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Chair

Mr. James Bezan

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● (1535)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): I call this meeting to order, meeting number 36. We are continuing with our study of Bill C-469, An Act to establish a Canadian Environmental Bill of Rights.

As the agenda shows, I have split this up into two hours. For the first hour we have at the table a person who is no stranger to the committee, Scott Vaughan, the Commissioner of the Environment and Sustainable Development. With him is Anne Marie Smith, the legal adviser. They are out of the Office of the Auditor General of Canada.

The Environmental Commissioner of Ontario, Gord Miller, is also joining us.

Welcome to committee.

I turn it over to you, Mr. Vaughan, to present your opening comments. I would ask that you try to keep them to under ten minutes.

Thank you.

[*Translation*]

Mr. Scott Vaughan (Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada): Thank you, Mr. Chairman.

I would like to begin by thanking you for this opportunity to appear before the committee today to discuss Bill C-469, An Act to establish a Canadian Environmental Bill of Rights. Joining me today is Anne-Marie Smith, our senior legal counsel.

We have reviewed Bill C-469 with interest, in particular those clauses that establish new responsibilities for the Auditor General and the commissioner. Clauses 13 and 14 of Bill C-469 describe two possible new administrative responsibilities for my office. In both clauses, those new responsibilities assigned to the commissioner entail forwarding a request from a Canadian resident or entity to the minister responsible for a review or investigation—acting as a kind of clearing house. We could perform that function.

[*English*]

As committee members may know, the commission already acts as a clearing house for environmental petitions by tracking the environmental petitions received and reporting to Parliament on the issues raised and the timeliness of ministerial responses.

Turning to clause 26 of the bill, this would, as we understand it, require the Auditor General of Canada to examine all new federal regulations and every bill introduced to the House of Commons to determine whether they are inconsistent with the purposes and provisions of Bill C-469. We have concerns with these responsibilities. Although the goal of ensuring regulatory consistency is important, in our view this is the responsibility of the government rather than the OAG. Indeed, mechanisms already exist designed to ensure consistency and consideration of environmental implications in government policies and programs.

For example, regulatory impact assessment statements must accompany every regulatory proposal submitted for government approval and each statement must include various analyses and justification prior to implementation. Another example is the strategic environmental assessment of policy, plan, and program proposals.

This committee may wish to explore these mechanisms as well as the role of the Department of Justice Canada. That department is the central agency responsible for providing advice on all legal matters, including the constitutionality of government initiatives and activities.

[*Translation*]

Mr. Chairman, this concludes my opening remarks. We would be pleased to answer any questions.

Thank you.

[*English*]

The Chair: Thank you, Commissioner. We appreciate that.

Mr. Miller, we welcome you to the table. We were hoping to have some other jurisdictions that already have an environmental bill of rights in place, so it's great to see you, representing Ontario.

Mr. Gord Miller (Environmental Commissioner of Ontario): It's a pleasure, Mr. Chairman, to be here. In fact, I'm really pleased to appear before this committee, because the Canadian environmental bill of rights reflects many of the experiences we're had in Ontario with our Environmental Bill of Rights.

As the Environmental Commissioner of Ontario, appointed by the Legislative Assembly of Ontario, I'm responsible for monitoring and publicly reporting on the government's compliance with Ontario's Environmental Bill of Rights, or, as we call it, the EBR. As Environmental Commissioner for over 10 years, I would like to share some general comments based on my own experiences with Ontario's EBR for your consideration on the purposes of the CEBR, just by way of general comments.

I believe the proposed CEBR has the potential to become an important and positive piece of legislation. Since coming into force in 1994, Ontario's EBR has helped to increase accountability, transparency, and public participation in environmental decision-making and ultimately improve environmental protection in the province. In my view, Bill C- 469 has the potential to provide many of the very same benefits—i.e., improved accountability, transparency, public participation, and environmental protection—on a federal level.

In regard to examination of bills and regulations by the commissioner, the proposed CEBR would require the Auditor General, through the Commissioner of the Environment and Sustainable Development, to examine all proposed bills and regulations to ensure consistency with the purposes of the CEBR. Although similar provisions in Ontario's EBR require me to review and comment on compliance of government decisions with the provisions of Ontario's EBR, the ECO—my office—has provided an important independent and impartial voice in the public discourse on environmental issues, helping to pave the path for improved future environmental decision-making.

On the point of access to information and public participation in environmental decision-making, the proposed CEBR would require the federal government to provide information to the public on environmentally significant decisions as well as provide a right for the public to participate in environmental decision-making. In Ontario, the high level of public engagement in environmental decision-making under the Ontario EBR has been one of the greatest successes of the statute. Through the use of a dedicated web-based environmental registry, each year provincial ministries now post thousands of public notices relating to proposed and final environmental decisions, including convenient links to background documents. Through this same registry the public can provide informed comment, which is considered by the ministries in their final decision-making.

By posting proposals for new environmentally significant acts, regulations, and instruments on the environmental registry for public notice and comment, the government has increased transparency and accountability in its decision-making, which has resulted in improved environmental decision-making, and in many cases, greater public buy-in to government decisions.

While the proposed language of Bill C-469 includes the key components of public engagement—i.e., access to information and the opportunity for effective public participation—I strongly encourage the use of a single dedicated registry, such as is used in Ontario, to maximize public access to government proposals and decisions, as well as mandatory minimum standards for consultation.

On the point of the right to request a review of a federal policy, regulation, or law, the proposed CEBR would provide a right for a member of the public to request a review of a federal policy, regulation, or law. Ontario's EBR includes a similar right, but requires that two applicants request a review. I believe that requiring the collaboration of two applicants encourages thoughtful, well-documented applications.

In Ontario approximately 10 to 25 applications for review are submitted each year. These applications contribute insights and new perspectives that might not be raised by the usual mix of civil servants and stakeholders talking around the table. Of the requests submitted, about 13% lead to some direct action, such as a review of and/or improvements to the law, or regulation, or policy. Moreover, in many cases where a review is not formally undertaken the application nevertheless helps push the agenda forward, throw light on the issue, or trigger some other indirect action.

On the point of the right to request an investigation, the proposed CEBR would provide the right for a member of the public to request a government investigation of a suspected violation of a federal environmental law. Again, Ontario's Environmental Bill of Rights includes a similar right allowing any two applicants to request an investigation. In Ontario approximately 10 to 20 such applications for investigation are submitted each year. Of these, about 36% of the requests have led to investigations with some sort of enforcement action arising out of them. In many other cases, even where the government has denied the application for investigation, the ECO has found that the application has resulted in some other indirect action.

● (1540)

I believe this right provides a particularly valuable tool. With limited government staff and financial resources to regularly inspect all regulated facilities, this tool empowers the public to play a role in helping to identify potential environmental violations. Without this right, a number of violations identified in Ontario may not have been uncovered.

On the point of legal actions, the proposed CEBR would provide the public with access to additional legal recourses. First, the CEBR would ensure that concerned residents are not denied standing before the courts in environmental actions solely because they do not have a private or special interest in the matter. Second, the CEBR would allow the public to seek judicial review of a government action or inaction that has resulted or is likely to result in significant environmental harm. Third, the proposed CEBR would provide a right to commence a civil action against a person who has contravened a federal act or regulation that is likely to result in significant environmental harm.

Ontario's EBR provides the public with a different but comparable set of legal rights. We have appeal rights. Where an appeal right already exists for an instrument-holder, for some company that has a permit or licence, for example, the Ontario EBR provides a right to third parties to request permission from the relevant tribunal, usually the environmental review tribunal, to appeal a ministry decision on certain environmental instruments, such as licences and permits. Permission to appeal will be granted only if the applicants are able to successfully demonstrate that they have an interest in the decision in question, that no reasonable person could have made the decision, and that the decision could result in significant harm to the environment.

On the matter of public nuisance claims, the Ontario EBR provides members of the public with a right to sue for damages for direct economic or personal loss that has resulted from a public nuisance that has harmed the environment, without the approval of the Attorney General. Prior to this act being passed, claims for public nuisance in Ontario had to be brought by, or with the leave of, the Attorney General.

On the matter of "harm to a public resource" claims, the Ontario EBR gives members of the public the right to sue any person who is breaking, or is about to break, any environmental law, regulation, or instrument that has caused, or will cause, harm to a public resource.

In Ontario, these legal actions have been used very sparingly. While public participation mechanisms through other mechanisms—i.e., commenting on government proposals and submitting applications for review and investigation—have been used extensively, use of these legal actions has been minimal. In the 16 years since the Ontario EBR was enacted in 1994, Ontario has seen only one claim for public nuisance—and in that case, public nuisance was just one of many causes of action relied upon—and only one court action under "harm to a public resource". In addition, about five to ten "leave to appeal" applications are filed each year. Clearly, the legal actions have been reserved as a last resort, which was the intent of the drafters of our legislation.

On the matter of legal costs, the proposed CEBR would allow a court to order a plaintiff of a judicial review to pay costs only if the action is frivolous, vexatious, or harassing. The proposed CEBR would also authorize the court to award a plaintiff counsel fees and/or an advance cost award in certain circumstances. I strongly support these provisions. I have identified the chilling effect of potential cost awards as a serious barrier to public interest legislation, and I have intervened in two separate court proceedings to speak to this issue. The proposed provisions in the CEBR should help address this barrier to meritorious environmental legal cases.

In closing, I would like to reiterate my opinion that the proposed CEBR would be an important and positive piece of legislation that would enhance government accountability, transparency, and public participation in environmental decision-making. In these ways, the CEBR would encourage better environmental decisions and in turn ensure a better-protected environment for future generations.

Thank you.

● (1545)

The Chair: Thank you, Mr. Miller.

We're going to go to our seven-minute round, and kicking this off is Mr. Kennedy.

Mr. Gerard Kennedy (Parkdale—High Park, Lib.): Thank you both for your presentations and the work that you're doing.

Mr. Vaughan, could I ask you for a little bit more elaboration? I don't want to paraphrase, but it sounded as though you didn't think there was potential for duplication in the potential new role being contemplated for the Office of the Auditor General. I wonder if you could give us a little bit more of the "whys" of that.

