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Chair

Mr. David Sweet

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● (1535)

[*English*]

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

Welcome to the 22nd meeting of the Standing Committee on Industry, Science and Technology. Pursuant to Standing Order 108 (2), we continue our study on the subject matter of clauses 175 to 192, Atlantic Canada Opportunities Agency and Enterprise Cape Breton Corporation; clauses 239 to 241, Telecommunications Act; clauses 317 to 368, amendments relating to international treaties on trademarks; and clauses 369-370, reduction of Governor in Council appointments, of Bill C-31, an act to implement certain provisions of the budget tabled in Parliament on February 11, 2014.

We have with us today, from OpenMedia.ca, Steve Anderson, executive director. We have from the Public Interest Advocacy Centre, John Lawford, executive director and general counsel, and Geoffrey White, counsel. Mr. Lawford's also here for the Consumers' Association of Canada.

Mr. Anderson, could you please go ahead with your opening remarks, and then we'll go on to Mr. Lawford.

Mr. Steve Anderson (Executive Director, OpenMedia.ca): Thanks for the opportunity to present to the committee on Bill C-31.

I'm Steve Anderson, the executive director of OpenMedia.ca. We were founded in 2008. We're a civic engagement organization working to safeguard the open Internet. For those who aren't familiar, OpenMedia.ca is perhaps best known for our Stop The Meter campaign that engaged over half a million Canadians on metered Internet billing, or usage-based billing. It is the largest online campaign in Canadian history. In addition to our civic engagement work, we also regularly participate in policy processes and produce policy reports.

My comments today will be focused on clauses 239 to 241, which pertain to the Telecommunications Act.

I'll start with a little bit of context. Canadians are upset that we pay some of the highest prices in the industrialized world for cellphone service. Canada ranks among the 10 most expensive countries within the OECD in virtually every category, and among the three most expensive countries for several standard data-only plans. We rank near last on pricing, yet Canadian operators rank fourth in the OECD in mobile revenues. Mobile usage is growing everywhere in the world, yet carrier revenue per user is going up only in North America, and particularly in Canada.

Last year OpenMedia.ca released findings in our report “Time for an Upgrade”, which showed Canadians face systemic mistreatment at the hands of the big three cellphone providers. Lack of choice in the marketplace is the cause of our woes. The Competition Bureau examined the wireless market for a CRTC submission earlier this year and found that incumbent wireless providers have significant market power, which they define as “the ability of a firm or firms to profitably maintain prices above competitive levels”.

The mistreatment and high prices persist because we have three large incumbent conglomerates, Bell, Rogers, and Telus, that control over 90% of the market. The big three have achieved this oligarchic level of market power because they control upwards of 85% of the spectrum available for use. Much of that was handed to them for free. Spectrum, of course, is the digital highway in the sky that cellphone providers use to deliver wireless service.

I appreciate that the government and opposition parties recognize these facts and have committed themselves to fixing our broken cellphone market. While there has been some positive movement by the CRTC and government to follow through on these commitments, so far prices have increased. In fact, in March each of the providers increased its rates.

In 2008 in the AWS spectrum auction, the government ensured an influx of new cellphone choices for Canadians by dedicating spectrum to new entrants. However, these new entrants did not get the regulatory support they needed to gain the market penetration required to be sustainable. With Telus recently taking over independent provider Public Mobile, Canadians now have actually less choice than they had one year ago.

I'm going to move to the cap on roaming charges that's within the legislation.

The provisions to cap roaming rates in Bill C-31 are a welcome interim step. The measures in the bill will make it so that the big three providers cannot charge new entrant competitors more for roaming than they charge their own customers. This is a welcome step because, as Industry Minister James Moore said, the big three incumbents now sometimes charge new entrants “more than 10 times what they charge their own customers”. There is no way an independent provider can compete with those terms.

To be clear, we're not talking about directly regulating the roaming rates Canadians pay, but rather the cost that independent cellphone providers pay to utilize the big three's spectrum infrastructure. While the measures in this bill do not directly regulate retail service, they should begin to level the playing field between incumbents and new entrants, and thereby have a modest downstream effect of lowering prices for Canadians. These measures should also increase the chance that independent cellphone providers will survive and remain available for wireless customers.

I initially emphasized this as a positive interim step because, one, the bill takes on only one of many unfair impediments to real cellphone choice, and two, it also simply limits the inflation of costs for new entrants to service Canadians rather than going the full distance to ensure players have the same basic costs of delivering service.

Basing infrastructure costs on retail revenue essentially means the new entrants are paying for the cost of access, plus other factors that play into retail price, such as the cost of advertising, branding and promotion; device subsidy; customer support; retail, legal, and regulatory work; network operations; and much else. While the cap is a useful step in the right direction, new entrants should not, in the longer term, be subsidizing the big three.

To have a true level playing field for cellphone service and innovation, infrastructure must be available at a cost-based rate. Thankfully, the CRTC is also in the process of reviewing roaming agreements. I expect the CRTC will establish cost-based rates for roaming, which they have successfully done to some degree for wireline telecom services. If they do not establish cost-based rates, I'm afraid that it will fall to the government to take additional action on this matter.

I want to highlight, to end here—

Yes?

The Chair: How much longer do you have, because we have two panels and our timelines are pretty tight?

● (1540)

Mr. Steve Anderson: I have a minute left. Does that work?

The Chair: Yes.

Mr. Steve Anderson: I want to highlight that this is a structural issue, the fact that 90% of the market is controlled by three entities. Part of this is that the spectrum made available to new entrants was capped rather than set aside in the most recent auction. Furthermore, Rogers and Shaw have been permitted to sit on new entrant spectrum rather than reauctioning it. The cumulative effects of these developments on access to capital, investment, and customer acquisition for start-ups is significant, leading to what appears to be a cascading effect that has led to the loss of two new entrants.

I'll end by mentioning that we're not just talking about existing new entrants that are having difficulty competing because of these high roaming rates. There are also players like Ting, for example, a company in Toronto that wants to come into the market. It delivers service in the U.S. at very cheap rates, but can't come to Canada because it's being blocked by the big three. So it's not even just the entrants that we have. A range of companies want to start up in Canada, but can't because they're being systemically blocked, and that is—

The Chair: I'm sorry, Mr. Anderson, but that's all the time we have. We're two and a half minutes over.

Mr. Lawford.

Mr. John Lawford (Representative, Consumers' Association of Canada, Executive Director and General Counsel, Public Interest Advocacy Centre) Thank you, Mr. Chair.

Mr. Chair, honourable members, my name is John Lawford, and I'm executive director and general counsel for the Public Interest Advocacy Centre, and I'm appearing today on behalf of both PIAC and the Consumers' Association of Canada. With me is Geoffrey White, counsel to PIAC.

We are pleased to comment on the proposed amendments to the Telecommunications Act to set a maximum amount that a Canadian wireless carrier can charge another Canadian carrier for roaming. Our main message today is that it's necessary and positive to address ongoing challenges to wireless competition, in part through wholesale rate regulations, which part of this bill seeks to do. However, we have four specific points to make about this bill.

First, wholesale roaming rates directly affect the way Canadians select and use their wireless devices, and therefore affect competition. Second, presently high domestic retail roaming rates impair the goal of promoting wireless competition, so we welcome efforts to address that threat. Third, the rate formula in the bill, while a step in the right direction, temporarily passes on the same high prices that incumbents can charge their own customers. Fourth, the amendment is an exceptional occurrence, which should not be repeated as it may undermine the authority of the CRTC.

Geoff.

Mr. Geoffrey White (Counsel, Public Interest Advocacy Centre): On the first point that wholesale roaming fees directly affect the way Canadians select and use their wireless devices and therefore affect retail competition, where unreasonably high wholesale roaming rates, or restrictive terms and conditions are imposed by one carrier on another, these rates are inevitably passed through to consumers as retail charges. Canadian consumers, on their end, are more reluctant to subscribe to carriers if they face significant prices for domestic roaming. Wholesale rate regulation is intended to address this problem.

Our second point is that high roaming rates have been impairing the goal of promoting wireless competition, so we therefore welcome measures to address that threat. As the Commissioner of Competition recently noted, the incumbent service providers have "market power", and that the marketplace is "characterized by other factors that, when combined with high concentration and very high barriers to entry and expansion, create a risk of coordinated interaction in these markets." This has been a real problem in recent years with smaller competitors being charged unreasonable, unsustainable roaming rates that were orders of magnitude higher than the rates the big three charged each other for roaming, and higher than rates that even the smaller competitors could get for roaming in the U.S. from major U.S. carriers.

Rightly so, therefore, the CRTC has just held a public proceeding to determine whether the rates being charged for wholesale roaming are unjustly discriminatory under the Telecommunications Act. In addition, the CRTC is in the midst of another public process to examine other broad issues affecting wireless competition, including tower-sharing and network-sharing agreements.

John.

Mr. John Lawford: Our first point is that the rate formula in the bill, while a step in the right direction towards greater fairness in roaming rates, will pass on the high prices that incumbents can charge their own customers by virtue of their market power.

There are a number of ways that telecom regulators set wholesale rates. What this bill proposes is a simple application of average retail rates to wholesale. Basically the rates being charged to the incumbent's own retail customers become the wholesale rate the competitors will pay so that their customers can roam on incumbents' networks.

This is a rough and ready way to approximate what the going rate is for voice, text, or data, but what it doesn't do and what the CRTC will be doing in an open and public process is assess whether the going rate is fair under the Telecommunications Act, in light of the market power that the incumbents have.

However, we recognize that this may be an acceptable approach in the interim, given the urgency and importance of the issue, as the big three retrench and the remaining competitors struggle or consider whether to even enter the market nationwide.

Our fourth point is that amending the Telecommunications Act before the CRTC has finished its review is not the preferable way to achieve the result being sought. We would have preferred the government to leave the CRTC to pursue its mandate of setting rates and regulating the wireless market. Given the situation described in our first point about the market situation, however, we understand the purpose of the approach and suggest that quick targeted amendments made in the absence of the regulators' full review of issues not become a frequent practice, as it may eventually undermine the authority of the CRTC.

