

150108

No.

150108

No. 150108

Department of Justice
Ministère de la Justice

FILE CHECKED FOR MPV
E.A. BACK COVER
DOSSIER VÉRIFIÉ POUR BSUU
VOIR ENDOS DE LA CHEMISE

RECORDS — DOSSIERS

Titre
Title

OBJET
SUBJECT

POWER TO LICENSE MANUFACTURERS OF COSMETICS
IF SECTION 3(J), FOOD & DRUGS ACT IS UNCONSTITUTIONAL.

De
From

E.A.D.

JAN. 23, 1946

Mandataire
Agent

Renvoi
Cross Reference

PERMANENT RETENTION
IN JUSTICE
CONSERVATION PERMANENTE
À LA JUSTICE

BRING FORWARD -- DORMANT -- CLOSED
RETOURNER EN ATTENTE TERMINE

[illegible]

MPV / DSUU ON FILE / SUR DOSSIER
YES / OUI (✓) NO / NON ()

ABSTRACTOR / REDACTEUR: _____

DATE: 84/04/09 GL

DB

No. 150108

EAD/CM

Your File No. 336-2-12, V.1

November 3,

47.

150108



With reference to your letter of October 25th, I am of opinion that the amendments to the Food and Drugs Act respecting cosmetics and contained in sections one and two of An Act to amend the Food and Drugs Act, being chapter 3 of the statutes of 1939, are intra vires.

W. R. JACKETT

for Deputy Minister.

R. E. Curran, Esq.,
Legal Adviser,
Dept. of National Health & Welfare,
O T T A W A .

OTTAWA, November 1, 1947.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

The Food and Drugs Act was amended by 1939, c. 3. Included in the amendment were provisions respecting control of cosmetics. Many cosmetics on the market contain harmful ingredients. The Dept. of Pensions and National Health (as it was at that time) felt that there should be some control. The amendments with reference to cosmetics were as follows:

1. The definition of "drug" was revised so as to include cosmetics.
2. Cosmetics were defined.
3. The Governor in Council was authorized to make regulations providing for the licensing of manufacturers of cosmetics.

The amending Act of 1939 was to come into force in whole or in part by proclamation. The provisions relating to cosmetics have not yet been proclaimed.

On January 22, 1946, the Dept. of National Health and Welfare requested your opinion whether the licensing provision was intra vires. At that time the Dept. contemplated bringing the section into force and establishing regulations. I dealt with the problem in my memorandum of January 25, 1946, and on February 1, 1946, you advised the Dept. that the licensing provision was, in your opinion, of doubtful validity. You advised that it was a well established principle that Parliament cannot regulate a particular trade or business by means of a licensing system unless such licensing is necessarily ancillary to some other legitimate Dominion legislative scheme. You pointed out that no clue was given as to the purpose of the licensing provision other than the fact that it was contained in a statute dealing with the prevention of fraud, adulteration and injury to the public in the manufacture, use and distribution of food and drugs. You stated that this might easily be regarded by the courts as an insufficient basis but you went on to say that legislation to prohibit or restrict the

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-2-

manufacture or sale of dangerous cosmetics would be within the jurisdiction of Parliament and might very well include proper licensing provisions if they are deemed necessary to secure the attainment of the objects of the Act.

Following this opinion the Dept. of National Health and Welfare requested that you prepare a draft bill amending the Food and Drugs Act in accordance with your opinion. An amendment was prepared and submitted to the Dept. but insofar as cosmetics are concerned the amendment was never put forward. The bill contained other provisions and these alone were enacted by Parliament.

The Dept. of National Health and Welfare now asks your opinion whether the provisions of the 1939 amendment relating to cosmetics (other than the licensing provisions) are valid. If in your opinion they are the Dept. proposes to have these provisions proclaimed and to establish regulations within permissible bounds.

The remaining amendments are two. The one is an amendment to the definition of drugs so as to include "any cosmetic". The other is an amendment to the definition section defining cosmetic to mean any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and shall include deodorants and perfumes.

valid

The effect of this amendment would be to throw cosmetics into the Act and they would stand in the same position as drugs. Nothing new in the way of substantive provisions would be added and I think it must follow that the amendments would be as ~~silent~~ as the Food and Drugs Act itself. For the reasons given in my memorandum of January 25, 1946, I am of opinion that the Food and Drugs Act as it now stands is intra vires.

If the Act is amended so as to include cosmetics in the definition of drug the Governor in Council under s. 3 would have authority to make regulations -

- "(a) prescribing standards of quality for and fixing the limits of variabilities permissible in any article of food or drug the standard of which is not otherwise prescribed by this Act or the Meat and Canned Foods Act;

.....

-3-

- (b) respecting the packaging and labelling of any article of food or drug and the design of any such package or label with a view to preventing the public or the purchaser being deceived or misled as to the character, strength, quality or quantity of the article;
- (k) prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as a food or drug or restricting in like manner its use as an ingredient in the manufacture of food or drug;
- (m) respecting false, exaggerated or misleading claims for any article of food or drug."

In addition, s. 6 dealing with the adulteration of drugs will apply. This section provides, inter alia, that every drug shall be deemed to be adulterated if its strength, quality or purity falls below the professed standard under which it is sold. S. 10 would also apply; this section authorizes the prohibition of import of adulterated drugs.

These provisions are, of course, quite different from a blanket licensing provision.

Draft letter attached.

E.A.D.



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

IN YOUR REPLY REFER TO FILE No. 336-2-12, V.1

Room 736, Jackson Building,
OTTAWA, October 25, 1947.

Your File 150108

F. P. Varcoe, Esq., K.C.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

RECEIVED

1947 OCT 27 AM

DEPT. OF JUSTICE

150108

Dear Mr. Varcoe:

Under date of February 1, 1946, you gave us an opinion with respect to paragraph (j) of subsection (1) of section (3) of the Food and Drugs Act, as amended by Chapter 3 of the Statutes of 1939.

In that opinion you expressed doubt as to the validity of the section and suggested that you would be glad to assist in the preparation of a draft bill to overcome the difficulty in this connection.

A draft bill was accordingly prepared, which involved the repeal of the portions of the 1939 bill which related to cosmetics and the establishment of a special part of the Act to deal with the subject of cosmetics. For various reasons the introduction of this bill has been delayed and I have been requested to ask you whether there is any doubt respecting the validity of the portions of the 1939 Act which relate to cosmetics, other than paragraph (j) of subsection (1) of section (3).

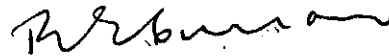
The opinion is sought with a view to proclaiming these portions of the Act and enacting regulations thereunder which will, within the limits thereof, enable some measure of regulation for the sale of cosmetics in Canada. In the light of the

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experience so gained, the draft bill, which is presently on file, may be introduced at a later date.

Your views, therefore, with respect to the foregoing will be very much appreciated.

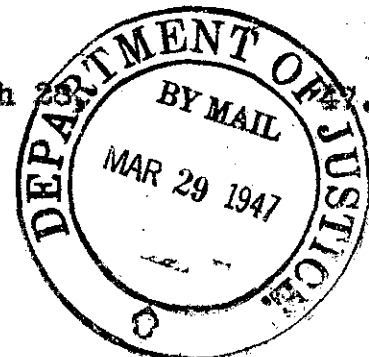
Yours very truly,



R. E. Curran
Legal Adviser

M.

March 28



150108

Referring to your letter of March 20th, I may say that I can see no objection to adopting, with some slight changes in form, the definition of "cosmetic" suggested by you.

I suggest the following definition to replace the present definition of "cosmetic" in the draft bill, namely,

"cosmetic" means any material intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any thing intended for use as a component of any such material but does not include soap."

F. P. Varcoe

Deputy Minister.

The Deputy Minister of National Health,
Dept. of National Health and Welfare,
O T T A W A .

OTTAWA, March 28, 1947.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

Recently we prepared a draft bill to amend the Food and Drugs Act. One of the main purposes of the bill was to bring cosmetics within the scope of that Act. The expression "cosmetic" was defined in the draft bill to mean "any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and includes deodorants and perfumes."

The draft bill has been discussed by the Dept. of National Health and Welfare with representatives of the cosmetic industries and some objection has been raised to the proposed definition of a cosmetic. It has been suggested to the Dept. that the definition in the U.S. statute should be adopted. The cosmetic manufacturers seem to prefer that definition and, in any case, they suggest it would be desirable to have the same definition in the two countries because Canadian manufacturers are largely dependent on U.S. requirements.

The definition in the U.S. statute, we are informed, is as follows:

"The term 'cosmetic' means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap."

I suggest this be revised as follows:

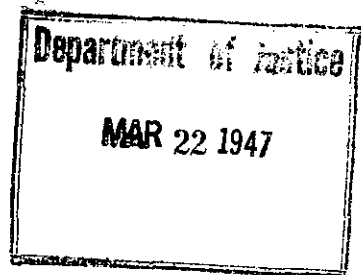
"cosmetic" means any material intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any thing intended for use as a component of any such material but does not include soap."

