HE STANDING SENATE COMMITTEE ON SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY

EVIDENCE

OTTAWA, Wednesday, November 25, 2009

The Standing Senate Committee on Social Affairs, Science and Technology, to which was referred Bill C-6, An Act respecting the safety of consumer products, met this day at 4 p.m. to give consideration to the bill.

Senator Art Eggleton (*Chair*) in the chair.

The Chair: Welcome to the Standing Senate Committee on Social Affairs, Science and Technology. Today we continue with the topic of Bill C-6, An Act respecting the safety of consumer products.

We have two lawyers here at the table with us, since much of the focus on Bill C-6 has been on different provisions in the bill. We have two of them to give us some advice in that respect.

Shaun Buckley is a constitutional lawyer. He has written extensively on the subject of Bill C-6 and some of its predecessor legislation.

Cyndee Cherniak is a law professor. She is a counsel at Lang Michener, involved in international trade law, and she is also an adjunct professor at Case Western Reserve University School of Law in Cleveland, Ohio.

Thank you both for coming. You have about 10 minutes each and then we will enter into dialogue and questions.

Shawn P. Buckley, Constitutional Lawyer, as an individual: I will take more of a legal philosophical approach, which is where my interest in this bill lies. It lies there because I have some very significant concerns about where we are moving and the precedent that this will set. It is interesting because we are dealing with a safety bill. This is to protect consumers, and it is very hard to resist safety legislation. Yet, when I look at the bill, it raises, in my mind, safety concerns from a legal philosophical perspective.

I did not always feel that way. My first introduction to the bill was, like everyone else, through government advertising. Prior to the election this was Bill C-52, which was really the same, with a few minor changes, primarily in the area of privacy. I was sitting down reading my newspaper and there was a half-page advertisement with pictures of cute, vulnerable-looking kids and a caption, "protecting you and your family." It was purely designed to evoke an emotional response, and it did evoke an emotional response. I felt proud that my government was going to do something to protect us. Then when I was asked to look at the bill, the first question I asked myself was: Do you mean today in Canada we do not have legislation to protect consumers? Do you mean the government cannot step in and effectively, if a product is dangerous, intervene?

When I started to look at it I found that there were overlapping pieces of legislation. The most obvious one is the Hazardous Products Act, and I will concede that this act goes further than it does; but the Hazardous Products Act is a fairly effective piece of

legislation if the government finds that there is a significant risk. Where it differs is in the procedural safeguards when property is seized.

We also have the Competition Act to cover some areas here. Clearly, the Criminal Code covers some areas. I think we would be amiss if we ignored the civil law, tort litigation, which historically has been the biggest break on the use of consumer products that are unsafe.

I am looking at this legislation and realize, first, yes, it has some features not in other legislation, but those features could be added without actually changing our legal philosophical landscape. When I looked at the bill, what first alarmed me was what I call a move away from the rule of law. When I say rule of law, I do not mean it in a technical, lawyer sense. A lawyer will view a rule of law as a legal principle that is so accepted that we expect courts to follow it without discretion. When I say rule of law here, I mean it more as a citizen would interpret it. A rule of law as a citizen would interpret it is that a person's body or property cannot be interfered with by the state without supervision by the courts. When I lecture on this topic, to make it simple for people I say imagine going back in history before we had courts interceding between the person and the state. If the ruler wanted to imprison you, the soldiers came and dragged you into the dungeon and that was it. If the ruler wanted to take your property, the soldiers would come and take your property and that was it. We did not have courts or procedural fairness, and revolutions were fought on this issue.

It is actually a very significant legal principle that we have in Canada that before the state can interfere with you as a person or before the state can interfere with your property in a significant way, they have to go through the courts. The courts adjudicate between the citizen and the state. That is what is changing with this bill, and that is what alarms me. Many administrative acts allow the state to seize documents, and courts do not seem concerned about that if they are pursuing legitimate, administrative purposes, and many acts allow the state to temporarily interfere with property, but this takes it to an entirely new level that I think creates a dangerous precedent.

Look at section 20 of the act, the seizure powers. I could ask rhetorically, what is the time limit for a seizure when an inspector seizes property? The discretion to seize property is extremely wide. There does not have to be a safety concern to seize property under this act. I could rhetorically ask, are there any limits on the amount of property they can seize? No, there are no limits. Do they have to report seizure to a court? No, they do not. If they charge you with an offence, then all of a sudden a court will perhaps supervise the property once they get to forfeiture proceedings at the end.

You have to understand this is a bill being billed to protect people and their families. If you own a family business, an inspector can walk in and effectively take control of your business and ruin you financially over regulatory violations that may have nothing to do with safety. That is the reality of this bill. If your property has been seized for them to check for compliance or for them to enforce compliance and, as I say, they decide to charge you criminally, they will not be able to forfeit your property without a court intervening. If they charge you administratively, it is a different story. Section 30 of this act allows them to order you to recall, and section 31 allows them to actually make broad orders. They can order you to stop sale. They can basically order you to do anything necessary in the inspector's opinion to assumedly bring you into compliance with the act.

Let us imagine you are a small family business. An inspector has found some violation that does not really create a safety risk and has taken control of your business and has decided they will not charge you criminally. They issue an order against you and you do not adhere to the strict letter of that order, so you are charged administratively with violating the order. You do not get to go to court. There is no way under this act that you could have a court review that order. In fact, you do not get to present any evidence orally, nothing under oath. You are restricted to submitting in writing to the minister. In fact, the act prohibits the minister from considering anything but writing. You are not presumed innocent until you are proven guilty beyond a reasonable doubt. If you do not do anything, you are just presumed guilty. If you have been issued this violation ticket and you do nothing, you are presumed guilty.

You can appeal to the minister. The minister decides whether you are guilty on the lower civil standard of balance of probabilities. The two main defences that you would have in an administrative law context, due diligence and honest but mistaken belief, are taken away from you under the act. You are not actually reviewing whether the order was reasonable or whether there was a health risk. The minister is only reviewing whether or not you adhered to the order, and that is actually very important for you to consider. The minister is only allowed to consider whether or not you violated the order, not to look behind the order to see if this was reasonable or justified or excessive. If the minister determines on a balance of probabilities that you are guilty, then section 61 of the act allows the minister, in his or her discretion, to decide to keep your property. It can be forfeited to the state.

In that scenario where you have been charged administratively, we have the state effectively taking control of your property for an unlimited period of time, never reporting it to a court, no limits on the amount of seizure, grey area for the reasons for the seizure, and your property can actually be forfeited to the state without any court supervision. We have a joining of the executive power and the judicial power in that context.

When I reviewed this act and saw that we have basically moved away from what I call the rule of law, it raised the question in my mind: Are we in a situation in Canada today where consumer products are creating such a risk that we have to abandon significant procedural safeguards and move away from the rule of law?

You will not hear me say that I have a concern about tightening up consumer legislation. You will not hear me say that there are not some positives on this act. However, if we want to have a reporting system or better tracking systems and things like that so we could actually address some legitimate safety concerns, can we not do those things in a way that actually enables us to still uphold as actually significant the rule of law? You will not find a political philosopher who will say that it is safe to allow the police to become the decision maker when it comes to seizure of property.

When I read the act, I have to tell you that I was personally just terrified that this creates a significant precedent of the move away from the rule of law, and it makes me feel very insecure. I would discourage my children very strongly from ever going into selling or manufacturing consumer goods because I know they would be in a situation where the state can be both the police and the judge.

