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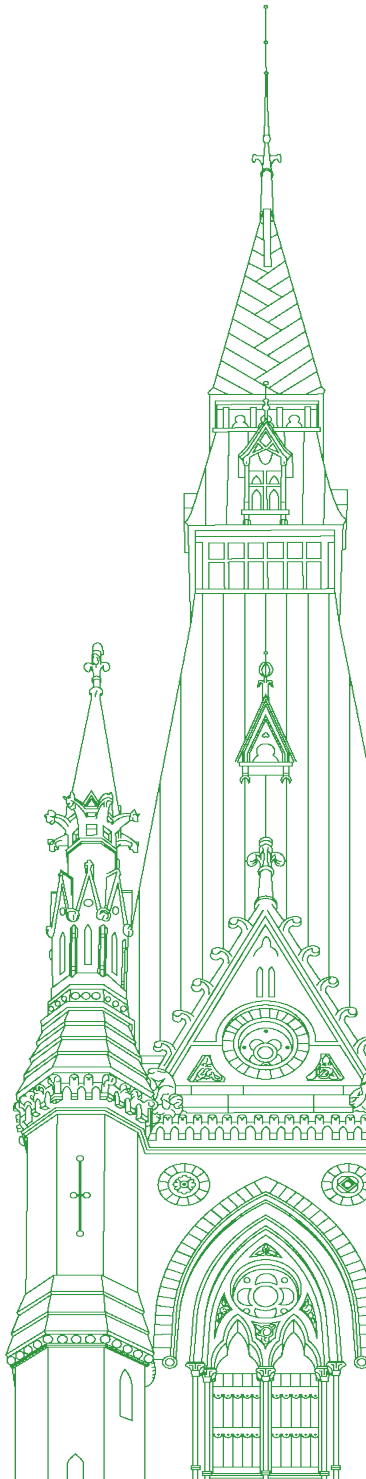

Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Friday, May 20, 2022

● (1325)

[*Translation*]

The Chair (Mr. Joël Lightbound (Louis-Hébert, Lib.)): I call this meeting to order.

Good afternoon.

Welcome to meeting number 25 of the House of Commons Standing Committee on Industry and Technology.

Pursuant to Standing Order 108(2) and the motion adopted by the committee on Friday, May 13, 2022, the committee is meeting to study the subject matter of part 5, divisions 15, 16 and 17 of Bill C-19, budget implementation act, 2022, No. 1.

Today's meeting is taking place in a hybrid format, pursuant to the House order of Thursday, November 25, 2021. Members are attending in person in the room and remotely using the Zoom application. Those who are here, in Ottawa, know the health rules in effect. Please act accordingly.

I am pleased to introduce our witnesses for today's committee meeting.

First, I'd like to apologize to the witnesses and thank them for their patience. A vote delayed the start of this meeting, and that somewhat shortens the time we'll have for the meeting today, because we must end at three o'clock exactly. I thank you for your patience and co-operation.

As an individual, we again have Ms. Vass Bednar, executive director of the master of public policy in digital society program at McMaster University. In Ottawa, we have Ms. Jennifer Quaid, associate professor and vice-dean of research in the civil law section of the faculty of law at the University of Ottawa. We also have Mr. William Wu, partner, competition, antitrust and foreign investment at McMillan LLP.

From the C.D. Howe Institute, we have Mr. Benjamin Dachis, associate vice-president, public affairs. From the Canadian Bar Association, we have Ms. Elisa Kearney, second vice-chair, competition law and foreign investment review section, and Mr. Dominic Thérien, secretary, competition law and foreign investment review section. Finally, from Unifor, we have Ms. Kaylie Tiessen, national representative, research department.

I thank all the witnesses for being with us.

Ms. Bednar, you now have the floor for five minutes.

[*English*]

Ms. Vass Bednar (Executive Director, Master of Public Policy in Digital Society Program, McMaster University, As an Individual): Thank you.

In addition to my leadership role at McMaster University, I'm one of the country's most vocal advocates for competition reform. I've contributed in modest but meaningful ways to the policy attention to these questions through opinion editorials in The Globe and Mail, the National Post, research published by McGill University and commissioned by ISED, various podcast interviews, and my newsletter “Regs To Riches”.

I think I'm back here to discuss the BIA with you because people are squirming. I don't mean “the people”. I mean corporate interests that have long benefited from the policy inertia on competition. The usual suspects have lost their monopoly on this conversation, which has meant that decision-makers like you are asking really important questions, like how we can promote more dynamic and fair markets. This is a good thing.

It's good because an Ipsos poll from earlier this year illuminated that most Canadians, 88%, say that we need more competition and that it's too easy for big business to take advantage of them as consumers. To me, this kind of last-minute, short-notice INDU meeting on a Friday before a long weekend feels kind of like a perfect example of just that—big business moving to skew a policy process that should be a no-brainer.

The initial amendments to the Competition Act that are currently contained in the BIA are a crucial down payment on competition reform. In this way they are, unfortunately, also a bit of a test. They are a test of whether Canada takes competition reform seriously. For way too long, we quite simply have not.

If you look at the available data, prices tend to go up after mergers, despite what companies claim before the merger occurs. The Washington Centre for Equitable Growth recently put together a searchable database of about 150 economic papers. A lot of these papers show empirical evidence that the permissive approach of authorities in the U.S. has led to higher prices and less competition.

Comparable Canadian research just doesn't exist, but there's so much that Canada should be learning from other jurisdictions. This extends beyond policy ideas, implementation and inspiration to a caution about the insane amount of lobbying dollars that are spent—usually by the largest technology firms—to stall antitrust policy change. A popular company tactic is the whitewashing of their perspectives through otherwise reputable think tanks and academics, or even the creation of shell organizations that are designed to resemble authentic grassroots interventions, like Meta's American Edge, or Amazon and Google's Connected Commerce Council.

Let's go back to the question of whether these initial amendments require further study or whether they should be retained. The challenge of wage-fixing has already been deeply explored through the good work of this committee. A range of stakeholders are in agreement that it must be addressed. Do we need to study whether the proposed AMPs are just too strong a punishment or a deterrent? Well, there's a whole body of literature that looks at the deterrent effects of fines in competition law and it supports what's in the BIA. Do we need to debate whether drip pricing has any utility for consumers that get tricked about what the actual retail price is for something by this deceptive marketing tactic?

These proposed changes are the absolute lowest hanging fruit. We shouldn't be examining them further at this point, because they clearly serve the public interest at a time when Canadians are under intense economic pressure. They'll improve the enforcement of the act. They were clearly foreshadowed in a February press release from the minister, they're aligned with analysis from the Competition Bureau and they've been discussed at length in the public domain, including at this very committee. Let's keep these encouraging, overdue amendments in the BIA. You must signal to Canadians that leaders in Ottawa will actually protect them and create the conditions for innovation and entrepreneurship.

Should they be studied further? Yes. We can study their implementation. We can debate the mechanics of that implementation, and we should support more research into the dynamics of competition in Canada, because we obviously need it. We don't need any more backroom baseball or tapping the brakes on reform.

You've heard from some respondents that having amendments contained in the budget bill is anti-democratic. Yes, budget omnibus bills are imperfect democratic tools, but there is an opportunity to better protect Canadians as they face the rising cost of living today.

Can we have more discussion about the nuances of these changes? Yes, and we will. Should we drop them altogether right now? No way. It is impossible to justify the status quo on competition in Canada, yet it persists.

The stakeholders that are agitating behind the scenes can go on the record with their concerns when the government launches a broad, open, inclusive and independent consultation on competition later this year. Such a consultation has been foreshadowed and endorsed by the godfathers of competition in Canada, like Senator Howard Wetston, Lawson Hunter and others.

At that time, those private actors who opposed these promising amendments—these early changes, this down payment—can step forward, instead of hiding behind their lawyers or lobbying behind the scenes. They can go on the record with their rationale for why we don't need these changes and convince Canadians. They can convince Canadians that there are instances where wage-fixing while the cost of living for Canadians rises is perfectly acceptable. They can come and convince Canadians that the AMPs proportional to the size of an offender are just too strong a deterrent. They can come and explain to Canadians why it's okay to hide the real prices from people when they're shopping online.

● (1330)

That is democracy, and that is what we need to improve Canada's competition laws.

Thank you.

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

I'll now move to Professor Quaid for five minutes.

[*Translation*]

Dr. Jennifer Quaid (Associate Professor and Vice-Dean Research, Civil Law Section, Faculty of Law, University of Ottawa, As an Individual): Mr. Chair and honourable members of the committee, I'm pleased to appear before you once again.