Draft letter attached.

E.A.D.



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE



OFFICE OF THE DEPUTY MINISTER
OF NATIONAL HEALTH
OTTAWA

March 20, 1947.

F. P. Varcoe, Esq., K.C.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

✓
150108

Dear Mr. Varcoe:

Re: Cosmetic Bill

The Bill which you drafted to amend the Food and Drugs Act to make provision for cosmetics has been discussed with representatives of the industries who are concerned with the manufacture and sale of cosmetics.

Some objection has been raised to the definition of a cosmetic and the officials of the Department propose to substitute for this definition the definition of a cosmetic as it is contained in the Federal Food, Drug and Cosmetic Act of the United States. A reason for adopting the U.S. definition is because great emphasis was placed by the manufacturers on their dependence on the requirements of the U.S.

We, therefore, thought that, if the present definition does not entirely meet the situation, they can take little objection to the American definition, which is quite adequate, and as a matter of fact is more embracing than was the definition which was proposed in the legislation.

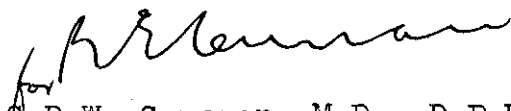
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The following is the American definition of a cosmetic and it would possibly require some slight modification in language, as you may consider that the word "attractiveness" is not a suitable word for a statute.

any material
"~~The term~~ "cosmetic" means ~~(1) articles~~
intended to be rubbed, poured, sprinkled, or
sprayed on, introduced into, or otherwise
applied to the human body or any part thereof
for cleansing, beautifying, promoting attractive-
ness, or altering the appearance, and ~~(2) articles~~ *includes any thing*
intended for use as a component of any such *material*
but does not ~~articles; except that such term shall not~~ include
soap."

Your comments in respect to this suggestion would be very much appreciated.

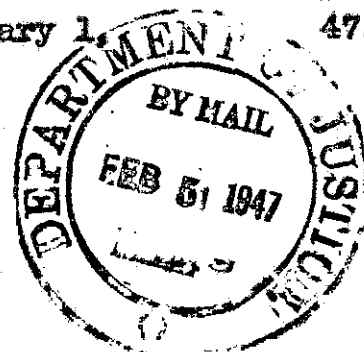
Yours very truly,


C.D.W. Cameron, M.D., D.P.H.
Deputy Minister of National Health

EAD/CH

February 1,

47.



150108

Replying to your letter of January 9th, I enclose herewith for your consideration a revision of your proposed bill to amend the Food and Drugs Act.

Encl.

F. P. Varcoe

Deputy Minister.

R.E. Curran, Esq.,
Legal Adviser,
Dept. of National Health and Welfare,
Room 736, Jackson Building,
O T T A W A .

OTTAWA, February 1, 1947.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

Last year we prepared a bill for the Dept. of National Health and Welfare amending the Food and Drugs Act. The main purpose of the amendment was to bring cosmetics within the scope of that statute; at the same time a few minor changes in other parts of the Act were being made.

The Dept., however, decided not to proceed with the bill last year insofar as cosmetics were concerned. These provisions were dropped from the bill and a short bill was passed. It is now intended to bring in a bill dealing with cosmetics.

The draft submitted by the Dept. now is substantially in the same terms as the sections we drafted last year. I have made some alterations and corrections, however, and attach draft letter returning a revised bill.

E.A.D.

P.S. Some of the provisions are not in particularly good form but the difficulty is there are parallel provisions in the Act now, relating to foods and drugs.



CANADA

DEPARTMENT OF
NATIONAL HEALTH AND WELFARE



IN YOUR REPLY REFER TO FILE NO.

Room 736, Jackson Building,
OTTAWA, January 9, 1947.

F. P. Varcoe, Esq., K.C.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

Dear Mr. Varcoe:

Re: 150108

Last Spring in connection with certain amendments to the Food and Drugs Act provision was made for cosmetics to replace the amendments in this connection which had been made in 1939, some of which were considered of doubtful constitutionality.

It was decided not to proceed with the amendments respecting cosmetics last Session and, meanwhile, following discussions with the industries concerned, a further Bill has been drafted to make provision for cosmetics in the Food and Drugs Act. Copy of this Bill is attached for your consideration and approval.

The attached makes provision for cosmetics as closely as possible in the same way as provision is made for food and drugs. It also is intended to straighten out the situation which resulted from the 1939 Bill, which provided that the whole or any portions could be brought into force on proclamation. Certain sections were brought into force in this way, except insofar as they related to cosmetics, and other sections have not so far been proclaimed.

The attached, therefore, repeals all such sections and re-enacts them without any reference to the

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word "cosmetics", which is entirely dealt with in the special part of the Act relating to the subject.

The Minister is anxious that this draft may have your consideration at your early convenience in order that it may be ready for Cabinet consideration.

I might mention that there are one or two minor points presently under discussion between the officials of this Department and representatives of the industries. These matters may involve further slight changes to the Bill, but, as they will not be substantial, the Minister did not wish to delay submission of the Bill to you pending such final consideration.

I shall be available to discuss the matter at any time convenient to you or to furnish information, should you require it.

Yours very truly,



R. E. Curran
Legal Adviser



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

OTTAWA, July 12, 1946.

IN YOUR REPLY REFER TO FILE NO.

E. A. Driedger, Esq.,
Department of Justice,
Justice Building,
OTTAWA, Ontario.

150108

Dear Mr. Driedger:

Further to our telephone discussion yesterday I have spoken to the Minister with reference to the change you suggested to the section in the Food and Drugs Bill.

He favours this change and it is, therefore, proposed that this section should be amended to read as follows:-

"(kk) Defining the conditions of sale of any drug in the interest and for the protection of the public health;"

The Bill will likely come up next Wednesday, and any further thoughts that you might have regarding this language would be appreciated.

I think that the addition of these words materially strengthens the argument for the constitutionality of the section and, at the same time, does not detract in any way from what the administration desires to do under it.

Yours very truly,

R. E. Curran
R. E. Curran (L.H.)
Legal Adviser

File away

EAD/CD

June 7,

46.

150108



As requested, I return herewith
printer's proof of the Food and Drugs Bill
which was forwarded with your letter of
May 27th.

Encl.

E. A. Driedger.

R. E. Curran, Esq.,
Legal Adviser,
Dept. of National Health and Welfare,
O T T A W A .

OTTAWA, June 4, 1946.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

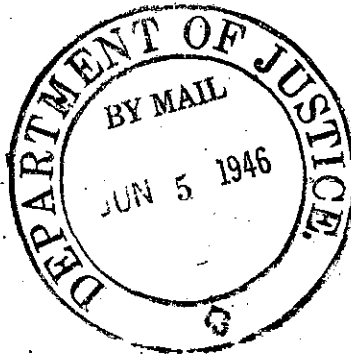
A short time ago you sent the Department of Veterans Affairs a draft bill to amend the Food and Drugs Act. The main amendments were in regard to cosmetics although a few other changes of a minor character are contemplated.

The amendments respecting cosmetics are intended to replace existing provisions that you ruled were ultra vires. Under the bill as drafted registration was required of all cosmetics. The Minister of National Health and Welfare feels that, from the point of view of policy, it would be better to restrict registration to those cosmetics which contain some ingredient of harmful character to be specified by the Governor in Council. A slight revision of the previous draft is therefore requested. At the same time the Minister would like to have an express statement that the present draft in your opinion is constitutional. This was obviously implied from your previous letter; nevertheless, the Minister wants to be satisfied on this point.

At the same time the Department seeks a further amendment to the Act. Section 6A prohibits the sale, etc., of any remedy represented as a treatment for the diseases named in the schedule. Sometimes people sell mechanical devices and represent them as treatments for these diseases and the Department feels that the Act as it now stands does not cover this. In fact in a recent prosecution in Alberta it was held that the sale of a metal chain as a treatment for high blood pressure was not a "remedy" within the meaning of this section. It is therefore proposed to change the word "remedy" to "food or drug". The new definition of "drug" is to include devices.

Draft letter attached.

E.A.D.



June 4,

46.

150108

Referring to your letter of May 27th, I suggest that you strike out the proposed section 40 in the draft bill and substitute therefor the following:

"40. (1) The Governor in Council may by order establish for the purposes of this Part, a schedule of substances that in his opinion may be injurious to health when used as an ingredient in a cosmetic, and may by order amend the schedule so established.

(2) Every manufacturer, before selling, offering for sale or exposing for sale any cosmetic containing as an ingredient any substance named in the schedule established under subsection one of this section, shall, at such time and in such manner as may be prescribed by regulation, register that cosmetic and give to the Minister such information with respect thereto as may be prescribed by regulation."

In order to avoid any possible difficulties in connection with the use of the word "injurious", I suggest that you substitute the word "prohibited" for the word "injurious" in line 28 on page 2 of the bill and also in the following places, namely, page 3, lines 10 and 16 and page 4, lines 41 and 44.