The other thing that I would want to address as extremely significant is this abolition of the rule of trespass. I find it absolutely amazing. The RCMP or OPP or municipal police investigating very serious matters cannot come onto our property. If

we tell them to leave and they do not leave, they can be charged criminally and they can be sued civilly. We have so cherished our right to private enjoyment of property that we will not allow the police to trespass, but we will absolve Health Canada inspectors from going onto our property without a warrant and without being invited. They can be on our property and not even be investigating us. They can be investigating somebody else.

It raised the question in my mind, again, are consumer products posing such a risk to Canadians that we cannot ensure consumer safety without abolishing the law of trespass? It sets a dangerous precedent. If it starts here for Health Canada, then what prevents another bureaucracy from going to the government and introducing legislation saying they need to have the same powers because they are also dealing with significant things?

Approaching this from a legal philosophical perspective, I have to say that the precedent this bill represents is very troubling. Ironically, it is a safety bill, but we also have to consider whether or not it is in the long-term interests of Canadians to move away from fundamental legal principles that we have all been taught are extremely important for our liberty and our safety.

The Chair: I sense you have more to tell us, but I think we will flesh it out in the question and dialogue period.

Mr. Buckley: I could go on for hours.

Cyndee Todgham Cherniak, Adjunct Professor, Case Western Reserve University School of Law, as an individual: My first comment is a basic premise. In trade law, you have good protectionism and you have bad protectionism. Bill C-6 clearly has some good trade protectionism in that the aim of the bill is to protect Canadian consumers from harm caused by goods. That is good protectionism. It is a good thing to do. None of my comments are intended to detract from the good potential of the bill. However, the ability for the Canadian government to prohibit a manufacturer or importers from selling creates some concern.

The question is whether Bill C-6, in its current form and language, opens the potential for bad protectionism; do we have the balance correct in this bill?

Bad protectionism is protecting Canadian manufacturers from foreign competition. Bad protectionism is technical barriers to trade. Bad protectionism is disguised restrictions to keep a wall up at the border so that foreign goods cannot get into Canada. Also, bad protectionism is putting up a wall at the border so Canadian manufacturers do not offshore some of their production; it is a two-way street.

Probably this is where my comments may get a little unpopular. However, I am not here on behalf of any client. I am not here on behalf of any international organization or NGO. I was asked to come and comment because I am a trade lawyer, a trade professor and a consultant to the Asian Development Bank. I have actually looked at 100 free trade agreements in my spare time.

As Bill C-6 is written, I do not see any intention to breach Canada's international obligations. I want to stress that as it is written, I do not see it as intending on doing something in particular when I read the language. However, my question is whether there is sufficient guidance in the bill or whether the powers are too broad, so that we can venture into the bad protectionism. That is really what I am here to talk about.

I will bring up five problems. There are more, but I do not want to go on and on, so I will address five issues that I see.

When I look at sections 5 to 8 of Bill C-6, I ask whether it could be used to justify an importation ban so that foreign goods are kept out in order to protect Canadian manufacturers. Paragraph 7(a) will allow an importation ban if an inspector determines that a consumer product is a danger to human health or safety. There is a similar provision in paragraph 8(a) with respect to retailers advertising and selling a consumer product that they know is a danger to human health and safety.

While there is a definition of danger to human health or safety in the proposed law, there are no clear rules. I do not know what that means, and I will not be able to advise foreign clients as to what that means and when someone will come to that determination. Therefore, is it possible for this to be misused?

Is it possible for me as a lawyer to have a new area of practice whereby I go to the Canadian government officials on behalf of domestic manufacturers and say: "I think these goods are of lower quality; they are a danger to Canadians so you need to investigate and stop them at the border."? When I look at what is going on in some foreign jurisdictions, I have seen that happen with respect to goods getting stopped at the border.

Hence, we have WTO cases; not necessarily on this basis, but there is a fear right now – especially with all this "buy America" talk. There are a number of protectionist measures going up in place around the world.

It is possible we will react in fear, without science or justification for our fear. It is possible we will go offside what is called "the precautionary principle" in international law. It is also possible that we will stop Canadian goods from coming in when they are manufactured offshore so that a manufacturer can be more competitive in the Canadian environment.

I talk about "what if." What if Canada was looking at a foreign jurisdiction, one of our trading partners who were going to pass this law? Would we have concerns if the shoe was on the other foot, so to speak; if Canadian manufacturers who want to get into a foreign market can have their goods stopped at someone else's border?

What if our bill gets adopted by some of our trading partners as the precedent? Could this type of bill be used against Canadians? We are supposed to lead the way. If leading the way may cause harm to our people – and we see that potential – should we not be looking at it from the perspective of our trading partners as well?

The bill adds business risk. Business risk was already discussed by Mr. Buckley, so I will not go on. However, when you have business risk, not all business risk is bad but you need to have clear rules for both the Canadian businesses and foreign businesses, because we do need some of the foreign goods.

The bill is also lacking in conformity, assessment procedures and other provisions to ensure that it is not used as a technical barrier to trade, a disguised restriction on trade – a trade-restrictive or trade-distortive measure. We can improve Bill C-6 if there is a clear statement that the bill will be interpreted consistently with Canada's international obligations.

We do not have that in the bill. It is ironic that we required, through negotiation with the Americans, to have a similar provision in their "Buy America" legislation that

it would not be used for bad protectionism. We have a precedent that we can borrow from our friends to the south.

If the bill included clear rules on what factors will go into the determination of whether a good is a danger to human health and safety, and if we could have clear rules about advance approvals that can be obtained to control business risk, such as advance rulings with clear procedures for appeal, then we might encourage some of our business partners to come forward and work with us so that we reduce the likelihood of dangerous goods entering into Canada.

Could we have provisions to deal with when goods are an imminent threat where immediate action is required, such as the melamine case out of China; and where there is a concern, but a more detailed and lengthy process should be available?

Problem number two is when I look at the international obligations. I look at paragraph four of the preamble, which states:

> Whereas the Parliament of Canada wishes to foster cooperation within the Government of Canada, between the governments in this country and with foreign governments and international organizations, in particular by sharing information. . . .

I do not see any provisions in the bill to do that. In fact, given the strictness of the provisions that my friend was talking about, foreign governments may be reluctant to share information with us because they do not want to disadvantage their businesses that have market access into the Canadian market. As we can see by a number of WTO cases, importation bans are taken very seriously by foreign governments.

It is also worth pointing out that two executives involved in the milk scandal in China were executed yesterday. Other countries have a different view on consumer protection and the penalties for consumer protection. Does this bill put us in a place where we may be in an uncomfortable position in sharing information? I just point that out in passing.

Problem number three is the requirement to provide any and all documents and disclosure. Section 38 establishes criminal consequences for infraction, and other provisions allow inspectors to go and obtain any document. Paragraph 20(2)(*c*) permits an inspector to examine any document and take copies.

It does not exclude legal opinions. It does not exclude anything that may be subject to solicitor/client privilege, but it also does not exclude technical intellectual property documents, secrets that companies do not want to have in the public realm. Should the Canadian government be required to get a court order in order to get these sorts of documents and have the opportunity to prevent the disclosure of these documents?

The requirement to provide any and all documents raises concerns of company secrets getting in the wrong hands. What if the shoe was on the other foot and it was China or Nigeria or someone else who was going to be able to get Canadian businesses' secret documents, their intellectual property? If the shoe was on the other foot, would we be concerned that maybe someone would be using Canadian secrets to infringe Canadian intellectual property rights? We need to consider that.