Those are our remarks, Mr. Chair. Thank you.

● (1545)

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

Now we'll go on to our regular rotation. We have four and a half minutes each, in order to stay within the timeframe that we need for the next panel.

Go ahead, Mr. Braid.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you very much, Mr. Chair.

Thank you to our two organizations for being here today and for contributing to our study.

It sounds as if you both agree that it's important that we find ways to deal with the barriers that exist for new entrants to the telecommunications industry. I wanted to ask both of you if you could list the top two or three barriers currently, in your mind, to new entrants in the cellphone marketplace.

Mr. John Lawford: I'll start.

The number one barrier to new entrants is the spectrum acquisition, not having a good result in the spectrum auction, say, for example in the most recent 700 megahertz. The second one is roaming. The third is tower-sharing. There are some other market elements, but those would be our top three.

Mr. Peter Braid: Thank you.

Go ahead, Mr. Anderson.

Mr. Steve Anderson: I agree with John on those.

I also think that phone locking is another issue. The CRTC has put forward its code, which remedies that to some degree, but I think it could use a bit more work.

Mr. Peter Braid: Why is it important to address and remove the barriers to new entrants? What will be the consequences of doing that, Mr. Anderson?

Mr. Steve Anderson: I think if we remove the barriers fully.... One thing I didn't get to is that I think we need to ensure that companies like Ting, the Toronto company, and many others that will come to market can get access to that infrastructure. What the CRTC is doing won't necessarily get us there. I think, if we removed those barriers and had cost-based rates, we'd have a plethora of different alternative providers and the rates would come down. We would see something a little bit closer, while still imperfect, to the wireline market where you have at least a little sector of independent ISPs that keep the pricing in check and have different service plans.

Mr. Peter Braid: That's great.

Mr. Anderson, you describe the cap on roaming rates contained in Bill C-31 as a welcome step. You also explain that it will have positive downstream effects. Could you elaborate on that please?

Mr. Steve Anderson: Sure.

It should enable at least the one or two independent providers that are still in existence to survive and hopefully make it to the end of the CRTC process. It will also give them a bit more flexibility in terms of having less cost that they will have to pass on their customers for roaming. So they should be able to modify their prices slightly, but again we're talking about a tweak here. We're going to need something more fundamental, but we could see some lower prices.

Mr. Peter Braid: Mr. Lawford, you described this as an exceptional occurrence, but it does sound as if you support the measure. Is that correct?

Mr. John Lawford: Yes, that's correct. We do support the measure, but it's because of a lot of barriers and timing issues with getting new entrants the kind of toehold they need, so it's a necessary measure. I add that on the downstream question you gave to Steve, we also see competition coming from new entrants and regionals that would put together a national program with this roaming and therefore could bring down prices across the board.

● (1550)

Mr. Peter Braid: Thank you.

Do I have time for—

The Chair: If you're very quick.

Mr. Peter Braid: I think I'll conclude there.

The Chair: Thank you, Mr. Braid.

[*Translation*]

Mr. Côté, you have five minutes.

Mr. Raymond Côté (Beauport—Limoilou, NDP): Thank you very much, Mr. Chair.

I would like to thank the witnesses for being here today.

The first issue I would like to raise pertains to the conditions in which we are studying this very important issue. The Standing Committee on Finance has asked us to study this issue, but unfortunately, we cannot undertake an in-depth examination separately from the omnibus bill, nor present amendments. This is truly deplorable.

Nonetheless, I thank you for appearing today and sharing your point of view with us.

During the single hour we dedicated to discussing this issue with government officials, and more particularly during the consultations we had outside the committee, it's become clear that this problem is far from being easy to resolve. In the Canadian market, there are disparities in the costs for services offered to consumers. In some provinces, costs are lower. Sometimes, lower costs do not necessarily entail quality service. There are clear examples of this across the world. I would like to hear your comments on this subject.

Could you please tell us about the situation in Canada? What would your priority be? Quality of service or pricing? At the end of the day, are these two aspects compatible on the Canadian market?

[*English*]

Mr. Steve Anderson: I think in terms of having new players and lowering prices, if you look at Saskatchewan or Manitoba, they pay a decent amount less than the rest of the country, and I think that's a good window into having a fourth player. If we enable the range of start-ups, we could have much lower prices.

I don't subscribe to the notion that having more choice will somehow lead to degraded service. I think it could create more incentive and more competition to enable and encourage and incentivize investments in the networks. There are other places in the world where complex factors are at play, but I think if you look at Ireland or France, they certainly have kept up with their networks and they have four or more players in the marketplace.

[*Translation*]

Mr. John Lawford: We completely share Mr. Anderson's point of view.

In the areas with four players, the quality of service is approximately the same, if not superior, as Steve has mentioned. Problems with roaming fees are not necessarily tied to the quality of service received, unless calls are being dropped along the way.

[*English*]

Mr. Geoffrey White: Thank you.

I think I would just add that we're living with the learnings of the 2008 spectrum auction, in which the regulator recognized the need to have these measures to promote competition, and these specific measures were the mandated roaming and the mandated tower-sharing. There was a learning experience with that and realizations that the process didn't necessarily move quick enough to let the new entrants realize their full potential. We did see a positive pricing, though, in the markets where there were the fourth players, in fact, and this isn't just about cost and low cost necessarily. It's about removing the barriers to entry so that these more innovative players and the regionals as well can add that competitive fourth that the incumbents respond to.

So I say the evidence shows that there was better pricing in those fourth markets, and I'll just end with that. When you saw the new entrants enter, you saw them offering unlimited talk and text plans. You saw the big three react with flanker brands and also similar offerings. So that's evidence that it's not just about cost; it's about competitive choices.

● (1555)

[*Translation*]

The Chair: Thank you, Mr. White.

Thank you, Mr. Côté.

[*English*]

Now we'll go on to Madam Bateman, for four and a half minutes, please.

Ms. Joyce Bateman (Winnipeg South Centre, CPC): Thank you very much, Mr. Chair.

Thank you to all of our witnesses. We very much appreciate your being here.

I want to follow up on the comments you've both made with regard to the work currently under way with CRTC and Industry Canada.

But I can't resist giving you the first comment, John Lawford, because your quote from the wireless policy piece that I've picked up here is Canada's wireless policy, which presumably is Industry Canada's wireless policy, "will increase investment in wireless networks and lower prices".

Would you just take a moment to expand on that? That's wonderful news for all of us, and I'd love to hear a little bit more about that.

Mr. John Lawford: Sure. Thank you for the question.

It's long been our position that more competition actually spurs investment because of a need to keep up with, as Geoff mentioned, innovative product offerings, and that the new entrants trying to break into the market now, or the regionals trying to build out, have to be innovative. They have to steal customers from the big three that have holdings as well and wireline phone and Internet and things that they can sell as a bundle. So those companies, to the extent that they enter the market, have to be very innovative, and that leads to really interesting packages, which then make the big three turn around and try to match or top. That causes them to direct more money to investments, less away from shareholder return, and that makes the system better for consumers. That's our view on it.

Ms. Joyce Bateman: Geoff, you made some comments in your remarks.... Forgive me for calling you Geoff. You made some comments in your remarks about the CRTC and what is currently under way and how it's going to change things. Could you expand on that?

Mr. Geoffrey White: Thank you. Yes.

Our point there is that the CRTC has done a fact-finding exercise to look into the issue of what the incumbents are charging the smaller competitors and regional players for this roaming. It's come to light that the incumbents are charging up to 10 times, perhaps more, for this essential service, a functionality for when you leave your home network and travel across Canada.

The CRTC has done two processes, and our comment there is simply that the CRTC is the expert regulator. It has all the facts before it. It's experienced with this sort of wholesale costing and rate setting and referencing. It's a pretty nitty-gritty process, and the bill speaks to this, that the amendments fall away once the CRTC has done its work and comes to a different conclusion.

So that's our point, that this is being studied and we expect the CRTC will arrive at the right outcome.

Ms. Joyce Bateman: Okay.

Maybe, Mr. Anderson, could you expand on your comments about the differential...? You also spoke of positive movement with regard to CRTC and Industry Canada. Your comments about Manitoba and Saskatchewan are particularly of great interest to me, being an MP from Manitoba.

Mr. Steve Anderson: In Manitoba, the services are generally getting more positive reviews and the prices are generally lower.

But I think I would like to insert a little caveat into what John and Geoff were saying in that I think Industry Canada and CRTC are moving in the right direction. These steps are positive, but I think that the key metric we need to look at is whether, at the end of all of this, the big three still control 90% of the market. I'm not sure that this is going to be enough. I would encourage—

● (1600)

Ms. Joyce Bateman: I'm sorry, but can you say that again?

Mr. Steve Anderson: The big three control 90% of the market, and I'm not sure that the measures we're talking about today—or what the CRTC is doing—are going to be bold enough to undo the years of regulatory coddling that have led to this point. So I—

The Chair: Thank you, Mr. Anderson. That's all the time we have.

Thank you, Madam Bateman.

Now we'll go on to Madam Sgro for four and a half minutes.

Hon. Judy Sgro (York West, Lib.): Thank you, Mr. Chair.

To our witnesses, thank you for being here.

You spoke about what you think prevents new entrants from entering the telecom sector, but can you tell us more about what you think we need to do to fix the problem? What does the government of the day need to do? Specifically, do you think the changes mentioned here in Bill C-31 are significantly going to change that and open up the marketplace?

Mr. Steve Anderson: Yes, this is a good segue into what I was just talking about. Personally, I'm skeptical that we've gone far enough with these measures. We'll have to see what the CRTC process leads to.

