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Mr. Brent St. Denis

Standing Committee on Industry, Natural Resources, Science and Technology

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● (0900)

[*English*]

The Chair (Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.)): Good morning, everyone.

I'm pleased to call to order this Tuesday, November 22, meeting of the Standing Committee on Industry, Natural Resources, Science and Technology.

Just before we go to our witnesses—and I'm very pleased that you are here to help us with Bill C-19, and I'll talk a bit about that in a moment—now that we have a quorum, last Thursday I raised with the committee the nomination of Dr. Suzanne Fortier as the chairman of the Natural Sciences and Engineering Research Council, known as NSERC. I haven't received any objections, so I'm just going to ask the committee if they would entertain a motion by Jerry for that nomination.

Hon. Jerry Pickard (Chatham-Kent—Essex, Lib.): I move that the chair report to the House that this committee has examined the qualifications and competence of Dr. Suzanne Fortier as president of the Natural Sciences and Engineering Research Council and finds her competent to perform the duties of the position for which she has been nominated.

The Chair: A point of order, John?

Mr. John Duncan (Vancouver Island North, CPC): Why would we make a motion like that when we haven't examined the competence?

The Chair: The CV was out last week, so I asked members to have a look.

Mr. John Duncan: I don't think we can say it was an examination; I think we can just say we have no objection.

Hon. Jerry Pickard: To be honest about this whole process, the doctor who was the president, and operated very, very well as a matter of fact, has resigned that position. It is an important position and very much a scientific, non-political position. Her name was forwarded by NSERC. I think it's quite broadly accepted right across the board—from every university, all the people who have been involved, all of the folks who have anything to do with science research and technology—that she is really an ideal person for the position, so her name was brought forward to the committee. That's really what has happened. It's not a political appointment. It's a recommendation from the entire science community.

Quite frankly, realizing the political spectrum of an election coming forward, I think it would be wise to have a competent person in that position at this point. That's why the motion has been forwarded at this time.

Mr. John Duncan: I move that the motion be amended to read, "the committee—

The Chair: You want to change the word to "considered" instead of "examined"? I don't think that would change the—

Hon. Jerry Pickard: Oh, fine. Absolutely.

The Chair: We will use the word "considered". Would you write that in on that—

Hon. Jerry Pickard: I will accept that as a friendly amendment.

(Motion as amended agreed to)

The Chair: I shall report that to the House.

Thank you, Jerry.

With that, thank you very much for appearing this morning. You comprise an important group of witnesses.

We're going to have hearings that we suspect may be suspended with an election call, likely next week. But you should know that all your testimony will be on record and that a future government, which would likely bring forward some sort of version of amendments to the Competition Act, would use this. It will all be there.

With that, we're going to invite you to speak in the order of your appearance on the agenda.

Mr. Methot, are you going to speak for the CRFA? I'm sure the clerk asked you to keep your remarks to six or seven minutes. We only have an hour, and we have to be out by 11 o'clock. We have another group right after you.

Mr. Methot, I would ask you to proceed.

Mr. Paul Methot (Vice President, Pizza Pizza Ltd., Canadian Restaurant and Foodservices Association): Thank you.

Good morning, Mr. Chairman. My name is Paul Methot. I'm vice-president of Pizza Pizza Ltd.

Pizza Pizza is a Canadian-owned company with a strong presence in Ontario, Quebec, and all regions of Canada. From our beginnings in Toronto in 1967, Pizza Pizza has always been an industry innovator. As some of you may know, to reduce delivery time and cost, we developed a one-number centralized and computerized telephone system for pickup and delivery of pizzas. Today our corporate and franchised restaurants employ more than 4,500 men and women in more than 500 establishments across the country.

Pizza Pizza is a member of the Canadian Restaurant and Foodservices Association—CRFA. Today I'm joined by James McIlroy, who is counsel to the CRFA.

From the outset I would like to make it clear that I'm not here to discuss the substance of Bill C-19. Instead, I want to focus solely on a procedural issue that is of critical importance to our industry. I'm here today because I want to make sure Bill C-19 does not have any retroactive effect on proceedings that are currently in progress under the present Competition Act.

Mr. Chairman, as you know, last month we requested an appearance in our letter to the clerk of this committee, which we also sent to you and your co-chairs. In our letter we noted that clause 2 of Bill C-19 will repeal the price discrimination provisions in section 50 of the Competition Act. However, as currently drafted Bill C-19 contains no transitional provisions regarding section 50 proceedings that have been commenced but have not yet been concluded. We are concerned that this could create uncertainty and give rise to costly and time-consuming litigation.

On April 8, 2005, pursuant to section 9 of the Competition Act, I joined with five other members of the CRFA and we applied to the Commissioner of Competition for a price discrimination inquiry in accordance with the illegal trade practice provisions of section 50 of the act. Pursuant to section 10 of the Competition Act, the Commissioner of Competition is currently conducting an inquiry in private.

If passed in its present form, we are concerned that Bill C-19 could change the rules in the middle of the inquiry and adversely affect this proceeding before it runs its full course. This would deprive our members of rights that currently exist under the Competition Act, including prosecution by the Attorney General pursuant to section 23 and recovery of damages under section 36.

Mr. Chairman, our situation is similar to being in the first period of a hockey game. We started the game under one set of rules and we want to make sure we finish all three periods without having the rules changed in the middle of the game. To guarantee that there is no uncertainty or misunderstanding regarding Parliament's intent, we ask that Bill C-19 include clear transitional provisions that specify that none of our current rights of inquiry, prosecution, and damages are adversely affected by legislation enacted after this price discrimination proceeding was commenced.

We understand that one of your committee colleagues, Mr. John Duncan, has submitted an amendment, which has been drafted by House of Commons legislative counsel. To ensure that Bill C-19 does not have any unintended consequences or does not retroactively apply in any way to our inquiry, we hereby request that the industry committee pass Mr. Duncan's amendment during your clause-by-clause consideration of Bill C-19.

Mr. Chairman and committee members, thank you for this opportunity to appear. Mr. McIlroy and I will be pleased to answer your questions.

● (0905)

The Chair: Thank you for your very concise presentation.

We'll go to Mr. Alvarez, from the Canadian Association of Petroleum Producers.

Mr. Pierre Alvarez (President, Canadian Association of Petroleum Producers): Thank you very much, Mr. Chairman and honourable members. Thank you very much for this opportunity to speak before the committee today. In fact, this is the fourth time CAPP has appeared before your committee this year, and we greatly appreciate your invitations and the opportunity to speak.

With me today I have Nick Schultz, who is our legal counsel and who has a great deal of experience on this issue and other competition-related matters.

I will speak on only two topics today: first is the government's market study amendment, and second is an amendment that would remove the key word "unduly" from section 45.

Mr. Chairman, competition is the foundation of our economy and freedom is the foundation of competition. It is entrepreneurs in the free exercise of their own creativity and free pursuit of trading opportunities that drive Canadian prosperity, and it is those thoughts that form the basis of our presentation.

The companies CAPP represents are some of the most innovative and creative businesses in the world. CAPP's 148 producer members produce over 98% of Canada's crude oil and natural gas. We directly and indirectly employ over 500,000 Canadians and will pay directly to governments in taxes and royalties over $20 billion this year. We represent over 25% of the value of the Toronto Stock Exchange and the same proportion of the private sector capital investment in Canada. I should note here, however, that CAPP does not represent refiners, gas distribution companies, or fuel oil suppliers, who are represented by other associations.

Mr. Chairman, the Canadian upstream oil and natural gas industry operates in an intensely competitive North American and global marketplace. The Competition Bureau knows the upstream oil and natural gas industry well because it has the opportunity to review the many mergers and acquisitions that occur as the industry continually recreates itself.

We accept that the protection of competition is vital to Canada's economy. It is also vital that the measures available to protect competition respect fundamental freedoms, that they be necessary, and that they not have undesirable consequences.

We believe the market study amendment fails on all counts. It would give the Commissioner of Competition the power to conduct formal section 11 inquires in the name of a "study". A section 11 inquiry has one purpose and one purpose only: enforcement action.

The inquiry can only have three results: termination of the inquiry, criminal charges, or an application by the commissioner to the Competition Tribunal. This is made clear in an information bulletin just released by the bureau on section 11. Our view is that it is not just a study.

A section 11 inquiry can presently be initiated any time the commissioner has “reason to believe” there is a contravention of the act. With the amendment, the commissioner would have the ability to initiate such an inquiry for no reason at all. This is fundamentally wrong. We do not give the police a weapon and then say, “If you use this in your right hand, you must have good reason, but if you use it in your left hand, you need no reason at all”.

The commissioner even told the committee on November 18, 2004, that this amendment would not work. Therefore, what is proposed remains improper and is unnecessary.

The bureau already studies sectors of interest, as do many other government departments, agencies, and regulators. There is no need to study something by launching a formal inquiry. Everyone knows that this is a sign of something wrong, and any industry subjected to that could suffer a severe loss of reputation. If the power would only be used when there is good reason to investigate, then the act already gives extensive powers to inquire and investigate.

CAPP participated in the extensive consultation conducted by the bureau. Two issues were of particular concern to us: the market study proposal and the amendment of section 45. The government took both these issues off the table for further review.

● (0910)

[*Translation*]

We have not been active on the Bill C-19 debate because the two topics of particular concern were not raised. This does not mean the other matters in Bill C-19 are not of concern, but only that we saw that the issues would be addressed very well by others.

It is very disturbing to see the government bringing this market study proposal forward at the least minute. It is an unnecessary proposal. It is proposal that is fundamentally wrong. It is a proposal that does not work.

As to section 45, many very positive agreements, alliances, and associations were formed because of the language used. This is one reason the changes have been so complex. Please allow the time for the review and consultation on any change to proceed.

Thank you.

[*English*]

Thank you again for the opportunity to speak, Mr. Chairman. I look forward to your questions.

The Chair: Great. Our witnesses are great in their excellent summaries of their points of view. Thank you, Mr. Alvarez.

Ms. Hughes Anthony, please, on behalf of the chamber.

Mrs. Nancy Hughes Anthony (President and Chief Executive Officer, Canadian Chamber of Commerce): Thank you. Good morning, Mr. Chairman and honourable members.

My name is Nancy Hughes Anthony, and I'm the president and CEO of the chamber. With me here today is John Clifford, who is a competition law partner with McMillan Binch Mendelsohn; he is also the vice-chair of the Canadian chamber's competition law and policy task force.

I'm very pleased to have the opportunity to address the industry committee today and to speak very briefly about our concerns regarding several amendments.