I had a recent case coming out of China on behalf of a client, where the Chinese customs seized goods leaving China and allowed the person making the complaint to go in and look at all the documents, take photocopies, and then file patents to

contradict the Canadian exporter's rights. Things happen around the world. We learn from these experiences, so I can see the potential for some mischief in this bill.

Sections 15 and 16 grant the minister the right to disclose personal information and confidential business information without the consent of the manufacturer, importer, et cetera. Section 17 goes even farther and allows the minister to disclose confidential business information to the public where there is a serious and imminent danger.

The question is whether alerting the public would require the disclosure of any type of confidential business information. When you look at the definition of "confidential business information," it seems to go beyond what is necessary to alert someone to a danger and the secrets of the business.

The time frames for reporting incidents is short and might not be realistic in the corporate or international context. For example, subsection 14(2) requires a report of incidents within 2 days and subsection 14(3) within 10 days. By putting the number of days in a statute, you are setting up good corporate citizens to fail. Generally under international law, reporting requirements need to be reasonable and sometimes translations need to take place. As well, there are time zones to consider. I am not sure whether this will work.

The last point is that there does not appear to be a due diligence provision, as Mr. Buckley said. Also, if this is about consumer protection, should we not have a due diligence provision that says: Come forward and act in a duly diligent manner. If you do that, we understand mistakes can be made. Someone can have all the best intentions but then afterward, we come across additional information. If you have a due diligence defence and a due diligence process, would we not encourage foreign businesses to comply and come forward to work up front so that nothing bad happens? Should we not have that as part of this bill? It would allow our trading partners to understand Canadian law and Canadians' needs, concerns and procedures.

I would be happy to answer any questions.

The Chair: I thank you both for your opening comments. Mr. Buckley, I will tell you what Health Canada officials have told us, and ask you to respond. You talked about the precedent. Health Canada officials say that the powers outlined in this legislation are similar to other pieces of legislation, such as the Canadian Environmental Protection Act, the Pest Control Products Act, the Canadian Labour Code, the Controlled Drugs and Substances Act and the Health of Animals Act. You also talked about the law of trespass being abolished by Bill C-6. Government officials have said that no, the inspectors will be permitted to pass over or enter a private property for carrying out their duties under the law.

Could you comment on the trespass part of this and the precedent review of other pieces of legislation?

Mr. Buckley: I will start with the comment on trespass. We are not expecting Health Canada inspectors on their off time to decide to wander onto people's properties. I take it as a given that they will exercise their duties under the act, as broad as that authority is. I do not know that it is any consolation to Canadians that health inspectors cannot go into their house without a warrant but can go onto their private property. I do not read this as limiting them from staying out of your out buildings. They can certainly enter commercial premises. I am most concerned about

the private property in terms of the residential property aspect. It is no consolation that they might investigate you or your neighbour.

The bill exempts them from the law of trespass, which raises the question: If I am carrying out a business in my home, they have the right under the act to come to my house and ask if I will let them in to inspect the home. If I will not, they have the right to apply for a warrant under the act that would be restricted to verifying compliance with the act. That is common. Those types of provisions are in our current Food and Drug Act, which they administer. That is different from exempting inspectors from the law of trespass. This bill is a precedent. I am not familiar with the Environmental Protection Act. Of the acts you listed, the only one I am familiar with is the Controlled Drugs and Substances Act, which is a criminal act that does not allow the police to seize property and not report it to a court. Under the Controlled Drugs and Substances Act, if a police officer seizes property, it needs to be reported to a court.

Section 8 of the Charter clearly governs that. I do a lot of work in the controlled drugs and substances field involving seizures with warrants and seizures from cars. It is nothing akin at all to what we are looking at in Bill C-6. It is possible that there are similar provisions in other pieces of legislation that I am not aware of, but I do not think it removes the precedent that the bill would set, which this committee needs to consider.

Let us say for argument's sake that the Environmental Protection Act allows inspectors to seize property under that act and never report it to a court and that they can charge administratively and forfeit it to the Crown without the court ever learning of the property. That would be alarming and would be an example of other agencies wanting it because one agency has it. Let us say this is the first example of such proposed legislation and it passes. Is the next bureaucracy going to line up and say, well Health Canada has it, is it okay? I am here to say that I have read this bill and I am alarmed by its extremely broad scope. I ask the question: Is it necessary for us to protect ourselves from consumer products and allow the state to have such broad sweeping powers without court supervision? You do not hear me saying that consumer protection is not necessary. Parts of this bill could enhance consumer safety but it is the question of having private property seized without limits or supervision. If I were a small business owner and it happened to me, putting my livelihood and provisions for my family in jeopardy without any recourse, I would find it intolerable. One of the dangers of allowing the state to have these types of powers is that those subject to those powers become alienated from the state because the state becomes a complete adversary without a forum, such as a court, to resolve issues. The state has an interest in consumer protection, but we have laws, such as the Canadian Charter of Rights and Freedoms and section 8 which guarantees everyone the right to be free from unreasonable search and seizure, to moderate how the state interacts with us. If anybody wants to ask me about jurisdiction, I am anxious to talk about whether the federal government has jurisdiction to pass this bill because of its overall breadth.

The Chair: Ms. Cherniak, I appreciate your analysis of good and bad protection. When Health Canada officials were here, they said that Bill C-6 is consistent with changes to product safety legislation in the United States and in the European Union. Do you agree?

Ms. Cherniak: I have not looked at the EU or the U.S. provisions. I looked at this from a perspective of whether this is consistent with Canada's international obligation and not criticizing another state's decisions. When I looked at this bill as it is written, nothing jumps off the page to indicate that something could go to the WTO tomorrow.

I can see a great deal of potential for bad protectionism and actions to be taken under this bill that will lead to disputes that go either to the WTO or to a NAFTA panel or to another FTA panel.

Senator Eaton: Mr. Buckley, I am not a lawyer, so I do not understand the law as well as you understand it. Perhaps you could explain. I believe you said in your last response to Senator Eggleton that inspectors were exempted from the law of trespass. Could you explain?

Mr. Buckley: Yes. I believe it is subsection 20(4), which exempts them from liability for being on people's property. We have inherited the law of trespass from the English Common Law.

Senator Eaton: A point of order -- I have understood that on the contrary, inspectors are liable. They can be taken to court and be charged if they misuse their right to go on your property.

The Chair: I do not think it is a point of order, but you have clarified your question so Mr. Buckley can take it from there.

Mr. Buckley: I am not sure that I am following now.

Senator Eaton: They could be charged. If somebody goes into a shopping mall, goes into your store and starts breaking apart your products, it is my understanding from Health Canada that they could be held responsible and be charged if they misused their right of inspection.

Mr. Buckley: That is interesting. As I say, I read section 20(4) as exempting them and people accompanying them, entering on or passing through private property. Just the way I am reading that, it basically exempts them from the law of trespass.

The Chair: " . . . they are not liable for doing so" are the last few words.

Senator Eaton: They are not liable for crossing into a shopping mall but that does not excuse them from not behaving according to the law.

Mr. Buckley: I have to stick with my answer. First, it is not limited to shopping malls.

Senator Eaton: They need a warrant to go into someone's private house. If they destroy or wilfully do things that are not right, according to this bill, they are subject to being charged.

Mr. Buckley: The interesting thing about this subsection 24 is that when you look at administrative law and administrative law cases, courts have been very clear. When a section says an inspector can go where he expects there is something regulated by the act, that is completely allowed, and he can inspect documents and basically check for compliance.

