

## Regulation of Electrical Consumer Products in Ontario: “A Brave New World”

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As many U.S. manufacturing corporations and their attorneys are aware, governments in Canada have taken a distinctly *laissez faire* approach toward the regulation of most consumer products (with the exception of food, drugs, medical devices and motor vehicles). However, the winds of change are in the air. The first gust blew through Ontario on October 1, 2007. On that date, the regulator of electrical products in Ontario – the Electrical Safety Authority (“ESA”) – acquired new regulatory powers which are comparable to many of those enjoyed by CPSC in the United States. Based on early indications, ESA has seized its newly-defined role with vigour. This has abruptly changed the regulatory landscape for companies that manufacture or sell electrical consumer products in Ontario and, by implication, in Canada as a whole<sup>1</sup>.

While its powers are new, ESA itself is not a new entity. ESA was created in 1999 as a non-profit corporation operating at arm’s-length from the Ontario government. At that time, the Ontario Government “outsourced” to ESA the function of regulating the electrical industry in Ontario.

ESA’s mandate was initially limited to establishing and enforcing standards for the work performed by electricians and electrical contractors in the installation and renovation of electrical systems in buildings.<sup>2</sup> However, the legislative amendments in 2006 and 2007 have substantially broadened ESA’s mandate to cover any “electrical product or device.” That phrase is defined as “anything used or to be used in the generation, transmission,

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<sup>1</sup> These amendments to the regulation of electrical consumer products in Ontario appear to be a harbinger of more widespread and intrusive regulatory action in Canada. Canada’s federal regulator of consumer products – the Consumer Product Division of Health Canada – currently has very limited regulatory powers. These regulatory shortcomings were recently critiqued in a federal government paper, entitled “Discussion Paper on Canada’s Food and Consumer Safety Action Plan.” This discussion paper recommended the enactment of a new *Canadian Consumer Product Safety Act*, and the federal government has already acted upon that recommendation; in early April 2008, the Government of Canada introduced in the House of Commons a bill entitled “Canada Consumer Product Safety Act.” If enacted, this statute will establish a new and powerful regulator of most types of consumer products in Canada. This proposed legislation will be discussed in a subsequent newsletter of the IADC Product Liability Committee.

<sup>2</sup> See, s. 113 of the *Electricity Act*, 1998, S.O. 1998, c. 15, Sch. A, as originally enacted.

distribution, retail or use of electricity,” thus, ESA now has jurisdiction to regulate electrical consumer products in Ontario.

## ESA’s New Regulatory Powers

The primary obligations for manufacturers, importers and sellers of electrical products are stipulated in the *Product Safety Regulation*.<sup>3</sup> Central to these obligations is the requirement that manufacturers must obtain “approval” of electrical products in order to sell or advertise their electrical products in Ontario. A product may be approved in one of three ways: (1) a certification body (such as Underwriters Laboratories, Canadian Standards Association, etc.) may issue a report certifying the product’s conformity with applicable standards; (2) a field evaluation agency<sup>4</sup> may inspect the product and issue a report confirming that it conforms with applicable standards and presents no undue hazard; or (3) ESA itself may test the product to determine that it does not present any undue hazard.

Even after a product has been approved, ESA has the power to suspend or revoke that approval at any time if it is discovered that the product has not been manufactured in accordance with the design and construction standards originally approved; if subsequent examination by ESA discloses that the product does not meet applicable standards; or if ESA subsequently finds that the product presents an undue hazard.

If a product approval is subsequently revoked or suspended, any units of that product which have been manufactured or sold in the Ontario market effectively become worthless, as retailers and distributors would then be prohibited from selling such products. Moreover, under the strict wording of this section, consumers who previously purchased the product will be prohibited (at least theoretically) from continuing to use the product.<sup>5</sup>

Potentially more far-reaching than the prohibition against selling or using unapproved products is the self-reporting obligation imposed upon all parties in the manufacturing and distribution chain which comes into force on July 1, 2008. Section 8 of the Regulation will require:

“... [every] manufacturer, wholesaler, importer, product distributor or retailer that becomes aware of a serious electrical incident or accident or a defect in the design, construction or functioning of an electrical product or device that affects or is likely to affect the

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<sup>3</sup> O. Reg. 438/07.

