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Chair

Mr. David Sweet

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● (1105)

[*English*]

The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)): Good afternoon, ladies and gentlemen.

Welcome to meeting 52 of the Standing Committee on Industry, Science and Technology.

Today, we have two groups with us: the Canadian Bar Association and the Public Interest Advocacy Centre.

I understand that Tamra Thomson and Shulamit Rodal will be splitting their time. Is that correct?

I'll begin with Ms. Thomson for five minutes.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair, honourable members.

The Canadian Bar Association is pleased that you have given us the opportunity to comment on this bill today. It is one that we have a great interest in, evidenced by the fact that the letter you have before you is dated in September. We are happy as well that these hearings have started on the bill.

The letter before you was prepared by the competition law section of the Canadian Bar Association. That section comprises some 1,500 members, lawyers all, who practise in the area of competition and anti-trust law.

In reviewing the bill, they have looked at it with a view of improving the law and the administration of justice.

I am going to ask Shuli Rodal, who is the vice-chair of the legislation and policy committee of the competition law section, to address the specifics of the bill.

Ms. Shuli Rodal (Vice-Chair, Legislation and Competition Policy Committee, Competition Law Section, Canadian Bar Association): Thank you, and good morning.

My name is Shuli Rodal. I am a partner in the competition and anti-trust law group of Osler, Hoskin & Harcourt in Toronto. I'm appearing today on behalf of the competition law section of the Canadian Bar Association.

I would like to begin by thanking you very much for the invitation to appear on Bill C-452.

The CBA section does not believe that amending the Competition Act to provide for an industry sector competition law inquiry power is necessary or appropriate. The CBA section believes that it is highly preferable for inquiries to continue to be carried out on a targeted basis, as is currently provided for, where there is a concern about anti-competitive conduct by one or more market participants.

For full detail, I refer you to the CBA section's letter of September 14, 2010, but by way of summary, the inherent difficulties in the use of a market inquiry power can be illustrated by the fact that it is difficult to conceive of a market inquiry that would have a positive outcome.

First, it is possible that the conclusion of an inquiry may be that the sector in question is sufficiently competitive. If this is the outcome, the commissioner and the Competition Bureau would be vulnerable to legitimate criticisms about the significant costs in terms of the bureau's resources, private sector resources, and disruption to business just to confirm that a market is in fact competitive.

The second alternative is that the conclusion of the inquiry may be that the sector is not sufficiently competitive, that this is due, for example, to the structure of the market and not to conduct that offends the Competition Act.

If this is the result, the reality is that there is nothing the commissioner can do, and this can be expected to result in significant frustration. This is because the Competition Act is focused on protecting the competitive process through enforcement action against potentially anti-competitive conduct.

The mere existence of dominance or market power obtained by legitimate means does not violate the act and cannot trigger enforcement action by the commissioner. The Competition Act is not intended to regulate markets or to cast the bureau in the role of a regulator that proactively engineers competition. In the absence of anti-competitive conduct, there is nothing the commissioner can do.

The third alternative is that the conclusion of the inquiry may be that the sector is not sufficiently competitive and that this is due to conduct that offends the act. At this stage, the commissioner would then have to consider whether to proceed with enforcement actions against one or more persons based on information gathered during the market inquiry despite the fact that the success of the bureau's case may be, as a matter of law, considerably weakened and potentially undermined on account of due process concerns that could legitimately be raised about the manner in which evidence was collected.

In particular, serious questions may arise regarding rights against self-incrimination, where information is compelled from a person for purposes of a market-wide inquiry and then later used in enforcement proceedings against that person.

In conclusion, the CBA section remains of the view that in addition to potentially imposing significant costs on the business community unnecessarily, expanding the commissioner's mandate to undertake formal sector inquiries raises serious due process issues and is inconsistent with Canada's approach to competition law enforcement.

Accordingly, the CBA section recommends that this power should not be reintroduced into the Competition Act.

● (1110)

The Chair: Thank you, Madam Rodal.

Now on to Mr. Janigan for five minutes, sir.

Mr. Michael Janigan (Executive Director and General Counsel, Public Interest Advocacy Centre): Thank you, Mr. Chairman. I'm pleased to attend today to speak to this bill. My remarks are generally directed to the principle of the bill, with some emphasis on the significance and history of the desire for these kinds of studies.

Back in 2003, the Competition Bureau put forward a paper called "Options For Reform". It dealt with a motion that I believe had been proposed by Mr. McTeague, namely, to have the Canadian International Trade Tribunal inquire into the state of competition and functioning of markets. At that time, the option paper provided for that particular way of proceeding in relation to market studies and referred the matter to the Public Policy Forum for a public consultation. A public consultation took place in the summer of 2003, and the Public Policy Forum released its paper, a report on the consultation, saying that there were intervenors on both sides of this question. Intervenors supported the market reference proposal and said they agreed with the principle that Canadians should be able to get a picture of the state of competition and the functioning of markets in any sector of the economy. Opponents gave a number of different reasons for their opposition, including some of the arguments that you've heard: this is suspenders and a belt; the commissioner already has these powers; there may be costs incurred in this; and what procedure is going to be followed?

In 2004 the OECD made a study on the state of Canada's competition policy and recommended that we institute a power to implement market studies. Quoting from their study:

> No agency in Canada presently has express authority to study an industry simply for purpose of illuminating its competitive dynamics. This is a tool that should be available to advance the objectives of competition policy. Market studies can reveal previously unsuspected forms of private conduct or government regulation that impair competition. And study results can play an important role in promoting public understanding of how competition works and what benefits it produces.

At the time, the OECD recommended that it would be more appropriate to have the Competition Bureau undertake these studies rather than the Canadian International Trade Tribunal.

We proceed to Bill C-19, which was the first attempt to reform the Competition Act. As that bill was being presented, a government amendment was made to Bill C-19 in committee that created the power for market studies. It was referenced as C-19, G-2, and it was offered by Mr. Pickard. It provided that the commissioner may carry out a study on the state of competition in any sector or subsector of the Canadian economy.

The Commissioner of Competition, Sheridan Scott, appeared before the committee on October 5 and October 27 to deal with this matter. She discussed the power and the precautions that should be taken with respect to the exercise of that power. In dealing with the advantages that would be conferred upon the commission with respect to the power, she said:

> If a power to conduct market studies were to be introduced, it would have a number of advantages. A better understanding of the state of competition in various industry sectors could lead to a more effective enforcement of the Competition Act. It could also lead to improved advocacy. It could contribute to the development of good policies to achieve economic objectives, which would benefit all Canadians. Finally, it would lead to enhanced transparency in the marketplace for businesses and for consumers. In our view, it would be feasible to introduce a market study power, as has been done in other jurisdictions, as long as careful attention is paid to the concerns I have outlined today.

These concerns include procedural safeguards as well as assurances that the matters to be addressed are legitimate under the act.

● (1115)

Consequently, of course, the bill died in committee with the fall of the government.

We believe this effort is in aid of a principle that is important in the Canadian economy, important for the state of competitive markets, and we would urge that the committee give careful consideration to the same. We believe—

The Chair: Mr. Janigan, I'm sorry, but we're well over time. Thank you. If you need to complete some points, you can do that during the question period.

I'll remind members that we'll be continuing for an hour and a half, and then we'll go to clause-by-clause consideration of this bill.

Now I'll go to Mr. McTeague.

Mr. Mike Wallace (Burlington, CPC): On a point of order, Mr. Chair, if we don't need the bottom half, can we go right to the...?

The Chair: Yes, absolutely.

Mr. McTeague for seven minutes, please.

Hon. Dan McTeague (Pickering—Scarborough East, Lib.): Chair, thank you very much.

Witnesses, thank you for being here.

Mr. Janigan, thank you for bringing us through what I'd almost forgotten over the years: the evolution of where the issue of market studies pertinent to this industry—and I'm sure to others—occurred.

Ms. Rodal, I appreciate your comments. I have, as an article of my work on this file for several years now, been concerned and reflective of the time period in which I started, with the first Competition Act amendments that changed the Restrictive Trade Practices Commission back in 1986. I was appalled to learn that the lawyers of McMillan Binch representing Imperial Oil had an uneven hand in recreating or rewriting the Competition Act, such that people were quite able to assume that it was the first time a country had allowed its competition policy to be written by the very people it was meant to police. I think the concern we have all shared over the years is that this act is by, for, and with the consent of only those who are experts in the field, so I appreciate your expertise. It took me quite a long time to even assume some responsibility for being able to answer and address these questions.