● (0915)

[*Translation*]

The Canadian Chamber of Commerce and my colleagues from other national associations of business people were surprised to learn that the federal government was tabling to the bill at committee stage, without first consulting stakeholders. Therefore, we appreciate the due diligence shown by committee members today in taking the time to listen to our comments.

The proposed government amendment, which would give the Competition Bureau the authority to conduct market studies, is not nor necessary nor desirable. The amendment would place, in our opinion, an unjustified and additional financial burden on corporations. The market studies proposal was debated at length by stakeholders during the Public Policy Forum consultations organized by the Competition Bureau in 2003.

The outcome of these consultations clearly points to the fact that stakeholders are averse to giving the Competition Bureau this authority.

[*English*]

In fact, on November 18, 2004, the Commissioner of Competition stated that providing the bureau with the authority to conduct its own studies could be problematic, given that the bureau could face problems with the Charter of Rights and Freedoms if the testimony of individuals provided in a general context led the bureau to carry out a criminal investigation.

Given that the government decided previously not to include this provision in the bill, as it was originally presented to the House of Commons, it would appear that the government is now introducing the amendments in a hasty reaction to recent increases in gasoline prices. This initiative would appear to be politically motivated and designed to defuse pressure on the government by allowing the Competition Bureau to conduct an investigation against a specific industry or group.

The Canadian Chamber of Commerce has serious concerns that if the Competition Bureau had these additional powers, the powers would be directed squarely at an industry without the commissioner first having to identify a competition issue under the act. This would lead to significant cost increases for businesses, given that such proceedings are typically lengthy and very expensive.

Mr. Chair, I would ask Mr. John Clifford to provide some additional brief comments.

Mr. John Clifford (Vice-Chair, Competition Law and Policy Task Force, Canadian Chamber of Commerce): Thank you, Nancy.

In my remarks I'm going to focus on two topics: market studies and fines for conspiracies.

In addition to the points made by Ms. Anthony regarding market studies, we'd like to draw the following points to the committee's attention. At number one, there's no evidence that the Commissioner of Competition requires the market study power for her and the bureau to do their jobs effectively. The act contains all of the tools necessary for the commissioner to investigate non-compliance with the act, and these powers are routinely exercised.

We have significant concerns about the fact that the proposed amendment does not require the commissioner to have any grounds for believing that an anti-competitive conduct has occurred prior to starting an inquiry. There are no limits or thresholds imposed on this potentially intrusive power.

And third, there is a real issue about whether the proposed market study power is compliant with the Canadian Charter of Rights and Freedoms. As Ms. Anthony mentioned, even the Commissioner of Competition has identified this as a concern. And fourth, in our view market studies as they are proposed in Bill C-19 do not comply with the requirements of the government's own smart regulation initiative.

I also note that while the commissioner has prepared a report on other jurisdictions that have a market study power, the report does little to inform this committee about the extent to which those other jurisdictions actually use that power, the legal protections provided in those jurisdictions for targets of inquiry, and whether the market study power in those jurisdictions has resulted in real, positive change.

Each of these are important considerations as to whether or not the amendment should be made.

With regard to conspiracy fines, price-fixing and other conspiracies are recognized as the worst type of anti-competitive behaviour, and we cannot imagine anyone appearing before this committee to argue that it is not good policy to have a high fine for this type of conduct. However, while the Canadian chamber is not opposed to this measure, we have three observations. First, neither the government nor the commissioner has provided any evidence that the current maximum fine of $10 million does not provide adequate deterrence. Secondly, we are concerned that the government is acting too hastily, again perhaps in a knee-jerk reaction to increased gasoline prices. The commissioner recently has established a group of experts to advise her on amendments to section 45. In our view, that group should consider an appropriate level of fines for conspiracy at the same time.

One of the criticisms heard by this committee about the proposal to introduce administrative monetary penalties is that the level of the proposed AMPs are the same as the current maximum conspiracy fine. The Canadian chamber is concerned that the proposed increase in the conspiracy fine, which would distinguish conspiracy fines from the level of AMPs proposed, is an attempt by the government to justify its AMPs proposal.

In addition to the government proposals, other significant amendments to Bill C-19 have been proposed in this committee. The five minutes permitted for these remarks do not permit the Canadian chamber sufficient time to articulate its concerns about the amendments. However, we note that we have a significant concern about making fundamental changes such as the amendments proposed to section 45 of the Competition Act in the absence of a thoughtful, full discussion, especially in circumstances such as those currently before us where the Competition Bureau conducted a full consultation on similar changes and was unable to achieve consensus from stakeholders.

Thank you for the opportunity to present our views. We would be happy to take questions.

● (0920)

The Chair: And certainly to all the witnesses, if there's a point you failed to make in your presentation, feel free to import that into one of your answers to members.

Colleagues, I'm going to start with John, and then I have Paul, Marlene, and Brian. We'll try to get through everybody. If we miss anybody, you'll be priority on the next round with the next group.

John, please.

Mr. John Duncan: Thank you very much.

The presentations were all very clear and concise.

My first question is for Paul Methot, and deals with the concerns regarding changing the rules midstream. There was a report prepared for the committee dealing with your concerns, and at that time there was a suggestion that there was nothing in the new Bill C-19 that would pre-empt you or prevent you from pursuing the legal avenue you've chosen. Can you give us a concise response to why that is not the case, in your view?

Mr. Paul Methot: I'll have Mr. McIlroy answer that for you, Mr. Duncan.

Mr. James McIlroy (Counsel, Canadian Restaurant and Foodservices Association): Thank you very much, Mr. Duncan.

As Mr. Methot mentioned, we're in a unique situation where under the act the analogy with a three-period hockey game is very appropriate. Currently there is an inquiry being conducted by the Competition Bureau. The second period would be that if the Competition Bureau refers the evidence to the Attorney General, the Attorney General would commence a prosecution. The third period would be that, if the Attorney General convicts, then we would have the right to go to court and not have to go through the second period all over again to get a conviction; we could go to court, rely on the conviction of the Attorney General, and make a claim for damages.

To respond to your question, Mr. Duncan, the report, the memorandum from the Library of Parliament dated October 26, which we've have an opportunity to review, raised more questions than it answered, in that on the last page—I'll just read it to you very briefly, if I could, Mr. Chairman, to respond—it says: “Vested rights will generally accrue once a lawsuit is filed. It was not stated in the letter of October 21 whether the CRFA has initiated a lawsuit against the party alleged to have breached the price discrimination provision.” This is the key point, Mr. Chairman: “Nothing is preventing the CRFA from filing such a suit before Bill C-19 comes into force.”

Our problem is that this memorandum is essentially telling us we have to start playing the third period now if we want to protect our rights. We submit that under the current rules, we don't have to do that. We should be allowed to have the commissioner finish her inquiry—finish the first period—allow the Attorney General to conduct his proceedings, and then and only then should we be required to file our lawsuit. What this memorandum is saying is "file it today to protect yourself".

We may be in the situation where we would spend a lot of time and money filing a lawsuit now, and then if the Attorney General does not convict, we would not be proceeding with it.

The bottom line is this, sir. We went on the ice in accordance with the set of rules that currently exists, and all we're asking is that Parliament express its intent clearly that you do not want Bill C-19 to change the rules in the middle of this game. The amendment that has been put forward is essentially section 43 of the Interpretation Act, which this memorandum discussed, but it makes it a little clearer, Mr. Chairman. The bottom line is that this memorandum alerted us to a problem, and that's why we'd like the amendment.

Thank you very much.

● (0925)

The Chair: The committee likes to help.

Is that okay, John?

Mr. John Duncan: That's great. I wanted to get that on the record.

I will leave it at that.

The Chair: Good. Thank you, John.

With that, just so I can get everybody on, we'll have Paul, then Marlene.

[*Translation*]

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Thank you, Mr. Chair.

Mr. Alvarez, I'm a little surprised to hear you say that such news was unexpected. Bill C-19 was introduced November, 2, 2004, and the consideration of the bill was put on hold while the Competition Commissioner was asked to verify, and report to the committee on, the existence of similar such powers in other jurisdictions. In the meantime, there was the hike in the price of gas, in September, which was the straw that broke the camel's back. This price hike was the prime example of the need for authority to carry out such studies. The government agreed to act on a recommendation made by the committee some time ago. Moreover, the power to conduct such studies was part of the Petroleum Monitoring Agency's mandate, which your association approved of.

Official statements were made by your association over a year ago stating that this was a good idea. However, following a quasi-unanimous recommendation by the committee, the government divided the Petroleum Monitoring Agency's mandate in two, handing the responsibility to carry out studies over to the Competition Commissioner.

When one sector of the economy takes the rest of the entire economy hostage, we wish to ensure that it doesn't happen again in the future. I was very surprised to hear that you don't agree with this. It is not a question of determining whether things were rigged. What we are talking about rather is what measures the government must take to deal with such situations in a complex marketplace.

Wouldn't your industry benefit from the Competition Commissioner having such investigatory power, which is what Mr. von Finckeinstein, the previous commissioner, sought? I thought that you had acknowledged that under the Petroleum Monitoring Agency's mandate, the rationale behind the authority to conduct studies was to avoid a repeat of what we have been seeing for many years: very substantial increases followed by small reductions.

[*English*]

The Chair: Mr. Alvarez.

Mr. Pierre Alvarez: Thanks very much, Monsieur Crête.

There are a couple of things. One is that CAPP represents the upstream, and we have been opposed to these two measures. We were opposed to them in 2004. I think the communication that Monsieur Crête is referring to is by another organization, Canadian Petroleum Products Institute, rather than us. We don't represent the refiners; therefore, I won't get into that, although we do get brought into the debate.

As to your comment about whether we would benefit from clarity, absolutely we benefit from clarity, but we simply do not believe the measures being proposed bring greater clarity. In fact, our view is that they impose greater lack of clarity. If there are reasons to believe there are improper activities occurring in the marketplace, the commission has the authority, but the private sector needs to have a belief that there are reasonable grounds for such an investigation to occur.

Do we understand the public frustration about increases in energy prices? Certainly we do, but that does not mean that the law should be changed to simply give the Competition Bureau the ability to use very, very strong powers under law to conduct a study. If they want to conduct an investigation and there are reasons for it, they already have that.

So I would say we've been very consistent, Mr. Chairman. As to some of the comments, I'd be happy to talk to Monsieur Crête off line about what we've submitted and what we haven't, but the downstream pricing side is not our file.

