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**EVIDENCE**

**Wednesday, November 20, 2013**

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**Chair**

**Mr. David Sweet**



## Standing Committee on Industry, Science and Technology

Wednesday, November 20, 2013

• (1530)

[English]

**The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)):** Good afternoon, ladies and gentlemen. *Bonjour à toutes et à tous.*

Welcome to the 5th meeting of the Standing Committee on Industry, Science and Technology. We're hearing testimony from witnesses regarding Bill C-8.

We have before us, from the Canadian Chamber of Commerce, Scott Smith, who is director, intellectual property and innovation policy, and Lorne Lipkus, partner, Kestenberg Siegal Lipkus LLP, Canadian Intellectual Property Council; from the Canadian Generic Pharmaceutical Association, Jim Keon, president; from Food and Consumer Products Canada, Carla Ventin, vice-president, federal government affairs; and from Eaton Industries (Canada), Vladimir Gagachev, manager, regulatory affairs, electrical sector.

Thank you very much, ladies and gentlemen, for being with us. I understand that the clerk has advised you of the time limits for your testimony.

I need to ask the Canadian Chamber of Commerce if it is just one person who will be giving testimony today or if you are sharing your time.

**Mr. Scott Smith (Director, Intellectual Property and Innovation Policy, Canadian Chamber of Commerce):** We'll be sharing our time. Thank you.

**The Chair:** Would you like to go ahead then, Mr. Smith?

**Mr. Scott Smith:** I will indeed.

Thank you, Mr. Chairman and members of the committee, for the opportunity to address you today.

I am representing, as you mentioned, the Canadian Intellectual Property Council, which I'll refer to as CIPC. The CIPC is a special council of the Canadian Chamber, representing a broad cross-section of companies dedicated to improving the IPR regime in Canada.

With me is Mr. Lorne Lipkus. He is an intellectual property lawyer, an active member of CIPC, and a recognized expert in the fight against the proliferation of counterfeit goods in the Canadian marketplace.

I'd like to take a few minutes to talk to you about an overview of how important Bill C-8 is to the membership of CIPC and the Canadian Chamber. Lorne is here to provide you with some specific examples of how a few modifications to the bill could save

significant time, effort, and money for taxpayers, enforcement agencies of the crown, and brand owners who are the victims of IPR crimes.

The Canadian Chamber, through the CIPC, has been strongly advocating for IPR regime change for the past five years. Many of our members have been doing so for much longer than that. A key component of this advocacy effort is marketplace integrity. Securing ex officio powers for the CBSA, the facilitation of information exchange between enforcement agencies and brand owners, and criminal enforcement provisions for the importation of trademark and copyright infringing materials are high on our list of needed measures. And all of these are hallmarks of Bill C-8.

Counterfeit goods, as you know, cost the Canadian economy billions of dollars. I did have a handout for you, but unfortunately I don't think I had enough English copies, so those will be distributed to you at a later time, but it gives you most of the stats that are of interest to you.

What I'd like to focus on is the fact that we are pleased to see the introduction of Bill C-8 in Parliament. In particular, we are pleased to see the addition of criminal offences in the Trade-marks Act, making it a crime in Canada to import, export, manufacture, or distribute counterfeit goods.

Without second-guessing the urgency of the need to move forward with this bill, there are a few suggestions that we have that might serve to aid the operational side of the legislation. First is the knowledge requirement provisions. We see those as being difficult to proceed with. A preferred approach might be "knowingly" or "should have known". We look at counterfeiting as being all about money. It's willing buyers and willing sellers, and finding ways to curb the revenue flow for the perpetrators of counterfeit is the most effective deterrent.

A second effective deterrent would be education. We look at education as also being important for enforcement agencies to ensure they are familiar with the marks, the product IDs, etc., of all shipments. So clarity in the request for assistance provisions of Bill C-8 that facilitate the recording of information pertaining to the products of goods of a right-holder in a system that is accessible to CBSA would be very helpful.

One final comment before I pass this on to Lorne is about the exclusion of in-transit shipments. There is a potential threat to public safety if these products are allowed to continue to circulate in the marketplace; they may cause public safety problems.

I'd like to pass this on to Lorne now, who will speak about a simplified procedure that might save time and money. But in thinking about these options, I'd also like to suggest that the committee consider the benefits of operational monitoring, and by that I mean maintaining performance-based statistics leading to a statutory review in three years.

**Mr. Lorne Lipkus (Partner, Kestenberg Siegal Lipkus LLP, Canadian Intellectual Property Council, Canadian Chamber of Commerce):** Thank you for allowing me to testify before you today.

I've been involved in over 10,000 actions or enforcements against counterfeiters since 1985, and I've coordinated and conducted the training of thousands of customs officers and law enforcement officials across Canada for the identification of counterfeits and how to prosecute cases for over 18 years. I've been practising across the country.

I'm here to underscore the importance of having a simplified procedure to deal with what I strongly believe will be the majority, the vast majority, of counterfeit product shipments coming into Canada. A simplified procedure will reduce additional and unnecessary cost to customs, which means to taxpayers, to everyone in Canada.

Canada's court system has been moving, along with other court systems, towards a mediation process, not a litigation process. I believe if we move towards a simplified procedure, we will reduce the strain on our courts, which are presently quite busy.

I was very involved in the RCMP's Project O-Scorpion that you've heard about. I was very involved as I was in charge of anti-counterfeiting for the Olympics for VANOC, and I was quite familiar with the hockey jersey situation.

In respect of O-Scorpion, on the RCMP website they talk about having 49 seizures valued at \$78 million over six months. Fantastic. It's depressing because the largest seizure total they had before then was \$37 million, and since then it has dwindled to next to nothing.

Our office was involved in over a dozen of these cases, providing information to the RCMP to help them prosecute the cases for 23 rights holders and others that we assisted. In many cases, there were multiple brands on the shipment, as many as 39. Under a simplified procedure, many—and I underscore many—of the brands with small quantities of counterfeits on those shipments that would otherwise opt not to institute legal action under the current legislation would take part in a simplified procedure. That translates into more counterfeits being dealt with quickly, cost effectively, and destroyed at a cost to the brand owner, which, as I understand it, is what is intended by the legislation. There will be significant cost savings all around, especially to customs.

If a shipment has some brands filing actions and some not filing actions, it means that customs is going to have to incur additional cost to remove the goods from the brands that opt out.

I think we all agree that the legislation should, and in my respectful opinion must, encourage brands to take part in the process of removing these goods at their cost. The simplified procedure has worked very well. If you look at the statistics in the European Union, over 75% of the shipments that have been detained, resulting in destruction, were because of the simplified procedure. There was no court action required.

My question is, why should we even consider a court action if it's not required? Why do we need to hire more people in the courts to deal with these matters if it's unnecessary. I looked at the Federal Court, at their records, and the most number of copyright or trademark infringement matters they've deal with per year is 225.

If we look at O-Scorpion, with 49 different seizures involving all these multiple brands, that was approximately 250 brands. That's adding 250 additional court cases if the brands would go along with it. If we look at the VANOC situation, it's interesting—1,500 shipments. Not one person, when provided with evidence of the authenticity that these goods were counterfeit, disputed the authenticity.

Of the over 16,000 jerseys that were detained by a customs officer as being suspected of being counterfeit, not one of them was a grey market. Not one of them was authentic; every one of them was counterfeit. How many of the over 1,500 people agreed to a voluntary relinquishment without a court case, without dealing with it? Every one of them, because the evidence was given to them.

In many of the shipments involved in Project O-Scorpion, the brand didn't have a trademark registered in Canada. I think there will be increased cost to customs having to remove the goods from a shipment when the counterfeit is really from a company that has a common law right but not a registered trademark right.

● (1535)

In my opinion, anyone supporting or buying counterfeits is supporting a serious crime that is deserving of the attention this committee is giving the subject through these hearings. For that, I thank and applaud you, and more importantly, I urge you to consider some of the submissions that I think will save us all a lot of money.

Thank you.

**The Chair:** Thank you very much, Mr. Lipkus.

Before we go on to Mr. Keon, colleagues, I just want to bring something to your attention—and I will take responsibility. I apologize, because we are in a new session, we have a brand new clerk, we have an additional researcher who wasn't with us last time, and we have some members who were not here. We've operated with the understanding that the officials here who are up at the front are at your full disposal at any time until we call the meeting to order. Then, if you need one of the officials up here, please go through the chair for that. That way it's orderly; we don't have any disruption up here and the officials know exactly how to respond to members as well. Once we're in order, please just go through the chair for either researchers' or the clerk's expertise. Thank you very much.

Now on to Mr. Keon.

● (1540)

**Mr. Jim Keon (President, Canadian Generic Pharmaceutical Association):** Thank you, Mr. Chair and honourable members of the committee. On behalf of the Canadian Generic Pharmaceutical Association, let me say that we appreciate the opportunity for Canada's generic pharmaceutical industry to contribute to your study.

The bill is largely focused on the important objective of combatting counterfeit products. We've already heard some explanation of the importance of that. I will not address my comments to that issue; I would be happy to address questions about it later. I want to focus on one issue, a very specific issue, and that includes the part of Bill C-8 that is related to changes to the Trade-marks Act.

Before I do that, I'll just say a couple of words about our industry. We, the generic pharmaceutical industry, are operating the largest life sciences companies in Ontario, the largest in Quebec, and the largest in Manitoba. We are Canada's primary pharmaceutical manufacturers and exporters. We are among the top R and D spenders across all industrial sectors. Generic pharmaceutical companies employ directly more than 12,000 Canadians in highly skilled research, development, and manufacturing positions.

We are strong supporters of free and open trade, and we export our high-quality "Made in Canada" generics to more than 115 countries. We supply two out of three of all prescription medicines in Canada—two out of three are with generics—quality products at very good prices. That is our role and responsibility in the Canadian health care system.

The issue I wish to address today, as I mentioned at the outset, will focus on the aspects of the bill aimed at modernizing the Trade-marks Act. They are not really intended at all to deal with the issue of counterfeiting; they're just about modernizing the act.

Our primary concern with Bill C-8 is the change to the definition of what is considered "distinctive" under this act.

By way of background, the Canadian Generic Pharmaceutical Association and our member companies have invested tens of millions of dollars in litigation under the provisions of the current Trade-marks Act to develop decades of Canadian case law on this issue. The case law has determined that trademark applications for the size, shape, and colour of a medicine do not meet the requirement for "distinctiveness" under the current Trade-marks Act.

