House of Commons
CANADA

Standing Committee on Industry, Natural Resources, Science and Technology

INDU • NUMBER 028 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Wednesday, April 6, 2005

Chair

Mr. Brent St-Denis

All parliamentary publications are available on the
``Parliamentary Internet Parlementaire´´ at the following address:

http://www.parl.gc.ca

Standing Committee on Industry, Natural Resources, Science and Technology

Wednesday, April 6, 2005

● (1605)

[*English*]

The Chair (Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.)): *Bonjour, tout le monde.* Good afternoon, everyone.

I'm pleased to call to order this Wednesday, April 6, meeting of the Standing Committee on Industry, Natural Resources, Science, and Technology. Today we are continuing our study of Bill C-19, which amends the Competition Act. We have a fine panel of witnesses with us here today.

We have lost quite a bit of time due to votes. I may ask colleagues to cut down the question time a little bit on the question round. Maybe we can go over a few minutes after 5:30 to make up some time as well.

Witnesses, you'll be asked to speak in the order you are on today's agenda. I'm going to ask you to keep your presentations to five to seven minutes maximum. I will start to signal you at around seven minutes if I don't see you winding up.

Thank you for being here today.

With that, we will start with the Food and Consumer Products of Canada and Ms. Witterick. We invite you to start.

Mrs. Crystal Witterick (Lawyer, Blake, Cassels and Graydon LLP, Food and Consumer Products of Canada): Good afternoon. As mentioned, I'm appearing on behalf of the Food and Consumer Products of Canada, FCPC for short. I'll probably refer to them in that context.

Just to give you some background, FCPC is the industry association representing approximately 150 Canadian-operated companies that manufacture and market retailer and national brands. These products are sold through all channels: grocery, drug, convenience, mass merchandise, and food service. FCPC members cross the size spectrum, from small enterprises to large multinationals.

So on behalf of FCPC, I've been asked to thank you for the opportunity to appear before you.

I have been competition counsel to FCPC for approximately 12 years now. As a trade association, I can tell you that FCPC is very, very careful to ensure compliance with the Competition Act. We regularly hold educational seminars on competition law.

I've been very active over time in commenting on proposed amendments to the Competition Act. We've provided input on the guidelines on abuse of dominance as applied to the grocery sector. We've provided comments on these proposed amendments, and we've participated in the consultative process with the Competition Bureau.

I will be addressing only two of the proposed amendments this afternoon: first the AMPs for abuse of dominance, and the proposed amendments to the civil misleading advertising provisions.

While others who have appeared before me have very ably conveyed some of the same points, I suggest to you that it would be beneficial for you to hear FCPC's perspective. As I read through some of the previous testimony, it struck me how similar the concerns of business groups, the legal profession, and others are. I suggest that with such an overwhelming course of objection, perhaps the tabled amendments to the Competition Act should be sent back for reconsideration and revision from the obviously different perspective that the non-bureau contingent has.

Before I address the two specific proposals, I'd like to make a general comment. That is, the Competition Act is a very important framework for our country. It should be used to promote not only competition in Canada, but international competitiveness. We should not be tying the hands of business. We should be looking at that legislation in its entirety, not piecemeal, not with a series of amendments when you're not sure what the next steps are going to be and how the whole scheme and framework of the act is going to fit together.

In 1986, the act was amended. It was a tremendous accomplishment. It took a lot of time to put together the framework legislation, and it concerns us that it is being picked at on a piecemeal basis without contemplating the whole framework. None of our members would consider putting a product on the shelf for consumers without considering all the ingredients and how they work together, just as the framework of the Competition Act should be considered as a whole and how it works together.

So starting with the proposal to impose AMPs for abuse of dominance, our position is that they're unnecessary for four main reasons. First, we suggest that no further deterrence is necessary. There's no evidence that the penalties are necessary. There have been very few abuse cases, so it's difficult to understand the need for greater deterrence. I suggest that we already have AMPs in the millions for abuse of dominance. Those apply whether you're guilty or not. I think that is more than sufficient deterrence.

In addition to the costly and complicated legal advice that is necessary to facilitate compliance with those provisions, it costs several millions to go through a tribunal hearing. That doesn't even account for the tremendous executive time, the management time, and the reputational damage.

I can walk you through what happens in our office when we have a counselling session with a client. You say, “Mr. X, I think your conduct raises issues under the abuse provisions”, key word being “issues”. Very rarely would we say.... I mean there are some circumstances when we say it's a problem and you need to do something, but mostly it's issues. The executive, of course, says, “What do you mean, issues? Am I doing it right? Am I doing it wrong? Is there a problem?” I don't know. You have to go to the tribunal and the tribunal will decide. There's not a lot of clarity in the provision to help guide clients. Companies need that guidance to carry on their business effectively.

So when you add to that uncertainty and the weighing of the pros and cons the company must make in order to decide whether to pursue their conduct, with the spectre of millions of dollars a hearing and then the possible penalty of $10 million to $15 million, they're going to err on the side of caution, serious caution, which I think, as I'll get to in a moment, will have a chilling effect on pro-competitive behaviour, which is the last thing we need in this country.

● (1610)

So in this scenario the bureau has a huge hammer to encourage companies to mind their p's and q's, and to stop any possible anti-competitive conduct. That's a factor in day-to-day decisions that companies make. They think about those risks. They think about the implications of their conduct. They weigh the pros and cons, and by and large, the companies err on the side of caution. They don't want the headline that they're under investigation by the bureau for abuse of dominance. They don't want their dirty laundry, or their confidential business information, or anything aired out in a tribunal proceeding. That has a tremendous deterrent effect. I don't understand why we think $10 million and $15 million AMPs are necessary.

The second point is that I think it's unconscionable to punish non-criminal conduct with fines. With the magnitude of the proposed AMPs, there's going to be a message sent that abuse of dominance, which is not criminal, and in some cases can be pro-competitive, is more serious than price-fixing, which has been characterized by the OECD as the most egregious anti-competitive behaviour. I know, through reading the transcripts of the previous hearings, it's been suggested the answer to this is to increase the fine for conspiracy. That's not a good answer, because, again, that's the piecemeal approach. You're dealing with amending the act based on the domino effect. When you have an issue, you'll do this over here to address it, and then that's going to raise another issue. How do you deal with, I don't know, price maintenance? That raises another issue. You can't look at it in isolation. You need to, again, consider the whole framework.

The third point is, as I alluded earlier, that I think AMPs will have a chilling effect on pro-competitive conduct. There already is somewhat of a cautious approach. I think it will have a tremendous deterrent effect. There's already significant uncertainty. It's not easy to explain to an executive how the abuse provisions work and what conduct is caught. We conduct regular educational seminars for FCPC members, and it comes up year after year, time and time again: What do the abuse provisions mean? How do they apply? How can I tell if what I'm doing raises issues? I need to be careful, and more careful than I might need to be if there were greater clarity.

Now, to consider all that and then be told you can be careful and there's some uncertainty, but, by the way, you could be faced with $10 million to $15 million in a penalty, and millions and millions of dollars in costs if you go through a hearing, that's just a tremendous, tremendous disincentive to compete aggressively.

I'm not a constitutional expert, but I know that there is a serious constitutional issue, and I think my partner, Peter Hogg, is appearing before you at some point in the future to talk to you about whether the AMPs are valid.

I guess my question is—and maybe I should have asked this of Peter, but I'll ask it of you—whether there is some mechanism to test the constitutional issue, rather than starting into years of hearings on the issue, with enforcement of the abuse provisions possibly put on standstill until those issues are addressed. You know, if these proposals go forward, as soon as the AMPs are in place, the first case is going to be a constitutional challenge.

Regarding misleading advertising, FCPC also opposes the proposals for three main reasons. The first question everyone is asked is why. The bureau is already obtaining large AMPs based on multiple counts. Does it need a heavier hammer to encourage settlement to avoid a trial and the attendant costs and the reputational damage, even if you're innocent in the end? That's a big, huge consideration for companies when seeking advice and when dealing with the bureau. When the bureau calls and says, “We have a problem with your advertising”, most companies will fix it voluntarily because they don't want even the hint that they've engaged in some illegal conduct.

Second, again, the proposals will have a chilling effect on aggressive competition.

I guess the last point is, why is the bureau suddenly assuming the role of consumer crusader? We have a lot of different avenues for consumers to pursue for redress. We have a new class action regime to facilitate class actions. There's the private right of action. I think that competition, not the bureau, is the best enforcer of misleading advertising.