With reference to the proposed amendment to section 6A of the Act, I suggest you insert, immediately after the present clause 3, the following clause:

"4. Section six A of the said Act is repealed and the following substituted therefor:

6A. No person shall import, offer for sale, or sell any food or drug represented by label or by advertisement to the general public as a treatment for any of the diseases, disorders or abnormal physical states named or included in Schedule A to this Act or in any amendment to such Schedule."

With reference to the penultimate paragraph of your letter, I am of opinion that Parliament is competent to enact the proposed legislation.

F. P. Varcoe

The Deputy Minister of National Health,
Dept. of National Health and Welfare,
O T T A W A .

Deputy Minister.

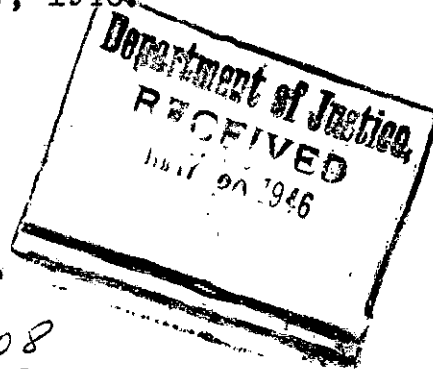


DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

May 27, 1946.

IN YOUR REPLY REFER TO FILE NO.

F. P. Varcoe, Esq.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.



Dear Mr. Varcoe:

Re: Food and Drugs Bill

I attach printer's proof of the Food and Drugs Bill as it was drafted by you. Before the Bill is finally printed there is a further slight amendment which will be required. Mr. Driedger mentioned this and I have written to the Law Clerk of the Senate advising of the further change to be made.

The Minister, however, has raised certain questions with respect to the registration provisions in the portion of the Bill relating to cosmetics. He feels that registration of all cosmetics, irrespective of their ingredients, may prove contentious and, with this in mind, it is proposed to modify the registration provisions by requiring registration only of cosmetics containing ingredients which may be harmful. A list of such ingredients will be set up by regulation.

The Minister has accordingly asked that the Bill be further considered by you with a view to making necessary changes so as to permit of a schedule of ingredients, the use of which will require registration. The registration provisions of the Bill would be modified to require registration in respect of cosmetics using any ingredient which may be set out in the schedule. The power to set up the schedule should indicate that once an ingredient has been added to the schedule it is not susceptible

Return

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of argument that it need not have been so added.

A further provision in the Bill might be required to provide for regulations being made to prescribe or define the conditions of sale of cosmetics containing any ingredient which is on the schedule. There should of course be power for Governor in Council to add from time to time further ingredients as may be desirable. There is some parallel for this in section 3 (i) of the present Act.

In view of the fact that a drug is being defined by the proposed Bill to include any article that may be used for the diagnosis, treatment, mitigation or prevention of disease, your views as to whether section 6 (a) should not be amended will be appreciated. Section 6 (a) prohibits sale of any remedy represented by label or by advertisement to the general public as a treatment for the conditions set out in Schedule A to the Act. The word "remedy", which is so used, has given some difficulty. I raise for consideration, therefore, whether it would not be desirable to substitute for the word "remedy" "any article of food or drug". This would include mechanical devices. ✓

A case is presently before the courts in Alberta for interpretation of the word "remedy" in relation to a metal chain sold as a treatment for high blood pressure. The Magistrate dismissed the charge on the basis that the Food and Drugs Act did not apply. An appeal is being considered by way of stated case from his decision. An amendment, as above indicated, would appear to me to be in keeping with the general phraseology of the Act and preferable to the use of an expression which is susceptible of various interpretations.

Section 2 of the Bill provides for regulations being made "prohibiting the sale of any drug". The Minister feels that it would be sufficient to limit

-3-

this to prescribing the conditions of sale and the words "prohibiting the sale" might be dropped.

In view of the fact that the constitutionality of certain sections of the 1939 amendments to the Food and Drugs Act were questioned, and in your opinion rightly so, the Minister has asked if you would be good enough to state specifically that the draft Bill meets the objections previously raised and that it is, in your opinion, constitutional. This, I appreciate, is implied from the fact that you prepared the Bill to meet the very doubt which had been raised as to the former legislation. At the Minister's request, however, would you be good enough to cover this point specifically.

I shall be glad to attend with the technical officers of the Division to discuss with you the further changes which the Minister desires. In view of the fact that he wishes the Bill to go to Cabinet as soon as possible, anything which you can do to make this available at an early date will be very much appreciated.

Yours very truly,



R. E. Curran
Legal Adviser

OTTAWA, May 15, 1946.

Flavigny 150108
J. F. MacNeill, Esq.,
Law Clerk and Parliamentary
Counsel to the Senate,
The Senate,
OTTAWA, Ontario.

Dear Mr. MacNeill:

Further to my telephone conversation of today a point has been drawn to my attention in connection with the Bill to amend the Food and Drugs Act and which will require a further change in the draft Bill which has just been printed.

As mentioned in my letter of April 17th, certain amendments were made to the Food and Drugs Act in 1939 to come into force on proclamation. Some of these were proclaimed, but certain sections were not. It was, therefore, necessary in the present Bill to take care of those sections which had not come into force on proclamation.

I find that section 3 of the 1939 Bill, which amended subsection 1 of section 3 of the Act, was partially brought into force. I had not known this and, in view of the fact that it was partially brought into force, it would seem desirable that the entire section should be repealed and the section substituted therefor which is now desired. This in effect is really a reenactment of the proclaimed portion, but, for purposes of clarity, I think it would be desirable that section 3 be repealed and the desired section substituted for it.

The draft Bill, therefore, should be amended by the following as section 2 thereof, in lieu of the present section 2:-

-2-

"2. (1) Paragraph (b) of subsection one of section three of the said Act is repealed and the following substituted therefor:

'(b) respecting the packaging and labelling of any article of food or drug and the design of any such package or label with a view to preventing the public or the purchaser being deceived or misled as to the character, strength, quality or quantity of the article;'

(2) Subsection one of section three of the said Act is further amended by adding thereto, immediately after paragraph (1) thereof, the following paragraph:

'(j) prohibiting the sale or defining the conditions of sale of any drug;'

In regard to paragraph (b), which is the reenacted paragraph, I suggest the following be adopted as the explanatory note thereto:-

"Included in the 1939 amendments to the Food and Drugs Act above mentioned, section 3 thereof repealed the former paragraph (b) of subsection 1 of section 3 of the Act and substituted a new section, which included certain provision relating to cosmetics. This subsection, except insofar as it related to cosmetics, was brought into force by proclamation. In view of the new provisions proposed for cosmetics, it is desirable, therefore, that paragraph (b) of subsection 1 of section 3 so proclaimed be repealed and reenacted in the desired form, deleting that portion which referred to cosmetics."

In addition to the above, I should be glad to discuss with you the other minor points which you mentioned in connection with section 6 of the draft Bill and relating to the terminology employed.

-3-

I wonder if you would be good enough to forward to Mr. Driedger, Department of Justice, a copy of the draft Bill. He prepared the original revision, and the above mentioned correction to the draft Bill is pursuant to his suggestion.

Yours very truly,

R. E. Curran
Legal Adviser

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DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

Your file No. 150108
Our file No. 4-48, V.6



OFFICE OF THE DEPUTY MINISTER
OF NATIONAL HEALTH
OTTAWA

April 11, 1946.

F. P. Varcoe, Esq.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

150108.

Dear Mr. Varcoe:

I wish to thank you for your letter of April 5th. The points mentioned will be drawn to the Minister's attention.

It is desired that a registration fee be prescribed in respect of each article of cosmetics which by the draft Bill are required to be registered under regulations to be made.

No specific provision is made in the Bill for prescribing a tariff of fees for registration, and I would accordingly propose that subsection (e) be added to section 41, as follows:-

"for prescribing a tariff of fees payable for registration of cosmetics".

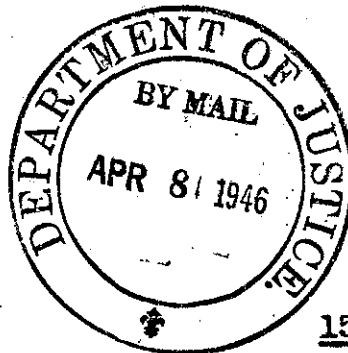
Yours very truly,

G. B. Chisholm, M.D.
Deputy Minister of National Health

File away

EAD/CD

Your File 4-48, V.6



April 5th,

46.

I have to thank you for your letter of April 2nd respecting the bill to amend the Food and Drugs Act.

The change you suggest to subsection (2) of section 38 would be a repetition of the definition section and while it might not do any harm, I would not favour making the alteration you suggest.

I can see no objection to substituting the word "preparation" for the word "manufacture" in paragraph (c) of section 41.