Last week, we had very good discussions on the amendments to the Competition Act as part of your study on small and medium-sized enterprises. I'm pleased today to be able to continue the discussion of the amendments in a broader context.

I'd also like to note that the panel of witnesses you have brought together, most of whom I know personally or by reputation, is impressive. They will all surely give very informative and thought-provoking comments.

For those who don't know me, my name is Jennifer Quaid. I'm an associate professor and vice-dean of research in the civil law section at the University of Ottawa. My areas of expertise primarily lie where business law and criminal law intersect: business criminal law, competition law, anti-corruption law and economic crimes, business law and general criminal law.

[*English*]

I will not repeat my remarks of last week, in which I lamented the use of a budget bill to enact substantive changes to the Competition Act. My views have not changed on this. Using a BIA as a fast track for amendments, however well intentioned, is a practice that has gotten out of hand. It undermines the legitimacy of the provisions that are enacted in this way, because there is no time for debate on the merits, even where there is agreement, and there is no opportunity for scrutiny and constructive comments to ensure that the provisions work as intended.

I alluded to it last week. I won't go into detail now, because we're late and short of time, but an example is the enactment of part XXII.1 of the Criminal Code, which was enacted in haste, a substantive change to the criminal law. We are reaping what we sow, because we saw arguments in court last week that suggest that, contrary to the intentions, there were arguments made that were completely different. I think we need to be careful about rushed amendments.

However, I want to be practical today. The focus of my remarks today will be on how to move forward in the less-than-optimal conditions we find ourselves in. I have taken to heart some advice that was provided to me by a colleague when I was writing my doctoral dissertation: “Beware, better is the enemy of good.”

● (1335)

[*Translation*]

I'll review the content of the proposed amendments to highlight what's good, although these amendments could have been better with more time and consultation. Clearly, I'm sharing thoughts with you that have been developed over an intensive period. Indeed, you've made us work quite hard in recent weeks. I may change my opinions, or my thoughts may evolve over time.

Of the eight proposed amendments, only one is not good. I want to stress that. It's the provision that would add an offence related to fixing salaries, found in proposed new subsection 45(1.1) of the Competition Act. We can discuss it. I have a lot to say on the matter. I find that there are a lot of problems, both in principle—is it the solution to the problems in question?— and in execution, or the wording of the provision. It merits considerably more study.

Apart from that, I find that the amendments, although not perfect, can be adopted without any major problems.

[*English*]

I would add that in almost all these cases, the amendments, though they are imperfect, could be, let's say, complemented by advice from the bureau and publication of enforcement guidelines. I really hope that this is forthcoming quickly, because some of these changes will need support.

I'm going to go very quickly and provide one line on every amendment, but of course, I'm happy to discuss them in detail later.

On the increase to the fine under section 45, at the discretion of the court, this brings the fine under section 45 in line with the other serious provisions in the act, sections 46, 47 and 52, but I caution this committee that there is a serious escalation of the penalties for the criminal provisions of the act, and I think that merits consideration in round two. It looks elegant and symmetrical, but it's hiding a bigger problem.

The next thing is the changes to the AMPs. There's been a lot of debate about that. My friends at the CBA will have a lot more to say about that. Let's say that I think we need to focus on the key thing here, which is that the additions are in relation to cases where we go above the maximum. I think that frames a little bit our concerns to really focus on the cases where we would be above those maximums. We're not talking about SMEs; we're not talking about small businesses. We're talking about larger businesses. We're talking about the Facebooks of this world. I think we need to put that into context.

I acknowledge there are some things we can debate, like the metrics.

In terms of drip pricing, yes, there are some things that could have been better done, but at the end of the day, the bureau already enforces against drip pricing; this is just being more specific. I think we can leave room for modification or tinkering. I think there is some stuff that will need to be looked at, but I also think that bureau enforcement advice might help get us through the period before we can modify the provision to our satisfaction.

There are new factors that have been added to the abuse of dominance, merger and civil collaboration regimes in terms of referring to elements of the digital economy like consumer privacy, referring indirectly to nascent competitors and so forth. The language is a little more precise than I'm making it right now. I don't think there's really any problem with that. The bureau is probably already taking into account those provisions through the basket clauses that are provided in each of those sections, and all we're doing is being more transparent about it.

Again, is this the last word? I doubt it. In fact, I think at the consultation we're probably going to have a substantial discussion about whether we need to restructure some of these analytical frameworks, but in the short term, I don't think this is a big deal. Other countries are also taking into account these factors.

I'll be going super fast. In terms of the private right of action, I hear my friends who are concerned that this could be used as a way for unsatisfied competitors to maybe not entirely meritoriously target dominant firms. I'm not sure I share their concerns, and I would be interested to know what kind of evidence suggests that this is really a problem. My greater concern is that a private right of action cannot be viewed as something that diminishes the role of the commissioner, because the commissioner still has an important role here. This is not a savings in enforcement; it's a complement.

On the modifications to the abuse of dominance provisions, I think these were proposed by Professor Iacobucci, who is very cautious about modifying the act, but he thinks there's a gap, and I tend to agree with him. Again, it's not perfect, and maybe we're going to restructure abuse of dominance completely differently after the consultation, but for now I'm not sure this is going to create a huge problem in the short term, as cases on abuse of dominance take time to bring together and analyze.

On the general anti-avoidance and the revisions to section 11, these were both requests by the commissioner, and I think we need to keep in mind that.... I can't substitute my judgment for what they think is necessary. Maybe this committee can ask them for further details and examples to give a dimension to the problem. Is there an anti-avoidance problem? I can't comment factually about whether this is an overreach or whether this is going to be a problem. I'm sure my friends from the CBA will have more to say on that.

I want to conclude—and I know I'm over time—by saying that this is step one. I'm trying to be practical and give you suggestions for how to get to step two, which is the really important game. We need this consultation; we need the substantive analysis.

● (1340)

[*Translation*]

I can't stress enough the importance of holding as broad of a consultation as possible.

Our economic policy and Competition Act must be updated, but it needs to be done in a way that helps define the main values we're seeking to promote through our economic policy. The creation of a robust governance architecture, particularly in terms of digital technology, and the passing of coherent laws are not possible without this essential step.

I'll stop here. I'm available to answer any questions from the members of the committee.

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

Mr. Wu, you now have the floor.

[*English*]

Mr. William Wu (Partner, Competition, Antitrust and Foreign Investment, McMillan LLP, As an Individual): Thank you very much for this opportunity to appear before the committee. My name is William Wu. I'm a partner in the competition and foreign investment group at McMillan in Toronto.

It has been almost 15 years since the last major review of Canadian competition law and competition policy. I think everybody here would agree that it is time for another review of Canadian competition law. In this regard, I applaud Minister Champagne for announcing a broad review of the Competition Act. That consultation will need to be broad and inclusive. I think everybody here would agree with that.

With that in mind, it is unclear to me why we need to have all these amendments done through this process right now, when the broader consultation is coming in the next couple of months, I believe. In relation to the wage-fixing and no-poaching provision in particular, in the bill itself that provision is only intended to come into force one year after the BIA receives royal assent. It already contemplates that something more needs to be done to that provision. With that delay already built in, I see no compelling reason why that provision in particular needs to be rushed through this regulatory process right now.

In terms of the substance of the no-poaching and wage-fixing provision, I share Professor Quaid's concern that using criminal law to deal with this issue may not be appropriate. Looking at the wage-fixing and no-poaching agreement, I think we can really conceive of it as a competition law issue or as a labour and employment law issue. To the extent that it is a competition law issue, the concern would be that employers are agreeing not to compete in their hiring or compensation practices. If that is a concern, I would say that using criminal law to create a per se prohibition is too blunt an instrument.

There are a lot of legitimate and pro-competitive reasons why employers might want to talk to each other about their hiring and compensation practices. I can speak to those in more detail later. It is not obvious at all that these types of agreements will always cause harm to employees by depriving them of higher wages or job opportunities. In that context, given that there can be harmful no-poaching and wage-fixing agreements and there can be legitimate ones as well, using the existing civil reviewable practices provision in section 90.1 of the act is an appropriate competition law framework to address these issues.

To the extent that the concern is the protection of workers, in particular low-wage workers, that is traditionally within the ambit of provincial labour and employment law and less of a competition law issue. I would submit that labour and employment law and labour and employment law regulators are better equipped and have better expertise and experience in dealing with those issues.

I will stop here for now, given the short time today. I would be happy to answer questions. I do have other views on other amendments, particularly the drip pricing provision, which I can speak to during questions.

● (1345)

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

I will now move to Mr. Dachis.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much.

I have the great pleasure of working with the C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners. Elisa Kearney, whom you will be hearing from later today in her role at the CBA, is the chair of the council.