When we look at the first part of this section 20(1), where they can enter on the property, that is valid, where they can examine and test things. In my opinion, that would be valid administrative law. It is very well accepted that they can go on to commercial premises. They can even go up to a home; let us say you had a home-based business with a consumer product. They are allowed to do that and that is a given. No one will charge someone for going into a shopping mall because he or she is not trespassing. Everyone is allowed to go into a mall. There is an implied

invitation. When I read 20(4), it sticks out: Why did they need that there, being that courts accept inspectors' rights to go on to property? It is set out in a common way. This first part of section 20 does not alarm me -- I see a pattern with other acts -- but this 20(4) jumped out and it is not limited to commercial premises. It is anything and it is actually on the private property that I think it is designed for, unless you are jumping into someone's storage yard at night.

Senator Eaton: To go into a private property, they need consent or a warrant. If you go into someone's house you need a warrant or consent.

Senator Day: You said private property.

Senator Eaton: A shopping mall is private property.

The Chair: Senator, let us keep this to questions to the witness, please, and give him a chance to respond.

Senator Eaton: I am, but I guess we disagree.

I do not understand what you are saying.

Mr. Buckley: The way the law of trespass works is that we start with the premise that we have absolute right to private enjoyment of our property, but we do give that up in certain contexts where there is an implied invitation. For example, if we go to the mall, that is designed to be a public place and there is an implied invitation for us to go there, so you would not ever be violating the law of trespass going to the mall, unless it was after hours when you are not expected to be there.

Even in our private homes, there is an implied invitation that someone can walk up and ring the doorbell and ask a question and interact. Your neighbour can come to your door and ask to borrow a cup of sugar, or someone can come and solicit, but beyond that, if you told them to leave, they would have leave. It is the same with the police. The police could walk up to your door if there has been a crime and they are going door to door to see of anyone has seen something. Even though they are investigating a crime, they are not trespassing using this implied licence, but the licence ends whenever you tell people to leave. If you told the police, "I am sorry, I do not want you on my property; please leave," at that point they have to leave. At that point any private citizen has to leave. This implied licence is now withdrawn and you are liable for trespass if you do not honour it.

As I read section 20(4), if I told a Health Canada inspector to leave my private property, they are exempt, as is anyone accompanying them to assist them.

Senator Eaton: What are you defining as private property?

Mr. Buckley: It is very broad. It could be commercial property where there is not an implied licence for you to be there.

Senator Eaton: Could it be a manufacturer of toys, for instance?

Mr. Buckley: It is a good question. It is important to understand. Under section 20(1), they are exempted certainly to go on to commercial property to check for compliance under the act, so even that alone would exempt them from the law of trespass. As I say that, the first part of section 20 is a very common type of wording and a common type of power. We actually want inspectors under regulatory regimes to be able to check for compliance, or the system breaks down. We do want to grant

them the right to go on to commercial premises. We want them to be able to inspect machinery if that is relevant, or check documents if that is relevant. We give them that power and the courts are good at allowing that to happen, because otherwise how do you enforce a regulatory regime or check for it? In that circumstance, they would already be exempted. If you or I did that, we would be trespassing. I have no objection to that at all.

As I read section 20(4), it is broad enough to also include private property, meaning residential and things like that.

Senator Eaton: If it is residential, they have to have a warrant or your consent.

Mr. Buckley: That is not how I read that section. I guess maybe that is where we differ.

Senator Eaton: Can you give me concrete examples of something other than residential property that you consider private property that is not a shopping mall and not a manufacturer?

The Chair: Let us get the answer and then I have to move on to another senator.

Mr. Buckley: The short answer is that we have from a private property perspective personal residence and, as far as this act goes, commercial property. Those are the only two we are talking about.

Senator Martin: Mr. Buckley, I will begin with the question that you asked during your presentation, which is: Is it in the best interests of Canadians? My questions are coming from that place of wanting to find out whether it is in the best interests of Canadians. I too am not a lawyer but I am a parent. I was watching CBC News yesterday, *The National* with Peter Mansbridge, about the recent case with the drop-side cribs and a mother who at this time cannot afford to buy another crib because they are very expensive. At this time she is using a temporary playpen. These cribs are potentially very dangerous to these babies and they could lead to great injury, perhaps even suffocation. I am sure many parents who own these cribs are not sleeping very well at night. Is it in the best interests of Canadians for Health Canada to have the power, the tool to order mandatory recalls in such cases?

I know in this case there is a recall, but as you know, there are no powers currently for ordering recalls. It is all voluntary. Is it in the best interests of Canadians, Mr. Buckley, to give Health Canada the tool that is written in this act?

Mr. Buckley: Just so I understand your question, are you limiting it to recall, or do you want me to answer more broadly?

Senator Martin: I am focusing now on recall because that power does not exist in the Hazardous Products Act, which you cited as being sufficient. Is it in the best interests of Canadians to have this act that is about 40 years old and has not been modernized and without Health Canada having the power of recall? What is your opinion about what is in the best interests of Canadians?

Mr. Buckley: That is interesting, because even when I look at the Consumer Protection Act, it has ministerial powers that seem to have been borrowed from the Hazardous Products Act where the minister can make an order, but there are some procedural safeguards there.

There are several different issues here. It is perhaps a good thing that this involves consumer safety because it is difficult to resist consumer safety. It is. A question like babies in cribs is an emotional issue, and I think we are obligated to say the government should do everything it can to ensure the safety of babies and cribs. Does that mean that we cannot regulate things like crib safety and cannot protect babies without involving the court when the state will take control over private property? That is the question. You have not heard me criticize consumer safety. You have not heard me criticize the objects of the act. You have certainly heard me say there is a danger to allowing the state to take control over private property without court supervision.

There is a danger. We have grown up and taken it for granted that we will not have state agents in our yard. We have taken it for granted that if the state seizes or takes our property or interacts with us in any way, that we will be in court. They will compel us to go to court over it, and the court will deal with it. Do we want our children to not take privacy rights and the enjoyment of private property for granted? It is an interesting question. Do we want our children to not assume that if the state will seize their property, then the state will have them in court and the court will supervise the process? I am not criticizing legitimate state ends, but I think we could craft effective consumer protection legislation to deal even with these emotional issues in a way that also respects the rule of law. That is all I am saying.

Senator Martin: Thank you for your explanation. I would disagree with you in terms of the powers that are written in this act for the minister and for the inspectors in situations where it requires urgent response, and when it comes to the lives of consumers, and especially our most vulnerable and, in this case, babies. We have also heard from different witnesses that Health Canada has a record of trust and collaboration, and we heard the confidence of various groups that have worked with them. We also heard from the Privacy Commissioner last week, who gave her endorsement or confidence in Health Canada in all of her meetings and consultations. There is assessment to be done in the regulatory phase where she again feels that that process will be very transparent and interactive. We too as senators could be viewing what that will look like.

What is happening in the news is emotional. We think that things are safe when we buy them. Our consumers assume that what they purchase in stores is safe. The fact that in Canada, Health Canada does not have the authority to do any mandatory recalls concerns me. I am going back to this question of what is in the best interest of Canadians. We may differ on that.

The Chair: Do you have a further response, Mr. Buckley?

