COMPETITION TRIBUNAL
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CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

MOTION RECORD
VOLUME 12 OF 29

May 6, 2025

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This is Exhibit “21” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

First Session
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

SENATE OF CANADA

SÉNAT DU CANADA

Proceedings of the Standing Senate Committee on

Délibérations du Comité sénatorial permanent des

Banking, Trade and Commerce

Banques et du commerce

Chairman:
The Honourable LOWELL MURRAY

Président:
L'honorable LOWELL MURRAY

Wednesday, May 28, 1986

Le mercredi 28 mai 1986

Issue No. 48

Fourth Proceedings on:

Subject-matter of Bill C-91, "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof"

Fascicule nº 48

Quatrième fascicule concernant:

Teneur du projet de loi C-91, «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois»

WITNESSES:
(See back cover)

TÉMOINS:
(Voir à l'endos)

28432—1

STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Lowell Murray, *Chairman*
The Honourable Ian Sinclair, Q.C., *Deputy Chairman*
The Honourable Senators:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (or Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (or Doody)
Kelly	Sinclair
Kirby	Walker

**Ex Officio Members*

(Quorum 4)

COMITÉ SÉNATORIAL PERMANENT DES BANQUES ET DU COMMERCE

Président: L'honorable Lowell Murray
Vice-président: L'honorable Ian Sinclair, c.r.
Les honorables sénateurs:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (ou Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (ou Doody)
Kelly	Sinclair
Kirby	Walker

**Membres d'office*

(Quorum 4)

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ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate, Thursday, April 17, 1986:

"With leave of the Senate,

The Honourable Senator Murray moved, seconded by the Honourable Senator MacDonald (*Halifax*):

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine the subject-matter of the Bill C-91, intituled: "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof", in advance of the said Bill coming before the Senate or any matter relating thereto.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

ORDRE DE RENVOI

Extrait des Procès-verbaux du Sénat du jeudi 17 avril 1986:

«Avec la permission du Sénat,

L'honorable sénateur Murray propose, appuyé par l'honorable sénateur MacDonald (Halifax),

Que le Comité sénatorial permanent des banques et du commerce soit autorisé à étudier la teneur du projet de loi C-91, intitulé: «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois», avant que ce projet de loi soit soumis au Sénat ou toute question s'y rattachant.

Après débat

La motion, mise aux voix, est adoptée.»

Le greffier du Sénat

Charles A. Lussier

Clerk of the Senate

MINUTES OF PROCEEDINGS

WEDNESDAY, MAY 28, 1986
(62)

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce met at 3:30 p.m. this day, the Chairman, the Honourable Senator Lowell Murray, presiding.

Members of the Committee present: The Honourable Senators Anderson, Barrow, Buckwold, Godfrey, MacDonald (*Halifax*) and Murray. (6)

In attendance: From the Library of Parliament, Research Branch, Economics Division: Mr. Basil Zafiriou, Chief.

Also in attendance: The Official Reporters of the Senate.

Witnesses:

From the Canadian Bankers' Association:

Mr. Robert M. MacIntosh, President;

Mr. T. G. O'Connor, Chairman, Legal Affairs Committee; Associate General Counsel, Toronto-Dominion Bank;

Mr. David Phillips, Vice-Président, Legal Affairs.

From the Association of Canadian Franchisors:

Mr. John Gillespie, President; President, Pizza Pizza Ltd.;

Mr. Harold Knifton, President, Independent Grocers' Association;

Mr. Ken Fong, Member, Government Liaison Committee; Vice-President, McDonald's Restaurants of Canada Ltd.;

Mr. Wayne McCracken, Special Counsel.

From Stelco Inc.:

Mr. R. E. Heneault, Executive Vice-President;

Mr. Warren Grover, Q.C., Counsel, Blake, Cassels and Graydon.

The Committee in compliance with the Order of Reference dated April 17, 1986, resumed consideration of the subject-matter of the Bill C-91, intituled: "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof".

The witnesses from the Canadian Bankers' Association made a statement and answered questions.

It was agreed—

That the following be filed as an exhibit with the Clerk of the Committee:

Canadian Bankers' Association Submission to the Senate Standing Committee on Banking, Trade and Commerce *(sic)*, *Comments on Bill C-91; An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, May 1, 1986 (English and French) (*Exhibit BTC-J*).