In other words, I think the intent of the legislation—maybe the drafter can speak to it in her round—is independence, and an independent opinion about how well that's being done. We all know there are various other efforts and onuses on federal government deputy ministers. There's a ministerial directive, and there's the new sustainable development, but I think the general context for this bill is that we've not succeeded as much as people would like us to have.

So could you address that, maybe just briefly for us, to give us a little bit more of the practical part of that?

Mr. Scott Vaughan: Thanks very much for the question.

I think you can see from the opening statements between the two the contrast of the mandates between Mr. Miller's work and the work that we do through the OAG.

In a nutshell, most of the work that we do in providing reports to Parliament are through assurance engagements, meaning that we won't say something until we are absolutely certain of what we are saying. That assurance is based on looking at implementation to a fixed date. So trying to speculate, for example, or doing an *ex ante* forward assessment on what might be an area of potential regulatory inconsistency....

We certainly will do whatever Parliament wants, but it seems to me, and I was trying to suggest, that there already are mechanisms in the government. I think they certainly can be strengthened, they can be clarified. Regarding the strategic environmental assessment, there's been a new cabinet directive which requires ministers to ensure consistency among all the policies government-wide, and to ensure consistency within the context of environmental goals and sustainable development. And there are others. I mentioned the regulatory impact assessment.

The second part of this, though, is that if, for example, we did do that forward-looking *ex ante* type of assessment on what might happen in the future, it's important for Parliament to be able to rely on the OAG to go back and say, "Well, what has been the performance? Has the government done what they've said they were going to do?" Our recommendations are, by nature, forward-looking. If we see something that's broken, we will make recommendations to the government, hopefully, to fix it. We will go back and audit them and provide additional clarification to Parliament on saying, "Is it working? No. How best to fix it? Is it fixed?" The government will say what it is going to do.

So part of it is duplication, but it also gets in part to the different mandates between what we do and what Mr. Miller's office does.

Mr. Gerard Kennedy: I appreciate that.

Mr. Miller, welcome. Good to see you again in different context.

I appreciate your testimony. I think it's really important. You have one of the biggest mandates of the provincial governments that have this. But there are differences between the law that you're implementing and the one that's contemplated here.

Some observers have told us that the implementation mechanism here is more significant than the Ontario one. I think you've been very helpful to point out differences in how things work, and to draw on your experience to say whether things have been working, and what to expect, and so on.

Do you see important differences here? Some people coming before the committee have said that this takes it too far, if I can overgeneralize, and that there are new powers and new things here that we would perhaps be surprised by the results of.

● (1550)

Mr. Gord Miller: It's interesting; the way I look at it is that it brings your proposal.... I mean, there is a very big difference between the federal commissioner and my office in terms of the way we're structured and the way we are intended to report to the legislature.

I see the provisions in this bill bringing in some of the better elements—well, what I would call "better elements"—in terms of public participation and the public's ability to access decision-making in the government and improve the role of the federal Commissioner of Environment and Sustainable Development in that the request for review and request for investigation allows the public to have a more direct and intimate relationship with the office, as they do with my office.

I don't think it fundamentally changes the main structure and difference, which is that the federal commissioner's office is primarily an audit office and my office is a policy office. But I think there's some tremendous value in allowing the public a little more "in". With all due respect, an auditor's job is not a great public involvement job, although traditionally a valuable job. This allows the public to engage a little more, which I think would be an enhancement without actually undermining the structure and intent of the model that they work with.

Mr. Gerard Kennedy: Just to be clear, then, you don't see any really new and adventuresome parts to this act, based on your experience?

Mr. Gord Miller: Well, one part of new and adventuresome is the cost funding in the legislation. That clearly is new and cutting-edge. The reverse of that, which is to use cost awards in proceedings before tribunals and courts has been used punitively, in my opinion, in Ontario. It becomes punitive not only in the magnitude of the award, it becomes so costly to fight the possibility of a cost award, that in itself.

What you've done here in this bill, for the legal opportunities provided, is you've taken that stigma out and allowed it to be much friendlier to proper intervenors, people who have a legitimate case brought forward.

So that, I think, is cutting-edge. I congratulate you for considering it, because it is an interesting and dynamic part. I wish I had that in Ontario.

For the rest, I see it as being similar to some of the stuff that we've pioneered and added to the existing role. I don't see it as being terribly dramatic, but very worthwhile.

Mr. Gerard Kennedy: I just have a couple of seconds left, but on a scale of 1 to 10, then, how important is getting rid of that chilling effect for public participation?

Mr. Gord Miller: Oh, it's very important, because it's becoming very dominant in my day-to-day activity.

Mr. Gerard Kennedy: So it's an eight?

Mr. Gord Miller: I'd give it a nine out of ten.

Mr. Gerard Kennedy: Okay. Thanks.

The Chair: Thank you.

[*Translation*]

Thank you, Mr. Chairman.

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Thank you, Mr. Chairman.

Good afternoon, Commissioners.

Mr. Vaughan, when it appeared on November 17, the Canadian Shipowners Association tabled a brief. On page 4 of that brief, shipowners stated that clauses 14 and 16 of the bill were of great concern to them, and I quote:

> [...] our organization is concerned that clauses 14 and 16, as currently worded, could undermine the current environmental petitions process under the Auditor General Act.

Clauses 14 and 16 deal with everything related to investigations.

Do you share the view of the Canadian Shipowners Association that clauses 14 and 16 of the bill could undermine the petitions process under the Auditor General Act?

Mr. Scott Vaughan: No, not at all. We have reviewed clauses 13 and 14 and, as I mentioned in my opening statement, I believe there is some compatibility between the environmental petitions process currently in place at the Office of the Auditor General and the mechanisms proposed in this bill.

In fact, I have no concerns with respect to the compatibility of the systems currently in place and what is proposed in the bill.

● (1555)

Mr. Bernard Bigras: My second question is for Mr. Miller.

I imagine you are familiar with the federal petitions process under the Auditor General Act. You also have your own investigative process. How would you compare the two processes currently in place?

[*English*]

Mr. Gord Miller: Well, I would argue that the right to request an investigation under the Ontario legislation is more powerful, in that it puts an obligation on the two applicants. They have to provide evidence. Their request doesn't have to be a prima facie court case, but it has to provide evidence. Then it goes to the ministry responsible for the enforcement issue in hand. That ministry has 60 days to respond on whether or not they will do that investigation. If the answer is they will not, they have to give reasons, and those reasons are subject to my independent review.

So it is a more formal and structured mechanism of response. It's dealing specifically with what potentially would be a provincial offence. So I think it is more rigorous than the petition process, as I understand it, where people can bring forward concerns and the evidentiary burden is not great, and where people are potentially by their nature less sophisticated. They may know something or sense that things are wrong and they...there's not rigour on that part, so the response from the government ministry may not in fact be as thorough.

It may be the case that the Auditor General's office may comment on those, but again, the interaction of information is not as rigorous because it's not as structured. So I think our system is more structured and, therefore, that it gives a better outcome, even if that outcome is negative and the ministry says no and gives good reasons why they are not doing that.

[*Translation*]

Mr. Bernard Bigras: My question is still for Mr. Miller. It has to do with clause 23 of the bill regarding civil actions. You quite rightly point out, in item 6 of your brief that "the proposed CEBR would provide the public with access to additional legal recourses." A little further on, you say that "Ontario's EBR provides the public with a different, but comparable set of legal rights". You draw a parallel between civil actions in Ontario and federal actions.

The Canadian Petroleum Products Institute provided a legal opinion that I would like to quote from on page 6:

> Unlike similar provisions in the CEPA and the 1993 Ontario Environmental Bill of Rights, 1993, it is not necessary to request an investigation before bringing a civil action to protect the environment under Bill C-469.

So, you say they are comparable, but people in the industry are saying there are not. So, how can you claim that Ontario's EBR provides a different but comparable set of legal rights?

[*English*]

Mr. Gord Miller: Perhaps I would go so far as to say that perhaps I've overstated that in the sense that when I'm talking about comparability in my comments, I'm talking at a very general level, in that both pieces of legislation invite the public to participate in some kind of civil action.

In fact, to be very clear, and thank you for the question, it breaks down very quickly and it is quite different. The civil action envisaged under the provincial Environmental Bill of Rights is quite focused on allowing public nuisance claims, which is something that is set down in common law and widely recognized. It really releases the block that exists with the Attorney General.

[*Translation*]

Mr. Bernard Bigras: That's correct.

[*English*]

Mr. Gord Miller: The other one is the harm to a public resource claim, which is quite different from what is in your proposed legislation. The only similarity is that they're both civil actions that can be brought.

● (1600)

[*Translation*]

Mr. Bernard Bigras: As I understand it, unlike the bill presently before us, under the Ontario Charter, there has to have been an investigation before a civil action can be brought. Is that not what really explains…?

[*English*]

Mr. Gord Miller: It's a request for investigation.

[*Translation*]

Mr. Bernard Bigras: Yes.

[*English*]

Mr. Gord Miller: There has to be a request for investigation, which may be turned down.

[*Translation*]

Mr. Bernard Bigras: But do you agree that under the Ontario Charter, there are quite a few more limitations than under Bill C-469, even though the spirit of the legislation is essentially the same? We recognize that the spirit of the legislation is the same—a process open to the public, the ability to bring civil actions—but, ultimately, the Ontario Charter contains more limitations than Bill C-469.

[*English*]

Mr. Gord Miller: I agree. If I was unclear on that, I apologize. I agree with your analysis. There are more parameters. It is more restricting in its application.

That was, in the design, the attempt...if you review the comments made at the time of drafting, the rights to sue, the actionable portions of our bill, were intended to be the backstop, the last resort, only to give rigour to the other provisions. In fact, that's how it has played out in Ontario.

[*Translation*]

The Chair: Thank you. Your time is up.

Ms. Duncan.

[*English*]

Ms. Linda Duncan (Edmonton—Strathcona, NDP): Thank you, Mr. Chair.

I also wish to thank the witnesses for attending to speak to my bill. I really appreciate the effort you put into your testimony and the analysis.

I want to congratulate both offices. Commissioner Vaughan's ears are probably buzzing for all the compliments I give for the work his office does. I want to extend them as well to the Ontario office. After 15 years, I think it has shown itself to be an invaluable office. Thank you for your good work.