● (0930)

[*Translation*]

Mr. Paul Crête: I acknowledge that the situation I was referring to involved the other association. I apologize. The fact remains, however, that the Canadian public is clearly aware of a major imbalance between the common good and the good of a particular industry.

In my opinion, this amendment will serve the common good by correcting this imbalance, because across the board, in all other industrial sectors, they are bitterly paying the price of the recent increase in the cost of gas. The government would be irresponsible if it didn't try to find solutions to tackle this problem in the future. No problem on earth is without a solution; all you need to do is devote the necessary time and energy to finding one.

I simply can't be against the proposed government amendment, because we have lobbied for years for it to be included in the legislation. I am extremely happy about it and I am surprised that you consider it a threat, when in fact, it is a way of ensuring that in six months, one or two years' time, there isn't another public opinion crisis that will pressure us into passing even tougher legislation. I'd invite you to weigh up these arguments.

The Chair: Thank you, Paul.

[*English*]

Mr. Pierre Alvarez: I agree with Monsieur Crête about the need to protect competition in the marketplace. There is no question about that.

On the other hand, we have been clear from the very beginning, from 2004, and the bureau has yet to bring forward a case that explains this amendment and how it would work in a way that we agree with Monsieur Crête. I don't think it's a principle question; it's just that since November of last year they have not brought forward the information that would give us the view that they have solved the problem. In fact, they are creating new problems with this amendment.

The Chair: Thank you, Mr. Alvarez.

Marlene, please, and then Brian.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Chair.

Thank you very much for your presentations. I have just a couple of questions.

With regard to the presentation you've made, Monsieur Methot, about your concern that because there are no transitional measures proposed in the legislation, the potential right of civil proceedings subsequent to the investigation that is ongoing by the Competition Bureau for price discrimination, I believe....

Mr. Paul Methot: Correct.

Hon. Marlene Jennings: You are concerned that you may lose that right. And because of that last paragraph Mr. McIlroy referred to on page 4 of this document produced by the researcher, saying "Vested rights will generally accrue once a lawsuit is filed"....

I read section 43 of the Interpretation Act as saying that if in that time you acquire the right to sue civilly—to institute—the commissioner has the right to investigate, and the investigations of the acts committed give rise to potential criminal proceedings by the Attorney General. None of that is changed. So you don't have to initiate civil proceedings now in order to maintain that right.

However, I do appreciate the point that's been made about the insecurity concerning that. I'm quite sympathetic to your point that if the right exists through section 43 of the Interpretation Act, what stops the government from bringing in an amendment to this piece of legislation simply to repeat it, so one doesn't have to refer back to section 43 of the Interpretation Act?

I want it on the record that I'm sympathetic to that.

My other questions pertain to the whole issue of the market study.

Ms. Hughes Anthony, you remember me very well from the industry committee from 1997 to 2001. So you know there were a number of times when that committee actually looked at the whole issue of the Competition Bureau—at the types of authority it had and didn't have. I can remember in 2001, when we were reviewing Dan McTeague's private member's bill—which the committee attempted to completely quash, and I worked with Dan to get it revived at report stage and third reading in the House—one of the things that Dan McTeague raised was the possibility that the Competition Bureau has the authority to conduct market studies. So this is not a new idea. It's something that has been on the horizon of at least some members of Parliament, and something the government and the Competition Bureau have had to grapple with to some extent, whether they wanted to or not.

My question is for Mr. Alvarez and Ms. Hughes Anthony. There are foreign jurisdictions where their equivalent or counterpart of the Competition Bureau does have these authorities to conduct market studies. With your knowledge, have you seen abuse of those authorities? Are the authorities that exist in these other jurisdictions similar to what the government, through these amendments, is proposing for the Competition Bureau?

● (0935)

The Chair: Thank you, Marlene. I want to make sure they have time.

Hon. Marlene Jennings: Sorry.

Thanks, you're right. I could go on.

The Chair: It's a good question.

Could we start with Ms. Hughes Anthony, then Mr. Alvarez? As best you can, briefly answer that excellent question.

Mrs. Nancy Hughes Anthony: Certainly.

I do remember the private member's bill the Honourable Ms. Jennings refers to, and I do believe our concerns remain consistent over time.

The Competition Act is vitally important framework legislation, not only for businesses in Canada, but for international businesses that want to come and invest, or look at the investment climate. It's really important that it also be internationally competitive. Quite frankly, the concern we have is that the open-ended nature of the proposal here could lead to fishing expeditions.

I wonder if I could ask Mr. Clifford to make the point and give some information about some of the international precedents that are somewhat different from what—

The Chair: Yes, sure.

Mr. John Clifford: Ms. Jennings, I think of it in terms of there is the fact of a market study, and secondly, how it is conducted or how the power is proposed.

In the amendment right now, the proposal is that there would be a market study without any tie to that study being around a competition issue.

Connected to that is the ability for the commissioner to use her powers under section 11 of the Competition Act to gather evidence. Those are very strong powers. For the small and large businesses that are subjected to section 11 orders, as we call them, it's very costly both in terms of time and in terms of expense to comply with them.

When you look at other jurisdictions, I have some familiarity with other jurisdictions, but I've focused my study on the commissioner's own report. She talked about the four different jurisdictions of Australia, the United States, the United Kingdom, and the European Union.

If you look at her report, you'll see that they have a market power study in Australia, but it's a voluntary system and there is no power to compel evidence. In the United Kingdom, there is the power to compel evidence, but that power is not used. In the United States, they have a power to compel evidence, but it's again rarely used because of the concerns about the costs of conducting it, as well as the fact that the market studies themselves are infrequently conducted because they tie up too many resources. In the European Union, there is a power to compel evidence that is used, but the inquiries must be linked to substantive competition concerns.

We don't have that link in Canada. We have power that can be used and subjected upon businesses. That's the basis of our concerns.

Hon. Marlene Jennings: Okay. Thank you.

The Chair: Monsieur Alvarez, very briefly.

Mr. Pierre Alvarez: I'll be very brief, Mr. Chairman.

Ms. Jennings, thank you very much.

You're quite right that the debate has gone on. In our view, we haven't got the answers.

Let me give you an example in the energy sector. We have the National Energy Board. Each provincial government has their own regulatory agency that regulates the price of electricity and the price of natural gas. Some provinces do fuel and fuel oil.

We have yet to get an answer that explains to us what a market study is versus everything we already live with. Our point is that we don't understand how it's going to work, and when you're dealing with powers as potentially onerous as these, you need to understand what the implications are before you pass the provision.

The Chair: Thank you.

Brian, James, and Lynn.

Brian Masse.

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

Thank you to our guests for being here today.

To follow up on the jurisdictions that you mentioned, it's important to note that they haven't been used very often. What evidence do you then have that we would have fishing expeditions over here in Canada?

For the other jurisdictions that have applied this, some have used it a little bit and some have not even used it at all. What is the thought in terms of these fishing expeditions? How often would the market studies be conducted in the context of our Canadian Competition Bureau?

● (0940)

Mr. John Clifford: I don't think that we in fact have any evidence that it's going to be held as power that will be used, but we have a strong concern that the possibility could exist. The fact that this amendment was proposed as part of an energy package raises the question of the political motivation for wanting the market power.

We can look at an industry like gas pricing, where five studies have been conducted by the commissioner since 1990. The industry has been studied, yet in the context of a valid political concern, we see this power being introduced.

It raises the question of how it will really be used and whether it will be used as an opportunity for government to request a study to be conducted to deflect political concern. That would be an unfortunate exercise of this power.

Mr. Brian Masse: What other jurisdictions do you envision where there might be these types of fishing expeditions?

We mentioned oil and gas. Part of the reason that I think we've had some discourse out there about different information is because there hasn't been an overall examination of the industry, which is still necessary, but that's another story in itself. What other type of industry do you think would be vulnerable to these fishing expeditions?

Mr. John Clifford: I think that any industry could be subject to them, but when you look back in history, there was a time in the 1990s when airlines were the subject of much public debate. The telecom industry is an area where there is much discussion today. For banking, finance, and the retail industry, of course, any of those industries could really be subject to it.

Over the last five or ten years, those are the industries that have had a lot of public airplay and discussion about what's going on in those industries and how those industries should effect structural change. I would have thought that may be a basis or an excuse to try to use the study to divert political concern.

Mr. Brian Masse: I'd like to ask you about the Canadian Chamber of Commerce itself. In your submission on conspiracy provisions under section 45, it says that you're not opposed to an increase, but you raise concerns about it. Is that generally the position?

It seems to be a little confusing, and I only want to clarify it to make sure that I correctly understand your submission. It's on page four of your submission.

Mr. John Clifford: Our submission would be that we're not opposed to the fine going from $10 million to $25 million, but we question the rationale for that decision and the base upon which the government had made the decision to increase the fine.

Mr. Brian Masse: Okay, great. Thank you very much.

A quick question over to Mr. McIlroy just with regard to your case. You might have mentioned this and I might have missed it. When did your case actually start in the system? I'm just curious to know how long this has been going on in terms of the current timeframe.

Mr. James McIlroy: The statutory declaration that was signed by the six individuals was filed on April 8, 2005. My understanding is that the Commissioner of Competition commenced the inquiry over the summer.

Mr. Brian Masse: Thank you very much.

Thank you, Mr. Chair. Thank you to the witnesses.

The Chair: Okay, thank you very much.

Any final comments on this? Thank you, Brian.

James, please.

Mr. James Rajotte (Edmonton—Leduc, CPC): Thank you, Mr. Chairman.

Thank you very much for appearing before us today. I want to touch upon, first of all, the AMPs and touch upon the chamber's presentation. Specifically with respect to the increase in AMPs, you recommend here that the maximum level that the tribunal can impose be $3 million.

One of the questions we've asked consistently—and we haven't really got a satisfactory answer, and I just want to know whether you've been given any information—is we've asked the bureau to provide information, evidence as to why the increase in AMPs is necessary. Because it seems to me if you're going to change legislation, you ought to have evidence that says here's a problem and here's a piece of legislation that will fix it. My colleague Mr. Chong has asked for that every meeting, and we've not been provided with that.

I just want to ask a simple question. Has the government provided you with any evidence whatsoever that would lead you to believe that any increase in AMPs is necessary at all?

Mr. John Clifford: Mr. Rajotte, we've not seen any evidence that would justify the increase of AMPs. To begin with, these AMPs are not a possible stay for abuse of dominance, or that the current law makes it difficult for the commissioner of the bureau to do what they do. In fact they've got a pretty good record on bringing abuse of dominance cases and winning those cases in a variety of industries.

