



Debates of the Senate (Hansard)

**2nd Session, 40th Parliament,
Volume 146, Issue 52**

**Wednesday, September 16, 2009
The Honourable Noël A. Kinsella, Speaker**

(non Bill C-6 related proceedings edited out to this point)

ORDERS OF THE DAY

Canada Consumer Product Safety Bill

Second Reading—Debate Continued

On the Order:

Resuming debate on the motion of the Honourable Senator Martin, seconded by the Honourable Senator Ruth, for the second reading of Bill C-6, An Act respecting the safety of consumer products.

Hon. Joseph A. Day: Honourable senators, I would like to refresh your memories, if I may, regarding a bill that was before the Senate in June, shortly before the summer break. Senator Martin gave us an outline of Bill C-6, An Act respecting the safety of consumer products, and some of the main amendments that had been proposed. I would like to thank her for her very informative speech and remind all honourable senators what the bill is all about.

Bill C-6 had been previously introduced in the House of Commons as Bill C-52. It did not make it to the committee stage because Parliament was dissolved. Bill C-52 was later introduced with its companion bill, Bill C-51.

Thus, there were two bills: Bill C-51 and Bill C-52, An Act to amend the Food and Drugs Act. Together, those legislative measures were aimed at implementing the Food and Consumer Safety Action Plan, and Budget 2008 even earmarked \$113 million for those measures.

I am wondering why we have not yet heard anything about Bill C-51 being introduced again. We are being asked to consider only half of the legislation proposed in these two bills.

[English]

One of my concerns, honourable senators, is that there were two bills in this plan for security of food and products. We see only one-half of that here whereas the two were intended to be studied together.

Honourable senators, it is a good concept, and let me read the purpose of Bill C-6, what it intends to do. I will refer to a number of clauses of Bill C-6 to help us understand what approval is being sought. Clause 3:

PURPOSE

3. The purpose of this Act is to protect the public by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada, including those that circulate within Canada and those that are imported.

It is difficult to argue with that purpose, honourable senators. Honourable senators will know that with that kind of wording the federal government's jurisdictional basis for passing this to protect the public is criminal law basis. I believe that is important, honourable senators, as we study the various clauses, that it is a criminal law basis upon which the federal government has jurisdiction to propose this legislation.

Now, honourable senators, as the Rules provide, second reading of a bill is the study of the bill in principle. We are studying the bill in principle in this particular instance.

Bill C-6, the Canada Consumer Product Safety Act, replaces another bill with which we are quite familiar, and that is the Hazardous Products Act and Part I of the Hazardous Products Act. If this bill is passed, Part I of the Hazardous Products Act will cease to exist. Honourable senators need to be convinced that it is important to replace Part I of the Hazardous Products Act with this new regime.

Why do we need to do away with the Hazardous Products Act and the regime that has become well-known in the courts and in society? Why must we do away with the present act and pass this new piece of legislation, which is quite different in its approach?

This particular piece of legislation provides for increased federal government control. One part of the legislation that perhaps I could be convinced is acceptable is recalls. Honourable senators are quite familiar with the news about product recall.

Under the Hazardous Products Act product recall is voluntary by the manufacturer or the importer of the product. Under this legislation there is —

The Hon. the Speaker *pro tempore*: Order, please. There are many conversations in the chamber. Please take them to the reading room.

Honourable Senator Day, please continue.

Senator Day: Thank you, honourable senators. I was talking about recall, and this legislation provides that the government can order a recall or order the manufacturer or importer to recall a product as opposed to the company looking after that recall. Having looked at some recalls in the past year, honourable senators will understand how devastating and important that can be to the future viability of a company. We want to be vigilant in determining the test that the government will apply to impose a recall whereas previously it had been voluntary.

For your information, in 2008 there were 165 voluntary product recalls by companies or individuals. To September of this year, from January to September, there have been 224 voluntary recalls. That does not suggest to me that the system under the Hazardous Products Act was not working, and we will want

to be convinced that it was not and that certain recalls did not occur. We must look into that area.

This legislation is a major increase in the government's involvement in setting safety guidelines for new product development. The federal government is now moving into setting guidelines for product development, not just looking at the product after it is finished. A stronger role for the government in oversight will require many more records to be kept and to be made available to inspectors. One can imagine how onerous that much reporting will be for small importing businesses. The government will appoint many more officials as inspectors and verifiers and I will point out the relevant sections shortly.