Thank you.

● (1615)

The Chair: Thank you very much, Ms. Witterick.

For the Canadian Federation of Independent Grocers, I believe, Mr. Scott, you are going to be speaking.

Mr. John Scott (President, Canadian Federation of Independent Grocers): Good afternoon, sir.

Thank you for the opportunity to address you this afternoon.

Late yesterday we sent an amendment to our brief to the clerk, and I believe it's been circulated to most of you. I just wanted to make you aware that the brief has changed slightly.

With me today are: Gary Sands, vice-president of CFIG; Anthony Longo, president and CEO of Longo Brothers Fruit Markets, a highly acclaimed, 14-store, independent and full-service grocery company based in Toronto; and François Bouchard, who may be familiar to committee members, because he's the owner of Country Grocer, a renowned store here in Ottawa.

CFIG decided to bring two owners with a vested interest in this legislation to underscore the importance to our members of the amendments contained in Bill C-19, which are before this committee.

CFIG is a national, non-profit association formed in 1962 with the purpose of furthering the unique interests of independent and franchised grocers in Canada. From modest beginnings, our organization now represents over 4,000 independent and franchised retail grocers located in every province and territory. The prime mission of CFIG is advocacy directed towards ensuring there is a reasonably level playing field for independent grocers in the marketplace.

We are confident that members of this committee are acutely aware that the Canadian grocery industry is one of the most concentrated in Canada. Two players control almost 60% of the market, and the addition of four other companies swells that number to over 80%. The major players in the Canadian grocery industry operate corporate stores, they franchise, and they wholesale. At times, this activity leaves them, in essence, competing against themselves in the same market.

With this level of concentration, there is little room for any player, whether large or small, to make mistakes. Every company works very hard to differentiate themselves. You are aware of some of the differentiation tactics, including things like private label products, technology, loyalty cards, expanded merchandising offerings, and other things. The most common, however, is the price at which products can be obtained and the price at which they are sold to consumers. Clearly, the differential in size of major players versus the smaller players results in competitive acquisition and operational cost differentials, which are often reflected in the normal or promotional cost of goods.

Our members accept that there's a certain amount of this activity in the marketplace as the norm. However, competitive problems arise when these discrepancies are unreasonable and are directed towards the elimination of smaller players in a particular market. It is for this reason that the Parliament of Canada originally inserted clauses in the Competition Act, formerly the Combines Investigation Act, pertaining to price discrimination and promotional allowances. Both of these amendments were adopted because of perceived abuses in the Canadian grocery industry. As we all know, despite being in the act for many years, these well-intentioned clauses have resulted in no convictions, as the burden of proof for criminal conviction is simply too high. So despite the existence of provisions in the act to prevent anti-competitive behaviour, extremely aggressive activity related to promotional allowances and price discrimination continues to be a practice in the Canadian grocery industry.

We've had discussions with organizations that have already made representations to this committee expressing opposition to the concept of administrative monetary penalties, but supporting the idea of decriminalizing price discrimination and promotional allowances.

Members of the committee, in our opinion, decriminalizing promotional allowances and price discrimination without balancing that change with a consequence in the form of administrative monetary penalties for egregious behaviour would actually weaken the act. Bill C-19 allows the obvious to take place. Indeed, Canada now has an opportunity to strengthen its act and be in step with most of the rest of the world by adopting a consequence, in the form of administrative monetary penalties for anti-competitive behaviour.

The only question that CFIG has with respect to the proposed penalties is whether the $10 million limit is a sufficient deterrent. Indeed, the well-intentioned passage of AMPs should not result in any Canadian company considering a penalty merely a cost of doing business. In the EU, AMPs are 10% of annual turnover. In 2004, Microsoft Corporation was found to have abused its dominant position and an AMP of $700 million in Canadian dollars was imposed on it. In the U.S., they have private action and treble damages. This is truly a significant deterrent, and Canada must be confident that its maximum AMP is seen in a similar punitive light.

● (1620)

To summarize our position on Bill C-19, first of all, the administrative monetary penalties are a sound addition to the abuse of dominance section of the act. The only current consequence for anti-competitive action is that the tribunal either orders that a questionable practice cease or perhaps that a company divest certain assets. This amounts to a slap on the wrist as a consequence for engaging in egregious anti-competitive behaviour.

Secondly, we're in favour of decriminalizing the pricing provisions, including price discrimination, geographic price discrimination, predatory pricing, and promotional allowances, provided that the administrative monetary penalities are applicable to this section of the act.

Our only question is whether the proposed $10 million limit on the AMP is sufficient.

CFIG is also strongly in favour of other proposals that were considered by this committee. One in particular was the right to civil damages as a result of proven anti-competitive behaviour. Unfortunately, that section was not included in these amendments. Truthfully speaking, proving an anti-competitive case takes so long that the smaller player being affected by the activity is often out of business long before they could ever consider legal action to recover damages. Still, the concept has great merit, perhaps as another potential deterrent, and the committee might wish to revisit this idea in the future.

The Canadian Federation of Independent Grocers truly appreciates the attention your committee has given to this important piece of legislation. Bill C-19 is a critical piece of legislation for our industry, and we do encourage the committee to support a very speedy passage of the bill.

Mr. Chairman, this concludes our opening statement.

The Chair: Thank you, Mr. Scott.

For the Canadian Independent Petroleum Marketers Association, I believe Jane Savage is presenting.

Mrs. Jane Savage (President and Chief Executive Officer, Canadian Independent Petroleum Marketers Association): Thank you for the opportunity to be a witness at this hearing regarding Bill C-19.

Without question, issues of competition and the state of competition in Canada's business environment are the top priority of the Canadian Independent Petroleum Marketers Association, or CIPMA. Our mission is to promote and improve long-term competition at the retail and wholesale levels in the gasoline and fuel industries.

CIPMA represents independent fuel marketers across the country. I've brought with me today Mr. Dave Collins, the vice-president of Wilson Fuels in Atlantic Canada. Wilson Fuels is the largest independent petroleum marketer east of Quebec City and provides enormous competition in the gasoline industry down there. Also with me is Alan MacEwen, who is the president of MacEwen Petroleum, a name you will know here in the Ottawa area.

Independent fuel marketers inject competition into what would otherwise be a one-dimensional market dominated fully by the major refiners. To quote Richard Taylor, the former director of competition at the U.S. Federal Trade Commission, “independent marketers are extremely valuable, in that they provide the much needed source of competition at wholesale in the petroleum industry”. Again, names you might recognize are MacEwen, Mr. Gas,Canadian Tire, Pétroles Crevier, OLCO, Can-Op, etc. Independents are generally family owned, multi-generational, small and medium-sized enterprises. They have built their reputations by being solid local businesses that reinvest profits into their local economy and local charities.

Underpinning all of CIPMA's activities is the belief that businesses with deep pockets and market dominance should not be allowed to steamroll players whose primary characteristics are not deep pockets, but rather efficiency and strong management. We think this belief aligns fully with the stated purpose of the Competition Act. To quote and paraphrase section 1.1 of the Competition Act:

> The purpose of this Act is to…ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Nothing can be closer to the truth at this point when we're seeing gasoline prices reaching a dollar per litre across the country.

To further the purpose of the act, CIPMA has been active on two broad fronts with the Competition Bureau. First, for ten years we and our affiliates have been bringing cases of business practice that is hurtful to competition to the attention of the bureau. Second, because of the dearth of prosecutions and investigations under the existing act, CIPMA has participated with the policy branch in an attempt to modernize and upgrade the Competition Act, with the purpose of providing the bureau with better tools to prosecute, deter, and prevent anti-competitive activity in our industry and in other industries.

In summary, we respectfully submit that Bill C-19 as it stands falls way short of reforming the act effectively. In addition, we submit that the bureau does not take sufficient action to protect competition in Canada. I will address each of these in turn, and I invite you, as parliamentarians, to recognize that by not rectifying these shortcomings, competition in Canada is at risk.

First, Bill C-19 provides only the illusion of reform. The decriminalization of the pricing provisions, although appearing to enable prosecutions by lowering the burden of proof, in fact improves nothing because the provisions will be enforced under section 79, the abuse of dominant position provision. This section is available today but has proved ineffective. Bill C-19 does not make section 79 more effective.