My first question is for Commissioner Vaughan. Thank you for your points on seeing that there are no inconsistencies, under your point three.

Under your point five, I want to review your mandate a bit to see what you think about an argument for why it may not be conflicting. It's actually interesting, listening to Mr. Miller's testimony, that he seems to be paving the way for the argument I'm about to make, which hadn't occurred to me.

That is, of course, that various entities can be mandated under different pieces of legislation. Of course, the Commissioner for the Environment and Sustainable Development is mainly mandated under the Auditor General Act. But over time, the commissioner has also been given an extended mandate under a lot of other pieces of legislation.

Of course, it may well be argued that having established the commissioner's office under the Auditor General's office may lead to a mindset of approaching matters in "the way things are done", rather than with an approach as a separate commissioner for environment. I think that's a very interesting point.

Mr. Vaughan, I've looked at a number of statutes that you are mandated under. It appears to me that your mandate already moves your office towards being more forward-looking, not just waiting until the government has acted. It's similar to the provision in clause 26 of the environmental bill of rights. Let me give a couple of examples.

For example, subsection 9(4) of the Federal Sustainable Development Act empowers your office to "review and comment as to whether the targets and implementation strategies can be assessed" in advance of final cabinet approval. Again, that's forward-looking, making recommendations so that potentially there could be changes before the final determination by the cabinet.

Secondly, sections 21.1 and 23 of the Auditor General Act mandate your office to provide sustainable development monitoring —reporting towards sustainable development—and to consider a wide array of factors that mirror the environmental bill of rights; again, it's forward-looking.

Section 10.1 of the Kyoto Protocol Implementation Act requires your office at least every two years to submit a report to Parliament analyzing progress in meeting those obligations under that law and reporting any other observations and recommendations.

Is it not a reasonable argument that in undertaking those analyses you would also consider whether the government has exercised its discretion to enact laws, promulgate regulations, or even in its Budget Implementation Act to give consideration to sustainable development, environmental protection, and so forth? Is that not very similar to clause 26?

I'm sorry if that's a complicated question.

● (1605)

Mr. Scott Vaughan: No, on the contrary. I think the honourable member has raised important issues. Thank you very much,

I'll just go through those examples, and maybe this would then provide clarification on some of the work we do and the timing of it. The member is quite right that under the FSDS we were requested to comment in advance of. To give an example of what that looked like in the letter that I sent to the minister under my statutory obligations in June, we did an assessment of the targets, the goals, and the initiatives in the draft strategy. So there was something there for us to examine that the government had released in March on its draft strategy, which looked at the eight goals, 23 targets, and 2,200 existing initiatives. We asked "Can they be assessed?"—meaning can they be assessed from what we know right now—and what we said was "Not very well" in that 30% of the targets and 5% of the implementation strategies had enough information.

So that goes to some of the work that our office does. Certainly the member is right; we would look at a governmental strategy, a governmental plan, which by definition is forward-looking, and we would take apart the components of that plan to say do they have a baseline, do they have a timeline, do they know where they are now, do they know where they want to get to, do they know how they're getting there, and do they know a way of reporting if they are succeeding or not.

Ms. Linda Duncan: And might you not also ask them if they have a regulatory agenda and timeline?

Mr. Scott Vaughan: And so within that, any measure related to advancing the government's policy on sustainable development, whether it's fiscal policy, regulatory instruments, programs, or other initiatives, that is and that would fall in within the work that we do. We also then, looking at regulations, would say—again back to an *ex post* rather than an *ex ante*—if it is not being implemented, the government looks like it is not in compliance with, but to go toward the forward-looking, then, gets into different areas.

I take your point on section 21 of the OAG act that certainly is progress towards in KPIA, as well as progress towards implementation. Our KPIA report from 2009 was to look to the progress to date, and we were very careful to say you cannot speculate forward on what would happen during the full Kyoto period to 2012. We wouldn't go and speculate what the post-Kyoto period looks like.

Ms. Linda Duncan: Okay.

At any rate, thanks for your very astute answer, so quickly, in response to my complicated question.

Mr. Scott Vaughan: I'm sorry for the long answer.

Ms. Linda Duncan: Mr. Miller, thank you very much for your testimony.

A very important part of this bill that I tabled is the part about enabling the public to participate in environmental decision-making, and that appears in a number of the provisions. I have very profoundly supported that for my 40-year career, that there is an imbalance in opportunity for the public to participate in decision-making. I am raising it particularly because, of course, I was the first head of law and enforcement for the NAFTA environment commission, where Canada and the Province of Alberta, and I think Quebec, and maybe Manitoba, have signed on and committed to advance notice and consultation on any new environmental law or policy.

So I am wondering if you could elaborate a bit. We have heard from other witnesses talking about where they found that part of the Ontario bill has ended up being the most profound new right and opportunity.

The Chair: Ms. Duncan, your time has expired.

Mr. Miller, if you could make just a short response, I would appreciate that.

Mr. Gord Miller: A quick response would be to say that, yes, on the environmental registry, the ability of the public to respond has evolved quickly in time in that thoughtful ministries are using it very effectively in multiple tiers to identify public concerns early with draft papers and such things before the actual proposal comes out. In that way, they are able to identify where problems are, head them off well before things they didn't anticipate. So I think it has been a very useful process for both the government bureaucrats trying to do the work, for the government members trying to get the legislation passed, and certainly for the public.

Ms. Linda Duncan: Thank you.

The Chair: Thank you.

Mr. Warawa, can you bring us to the last part of this seven-minute round?

Mr. Mark Warawa (Langley, CPC): Thank you.

Thank you to each of the witnesses for being here.

As we heard testimony this afternoon it became evident very clearly that the roles and responsibilities of the two offices, the Commissioner of the Environment federally and the office of Mr. Miller, have quite different mandates. I'm going to focus on the federal aspect. And thank you, Mr. Miller, for the comments that you've made.

The Auditor General of Canada and the Commissioner of the Environment provide parliamentarians with objective, independent analysis and recommendations on the federal government's efforts to protect the environment and foster sustainable development.

Mr. Vaughan, you talked about the FSDS. That is a very important piece of legislation. Everything federally now is looked at through the lens of sustainable development, and there are three legs to that stool. There are economic impacts, social impacts, and environmental impacts, and there's that balance that government tries to reach. So it's through that lens. My questions are going to focus on a new lens, and that's the environmental bill of rights.

Now, do we use the lens of sustainable development or do we use the lens that you do your audits through, the environmental bill of rights? Which lens do we look through? Which is the dominant lens? Will all legislation now be looked at through the environmental bill of rights?

We've heard testimony for the last couple of weeks. In the first couple of meetings we heard primarily from NGOs, non-governmental organizations, and the term "stick" was used a number of times. They wanted a piece of legislation, like Bill C-469, that would be a stick that could aggressively encourage the government to move in a certain direction. The issue of litigation has come up time and time again. The question was asked whether there would likely be an increase in litigation. Mr. Miller touched on that. I'd like to read what one of those witnesses, Jamie Kneen, said: "The entire point is that the threat of litigation is a very strong motivator."

I think most of us interpreted that to mean it may not necessarily increase the number of actions against the government, but it would be a very strong motivator to move in a certain direction.

So my question then was whether it's the threat of legislation that is the stick, to which he said, "I believe so."

After the NGOs we heard from industry—the Chamber of Commerce, business—and we heard about the chill that Bill C-469 could provide, again, through this threat of litigation. We also received a letter from the Quebec Business Council on the Environment, and they shared some concerns that there's no circumscription on Bill C-469, no restrictions. It's unlimited. We had also heard through the previous testimony that there was an unlimited uncertainty, that there was no end to appeal, that appeal could go on and on, and that any resident could take an action. So I think that has been a concern around this table.

Are there any limits or is it unlimited? If it is unlimited, then it would provide unlimited uncertainty and loss of investment.

This is what the Quebec Business Council shared in their conclusion:

> This bill calls into question the power of the federal government to give legal authorization for projects or actions likely to have environmental impacts and grants the courts very broad ordering powers. It includes many vague concepts, such as a right to a healthy and ecologically balanced environment, which is not circumscribed, contrary to what is found in Quebec's legislation, for example.

● (1610)

How much time do I have left, Mr. Chair?

The Chair: You have three minutes.

Mr. Mark Warawa: Okay.

I think this is very important, Commissioner. Your responsibility is to do performance audits on how the government's performing. If Bill C-469 provides a very vague framework with almost unlimited, unrestricted powers for action against the government, how difficult will it be for you to audit the performance of a government that's dealing with a bill that doesn't provide any certainty?

Do you understand my question?

● (1615)

Mr. Scott Vaughan: Good. Thank you.

What I can say is that my colleagues, both within my group and more generally, are fairly enterprising in trying to figure out or get some clarity on what they audit. So we will audit some governmental programs that are vague in their objectives and timelines, and vague on whether they know what they're doing or why they're doing it. Some have always been there—they're legacy issues.

It is easier to audit and present to Parliament when there are clear objectives, timelines, and goals that a government has ascribed in a program. We will explain whether they're on target. If there is a variance we will try to probe why it isn't doing what it is supposed to do and make some recommendations to fix it.

But vagueness is not isolated. We see this in several programs, so it wouldn't be highly unusual, to put it that way.

Mr. Mark Warawa: What lens would you be looking through? Is it possible to look through both, or would one be dominant?

Mr. Scott Vaughan: Do you mean sustainable development and environment?

Mr. Mark Warawa: Yes. The sustainable development strategy includes three legs, as opposed to one leg.

Mr. Scott Vaughan: As you've said, sir, the new Federal Sustainable Development Act has been passed by Parliament. The strategy was released on October 8. That is the government's lens on four critical goals related primarily to environmental protection.

In our commentary to the minister we noted it seemed that the draft strategy provided a listing of existing environmental programs, and it was unclear to us how the three pillars of sustainable development were actually going to be integrated. We weren't saying they were not, but it was unclear to us what those linkages were among the three pillars. We're looking forward to seeing some clarification on that as the implementation moves forward.

The Chair: Thank you.

That wraps up our seven-minute round. We'll go to the five-minute round and see if we can get in two or three members in that time. We have about 12 to 13 minutes left, so somebody might get cut off here.