I think what the government should consider is a policy directive, calling on the CRTC to open the network infrastructure to wholesale and MVNO access also—mobile virtual network operators. This second category is the example I was talking about with regard to Ting. It's that kind of wireless start-up that's delivering service to the U.S. but not Canada that I don't think is necessarily going to be captured by the CRTC process. That's an additional step that I would encourage the government to consider.

Hon. Judy Sgro: Mr. Anderson—just before you answer, Mr. White—do you think doing that, though, opening up the network, will allow more of the small entrants to come in and get started?

Mr. Steve Anderson: Absolutely. I've talked with the people at Ting and with other providers who have said that they have written and actually have asked Bell, Rogers, and Telus if they could come to market. But they've just said, "No, we're not giving you access." So absolutely, there would be a range of service providers.

Hon. Judy Sgro: Mr. White.

Mr. Geoffrey White: Thank you.

I think the question was about whether we think this particular bill is going to solve the problem facing wireless competition and the market power of the incumbents. I think the short answer is no. Our recommendation is that the CRTC process, which is much broader in scope and resides in the expert regulators that have all the facts before them...it's these processes that we think are the proper place to resolve the broader issues.

Also, we don't think a policy direction is necessary. The CRTC has all the tools it needs. We could debate that. We could go into segues on that, but the Telecommunications Act has, under sections 24 and 27, the undue discrimination and just and reasonable rates provisions. The CRTC has these tools already, and that's their basis for going into this.

So again, to recap, no, this isn't a fix to all the problems, but we appreciate it in the interim.

Hon. Judy Sgro: Are these changes being proposed here by the minister eventually going to undermine the role of the CRTC in any way? If you were the chair of the CRTC, what would you think?

Mr. John Lawford: I think the chair of the CRTC has been very sanguine about this and has just said that they will take the bill into consideration, as they should, but that they are going to continue with their hearing.

Listen, it's a difficult situation, I think, to be told that you have what I called in another forum a "peekaboo amendment"—it comes in and it goes out—but the rationale, as I understand it from the government, which fits with what we've been saying today, is that there is a very difficult problem with pricing for roaming, and this bill does seek in the meantime to bring it from where it is up there, down to here. Maybe the rate should well be set somewhere down here, but the government is moving it down in a rapid fashion, because CRTC processes unfortunately do take time, and the new entrants and the regionals need to gain market share quickly.

Hon. Judy Sgro: What else needs to be done when we're talking about opening up the marketplace for more entrants? I have met with a lot of the smaller providers. Clearly they want more opportunity to have spectrum and to seriously be part of the landscape over and above the big three. What else do we need to be doing to make sure we have a system across Canada? What do we need to do over and above what we're specifically talking about today?

The Chair: You have 15 seconds.

Mr. Steve Anderson: I'll add one thing, which would be to give the CRTC monetary penalty powers, because right now if people break these rules we're talking about, there's no financial cost to it.

The Chair: We'll have to stand that answer. Hopefully somebody will answer it in response to some other question when it comes down the line.

Mr. Warawa, you have four and a half minutes.

● (1605)

Mr. Mark Warawa (Langley, CPC): I thank you, Mr. Chair.

I appreciate the question of my colleague, Judy Sgro, and I don't think anybody around this table would think that any one thing, Mr. Chair, would fix the problem. The common theme we've heard and the common comments are that cellphone prices are too high, that we need more competition. No one thing is going to do it, but I think I'm hearing that it's one of a suite of things and that we're heading in the right direction. The fact is Mr. Bruce Cran from the Consumers' Association of Canada, one of your colleagues, Mr. Lawford, said:

> Canadians are paying too much for cellphone service because their market is lacking real competition at the national level....

He went on to say:

> We support the Government of Canada's spectrum policy because it is designed to help introduce this badly needed competition in the Canadian wireless market.

Do you agree with that also?

Mr. John Lawford: Yes, and since I'm here today speaking for Bruce as well, I really do. His point is one I meant to make during our remarks, which is that the roaming amendment will make it possible for regionals and new entrants to offer nationwide plans. That's where you get pricing pressure. Because the big three market nationally, they design their packages nationally. If you have a competitor that can say, "Yes, you can get a phone from us and you can go across this country, just like you have for Bell, Telus, and Rogers", that's where competition is really going to happen. I absolutely agree with that statement.

Mr. Mark Warawa: He also went on to say that, "We are happy that new Industry Minister Moore is staying the course".

Would you agree with that also?

Mr. John Lawford: Yes, I think that Mr. Moore faces quite the vehement opposition to some of the efforts he's made. It takes a lot of effort to change the course of things.

Mr. Mark Warawa: Good. Thank you.

Mr. Anderson, you also were talking about the need for competition and the high cell prices. You said that high cellphone prices are acting as a dead weight on job creation and economic opportunity across the country. I'm sure you stand by that statement and agree with the government that the priority is a strong economy, jobs, a prosperous economy, and competition, and that lower cell rates are very much a part of that.

You're aware that the government has invested millions of dollars in infrastructure and is now creating a more competitive environment where Canadians can pay less. Would you agree that we're on the right track in doing that? We haven't done everything as you pointed out. We can do more, but would you agree we're on the right track?

Mr. Steve Anderson: I think the government is on the right track. However, I would say that the investment in infrastructure that you mentioned was a bit of a letdown. If we're looking at other countries around the world, we should be investing the full proceeds of the wireless spectrum, the $4 billion, into keeping up with the rest of the world, because we're falling behind on speed as well as cost.

We're moving in the right direction, but at this point, considering how important our digital economy is to our overall economy and that business and consumers have affordable prices and the kind of multiplier effect that has, we need to be as bold as we possibly can. We're moving in the right direction, but I'd like to see the government be a little bit more aggressive in these ways.

Mr. Mark Warawa: Do I have any time left?

The Chair: Fifteen seconds....

Mr. Mark Warawa: Would you agree that rates have dropped and that by introducing more competition into the market, rates will continue to drop?

Mr. Steve Anderson: Well, we have less competition now than we had a year ago, but I appreciate the historical and the more recent actions. I think there was kind of an area in between where there was a lack of action. I'm not sure that rates have dropped; I think that's a contested figure. So—

The Chair: I'm sorry. Time is always our enemy.

Mr. Masse, go ahead for four and a half minutes.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair. Thank you witnesses for being here today.

It's worse off today than a year ago. That's the reality of what we have. Tomorrow will be my 12th year here in this place and it will be the 12th time we've gone in a circle, where the government has promised to reduce rates and increase service, yet it's never happened.

One of the things to note though, will this...? Mr. Anderson, you had mentioned systemically blocked barriers. Can you expand on that? Will this bill actually reduce those?

● (1610)

Mr. Steve Anderson: No, it will not. This bill will not address at all that start-up in Toronto I mentioned, and a range of others. I'm skeptical that the CRTC process will go that far.

Mr. Brian Masse: With regard to the CRTC process, and no monetary penalty—and I'll open this to everyone—how significant a barrier is this going to be? How serious are companies going to treat this, when it's like Minister Kenney putting you on the blacklist for temporary foreign workers? There's no real penalty.

How do you think companies will react to this, knowing that the CRTC is toothless at end of the day?

Mr. John Lawford: It'll be interesting to see how it plays out. The very practical effect of the bill, or this section of the bill, if passed, is that immediately there will be an adjustment of rates for roaming, which is one of the big inputs. To be honest, that will have some effect. Whether it's enough for a new entrant or a regional to consider launching a nationwide roaming talk-text plan, say, or a data plan across Canada, will remain to be seen. Then the CRTC will have to decide if a different rate is really necessary to launch that competition.

Mr. Brian Masse: With regard to new entrants, given the volatility of what's taken place over the last several years with this industry, have we poisoned the well a little for new entrants, in that they're feeling a little spooked about making an investment in Canada?

Mr. John Lawford: If I may—and, Steve, you can certainly answer too—the market is so tied up with various factors. With spectrum having to be planned years ahead, and the complications with that, with tower-sharing not working the way Industry Canada I think intended at first, and with roaming only now being fixed, we have a timing problem. The new entrants started five years ago, but they've faced barriers to roaming, tower-sharing, and spectrum acquisition that have made it very difficult. It may be characterized as a failure, but we prefer to view it as a longer-term job than perhaps was first recognized.

Mr. Steve Anderson: I think some investment has definitely been scared off. Not recently, but for a couple of years there was definitely an incoherent approach to government policy in this area. I think that the independent providers were assured they would have the cost-based roaming, the tower-sharing, very quickly, and obviously we're just talking about this now, so it's been quite a while.

On top of that, the spectrum allocation recently, rather than being a bolder and more straightforward set-aside of 40%, which we called for, there was a cap, which is a bit more of a half measure. It's clearer now, but the last couple of years have been not so much.

The Chair: You have one minute.

Mr. Brian Masse: With regard to other examples, you mentioned Ireland. Can both of you highlight a couple of things really quickly that perhaps other countries have done, that would be helpful in this situation?

Mr. Geoffrey White: Thank you.

Other countries and Europe have had far more extensive experience with international and domestic roaming and have gone to a pricing model that's more reflective of cost. That's the message John and I are trying to relay. The fix that's in this bill today just passes on whatever rates the big three can charge, and they can charge quite high rates by virtue of their market power, so we're advocating—and we expect the CRTC process will unfold—a process that's more tied to reality, and that isn't raising the prices of an essential service for Canadians.

Mr. Brian Masse: So essentially we're grandfathering high rates.

The Chair: That's it. I'm sorry.

We'll move on to Mr. Van Kesteren for four and a half minutes, please, sir.

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

Thank you for being here. It's good to see you again.

We've spoken about this quite a bit, John, I think, in the past.

This is a very difficult issue, isn't it? When we think about traditionally how Bell Canada, as you said in your opening remarks, laid out the groundwork across the country, the thinking was that when the company became privatized, when we opened it up, they were able to do that as a monopoly, and as such it really belongs to the people of Canada. Now what we're really doing is we're taking all of that infrastructure and forcing companies to share it. It gets more complex, because these companies now become public companies, and lots of people's pensions, or their investments, go into these companies. It really is a very difficult situation when we try to determine just what is fair and what isn't fair.

