



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

September 3, 2009

Consultation on *Consumer Products Containing Lead (Contact with Mouth) Regulations*
Chemistry & Flammability Hazards Division
Consumer Product Safety Bureau
Health Canada
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Submitted via e-mail: C&F@hc-sc.gc.ca

Re: *Consumer Products Containing Lead (Contact with Mouth) Regulations*

About CELA

The Canadian Environmental Law Association (CELA) was incorporated in 1970 and became an Ontario legal aid specialty clinic in 1978. We provide direct representation and legal services to low income and vulnerable Ontario communities in environmental law matters where they would be otherwise unable to afford or obtain legal representation. We also undertake law reform, public legal education and community development work that advances protection of the environment, with a particular view to the interests of low income and vulnerable communities.

CELA has had a longstanding interest and involvement with the regulation of lead in the environment and consumer products. One of our priority areas of focus is children's environmental health, focused especially on toxic substances. In addition to legal representation of clients in this area, we have conducted extensive research and law reform advocacy on the greater vulnerability of children to environmental contaminants, particularly lead. We write today in response to the above-noted consultation concerning regulation of lead in consumer products.

Background and Context

Children in Canada remain at significant risk from lead exposure and experts now believe that lead is unsafe for a fetus or young child at any exposure level. While important progress has been made on controlling lead sources, environmental contamination from mostly historical sources is very high. It explains why blood-lead levels, even though they are as low as ever recorded, are still over 100 times higher than in pre-industrial human populations (as measured in skeletal remains). In particular, the legacy of lead in old paint will remain a significant exposure risk for decades into the future, particularly for children living in poverty. This legacy underscores the need to stringently control ongoing and new uses of lead in consumer products.

Despite all that is known about the hazards of lead, it continues to be in common use in many different consumer products. Regulation of these products by Health Canada has a sorry history of being far too slow and it remains inadequate. The toy recalls of 2007 and 2008 appear to have subsided in volume and frequency though they have not ended – witness yet another toy recall by Health Canada only last week. Thousands, if not millions, of lead-bearing consumer products continue to be in commerce. Even if these products have not directly harmed children, millions upon millions of them, notably the dozens of toy recalls of the last two years, have ended up in the municipal waste stream. Where this waste is incinerated, much of this lead will be released in air emissions or contaminate incinerator ash that is sent to landfills.

We know enough about the hazards of lead to insist that, worldwide, lead should be highly controlled, including a ban on all non-essential uses in consumer products. Such an approach is planned for the non-essential use of mercury in consumer products.

Health Canada’s “Lead Risk Reduction Strategy”

Since 1994, there have been dozens of advisories, warnings or requests for product recalls and the majority have been about products that pose a risk of lead poisoning to children.

Getting Beyond a Product-by-Product Approach?

In 1997 Health Canada began to develop a national strategy on lead reduction. It was called, appropriately, the “Lead Reduction Strategy.” An early statement of the overall rationale for the strategy was a desire to correct the historical approach of reducing lead exposure on a product-by-product basis which had resulted in an ongoing situation of products being available containing excessive amounts of lead. Instead, preventive measures that avoid crisis situations were noted as necessary. Other stated goals of the strategy were to enable industry to phase out the use of lead in non-essential applications and to provide industry with guidance to set quality control, purchase raw materials, etc. As well, the strategy was intended to create public confidence in the products and the marketplace.

A range of guidelines for achieving these objectives was outlined when the strategy was launched for consultation in 1997. These highly worthwhile proposals included:

1. The elimination of lead from all non-essential production applications.
2. Lead should not be added during production to any product subject to this strategy
3. The total lead content should not exceed 15 ppm which will be used to determine compliance with the strategy and the above two guidelines.
4. Use of children’s and other consumer products by children should not increase the overall body lead burden of the user.
5. Industry (manufacturers, importers, retailers, and distributors) is responsible for voluntary compliance with the strategy.
6. All products subject to the Health Canada strategy and guidelines will be in compliance by the year 2001.

None of these objectives were met.

Excessive Delay in Regulating a Clearly Understood Hazard

Instead, the Lead Reduction Strategy became the Lead Risk Reduction Strategy. The initial rationale of getting beyond the reactive, product-by-product approach was clearly abandoned. Nor has the problem been approached with the efficiency implied in the first objective (eliminating lead from non-essential lead product applications).

After 12 years, Health Canada has accomplished a single regulation (for children's jewellery), updated two others (on glazed ceramics and glassware and lead in paint) and modified various items in Schedule I to the *Hazardous Products Act* to apply the updated lead in paint regulation to various products intended (by manufacturers) for children.

When the Canadian regulatory levels for paint were revised to 600 ppm in 2005, this regulatory limit for both interior and exterior paint had been established in the US in 1976, *28 years previously*. Fortunately for Canadians, the paint industry voluntarily moved to the U.S. regulation throughout North America but this was in no way due to effective Canadian regulatory action.