Mr. Scarpaleggia.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): Thank you.

I'm trying to understand a little better this idea of analyzing laws and regulations to make sure they fit with environmental goals and are consistent with other laws and regulations in protecting the environment, and so on.

If I understood correctly, Mr. Vaughan, you were saying it's not really your role to look at upcoming laws and regulations and make judgment on whether they're environmentally sound, whereas it's Mr. Miller's role to do that, as per his legislation. He has the power and duty to do that. Am I correct in my understanding?

Mr. Scott Vaughan: That is essentially it. As you know and as members know, the role of OAG is to examine the implementation and performance of programs that exist. There's a time period, where we would say three or four years afterwards how they have been doing. Moving forward, we'll do whatever Parliament requests.

Mr. Francis Scarpaleggia: Going back to Mr. Warawa's point—

Sorry. Go ahead, Mr. Miller.

Mr. Gord Miller: May I clarify? You didn't quite put it the way it's done.

For instance, let's say we're talking about a piece of legislation. If there's an issue going on, I may become engaged; I may even on my own initiative bring forward an issue on such things. But once it has progressed to the posting of a proposal on the environmental registry, and especially a proposal pursuant to a law, I cease comment until after it has gone through the entire consultation process and the legislature and is passed. It's only afterwards that I review it.

Mr. Francis Scarpaleggia: How can you review it before the proposal?

Mr. Gord Miller: I do not review legislation before.

Mr. Francis Scarpaleggia: So it's after as well.

Mr. Gord Miller: It's after; once it's in the legislative process, I reserve all comment until it's concluded.

Mr. Francis Scarpaleggia: Okay.

I'd like to go back to Mr. Warawa's point that we have a federal Sustainable Development Act, which requires the government to analyze its programs, policies, laws, and regulations through an environmental lens.

Mr. Vaughan, correct me if I'm wrong, but you seem to saying that your role in auditing these plans is really sufficient, because you bring an independent perspective to those, and therefore you're already going to be doing it through that law. Is that correct?

● (1620)

Mr. Scott Vaughan: That's correct, yes.

Mr. Francis Scarpaleggia: Okay.

I'm not quite clear on civil actions. There is already a right to private prosecution here in Canada, is there not? Somebody can take another private entity to court for breaking an environmental law, and so on. That exists. So why do we need to talk about civil action in this bill if that right already exists?

I'm told that attorneys general can stay a civil action in Canada. Would an attorney general still be able to stay a civil action under clause 23? Is clause 23 somehow stronger in that it wouldn't allow an attorney general to stay a private prosecution?

You see, industry came to see us, and they were quite concerned about the civil action clause. They feel it makes them vulnerable, when, in fact, there is already a right to private prosecution in Canada. They're saying, look, if environmental laws and regulations aren't strong enough, it's the government's fault and it's the government's problem. They think it's a good idea to have judicial review of government policies, but they'd rather we left them out of this and sorted out these issues in democratic fora.

Mr. Scott Vaughan: Mr. Chair, I know that the next witnesses are from Justice Canada.

Mr. Francis Scarpaleggia: Okay.

Mr. Scott Vaughan: I wish I could help, but I'm in the position of not being a lawyer. That would be in an area that would be outside of our....

Mr. Francis Scarpaleggia: No, that's fine. I apologize for that.

Do you agree, Mr. Miller, that in terms of civil action, it shouldn't be every resident of Canada who can seek recourse, that it should be somebody who's affected by an action that a company or someone else has done to harm him?

Mr. Gord Miller: I'd have to fall back on the way we define it. We keep it open with respect to harm to a public resource. That is probably the most relevant here. We're not talking about people who suffer economic damage. Let's leave that aside. A claim of harm to a public resource is the closest equivalent we have. It is open to all parties, but the remedies are listed in quite a lot of detail and are quite restrictive. You cannot benefit, personally and financially, from such a lawsuit. You can ask the courts for remedies centred on the environment.

So we deal with that very strictly. People have to come with their own means, in our case, because there is no advance cost on such things. They can bring an action asking the courts to stop this or do something.

The Chair: Thank you.

The time has expired.

Mr. Armstrong.

Mr. Scott Armstrong (Cumberland—Colchester—Musquodoboit Valley, CPC): Thank you.

My thanks for your submissions and for being with us.

Mr. Vaughan, you talked a bit about how your current mandate may not be as directive as you might want, sometimes, with the result that you and your staff have to be adaptable. Is that accurate?

Mr. Scott Vaughan: Sorry, I probably wasn't clear.

Our mandate is very clear. I think the honourable member's question was whether we always audit programs or areas that are absolutely clear. I wish the answer was always yes, but sometimes things are less clear. Our mandate, however, is absolutely clear on what the OAG sets out.

Mr. Scott Armstrong: Currently, can citizens request that you monitor compliance through performance audits and review the responses to petitions?

Mr. Scott Vaughan: Citizens, through the environmental petitions process, can write through our office to the Auditor General. They can pose any question or express any concern to any federal minister on any area under federal jurisdiction related to environment and sustainable development. The ministers have a legal obligation to respond within 120 days to the questions, concerns, or issues raised in an environmental petition.

Mr. Scott Armstrong: Does the same thing currently apply to residents of Canada, as it does to the citizens? Do residents have the same privileges?

Mr. Scott Vaughan: Our legislation relates to “a resident of Canada”.

Mr. Scott Armstrong: Okay.

Since 1995 how many times has the petition process been used?

Mr. Scott Vaughan: It's been used approximately 350 times in total.

Mr. Scott Armstrong: Have you had any feedback on how this process works, or the effectiveness of the process?

● (1625)

Mr. Scott Vaughan: My predecessor did an evaluation in 2007. I think that among the findings was that it was an important tool to enable Canadians to get a response directly from federal ministers. It was not a tool or process that was well known. It remains, in my view, not well known, but it's an important part of democratic accountability.

In addition, if I may say something related to what Mr. Miller said, for me the numbers aren't as important as the fact that each one of these petitions represents a commitment of a Canadian resident to go through, understand, research, and post questions directly related to federal responsibilities. We provided a guide to help them in that. So each one of these, in its own right, we view with great seriousness.

Mr. Scott Armstrong: Thank you.

Is the current bill before us now, that you're here to comment on, in any way redundant with the current legislation in place that you administer?

Mr. Scott Vaughan: This would be then speculating on what may happen in the future if the bill were passed.

Mr. Scott Armstrong: If it were passed as it's written now.

Mr. Scott Vaughan: Correct.

It could be redundant. The reason I say this is that if this becomes Canadian law, and there are obligations under federal law related to those obligations, the current environmental petitions process empowers any Canadian resident to pose any question or concern relating to existing laws and regulations. So if this does become a law, it arguably could fall under the existing orbit, if you will, of what's in the OAG act related to the environmental petitions process.

So there potentially could be redundancy. As I understand it, however, there are two different parts of the process in clauses 13, 14, and 15. There is an investigative process, which would be a little different.... It is different; it could be included, but it is different, or it's more precise than what is in the existing OAG act.

Mr. Scott Armstrong: Do you anticipate these redundancies causing an increased amount of bureaucracy that would delay projects or increase litigation going through the courts?

Mr. Scott Vaughan: We didn't provide any analysis. We looked at it purely from our own internal ability and whether we could support an increased number through the bill. As I mentioned in my opening statement, we see the similarities and we could accommodate them under existing resources within the Auditor General's office.

Mr. Scott Armstrong: Okay, thank you.

The Chair: Thank you.

[*Translation*]

Mr. Ouellet, you have three minutes.

Mr. Christian Ouellet (Brome—Missisquoi, BQ): Thank you, Mr. Chairman.

Mr. Vaughan, Mr. Miller, thank you for being with us this afternoon.

Mr. Miller, you said earlier than Ontario's EBR provides comparable rights. That is what I'm interested in: jurisdiction. If you say that there are comparable rights, in that case, how do you deal with someone who is subject to two statutes, one within federal jurisdiction and the other within provincial jurisdiction, which basically have about the same requirements? What should that person do and what would your advice be? Should that person invoke the Ontario statute or the federal statute?

[*English*]

Mr. Gord Miller: Well, our legislation is very definitely prescribed to provincial statutes in areas of provincial responsibility. With some regularity, we get requests to our office, for instance, to pursue things under the federal Fisheries Act, which we now have to turn back. We simply say it is federal legislation and does not apply.

In fact, the legislation we oversee and respond to actually has to be a legal step. Something actually has to be prescribed, by regulation, to apply to me. I currently have 14 government ministries assigned or prescribed under legislation...and I don't know how many pieces of legislation. In any given ministry, maybe not all of their legislation would be prescribed under....

So it's pretty well defined on our side in that there would be no overlap, from our perspective.

[*Translation*]

Mr. Christian Ouellet: Yes, but in terms of the federal statute, do you not see this as intrusion on your jurisdiction? Don't you think that Bill C-469 could possibly interfere with your provincial jurisdiction?

[*English*]

Mr. Gord Miller: I have worked in this field for over 30 years and I can only see one area where that would occur, and that's in the provisions of the federal Fisheries Act. Someone could pursue a dual action in the case of a deleterious substance—to use the federal legislation—that was put into waters that have fisheries in them. You could pursue it through me under the Ontario Water Resources Act, and pursue it conceptually through the federal commissioner and the Fisheries Act.

Aside from those pieces of legislation, the jurisdictions are pretty discrete, and I'm not aware of another area where there would be a conflict. Many of the other things only apply on federal lines where our legislation doesn't apply.

● (1630)

[*Translation*]

Mr. Christian Ouellet: Do you think it would be valuable, as a means of respecting provincial jurisdiction, to avoid the possibility of a conflict between federal and provincial jurisdiction?

[*English*]

Mr. Gord Miller: I think that would be valuable. Certainly I have pursued, over many years, trying to get clarity on the question of the Fisheries Act, just historically where it has been much more vague. It is quite clear now.

If you wanted to put in a provision to say, for instance, that in issues under the Fisheries Act you had to choose between provincial legislation and federal legislation—remember, not all provinces have the same legislation we do—then I think that would be quite reasonable. It would certainly give very good clarity to my staff and me.

The Chair: *Merci beaucoup.*

We are at the bottom of the hour and we want to switch witnesses.