As a result, there are very few trademarks covering the size, shape, or colour of pharmaceutical products that are registered in Canada today. Very few of those trademark applications are ever granted; they are rejected as being not distinctive. Our Canadian pharmacy customers expect generic medicines to appear in similar size, shape, and colour to their brand-name equivalents. In addition to being beneficial for pharmacists, this is also of enormous benefit to patients, as it helps them adhere to their treatment regimens. Their blue water pill is their blue water pill, regardless of whether they are using a brand name or a generic medication.

So similar trade dress for pharmaceuticals is the situation we have today in Canada, and it has been the situation for several decades. The definition of what is "distinctive" under the Trade-marks Act, as it has been interpreted by the Trade-marks Opposition Board and the courts over the span of several decades, is at the heart of it all.

So why is Bill C-8 of concern to our industry?

Bill C-8 changes the definition of what is distinctive under the Trade-marks Act. In our view, it will create a great deal of uncertainty in the law. The International Trademark Association's submission agrees that legal uncertainty is created by the change in definition.

I'll ask for the committee's indulgence. I'm just going to read the two definitions. They can be found on the last page of our brief, for anybody who wants to follow along with our three-page brief.

The well-established definition in the current Trade-marks Act reads as follows:

"distinctive", in relation to a trade-mark, means a trade-mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them

The definition in Bill C-8 is different. It sounds different; it is different. This is in Bill C-8:

"distinctive", in relation to a trade-mark, describes a trade-mark that actually distinguishes, or that is inherently capable of distinguishing, the goods or services of the trade-mark's owner from those of others

● (1545)

Our concern is with regard to the current case law, which has become clear after decades of litigation around it. It establishes that a mark actually distinguishes something and has acquired that distinctiveness through use, and that a trademark is adapted to distinguish when it is inherently distinctive.

The new language introduces the phrase “is inherently capable of distinguishing”. It will introduce uncertainty. What does “inherently capable of distinguishing” mean? How will this be interpreted by the Canadian Intellectual Property Office, the Trade-marks Opposition Board, and the courts?

It is our understanding from officials...and we understand that Industry Canada officials and the minister made it clear when they were here that in drafting the language in Bill C-8 they had a legal opinion asserting that the new definition is clear under the law and does not create any substantive change in the law.

Industry Canada, the Canadian Intellectual Property Office, and Public Safety Canada have all advised CGPA and this committee that their sole intention is to modernize the language of the act. There was no intention to make a substantive change in the definition of “distinctiveness”. Again, they have clarified that to your committee. Neither was there any intention of altering pharmaceutical trade dress practices in Canada in any way.

This give us little comfort. We have consulted three different law firms who all raised concern that the new definition will create a great deal of uncertainty in the law around pharmaceutical trade dress. It will perhaps come as no surprise to members of this committee that the pharmaceutical industry is the most litigious industry in Canada. At the very least, the change in definition would cost the generic pharmaceutical industry millions of dollars in their efforts to maintain Canadian trade dress for pharmaceuticals and bring increased certainty in the law.

In our view, this is an unintended consequence that is entirely avoidable. On behalf of CGPA, we would urge the members of the committee to table and adopt our proposal for a technical amendment to the definition of “distinctive”. This would not impact the anti-counterfeiting objective of Bill C-8 in any way. It would address the Government of Canada's goal of modernizing the act, as well as the concerns I have outlined to you this afternoon.

I am going to stop there.

I thank the chair and committee for the opportunity to appear and for considering our request.

I look forward to further discussion with you.

**The Chair:** Thank you very much, Mr. Keon.

Now, on to Ms. Ventin.

**Ms. Carla Ventin (Vice-President, Federal Government Affairs, Food and Consumer Products of Canada):** Food and Consumer Products of Canada welcomes the opportunity to contribute to the Standing Committee on Industry, Science and Technology's study of Bill C-8, the Combating Counterfeit Products Act.

FCPC is the largest national industry association in Canada, representing companies that manufacture and distribute food and consumer products. Our industry is the top employer in manufacturing in Canada, employing approximately 300,000 Canadians in 6,000 manufacturing facilities located in every region in Canada.

Our members represent a vast array of household products sold on grocery and drug store shelves across the country. I have distributed

a handout that has some facts on our industry and that on the opposite side has a list of our member company logos.

We're very pleased that the government has taken action to address the growing presence of counterfeit products in the Canadian marketplace. Our industry's priority is the safety and integrity of our products, and we therefore welcome the introduction of Bill C-8.

We've become increasingly concerned with the growing presence of counterfeit and non-compliant products in Canada and have been raising awareness of this issue with the federal government for some time. Our primary concern is the impact on the health and safety of Canadians. We are also concerned about the negative impact on Canadian manufacturers, especially in terms of brand reputation.

FCPC is a proud member of Canadian Anti-Counterfeiting Network, which appeared before this committee on November 6 and which represents a coalition of individuals, companies, and associations that have united in the fight against product counterfeiting in Canada and abroad.

The provision of new authorities in Bill C-8 for border officers to detain suspect shipments and share this information with rights holders is a critical component of the bill. Importantly, the legislation allows for businesses to file a request for assistance with the government regarding suspect shipments. This new framework will, for the first time, allow border officers and rights holders to share information and work together. We fully support this collaborative approach.

As the government steps up its efforts at the border, additional resources will be required, and we would like to ensure that this requirement has been accounted for. The ability to enforce this legislation at the border will determine whether we succeed in decreasing the number of counterfeit products entering Canada.

We need to ensure that Bill C-8 strikes a reasonable and fair balance between law-abiding rights holders who play by the rules and those who profit at the expense and safety of others. Bill C-8 must deter this illegal activity while at the same time not place an unnecessary burden upon legitimate and law-abiding companies. There are a few areas in Bill C-8 in which we think this balance needs to be adjusted.

Our first concern deals with the financial burden and liability for charges.

Under proposed subsection 44.07(1) of the Copyright Act, the rights holder is responsible for costs associated with the storage, handling, and destruction of detained goods. We disagree that rights holders who play by the rules should pay for the costs associated with the illegal activity of others. Canadian manufacturers already face enormous challenges, and we oppose any new fees that unfairly burden law-abiding companies.

We fully support the Canadian Anti-Counterfeiting Network's recommendation to amend this provision so as to put primary responsibility for costs on the perpetrators of the crime instead of on the rights holders.

In the legislation, under the heading "OFFENCES AND PUNISHMENT", we have concerns also about proposed subsection 51.01(1) of the Trade-marks Act, which outlines that a new trademark offence is limited to situations in which the perpetrators know not only that the goods are counterfeit but also that the acts of sale and distribution that they are undertaking would be contrary to the law.

Obtaining proof that counterfeiters knew they were selling illegal products and were also aware that their activity is illegal will be extremely challenging. We need to take into consideration that it is a reasonable requirement for a person conducting business to not only understand the laws of the country in which they operate but also to familiarize themselves with the products they are importing or selling. We therefore recommend a more pragmatic approach to the intent provision that would place more responsibility upon the perpetrator.

● (1550)

I'd also like to take this opportunity to provide comment on how the tools and authorities outlined in Bill C-8 could help our industry address a similar concern regarding an increase in non-compliant products entering Canada. While these products are not counterfeit, they originate from other parts of the world with different labels that do not comply with Canadian regulations. Some of these products also contain ingredients that are not approved for use in Canada or are not clearly identified or disclosed on the package.

Like counterfeit products, non-compliant products are a health and safety concern, especially to Canadians with allergies. The presence of these products also has a negative impact on Canadian manufacturers who take the time to comply with Canadian rules and regulations regarding both product formulations and labelling.

To address this concern, we suggest that companies be allowed to use the request for assistance to flag to border officials not only counterfeit products but also non-compliant products. We'd be interested in discussing in more detail how we can rely on the new tools and authorities in Bill C-8 to prevent these products from entering Canada.

Finally, we would also be interested in learning how Bill C-8 will apply to the selling of counterfeit products on the Internet. We need to be prepared for the different and changing ways that illegal products are entering Canada.

The safety and integrity of our products will remain a priority for our industry, and we look forward to continuing to work with the government and to discussing partnering in areas like training to help equip border officials with the information they require for implementation.

Thank you.

● (1555)

**The Chair:** Thank you very much, Ms. Ventin.

Now we go on to Mr. Gagachev.

**Mr. Vladimir V. Gagachev (Manager, Regulatory Affairs, Electrical Sector, Eaton Industries (Canada) Company):** Thank you, Mr. Chair.

Honourable members, thank you for the opportunity to appear before you today.

My name is Vladimir Gagachev. I am a professional electrical engineer employed by Eaton Industries (Canada) Company, the Canadian operations of Eaton Corporation, based in Burlington, Ontario.

We manufacture electrical equipment and systems that range from 120 volts to 46,000 volts. My company employs about 1,200 Canadians in manufacturing facilities located in most Canadian provinces and in sales and field services offices in each major city across Canada.

The whole electrical industry in Canada and across all of North America faces grave challenges from reconditioners who place counterfeit labels on electrical products and from product counterfeiters, both domestic and foreign. While this unlawful activity impacts our businesses, there is a far more serious impact and danger to our citizens here in Canada. Unsafe and dangerous electrical products are being installed in facilities that cannot only cause significant property damage but also have life-threatening effects. Electrical shocks and fire hazards can result when an electrical product does not perform as a consumer expects from reading the label on the product. This consumer can be a trained electrician relying on the information contained in labels on the product. Consequently, counterfeit labels and/or products with false labelling can lead innocent users to believe, albeit incorrectly, that they are dealing with a safe product.

Canadian manufacturers of electrical products, represented by Electro-Federation Canada, recognize the seriousness of grave issues with both domestic relabelling, which is outright counterfeiting, and international product counterfeiters. Please allow me to explain.

About 16 years ago we found an electrical product reconditioner selling unauthorized circuit breaker products. Using private investigators we purchased some of these breakers. Subsequent laboratory analysis concluded that the investigators purchased used circuit breakers being passed off as new. These breakers were likely salvaged from demolition sites in questionable circumstances, tampered with and relabelled to change the electrical ratings of the breaker, which is extremely serious and dangerous. The new labels also included trademarks of certification organizations, such as the Canadian Standards Association and the Underwriters Laboratories, along with the original equipment manufacturer's counterfeited labels.

Subsequent litigation in the Federal Court of Canada with one such counterfeiter has had no impact on this counterfeiting activity in Canada. Over the past 15 years, examples of these dangerous electrical devices have been found in the intensive care unit of a hospital, a grocery store, and even in schools. This problem, like cancer, is appearing to grow and spread, threatening the electrical safety integrity of our country.