Second, we disagree with the elimination of price discrimination as a specific pricing provision in the act. Price discrimination is a rampant activity in our industry, and it threatens competition hugely. By eliminating this as a provision, we move competition laws in Canada backwards relative to the stated purpose of the act, and we remove provisions that our U.S. colleagues have had since 1932.

Third, the fact that the right to recover damages as a result of non-criminal conduct was not included in Bill C-19 means the act has not increased convergence of Canada's competition laws with those of other jurisdictions, namely the United States. As a result of this and the removal of price discrimination, corporate concentration will continue to be higher in Canada, and smaller enterprises are at higher risk than those in the U.S.

● (1625)

On the second main issue, the enforcement of the current act, it is unclear why the bureau is reluctant to prosecute behaviours that lead to reductions in deterioration in competition. Whatever the root cause, neither the stated purpose of the act nor the intent of the act as Canadians view it is being carried out.

CIPMA could support Bill C-19 if the following recommendations are acted upon:

Price discrimination provisions are expressly retained.

Section 79 is changed or a new section is created to enable effective enforcement of all the pricing provisions—predatory pricing as well as price discrimination.

The right to recover damages for non-criminal conduct is added.

In conclusion, we are disappointed in the state of competition in the gasoline industry and in general in Canada. We are also disappointed in the Competition Act and the enforcement of those laws. We urge this committee to give Canadian business the same protection that U.S. businesses have and instruct the bureau to revise this piece of legislation to do this. Failing that, we urge the committee to strike down this ineffective piece of legislation. Without real reform, Canada's small and medium-sized enterprises will continue to be at risk, and inevitably Canadian consumers and our economy will pay the price in the long run.

Our act is far less onerous than U.S. competition laws. In the face of free trade with the U.S., we have recommended the same protections that U.S. businesses enjoy. Judging by the U.S. state of business, we feel there will be no business chill, as detractors of real competition law reform will claim and have claimed.

We encourage you as parliamentarians to do the right thing to ensure that Canadians get what they expect—strong competition laws and vigorous enforcement of those laws.

Thank you again for the opportunity to present these recommendations to the committee.

● (1630)

The Chair: Thank you, Ms. Savage.

We'll start questions. I'll remind members that I'm going to be a little tighter than usual with the time so we can get everybody on.

We'll start with Werner Schmidt, please.

Mr. Werner Schmidt (Kelowna—Lake Country, CPC): Thank you very much, Mr. Chair.

Thank you for your presentations this afternoon.

I find it very interesting that at least there's some agreement here between the independent petroleum producers and the food manufacturers group that this act should probably be redrafted. It's very interesting that we have gone this far, Mr. Chairman, to be told that maybe we haven't considered the issue of competition adequately. I certainly agree that piecemeal approaches to legislation are not the right way to go.

However, I would like to ask you whether this is an improvement over what we have at the present time. It seems to me there is some disagreement. Some would say no, there's no improvement at all; in fact it's a regression and we're going backwards.

But I would like to have an answer to my question. Is it better than what we have?

The Chair: Are there any takers?

Mrs. Jane Savage: Perhaps I could ask Dave Collins of Wilson Fuels to respond.

Mr. David Collins (Executive Vice-President, Wilson Fuels, Canadian Independent Petroleum Marketers Association): My experience of the bureau is dated back some 10 years when we first started out. Actually, the bureau, to its credit, helped me get gasoline deregulated in the province of Nova Scotia in 1991. Then in 1995-96 we had an incident with Irving Oil, which was then followed up by Petro-Canada. This was well-documented at the time, and the bureau has the records. They actually stepped over markets to move retail gas prices down to below acquisition costs, and then down to below crude costs in the case of Petro-Canada.

What happened in the end when we went to see the bureau was that it said it was a regional issue, not national in scope. It didn't make me feel very good sitting out in Nova Scotia that the federal bureaucrats were unwilling to exercise a federal law clear across the country. That was done by Mr. John Bean at the time. What ended it was that the Minister of Economic Development of Nova Scotia actually had to write the oil companies and tell them to stop. It was moral suasion that got them to stop in the end.

It's been my experience—and there's one here I just got from a dealer in southern Ontario who is struggling with the same things we saw. What they do is they get a letter back—they come to them. It's like walking into the police station with a bullet hole, bleeding, and you call for help, and they say, “Well, here, I want you to go down and find out where the guy lives, I want you to get his gun, and I also want you to have him sign a confession. When you come back with all that stuff, then we'll move.”

There's no vigorous enforcement of the act as it stands today. They don't get out. There's a crisis of management.

To answer your question, which I'm getting around to, this law has the potential to be a lot better, but you don't make the act stronger by ripping certain things out of the act. That's really what's starting to happen when it comes to price discrimination—which is out, and we would like to see it put back into the act. I think that would make it better, clearly for our industry. Ours is unique in that 80% of the revenue of the site comes from one product. If you move that product down below acquisition costs, and it doesn't take long....

Mrs. Crystal Witterick: I do not think this is an improvement over the current legislation. If you weigh the chilling effects against the potential benefits, or the argued benefits, the balance comes down against us, in respect of our ability to promote competition in Canada.

There is already sufficient deterrence in the current provisions. Adding $10 million to $15 million in possible penalties will encourage a more cautious approach, which is not helpful.

There haven't been a lot of cases. There's already deterrence in the cost of an investigation of a proceeding. I just don't think it's necessary.

● (1635)

The Chair: Mr. Collins, let Mr. Scott respond, please.

Mr. John Scott: This is clearly an improvement over the existing act. I take these points under advisement. But let's not forget, the predecessor of this committee proposed some of these changes in the last Parliament, and they were debated at great length by many groups across the country. We spent many hours at it. What you have in front of you is the best compromise now available.

Do other amendments need to come forward? Of course they do, but there is a process in place that allows for amendments to be made over time. Are we happy with that? Not completely, but we'll take what we can get. It's important.

Mr. Werner Schmidt: There hasn't been much prosecution, but that doesn't mean the law is bad.

Mr. John Scott: That's right.

Mr. Werner Schmidt: You made the accusation, Madam Savage, that the current act wasn't being enforced. It may be that the current act isn't being enforced, but that's no reflection on the law itself. If a law, no matter how good, is not enforced, nothing's going to change. So the issue could well be enforcement rather than the law itself.

I take your point that this law is better than the existing one. If that's the case, we have good reason to move ahead.

On the other hand, I'd like to ask you all, and particularly Ms. Witterick, about the upper limit of the AMPs. Is that a problem, or is the problem that there are AMPs?

Mrs. Crystal Witterick: Certainly, the upper size is a problem, but I don't think AMPs are necessary at all. There's sufficient deterrence already; I see it everyday in my practice.

The Chair: Comments on Mr. Schmidt's question? Mr. Longo, then Ms. Savage.

Mr. Anthony Longo (President and Chief Executive Officer, Longo Bros. Fruit Markets Inc., Canadian Federation of Independent Grocers): There hasn't really been enforcement, because the bar has been set too high for criminal conviction. There have been two cases of small grocery chains on opposite sides of the country, one in Corner Brook, Newfoundland, and one in Tsawwassen, B.C. They were under siege by two large competitors that drove the price of staple products significantly below acquisition costs.

When the bureau was called, there was a lengthy investigation. At the end of the day, there just wasn't enough evidence to support a criminal conviction. In such cases, we believe that the AMPs will be a more effective deterrent. They will allow the bar to be set at an appropriate height, so that we can go after the large abusers of their position in this marketplace.

With regard to the two chains I mentioned, one has seven stores, the other sixteen. If they'd been single-store operators, they'd be out of business today and that community would be short a grocery store.

Mrs. Jane Savage: The dearth of prosecutions under the current act has nothing to do with the lack of anti-competitive behaviour. There is significant evidence of anti-competitive behaviour in our industry every single day.

The infrequency of prosecution has two related causes: the high burden of proof in the criminal area, and difficulties in enforcement. We're very strong on this. We have a crisis of leadership at the bureau and we need some help. The bureau needs to understand that its job is to investigate anti-competitive behaviour. This does not seem to be happening.

The Chair: Thank you, Ms. Savage.

We will move to Paul Crête, please.

● (1640)

[*Translation*]

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Thank you very much for your presentation, particularly as it relates to gas prices. Ms. Savage and Mr. Collins, you have touched upon a very important issue. We have had repeated studies here. Over the past two years, I attempted to ensure that we would not have to go through this on a yearly basis.

