

Draft Discussion Paper on Bill C-6 the Canada Consumer Product Safety Act

**Prepared by Shawn Buckley, president of the Natural Health
Products Protection Association** on February 18, 2009.

Discussion Paper Only

This is a discussion paper only and does not reflect the position of the NHPPA or of the NHPPA Advisory Board. The thoughts and comments are those of the author, Mr. Shawn Buckley and are intended to encourage Canadians to read Bill C-6 and to foster discussion.

This is an initial discussion paper only. The author expects that as feedback is received and further study of the Bill is undertaken, that the opinion of the author will broaden.

The NHPPA is inviting comments on this discussion paper. Feedback and comments can be forwarded to the attention of Shawn Buckley or Peter Helgason at info@nhppa.org.

For media enquiries only, contact the Natural Health Products Protection Association at 250-377-4930.

Background

On January 29, 2009, Bill C-6 passed first reading in the House of Commons. A copy of the Bill can be found at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3633883&Language=e&Mode=1>. Bill C-6 is almost identical to Bill C-52 which had been introduced into the 39th Parliament on April 8, 2008.



The Differences between Bill C-51 and C-6

Prior to the election there was a broad citizen revolt against Bill C-51, an act to amend the *Food and Drugs Act*. To identify the main concerns, our critique of Bill C-51 can be downloaded at http://nhppa.org/?page_id=27.

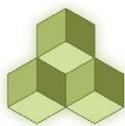
It is important to note that Bill C-6 contains enforcement and penalty provisions very similar to Bill C-51 except that Bill C-6 goes further with the addition of the administrative penalties sections. As discussed below, the enforcement and penalty provisions of Bill C-6 raise serious questions about the rule of law and procedural fairness. As with Bill C-51, Canadians have reason to be concerned over Bill C-6.

Relevance to the Natural Health Community

Bill C-6 currently does not cover Natural Health Products. Section 4(1) of the Bill sets out that the Bill does not apply to consumer products listed in Schedule 1 of the Bill. Schedule 1 of the Bill includes in its list: “Drugs within the meaning of section 2 of the *Food and Drugs Act*”. Natural Health Products are “drugs” under the *Food and Drugs Act* and consequently are currently exempted from the application of Bill C-6.

Although Bill C-6 does not “currently” apply to Natural Health Products, the Bill poses a threat to Natural Health Products in two ways:

1. **Bill C-6 could be made applicable to Natural Health Products by a simple regulatory amendment.** Regulatory amendments do not need the approval of Parliament. Section 36(1)(c) of the Bill allows the Government to amend Schedule 1 to make Bill C-6 apply to drugs (which includes Natural Health Products) by passing a regulation. This puts Canadians in an awkward position. After successfully fighting Bill C-51 in 2008, they could find Natural Health Products threatened by the same provisions found in Bill C-51 applied through Bill C-6.



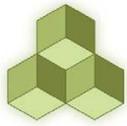
Bills such as Bill C-6 are carefully drafted and it is fair to assume that the power to expand the Bill to cover things such as drugs and Natural Health Products without Parliament's supervision is deliberate. On this point it is important to note that the *Hazardous Products Act* which Bill C-6 will replace does not apply to drugs. The *Hazardous Products Act* was drafted to ensure that drugs could not be included without Parliament's approval;

2. **if Bill C-6 passes, a precedent is set. It is completely unrealistic to assume that similar enforcement provisions and penalties would not be applied to drugs and Natural Health Products.** As discussed below, Bill C-6 provides Health Canada with dramatically expanded powers to:

- a. search private property without a warrant;
- b. seize private property without Court supervision;
- c. destroy private property without Court supervision;
- d. take control of businesses without Court supervision;
- e. in some circumstances to keep seized private property without a Court order;
- f. impose penalties that manufacturers, distributors and retailers in the natural health community could not survive.

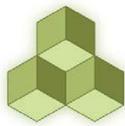
If Bill C-6 becomes law, then Health Canada inspectors will have two sets of powers. One set for foods, drugs, medical devices and cosmetics, and another set for consumer products. Their powers concerning consumer products will be dramatically more powerful than their tools for foods, drugs medical devices and cosmetics. Since it is beyond question that drugs carry a much higher risk profile than consumer products, how long will it be before Health Canada will credibly argue that they need the same powers for “drugs”? From a public policy perspective it would make no sense for Health Canada to have less power to protect public safety for drugs than they have for less risky consumer products.

Bill C-6 would represent a dramatic precedent of a move away from the rule of law, and towards unaccountability for bureaucratic incursion into privacy and property rights.



Summary of Points Discussed In This Paper

- Bill C-6 is being promoted as necessary to protect our families. However, under the existing law the State can already:
 - ban or restrict any consumer product under threat of million dollar fines and two year jail sentences under the *Hazardous Products Act*;
 - make immediate orders banning or restricting any consumer product if there is a significant risk to health or safety. In addition to fines and imprisonment for non-compliance, the State can apply to the Court for an injunction which brings police enforcement of the order, and
 - prosecute for criminal negligence or homicide under the *Criminal Code*. In some cases this can result in penalties of life imprisonment.
- The real change brought about by Bill C-6 is not that it protects consumers, as the current law already grants the State significant powers to protect safety. Rather the real change is the abolition of procedural safeguards citizens currently enjoy.
- Bill C-6 abolishes the law of trespass thus allowing the State access onto private property without any legal recourse.
- Bill C-6 for the first time in Canadian history allows warrants to be issued to search private homes without evidence of criminal wrong doing.
- Bill C-6 allows the State to seize property without a Court order, without reporting the seizure to a Court, and for an indefinite period.
- Bill C-6 allows the State to assume control over the movement of private property without a Court order and without a safety concern.