We have been involved with our industry's attempts to stop this activity for the past 13 years. It still continues, and we need your help by bringing Bill C-8 into law.

About 11 years ago, the Royal Canadian Mounted Police agreed to act on a formal complaint logged by Eaton. That complaint was based upon a discovery of a counterfeit-labelled moulded-case circuit breaker, MCCB for short, supplying power to the intensive care unit of a Quebec City hospital. Other investigations and seizures found similar cases of counterfeit and tampered circuit breakers in hospitals. These investigations culminated in search and seizure operations against three suspected businesses, with charges being laid in two instances. The charges brought were forgery and passing off under the Criminal Code, for lack of better provisions in the Trade-marks Act.

In the cases where charges were laid, the perpetrators pleaded guilty. In the first case, the defendant was fined \$76,000. In the second case, a fine of \$40,000 was assessed, along with an unconditional discharge. The third case was not prosecuted because the crown did not believe there was sufficient evidence to bring charges.

● (1600)

Another firm, sued by Eaton in 2000 in civil court with a favourable judgment, has been charged by the crown in new criminal proceedings. The trial has been set for early 2014 in a Montreal court.

Eaton's manager for codes and standards at that time, Brian Savaria, professional engineer, appeared as a witness before this standing committee and testified on these very issues on April 30, 2007.

However, this problem continues. Are you sure your electrical system will function as it was intended? As long as Canada has electrical retailers selling suspect reconditioned products from unauthorized sources, how do we know they have not been tampered with? We cannot possibly check them all. We do check the ones that look suspicious, but with the state-of-the art copying technologies nowadays there should be serious concern about this issue.

During the course of 2011, 2012, and 2013, Eaton, Schneider Electric, and Siemens helped Public Works and Government Services Canada in the inspection of electrical panels in thousands of buildings across the country. A large number of counterfeit-labelled moulded-case circuit breakers were identified and designated for removal from panels in federal buildings and airports. I believe the number approached almost 150. A couple of representative examples have been submitted with this testimony. They should be in your package. If this is the situation with the largest landlord in Canada, then, by extension, it will be similar to any other commercial or industrial property, etc., in the country.

The international counterfeiting problem that was referred to earlier is equally serious, in that Asian copies of circuit breakers are being made and widely distributed at trade fairs and on the Internet. There are many Chinese websites purportedly offering genuine circuit breaker products. Your information package also includes a photograph example of what happens when an electrical circuit breaker fails. In this case, it shows a Chinese residential breaker seized by U.S. Customs failing the Underwriters Laboratories standard test. As you can see, the results are catastrophic.

I shall now play you a quick video—it's only 11 seconds—of a mining circuit breaker.

[*Video Presentation*]

**Mr. Vladimir V. Gagachev:** I shall spare you the technical details of what just happened. I'll just say, imagine this happening in a mine where methane and whatnot gases are present

The Canadian Electrical Code defines "circuit breaker" as "a device designed to open and close a circuit by non-automatic means and to open the circuit automatically on a predetermined overcurrent without damage to itself when properly applied within its ratings." Circuit breakers are absolutely essential devices in the modern world and are one of the most important safety mechanisms in homes and other buildings. Whenever electrical wiring in a building has too much current flowing through it, these devices interrupt the power until somebody can attend to the problem.

Without circuit breakers, or the alternative fuses, electrification would be impractical because of the potential for fires and other mayhem resulting from simple wiring problems and equipment failures. Counterfeit circuit breakers can potentially explode, cause fires, as you saw, or false trip. If that circuit breaker is on life support equipment in a hospital, the false trip would shut the equipment down and could kill the patient. In an airport control tower, a false trip can also be catastrophic. One of the examples in your package contains four counterfeit circuit breakers from the L.B. Pearson International Airport.

The spectre of substandard, defective, and counterfeit circuit breakers and domestically labelled circuit breakers with false information and settings entering into Canadian homes, stores, public buildings, schools, and hospitals poses a serious threat to a safe electrical infrastructure. It is a truly frightening situation that must be addressed. The Canadian electrical safety community has been on guard, and for many years it has been alerted to the potential hazards these products can cause.

● (1605)

Consumers are also looking for evidence that government views this as a serious problem that has consequences. I do like to think that I testify before you today, not only as a corporate employee but also as a father, a neighbour, a citizen. But of course the most credible spokespeople against counterfeit products would be the victims thereof, people whose health has suffered.

Thank you.



**The Chair:** Thank you very much, Mr. Gagachev.

We'll move to our first round of questioning, a seven-minute round.

Mr. McColeman, for seven minutes.

**Mr. Phil McColeman (Brant, CPC):** Thank you, Chair. And thank you to the witnesses for being here.

As a quick observation, I think across the board you all see the benefit of this legislation coming into existence. I appreciate all of your suggestions as to some of the things you might like to see.

Mr. Gagachev, the video you played, plus your testimony, indicates that these counterfeit goods could have catastrophic effects on public safety and health.

Right now in the construction process, how are these being found? In practical terms today, how do inspectors know? Do they know? When do you find out during the process? I know there's an electrical inspection process. Is there random testing? What is the protocol right now?

**Mr. Vladimir V. Gagachev:** There is no protocol. My understanding is that the federal buildings that were inspected, which is the only comprehensive study in the country that we went through for a single landlord.... My understanding is that the Electrical Safety Authority, for example, in Ontario, does not inspect federal buildings; it has provincial jurisdiction. I'm not sure how federal buildings get inspected.

When we're talking about buildings that are under the jurisdiction of the authority having jurisdiction—the general term of the inspectors—it depends on their sharp eye and the amount of time invested in their training to be able to spot a counterfeit. They're getting better and better.

In the case that was mentioned that's actually in the Superior Court in Montreal right now, we had to bring a label designer back from retirement to spot the minute differences, the nuances in the label. They were getting that good.

So it's getting more and more difficult. I mentioned that in my testimony. With the copying techniques nowadays, it's getting increasingly difficult. We therefore need counterfeiting defined as a crime to begin with.

**Mr. Phil McColeman:** Okay.

I'll move on to Ms. Ventin and ask you about your comments regarding adjusting the balance within the legislation, "adjusting the balance" meaning costing less to the rights holders, more to the perpetrators.

Can you elaborate on that, as to how you see that would function in a legal context?

**Ms. Carla Ventin:** Sure.

The concern about cost has to do with proposed subsection 44.07 (1). Our concern here is that currently, as stated in the legislation, the rights holders would be responsible for the cost of the storage, handling, and destruction of the suspect goods. We're concerned about that, but we'd also be interested in how exactly that would work, because we have been getting some different details on this.

We do think that rights holders who do play by the rules should not be paying for the cost of those who are breaking the rules. So any kind of clarification on that.... That was our read on it in our discussions with officials.

**Mr. Phil McColeman:** Now I'll move on to Mr. Lipkus.

Your comments regarding a simplified procedure—I wrote that down. What is a simplified procedure? Could you put a little more description into what you mean by "a simplified procedure"? You said something that doesn't go to court, obviously, but what actually is, in practical terms, a simplified procedure?

**Mr. Lorne Lipkus:** Quite simply, customs suspects at the first stage that a product is counterfeit. They then contact the brand owner, because customs isn't the party that is going to determine definitively that it's counterfeit; they suspect it's counterfeit. So they contact the expert for that product; they contact the brand owner. They either send pictures or the product and they ask them to verify whether the product is counterfeit.

The way they verify that it's counterfeit now is that we provide either an affidavit or something in writing giving some of the reasons as to why it's counterfeit.

Under the simplified procedure, the next step would be that this information is then given to the importer. Now the importer has the onus. The importer has to say, "I've looked at this evidence you have that it's counterfeit, and I have my own evidence and I disagree with you." Well, you can't then have a simplified procedure.

But in 77% of the cases in the EU, when confronted with that evidence, the importer said okay and agreed to allow the goods to be destroyed—or did nothing, in which case the simplified procedure said you didn't take the next step and dispute it; therefore, the goods can be destroyed.

In summary, if there's a determination that it's suspected of being counterfeit and the rights holder says it is counterfeit, the importer is given an opportunity to contest that position. If the importer doesn't contest it, the goods are destroyed. No action is instituted; no court is involved. It's simple, cheap: customs takes a shipment, gets it destroyed, and under the present legislation sends the bill to the rights holders.

● (1610)

**Mr. Phil McColeman:** In your presentation you said, and you just said again, that customs sends the bill to the rights holders. What is your view of legislation that would send the bill to the perpetrators? In practical terms, do you think that money could be collected?

**Mr. Lorne Lipkus:** The answer is yes, in many cases, and no, in many cases.

I keep hearing that counterfeiters can't be caught, and it's true, many of them can't be. We have collected hundreds of thousands of dollars from counterfeiters every year for the past several years, so some of them can be found. The problem is that too many of them can't be found. When you have a criminal who is importing product and gives fake information, the chances are that you're not going to be able to collect your money. If it's someone who has given proper information, then you have the ability to go after them.

But that underscores my answer to your first question. If we have to institute an action and don't even have proper information, then we've instituted an action against a Jane Doe or John Doe or J. Doe company whom we don't know, and we've had to spend all that money for nothing.

In a perfect world, and in any world, I would prefer that the importer, who is the one who ordered the goods, be the one responsible for it, and that in any event they be, under the legislation, the primary person responsible for paying.

**The Chair:** Thank you, Mr. Lipkus. I have to cut you off there; we're over time.

Thank you, Mr. McColeman.

We go on to Madam Charlton.

**Ms. Chris Charlton (Hamilton Mountain, NDP):** Thank you very much to all of the witnesses.

I'd like to bring Mr. Keon into the conversation today.

First of all, I want to thank you for addressing the trademark side of the legislation. I don't think we've had enough conversation about that side. I really welcome the way you've made quite clear why this piece is so important.

You talked about its being essential that the size, shape, and colour be readily identifiable for generic pharma companies as well as for pharmacists, but I have to tell you, I'm thinking about my parents. I'm thinking that if a drug that my dad is taking suddenly can be replaced by a generic, he might be terribly confused, if the colour, shape, or size changed. I'm comforted by the fact that you're doing everything you can to make it easy, particularly for seniors and other patients, to continue their treatment successfully.

I want to ask you, though, about this notion of distinctiveness. We've had a bit of conversation about it in the committee before. When we asked the minister, he responded that the change to that particular definition....

I'll quote the minister:

The technical explanation from my department is that the new language of the definition aligns with the agreements on Trade-Related Aspects of Intellectual Property Rights...as well as with the case law of the Trade-marks Opposition Board decisions.