But as you wear two hats here, both as a practising lawyer and as a member of the competition bar, I want to ask you, does Osler, Hoskins have any clients who are oil companies?

Ms. Shuli Rodal: You're right that I'm here on behalf of the Canadian Bar Association. I'm not really in a position to tell you about who our clients are, because I'm here as vice-chair of the legislation and competition policy committee, expressing views that have been carefully considered by the Canadian Bar Association's executive on behalf of all members of the executive, who include a wide cross-section—

Hon. Dan McTeague: I appreciate that.

Ms. Shuli Rodal: In the course of our work, we consult carefully with the Competition Bureau—

Hon. Dan McTeague: My concern is that in Canada the defence bar tends to be very much on one side. Small players, over the years, cannot afford the kinds of fees that will get them the expertise to navigate through the very difficult Competition Act. This, too, may be a finding that might be related to the bill before us. In fact, it might allow us an opportunity to demonstrate that unlike the United States, which is under the Clayton and Sherman Antitrust Acts, whereby damages of course go back to the individual who has actually been aggrieved, we don't have a similar or parallel situation in Canada. That's a debate from another time.

But specifically to this question, you do not see this bill, in particular, as being unconstitutional. I haven't heard that word. You've been concerned about due process. Does the question of constitutionality come into this at all?

Ms. Shuli Rodal: I think the constitutionality of the exercise of the powers contemplated is a concern, depending on how they're exercised. The Commissioner of Competition can undertake voluntary inquiries, which I think is a reasonable exercise of the commissioner's proactive power to enhance competition.

When it comes to mandatory powers, compelling the production of documents and undertaking inquiries that essentially give the commissioner exclusive jurisdiction to undertake those studies, we do then get into areas where constitutional challenges are a possibility, I think.

Hon. Dan McTeague: Mr. Janigan, in the time I have, I will point out that two eminent members of the Canadian competition scene, both previous commissioners, have opined and suggested that we go in this direction. I refer to Konrad von Finckenstein and Sheridan Scott.

As you quite readily pointed out, we've obviously heard nothing from the current competition commissioner. I don't wish to disparage her. I'm not surprised. She represented the propane industry in the bar on the efficiencies defence, a bill that I brought before the House and that was passed by the House, but of course was retained by the Senate, which is ammunition for my Conservative friends here. It isn't the first time a bill has been stifled by the Senate.

Mr. Janigan, in your opinion, what would be the harm to full disclosure—which this bill I think would try to obtain—given the support of two previous competition commissioners?

● (1120)

Mr. Michael Janigan: First of all, to some extent there are two views of the role of the Competition Bureau and the competition commissioner.

One is that the competition commissioner is a cop. The cop goes out, investigates whatever the offence is, and brings it to either the applicable court or the Competition Tribunal.

The other view is that the competition commissioner is more than simply a cop; he or she is an advocate for competition and must promote it in the industries. The Competition Act, for example, gives the commissioner the power to attend before regulatory boards to urge the adoption of competition. In fact, he or she is in many respects an independent observer and advocate on behalf of competition. That's what market studies speak to.

I was reading the transcript of a debate in the previous session. I think the focus on cartel behaviour, price-fixing, and other hard-core offences is a little bit misleading in relation to what is contemplated here. What is contemplated here are industry-wide studies that look across the board at what may be barriers to competition.

Most barriers may not necessarily be with business. They may be with government, unions, or interprovincial relationships. There could be a whole variety of things that may be obstructing competition.

When you want this study done, presumably you want it done by the agency that has the most experience in the area, which is the idea behind market studies. It is to provide the kind of tool that enables policy changes or reform to take place, or to assure the public that the state of the competitive markets is appropriate.

Hon. Dan McTeague: Are you hopeful that a fair, thorough, transparent market study on the key sectors of the economy—given the sponsor's interest in gasoline—will provide timely answers to why Canadians pay lockstep, uniform regional pricing, as the sponsor of the bill suggested last week? Do you think it will meet the test of finally explaining to Canadians...some transparency in terms of the supply and demand equation in Canada? Of course, we as the Liberal government tried to bring that forth, but it was killed by the Conservatives as the first act of their government in 2006.

Are you concerned about the low level of transparency in this industry and others?

Mr. Michael Janigan: Sorry, but I don't think I can speak directly to the problems in those industries. I know for a fact that those kinds of studies have had good results in other countries, such as in the U. K. When Richard Taylor, the Deputy Commissioner of Competition, attended before this committee in October 2006, he spoke of market studies that had been done in the U.K. on car dealerships. They resulted in significant changes in the industry. As he said, these studies aren't just filed on a shelf to collect dust; they've had actual results.

The Chair: Thank you.

I allowed some time there, but you were quite a bit over.

[*Translation*]

Mr. Cardin, you have seven minutes.

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chair.

Ladies and gentlemen, good morning and welcome to the committee.

Last week, we heard from Richard Bilodeau, Acting Assistant Deputy Commissioner. He said that Bill C-452 was unnecessary because, at the end of the day, the commissioner had all the power she needed. This is what he said in his brief:

> Whenever the commissioner has information that indicates that one of the enforcement provisions of the act has been or is about to be violated, regardless of the source of that information, section 10 of the act provides the commissioner with the authority to commence an inquiry into any matters she considers necessary.

According to him, the bill is definitely not necessary, because the commissioner has the authority to begin any inquiry she sees fit. But, according to you, that does not seem to be the case.

So I would ask the two of you whether you think the commissioner currently has the same authority to conduct an inquiry.

● (1125)

[*English*]

Mr. Michael Janigan: I've read or listened to part of the information that was part of the committee. I think to some extent you're talking at cross-purposes. He was referring to the ability to launch an inquiry in relation to all the different types of hard cartel offences that exist under the act, things like price-fixing and collusion. They have all the powers that are needed to carry out search warrants, to make telephone interceptions, to have documents produced. All those powers are before them. However, if they are presented with a circumstance—for example, why is the Canadian retail market so sluggish in relation to competition, or why is there such concentration in that market—they don't have the power to go out and gather information to study that problem, even though its implications may be as great, if not greater, for the population and the state of competition as a whole than would be those of the individual investigations of the hard cartel offences.

So in relation to what these kinds of studies wish to deal with, they don't have the kinds of powers that would require them to collect the information, except on a voluntary basis. Certainly collecting on a voluntary basis is one way to proceed, but generally this is the planet Earth in relation to authorities, and to have the authority to compel the production of that information is generally pretty helpful when you are trying to get voluntary compliance.

[*Translation*]

Mr. Serge Cardin: Ms. Rodal, what do you think?

[*English*]

Ms. Shuli Rodal: If I may say so, and with respect, I think that, first of all, it's important to recognize that when the Commissioner of Competition does seek information on a voluntary basis, there is generally a real willingness of the business community to participate in that. I imagine that would be particularly true where there are issues relating to competition that are a barrier to industry members participating.

I think our concern is giving the Commissioner of Competition a power to compel information and to conduct market-wide studies in a framework in which there is mandatory compliance. That requires, first of all, that the Commissioner of Competition undertake an extremely thorough inquiry in order to reach a fulsome conclusion, considering that it is a mandatory act. The costs that are imposed on the business community and on the Competition Bureau when that kind of mandatory action is undertaken I think outweigh the benefit or the perhaps slight added enhancement that would come from doing it on a mandatory basis rather than on a voluntary basis.

So I think we also need to consider one of the main reasons that has been advocated for mandatory enforcement, which is that people are not voluntarily complying because they have something to hide. I think this really gets at the heart of the issue, which is whether we are going on a fishing expedition to find out whether there are people out there engaging in criminal behaviour when there's no reason to think that may be the case. If there is a reason that people are not behaving properly in the market, the commissioner already has the power under section 10 to go out and undertake an inquiry.

[*Translation*]

Mr. Serge Cardin: Let's refer to an example, then. In the construction sector, for instance, the commissioner can launch a public inquiry or a police investigation. They can be similar.

Let's consider a specific sector. Say I am the commissioner, and I see what is happening in the construction sector. I will try to identify any competition that could possibly exist in that sector, and not just in Quebec, because I get the sense that is how it works everywhere. Even though it imposes costs, as you say, the fact remains that, in this situation, there are certain things that suggest the bidding up of prices. Some stakeholders could have agreements to increase costs by 30%, which represents billions of dollars. Therefore, it would be beneficial to invest a few million so the commissioner, who wants to look into the matter more closely, could conduct an inquiry in order to determine exactly where competition stands in a particular sector and find a solution.