- The search and seizure powers in Bill C-6 are probably unconstitutional for violating the right found in section 8 of the *Canadian Charter of Rights and Freedoms* to be free from unreasonable search and seizure.
- Persons can be fined and have property forfeited to the State for administrative violations. Persons so charged have no right to have a Court determine their guilt or innocence. Guilt is determined by the Minister. There is no defence of due diligence or of honest but mistaken belief. There does not have to be a safety risk to be charged with an administrative offence. The Minister who determines your guilt or innocence can keep seized property if he/she finds you guilty.
- All businesses manufacturing, selling or distributing consumer products are saddled with additional red tape and expense regardless of whether or not there is a safety concern.
- Retailers and distributors of consumer products become liable for product labelling and instructions.
- Some consumer products such as sporting goods may have to be removed from the market for violating the safety provisions of the Bill.
- The Provinces are allowing the Federal Government to regulate in the Provincial area of property and civil rights.
- The federal cabinet can incorporate documents from foreign governments or organizations as law by referring to them in regulations. This will remove Parliamentary scrutiny on issues that could fundamentally change the ground rules for the consumer product industry. If foods and Natural Health Products were added to the ambit of the Bill by amending Schedule 1, this would allow for the implementation of foreign standards such as CODEX by passing a regulation.



The Property and Privacy Rights Affected by the Bill are Broad in Scope

The Bill has a very wide application. Section 2 of the Act contains the following definitions:

“consumer product” means a product, including its components, parts or accessories, that can reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes its packaging.

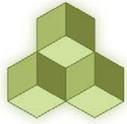
“article to which this Act or the regulations apply” means

- (a) a consumer product;
- (b) anything used in the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of a consumer product; and
- (c) a document that is related to any of those activities or a consumer product.

“Consumer product” covers anything from start to finish that makes its way into the hands of consumers, even if it is just a part of a consumer product. **A product remains a “consumer product” after it is purchased by the consumer.** The definition is not limited to apply only to consumer products prior to sale to consumers.

“Article to which this Act or regulations apply” covers all consumer products and all property including equipment, buildings, vehicles, media outlets, and labs that are used in the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of a consumer product.

In discussing the broad powers the new law gives the State to seize and destroy property without any compensation, it is important for Canadians to realize that the new law applies to:



- **most items purchased by consumers regardless of cost to the consumer, and**
- **a very wide range of commercial property including buildings, media outlets and vehicles that are not themselves “consumer products” and which pose no risk to the consumer.**

Consumers are not being told that as the new law is currently written, products they purchased may be subject to seizure without compensation.

Business owners are not being told that the new law gives the State sweeping powers to control and seize their property without a warrant and without having to report to a Court.

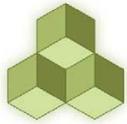
Context for the New Law – is it necessary to take away freedoms to protect us?

New laws are supposed to serve a public purpose. In this case the State is communicating that the new law is necessary to protect our families from dangerous consumer products.

This raises the question: **are we so unsafe without the new law that we legitimately need the new law to protect us?**

For citizens to form a realistic opinion on this, it is necessary to understand the powers the State currently has to protect consumers from dangerous products. As outlined below the State currently can:

- ban or restrict any consumer product under threat of million dollar fines and two year jail sentences under the *Hazardous Products Act*;
- make immediate orders banning or restricting a consumer product if there is a significant risk to health or safety. In addition to fines and imprisonment for non-compliance, the State can apply to the Court for an injunction which brings police enforcement of the order, and



- prosecute for criminal negligence or homicide under the *Criminal Code*. In some cases this can result in penalties of life imprisonment.

With these tools already in place, the question arises as to what “other” powers are necessary to protect us?

Bill C-6 adds new powers. However, the real significance is that it allows the State to control and destroy private property without the review and supervision of the Courts or of other independent review boards. This raises another question: considering the sweeping powers the State already has to “protect” us, is it necessary to take away the independent supervision of the Courts that citizens have traditionally relied upon to “protect” citizens from the State?

Put another way: if the State already has all the powers necessary to ensure that consumer products are safe, how are we protected by allowing the State to control, seize and destroy private property without the independent supervision of the Courts that citizens currently enjoy?

These are questions of fundamental importance that need to be addressed as people read and consider the need for the sweeping State powers found in Bill C-6. We look forward to input on these questions as we try to formulate answers.

The Hazardous Products Act

This Act can be found at http://laws.justice.gc.ca/en/ShowFullDoc/cs/H-3//20080514/en?command=HOME&caller=SI&search_type=all&shorttitle=%22hazardous%20products%20act%22&day=14&month=5&year=2008&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50.

The *Hazardous Products Act* (the “HPA”) currently gives the State significant powers to protect consumers. Under this Act the State can:

- prohibit the advertising, sale or importation of a consumer product;



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There's more than one way of looking at health

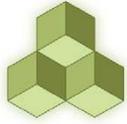
- put restrictions on the advertising, sale or importation of a consumer product;
- if there is a significant risk to health or safety, **make an order prohibiting or restricting the advertising, sale or importation of a consumer product**, and
- demand any information from a manufacturer to determine the safety of a product.

Although the State has broad powers to make immediate orders to stop the sale of any hazardous product, the HPA also protects the property owner by having procedural safeguards that comply with the rule of law. These include provisions that:

- orders made for safety reasons expire after 14 days unless they are approved by the Governor in Council (i.e. the Federal Cabinet). This gives the State 14 days to determine if there really is a health risk in the situation where an order was made as a precaution;
- the order must be tabled in Parliament for review, and
- if the order is confirmed the property owner can apply to an independent Review Board to contest the order. In this way the rule of law is respected. The State cannot affect property rights without an independent review.

It is an offence under the HPA to ignore an interim order. Penalties include fines of up to a million dollars and/or imprisonment of up to two years for each violation.

Although there are significant penalties under the HPA to ensure compliance with orders made to protect consumer safety, it needs to also be kept in mind that the State can apply to the Federal Court for an injunction if an order is ignored. This can be done quickly. It enables police intervention to enforce the Court's order. The property owner is protected as the Court will consider all of the evidence concerning safety and can compensate the property owner if it is eventually determined that there was not a safety risk.