I might as well just clarify the point on the chamber's position on AMPs. Our position in fact is that AMPs should not be available for the first time a respondent appears before the commissioner. If in fact the tribunal subsequently makes a second order with respect to that respondent, at that point in time the AMP could be a maximum of $3 million.

● (0945)

Mr. James Rajotte: Thank you for that.

The second issue I want to touch upon is the whole market studies issue. It seems to me the background here is there were consultations done in 2003, they were rejected at the time. The competition commissioner's testimony before this committee on Bill C-19 originally said they were not necessary and recommended against doing it at that time. Now it's been brought in, obviously, with the whole oil and gas industry.

Is it the concern here...? First of all, the bureau has all the powers necessary to conduct investigations, and in the Canadian Association of Petroleum Producers the evidence there is in terms of section 11 inquiry being used. But isn't one of the possibilities...? And perhaps this is for the chamber. Everybody sort of focuses on oil and gas, but the reality is you could do this with any sector. This market study empowers you to go into the automobile industry and say "Why are cars from Toyota and Honda priced similarly? So we better do a full investigation and compel them to produce all sorts of evidence." Maybe we'd go into the pharmaceutical industry and say "Why are Glaxo and AstraZeneca producing pills at the same amount? There must be some collusion going on, let's get in there and investigate that."

We could do that with any industry in any sector and create such a chill on industrial activity in this country. For what? What end are we actually producing it for? Isn't this a real concern? I know everybody now is so focused on oil and gas, but the reality is you could do this with any sector and create a chill on investment in any sector.

Mrs. Nancy Hughes Anthony: If I could just respond to Mr. Rajotte, I very much agree with you. I think that is the fundamental basis of our particular concern for businesses large and small. Even the threatened use of this power could have a very detrimental impact on certain industries.

I think the other point that we would continue to stress is that the commissioner does have the power to undertake research and investigate any anti-competitive behaviour. Therefore, we still question the whole fundamental need to have this kind of provision in the act when the results of putting in this provision are so unclear.

The Chair: Mr. Schultz.

Mr. Nick Schultz (Vice-President, Regulatory and Transportation Policy and General Counsel, Canadian Association of Petroleum Producers): I think the point here is quite simple in terms of the question. When you look at these other jurisdictions that have been referred to, you will not find in the comparison that the commissioner has done for you any jurisdiction that has been given as wide-sweeping a power as this to invoke their enforcement powers, on the one hand, if they have good reason, and on the other hand, if they have no reason at all, and investigate any industry for any reason their curiosity is piqued.

The Chair: Thank you.

Jerry, then Marc, and maybe 30 seconds for Werner at the end.

Jerry, please.

Hon. Jerry Pickard: Thank you very much, Mr. Chair.

Thank you, guests, for coming in today.

There are a couple of areas I would like to speak to as well, having to do with a detrimental effect of this legislation on business, as well as fishing expeditions, on which comments have been made.

A couple of the groups here have suggested that this is set up to have the effect of fishing expeditions into business, but that's not the case, because the structure of whatever term of reference must be followed has to be published in the *Canada Gazette*, which would limit the ability and power in whatever is being investigated. When problems come up, if the Competition Bureau feels that it is of benefit to the nation and of benefit to business in this country that they go ahead and set the terms and publish those terms very clearly, I don't believe that's just widespread ability to move into the markets.

The second area is that you've suggested these studies are time-consuming, costly, and interfere with business. But on the other anti-trust agencies in the other jurisdictions that have been mentioned, the information I have is that they do not stay away but routinely investigate situations that are similar and look into business opportunities. The European Union, the United States, the U.K., and Australia all have the inquiry powers that we're suggesting here, and it doesn't seem to affect or put a major chill on business, as has been suggested here. The studies in other jurisdictions, all the jurisdictions that we primarily do a lot of business with, exist; why should they not exist in Canada, which is a similar competitive country? What is it that makes Canada extremely different in its operation from the other countries that were referred to?

● (0950)

The Chair: Mr. Clifford.

Mr. John Clifford: I could respond to Mr. Pickard's question with two thoughts, one on the scope of the power itself.

The proposed amendment to Bill C-19 would permit the commissioner to conduct a study on the state of competition in any sector or sub-sector of the Canadian economy, full stop. There are no limits within that power as to the basis upon which the study would be commenced and how it would be conducted.

I acknowledge that ultimately it would have to be published in the *Canada Gazette*, but it's up to the commissioner to craft the framework and the bounds for that study. So I don't see where the limit is there.

Secondly, as I mentioned in response to an earlier question, regarding other jurisdictions around the world that the commissioner has informed this committee about that have investigative powers—Australia, the United Kingdom, the United States, and the European Union—you need to take a close, careful look at those powers, what is available and how they are exercised.

In some jurisdictions, you have a voluntary scheme. So while they can conduct inquiries, there's no power to compel the production of evidence. That's a significant issue for us, both the fact of that power and the Charter of Rights issues that are raised by the exercise of that power.

Then you have other jurisdictions that, while they have the power, the power actually is not exercised much, if at all, because in those jurisdictions they seem to recognize that there are concerns about conducting studies of any nature and exercising compulsory powers without conducting an investigation that's tied to a substantive competition law concern, which, for example, would be the case in the European Union. You have to have a substantive competition law concern before you conduct your study, which then gives you the right to investigate.

Our concern is that here you have a power that's not tied to a substantive competition law concern, coupled with a very strong use of section 11 powers.

The Chair: Mr. Clifford, could you give us an outline of that in a sample form?

Mr. John Clifford: Absolutely. And I might just say, Mr. Chair, the information I've given you is reflected in the commissioner's own report, which has been provided for this study, but I'm happy to provide that to you.

The Chair: Your summary would be helpful.

Mr. Alvarez.

Mr. Pierre Alvarez: I'll just make one comment further to John's comment that where there's smoke, there's fire. The concern is that in a highly competitive capital market, if all of a sudden the commissioner puts out a notice in a gazette that says we're investigating, the capital markets are going to pay attention to that very quickly. The company or the companies in question may or may not have any idea about what the investigation is about. The capital markets are incredibly skittish now. We are competing for capital around the world. There are consequences associated with this, and I think that's something the committee needs to keep in mind.

The Chair: Thank you, Mr. Alvarez.

Marc.

[*Translation*]

Mr. Marc Boulianne (Mégantic—L'Érable, BQ): Thank you, Mr. Chair.

My question is directed to Mr. Methot. You said that section 50 was appealed and that this causes problems as far as transitional provisions are concerned. In your presentation, you said that very clear transitional provisions were crucial; otherwise, it could lead to a time-consuming and litigious process.

What do you mean exactly by "very clear transitional provisions"? Are you prepared to go so far as to challenge this bill?

Mr. James McIlroy: No, sir. We're not here to oppose the bill. We're simply here to ensure that Parliament is very clear in the way it expresses itself. As Ms. Jennings already said, section 43 of the Interpretation Act is what I would categorize as generic, whereas the amendment that Mr. Duncan is putting forward refers to a specific wording in the Competition Act. In short, we are asking for the Interpretation Act to be worded in such a way that it corresponds to the Competition Act.

Mr. Marc Boulianne: Thank you, Mr. Chair.

[*English*]

The Chair: A short question, Marlene—we have time—and a short question to Werner; but short, both of you, please.

Marlene.

● (0955)

Hon. Marlene Jennings: It's going to be a real challenge.

Coming back to the market study and the distinctions that you've made between what exists and the powers that exist in other jurisdictions, I'm going to put a hypothetical in front of you. Let's say government and this committee is going to go forward with the amendment that will allow the power of market study to the Competition Bureau. I would then say, if that hypothetical goes forward, what amendments would you propose (1) for example, to tie the power to conduct such a market study to a substantive competition law concern; and (2) on the issue of either voluntary disclosure of documents or the power to compel the disclosure? If the Competition Commissioner had the power to compel documents, that would have to be tied to some criteria that would determine the exercise of that power—for instance, the cost.

The Chair: Thank you, Marlene.

Do you want to try that?

Mr. John Clifford: I'm not sure there's a short answer for that short question, but I'll try to be brief.

The Chair: If you want you can follow up with an addendum to the other note we've asked you for, but try to summarize it.

Mr. John Clifford: Ms. Jennings, firstly I'll make the assumption you're going to go ahead with the market power study. We have concerns about the fact of the study, the cost that imposes and the chill it might impose on business. If you have a market power study, to tie it to a substantive competition law concern, I would say we don't need the power, because there's sufficient power in the Competition Act to conduct an inquiry to determine that. If you look at the act today and how inquiries are conducted, you'll see that's really how you tie it to whether there are grounds for an order to be made.

Secondly, if you then create a power that has those parameters, then I would say do not include a reference to section 11, because that way it would make the provision of the information voluntary without exposing businesses to the compulsion of a court order to produce evidence.

On the third in your range of possibilities, if you have a power with the section 11 order, then I think you need to be explicit about the fact that information gathered through that process will not subject or be used against the person who provides the information in a subsequent inquiry. Perhaps you might think about a provision that compensates the participants for their costs to comply with the order and the inquiry.

Hon. Marlene Jennings: Thank you.

The Chair: Thank you, Mr. Clifford, for helping us focus on that.

I'm sure you'll want to pursue that in the next round.

Hon. Marlene Jennings: Anytime, chair.

The Chair: The last word to you, Werner.

Mr. Werner Schmidt (Kelowna—Lake Country, CPC): Thank you, Mr. Chairman.

Thank you all very much for appearing. I think the precision of your answers has been really singular in its focus and I'm very pleased with it.

I was particularly taken by your observation, the president of the chamber, Nancy Hughes Anthony. You made the observation that this market study could be carried out without any evidence of anti-competitive behaviour. I think, Madam, you've been in charge of the chamber now for a number of years, and, Mr. Clifford, you've been around, and Pierre, and all the rest of you have been in business for a long, long time. I'm wondering, under what kinds of conditions and for what sorts of reasons would anyone want to give that power to a commissioner to conduct studies of an unlimited scope to cover any kind of an industry without any evidence that such a study is needed?

Mrs. Nancy Hughes Anthony: Perhaps I could comment.

I certainly agree with your comments. We do not feel this power is necessary. I also have a concern and a certain sympathy for the commissioner, who, on November 18, 2004, in front of this committee, did present concerns about exactly how this would possibly work with respect to the Charter of Rights and Freedoms. Subsequently, on October 6, 2005, a number of ministers, including the very minister in whose department she is lodged, initiated this particular request. I would feel that the commissioner herself now is potentially in an extremely uncomfortable position, because she has in fact advised against it, and now her minister is saying that because on October 6 there was a concern about gasoline pricing, this power is suggested.