On top of that is the geography. We talked about Ireland. Of course, Ireland is probably the size of, I don't know, maybe New Brunswick, with the population of half of Canada. The same thing is true for so many others. They don't have the severe winter. This is a really tough place to do this.

First off, did we make a mistake, or did we lay out the wrong groundwork, when we broke up Bell? Were the rules not put properly into place at that time, and are we just trying to patch it up? Ultimately, if we're going to attract new businesses, they have to be profitable. At the same time, we can't steal profits, legitimate profits, from other companies that have poured shareholders' moneys....

Where's that balance? I guess that's what we're looking at. Can you maybe comment on that?

● (1615)

Mr. John Lawford: I don't think anyone's talking about, with this measure or any other of the policies of the government, expropriating legitimate investments that the companies have made. I believe Bell Canada wanted out of regulation and to become its own private outfit sometime in the seventies and eighties anyway.

The point is this. There's a point where, if wireless rates are too high, you're then retarding the general growth of the Canadian economy. That would be our concern. We're looking at things like OECD reports and other reports that have shown that prices in Canada are high in comparison with the rest of the world, and therefore are probably a drag on the Canadian economy in general.

We're talking about just introducing a measure of competition—this bill is one way to try to get competition working a little faster—and just trying to introduce enough competition to make the prices come down to a level that stimulates the economy and is fair to consumers. If it goes below that, then we believe the CRTC wouldn't let it bottom out at a point where there's confiscation of sunk costs by the incumbents.

Mr. Dave Van Kesteren: How much time do I have left, Chair?

The Chair: A minute....

Mr. Dave Van Kesteren: Thank you.

Perhaps you could expand on the importance of that, because if I think about growth industry and we talk about jobs, the world of telecommunications and wireless will probably have the greatest growth. Why is that important—the changes that we've made—for growth and expansion and the jobs in the industry that would follow?

Mr. John Lawford: I don't have the figures before me, but I think the OECD and others have done studies showing that the GDP does advance more quickly in countries that have more competitive wireless and Internet markets. I think the government's focusing on wireless as part of its overall communications strategy is very smart, because they're seeing that kind of research. But I'm afraid I don't have it in front of me.

Mr. Dave Van Kesteren: Okay. Good.

Thank you.

The Chair: Thank you, Mr. Van Kesteren and Mr. Lawford.

We'll now go to Mr. Angus for four and a half minutes.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you.

It's great that you gentlemen are here.

I think I'd like to put the regional lens on this, because in order for Canada to stay competitive, our regions have to be competitive. Competitive means fibre, it means high speed, and it means competitive phone rates. Looking at all of the numbers we have to deal with in terms of tower-sharing and pole access, the idea in the nineties was that we'd deregulate the market and everything would look out for itself, but it just doesn't seem to be the case. You have to have a player—the referee—who's going to insist that the big guys let in the small players in the regions, because there's no economic case ever for putting in your own infrastructure or having to pay outrageous access fees.

What role do you see the CRTC playing in 2014 in order to assure that in regions we're actually able to bring in some competition?

Mr. John Lawford: Part of the trouble with the regional coverage is that there's often only one carrier out there with towers, and it's often on a less modern network, let's say, so you're running on not even GSM. Sometimes you just get voice in these areas, yet that's where we need it the most.

Now, I would be concerned, as you're saying, that the CRTC process, as we've read it, really gives a lot of concern to that. It may be that we'll need to have other measures and they're not in this bill. They're not in the CRTC process per se. But I follow your issue, because other programs are probably needed to get the networks up to speed to then allow the roaming or sharing, especially in those regions.

I don't know if my colleague wants to add to that.

● (1620)

Mr. Geoffrey White: The CRTC has an important role to play here, and it's on their three-year plan to revisit that basic service objective. This is what allows Canadians in rural, remote, and hard-to-reach places to have the ability to access plain old telephone service and dial-up Internet. But as we all know, dial-up Internet these days isn't really going to cut it anymore, so the CRTC will be looking at that.

That's the kind of role we see the CRTC playing here in figuring out the balance between, admittedly, the need, perhaps, or the ability of only one service provider to get the job done, but also what the standard should be so that all Canadians—who, by the way, are spending on average of $185 a month on their communication service—can afford to actually get the level of service that they need to participate.

Mr. Charlie Angus: I find it interesting, because it's great to talk about outside players coming into Canada—and we're always waiting for the great white saviour of telecommunications that's never shown up—but I'm also looking at the small regional players that want to get into the game and the difficulty they're facing in actually moving into a bigger market.

In my region, Ontera did a lot of infrastructure that there was no business case for, and now the provincial Liberals have sold it off in a fire sale to Bell. I'm talking to smaller players that are very interested in expanding and competing and are saying, "Well, if Ma Bell is now holding all the infrastructure, what possibility is there for us to even try to get competitive and offer an alternative?" There we had a provincially run operation that was servicing regions. If it's all just sold off to the big Bell infrastructure without some regulator in there to say they are going to make sure that these smaller players actually get to the game, we're worse off than we were.

You're saying that you're waiting on the CRTC overview, and they do an excellent job, but do you think they need more power so they can actually.... I mean, there's no business case for Bell to welcome in small competition.

Mr. Steve Anderson: I think it goes back to my earlier point with regard to opening the networks. We've talked to local businesses in communities in several areas across the country. They say that if they had access to that network, they would build the next part and would make sure that our communities could have affordable, fast service. But the problem is that the telecom companies are not providing that access in some cases, while in other cases they're providing it at a very inflated rate, because they don't actually want the competition. They're at the last mile.

That's why, at the end of the day, we need to get to open networks. If the CRTC doesn't get there soon, I think the government is going to need to take action on this.

The Chair: Thank you very much, Mr. Anderson and Mr. Angus.

Now we'll go on to Madam Gallant for four and a half minutes.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman, and through you to our witnesses.

It was mentioned that the full profit from this spectrum auction should be put towards infrastructure. In the past when we've rolled out infrastructure for broadband high-speed Internet, the different territories have been designated and then contracts put to tender for the various areas. Often, we have just one company that will put in an offer to do it. Is there some other model that you would recommend in terms of rolling out the bids for the contracting on the infrastructure?

Mr. Steve Anderson: I like the option that Nordicity has put forward, which is reverse auctions, having a totally open process and letting the bidders put their proposals forward in a more open way without limitations. I think that's one option. Also, I think giving more outreach...because when I talk to first nation communities or rural municipalities, they say they really want money to invest in this infrastructure. There's some sort of disconnect, so I think the terms may need to be looked at more closely, along with some consultation with those communities.

● (1625)

Mr. John Lawford: I believe that in the fall, the CRTC will be looking at a mechanism in this essential services proceeding that Geoff mentioned. The way the CRTC tends to look at this, as they did with high-cost telephone service, is to set up a contribution fund to which you can then apply, and it can be nationwide. We would likely support something like that. So, yes, in certain regions you might only have one provider that wanted to take up that money, but as long as it's designed so it's open to all—and we can get into the nuts and bolts of that—we think that might be a better way to approach your question.

Mrs. Cheryl Gallant: Okay.

It's interesting that you mentioned a contribution fund because what we do have is the deferral fund. Our experience has been, and I have this in my area, where we still have pockets of the geography that do not have the infrastructure for high speed because they're in that shaded area controlled by the company who has access to the deferral account. So they're still holding out. We're matching funds on top of what's already been set aside for them. Would you offer a solution to how we get past this impasse?

Mr. John Lawford: The deferral accounts is a nasty episode in CRTC history. I would hope that the CRTC would design it so that kind of gaming could not take place. It's often a "use it or lose it" kind of rule so that if someone does not get something ruled out in the area they promised, it goes back to tender, if you will. That's one mechanism.

Just keeping on top of them with targets, which I think the CRTC is starting to do now but maybe left for a couple of years, for the deferral accounts is another method. I can probably think of more if I had a little more time, but that's my best answer.

Mrs. Cheryl Gallant: Thank you.

Mr. Steve Anderson: I think the monetary penalties could play a role there as well, penalizing those companies when they don't do bill dates on time or in the right area because that type of thing is happening all over the place.

Mrs. Cheryl Gallant: Thank you.

One other aspect on the roaming fees and your organizations being consumer advocates is that the complaints I receive from consumers are that they can't justify and there's no way for them to validate what the roaming charges or data charges that they receive on their bill actually are. They see the numbers, but there's no way for them to verify that they are correct. Have your organizations encountered this and if so, what have they learned in terms of the verification of these numbers?

The Chair: Go ahead very briefly, please.

Mr. John Lawford: Very briefly, there has been some work done by CRTC in measuring broadband, you know, receipt of packets, which I think will help in the upcoming future. To some extent, consumers also can go to the consumer complaints ombudsman now for telecommunications and say that they don't understand this, it wasn't explained, and therefore they don't think they owe it. Some folks have done that.

But you're right. It's difficult because the consumer, unless they're using a measuring tool on their device, can't really tell if the charges are accurate, but there, we're in the hands of the companies at that point, unless the CRTC sets a rule.

The Chair: Thank you very much, John.

On behalf of the committee, we really appreciate your testimony. I know we only had a limited amount of time today, but I think we had the right questions and right answers.

Colleagues, we're going to suspend for three minutes, and we'll ask the next panel to come in quickly so that we can start with them.

● (1625)

(Pause)

● (1630)

The Chair: Okay, colleagues, we're back in session now.

We have two groups before us as witnesses: the Canadian Bar Association, Janet Fuhrer, second vice-president; and the Intellectual Property Institute of Canada, Mark Eisen, treasurer and past-president, as well as Michel Gérin, executive director.

We'll first go with the Intellectual Property Institute because I understand we're having some copies made now of some remarks from the Canadian Bar Association.

Please go ahead and try to keep your comments to five minutes.