PROCÈS-VERBAL

LE MERCREDI 28 MAI 1986
(62)

[*Traduction*]

Le Comité sénatorial permanent des banques et du commerce se réunit aujourd'hui à 15 h 30 sous la présidence de l'honorable sénateur Lowell Murray (président).

Membres du Comité présents: Les honorables sénateurs Anderson, Barrow, Buckwold, Godfrey, Macdonald (*Halifax*) et Murray. (6)

Également présent: De la Bibliothèque du Parlement, Service de recherche, Division de l'économie: M. Basil Zafiriou, chef.

Aussi présents: Les sténographes officiels du Sénat.

Témoins:

De l'Association canadienne des franchiseurs:

M. Robert M. MacIntosh, président;

M. T. G. O'Connor, président, Comité des affaires juridiques; conseiller général associé, Banque Toronto-Dominion;

M. David Phillips, vice-président, Affaires juridiques.

De l'Association canadiennes des franchiseurs:

M. John Gillespie, président; président «Pizza Pizza Ltd.;

M. Harold Knifton, président «Independent Grocers' Association»;

M. Ken Fong, membre, Comité de relations gouvernementales; vice-président, Les restaurants McDonald du Canada Limitée;

Me Wayne McCracken, conseiller juridique spécial.

De Stelco Inc.:

M. R. E. Heneault, vice-président exécutif;

Me Warrent Grover, c.r., conseiller juridique, Blake, Cassels et Graydon.

Conformément à son ordre de renvoi du 17 avril 1986, le Comité poursuit l'étude de la teneur du projet de loi C-91: «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois.

Les témoins de l'Association des banquiers canadiens font une déclaration et répondent aux questions.

Il est convenu,—Que la pièce suivante soit déposée à titre de documentation auprès du greffier du Comité:

Le mémoire présenté par l'Association des banqueirs canadiens au Comité sénatorial permanent des banques et du commerce, *Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois*, le 1er mai 1986 (anglais et français) (*document BTC-J*).

The witnesses from the Association of Canadian Franchisors made a statement and answered questions.

It was agreed—

That the following be filed as exhibits with the Clerk of the Committee:

Position Statement on Bill C-91 (the "Bill") of the Association of Canadian Franchisors ("ACF"), April 8, 1896 (English and French) (*Exhibit BTC-K*);

Mr. K. Wayne McCracken, Memorandum: *The "Abuse of Dominance" Section and Intent*, May 12, 1986 (English only) (*Exhibit BTC-L*).

At 4:37 p.m. the Committee adjourned for a brief period and at 4:48 p.m. the sitting was resumed.

The witnesses from Stelco Inc. made a statement and answered questions.

It was agreed—

That the following be filed as an exhibit with the Clerk of the Committee:

Blake, Cassels and Graydon, *Memorandum on Bill C-91*, May 21, 1986 (English only) (*Exhibit BTC-M*).

At 6:06 p.m., the Committee adjourned to the call of the Chair.

ATTEST:

Les témoins de l'Association canadienne des franchiseurs font une déclaration et répondent aux questions.

Il est convenu,—Que les pièces suivantes soient déposées à titre de documentation auprès du greffier du Comité:

Déclaration de principes au sujet du projet de loi C-91 par l'Association canadienne des franchiseurs («ACF»), le 8 avril 1986 (anglais et français) (*document BTC-K*);

M. K. Wayne McCracken, note de service: *The "Abuse of Dominance" Section and Intent*, le 12 mai 1986 (anglais seulement) (*document BTC-L*).

A 16 h 37 le Comité suspend ses travaux pour une brève période et les reprend à 16 h 48.

Les témoins de Stelco Inc. font une déclaration et répondent aux questions.

Il est convenu,—Que la pièce suivante soit déposée à titre de documentation auprès du greffier du Comité.

Blake, Cassels et Graydon, *Memorandum on Bill C-91*, du 21 mai 1986 (anglais seulement) (*document BTC-M*).

A 18 h 06, le Comité suspend ses travaux jusqu'à nouvelle convocation du président.

ATTESTÉ:

Le greffier du Comité

Timothy Ross Wilson

Clerk of the Committee

EVIDENCE

Ottawa, Wednesday, May 28, 1986

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce met this day at 3:30 p.m. to consider the subject-matter of Bill C-91, "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof".