So I go back to our comments that I think this was politically motivated. It doesn't make any sense in a very important framework statute, such as Canada's Competition Act.

● (1000)

The Chair: Thank you, Werner, and thank you all.

Thank you very much to our witnesses.

We will suspend for one minute; then we invite our witnesses for the second hour to the table.

Thank you.

● (1000)

(Pause)

● (1002)

The Chair: I'd like to reconvene this November 22 meeting of the Standing Committee on Industry, Natural Resources, Science and Technology.

In this second hour we're continuing consideration of our Bill C-19. We're pleased to have with us delegations representing the Public Interest Advocacy Centre, the Canadian Real Estate Association, and the Canadian Council of Chief Executives. That's sort of first-come, first-served, when the clerk does up the agenda.

Thank you very much to the witnesses for being here. We do need to clear the room around 11 o'clock for the next committee, so we will start with Michael Janigan from the Public Interest Advocacy Centre. The clerk probably advised you that we ask you to keep your remarks to about five minutes, giving lots of time for questions from members, and then you can always bring up a point later, if you miss it in the opening remarks.

Mr. Janigan, we invite you to start, sir.

Mr. Michael Janigan (Executive Director and General Counsel, Public Interest Advocacy Centre): Thank you, Mr. Chair and members of the committee, for the opportunity to address the members of the committee on the subject of Bill C-19. We're pleased to do so, as we were also able to take part in the public consultations associated with the issues addressed by this legislation and have subsequently had the opportunity to review many of the comments made before this committee that are associated with the legislation.

As most of you have been well briefed by the commissioner on the specifics of the legislation, it may be helpful to touch upon the aspects of the bill that seem to have provoked the most debate, and which may be subject to potential amendments. However, some preliminary remarks on the recommended approach to competition and anti-trust legislation are perhaps in order.

The public interest, as articulated in section 1.1 of the Competition Act, is advanced by the maintenance and encouragement of competition. To paraphrase the act's purpose further, if we maintain and encourage competition, we give opportunities to all sizes of business to participate in a more efficient Canadian economy and in world markets, and provide consumers with choice and competitive prices.

All private interests are not always aligned with these public objectives. Competition doesn't always just mean the absence of government regulation. It means the promotion of an end state where the goals I've just mentioned can be achieved. The interest of private interest stakeholders is in winning the competition, not necessarily in ensuring the fairness of the competition.

Let's look at the two major areas of any competitive conduct affected by the amendments in Bill C-19. Misleading advertising is not only financially damaging to consumers who are induced to buy or to act as a result of the misrepresentation, but is corrosive to the other businesses that are unable to compete with the misleading offer, and whose reputation may be affected by the shoddy practice.

Abuse of dominant position can be enormously beneficial to the dominant player if it forces competitors to exit the market. This is particularly the case in markets involving new-entrant competitors with high costs of entry. The elimination of choice can be a precursor to uncompetitive pricing and quality for consumers.

As well, Canada is a country with high levels of concentration in many markets, particularly when compared to the United States, a phenomenon that is likely a difficult match for any innovation agenda. You can't wring your hands about the competitiveness of Canadian markets, then deny the competition commissioner the tools to alleviate the problem.

Let me briefly deal with the issue of penalties, which have seemingly vexed a number of speakers. First, when you are designing a package of penalties for misconduct, I would think that the first point of reference would be the victims of the misconduct. What can ensure that there'll be no repetition of this behaviour, and what is adequate to compensate for the damage caused? For example, if you were designing the legislation to prevent the escape or misuse of dangerous substances, the likely first concern would be the people, property, and businesses that might be affected by such escape or misuse. The views of those who were in the business of handling dangerous substances as to the penalty they should suffer if they failed in their duties would be interesting, but would not likely determine the issue. Similarly, you probably wouldn't lower the maximum penalty because there may be some small-time operators in the dangerous-substance business who might be frightened by high maximum penalties.

We would question why the health and safety of competition in the markets in the economic interests of consumers must play second fiddle to speculative fears. “Speculative” may be too generous. We've heard the advertisers claim that sanctioning their creative but misleading advertising will put a chill on their ability to thrive and do healthy advertising. Without the ability to freely shade the truth, who knows what we'll be missing during this Super Bowl.

Finally, if the new powers had the potential to be abused, they would first have to be exercised in an unfair way by the commissioner and applied in an unfair fashion by the Competition Tribunal, and the result would have to be ignored by the appellate courts. However, the excision of these new powers may leave victims without effective remedies—and injurious misconduct undeterred—with no avenue of appeal.

One of the opposing witnesses before this committee noted that the way you keep the market lively is you keep it active, you keep it noisy, you keep it messy. With respect, in our capacity as consumer representatives, we would like someone else to clean up the mess.

I'd be happy to answer any questions. In particular, I haven't dealt with the market studies issue, and I'd happy to deal with that in questions.

● (1005)

The Chair: Thank you for being so concise.

We will have Monsieur Beauchamp for the Canadian Real Estate Association.

[*Translation*]

Mr. Pierre Beauchamp (Chief Executive Officer, Canadian Real Estate Association): Thank you, Mr. Chair.

[*English*]

I am Pierre Beauchamp, CEO of the Canadian Real Estate Association. With me is Catherine McKenna, our specialist legal counsel on competition matters.

On behalf of realtors across Canada, I certainly would like to thank the committee for providing this opportunity for us to comment on Bill C-19.

The Canadian association is one of the largest single-industry trade associations in Canada, and the majority of our membership are small-business owners and operators. Our association and member realtors take competition compliance very seriously, Mr. Chair. The Canadian association has worked with the Bureau of Competition over the years to promote compliance and we're constantly working to find ways to ensure that realtors, in even the most remote communities, understand the roles of competition policy.

My comments today come from that experience of dealing with the Competition Act and from our work with the bureau to ensure that our members are in compliance with the laws of Canada.

● (1010)

[*Translation*]

I would like to begin by focusing on our association's greatest concern—government amendment number two. This is the amendment that proposes to give new market study powers to the Competition Bureau.

I would like to stress to members of this committee that the Canadian Real Estate Association fully supports the ability of the Competition Bureau to use its existing powers to investigate businesses and industries when legitimate concerns about Competition Act violations have been raised. These powers help promote and maintain fair competition. They are important for both consumers and businesses.

[*English*]

Under existing law, the Commissioner of Competition can initiate a formal inquiry if there's a belief that the act may be contravened. The commissioner is obliged to initiate an inquiry if she is petitioned to do so by any six Canadian residents, or if she is directed to do so by the industry minister. These investigative powers are extremely comprehensive, in our view, and they are functionally the same as the powers available to foreign regulators. We have provided a summary in our presentation of the powers that are available in other countries—that's on page 4 of our brief—for comparative purposes. We question why this amendment is necessary at all. The bureau and the commissioner already have a comprehensive range of investigative tools. No evidence, at this stage, has been provided to support the contention that the bureau currently lacks the necessary tools to investigate legitimate competition concerns. In addition, this new proposed power could be a poor use of the Competition Bureau's limited resources and would provide no clear benefit to consumers.

The proposed market study power also raises serious charter concerns, because of the lack of procedural safeguards. The proposal would provide the commissioner with unfettered power to determine that a study should be conducted. In our view, this is a license for the bureau to conduct fishing expeditions, which were referred to at the earlier session.

What happens if a business provides information in the context of a market study and that information leads to a criminal investigation by the bureau? The commissioner expressed concern about this possibility of self-incrimination, when she appeared before this committee last November. Canadian realtors share that concern.

[*Translation*]

The proposed market study amendment does not address this issue, nor does it include minimum criteria for conducting market studies that would address concerns about "fishing expeditions" by the Competition Bureau. A market study would be extremely onerous on a business or industry subject to such an examination, especially for a small business. Lawyers would have to be retained. Records would need to be produced, and submissions prepared.

[*English*]

Market studies are also extremely intrusive and human-resource-intensive. The business would be forced to focus its energies on responding to inquiries, diverting attention from regular operations. There's also the stigma factor. The fact that an industry is a target of an inquiry is likely to taint it in the eyes of the public, even in the absence of wrongdoing.

For all these reasons, our association strongly recommends that the government drop the proposed market study power from its suggested amendment to Bill C-19, and that the committee members do not adopt government amendment number 2.

We are also concerned with some of the other proposed amendments to Bill C-19. They are discussed in more detail in our written submission to the committee.

We wish to thank you, again, for providing us the opportunity to share our views on Bill C-19, and we rest ready to answer your questions.

The Chair: Thank you, Mr. Beauchamp.

Next is Mr. Dillon, please, on behalf of the Canadian Council of Chief Executives.

Mr. John Dillon (Vice-President, Regulatory Affairs and General Counsel, Canadian Council of Chief Executives): Thank you, Mr. Chairman and honourable members. It's my pleasure to be here this morning to discuss the latest proposed changes to the Competition Act.

Mr. Chairman, the pace of change in the marketplace is accelerating. Competition law, along with other economic framework policies, must keep pace if Canada is to continue to be an attractive location for investment and offer a sound foundation from which businesses can compete internationally. Needless to say, dynamic firms operating from a Canadian base are the best way to ensure jobs and social benefits for Canadians and to provide Canadian consumers with useful and competitively priced products.

As I stated before this committee last December, we support two of the specific provisions in Bill C-19: those dealing with the repeal of the criminal pricing provisions and the deletion of the airline-specific provisions. However, in our previous submission, we indicated that we had problems with two other provisions in Bill C-19.

The 1986 amendments to the act drew a clear distinction between criminal offences of anti-competitive conduct and the civil reviewable practices. Bill C-19 would greatly increase the administrative monetary penalties, to $10 million for a first offence, for civil cases of deceptive marketing. As pointed out by Professor Peter Hogg, a noted constitutional scholar, in his brief to this committee on behalf of the Retail Council of Canada, this raises the penalties to a quasi-criminal level without the protections normally afforded in criminal proceedings, giving rise to serious questions about the protections under the Charter of Rights.

Bill C-19 also would provide authority for the commissioner of competition to seek restitution for consumer loss resulting from false or misleading representations. Restitution is appropriate, in our view, where the bureau is proceeding under the criminal track in cases of outright fraud committed on consumers. However, what may constitute a "misleading" representation when the bureau is proceeding on a civil basis is certainly a grey area, and there's not been a convincing case made that there are significant problems in this area. Increasing the size of AMPs and allowing restitution where no consumer loss has been shown would in reality be punitive measures that could simply deter the kind of aggressive but fair advertising that is an important part of the competitive consumer marketplace.