For the purposes of this Discussion Paper I should add that I am not certain that the Board of Review provisions would apply to an interim order under the HPA. There is some ambiguity in the wording of that Act. I have only done cursory research and have not found a case to resolve that ambiguity. It is my current opinion based on the wording of the HPA that the Board of Review provisions apply to interim orders. I look forward to feedback on this issue.

The Criminal Code Criminal Negligence Provisions

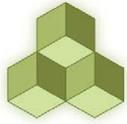
Under section 219 of the *Criminal Code*, a person or company commits criminal negligence if they do anything or fail to do anything it is their duty to do which “shows wanton or reckless disregard for the lives or safety of other persons.” This means that if a person or company sold a consumer product which they knew was not safe or which they should have known was unsafe, they are committing a criminal offence and are subject to the penalties for criminal negligence found in the *Criminal Code*.

The penalties for criminal negligence vary depending upon the harm caused. If bodily harm is caused the maximum penalty is imprisonment for 10 years. If death is caused the maximum penalty is imprisonment for life. Persons who cause death by criminal negligence can also be charged with homicide under section 222(5)(b) of the *Criminal Code*. The penalties for homicide vary depending upon whether the homicide is characterized as murder, manslaughter or infanticide. If the criminal negligence is characterized as murder, the minimum penalty is life imprisonment.

The *Criminal Code* penalty of life imprisonment for criminal negligence and murder is the most severe penalty permitted in our Justice System.

Civil Penalties

Anyone harmed by a consumer product can sue for damages. Arguably it is the threat of bankruptcy posed by law suits that have historically ensured that



consumer products are safe. Any person or company that sells a dangerous product faces bankruptcy regardless of whether they knew the product was unsafe.

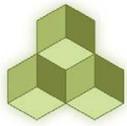
The Abolition of the Law of Trespass

As a British Colony we inherited the British Common Law on trespass. Indeed, it has been one of the foundations of our right to own and enjoy property that no-one, including the police, can come onto our property or interfere with our property. We consider this to be such a fundamental freedom that when suing for trespass upon our land, we do not even have to prove we suffered any damage or loss. The law has traditionally held the right to private enjoyment of our land to be so significant, that the mere trespass upon it is enough to get a civil judgment.

Our right to enjoy property free of trespass is not limited to land. We have the right to enjoy our personal property without interference. Anyone who interferes with our personal property commits trespass.

We hold the right to the private enjoyment of property as so important, that we have placed specific provisions in the *Criminal Code* to protect it. These include:

- section 177 which makes it a criminal offence to trespass near a private home at night;
- section 38 which makes it an offence to take away our personal property. It also allows us to prevent a trespasser from taking our personal property without worrying about being charged with assault;
- section 39 which protects us from criminal prosecution for defending our personal property;
- section 40 which enables us to use as much force as is necessary to prevent trespassers from entering our homes, and
- section 41 which deem trespassers to commit assault if they resist attempts to remove them from a house or land. This section also allows persons to use force to remove persons from their homes or land.



Bill C-6 abolishes the law of trespass. Subsection 20(4) provides:

An inspector who is carrying out their functions or any person accompanying them may enter on or pass through or over private property, **and they are not liable for doing so.**

Note that under subsection 20(4), an inspector is not limited to investigating the property owner. An inspector or any person accompanying an inspector can trespass on your property if investigating another person's property and you have no recourse.

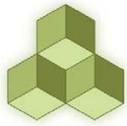
Currently consumer safety is protected under the *Hazardous Products Act*, the *Criminal Code* and Civil Law while respecting the law of trespass. **This raises the question as to whether it is necessary to abolish fundamental property rights under the justification of “consumer protection”.** I look forward to comments on this question.

The Right to Seize Property Without a Court Order, Without Reporting the Seizure to a Court, and for an Indefinite Period

Section 20 provides in part:

20(1) Subject to subsection 21(1), an inspector may, **for the purpose of verifying compliance or preventing non-compliance with this Act or the regulations**, at any reasonable time enter a place, including a conveyance, in which they have reasonable grounds to believe that a consumer product is manufactured, imported, packaged, stored, advertised, sold, labelled, tested or transported, or a document relating to the administration of this Act or the regulations is located.

20(2) The inspector may for the purpose referred to in subsection (1),



- (a) examine or test anything – and take samples free of charge of an article to which this Act or the regulations apply – that is found in the place;
- (d) seize and detain for any time that may be necessary
 - (i) an article to which this Act or the regulations apply that is found in that place, or
 - (ii) the conveyance;

Please note that these sections do not allow an inspector to enter into your home. To enter a private home an inspector has to apply for a warrant (see section 21).

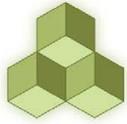
These sections provide that, with the exception of a private home, inspectors can enter on any property in which the inspector believes a consumer product is manufactured, imported, packaged, stored, advertised, sold, labelled, tested or transported. This would include:

- all media outlets that accept advertising of consumer products;
- private property (excluding homes) in which a consumer product is stored;
- all commercial property which is in any way connected with consumer products or parts of consumer products, and
- conveyances such as trains and trucks.

Subparagraph 20(2)(a) permits the seizure of samples for testing. This means that subparagraph 20(2)(d) is not referring to the taking of samples for testing.

Under subparagraph 20(2)(d) there is no limit to:

- **how much property can be seized, and**
- **how long the property can be seized.**



There is also:

- **no requirement for a warrant prior to seizure;**
- **no requirement to report the seizure to a Court;**
- **no mechanism to have the seizure and on-going detention reviewed by a Court or independent review board (as in the *Hazardous Products Act*), and most importantly**
- **THERE DOES NOT HAVE TO BE A HEALTH RISK BEFORE THERE IS A SEIZURE AND DETENTION.** All that is required is that the seizure be for the purpose of verifying compliance or preventing non-compliance.

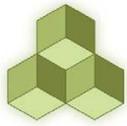
Considering that the stated purpose of the Act is to protect our safety, it is curious that there does not have to be a health risk for there to be a seizure. If we are being asked to surrender our property rights in the name of safety, we should consider when analysing this Bill whether there should be a safety requirement for there to be a seizure and unlimited detention.