[*Translation*]

Mr. Michel Gérin (Executive Director, Intellectual Property Institute of Canada): Thank you, Mr. Chair.

Good afternoon and thank you for inviting us to appear before you today.

My name is Michel Gérin, and I am Executive Director of the Intellectual Property Institute of Canada. With me today is Mark Eisen, one of our past presidents, who has returned to our board of directors because our former treasurer has just been appointed to the Federal Court.

The Intellectual Property Institute of Canada is the professional association for trademark agents, patent agents and intellectual property attorneys. It has over 1,700 members.

Mr. Eisen will now present our views on this bill.

[*English*]

Mr. Mark Eisen (Treasurer and Past President, Intellectual Property Institute of Canada): Thank you, Michel.

Thanks for the opportunity to speak today.

My background is as a lawyer, called in the province of Ontario in 1985. I am certified by the Law Society of Upper Canada as a specialist in intellectual property. I am a registered patent and trademark agent and have been filing and prosecuting trademark applications in the Canadian trademarks office since 1985.

We've reviewed this bill, and find it contains many positive aspects. A number of them are really quite detailed, and today's time doesn't permit me to review any in detail, but things like correction of obvious errors on the register, simplification of procedures for recording transfers of title, and so on, are all very good things.

I'm here primarily to discuss one large concern, which is abolishing the requirement that a trademark be used before a Canadian trademark registration can be granted. The concern is cluttering the register with deadwood. Primarily, the Intellectual Property Institute believes that more consultation is required and that the amendment should not proceed in a bill such as this without further consultation. However, if the amendments are going to proceed, IPIC recommends that further amendments be introduced to put safeguards in place to avoid cluttering the register with trademarks that are not in use in Canada.

Today a proposed applicant who ends up not using their trademark, and who therefore can't file a declaration of use, abandons their application. Under the proposed amendments, that trademark will be registered.

Why do we care about cluttering the trademark register?

Well, here's what a typical day looks like in my office. A client comes into my office. Their business has a new product they would like to introduce. They've selected one or a few possible trademarks for this product. The trademark they choose will be used in their promotion and in their advertising. It will be used on their packaging. They may acquire a domain name. Ultimately they're going to apply to register this trademark.

Before they do any of these things, this trademark has to be cleared. The first place we go to clear a trademark is to the Canadian trademarks register. We have professional trademark searchers who review similar trademarks in related product areas for anything that might pose a conflict. I get the results of this search, and I determine whether in fact there is a trademark in there that may be confusing. If I render a favourable opinion, the business goes ahead with the trademark. If I say, “Sorry, there's something in there that conflicts”, they go back to the drawing board and have to start again. Sometimes it takes quite a number of these searches before a business can arrive at a trademark that both satisfies their business needs and does not conflict with an existing trademark.

This gives rise to a lot of costs. There's the attendant cost of clearing the trademark, which increases with the number of trademarks on the register. That's fine if we're busy and our economy is flourishing, and all these trademarks are in use. But the proposed amendments, unfortunately, will result in a number of trademarks on the register that are not in use in Canada. In IPIC's view, this puts an unnecessary burden on Canadian businesses seeking to launch new products.

We have proposed three recommendations to reduce or alleviate this problem.

The first, which is in our submission, is to provide a definition of “propose to use”. What does an applicant mean when they say they intend to use this trademark? Does this mean “we might use it someday in Canada”, or does this mean “we have a bona fide intention to use this trademark in Canada in the imminent future”?

The second and related recommendation is just that. The applicant should be declaring their bona fide intention to use this trademark and commit to and put some teeth in what they're actually stating when they say they have that intention to use.

Finally, as a safeguard, post-registration, registrants should be required to periodically file evidence that the trademark is in fact in use in the Canadian marketplace. In the United States, they do this with what's called a section 8 declaration between the fifth and sixth anniversaries and then again at every renewal, at 10-year increments.

Those are our proposals for further implementation of legislation if these provisions are passed.

● (1635)

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

We now go to Ms. Fuhrer for five minutes, please.

Ms. Janet Fuhrer (Second Vice-President, Canadian Bar Association): Mr. Chair, honourable members, we thank you for the invitation to speak with you today.

The Canadian Bar Association is a national association of 37,500 lawyers, notaries, law teachers, and students. Many of our members are in-house counsel who represent significant stakeholders in the intellectual property system. The CBA national intellectual property law section deals with law and practice relating to all aspects of ownership, licensing, and transfer and protection of intellectual property.

Canadian trademark law is respected internationally as effective in protecting the rights of trademark owners. A fundamental requirement of the trademark system is that the trademark be used before its owner will be granted exclusive rights. This has been a cornerstone of Canadian trademarks law since the statute first was enacted in 1868.

The sections of the bill implementing this change—that is, the elimination of a requirement to declare use—include clause 330, which impacts section 16 of the Trade-marks Act regarding entitlement to registration; clause 339, amending section 30 concerning the contents of applications; and clause 345, removing from section 40 the requirement to file a declaration of use. But this is not just about removing a form. Really, these sections deal holistically with the requirement to use, as has been covered by Mr. Eisen.

One of the points we want to make is that elimination of the use requirement is certainly not a prerequisite of the three treaties that are contemplated to be implemented by Bill C-31—the Madrid protocol, the Nice classification, and the Singapore treaty. In fact the Singapore treaty contemplates the maintenance or introduction of a use requirement in jurisdictions that have adopted that treaty.

The proposed amendments will have a negative impact on Canadian businesses in several respects. We have outlined seven in our submission. First, as mentioned by Mr. Eisen, the trademarks register will be cluttered with registrations that no longer reflect market realities—that is, a ground of use and a date, as currently required if a mark has been used. The lack of useful information will make it more difficult to pre-clear marks, as Mr. Eisen has covered. That makes it more difficult to give meaningful advice on, for example, the chance of success by a business in Canada in an infringement or passing-off type of scenario.

Without the requirement to declare use to keep applicants accountable, more trademark opposition proceedings—these are administrative proceedings that can occur in the course of a trademark application—will be required to protect the interests of trademark owners.

There is real potential for trademark squatters or trolls. Industry Canada recently had a consultation about implementing measures to address patent trolls. This legislation, unfortunately, is introducing the possibility of trademark trolls or squatters. Think about domain names and the initiation of the domain name system and all the difficulty that occurred with cybersquatting. It's a very similar scenario here.

While deadwood registrations can be cancelled or removed summarily, under section 45 of the Trade-marks Act, for non-use, this cannot occur until three years after registration. Nothing prevents the owner of the deadwood registration from re-registering the mark, a direct consequence of the check of having to declare use being eliminated.

We believe these amendments create trademark rights “in gross”—that is, a bare or naked right in a trademark no longer cloaked in use. That jeopardizes the effectiveness of the trademark system.

At the same time that Canadian businesses face these increased costs and uncertainties, they also may face increased filing fees, because of the Nice classification system that requires all goods and services to be classified, and more frequent renewals. The initial period of registration in any renewal period is being reduced by one-third, from 15 years to 10 years, as a result of the adoption of the Madrid protocol.

In addition, Canadian businesses may face increased costs from having to re-register or apply to the Federal Court when they cannot correct errors in the certificate of registration that issues within six months. They have to make that correction within six months under this bill. They should have ample opportunity to correct errors made by the Canadian Intellectual Property Office.

● (1640)

Thank you.

The Chair: Madam Fuhrer, that's all the time for your opening remarks.

Colleagues, because we have some business at the end, I'm going to stick with the four and a half minutes so we can finish on time. We have to clear the room because we have business to do in camera.

We'll start now with Mr. Braid.

You have four and a half minutes.

Mr. Peter Braid: Thank you, Mr. Chair.

Thank you, witnesses, for being here today.

I'll start with Ms. Fuhrer from the CBA.

You've outlined your various specific concerns about the sections of the bill. What I didn't hear—at least I don't think I did—was whether or not you support Canada in the adoption of these three treaties, generally speaking.

Ms. Janet Fuhrer: That's a good question. If use were maintained, I think we could live with the adoption.

Let's put it this way. The treaties provide tools, and Madrid in particular, because what Madrid does is provide a mechanism for obtaining an international registration, but it's not really.... It's a bundle of national registrations. That's the way to think of what Madrid does for owners. But really, that benefits owners who want to register in more than two or three countries. It's really not cost effective to do it otherwise.

Most of our clients, for example, look at the U.S. to register and they look at Europe to register, two jurisdictions. Europe has a unitary system, unlike the Madrid system. You can get one registration that covers 28 countries. Under Madrid, really, you're getting national registrations. You have to designate the countries. There are fees. It's a very complex system. Again, it really will be the more sophisticated businesses and owners with larger portfolios that will use it. It's really not of big benefit to smaller companies or businesses.

Mr. Peter Braid: With respect to the declaration of use form, what other countries have this particular form in place? What other countries around the world are using the declaration of use form?

Ms. Janet Fuhrer: The U.S. in particular....

Mr. Peter Braid: In what cases do they use the declaration of use in the U.S.?

Ms. Janet Fuhrer: It's very similar to Canada. Once an application has been allowed, if it was based on intent to use there's a requirement to file a statement of use, and not only a statement of use but specimens. Also, as Mr. Eisen mentioned, between the fifth and sixth anniversaries of registration in the U.S., it's required to file an in-use declaration and specimens again. As well, with every renewal, it's required to file a statement of use or an in-use declaration and specimens.

Mr. Peter Braid: So other than the U.S. there's no country using the declaration of use form. I presume that in those other countries we need to distinguish between the name of a form and the concept of use.

● (1645)

Ms. Janet Fuhrer: That's right.

Mr. Peter Braid: Those are two totally different things, right?

Ms. Janet Fuhrer: That's correct.

The bill does maintain some aspects of use, but I will say this. Many countries, Europe and the European Union included, did away with use, but I am aware that there may be considerations ongoing at the moment to implement again a requirement to use.

