

November 23, 2009

Via email

Senate Committee on Social Affairs, Science and Technology
The Senate of Canada
Ottawa, Ontario Canada,
K1A 0A4

To: the Senate Committee on Social Affairs, Science and Technology

I am the Executive Director of Ecojustice Canada (formerly Sierra Legal Defence Fund). Ecojustice is Canada's premier non-profit providing free legal services to protect and restore the environment. From offices at four locations in Canada in three provinces, we are legal counsel on the leading environmental issues across the country, at every level of court.

One component of our work focuses on healthy communities, a component of which seeks to address the intersection between the proliferation of environmentally harmful substances that enter our communities in part through sale and distribution of consumer products. Ecojustice believes that Bill C-6, the *Consumer Product Safety Act* is a necessary advancement in the lax regulation that describes Canada's present approach to consumer products.

The 40 year old *Hazardous Products Act* ('HPA') lacks the tools needed to protect Canadians from the human health and safety threats posed by some products in the modern Canadian marketplace. The United States¹ and the European Union¹ have already modernized their legislation leaving Canada as a potential dumping ground for products that don't meet their standards if Bill C-6 is not brought into force.

Environmental groups like Ecojustice took notice of Bill C-6 in hopes it would require labelling of products containing toxic substances and the eventual replacement of toxic substances with safer alternatives. We are disappointed that such amendments to Bill C-6 were not made but we still fully support Bill C-6 becoming law because it is a vast improvement upon the HPA.

Environmental organizations like Ecojustice can no longer simply focus on what contaminants are being released from sewer pipes and factory stacks because many contaminants impacting the environment and human health can be sourced back to consumer products. As an environment group, we are not experts on safety concerns such as choking or falling hazards, and can not speak to those aspects of consumer safety. But our efforts to protect the environment and human health by banning or reducing releases of toxic, persistent and bioaccumulative substances into the environment has lead us to consumer products, where the substances often originate.

I write to provide you with our submission to inform the Committee's deliberations on this Bill. Below, I address how Bill C-6 will improve consumer safety compared to the HPA. I will make some comparisons to US law. I will also address some of the concerns raised about the inspection and enforcement powers in Bill C-6.

As an overview, however, I advise that notwithstanding our concerns regarding deficiencies of the proposed Bill, as set out above, we believe the risk to consumers posed by further delay justifies the Bill's passage now, without amendment.

General prohibition

The general prohibition¹ in Bill C-6 protects consumers from products that pose a danger to human health and safety due to an 'unreasonable hazard'². The use of the word 'unreasonable' is to make it clear the hazard does not relate to a hazard based on the expected use of the products such as a burn from a stovetop; or an inappropriate use of the product, such as hitting someone over the head with a frying pan. In contrast, the HPA has no general prohibition clause, thus the jurisdiction HPA has over products is limited to products or product characteristics scheduled or regulated under the Act.

Section 15 of the US *Consumer Product Safety Act* has a similar provision. It describes a substantial product hazard as a product defect which... creates a substantial risk of injury to the public.³ Finding a product as such, can lead to public notification and if an 'imminent hazard'⁴ is found, a mandatory recall or various other actions.⁵

Reporting requirements in the event of an incident

Bill C-6 requires manufactures, importers or sellers to report 'incidents' which are occurrences, defects or incorrect or incomplete labelling or instruction information of consumer products resulting, or may reasonably be expected to result, in serious adverse health effects or death.⁶

HPA has no such requirement. It is our understanding that Canadian authorities often only learned of product flaws causing 'incidents' due to the reporting requirements in other countries.

Some witnesses have questioned the requirement in Bill C-6 for manufactures, importers or sellers to report these incidents quickly, initially within two days⁷ with

¹ Section 7

² Unreasonable hazard is used in the definition of 'a danger to human health and safety' in section 2.

³ US *Consumer Product Safety Act* paragraph 15(a)(2)

⁴ US *Consumer Product Safety Act* paragraph 12 (a)(3). A consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

⁵ US *Consumer Product Safety Act*. Paragraphs 12 (b)(1) and 15 (c)(1)

⁶ Section 14

⁷ Subsection 14(2)

a more detailed report in 10 days, after they became aware of the incident.⁸ The second report will give the manufacture or importer time to further investigate the incident link to the product. This quick turn around is needed to minimize further incidents and protect the public.

Section 15 of the US *Consumer Product Safety Act* requires manufactures, distributors or retailers of products, “who obtains information which reasonably supports the conclusion such product,” among other possible things, “creates an unreasonable risk of serious injury or death, to immediately inform the Commission,” which is the US Consumer Product Safety Commission.

Testimony given has suggested that this allows companies time to investigate since the requirement to report immediately is not tied to an ‘incident’ but ‘information they obtain’. That is open to interpretation, but it should be noted that allowing time to investigate could result in unnecessary delay and further harm as we witnessed recently in the US when over one million strollers were recalled after a company came forward and revealed that they had received 15 reports of children’s fingers getting stuck in the strollers hinges resulting in 12 fingertip amputations.⁹ If the US required reporting after the first ‘incident’, as required in Bill C-6, 11 fingers may have been saved.

Testing and Information Disclosure

The Minister can order manufactures or importers to conduct testing or studies to verify compliance or prevent non compliance.¹⁰ Under the HPA no such powers existed and testing, if done, is done at the expense of Health Canada unless the company volunteers to test their products.