I want to thank Commissioner Vaughan and Ms. Smith from the Auditor General's office, and Commissioner Miller from the Ontario government, for coming in and sharing your points of view on Bill C-469.

We are suspended.

● _____ (Pause) _____ ●

The Chair: I call the meeting back to order.

We will continue with our second hour on Bill C-469, An Act to establish a Canadian Environmental Bill of Rights.

Joining us now from the Department of Justice we have Eric Nielsen, counsel with the public law policy section, and Kathleen Roussel, the senior general counsel and executive director of Environment Canada legal services. She is joined by Joseph Melaschenko, legal counsel of Environment Canada legal services.

Thank you all for coming.

Madame Roussel, could you kick us off with your opening comments?

[*Translation*]

Ms. Kathleen Roussel (Senior General Counsel and Executive Director, Environment Canada, Legal Services, Department of Justice): Thank you, Mr. Chairman.

Good afternoon. It was very interesting for us, as Justice counsel, to have an opportunity to hear what the commissioners had to say who appeared before us. I hope we can help to answer any other questions that have been raised.

[*English*]

Mr. Bezan has already introduced me and my colleagues Mr. Nielsen and Mr. Melaschenko. Once again, we are pleased to be before you today to answer your questions.

[*Translation*]

Specifically with respect to the consequential amendment to the Canadian Bill of Rights, that you are surely aware that it is an issue of particular interest to Justice. Mr. Melaschenko and myself will try to answer any factual questions you may have in relation to existing environmental legislation or other such matters in relation to the bill before you.

As you are aware, as Justice counsel, we are not able to provide the committee with advice about potential amendments to the bill, or any other matter that would be covered by solicitor-client privilege.

● (1635)

[*English*]

Given the issue of particular interest to Justice—namely, the amendment to the Canadian Bill of Rights—I'll now turn to that specifically.

Our understanding of the amendment is as follows. By enacting this consequential amendment to the Canadian Bill of Rights, Parliament would—to use the language of the Canadian Bill of Rights—recognize and declare that there has existed and shall continue to exist a right to a healthy and ecologically balanced environment and a right not to be deprived thereof except by due process of law.

Parliament would direct—again to use the language of the bill—that every law of Canada shall, unless it is expressly declared by an act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe, or to authorize the abrogation, abridgment, or infringement of the right to a healthy and ecologically balanced environment.

Finally, Parliament would direct the Minister of Justice to examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act, and every bill introduced in or presented to the House of Commons by a minister of the crown, in order to ascertain whether any of the provisions thereof are inconsistent with the right to a healthy and ecologically balanced environment, and to report any such inconsistency to the House of Commons at the first convenient opportunity.

[*Translation*]

With this understanding of the consequential amendment, we will be happy to entertain your questions.

[*English*]

The Chair: *Merci beaucoup.*

We'll go with another seven-minute round.

Ms. Murray, you have the floor.

Ms. Joyce Murray (Vancouver Quadra, Lib.): Thanks.

Thank you for being here to help clarify the justice department's view.

I want to get your opinion on some concerns that were raised by one of the members here, in a motion. There's been a notice of this motion. The question I have is whether from a legal perspective you see this being a problem in terms of trumping existing regulatory processes and creating regulatory unpredictability.

Ms. Kathleen Roussel: I'll start by saying that you're not going to hear any of us, I think, talk in terms of something being a problem. It's a matter of the policy choices that parliamentarians can make. We can, however, speak to some overlap that will be created.

I'd ask Mr. Melaschenko to speak specifically to something that Commissioner Vaughan raised in respect to clause 26, because I do think there clearly would be some overlap between—

The Chair: Mr. Warawa has a point of order.

Mr. Mark Warawa: Mr. Chair, my question to you is whether Ms. Murray's question is in order. I believe it's not in order.

The Chair: She referenced a notice of motion that hasn't been tabled and is not public yet.

Actually, it is out of order, so I would ask that you ask a different question, Ms. Murray.

Ms. Joyce Murray: Thank you, Mr. Chair. I apologize for that.

In the testimony of the previous witnesses, there was a discussion about whether there was an overlap with other laws, and I understand the Fisheries Act was one that was mentioned as potentially being a duplication. Is there concern about other areas of overlap with provincial jurisdiction and provincial laws?

Ms. Kathleen Roussel: I think it's probably worth taking the time to talk a little bit about the overlap with the mandate of the Attorney General in clause 26, but I'll answer your question more generally first.

There are certainly occasionally—because of the shared nature, constitutionally, of jurisdiction over environment—acts that would trigger an offence under both a federal and a provincial statute. That's not to say that the offence provisions are necessarily overlapping, but it does mean that there may be circumstances under this bill in which a citizen could be complaining to both the federal and the provincial governments, and certainly I would leave it to you to work out whether that's a problem.

● (1640)

Ms. Joyce Murray: Thank you.

One of the members asked whether this would significantly increase bureaucracy and workload for government departments. From your study of this bill, how would you comment on that question?

Ms. Kathleen Roussel: I'm not going to argue myself out of a job, obviously, but I think really that calls for a lot of speculation. Certainly the bill introduces new avenues of litigation against the government, and it does introduce some remedies that were not previously there, particularly with respect to things like requesting an investigation and review of statutes.

So is it introducing new obligations for government and perhaps new legislation? Absolutely. But it would be purely speculative at this point to say how much work that would turn out to be.

We do have provisions for a request for investigation, with which we're quite familiar under the Canadian Environmental Protection Act. This is almost anecdotal, but I've been in environment for five years, and I think we've had two or three requests, so whether this would bring a large new crop, I don't know.

Ms. Joyce Murray: My interpretation of what we heard from the Environment Commissioner of Ontario is that this bill would add some positives in terms of public participation and transparency and so on, but it didn't sound like a substantive change in approach to environmental protection.

On the other hand, we had a submission last week, which I'll quote, that said this “would fundamentally change the nature of environmental protection in Canada, increase uncertainty, [and] invite litigation”.

From your review, does this fundamentally change the nature of environmental protection in Canada?

Ms. Kathleen Roussel: I'm not sure what that means in terms of the nature of environmental protection, so I don't know if I can answer that fairly. It certainly does add remedies that were not there previously and avenues for obtaining further information. In some cases, things like registries of environmental information already exist, so there are some processes that already exist under several federal statutes.

Ms. Joyce Murray: I'm also interested in your take on the commissioner of the environment's comments—I think it was clause 26 he was talking about—that this would tend to cause his office to do work they're not normally doing. One of our members pointed out some statutes under which the commissioner's office would be commenting in a forward way on potential impacts on the environment.

So how does the justice department see that?

Ms. Kathleen Roussel: I'll ask my colleague to address that, because I think it's a fairly clear area of overlap with the mandate of the Minister of Justice.

Mr. Joseph Melaschenko (Legal Counsel, Environment Canada, Legal Services, Department of Justice): Yes, I think there is some overlap in the sense that the Canadian Bill of Rights now imposes an obligation on the Minister of Justice to examine the consistency of both government bills and regulations with the Canadian Bill of Rights.

Now, if this bill passes with the amendment to the Canadian Bill of Rights, that statute will include "the right to a healthy and ecologically balanced environment". That is the overlap in the sense that under clause 26 of this bill, the Auditor General will have to examine government bills and regulations for compliance with *this* bill, which also includes the right to a healthy and ecologically balanced environment.

With the passage of this bill, that is something that both the Minister of Justice and the Auditor General would then be looking at.

Ms. Joyce Murray: Has the justice ministry looked at issues around environmental protection and the right to a healthy environment in reviewing bills under the bill of rights in the past?

Mr. Joseph Melaschenko: I would have to say no, just because that right is not currently included in the bill of rights.

The Chair: Thank you.

The time has expired.

[*Translation*]

Mr. Bigras, please.

Mr. Bernard Bigras: Thank you very much, Mr. Chairman.

I would like to thank our witnesses for being with us this afternoon.

I will begin with clause 9, which sets out the right to a healthy environment. Subclause 9(1) reads as follows:

> 9. (1) Every resident of Canada has a right to a healthy and ecologically balanced environment.

It seems to me that this is a very vague conceptual right, with no references. Yet some provinces have implemented the same system. I'm thinking of the Quebec Environmental Quality Act which states the following in section 19.1 with respect to the right to a healthy environment:

> 19.1 Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals [...]

What is the effect of this lack of reference to federal legislation? What is the effect of a lack of parameters? It says here that people have a right, but that right does not refer to the Canadian Environmental Protection Act or any other statute. What is the difference between leaving this clause as is and specifically saying "to the extent provided for under existing legislation"?

● (1645)

Ms. Kathleen Roussel: Mr. Melaschenko has done a comparative study. So, if you have any questions on that, I will let him answer them. I would just like to begin by giving you a more general response.

I would agree that subclause 9(1) is quite broad in scope. In spite of that, however, I think it's important to read it in relation to the remedies available to residents under subsequent clauses of the bill. My reading of it would suggest that we are talking about the remedies set out in clauses 10 to 23. Ultimately, that is probably the way it would be interpreted. Clause 9 would be interpreted in light of the potential remedies set out subsequently in the bill. However, I do agree that it would be easier if this were specified in the clause.

Mr. Bernard Bigras: Fine. Thank you. Would your colleague like to add anything?

[*English*]

Mr. Joseph Melaschenko: I would simply say that on the face of it, you're correct. If I understand your comment, that's a limitation you don't find in clause 9. It is in the Environment Quality Act and, as you probably know, it's in Quebec's Charter of Human Rights and Freedoms as well.

[*Translation*]

Mr. Bernard Bigras: My second question relates to subclause 23 (1), which reads as follows:

> 23. (1) Every resident of Canada or entity may seek recourse in the Superior Courts of the relevant province to protect the environment by bringing a civil action against the person who has contravened, or is likely to contravene, an Act of Parliament or a regulation made under an Act of Parliament [...]

Please correct me if I'm wrong, but is this recourse to Superior Courts of the relevant province the usual reference in federal statutes? It seems to me that civil matters fall within provincial jurisdiction. Is this a common occurrence? Do you often see this in federal statutes?