In another example of delay and duplicate effort, Health Canada has conducted a consultation during 2009 to propose a level of lead allowed in kettles. The proposal is to drop the level of 50 parts per billion to 10 parts per billion to match the Canadian Drinking Water Quality Guidelines. Yet, exactly the same regulatory proposal had been the subject of public consultation two years previously in September of 2007.

In addition, another public consultation held during 2004 concerned a proposed regulation to limit the lead content of candle wicks. Five years later, no regulation has yet materialized and nor have lead-bearing candle wicks been added to items listed in Part I of Schedule I to the *Hazardous Products Act*.

The Children's Jewellery Regulation – Trade Trumps Health

The *Children's Jewellery Regulation* came into force in June of 2005, after multiple product warnings and eight years after Health Canada identified lead in jewellery as a hazard. The regulation requires that children's jewellery not exceed 600 mg/kg (or parts per million - ppm) total lead or 90 mg/kg migratable lead. In contrast, lead levels in inexpensive costume jewellery, promotional key chain fobs, zipper pulls, and other decorative metal objects can range between 5% to 50% lead (50,000 to 500,000 ppm) or even higher. It is likely a conservative estimate that millions of these items have been available for over ten years in stores selling inexpensive notions and accessories as well as from street vendors, temporary booths at fairs, expositions and shopping malls, and from marketing-support companies that provide promotional key chain fobs, conference pins, etc.

The central flaw of the children's jewellery regulation is that it applies only to jewellery that is marketed to children. This choice was made, according to the government's Regulatory Impact Analysis Statement (RIAS), to avoid economic hardship to the costume jewellery industry.

The distinction between adult and children's jewellery is an artificial one that is impossible to enforce. The government's regulatory impact statement disturbingly allowed trade to trump health. It is more concerned with the economic health of the costume jewellery industry than with the health of Canadian children or environmental lead contamination from these inexpensive and poor quality products entering the waste stream in large numbers. The children's jewellery regulation probably avoids addressing at least 90% of the problem of lead in costume jewellery and related items.

Even where the regulation legitimately applies, more advisories about lead in children's jewellery have been issued, alongside voluntary industry recalls, after the regulation came into effect. As a demonstration of how this problem remains unresolved, after taking eight years to write a regulation that only addressed a tiny fraction of the problem, Health Canada issued an advisory during the 2006 Christmas season warning parents to exercise caution in holiday purchases of children's jewellery. Similar warnings continue in Health Canada's on-line and print materials. Such warnings are clearly necessary since the regulation does nothing to remove many thousands, probably millions of these items from stores and other vendors. Moreover, the artificial and unenforceable distinction between regular jewellery and "jewellery intended for children" would not address the ability of women to purchase and wear necklaces containing this kind of jewellery that their small children could handle and put in their mouths. Nor does a jewellery regulation, even were it to cover all jewellery, include lead in commonly available key chain fobs that young children can put in their mouths if parents give them their keys to play with, for example. It has long been known that lead is sweet-tasting explaining why children will eat paint chips or preferentially suck on items containing lead.

Regulations Should Address Potential for Actual Lead Exposure Not Packaging Directions

Further actions under the Lead Risk Reduction Strategy, including the regulation currently proposed, extend the product-by-product approach to a broad array of consumer items, aggregated in four product groupings organized according to manufacturer directions for product use, including for intended age groups, information that is largely gone after packaging is removed.

Long gone from this approach are the objectives proposed in 1997 of getting beyond product-by-product crisis management, seeking the elimination of lead from non-essential production applications, avoidance of adding lead during production and the objective of keeping total lead content below 15 ppm. If these original objectives remained, the allowable level of 15 ppm would provide for a contamination level, in recognition of the reality of global lead contamination and the fact that lead is a naturally occurring substance. Instead, the Lead Risk Reduction Strategy states that:

“Zero-lead content limits for consumer products are not realistic because trace amounts of lead are found everywhere in the natural and human environments.

This statement sets up the proverbial “straw man” to knock down. It is entirely reasonable to ban non-essential uses of lead and set regulatory limits that account for the reality of contamination. This approach has been followed since the introduction of lead-free gasoline in the 1970s.

Instead, the Lead Risk Reduction Strategy proposes to set multiple regulations across numerous products that will serve to sanction the use of lead in dozens of consumer products. It is a highly inefficient, labour-intensive exercise to both create and enforce multiple regulations applicable to myriad products. Not only does the work on writing these many regulations never seem to get done, it also sends a signal that continued use of lead across broad categories of products is acceptable.

Finally, if and when the four proposed regulations in the LRRS are ever finalized, it is a significant concern that a distinction is being made between products intended for children under and over three years old, if it is Health Canada's intention that such a distinction will allow for higher lead levels in products intended for children over the age of three. It has been known for at least two decades that the hazards of lead are of concern to children up to at least six years of age. More important, like the children's jewellery regulations, such distinctions ignore the reality of homes and other child care settings with multiple children of many ages who use and share toys regardless of manufacturers age recommendations on packaging that has long since been removed. These age distinctions also do not recognize that children play with what is in their environment whether it was initially manufactured and labelled as a toy, or otherwise intended for children, or for whatever age group recommended on a label. Nor do such distinctions adequately recognize the need for women of child-bearing age and particularly pregnant women to avoid lead exposure throughout the child-bearing years.