F. P. Varcoe

Deputy Minister.

The Deputy Minister of National Health,
Dept. of National Health and Welfare,
O T T A W A .

OTTAWA, April 5, 1946.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

You recently sent to the Department of National Health and Welfare a bill to amend the Food and Drugs Act. The main purpose of the bill was to make provisions for cosmetics and a new part was added to the Act dealing with this subject.

In the definition section the word "injurious" as applied to a cosmetic was defined to mean (1) injurious to health, or (2) not prepared, packaged or labelled in accordance with regulations.

The reason for the labelling provision was that many of the administrative sections of the present Act are made applicable to cosmetics, and foods or drugs not labelled in accordance with regulations are deemed to be adulterated. It was therefore necessary to incorporate the same idea with reference to cosmetics.

However, to provide for flexibility your draft provided also that "every cosmetic shall be deemed to be injurious if its quality falls below the standard or its ingredients are present in quantity not within the limits of variability fixed by the Governor in Council." The Governor in Council is given authority to make regulations respecting standards, etc.

The Department now suggests that in addition to the definition section we should provide that every cosmetic shall be deemed to be injurious if its quality falls below the standard, etc., or if it is not prepared, packaged or labelled in accordance with regulations.

This would be a repetition of the definition section but the Department says that this will be useful in the administration of the Act.

In my view this addition is unnecessary and superfluous and I would not recommend its inclusion as suggested.

The Department suggests also that the expression "manufacture of cosmetics" be changed to "preparation of cosmetics". I can see no objection to this.

Draft letter attached.

E.A.D.

000031



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE



Your File No. 150108

Our File No. 4-48, V.6

OFFICE OF THE DEPUTY MINISTER
OF NATIONAL HEALTH
OTTAWA

April 2, 1946.

F. P. Varcoe, Esq.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

150108

Dear Mr. Varcoe:

I wish to thank you for your letter of March 26th enclosing Bill to amend the Food and Drugs Act.

This Bill has been examined by the technical officers of the Department and our Legal Adviser, who consider that it covers everything that was desired and who wish to express their appreciation for the care taken in its preparation.

There are two very slight changes which have been suggested might be made in the Bill and on which I would appreciate receiving your concurrence. These are as follows:

Subsection (2) of section 38 be amended by adding the words "or if it is not prepared, packaged or labelled in accordance with regulations". This may be some slight duplication but, as the Act will be administered for the most part by laymen, the addition of these words may prove useful to them in interpreting it. If you have no objection, I would therefore propose that these words be added to the section.

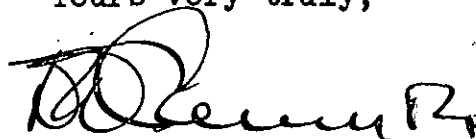
Subsection (c) of section 41 uses the word

-2-

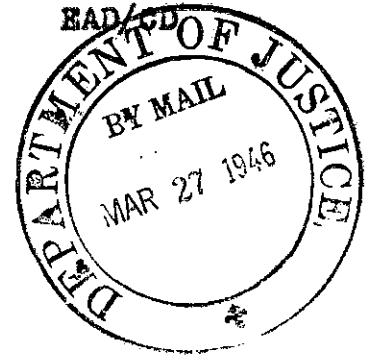
"manufacture". Manufacturer is defined in the Bill and manufacture, according to the Food and Drugs Act, merely means manufacture for sale, which is not helpful. I would, therefore, suggest that the word "manufacture" be changed to "preparation".

Would you advise me at your earliest convenience whether you are agreeable to the foregoing slight changes so that the Bill may be sent forward for printing and introduction.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'G. B. Chisholm', with a stylized flourish at the end.

G. B. Chisholm, M.D.
Deputy Minister of National Health



March 26th,

46.

150108

Replying to your letter of February 19th, I enclose herewith a Bill to amend the Food and Drugs Act. In addition to the amendments respecting cosmetics I have, at the suggestion of the Chief Dominion Analyst, included slight amendments to sections three, four and fifteen. Please consider whether this Bill is in accordance with your intention in every respect.

I return herewith your draft Cosmetic Regulations.

Encls.

F. P. Varcoe

Deputy Minister.

The Deputy Minister of National Health,
Dept. of National Health and Welfare,
O T T A W A .

OTTAWA, March 19th, 1946.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

In 1939 the Food and Drugs Act was amended by inserting in the definition section a definition of "cosmetic" and by inserting a paragraph in section 3 authorizing the Governor in Council to make regulations for the licensing of manufacturers of cosmetics. These provisions respecting cosmetics were to go into force by proclamation but the proclamation has not yet issued. The Department of National Health and Welfare prepared draft Cosmetics Regulations but before submitting these to you requested an opinion from you as to whether the 1939 amendments were intra vires. I dealt with the matter in my memo. of Jan. 25th and concluded that these provisions were beyond the authority of Parliament; nevertheless, the Dominion could by appropriate legislation prohibit or restrict the manufacture and sale of dangerous cosmetics. In your letter of February 1st you so advised.

The Department has now asked you to prepare a draft amendment to the Food and Drugs Act that would enable the Governor in Council to make the necessary regulations. At the same time the Department wishes to repeal the present Part II of the Act (which deals with honey) and also to amend sections 3, 4 and 15.

With regard to cosmetics I have prepared a new Part to the Act, the main provision of which prohibits the sale of injurious cosmetics. The word injurious is defined to mean (a) ~~declared by Regulation to be injurious~~ *regulated by Regulation*; or (b) not prepared, packaged or labelled in accordance with the regulations. As ancillary to this prohibition I have provided that manufacturers shall register their cosmetics with the Department and give information with respect thereto. The Governor in Council is given power to make regulations respecting registration, packaging and labelling of cosmetics, restricting the use of ingredients that may be injurious and exempting certain cosmetics from the operation of the Act; *and also to prescribe standards and fix limits of variability.*

Legislation along these lines would, I think, be intra vires. The object is not to control the manufacture of cosmetics but rather to prohibit, in the interests of public health and safety, the sale of *harmful* cosmetics.

The present Food and Drugs Act contains elaborate provisions respecting the procuring of samples and their analysis. See sections 8 to 22 inclusive. The Department wishes to have these sections applied to cosmetics. I pointed out to them that the best way of dealing with the matter would be to rewrite the entire Food and Drugs Act and make the necessary changes in each section. As the sections now stand they relate only to food and drugs. However, the Department does not wish

- 2 -

to proceed in that way at this time. It is intended to revise the Act within the next year or two but the Minister is not prepared to go to Parliament with a new Act at this time; all they want is sufficient authority to proceed with the regulation of cosmetics.

In these circumstances our only alternative is to incorporate these sections by reference and this I have done in section 43 of the attached draft.

With regard to the amendment to section 3, paragraph (k) now provides that the Governor in Council may make regulations prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as a food or drug. The new drugs such as penicillin and the sulfa drugs are creating difficulties. Penicillin, for example, is perfectly harmless in itself and there would, therefore, be no authority under paragraph (k) to restrict its sale. However, the use of penicillin, except under a physician's instructions, may build up an immunity with the result that penicillin will be ineffective. The same is true of other preparations. In other cases new drugs have not been fully investigated and their effect is not known. Pending further research the Department thinks that some control over the sale of these drugs should be exercised.

I have provided in the attached draft for authority to make regulations "prohibiting the sale or "defining the conditions of sale of any drug." This perhaps is a wide power as no reference is made to effect on health but on the other hand it deals only with drugs.

It is also proposed to amend paragraph (d) of section 4. Sometimes foods are in a disgusting or filthy condition but they contain no disease or putrid or rotten substance. It is proposed to amend the Act by including foods of this kind.

In the case of section 15 only the Chief Dominion Analyst is mentioned; it is intended to add the Assistant Chief Dominion Analyst.

E.A.D.

P.S. It is also necessary to remove from the 1939 amendment the provisions respecting cosmetics. I have, therefore, provided for the repeal of the definition of "cosmetics" and the provision authorizing the Governor in Council to make licensing provisions. In that year the definition of drug was also amended to include cosmetics. Other amendments to the definition were also made. Under section 10 of the 1939 Act the amendments were not to come into force until proclaimed. To preserve this I think we should re-enact section 1 of the 1939 amendment. Section 3 of the 1939 amendment amends paragraph (b) of section 3 by including a reference to cosmetics. If we take this out the paragraph would then be exactly the same as it now reads. We can therefore repeal section 3 of the 1939 Act.



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

IN YOUR REPLY REFER TO FILE NO.

Food and Drug Laboratories,
35 John Street,
OTTAWA, March 15, 1946.

Mr. E. A. Driedger,
Department of Justice,
Ottawa.

Dear Sir:-

As agreed in our conference yesterday regarding proposed amendments to the Food and Drugs Act I have drafted, in consultation with technical advisers, an amendment to 4(d), adulteration of food, which is as follows:-

- 4(d) if it consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance, whether manufactured or not, or if it is otherwise unfit for food;

This meets all the requirements of a similar section in the Federal Food, Drug and Cosmetic Act of the United States, copy of which is enclosed for your information. Will you please refer to page 12, Section 402.