I took it from your testimony (a) that it actually doesn't align with the Trade-marks Opposition Board decisions, but (b), I don't recall your talking about the trade-related aspects of intellectual property rights. I wonder if you could expand on that for me a little bit.

**Mr. Jim Keon:** Yes. Thank you very much.

I agree with your point that similar size, shape, and colour of generic medicines—similar trade dress—is important for patients,

particularly seniors, who often are taking many medications. If they are switched from one manufacturer to another, it's much easier to maintain their regimen if the product looks the same. That is the basic reason that the medicines look similar.

With regard to the trade-related aspects of the intellectual property agreement—the TRIPS agreement, which is a specialized intellectual property agreement under the World Trade Organization, and Canada is a member of that—the first thing I would say is that this agreement has been in place since 1995, and no one in the courts or before the courts has ever suggested that Canada's current definition is not consistent with the TRIPS agreement. That's the first thing: our current definition of “distinctiveness” is consistent with TRIPS, and no one has said that it's not.

The Industry Canada witnesses said that the new language was taken from the TRIPS agreement. It's our view that the two sections they pulled out are actually slightly different and that the wording is contrary to what they had intended.

We're suggesting very minor changes to modernize the definition of “distinctiveness” such that it would continue with the essential implication of today's language, that there has to be actual demonstration that the product is distinguishable. That is consistent with TRIPS and that is what we're proposing.

I don't see any conflict with the TRIPS agreement. In fact, I think the modernization attempt in this case is simply introducing uncertainty into a highly litigious industry and is going to create a lot of litigation and perhaps a change in the law that is unintended. As we've been told, it is not the intent to change the substantive law here.

•(1615)

**Ms. Chris Charlton:** I certainly am very sympathetic to making sure that we don't inadvertently change something that has been successful, and I haven't heard any other witnesses suggest that it's imperative that we change the definition of “distinctive”, except for ministry officials, who said they were changing it in an effort to modernize. But again, as you rightly point out, it may not be necessary at all.

I wonder whether any other witnesses feel strongly about the definition of “distinctive”. Is there an alternative view at the table?

No? Okay, that's terrific.

I just want to ask one other question. Another witness at our committee addressed in-transit shipments and questioned whether they should be excluded from this bill. That witness specifically referred to the experience with in-transit seizures in Europe, revealing that generic pharmaceuticals were often targeted.

There are two examples that I'm aware of. During 2008 and 2009, Doctors Without Borders found that at least 19 shipments of generic medicines from India to other countries were impounded while in transit in Europe. This included a Dutch seizure of AIDS drugs en route from India to a Clinton Foundation project in Nigeria.

I'm wondering about two things. First of all, why is it, do you think, that pharmaceuticals are often targeted? Second, would you agree that we should continue to exclude in-transit shipments here in Canada for precisely the reason that you're worried about, that pharmaceuticals would perhaps be targeted more often than other goods?

**Mr. Jim Keon:** Bill C-8 does not include in-transit goods as part of the "in scope" activities the Canadian Border Services Agency would be looking at. We think this is appropriate; we're not in favour of expanding those powers beyond the scope of the current bill.

Pharmaceuticals trade around the world. Many companies, brand name and generic, buy inputs from around the world, manufacture in one location, and package and distribute in others. In some cases, trademarks law and patent law can be different. If the product is not coming into Canada for sale in Canada, then asking the Canadian Border Services to interpret the product according to Canadian law is inappropriate, and has led in the past, as you indicated—in Europe in particular—to seizure of legitimate products, delays of those products, extra costs, and uncertainty, and in some cases has resulted in companies changing the way they distribute products. I don't think that's the intent here.

We support Bill C-8 in that regard and would not recommend any change.

•(1620)

**Ms. Chris Charlton:** Thank you.

Do I have time left?

**The Chair:** You have 15 seconds.

**Ms. Chris Charlton:** Just very quickly, then, I want to move to the counterfeit side.

Mr. Smith, if I understood you correctly, you said that you had some statistics you had hoped to distribute, but they weren't in both official languages. I wonder if you could orally tell us what those statistics are, because I think they're really important to the debate we're having.

**Mr. Scott Smith:** Thank you.

The report I was circulating is quite large. If you're asking specifically about the generic drugs or brand-name drugs and in-transit shipments, the concern we have is about what happens with things like the customs bonded warehouse program, where shipments of drugs can actually be broken down, repackaged, relabelled, and re-sent without actually incurring any tax implication. Are those still considered in-transit shipments? Could those actually end up back in the hands of Canadians through small shipments coming back into the country? I think that's the concern we have.

**The Chair:** Thank you, Mr. Smith. We're over time there.

Ms. Charlton, we do have those statistics. We just don't have enough copies. They will be here momentarily.

Now, for seven minutes, Mr. Holder.

**Mr. Ed Holder (London West, CPC):** Thank you, Mr. Chair.

Thank you to all of our guests for your representations today. I'll probably work my way down and see how far we go with that, if we might, please.

Mr. Smith, I might start with you. Just based on some of those statistics, what I'm really trying to get a handle on is how huge the problem of counterfeiting is to Canada. You may have a lot of stats in that package you have. Has the Canadian Chamber of Commerce been able to guesstimate how big the problem truly is?

**Mr. Scott Smith:** The challenge was in trying to figure out how much volume there is or what the value of those products coming through is. In putting a number on that, you get statistics on the seizures, but you don't get statistics on what's not being caught. What we know, for instance, is that in 2011, in Project O-Scorpion, they seized product worth \$78 million.

We also know that the RCMP investigates roughly only 25% of the cases that are put before them. There was probably a bump in 2011 where it was probably more than 25%, but that was very focused on the Toronto market.

Do we have a sense of what it is in Canada? No, we don't. The only thing we do know is that the OECD has put a number on it at somewhere near \$250 billion worldwide.

**Mr. Ed Holder:** You made a comment in your testimony about some of the challenges associated with in-transit shipments and Internet issues, but actually, just because of time, I'd like to talk to Mr. Lipkus.

Mr. Lipkus, you are the second Mr. Lipkus I've ever met in my life, the first one a couple of days ago. Any relation?

**Mr. Lorne Lipkus:** Yes. Come to our supper table. There are lots of Mr. Lipkuses. I have three sons.

**Voices:** Oh, oh!

**Mr. Lorne Lipkus:** He's my middle son.

**Mr. Ed Holder:** I couldn't imagine who gets a word in. I'm not sure, but—

**Mr. Lorne Lipkus:** And you haven't heard from the other two.

**Mr. Ed Holder:** I think to be a fly on the wall would be exhausting, actually.

**Voices:** Oh, oh!

**Mr. Ed Holder:** With deep respect I say that, of course, Chair. He was eloquent and, I will say, a chip off the young block.

You made a comment about common law right versus trademark right. Forgive me, but not being a lawyer, what's the difference? Can you explain that to me, please?

**Mr. Lorne Lipkus:** If you register under the Trade-marks Act, you have a registered trademark in Canada. You have certain rights under our legislation.

If you have a trademark, you have a right under the common law, which would be case law that's evolved over the years. You still have certain rights, but you don't have the statutory rights that are contained in the Trade-marks Act. You don't have the exclusive right to a particular trademark in Canada, which you do if you've registered.

Very often in Canada it takes years to get your trademark registered, and what happens is that many of the very famous trademarks we're dealing with now encountered a counterfeiting problem before they could even get their trademark registered. But they would still have protection. They could still prevent someone else from using it, because that would be like passing off the other product for the unregistered trademark.

**Mr. Ed Holder:** All right.

**Mr. Lorne Lipkus:** It would be confusing to the public.

**Mr. Ed Holder:** Well, I'm getting it a bit more, so I thank you for that. I look forward to reading more of your formal representation on that, which is a nice segue to Mr. Keon.

Mr. Keon, it looks like you're talking specifically to one issue as it relates to the Trade-marks Act. It didn't sound to me like you didn't want to modernize the Trade-marks Act, you just wanted to make sure that it was not counter to the tradition you've had with regard to generic drugs.

Here's my question. I look at page 3 of your presentation, and I'm a little confused. Mine's just a philosophy degree, so I have to read this a little more carefully. As I see this, there are two sets here on page 3, at the very bottom. There's the CGPA proposal compared to the definition of Bill C-8. There is the definition of Bill C-8 compared to your proposed revised definition. Then below that is your proposal compared to the definition in the current act, where you have the definition of the current act versus the proposed revised definition.

From your perspective, where are you going? Where would you like to see this? I think it really does centre on the point you made about "distinctive" in relation to a trademark, and that which is inherently capable of distinguishing and so on. That is your definition concern. I see a couple of proposals here. From the standpoint of your association, where are you looking to take this?

• (1625)

**Mr. Jim Keon:** Just before I answer that, I can also say that we use one of Mr. Lipkus' other sons as a lawyer who advises our industry sometimes. They are very good lawyers.

**Mr. Ed Holder:** I hope your other son has enough work.

**Mr. Lorne Lipkus:** He's a very good lawyer too.

**Mr. Ed Holder:** Sorry, please go ahead.

**Mr. Jim Keon:** On the definition of "distinctive", the phrase that we are suggesting be taken out of Bill C-8 is the phrase "inherently

capable of distinguishing". Why we think that introduces uncertainty is simply that under the current law it's been made clear that you have to demonstrate that a trademark actually is distinctive. In the pharmaceutical industry, where wording matters, and issues of technical definitions matter and are litigated extensively, putting in a new concept there, we believe, will open up more litigation, more uncertainty. That particular phrase is what our law firms have flagged for us.

**Mr. Ed Holder:** From your perspective, what's the implication if the definition remains the same as suggested in Bill C-8? You talked about litigation, but what's the other specific use?

**Mr. Jim Keon:** I think it's that a pharmaceutical application for a pharmaceutical trade dress would now argue that my particular medication, the look of it, the little triangular blue pill, may not yet have become "distinctive", but it is inherently capable of being distinctive, and therefore I should get a trademark, with all of the rights flowing from that. For the generic pharmaceutical industry, that would be troubling because we have so far been successful in ensuring that those trademarks are not granted to the look of a pill.

Just to be clear, if it's a brand-name company—Pfizer, Merck, or Glaxo—it is clearly distinguished that those are their products. Their name and company logo are on the pill and on the package. Then if it's Apotex or Teva or Pharmascience, that's clearly distinguished. There is no attempt to confuse anyone wanting to know who the manufacturer is. But the reality is that—

**The Chair:** I'm sorry, we're over time.

By the way, in the last seven-plus years I've heard a lot, Mr. Holder, but I can't remember ever hearing on record somebody asking for forgiveness for not being a lawyer.