The core concern of the council is that the scope of changes to the Competition Act and the BIA is not fulfilling the commitment articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. Let me address some of the problems that could have been fixed with consultation on the specifics of the bill.

First, the changes proposed in the BIA result in corporations now facing administrative monetary penalties, or AMPs, of up to 3% of annual worldwide gross revenues. The legal details really matter here. If an AMP is penal in nature rather than a deterrent, then it is effectively a criminal penalty. The alleged offender must be tried in accordance with the due process requirements of section 11 of the Charter of Rights and Freedoms. Neither the misleading advertising nor the abuse of dominance provisions that attract these significant penalties are criminal offences.

The burden of proof to be convicted is a lower balance of probability standard. The increase to the fines to be set on global revenues of a firm—this is a critical part—that are not directly related to the harms of the practice greatly raises the likelihood that the fines could be found as penal and therefore unconstitutional.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair. This is the second time that the interpreter has mentioned problems with sound while the witness was speaking.

[*English*]

Mr. Benjamin Dachis: Is that any better?

The Chair: It seems to be a network issue, but if you can, speak a little more slowly, Mr. Dachis.

Mr. Benjamin Dachis: Sure. I'm sorry about that.

With such large potential penalties, there's a risk of over-deterrence, and firms may shy away from practices that may be beneficial for Canadians. These potential fines raise reputational risks for Canada as not being supportive of foreign investment, given that fines will be disproportionately large for foreign multinationals.

The risks of over-deterrence are magnified by the changes in the BIA to allow private parties access to the tribunal to make a complaint about abuse of dominance. Although private litigants do not have the ability to receive damages themselves, the defendants in a privately brought case of abuse of dominance will face a large potential fine that will be paid to the government. This goes well beyond the appropriate role—and there is an appropriate role for private litigation in abuse of dominance—and risks creating “private sheriffs”, where competitor-driven complaints before the tribunal may result in government levying disproportionate fines against parties.

Moving to wage-fixing and no-poach agreements, there are very sound legal and economic reasons to address them. Price-fixing and wage-fixing are economically similar. However, as we've heard a couple of times today, the language of the new amendment is overly broad and creates great uncertainty.

There is uncertainty about whether the term “employee” captures all categories of workers. There's no definition of “employer” and “employee” in the Competition Act. Given the changing nature of employment, as well as the varying provincial definitions of employee-employer relationships, the proposed amendments would benefit from proper consultation with employment law experts directly from the government, rather than what a single committee like this or a single senator like Senator Howard Wetston can manage on their own.

I can get to various approaches on how to deal with wage-fixing in the questions, but William Wu is a real expert on this, so I defer to him in particular.

The last thing on substance is that the identification of privacy as a specific characteristic of non-price competition, separate from product quality, raises particular questions. If privacy is distinct from product quality, what does this really mean? Will competition law cases—mergers, for example—turn on a privacy issue even if competition issues are otherwise unproblematic? Once again, the amendment would have benefited from broader consultation.

Let me close on the core problem, and that's process. The problems of the BIA are reminiscent of similar process concerns that accompanied the legislative changes to the Competition Act in 2009 via the budget process. Some of the proposed amendments in the BIA now reflect legislative fixes to fix that flawed process, yet by following the same flawed process, the inevitable result is an overcorrection and the need for legislative amendments in the future, which, more importantly, do not achieve the government's objective of improving the operation of the Competition Act.

What's the practical bottom line? Carving division 15 out of the BIA would be the right approach. If that isn't feasible, the committee should call for setting the proclamation date for all provisions—not just some—for a year from passage. We also need to hear more from the government on their plans for further consultation, as they promised.

These proposed changes can be seen in concert with other proposed changes that would come as part of a prompt second stage of Competition Act reviews. Proceeding right to these amendments, especially ones that may be unconstitutional, taking force without further consultation could be potentially reckless. We can work out the details of the implementation of changes before they take effect, with a later proclamation.

I'll leave my opening remarks there, and I look forward to your questions.

Thank you again for the invitation to speak on this issue.

● (1350)

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

We'll now turn to the Canadian Bar Association, with Ms. Kearney.

[*Translation*]

Ms. Kearney will be splitting her time with Mr. Thérien.

[*English*]

Ms. Elisa Kearney (Second Vice-Chair, Competition Law and Foreign Investment Review Section, The Canadian Bar Association): Good afternoon, Mr. Chair and honourable members of the committee.

My name is Elisa Kearney. I am the second vice-chair with the competition law and foreign investment review section of the Canadian Bar Association. Thank you for inviting the CBA to discuss the proposed changes to the Competition Act as set out in the budget implementation act. With me today is Mr. Dominic Thérien, the secretary of the section.

[*Translation*]

Mr. Dominic Thérien (Secretary, Competition Law and Foreign Investment Review Section, Canadian Bar Association): Thank you, Ms. Kearney.

The Canadian Bar Association, or CBA, is a national association of over 36,000 legal practitioners across the country. The main objectives of the CBA are to improve law and the administration of justice, and that's why we're here today on behalf of the competition law and foreign investment review section.

[*English*]

I'll turn back to you, Elisa.

Ms. Elisa Kearney: To begin, the CBA strongly believes that the proposed amendments to the Competition Act should not be in the BIA. Given the critical role of the Competition Act in promoting dynamic and fair markets, and given the importance of innovation, meaningful and thorough consultations are necessary to ensure that the underlying policy objectives of the proposed amendments are indeed achieved.

The CBA does support the government in its ongoing review of the Competition Act but believes that the amendments proposed in the BIA need to be further amended, studied and refined to ensure they improve the operation of the act and do not create unintended adverse consequences.

Let me provide a few examples.

On abuse of dominance, we are concerned that the proposed substantive amendments on abuse may be overbroad and carry the unintended consequence of softening competition on the merits. These concerns are augmented by the amendments in the BIA that permit private parties to seek relief. The CBA is concerned that competitors will use the threats of private litigation and large penalty awards to deter conduct by rivals that may be pro-competitive and beneficial to Canadians.

On the penalties, the BIA proposes to increase the amount of administrative monetary penalties for both deceptive marketing and abuse of dominance to three times the value of the benefit derived or, if that benefit cannot reasonably be determined, 3% of annual worldwide gross revenues. In the view of the CBA, there is no policy for considering benefits arising or sales made outside of Canada when determining an appropriate penalty. The CBA believes that any attempt to connect an AMP to the benefit derived or the overall revenue received should be limited to benefits and revenues in Canada.

As you have heard, there are potential constitutional issues with large punitive amounts for non-criminal conduct. We have concerns that punitive amounts will damage Canada's reputation as a good place for foreign firms to do business, with negative effects on the Canadian economy.

My colleague, Monsieur Thérien, has a few more examples.

● (1355)

Mr. Dominic Thérien: You heard before that I'd like to address the wage-fixing and the no-poach proposed amendments. The BIA would expand the current per se illegal criminal conspiracy offence under section 45 to such no-poach and wage-fixing agreements.

The CBA is of the view that the criminal offence for wage-fixing and no-poach agreements may not be the most efficient way to improve the act's operation. Currently, there's already a non-criminal enforcement track for wage-fixing and no-poach agreements under section 90.1 of the act, but this section has never been used. This provision can be improved to be more effective without resorting to criminal liability, which of course has a higher burden of proof and is thus more difficult to prosecute.

We have concerns that the proposed amendments as currently drafted are both over- and under-inclusive.

First, the proposed wage-fixing offence would basically apply to agreements regarding any term and condition of employment. “Terms and conditions of employment” is without a doubt very broad language and ambiguous, to say the least.

If we turn now to the proposed no-poach agreement offence, I want to echo earlier comments that this would only currently apply to “employees”, which is an undefined term. I share the view that under the current changing nature of employment relationships in the Canadian economy, we should further consider whether the provision is warranted to ensure that it actually captures the government's policy objectives.

We also want to bring to the committee's attention that an offence under section 45 basically triggers significant collateral consequences. First of all, we're talking about class action risks and also debarment risk, losing qualifications or being disqualified from public contracts. These issues have not been discussed. They should be fully debated before amendments that would bring no-poach and wage-fixing agreements under the criminal offence in section 45 are rushed through the BIA process.

[*Translation*]

That concludes our opening comments.

We would be pleased to answer your questions.

We thank you again for inviting us to come share our concerns with you today.

The Chair: Thank you very much.

I now give the floor to Ms. Tiessen, from Unifor.

[*English*]

Ms. Kaylie Tiessen (National Representative, Research Department, Unifor): Good afternoon, everyone.

My name is Kaylie Tiessen. I'm an economist and a policy analyst in the research department at Unifor. I'm here to discuss the long-awaited initial changes to Canada's competition policy that are inside the budget implementation bill.