Senator Lowell Murray (*Chairman*) in the Chair.

The Chairman: The committee resumes its prestudy of Bill C-91, the Competition Tribunal Act.

Before introducing today's witnesses, perhaps we might discuss the progress of this Bill. The Bill has cleared the committee stage in the House of Commons. The legislative committee has made a number of recommendations for proposed amendments to the Bill, to which I take it the government is well disposed. I have asked officials to make a copy of the list of amendments that have been recommended by the committee in the other place so we will know what we are dealing with.

Since we began our prestudy, we have heard from the senior officials in the Department of Consumer and Corporate Affairs; we have heard from witnesses from the Canadian Federation of Independent Business, and from the Canadian Bar Association, and from the Association of Tobacco and Confectionery Distributors. Today we will hear from witnesses of three other organizations.

The time is coming, I believe, when we should wind up our pre-study and call the minister. I am endeavouring to arrange this now. Unfortunately, he is not available next Wednesday afternoon. He has to be in his constituency because the Prime Minister is visiting that constituency on that day. I am trying to arrange another day, possibly Tuesday afternoon or night or some time Thursday morning. Failing that, we would hear from the minister on June 11, 1986. I have now been informed that all of our attempts have failed. So we will hear from the minister on June 11. By that time, the legislative process may have overtaken us and the Bill may be formally in front of the Senate. However, I do not think that creates any great problems.

I have also asked Basil Zafiriou, who is from the Parliamentary Library, to go through the testimony that we have heard and to extract the major issues raised by witnesses. He will give senators a briefing paper on that in order for use to question the minister on those matters. The committee will meet next Wednesday afternoon in any case because I am sure there will be other business for us to transact.

This afternoon we have witnesses from three organizations that have an obvious interest in this bill. We will hear from the Canadian Bankers' Association, the Association of Canadian Franchisors and Stelco Incorporated. I have not attempted to apportion the time in advance for each of these witnesses. I will leave it to the judgment of honourable senators to question the witnesses or discuss the issues with them as they wish. I had not, however, intended to adjourn the committee for din-

TÉMOIGNAGES

Ottawa, le mercredi 28 mai 1986

[*Traduction*]

Le Comité sénatorial permanent des banques et du commerce se réunit aujourd'hui à 15 h 30 pour étudier la teneur du projet de loi C-91, «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois».

Le sénateur Lowell Murray (*président*) occupe le fauteuil.

Le président: Le comité reprend l'étude du projet de loi C-91, instituant le Tribunal de la concurrence.

Avant de présenter nos témoins, il serait peut-être utile de voir où nous en sommes dans l'étude de ce projet de loi. L'étude en comité à la Chambre des communes est terminée. Le comité législatif a recommandé quelques amendements, que le gouvernement est disposé à adopter, je présume. J'ai demandé au greffier de me faire parvenir une copie des amendements qui ont été proposés par le comité de l'autre endroit, afin que nous puissions savoir à quoi nous en tenir.

Depuis que nous avons commencé notre étude préliminaire, nous avons entendu les hauts fonctionnaires du ministère de la Consommation et des Corporations, les représentants de la Fédération canadienne de l'entreprise indépendante, de l'Association du Barreau canadien et de l'Association nationale des distributeurs de tabac et de la confiserie. Nous entendrons aujourd'hui les représentants de trois autres associations.

Le temps est venu, je crois, de mettre un terme à notre étude préliminaire et de convoquer le ministre. Je prends les dispositions en ce sens dès maintenant. Malheureusement, le ministre n'est pas disponible mercredi après-midi prochain car il doit se rendre dans sa circonscription pour la tournée du Premier ministre. J'essaie de convenir avec son Cabinet d'une autre date, peut-être mardi après-midi ou mardi soir, ou jeudi matin. Si ce n'est pas possible, nous entendrions le ministre le 11 juin 1986. On m'apprend justement qu'il ne sera pas disponible ces jours-là et qu'il témoignera le 11 juin. À ce moment, le processus législatif nous aura peut-être devancé et le projet de loi sera peut-être officiellement devant le Sénat. Je ne crois toutefois pas que cela pose de grands problèmes.