Madame Sgro, you have seven minutes.

**Hon. Judy Sgro (York West, Lib.):** In this industry portfolio, I suspect we will see a lot of lawyers. Maybe we should see a few more theologians; it might be more helpful as we move forward.

There have been quite some serious health and safety issues raised by many of the panellists we've had a chance to see. That very much concerns me.

Mr. Keon, you can elaborate more on Mr. Holder's question.

On the case law that's already been established as a result of years and years of litigation, with the changes being proposed in Bill C-8, it seems to be your feeling that unless amendments are done to change further that issue of "distinctiveness", it will lead to more litigation, which may be great for Mr. Lipkus and his sons and others, but I'm not sure that it's necessarily good for the taxpayer. Is that correct?

•(1630)

**Mr. Jim Keon:** Correct. Our legal analysis shows that, first of all, there have been dozens and dozens of cases in the trade dress area in pharmaceuticals. Consistently the courts have said that for trademarks relating to the physical appearance of a pharmaceutical dosage form, the tablet, they can get registered only where the product appears that it actually distinguishes the applicant's pharmaceutical from those of others. That has been the case law.

Nothing in the Trade-marks Act says you can't register a pharmaceutical product trade dress. It's simply that the courts have said that pharmaceutical trade dress is not distinctive. It doesn't identify the product as coming from your company. The pharmaceutical trade dress identifies the type of medication, and that is the issue that's been settled.

We're just very concerned that changing the definition...again, not to aid or assist in anti-counterfeiting measures, which are, we've all indicated, and everyone would agree, absolutely important that we do, with increased criminal fines and increased border surveillance. It's simply because there was an opportunity where we were opening up the act to introduce anti-counterfeiting legislation. The trademark office said, "You know what? We haven't updated our act in a long time. Let's modernize it."

Our concern is that in modernizing this particular definition, they've created some unintended consequences, which, as we were told by the minister and his staff, was not their intention.

**Hon. Judy Sgro:** If it wasn't their intention, then some amendments to make sure that's clear shouldn't be a problem for the department.

**Mr. Jim Keon:** That's what we're hoping, yes, that they would agree that the type of amendment we're proposing is a reasonable one that would not in any way change the intent of the bill.

**Hon. Judy Sgro:** Okay.

Mr. Lipkus, we are talking again about this bill going forward in its current form. What kinds of amendments would you suggest, given the fact that we seem to be moving relatively quickly on this bill? What kinds of amendments would you suggest should be done in order to strengthen the bill? Or are you comfortable with the bill going forward in its current form?

**Mr. Lorne Lipkus:** I think there are a lot of good things in the bill, so I want to say that. I think everyone can applaud the government for finally dealing with this issue.

Having said that, I think we can do better, and I think we can do better without going back and reinventing the wheel. I think all we have to do is just add a few provisions in the existing sections that talk about a simplified procedure.

The simplified procedure is just that: it's simple. It works; it just adds a few steps. So let's add the few steps and get on with it.

**Hon. Judy Sgro:** Yes, it just seems like that isn't the simplest way to deal with it. You call it a simplified regime versus an administrative regime, but it does seem a much simpler way of dealing with a problem than the way we're doing it in Bill C-8.

**Mr. Lorne Lipkus:** Well, Bill C-8 creates a mechanism whereby you have to go to court, and the existing simplified procedure

regimes also have a very similar regime for going to court when there's a dispute.

The point that people like me are making is that if there is no dispute, let's not go to court. Those are the cases that we have to get rid of. Those are the cases that I think are going to cost the government, cost the taxpayers, cost customs a lot of money to go after.

A simplified procedure will save everybody money.

**Hon. Judy Sgro:** The issues in and around the RCMP and CBSA continue to have some significant challenges themselves. Are you satisfied, based on the amount of time you've spent on these kinds of counterfeit issues and the number of border crossings we have and so on that they have sufficient knowledge and manpower to be able to make a significant dent if they have Bill C-8?

**Mr. Lorne Lipkus:** The short answer is yes.

To give you a slightly longer answer, I've worked with many officers across the country, and we have among the most dedicated and knowledgeable and brightest officers in the world. I've worked with people in other countries as well. When they're given a task, they perform the task.

I'm talking about counterfeit situations right now. They've come up with some amazing cases in Canada. Look at O-Scorpion; what a tremendous success.

If we look for counterfeit, look what happens. We find it.

•(1635)

**Hon. Judy Sgro:** To our other two witnesses, you made comments with regard to concerns on health and safety issues. You certainly raised some concerns with us that are of significance. Are you satisfied that Bill C-8 will be able to address those?

**Mr. Vladimir V. Gagachev:** In my business, yes. But Eaton as well as other electrical manufacturers are members of the Canadian Intellectual Property Council.

I'm an engineer for the legal matters. I differ from Mr. Lipkus. However, we are generally satisfied with the intent and the way the bill is going forward.

**Hon. Judy Sgro:** Good.

Ms. Ventin, do you have a comment?

**Ms. Carla Ventin:** We're satisfied as well.

Many of our products line the grocery shelves and drugstore shelves. These are products that you put in your mouth and that touch your skin, so the stakes are very high. These are a concern for us, and we think Bill C-8 will address that on the counterfeit side.

As I mentioned in my remarks, there are also other products, non-compliant products. These are products that are also a health and safety risk. They are not counterfeit, but they do pose a health and safety risk to Canadians, both inside and outside the product. For example, on the inside these products may not comply with Canada's very strict rules and regulations. They may have ingredients that have not been approved in Canada. This is a really big concern.

**The Chair:** Thanks, Ms. Ventin.

Sorry, we're way over time.

That's the completion of our seven-minute round. Now we're going to our second round of five minutes.

Ms. Gallant.

**Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC):** Thank you, Mr. Chairman.

A number of you have indicated that it should not be the trademark holder, essentially the victim of the counterfeiting crime or the transport of them, who should be financially responsible. What are your thoughts on holding the transporter accountable, the entity on whose ship or truck it came through?

We'll start at one end and go through.

**Mr. Scott Smith:** I would agree that the brand owners are the victims in this situation. They have an investment in their brand and they do want to protect that, so they have a willingness to spend some money to be part of this process.

In terms of those who are transporting, generally they have no knowledge of what's in those containers. There is no process for a transporter to be able to recognize what's in a container's shipment, as far as I'm aware.

**Mrs. Cheryl Gallant:** Is there no request for the ship's captain to carry a manifest and hand that in to Canada Border Services Agency?

**Mr. Scott Smith:** He would have a manifest, but it would tell him what the product is; he wouldn't be able to distinguish what's counterfeit and what's not counterfeit from that manifest.

**Mr. Lorne Lipkus:** If I could help out on that, it doesn't really tell him what's in there; it tells him what the person who is exporting it or importing it says is in there. It's up to customs to look to see if that makes sense or not.

Very often, they catch counterfeiters because they make mistakes in their manifests. It's actually moving from one victim to another victim.

Where it might be nice to hold some people responsible is if you have someone who is responsible for getting proper information on the address and name and contact information for the importer.

**Mrs. Cheryl Gallant:** Thank you.

Mr. Keon.

**Mr. Jim Keon:** I would say that in general, in the prescription pharmaceutical industry, you're dealing with entities that are highly regulated. All manufacturers, wholesalers, distributors, and retail pharmacies are licensed. They need establishment licences, and they are inspected by Health Canada. For the physical products coming into and being sold through legitimate trade in Canada, the products are generally safe.

I think where we've had more problem with pharmaceuticals has been with online sales. We know that the RCMP and others have done a very good job, as Mr. Lipkus and others have said, in attacking that problem and addressing it.

I'm not really answering your question on whether shippers or distributors should be liable, but I think in general they deal with parties who are registered and need establishment licences. If you're dealing with anyone other than that, you probably would and should be liable.

• (1640)

**Ms. Carla Ventin:** Going back to Lorne's earlier remarks that in an ideal world importers would be responsible and it is difficult tracking down importers to pay for these costs, I agree. But if it's difficult tracking down the importers of these counterfeit products, I would say try harder. Let's figure out a way to do that.

I don't think rights holders should be responsible for the illegal activity of others. If it is your business of importing certain products, you have a responsibility to know what those products are and to understand the rules and regulations of a country.

Yes, it may be hard to track down importers and to get them to pay, but that's not the rights holders' problem.

**Mr. Vladimir V. Gagachev:** This goes to what Mr. Lipkus said. The shipper says he is shipping circuit breakers. He doesn't say that he is shipping counterfeit circuit breakers. So the shipper wouldn't.... I can't see how they would be responsible in....

**Mrs. Cheryl Gallant:** They have no way of knowing. Okay.

Mr. Keon, in previous testimony, we heard that when counterfeit goods were seized it was discovered that in another room there was counterfeit medicine, and there was a relationship to Hezbollah. Are you familiar with that particular incident?

Is anyone else familiar with that particular seizure in which they identified Hezbollah as the perpetrator of the illegal importing of counterfeit medicine?

**Mr. Jim Keon:** No, I'm not familiar with that particular case. I'd be happy to look at it.

But I would say again that—

**The Chair:** Mr. Keon, I'm sorry, but we're out of time. All we had time for was the yes or no answer. I'm sorry about that.

Now we'll go to Madam Quach for five minutes.

[Translation]

**Ms. Anne Minh-Thu Quach (Beauharnois—Salaberry, NDP):** Thank you, Mr. Chair.

Thank you to everyone for being here to testify about this very important subject.

My questions are for Carla Ventin and Mr. Gagachev.

You both spoke about additional resources. Mr. Gagachev, you rightly said that you had to use specialists in your industry in particular, even retired gentlemen, to do inspections. Under Bill C-8, all these additional responsibilities would be given to our Canada Border Services Agency officers, with no additional financial or human resources.

Does that trouble you? Do you think the lack of resources will cause problems in applying the legislation?

[English]

**Mr. Vladimir V. Gagachev:** Yes, exactly. The level of sophistication of counterfeiters does represent a problem. Therefore, the CBSA would have to work with the rights owners as a resource. They would have no idea.... Whether it's simple or difficult to identify counterfeit product, they still need to work with the rights owners. They cannot identify a counterfeit. They are not the experts.

[Translation]

**Ms. Anne Minh-Thu Quach:** Ms. Ventin, would you like to add anything?

[English]

**Ms. Carla Ventin:** I think the border officers would require perhaps more resources. I mean, let's think about this. Counterfeiters are becoming much more sophisticated. If the officers are going to be given additional responsibility at the border, I think more training would be required. I think that's a key consideration.