This is the third time in just under two years that Unifor has appeared before this committee to discuss Canada's wage-fixing problem. The first was in 2020, when our president, along with two local union leaders in the grocery store sector, appeared to ask this committee to investigate the blatant wage-fixing that occurred in the sector when the major grocery stores all cancelled pandemic pay on the same day. The second was in the spring of 2021, when I appeared here to discuss our recommendations for strengthening the Competition Act. We want to improve outcomes for workers and consumers in Canada through a Competition Act that actually accomplishes creating the conditions for healthy competition in this country.

I'm here before you for the third time to remind you of four things. One, making wage-fixing and no-poach agreements a criminal offence is the bare minimum that must be done to foster fair competition in Canada in the labour markets. Two, wage-fixing and no-poach agreements used to be considered criminal offences in the Competition Act. Three, two egregious cases of anti-competitive behaviour in labour markets have recently been rejected by competition investigators—this is in the last 18 months—because of the high threshold required by civil law, not because any competition officer thought that the actions were not anti-competitive. Four, administrative monetary penalties are supposed to be high enough to deter the behaviour, instead of low enough to become a cost of doing business.

I'll address each of these in more detail individually.

First is doing the bare minimum. Moving wage-fixing and no-poach agreements back to the realm of a criminal offence is just one of several changes that are needed in order to improve outcomes for workers and consumers through the elimination of anti-competitive behaviour.

As it currently stands, the Competition Act doesn't specifically consider the effects of anti-competitive behaviour on workers at all. The bureau can pursue anti-competitive behaviours that impact workers through its merger reviews and potentially through other civil provisions, like section 90.1—which we've heard about already today—which deals with competitor collaborations. However, to date, we find no evidence that the bureau has actually done a serious investigation. Some of that is because that threshold is too high; they would have liked to pursue that, but they couldn't. This means that Canada might be allowing actions that artificially suppress wages and working conditions, decreasing the well-being of workers across the economy, and we don't even have the tools to find out if that's happening. Recent research from the Department of the Treasury found that anti-competitive behaviours in American labour markets have depressed wages by 20%, so they're 20% lower than would have been the case if no anti-competitive behaviour existed.

Number two, wage-fixing and no-poach agreements used to be criminal offences under the Competition Act. It wasn't until a change in 2009 that these actions were relegated to the realm of civil law, where the law has languished and remained ineffective at dealing with the anti-competitive behaviour I have just mentioned. We're a laggard when it comes to workers' rights under competition law, and the opportunity to change that is right here in front of you today.

My third reminder is that there are two recent cases that were rejected by competition officers because of this high evidentiary threshold in civil law. The first was the grocery company same-day pandemic pay cancellation I mentioned earlier, which we've spoken about on multiple occasions here already. The second was a class action lawsuit accusing Tim Hortons franchises in B.C. of artificially lowering wages and working conditions of workers in the industry through no-poach agreements. Both of those cases have been rejected under competition law in the last 18 months because of this high threshold of evidence required, not because any competition official thought the actions weren't anti-competitive.

Number four, administrative penalties are at risk of becoming a cost of doing business. This is a situation the Competition Bureau has stated it wants to avoid. It's my opinion that administrative penalties must be high enough to deter the behaviour the law is trying to prohibit, not so low that companies can just absorb the cost of breaking the law.

I have more recommendations to make to the Competition Act review that's coming later this year, and I look forward to coming back here to talk to this committee about them all.

● (1400)

Canada's workers are directly and indirectly affected by Canada's competition policy every day. In my experience, the bureau lacks the power it needs to ensure that anti-competitive behaviour does not negatively affect wages or working conditions in Canada.

Thank you, and I look forward to taking your questions.

The Chair: Thank you very much to all of our witnesses.

Before we open up the discussion, I want to inform colleagues that, given the delays, we'll only have time for the first two rounds of questions.

Without further ado, we'll start with Mr. Deltell for six minutes.

[*Translation*]

Mr. Gérard Deltell (Louis-Saint-Laurent, CPC): Thank you very much, Mr. Chair.

Thank you all for taking part in this very interesting and extremely enlightening meeting, as always. This meeting is shorter than what was scheduled, but there are a lot of elements that we can discuss. I'd like to start by addressing Mr. Thérien from the Canadian Bar Association.

Good afternoon, Mr. Thérien. Welcome to the committee.

I am going to follow up on something your colleague said. However, for discussion purposes, I'll speak mainly to you and in French.

I'd like more details on one point. In your presentation, you spoke about the impact this bill could have on Canada's reputation abroad if we were to pass it or amend it too quickly.

What are your concerns in this respect?

Mr. Dominic Thérien: Thank you for your question.

First, the comment about the potential impact the bill could have on Canada's reputation is more about the calculation of the administrative monetary penalty that could be imposed in the event of abuse of dominant position, as proposed in the bill.

Essentially, the concern is related to the method of calculation. Professor Quaid already mentioned it, I believe. It can be hard to calculate the benefit from a problematic practice. The calculation takes into account up to 3% of the company's revenues, but is not limited to revenues generated by or linked to activities in Canada.

The fear is thus related to the calculation of a fine. The need to increase the value used in the calculation can certainly be debated; the maximum is $10 million for a first offence. However, it's problematic to have a new cap that could be calculated based on worldwide revenues, depending on the company in question. We believe that there must at least be a discussion to better identify what we're talking about, particularly as relates to the calculation of the penalty based on a figure of 3% of the company's revenues.

I believe that Canada's reputation could be tarnished if, going forward, the calculation was based on all of a company's worldwide revenues without any impact for Canadians.

● (1405)

Mr. Gérard Deltell: Several witnesses found that some of the administrative monetary penalties were disproportionate. We agree that, if someone acts illegally, they must pay.

However, in your opinion, since the current monetary penalties are deemed to be too high, do we risk doing the opposite if we exclude the example that you just gave concerning the calculation based on 3% of a company's worldwide revenues?

Mr. Dominic Thérien: I believe that our section's position and that of the Canadian Bar Association are in fact a combination. I must note the somewhat technical aspect of the act. Honestly, the caps are also regulated. The new caps in question here applied to cases of abuse of dominant position and misleading advertising. In our opinion, there could be debate if such calculations were to be based on revenues for misleading advertising. We're not certain that there would be equivalencies in other countries in relation to misleading advertising.

There are checks and balances, if you will, because the judge or tribunal has tests to consider, such as the duration of the practice, the repercussions, the actual objective. An investigation will certainly help limit the caps.

The problem, here, is the combination of new thresholds and private remedies related to abuse of dominant position. Without reiterating what has been said and done, this raises important questions. We've never seen this in Canada. These businesses could complain, possibly with reason, and we aren't questioning that. However, the administrative monetary penalty that could be imposed doesn't go into the pockets of the company complaining; it goes to the Receiver General for Canada. It's a system that we don't understand. It's new and it's never been seen in Canada. What will happen if this type of situation comes up? What type of incentive will it provide for potentially strategic litigation?

The combination of civil remedy and new caps is what concerns us. That needs to be examined more closely.

Mr. Gérard Deltell: Would it be the first time this has happened in Canada?

Mr. Dominic Thérien: In the letter from the Canadian Bar Association, a footnote indicates what could be a similar case related to the Ontario securities legislation. In that other case, however, the maximum threshold is $1 million, and according to the information we have, that measure has never been invoked.

Before the government introduces the concept of “private sheriffs”, as someone called them I believe, debate is needed on what will happen in terms of this type of potentially strategic litigation. Is the money that goes to the Receiver General for Canada further to a private remedy the incentive that should be given to businesses, or should they instead be entitled to damages? The time must be taken for this type of debate.

Mr. Gérard Deltell: I'd like to continue with you, Mr. Thérien, on the direct consequences for privacy. You spoke about it earlier, and other witnesses have as well.

Once the issue of privacy comes up, we're on very thin ice. I think you're the first to recognize that, particularly since privacy is at risk because of social media these days.

Given what is currently in the bill, how could privacy be negatively impacted?

Mr. Dominic Thérien: I believe, honourable member, that a criterion would need to be added to those used to determine whether anti-competitive effects exist. Without knowing whether our section has adopted a firm stance on the matter, I don't want to say any more on the topic. I'll just tell you that there is a problem and invite you to question the other witnesses.

The Chair: Unfortunately, Mr. Deltell, that was all the time you had.

Thank you, Mr. Thérien.

Mr. Erskine-Smith, you have the floor for six minutes.

[*English*]

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Thank you very much.

Mr. Dachis, I think you said price-fixing and wage-fixing are economically similar. Why would the act treat them differently?