Indeed, this reality of how children actually behave and play with toys is specifically noted in the proposed regulations for phthalates in toys issued for public consultation at the same time as the draft regulation for lead in products. In response to industry claims that restrictions should be limited to toys that are mouthed by children, the Regulatory Impact Analysis Statement for the proposed *Phthalates Regulation* (<http://gazette.gc.ca/rp-pr/p1/2009/2009-06-20/html/reg3-eng.html>) states the following:

...limiting the prohibition to products intended to be mouthed by young children is not considered by Health Canada to be sufficiently protective of children's health. It is recognized that young children, particularly once they become mobile, mouth a variety of items in the home, including items not intended to be mouthed, since this is how these children explore their world. It is also recognized that parents cannot always be watching their children and controlling what they put in their mouth. It is impossible and impractical to control through legislation what people have in their homes or what children put in their mouths. However, it is a priority for Health Canada to set legislation which ensures that children's products are as safe as possible. A prohibition limited in scope to products intended to be mouthed by young children is too narrow to be protective of health given that an estimated 75% of items mouthed by young children are those not designed for or intended to be mouthed according to a study on *Research into the mouthing behaviour of children up to 5 years old* (July 2002) by the Consumer and Competition Policy Directorate, Department of Trade and Industry, United Kingdom, available at www.berr.gov.uk/files/file21800.pdf

Why is it that this entirely reasonable and logical argument, advanced by Health Canada with respect to regulating phthalates in toys is not also applied by Health Canada to lead in toys?

The proposed Consumer Products Containing Lead (Contact with Mouth) Regulations

Notwithstanding the foregoing concerns about the overall legitimacy of the LRRS, we have the following response to the proposed regulation.

We support the proposal to set a low level of 90 mg/kg total lead for two reasons. First, this level offers reasonable assurance that it will ensure an approach by manufacturers of “no intentional addition” of lead and that monitoring results would likely serve to indicate only environmental lead contamination – an approach that was envisioned in the original version of the Lead Reduction Strategy.

Second, as noted in the Regulatory Impact Analysis Statement (RIAS), there is no scientifically justifiable reason to distinguish between total lead and migratable lead and therefore no valid reason to set a total lead level different or higher than a migratable level.

However, while we strongly support that the RIAS reflects this up to date understanding of current scientific evidence, we note that the limit for lead in children’s jewellery does make a distinction between total lead (at 600 mg/kg) and migratable lead at 90 mg/kg. We also note that all of the various limits on paint are also set at 600 mg/kg.

At a minimum, these other limits are likely in need of revision. More efficient would be to apply the approach of banning non-essential uses of lead in consumer products.

Finally, it must be said that it has taken us many hours of tortuously slow research looking at the obtuse details of the *Hazardous Products Act*, its detailed schedules and regulations and the many iterations of the Lead Risk Reduction Strategy (still in draft and out-of-date form on the Health Canada website) to make sense of the manner in which Health Canada has previously or in future intends to regulate lead in consumer products. The result is a chaotic and at times contradictory series of limits or yet-to-be-determined limits for lead in a wide range of products, all of which are products that do not need to intentionally use lead at all.

The most recent toy recalled for lead content (on August 26th) is an example of the ineffectiveness, slowness and frankly plain silliness of parsing out regulations for all the many product categories in the Lead Risk Reduction Strategy. The recall is a toy for which the packaging says it is for children over the age of three.

Hence, this toy would not be included in the 90 mg/kg limit for Group One, the subject of the current regulation under consultation. The lead content of the paint would however be covered under the *Hazardous Products Act* limit of 600 mg/kg for paint on toys.

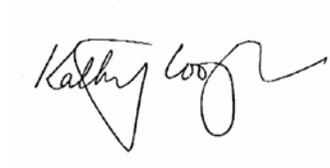
It would be routine for a younger sibling (i.e., under age three) of a child over age three to have access to such a toy and the younger child would be more likely to put it in the mouth. Once Health Canada gets around to regulating Group 2, presumably toys for children over age three are to be included and perhaps the need for such a recall would be prevented.

A fundamental problem with the LRRS remains that it is overly focused on establishing regulations in terms of how products are promoted or marketed, i.e., those aspects of products that generally end when the packaging is removed. This regulatory approach inadequately considers how the products are actually used, shared, given as gifts, etc., by children and adults in families, in homes, schools and child care settings. It is also contradictory to the approach taken at the same time by the federal government in the regulation of phthalates in toys; an approach that begins to include a more realistic recognition of children's activities and behaviour.

All of which is respectfully submitted.

Yours very truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read "Kathleen Cooper". The signature is written in a cursive style with a large, stylized initial 'K'.

Kathleen Cooper
Senior Researcher