Ms. Kathleen Roussel: I will limit myself to the legislation I'm familiar with. This may not be something we often see, although in those statutes that deal with actions against the federal government, except in areas under the Federal Court's jurisdiction, the provincial superior courts are the appropriate authority. Civil suits are definitely handled by the superior courts as a general rule.

Mr. Bernard Bigras: Yes, that's clear.

Ms. Kathleen Roussel: It does not normally have to be specified.

Mr. Bernard Bigras: It doesn't have to be specified in a federal statute. But isn't that interference?

Ms. Kathleen Roussel: I think it's more to clarify, although it wasn't necessary perhaps.

Mr. Bernard Bigras: It's not a common occurrence.

Ms. Kathleen Roussel: No, it's not a common occurrence.

Mr. Bernard Bigras: My second question deals more with subclause 16(1) of the bill, which reads

> 16. (1) Every resident of Canada or entity may seek recourse in the Federal Court [...]

That type of recourse can be sought in relation to any action or inaction by the Government of Canada that has in whole or in part resulted, or is likely to result, in significant environmental harm, but without the party that is the subject of the action having the right to be heard.

Isn't that a breach of the principles of natural justice?

Ms. Kathleen Roussel: I believe you're asking me for a legal opinion which I am not in a position to provide.

Mr. Bernard Bigras: But is that standard practice? Would that change the right to seek this kind of recourse?

● (1650)

Ms. Kathleen Roussel: Some laws, particularly those dealing with injunctions, do from time to time provide an opportunity to seek an injunction without the opposing party being represented. We normally see this in emergency situations, and the party against whom the injunction is granted normally has access to some sort of appeal or review.

So, this is not something that is part of our corpus of laws. We may see this less often, and usually only in very specific situations.

Mr. Bernard Bigras: Is it your view that any action or inaction that has in whole or in part resulted, or is likely to result, in significant environmental harm is an emergency?

Ms. Kathleen Roussel: Without having the facts, I can't answer that. I have no example in mind at this point.

Mr. Bernard Bigras: Who would be responsible for determining whether something was likely to cause…? Isn't that a little vague?

Ms. Kathleen Roussel: It will be up to a court of law to determine whether it's something which is covered by the legislation and what action they are able to take.

Mr. Bernard Bigras: I have no further questions.

[*English*]

The Chair: *Merci beaucoup.*

It's been a while since we've had some witnesses from the department here. I'll quote from chapter 20 of O'Brien and Bosc, page 1068, as follows:

> Particular attention is paid to the questioning of public servants. The obligation of a witness to answer all questions put by the committee must be balanced against the role that public servants play in providing confidential advice to their Ministers. The role of the public servant has traditionally been viewed in relation to the implementation and administration of government policy, rather than the determination of what that policy should be. Consequently, public servants have been excused from commenting on the policy decisions made by the government. In addition, committees ordinarily accept the reasons that a public servant gives for declining to answer a specific question or series of questions which involve the giving of a legal opinion, which may be perceived as a conflict with the witness' responsibility to the Minister....

So I do excuse Madam Roussel from answering those questions put by Mr. Bigras. I just want to remind everyone that there is a responsibility that public servants do have.

With that, we're going to move on to Ms. Duncan.

Ms. Linda Duncan: I'll just assume that's not applying to me.

Voices: Oh, oh!

Ms. Linda Duncan: I mean, you didn't say that because you're afraid of what I might say.

The Chair: No, I was just following up on Mr. Bigras' questions.

Ms. Linda Duncan: No, no, that's fine. I'm just teasing you.

The Chair: They're fair questions, but they aren't expected to be answered.

Ms. Linda Duncan: Yes, sure.

Mr. Melaschenko, I want to take issue with the reply you gave about the potential for duplication of the power or responsibility of the Department of Justice to review consistency with the Canadian Bill of Rights. That's fine, and I take that on the face of it. That's good. It would be nice in fact if that's being delivered. That might be something we'll be "watchdogging".

But what clause 26 deals with is not consistency with the bill of rights but consistency with the environmental bill of rights. Would it not be fair to say that is not necessarily an overlap? It may be the case for clause 28, but it's certainly not the case for the remainder of the bill. That responsibility is not prescribed anywhere else specifically.

I'm not saying that the role of Justice is to be looking at consistency and so forth, and hopefully that happens when legislation is tabled. But I want to seek your clarification on that.

Mr. Joseph Melaschenko: Thank you. It's a fair question.

Both Bill C-469 and the Canadian Bill of Rights would include this right to a healthy and ecologically balanced environment. My point was that there's some subject matter overlap there.

Ms. Linda Duncan: Yes, and it's a fair point. Thanks for pointing that out.

I don't want to steal Mr. Scarpaleggia's question, but I thought I might ask it because many of these questions were not put to me when I spoke to my bill. I want to give you the chance to clarify, and he can follow up additionally.

There seems to be a bit of confusion by some of the committee members and some of the witnesses on the difference between the rights to bring civil actions and private prosecutions, which of course are completely separate. The Attorney General has the power to intervene to stay a private prosecution. But this bill does not deal with private prosecutions, it deals with standing to file civil actions—environmental protection actions—and judicial review.

I'm wondering if you might clarify that a bit. Is it not also the case that the rules of standing to file civil actions are bound by common law and precedent, and in many cases statutes? The Canadian Environmental Protection Act actually specifies that you can have standing. In fact, it clarifies that so you don't have to fight in the courts about standings on cases.

● (1655)

Ms. Kathleen Roussel: First of all, I agree with the premise of your question. When we're dealing with private prosecutions, the Attorney General has the authority to step in to either stay the prosecution or to conduct the prosecution on behalf of the private prosecutor. When we're dealing with civil actions, whether we're dealing with judicial review, as you do in the bill, or a civil action writ large, the Attorney General does not have a role unless he's one of the litigants. The Attorney General would not have any role in a civil action between two other parties.

In terms of standing, there are some statutes that have some standing provisions, but it is something that's otherwise largely codified in case law and common law.

Ms. Linda Duncan: Thanks.

The issue has been raised, by a number of witnesses, about the scope of the bill. Some of the committee members have been concerned about whether or not the scope of the bill is clear, which would be apparent if you heard the questions to the previous witnesses. I would welcome your opinion on this. I guess you can't give legal advice, but it is something the committee might look at.

In the way it has been drafted, this act, as I understand...it's quite different in our law than in the codified Quebec law, where it may be more specified per provision. It's quite common, is it not, in common law statues, I guess we would call them, at the federal level, in provinces other than Quebec, to clarify the scope of the legislation at the very beginning?

In fact, clause 8 sets out immediately to clarify the scope of application to “decisions emanating from a federal source or related to federal land or a federal work or undertaking” . Then subclause 9 (2) clearly places the obligation on the Government of Canada within its jurisdiction. In clause 13, it's only the review of federal instruments, and clause 14, acts of Parliament.

Are there not in fact many measures in this bill that set forth to constrain the ambit and scope of the bill?

Ms. Kathleen Roussel: I can't answer that directly, because it will be verging on legal advice, but I think I can answer at least the beginning of your question.

Certainly it's not unusual in federal statutes, particularly in areas of overlapping federal and provincial jurisdiction, to have clauses at the beginning of a bill that set out the ambit of the federal authority. It often is referred to, particularly if you look at environmental statutes, as federal lands, undertakings, etc. Those types of things are not unusual in federal statutes.

I think the other part of your question did look like legal advice, so I'll stop there.

Ms. Linda Duncan: Yes, it's hard to generalize that.

It was suggested by some witnesses that this bill would cause great legal uncertainty because citizens could request a review of the adequacy of current legislation, statutes, or regulations.

Is it not the case that under a good number of federal laws, such as CEPA and the Canadian Environmental Assessment Act, the law itself requires that the law be reviewed every five years or so to make sure it is current? Is it not the practice that laws are regularly reviewed and updated? All this bill does is provide that the public would have a role in any such processes.

Ms. Kathleen Roussel: It is certainly not unusual for statutes to have what we call statutory review provisions. They are, as far as I'm aware, all reviewed by Parliament. Certainly the examples are the Canadian Environmental Protection Act, the Canadian Environmental Assessment Act, and the Species at Risk Act, all of which I think this committee has or will be dealing with shortly.

What I think is unique here, and I certainly have not seen it in federal statutes, is a citizen asking a minister to review his act. I'm not putting a value judgment on that, but I think that is unique.

● (1700)

The Chair: Thank you. Time has expired.

We'll move on to our last seven-minute question, from Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much, Mr. Chair.

Thank you very much, Ms. Roussel, gentlemen, for attending today. It's always refreshing, if I may say so, as a lawyer myself, to have witnesses appear who are lawyers and have read the act, and are able to discuss the act and its specific provisions.

What I would like to do, if I may, Ms. Roussel, is to direct some questions to you around the remedy provisions contained in clauses 19 and 20 of this proposed bill. I want to be sure the committee understands precisely how these will work.

First of all, looking very specifically at paragraph 19(2)(b), where it talks about ordering the defendant, am I correct that the reference to “defendant” in that paragraph must refer to the Government of Canada?

Ms. Kathleen Roussel: No.

Mr. Stephen Woodworth: All right.

All these remedies only exist in an action under clause 16, which is against the Government of Canada. Again, in looking specifically at paragraph 19(2)(b), I think we sometimes can imagine that if the Government of Canada were the plaintiff suing a private party, the court might order the defendant in such a case to provide financial collateral for the performance of its action.

Can you help me to make sense of this when the Government of Canada is the defendant being asked to provide financial collateral? To whom would that be provided? Can you help me to understand that?

Ms. Kathleen Roussel: I don't know that I'm going to be much help. You can appreciate that I've not seen this previously in a statute where the defendant is the government. It's a presumption, and I don't want it to be seen as advice, but I would presume that because the action is between two parties, the court would order Canada to provide collateral to the other party in the action, but it's not spelled out here. I do think that may give the court some leeway.

Mr. Stephen Woodworth: Is it a possibility that the financial collateral would be paid to the court?

Ms. Kathleen Roussel: I think that's left to the court, quite frankly, because it's certainly not in the statute.

Mr. Stephen Woodworth: Similarly, with respect to paragraphs 19(2)(c) and (d), where the Government of Canada is liable to be ordered to pay an amount for the restoration or rehabilitation of a part of the environment, or for the enhancement or protection of the environment generally, this is not money that the Government of Canada would pay to itself, right?