Mr. Benjamin Dachis: A good example here is the question of competitors. Right now, the legislation as it is currently enforced requires that price-fixing be among competitors. That is, per se, a leap. The legislation as proposed includes any employers, not necessarily competitors. This could have a much more wide-ranging application than the way it is—

● (1410)

Mr. Nathaniel Erskine-Smith: Why would it ever...? Could you provide an example where employers in vastly different sectors that aren't competing with one another would enter into an arrangement to fix wages?

Mr. Benjamin Dachis: In no-poach, for example.... Take the example of a consulting company sending someone in-house to a client for a set term of three, four or five months, while the employee of the consulting firm is embedded in that client. Rather than that individual person having to float around on individual contracts, that person could be employed by that consulting company and go from client to client. In order for that consulting company to want to enter into that agreement, they are going to have to have certainty that they are not going to lose that employee to that company. That kind of arrangement can be beneficial for all parties, where these employees know they're not going to have go contract to contract, while—

Mr. Nathaniel Erskine-Smith: You're talking about no-poach. Let's talk about fixing wages.

Let's take an example where the evidence around price-fixing is such that section 45 could be pursued beyond a reasonable doubt and, in a similar manner, wages of low-income workers in an oligopoly sector have been suppressed by way of an agreement between those employers. Don't you think that should be treated the same way price-fixing is treated under the act?

Mr. Benjamin Dachis: It comes down to the definition of "per se". This is where I'll definitely defer to some of the lawyers—

Mr. Nathaniel Erskine-Smith: Let's go to Mr. Thérien.

You mentioned some concerns. You said there is a civil standard and we could improve upon the civil standard.

My understanding.... This is from a public comment made by former Commissioner Pecman in relation to wage-fixing in particular. He said, "There's just a gap in the legislation". In his response to a letter that I sent, Commissioner Boswell wrote, "Proving a substantial lessening or prevention of competition is not a low threshold".

Section 90.1 is not specific to wages, of course; it's buy-side agreements in general. Don't you think there should be something specific to wages, as there was previously and as there is in other jurisdictions? Should we not be treating wages specifically and separately?

Mr. Dominic Thérien: Let me answer that twofold.

In the past, we had this general criminal prohibition that could encompass any agreements that had an undue lessening of competition. We moved away from that. Those were the 2009 amendments. It was furthered through a very long process, if I may. Three expert reports were commanded by the commissioner at the time to get ideas of what exactly should be per se, with 14 years of jail term attached to that.

When we're saying let's compare to the U.S., the U.S. has been acting against no-poaching and non-solicitation since 2010 under civil actions. In 2016, they provided guidelines for professionals saying that the next time it's going to be criminal. They came up with their first criminal charge in 2020. This committee isn't aware of this, but it is in our letter: In the first trials in the U.S. for criminal no-poach and wage-fixing, they lost.

All we're saying is that it would be—

Mr. Nathaniel Erskine-Smith: That's not necessarily a consequence of a poor approach. That could well be a consequence, in those particular instances, of not being able to prove the burden beyond a reasonable doubt.

I'm not suggesting that the criminal standard is the right one here. I'm just a bit confused about why we're articulating the need to address this problem of wage-fixing.

I know Mr. Wu has suggested that we should treat no-poach in particular—and I think Mr. Dachis suggested something similar—in an employment labour context, but the example before this committee previously was specifically around wage-fixing, suppressing low-income employees' wages and communication between employers in the same oligopoly sector. I don't really understand how low income and minimum wages are different from bread.

● (1415)

Mr. William Wu: Maybe I'll just jump in with one comment.

I disagree with the commissioner's concern that the need to prove substantial lessening and prevention of competition is a burden that he ought not need to discharge. This specific context of the grocery hero pay was a very unique situation in the labour market. That was a situation where basically every store other than grocery chains was closed. In that specific context, one can imagine that this type of wage-fixing agreement indeed had an anti-competitive effect on the labour market. Those workers would have nowhere else to turn for another job opportunity. They would not have had the opportunity to get another job with higher wages elsewhere.

In the hot labour market as it is right now, with an extremely low unemployment rate, the agreement between some employers to fix wages would, I suggest, have a limited impact on employees' actual welfare, especially for employees with generally transferrable employment skills. Those skills can be easily transferred to another position. The alternative employer doesn't need to be in the same industry. A grocery worker probably would be using a very similar skill set as someone in another retail context.

When we're thinking about competitors in the no-poaching or wage-fixing context, it is about who is competing for the same types of employment skills, rather than competitors in the supply market.

Mr. Nathaniel Erskine-Smith: I'm out of time.

It seems to me that section 90.1 is insufficient. If you don't like the new proposed section 45, it would be very helpful for you to send something to the committee by way of what it should look like, because I want to address this issue. If the criminal law is not the way to do it, I don't think section 90.1 is sufficient.

It would be helpful if all of you smart people who work and think in this space send me what you think it ought to be. There's a gap in the current law. If you don't like the current proposal, I'd like to see what the alternative is.

The Chair: Thank you very much, Mr. Erskine-Smith.

[*Translation*]

Mr. Lemire, you have the floor for six minutes.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

The Standing Committee on Industry and Technology has addressed anti-competitive practices on several occasions, particularly in relation to telecommunications technologies, large technology corporations and so forth. We also addressed this topic in our study of the labour shortage being experienced by small and medium-sized enterprises.

We have heard from many witnesses concerning the considerable decline in competition, which should be examined. This includes presentations by Ms. Vass Bednar, Ms. Jennifer Quaid and Mr. Edward Iacobucci, who all spoke about the merger of companies and the reduced number of players, situations that are increasingly common on the market. We have also heard from Ms. Robin Shaban and Ms. Yelena Larkin on this topic.

I'd like for us to take their comments into account in the analysis we'll submit to the Standing Committee on Finance. Their comments should also maybe be included in our recommendations.

In 2020-21, our committee also conducted a study that shed light on the power of a small group of grocers who had agreed to reduce the COVID-19 wage premium they were paying workers. The study showed how they could exercise greater power over the sale of a majority of foods. These examples are far from unique, and this raises more and more concerns because we are unaware of other situations out there.

The commissioner of competition, Mr. Matthew Boswell, chose not to pursue the matter because, under the Competition Act, as it exists today, fixing salaries is not considered to be a criminal act. Only agreements between competitors to fix the price of goods are seen as a criminal act.

My question is for Ms. Tiessen, from Unifor.

Ms. Tiessen, do you think the amendments made will serve as a deterrent for employers who might be tempted to use practices now defined as anti-competitive?

[*English*]

Ms. Kaylie Tiessen: That's a good question.

Let's see. I think we've seen this committee study this issue. We saw the commissioner and their response and their reasoning behind not studying the issue.

We know that we have a wage-fixing problem. Previously when we were here, our president stated that if this is something that's so obvious and these retail giants think they can get away with it, then what else is happening that we don't see, don't know about and can't investigate?

We're seeing that it's being thought of as a cost of doing business or that it's at risk of the cost of doing business, either because they can get away with it—it's not illegal and the threshold is too high—or because the penalties are too high. We need to make sure that we are dealing with that issue.

This committee made the recommendation last year, in your report in June 2021, to make this change to the Competition Act, and I think it's really important that we go forward with it.

● (1420)

[*Translation*]

Mr. Sébastien Lemire: My next question is for Ms. Quaid.

Ms. Quaid, we understand your questions about the inclusion of the first stage of the modernization of the Competition Act in a budget bill. We have also heard from others about this today. We heard from competition experts who told us that Canada's Competition Act was not in line with what was being done elsewhere in the world. According to the minister, Mr. Champagne, those changes stem from the urgent need to act in relation to digital giants.

In your opinion, are the provisions as they are worded in Bill C-19 enough, and do they do justice to the minister's main objective?

Dr. Jennifer Quaid: I'll try to be as brief as possible. This is one of the reasons why my opening statement differed from the last time.

I'm setting aside the issue of fixing salaries, which merits a meeting of its own, in my opinion, at which I'd be pleased to make a lot more comments on the topic. I'm also setting aside the fact that I don't like the use of a budget bill. As for the other provisions, I'm of the view that they're not surprising amendments and are justifiable, given that we're trying to catch up.

I think that my perspective will differ somewhat from those of some of my colleagues on the fact that we'll be criticized or that our reputation will be tarnished. In the consent agreement with Facebook, the penalty that we imposed was $9.5 million, almost the maximum amount possible. The United States imposed a penalty of $5 billion.

I think that the possibility of increasing the amount is not a problem in itself. We are well below the fines imposed by European countries and the United States. Should we go as high as them? No. That was just an example.