Under the *Hazardous Products Act* which Bill C-6 replaces, property owners have the right to apply to Court for the return of seized property. This raises the question as to why Bill C-6 takes away the rights of property owners to apply to Court for the return of seized property.

The Private Home Problem

Bill C-6 represents a startling removal of our freedom from State intrusions into our private homes.

The right to be free from State Agents coming into our private homes uninvited has been a fundamental right for all of Canada's history. Presently, the police or Health Canada Inspectors, can only get search warrants to enter our private homes if they have some evidence of criminal wrong doing.



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Currently a Health Canada Inspector who wants to search your private home has to abide by the same rules as the regular police. The Inspector has to apply for a search warrant under s. 487 of the *Criminal Code*. Section 487 includes:

487(1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

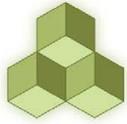
- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
- (c.1) any offence related property,

May at any time issue a warrant...

Our current law strikes a balance between our need to be free from police intrusion into our private homes, and the State's interest in investigating crime. This balance is struck by only allowing the search of our private homes when there is evidence placed before a justice of criminal wrong doing.

Bill C-6 represents an astonishing removal of our right to be free from the police searching our homes unless there is evidence of criminal wrong doing. Subsection 21(2) of the Bill allows a justice of the peace to grant Health Canada Inspectors warrants to enter our homes if:

- (a) the inspector has reasonable grounds to believe a consumer product is stored in the home [everyone's home is filled with consumer products so this really is not a condition]. This condition can also be met if the Inspector has reasonable grounds to believe a consumer product is manufactured, imported, packaged, advertised, sold, labelled, tested or



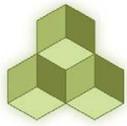
- (b) transported, or a document relating to the administration of Bill C-6 or of the regulations to Bill C-6 is located in the home;
- (c) Entry into the home is necessary for the Inspector to verify compliance or prevent non-compliance with the Act or regulations, and
- (d) Entry into the home was refused or there are reasonable grounds to believe that it will be refused or to believe that consent to entry cannot be obtained from the occupant.

Allowing Inspectors the right to enter our private homes without having evidence of criminal wrong doing, is a significant departure from the right to privacy we currently enjoy. Before this is given up, we should ask:

- 1. should Health Canada Inspectors have more power to enter our private homes than the police which investigate much more serious matters under the *Criminal Code* and other Federal Laws?**
- 2. are we in such danger that we need to give up what has traditionally been held as a fundamental freedom?**
- 3. what is wrong with the current power Health Canada Inspectors share with other law enforcement persons under s. 487 of the *Criminal Code*. Are there examples where that rather broad power was insufficient for an investigation?**

In answering these questions, it may be helpful to keep in mind that Bill C-6 was written by Health Canada, the very State Bureaucracy which will benefit from the new powers. We do not allow the police to write the *Criminal Code* for much the same reason we do not allow taxpayers to write the tax laws.

I do not expect that a search warrant of a private home issued under Bill C-6 would stand up to a challenge in Court under s. 8 of our *Charter of Rights and Freedoms*. Section 8 reads: “Everyone has the right to be free from unreasonable search and seizure”. My expectation based on having made many s. 8 challenges in Court, is that the Courts will not allow our private homes to be searched without evidence of criminal wrong doing. However, this is no protection for those of us



who may have our private homes searched under Bill C-6 and who cannot afford to make costly constitutional arguments in Court. Our best protection against unconstitutional laws is to ensure that our elected representatives do not pass them.

The State can Assume Control over the Movement of Private Property Without a Court Order and Without a Safety Concern

Paragraph 20(2) includes:

- (2) The inspector may, for the purpose referred to in subsection (1),
 - (e) order the owner or person having possession, care or control of an article to which this Act or the regulations apply that is found in the place – or of the conveyance – to move it or, for any time that may be necessary, not to move it or to restrict its movement;

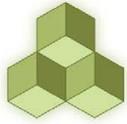
Section 24 of the Bill reads:

24 An inspector who seizes a thing under this Act shall release it if they are satisfied that the provisions of this Act and the regulations with respect to it have been complied with.

The purpose set out in subsection 20(1) is “the purpose of verifying compliance or preventing non-compliance with this Act or the regulations”.

As outlined above an “article to which this Act or the regulations apply” includes all consumer products and all property including equipment, buildings, vehicles, media outlets, and labs that are used in the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of a consumer product.

This means that an inspector can tell property owners to not move private property to check compliance or to prevent non-compliance regardless of how



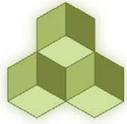
trivial the compliance issue is and regardless of whether or not there is a health risk. I would expect that property owners would be surprised that the movement of their property can be restricted without the presence of even an imagined health risk.

The State can Assume Control of Private Property, Including Land, Without a Court Order and Without a Safety Concern

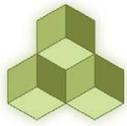
Bill C-6 enables the State to shut down businesses and to control public property for non-health reasons such as over a testing disagreement with the State or if the State believes there is a contravention of the Act or Regulations. The “contravention” does not have to be one that creates a health risk.

For greater clarity, these new powers permit the State to take control of business and of private property for trivial violations of the Act or Regulations even if those violations do not in any way pose a safety problem. Currently the State has to apply to a Court for a warrant to gain control of private property for alleged offences. The property owner is currently protected as the Court will only issue a warrant on evidence under oath that meets a legal test. Property seized under a warrant has to be promptly reported to the Court. The Court then supervises the holding of the property to ensure it is returned if proper to do so. Bill C-6 removes these fundamental safeguards. In effect, Bill C-6 moves us away from the rule of law. The sections to review are:

- 30.** (1) If an inspector believes on reasonable grounds that a consumer product is a danger to human health or safety, they may order a person who manufactures, imports or sells the product for commercial purposes to recall it.
- (2) The order shall be provided in the form of a written notice and must include
- (a) a statement of the reasons for the recall; and
 - (b) the time and manner in which the recall is to be carried out.