<sup>4</sup> Certification bodies and field evaluation agencies must be accredited by the Standards Council of Canada under the federal *Standards Council of Canada Act*, R.S.C. 1985, c. S-16

<sup>5</sup> As a practical matter, however, it is not clear whether ESA would have any incentive, or the ability, to try to enforce this prohibition against individual consumers.

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safety of any person or cause damage to property, [to] report to the Authority as soon as practicable after becoming aware of the serious electrical incident or accident or defect.”

Effective July 1, 2008, a similar obligation will be imposed upon certification bodies and field evaluation agencies. These entities will also be under an affirmative obligation to report to ESA if, after preparing a product approval report about a product, they learn that the product exhibits some potentially dangerous defect in its design, construction or operation.

The new legislation also grants ESA a number of enforcement powers to equip ESA to compel industry compliance with all of these new obligations and prohibitions.<sup>6</sup> For example, under section 113.13 of the Electricity Act, ESA inspectors may enter any premises (except residential premises where the occupant does not consent) to examine any electrical product. Under section 113.13.1, if an inspector finds that unapproved electrical products are being sold or offered for sale, the inspector may seize the products, and the “Director” (an administrative official appointed under the Electricity Act) may then determine whether the product should be returned to the company or forfeited to the government of Ontario.

## ABOUT THE COMMITTEE

The IADC’s **Product Liability Committee** serves all members who defend manufacturers, product sellers, and product designers. Members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one broadcast e-mail, a member can obtain information on experts from the entire Committee membership.

Learn more about the Committee at:  
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<sup>6</sup> The *Electricity Act, 1998* sets out a variety of offence provisions, making it an offence to fail to comply provision of the Act, any regulation or any order made by ESA under subsection 113(11). Upon conviction individual may be liable to pay a fine of up to \$50,000 and/or imprisonment for a term of up to one year, corporation may be subject to fines of up to \$1,000,000: sections 113(12), (13), and 113.20(1)-(5).

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ESA also now has the authority to require the manufacturer, importer, distributor, wholesaler or retailer of the product, or the certification body or field evaluation agency that prepared a product approval report, to give notice to the public of any risk or defect in an electrical product. Further, if ESA orders any of these persons to issue a public notice and the order is not complied with at all, or is not complied with ESA's liking, ESA may issue the notice itself and then recover the cost of doing so from the "non-compliant" party.<sup>7</sup>

In addition to these specific enforcement powers, subsection 113(11) of the Electricity Act, 1998 confers upon ESA a very broad general power to make orders "necessary or advisable for the safety of persons or the protection of property;" the provision states:

"The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things [used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario] as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order."

While the precise scope of this awkwardly-drafted provision is not entirely clear, its legislative intention appears to be to equip ESA with broad powers to respond to most situations that could potentially pose a risk to the safety of persons or property. The full scope of these powers, and how ESA will exercise them, remains to be seen.

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<sup>7</sup> *Product Safety Regulation*, section 9.

## Conclusion

Canada is a federal state, comprising one federal government and thirteen provincial and territorial governments. The geographic scope of a given provincial government's laws is limited to that province's own borders. Thus, ESA's exercise of its new powers is restricted to business activity occurring only in the province of Ontario. However, as a practical matter, it would be very challenging for manufacturers or sellers of products in Canada to apply one standard for its customers in Ontario and a different standard for its customers in the rest of Canada. Consequently, it seems inevitable that the regulatory decisions and actions of Ontario's ESA will have a national impact, as manufacturers and sellers of electrical products in Ontario will likely apply to all Canadian markets any standards or corrective actions that ESA might require of them in Ontario.



### ABOUT THE AUTHORS AND THEIR FIRM

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