Mr. Peter Braid: Certainly my understanding with respect to the provisions in this bill is that it does away with the use of the form. It does not do away with the concept of use and any of the important aspects that come with that, and understanding whether use is actually being applied in the marketplace. That's the key, right?

Ms. Janet Fuhrer: Well, no, not entirely, because what's happening is that registration can be obtained without having to file a declaration of use, yes, but what that does is give someone the right to sue for infringement and passing off. In an infringement scenario, there's no requirement, then, as the act is currently structured, to establish reputation.

So this is what we're giving these trademark squatters, who could be from halfway around the world and with no interest in Canada whatsoever, other than going to businesses and saying, “Okay, I've registered your mark, so if you want it, pay me for it, or if you want to avoid a lawsuit, pay me for that.” These are real risks and real costs that will be faced by Canadian businesses as a result of this change.

The Chair: Thank you very much.

Now we'll go on to Mr. Masse, for four and a half minutes.

Mr. Brian Masse: Thank you.

I thank our witnesses.

Unfortunately, this committee cannot make amendments to the bill. It has to be done at the finance committee, but thank you very much for those specific amendments and what they do.

Did the government consult any of your organizations on this bill prior to doing this?

Ms. Janet Fuhrer: No. Sorry.

Mr. Michel Gérin: They didn't on the content of this bill.

Mr. Brian Masse: That's why you have over 150 lawyers and businesses all up in arms on this issue. If you don't talk to people, then you don't find out the problems.

Do the treaties involved here require us to change our use and the way we've been doing things for about the last 150 years?

Ms. Janet Fuhrer: They don't require the elimination of a requirement to declare use.

Mr. Brian Masse: Okay. So, then the provisions you have would be acceptable to moving forward. I guess the suggestions you're making don't undermine our responsibilities in the treaties. Is that correct?

Ms. Janet Fuhrer: That's right. The suggestion would be to hive off at least these sections, if not the whole division, for greater consultation.

Mr. Brian Masse: Okay.

I understand that with the proposal being made by the government here, the onus will now be put on the trademark company rather than on someone violating the trademark. Can you explain a little bit about that? It seems rather onerous that you would have to prove that somebody else is actually interfering with your trademark, versus the way things are done in the current system, in which there's a little bit more policing involved.

Ms. Janet Fuhrer: That's right. At the moment, there is a lot more policing involved at the examination stage, and that is being eliminated.

Mr. Brian Masse: Okay, let's move to clutter. I understand there are around 40,000 applications in place right now. Some of the testimony in the Senate was about how, with the changes proposed by the government, we'll go from basically 1% or 2% of trademarks being challenged, up to 7% or 8%. Is that the clutter you're worried about, all those extra changes and challenges, which will mean your trademark application will take longer than before?

Ms. Janet Fuhrer: It could, if oppositions are launched. These are third-party oppositions. If a trademark owner has been using their mark for years and maybe, for whatever reason, they didn't get around to registering it, and someone else comes along and scoops it, if the owner is in time, the owner can oppose the registration. We do see that there will be significant increases in opposition proceedings.

Mr. Brian Masse: Okay, so this may require more resources, or it's going to take longer for the application to get through, then.

Ms. Janet Fuhrer: Yes.

Mr. Brian Masse: Okay.

With regard to squatters—and you also mentioned registering domain names—I see that as a significant challenge for businesses, because if that's happening, they can't progress some of their products and brands. How much of a hit to the economy could that be?

Do you have any idea, Mr. Eisen?

● (1650)

Mr. Mark Eisen: Well, it could be fairly significant, I think, if in fact squatters start to see this opportunity and go the way things went with domain names. I think that could actually be very significant, because the onus is thrust upon the person who considers that they rightfully own this trademark to challenge that right. That right can be an existing registration because no use was required to be proved before the registration was granted. So, it may not be a problem six months from now, but I can see that being a significant problem in a short time.

Mr. Brian Masse: Could businesses be delayed from launching products and services because of that?

Mr. Mark Eisen: It could make that more onerous and burdensome. I don't know how much of a delay would be involved, but certainly businesses get back to the drawing board very quickly when they have plans like this that are scuppered by existing trademark registrations.

Mr. Brian Masse: There is a significant problem with domain names. There's somebody fishing to see whether I want to buy brianmasse.something or whatever, and they want $200 to $600 for it, and stuff like that. It becomes a pain.

How much time do I have, Mr. Chair?

The Chair: You have 20 seconds.

Mr. Brian Masse: I'll end it at that, and just say thank you.

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

We now go to Madam Bateman for four and a half minutes.

Ms. Joyce Bateman: Thank you so much, Mr. Chair.

Thank you to all of our witnesses. I very much appreciate you being here.

I'm going to continue with my colleague's line of questioning on the declaration of use form. But first I want you, as lawyers, to give me your opinion. Free legal advice, who knew?

We got some information on amendments related to the international treaties on trademarks for Bill C-31, and one of the comments was that litigation outcomes are determined on actual use of a trademark in the marketplace. In other words, they're not based on filling out a form or not filling out a form. They're based on actual use. Is that correct or is that not correct?

Ms. Janet Fuhrer: That's part of the picture. What can happen is that spurious folks who have no interest in Canada come in. They will not now face a requirement to declare use. They can get registered. They can go and initiate infringement in passing off or—

Ms. Joyce Bateman: So you can sue somebody without actual use in the marketplace?

Ms. Janet Fuhrer: You can. Now, whether you will be successful.... But it can be used as a strategy to extort money from the businesses. Then what the business owner has to do is say, “I know this person hasn't used, but now I have to go to the trouble of expunging that registration or paying them to buy that registration.”

Ms. Joyce Bateman: Okay, but theoretically you're okay with the fact that litigation is generally based on actual use of a trademark in the marketplace.

Ms. Janet Fuhrer: Generally, yes—

Ms. Joyce Bateman: But you can also suck money out of a company with theoretical lawsuits that, in your own words, would not necessarily be successful but would be expensive.

Ms. Janet Fuhrer: Right. Again, we saw this in the domain name world. This was all foreshadowed by the domain name world, where cybersquatters came along and they then used those domain names to extort some legitimate businesses.

Ms. Joyce Bateman: Yes. We had other witnesses on this and we learned from our other witnesses last week about the declaration of use being a document. I just want to follow up on some of your comments. The comment made to us at that point was, the only other country still requiring this document is the Philippines, and the U.S. only requires it for foreigners. Is that—

Ms. Janet Fuhrer: No, that's not correct.

Ms. Joyce Bateman: So the U.S. doesn't only require it for foreigners?

Ms. Janet Fuhrer: No, it's required for domestic, yes.

Ms. Joyce Bateman: So everybody in the U.S. has to fill in a declaration of use.

Ms. Janet Fuhrer: Yes.

Mr. Mark Eisen: To be clear, they have to either state use in the application and provide a specimen showing that mark is used at the time they file or they will have to file a statement of use with that specimen later.

Ms. Janet Fuhrer: Yes.

Ms. Joyce Bateman: Okay, so as long as they state use—

Ms. Janet Fuhrer: And provide a specimen.

Ms. Joyce Bateman: So it's not a little form. But your comments earlier—

Ms. Janet Fuhrer: Well, let's look at it because the systems are very similar at the moment. At the moment for a Canadian trademark application, if the mark has been used, the owner must indicate that it has been used and provide a date of use. The only difference is that we don't provide specimens. We did at one time, but that requirement was eliminated long ago. Or if it's a proposed use application, then when the application is allowed, that's where the applicant is required to declare use.

Ms. Joyce Bateman: Okay.

Because time is so short, I want to go to your other comment. You said, yes, there are lots of people in the international community who don't use it. In fact, some of the information that has been provided to us is that Canada is in fact not at all aligned with the international community, where the form is not required. Do you have any comments on that?

● (1655)

Ms. Janet Fuhrer: Well, again, we understand that some of the international community, including Europe, is rethinking these requirements—

Ms. Joyce Bateman: So these are big communities.

Ms. Janet Fuhrer: Yes, Europe is a big one, and the U.S., our largest trading partner, has this requirement.

Ms. Joyce Bateman: You just said on the record that Europe requires this—

Ms. Janet Fuhrer: No, they're rethinking it. That's my understanding.

Ms. Joyce Bateman: Sorry...?

Ms. Janet Fuhrer: Europe at the moment does not require it, but they're rethinking it, again, because of issues like this, like the trademark squatting, pre-clearing, and the cost, etc.

The Chair: Thank you very much, Madam Fuhrer.

Ms. Joyce Bateman: Okay. Thank you. You made me feel like a lawyer.

The Chair: Now on to Ms. Sgro for four and a half minutes.

Hon. Judy Sgro: Thank you all very much.

While the debate on Bill C-31 has been going on, and of course, Bill C-8, being very similar, the government has insisted that this was going to be good for business, right? But the amount of letters and other things from IP people and lawyers from across this country flagging this issue have been very overwhelming.

Can you tell me a little bit more about this? Since a lot of people seem to think this is going to hurt businesses in Canada, and you have more or less all been alluding to that fact, could you reiterate some of the ways that it's going to affect business in Canada if this goes forward?

Mr. Mark Eisen: We talked about the clutter on the register. I think that's an important one because it takes a lot of trademarks out of circulation, and there are few enough as it is. I think there is a certain amount of upheaval involved in taking a hundred-some years of case law defining trademarks, defining what use is, defining when rights can be exerted, and flushing it down the toilet, because I think that the abolition of the use requirement goes a long way toward doing that. It takes a system that has been entirely use-based, where you could not get a registration in Canada without having use somewhere in the world, to one where simply no use is required at all. I think a lot of the case law that has been developed over the years, which gives us stability in the legal community and as businesses, is really going to be useless after amendments like this. That could only hurt business.

Hon. Judy Sgro: Do you think we could end up with a constitutional challenge as a result of this?