J'ai également demandé à M. Basil Zafiriou, de la Bibliothèque du Parlement, de passer en revue les témoignages que nous avons reçus et de tirer les principaux points soulevés par les témoins. Il remettra aux sénateurs un document de base pour leur permettre d'interroger le ministre sur ces questions. Le Comité se réunira mercredi après-midi prochain de toute façon, car je suis sûr que nous aurons d'autres affaires à régler.

Cet après-midi, nous entendrons les représentants de trois associations pour lesquelles le projet de loi suscite un intérêt évident. Nous accueillerons les représentants de l'Association des banquiers canadiens, de l'Association canadienne des franchiseurs et de Stelco Incorporated. Je n'ai pas essayé de répartir d'avance le temps dont nous disposons pour chacun de ces témoins. Je laisserai au jugement des honorables sénateurs le soin d'interroger les témoins ou de discuter des questions comme bon leur semblera. Je n'avais toutefois pas l'intention

[*Text*]

ner. I thought we might continue until we had heard all three of these organizations, if that was agreeable to the committee.

Without further ado, let me introduce our friends from the Canadian Bankers' Association. Their brief has been distributed to you. Mr. Robert MacIntosh, who is the President of the CBA, has a brief opening statement to make. At the witness table is Mr. MacIntosh; Mr. T. G. O'Connor, Chairman of the Legal Affairs Committee of the CBA, who also happens to be associate general council of the Toronto Dominion Bank; and Mr. David Phillips, Vice-President, Legal Affairs of the Canadian Bankers' Association.

Welcome back, Mr. MacIntosh.

Mr. Robert MacIntosh, President, Canadian Bankers' Association: Thank you, Senator Murray. We are pleased to have this opportunity to appear before this committee to comment on Bill C-91. I have a brief opening statement to make which really summarizes the brief we have submitted to you.

The submission which we have presented to you is intended to serve two purposes. First, the submission traces the legislative development of competition law governing banking services. It is important to note here that banks have been subject to competition law since 1967. This law, which was a predecessor of the current section 309 of the Bank Act, prohibited a variety of interbank agreements governing services and charges to customers. From 1967 to 1976 banks were the only deposit-taking financial institutions that were governed by competition law.

When the scope of the Combines Investigation Act was exapanded in 1976 to cover services, banks as well as other financial institutions became generally subject to the provisions of the Act. The banks have received a limited exemption from section 32 of the Combines Investigation Act because the prohibition against anticompetitive agreements between banks has been set out in the Bank Act. Despite this exemption in the Combines Act, the banks have been subject to comprehensive competition law for many years.

The second purpose of our submission is to present to you several recommendations for amendments to Bill C-91. I would like to take this opportunity to highlight three of these recommendations.

First, section 33 of the bill relating to interbank agreements should apply equally to all deposit-taking financial institutions. The bill proposes to transfer section 309 of the Bank Act to the Competition Act. Section 309 makes it a *per se* offence for banks to enter into a variety of agreements relating to charges or services to customers. In other words, the effect of such agreements on competition is immaterial. The fact of having entered a prohibited agreement, no matter how inconsequential it may be, constitutes an offence. The *per se* offences are not applicable to non-bank financial institutions. These institutions, however, do not benefit from several exemptions in section 309 that are pertinent to financial institutions.

[*Traduction*]

d'interrompre les travaux pour le déjeuner. J'ai pensé qu'il serait peut-être souhaitable d'attendre que nous ayons entendu les trois représentants de ces associations, si tel est le désir du comité.

Sans plus de procès, permettez-moi de vous présenter nos amis de l'Association d es banquiers canadiens. Leur mémoire vous a été remis. M. Robert MacIntosh, président de l'Association des banquiers canadiens, fera une déclaration préliminaire. A la table des témoins, nous avons donc M. MacIntosh, M. T. G. O'Connor, président du Comité des affaires juridiques de l'Association des banquiers canadiens, qui est également conseiller général adjoint de la Banque Toronto Dominion, et M. David Phillips, vice-président des affaires juridiques de l'Association des banquiers canadiens.

Nous vous souhaitons la bienvenue, monsieur MacIntosh.

M. Robert MacIntosh, président de l'Association des banquiers canadiens: Merci beaucoup, sénateur Murray. Il nous fait plaisir de comparaître devant votre comité pour exprimer notre point de vue sur le projet de loi C-91. Je ferai d'abord une brève déclaration préliminaire, où je résumerai le mémoire que nous vous avons soumis.

