the *HPA* (sections 3 to 10); controlled products are covered in Part II of the Act (sections 11 to 20). If a product is not listed in Schedule I or included in the classes of products in Schedule II, enforcement action under the *HPA* cannot be taken regardless of how hazardous it is or appears to be.

Minister: Throughout this document, "Minister", unless otherwise noted, should be understood to mean the Minister of Health Canada.

Sell: The Oxford Dictionary defines the meaning of the word "sell" as "to give up or hand over (something) to another person for money (or something that is reckoned as money)". Under the *HPA*, the term "sell" also includes "offer for sale", "expose for sale" and "distribute". Thus, the actual sale of a hazardous product does not have to be established since the offence is committed when the hazardous product is

offered or exposed (i.e. displayed) for sale. A distribution or give-away of the product as a prize or a "free" item is, therefore, included in the definition of "sell" where the distribution may be characterized as a promotion of the product.

The *HPA* applies to both consumer sales and non-consumer sales (e.g. a sale between companies, institutions, etc.).

For the *HPA* to apply, the product must have been advertised or sold in Canada or imported into Canada. It is sometimes difficult to determine whether "sale" occurred in Canada in fact or in law. Where a sale is wholly negotiated and concluded outside Canada and the product enters Canada in the possession of the person who will use it, then, in both fact and law, the sale will probably not have occurred in Canada. However, if the negotiations and agreement for the sale take place in Canada, the sale may, in law, have occurred in Canada. Laws regarding sales and the location of sales transactions are within provincial jurisdiction. Nevertheless the requirements of the *HPA* governing importation would apply.

The word "distribute" does not include internal distribution of a product within an organization but does include transfers of a product between independent organizations as well as between separate subsidiaries of a parent corporation.

The objective of WHMIS is to ensure that a person using a hazardous product, material or substance in the work place will receive information on its hazards as well as its ingredients. Where a controlled product, such as a laboratory sample, is supplied to a work place by the same entity that operates the workplace, the supply of that hazardous product is not governed by Part II of the *HPA*. Conversely, where a controlled product is supplied to a work place by a different entity than the operator of the work place, then the supplier is "distributing" the controlled product within the meaning of the *HPA*. The supplier, in the latter case, is required to comply with the requirements of the *HPA* and the *Controlled Products Regulations*.

Second-hand Products: The requirements of the *HPA* apply to the advertising, sale and importation of second-hand products such as used cribs.