With reference to the proposed amendment of Section 3, it has been held by your Department that Section k could only apply to substances which are harmful per se by their toxicity or a similar inherent quality but that it did not cover such preparations as penicillin which is not toxic but which may lose its value as a therapeutic agent if used indiscriminately. It is the desire of the Department to control the sale of such products and restrict them to sale on prescription only. In order to accomplish this the Act would have to be amended.

We have given consideration to the addition of another paragraph Section 3(n) which reads as follows:

- 3(n) prohibiting the sale or defining the conditions of sale of any drug or device which may be injurious to health indirectly through its use or conditions of use.

It would be appreciated if you would return the enclosure.

Yours very truly,

A. Valin
A. Valin,

CHIEF DOMINION ANALYST.

AV/RM.



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE

IN YOUR REPLY REFER TO FILE NO.

OTTAWA
March 1, 1946.

Mr. E. A. Driedger
Room 254
Department of Justice
Justice Building
O t t a w a

Dear Sir:

Further to our discussions regarding cosmetics I have had an opportunity to discuss with the officers of the Cosmetic Section of the Department specific sections of the Food and Drugs Act which they would wish to have made applicable to cosmetics.

As mentioned, there is a prospect of considerable revision of the Food and Drugs Act to commence in the near future and which, if approved, will likely be ready for presentation some time towards the end of this year or the beginning of next. Meanwhile it would be appreciated if such amendments could be made as are necessary to authorize the making of regulations substantially in accordance with the terms of the draft sent you. Although these rest upon a licensing authority it would be quite satisfactory to require registration of a product with a list of the ingredients as a condition precedent to its sale.

The regulations are specifically a code covering most aspects of the cosmetic administration but in addition there are certain sections of the Act which could be usefully incorporated. Mr. Valin suggests that Part 2, relating to honey be repealed and that the cosmetics be set up as a special part of the Act in lieu thereof.

If a mutatis mutandis provision could be

-2-

Mr. E. A. Driedger

March 1, 1946.

utilized rather than re-enacting a number of sections this would seem to be a satisfactory expedient, for the time being at least. The following are the sections which might be referred to specifically in such mutatis mutandis provision:

2,3,9 to 22 inclusive, 24 to 30 inclusive
32 to 36 inclusive.

In lieu of section 23 of the Act, which is the penalty section, it would seem to be preferable that specific authority be provided for the Governor in Council to prescribe by regulation penalties for violation of the Cosmetic Regulations and possibly the present section 33 would be sufficient for a violation of the cosmetic part of the Act and in respect of which no regulation has been made and specific penalty provided.

The above would be preferable from the departmental point of view to specific re-enactment of the above mentioned sections, which would look to be a formidable amendment to the Act to cover one particular type of product only.

In the above list, sections relating specifically to food have been eliminated and the above mentioned sections all contain provisions which are applicable to cosmetics if brought under the Act.

The foregoing is, in general terms, what the officers of the Division would like if it can be so provided.

I shall be glad to discuss the matter with you and to give any further explanation which you may require. Mr. Valin and Mr. Thompson will both

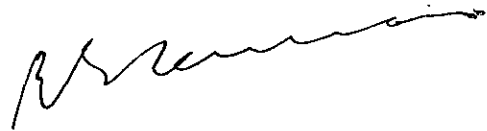
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Mr. E. A. Driedger

March 1, 1946.

be available at any time to furnish any technical
information regarding the matters to be covered
by amendment.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'R. E. Curran', written in a cursive style.

R. E. Curran
Legal Adviser.

rec/mr



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE



OFFICE OF THE DEPUTY MINISTER
OF NATIONAL HEALTH
OTTAWA

February 19, 1946.

F. P. Varcoe, Esq.,
Deputy Minister of Justice
Justice Building
O t t a w a

150108

Dear Mr. Varcoe:

Thank you for your opinion of February 1st regarding the licensing provision for cosmetic manufacturers contained in paragraph (j) of subsection (1) of section (3) of the Food and Drugs Act, and which has not yet been proclaimed.

I have discussed with the technical officers of the Department the effect of the opinion given, and your suggestion of further amending the Food and Drugs Act in order to provide better basis for licensing cosmetic manufacturers.

The technical officers have suggested that if the legislation can be amended as seems necessary that it would be preferable that in lieu of, or in addition to, licensing requirement that there be authority to require registration of articles of cosmetics. Such registration provision would by itself, or by regulations require the qualitative formula of the ingredients as a condition of registration. It would not be sufficient merely to require dangerous cosmetics to be registered. It is impracticable to devise an exhaustive list of what ingredients may be actually, or potentially, dangerous and it is not considered sufficient that this choice be left to the manufacturers. Accordingly, as in the

-2-

F. P. Varcoe, Esq.,

February 19, 1946.

case of proprietary and patent medicine preparations, each article of cosmetics should be registered with the Department and a list of the ingredients shown in the registration application. This does not create an unfair onus on the part of the manufacturers and does not result in disclosure of trade secrets, as this information could be secured by an exhaustive analysis of the articles sold. For administrative purposes therefore disclosure of the ingredients would avoid considerable work in analyzing cosmetics and would enable a ready decision to be made regarding certain things which might or might not prove to be injurious. In any event this information would be confidential in the Department.

I would very much appreciate if you could give consideration to the providing of appropriate amendments which might be submitted to the Minister at an early date.

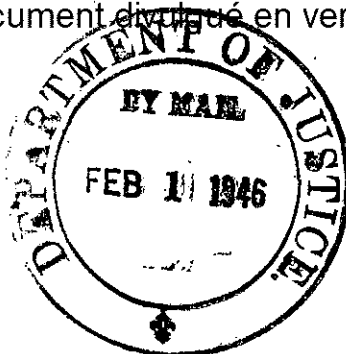
If you would advise me, I will have technical officers of the Department and the Legal Adviser, attend on you to explain in detail any points on which you may require further information in the drafting of appropriate legislation.

I anticipate that there may be one or two other minor amendments to the Food and Drugs Act and at the same time information can be given regarding these, so that a draft bill can be prepared which will incorporate everything which it is desired to put forward at this time.

Yours very truly,



G. B. Chisholm, M. D.
Deputy Minister of National Health.



2366

February 1,

46.

150108

Paragraph (j) of subsection (1) of section (3) of the Food and Drugs Act is in its present form, in my opinion, of doubtful validity since it provides merely for the licensing of manufacturers of cosmetics. It is a well established principle of our Constitution that Parliament cannot regulate a particular trade or business by means of a licensing system, unless such licensing is necessarily ancillary to some other legitimate Dominion legislative scheme. The Food and Drugs Act contains no other substantive provision dealing with cosmetics and, consequently, there is no clue given as to the purpose to be served by the licensing system other than the fact that the provision for licensing is contained in an Act which has to do with the prevention of fraud, adulteration and injury to the public in the manufacture, use and distribution of food and drugs. This might easily be regarded by the courts as an insufficient basis. Legislation, on the other hand, to prohibit or restrict the manufacture and sale of dangerous cosmetics, would be within the jurisdiction of Parliament and might very well include proper licensing provisions if they are deemed necessary to secure the attainment of the objects of the Act.

With reference to the statutes referred to by you on page two of your letter, I am of opinion that these are intra vires and various courts in Canada have so held. The licensing provisions are merely ancillary to the main purpose of this legislation, namely, to protect the national health and to punish dishonesty.

I would recommend that you amend the Food and Drugs Act as I have indicated above before embarking on a course of regulation which may result in litigation and a judicial determination that the statute is invalid.

If you wish me to assist in the preparation of a draft bill, I shall be glad to do so at your request.

I return your papers herewith.

Encl.

F. P. Varcoe

Deputy Minister.

The Deputy Minister,
Dept. of National Health,
O T T A W A.

EAD/CD

PLEASE ADDRESS
THE DEPUTY MINISTER OF JUSTICE
OTTAWA

OTTAWA, January 29th, 1946.

150108

I have your letter of January 22nd together with the enclosures respecting proposed regulations under the Food and Drugs Act on the subject of cosmetics. A

Paragraph (j) of subsection (1) of section 3 of the Food and Drugs Act ~~may well be ultra vires~~. This paragraph purports to authorize the Governor in Council to make regulations providing for the licensing of manufacturers of cosmetics; the Food and Drugs Act, apart from the definition section, contains no other provisions respecting cosmetics. It could be urged with considerable force that this is primarily a matter of property and civil rights and therefore the Parliament of Canada has no legislative jurisdiction. However, I have no doubt that the Parliament of Canada is competent, in the interests of public safety, to prohibit or restrict the manufacture and sale of dangerous cosmetics and there would be no objection to including in such legislation appropriate licensing provisions if such provisions are necessary to secure the attainment of these objects.