Le mémoire que vous avez devant vous comporte deux volets. Nous dressons d'abord un bilan de l'évolution des mesures législatives sur la concurrence qui régissent les services bancaires. Il est important de signaler que les banques sont assujetties à la Loi sur la concurrence depuis 1967. La première loi, qui a précédé l'article 309 actuel de la Loi sur les banques, interdisait un certain nombre d'accords entre banques concernant les services et les frais aux clients. Entre 1967 et 1976, les banques étaient les seules institutions financières de dépôts a être régies par la loi sur la concurrence.

Lorsque la Loi relative aux enquêtes sur les coalitions a été révisée en 1976 pour inclure les services, les banques, comme les autres institutions financières, ont été assujetties à la plupart des dispositions de cette loi. Les banques ont cependant été partiellement exemptées de l'application de l'article 32 de cette loi car l'interdiction de conclure des accords anti-concurrentiels entre banques était déjà prévue dans la Loi sur les banques. Malgré cette exemption à la Loi relative aux enquêtes sur la coalition, les banques, sont, grosso modo, assujetties aux lois sur la concurrence depuis longtemps.

Dans le deuxième volet de notre mémoire, nous vous présentons plusieurs recommandations d'amendements au projet de loi C-91. J'insisterai plus particulièrement sur trois d'entre elles.

Tout d'abord, l'article 33 du projet de loi régissant les accords entre banques devrait s'appliquer de manière égale à tous les établissements qui reçoivent des dépôts. Le projet de loi propose de transférer l'article 309 de la Loi sur les banques à la Loi relative aux enquêtes sur les coalitions. L'article 309 qualifie d'actes criminels certains types d'accords entre banques concernant les frais et les services aux clients. En d'autres termes, ces accords ont peu d'effets sur la concurrence. Le fait de conclure un accord interdit, qu'Il ait beaucoup de portée ou non, constitue un délit. Ce n'est pas le cas pour les institutions financières non bancaires. Ces dernières ne sont toutefois pas

[*Text*]

Mr. Chairman, perhaps I might elaborate on the nature of those exemptions a little later.

Since some non-bank financial institutions are as big as the big banks, it is anomalous that section 33 of the Competition Act should apply only to the banks. We recommend that section 33 of the act should be amended so that the application of this provision is extended to all deposit-taking financial institutions, not just banks. We also recommend that, following the enactment of this amendment, the government should initiate consultations with financial institutions for the purpose of eventually eliminating the *per se* offences from the Competition Act.

Secondly, we are concerned that the computer search provisions of the bill appear to provide investigators with unhindered access to the computer equipment of firms that are subject to an investigation. In our view, the bill should be amended to clearly provide the owners of computer systems with the ability to limit a computer search before the search takes place. This type of procedure would help to ensure that the owners of computer systems were protected at all times during the course of a computer search. The provisions, as currently drafted, do not provide this protection.

Thirdly, we are concerned about the scope of the merger provisions. The term "merger" is defined so broadly that it would appear to encompass ordinary secured transactions between borrowers and lenders. In our view, the taking of security for a loan is not a merger, and should not be considered as such under the Competition Act. We note that section 83 of the bill contains an exemption for secured transactions from the merger prenotification requirements. We are concerned, however, that the exemption as drafted may be susceptible to a narrow interpretation by the courts. If the provision is narrowly interpreted, lenders may be faced with an obligation to prenotify the director of investigation and research when taking security for some loans. We recommend that the prenotification exemption should be broadened to ensure that it applies to all secured transactions in the ordinary course of business.

Although the CBA is generally supportive of Bill C-91, we feel that the foregoing issues and the other issues discussed in our written submission should be addressed in the form of amendments to the bill. We would be pleased to assist the committee with any questions the members may have on our submission.

The Chairman: Thank you, Mr. MacIntosh.

Senator Buckwold: Mr. Chairman, as Mr. MacIntosh is aware, I am a director of a chartered bank. For the record, I

[*Traduction*]

exemptées de plusieurs des modalités de l'article 309 qui régissent les institutions financières.

Monsieur le président, il sera peut-être utile de vous donner quelques explications concernant la nature de ces exemptions un peu plus tard.