- 31.** (1) An inspector may order a person who manufactures, imports, advertises or sells a consumer product to take any measure referred to in subsection (2) if
- (a) that person does not comply with an order made under **section 12** [section 12 concerns orders by the Minister for testing and/or the production of documents] with respect to the product;
 - (b) the inspector has made an order under section 30 with respect to the product;
 - (c) the inspector believes on reasonable grounds that the product is the subject of a measure or recall undertaken voluntarily by the manufacturer or importer; or
 - (d) the inspector believes on reasonable grounds that there is a contravention of this Act or the regulations in relation to the product.
- (2) **The measures include**
- (a) **stopping the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation** of the consumer product or causing any of those activities to be stopped; and
 - (b) **any measure** that the inspector considers necessary **to remedy a non-compliance with this Act or the regulations, including any measure that relates to the product that the inspector considers necessary in order for the product to meet the requirements of the regulations** or to address or prevent a danger to human health or safety that the product poses.
- (3) The order shall be provided in the form of a written notice and must include
- (a) a statement of the reasons for the measure; and
 - (b) the time and manner in which the measure is to be carried out.
- 32.** If a person does not comply with an order made under section 30 or 31 in the time specified, **the inspector may**, on their own initiative and at that person's expense, carry out the recall or measure required.



The Move Away from the “Significant Risk” Test

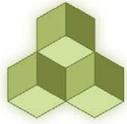
As outlined immediately above, sections 30 to 32 appear to permit the State to take control over businesses and private property. This can be to address a “danger to human health or safety” or “to prevent a danger to human health or safety”.

At first this sounds reasonable as the entire purpose is to protect safety. One concern may be, however, that “danger” is not qualified. Many consumer products inherently pose a danger, some sporting equipment being obvious examples. As written the State can take control of businesses and private property for **any danger, however trivial**. This raises the question as to whether or not the State should be able to override private property rights for trivial safety concerns.

Under the current *Hazardous Products Act*, the State cannot make orders unless there is a “significant risk, direct or indirect, to health or safety”. By requiring the risk to be “significant”, the *Hazardous Products Act* protects property owners by ensuring that the State can only override their property rights when there is a “significant” danger. In analysing Bill C-6 the question needs to be addressed as to: whether the State should be allowed to take control of private property without there being a significant risk, as is currently the case.

In considering whether inspectors should have the power to control private property without a “significant” risk, it should be kept in mind that Bill C-6 permits the Minister to make the same interim orders that can be made under the *Hazardous Products Act* if there is a “significant” risk.

It is curious that under Bill C-6 inspectors can make orders for trivial suspected violations that do not create any health risk. These orders have no time limit. Business owners can be destroyed by fines for non-compliance. At the same time, the Minister can only make orders if there is a “significant danger”. Further, the Minister’s orders cease after 14 days unless approved by the Governor in Counsel. In addition, the Minister’s orders must be tabled in the House of Commons within 15 days to ensure they can be scrutinized by Parliament.



Bill C-6 creates the unusual anomaly that the Minister's servants, the inspectors, have more power than their master, the Minister. This type of anomaly may serve to explain why we generally do not allow the police to write their own laws.

The Abolition of the Independent Review Board

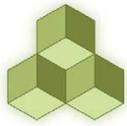
Under the *Hazardous Products Act*, State actions and orders affecting private property can be appealed to a Board of Review (see section 8 and 9 of that Act).

An appeal to the Board of Review under the *Hazardous Products Act* is like an appeal to a Court. The Board of Review has the power to:

- compel witnesses to attend before the Board of Review;
- compel persons to produce documents;
- compel witnesses to testify under oath;
- hire experts to assist it to make a fair determination, and
- employ clerks and court reporters as necessary to ensure a proper hearing.

It is clear that under the *Hazardous Products Act* property owners are protected by having an independent Board of Review which acts like an independent Court to adjudicate between the State and the property owner. In this way the current system upholds the rule of law.

Bill C-6 does not have the Board of Review procedural safeguard. There are two types of orders under Bill C-6: inspector orders and Minister orders (see ss. 30, 31, and 37). The Ministerial orders are a repetition of the power to make orders found in the *Hazardous Products Act*. However, unlike *the Hazardous Products Act*, there is no Board of Review.



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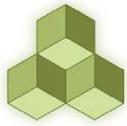
Under Bill C-6 property owners can ask for a review of inspector's orders. However, that review is not conducted by an independent Board of Review with Court powers to ensure a fair hearing. Rather, reviews are to be done by "review officers". Subsection 34(5) suggests that "review officers" will be inspectors other than the inspector who made the original order. This is like asking one police officer to review the order of another police officer in the same department.

The review officer does not have any of the powers the Board of Review has under the *Hazardous Products Act*. They cannot compel witnesses to testify. They cannot compel the production of documents. They cannot take evidence under oath. They are not given the authority to hire experts.

There is also a very short time limitation in Bill C-6 which may prevent property owners from fairly stating their case. Under the current *Hazardous Products Act* a person has 60 days to ask for a review. They can ask for a review sooner. However, if they need 60 days to get the necessary evidence together, they can take that time. Under Bill C-6, property owners now only have a **maximum of 7 days to put their case together or "any shorter period that may be specified in the order"** (see s. 34(2)). Seven days or less is a very short period of time for which to gather and submit evidence for review of decisions that can destroy a business and which can involve the seizure of private property.

In assessing the removal of the Board of Review safeguard that we currently enjoy, the question needs to be asked as to: whether it is necessary to restrict property owners to 7 days or less to present a case as to why their property should not be seized or their businesses impacted?

It is also germane to determine why the Review Board safeguard should be removed so that business persons whose businesses may be seized cannot apply to an independent body for a review.



Are the Powers to Take Control of Businesses and to Seize Private Property for Alleged Contraventions Legal?

Section 8 of the *Canadian Charter of Rights and Freedoms* gives us the right to be free from unreasonable searches and seizures. These rights apply to both individuals and to businesses.