So, Mr. Janigan, under Bill C-452, could the commissioner decide to conduct an examination of the state of competition in the construction sector, in an efficient and effective manner, of course?

● (1130)

[*English*]

Mr. Michael Janigan: I certainly think if there were a perceived problem with competition or competition-related concerns in the construction industry, certainly that is something for which, with this bill, he or she would be able to launch an appropriate inquiry.

With respect to the compelling of information, when I'm not attending before parliamentary committees, I'm usually in utility proceedings, where we are attempting to get information from the regulated company. I can tell you that without those powers of compulsion for the tribunal, there would have been a considerable amount of information that would have been lacking before that tribunal in order to produce the record. Whatever the intentions—it wasn't the fact necessarily that the companies were attempting to occlude—this was necessary information for the tribunal. This happens all the time.

I trust that the Commissioner of Competition will have the judgment in relation to pursuing market studies to do it in a judicious fashion and to do it in a way in which the collection of information advances the goal of market studies and is not simply a fishing expedition.

Mr. Serge Cardin: *Merci.*

The Chair: Thank you, Mr. Janigan.

Merci, monsieur Cardin.

Now on to Mr. Van Kesteren for seven minutes.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Thank you, Mr. Chair.

Thank you, witnesses, for appearing before us again.

My friend and colleague, Mr. McTeague, offered me a formula a few years ago. I keep it in the back of my book. That reminds me, I haven't transferred it to this book yet, but I keep it there. It's a formula that explains the cost of fuel. It's quite clever, and it makes sense time and time again if you want to know why fuel is charged at a certain amount. You just follow this simple formula and you come up with the end results. I keep it there because inevitably I'm going to run into somebody who tells me again that there is a conspiracy going on and prices of fuel are the result of a vast network of clever schemes by oil companies.

I don't want to belittle that because if that were the case we'd certainly need to do it. But we've had so many inquiries into this. And in particular I have a friend who...every three months we get together and he tells me again. So I explain the situation and I settle him down. Inevitably, three months later I have to have the same conversation. I've quit the conversation now because this has become an urban legend, I think. It's kind of like J.F.K. I don't think there are too many people in the United States who believe that Mr. Oswald really shot J.F.K. It's that smoking gun. But we come up with this time and time again.

I say that too because really this bill is about oil companies. This bill is about the fact that there's this perception that we're being cheated at the pumps. If this would result in proving that, I'd be the first one to stand up in front...but I've just seen so many cases tried and we've gone through this so many times that I guess I'm a skeptic as to whether or not this is the solution.

Mr. Janigan, I think we've asked this question, or it's been stated: has this bill been tried in other countries? Are there other countries that have used this type of legislation?

Mr. Michael Janigan: Yes. Actually, when the competition commissioner presented her endorsement of the market reference study back in 2005, it presented a number of different examples in the accompanying document, both with relation to Australia, the United Kingdom, the European Commission, and—

Mr. Dave Van Kesteren: Have they uncovered any schemes by the oil companies as a result of them?

Mr. Michael Janigan: I have to say I'm not here as an advocate of investigating the oil companies. I understand your position on this. We're not an organization that has delved deeply into that issue, and I don't want to disparage positions on it, but I don't approach this as an opportunity for an inquiry into the oil companies.

But yes, as a matter of fact, when Deputy Commissioner Taylor attended before the INDU committee, he indicated in his testimony:

> Yes, I'm familiar with a number of the actual studies that have been undertaken.
>
> In the U.K. a few years ago, the price for cars in the U.K. was considerably higher than it was on the continent, and there was concern about that price differential, given that they're in a common market. They analyzed that particular trend. They confirmed the trend and they looked to the possible reasons why, and they felt it was generally a systemic low level of competition among dealerships. So they took action to actually allow dealers to carry more than one line of cars. With that activity, prices for cars came back in line with the European level within about three years.
>
> They did a similar thing with the breweries and the vertical integration between the breweries that owned all the pubs in England, and they did take action. They again observed a problem. Whether it led to lower prices for beer, I don't know. I can tell you there is action taken. These studies aren't just filed on a shelf to collect dust.

● (1135)

Mr. Dave Van Kesteren: I suppose if this could result in lower prices for beer we might get re-elected.

Ms. Rodal, we need to ask the question why or why not. Is this really a bad thing? What kind of affect would C-452 have on the industry as far as cost? Mr. Janigan aptly mentioned that other industries would be affected. What kind of negative affect would it have on other companies?

Ms. Shuli Rodal: The first thing to say is that if a power exists there will be an expectation it will be used. The CBA and I thought about what the outcomes of an inquiry can be. We cannot come up with an outcome that puts the Commissioner of Competition in a better position to do something than having properly thought about a market, obtained information from market participants, and, if the circumstances warranted it, proceeding with an inquiry on a targeted basis.

The costs need to be measured relative to the benefits of undertaking an inquiry, and certainly the costs would be very significant. Resources would be redirected. There are limited resources at the bureau—I think they'll be the first ones to tell you that—and to redirect resources to a massive market-wide inquiry that would have to be comprehensive in order to be fair, in order to reach an outcome that really can have no positive effect, is a cost that is not outweighed by the benefits.

On the other hand, allowing the commissioner to focus on its role as an enforcer, to take action where it's warranted in the market, where the protections in the act have been well contemplated, where market participants will know in advance they are the target of an inquiry and will take appropriate action to protect themselves, that's worth it. To go down this road only sets us up for the bureau being pressured to undertake a market study at tremendous costs to numerous market participants—and all market participants would have to be included—who then fear the consequences of not fully complying with a court order, which is the only way to compel production of information.

I can tell you if you go into a company and speak to employees who don't deal with lawyers every day and you say you need every document that uses the word X or Y, they're afraid of the consequences of not fully complying. It's a huge imposition on business, in terms of retaining lawyers but also lost productivity of people searching their files. And for what? What will be the outcome? Will there really be the benefit that is hoped for? Our concern is that there won't be, and that the costs will definitely outweigh the benefits.

The Chair: Thank you, Ms. Rodal.

Thank you, Mr. Van Kesteren.

Now we're going to Mr. Thibeault, *pour sept minutes.*

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

Thank you, witnesses, for coming here today.

I'll start with you, Mr. Janigan. There's been a lot of discussion today over study and inquiry. I have a couple of questions I'm compiling into one here. I'd like to hear what your thoughts are on getting studies in competition versus an inquiry. Does one have more teeth than the other? Just from the reading I've been doing on this bill, it seems that this bill tries to look at things from a proactive side rather than a reactive side. Rather than waiting for something to become a problem, does it give the commissioner the opportunity to—I wouldn't say the fishing expedition that was used earlier—have the tools necessary to do the job?

● (1140)

Mr. Michael Janigan: I think it does. I don't wish to diminish the importance of the development of regulations under the act in relation to this section to provide the kinds of procedural protections, the procedure for gathering evidence, the kind of transparency and certainty that's going to be required for this provision to work. I haven't done any advanced work on those provisions, but I think they're required.

Yes, I think it does present a very proactive view of the competition. As I said, the two views are basically the competition commissioner as cop or the competition commissioner as being generally responsible for the state of competition in Canada and acting as an advocate and promoter, and someone who can point out where policy changes need to be made. I think that's a tremendously important role.

I think the first role is important in relation to the development of competition law, in particular on hard cartel offences and things of that nature. They're significant, but they're not the only thing. I have some confidence that the competition commissioner would be able to develop an appropriate protocol, both in terms of the regulations and in the way this act is enforced, to ensure that these studies are undertaken with a view to advancing the interests of competition.

I think it's a mistake to try to look at this as another way to dig up evidence to charge people in the market. That might be one result, but that's not the intent of the studies. The studies are effectively to give you a window on the industry to see what has to be done. These changes may not be with business; they may well be with government. They may well be with other things that have to be done. We're in the 21st century now. We can't take an approach that the competition commissioner is like a cop going out and busting a three-card monte game on the corner. It's more than that now. If we get it wrong, the price will be paid in the economy as a whole, not simply in relation to individual business.

Mr. Glenn Thibeault: I'd like to offer you the opportunity to respond, Ms. Rodal.