Ms. Kathleen Roussel: I don't think that's impossible. I think it's feasible. If I look at restoration orders, generally, under environmental statutes, typically the court will make a precise order where the money is to be paid. I'm certainly not seeing a bar in the bill to paying it to itself to be held for a particular purpose.

Mr. Stephen Woodworth: All right. So the court would then be engaged in crafting the purpose, I assume. It wouldn't be just saying "Go spend the money however you wish" when the government itself is the defendant.

Ms. Kathleen Roussel: I would expect so, but that's speculative. I don't know how these cases would actually play out.

Mr. Stephen Woodworth: Under paragraph 19(2)(d), if the court ordered the Government of Canada to pay an amount to be used for the enhancement or the protection of the environment generally, because it found that the Government of Canada had failed in its duty as trustee of the environment, I'm thinking that this money would not come out of the environment department's budget, because then you'd be just robbing Peter to pay Paul. Do you see what I'm saying?

Ms. Kathleen Roussel: I think I see where you're going, and I think you're about to push me over a policy line where I can't go.

Mr. Stephen Woodworth: Well, I'm thinking it would be the court that would be drafting policy and would be saying to the government, "All right, you're not spending enough in the environment department; therefore we want you to spend more for the enhancement or protection of the environment, even if you have to take it away from other departments."

Would that be a reasonable interpretation?

● (1705)

[*Translation*]

Mr. Bernard Bigras: I think you have been pretty clear with the opposition about the ground rules. I would simply ask that you apply the same rules to the government and tell my colleague he is out of order.

[*English*]

The Chair: Mr. Woodworth, you can ask what questions you want, but I will excuse our witness from having to answer anything that might go over the line in respect of policy, or that would put her in a conflict with the minister over legal advice that she has provided.

Mr. Stephen Woodworth: Sure.

I'm not asking for any policy input, nor am I asking for anything that might put you into a conflict. I am asking for some help in interpreting this provision, if you're able to provide it.

Ms. Kathleen Roussel: I don't feel that I am able to provide it. Certainly, given the way the bill is drafted, I think a lot of things would be left to a court. Whether a court would get involved in appropriations, I don't know, Mr. Woodworth.

Mr. Stephen Woodworth: Well, let me ask you about paragraph 19(1)(f), which orders the defendant to take specified preventative measures. Again, that defendant is the Government of Canada, correct?

Ms. Kathleen Roussel: Yes.

Mr. Stephen Woodworth: Have you ever seen any other statute that permits the court to order a government to take specified preventative measures on an environmental matter?

Ms. Kathleen Roussel: I've never seen another statute written in this fashion. But it's fair to say that injunctive relief at common law is quite broad, and I think there are certain injunctions that could be brought preventatively to that purpose.

Mr. Stephen Woodworth: Have you ever seen another injunction ordering a government to restore or rehabilitate any part of the environment, such as the court is permitted to do in paragraph 19(1)(e)?

Ms. Kathleen Roussel: I certainly have never seen such an order made.

Mr. Stephen Woodworth: If we look at subclause 16(1), would you consider that the Government of Canada's failure to comply with or implement the Kyoto Protocol Implementation Act would fall within paragraphs 16(1)(a), (b), and (c), and give rise to an action against the Government of Canada?

Ms. Kathleen Roussel: I think you won't be surprised that as a head of legal services at Environment Canada, I've given a lot of advice on the Kyoto Protocol Implementation Act, and I cannot answer that question without breaching privilege.

Mr. Stephen Woodworth: All right.

I'm going to say that it's my opinion that it very well would, and probably that's exactly what clause 16 is directed toward, and that as a consequence it would trigger all of the remedies in clauses 19 and 20, ordering in effect a judicialization of environmental policy.

But I'm probably out of time at this point.

The Chair: Thank you, Mr. Woodworth. I'm sure that you will not be submitting legal fees to the rest of us as members for your advice.

Mr. Kennedy, you can kick us off on the five-minute round.

Mr. Gerard Kennedy: I will, and I will try not to interrogate myself.

I just want to assure the witnesses that we have very good Hansard folks. They will not misattribute comments that were made most recently.

I want to go to the actual differences between this proposed act and what you now have as a framework. You have a legal framework that emanates from a variety of different legislative sources, and I'm wondering if you could focus for us.... I know in your presentation you talked very specifically about the broadest implication, which is this overarching reference to the bill of rights.

Actually, I wonder if you could help educate us a bit. The bill of rights has been around for some time. How has that been implemented over the years? Obviously the charter has taken precedence in many important areas, but the presentation you made to us—I'm going to ask this question first—is about the implications of it having this overarching charter reference that it must comply with. How would that be enforced? What do we know from the past use of charter-based rights how legally it would be binding on the government?

● (1710)

Ms. Kathleen Roussel: I will let Mr. Nielsen answer.

Mr. Eric Nielsen (Counsel, Public Law Policy Section, Department of Justice): Judging by the past, you can look at two elements in the Canadian Bill of Rights. In section 1, Parliament has declared a number of rights that in its judgment had existed and shall continue to exist, and that is where the new right to a healthy and ecologically balanced environment would go.

Then those rights are put to work through section 2 of the Canadian Bill of Rights. Section 2 directs that the laws of Canada shall be interpreted and applied so as not to infringe the rights in section 1. And if they cannot be sensibly interpreted and applied so as not to infringe the rights in section 1, then a court can find the relevant law inoperative, which means it will not be applied in a particular case.

Mr. Gerard Kennedy: So basically it's on application of someone to a court to say that this hasn't been applied? The court would have to be brought into the picture, correct?

Mr. Eric Nielsen: It can arise in different ways. If you are in a proceeding in which a federal law applies—it could be in the context of criminal law, it could be a judicial review, perhaps, it could be a civil action against the federal crown in a provincial superior court, and so on—then as long as a federal law applies, the court could work with the Canadian Bill of Rights—

Mr. Gerard Kennedy: So it's a justiciable right. It can be used in argument and applied. Do we have any other rights that exist in the bill of rights that aren't in the charter? Can we get a few examples of those?

Mr. Eric Nielsen: Yes, the main one is in paragraph 1(a). It's the right to the enjoyment of property and the right not to be deprived thereof, except by due process of law.

Mr. Gerard Kennedy: And is it often relied on? Do those exceptional elements get used a lot in applications to the courts?

Mr. Eric Nielsen: It has in the past. The most recent case I'm aware of was the Authorson case, 2003, Supreme Court of Canada. A claim was made that a certain law deprived the claimants of their property without due process, and they lost at the Supreme Court of Canada.

Mr. Gerard Kennedy: I won't ask you for the details of that, but the argument wasn't successful, is what you're saying.

There have been deputations here that suggest that certain charter rights might overrule here—right to liberty and.... I won't try to quote which sections. But has any assessment been done as to how effective this particular couching of rights under the bill of rights could be?

I'm asking here, not from a policy standpoint but from a purely legal standpoint, your knowledge of these other workings, these other applications of the bill of rights, the chances of some of the things being proposed here being overruled by the charter. Or is that speculative to ask you?

Mr. Eric Nielsen: I'm not sure I'm understanding your concern. Overruled by the charter in the sense that...?

Mr. Gerard Kennedy: An existing provision in the charter would be used to say that this interferes with a right that is, I guess, more fundamental.

Mr. Eric Nielsen: Of course, the right to the healthy and ecologically balanced environment would be added only to the Canadian Bill of Rights and not to the charter. The charter is part of the supreme law of Canada. It always controls all other subordinate laws. That would include the Canadian Bill of Rights.

Mr. Gerard Kennedy: Right. I should be more specific; there was one particular deputant who suggested a portion of the charter that they thought would overrule or have some negative effect on the application of this.

Maybe that's just too esoteric. I'll pass on that question.

The Chair: Thank you, Mr. Kennedy. Your time has expired.

[*Translation*]

Mr. Blaney, please.

Mr. Steven Blaney (Lévis—Bellechasse, CPC): Thank you very much, Mr. Chairman. I have no questions for my colleague, Mr. Woodworth.

I don't know if it's because the *Harry Potter* film has just been released, but I increasingly have the feeling that someone is playing sorcerer's apprentice with this bill.

I would like to thank the witnesses for being here.

I have no legal training, but as you were making your comments, a document was handed to us from the Conseil patronal de l'environnement du Québec in which there are a number of 'shock' statements that I'd like to share with you. One deals with clause 22 and reads as follows:

> Moreover, the CPEQ notes that such an erosion of fundamental legal principles would be likely to shake the foundations of our judicial system and give rise to precedents that might be repeated in other areas.

That is mind-boggling, as they say. You said it would be up to a court of law to make such a determination.

[*English*]

A lot of things would be left to the courts.

[*Translation*]

I know that you have limited speaking time this afternoon. I have no desire to take you somewhere where you don't want to go, but I can tell you that, personally, this bill does take me somewhere where I don't want to go—namely, into areas or situations that will ultimately create new law. What I discovered this afternoon is that this could happen, not only in the environmental domain, but also in other areas of jurisdiction.

Have you compared the bill that is before you, and which we are currently reviewing, with institutional legislation? Earlier the Environmental Commissioner of Ontario told us that there are civil remedies available, but that they are in no way comparable to what is proposed in this bill.

I'd like to come back to the Conseil patronal de l'environnement du Québec and give a few examples from Quebec. In the Quebec Charter of Rights and Freedoms, section 46.1 enshrines every person's right to live in a healthful environment in which biodiversity is preserved. That looks very similar to the substantive principle that appears in the bill that is before us, which is the right to live in a healthy environment, except that the right is framed using the following words: “to the extent and according to the standards provided by law”. The same applies to the Act to affirm the collective nature of water resources and provide for increased water resource protection, which enshrines the right of every natural person to have access to water that is safe for drinking, cooking and personal hygiene, under the conditions and within the limits defined by the law.

Finally, what we're saying is that this bill does not contain any “buts”; there are no limitations. The federal government, as custodian of the environment, would have an obligation to protect this undefined right. The lack of limitations creates a climate of constant uncertainty where authorizations granted to companies, as well as adherence to the laws and regulations in effect, become almost secondary. Environmental laws become secondary in the environmental domain.