In determining whether State rights to seize property are “reasonable”, Courts have drawn a distinction between administrative and criminal seizures. Administrative seizures are seizures that are necessary for the State to check to see if the rules are being followed. So for example, the taking of samples for testing is generally considered to be a legitimate administrative seizure.

For administrative seizures the State is not taking control of business premises or stock. Rather, small samples are taken to check for compliance. Courts generally do not require search warrants for administrative seizures.

Criminal seizures are seizures made by the State when the State believes that an offence has occurred or is occurring. Criminal seizures usually involve the taking control of private property for evidence and/or to prevent the continuation of an offence. Criminal seizures are by nature intrusive.

Because criminal seizures encroach upon the property owner’s rights, Courts have found that to be “reasonable” criminal seizures can only occur if:

- there is a search warrant or other prior authorization for the search and seizure;
- the warrant or other prior authorization must be given by an independent person who is capable of acting judicially, and
- the issuance of the warrant or other authorization is based on an objective standard. Search warrants cannot be issued because an individual subjectively feels one should be issued.



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The leading case on this point is *Hunter v. Southam*, [1984] 2 S.C.R. 145.

Because Bill C-6 allows the State to take control of businesses and to seize property when “the inspector believes on reasonable grounds that there is a contravention of this Act or the regulations in relation to the product”, it probably violates the *Charter of Rights and Freedoms*.

I suggest that Bill C-6 probably violates the *Charter of Rights and Freedoms* because it authorizes a criminal seizure without a warrant issued by an independent person based on an objective standard.

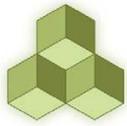
It is important to note that an almost identical seizure power was declared unconstitutional in the case of *C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General)*, [1987] F.C.J. No. 826 (T.D.). This means that the Government is currently trying to pass a law giving the State authority to seize private property in a way that has been found to be unconstitutional. When reviewing Bill C-6 the question should be asked as to: **why we would support a law which probably violates our right to be free from unreasonable search and seizure?**

An ancillary question would be: is it necessary to give up the current protection we have whereby the State has to apply for a warrant prior to seizing our property. In considering this question, it is important to note that it is not difficult for the State to apply for warrants. Indeed, an inspector does not even have to go to Court. They can fax or phone in under what is called the telewarrant process. This process is designed to enable inspectors to act quickly, while at the same time maintaining the rule of law.

The Creation of Administrative Offences

Bill C-6 creates two types of offences: criminal and administrative.

The new administrative offences create some interesting ramifications for property owners.



Section 56 sets out that for administrative offences **you cannot** defend yourself by saying you exercised due diligence or were honestly and reasonably mistaken.

Due diligence is defined in Black's Law Dictionary as:

“such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particularly circumstances”.

All of this means that you can be convicted of an administrative offence even if:

- you were doing everything that a responsible business person would be expected to do, and
- you honestly believed there was no violation of the Acts or Regulations.

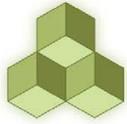
Further, to convict you the State does not have to prove guilt on the usual standard of guilt beyond a reasonable doubt. Rather the standard is the lower civil standard of the balance of probabilities (see s. 57).

Aside from being convicted and penalized:

- when acting responsibly;
- without knowledge of any wrongdoing, and
- on the lower civil standard of a balance of probabilities,

where the administrative penalties get interesting is that they allow the State to keep private property upon an administrative conviction. This is found at section 61 which provides:

61. Anything seized under this Act in relation to a violation is, at Her election, immediately forfeited to Her Majesty in right of Canada and may be disposed of, at the expense of its owner or the person who was entitled to possess it at the time of its seizure, if



- (a) the person is deemed by this Act to have committed the violation; or
- (b) the Minister, on the basis of a review under this Act, has determined that the person has committed a violation.

Finally, it is the Minister who determines if you are guilty of an administrative offence. Once you are served with a notice of violation you have to request a review by the Minister to contest the charges (see s. 50). **You do not get to go to Court to have an impartial Judge determine whether or not you are guilty or innocent.** Rather, the Minister makes the decision. **Remember it is the Minister who gets to keep your property if he/she finds you guilty.**

Under the administrative provisions you can be fined and have your property permanently taken by the State without a Court finding you guilty. Indeed, you have no right to a Court hearing.

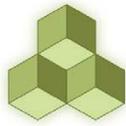
This is in stark contrast to the current *Hazardous Products Act* under which Courts determine guilt or innocence and property issues.

Administrative violations relate to any violation of the Act or Regulations. There does not have to be a safety risk.

In assessing these administrative provisions there should be dialogue concerning whether the State should be allowed to fine property owners and keep property without determinations of guilt by a Court as is currently required.

We are Responsible for the Costs of Seizures and Detentions Regardless of Whether the Seizures and Detentions were Justified

There is a long-standing principle in Canadian law that the State cannot take a citizen's property without compensation. It is also unprecedented for the State

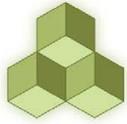


to invoice citizens for the State's cost in seizing our property. Bill C-6 moves away from this tradition with the following provisions:

- s. 20(2)(a) allows the State to take samples for testing “free of charge”;
- s. 23 makes the property owner responsible for the State's cost in seizing, removing and storing the property owner's property. Alternately, the State can direct the property owner to move and store the owner's property at a place directed by an inspector at the owner's expense;
- s. 25 makes the property owner responsible for the cost of destroying property that is forfeited to the State under that section;
- s. 27 makes the property owner responsible for the cost of destroying seized property under s. 27;
- s. 32 makes the property owner responsible for the State's cost in forcing a recall or taking other measures such as taking control of business premises. This is the case even if it turns out that the State was wrong in forcing a recall or taking other measures, and
- s. 61 makes the property owner responsible for the cost of destroying property that is forfeited to the State under that section.

When one considers that there is no limit to the amount or value of property seized, or for the length of time the State can hold the property, it is clear that the costs to the property owner could be significant. By placing the cost on the property owner, there is no incentive for the State to move quickly concerning stored property, as there is no expense to the State.