Now, in decriminalizing the price-fixing provisions, are we not handing the large oil companies an enormous concession? That was the last area where it was still possible to make certain demands, even if we did not always have enough evidence. Will this not make it easier for those who want to control the gas market? I am referring mainly to the big, fully integrated producers.

[*English*]

The Chair: Does somebody want to...?

Mrs. Jane Savage: I'm sorry, I'm not quite sure I got the question. My apologies.

What concession did you...?

[*Translation*]

Mr. Paul Crête: You are sorry that the clauses related to price fixing have been withdrawn from the act. I would like to know if this will simply encourage more monopolistic activity within the industry, particularly the petroleum industry, which you represent. We have witnessed certain ongoing activities over the years, and we have yet to find a solution to these problems.

[*English*]

The Chair: Okay, Ms. Savage?

Mrs. Jane Savage: Yes. Thank you for the question.

The criminal activity in the gasoline industry is related to predatory activity. It is not related to collusion per se. One area that the bureau has investigated extremely well is the area of collusion amongst oil companies. And they have concluded time after time that there is no collusion in the retail markets of the industry.

The real issue in the market is the fact that there is not enough competition at the wholesale level and that the predatory pricing and price discrimination that occurs in the industry today, as a criminal provision, has too high a burden of proof. The criminal courts are not interested in this as an issue. So decriminalizing those pricing provisions, we think, will make prosecutions easier, as long as we get it into a section on the civil side that will make it work.

So, yes, absolutely, let's decriminalize the pricing provisions. But the activity you're talking about with the major oil companies, i.e., collusion, which is covered by section 45, which is that area of the law—and we can attest to this as independent gasoline marketers—does not occur as actively as in the retail market, as section 45 covers it. It won't make the issue worse by decriminalizing the pricing provisions.

[*Translation*]

Mr. Paul Crête: With respect to independent grocers, you are advocating an increase in the administrative monetary penalties, the AMPs. However, you don't seem to want to go as far as an amendment. You mentioned the American model, which could go as high as $100 million, and the one in the European Union, which sets a percentage. I may not have taken a close enough look at your brief, but I would like to know if you think that should be reflected in an amendment.

[*English*]

Mr. Gary Sands (Vice-President, Government and Industry Relations, Canadian Federation of Independent Grocers): We view the $10 million as a compromise.

One of the comments we would like to put on the record, though, is there is no doubt that in our industry, $100,000 in the context of the other changes that are being taken away is just a cost of doing business. That is not a deterrent. Anyone who would suggest the opposite to this committee is just not being—I have to be careful with the parliamentary phrase—is not giving you an accurate reflection of this industry.

One hundred thousand dollars? That's nothing. There are some operators who would spill that in six months. You have to have a reasonable deterrent. We view the $10 million as a reasonable compromise, and this is an important step along the way to reforming the act.

We agree with you, Mr. Schmidt, that the issue of enforcement and the changes that are before you today are two different issues, but as Mr. Scott outlined, this is an important change for us.

● (1645)

Mrs. Crystal Witterick: Can I respond to that?

The Chair: Go ahead, Ms. Witterick.

Mrs. Crystal Witterick: Let me ask you this. In the United States, they have penalties for conspiracy in the hundreds of millions of dollars. There are companies being fined globally in the hundreds of millions of dollars and then subject to trouble damages and class actions.

Is price fixing stopping? No. We see more and more cases of price fixing every day. That number is still a cost of doing business. So $10,000 is the cost.

In the conspiracy framework, what we're seeing more and more is that the threat of criminal sanction against individuals is the deterrent in that setting.

In the abuse setting, as I've said, the deterrent is the threat of public reputational damage to the companies, the management time, and the effect of an investigation on the company. That's the deterrent, and that's the impetus to settle a case.

[*Translation*]

Mr. Paul Crête: I have a question for you, Ms. Witterick. Let's take Microsoft, in the United States, for example, which was fined $700 million. Would our Canadian law have allowed us to deal with this type of situation?

[*English*]

Mrs. Crystal Witterick: I think probably the bigger deterrent in a situation like Microsoft's—and I can't comment specifically on Microsoft, for client reasons—would be the remedy, for example, as proposed in the EC to modify their product and to sell a different product, just like in the abuse cases, Laidlaw was prohibited from purchasing additional businesses, from enforcing contracts, and—

[*Translation*]

Mr. Paul Crête: Ms. Witterick, I'm not sure if we understand one another. Let's say that the limit for Microsoft was the same as the one we now have in Canada. It is essentially the same question as the earlier, $100,000 one. For Microsoft, $10 million would probably be the same as 25 cents or one dollar to me. If, for them, the amount involved was very low, they would probably have settled out of court and stayed in the marketplace, while continuing to exhibit the behaviour that was finally condemned.

I simply want to see whether or not you feel that the monetary value is important, even though you have said that it is not the main deterrent. That was my question. We can also ask how others feel about it.

The Chair: Thank you, Paul.

[*English*]

We'll let a couple of witnesses quickly intervene and then we'll move on.

Mr. Scott and then Mr. Sands.

Mr. John Scott: I'll be very, very quick, sir, in response to your original question.

The reason we cited the European model in here is because we believe it's commensurate with the size of a business. You can move up to a Microsoft or down, so it's actually damaging to that type of business and not simply a cost of doing business.

We don't believe you can just arbitrarily put a dollar amount against that. We discuss that during the consultation period, but to Mr. Sands' statement, we'll take what we can get, sir.

The Chair: Mr. Sands, did you want to comment?

Mr. Gary Sands: No, that was exactly the comment.

[*Translation*]

Mr. Paul Crête: The first question was: would you like an amendment, yes or no, or is it simply a recommendation?

[*English*]

The Chair: Yes or no?

Mr. Anthony Longo: Yes. We don't want to lose the bill, sir.

Mr. John Scott: If the amendment would pass, sure. We need the bill.

The Chair: Okay, very good. That's the answer.

Merci, Paul.

Andy Savoy and then Brian.

Mr. Andy Savoy (Tobique—Mactaquac, Lib.): Thank you very much, Mr. Chair.

Thank you for coming.

I'm from rural New Brunswick, and of course I know Wilson Fuels. I have great concerns regarding the competitiveness of small retailers in my communities. I have a very rural riding of large communities: 5,000 in Woodstock and 5,000 in Grand Falls. You can imagine how everything else is smaller than that. In fact, I have a good friend who runs a small store that is turning into more of a niche food products store. He has concerns regarding this very issue and the fact that with the vertical integration in food retailing now, with the 60% control that the two companies have, it's also the case that the retailers and the wholesalers are the same in his situation. The only access he has to products are basically from these wholesalers.

So in terms of AMPs and looking at the situation, where he feels.... Whether it's warranted or not, I'd leave that up to the Competition Bureau in his case, though I don't think he could afford to go the Competition Bureau. But in a case where you could go to the Competition Bureau, in his situation where he's buying products that have made him non-competitive in the market against the two larger stores, due either to packaging reasons or pricing reasons, how would you see the Competition Bureau dealing with that? How would you see this legislation being modified to deal with that, and is it sufficient in its existing form?

I throw it open. This is simply for the independent grocers.

● (1650)

The Chair: Do you want to start, Mr. Scott?

Mr. John Scott: It's a pretty broad question.

Gailen Drost must be in your riding in Bath, New Brunswick. He's a former chairman of our organization and is very familiar with all of this stuff.

We're pretty good at figuring out what is truly egregious anti-competitive behaviour and what isn't, and we only take forward to the bureau what we believe merits their examination of this issue. We've been pretty good at that over the last few years. So if an independent grocer, whether in Bath, New Brunswick, or wherever, is in that situation, we spend time with them and figure out whether or not there's applicability under the Competition Act. Sometimes we'll try it on, but most of the time we'll have a pretty good idea of whether or not that type of thing will fly. Up to now, we've been pretty good. We have a reasonable rapport with those folks over there so that they'll take a look, because we're not crying wolf all the time.

We're aware of a couple of things. To add to Ms. Savage's point, I think the bureau needs some more resources. I think it says up front in the act that they be given adequate resources to do their job. I don't think they are; I think they need some more resources. Secondly, they need a little more sympathetic ear in some situations as well. However, over a period of time they've come to know our industry and are getting a better handle on it.

We think that as we add a few more tools, we might actually come up with something that may be very helpful to the independent grocer in Bath, New Brunswick.

Mr. Andy Savoy: Thank you.