Mr. Buckley: I would be more comfortable with the procedure we have in the Hazardous Products Act, where the minister, if there is a significant risk, can make an order that is immediately binding. It is reviewable in case they got it wrong, and if they have not got it wrong, it can be renewed and enforced, but with some review mechanism. I agree that when a risk pops up, there should be a mechanism, but I am absolutely firm that I do not view it as long-term in our interests, even from a safety perspective, to be allowing this without court supervision and to be joining the executive and the judicial branches.

Senator Martin: We heard some statistics from Safe Kids Canada that unintentional injuries are the leading cause of death of Canadians ages 1 to 34, with

nearly half the injuries being caused by consumer products. Do you have any evidence to support your mention of consumer products being low risk?

Mr. Buckley: I have not said that.

Senator Martin: Earlier you had mentioned that it was a lower risk.

Mr. Buckley: Was I meaning lower risk in comparison to drugs?

Senator Martin: You also said it in other statements you made outside today.

Mr. Buckley: Outside of today, certainly, when I compare consumer products to things like chemicals or pharmaceutical drugs, I view them as a lower risk, by far. That is definitely my personal opinion, although it was not an issue I was addressing here.

Senator Segal: I thank the witnesses for making themselves available. I am glad we were able to accommodate Mr. Buckley's challenging and important schedule. I want to step back from the specifics and see if I can get you to share your considered opinion based on your interaction with these issues both on the trade side and on consumer safety and purveyor's rights side.

What do you think is really happening here? I ask the question in a specific way. Many of the issues that you have raised have been raised by other members of the committee, although perhaps not as articulately as Mr. Buckley has. The response from Health Canada has been one of the reasonable person. Health Canada is a reasonable place with reasonable people working to protect the public. Their inspectors will act in a reasonable way. Therefore, the presumption that they would go to the extremes that you may very well believe, and there may be an objective analysis to suggest the law might let them go to, is perhaps somewhat unfair. I would be interested in your reflection on that.

Ms. Cherniak, as we saw with some tobacco legislation a few weeks ago, Health Canada is not in the trade business. They are in the public protection business. The Department of Foreign Affairs and all that stuff and people who interact with the WTO are part of that specialized world that you professionally cohabit, I guess. The question becomes: What would you think of a preamble that simply inserted the proposition, as you suggested, same thing we were delighted to get from President Barack Obama, namely, that no provisions of this act are meant to operate notwithstanding Canada's international trade obligations? Would that give you a measure of confidence about how this might be interpreted, or are there problems that are more severe?

Ms. Cherniak: The provision in the buy-America legislation does not give me much confidence that it will not be applied in a bad protectionist manner. Therefore, just having the provision in there does not do a whole lot. However, it may guide state actors in the decisions that they make.

In the United States, we see that maybe in some cases they do and in some cases they do not. However, I would think that in Canada, it may assist in the guidance of those applying the law. When they are asking questions such as should we engage in this recall, should we take this step or if we have choices, what should we do, under the provision in the legislation that says we will act consistently with our international obligations, they ask DFAIT and JLT or whomever what is acting consistently within

our international obligations, and the actions taken would be consistent with those obligations.

The Chair: Mr. Buckley, on the other question of Health Canada officials?

Mr. Buckley: Right, and the "reasonable person." First, I would not expect any bureaucracy appearing before a Senate committee asking to be given sweeping powers to say they are unreasonable and they will abuse this and you cannot trust them. I would certainly expect them to say everything is fine. There is nothing to worry about here, citizen; move along.

I just spent three weeks in Federal Court trying to get Health Canada's seizure power under the Food and Drugs Act declared unconstitutional in what is a very egregious case. We had there a company that had developed a vitamin and mineral supplement for bipolar disorder, called the EMPowerplus; and Health Canada was taking it off of the market because it did not have a drug identification number.

This is in 2003. The Natural Health Product Regulations are set to come into effect in 2004, and basically the entire natural health product industry is illegal because they cannot get DINs. That is why we are getting new regulations.

Before Health Canada seizes a shipment and starts turning away shipments at the border – because it is shipped in from the United States – they had received ample communications that they would be putting people at risk, including risk of suicide, if they continued. They continued.

One inspector agreed under oath that Health Canada was basically receiving constant communications that their activities were leading to suicides. We had Mr. Ron Lejeunesse, who is the head of the Alberta branch of the Canadian Mental Health Association – no connection with Health Canada, no connection with TrueHope – who was publicly blaming Health Canada for suicides of Canadian Mental Health Association members.

This gentleman used to run the Province of Alberta's mental health programs. He is a heavy hitter in the mental health field, and all of this was ignored. There were protests on the Hill – the "Red Umbrella" ladies; there were press conferences, letters and rallies.

It was literally a case study in how to draw attention to the fact that a bureaucracy is causing harm. Yet they did not relent for approximately a year, until an arrangement was reached with the minister.

I practice widely in the area of dealing with companies that make natural health products that Health Canada is going by. I have never actually heard Health Canada described as a reasonable person until today. It very well may be that in other areas they are.

The problem with the Food and Drugs Act section 23(1)(*d*), they are allowed to seize if they believe that an offence has taken place. They can only release when they are fully satisfied that there is no violation. There is actually some symmetry with a provision in this act.

If you basically give the government a power to seize when there is a violation and they can only release when there is full compliance, that is what you will get. Inspector after inspector told us under oath the only consideration was whether they

were in compliance. If you pass this act and you give the inspectors the power to take control over private property, to check for and ensure compliance, that is what you will get. You will get exactly what you give them.

If I am a property owner and I have an inspector acting reasonably – they are treating me well – but they seize my stock, I do not get to go to court, they charge me for an administrative violation and the state forfeits my property, it does not matter how reasonable that was or was not. It is a move away from the rule of law. It is a move away from procedural fairness.

I am willing to presume that Health Canada right now is committing to acting reasonably, but that is not the issue. The issue is do we give anyone, a reasonable person, these powers? Laws are passed and they stay there for a long time. You are giving people enormous discretion on some very significant property right issues.

Senator Segal: Health Canada has been very forthcoming with respect to a long consultative process on the regulations, which will shape what the statutory reality is on the ground. In your judgment, is there any regulatory specificity that might emerge from those discussions with various parts of the to-be-regulated industry that could provide a measure of either confidence or balance relative to how the statutory parts of the law were enforced?

What constitutes a risk? What constitutes a problem? Are there definitions of what constitutes, for example, the issue my colleague Senator Eaton raised – a private or a non-private facility that may be subject to search and seizure, those sorts of things?

Do you have any hope or belief that an honest, regulatory process, where there was open consultation, could provide some measure of comfort for the vast majority of manufacturers, producers, wholesalers, importers who are honourable people and who want to go about their business in an honourable way? Or do you fear that if the legislation passes, the regulatory process will somehow not be managed honestly, or really has no hope of generating the kind of balance and fairness which clearly, on the trade side in one case and on the purveyor's rights side, you are looking for in your submissions to us today?

Mr. Buckley: First, when a law is passed, it will now be the courts that interpret the law. Let us assume we are not dealing with a constitutional challenge, where just the court is interpreting the law. The court will not be swayed by some modus operandi between industry and Health Canada that may have commenced, greased passage and gained support for a bill. The court will interpret the law according to a whole set of procedures for a statutory interpretation.

Also, I would say that Health Canada is obligated, once the law is passed, to enforce it in its true meaning and not to shackle itself by policy. It is an interesting question because I think the responsibility of both the House of Commons and the Senate is to ensure that it is passing laws, first, that are clear on things like risk. I would echo my friend's comments on how vague it is – the concept of risk.