Ms. Shuli Rodal: The role of the commissioner as an advocate for competition is important, but I think it's important to recognize as well that we have decided in Canada that the Competition Bureau is really primarily an enforcement agency. For example, we would have had, at a certain point, the choice of looking at competition law in Canada as a way of protecting low prices for consumers, but that's not what we've said. We have said that under the Competition Act there's absolutely nothing wrong with attaining market power through having a better product or innovation. And if it puts you in a position of being able to charge higher prices than might otherwise exist, there's nothing wrong with that, as long as you have not abused your dominant position.

So we have decided in Canada that the Competition Bureau and the Commissioner of Competition protect consumers and competitors and competition from behaviour in the market that is anti-competitive. We do not regulate the market in Canada to keep prices low. That is not the role of the Competition Bureau. So when we think of the Commissioner of Competition as being an advocate for competition, it has to be with our having in mind that the enforcement powers of the Competition Bureau are not part of that advocacy role. The enforcement powers of the Competition Bureau are directed towards preventing and dealing with anti-competitive behaviour in the market.

Mr. Glenn Thibeault: So if we're looking at what the changes would be to paragraph 10(1)(b), it talks about grounds existing for making an inquiry into an entire industry sector. When I read that, I don't know if that necessarily means that all of a sudden we have these sweeping powers that we're going to investigate everything; there have to be grounds existing.

Mr. Janigan, and then Ms. Rodal—if we have the time, if I can wrap up my question quickly—is this something that...? We've been hearing that this is the negative side of it, that you could be open anywhere. But “grounds exist”, it seems to me, sets some parameters.

● (1145)

Mr. Michael Janigan: I think it does. As well, I would think you would want to develop that in a more comprehensive fashion under the regulations, similar to the way a number of different items are developed, including abuse of dominance, the merger enforcement guidelines. In using that section we would presumably use it in a way that would best achieve the goal of attempting to create competitive markets.

While yes, the enforcement powers are directed primarily to achieving competition in the market, the identification of problems in the market is an important role that the competition commissioner has. For example, with respect to markets such as airlines or markets where you have essential facilities that have to be used by competitors, it would be extremely useful for the competition commissioner to have a market study that shows where the bottlenecks are, what's needed to bring competition to the industry, and what's needed to promote competition as a whole to bring better prices and choices to Canadians.

The Chair: Thank you very much, Mr. Janigan.

That uses up the time, Mr. Thibeault.

Now on to Madam Coady for five minutes.

Ms. Siobhan Coady (St. John's South—Mount Pearl, Lib.): Thank you very much.

First of all, thank you for taking the time from your busy schedules to be here today and for the role you play in a good public discourse about public policy and law. We certainly do appreciate that.

I'm going to ask three questions up front, primarily to the Canadian Bar Association. As you know, I only have five minutes, and I'd like for you to wrap them all up at the end.

First of all, in the letter to us from the Canadian Bar Association, you talk about Bill C-452 proposals to amend subsection 10(1) of the Competition Act to mandate the Commissioner of Competition to cause an inquiry to be made whenever the commissioner has reason to believe that grounds exist for making an inquiry of an entire industry sector.

We had Mr. Bilodeau before us last week. He's the acting assistant deputy commissioner of the Competition Bureau—that's quite a title—and he says that in effect the commissioner now has access through the legislation to new and powerful provisions that clearly strike at the heart of this legislative matter. As you indicated a few moments ago, if the power exists, then the expectation is that it will be used.

My first question speaks to this issue. If the new provisions that were given to the commissioner eight or nine months ago in effect give them this power, why are you concerned that clarity or surety around those powers is a detriment? That's the first question.

The second question goes to jurisdiction. The committee has been told that jurisdictions like the United States, the United Kingdom, Australia, and the European Union all have similar provisions. Yet in Canada there's a concern—and you're expressing it quite clearly—around this.

Could you talk about why it is in Canada that we would be concerned about having this when other jurisdictions, partners of ours in global trade, would have the provisions that are being proposed in this bill?

The third question goes to what I'm going to call frivolous or vexatious types of investigations. You're saying it might be costly to do the investigations. Are there safeguards to ensure any investigation that's done is required? If we do move forward with this type of provision, based on the fact that the commissioner already has these provisions and that other jurisdictions have them, is there anything you could suggest to ensure there would not be any frivolous actions taken?

I'll leave those three questions to you to answer. I'd appreciate it.

The Chair: Do what you can within two and a half minutes.

Ms. Shuli Rodal: Sure. First, on the new powers of the commissioner, I may have misunderstood, but I believe the representatives of the Competition Bureau yesterday were referring to the greater clarity that now exists under the criminal conspiracy provision. First of all, the language is very clear about the conduct that is a criminal offence; and secondly, the requirement that there be an impact on the market in order for there to be a successful prosecution has been eliminated. So automatically illegal agreements are anti-competitive, criminal in nature, and as soon as the agreement is established, that's the end of the story, the parties are guilty.

I think the reference was that where there may have been more difficulty to address the types of issues being alluded to, perhaps in the oil industry...or that is maybe the underlying reason there's a desire to do further inquiry into the market, to find out if there are illegal agreements to restrain pricing. The point is, to the extent that anything like that would exist, it is now much easier for the Competition Bureau to encourage the prosecution of those offences because they're much easier to prove.

Secondly, with respect to other jurisdictions, it's true that other jurisdictions do have—through their competition authorities, in some cases—the ability to undertake market research inquiries. But in Canada I think we need to recognize that outside of the Competition Act there is the Inquiries Act, and there is the International Trade Tribunal that can undertake inquiries.

More importantly, I think we need to think about Canada as being somewhat unique. We have taken a very clear position in the Competition Act on what we think are the enforcement rights and enforcement role of the Commissioner of Competition.

We also have a somewhat unique country. We have a vast geography, with a relatively low density of population. Because of that, we don't necessarily have the same level of competition as perhaps the United States, which is much more densely populated. In some cases we need to tolerate higher concentrations within certain industries because we can't support as many competitors in certain industries. So I think we need to be a bit more cautious in thinking about looking at pricing in the market or the number of competitors in the market.

● (1150)

The Chair: Madam Rodal, I'm going to have to ask you to provide your third answer in some other portion of questioning. You did a great job trying to race through that. That was very good.

Now we're on to Mr. Lake for five minutes.

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

I'm just taking a look at section 10 in the actual Competition Act. It says under the heading "Inquiry by Commissioner", "The Commissioner shall (a) on application made under section 9", and it gives paragraphs (b) and (c). It gives three different areas where the commissioner can "cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts".

Paragraph 10(1)(a) is an "application made under section 9", which refers to any six persons resident in Canada who have a concern.

The concerns are similar to paragraph 10(1)(b), which is what we're changing: "whenever the Commissioner has reason to believe that (i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII".

As I look at that, part VII.1 talks about deceptive marketing practices. Part VIII talks about matters reviewable by the tribunal and refers to restrictive trade practices, refusal to deal, tied selling, abuse of dominant position, and so on. That's number one.

Subparagraph 10(1)(b)(ii) says: "grounds exist for the making of an order under Part VII.1 or Part VIII".

Subparagraph 10(1)(b)(iii) says: "an offence under Part VI or VII has been or is about to be committed, or".

Now we're adding this fourth one. This is what strikes me as kind of odd. The fourth one, this new one, is very different from the others. The others seem to actually refer to something, some criteria or some condition, that has to exist for the commissioner to make that inquiry. I'll quote: "Grounds exist for the making of an inquiry into an entire industry sector".

One of the things that strikes me is that the grounds are not actually defined here. In subparagraph 10(1)(b)(ii), "grounds exist for the making of an order under Part VII.1 or Part VIII". There is a definition of those grounds. It tells you what grounds are.

What are the grounds here? I don't understand when I'm looking at this what the grounds would actually even refer to.

Mr. Michael Janigan: Of course, I didn't draft the proposed subparagraph, but I'll speak to it in terms of what in fact may provide the appropriate remedy for circumstances associated with the lack of specificity as to the grounds.

I would suggest that this would be a matter that might be dealt with by way of section 18 regulations. They would be set out, in terms of guidelines, in a way similar to abuse of dominance guidelines and merger enforcement guidelines—guidelines made under the act—that provide the terms and circumstances by which the authorities could be exercised.

It provides as well some appropriate procedures with respect to the gathering of information and the use of that information in further matters. This requires that extensive regulations be put into effect. Presumably, with respect to that section, you would wish to deal with the guidelines when such grounds exist.