Mr. Longo and Mr. Bouchard, do you think this legislation and the fact we're going from criminal to civil will provide users or companies such as yourselves more opportunity to in fact make those challenges, and that the take-up or number of cases that we see will increase? How critical is the legislation to your business and the fact that we are moving from criminal to civil?

The Chair: Mr. Bouchard.

Mr. François Bouchard (President, Country Grocer Inc., Canadian Federation of Independent Grocers): I think it's very important, obviously.

I run a small store of 30 employees, similar to what you just described. We're in our community, and we do everything. We battle all of the giants of the industry basically where we reside.

When it's criminal, I cannot go to anybody—it doesn't matter where—and have the proof to be able to prove it without a shadow of a doubt. If there are punitive damages, obviously they keep everybody on a more level playing field. They give us access to that level playing field and give me a chance to compete and reinvest in my store, and not basically just be a casualty of the competition around me.

Obviously, it's easier with these amendments to actually prepare something and have somebody look at it. If I were trying to go to criminal court, it's very hard as a one-store operation with 30 employees in a small community to even get the attention of any lawyers, in essence, or the bureau for that matter.

Mrs. Crystal Witterick: I would also suggest that it's important to keep in mind whether your objective is to facilitate competition and efficiency and make our Canadian businesses more competitive internationally or to protect small businesses, which are two different objectives. You can't necessarily fulfil both at the same time. You can certainly protect the small business against anti-competitive behaviour, but some behaviour that looks anti-competitive is just a matter of efficiency.

So you have to be careful to distinguish between what's anti-competitive and what's just good, efficient, and aggressive competition.

● (1655)

The Chair: Ms. Savage, and then I think Mr. Bouchard wanted to add something.

Go ahead, Ms. Savage.

Mrs. Jane Savage: I couldn't disagree more with that comment. These are completely co-existing objectives. When efficient small and medium-sized enterprises are protected in Canada, it requires a much more competitive environment. The whole environment is more competitive. If large business has a more competitive environment at home, they will be more competitive on the world stage. So those are co-existing objectives, in my mind.

The whole idea of the Competition Act is to have business err on the side of caution so they don't do something illegal or something anti-competitive, which I'll call one and the same. When Ms. Witterick says the problem with AMPs, or the problem with the Competition Act, in general, is that it will cause us to err on the side of caution and we don't want to air our dirty laundry, that is exactly the point. That is exactly what we should be doing. We should be requiring large businesses to be very cautious when they're dealing with issues of competition so that they don't squash and kill competition here in Canada.

The Chair: You want to add a small point, Mr. Bouchard.

Mr. François Bouchard: I would support that, because, in essence, the importance of it is we're involved in our community. I employ the people, we're an SME, but we're still efficient. We'll do everything we need to be efficient. We basically don't want to have to worry, and if amendments like this are presented, it's one less thing we have to worry about. We can actually worry about building the store, training the staff, and being involved in the community. So that's why it's important to us.

Mrs. Crystal Witterick: Of course, I wasn't saying you shouldn't be protected from any anti-competitive activity, because you should.

The Chair: You'll get a chance to follow that up.

Andy, quickly finish up.

Mr. Andy Savoy: In this situation I think you have to look at the realities of a rural and urban Canada. In fact, I agree totally with efficiencies in competition, 100%. If you look at the specific dynamic in rural Canada, that competition could lead...aggressive competition is good, but in that situation it could actually be counter-competitive because you see the smaller businesses going out of business and having a monopoly based on your small market. I think we have to take that into account in dealing with our changes.

The Chair: Perhaps you could wind up quickly.

Do you have a short final question or comment?

Mr. Andy Savoy: On Mr. Crête's—he's not here—question on the EU and the $700 million penalty to Microsoft, do you find, Ms. Witterick, that it has chilled Microsoft's development of the EU market? The claim is that high AMPS will chill development. Do you find in this situation, which is in fact the largest case we know of, that it has chilled investment for Microsoft in the EU?

Mrs. Crystal Witterick: I can't comment on Microsoft, but let's take another company in a similar scenario. Let's take Ford or some big car company that's hit with the same scenario. Would it chill investment? I think the other remedies are more problematic in the EU, like interfering with the company's intellectual property, because then you certainly have a chilling effect on product innovation. You're not going to innovate and create a new product that could be completely dismantled by a regulatory authority. If you take that and you look at the abuse provision, certainly the tribunal has discretion to order other remedies, aside from the cease and desist, to deal with the anti-competitive effects. They have a lot of power to address conduct, and that would have a chilling effect on companies.

The Chair: Thank you very much.

We move to Brian Masse, please.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

I'll carry on with Mr. Savoy's questioning. This is really just boiling down to the AMPs situation and a few other parts of it. I've been asking for the evidence of this chilling effect and I'm having a hard time getting it. There's maybe a case here or there, and to be quite frank, I haven't seen the really profound evidence that there's going to be a halt. The way it was termed by a lot of presenters before is that aggressive behaviour will cease and desist, and that benefits consumers and lower prices, and so on. Can you provide any commentary in terms of that argument?

That's the thrust of the argument, getting rid of the AMPs; it's going to chill things, whether it be Microsoft or...and you may have another example you can use. I'd be interested to know that, versus that of protection of consumers, by watching some small, medium, and larger companies become victims of unfair competition and then having their services eliminated from the market, from consumers, because they can't survive a longer period of time through a price war that's not fair.

I'll turn that over for everyone to answer.

● (1700)

The Chair: Mrs. Witterick, go ahead.

Mrs. Crystal Witterick: A perfect example would be price discrimination. Depending on how you interpret the legislation, it could be illegal for you to offer a discount to a competitor on a full product line. There are certainly benefits to consumers and others to having a full product line carried in a store. Otherwise, it's conceivable that somebody may carry one specific product in a whole line. Consumers wouldn't have access to different varieties or derivations of that line. The manufacturers wouldn't have any incentives to invest in R and D to get that product to market because no one will want to carry it if it's not the bestselling product in that line. That has a chilling effect.

Mr. Brian Masse: Can you give me an example of a specific product, though?

Mrs. Crystal Witterick: I don't know. Let's say you have six different batteries. There is one AA that's the best seller. I'm going out on a limb here because I don't have the data in front of me, but let's say it's a AA. You also have other batteries. You have Ds, Cs, Es, and whatever, and you have six packs and five packs.

It's valuable for the consumer to have that choice, but if you're a retailer, maybe you don't want to carry all of those products unless there's some incentive for you to do that. If manufacturers say they'll give you a discount if you carry the full line, other retailers may complain that they're not getting the same discount. Some may say it's anti-competitive. Then, depending on how you read the price discrimination provisions, maybe it is anti-competitive. If you increase the penalties for that kind of conduct, it's going to have a chilling effect.

Mr. Brian Masse: Please, go ahead. You can all take a turn. I'd like to hear from everybody.

The Chair: Mr. Longo.

Mr. Anthony Longo: Let me speak to your point in terms of examples of a chilling effect. I think we're seeing a chilling effect today by not having AMPs because people are leaving the business. There's a good example in the Annapolis Valley of a family chain that actually shut their stores. They could not compete any longer because they were being deluged by a large national chain with anti-competitive pricing. That chain is now gone from the Annapolis Valley, and it was a family business for two generations.

The idea is not to protect and coddle small business. I know that's not the intent. It's to have deterrents there for the national players so that they cannot sell product at a price far below the landed costs.

The Chair: Mr. Sands and then Mr. Collins.

Mr. Gary Sands: To add to Mr. Longo's comment, the chilling effect we see is that the nature of the market is such that it's becoming a barrier to entry for many small and medium-sized grocers.

Going back to the cases Mr. Longo brought up earlier, the one in Newfoundland and the one in B.C., we can tell you that while those two medium-sized independent chains were able to stay in business, they would have gone out of business if they were one-store operators. But it still had an impact on them, a significant impact. It stopped them from ramping up their businesses to become more competitive, which may have been the intent. There were halts put on renovations and on hiring new staff.

There were things they had planned that they could no longer do, not because they weren't able to compete on the one SKU, but because they were competing with a large player in the marketplace that was providing products in a wide area below acquisition cost over a sustained period of time. That would drive a one-store operator out of business. For the independent chains, they can't ramp up to stay more competitive and become more efficient.

I would suggest to the committee that when that happens in communities across this country, in the long run, we're all the losers because these small stores make a tremendous contribution to each and every community in this country. They're being threatened. We urge you to pass this legislation to protect that.

The Chair: Mr. Collins.