Mr. Chairman, do you think I can ask our legal counsel to comment on this, within their area of jurisdiction?

● (1715)

[*English*]

The Chair: Only what you feel comfortable commenting on....

[*Translation*]

Ms. Kathleen Roussel: We can certainly give you a comparative overview between Ontario and Quebec and what this bill is proposing.

I will let Mr. Melaschenko answer that question.

[*English*]

Mr. Joseph Melaschenko: I offer my comments to the committee not as an expert on provincial law. I've had occasion to read the provincial statutes that we've been discussing, including statutes from the Yukon and the Northwest Territories, so I very much offer my comments in that context. I hope they answer your question to some degree.

What I've noticed is that the statutes from these four jurisdictions do, in some way, recognize environmental rights. However, all the rights being recognized don't necessarily mean the same thing.

Why would I say that, not being an expert in provincial law? Well, for one, on their face, they're worded differently. Some have limitations, which we've alluded to, in particular in Quebec.

Also, the legislation of the Northwest Territories, the Yukon, and Ontario does not provide for a specific right of action against the government for violating a right to a healthy and ecologically balanced environment.

I've also compared the civil causes of action, which I can speak to you about, if you'd like, although I don't know if at this point if....

[*Translation*]

Mr. Steven Blaney: Are there any parameters or limitations in the bill that is before us, compared to provincial statutes?

[*English*]

Mr. Joseph Melaschenko: Again, I think we're getting into too much of a value judgment to ask me to say whether this bill is limitless or not.

Mr. Steven Blaney: Okay. Then I'll go with another question.

[*Translation*]

Are you able to talk about natural law? Some say this bill does not respect the principles of natural justice. Can you explain what they are?

Ms. Kathleen Roussel: I think that is the first question which we really could not have expected to be asked. So, I am going to lay out some fairly general principles.

First of all, I don't know who told you that or where that came from, and therefore I have no context for the premise of your question. Normally, when we talk about the principles of natural justice, we're talking about things such as consultation, the right to be given information and to consult others. Also, if someone is being asked to make a decision, people have the right to be informed of the rationale for that decision, particularly if they are going to be deprived of a right, a permit or a licence which they would otherwise have been entitled to. Those are very general principles.

● (1720)

Mr. Steven Blaney: You answered my question.

Thank you, Mr. Chairman.

The Chair: Mr. Ouellet, please.

Mr. Christian Ouellet: My question is addressed to Ms. Roussel. I am not sure I fully understand the definition and interpretation of clause 2. In the definition, in the fourth paragraph, reference is made to federal works or undertakings. However, subparagraph 2(h) reads as follows:

> (h) a work or undertaking that, although wholly situated within a province, is before or after its completion declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces;

Do you have an idea of what kind of work or undertaking is referred to here?

Ms. Kathleen Roussel: I can give you a general answer. In our opinion, this is similar to the Constitution, in that there would be a power to declare a work or undertaking to be in the national interest. I am going to give you an example, but I am not saying that is the case. For example, if a company were generating power for the entire country—and this is a totally fictitious example I'm giving you—it would be possible to declare that this was an undertaking for the general advantage of the country—and therefore national in nature.

I'm not aware of anything having been declared to come under that category. There is transportation, for example, but that is normally covered more specifically in the Constitution.

Mr. Christian Ouellet: Is it possible that a power transmission line in only one province could possibly be considered to go all across Canada and therefore be subject to this right off the bat?

Ms. Kathleen Roussel: I wouldn't think so, no. Constitutionally, that would be very surprising because, as a general rule, natural resources are primarily a provincial area of responsibility under the Constitution.

I used a purely fictitious example, but I believe the classic example would be the transportation industry.

Mr. Christian Ouellet: Is it possible that a pipeline located in a given province could be considered, before or after its completion, to be…?

Ms. Kathleen Roussel: If the assumption is that we're not talking about a federal building, I would say no.

Mr. Christian Ouellet: In your opinion, why is there a reference to banks here? The banks obviously fall within federal jurisdiction, but not the buildings. Here we are talking about what could affect the environment, and not about governance. So, it's the bank building, the bank vault or something physical. How could a bank be declared a federal work or undertaking under this bill?

Ms. Kathleen Roussel: Well, I cannot speculate as to the origin of this, but I agree with you that the building is something different.

Mr. Christian Ouellet: So, it's not because the banks fall within federal jurisdiction that they would automatically—

Ms. Kathleen Roussel: I think we need to make a distinction between the bank and the building in which it's located.

Mr. Christian Ouellet: But that could cause legal problems in a court of law. It could end up being up to a judge to determine whether it was or was not a federal work or undertaking.

Ms. Kathleen Roussel: It's a matter of how the legislation is interpreted.

Mr. Christian Ouellet: There are a number of areas that could give rise to interpretation. Can it be said that a broadcast undertaking, because it has a federal permit, automatically is connected to the environment?

● (1725)

Ms. Kathleen Roussel: There is no doubt we would rely on current rulings and the case law to try and interpret what is in this bill and what is also in other federal statutes.

Mr. Christian Ouellet: So, based on the case law, a hydroelectric dam, given the fact that water moves and leaves the provinces, would automatically be a federal work or undertaking.

Ms. Kathleen Roussel: I don't think I'm prepared to go that far. At the present time, it is clear that water is a shared jurisdiction in Canada, depending on whether the waterway is limited to one province or not. I don't think this bill will necessarily change the case law that has built up over the years in that regard.

[*English*]

The Chair: *Merci beaucoup. Votre temps est écoulé.*

Mr. Warawa, you can have the last round.

Mr. Mark Warawa: Thank you, Chair.

I'm glad we have Steven Blaney here from Quebec sharing his concerns of the impact this would have in Quebec. Unfortunately, he is the voice of Quebec here at the committee. I wish there were more voices like Monsieur Blaney and I'd like to give my time to him to ask questions.

[*Translation*]

The Chair: Mr. Blaney.

Mr. Steven Blaney: Thank you very much.

I would like to complete my earlier question with respect to the principles of natural justice. According to the Conseil patronal de l'environnement du Québec, the bill we are considering does not abide by the principles of natural justice, such as the right of a party likely to be affected by the action to be heard. So you answered my question. It stated the following:

> [...] it undermines the credibility of all authorization processes where stakeholders have an opportunity to participate in what are often long, tedious processes. Consequently, it would create enormous legal uncertainty, since all federal government environment-related decisions and authorizations, taken or granted legally, could be challenged.

Our previous witness was the Canadian Hydropower Association. Referring back to Mr. Ouellet's question, I was looking in my notes for the quote from their brief. That is another brief that contains a legal opinion on the bill that is quite devastating, as they say that a hydroelectric project is normally developed over a 7- to 14-year horizon. But, according to them, this bill could result in much longer timelines.

Do you share that view, given the legal uncertainty that is created?

Ms. Kathleen Roussel: I'm not sure I can fully answer that question because I can't tell you that we have done an analysis to determine how the bill complies with the environmental assessment process, either federal or provincial. You also know that, for major projects, there is a requirement, both federally and provincially, to carry out environmental assessments, which can lengthen the process.

Let's consider the remedies included in the bill and the possible interaction. I am still using fictitious examples here, to avoid giving you a legal opinion. If there was an environmental assessment done on a resource project requiring both a federal and a provincial assessment, and the federal government had to issue a permit, there is no doubt that clause 16, based on our reading of it, could trigger a process against the federal government in relation to the authorization to be issued, or previously issued, for the project.

Furthermore, under clause 23, there is also the possibility that an action could be brought by a third party against the project developer, if a federal law has been violated or if there is the risk of such a violation. That said, I realize that this is a hypothetical situation which has no basis in fact. At the same time, it is possible, within the assessment process as a whole, for an action to be brought under this bill. Will that lengthen the process? I can only provide speculate on that point.

Mr. Steven Blaney: If I understand you correctly, any project that triggers the involvement of the Canadian Environmental Assessment Agency is subject to this legislation. Is that what you are saying, or does it also affect other projects?

● (1730)

Ms. Kathleen Roussel: What I'm saying is that, if you read the bill, clause 16 should apply when federal authorization or federal action is required, which is the case when there is an environmental assessment under the Canadian Environmental Assessment Agency.

Mr. Steven Blaney: That means that once the project has gone through all the different legal steps, both provincial and federal, and has been accepted, any Canadian, whoever he or she may be and at any time, as the Shipping Federation of Canada has pointed out, could come along and say that the proposed project could cause significant environmental harm, and create additional delay—in other words, compromise the completion of the project.

Ms. Kathleen Roussel: Someone could bring an action against the federal government for breaching its obligations under clause 16, or sue the project developer. That is possible.

Mr. Steven Blaney: Do you agree with me that, when we are talking about major projects involving mining, hydroelectric power, sustainable development, peat development or wind energy, there is no doubt that projects of this kind will never have 100% support. There will definitely be people—for example, a competitor or a competing energy supplier—with different interests who will say that they would prefer the project not go forward.

This afternoon, the commissioner for Ontario told us that Ontario has restrictions. If someone will profit from a project not going forward, no intervention will be possible. However, in the bill under consideration, the competitor can come along and say that he thinks this will result in significant environmental harm, and therefore put a stop to the project.

Ms. Kathleen Roussel: I will not go as far as to say that this would put an end to the project, but a competitor could certainly bring an action. At that point, it would be up to a court of law to determine whether the parameters set out in the legislation have been met or not.

Mr. Steven Blaney: Thank you very much.

Thank you, Mr. Chairman.

[*English*]

The Chair: I want to thank all of our witnesses for coming in today. I really appreciate your expertise and input as we wrap up our study on Bill C-469.

Mr. Melaschenko, Madam Roussel, and Mr. Nielsen, thank you very much.

Not all committee members have gotten their amendments in. I request that you get them in by first thing tomorrow morning so that we can circulate them to other committee members for due consideration and give our clerk and analyst time to put together the packages so we can have a fruitful debate as we go through the clause-by-clause study, which begins on Wednesday.

Is there a motion to adjourn, please?

Thank you, Mr. Woodworth.

We're out of here.

The meeting is adjourned.

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