● (1155)

Mr. Mike Lake: Is an amendment needed here? Right now it seems pretty open-ended. There is no reference to regulations.

Mr. Michael Janigan: Effectively what's occurring here are the inquiries under section 10, but they take place with respect to the powers set out between sections 11 and 19, I believe.

The regulations section, which is under section 24, provides that the "Governor in Council may make regulations regulating the practice and procedure in respect of applications, proceedings and orders under sections 11 to 19".

Effectively, you would want to use those sections to clarify how the powers for inquiries are going to be exercised.

Mr. Mike Lake: There might be some amendment needed.

Mr. Thibeault said he does not know what it means. I agree with Mr. Thibeault. I don't know what this means, and it's problematic for me.

Ms. Coady talked about safeguards. Are there any safeguards to ensure against frivolous investigations? It seems to me that this is the way the law is drafted as it is. The law, as drafted, provides safeguards. What this does is remove them.

Ms. Shuli Rodal: I think what you referred to in question 10, when you read it out, is exactly the problem, which is that the Competition Act says that the enforcement powers are exercised where there is reason to believe that there is some anti-competitive conduct in the market.

If you look through all of the provisions of the Competition Act, you will not see any provision that says that being in a position of market power is itself anti-competitive. You will not see anything that says charging higher prices than might otherwise exist is itself anti-competitive. All of the enforcement powers are directed to protecting against anti-competitive conduct.

So if you just add at the bottom "grounds exist", presumably not including anything that raises any concerns about anti-competitive conduct, what are you talking about? You're talking about the market being just not as competitive as we would hope, and this is an extremely broad question. And you go out into the market, and what are you going to do if you find out that it's true that we have a monopolist or we have three large companies that seem to be the most successful, and others are not really getting in there because their products aren't as...? What are you going to do?

The Chair: Thank you, Madam Rodal.

We'll now go on to Monsieur Bouchard.

[*Translation*]

You have five minutes, Mr. Bouchard.

Mr. Robert Bouchard (Chicoutimi—Le Fjord, BQ): Thank you, Mr. Chair.

Good morning, ladies and gentlemen.

My first question is for Mr. Janigan.

You said that the OECD recommended that we institute a power to implement market studies. If I am interpreting your comments correctly, that means that the Competition Bureau currently does not have the power to implement market studies.

Does Bill C-452 address the OECD's recommendation, in other words, does it have a provision that would give the commissioner the power to implement market studies?

[*English*]

Mr. Michael Janigan: Yes, I believe that's certainly the power that's been invested with the commissioner in Bill C-452: it would enable those market studies to take place.

As I said before, one of the first acts would be, of course, that the commissioner would develop regulations that would set out the way in which those studies would take place, the powers that would be exercised, and when they're exercised. That's an important component that will accompany this, and when put together I think it would meet the concerns of the OECD that Canada was bereft of an express authority to study an industry simply for the purpose of illuminating competitive dynamics, which is effectively what a modern nation has to do.

[*Translation*]

Mr. Robert Bouchard: I would like Mr. Janigan to answer my next question, followed by Ms. Rodal.

What new authority does Bill C-452 give the Commissioner of the Competition Bureau?

● (1200)

[*English*]

Mr. Michael Janigan: As I understand and interpret Bill C-452, it brings a new authority or is meant to bring a new authority to the competition commissioner to undertake a study with respect to the competitiveness of a particular industry and to report on the competitive dynamics and the means that might be taken to achieve a more competitive result. It differs from the other kinds of inquiries that are to take place with a specific view to ascertaining whether an offence has taken place or whether or not some kind of marketplace conduct has taken place. The marketplace study may find marketplace misconduct, but that's not the essential reason behind those studies. The essential reason behind them is to establish what the state of competitiveness is in the market and what we can do to increase competitiveness, and to make recommendations accordingly.

Ms. Shuli Rodal: One thing that perhaps is not fully appreciated is that the power of the Commissioner of Competition to initiate an inquiry is actually quite broad. The first thing is that the Commissioner of Competition can respond to a complaint, which is either made directly or, if the commissioner is paying no attention to a complaint that has been made, a six-resident complaint can be brought essentially forcing an inquiry. But on top of that, the commissioner can initiate her own inquiry without a complaint having been made.

My understanding is that in probably close to a third of the cases in which inquiries have been initiated, it was the commissioner and the Competition Bureau on their own volition suspecting that something might be anti-competitive in the market and initiating an inquiry on that basis. When we talk about the Competition Bureau behaving responsibly and properly exercising their mandate, I think that's exactly what they're doing under the existing law: looking carefully at a market, and if there's an inkling that somebody is doing something anti-competitive, which is what we've said in the Competition Act is a problem, then they go out and look into it. In the absence of a concern that something untoward or anti-competitive is going on in the market, the commissioner and the Competition Bureau say that if they're interested, they will look at it on a voluntary basis, will continue to think about it, will continue to monitor the market, and will listen carefully to market participants.

In my experience, people are not shy to complain if they think they're having a hard time competing in a market. Proceeding on that basis is I think sufficient. I don't see what is really being added by this open-ended power to undertake an inquiry, which we think in the end produces, as I've said, very little benefit.

[*Translation*]

The Chair: Thank you, Ms. Rodal and Mr. Bouchard.

It is now over to Mr. Wallace.

You have five minutes, sir.

[*English*]

Mr. Mike Wallace: Thank you, Mr. Chair. You were looking the other way. I thought you had tricked me there for a minute.

Thank you for coming this morning.

I'm going to make an initial comment. All three of you are lawyers. Is that not correct? You're all members of the bar? And as we know, not all lawyers agree, and that's how they make their living.

My initial point, which I've been trying to make everywhere I can, is that in my view this is a one-line, one-word...it's basically a word-change bill. It's an inappropriate way to do law in this country.

Obviously, based on the issues that you've brought forward, based on issues that we've heard at the last committee meeting, to have a complete review of the Competition Act in areas—my colleague here, Mr. Lake, just indicated that there may be some amendments needed.... That work gets done if an appropriate legal document comes forward after lots of consultation and a review of how legal it is and of its wording and of what section fits which section, and so on. These private members' bills with one-word lines are problematic, in my view, and I don't think they are good law-making in this country.

That is my initial point. I have three points to make.

My second point is this. I think, Mr. Janigan, you said that you trust the commissioner's judgment. Is that correct?

The commissioner's representatives were here last meeting, and they indicated that they don't need this clause. It's not a power they need. They have the authority to do....

Do you trust that judgment in this case?

● (1205)

Mr. Michael Janigan: I guess I exercise the prerogative to demarcate those areas where I believe—

Voices: Oh, oh!

Mr. Mike Wallace: That's the problem with this law. It sounds good: we trust the judgment of the commissioner. But you quoted two commissioners in the past, and then this commissioner has a different view. You trust the judgment of the previous commissioners, but not this one.

As my final point—and, Ms. Rodal, you have basically commented on it—my real concern, and Mr. Lake pointed it out and used better wording than I was going to use, is profiling. In my business as the politician locally, not just in industries but in immigration and in lots of areas, we get people calling who have opinions that in my view are not correct and actually are profiling, whether of an industry, a cultural group, or all kinds of things.

The danger, in my view, of an open-ended study, which I think this would allow, is that it would put the commissioner in a very difficult position. If the commissioner got hundreds of calls and letters and e-mails from a consumer group, or if another industry wants to compete, say, in the energy field and says they think another group is anti-competitive and they want the commission to study that group, is there a problem, based on your looking at this issue, that there might be a potential for profiling and for industries to use it as a tool to get at other industries?

Ms. Shuli Rodal: There is definitely a concern about the pressures that would be placed on the bureau to use this power and where those would come from.

The issue you raise also suggests a concern that if the commissioner were to undertake a market inquiry, immediately there would be an inference that something was wrong with that industry. And all participants in the industry, on top of having to pay for the pleasure of being targeted in that market inquiry, would also suffer during the very long period of time it would take to actually conduct the inquiry, with the sort of cloud of something being wrong hanging over the industry.

We know that the Commissioner of Competition didn't think something was wrong or she would have proceeded under the existing powers if there were actually a concern that something was anti-competitive. But I think that nuance may perhaps be lost on the public. What they would see is the commissioner undertaking a mandatory review of sector X, so right away the inference would be that there is something wrong with that industry. And that is something to be concerned about, I think.

The Chair: Thank you, Madam Rodal.

We have 20 minutes left, so I'll just ask the members to keep it as tight as possible.