With reference to the ~~legislation~~ referred to by you on page two of your letter, I am of opinion that these are intra vires and various courts in Canada have so held. The licensing provisions are merely ancillary to the main purpose of this legislation, namely, to protect the national health and to ~~prevent~~ dishonesty. B

So far as your proposed regulations are concerned there is a further difficulty. ~~Even assuming that paragraph (j) is intra vires~~ there appears to be no authority in the Food and Drugs Act for the Governor in Council to make regulations prohibiting the sale of cosmetics or prescribing standards of quality, etc. These powers are given to the Governor in Council in relation to foods and drugs but they do not appear to extend to cosmetics. I have examined your draft regulations and I think that the Parliament of Canada is competent to enact the prohibitions and restrictions therein contained or to authorize the Governor in Council to do so by regulation. I am not entirely satisfied, however, that the licensing provisions are necessary; at the moment it seems to me that the same results could be achieved by providing for inspection of factories and require manufacturers to make appropriate statistical returns. punch

If it is your intention that the sale of cosmetics should be restricted in the way intended in your draft regulations, I think that an amendment to the Food and Drugs Act would be highly desirable and if you wish me to assist in the preparation of a draft bill I shall be glad to do so at your request.

Encl.

I return your papers herewith.

The Deputy Minister of National Health,
Dept. of National Health and Welfare, Ottawa.

Deputy Minister 000044

EAD/CD

OTTAWA, January 25, 1946.

MEMORANDUM FOR THE DEPUTY MINISTER:

150108

This is a reference from the Department of National Health and Welfare concerning the validity of paragraph (j) of subsection (1) of section 3 of the Food and Drugs Act as enacted by section 5 of chapter 3 of the statutes of 1939.

Prior to this amendment the Food and Drugs Act dealt only with "food" and "drugs" as therein defined and I think it is reasonably clear that neither the definition of food or of drug extended to cosmetics. The main purpose of the Act is to prohibit under penalty the sale of adulterated food or drugs.

In 1939 the Food and Drugs Act was amended and a new definition was added to section 2, namely, "cosmetic" which was defined to mean any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and to include deoderant and perfumes. At the same time section 3 was amended so as to give the Governor in Council authority to make regulations -

"(j) providing for the licensing of manufacturers of cosmetics, whether such manufacturers carry on business as such within or without Canada, specifying such terms and conditions as may be deemed advisable in the public interest and prescribing a tariff of fees to be paid for any such licence;"

The 1939 amendment respecting cosmetics has not yet been proclaimed in force. It is intended to, so in the near future and in the meantime the Department has prepared a set of Cosmetic Regulations. These Regulations were submitted to the trade for their comments and the Toilet Goods Manufacturers Association of Montreal has replied stating that in the opinion of the Association paragraph (j) of section 3(1) of the Act is ultra vires. The Association submitted a short brief on the point and also an opinion signed by Mr. Aime Geoffrion, K.C., that this provision is ultra vires.

Your opinion in the matter is now requested. It is also suggested that consideration might be given to other departmental statutes including licensing provisions such as the Opium and Narcotic Drug Act and the Proprietary or Patent Medicine Act. There is also the Food and Drugs Act which in section 6 authorizes the Governor in Council to provide for the licensing of manufacturers of certain biological drugs.

The 1939 amendment was reviewed in this Department in its draft stages and although the constitutionality of the provision in question does not appear to have been considered at any length, the then Deputy Minister of Justice did state in his letter of December 30, 1938, with respect

- 2 -

to this amendment that "the breadth of the field of jurisdiction sought here may occasion contention but I am not prepared to object to the form of the paragraph as drafted."

In my opinion the provision in question is ultra vires. All it says is that the Governor in Council may make regulations providing for the licensing of manufacturers of cosmetics. This, apart from the definition of cosmetics, is the only provision in the entire Act respecting cosmetics. None of the other sections have any application whatsoever because they deal solely with foods and drugs as defined in the Act. The whole statute therefore so far as cosmetics are concerned is contained in this one paragraph.

Clearly the licensing of manufacturing is a matter of property and civil rights unless it can be shown that the provision comes within one of the enumerated heads of section 91 of the B.N.A. Act. I find nothing in section 91 to support this provision. The only possible grounds are trade and commerce, criminal law and the peace order and good government clause. With reference to trade and commerce and the introductory words of section 91, it is necessary only to refer to the Attorney General of Canada v. the Attorney General of Alberta (1916) 1 A.C. 588 where Viscount Haldane at page 596 with reference to Dominion insurance legislation said that - "Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces. Nor do they think that it can be justified for any such reasons as appear to have prevailed in Russell v. The Queen."

The legislation cannot be supported on the ground that it is legislation with respect to criminal law because nothing is prohibited. To say that the Governor in Council may provide for the licensing of manufacturers is clearly not, taken by itself, criminal legislation. See Proprietary Articles Trade Association v. Attorney General for Canada (1931) A.C. 52 and Attorney General of British Columbia v. Attorney General for Canada (1937) A.C. 318.

In my opinion there is no difficulty about the licensing provision in the Food and Drugs Act respecting biological products. The Food and Drugs Act itself is, I submit, intra vires on the ground that it is criminal legislation. Its purpose is not to control any particular trade, industry or activity but to prohibit the sale and distribution of adulterated foods and drugs. So far as biological products are concerned a licensing provision is probably very necessary. These products are no doubt injurious to health unless they are carefully manufactured, tested and labelled under proper conditions, by competent persons and in suitable premises. The licensing provisions are merely ancillary to the main purpose of the Act and are designed to protect the health and life of the public. The Food and Drugs Act does not appear to have been considered by the Privy Council but the British Columbia Court of Appeal held that this Act was intra vires. See the case of Standard Sausage Co. v. Lee (1934) 1 W.W.R. 81. In that case Martin

.....

J.A., said that -

".... the National Parliament was validly exercising its powers in passing the impugned legislation, the primary objects of which were to create new offences for the general protection of the national health and to prevent dishonesty in dealings in the subject-matter....."

The Proprietary and Patent Medicine Act can be justified on similar grounds. As stated in the case of Rex v. Warne Drug Co. Ltd. 37 D.L.R. 788 (and approved in Rex v. Sheridan (1924) 3 W.W.R. 617) the pith and marrow of the Dominion Act with respect to the sale of patent medicines is the prescribing certain conditions and limitations for the protection of the public. The same is true of the Opium and Narcotic Drug Act. This was held to be intra vires in the case of Rex v. Wakabayashi (1928) 1 W.W.R. 487. In that case Mr. Justice Macdonald of the British Columbia Supreme Court said that -

".... I have no hesitation in holding that the Act in question is criminal, and not licensing, legislation. The primary object was to create a crime and afford punishment for its infraction. The licensing provisions were necessary but did not affect the validity of the legislation."

Legislation of this character is not colourable and is not of the class referred to by Mr. Justice Duff in the Reciprocal Insurers case (1924) A.C. 328 at 342. The Dominion is not by this legislation attempting to regulate any trade, business or occupation. Legislation of this character, generally, was considered by the Privy Council in Russell v. The Queen 7 A.C. 829 at page 838. A comparison was there made with "laws which place "restrictions on the sale or custody of poisonous drugs, "or of dangerously explosive substances". Sir Montague Smith said that -

"These things can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law.....Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights."

The difficulty with the legislation under consideration is that Parliament has not said enough. A statute prohibiting the sale of dangerous cosmetics would, I submit, be intra vires and such a statute might well include in its provisions appropriate licensing sections.

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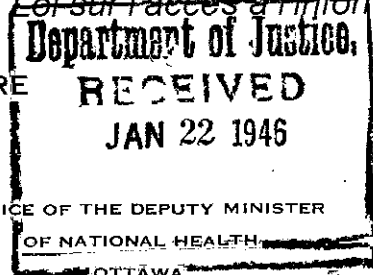
There is a further difficulty with respect to the proposed regulations. Even assuming that the Act with respect to cosmetics is intra vires I submit that there is no authority to make the regulations in question. A copy has been submitted and in addition to providing for the licensing of manufacturers these regulations prohibit the sale of various types of cosmetics. For example, the sale of cosmetics containing antimony, arsenic, lead, etc., is prohibited; the use of cold tar products is restricted and is prohibited in the case of certain cosmetics. There is no power in the Act to make regulations of this kind. As intimated above the only power is to make licensing provisions and the Governor in Council has no authority to prohibit the sale of cosmetics or to prescribe standards of quality, etc. The Governor in Council has these powers under section 3 of the Act with reference to food and drugs but that is as far as the statute now goes.

Draft letter attached.

E.A.D.



DEPARTMENT OF
NATIONAL HEALTH AND WELFARE



January 22, 1946.