If there are questions about what is property and is the law of trespass abolished, these things should be clear going in. They should not be subject to opinion. Laws are supposed to be clear. They should be defining, with some certitude, what is going on.

I was not focusing on the ambiguity in this act; my friend covered that. However, there are many ambiguities, and I would have difficulty instructing clients as to the scope of the act.

Clearly, whatever the scope is, it should not be bound by a policy or some agreement between industry and Health Canada. I do not think that is really a consideration that the Senate or House of Commons should be taking into account. That is just my opinion.

Ms. Cherniak: In addition to what my friend said, I will go back to the first question that you asked, Senator Segal, which is what is happening? From the international perspective, I asked that question as well. Is this a reaction to some of the international scandals that came out of China and elsewhere a year ago? If we are reacting to an external issue by putting something into the regulations, will those regulations change as the wind changes as we react to media attention to some of these issues? I trust that regulations are put forward in good faith but I also trust that we react at times such that changes can be made so that a particular circumstance can fit into a regulatory regime so that action can be taken to erect a blockage at the border. Therein lies my concern. Creating a mechanism quickly to stop things form entering the country, such the milk containing melamine from China is not necessarily a bad thing. However, even when we do not have scientific evidence a public outcry can occur about a product. What do we do in that case? Do we have the right balance? That is my question.

Senator Ogilvie: Mr. Buckley, if I understood you correctly, a great deal of what you said had to do with the phrase "state seizure of property." The state was in the person of regulators who would be carrying out the action of the state. I heard you explicitly start a major portion of your commentary at clause 31 of the bill leading you through to the seizure and disposal of property at clause 61.

My reading of the bill is such that by clause 31, a number of steps have been initiated to provide the individual corporation or other identified object of a product contravening or potentially contravening the legislation with an opportunity to comply or show that their properties do conform. Clause 31 says that if a person has not complied up to this point, a series of steps can be initiated with regard to stopping manufacturing, et cetera, and can provide an order in this regard, but this order must include a statement for the reasons of the measure and the time and manner in which the measure is carried out. The individual or corporation is provided with time to comply, and on it goes through a series of events.

I am having difficulty understanding why society cannot lay out a reasonable set of steps that allow an individual, a corporation or other entity to comply and show that a product is safe within the terms of safety under an act. If they continue to refuse to do so, surely a stage would be reached whereby, provided sufficient grounds exist, the state must have the opportunity to act on behalf of consumers to protect them. That is my observation.

Mr. Buckley: It is interesting. Let us agree that we want the state to be able to ensure that consumer products are safe. You do not hear me saying otherwise. It is actually quite fantastic that an inspector could show up at the door of a business he does not know, find the owner non-compliant, find no safety risk other than a presumed risk for non-compliance, and seize the property right then and there. The inspector could write an order stating that if the owner does not comply with it, every day is an offence. If the owner is charged criminally, every day is an offence with significant penalties. Yes, a court will adjudicate it but they can charge you administratively, whether the order was properly made or made sense is not even an issue, id you did not comply with the order. Let us say that an inspector comes to your premises. You are not compliant and you are not willing to be compliant and you

disagree with them. They will get a warrant and seize your property and the court will manage it. I am not aware of circumstances where the existing rule of law is not working. That confuses me with this bill. If this were completely exigent and I could not get a telewarrant but I had to interfere right away, with 48 hours to report with a court, then I would be less concerned. You do not hear me saying that consumer safety is not an important issue. You do not hear me saying that there is not room to improve the legislation we have. However, you have me saying surely to goodness we can accomplish those legitimate goals in a way that involves the courts and involves the rule of law.

That is where I differ. When I look at the objects of the bill, I do not see why we cannot have consumer safety and involve the courts. It has been working. I do not think it is a case of suddenly in 2009 consumer products are more risky than they were before. There has always been risk and there have always been shady operators and fraud. We have a number of laws to protect against those things. Currently, we charge people and we have the courts supervise the seizure of property.

The Chair: Do you have a further question?

Senator Ogilvie: I have heard you but I do not agree with your interpretation. My interpretation is that the individual, corporation or entity has the opportunity to respond to the issue raised. If they refuse to respond then presumably, at some point, they will have to suffer the consequences.

My reading of the law is that inspectors are subject to the rule of law and have to justify their action under normal Canadian law. Thank you.

The Chair: Okay.

Mr. Buckley: We will just have to disagree on that.

Senator Cordy: As a non-lawyer, it is interesting to have the legal perspectives that you are both offering. We are all interested in product safety, which you mentioned at the outset. We would hope that the products Canadians receive would be safe. It is not the reality, so we have to have legislation to make things better for Canadians.

At times when proposed legislation is drafted there are unintended consequences. This bill contains what I hope are unintended consequences. Mr. Buckley, you talked about moving away from the rule of law. Will a person be found guilty by not a court of law, not a judge, not a jury, but a minister of the Crown? I have a few concerns about that. Clause 20(4) says that an inspector carrying out their functions or any person accompanying them may enter on or pass through or over private property. They are not liable for doing so.

Clause 21 says that if the place mentioned in subsection 21 is a dwelling house, the inspector may not enter it without the consent of the occupant, except under the authority of a warrant issued under subsection 2. Subsection 2 says that a justice of the peace may give that warrant. I am not a lawyer. Is there a difference between getting a warrant from a justice of the peace and getting a warrant from a judge?

Mr. Buckley: Good question. So that you are aware, most warrants are issued by justices of the peace. Even under the Criminal Code provisions, which would be the search warrant provisions Health Canada currently uses, it is issued by a justice of the

peace., if a justice of the peace is not available, then a judge may sit as a justice of the peace. It is the norm for the warrant to be issued by a justice of the peace.

Senator Cordy: It is just the norm.

Mr. Buckley: It is not a lower standard, if that is what you were thinking. No, it is not a lower standard.

Senator Cordy: I am also wondering about disclosure of information by the minister. You made reference to it in sections 15, 16 and 17. We have had businesses quite concerned that this disclosure of information by the minister may be disclosed not only to a person but to a government, and the definition of a government is not the Canadian government but it is the government of Thailand or China or India or any other government. Not only is the information disclosed, but it can be done without the consent of the individual. Again, the individual is deemed to be guilty before any discussion whatsoever with the inspector.

Mr. Buckley: Do you want me to answer? I am thinking my friend is probably better placed to answer that privacy question.

The Chair: Either one of you, or both of you if you like. Go ahead.

Ms. Cherniak: In my experience, in the Customs Act and in the Special Import Measures Act, provisions prevent government officials, including the minister, from disclosing sensitive customs information to third parties. They can share it internally within the government, but they cannot give the information to a competitor. They cannot give the information to someone that writes in for an Access to Information request, and they cannot give the information to a foreign government. We have precedent in other pieces of legislation where information that is provided is kept confidential by the government. If you are giving the information in order to resolve a dispute or to communicate effectively and efficiently so that the right decision is made by a decision maker, it is not disclosed to other persons.

What if the shoe was on the other foot? What if this piece of legislation were passed in a foreign jurisdiction and a Canadian company has patents or trademarks or some information and they really do not want their intellectual property rights to be infringed in a foreign market? What would we be saying if a foreign jurisdiction passed this legislation? I will pick on the Chinese, but I do not mean to. A Chinese minister could hand this information over to a factory owner in China who is concerned about the quality of a Canadian good. We would not want that to happen if it was a foreign jurisdiction. Should there not be checks and balances that someone's sensitive business information will not be shared and it will not be shared to a foreign government? That can lead to all sorts of other complications. What if we are wrong? What if there is not a problem with respect to these goods? All of a sudden we have created a tempest in a teapot just because one individual did not understand some of the business interests or some of the intellectual property rights interests, et cetera. An inspector cannot know everything.