(1510)

There is also the issue of recall, to which I just referred. This proposed legislation provides the federal government with a new broad authority to order many new things to be done. The bill includes a wide array of new offences.

The fundamental point is that this new scheme is much more invasive and intrusive than previous legislation and its ideology is vastly different. Perhaps that is good. Perhaps this is the way in which government should operate within society. Perhaps this is what the public expects these days. However, we must understand that there is a change in the scheme.

The preamble in Bill C-6 is rather interesting. Typically, bills do not have much in the way of a preamble. One witness indicated to the committee that preambles have no legal effect, making one wonder why seven "Whereas" paragraphs appear in this bill. Perhaps the drafts people were trying to convince themselves that this proposed legislation was proper and required.

I found the fourth paragraph in the preamble most interesting. It states:

Whereas the Parliament of Canada wishes to foster cooperation with the Government of Canada, . . .

The sixth paragraph states:

Whereas the Parliament of Canada recognizes that a lack of full scientific certainty is not to be used as a reason for postponing measures . . .

We recognize that fact and we are suggesting they should continue with that. The reason is that the government is moving away from requiring a scientific basis for making an order.

Honourable senators have received many emails on this matter. Certainly, we are not guided solely by the number of emails received from individuals expressing concern about a piece of proposed legislation, but we owe it to those individuals to study their concerns. Most of those concerns relate to process and the fundamental rights of justice, as opposed to the concept of product safety. I will deal with some of the clauses brought to my attention via the 600 emails I received in respect of Bill C-6. I suspect that other honourable senators have received just as many.

Clause 15 of the bill addresses the disclosure of information by a minister. This concern has been brought to the attention of the committee. Clause 15 states:

The Minister may disclose personal information to a person or a government . . .

The committee will want to hear from the Privacy Commissioner on this to determine whether it falls within the rules or if this is a special right provided to the minister in the guise of product safety.

Clause 16 addresses confidential business information and states:

The Minister may disclose confidential business information to a person or a government . . .

This raises some concerns because the definition of "government" includes foreign institutions. Thus, one is left wondering what controls will be in place when confidential information is to be disclosed to a foreign institution. Honourable senators, that area will have to be scrutinized closely. The definition of "government" includes:

- (a) the federal government;
- (b) a corporation named in Schedule III to 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.

Why is that definition of government important? It is because, under Bill C-6, the Minister of Health and all the people who work for her will have the right to disclose personal information and confidential corporate information to all of the aforementioned entities.

I would submit, honourable senators, that the committee will want to look very closely at those issues. Inspectors are addressed at clause 18, which states:

The Minister shall decide on the number of inspectors . . .

The scheme is set up such that the minister may appoint the inspectors, as per clause 18. Clause 28 states that the minister may appoint analysts. Clause 33 states that the minister may review officers and clause 48 states that the minister may appoint the people to issue a notice of violation. That is all it says. The supporting regulations are very broad on the number of people and their qualifications. That is how the minister will determine what these various people will do.

Clause 20 and subsequent clauses address the authority proposed for inspectors and honourable senators will want to look at those. This will be a broad authority to order an owner to hold a product, to give it up or to restrict its movement. The inspector will have authority to use a computer or photocopy machine at the business establishment and to seize and detain for any time any article, including the consumer product and all the related items.

Inspectors will be able to enter a business without reasonable and probable grounds to suspect a violation, which would be the norm for an inspection to take place. When there are reasonable and probable grounds to suspect a possible violation, it is usual to obtain a warrant from a third party, such as a justice of the peace or a judge, before the inspection takes place. That is the procedure in criminal matters. Under Bill C-6, reasonable and probable grounds for entry by an inspector would be a belief that a consumer product is manufactured or sold on the particular property. There is no need to believe that the product is dangerous or problematic. I would think that those clauses should be reviewed more closely.

(1520)

Honourable senators, clause 20 is about articles. Clause 23 says an inspector may seize "a thing" under the act. I ask, what is a "thing," and go back to the definition section. There is no definition of a "thing," therefore, the inspector can go in and do all these things with respect to articles. Then we go to the procedure following seizure. The inspector seizes an article and ends up with a thing.

There are obvious drafting problems here that must be looked at. I point out a few of these things found through a reading of the act. That is what we do in this place. We read the acts. It is good that we read them because this one was somewhat rushed in the other place in June. It came here in late June.