F. P. Varcoe, Esq.,
Deputy Minister,
Department of Justice,
OTTAWA, Ontario.

Dear Mr. Varcoe:

Section 5 of Chapter 3 GEORGE VI, being
an Act to amend the Food and Drugs Act, provides as
follows:-

"(j) providing for the licensing of manufacturers
of cosmetics, whether such manufacturers carry
on business as such within or without Canada,
specifying such terms and conditions as may
be deemed advisable in the public interest
and prescribing a tariff of fees to be paid
for any such licence;"

Provision is made for the various amend-
ments in the above Act to come into force on proclamation
and subsection (j) has not yet been proclaimed due to
the intervention of the war and the disruption of industry
consequent thereon. It has been considered that this
section should be proclaimed at an early date and, in
anticipation of this, regulations regarding cosmetics,
including the licensing of manufacturers, have been draf-
ted. As a preliminary to the final approval of such
regulations, copies of the draft regulations were sub-
mitted to the Association for consideration, and a
meeting of representatives of the industry has been
fixed for Thursday, January 24th, at which time it was
proposed that the views of the representatives be ex-
pressed as to the practicability of the regulations
for the industry involved.

-2-

Today the Chief Dominion Analyst has received^a letter from the Secretary of the Toilet Goods Manufacturers Association, enclosing an opinion given by Mr. Aime Geoffrion, K.C., and a brief from the Secretary expressing the view that the foregoing section is unconstitutional. I attach copies of the material received, together with draft of the proposed regulations.


If the contention of the Association that the power to license manufacturers is unconstitutional, then immediate consideration must be given to the situation as it pertains to the cosmetic industry and possibly as it may pertain to biological products which are presently the subject of licence. Consideration might, moreover, require to be given to other departmental statutes which prescribe power to license. In this connection I mention the Opium and Narcotics Drug Act and the Proprietary or Patent Medicine Act, which latter provides for registration of patent medicines as a condition to the sale thereof in Canada.

I would appreciate your views as soon as possible as to the point raised by the Toilet Goods Manufacturers Association and, if in your opinion the section is unconstitutional, your views as to whether legislation requiring registration of cosmetics could validly be enacted in lieu of the licensing of manufacturers.

The question is of some urgency and, if your opinion is that such legislation is unconstitutional, then very careful consideration will need to be given to the section in question, as well as possibly other departmental legislation. You might possibly feel that the point is of sufficient doubt as to justify a reference to the Court for interpretation.

Might the attached material be returned when it has served its purpose as it is the only copy that I have, and I would be glad at that time to have copies made for your file.

Yours very truly,


G. B. Chisholm, M.D.

Deputy Minister of National Health

000050

His Majesty, by and with advice and consent of the Senate and House of Commons of Canada, enacts as follows:-

1. Paragraph (c) of section two of the Food and Drugs Act, chapter seventy-six of the Revised Statutes of Canada, 1927, ~~as amended by section one of chapter three of the Statutes of 1939~~, is repealed and the following substituted therefor:

"(c) 'drug' includes all medicine for internal or external use for man or animal; any substance, mixture of substances and any article that may be used for the diagnosis, treatment, mitigation or prevention of disease in man or animal; any material that may be used for disinfection in premises in which food is manufactured, prepared or kept or for the control of vermin in such premises;"

2. Paragraph (b) of subsection one of section three of the said Act, ~~as amended by section three of chapter three of the Statutes of 1939~~, is repealed and the following substituted therefor:

"(b) respecting the packaging and labelling of any article of food or drug and the design of any such package or label with a view to preventing the public or the purchaser being deceived or misled as to the character, strength, quality or quantity of the article;"

3. PART II of the said Act, ~~as amended by section four of chapter twenty-three of the Statutes of 1946~~, is repealed and the following substituted therefor:

Draft
Revised

PART III

COSMETICS

38. 42. (1) In this Part, unless the context otherwise requires,

(a) 'cosmetic' means any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and includes deodorants and perfumes, but not toilet soaps in the solid form;

(b) 'manufacturer' means a person who, under his name or under a trade mark, design mark, word mark, trade name or other name, word or mark owned or controlled by him, offers for sale, exposes for sale, or sells a cosmetic to the general public or to a wholesaler, jobber or other distributor for resale to the general public and includes such other persons as may be prescribed by regulation; *and*

(c) 'regulation' means a regulation made by the Governor in Council under this Part.

39. 43. (1) The Governor in Council may make regulations for carrying into effect the purposes or provisions of this Part, and without restricting the generality of the foregoing may make regulations;

(a) respecting the packaging and labelling of any cosmetic and the design of any such package or label with a view to preventing the public or the purchaser from being deceived or misled as to the character, strength, quality or quantity of the cosmetic or with a view to protecting the public health, and requiring a declaration of net contents upon any such package, having a net content of one ounce or over.

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- (b) prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as a cosmetic, or prohibiting the use, or defining the conditions of use, of any such substance as an ingredient in the manufacture or preparation of a cosmetic; ~~and establishing schedules of such substances and adding thereto or removing therefrom any such substance.~~

- (c) *(2) The Governor in Council may exempt* exempting from this Part or from any requirement of this Part any cosmetic or type of cosmetic ~~for which such control is deemed to be inadvisable and~~ *the Governor in Council may remove any* ~~for removing such exemption as may be required.~~

40. #.

A cosmetic shall be deemed to be adulterated within ^{Art} the meaning of this Part,

- (a) if it consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance, whether manufactured or not, or if it is otherwise unfit for use as a cosmetic;
- (b) if it contains any ingredient or impurity which may render it injurious to the user under conditions of use prescribed on the label, directions or in any advertisement or under such conditions as are customary or usual;
- (c) If its container is composed in whole or in part of any substance which may render the contents injurious to health;

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- (d) if it does not bear any warning or caution as may be required by regulation;
- (e) if it contains any substance which is prohibited.

41/45.

A cosmetic shall be deemed to be misbranded within the meaning of this Part:-

- (a) if it is not labelled in accordance with the requirements of this Act and the regulations;
- (b) if it is stated to be the product of a place or a country of which it is not truly a product;
- (c) if it is sold or offered for sale by a name which belongs to another article;
- (d) if in package form, sealed by or put up by the manufacturer, the contents of each package are not conspicuously and correctly stated in terms of weight, measure or number, upon the outside of the package, unless such package contains less than one ounce.
- (e) if its package is deceptive with respect to design, construction or fill;
- (f) if its package or label bears any statement, design or device which is false or misleading in any particular;
- (g) if any word, statement or other information required by this Act or the regulations to appear on the label or container is not placed thereon with such prominence, as compared with other words, statements, designs or devices on the label or container, and in such terms as to render it likely to be read and understood by the ordinary

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individual under customary conditions of purchase
and use;

42. 46. (a) No person shall import, offer for sale, expose for
sale, or sell any cosmetic which is adulterated or
misbranded;
- (b) No manufacturer shall make any false, or misleading
claim for any cosmetic;
- (c) No person shall make any false, or misleading claim
for any cosmetic imported for sale, offered for sale,
exposed for sale, or sold by him.

43. 47. Paragraphs (d), (e), (f) and (g) of section three,
subsection two and three of section three, sections nine to
thirty inclusive, and sections thirty-two to thirty-six
inclusive, and section forty-one of this Act shall mutatis
mutandis apply to and in respect of cosmetics; the expression
'food or drug' whenever used in any of the said sections shall
be read and construed as including cosmetics.

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PART III
EXPORTS

*containing such
food, drug or
cosmetic*

44. This Act ^{does} ~~shall~~ not apply to any packaged food,
drug or cosmetic not manufactured ^{for consumption in Canada} ~~or~~ ^(not) sold for consumption
in Canada, ^{if} the package ~~whereof~~ is marked in distinct over-
printing with the word "Export" and ~~is the subject of a~~ ^{manufacturer's certificate}
~~certificate~~ that the package and its contents do not contra-
vene any known requirement of the law of the country to
which it is or is about to be consigned.

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4. An Act to amend the Food and Drugs Act, chapter three of the Statutes of 1939, is amended as follows:-

~~(a) Sections one and three are repealed;~~

still

(a) Section two is amended by deleting therefrom the following:

"(k) 'cosmetic' means any material intended to cleanse, improve or alter the complexion, skin, hair or teeth; and shall include deodorants and perfumes;"

(b) Section five is amended by deleting therefrom the following:

"(j) providing for the licensing of manufacturers of cosmetics, whether such manufacturers carry on business as such within or without Canada, specifying such terms and conditions as may be deemed advisable in the public interest and prescribing a tariff of fees to be paid for any such licence;"

Second Revision

January 30, 1947.