But also, to help alleviate that concern somewhat, don't forget that Bill C-8 will actually allow—for the first time—the border officers to contact and discuss with the rights holders.... For example, our member companies have intelligence and can help out at the border. Hopefully that would be helpful, and we look forward to working with the border officers on this.

•(1645)

[Translation]

**Ms. Anne Minh-Thu Quach:** So there should be more resources. When the Minister of Industry came to testify, he clearly repeated a number of times that there would be no further investment, that all of it would be part of people's duties.

Should we have an amendment to Bill C-8 that would add financial and human resources? Would you recommend that?

[English]

**Ms. Carla Ventin:** I'm not sure how the resources are currently allocated, nor of the roles and responsibilities in how the border officers will operate in the future. I'll leave that to the department and the MPs on the committee to determine.

[Translation]

**Ms. Anne Minh-Thu Quach:** Right. Perfect.

Both of you also addressed the issue of cybercrime involving products sold over the Internet. Should any measures be added to Bill C-8 to cover everything sold over the Internet?

[English]

**Mr. Lorne Lipkus:** Is your question for anybody?

[Translation]

**Ms. Anne Minh-Thu Quach:** Yes, my question is for everyone.

[English]

**Mr. Lorne Lipkus:** Okay. Thank you.

As part of the intelligence-gathering we presently have, and as part of the intelligence-gathering brands will use, as Ms. Ventin has mentioned, when working with customs, the Internet will be dealt

with. Right now, not only are we using that information, but we're also working very closely with the Anti-Fraud Centre, which is a very effective way of dealing with Internet-type counterfeiting.

The Anti-Fraud Centre is based in North Bay. It's a partnership of industry, law enforcement, payment processors, and others. They are extremely effective, and we work very well with them. I urge anyone with a counterfeiting problem to deal with them on Internet issues as well.

**Mr. Scott Smith:** I would add that the RCMP has announced that they will be adding additional resources to the Anti-Fraud Centre for next year, as part of their priorities.

[Translation]

**Ms. Anne Minh-Thu Quach:** You just mentioned the RCMP. We finally received some statistics about the RCMP's work. According to them, the number of RCMP investigations dropped in 2012, given that other priority files were drawing from federal resources. That's just one more bit of information that makes me think that we need more resources.

I would like to come back to Ms. Ventin and move on to something else.

You work directly with some small businesses. What fee structure do you think should be put in place to ensure that small businesses can get the same protection as multinationals that have more resources?

[English]

**The Chair:** Madam Ventin, you'll have to hold on to that question. We're way over time on that round. Maybe you can answer it when you're addressing another question.

Mr. Jean, five minutes.

**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** Thank you, Mr. Chair.

Thank you to all the witnesses for appearing today.

I will be addressing my questions to you, Mr. Keon. First of all, thank you very much to your industry for the medicines you've donated to Health Partners International. They celebrated \$40 million worth of medicines distributed to the world's most needy last year. I know that's in large part your industry. Even now they're delivering medicines to the Philippines. So thank you very much for that.

My question is also in relation to the definition and the suggestions you've made. I see by your brief...which I found quite disturbing, to be honest, as a lawyer as well, because of the changes.

My understanding, in relation to the definition in the current act, is that you are only making a suggestion that two words be deleted, in essence—three words, but only two different words—and in the new definition in Bill C-8, there are actually 14 words that you're suggesting that are different.

So there's quite a difference between the old definition and the new definition, and you're only suggesting a minor change to the old definition—a tweak, in essence—because of the case law that has taken place over the last how many years.

**Mr. Jim Keon:** That's correct. We are proposing changes to the current act, changing the word “means” to “describes”, and changing the word “wares” to “goods”. I think they're minor modifications and more reflective of current terminology.

We believe that's sufficient for the changes, yes.

• (1650)

**Mr. Brian Jean:** The courts have been interpreting these for years, I suppose.

**Mr. Jim Keon:** Correct.

**Mr. Brian Jean:** How long has this definition in the current act been going?

**Mr. Jim Keon:** This definition has been in the current act for more than 50 years now.

**Mr. Brian Jean:** So we have case law from judges all across Canada for the last 50 years using this definition in the current act, which is obviously critical to how the act is interpreted, and you're suggesting only two tweaks to that.

**Mr. Jim Keon:** That's correct. These trademark cases around trade dress in pharmaceuticals have been interpreted many, many times through the opposition board and then on to the Federal Court and even up to the Supreme Court, which has commented that the definition of distinctiveness is critical to the whole Trade-marks Act.

So yes, this particular aspect of trademark law has been interpreted extensively by the courts over the last several decades, and in particular with regard to pharmaceutical trade dress in Canada.

**Mr. Brian Jean:** I did notice that the new definition is quite a bit different in its read than the last definition, and I'm wondering where they got it from. Often I've seen that when definitions are changed, the new definition has often come from another jurisdiction, such as Australia or the United States, etc.

Is this proven case law in any other Commonwealth country in the world?

**Mr. Jim Keon:** The explanation we were given is that they had gone to the international agreement, the trade-related intellectual property agreement, and tried to incorporate some of the elements from that into the Canadian law.

In our view, they actually didn't do that entirely correctly. But more fundamentally, the wording is quite different.

No one has ever suggested before the court, in challenging or not these opposition cases in regard to trade dress in pharmaceuticals, that Canadian law is in any way inconsistent with TRIPS. Our current law is consistent with TRIPS.

We believe, again, that the change they're suggesting would create uncertainty and actually do a disservice to the case law that's been pretty well formed now.

**Mr. Brian Jean:** From my understanding—and correct me if I'm wrong—in Canada we actually, at all court levels, have to take into

consideration international agreements that are ratified by our government, or signed by our government, whereas in the United States it's a different process; I think it has to go through the federal court.

Notwithstanding that, surely we can't be the first country to decide that this is an interpretation we need to take from the TRIPS agreement. There must be other countries that are signatories to the WTO that have put together new legislation to reflect this. I can't believe our officials would come up with a new law or a new definition based upon what they believe needs to be done differently, when we have the United Kingdom, India, Australia, and many other jurisdictions that our courts actually refer to in their decisions that would use this definition.

**Mr. Jim Keon:** I think that's right.

The TRIPS agreement is signed by more than 120 countries. The wording is intended to be general, reflective of common-law countries, civil-law countries, many varying systems of business law, etc.

There's no suggestion that everyone has to change their law to be exactly, word for word, what's in the TRIPS or any other trade agreement. The substantive effect of your law has to be consistent with what's in the agreement—and our law is.

Thank you.

**The Chair:** Now we'll move on to Mr. Masse for five minutes.

**Mr. Brian Masse (Windsor West, NDP):** Thank you, Mr. Chair. It's good to be back here.

We've done this a number of times. It's good to see something moving forward. As New Democrats, we've been pushing this for a number of years.

Mr. Smith, you distributed an interesting chart from the Royal Canadian Mounted Police. For those who don't have the benefit of being able to see it, it shows that since 2005 the percentage of occurrences involving harmful products has gone from 11.2% up to 30.4%. As well, the total retail value of seized IP-infringing goods has spiked to \$38 million. But there's an interesting anomaly on the chart, and I'll ask about this. In 2010 it was at \$24 million. It went up to \$67 million and then back down to \$38 million in 2012. So in 2011 it was \$67 million. Can you tell us what happened in that timeframe?

**Mr. Scott Smith:** That's been referred to a couple of times by several witnesses.

That was Project O-Scorpion. That was when there was a specific effort by the RCMP to target areas around Toronto.

• (1655)

**Mr. Brian Masse:** We know we get the results when we put the resources there.

**Mr. Scott Smith:** Precisely.

**Mr. Brian Masse:** What is the reason for the harmful products coming in? Are there certain types of products? Does this information also include cigarettes? I didn't notice them on—

**Mr. Scott Smith:** I believe it does.



**Mr. Brian Masse:** Are there any particular harmful products that are coming in?

**Mr. Scott Smith:** There are all manner of products. The food and consumer products.... People are here and they'll tell you about a number of products that have issues around them, things such as air bags. You saw the circuit breakers. It could be any manner of thing.

**Mr. Brian Masse:** I'd like to move to how we actually work this through with the CBSA. By 2015 this government will have taken \$143 million out of CBSA's budget and reduced front-line officers by 325. There are also going to be 19 detector dog units retired in total. Actually, some have already been moved to the prisons as opposed to the front line of our country.

Ms. Ventin, you said more training is going to be necessary. What type of training? Will the CBSA agents be under any risk, given that harmful products are included in what they actually are looking for?

Mr. Lipkus, if you have something to say to that as well, I would like to hear that.

**Ms. Carla Ventin:** Training is definitely an ongoing challenge on this issue. As I mentioned, counterfeiters are much more sophisticated. Often it takes the rights holders' expertise within the companies—to actually go and physically do the inspection themselves and discuss with the border officers whether something is counterfeit. It is so difficult to detect now. So that's an ongoing challenge.

The turnover rate at the border is a challenge. From what I hear, border officers are already very busy and have an awful lot of responsibility.

**Mr. Lorne Lipkus:** Certainly I can't comment on what the best allocation of resources is for customs; I can only say it's a proven fact that the more resources you allocate to look for counterfeit, the more counterfeit you find. That's Project O-Scorpion.

I can also say, in respect of working with customs, that they're already working with these shipments. They're already looking at these shipments, many of them for other customs violations.

We're just talking about counterfeit, but very often for these shipments they're undervalued, they're mis-declared, and they're mis-described. There are all kinds of other issues with them. Some of these shipments have guns in them. They also have counterfeit. There are a lot of other things going on.

The training usually results in the sharing of information, a partnership between the brand and customs and the police, as a result of which the system our customs officers have allows them to target where a likely shipment of illegal product being counterfeit is going to be found. That's the 1% to 3% of shipments they look at.

**Mr. Brian Masse:** Is the 10 days going to be enough for the information from customs to be shared, to get a responsible action back to confirm or deny whether it's counterfeit, and then, if that takes place and it is counterfeit, to contact the importer? Is that enough time in the process? Or should there also be a built-in fail-safe? For example, if they need another 48 hours, they can institute another 48 hours if necessary.

**Mr. Lorne Lipkus:** In the vast majority of cases that I've been involved in, I would say for over 95%, absolutely, for certain, when

we're contacted by the RCMP, which usually is the same day they're contacted by customs, within 24 to 48 hours at the outside we let them know whether it's counterfeit or not.

We can usually tell from a picture. I can give you one example on luxury goods. I can't say that every shipment of luxury handbags coming from China to Canada is counterfeit. I can only tell you that almost every time we're contacted for a verification, they wind up being counterfeit.