Aside from the significant financial damage that consumers or businesses face if their property is seized and detained, these changes raise some interesting philosophical issues. Under the *Hazardous Products Act* the State does not currently have the power to charge citizens for the costs of seizing, storing and destroying private property. Are we currently facing such serious safety issues that it is necessary for us to give up the fundamental right we have to



compensation if the State takes our property? I look forward to comments on this issue. I also look forward to comments on all of the other issues raised in this Discussion Paper.

Additional Costs and Responsibilities for Small Businesses

Bill C-6 will impose additional costs and responsibilities on small businesses. Unlike the *Hazardous Products Act* in which the responsibilities of businesses are clear, Bill C-6 introduces uncertainty.

The uncertainty begins with the following definition in section 2:

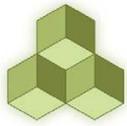
“danger to human health or safety” means any unreasonable hazard – existing or potential – that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual’s health – including an injury – whether or not the death or adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.

This definition is crucial as it affects the responsibility of all businesses connected with consumer products.

Unfortunately, the definition is convoluted and unclear. To make it more manageable I think that it is fair to distil it as follows:

“danger to human health or safety” means:

any unreasonable hazard posed by a consumer product during normal use, which may reasonably be expected to:
cause death **or** an adverse effect on health, **including injury, and**



includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.

The first problem with the definition is that it is unclear what “unreasonable” means. Read in the context of the definition it seems that an “unreasonable hazard” includes the hazard that over the life of a consumer product can be reasonably expected to cause an injury of any type. The definition includes the words “or have an adverse effect on that individual’s health – including an injury”. Injury is not qualified by words such as “serious” so it means any injury, however trivial.

The second problem with the definition involves the last part reading:

and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.

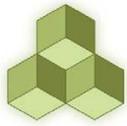
The word “chronic” is not defined leaving us with normal dictionary meanings such as constant or continuing over a long time. “Adverse effect on human health” is not defined or qualified. We are left with any adverse health effect whether great or small. The only qualifier is “chronic” so the injury must continue for a long time.

It appears that the words “danger to human health or safety” could include any injury, however small, caused by a consumer product over the expected life and use of the product.

Are many Consumer Products Banned?

Section 7 bans manufacturers or importers from manufacturing, importing, advertising or selling consumer products that are a “danger to human life or safety”

Section 8 prohibits anyone from advertising or selling a consumer product that they know is a “danger to human life or safety”. Selling includes distributing.



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Because “danger to human life or safety” as defined by Bill C-6 probably includes any injury, however small, caused by a consumer product over the expected life and use of the product, it may be that many consumer products will have to be removed from the market. The most obvious examples are sports equipment. For example, I live near a ski hill and my family skis and snowboards. I can say from experience that exposure to skis and snowboards leads to injuries. Any admissions clerk at a hospital near a ski hill will tell you the same. Under the current definition of “danger to human life or safety”, the advertising and sale of snowboards is probably an offence.

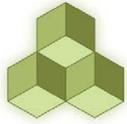
It is unrealistic to think that the intent of Bill C-6 is to prohibit the manufacture, distribution, advertising and sale of sports equipment. However, that may be an unintended consequence caused by the convoluted definition of “danger to human health or safety” in section 2.

Orders to Test, Research and provide Documents without any indication of risk

Under section 12 the Minister can order any manufacturer or importer of a consumer product to conduct tests, compile information, and produce documents to verify compliance or prevent non-compliance with the Act or Regulations.

This could be a useful tool for the Minister to manage risk. It should be noted, however, this section allows the Minister to offload testing costs upon any manufacturer or importer. Further, the Minister can order any testing, even if the testing is not connected to safety, or will not address any safety concern. Finally, the Minister does not have to have any evidence of a safety concern before making an order. The concern is that small businesses targeted under this section could be financially crippled when there are no safety concerns.

Other sections of the Bill enable inspectors to attend at business premises, make inspections, copy documents, and take samples for testing. It may be that section 12 is not necessary, or in the very least should be amended so that its use is limited to where there is evidence of a concern which would require testing or the compiling of documentation.



The Perpetual Documentation Burden

Section 13 of the Bill requires anyone who manufactures, imports, advertises, sells or tests a consumer product to maintain documents.

For each consumer product retailers must keep:

1. the name and address of the person from whom they obtained the product;
2. the location where and the period during which they sold the product, and
3. documents to be prescribed by the regulations yet to be introduced.

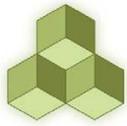
For each consumer product manufacturers, importers, advertisers or testers must keep:

1. the name and address of the person from whom they obtained the product or to whom they sold it or both, as applicable, and
2. documents to be prescribed by the regulations yet to be introduced.

These documents must be kept at the place of business or any other place to be prescribed in the regulations.

There is no time limit for how long these documents must be kept. As Bill C-6 is currently written these documents must be kept in perpetuity.

Bill C-6 is imposing documentation requirements on all businesses, small and large that deal with consumer products. The documentation requirements are imposed across the board with no exemption for small businesses or businesses in low risk areas.



The Reporting to the Minister Burden

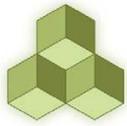
Section 14 requires anyone who manufactures, imports or sells a consumer product to report to the Minister whenever there is an “incident”. An “incident” includes:

- (a) an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury;
- (b) a defect or characteristic that may reasonably be expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury.
- (c) incorrect or insufficient information on a label or in instructions – or the lack of a label or instructions – that may reasonably be expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury.

Using the ski and snowboard example, this would require the ski shop, the distributor, and the ski manufacturer, to report to the Minister every time they become aware of a serious injury caused by a ski or snowboard accident.

Ski shops, distributors, and manufacturers will also be required as soon as Bill C-6 passes to report to the Minister concerning every snowboard. They all have edges which is a “characteristic that may reasonably be expected to result in...a serious injury”. Indeed, not only is this characteristic reasonably expected to result in a serious injury, but as any hospital admissions clerk will tell you, it regularly does.