Turning now to the most recent amendments, the proposal by the government would grant the commissioner the power to launch an inquiry into the state of competition in any industry sector. This idea was extensively discussed during public consultations undertaken by the bureau in 2003, and the response was generally quite negative. The reality is that the bureau already has sufficient powers in this area, and the government, indeed, has several other means by which it can assess the state of competition in specific sectors and/or markets. There is considerable concern in the business community that such inquiries could be politically motivated, and frankly that has been reinforced by the fact that the government has made the announcement to include the new power as part of the package of measures announced on October 6 to deal with higher energy prices.

Equally important, introducing a general power of market investigation in this manner raises concerns of fairness and due process. As the Competition Bureau itself has noted in its recent paper on market studies, it raises important legal questions, including whether such a study could be used as a disguised enforcement inquiry and whether the power to compel evidence could violate the charter's guarantee against self-incrimination.

Before closing, Mr. Chairman, I'd like to note that we also have some serious concerns with respect to several of the amendments put forward on behalf of the Bloc Québecois, in particular the proposal to remove the word "unduly" from section 45.

Canadian firms of all sizes are increasingly using joint ventures and strategic alliances to undertake pre-competitive research, to develop new products, or to secure markets in other countries. When these arrangements are undertaken among competitors or potential competitors, there may be some incidental effect on competition, but in almost all cases this would clearly be outweighed by the overall gains to the Canadian economy. Getting rid of the tests of an "undue" lessening of competition in section 45 would undoubtedly cast a chill on such alliances and inhibit the kind of innovative strategies that could actually improve competition in the Canadian marketplace, as well as secure a stronger base for Canadian firms to compete internationally.

As I stated at the outset, our goal should be to ensure that the Competition Act strengthens the Canadian marketplace while also enhancing the ability of firms of all sizes to grow and compete effectively in the global arena. Many of the proposals before this committee fail to meet that test.

Thank you, Mr. Chairman and honourable members. I look forward to your questions.

● (1015)

The Chair: Thank you, Mr. Dillon.

These were great presentations by all of you.

We'll start questions. I have James, Paul, Jerry, and Brian.

I'm sorry. Werner, are you going to start?

Mr. Werner Schmidt: Yes, thank you very much, Mr. Chairman.

Thank you to the witnesses, who were very concise and very direct.

I have a whole series of questions. The first question I would like to address to Mr. Janigan.

The question is about restitution to victims. Are you in favour of that provision?

Mr. Michael Janigan: Yes, I am. I think it's an important way in which the consumers who have been directly impacted by misrepresentation are able to be compensated.

Mr. Werner Schmidt: If that is the case, then there is some indication that where there is no evidence of harm to a victim.... I think this is a point Mr. Dillon just made, and I think it's a very significant observation. Where it cannot be shown clearly that there was hurt, damage of a victim, how would one actually go about this whole restitution business? Is there some difficulty here as to actually carrying out such a noble enterprise?

● (1020)

Mr. Michael Janigan: Absolutely. In circumstances where you lack the factual background to establish who should be compensated, it's always a difficult proposition. Courts and tribunals have resorted to a variety of different measures to try to deal with that, depending upon the circumstances. Some may involve putting public notices to ensure that you've adequately canvassed for the potential victims of misrepresentation. Some may involve a lessening of the amount of the award associated with the restitution. It may well be that you have circumstances where no restitution is paid and an administrative monetary penalty is more appropriate in the circumstances, given the difficulties associated with attempting to organize the restitution properly. All of these options should be available, depending on the particular fact situation.

Mr. Werner Schmidt: I think the other point that has been made very clearly here this morning is that fairness and due process ought to exist, whether it is with regard to establishing damage, whether it is to determine anti-competitive behaviour, whatever the case may be.

Fairness and due process is, I think, a very fundamental issue with all of us in this country. I'd like to ask Mr. Dillon if he would please give us a much clearer, concise statement of what fairness and due process would actually mean here, because I think in the whole area of this new market study, which is so wide-ranging.... I think the indication in your presentation was that it's probably directed at the gas industry. Well, the way the amendment is written, it doesn't name the gas industry. It doesn't name any particular industry. It actually could apply to absolutely any industry. And there's no provision that the commissioner needs to have evidence that in fact there is anti-competitive behaviour. She or he could have a dream one night and decide to study this industry, then go about doing it.

Is that what you meant by fairness and due process and other things?

Mr. John Dillon: Thank you, Mr. Schmidt.

That is part of it. The reality is that there are two aspects to it. The first one is how would such a study actually be crafted and implemented? There is a requirement in the proposed amendment that a notice be put in the *Canada Gazette*, but there's absolutely no guidance given as to what the range of that study would be. It's up to the commissioner to decide what the range of that study should be, and simply having a requirement that it publish a notice in the *Canada Gazette* doesn't provide any safeguards. It is a concern, as I think was mentioned by previous witnesses.

There are a number of industries over the years that have been the subject of considerable political scrutiny when it comes to their operations. It's interesting that Bill C-19 would remove the airline-specific provisions, because certainly there was a time when it was considered to be a dominant player in that industry and they had to have separate regulations within the Competition Act to deal with that industry. That apparently is no longer the case. We have effective competition in the airline industry. But it could be some other industry in the future.

It is significant, I think, and the reason that it raises a concern for a lot of people in the business community is that this amendment was reintroduced after having been discussed and not included in Bill C-19. It was reintroduced as part of the package that the government developed in October to deal with higher energy prices. But certainly it's not only the oil and gas industry that' s concerned about this.

The second element of fairness and due process relates to the issue of the power to compel evidence and whether or not that might violate the protections against self-incrimination. I can deal with that in more detail, but it is certainly a concern.

The Chair: Thank you, Werner.

Mr. Werner Schmidt: Is my time gone already?

The Chair: Well, it's five and a bit.

Mr. Werner Schmidt: That's really too bad, because I wanted to ask him about—

The Chair: If you make it very short.

Mr. Werner Schmidt: A very short question.

Has the word “unduly” been a problem in its definition in the courts?

The Chair: Thanks, Werner.

Mr. John Dillon: Not to my knowledge. The concern is that paragraph 45(1)(a) deals with the mode, and there is a process of review that's currently under way by the bureau to try to determine how to deal more effectively with joint ventures and strategic alliances, because the reality is that many of those are undertaken between companies that are potential competitors. So we have to be clear about the fact that we want to encourage those kinds of productivity enhancing agreements that assist those firms in developing new products and in entering new markets. We don't want to discourage that.

If you take out the word “unduly”, that means potentially any impact on competition brings in section 45 and a very significant criminal process that's attached to section 45.

● (1025)

The Chair: Thank you, Mr. Dillon.

Thank you, Werner.

Paul, Jerry, Brian.

[*Translation*]

Mr. Paul Crête: Thank you, Mr. Chairman.

I would like to talk about market studies, given that the Bloc Québécois has lobbied hard to have these amendments carried. Actually, our efforts come as a result of what was experienced particularly in the petroleum sector, but I think they may apply in other industries. The former competition commissioner said that he did not have adequate investigatory powers and that he had to have quasi-judicial proof of rigging to proceed with any investigation. The objective of this amendment is not to determine whether or not collusion occurred. Rather, under the amendment, the competition commissioner would be able to study other industrial sectors to ensure that they are operating appropriately from a competition standpoint. Over a 10- to 20-year period, there may end up being several studies on several different sectors. Such studies would confirm that a particular sector is functioning as it should.

Because of a substantial legal vacuum there is no provision whatsoever for such an investigation without bringing forward proof of a quasi-judicial nature. As a result, there is an imbalance between consumers' power and the interest of individual industrial sectors. In my opinion this amendment aims to resolve this problem.

Why do you not think that such a investigatory power will be beneficial for your various sectors?

Mr. Pierre Beauchamp: Any investigation carries a pejorative connotation.

Mr. Paul Crête: Now, why would that be the case?

Mr. Pierre Beauchamp: We are talking about the Competition Bureau. To date, the Competition Bureau has conducted investigations which, usually, come as a result of complaints. The Competition Bureau does not embark on investigations to ensure that a particular industry is productive. That is not its role.

Mr. Paul Crête: Investigatory powers in the area of competitions are by no means negative. The amendment would simply give the competition commissioner an additional power...

Mr. Pierre Beauchamp: What would be the point of such investigations?

Mr. Paul Crête: The point would be to provide a snapshot of the state of affairs in a particular industrial sector. Such an investigation would therefore help to determine whether measures need to be taken to avoid crises such as the one we have just experienced in the petroleum sector in August and September, crises which may occur in other sectors.

Mr. Pierre Beauchamp: The Competition Bureau has already carried out investigations concerning the problems you referred to. In fact, there were four. So, the tools do exist.

Mr. Paul Crête: There was one investigation on price rigging, but there was no general investigation. That is very different.

Mr. Pierre Beauchamp: There are no specifics given about such a general investigation, nor about the procedure that would be followed. And that is a problem. However, the tools are already available. There can be a dialogue between the Competition Bureau and any sector whatsoever. In fact, there is an ongoing dialogue with our industry. There is a good dialogue. We speak a lot. If there are problems, we try to fix them. If the Competition Bureau is not happy with the answers we give them, well they have a number of tools at their disposable, section 11, for example.

Mr. Paul Crête: Mr. von Finckenstein, Ms. Scott's predecessor told us himself that that very tool was missing from his tool kit. We kept asking the minister if this sector would be investigated. The minister said that he did not have the formal authority to commission investigations of this type, without formal evidence of collusion. The commissioner said the same thing. In fact, under the amendment, we will simply be able to obtain a better idea of the state of affairs from the competition standpoint in various sectors without any charges of collusion, for example, being necessarily laid.

This would be a little like what occurs in the labour market. Departmental assessments are carried out, year to year, on the state of the labour market in various sectors of activity. In my opinion, this will allow us to do likewise in the area of competition.

Mr. Pierre Beauchamp: If I could just make a quick comment. The government's role is not to act as a consultant, by telling industries whether or not they are productive.

Mr. Paul Crête: This is a matter of public interest.

Mr. Pierre Beauchamp: Precisely. We are not only dealing with collusion here. If the government needs tools, it can choose those that are available. We already have them; there is no need to invent new ones.