**The Chair:** Thank you very much, Mr. Lipkus and Mr. Masse.

Now we'll go on to Mr. Merrifield for five minutes.

**Hon. Rob Merrifield (Yellowhead, CPC):** Thank you.

I'm new to the committee, so I'll come at it from a bit of a trade perspective, as I do have an opportunity to chair the international trade committee. We've been working very hard. There actually is a difference between this committee and the trade committee. I've noticed that already. I don't think there's a person in the room who has a disagreement, really, with the concept of what we're trying to deal with. That never happens in the trade committee. I don't know if you realize that.

**Voices:** Oh, oh!

**Hon. Rob Merrifield:** Nonetheless, when it comes to counterfeiting and what we're talking about in this bill, and whether it's going to deal with the issues as directly as we need to, I'm trying to get a handle on how large a problem we actually have.

I have information here and the numbers. I think it seems to be growing, but in the last year it is down a little bit. I was struck by one thing, and that's the countries we're seeing counterfeit from.

We're seeing it from China, India, Pakistan, and Thailand. Those don't really alarm me that much. Well, maybe they alarm me, but they don't surprise me. The United States is the other one. That does surprise me a little bit.

Our largest trading partner is the United States. The United States' largest trading partner is Canada. I'm wondering if they're seeing the same thing. I'm wondering if they see counterfeit coming from Canada to the United States, if we happen to be manufacturing counterfeit, or if we're a pipeline to the United States and they're a pipeline to us.

The chamber might have some comments on that.

● (1700)

**Mr. Lorne Lipkus:** I would like to answer that. I've been involved in several cases involving in-transit shipments coming from China or other countries through Canada into the United States.

On cases I've personally been involved in, counterfeiters have shipped by boat goods originating in China, goods that were stopping in places in Europe and then being offloaded in Halifax to be transported by rail across the country—true cases. Counterfeits are coming in through the FedEx facility in Anchorage and being transshipped through Canada and then back into the United States.

The largest case of counterfeit cellular products, including dangerous batteries and chargers, was a result of an in-transit shipment that would have come through Canada and back into the United States, and it was caught by the combination of customs in the United States and in Canada.

So there is some sort of cooperation; perhaps there were other crimes going on with that shipment such that they caught it. But in transit is something that absolutely happens on a regular basis, where there is cooperation and there is counterfeiting.

**Hon. Rob Merrifield:** Are there cases where we actually manufacture counterfeit goods either in the United States or Canada?

**Mr. Lorne Lipkus:** I've been involved in cases, in fact, several cases, and one was in the Toronto area where apparel was being manufactured. We found banks of sewing machines. In two of the cases I was involved in, there were immigrants who were in the country illegally and were being paid \$4 an hour. That was just a few years ago, and that is what came out of the police investigation. They were manufacturing counterfeit apparel.

**Hon. Rob Merrifield:** That begs the question that if we find counterfeiters making counterfeit goods in Canada or in the United States, which are countries with the rule of law, is there a law against that in itself?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** Then are we dealing with that in our court system?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** Both in the United States and in Canada?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** Okay.

That takes us to Europe. We just signed a EU free trade agreement.

Are we seeing the same thing there, and the potential for that kind of a pipeline happening in Europe?

**Mr. Lorne Lipkus:** Yes. And they have their laws that relate to that.

The issue is that in Canada and the United States we're more assemblers than manufacturers.

Upwards of 80% of the counterfeits that we find are from China, but we—

**Hon. Rob Merrifield:** But with a piece of the electrical coming in, you have to bring those things in pieces and put them together. It would be just as illegal and just as dangerous.

**Mr. Lorne Lipkus:** Correct. That's assembling, and we have laws that make that illegal.

**Hon. Rob Merrifield:** Do the laws in Europe and/or in the United States resemble what we're trying to do in this bill?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** Do they have them already?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** In both cases?

**Mr. Lorne Lipkus:** Yes.

**Hon. Rob Merrifield:** So we're not ahead or behind.

**Mr. Lorne Lipkus:** We're behind right now.

They started off without a simplified procedure, as an example, and they've all gone to the simplified procedure. Just as Australia is now moving to a simplified procedure, those that were without it are realizing they need it.

**The Chair:** Thank you very much, Mr. Merrifield.

Now on to Mr. Thibeault for five minutes.

**Mr. Glenn Thibeault (Sudbury, NDP):** Thank you, Chair.

Thank you, witnesses, for being here today.

I think one of the interesting things you'll find around this table is that we're all in agreement that we need to keep counterfeit products out of our country. As was said on Monday, that's really important, no matter what colour of tie we have or what party we sit on.

What I find interesting, though, is that from testimony to testimony, from witness to witness, we're hearing that once resources are allocated, we find more counterfeit. In the report we have here about Project O'Scorpion, we were able to capture \$78 million from one year to the next. That's fantastic.

Thinking about the products we're seeing...you talked about the mining circuit breaker. I'm thinking about the thousands of men and women who go down the mines in my riding, and if that were one of those circuit breakers, what could happen? They are family and friends, not just in Sudbury but right across the country, so we need to do what we can.

Again, we heard my colleague Mr. Masse talking about the reduction of CBSA officers in dog detection. Even in this report, in 2012 the RCMP reported a total of 726 occurrences, a slight decrease from the previous year due to other priority cases drawing upon federal resources.

I think we need this to become a priority, to ensure that we're protecting our citizens and keeping these products off our streets. It's very concerning to see these type of things. From the training aspect, to the education of CBSA officers, to the allocation of resources and putting more of the officers on the front lines, it's a priority.

Mr. Lipkus, I guess I'll start with you. Isn't that a priority? Isn't it something we should be looking at?

• (1705)

**Mr. Lorne Lipkus:** Certainly every brand owner I know and every organization that deals with counterfeit want this to be a priority. Those who are involved, especially those in the field, see the dangers of counterfeit product and an increase in the involvement of organized crime. The amount of money that's being made is increasing on a yearly basis.

I first started doing this work in 1985, and there has not been one year, including this year, that we haven't seen more counterfeit than the previous year. It's on the rise, and those in this industry would like to see as much resource allocation as possible.

**Mr. Glenn Thibeault:** Great.

This relates to the in-transit, the current exclusion.

Am I understanding correctly that your organization is not in favour of that? Did I understand that correctly?

**Mr. Lorne Lipkus:** No.

**Mr. Scott Smith:** Essentially, we're not in favour of an exclusion of in-transit, largely because it doesn't capture things that could be re-entering the Canadian marketplace, and it's inconsistent with our major trading partner in the U.S.

**Mr. Glenn Thibeault:** Again this leads to resources. Here we're asking all of these things of CBSA—to do the things they need to do at the border and now in transit as well. This is coming down to some of these things, unfortunately—the idea that if it's not staying in our country, let's let it go—but ultimately it may come back in the form of circuit breakers. Am I getting that whole “squaring the circle” type of thing there?

**Mr. Scott Smith:** I would say so.

**Mr. Glenn Thibeault:** Fair enough.

Mr. Smith, during your opening presentation I think I heard you say something about attracting the “effectiveness of enforcement”. Can you explain what you meant by that?

**Mr. Scott Smith:** There has been a lot of talk about the idea of a simplified procedure. If that doesn't happen, we're saying make sure you're tracking the number of seizures. Make sure you're tracking the resources that get allocated, and look at some performance measures from the various agencies that are involved. Look at the performance measures from some of the companies involved—how many are actually registering with the request for assistance program?—and be able to use that information down the road to say whether this is an effective regime or it is not an effective regime. If it is, great. If it's not, you'll know how to fix it.

**Mr. Glenn Thibeault:** Do I have a little bit of time, Mr. Chair?

**The Chair:** Thank you very much. You're right at five minutes.

We now go to Mr. Lake for five minutes.

**Hon. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC):** Thank you, Mr. Chair.

I'd like to thank the witnesses. This has been a very interesting panel today because different points of view on different aspects of the bill today are represented. I think it has been a very well-rounded panel.

Perhaps I'll start with the resources issue that the NDP is bringing up. It's interesting, because no matter what we talk about in any committee on the Hill, the NDP want to spend more money on that thing. Certainly, as governments, we need to assess our priorities and make decisions accordingly.

If you were to package together all of the different expenditure proposals the NDP have, they would have a significant impact. For example—and maybe I'll come to Scott on this—in their last platform they called for, I think, an 18.5% corporate tax rate versus the 15% we have right now. That might be one way to pay for all of the things they talk about.

Where would the chamber stand on increasing the corporate tax rate from 15% to 18.5%?

• (1710)

**Mr. Scott Smith:** If you're looking at adding more resources to the CBSA or the RCMP, one of the ways of doing that might be through administrative penalties or statutory damages. The government could recoup some of the costs they might invest in things such as training.

**Hon. Mike Lake:** So the increase in the corporate tax rate wouldn't be something the chamber of commerce would favour?

**Ms. Chris Charlton:** Try to lead a little more.

**Hon. Mike Lake:** Just a yes or no.

**Mr. Glenn Thibeault:** I can write his answer out for him if you want, Mike, and bring it to him.

**Ms. Chris Charlton:** Just throw it from the desk. Just play with him a little bit.

**Hon. Mike Lake:** I think about resources and I think about the fact...because clearly we have experts at the Border Services Agency who know what their priorities are, and given the tools they have, they allocate those resources accordingly. I think about the resources in my day. I have 24 hours in my day, every day, and I have various tools I might add to what I do every day—BlackBerry, information management techniques, time management techniques, networks of people who I talk to—that will make me more effective. I can add those different tools and I can choose to use or not use those tools to get more out of my 24 hours. I don't have to add three hours to my day to actually use those tools to be more effective. I think that's what we're seeing here. We're adding tools to the resources that CBSA officials have. I think they've said they will be able to use those tools to be more effective in attacking counterfeit.

**Mr. Scott Smith:** I would agree with that as well. That was sort of the central message I was trying to get across in my original presentation—that there are a number of things this bill does that add tools to the cadre the enforcement agencies are able to use, and we'd like to see those come to fruition. I think that's important. It's about efficiency.

**Hon. Mike Lake:** Maybe we could go along the table and hear what the most important of those tools are. We've heard some ideas for tweaks we might make or things like that we could use to make the bill better, which the government might consider. Of the things in the bill, what are the most important aspects, the most important tools for you?

Perhaps, Mr. Lipkus, you could answer.

**Mr. Lorne Lipkus:** An officer having ex officio power to take the counterfeit off the market, to deal with it even if it's just to send it to the brand—that is the number one tool that people have been asking for forever.

