

MIND THE (EBIKE) GAP: HOW TO PROCEED WITH PRODUCT RECALLS WHEN THERE IS A REGULATORY GAP

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The electric bicycle market is booming—the number of manufacturers, retailers, and bicycle models present in Canada keep growing. But while consumer interest in electric bicycles is increasing, regulatory interest in electric bicycles, or ebikes, also known in Canada as assist bicycles or power-assisted bicycles,^[1] is waning. After amendments excluded most ebikes from regulation by Transport Canada under the Motor Vehicle Safety Act (“**MVSA**”) and Motor Vehicle Safety Regulations (“**MVSR**”), ebikes seemingly fell into a regulatory vacuum rather than becoming regulated by Health Canada under the Canada Consumer Product Safety Act (“**CCSPA**”). In the circumstances, manufacturers and retailers of ebikes could understandably find themselves spinning their wheels trying to sort out what to do if an ebike needs to be recalled in Canada.

Transport Canada Gears Down

As of February 2021, the MVSR no longer includes the definition of a “Power-Assisted Bicycle”. According to Transport Canada, the following features exclude ebikes from regulation under the MVSA/MVSR:

- conventional pedal bicycles with a gas or electric motor assist; and
- do not exceed a speed of 32 km/h (or 20 mph).

There are ebike designs and features that can take vehicles belonging to this broad class into the definition of a “prescribed vehicle” under the MVSA. A substantive review of an ebike’s features should be undertaken when considering selling a new ebike in Canada. However, generally speaking, this legislative change removed ebikes from regulation by Transport Canada. When assessing whether or not an ebike is regulated, Transport Canada considers:

- how much it looks like a type of on-road vehicle that is prescribed under the MVSA; if a product is equipped with features that resemble on-road prescribed classes of vehicles, such as motorcycles or scooters, they will be regulated as such.
- If the product is exclusively off-road and the maximum speed of the ebike is 32 km/h (in fact or because of a speed governing mechanism that in Transport Canada’s assessment validly restricts the top speed to no more than 32 km/h), the e-bike is exempt from the MVSA/MVSR.

When the MVSA and MVSR do prescribe safety standards for a vehicle, importers must give notice of any defect affecting safety or non-compliance with the regulations to the Minister of Transport (Transport Canada) and to vehicle owners (unless, in the case of a non-compliance, it is assessed to be inconsequential to safety). However, there is no reporting requirement for unregulated vehicles, meaning that a seller of an “unregulated” ebike in Canada is not required to report any safety defect through Transport Canada’s regulatory scheme.

Health Canada Swerves

With Transport Canada declining jurisdiction over ebikes, the natural heir of regulation should be Health Canada, which administers the CCPSA. Health Canada has historically assumed jurisdiction over ebikes. However, in recent months, our experience has been that Health Canada has refused to assume jurisdiction in relation to ebikes, on the basis that the products could conceivably be used on roadways. The CCPSA Directorate reasoned that the product was captured under the definition of “vehicle” under the MVSA (despite the legislative change noted above) and is therefore exempt from the CCPSA by virtue of Schedule 1, section 7, which excludes from Health Canada’s purview all “vehicles” under the MVSA.

Therefore, an ebike can be an unregulated vehicle under the MVSA/MVSR, and yet still considered a “vehicle” by Health Canada and therefore unregulated under the CCPSA.

But a Recall is Needed: What is an Importer/Distributor/Manufacturer of Ebikes to Do?

With Health Canada’s decision to decline jurisdiction, ebikes fall within a grey area, where neither Transport Canada nor Health Canada take control of oversight over incident reporting and recall posting/coordination. However, best practices dictate that a company should still exercise vigilance when responding to incidents. Where there is no reporting obligation or oversight by a Canadian regulator, a company should still follow normal procedure and protocol with respect to recalls and corrective actions, as it would normally do with regulatory oversight. Convention includes posting the recall on social media and the company’s website, tracking consumer interactions relating to the recall, and tracing products impacted by the recall. This type of behavior will protect the companies from potential product liability claims, and provide a good defence in the face of a claim.

Furthermore, there is nothing to prevent a company from reporting an ebike incident to Transport Canada and Health Canada, with the sole purpose of obtaining written confirmation from the regulators that the product falls outside their regulatory purview. As is often the case, being a corporate good citizen will pay off in the long run.

A Note on Additional Provincial Oversight

Each province regulates ebikes under its own legislation, defining them based on criteria such as power, pedal control, wheel size, and speed; and those regulations set out the requirements for both sellers and riders (such as certifications, seat height, helmets, rules of the road, insurance, etc). Many of these regulations were developed to align with the definition of “Power-Assisted Bicycle” that was removed from the MVSR and may well soon be updated. A review of the current provincial and federal regulations for manufacturers, retailers and riders should be undertaken before importing and selling ebikes in Canada.

[1] Note that this category of bicycles does not include bikes with internal combustion engines.

by [Lindsay Lorimer](#), [Rachel Cooper](#), [Timothy Cullen](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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