II
PART ~~III~~

COSMETICS

38. 42. (1) In this Part, unless the context otherwise requires,
- (a) 'cosmetic' means any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and includes deodorants and perfumes, ~~as defined by regulation~~, but ^{does} not ~~include~~ soap, ~~as defined by regulation~~.
- (b) 'manufacturer' means a person who, under his name or under a trade mark, design mark, word mark, trade name or other name, word or mark owned or controlled by him, offers for sale, exposes for sale, or sells a cosmetic to the general public or to a wholesaler, jobber or other distributor for resale to the general public and includes such other persons as may be prescribed by regulation; ~~and~~
- (c) 'regulation' means a regulation made by the Governor in Council under this Part.
39. 43. The Governor in Council may make regulations for carrying into effect the purposes or provisions of this Part, and without restricting the generality of the foregoing may make regulations;
- (a) respecting the packaging and labelling of any cosmetic and the design of any such package or label with a view to preventing the public or the purchaser from being deceived or misled as to the character, strength, quality or quantity of the cosmetic or the place or country of origin, or with a view to protecting the public health, and requiring a declaration of net contents upon any such package, having a net content of more than one fluid ounce, and in the case of perfumes having a net content of more than four fluid ounces;
- (b) prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as

DEPARTMENT OF JUSTICE

MEMORANDUM

(a) *defining, for the purposes of*
this Act, the expressions
'perfume' and 'soap'.

(S)

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a cosmetic, or prohibiting the use, or defining the conditions of use, of any such substance as an ingredient in the manufacture or preparation of a cosmetic; ~~and establishing~~ schedules of such substances and adding thereto or removing therefrom any such substance; ~~and~~

- (c) exempting from this Part or from any requirement of this Part any cosmetic or type of cosmetic for which such control is deemed to be inadvisable and for removing such exemption as may be required; ~~and~~

10 44. A cosmetic shall be deemed to be adulterated within the meaning of this Part,

- (a) if it consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance, whether manufactured or not, or if it is otherwise unfit for use as a cosmetic;
- (b) if it contains any ingredient or impurity ^{that} which may render it injurious to the user ^{when used as} (under conditions of use) prescribed on the label, ^{by the} directions, ^{for use} or in any advertisement, ^{by the manufacturer} or under such conditions as are customary or usual; when used
- (c) if its container is composed in whole or in part of any substance ^{that} which may render the contents injurious to health;
- (d) if it does not bear any warning or caution as may be required by regulation; ~~and~~ ^{or}
- (e) if it contains any substance ^{the use of as an ingredient in the manufacture or preparation of} which is prohibited ^{by regulation}.

41 45. A cosmetic shall be deemed to be misbranded within the meaning of this Part:-

- (a) if it is not labelled in accordance with the requirements of this Act and the regulations;
- (b) if it is sold or offered for sale by a name which belongs to another article;
- (c) if in package form, sealed by or put up by the manufacturer, the contents of each package are not conspicuously and correctly stated in terms of weight, measure or number, upon the outside of the package, unless ^{the net content of} such package ^{is} contains ^{fluid} one ounce or less ^{or in the case of perfumes four ounces or less}.

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- (d) if its package is deceptive with respect to design, construction or fill;
- (e) if its package or label bears any statement, design or device which is false or misleading in any particular; *or*
- (f) if any word, statement or other information required by this Act of the regulations to appear on the label or container is not placed thereon in easily legible characters and with such prominence and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

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16.11 (a) No person shall import, offer for sale, expose for sale, or sell any cosmetic ^{that} which is adulterated or misbranded.

(2) (b) No manufacturer shall make any false or misleading claim for any cosmetic.

(3) (c) No person shall make any false or misleading claim for any cosmetic imported for sale, offered for sale, exposed for sale, or sold by him.

347. Paragraphs (d), (e), (f) and (g) of section three, sub-section two and three of section three, sections nine to thirty inclusive, and sections thirty-two to thirty-six inclusive, and section forty-one of this Act shall mutatis mutandis apply to and in respect of cosmetics ^{and} the expression 'food or drug' whenever used in any of the said sections shall be read and construed as including cosmetics. "

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Paragraph (c) of section two of the Food and Drugs Act, chapter seventy-six of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:

"(c) 'drug' includes all medicine for internal or external use for man or animal; any substance, mixture of substances and any article that may be used for the diagnosis, treatment, mitigation or prevention of disease in man or animal; any material that may be used for disinfection in premises in which food is manufactured, prepared or kept or for the control of vermin in such premises;"

2. Paragraph (b) of subsection one of section three of the said Act is repealed and the following substituted therefor:

"(b) respecting the packaging and labelling of any article of food or drug and the design of any such package or label with a view to preventing the public or the purchaser being deceived or misled as to the character, strength, quality or quantity of the article;"

3. PART II of the said Act is repealed and the following substituted therefor:

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"PART II
COSMETICS

38.(1) In this Part, unless the context otherwise requires,

- (a) 'cosmetic' means any material intended to cleanse, improve or alter the complexion, skin, hair or teeth and includes deodorants and perfumes, but does not include soap;
- (b) 'manufacturer' means a person who, under his name or under a trade mark, design mark, word mark, trade name or other name, word or mark owned or controlled by him, offers for sale, exposes for sale, or sells a cosmetic to the general public or to a wholesaler, jobber or other distributor for resale to the general public and includes such other persons as may be prescribed by regulation; and
- (c) 'regulation' means a regulation made by the Governor in Council under this Part.

39. The Governor in Council may make regulations for carrying into effect the purposes or provisions of this Part, and without restricting the generality of the foregoing may make regulations

- (a) respecting the packaging and labelling of any cosmetic and the design of any such package or label with a view to preventing the public or the purchaser from being deceived or misled as to the character, strength, quality or quantity of the cosmetic or the place or country of origin, or with a view to protecting the public health, and requiring

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a declaration of net contents upon any such package, having a net content of more than one fluid ounce, or, in the case of perfumes having a net content of more than four fluid ounces;

- (b) prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as a cosmetic, or prohibiting the use, or defining the conditions of use, of any such substance as an ingredient in the manufacture or preparation of a cosmetic;
- (c) exempting from this Part or from any requirement of this Part any cosmetic or type of cosmetic for which such control is deemed to be inadvisable and for removing such exemption as may be required; and
- (d) defining, for the purposes of this Act, the expressions 'perfume' and 'soap'.

40. A cosmetic shall be deemed to be adulterated within the meaning of this Act,

- (a) if it consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance, whether manufactured or not, or if it is otherwise unfit for use as a cosmetic;
- (b) if it contains any ingredient or impurity that may render it injurious to the user when used as prescribed by the label, by the directions for use or in any advertisement by the manufacturer or when used under such conditions as are customary or usual;
- (c) if its container is composed in whole or in part of any substance that may render the contents injurious to health;

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- (d) if it does not bear any warning or caution as may be required by regulation; or
- (e) if it contains any substance the use of which as an ingredient in the manufacture or preparation of the cosmetic is prohibited by regulation.

41. A cosmetic shall be deemed to be misbranded within the meaning of this Act:

- (a) if it is not labelled in accordance with the requirements of this Act and the regulations;
- (b) if it is sold or offered for sale by a name which belongs to another article;
- (c) if in package form, sealed by or put up by the manufacturer, the contents of each package are not conspicuously and correctly stated in terms of weight, measure or number, upon the outside of the package, unless the net content of such package is one fluid ounce or less or in the case of perfumes four ounces or less;
- (d) if its package is deceptive with respect to design, construction or fill;
- (e) if its package or label bears any statement, design or device which is false or misleading in any particular; or
- (f) if any word, statement or other information required by this Act or the regulations to appear on the label or container is not placed thereon in easily legible characters and with such prominence and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

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42.(1) No person shall import, offer for sale, expose for sale, or sell any cosmetic that is adulterated or misbranded.

(2) No manufacturer shall make any false or misleading claim for any cosmetic.

(3) No person shall make any false or misleading claim for any cosmetic imported for sale, offered for sale, exposed for sale, or sold by him.

43. Paragraphs (d), (e), (f) and (g) of section three, subsection two and three of section three, sections nine to thirty inclusive, and sections thirty-two to thirty-six inclusive, and section forty-one of this Act shall *mutatis mutandis* apply to and in respect of cosmetics and the expression 'food or drug' whenever used in any of the said sections shall be read and construed as including cosmetics.

PART III

EXPORTS

44. This Act does not apply to any packaged food, drug or cosmetic not manufactured for consumption in Canada or not sold for consumption in Canada, if the package containing such food, drug or cosmetic is marked in distinct over-printing with the word "Export" and the manufacturer certifies that the package and its contents do not contravene any known requirement of the law of the country to which it is or is about to be consigned."

4. An Act to amend the Food and Drugs Act, chapter three of the Statutes of 1939, is amended as follows:

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- (a) Sections one and three are repealed;
- (b) Section two is amended by deleting therefrom the following:
 - "(k) 'cosmetic' means any material intended to cleanse, improve or alter the complexion, skin, hair or teeth; and shall include deodorants and perfumes;"
- (c) Section five is amended by deleting therefrom the following:
 - "(j) providing for the licensing of manufacturers of cosmetics, whether such manufacturers carry on business as such within or without Canada, specifying such terms and conditions as may be deemed advisable in the public interest and prescribing a tariff of fees to be paid for any such licence;"