Section 14 also requires manufacturers and importers following an incident to also report to the Minister concerning any products they manufacturer or import that could be involved in a similar incident. They also have to report “any measures they propose to take with respect to those products”. Staying with the snowboard example, this may require a snowboard manufacturer to identify for the Minister all of their snowboard models and “any measures they propose to take with respect to those products”. Presumably such measures will be measures that are sufficient to make snowboards safe.



The disclosure of confidential business information

Under section 16 the Minister is permitted to disclose confidential business information relating to a consumer product to any person or government that carries out functions relating to the protection of human health or safety or the environment. This includes corporations. The Minister does not need the consent of the person or business to whom the confidential business information relates. Nor does the Minister need to notify the person or business that the Minister has released their confidential information.

The only requirement on the Minister is that the recipient agrees in writing to keep the information confidential.

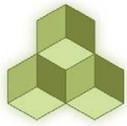
Note, there does not have to be a safety concern or issue before the Minister discloses confidential business information.

This is a departure from the Current *Hazardous Products Act* which prevents the Minister from disclosing confidential information that the Minister forces to be disclosed under that Act.

Retailers and distributors become responsible for ensuring instructions and labelling are sufficient

Section 14 requires anyone who manufactures, imports or sells a consumer product to report to the Minister whenever there is an “incident”. An “incident” includes:

incorrect or insufficient information on a label or in instructions – or the lack of a label or instructions – that may reasonably be expected to result in



an individual's death or in serious adverse effects on their health, including serious injury.

Section 14 requires persons who sell consumer products, including distributors, to report any "incident" to the Minister within two days after the day on which they become aware of the incident. Because the section places a positive obligation to report incidents, retailers and distributors may be ill-advised to try to avoid this requirement by being wilfully blind (i.e. not reading packaging and instructions).

Failure to report to the Minister incorrect or insufficient information on a label or instructions is an offence under section 38. Every day that goes by without reporting to the Minister is a separate offence (see section 41).

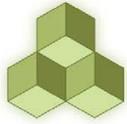
There does not seem to be any allowance for the fact that many retailers and distributors will not be qualified to assess whether the labelling or instructions on consumer products are sufficient.

I do not practice in the area of product liability and civil law, and cannot say whether the legal burden on retailers and distributors concerning the adequacy of labelling created by Bill C-6 could subject them to liability in civil suits.

The Corporate shield is removed and Directors and Officers are liable for Company Offences even if they are not prosecuted

Section 39 provides:

39 If a person other than an individual commits an offence under this Act, any of the person's directors, officers, agents or mandataries who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to the offence and is liable on conviction to the punishment provided for by this Act, **even if the person is not prosecuted for the offence.**



Normally when an act pierces the corporate veil enabling officers, directors and managers to be personally liable for offences committed by employees of the company, the officers directors and managers have to at least be charged with an offence. Section 39 of Bill C-6 makes it clear that directors, officers and managers can be personally charged for the acts of the corporation. However, Bill C-6 goes further and makes directors, officers and managers **liable for the punishments provided for in Bill C-6 even if they are not charged and prosecuted for the offence.**

This means that any time a corporation is charged and convicted, any director, officer or manager who “directed, authorized, assented to acquiesced in or participated in the commission of the offence” can also be held liable **although they were never able to give a defence because they were not charged.**

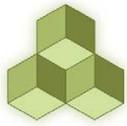
I do not expect that this would survive a challenge under section 7 of *the Canadian Charter of Rights and Freedoms*. Section 7 provides that everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Allowing Trade Agreements to become law without Parliamentary Oversight

Section 2 includes following definition of “government”:

“government’ means any of the following or their institutions:

- (a) the federal government;
- (b) a corporation named in Schedule III of the *Financial Administration Act*,
- (c) a provincial government or a public body established under an Act of the legislature of a province,
- (d) an aboriginal government as defined in subsection 13(3) of the *Access to Information Act*,
- (e) **a government of a foreign state or of a subdivision of a foreign state, or**
- (f) **an international organization of states.**



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(emphasis added).

Defining “government” to include foreign states or international organizations of states such as the United Nations, is important because subsection 36(2) adds the following to the regulation making power of the federal government:

36(2) A regulation made under this Act may incorporate by reference documents produced by a person or body other than the Minister including by

- (a) an organization established for the purpose of writing standards, including an organization accredited by the Standards Council of Canada;
- (b) an industrial or trade organization; or
- (c) **a government.**

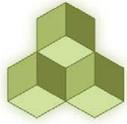
36(4) A regulation made under this Act may incorporate by reference documents that the Minister produces jointly with **another government** for the purpose of harmonizing the regulation with other laws.

These additions allow the federal government to make documents prepared by foreign governments or bodies law in Canada by simply passing a regulation incorporating the document.

Just so that everyone understands what this means I will explain the difference between Acts and Regulations. Acts are documents introduced into either the House of Commons or the Senate. They must pass three readings in both before they can become law. This process ensures that Canadians and their representatives become aware of proposed changes, have them debated in Parliament, and have time to contest them.

Regulations on the other hand are simply published in the Canada Gazette twice and then can be signed into law. Parliament does not vote on regulations.

This change to allow the federal cabinet to incorporate documents from foreign governments or organizations as law by referring to them in regulations will remove Parliamentary scrutiny on issues that could fundamentally change the ground rules for the consumer product industry.



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So for example, the federal cabinet could pass a regulation making Bill C-6 apply to foods and Natural Health Products (by amending Schedule 1) and at the same time adopt the CODEX treaty. Bill C-6 allows this to occur without Parliamentary approval.

These sections are almost identical to corresponding sections in the former Bill C-51. As discussed above, clauses are not inserted into Bills by accident. Because these clauses were not added by accident, the questions are raised:

what purpose is served by removing Parliamentary scrutiny to the adoption of documents from foreign governments and institutions into Canadian Law, and

does the federal cabinet already have specific foreign documents or agreements in mind?

I look forward to feedback on this issue.