Go ahead, please, Mr. Thibeault, for five minutes.

Mr. Glenn Thibeault: Thanks.

I'll go back to my previous line of questioning and kind of relate this to what my honourable colleague was talking about just a minute ago.

We were talking about grounds existing, and we see that as something that can be proactive. There was a lot of discussion about the constituents in his riding, and hundreds of people were sending e-mails and calling about a concern. Wouldn't that, then, justify the commissioner calling an inquiry if there were hundreds of people actually expressing concern?

As for whether grounds exist, the way I see it, if one person calls and says there's a problem with widgets, we're not actually going to call an inquiry into that. But if hundreds of people are starting to make phone calls and saying there are problems with widgets, do you not see this as, rather than being open-ended, providing for an opportunity to get in there and actually do the inquiry to make sure things are fair?

Mr. Michael Janigan: I think it's one element the commissioner can take into consideration in relation to whether or not a study should be commenced of a particular industry, but it's not the sole element. I think they would want to look a little more closely initially at the structure of the industry, the basis for the complaint, and whether or not the origin or the source of the problem lies within the ability of the industry to respond, and then make the judgment accordingly.

The other thing is I've read over yesterday's comments from the Competition Bureau. I'm not so certain that what they were referring to is in fact the use of this inquiry as a kind of suspenders and belt routine for anti-competitive conduct. I don't believe I heard them say that having the market reference study power was something that would not be of assistance. And they have a lot of concerns with respect to things like resources and things like the appropriate procedures that might be required to put it in place.

But I don't necessarily read this as being the previous two commissioners against this commissioner. I think it's more a function of the testimony, which seemed to be oriented almost exclusively towards cartel and criminal offences against which in fact the commissioner has all the powers he or she needs.

● (1210)

Ms. Shuli Rodal: I think when people complain—and people complain about all kinds of things—the real question is, what is the substance of their complaint? So if they call the Competition Bureau and nothing in what they're saying suggests that there is any conduct in the market that is anti-competitive, then it's probably appropriate for the commissioner not to take any action. People frame their complaints in all kinds of ways, and their issues may have nothing to do with competition. I think we need to leave it to the commissioner's judgment as to whether a complaint raises a competition law concern, and we've talked a bit about what competition law does and doesn't cover. And if the complaints do not suggest there is anything anti-competitive in the market, maybe it's better for those complaints to be directed elsewhere.

Mr. Glenn Thibeault: Thank you.

The Chair: Thank you, Mr. Thibeault.

We'll now move on to Mr. Lake, for five minutes.

Mr. Mike Lake: Thank you, again, Mr. Chair.

Just to clarify, Mr. Thibeault referred to hundreds of people calling and that might be grounds for an investigation, but under this legislation, as proposed, nobody would have to call. And nobody even has to make a complaint; the commissioner just decides that they're going to launch an inquiry into a certain sector and it happens. That's what's wrong with it.

We wouldn't allow this in any other area of law. We wouldn't allow the police to determine that a particular segment of society is more prone to criminal activity, so we're just going to investigate all of them, but that's what this does.

From a competitive standpoint, it does that. It basically says, "Hey, you know what? We think maybe this particular industry.... " Well, we don't even know what the grounds are because they're not listed, but maybe there's just a suspicion in the commissioner's office, and we just allow them to go out there and investigate an entire industry. I think that's what's wrong with this bill.

Then there's a significant cost attached to every member of the industry. And again, there's a significant label attached...just like there would be a label attached to that specific segment of society that is being investigated for whatever nefarious criminal activity they might be involved in because of profiling. We don't allow that because it's labelling. It's very detrimental to society to do that. I think in this case it's exactly the same thing.

The question we have to ask here is, what's the problem we're trying to solve?

Mr. Janigan, if you could, maybe you can tell us, other than the grounds already demarcated in this existing law, what grounds are missing?

Mr. Michael Janigan: Once again, in relation to your previous comment, in fairness as well, the commissioner, of course, can do the same thing with respect to the other offences, as long as she has reason to believe they are being committed. It's not a situation where she has to act on a complaint.

But let's deal with this. To some extent it's unfortunate that it's plopped in this particular section that deals with a variety of different offences under the act.

This is directed to the commissioner's responsibility to act as an advocate of competition and to promote competition. For example, the act specifically allows the commissioner to make representations on tribunals and boards that are dealing with matters that affect competition. There is a general responsibility in order to create and promote competitive markets separate and apart from going out and finding that there may be anti-competitive conduct that takes place.

There are a whole variety of different ways that competition may be affected that don't trigger anti-competitive conduct. There may be circumstances where there are essential facilities or bottleneck facilities where new entrants can't get access. There may be circumstances where there are supply problems that exist in the market that affect that—

Mr. Mike Lake: But in fairness, these sound more like studies than inquiries.

Mr. Michael Janigan: If you're saying the preferred word should be "study" rather than "inquiry", I agree. But the intent of this section, as I understand it, is in effect to parallel the market studies that are being done in the U.K., the United States, the European Union—

● (1215)

Mr. Mike Lake: Reading between the lines, though, from your testimony so far, it sounds like you're saying, "Hey, we need to make changes, but this clearly isn't the right way to make those changes."

Mr. Michael Janigan: As I said at the beginning, the mechanics of the bill are ones that I have not wordsmithed, nor was I responsible for the draftsmanship. I would assume that if the bill were to pass, a lot of these concerns could be addressed in the regulations in relation to appropriate procedure and how to deal with matters relating to the great degree of difference between the inquiries that are made and the reference to complaints, as well as where there's reason to believe that there is anti-competitive conduct and where you would attempt to pursue studies associated with competition.

Mr. Mike Lake: Is it fair to say that if you were trying to solve the problems, as you see them, you would draft it differently?

Mr. Michael Janigan: I think that's correct.

The Chair: Mr. Rota for five minutes.

Mr. Anthony Rota (Nipissing—Timiskaming, Lib.): Thank you, Mr. Chair.

Thank you for being here today.

Mr. Wallace brought up something that was interesting, about people calling and wanting a study. As I read it right now in the act, in subsection 9(1), "Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that". It gives three main criteria, with references; they "may apply to the Commissioner for an inquiry". So that exists. There's nothing new going on. This allows the commissioner to study a whole industry. Right now if the commissioner sees one particular corporation or one particular entity, he or she has the permission to go in to see if they're competing well.

Now, sometimes when you look at one entity within an industry, wouldn't it be a lot more productive if you got to study a whole industry and identify what's going on, what the positives and negatives are? Then maybe from that investigation of the whole industry—and it doesn't necessarily have to be a negative—we could look at a study, an inquiry, an investigation, maybe dig deeper to find out what's going on. Really what we're trying to do is promote competition. How we do it is the question here.

I hear that we don't really trust the person in charge or the commissioner with this. I would think that the Constitution would keep the competition commissioner in line. Is there any truth to that? There are some limitations. Are we running from our own shadows here trying to protect ourselves from the bad old commissioner?

I'll start off with Ms. Rodal, and then over to Mr. Janigan.

Ms. Shuli Rodal: I'll start. Thank you for your question.

The Commissioner of Competition, when conducting an inquiry under section 10, does actually obtain a fair amount of information from other market participants, and it's all on a voluntary basis, sometimes on a mandatory basis. Careful attention is paid to what is absolutely necessary to carry out the commissioner's enforcement mandate because there are real costs on members of the market who have not done anything or who are not suspected of having done anything anti-competitive in having to provide that information. At the same time, in order to make a proper inquiry under section 10, as it is right now, the commissioner does have to gather information about the market, understand competition in the market.

Mr. Anthony Rota: So if I understand this, it's almost like they have a case, they're trying to prove a point on a certain industry, so they're gathering information from different industry participants or different industry entities. What they're doing is trying to prove that this person is guilty, as opposed to looking at the industry and trying to see how it works, and then from there determining whether this person or this entity is dealing within the regulations that are standard or accepted.

Ms. Shuli Rodal: I think there are some issues that arise going the other way, looking at the whole industry, and then figuring out from there if anybody is doing anything wrong. The real issue is there are weaknesses in the case. The case is undermined by not having made a person properly a target of an inquiry from the beginning.

● (1220)

Mr. Anthony Rota: Okay. I'll ask Mr. Janigan, because we are a little limited for time, to comment on that as well.