● (1030)

Mr. Paul Crête: I also think that there is no need for this. However, the powers established in this bill were not included in the previous legislation. To my sorrow, more than once, I got the answer in the House that nothing in the legislation provided for this kind of investigation, and that this is why the government had finally accepted to include this provision.

The Chair: Thank you, Paul.

[*English*]

A few words to finish up, Mr. Dillon. Go ahead.

Mr. John Dillon: Thank you, Mr. Chairman.

[*Translation*]

Thank you, Mr. Crête. Let me answer in English.

[*English*]

I think something to keep in mind here is that the Competition Bureau is not the one and only source of information on the workings of various sectors and markets in this country. The National Energy Board has a great deal of knowledge of the energy industry. The CRTC follows the telecommunications industry in great detail and makes rulings all the time. The government itself asked the Conference Board to do a study of the oil and gas industry several years ago, when there were concerns about pricing. This isn't the only means the government has to have a discussion and have some study as to whether a market or a submarket or a sector is working effectively. But the concern is that the Competition Bureau does have this enforcement capacity. It's finding that fine line between general knowledge and understanding the industry and information that leads to a specific enforcement inquiry that's the concern.

The Chair: Thank you, Mr. Dillon.

Mr. Michael Janigan: Mr. Chairman, may I address that point?

The Chair: Very briefly.

Mr. Michael Janigan: I think Mr. Beauchamp brings up an important point: that in fact currently, when the commissioner conducts an inquiry, it's a matter of some problem from an image standpoint with the business. That is why the commissioner has gone to a circumstance where you'll be conducting a market study of the industry as a whole. The inquiry is a micro-tool that is used with respect to a particular business or a particular individual who has contravened the act, or likely to do so.

A market study is entirely different. It is devoted to looking at the circumstances of competition within an industry itself. We are increasingly turning to market forces to replace regulation, sometimes in areas where 50 years ago it would never have been discussed, as the area would have been too important and it was thought could only be delivered in a monopoly or government fashion.

In that circumstance, I think we have an obligation to ensure that in those particular industries we have the tools available in the most experienced part of the government that deals with these issues, to do a market study. There are some comments today that the fear is that market studies may respond to political pressure. I assume that is political pressure without any evidence of lack of competition in the industry. Responding to political pressure is not necessarily a bad thing. It may be important to have a well-done study, evidenced and researched and appropriate, in a particular industry, to make sure that the state of competition is as it should be, and that is effectively what the Competition Commissioner has proposed in this.

The Chair: Thank you, Mr. Janigan.

Jerry, Brian, James.

Hon. Jerry Pickard: Thank you very much, Mr. Chair.

Mr. Chair, I'm really astounded that big business seems to come in with all of the same arguments. Let's stop and look at it. What's competition about? It's making sure the consumer gets a fair, open opportunity, gets the best price, gets the best product, gets what they need in a marketplace.

I think Mr. Janigan was dead-on when he said what the Competition Bureau should be doing is protecting the consumer, making sure fair business practices go in this country, making sure that there are regulations.

We talk about the European Union, we talk about the United States, the U.K., and Australia all having legislation in place to make sure that their regulatory bodies can deal with these issues and look at market studies and move forward with it, and yet we're arguing that maybe if a company is doing criminal things they might self-incriminate themselves. I find that a ludicrous argument.

Quite frankly, they have the same rights and protections of the law in every case. They do not have to self-incriminate, but why the hell should we be sitting here worrying about a company that may be doing criminal actions and trying to protect them and strike down legislation that may disclose this? Quite frankly, I've got a real problem with that.

However, going beyond that, let's look at the fact that the Competition Bureau cannot deal with an issue unless there's a complaint brought forward to them. They're very restricted in their ability to deal with issues. When we're looking at the gas industry or when we're looking at any other industry, we need to know what's happening. They should have the right to look at that industry, and if there are self-incriminating issues that come up they will stop the study dead in its track and they will proceed under section 11 or other avenues.

That's the issue. The issue is that it's happening in all of our other countries. The issue is that we need to protect the consumers. The issue is that small business is getting some problems with it. They were in here, and they said they have some problems with what's happening right now. To say we shouldn't give the tools to the government, to the Competition Bureau, to deal with it, I find that really difficult to deal with.

I'd like Mr. Janigan to comment on it, because he's been very quiet and the others had an opportunity, and then I'd like the others to comment.

● (1035)

The Chair: Thank you, Jerry.

Mr. Janigan.

Mr. Michael Janigan: I want to deal specifically with the problem of self-incrimination. To a large extent the difficulty here is from the standpoint of prosecution, not from the standpoint of the companies themselves. Effectively what would occur, in the event that it could be conclusively shown that the information gleaned was in the process of a civil investigation, is there may well be a dispute or a defence available to the company that in fact this was obtained under other means and their charter rights have been infringed and this sort of thing.

It is a significant problem, and I think the commissioner has dealt with it and it has to be dealt with in a very delicate kind of way. The fear is not so much that the rights of the company are going to be trampled on, but that in fact criminal prosecutions or prosecutions that otherwise would have been launched will be stymied in the result.

Many of you may remember the Iran Contra investigations that took place a couple of decades ago. As a result of the investigations in Congress the information that was obtained was made available to the special prosecutor, and the convictions that were subsequently obtained by the special prosecutor against particularly Oliver North and a few other of the defendants were subsequently nullified because of the fact that the special prosecutor had gained access to that information through the means of the congressional inquiry.

It does present problems from a prosecution standpoint. The shoe has been put on the other foot here, and suddenly this information leaves open self-incrimination. It leaves open a big defence to potential criminal prosecution more than it has particular implications for the industry or the players within the industry.

The Chair: Thank you.

Mr. Beauchamp, go ahead, sir.

Mr. Pierre Beauchamp: Thank you for your comment and your good question.

First of all, we represent small business. You've made reference to big business. I don't know if you were looking at me at the time, but 65% of our member firms are ten employees or less. We consider that to be small business, as opposed to large or big business.

Secondly, the international competitive element is important. I don't know if I agree with what you proposed a moment ago. If you look at the research paper that we've put before you, it seems to not have quite the same direction. In Australia, what we've discovered is that there is no power to compel information. That's exactly what we have found out with the system that they have under their consumer commission.

In the European Union, inspections are limited to cases where there are specific concerns. There's got to be a concern, because an inspection or a market study that is initiated for absolutely no reason makes absolutely no sense. Why would you do it? I go back to the consulting function, which is not the government's.

The same applies with the United Kingdom. I won't take time here to explain that, but I'd like to go back to self-incrimination, because that's a very important notion. I would like to ask Catherine McKenna to comment.

The Chair: I'll get you to be brief, Ms. McKenna. Thank you.

Mrs. Catherine McKenna (Competition Counsel, Canadian Real Estate Association): Okay. I'll make only two very quick points.

First, we need to step back. What we're talking about is a market study where there's no evidence of anti-competitive conduct. So when you are talking about self-incrimination and whether or not that's important or whether we should be sympathetic, I think you need to be aware that this is where one day the commissioner decides there's a need to conduct a market study, so there is no evidence of anti-competitive conduct. I think you need to take this charter concern very seriously. I can reference the commissioner's comments from November 18, 2004, where she says this is a serious concern. She concludes: “We would certainly be prepared to use a model, but not one that doesn't work”. I think it's important for the committee to take her concerns seriously.

● (1040)

The Chair: Thank you.

Brian, James, Marlene.

Mr. Brian Masse: Thank you, Mr. Chair, and thanks to the panellists for being here.

I have a question for all of you that I'd like you to consider in terms of the market study we're talking about. We've heard a lot of discussion today about fishing expeditions. It seems to be in several presentations, as well as the issue, as you noted, Mr. Dillon, about political motivation in terms of the oil and gas review that we just did. Your organization actually conducts itself in very much a lobbying effort to actually get political motivation from different parties, to get going on different issues. So I think that whether you're on the side of it or not, it's okay. That's actually coming from people who are interested in the subject matter, whether it be citizens' groups or organizations, so I don't see it necessarily as a negative.

I'd like to focus on that, because there have been a lot of claims that these market studies are going to affect reputations and companies and their abilities to respond to the fact that they're going to be studied. Let's look at the last one we recently went through in terms of the oil and gas industry. I'd like the panellists to describe how it's been hurt by this recent process. Profits are up; the shares are up. They've actually now had some people invest in refining when we had committee testimony that said that basically 95% to 97% of refining capacity in Canada was already maxed out. Even experts from the industry said there would be no new refining operations on the horizon. There have been other suggestions that there is going to be that investment. It has uncovered all that type of an issue, as well as it gave more information to the public to digest.

That market study that we kind of did through this committee, explain to me how that hurt that industry. I'd like to know, because we just went through that process. How has it economically been damaging, publicly been damaging? The results have led to more investment, I believe, when there wasn't refining capacity, where they even testified—their own experts—saying their profits were spectacular. People realize that we're vulnerable in terms of not having enough supply available for refining capacity. It's a real vulnerability for areas that I represent, say, the auto sector and other manufacturing industries.They might actually have some redress now.

If you could comment on that across the panel, I'd appreciate it.

The Chair: Mr. Dillon to start.

Mr. John Dillon: Thank you, Mr. Masse.

You had the experts before you in the previous panel with respect to that particular industry, but let me make an attempt at that.

Mr. Brian Masse: I was asking about the market study affecting it.

Mr. John Dillon: I certainly was not suggesting that any study of the industry is contrary to the interests of that industry. Far from it. What I'm suggesting is that there are many other tools. I didn't mention parliamentary committees, but that's an obvious one. There are many other ways, and I'm sure the industry feels it is beneficial to get more information out there about how the industry operates, about the effect of supply and demand, about the situation with world food prices and how that flows through to the marketplace. So by no means should it be interpreted as suggesting that every study of the industry is detrimental to that industry. Far from it.

What I have been suggesting, though, is that when that study is undertaken by the Competition Bureau, which we all know has certain prosecutorial responsibilities, that does raise the potential for people to say, “Aha, you see there is something wrong with that industry, there is unfair competition, there is inadequate competition”, and the industry has to deal with that.

The Chair: Mr. Beauchamp.

Mr. Pierre Beauchamp: Similarly, what you're referring to, the market study there, was conducted by committee. We're not commenting on that today. We're commenting on the amendments that have been proposed. To me, that is a totally different thing altogether.

What is the circumstance that would commence that kind of market study? What is behind it? Is it, as was said earlier, a dream? Do you wake up one morning and decide to focus on this particular industry and see if you can make it better from a competitive viewpoint?