Mr. David Collins: I think the chill we see in competition now comes from small businesses. Mr. Savoy can comment on this as well. We have a lot of one-price markets in the petroleum business. You walk in and everybody has the same price. Your constituents all complain about it.

The reality is that once you've been exposed to a protracted period of below-cost selling, and you've had your banker asking you how you're going to do this or they'll pull the plug, what do you do? You follow them along in price because you know that if you step out of line, you're out of business.

That's the chill that exists out there now. You're not allowed to do anything innovative. You're not allowed to take your lower cost structure into the market, because the minute you do, you're taken out behind the woodshed and beaten to death. I think that's really the chill that exists now.

It's a little fatuous for the other side to argue that oh, my gosh, all of a sudden, Exxon is not going to invest in Europe because Microsoft got a penalty for bad behaviour. That's really what it's about. Are other businesses not going to invest in Canada because somebody else broke our laws? I doubt it.

● (1705)

The Chair: Mr. Masse.

Mr. Brian Masse: Thank you, Mr. Chair.

There's been concern about the AMPs, but it's always talked about in terms of the highest threshold. The competition tribunal will assert the damages based upon the information in front of it.

Does everyone have confidence in the current judgment process? If not, do they have any evidence of their numbers not being reflective of the cases they're putting forth? That's really the crux of the matter. We're saying that the award of the penalty cannot be handled properly here, because we're looking at the highest end in this situation. We may never get a highest end, and hopefully we don't in this country; hopefully it's never, ever used. But I do want to know if in your experience, quite frankly, you have confidence in this. I think they're terribly underresourced. That's the worst secret—everybody knows that—and they're frank about it too. But are you confident in their ability to levy fines appropriately?

Mrs. Crystal Witterick: Most of the conduct is not addressed at the tribunal stage. Most of the conduct is addressed informally with the bureau, so they don't even get to the tribunal—

Mr. Brian Masse: They settle beforehand.

Mrs. Crystal Witterick: Right. So these AMPs give the bureau a pretty heavy hammer to induce some kind of settlement, be that monetary or behavioural—

Mr. Brian Masse: I'm looking for anyone to come forward, though, and say that the bureau can't be trusted to make the right....

The Chair: Anybody want to go out on a limb?

Mr. Brian Masse: That's the reality at the end of the day.

Mr. John Scott: I think there's lots of integrity there. We get frustrated with their inactivity on certain files that we think should be at the top of their list. And we're certainly frustrated with the lack of resources. But there's lots of integrity there, and there's some pretty bright people and some very committed people over there. They do know that act inside and out, that's for sure. We just need some more cash going their way, sir.

The Chair: Okay. Is there nobody else taking Brian's bait?

Voices: Oh, oh!

The Chair: Okay. Thank you very much, Brian.

We're going to go to Jerry, and then Werner.

Hon. Jerry Pickard (Chatham-Kent—Essex, Lib.): Ms. Witterick, I really have a little bit of problem understanding this idea of a chilling effect on business. I just want to point out a couple of things. In Australia, fines can be up to $6 million, along with civil action, along with restitution if there are damages. In Europe, it's 10% of the total turnover; in France, it's 10% of the total turnover; in the United Kingdom, it's 10% of the total turnover; in the United States, it's treble the damages.

I look at our major competitor countries, and I know your clients are clients like Coca-Cola, Heinz, very large prosperous corporations. Quite frankly, I don't see Coca-Cola not selling pop in the United States, or in Europe, or in Australia, or in the United Kingdom. I don't see a chilling of any business at all.

Can you give us on this committee any empirical evidence of chilling of business? Rather than just “I think”, do you have evidence that Coca-Cola has been hurt by what's happened, or that any of these corporations...? Let's really get down to the hard facts that you have on the chilling of business.

Mrs. Crystal Witterick: Do you have evidence that they haven't been?

Hon. Jerry Pickard: I am asking if you have any evidence.

The Chair: You may or may not have an answer—

● (1710)

Hon. Jerry Pickard: You have zero evidence, and that's really the point I wish to make. You can say chilling of business, and I've heard big business come in and say it time after time, but there's been no one that can put any evidence on the table.

Quite frankly, there's a second suit against Microsoft in Europe right now, so maybe that $700 million fine didn't do the whole job. Other actions are being taken as we sit here right now, and you know that.

The Chair: We'll try to get some responses to your questions.

Hon. Jerry Pickard: Thank you.

The Chair: Do you want to try that, Ms. Witterick?

Mrs. Crystal Witterick: I don't think there's evidence either way. All I can speak from is my own experience. All I can speak from is the discussions I have with my clients, and I know what they do as a result. They are not as aggressive in terms of competing, and the spectre of these penalties will mean they're even less aggressive. The abuse provisions are not criminal. A lot of that conduct is pro-competitive in certain circumstances.

The Chair: Anybody else want to try? Any comments?

Okay, Jerry, continue.

Hon. Jerry Pickard: Jane, were you going to comment? Okay.

I guess my next one comes to you, Jane, and your organization. I think you brought up a very good point, that restitution is something.... In the oil business, or where there's one product and really a lot of things at odds, that may be something we should be looking at a little more carefully. I like your point.

Would the point Jane made still fall over into the small grocer retail sector as well? Is restitution a thing you would like to have? Obviously, it's not there.

Mr. John Scott: Of course. Absolutely.

Mrs. Jane Savage: The right to recover damages.

Hon. Jerry Pickard: Right.

Mr. John Scott: If you would amend that, it would be a very, very, very good thing.

Hon. Jerry Pickard: So what I'm hearing is, the small businesses....

Quite frankly, I come from a small town, and I remember having a Red and White store in our town and a Dominion store. The Dominion store was quite a small, old store. They decided to build a new one eight miles down the road. And you know what? They ran the Red and White out of the community and then they moved eight miles down the road and had all the business. Everybody in that town had to drive eight miles for groceries until another small retailer came in to fill the gap in that community.

Do you see that happening on a regular basis throughout Canada, those kinds of business opportunity failures going on?

Mr. John Scott: Oh, sure. We've seen lots of that over the years. We take great heart in the entrepreneurial spirit of the new independent grocer because it's actually quite exciting. You see them here in Ottawa, like Mr. Bouchard.

To Gary Sands' point, the barrier to entry is high. You need to be very mindful of who's large in the industry and what market share you're taking. You have to be very careful of that. The barrier to entry is high. Dealing in the marketplace is not always easy. You have to be mindful of who else is there.

I think the folks in the petroleum industry are in exactly the same position as we are.

Hon. Jerry Pickard: Just one point, Mr. Chair, and I do appreciate the opposition allowing me to go slightly ahead.

We at the federal level are really concerned when post offices close, but it's a lot more critical when all the clothing retailers close in a community, when the shoe stores close in a community, when the grocery stores close in a community. Those people, particularly seniors in those smaller neighbourhoods and communities, don't have the services any more because of the takeovers and things that are happening to the business cycle. That's what this committee has to really be concerned about.

Thank you, Mr. Chair.

The Chair: Thank you, Jerry.

Okay, back to Werner. Thank you for accommodating.

Mr. Werner Schmidt: Thank you very much.

I just wanted to say at the outset that Mike has a really short question after I've had my question, if you don't mind.

The Chair: Yes.

Mr. Werner Schmidt: Okay.

As I see it at the moment, then, there are three major parts here. There's the enforcement question, there's the matter of judgment, and there's also moving things away from the criminal requirements to the civil, or the administrative in this case. That really has to do with judgment and the confidence that you, as business people, have in the bureau to exercise better judgment more expeditiously than might be the case in a court, where the burden of proof is beyond a shadow of doubt.

If that is the case, do you think there is a chance of having a judgment that provides for greater equity of access to the marketplace through the Competition Bureau having access to MPs, as opposed to the criminal approach?

● (1715)

The Chair: Mr. Longo, were you going to...? Then to you, Ms. Witterick.

Mr. Anthony Longo: Yes. We definitely think that would get more enforcement, because, again, you're not proving beyond a shadow of a doubt. Cases like the ones we've outlined would, I believe, be subject to AMPs at that point in time because there was definitely a case there, but not enough to prove it beyond a reasonable doubt.

The Chair: Ms. Witterick.

Mrs. Crystal Witterick: In many ways you're putting the bureau in the position of investigator and adjudicator. They're the police and the judge in that context because the proposed answer is so high that there is such an incentive to settle, even if you're not sure what you're doing is wrong.