Mr. Michael Janigan: I think this is something you would want to address specifically in the regulations in relation to the way in which investigations take place, the way in which evidence is used, and in the event that there was anti-competitive conduct that wished to be proceeded to the Competition Tribunal or to the federal courts, how that will take place, whether or not there's a separation, particularly of the staff that deals with it. There are a host of considerations that have to go into the regulations. I'm confident that given the testimony that the previous competition commissioners have evidenced before the committee, they could deal with that effectively.

Certainly, if we agree there's some utility in a study of competitiveness in an individual industry sector, that it's of assistance to the industry, to consumers, and to possible entrants, who else would you want to do it, other than your competition authority?

Mr. Anthony Rota: Very good. Thank you.

How are we doing for time?

The Chair: We're pretty well out. There are 15 seconds left.

Mr. Anthony Rota: Can I make just a quick statement, then, to Ms. Rodal?

I come from a rural area, and I don't agree with charging more in all rural areas to compensate for the wide, expansive geography. That's my statement. I'll end with that.

Voices: Oh, oh!

The Chair: I'm going to ask the Bloc if there are any more questions.

Monsieur Cardin, Monsieur Bouchard, do you have any more questions? *Une question*?

[*Translation*]

Mr. Robert Bouchard: My question is for Ms. Rodal.

When you are driving down the street, and you notice that all the gas stations in the city have their gas advertised at the same price, that does not surprise you?

Right now, even if it receives complaints of that nature, the Competition Bureau does not do anything. So Bill C-452 would give the commissioner the authority to conduct an inquiry in that kind of situation.

My understanding was that the Competition Bureau had all the power it needed. In this case, does the Competition Bureau currently have all the authority it needs to launch such an inquiry? If so, is it a lack of resources that prevents the bureau from responding and carrying out a market study in that kind of situation?

[*English*]

Ms. Shuli Rodal: I don't think anyone would accuse the Competition Bureau of not spending any resources in looking into the oil and gas industry. We see them quite regularly doing studies on a voluntary basis on that industry. I can only assume that if the Competition Bureau had any inkling that anti-competitive conduct was responsible for the nature of pricing in the oil sector, they would not be shy to take action, certainly now that the criminal conspiracy provision is much easier to prove. I can only assume there would be an immediate inquiry if there were any suggestion of anti-competitive conduct.

The Chair: Thank you very much.

Mr. McTeague.

Hon. Dan McTeague: Ms. Rodal, you suggested that the Competition Bureau is the enforcement agency. Mr. Janigan suggested it was an advocate for competition. I think it's somewhere between the two.

There has always been a belief that the bureau acts more like a cop on the beat. It's probably best known—my Conservative colleagues would know this—that you can trust a police officer to understand a little more about the situation as it presents itself and be able to make some recommendations, given their first-hand knowledge of things.

The cost of doing business for many of these companies—they might be European-based or U.S.-based. They exist under far more rigorous oversight, you would have to agree, than companies here in Canada. The real question for members of Parliament and consumers is, how do you explain not knowing what the supply and demand picture is at any given time in Canada? The United States does it every week. In fact, tomorrow morning at 10:30 a.m. they will let the world know exactly how to account for every drop of energy. That has had some very positive, pro-competitive outcomes, in particular for the stock markets, the futures markets.

We also have the conundrum here in Canada of trying to explain why wholesale prices in most large, urban centres—whether it's Mr. Van Kesteren's riding, Mr. Wallace's riding, or Mr. Stanton's riding—move in a lockstep fashion. The fact that the Competition Bureau has not been able to address this fundamental reality is the huge divide between the public's expectations and the status quo. I believe that's the position the Canadian Bar has consistently taken over the years.

I wonder if you can resolve once and for all that we need a fair, unfettered, and transparent review of this industry. To do that we will have to allow the Competition Bureau to do what it normally does very well in other jurisdictions, and that is to say, "Here is the lay of the land. We find ourselves in a situation where supply is low and demand is high. We find ourselves with three players where we once had seven or eight. We understand that wholesale prices for gasoline and energy across this country are dominated by one or two players that don't need to compete against each other at wholesale. Why does the issue of predictability become so easy at four o'clock the day before the prices are set?"

I understand that the language, Mr. Janigan, is not correct. It's not exactly what you would like. Can you live with it?

● (1225)

Mr. Michael Janigan: You would certainly look to the regulations to fill in some of the gaps that seem to be evident in the amendment. I think it's possible to craft a solution that would satisfy some valid objections, or at least some valid concerns associated with implementing a market studies position. So yes, I think the regulations could respond to that.

Hon. Dan McTeague: I have a final question.

The way the Competition Act is currently written—on the civil side, certainly—if part of it has violated the Competition Act, a number of remedies are made available, but none of them include damages to the aggrieved party.

I'm wondering if in your opinion, Mr. Janigan—and perhaps Ms. Rodal could explain this. Why is it that lawyers in this country, who do extremely well, who are very much eminent members of the Canadian competition bar, never see the side of the little guy?

Mr. Michael Janigan: I think the fact that the primary competition authorities are largely people who are devoting their practice to attempting to insulate their clients from the effect of the competition law arises from the fact that we haven't had a tradition of private enforcement of the competition law in the same way as the United States has, bringing actions under the antitrust act. You have a plaintiff's competition bar in the United States as well as a defendant's competition bar. We don't necessarily have that up here.

Hon. Dan McTeague: I think I'm going to make a last statement.

You credit that with the difference in prices we see on every street corner in the United States, which is the extreme reverse opposite in Canada.

Mr. Michael Janigan: I haven't done any empirical study related to those two factors, so I can—

Hon. Dan McTeague: Americans have no trepidation with doing studies on industry and asking them to open their books in order to achieve that inquiry, whether it is done at the local court.... I assume most Canadian companies who are parented or headquartered in the United States would certainly now want a situation where they can do in Canada what they know is perfectly illegal or verboten in the United States.

Mr. Michael Janigan: Certainly I think it's fair to say we haven't inculcated the same culture of competition that exists in the United States, and I think we're attempting to do so.

The Chair: Thank you very much, Mr. Janigan, Madam Rodal, and Madam Thomson. We appreciate your time here today and your expertise.

You can go now, with our thanks.

We'll ask Ms. Einbinder-Miller and Ms. Downie to come to the table and we'll begin our clause-by-clause when that change happens. We'll just suspend for two minutes.

● (Pause)

●

● (1230)

The Chair: We're ready to go clause-by-clause now here, which in this case is a little bit of an overstatement.

Mr. Lake.

Mr. Mike Lake: I just wanted to throw something out here right now. It was clear from the witnesses' testimony today...even the one witness who seemed somewhat favourable to the concept suggested that the bill ought to be amended to make it make sense.

I intend to vote against the bill because I don't think it's a good bill. At the very least, based on testimony that we heard today, the folks on the other side may want to consider an amendment to make the bill less bad. Therefore, we may want to put off clause-by-clause until the next meeting. It's just a suggestion.

The Chair: Mr. McTeague.

Hon. Dan McTeague: The wording of the legislation, while not perfect, and at worst it might be considered redundant to powers that are already there...I think the argument has been successfully made that there is a need—certainly from the discourse of the two previous commissioners—to enhance those powers. Obviously the government will at some point need to decide where its priorities reside as far as appropriate inquiries in areas that have enormous impacts on consumers.

I never had a chance to put it out there, but it seems to me that if there's a problem with wholesale prices for gasoline, and 75 billion litres of diesel and gas are sold every year in Canada, and if it's selling from 4¢ to 6¢ per litre above, that's $3.5 billion out of consumers' pockets. That's quite a kick in the pants. Whether that's the result of hyper-competition or not, I'm prepared to say that it's time the buck stops here.

I believe we should pass this legislation. I believe very firmly that it's heading in the right direction. It can be amended at report stage or at third reading. The Conservatives have a majority in the Senate; they can choose what they want to do there. It's an innocuous but important message we're sending to the bureau and to others: the status quo is not acceptable. To have a handful of lawyers in the competition bar saying what's right and what's wrong with this industry is unacceptable, in my view. It's time that we have individuals committed to enhancing the competition process understand freely and without any direct links or conflicts of interest that they do want to see an explanation on the industry given as frequently as the public demands. Since 1986, we've had a Competition Act written by the very people it was meant to police. No wonder these inquiries are predictable, useless, and irrelevant; they're simply not able to find what's wrong.