If you take an industry like the one I represent today, it is highly competitive. It's a very competitive field. We cooperate on a full-time basis with the bureau. We have compliance programmed to death with our membership. People understand the application of the law to the industry. If we need more study, I can't understand that the tools that are there already do not allow the bureau to do that. We can speak openly with the officials. We can bring them up to date, as we do on a regular basis.

● (1045)

Mr. Brian Masse: I'll get Mr. Janigan to respond to this. I'm just a little bit frustrated, because I asked a specific question about how this overview of the oil and gas.... The Competition Bureau has investigated this before, and I didn't get a response as to how it affected this industry. That was my question.

The Chair: Thank you, Brian.

Briefly, Mr. Janigan, then we'll try to squeeze the last three questioners in.

Mr. Michael Janigan: I don't think you can approach this legislation with the view that the Competition Commissioner is likely to be reckless or profligate with his or her resources. The experience to date has been exactly the opposite. The Competition Commissioner has been very careful in terms of their approach to the duties.

If in fact there is a perceived need in the public or an important sector for a study to be done—no disrespect to parliamentary committees—with the other resources that are available, why wouldn't you want it done by an independent, neutral party that possesses the resources in the exact area you want studied? It seems like a no-brainer that you would want to have it done by the Competition Commissioner operating under the act and from an independent standpoint. That's why we support this legislation.

The Chair: Thank you, Mr. Janigan.

I'm going to try to squeeze James, Marlene, and Paul into the last little bit here.

James, please.

Mr. James Rajotte: Thank you very much, Mr. Chairman.

Thank you all for coming here today.

I think the question about the purpose of a market study is a very good question. If it's for information or for investigatory purposes, there are parliamentary committees and the Conference Board; there are other agencies and organizations to do that.

When people come to me and say there's a problem in an industry and you need to investigate it, something I emphasize is on page two of the Canadian Real Estate Association's submission: "Under existing law, the Commissioner of Competition can initiate a formal inquiry", first of all, "if she believes the act may be contravened"—so she has that power. But following that, secondly, "the commissioner is obliged to initiate an inquiry if she is petitioned to do so by any six Canadian residents, or if she is directed to do so by the industry minister". So if the industry minister thinks there is a problem in an area, thinks there is a problem in the oil and gas industry, the industry ministry can direct that.

I say this to people all the time: "If you think there is a problem in an industry, get five fellow citizens, sign a letter, and I will present that to the commissioner and something will be done".

It just seems to me—with the market studies—we don't need it. We have all the existing investigatory powers we need here. These three methods can happen.

Maybe, Mr. Janigan, you want to say something, but are these powers not sufficient?

Mr. Michael Janigan: Those powers are sufficient in circumstances where you want to investigate a business or an individual, or someone who has likely contravened the act or is about to do so.

What we are dealing with in this circumstance is not so much "Hey, I think Wal-Mart is contravening the Competition Act. Let's have an inquiry." This is a circumstance where we ask why there isn't enough competition available in retail stores across Canada and the reasons behind it. We want to take a look at it on a macro level, not to come out and necessarily point fingers, but to have the power to take a look at this in an independent, fair, and objective manner. At the end of the day, the conclusions are made available in an appropriate fashion to all the political actors and everyone who is interested in the process.

An inquiry is a whole different thing; it's an investigative process. At the end of the day, you will decide whether or not to proceed with civil or criminal sanctions, but that is the purpose behind it.

Mr. James Rajotte: Can I just follow that up, then, Mr. Janigan? If we want to look at the retail sector, why would we not say that the Conference Board of Canada would be well suited to investigate that issue generally?

We don't want to cast aspersions. We all read the financial pages, and if you see a company or a sector in there that's being investigated, you notice that; investors notice that. We should all recognize that's true.

If we just want to investigate it more generally and not point fingers, I appreciate that. Why would we not say this is something for the Conference Board to do, rather than the Commissioner of Competition? Because I read that and I think, uh oh, anti-trust behaviour; there's a problem there. If I see the Conference Board, I think, well, they're non-partisan, they're not political, maybe they're just investigating the industry to find out more information about it.

● (1050)

The Chair: Thank you, James.

Mr. Michael Janigan: My experience is that our investment analysts are pretty sophisticated in terms of their approach to evaluating the capital markets. I'm not certain whether or not a market study taking place on a cross-industry basis would have as substantial an impact on the market as you may believe.

Secondly, that's the reason why we're going to this kind of system, to escape the idea of an inquiry where an individual business or corporation is put under a microscope. This is a market study. This is to take a look at the competition problems across the board.

Thirdly, with respect to who should do it, I'm sure the Conference Board has good resources, and I'm sure other organizations have good resources as well, but I would think that the place where the most resources reside, in terms of independence and objectivity and expertise over given years, would be the Competition Commissioner.

Mr. James Rajotte: I would just like to add, Mr. Chair, that when the commissioner came before us, she said for many years they haven't had enough resources. All parties have agreed with that. If we add more powers and more responsibilities to her, the limitation of resources is even a greater problem.

The Chair: Thank you, James.

Ms. McKenna, very briefly, and then we'll go to Jerry.

Mrs. Catherine McKenna: I just want to clarify one thing that Mr. Janigan said. When you throw around the term "market study", it makes it sound like it's something innocuous. Remember, these are section 11 powers, which are powers of inquiry. So a market study combined with a section 11 power is an inquiry.

The Chair: Thank you.

Jerry, please.

Hon. Jerry Pickard: Thank you, Mr. Chair. I believe I have six minutes for equal time with the opposition.

I want to talk about the fishing expedition, first. Quite frankly, I think we know that within the recommendations coming forward there are clear parameters. They have to be gazetted. The industry has to know what is being studied. At this point in time, unless charges are laid against an organization, the Competition Bureau is strictly limited in what it can do. And yes, you're right, if the Competition Bureau gets involved in a case today, the fact is that it is leading to further actions. However, if we deal with a study, that is not the case. Therefore, the direction, the whole idea of what the Competition Bureau is doing, gives it an opportunity to better understand the whole impact, the broad nature of that industry, and why things are happening the way they are.

So that's critical. It's not a fishing expedition at all. I don't think it's something that any department would work on irresponsibly. I think they do take very responsible positions.

I also would point out that several people have said that the Competition Bureau administrators aren't necessarily in agreement. Quite frankly, I believe they are in total agreement with having the openness to studies. And studies are exactly what they are—studies of the industry.

When we talk about the detrimental effects that have been brought forward, many of the witnesses have consistently mentioned a detrimental effect to business. It also has been said that there are some limited powers in some areas. Well, very clearly there are limited powers here as well. The Competition Bureau is limited to the study that they set out the parameters for, as they are required to allow the Canadian public, under a gazetted form, to understand what the structure and what the limit of that study will be.

We know, on the effects of.... And there are, very often, studies done in other jurisdictions—Australia, the United Kingdom, the United States. It has been suggested that this is not a regular base, but I've been told very clearly by department officials and by competition officials that this parameter is very often used to look at the operations of business, to see how the different issues interrelate, and to see how the consumer is affected by the things that are happening within the industry.

Quite frankly, the amendments just give the Competition Bureau those tools in order to deal with that in a reasonable, well-organized way, and they have to be very clear in the direction they go in.

The Chair: Do you want to give the witnesses a chance to comment, Jerry?

Hon. Jerry Pickard: I realize, Mr. Chair, that I have time to lay it out—

● (1055)

The Chair: Usually the time includes responses.

Hon. Jerry Pickard: —and they may have a shorter time to respond.

My view, quite frankly, is that we need to protect business, and we need to protect business in all different parameters in this country, but we also have a responsibility to the consumer. Do you think the consumer is better served by allowing as much information flow from industry to the consumer...? And I believe the Competition Bureau, in doing studies, can expedite that flow of information, through business and to consumers.

The Chair: Thank you, Jerry.

Mr. Beauchamp and then Mr. Dillon.

Mr. Pierre Beauchamp: It's my understanding that the bureau does not have to lay charges to commence a section 11 research project. They can simply—-

Hon. Jerry Pickard: They do it on a complaint base.

Mr. Pierre Beauchamp: Well, the point is that they don't need to charge an organization, an industry, or a business; they can do the research they need. They can require under section 11, which is a reverse search and seizure, to have the business involved assemble all the material they need. They study it and then decide to do anything they wish, including abandoning the whole thing, which they often do.

Hon. Jerry Pickard: But it's very limited and it's on a complaint base.

Mr. Pierre Beauchamp: No, it can be broad enough to allow them to look at all aspects of a particular topic under section 11.

The Chair: Mr. Dillon, please.

Mr. John Dillon: Thank you, Mr. Chair.

Mr. Pickard, I'm not an expert on the procedures of the act of the bureau, but I don't believe that the bureau is limited to a complaint. It certainly has enough powers now to look into the industry on its own without necessarily having a complaint.

The concern that's been raised is one related to a wide-open study. The amendment as I have seen it says a notice should be published in the *Canada Gazette*. It says absolutely nothing about the scope of that study or requirements to put a scope to that study that would make people feel more comfortable. It is wide open at the moment.

Frankly, the bureau functions in the way it does. It has investigative powers. It has a relationship of an adversarial nature in some cases with some companies and some industries, and that's as it should be. If we want a totally impartial, unbiased, and complete study, there are many other places it can be done where the concerns we have raised do not come up.

The Chair: Thank you, Mr. Dillon.

We're just about going to get booted out of the room.

Very briefly, Paul.

[*Translation*]

Mr. Paul Crête: Mr. Dillon commented one of our amendments. I would like to review this text, after our meeting.

[*English*]

The Chair: Thank you, Paul.

Just before we wind up, I want to thank our witnesses, but as I'm thanking you I just want to inform my colleagues that Bill C-55 is gone.

Also, we're going day by day. I may be more effusive in my remarks Thursday, but Werner and Jerry are retiring. Just in case one of them is not here Thursday or all of us are not here, I want to thank you for being members of the committee and for your hard work as members, since 1993 in Werner's case and 1988 in Jerry's case. Thank you for your service to the committee.

Do you have a point of order, Paul?

[*Translation*]

Mr. Paul Crête: We are thanking them for the second time, but they do deserve it because of all the work they have done. However, I hope that there will not be a third time.

Some hon. members: Oh, oh!

[*English*]

The Chair: Well, I'm not sure.

Thank you to our witnesses.

We are back here Thursday at nine—or somewhere Thursday morning at nine, hopefully.

We're adjourned.

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