I was thinking this week, and you'll acknowledge that things are changing. I think our gradual recognition is an interim step. However, I really wouldn't want that interim step to become permanent, because that would be a mistake.

While we cannot do it all at once, we want to send a message to market players, consumers, Canadians, businesses of all kinds and our international partners. I think it's a good idea to at least take these small steps.

However, I have a reservation. Indeed, I find that the Competition Bureau should quickly publish clear guidelines on how it intends to enforce some of these elements. I am not convinced that we need to suspend the enforcement of the provisions. Setting aside the offence of fixing salaries, I think we could move ahead. However, it would be very important for the bureau to step up and oversee these changes.

It is very important to understand that the amendments to the act are not a silver bullet. It doesn't change a culture or an application. It doesn't change things. That's why we need guidance from the agency responsible for enforcing the law to adjust and support these amendments. The bureau is very good at consulting. It will propose guidelines to which people will react, including my friends who are attending this meeting virtually.

We are working to ensure that this is well done. I therefore think that it's a mistake to believe that passing legislation is a magic answer. My reservation is related more to that, and the fact that I still don't like using a budget bill. On those conditions, I'm prepared to accept that we may need to take strict measures.

The Chair: Your comments are duly noted, Ms. Quaid.

Thank you, Mr. Lemire.

Mr. Masse, you have the floor for six minutes.

[*English*]

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair, and apologies for being a bit late to the meeting. I had to do a panel show.

Ms. Quaid, with regard to the statement that AMPs here are not similar to those in the United States and Europe, what was the reasoning behind that? AMPs won't be set at the maximum and be automatic. Those go up to what they can go to, so what's the detraction for us having some consistency there, especially when we have quite a bit of integration on products and manufacturing with the United States and other types of standards?

When it comes to consumers and consumer protection, we're particularly poor. I'll give the auto example, just as a background. We aren't afforded the same protections as U.S. consumers. If you look at the Toyota Prius example, emissions from Volkswagens and all kinds of different things, Americans enjoy way greater consumer protection, yet companies treat Canada as a colony.

Why not at least have in our back pocket AMPs that are significant in case we need to protect consumers?

● (1425)

Dr. Jennifer Quaid: You may have missed my opening remarks, but I've become practical.

The AMPs change is a change. I'm not going to pretend it's not a change. I do think that, on the whole, it's a good change. I understand the concerns of my friends at the Canadian Bar Association and in private practice. There is an uncertainty now where there wasn't an uncertainty before.

I think we need to remember a couple of things. The first is that these extra calculations are for amounts that exceed the current maximums. There will be circumstances where we do not need to exceed the current maximums. In fact, I would like to see scalable penalties across the board, rather than saying under $9 million, because that's a huge amount for SMEs. I think I said that last week. I think we have to keep in mind that for some enterprises, scalable penalties are really the only way you're going to be able to come up with the correct amount. Canadian courts do not have a good track record of picking a number out of the air and making it high enough. I think that tying it to a metric is important.

Yes, there's going to be a transition period, but I don't see the downside in allowing penalties to go up. Do we have to reach the levels of the U.S. and Europe? Not necessarily. I would highlight two things. We have a list of aggravating and mitigating factors that must be taken into account when you determine the amount. Those are relevant. This is not a random, arbitrary amount, contrary to the impression you might be left with. The other thing I would underscore is that, for misleading advertising—it's not the case for abuse of dominance—AMPs are only available if the defendant has not been able to establish that they were diligent. You're already in a zone where you could say the conduct is less justifiable.

I don't know if there's anything else you need, but I'm going to stop there.

Mr. Brian Masse: No, that helps.

I see Mr. Dachis wants to get in. Anybody else who wants to can answer that. I am curious about it.

To be fair, your criticism of its being part of the budget bill is a fair one. It was Paul Martin who brought in the first non-budgetary legislative changes with immigration and a few other things back in 2006. Since then, unfortunately, we've had budget bills that have these elements in them, and it has become similar to the American system.

Does anybody else wish to comment on the AMPs and where we sit?

Mr. Benjamin Dachis: Senator Wetston's commentary on the [*Inaudible—Editor*] is a really useful touchstone of asking where the boundaries of debate are. One thing that was very clear in his commentary was a request to increase AMPs. There was consensus on that. There was no consensus, though, on the amount.

We're spending a lot of our time focused on the 3% of global revenues, and rightly so, but there is a provision in there that would allow scalable AMPs for three times the value of the benefit derived from the anti-competitive practice. That's the sort of thing that does make some sense in the spirit of Senator Wetston's consensus statement. Going beyond that is where things get a little more problematic.

Mr. Brian Masse: Thank you.

Ms. Bednar, do you feel the Competition Bureau is structured well enough right now to be able to handle any of the changes that are taking place? I'm curious as to what needs to be done there if there is more strengthening.

Ms. Vass Bednar: I think the recent budget increases to the bureau were welcome. I think they have some great policy advice they've gone on the record with. There was a really phenomenal response from the bureau to Senator Wetston.

If I can comment and contextualize about our bureau in an international context for the purposes of this discussion, our reputation abroad has seemed to factor prominently. On the international stage, we don't register on competition. Canada's reputation on competition reform is nothing short of absolutely humiliating. It's captured very well in a recent G7 compendium. No one is looking at us because we aren't doing anything.

Again, these are necessary first steps, and I don't have doubts that the bureau would be able to receive them as we look ahead to further reform.

● (1430)

Mr. Brian Masse: Thank you.

I'll go back to the original testimony later on.

Thank you, Mr. Chair.

[*Translation*]

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

Mr. Kram, you now have the floor for five minutes.

[*English*]

Mr. Michael Kram (Regina—Wascana, CPC): Thank you very much, Mr. Chair.

Thank you to all the witnesses for being here this afternoon.

Mr. Dachis, in your opening statement you used the word "unconstitutional". Could you elaborate on why you feel this bill may be unconstitutional?

Mr. Benjamin Dachis: Yes. This goes again to the question that we're talking about in terms of penalties and the question of it being a penalty versus a deterrent. When a fine is so large as to be well beyond any potential benefit that the company directly receives from the activity, we're starting to get into a different level of penalty. The Constitution gives a greater level of protection and a higher burden of proof that companies will be able to receive.

This goes to the drafting of the amendments. If there had been a line drawn earlier on with an increase in penalties but not to this level, along the lines of what the CBA has talked about—here we're talking about things that are connected to Canadian revenues, not international revenues, which are by nature and by definition not connected to the harm in Canada—there might have been a solution. However, we're looking at some serious risk of unconstitutional changes here that are going to throw the whole enforcement regime in the future into great uncertainty. I don't want the Canadian Competition Act enforcement regime to be thrown into that uncertainty because of poorly drafted legislation.

Mr. Michael Kram: It is section 11 of the charter that deals with "proceedings in criminal and penal matters". Are you saying that the bill may be in violation of section 11 of the charter?

Mr. Benjamin Dachis: Yes.

Mr. Michael Kram: You also mentioned that we have a couple of options. One would be to carve out division 15 from this bill. The other option would be having a later proclamation date. Do you have a preference between those two recommendations?

Mr. Benjamin Dachis: I totally get why the government would be hesitant to carve out division 15. Time is the most valuable commodity in the House of Commons, and adding one more bill into a legislative schedule is going to be really tricky and create congestion. I totally get that even though this would be the best approach, it would be something they are hesitant to do.

Delaying proclamation has a couple of benefits.

The first benefit is that, rather than drop tools on everything when we have other obligations, it gives us more of a chance to provide submissions on the details before things have implementation. It allows us the time to properly digest the changes.

It also helps create a bit of a deadline for the second round of review. We've heard no details from the government in terms of what that review is going to look at. If they have a timeline of a year from now, we can look at these amendments and what else we might need in order to properly digest how all these reforms, which a lot of people in the competition world and the economics world are looking for, fit together and find a compromise that we can all work with.

Mr. Michael Kram: Thank you very much.

I'd like to turn now to our two witnesses from the Canadian Bar Association.

Your organization sent a letter to the committee a couple of days ago, and I would like to read you a quick quote from the letter. Under "Administrative Monetary Penalties" it says, "The apparent lack of 'national treatment' afforded to foreign companies may be inconsistent with Canada's obligations under international trade agreements."

I wonder if you could elaborate on which international trade agreements you feel Canada may be violating and why.

● (1435)

Ms. Elisa Kearney: I can take that one.

We don't have specifics on which international trade agreement we think may have a specific concern, but the issue is one of treating foreign companies the same as you treat your Canadian companies. To the extent that the provision does treat foreign companies differently, which we are presuming have a larger worldwide revenue, then they would be subject to AMPs for potentially even less harmful conduct in Canada at a higher degree.