Let me give you an example. Abuse is not like when you kill your husband or wife and you're guilty. You know what you've done, you know it's wrong. It's like exclusive dealing. There are volumes of literature on how that can be efficiency-enhancing and pro-competitive. On the abuse side, if you're large and you engage in exclusive dealing and it's having a substantial effect on competition, and you haven't any competitive intent, then you may have issues under the abuse provisions.

Even if you're not large, there's another provision that deals with exclusive dealing that says if it's widespread in the market and it's having a substantial effect on competition, you've done something wrong. So it's not clear that what you're doing is wrong until somebody works it all out and you fight it out with the tribunal, and then they say, "You know what? I think it's having an effect on competition." Often you don't have the facts to assess that yourself. You need the tribunal to go through the process and determine those facts.

But you've got all that, and then you're giving the bureau this hammer to say, "$10 million to $15 million in AMPs if you don't settle, and you're going to go through a lengthy process". Well, what are you going to do? You're going to settle, and you're going to take a step back and say, "Okay, I won't be as aggressive. It may be pro-competitive, it may be efficiency-enhancing, but I'm not going to do it. I'm not going to take the risk."

What are the benefits? I don't know. How do you assess them? I don't know.

The Chair: Mr. Longo, do you have another comment?

Mr. Anthony Longo: Sure. If I could just add to that from a retailer's point of view, in terms of a large retailer not knowing if they're doing something right or wrong. We all have our costs and our retails, and we all have our volumes. People buy butter and eggs and milk and bread every day, so every retailer knows if you take your top 50 SKUs, which are stock-keeping units, and drop them below your cost, you will drive that competitor out of business because he'll have to match you. If he knows that your pockets aren't as deep as his—and in our case they're nowhere near as deep as the national brands—he knows that over a period of time I will go out of business. There's no question about that.

I can't speak for the manufacturers, but in the case of the retailers, when they do their mix and their calculations of what it would do to my business, they very clearly know what it would do to my business. It's not rocket science.

The Chair: Are there any other comments?

Back to you, Werner.

Mr. Werner Schmidt: I think the question really becomes one of a process of determining damage or determining abuse of pricing privilege or taking a dominance position or price-fixing, or whatever the case might be. The process you outlined, Ms. Witterick, isn't really that different from what exists in the court of law. Effectively there are certain differences, and proof beyond the shadow of a doubt is certainly there, but I would think that the tribunal would have as objective an assessment of what the facts are as would a judge considering a case. However, that's another issue.

I would really like to encourage us as a committee and you as practitioners in the business world to really ask the question: how will this benefit the competitive advantage of Canada in the international framework? This kind of problem we're dealing with here is not that different from the anti-dumping provisions that exist under NAFTA at the national level, vis-à-vis certain imports into Canada below cost. It's not that different. The principle is somewhat the same. I know I'm going afield a little bit, but nevertheless, there are judgments involved in each of these cases and I think that becomes the key issue.

I don't think there's a question there; it's simply an observation. But I think we need to be very, very careful that we don't drag in things that are so difficult and so costly to administer that it becomes impractical to do so, and what I've been hearing is that you believe the tribunal's taking this out of the criminal and putting it into the civil section actually makes that the case. Am I drawing the correct conclusion?

● (1720)

Mr. Anthony Longo: Yes.

Mr. Werner Schmidt: Okay.

I think Michael had one short question.

The Chair: Okay, Michael, go ahead please.

Mr. Michael Chong (Wellington—Halton Hills, CPC): I want to continue with what Jerry Pickard was asking about. My question for any of the witnesses is whether there are any studies that you're aware of—qualitative studies done by economists, containing data from the Canadian marketplace, whether that be regional or national—that have taken a look at and analyzed anti-competitive practices in Canada.

The reason for my question is we've heard from a number of witnesses today and over the past while that have talked either about a chilling effect or, on the other hand, about how we've got abuse of dominance going on, but I haven't seen any numbers. I haven't see any quantitative analysis either by academics or by private sector economists on this. I'm wondering if any of the witnesses would be able to tell this committee if they have undertaken quantitative studies, and if they haven't, if they know of any recent studies in the last couple of years that have been done by other organizations, universities, or otherwise.

The Chair: Thank you, Michael.

Ms. Savage.

Mrs. Jane Savage: I'll attempt that. I think there is a lack of study in this area, to be honest. I can give you some anecdotal information, which may or may not satisfy you.

As an example, we look at the market share of independents, and that has fallen in the last 10 to 20 years. We look at particular markets where extreme predatory activity has occurred, like Vancouver in the late nineties when ARCO, an American refiner operating in the Pacific northwest, decided to take on the lower mainland. They went in with pricing like 29.9¢ on gasoline prices. It was great for about six months for all consumers there, but it wiped out every last independent in the whole Vancouver area. Vancouver now has the highest prices in Canada.

So there are a number of pockets of data like that, but I'm not aware of any exhaustive study.

Mr. John Scott: I would have to agree with Jane totally. There are no studies per se, but, again, you can go through the country region by region and anecdotally say, this happened here and that happened there. I'd be glad to give you a half-day seminar on how our industry works and what the impact has been over a period of time. It's fascinating, by the way.

The Chair: Mr. Sands.

Mr. Gary Sands: But there's a study, or a report, done I believe annually by the *Canadian Grocer*, which looks at the industry. And I can tell you that the number of independents has declined and continues to decline. But I can't give you any study that would corroborate what the reasons for that are. We have our own anecdotal information. We're telling you, as people who live in the industry, what the reasons for this are, but....

The Chair: The last comment goes to Mr. Collins.

Mr. David Collins: Where do you as legislators want the chilling to occur? Do you want the chilling to occur on big business so that small business can grow? Right now what you're hearing is that under the current law, it's small business getting chilled by anti-competitive activities. What you're hearing from our businesses, which are small, is that we're being stifled. Now, it tends to be where the most innovative companies are; they come from new ideas and smaller entrepreneurs. Right now, we're chilled. So we're asking, sir, for some relief.

The Chair: Thank you, Mr. Collins.

Thank you, Michael.

I think the last questions go to Serge.

[*Translation*]

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chairman. My question is for Ms. Witterick.

You say that what is being proposed in terms of administrative penalties is useless. You explain the difficulties that can occur. People tend to hesitate before doing something that can be considered reprehensible.

I don't have much experience when it comes to competing, but there are businesses that have been operating for a number of years, and that have the expertise. How can they be sure that they are not sometimes doing something illegal?

Since the penalties are relatively low, they can do some figuring and pretend that they were unaware that what they were doing was illegal, even though they know full well that they have a great deal to win and very little to lose, in terms of the possible penalties. Without these penalties, how will you prevent people from breaking the law?

● (1725)

[*English*]

The Chair: Do we have any takers?

Ms. Witterick.

Mrs. Crystal Witterick: I think, stepping back, one of the issues is the lack of certainty I guess—if it's the right word—in the provisions. So if you're going to impose significant penalties, I think there should be some corresponding certainty. The abuse provisions don't have that.

As I've said, it's not like price maintenance, for example, which says if you've agreed to increase prices, that's it; you've committed an offence. That's clear. You know what the rules are. You don't know what the rules are in abuse, and in some cases, as I said, it can be pro-competitive conduct, and that's not bad. It's not punished under our act.

I think that's the starting point to analyzing the whole issue.

The Chair: Is there anybody else?

Serge.

[*Translation*]

Mr. Serge Cardin: The people here today spoke out against an increase in administrative penalties. They even suggested that the law might be broken, since they consider it to be unconstitutional. I think that you may have raised this issue because those who agree with the act have a different take on the unconstitutionality argument. As I am not an expert, I would like you to enlighten me.

How can some people say that it would be unconstitutional? And how can others say that it is not?

[*English*]

Mrs. Crystal Witterick: I have to tell you that's a legal specialty, which is not mine. Constitutionality of laws is not my area. I believe someone mentioned that Peter Hogg, one of my partners, will be here to talk to you about that. He's looked at this extensively.

The Chair: May 4 for Monsieur Hogg.

Mrs. Crystal Witterick: He's a constitutional expert. I understand that the issues relate to the fact that you have significant penalties but not the same disclosure obligations on the bureau that you have in a criminal case. There's a charter issue in terms of violation of rights. You don't get the same disclosure about the case against you in a civil case as you do in a criminal case. By in effect, imposing criminal penalties, the significant AMPs, which can be to all intents and purposes regarded as fines, you're raising some issues regarding people's charter protection. I understand that to be the issue.