Similarly, the Minister can request information to verify compliance or prevent non compliance.¹¹

Some witnesses have raise concern about the disclosure of confidential business information without consent. It is important to note that this is only done with foreign governments or persons that carry out a consumer product safety function with a written confidentiality agreement¹² or when there is an imminent danger to human health and the environment, and the information is essential to address the danger.¹³

The US *Consumer Product Safety Act* also permits the sharing of information among other federal and state agencies and foreign governments.¹⁴

⁸ Subsection 14(3)

⁹ See Reuters report. *Maclaren recalls strollers after amputation reports*. Nov 9, 2009. < <http://www.reuters.com/article/topNews/idUSTRE5A84LJ20091109>>

¹⁰ Subsection 12(a)

¹¹ Subsection 12(b)

¹² Section 16

¹³ Subsection 17(1)

¹⁴ US *Consumer Product Safety Act* paragraph 29 (f)(1)

Mandatory Recall

Under the HPA there is no mandatory recall provision. Recalls are voluntary, requiring negotiations with industry which may delay getting products off the shelf.

Bill C-6 would give inspectors powers to order recalls if, “an inspector believes on reasonable grounds that a consumer product is a danger to human health or safety”.¹⁵ It is possible to request a review of an order and the Minister may designate a review officer to do so who can confirm, amend, terminate or cancel an order.¹⁶ Remember Bill C-6 defines what would be considered a ‘danger to human health or safety’ from a consumer product.

Administrative Monetary Penalties

Bill C-6 introduces administrative monetary penalties, but it is important to note that these penalties only kick in when there is a contravention of an inspector’s order and thus a due diligence defence is not available as it would be if a person is prosecuted for an offence.¹⁷

Administrative penalties are reviewable by the Minister.¹⁸ It is important to note that administrative penalties are used in many federal statutes¹⁹ to gain compliance and encourage timely rectification of regulatory issues.

The US *Consumer Product Safety Act* uses civil penalties as a compliance tool up to a maximum of \$15,000,000 for any series of related violations.²⁰

Search and Seizure

Some have alleged that Bill C-6 is unconstitutional because it violates the right found in section 8 of the *Canadian Charter of Rights and Freedoms* to be free from unreasonable search and seizure. We examined this issue in great detail and can verify that Bill C-6 does not reach beyond the powers of search and seizure granted in other federal statutes.²¹

In regard to places of business, federal health and safety legislation does not require a warrant to conduct inspections of a place of business participating in a regulated activity in order to enforce the law. The rationale is that businesses should not

¹⁵ Section 30 and 31

¹⁶ Subsection 34(8)

¹⁷ Section 38

¹⁸ Paragraph 50(2)(b) and Section 53

¹⁹ *Agriculture and Agri-Food Monetary Penalties Act* and by reference to that Act the *Pest Control Products Act*, *Health of Animals Act*, *Plant Protection Act* and the *Fertilizer Act* .

²⁰ US *Consumer Product Safety Act* s. 20.

²¹ Statutes reviewed are *Health of Animals Act* , *Pest Control Products Act*, *Canadian Environmental Protection Act* and *Canada Labour Code*

receive advance notice that inspectors will be arriving to confirm compliance or non-compliance.

In fact, Supreme Court of Canada jurisprudence²² affirms that government inspections have a legitimate regulatory or administrative role to ensure that laws are being followed. It is well established that a person who participates in a regulated industry or activity has a considerably lower reasonable expectation of privacy. Thus, a search and seizure without prior authorization from the courts (i.e. a warrant) is reasonable in the regulatory context to protect Canadians.

Items can only be seized and detained²³ for the purpose of verifying compliance or non-compliance with the law. Bill C-6 also clarifies that inspectors have to return seized items once compliance with the law is confirmed.²⁴ Seized items will not be destroyed unless forfeited to the crown.²⁵ This is consistent with many other federal statutes.²⁶

Passage through or over private property

Concerns have also been raised that the Bill C-6 allows for trespass. Bill C-6 allows an inspector who is carrying out their function to pass through or over private property.²⁷ For example, private property could be a parking lot of a shopping mall that an inspector must pass through to gain access to a store.

This type of provision is not novel and has been used in various other federal statutes with nearly identical language.²⁸

Warrants

An inspector may not enter a dwelling or house without consent or a warrant²⁹ and may only do so when there are reasonable grounds to believe that the home is being used as a place of business³⁰ and that the Act applies. The reason that inspectors have this power is to verify compliance and non-compliance with the law. It is essential the inspectors have access to ensure compliance with the law. There are numerous precedents in various federal statutes for obtaining judicial warrants to carry out inspections in private homes without evidence of criminal wrongdoing.³¹

²² See *R. v. McKinlay Transport Ltd*, *Comité paritaire de l'industrie de la chemise c. Sélection Milton and British Columbia (Securities Commission) v. Branch*

²³ Paragraph 20(2)(d)

²⁴ Section 24

²⁵ Section 25-27

²⁶ *Health of Animals Act* subsection. 16(1) and the *Aeronautics Act* paragraph 8.7(1)(d).

²⁷ Subsection 20(4)

²⁸ *Canadian Environmental Protection Act* s. 226, *Fisheries Act* s. 52, *Migratory Birds Convention Act* s. 8.2 and the *Species At Risk Act* s. 90.

²⁹ Section 21

³⁰ Subsection 20(1)...a place including a conveyance, in which they have reasonable grounds to believe that a consumer product is manufactured, imported, packaged, store, advertised, sold, labeled, tested or transported.

³¹ *Meat Inspection Act* s. 13, *Explosives Act* s. 14, *Fish Inspection Act* s.4. and *Fisheries Act* s. 49.

We hope this addresses some of your concerns. We ask you to adopt Bill C-6 unamended. Thank you for your attention.

Sincerely yours,



Devon Page
Executive Director