Mr. Mark Eisen: I suppose anybody can challenge anything. I don't know enough about the division of powers to be able to say whether the trade and commerce power that the federal government has is exceeded in any way by this.

Hon. Judy Sgro: In the documentation we received from the law society and so on, they urged the government to do more consultations on this issue. I didn't think we have had enough consultation. I don't remember how long it was we dealt with this, but it was not a very long time for something as significant as Bill C-8. It did, however, certainly for all of us in the committee, show us the number of challenges there are, and the need to have good policy and good law in Canada.

Is the intent of use issue the most significant part that concerns you in Bill C-31 and Bill C-8 when it comes to the trademarks?

Mr. Mark Eisen: That would be my most significant concern.

Ms. Janet Fuhrer: Yes, I agree that it is the most significant. There are others, but it's the most.

Hon. Judy Sgro: What are some others that you're concerned about?

Ms. Janet Fuhrer: Well, I did touch on it a little bit in my remarks: the fact that there's only a six-month window for correcting errors made by CIPO on registrations; the fact that applicants could be facing a class fee not only at the filing of an application but at renewal, for example, which occurs in the U.S. I will say that, at the moment, Canada has a filing fee of $250 for a trademark application and a registration fee of $200, regardless of how many goods or services are covered in an application. In the U.S., the per-class fee is $325 U.S., and they will charge a class fee if you're requesting an extension of time, etc., or filing a renewal application. It's an opportunity for costs to escalate quite a bit for business.

Hon. Judy Sgro: Exactly.

Is there any other comment?

Mr. Mark Eisen: I will add to that point that the Nice classification system is a little bit odd by today's standards. For example, metal garbage cans and plastic garbage cans fall into two different classes. In a system that moves toward a per-class fee, you would end up paying a lot more to cover garbage cans of all types than to cover one or the other. There's not necessarily a sensibility there.

Hon. Judy Sgro: Just so you're aware, we received this from the finance committee, of course. We're holding some of these hearings, but we're not able to recommend some of the changes you're suggesting here at this committee. I would assume you've already been before the finance committee on this issue. If you haven't, maybe you could manage to manoeuvre yourselves an opportunity to go before finance, where they could actually respond to these changes there. We're not in a position to be able to do that.

Thank you.

● (1700)

The Chair: Thank you, Madam Sgro. We're over time.

Now on to Mr. Warawa, for four and a half minutes.

Mr. Mark Warawa: Thank you.

On the point made by Ms. Sgro, I don't think it would be efficient use of anybody's time for the same witnesses to go to multiple committees. That's why they're here. We can make recommended changes. They don't have to go to finance. They're here and we're here to listen to them.

Who is representing the Canadian Bar Association? Thank you.

Ms. Fuhrer, you've said that Europe is rethinking the declaration of use form.

Ms. Janet Fuhrer: That's my understanding. I haven't received any specifics, but I have been informed that is occurring.

Mr. Mark Warawa: Are you indicating that they're going to change the use?

Ms. Janet Fuhrer: You know what? I just don't know what stage they are at in their deliberations about this.

Mr. Mark Warawa: Is it fair to say that they are not using the declaration of use form at this time?

Ms. Janet Fuhrer: At the moment, that's correct, yes.

Mr. Mark Warawa: Is it fair to say that may not change, that they may continue not to use—

Ms. Janet Fuhrer: Yes, that is a possibility as well. Again, it's just my understanding that they are reconsidering.

Mr. Mark Warawa: Okay, and we're talking about the Madrid protocol. That does not require the use of—

Ms. Janet Fuhrer: No, the European Union has its own system, so it is possible to obtain what's called a community trademark registration. That is different from the Madrid filing system.

Mr. Mark Warawa: Great.

The Madrid filing system does not require the use of the declaration of use form.

Ms. Janet Fuhrer: No, that's right.

Mr. Mark Warawa: Okay.

If Bill C-31 were adopted, and finding efficiencies of the use of trademark, would it be fair to say that then we would be in line with the international standards of Europe, in that they do not require the use of the declaration of use form?

Ms. Janet Fuhrer: That's an interesting question because on Madrid all we have is one provision in Bill C-31 that leaves it to the Governor in Council to enact regulations. So we haven't seen anything about how this government is going to implement the Madrid protocol.

Mr. Mark Warawa: How about the Singapore treaty?

Ms. Janet Fuhrer: The Singapore treaty, there are lots of provisions in both Bill C-8 and Bill C-31 that deal with the Singapore treaty. The Singapore treaty is all about harmonizing procedural requirements for filing trademark applications.

Mr. Mark Warawa: So you've said that the other countries that require the use of the declaration of use form are the United States—

Ms. Janet Fuhrer: Yes.

Mr. Mark Warawa: —and Canada. So if Canada was to adopt that change, then we would be in sync with everybody but the U.S. Is that correct?

Ms. Janet Fuhrer: Essentially.

Mr. Mark Warawa: What I have heard is that the U.S. envies Canada's opportunity to make the changes that jurisdictionally they cannot change. We as Canada have the opportunity to make those changes and be in sync with the rest of the world. That's what I've heard. Have you heard that?

Ms. Janet Fuhrer: I haven't heard that, sorry.

Mr. Mark Warawa: There you go.

What's the cost for the average business for a trademark application? Do you know what the average cost would be?

Ms. Janet Fuhrer: It depends. It depends first if the business is represented by an agent or a law firm. It depends on—

Mr. Mark Warawa: What kind of time do I have, Chair?

The Chair: You have 45 seconds.

Mr. Mark Warawa: Okay. So what are the fees—

Ms. Janet Fuhrer: The official fees—

Mr. Mark Warawa: —of the CIPO? Is that $450?

Ms. Janet Fuhrer: It's $250 for the application fee. There's a $200 registration fee. There are fees for requesting extensions of time to file declarations of use of $125—

● (1705)

Mr. Mark Warawa: Sorry for interrupting, but anything above that is the legal fees that would be charged for that declaration of use form and that would be a direct benefit to the legal community that's doing that work, that bureaucratic work. Is that fair?

Ms. Janet Fuhrer: The fees attached to a declaration of use are so minimal, really, in contrast to what businesses are going to face in terms of litigation, opposition, etc.

Mr. Mark Warawa: You can face litigation on either side.

The Chair: Thank you very much, Mr. Warawa, and Madam Fuhrer.

Now on to Monsieur Côté.

[*Translation*]

Mr. Raymond Côté: Thank you very much, Mr. Chairman.

The Chair: You have four and a half minutes.

Mr. Raymond Côté: Thank you.

I will put these four and a half minutes to good use by beginning with the fact that it is quite difficult to do such work on the back of an envelope, as the government wishes, when these clauses we are studying should have been the subject of a distinct bill rather than being buried in an omnibus bill.

Nonetheless, I thank our witnesses for being here today and sharing their expertise with us as to the repercussions of these changes.

I would like to take advantage of this opportunity to mention a business that is located in my riding of Beauport—Limoilou, that being les Éditions Gladius inc., whose business model greatly depends on the brands it can register. This is an intellectual property issue.

You mentioned a possible increase in trademark litigation. Are certain types of businesses more affected than others?

[*English*]

Mr. Mark Eisen: If I understand the question, you're asking whether there are certain types of businesses that are more dependent upon their trademarks. There certainly are. A franchise, for example, would be a business that is very heavily dependent on trademarks. There would be certain types of Canadian businesses that would rely heavily on a trademark as an asset of the business and depreciation of that asset could have a substantial effect on the business.

Ms. Janet Fuhrer: I would just add that really almost every business has trademarks to some degree. Retail businesses tend to have a lot of them and so if I'm answering a little bit more directly, I would say retail businesses feel probably the greatest impact from this.

[*Translation*]

Mr. Raymond Côté: I was talking about a manufacturer of games that I visited. Not only are original products being developed there, but the company also manufactures them itself. In the manufacturing sector, are there similar examples of companies who develop original products, companies that could be especially affected?

[*English*]

Mr. Mark Eisen: I would think it would be large institutional businesses that sell multiple consumer products. That's the first thing that comes to mind. I'm not going to mention any specifically by name, but businesses that sell household detergents to diapers, businesses that sell stereo headsets to television sets and so on.

[*Translation*]

Mr. Raymond Côté: I would like to move to another issue. I would like to get into the details of how trademarks are used. I have to tell you that we have really gone after the government officials on this, albeit in a respectful way.

With the changes that are been proposed, how can we be sure of the date when a trademark is first used if there is no registration certificate? What possibilities do businesses have to take action in that respect?

[*English*]

Mr. Mark Eisen: Just to make sure I understand, again, you're saying that, if somebody registers a trademark without having used it and it turns out there is a business that has used that trademark, there are measures in the Trade-marks Act itself, including having to resort to the Federal Court, assuming they missed the opposition period, which would occur before the registration is granted. Anyone who has prior use of that trademark is the first adopter and has the right to prevent the use and registration by a third party.

[*Translation*]

Mr. Raymond Côté: If the registration were to be cancelled, there might potentially be long and costly litigation to determine use or at least to protect the trademark.

I am talking about legislative changes that are being proposed and that may come in the future.

[*English*]

Ms. Janet Fuhrer: Yes, that certainly is a real risk.

The Chair: Thank you, Mr. Côté.

Now we'll go on to Mr. Van Kesteren for four and a half minutes.

Mr. Dave Van Kesteren: Thank you all for coming here this afternoon and discussing this important part of the budget implementation.

Ms. Fuhrer, I'm curious that it's not discussed in your circles, the point that Mr. Warawa was making in regard to the United States and why they are regulated and have to go through the declaration. I'm certainly not going to lecture you. You have much more knowledge in international law than I do, but it is a fact that the way their constitution is set up, between the states.... You know, we talk about problems we have with trade amongst ours, and well, apparently they have this little issue as well. True to what Mr. Warawa was saying, they find this cumbersome as well.