Vu que certaines des institutions financières non bancaires sont aussi importantes que les grandes banques, il n'est pas normal que l'article 33 de la Loi sur la concurrence ne s'applique qu'aux banques. Nous recommandons que cet article soit modifié pour inclure toutes les institutions financières qui reçoivent des dépôts, et non uniquement les banques. Nous recomandons également, si cet amendment est adopté, que le gouvernement amorce des consultations auprès des institutions financières pour déterminer s'il serait souhaitable de faire disparaître la notion d'acte criminel dans la Loi sur la concurrence.

Deuxièmement, nous craignons que les dispositions concernant la recherche de données sur ordinateur donnent aux enquêteurs un accès inconditionnel aux systèmes informatiques faisant l'objet d'une enquête. À notre avis, le projet de loi devrait être modifié afin de permettre, de façon non équivoque, aux propriétaires de systèmes informatiques de restreindre les conditions de recherche avant que celle-ci ne soit entreprise. Ce genre de procédure contribuerait à protéger les propriétaires de systèmes informatiques pendant toute la durée d'une recherche de données sur ordinateur. Telle que libellée, cette disposition n'offre pas cette protection.

Troisièmement, nous entretenons certaines réserves au sujet de l'étendue des dispositions concernant le «fusionnement». La définition du «fusionnement», est si large qu'elle pourrait, semble-t-il, englober les transactions courantes assorties de garanties entre les emprunteurs et les créanciers. À notre avis, l'acquisition de garanties en vue d'accorder un prêt ne constitue pas un fusionnement, et ne devrait pas être considérée comme tel en vertu de la Loi sur la concurrence. Nous signalons que l'article 83 du projet de loi exempte ceux qui engagent des transactions comportant l'acquisition de garanties de l'obligation de donner avis de la transaction. Dans sa formulation actuelle, nous craignons que cette exclusion soit interprétée de façon très étroite par les tribunaux. En l'occurence, les prêteurs pourraient se voir obligés d'aviser le Directeur des enquêtes et recherches lorsqu'ils acceptent des garanties avant d'accorder certains prêts. Nous recommandons que l'exemption de l'obligation de donner avis soit élargie pour qu'il soit bien clair qu'elle s'applique à toutes les transactions comportant l'acquisition de garanties dans le cours normal des affaires.

Même si l'ABC appuie généralement la teneur du projet de loi C-91, elle estime que les questions dont nous venons de parler et les autres points soulevés dans son mémoire devraient faire l'objet d'amendements au projet de loi. Il nous ferait plaisir de donner au comité toutes les explications nécessaires concernant ces points de notre mémoire.

Le président: Merci beaucoup, Monsieur MacIntosh.

Le sénateur Buckwold: Monsieur le Président, comme M. MacIntosh le sait, je suis administrateur d'une banque à

[*Text*]

would like to declare my interest in the subject under discussion.

The Chairman: I appreciate that, Senator Buckwold. You are free to participate if you wish, having made that declaration. I do not expect there will be any votes today.

Senator Barrow: Mr. MacIntosh, I notice you have listed three items that you think should be remedied, although there are a number of others that you have mentioned. You have apparently had a number of discussions with officials from the Department of Consumer and Corporate Affairs. Were these items not brought up at the time of those discussions?

Mr. MacIntosh: I am glad you asked me that, Senator Barrow. The points we have been trying to make with regard to Bill C-91, especially the point about the transfer of section 309 of the Bank Act to the Competition Act, are ones that we have been talking to the Department about for at least three years. I have discussed that particular point with the staff of the Department under at least three ministers I can think of, and perhaps even before that. As yet the officials have not responded to our concerns.

I would like to explain why these concerns have come about. Financial institutions have one characteristic that distinguishes them from all other corporations in terms of agreements to provide services, and that is the fact that financial institutions—deposit-taking institutions—have to interface with each other. If you take a cheque that is drawn on another bank into your bank and deposit that cheque, the bank where you deposit the cheque is giving you cash right then and there for a piece of paper. So it is in fact relying on the credit-worthiness of the other bank which issued that piece of paper. They are out the money until they recover it in the clearing system by presenting it to the issuing bank, the payor's bank. The whole clearing system and the whole payment system hinges on the fact that bank A accepts the paper of banks B, C, D and up to the 65 banks that we have. They accept each other's paper without question; otherwise, the payment system does not work.