Mr. Chairman, I think it's critical. The Competition Bureau came before us and said they did an inquiry on Hurricane Katrina. The effect of Hurricane Katrina on motorists in the United States was no more than 2¢ a litre. But you'll all remember that during the height of the campaign, the second week of that election, we were feted with a 13¢ increase as a result of something that happened south of the border. The reaction was substantial from most Canadians, and the impact was beyond anything that anyone would have imagined only a few years before. It's an indication of a much deeper problem.

Two weeks ago, the price of gas went up 4.4¢ per litre. Yet when you look at the market forces and how the Canadian dollar interacts with commodity prices, there ought to have been no increase whatsoever. If you're not prepared as a caucus, Mr. Lake and others, to open the door wide to the discretion of the competition commissioner to finally investigate this industry, then I suggest that we're going to continue to have these cases over and over again. I've sat in this room for 16 to 17 years with several inquiries on bills that have attempted to do what I think is important—transparency, openness, an objective view of what has happened in this industry. Frankly, I think the Competition Bureau's decision to go to its enforcement guidelines, to its relevant market decisions, is hurting the Canadian consumer.

I think it's important that we adopt this bill and that we do so forthwith.

● (1235)

The Chair: Thank you, Mr. McTeague.

Mr. Lake, and then Mr. Wallace.

Mr. Mike Lake: I didn't know I was going to be triggering a speech when I made my comment. All I was suggesting was that even the folks who are in favour of the bill have suggested that it's not perfect. You yourself just used the words “not perfect”. Maybe you want to take one extra meeting to go back and look at an amendment that makes the bill more “perfect”, from your viewpoint, before we pass it through committee. That's the only suggestion I was making. Even proponents of the legislation acknowledge that work needs to be done to fine-tune it. And we might want to take one meeting to do that before we come back. That was my only suggestion. I take issue with your phrase that “at worst it's redundant”. I think at worst it's significantly worse than redundant, but that's an argument for another day.

The Chair: Mr. Wallace, before I go to you, is there any willingness to postpone?

It doesn't look as if there's any willingness.

Mr. Bouchard, I put you on the speakers list.

Mr. Wallace.

Mr. Mike Wallace: I'll be very, very, brief, Mr. Chair.

The witness we had today, who is a lawyer, which we made sure was on the record, indicated that he would reword the current bill. He was in favour of the concept in principle, but he said the wording was not where he would like it to be. That's why I think Mr. Lake was offering the opposition an opportunity to look at the wording to see if they could make additional recommendations in terms of attachments and references to different sections in regulation, and so on. But it doesn't sound like they are interested.

The other point I want to make, which Mr. McTeague made, is that this isn't a motion. This is law. We shouldn't be using the creation of, or changes to, the actual laws of the land to send messages. He was saying that it would send a message to the commissioner that we're not happy that they haven't been able to find anything in the petroleum business so far, and that with this one-word, two-word change, they'll go and study it again. He still might not be happy with the results, whether or not that happens.

But we shouldn't be using private members' bills to send messages. These are legal documents; this is changing the law of the land. Send a message another way, but don't let's do it through changes to the legislation.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Wallace.

Mr. Bouchard.

[*Translation*]

Mr. Robert Bouchard: First of all, Mr. Bilodeau, from the Competition Bureau, told the committee that his organization had all the powers it needed to initiate an inquiry. A little while ago, Mr. Janigan said that the Competition Bureau did not have all the powers it needed to initiate an inquiry.

I asked Mr. Janigan whether Bill C-452 addressed the OECD's recommendation that the Competition Bureau be given the authority to conduct market studies. His answer was that Bill C-452 addressed that recommendation in every respect.

Personally, I think the bill changes things for the better. For that reason, I think we should proceed with the clause-by-clause study, as planned. The bill has just one clause. This morning, we are supposed to vote for or against this bill. It is our view that Bill C-452 should be passed without amendment, as it was introduced and in its current form.

The Chair: Thank you, Mr. Bouchard.

Your turn, Mr. Rota.

[*English*]

Mr. Anthony Rota: I was going to make some comments, but Mr. Bouchard pretty well encapsulated what I had to say.

I think we should just move on to a vote and get this done.

● (1240)

The Chair: Okay.

It doesn't look like there's any more debate, so we'll get right to the bill then.

Shall clause 1 carry?

Mr. Lake.

Mr. Mike Lake: One second.

I just want to get to the officials....

So clause 1 is the clause.

The Chair: There's a clause and then the title, and then we'll be—

Mr. Mike Lake: I do want to go to the officials we have here before we pass the legislation—

The Chair: That's fine, Mr. Lake.

Mr. Mike Lake: —because there was some comment about the regulations. I'm not sure about the interaction of the regulations and the law. In this circumstance, it doesn't really refer to any regulations.

Is there something I'm missing in terms of the impact of this? Where would the existing grounds that we talk about in the bill refer? Would there be somewhere in the regulations that this might—

Ms. Colette Downie (Director General, Marketplace Framework Policy Branch, Department of Industry): Maybe I'll answer that, and perhaps my colleague can expand on my answer.

The regulations that were referred to by Mr. Janigan were pursuant to section 24 of the Competition Act. That section gives the Governor in Council the ability to make regulations with respect to sections 11 to 19 of the Competition Act, that is, with respect to the issuing of subpoena-type orders under section 11 that you've heard about, or the execution of search warrants under section 15. The bill amends section 10 of the Competition Act. So I suspect that it could not be used to set out parameters within which the inquiries under that provision could be conducted.

Do you have anything to add to that?

Mrs. Rhona Einbinder-Miller (Acting Executive Director and Senior General Counsel, Competition Bureau, Legal Services, Department of Industry): That's correct. Parliament is supposed to set out the parameters giving the Governor in Council the power to make regulations under a specific provision. As my colleague pointed out, in section 24 there are powers only in relation to sections 11 through 19 of the Competition Act, and not section 10.

Mr. Mike Lake: Okay. So when we are using the phrase "grounds exist for the making of an inquiry into an entire industry sector", who determines those grounds under this piece of legislation?

Ms. Colette Downie: It would be up to the Commissioner of Competition to determine whether she had sufficient grounds or not.

Mr. Mike Lake: What basis would she have for determining whether she has grounds or not?

Ms. Colette Downie: She'd have to look back at case law and some other statutes.

Maybe you could expand a bit on that, Rhona.

Mrs. Rhona Einbinder-Miller: That's correct. And again, the act should set out those parameters, giving meaning to the words "grounds exist". Currently in the bill as drafted there are no parameters to define and give meaning to the word "grounds".

Mr. Mike Lake: Could you point to where else in the competition law we would have grounds that aren't defined?

Mrs. Rhona Einbinder-Miller: No, there are no situations in the current Competition Act that would give such complete discretion to the Commissioner of Competition.

Mr. Mike Lake: Just to clarify too, when we say "industry", there is no limitation here as to what industry. Basically, this would give the commissioner grounds to launch an investigation of any industry in Canada for any reason that he or she deems necessary.

Mrs. Rhona Einbinder-Miller: That's absolutely correct.

Mr. Mike Lake: It's completely undefined.

Okay. I just want to make sure that we all know what we're voting on here today.

That's enough questions for me.

The Chair: Thank you, Mr. Lake.

Monsieur Cardin.

[*Translation*]

Mr. Serge Cardin: Mr. Chair, in light of everything that has been said, I would be prepared to move on to the vote.

[*English*]

Mr. Mike Lake: Could we have a recorded vote, please?

The Chair: That's fine. We'll call for a recorded vote.

(Clause 1 agreed to [See *Minutes of Proceedings*])

The Chair: Shall the title carry?

● (1245)

Hon. Dan McTeague: By recorded vote?

The Chair: By a recorded vote as well, or do you want—

Mr. Mike Lake: It's the amended Competition Act. I think we're okay.

The Chair: Shall the title carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the bill be adopted?

Mr. Mike Lake: Could we get a recorded vote, please?

(Bill C-452 agreed to [See *Minutes of Proceedings*])

The Chair: Shall I report the bill to the House?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the committee order a reprint of the bill?

Some hon. members: Agreed.

The Chair: I believe that's all the due diligence we have on this.

Hon. Dan McTeague: You may want to make a comment here.

The Chair: Folks, there's no meeting scheduled for Thursday. What is the pleasure of the committee?

An hon. member: Merry Christmas.

Hon. Dan McTeague: Merry Christmas, Chair. I think both vice-chairs concur. We'll leave it in your hands.

The Chair: All right. Merry Christmas. Happy New Year. *Joyeux Noël*.

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