Let us look at subclause 20(4):

An inspector who is carrying out their functions. . . .

That should be "his or her functions."

. . . or any person accompanying them may enter on or pass through or over private property, and they are not liable for doing so.

Inspectors do not need a warrant, or reasonable or probable grounds that something is happening. They can go over private property willy-nilly and they will not be responsible for any problems that they cause.

We are moving along nicely, honourable senators, and I thank you for bearing with me. I am almost at clause 30, which is about halfway through the bill.

I will speak about the Inspectors' Orders, honourable senators. The interesting thing about these Inspectors' Orders is that they are not considered to be statutory instruments. We can have statutory instruments. The honourable Senator Banks has raised this issue many times. Clause 64 states:

For greater certainty, orders made under this Act, except under section 37, are not statutory instruments. . . .

We do not know what the guidelines are because the guidelines will not be published in the *Canada Gazette*. They will not go before the Standing Joint Committee for the Scrutiny of Regulations because they are exempted.

There is another exemption in clause 37. Clause 37 deals with interim orders of the minister. What is an interim order? An interim order is when the minister has not gotten around to completing the regulation, so the minister can issue an interim order that is a regulation. That is what the bill has provided. The minister's interim order "contains any provision that may be contained in a regulation." The provision can be put in an interim order that lasts for up to a year.

The exception here is that "An interim order is exempt from the application of sections 3 and 9 of the *Statutory Instruments Act*." The minister does not have to go to the Privy Council Office, PCO, to ensure the interim order is within the rules, and it does not have to be published in the *Canada Gazette*. Those provisions are in sections 3 and 9. Again, that situation is not acceptable.

One must think of this legislation in terms of due process for, for instance, the small-business person or the small manufacturer who imports something. How will they put up with all these rules, all the inspectors, all the analysts and all the review officers that the minister has the power to appoint? We do not know who these appointments are. We barely know what authority they have, and we do not know what powers they have.

Honourable senators, the rules provide for two ways to go. If an offence is committed under this act, then the minister can decide to go one way or the other. If the minister decides to go via prosecution before a court, that is fine: We understand that. However, if the minister decides to go the administrative route, the other route, and issue a notice of a violation, then a whole lot of other rules begin applying and there is no court involved. Fines can be \$5 million per incident, and another section says that if an incident continues more than one day, each day is an incident. Another clause of the bill provides for that situation.

Two years per incident and \$5 million per day are provided for in this bill. Clauses 41 and 60 provide for violations continued on more than one day.

Clause 39, honourable senators, states that the directors are liable. However, the bill goes on to say there is no defence of honesty or having done due diligence. Those defences are not there. In fact, they are specifically excluded. Why would those defences be excluded for an agent, a director or an employee, who has performed due diligence? Why would the agent, director or employee be responsible under clauses 39 and 58, for those who are taking notes?

I do not have the answers. I raise a lot of questions and I notice a number of honourable senators opposite taking notes of various clauses. I hope they will have answers for me on some of these issues of due process. These issues are of fundamental rights of justice that we are here to defend.

The people from our regions will be impacted because of these issues. People will be impacted by a group of people appointed by the Minister of Health without that committee of the appointment commissioner that we had all voted for with Bill C-2, the Accountability Act. That appointment commissioner would have been a third party making these appointments, and we would have some confidence that a third party would supervise this process. That party would understand those things but it is not there. The appointments commissioner was never implemented. Even though we have spent millions of dollars in approving that position, each year it was not done.

All these individuals appointed somehow by the minister will interfere with the day-to-day operation without any scrutiny or any oversight, requiring more documentation. Honourable senators, is that where we want to go with respect to public safety?

We all agree that public safety is important. Is this bill the best way to achieve public safety with respect to consumer products?

Honourable senators, those are my comments. I look forward to this matter moving to committee. Which committee it goes to will be a matter of negotiation between leadership. I have pointed out that I believe there are serious legal issues that should be discussed and most of us, if not all of us, agree on the social aspects of this bill.

The Hon. the Speaker *pro tempore*: Do honourable senators wish to continue the debate? Senator Day, will you accept a question?

Senator Day: Yes, I will.

Hon. Jeremiah S. Grafstein: Honourable senators, I thank the honourable senator for drawing my attention to this bill. I was involved in the establishment of the first Department of Consumer and Corporate Affairs, so this issue of consumer protection is close to my background and heart.