I'd like to add to the answer regarding resource. Resource allocation is always a difficult thing. This bill doesn't create a new department within customs to deal with something; it's just giving them one more thing to look for in shipments that are coming in. A lot of this is intelligence-driven, and until we get out there and start seizing counterfeit, I don't think we really have the best appreciation for what we're going to find. I know that every time we look for it, we find more than we expected. If we have a regime where we have some tweaks to it and we allow other people to pay for it, I think we can make this work very well.

**Hon. Mike Lake:** Does anyone else want to weigh in?

**Mr. Jim Keon:** On prescription medicines, with the increased enforcement powers given to the Canada Border Service Agency, one of the things that we would recommend is increased cooperation with Health Canada and their inspectors, who I think are the real experts. There needs to be well-established protocols between the CBSA and Health Canada to allow for quick and effective determination of—

**Hon. Mike Lake:** To add to the efficiency of—

**Mr. Jim Keon:** It would make it far more efficient. Often it's not immediately obvious whether these are counterfeit medicines or not. An inspector or group could really bring that expertise to bear. I think that's a recommendation we would make.

**The Chair:** Thank you very much, Mr. Keon, Mr. Lake.

We have a few minutes left. I have a couple of members who have some burning questions. But the fairest and most effective way for me to bleed out this time is to go to the witnesses first. If there are any questions where I had to cut you off because of time, if there's something that you want to respond to right now, I'll just go across and ask. If you don't have anything, then I'll go to the members who have burning questions and we'll see how much time we have.

Mr. Smith, Mr. Lipkus, is there anything you want to add?

No, okay.

Mr. Keon, is there something you wanted to add that you didn't get a chance to say?

•(1715)

**Mr. Jim Keon:** I congratulate Mr. Brian Jean. He congratulated us on our work with Health Partners International. I think he does a great job in promoting them and in getting medicines abroad.

**The Chair:** I myself was at one of his big events.

Ms. Ventin.

**Ms. Carla Ventin:** I want to address Ms. Sgro's questions about the health and safety of products, especially non-compliant products. What I was saying is that there are health and safety concerns. The product formulations may not be approved in Canada, and the packaging and labelling may be deficient. There may not be full

disclosure; they may not be accurate. So there is a health and safety concern in dealing with counterfeit products.

**The Chair:** Thank you, Ms. Ventin.

Mr. Gagachev.

**Mr. Vladimir V. Gagachev:** The good news for this building, Public Works Canada, is that the investigation found only one counterfeit. It was last year, and I think it's been removed.

As to Mr. Lake's question about tools, records of trademarks at the border, the World Customs Organization has a tool, but its name escapes my recollection right now. Sorry?

**Mr. Scott Smith:** It's Interface Public-Members.

**Mr. Vladimir V. Gagachev:** Yes. It's used as a record of trademarks where the interface between the brand owner and customs officer comes into play. It's software.

**The Chair:** Thank you very much, Mr. Gagachev.

Now, the first one to get my attention with a burning question is Mr. Jean.

**Mr. Brian Jean:** Thank you for that, Mr. Keon. I have more questions for you, however.

The first is, I could not find any country that has adopted the terminology you're suggesting to take out of the definition: "or that is inherently capable of distinguishing". I tried to find it. I wasn't playing with my emails; I was actually trying to find more information on this. There doesn't seem to be any other country in the Commonwealth or otherwise that has that.

In fact, I looked at the United States, and I don't really put my head around the whole circle. It seems there's case law: Abercrombie & Fitch v. Hunting World, a 1976 case that uses the spectrum of distinctiveness.

The United States seems to have quite a bit of law relating to different types of trademarks: fanciful marks, arbitrary marks, suggestive marks, descriptive marks, and generic terms. When I was reading that, it became apparent that this was one of the issues. Courts could find that some trademarks would be considered generic.

Is that an issue? Can you comment on what I've just asked in relation to the United States and the case law they use? The United States has ten times the level of infringement that we have.

**Mr. Jim Keon:** Yes, I think trademark law is interpreted differently in different countries. We're not aware of any country that has adopted a definition identical to what the Canadian government is proposing.

As well, the International Trademark Association, in their brief, also expressed concern about the new definition of distinctiveness. They also highlighted the term “inherently capable of distinguishing”. They said that we should add a definition of that new term “inherently capable of distinguishing”, so it's an issue that they also flagged.

We don't think that you want to introduce a new definition and then add a new definition of parts of that new definition. The courts in Canada have never expressed a problem in determining what the act meant. They look at the facts of the case. They've been able to apply that to the definition. I think the best thing would be to, as much as possible, leave that definition as it is.

**The Chair:** Thank you, Mr. Keon.

Madam Sgro.

**Hon. Judy Sgro:** Do I have one minute or five minutes?

**The Chair:** Well, I'm just trying to be as expeditious as possible, so....

**Ms. Chris Charlton:** Thirty seconds.

**Voices:** Oh, oh!

**The Chair:** You have one question.

**Hon. Judy Sgro:** You're all very sweet. Thank you all so very much.

Since we seem to have this increasing speed to deal with this bill.... We have a memo that says we may have to put in our amendments as early as the coming Wednesday.

To any of you at the table, do you.... I'm glad we're dealing with Bill C-8, not to go on record as going the wrong way, but I see health and safety concerns being raised. I also see opportunities to talk more about a simplified procedure. Otherwise, it's the rights holder that's going to get hit with added costs and problems, whereas if we were to put in a simplified procedure or administrative regime—call it whatever you like—it seems to me that we would be saving money.

The government talks about spending tax money and so on. I think we should make sure that whatever we do is not adding costs that we don't have to for anybody other than the people who are doing the criminal activity, which I'd like to see us go stronger on from that perspective.

I guess that's the first question: do you think we should be spending more time on this bill to put more teeth into the bill?

Second, because I may not get the floor again, Mr. Keon, you mentioned legal opinions in regard to the distinctiveness issue that you're concerned about. Would you be prepared to give those to the committee to make sure that we all have adequate information?

• (1720)

**Mr. Jim Keon:** Yes. We'd be happy to share the legal opinions I'm referring to.

**Mr. Lorne Lipkus:** The optimist in me says, “Why can't we just quickly make these amendments and get moving and get this passed?”

**Hon. Judy Sgro:** That's a great idea.

**The Chair:** Thank you very much for that, Mr. Lipkus. We're trying to do just that.

Madam Charlton.

**Ms. Chris Charlton:** Thank you very much, Chair. I'm delighted to be able to use Ms. Sgro's remaining eight minutes. Thank you for that.

**Voices:** Oh, oh!

**Ms. Chris Charlton:** I want to follow up with Mr. Smith. I think where my colleague Mr. Thibeault was going with respect to the tracking is that we absolutely need to have some evidence with respect to the size of the problem before we can have an intelligent conversation about the enforcement that's necessary. We know at a rudimentary level that more resources are needed because we're asking the border guards to take on additional responsibilities, but really, we need to figure out what the magnitude is that we're talking about, and we all believe in evidence-based decision-making—at least on this side of the table.

You were talking about the need for tracking. Obviously, if we're going to do that, that information needs to become available. Would you be comfortable with requiring regular reports to Parliament so that we have transparency and real accountability? What were you envisioning with respect to that kind of tracking?

**Mr. Scott Smith:** I think that would be up to the agencies that are tasked with developing that information. They have their own protocols on how they disclose information. There may be some privacy issues there such that they aren't able to disclose everything, but I think it's important that the information be available to decision-makers if there's going to be such a thing as a legislative review in a few years.

**The Chair:** Thank you, Madam Charlton.

Mr. Holder.

**Mr. Ed Holder:** Thank you, Chair.

My question actually flows from Mr. Merrifield's questioning about the United States and the EU and what they do.

Mr. Lipkus, help us to understand. In those jurisdictions, who's responsible for the storage and destruction of counterfeit goods?

**Mr. Lorne Lipkus:** As I understand it, it's similar to what it is in Canada, where, if there's going to be an action, it's at the cost of the rights holder.

**Mr. Ed Holder:** So what's in the legislation proposed now that's consistent with what goes on in the United States and in the EU?

**Mr. Lorne Lipkus:** It's partially inconsistent. It's consistent in the sense that cost is there. In the United States it's a very minimal cost. It's not all the cost, which it is in Canada. In the United States it's destroyed by customs, everything is done, and they get a bill, which I understand is \$100 or \$150, and the rights holders are paying those costs.

I'm not as familiar with the cost in the EU, but I do know that there have been no bills for some of the detentions. I've read that in their reports, and those reports are of course public. In many of the cases, they're going by way of simplified procedure and customs is just destroying it. So although there is a cost, it's much less than what is proposed we have in Canada.

**Mr. Ed Holder:** But it does belong to the rights holders now?

**Mr. Lorne Lipkus:** Not in all cases, but in some cases.

**The Chair:** Mr. Thibeault has a 30-second question.

**Mr. Ed Holder:** I appreciate that. Thank you.

**Mr. Glenn Thibeault:** Mr. Gagachev, in relation to the breakers and the electrical circuitry you were talking about, you were able to rhyme off how many—and they found one in this building. Are there statistics out there that can show us how many, or how concerned we should be in relation to how many counterfeit circuits are out there? It's pretty disconcerting.

**Mr. Vladimir V. Gagachev:** Absolutely not. As I mentioned in my report, we can only inspect those that look suspicious to the people who report them to us. I've been training people and telling people, but as a brand owner, we cannot tell them everything; we have to hide something, otherwise it's a catch-up game. The bad guys always catch up.

As Mr. Lipkus said, we ask them for a photograph, and most of the time we can tell from the photograph that the brand owner called. Again, it's whether the owner of the equipment or the inspector can spot it, and those are the key people I need to work with and I do work with. It's a fluke. We cannot possibly check them all. We advise buying from authorized sources. That's extremely important.

I did mention in my report that unauthorized re-sellers of equipment concerned with public safety has to be addressed.

● (1725)

**Mr. Glenn Thibeault:** Thank you, Mr. Chair.

**The Chair:** Thank you, Mr. Gagachev.

I've adopted a new habit. When I see a product, I now call the manufacturer, if it's an online product, and ask them if they're an authorized seller, because it's so ubiquitous now.

I want to thank the witnesses. A number of colleagues mentioned just how important this subject is for us, and although we may disagree on process, we are all agreed on stemming the tide of this criminal activity that's endangering our citizens.

I want to thank you for bringing the concerns of your industries and also for your expertise; it's been very enlightening.

Colleagues, we're now adjourned.

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