Senator Cordy: The information can be given without having any discussion with the person whatsoever, so you are right.

Senator Eaton: What if it were reversed? What if, for instance, Korea issued a mandatory recall and we had that product in a Canadian store? Would we not expect the Korean government to let us know why they were recalling that product that was sitting on our shelves? When you talk about exchanging information between

governments, first, is it not confidential, and second, would it not be really to do with why the product was recalled and not personal information about the product that competitors would want to know?

Ms. Cherniak: You have asked a very good question, but I think that the definition of "business information" in the legislation is broader than what is needed to communicate to consumers. If Korea were communicating with its consumers publicly that a particular Canadian good --

Senator Eaton: No, no. Korea recalls one of its own products that sits on Canadian shelves. They communicate to the Canadian government, "We want X toy taken off your shelves, or we suggest you do so because we have taken it off ours." Would we not want them to feel free to communicate to us why they are recalling the product?

Ms. Cherniak: That would be an issue of Korean law under the Korean legislation as to what information can or cannot be disclosed, but the Canadian government would be able to get the same information that is released publicly in Korea that may not be sensitive business information. The fact that it is a particular model of a particular product that is manufactured by a particular Korean manufacturer at a particular plant would not be sensitive business information, and I would have no problem with that being communicated without consent, but Bill C-6 as drafted goes beyond the definition of business information.

> "confidential business information" — in respect of a person to whose business or affairs the information relates — means business information
>
> (*a*) that is not publicly available;
>
> (b) in respect of which the person has taken measures that are reasonable in the circumstances to ensure that it remains not publicly available; and
>
> (c) that has actual or potential economic value to the person or their competitors because it is not publicly available and its disclosure would result in a material financial loss to the person or a material financial gain to their competitors.

That is the information, and should that be released publicly without consent? Should we not be concerned about that? If the shoe were on the other foot, we would not want Canadian's not-publicly-available information to be given to competitors. I will use your example. We would not want a Korean competitor to have that information so that they can duplicate the Canadian product so that the Canadian can no longer exploit their patent rights.

The Chair: I have to move on, senator. I am sorry.

Senator Eaton: Excuse me, Mr. Chairman.

The Chair: We are running out of time. I have you down for the second round, senator. I am going to Senator Dyck.

Senator Dyck: Thank you both for your very clear presentations. Everyone around the table agrees that we need to provide Canadians with safe consumer products. It seems from what you have said, Mr. Buckley, that the concern is whether we have gone too far in this legislation where we are sort of trampling on the rights of

people who are involved in the manufacture or sale of consumer products. I believe you said something like, "Are consumer products creating such a risk that we need such a bill as Bill C-6 with such far-reaching powers?"

Are you saying that if there were situations where there was extreme risk, we might need something such as this, or are you saying that the risk right now from consumer products is such that the ends do not justify the means? In other words, what is proposed in here goes far beyond what is necessary in order to protect consumers?

Mr. Buckley: That is an excellent question. How many powers a state should have in any given situation tends to be fact-specific. For example, if we had a serious pandemic, which is something in the public mind, then it may be very reasonable for the state to say, "You cannot leave your house if you are sick," or, "You cannot send your kids to school." That would be an emergency situation in which I think even the courts would agree with the government that you can encroach on rights in areas that you could not otherwise.

It is funny, because most of the examples that were given, such as lead in baby toys and cribs, were examples where there were recalls and where the situation did work. In fact, I am not aware of companies that do not recall, because you are just a sitting duck both criminally and civilly if you do not. I am not saying there is not room for the minister to have the power to order recalls, but when I was asking that question, it really was rhetorical. My opinion is that consumer products have not moved into a higher risk area. Last year was the same as this year was the same as 10 years ago. I definitely do not think we are in an area where we need to be giving up fundamental freedoms in the area of consumer legislation.

Senator Keon: This is interesting stuff. I do not know how many thousands of emails we have had saying the same thing. The question is whether this legislation does encroach on freedoms of individuals guaranteed under the Charter.

Earlier, you zeroed in on clause 4 of section 20. I just do not believe that any inspector in Canada, under any circumstances, is above the law. I think if he breaks the law, you can go get him. I do not believe the points made on all these emails, which is fundamentally that.

Can you give me an example of any sector in Canada that is above the law?

Mr. Buckley: If I understand the question correctly, is there any regulatory sector –

Senator Keon: No, I mean any sector. Go as broad as you like.

Mr. Buckley: So you mean they can break the law at whim.

Obviously, I cannot; but is that not a different question? If we pass this bill, then they are not breaking the law if they seize property, assuming there is not a constitutional challenge.

For example, if an inspector believes an offence has taken place and seizes property because of that, under this act, I would argue that section 8 of the Canadian Charter of Rights and Freedoms has kicked in and what we call in law the "hunter standards" – we need to have a warrant issued by an independent person on objective criteria – has kicked in and that seizure would not be illegal.

Would the seizure be legal if they do not believe there is an offence? That is curious, because I am not aware of the state actually taking control of large amounts of property without belief an offence has taken place. Usually, we do not want the state to take control of property if there is not concern that an offence has taken place.

In the act, you are not supposed to sell things that are dangerous. If there is a significant health risk and we were using today's law where they need to get a warrant, we expect them to show to a justice that there is a health risk.

If you are a justice and you have a government agency telling you there is a health risk, you are inclined to issue a warrant, play it safe, and if they are wrong, have that sorted out in court later on. Courts always err on the side of public safety and we expect them to.

I think it is a different question. Let us assume that I am right and this really is going into new territory. If I am wrong and there has been some other legislation passed, it does not change the fact that this is changing fundamentally the state right to control over property, versus the individual right. This act has such broad application because consumer product is defined so broadly. Literally, it is anything, start to finish, that ends up in the hands of the consumer, exempted for other acts that are covering specific things.

However, this act covers a wide part of our economy. Do we want inspectors to legally be able to take control of property without the belief that an offence has taken place? In my opinion, once they believe an offence has taken place and that is why they are seizing property, I am fairly confident courts will say at that point section 8 of the Charter kicks in and there has to be a warrant. Therefore, they would have to go under the criminal code process to get a warrant. In my submission, that is a strong opinion that I hold and courts are consistent on that point.

If any of you want to look it up, there is the Supreme Court of Canada decision, *Regina v. Jarvis*, on this point. The year before that, there was an Ontario Court of Appeal decision, *Regina v. Inco*. Those cases deal with a situation where we have valid administrative powers, so the inspectors have the right to go in, get information and ask questions. They are valid powers, but they are exercising them after they believe an offence has been committed.

The question is at what point do you have to stop using valid administrative powers, and then section 8 of the Charter kicks in and criminal safeguards apply? Usually, once you believe an offence has taken place, section 8 of the Charter kicks in and you have to get a warrant.

The way this act is written, I am reading it as only allowing legal seizure of property prior to the belief that an offence has taken place. Do we want that? Let us assume that is legal. Do we want inspectors to be able to take control over property for undefined periods of time without reporting to a court, without limits on the amount of their seizure and with very grey criteria for the seizure?

When I read the act, I am not sure where it ends. It is not very specific. If this was about safety, should there not be perhaps a safety threshold for them to do this? It is just an interesting question, if that is what it is about.