However, when I looked at clauses 56, 57, 58, 59 and 60, they struck me as being unconstitutional in the sense that *mens rea* is no longer a condition precedent to a criminal offence. These provisions seem to be an extravagant use of the criminal power and I hope that the committee seized of this matter will deal with that issue and ask law officers of the Crown to come and deal with that particular matter. On the face of it, *prima facie*, these provisions are unconstitutional. I want the honourable senator's

comments.

(1530)

Senator Day: I am very concerned about the constitutionality with respect to due process and violations. Many of the emails each of you has received have brought out those same points. The law of trespass has been set aside. All of the due process with which we have become very familiar and that gives us some comfort has been set aside.

The short answer is I agree. Thank you for bringing that to our attention.

Hon. Elaine McCoy: I thank the honourable senators who introduced and have spoken to this bill. I want to add a few brief comments on the bill as a former minister responsible for consumer affairs.

The Hon. the Speaker *pro tempore*: Does the honourable senator have a question for Senator Day?

Senator McCoy: No.

The Hon. the Speaker *pro tempore*: Does any other senator have questions for Senator Day before I recognize Senator McCoy?

Hon. Lillian Eva Dyck: I have a question regarding clause 2, and the definition of "government." The clause states:

(d) an aboriginal government as defined in subsection 13(3) of the Access to Information Act;

Could the honourable senator give his opinion with regard to whether that definition of an Aboriginal government is appropriate?

Senator Day: Honourable senators, I must confess I had that underlined and thought I must look at that before we get to committee. At this stage of looking at the bill in principle, this is a huge definition of government. Where government becomes important is if we look at the clauses that can give away personal information to governments. An Aboriginal community government might not be the worst government they might want to give information to. We will have to look at why they go to the Access to Information Act to define an Aboriginal government, but I do not have an answer for the senator at this stage.

Senator McCoy: Honourable senators, what has been said here today is one issue that crosses party lines. Senators can do the jobs that we do the best — look at legislation and how it will benefit Canadians.

This is a case of legislation that will be very intrusive in corporate and individual lives in this country. I would have thought there would be no question — particularly among our Conservative colleagues — that we are extending government's reach way beyond anything we should be comfortable with.

On the other hand, yes, we believe in consumer product safety. However, what on earth are we imposing on the people of Canada with this kind of totalitarian tactic that is being endorsed and spread through this legislation into the tiniest corners of our lives? It even gives the minister and his or her officials the ability to take the word of a foreign government on which to base our decisions in Canada.

If China says a product is safe that could be the basis of our minister's decision. Is this the kind of country we want? I doubt it and I dare say that will be a common thread throughout the committee review of the legislation.

I went to the Food and Drugs Act to compare the empowerment, enforcement and inspection sections of that legislation with this proposed legislation. I thought if it were anywhere, the Food and Drugs Act

would have stronger criminal and quasi-criminal powers. Food and drug inspectors have fewer powers than those proposed in Bill C-6. If that does not frighten us all, it should.

Sheila Weatherill has just concluded her independent review of our federal government's response to the listeriosis tragedy. Ms. Weatherill wrote 57 very detailed recommendations on how to improve performance in the future. Not one recommendation called for more legislation. She essentially said that our officials and our ministers have all the authority they need under the Food and Drugs Act, and in that case, under the Canada Health Act. All they needed was to perform their jobs properly. For that, they needed resources, training and the will to act with some compassion.

Time and again that is the issue. It is not the legislation; it is what we are doing in empowering our officials to behave and respond appropriately.

One last example I will give is the Navigable Waters Protection Act that we had before a Senate committee for study just before the summer break. We pointed out that it did not need legislative but cultural changes in the regulatory attitudes of that division of Transport Canada.

I received a long email this week with attachments making it even longer that documented a conversation of an Alberta contractor who had been asked by the Government of Alberta to do a minor repair to a bridge in the province. After talking to the federal inspector for over an hour, he learned that it will still take six months before they even determine whether they have jurisdiction. This is after we gave the inspector more power than the officials asked for in the legislation. It has not improved their performance.

I heartily endorse honourable senators on all sides of this house and the committee. I hope enough time is put aside and enough witnesses are called forward to decide how many totalitarian powers you want to give to officials to achieve a very worthy goal, which is consumer product safety in this case.

(On motion of Senator Banks, debate adjourned.)

(remainder edited out)