There are assumptions built into the statement. Of course, there are Canadian companies with significant worldwide revenue that could equally be in the same situation, but I think the point is that if you have a fine that's twigged to worldwide revenues for harm that's conducted in Canada, there is a possibility that foreign companies will be subject to higher penalties and thus treated differently from their Canadian counterparts.

The Chair: Thank you very much.

We'll now move to Madame Lapointe for five minutes.

[*Translation*]

Ms. Viviane Lapointe (Sudbury, Lib.): Thank you Mr. Chair.

[*English*]

My questions are for Ms. Bednar, and I'd like to build on the questions that were raised by my colleague MP Erskine-Smith.

I'll invite you, Ms. Bednar, if you have some thoughts, to elaborate on the exchange that took place between Mr. Erskine-Smith and Mr. Dachis.

Ms. Vass Bednar: In terms of points to elaborate on, I think we are observing the policy process in action. There is consensus, both that people want action on this and that it is overdue as a policy priority.

We have heard from a range of stakeholders here today. It isn't about the "what"; it's about the "how". It sounds very much as though, across everything we are talking about, this is actually the only intervention for which we are talking about people—everyday people, not corporations and not large foreign corporations. I am supportive of further exploration as to the precise implementation of how we articulate that in legislation so that people are comfortable with it and there is clarity. I would not want to rush forward with something that won't be beneficial.

To some of our other questions, even related to exploring these AMPs, this conversation also assumes that we can even prove a competition case in Canada and actually fine someone and fine one of these companies. Back when we fined Meta, then Facebook, which was brought up by Professor Quaid, again, to put that fine in context, it was less than an hour of Facebook's annual revenue for that year. Now I'm pulling at a fines question, but thank you for the opportunity to slightly elaborate.

Ms. Viviane Lapointe: For me, it is important to try to make this very relevant for everyday Canadians.

The change to the Competition Act proposed in clause 257 creates a new criminal offence that would prohibit employers from conspiring, agreeing or arranging to fix, maintain, decrease or control wages and terms and conditions of employment. Help me understand: Would this clause have been helpful to have when three of Canada's major grocery store chains all stopped pandemic wages on the same day?

Ms. Vass Bednar: I believe it would have been helpful, yes. I find it difficult, personally, to rationalize to anyone, including myself, that there are instances in which wage-fixing works in favour of workers or consumers. I think we've seen that franchisees have an interest in being able to intervene in the labour market and that there is a stronger role for the state to play, whether through the Competition Act or, as was said earlier, through labour law, looking at the province. That is something there has been increasing research and activism around—that Canada could take a more holistic, all-of-government approach to achieving the competition outcomes we would like to see. There certainly does seem to be a stronger role for the provinces here.

Ms. Viviane Lapointe: Do you think that the new provision being a criminal offence, as opposed to a civil matter, would act as a greater deterrent?

Ms. Vass Bednar: Yes, I think it could act as a greater deterrent. We are speaking, again, concurrently about the penalties—the AMPs. We fundamentally want the law to deter poor behaviour. We want it to hopefully not happen in the first place, before we take action and bring cases forward.

Ms. Viviane Lapointe: That's a good point.

You have referred to corporate interests wanting to avoid significant changes to the Competition Act, including some of the ones outlined in the BIA. Why do you think those interests are mobilizing against these proposed amendments?

● (1440)

Ms. Vass Bednar: I think we have a weak competition law. I've written about this extensively. It's difficult to bring a case forward. We win cases, but we don't win them often. We have trouble bringing cases forward. There is a huge disconnect with what everyday people seem to expect. I get these questions all the time from the media, from people, from people who want to learn, from policy colleagues: “Hey, I see this case happening internationally again in a big tech context, or digital context. Are we taking it here? What happens here? What does it mean?”

With so many of them, we can't even contemplate them under our current law. That is the reason for some of the research you previously heard about from Robin Shaban when they testified. Starting to take cases and starting to take a data-driven approach and back it into our law could be something we could look at, going forward, when we are in a consultation. Again, Canadians expect more. They want more on competition, and I think they talk about it all the time. They just don't use the words we are using, in terms of competition law.

[*Translation*]

The Chair: Thank you, Ms. Lapointe and Ms. Bednar.

Mr. Lemire, you have the floor for two and a half minutes.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

I'd like to address another topic, the issue of awarding public contracts based on the lowest bidder. Clearly, that involves several risks and drawbacks today.

It's important not to overlook the possible repercussions of awarding public contracts on competition and on small and medium-sized enterprises, which probably cannot take into account competition based on price. Projects may cost less over the short term, but they cost a lot more over the long term. Also, those businesses are often deprived of the ability to innovate.

Is there another solution that could ensure the quality of projects and make it easier for small or medium-sized enterprises to participate in the public contracting process, a solution better suited to those businesses in terms of competition based on price?

My question is for Ms. Bednar, but other witnesses may also want to comment afterwards.

[*English*]

Ms. Vass Bednar: I'm happy to turn it to others as well. I'm sorry that I had to step away from my chair for a moment.

The Competition Bureau actually put out, a few years ago, their guidance on people self-selecting or self-declaring against bid-rigging. There's research that I'll have to pull up, although I have papers all around me on my desk related to it. Again, I think it's something that would happen outside of the act, but that is fundamentally a pro-competitive outcome that signals the intention we want to achieve and helps people get there.

I think your question was whether something like that would also benefit SMEs. Yes, I'm optimistic that it would, which is why I included it in the brief that Denise Hearn and I submitted, which is now available online, which I believe you referenced. So if anyone wants to take a look, please do.

[*Translation*]

Mr. Sébastien Lemire: Thank you.

Is there anyone else who wants to comment on the principle of public contracting?

Mr. Dominic Thérien: If I may, I'd like to make a very brief comment.

Mr. Sébastien Lemire: You certainly may, Mr. Thérien.

The floor is yours.

Mr. Dominic Thérien: I agree that this issue may not be related to the bill and its amendments. However, I'd like to come back to a point I raised about the new proposed criminal offence related to non-poaching and wage fixing. It must be agreed that, currently, the processes for disqualification from public contracting will ensure that someone who's found guilty of those offences would lose the ability to obtain federal and provincial public contracts, here, in Quebec.

That ties in with the comment you made, but I don't think these issues were studied. Once again, this highlights the point raised by Ms. Quaid, who has the time to study these questions.

Mr. Sébastien Lemire: That is obviously one of the objectives.

Thank you Mr. Thérien.

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

Mr. Masse, you have the floor for two and a half minutes.

[*English*]

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

To Ms. Tiessen, with regard to the corporations that are abusing Canadian industries, we don't have a good history. In fact, in the past you used to be able to write off as a business-related expense part of an AMP or even legal fines and penalties. You got up to 50%, and it was used as a loss leader, whether it was, you know, dumping oil down the drain for the environment, not cleaning up the shops properly and so forth. It stymies innovation and Canadian workforces and puts them at a disadvantage.

What do you see out there with regard to that? I'm worried that if we don't have the proper systems in place, companies will take fines and penalties and so forth as long as it makes good business sense and as long as they can clear their edges.

Ms. Kaylie Tiessen: I think that's a very important point. We need to make sure that any penalties that are in place deter the behaviour that we are trying to prevent. If we don't have those penalties in place, we see things exactly like what happened in the grocery industry with wage-fixing and cancelling pandemic pay, the examples that you've provided.

This goes to many different areas of Canadian law where, one, the law needs to be improved, and two, enforcement of that law needs to be improved as well, because the law in and of itself is one of many steps that have to be taken. We need to make sure that we are enforcing the law and trying the law and making sure that people are penalized and organizations are penalized when they interact and adopt that behaviour.

● (1445)

Mr. Brian Masse: On the flip side of that, you do work with a lot of progressive employers who actually bring in workplace safety enhancements and other types of investments to make a better workforce for Canadian competitors. If we undermine them, then we undermine the businesses that are actually putting the money towards that. They're also putting money back into the workers and doing all those things. It's enough of a struggle for health and safety and other things, but if other companies are doing worse, then doesn't it just put more people at risk and also disadvantage those who are being more progressive?

Ms. Kaylie Tiessen: Yes, it absolutely does. It lowers the floor of competition for all sorts of organizations that are always trying to do the right thing in concert with their employees, with their unions, with environmental law, and the list goes on. If we allow this egregious behaviour to happen, that makes it more difficult for the good actors to compete in a marketplace and actually elevate Canada's economy and society overall.

The Chair: Thank you very much.

We'll move to Madame Gray for five minutes.

Mrs. Tracy Gray (Kelowna—Lake Country, CPC): Thank you, Mr. Chair.