The Chair: Anything else, Serge? Are there any other comments?

[*Translation*]

Mr. Serge Cardin: No, that's it.

[*English*]

The Chair: Merci.

Brad Trost has a short question.

Mr. Bradley Trost (Saskatoon—Humboldt, CPC): Yes. I have a short question and comment mixture here. I'm looking for a little bit of feedback. When the Canadian independent small business group—I forget what their initials are—was here last time, I made the observation that the AMPs are a big, unwieldy tool. I could honestly see both sides of the argument.

I suggested some good ideas about some other tools to do it. If a small business, or any business for that matter, is having anti-competitive behaviour enacted against it, to get the wheels going, and justice and whatever, is a very long, slow, awkward process. As has been pointed out, for someone with only 30 employees, this is way too far....

So I'm looking for suggestions, things other than AMPs. We talked about an ombudsman and so forth, things that can be efficient, maybe not as much a hammer. I'm looking for different, finer tools, maybe a full set of tools to make quicker responses more accurate, more balanced, etc. I'm looking for anyone's response, one person starting here.

Ms. Savage, go ahead.

Mrs. Jane Savage: We've recommended civil cause of action, the right to recover damages as being a deterrent that we think is absolutely essential when these provisions are decriminalized.

Part of that is to align with the United States, where certainly there is no business chill, as you can probably observe. It provides, we think....

On the one hand, the AMPs are meant to be deterrents, but will they work? We hope they will, but we don't know that. There's a long process there.

So we think the right to recover damages is what we will do. Right away, we'll be on that case. When we start being aggrieved, as we are at the moment, we'll be right on that case. Maybe I'll turn to Dave to see if he agrees with me here, but I think that is in addition to AMPs, because then you cover both sides, the after-the-fact situation and the situation you're dealing with right at the moment when we can start to take action as individual companies.

● (1730)

The Chair: Mr. Collins.

Mr. David Collins: Absolutely. Private right of action would be at least a significant deterrent. I think what ends up happening, especially in large corporations, is the top of the house is very circumspect, but in the business drives, as it percolates down, stuff happens in certain levels of the company that they aren't aware of. So by launching a suit, you frequently get a senior enough focus, and somebody wades in to have a look at what's going on and says, we don't behave that way, and it ends.

I think that's really where private right of action probably has its most benefit and also probably would be the saviour, plus it will alleviate some resources of the bureau as well.

The Chair: Ms. Witterick.

Mrs. Crystal Witterick: You've heard the expression "without benefit of counsel". I'm without benefit of client. So if you'll let me speak on my own behalf and not with my FCPC hat on, because we haven't talked about this....

I have one thought as I've been reading through all the transcripts and thinking about the amendments and the process. A lot of the issues arise—and maybe you guys could comment on this—because there's been a complaint by a competitor or, in the advertising case, maybe by a consumer. A lot of it is by competitor to the bureau saying, look, there's something going on in the industry and we have a problem with it. It's not so much the bureau going out and finding problems. Mergers are a different story, but we're talking about anti-competitive conduct, I think that's fair to say.

Maybe there is some sort of abridged adjudicative process that could be implemented where the parties consent to a binding arbitration to resolve the issue and address the alleged anti-competitive conduct. I don't know, but it certainly could streamline the two years, three years, six years to go through the tribunal process, limit discovery, get it done faster, address the problem right away, and let the parties go on about their business.

I don't know. I know the statistics in the non-competition context with courts. More and more parties are choosing to take their disputes out of the courts, to abridge the process.

The Chair: Mr. Scott.

Mr. John Scott: That's a great idea, Crystal. Sometimes people really don't want to stand up and say...and you and I discussed that before the hearing. It makes it difficult.

But back to your point, a lot of great minds have wrestled with that problem around the world, and it basically comes down to two things. It's the civil damages that these folks are championing and that we support wholeheartedly, and AMPs. It really comes down to those. I'm not sure how else you can do it. If we adopt this type of approach, we certainly come in lock step with other similar jurisdictions in the world. And why not? We're not dampening international competition; we're just coming into line with it.

Mr. Bradley Trost: I'll just say at the end that I can see both sides of the argument here. I'm trying to see if there's some way we can be flexible, because neither side is going to get 100% of what they're looking for at the end of the day, when the act is implemented and worked through. Maybe that's true with all legislation, but I'm looking for suggestions here by which one could amend the bill to add some more flexibility.

Mr. John Scott: Add civil damages. Right now, we're only getting half of what we want.

A voice: What we need.

Mr. David Collins: Personally, as a businessman, I'd much rather have civil damages than AMPs.

The Chair: Thank you, Brad.

Thank you, colleagues.

Thank you very much, witnesses, for indulging us, given the delay caused by votes in the House. To those of you who have travelled in from outside of Ottawa, which I think is quite a number of you, we really appreciate the efforts.

As I say thank you to you, colleagues, I just have a couple of little schedule things to mention to you as we allow our witnesses to leave the table.

Before I adjourn, colleagues, I would just mention that we have the delegation of Swedish parliamentarians here on May 5. You have a notice to that effect. We might even arrange a reminder so that the chair is not alone with the Swedish delegation on May 5. It's for an hour, 11 a.m. to 12 p.m., and it's with members of their finance and industry committees.

We're going to do Bill C-19 again on May 4. We have some witnesses, including Professor Peter Hogg, the constitutional expert, and the commissioner. She'll appear separately, I think. We'll have the witnesses first, and the commissioner for the second half of that meeting, because you had asked to have the commissioner after we'd heard from witnesses. That may be our last meeting with witnesses, but maybe not. We'll see how it goes. According to the schedule, it will be our last meeting with witnesses on Bill C-19, with clause-by-clause hopefully on June 1, but we can see how that goes.

We have the Canadian Tourism Commission in on April 11. That was Mr. Crête's suggestion. We agreed to the main estimates for the CTC. The official languages commissioner has asked to participate separately in that. We've put her at the end, because she apparently has some thoughts on the CTC's move to Vancouver.

We have Peter Clark here on April 13 for an hour, and then Bill C-37 for an hour. Bill C-37 is the “do-not-call list”.

With that, we are...oh, we're not adjourned.

● (1735)

Mr. Werner Schmidt: I just want to ask a question. We've heard some very intense testimony from a lot of witnesses. There are certain common elements and certain disparate elements. I'm wondering if it would be a service to us as a committee if our researchers could find out which are the areas of agreement and which are the areas where there is disagreement, and what the rationale is for the positions. Is that a big task?

The Chair: How does that sound, Dan?

Mr. Dan Shaw (Committee Researcher): The answer is yes, and we've already started on it. What we want to do is get the issues laid out in a proper format. We should have it all done. We'll have a meeting on May 4, which will be with the last witnesses. Since we have such an important person on the constitutional issue, Mr. Hogg, and the commissioner is going to come back to address us, we would like to then take that information and feed it into the work that's already done.

Since the difference between May 4 and the time when we'll probably look at clause-by-clause is almost a month, you should have plenty of opportunity.

Mr. Werner Schmidt: Thank you very much, Mr. Chairman. I really think that would be very helpful for all of us.

The Chair: So there's no delay. They're working on it. It's just that they want to have all the witnesses included in that matrix.

Mr. Werner Schmidt: And so do I. I think it would be good if they did that, and I really appreciate that they're anticipating our questions.

The Chair: It's lucky that we have these smart people helping us.

Mr. Werner Schmidt: They're just too smart.

An hon. member: You're so transparent.

The Chair: Thank you, all, and I thank the console operator and the clerks as well.

We're adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliamentary Internet Parlementaire at the following address:
Aussi disponible sur le réseau électronique « Parliamentary Internet Parlementaire » à l'adresse suivante :
http://www.parl.gc.ca

The Speaker of the House hereby grants permission to reproduce this document, in whole or in part, for use in schools and for other purposes such as private study, research, criticism, review or newspaper summary. Any commercial or other use or reproduction of this publication requires the express prior written authorization of the Speaker of the House of Commons.

Le Président de la Chambre des communes accorde, par la présente, l'autorisation de reproduire la totalité ou une partie de ce document à des fins éducatives et à des fins d'étude privée, de recherche, de critique, de compte rendu ou en vue d'en préparer un résumé de journal. Toute reproduction de ce document à des fins commerciales ou autres nécessite l'obtention au préalable d'une autorisation écrite du Président.