I am not sure that I answered your question.

Ms. Cherniak: I do not think that anyone is above the law, but I am looking at it from a balance perspective. I am also a sales tax practitioner; in that part of my life, I look at it as inspectors and auditors are human beings and they sometimes get it wrong. We would not have the Tax Court if they did not get it wrong sometimes.

If we have an inspector in this circumstance who, notwithstanding best intentions, gets it wrong, what is going to happen to the business? Inspectors can make mistakes. If a business is considered and it gets out into the media that they have unsafe products for consumers, people will not buy from that business. That business will go out of business.

They will be spending a lot of money to set everything straight. Yet it may be, at the end of the day, their reputation is so damaged by a mistake in assumptions that the business will never come back. That is where I come back to a balance: Does this legislation have the right checks and balances in it?

The Chair: Colleagues, it is 10 minutes to the hour. We have to vacate the room at six o'clock because another committee is coming in. I need five minutes at the end to talk about processing the balance of Bill C-6. I am afraid we will not have time to get to a second round.

Senator Day: Thank you to each of you for helping us to focus. This is a difficult role to play because we typically deal with policy matters, and there is not one person here that goes against the policy purpose of this legislation.

However, when we are asked to look at a piece of legislation – and we will be shortly asked to look at this on a clause-by-clause basis – that reminds us, and you have helped us do that today, that it is not the platitudes from a department of health that we are accepting here. It is these words that are going to form a law that will hopefully protect our consumers. Let us hope as well that it will not be overly burdensome on the 99 per cent of business people who are honest and not interested in putting products on the market that are not safe.

When we were going through the analysis, there was confusion between clause 20(4) which deals with private property and the inspector not being liable upon entering private property and clause 20(5), which deals with the requirement to obtain a warrant in the case of a dwelling place. Why not require a warrant for all property? Why are the types of properties dealt with separately? Obviously, it is for some policy reason that is not clear. Let Senator Martin talked about baby cribs. My understanding is that the recent recall order of cribs is voluntary, not mandated. It worked very well with 150 voluntary recalls last year. You used that as a basis for arguing that there should be power within a department to have the right to mandate a recall.

My first question is: Why would we allow someone that we call an inspector to be the judge and jury on an issue and to order a recall? Why would we not have that at a higher level, such as the minister who has a political responsibility? Can you help me with that?

Mr. Buckley: That is the point I am trying to make. You have not heard me say that there should not be a power to order a recall. Because that has such dramatic impact, it needs to be reviewable. I am not opposed to the structure that was set out in the Hazardous Products Act or if you had to apply to a court to get a recall order. However, I would caution against having an inspector do it and having it non-reviewable except by another inspector.

The Chair: I am sorry, Senator Day; we have run out of time.

Senator Day: I am just warming up.

The Chair: Ms. Cherniak, do you have a brief comment to make on Senator Day's question?

Ms. Cherniak: I agree that there will be a burden on small, medium and large businesses, and importers and exporters under this proposed legislation. Are these economic times the right time to place an additional burden on business? There is a chill factor given the extreme results that can take place under a piece of legislation. Will business spend so much time trying to ensure that they do not run afoul to the point that their goods become too expensive? I am not detracting from consumer protection or safety and I do not mean to suggest that. I agree with your comment that there will be an additional burden of unnecessary work for a number of our good businesses. I am not talking about the ones that have crossed the line or might be close to the line.

Senator Day: You agree with the first part of my comment that the majority of business people are not interested in putting unsafe consumer products on the market.

Ms. Cherniak: I have not seen that.

The Chair: I am sure we could go another hour here but our adjournment time is at hand.

I thank the two witnesses, Mr. Buckley and Ms. Cherniak, for appearing on Bill C-6.

Senators, tomorrow's meeting will be the last one involving witnesses when we will hear from Health Canada officials. We will question them on a number of things that we have heard from previous witnesses.

Given that there is a lot of information to absorb I propose that we begin clause-by-clause consideration of Bill C-6 at next week's meeting on Wednesday, from 4 p.m. to 6 p.m. I understand there might be a conflicting event, and we try to accommodate those. If we do not proceed in the 4 p.m. to 6 p.m. time frame, we could ask permission of the Senate to begin the meeting earlier on Wednesday. We will need two hours to do clause-by-clause consideration because people have indicated that they have a number of areas of concern to address. We can try for permission to meet at 2:30 p.m. while the Senate is still sitting.

The second option is to go to the next day, Thursday, which is one week from tomorrow. The third option is to call a special meeting on this Friday or next Monday. Are there comments? Do you want a special meeting or do you want to go to the next regular meeting?

Senator Day: I prefer the next regular meeting.

Senator Keon: The special meeting conflicts.

The Chair: I am hearing from most of you that you do not want a special meeting. You would rather go to the next regular meeting.

Senator Eaton: We can go to the reception later. This bill is very important.

The Chair: That is okay by me. I am not invited.

Senator Eaton: I could make sure, if you pass the bill chair, that you are invited. I can invite you too, Senator Cordy.

The Chair: We could ask for a dispensation to meet earlier or we could try the regular time slot and do as much as we can, notwithstanding the other event, on Wednesday.

Senator Eaton: We could arrive at the event later or we could begin the meeting earlier.

Senator Segal: How is three o'clock, perhaps?

Senator Ogilvie: Tomorrow we will hear from Health Canada officials.

The Chair: Tomorrow is our Thursday meeting when we will hear from Health Canada officials. I am talking about going to clause-by-clause consideration next week.

Senator Ogilvie: Is there no chance of continuing tomorrow's meeting through lunch to begin clause-by-clause?

Senator Day: With a complicated bill it is practice in the Senate to allow senators to consider the evidence they have heard and to not proceed immediately into clause-by-clause. Typically, we would do it the next day, which would be our meeting next week.

The Chair: Is it the next day, Friday, or is it the next meeting day, Wednesday, during our regular time slot.

Senator Ogilvie: It is the next regularly scheduled meeting day.

The Chair: Shall I seek leave to begin the meeting earlier on Wednesday?

Some Hon. Senators: Yes.

The Chair: I suggest we begin at three o'clock. Do I have consensus? I will ask for leave to meet at 3 p.m., even though the Senate may still be sitting, and we will go to 6 p.m. If we do not finish, we will have the next day, Thursday, to complete.

Senator Cordy: Health officials are coming tomorrow. Will the minister come?

The Chair: The minister has been invited but is not available, so we are told.

Senator Day: Some Senate committees refuse to pass a bill unless the minister comes to talk about how important it is, although I am not suggesting that.

The Chair: We have invited her. You asked in a previous meeting whether we invited her and we did so.

Senator Cordy: When Senator LeBreton was a member of the Social Affairs Committee, she would not let a bill pass unless the minister appeared before the committee. You can tell her that I quoted her. I am willing to let it go but this is an important bill. We have heard many concerns expressed by legal experts and people in the business field. It would have been helpful for the committee to hear from the minister.

The Chair: Point well taken. We could ask again or ask senators on the government side of the chamber to urge the minister to appear.

Senator Day: Perhaps we could ask the sponsor of the bill in the Senate to use her good offices to try to convince the minister to come, even for part of the time.

Senator Martin: I will do my part and ask on behalf of the committee.

The Chair: This will be for the meeting tomorrow.

We are agreed that I will seek leave to meet at three o'clock next Wednesday.

(The committee adjourned.)