Thank you to all the witnesses for being here today.

We've heard from some stakeholders their concerns that these comprehensive changes to the Competition Act need more consultation in order to ensure that they're doing what is intended. I have a question I'd like to ask the C.D. Howe Institute, and then the Canadian Bar Association and then Mr. Wu.

Do you believe there has been adequate consultation on these changes to the Competition Act that we are seeing in this budget?

I'll go first to the C.D. Howe Institute.

Mr. Benjamin Dachis: Oh, I don't think so.

Again, I go back to the only public consultation that I've really seen, which was run by Senator Wetston. The efforts of one senator should not make up the extent of our really delving into it, and the efforts of a senator over maybe six months, at most, should not be the extent of our conversation on some very serious changes.

I go back to some of the changes on wage-fixing, for which consultations, for example, need to include provinces with respect to their views on employee-employer relationships. That will be fundamental to the kinds of changes that can be very consequential to people's lives. That's just one example of a group that we didn't see weighing in on the existing consultation that probably needs to weigh in in the future.

Mrs. Tracy Gray: Thank you.

Next I'll go to the Canadian Bar Association.

Ms. Elisa Kearney: Sure, and thank you for that question.

We would agree with the response of Mr. Dachis. On consultation with respect to the specific provisions that are brought into this BIA, there was absolutely none. We think it's very important that consultation happen, not only at a higher level, on which there is broad public consultation, but also, as I think all the witnesses agree, by bringing in a variety of experts.

We've heard witnesses with us here today speak about trade law, franchise law and employment law, but there has been no consultation with the businesses themselves. Not only do we see a need to consult on the broader issues, but the devil is in the details with much of this legislation, so it's very important to also consult on the wording. As Ms. Bednar mentioned, it's also when you get into implementation that you need to ensure that you look at that quite closely.

Mrs. Tracy Gray: Thank you.

Mr. Wu, go ahead.

Mr. William Wu: Thanks for the question.

Yes, I would agree that the only consultation so far is Senator Wetston's consultation process. When you look at the submissions that were provided to that consultation, they are predominantly from observers and practitioners of competition law, so the range of views is coming from a fairly narrow set of stakeholders, and the larger, broader competition consultation that's supposed to come is intended to include broader stakeholders. I would hope that the amendments before us would enjoy the benefit of that broader consultation as well.

Just briefly on the no-poach, wage-fixing issue, when you look at the consultation paper by Professor Iacobucci, his concern is that there is no financial consequence to potentially harmful wage-fixing and no-poaching conduct. He thinks that there ought to be some mechanism in the competition law to provide that financial deterrence.

I must admit that deterrence is provided not only through a criminal provision. There are ways to amend section 90.1 to strengthen it to also provide that deterrent effect, and that can be very much part of the consultation process.

● (1450)

Mrs. Tracy Gray: Great. Thank you very much.

I have only one minute left here, and I have one more question.

Are you concerned that there would be unintended or unforeseen consequences that could arise from these changes to the Competition Act not going through a wholesome study?

I'll go to the C.D. Howe Institute, and then we'll see if we have time for a couple of others.

Perhaps you can be brief. Thank you.

Mr. Benjamin Dachis: Yes, and we've only just scratched the surface of some of the changes here. We haven't even talked about questions of an extraterritorial jurisdiction for a court order for the production of records for merger reviews. Is that enforceable? That's a whole other conversation that we have to have in terms of the implementation of some of these changes.

Again, I ask how implementable these changes are. Having them come into force right away without really thinking them through is problematic.

Mrs. Tracy Gray: Am I out of time?

The Chair: Yes, unfortunately, you are out of time.

I'll remind witnesses that they can always submit in writing if they have additional information that they want the committee to be aware of.

I will now turn to Mr. Dong for our last round of questions, for five minutes.

Mr. Han Dong (Don Valley North, Lib.): Thank you very much.

I, too, want to thank all the witnesses for coming today on short notice.

I want to go to Ms. Bednar, followed by Ms. Tiessen, for their comments on the consultation piece, because I would think that for anything to be in the BIA, the ministry would consult the industry and stakeholders before they make these suggestions.

What are your thoughts on whether or not enough consultation has been done, and what's the risk of not acting on these changes?

Ms. Vass Bednar: Thanks for the question.

I think there's a broader kind of idealized version that many of us hold about how policy change can be achieved and about the best fundamental practices. The reality is that we're so overdue for these changes, as I said in my opening remarks, that I think they should be welcome.

I say that because, over the past two years, as more people have been writing about competition, asking questions about how the Competition Act works and finding ways in which it doesn't quite work as well as we think it could, many stakeholders, broadly, have been met with arguments that say, “Actually, the Competition Act is perfectly up to the task. It's flexible. It can take on anything. It's ready to rock. It shouldn't have any changes at all.” These are now often the same voices in the public debate that are saying, “Whoa, we need to really tap the breaks again and talk more.” We do need to talk more, so there's a public appetite.

What would be the risk of not moving forward with these initial amendments? I think it's that we would be demonstrating again that we're not taking competition change seriously and that we're not ready to take these modest initial steps on consumer privacy that would put us in line with other actors internationally.

This isn't coming out of left field. It's not coming out of nowhere in the broader competition conversation. Have we deeply consulted on it and ticked all our boxes in terms of pounding the pavement and previewing it for everyone? Not quite yet, but again, that's what I think people are anticipating and what we need to do.

We're having two big conversations about competition right now, and they don't always go well together. One of those is mechanical, and that's the kind of conversation we're having now, but the other is philosophical, in terms of what the act is, what we expect of it and what Canadians expect of it. That's a bigger and broader conversation.

I'll give the rest of the time over to Kaylie.

Ms. Kaylie Tiessen: Thanks, Vass, and thank you very much for the question.

There have been some consultations on these, and the law has been tested and found to be insufficient to study wage-fixing, so that needs to be fixed, and it needs to be fixed now. Can we consult further after this change is made? I think that's really important, and I'm looking forward to participating in the additional consultations that are going to happen over the next year.

The risk, I think, of not implementing this wage-fixing change now is that it will languish for years, just like changes to hours of work rules have languished for years in that consultation. Should people get a break for lunch? When should they get a break for lunch? It means that we're having the same conversation over and over again about something we've already decided to change.

We need to make this change now, and then we can discuss the rest of them further afterwards. The risk of not making the change is that it doesn't happen.

● (1455)

Mr. Han Dong: Thank you very much for that input.

I want to ask both of you for your thoughts on the 3% of worldwide gross revenue as the changes to AMP. What are your personal thoughts on this?

Ms. Vass Bednar: Kaylie, I'm going to jump in.

I also want to say, in case I wasn't clear on this, that I'm not trained as a lawyer, so I'm happy to defer to others overall. However, in terms of why we have AMPs, first, fundamentally, it's as a deterrent. Second, it's so that firms can be penalized proportionally to what's happening. Again, if this is a novel design in terms of the 3%—I think we've heard questions about whether it should be Canadian revenues versus international revenues—it's worth ironing out.

We could see an additional change or amendment through this future consultation, but I think it's important. I'd love to make a graph for you of our AMPs in Canada and benchmark them against our international peers, and then we can have another conversation about what our reputation means in that regard.

Kaylie, I'll turn it to you if you have something to add.

Ms. Kaylie Tiessen: I don't have a specific idea of what the threshold should be. I definitely agree that they need to be much higher. I like the idea of them being proportional to the income or the profits that corporations have worldwide.

One thing that I've heard a few times today is that this change will damage Canada's reputation, and I think what we would actually see is other countries following suit. This conversation is happening globally. We need to make sure that we are deterring the behaviour and that we're punishing this behaviour when it happens. If we move, other countries will move as well.

It's very important. We're being held hostage by this argument that no corporation will ever invest in Canada again. I just don't think that is true.

Mr. Han Dong: Thank you very much.

I would love to see that graph that Ms. Bednar talked about, so if you do come up with it, feel free to send it through a written submission.

Thank you, Chair.

[*Translation*]

The Chair: Thank you, Mr. Dong.

Again, we've had the opportunity as a committee to hear from a panel of experienced witnesses.

I thank all the witnesses who made themselves available so quickly to take part in our meeting.

I'd now like to remind the honourable members that I must prepare a letter to the chair of the Standing Committee on Finance by next Friday.

You'll have the opportunity to provide me with all your observations, recommendations and proposed amendments, which I'll add to the letter that I'll submit for review by the Standing Committee on Finance. Please send me that information fairly early next week. It also has to be translated by the translation service before being sent to the Standing Committee on Finance.

I thank our witnesses again. I also thank the clerk, the analysts, the interpreters and the support staff.

The meeting is adjourned.