Now I understand your concerns, and I think as a lawyer I perfectly understand that you want to protect your client, but do you see the need for changes that are being made as an overall playing-out into the new international trade? The horse has left the barn; this is the way the world is going. Can you maybe have some sympathy with the government for moving along with international regulations?

● (1710)

Ms. Janet Fuhrer: I have some understanding of why the government is doing what it's doing. I've practised long enough, been involved with liaison committees with the Canadian Intellectual Property Office, etc., attended meetings where representatives of government have been present at the World Intellectual Property Organization, for example, so I do have some understanding of where the government is coming from on this.

Mr. Dave Van Kesteren: Now, maybe again I'm talking to the wrong forum because your role is strictly to protect your client, but are you finding a lot of your clients contact you saying, “Gee, I really think the government is making a mistake. Please, on our behalf, would you advocate for us to change this provision?”

Ms. Janet Fuhrer: No, and I say no because, for most of our clients—and I am in private practice—where they look to next after Canada to protect their marks is the United States.

Mr. Dave Van Kesteren: Yes and I said that as a preamble, too. That's not your role; that would probably be another role.

With the Intellectual Property Institute of Canada, are you hearing any murmur amongst the corporations and the businesses that this is a mistake, this provision that we're introducing into the bill?

Mr. Mark Eisen: I have not. I wouldn't necessarily attribute anything to that. It's happened very quickly and I'm not sure that news of this has filtered out, and if it has, whether there's a complete understanding on the businesses' side of what it actually means. But I have not heard murmurs or rumours of that nature.

Mr. Dave Van Kesteren: Mr. Chair, that's the only question I wanted to ask.

The Chair: All right. Thank you very much, Mr. Van Kesteren.

I'm sorry, I can't see—

Ms. Annick Papillon (Québec, NDP): Ms. Butterfly.

Voices: Oh, oh!

The Chair: Madame Papillon, I'm sorry, it's the first time you've been in this committee. I have a hard time remembering all of my caucus's names, so....

Please, you have four and a half minutes.

[*Translation*]

Ms. Annick Papillon: Thank you, Mr. Chairman.

Mr. Gérin, I was listening to your remarks. Intellectual property is certainly something of concern to my riding in Quebec, where certain industries have a strong interest in this.

Do you have any information about cultural industries? Quebec City is first and foremost a major cultural city with a great deal of artistic activity and many cultural performances. So people pay very close attention to intellectual property and all the bills and anything else proposed by the government because those provisions have a concrete impact. Could you give me any information about the sector that might be affected?

There is also the IT sector. The video game industry is experiencing an unprecedented boom in Quebec City, and, as was confirmed to me recently, it has a considerable market share.

Would you be able to tell us how the government's current proposal might affect those industries in particular?

Mr. Michel Gérin: The current proposal might affect those industries as well as others. When you talk about the cultural sector, copyright issues might have more of a direct impact,which is not the subject of Bill C-31. As for video products and so on, they would be affected more by patent issues.

However, to the extent that all of those businesses, whether they are working in the video field or cultural activities, have trademarks or wish to apply for them, they will be affected in the same way as other businesses.

● (1715)

Ms. Annick Papillon: I would like to take this opportunity to ask you something about public consultations.

The current government is somewhat allergic to public consultations, even though they can be so beneficial. The more people who are consulted from these fields, the more voices we will hear from. It may be that not all of the ideas expressed are good ones, and maybe some of them will turn out to be far-fetched, but certain ideas that come from experts involved in these areas could be helpful to the process.

Could public consultations have been beneficial in this case in improving the current proposal? If so, could you please tell us what you think could have been most helpful for us, as legislators?

Mr. Michel Gérin: I would like to be clear about the issue of consultations, since you have probably received this information. In 2010, the government held consultations on the issue of treaties. I am not sure how broad those consultations were. As other witnesses have said, the treaties contained both positive and negative aspects.

With respect to the issue of use that is currently the focus, the recommendation to the government was that there be more discussion. We did not have enough information at the time to be able to take a position. We felt that more discussion was needed, but that did not happen. In November, there was a very brief consultation. It was very limited and dealt only with certain aspects. It did not deal with the overall set of provisions we are seeing today.

So yes, I think that more consultation would have been helpful. As Mr. Eisen mentioned, businesses could have had the opportunity to express their views about the changes being proposed now.

Ms. Annick Papillon: Should we not take that comment seriously today? I will let you continue on that point.

Should we not acknowledge that, and no longer do public consultations in the way that I have too often seen them done? The government tends to choose someone and ask about certain specific points. But I do not have the impression that there is any genuine exchange of ideas. There is no real dialogue, as should be the case in a consultation process. Moreover, the consultation needs to be public.

Sometimes it seems to me that the government has only consulted two or three people and has only told them what the government is intending to do, without necessarily taking into account aspects that might create problems.

I will let Ms. Fuhrer speak to that.

[*English*]

The Chair: That will have to stand as a statement, Madame Papillon. We're well over time.

Ms. Annick Papillon: Sure, that's okay.

The Chair: Madam Gallant, now, for four and a half minutes.

Mrs. Cheryl Gallant: Thank you.

First of all, I'd like to ask the witnesses whether or not they are opposed to the Canadian government joining the treaties. It's supposed to ease the process for foreign applicants to register their trademarks within Canada, giving consumers more choice. Is everyone consistently in agreement with that?

Mr. Mark Eisen: Whatever the benefit may be, IPIC is not opposed to adopting the treaties per se.

Mrs. Cheryl Gallant: So now with the Internet and what's available online, if you go to the website for trademarks, Canadian Intellectual Property Office—www.cipo.ic.gc.ca—it really provides a step-by-step way of searching trademarks and applying for one. It really makes it look like somebody who is starting up a small business with an idea in mind and a trademark in mind can actually go through the process themselves.

So I would like you to tell me why going through the process online would be insufficient, if all of the steps are followed on the part of an applicant.

Ms. Janet Fuhrer: Yes. If I may, first, it's the database. It's okay for finding the exact market interest. It will not necessarily locate phonetic similarities, marks that have a similar idea or connotation, all of which can prevent the registration of a trademark. So that's a difficulty with the current database. So a company comes along, it wants to register XYZ. Someone may have XYZA. That search won't necessarily locate XYZA, and XYZA might oppose...XYZA might be cited. So this owner who's done his or her own search could be facing these obstacles to registration and have gone a significant way down the road in terms of cost and trying to develop this XYZ brand, but not be able to do anything with it in the end. So that's a risk of....

There are lots of other issues as well. Describing goods and services; there are some tools online, but there's a lot of case law around what's an acceptable description of a good or what's an acceptable description of a service.

● (1720)

Mr. Mark Eisen: Yes, there are two issues there. Issue number one, is XYZ actually confusing with XYZA? There are many factors that the professional looks at in determining that. The other is the nuances, as Ms. Fuhrer was suggesting, of doing actual searching. I've been practising for over 30 years and I don't do trademark searching. I have a professional trademark searcher who does all of my searches for me because I would not hazard a guess at how that could be done comprehensively by someone just walking up to a computer and searching. So I actually have a searcher who lives here in the Ottawa area, who does all of my trademark searching.

Mrs. Cheryl Gallant: Mr. Gérin, did you...?

Mr. Michel Gérin: I don't practice so I'd rather leave it to them.

Mrs. Cheryl Gallant: Do lawyers who practice in this area receive updates on a regular basis of what is new to the trademark database? Or is that again something that you farm out to someone who is doing that day in, day out, looking at the database?

Ms. Janet Fuhrer: There is a *Trade-marks Journal* that's electronic now. It's a weekly electronic publication where any approved application is advertised. So that happens once a week and there are updates. So the commercial searchers all get these updates from the Intellectual Property Office so that they can conduct their searches.

Mrs. Cheryl Gallant: Each time you help a client with an application, a brand new search has to be done just in case there's been something added to the database, which you may have searched with the exact same genre previously, just to double-check.

Mr. Mark Eisen: The reliability of that previous search goes down as time passes. So whether you draw the line at two months or four months, by six months you're doing a different search.

Ms. Janet Fuhrer: The other complication, too, is that there's something called the Paris convention, which Canada already belongs to, as does most of the world. So an application could be filed in a foreign country like the U.S., and that applicant has six months to file in Canada and have the Canadian application treated as though it had been filed on the same date as the U.S. application. So I do my search at three months and I won't find that U.S. company because that person won't have filed or may not have filed yet in Canada.

The Chair: Thank you very much, Madam Gallant.

Thank you very much for your testimony.

Because everybody was so efficient, I now have this luxury of asking a question.

Because of the kind of questioning that was going on, there were a couple of things that I got confused about. I did quite a bit of research on this. Regarding the other countries that are party to these treaties, do you have any specific evidence that there was a vast growth in trademark trolls?

Mr. Mark Eisen: I do not.

Michel, are you aware of any?

Mr. Michel Gérin: No.

The Chair: Okay.

I was under the impression that the declaration of use is not really used evidentially in courts. It's really not even used by the governments. It's filed and that's it. Is that not the case?

Mr. Mark Eisen: That's true, but it's used by practitioners who, when searching a mark and noting that a declaration of use was filed recently, will suspect that the mark may still be in use in Canada and suggest to a client that this is not one to challenge. It's not used by the courts. It is, however, used by professionals.

The Chair: But it is one of many ways of checking for trademarks out there, right, a vast array of them?

Mr. Mark Eisen: Yes. It is one of the many tools.

The Chair: Yes.

Ms. Janet Fuhrer: If I may add to that, though, again, at the moment, if a trademark has been used already—and a good number of them are before someone files an application—there is a requirement to state that in the application itself. It also technically is a declaration, but it can be stated in the application that use has occurred and a date of use can be provided. That's all useful information when trying to clear marks.

● (1725)

The Chair: Thank you.

On behalf of the committee, I thank you very much, witnesses, for your testimony today.

Colleagues, in our transition, try to only take two minutes of shaking hands, etc. We need to go in camera for some quick business.

[*Proceedings continue in camera*]

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