Because they have to interface in this way with each other, it is required to have agreements between them as to the nature of that interface. The two manuals of procedure that involve the payment system—I did not bring them with me today—have to do with the specific qualities of the cheque, what can go on a cheque, where it can be on a cheque, what times of day cheques are going to be settled between banks, what happens if there is a default, what happens if there is an error. It is a massive structure which has been built up over more than a century to deal with this kind of structuring.

In 1980, parliament introduced a new element. This was the Canadian Payments Association, which brought into the payment system other institutions which are not banks. I am referring to trust companies, the caisses populaire, credit unions, the Alberta Treasury Branches, the Montreal City and District. They are now all part of the Payments Association. We

[*Traduction*]

charte. J'aimerais qu'il soit inscrit au compte rendu que je déclare avoir certains intérêts à l'égard du sujet en discussion.

Le président: Nous en prenons note, sénateur Buckwold. Vous pouvez participer à la discussion si vous le voulez, vu que vous avez fait cette déclaration. Je ne crois pas que les sénateurs auront à prendre un vote aujourd'hui.

Le sénateur Barrow: Monsieur MacIntosh, je remarque que vous avez énoncé trois lacunes auxquelles on devrait remédier, bien que vous en ayez mentionné d'autres également. Apparemment, vous avez eu bien des discussions avec les hauts fonctionnaires du ministère de la Consommation et des Corporations. Ces points n'ont-ils pas été soulevés au moment de ces discussions?

M. MacIntosh: Je suis content que vous me demandiez cela, sénateur Barrow. Les points que nous avons tenté de faire valoir au sujet du projet de loi C-91, en particulier celui concernant le transfert de l'article 309 de la Loi sur les banques à la Loi sur la concurrence, font l'objet de discussions avec les autorités du ministère depuis au moins trois ans. Nous l'avons fait sous au moins trois ministres successifs, et peut-être même avant. Pourtant, les fonctionnaires n'ont pas tenu compte de nos recommandations.

J'aimerais vous expliquer l'origine de ces préoccupations. Les institutions financières ont une caractéristique qui les distingue des autres entreprises en ce qui concerne les accords de services qu'elles peuvent conclure entre elles, et c'est que les institutions financières qui reçoivent des dépôts doivent nécessairement transiger entre elles. Quand une banque accepte un chèque tiré sur une autre banque, la banque qui reçoit le dépôt vous remet un montant d'argent sur le champ, mais c'est elle qui a l'instrument en main. Elle est donc obligée de miser sur la solvabilité de la banque émettrice de cet instrument de paiement. Elle est en déficit tant qu'elle n'a pas récupéré le montant de la banque émettrice, de la banque payeuse, par l'intermédiaire du système de compensation. Tout le système de compensation et tout le système de paiement reposent sur le fait que la banque A accepte l'instrument de la banque B, C, D, ou de l'une des 65 banques qui forment le réseau. Chacune d'elles accepte les instruments des autres banques sans autres procès; autrement, le système de paiement ne pourrait fonctionner.

Comme ces institutions doivent avoir ce genre de liens entre elles, elles doivent conclure des accords concernant la nature de ces échanges. Les deux manuels de procédure qui traitent du système de paiement—je n'en ai malheureusement pas avec moi—définissent les caractéristiques spéciales du chèque, les annotations qu'il doit comporter, l'endroit où celles-ci doivent être placées le moment où doivent être réglés les paiements entre les banques, ce qui arrive si les fonds sont insuffisants et ce qui arrive s'il y a une erreur. C'est un système complexe qu'on a mis plus d'un siècle à monter.

En 1980, le Parlement a introduit un nouvel élément. Je veux parler de l'Association canadienne des paiements, qui a intégré dans le réseau d'autres établissements qui n'étaient pas des banques. Je songe aux sociétés de fiducie, aux caisses populaires, aux coopératives de crédit, aux succursales du Trésor albertain, à la Banque de la Cité et du District de Mont-

[*Text*]

have one board of directors in this country. I happen to sit on the board as one of the five bank representatives, and there are five representatives from the near banks, as we call them, and a chairman who is an officer of the Bank of Canada. That's the board of the Canadian Payments Association. It has now taken responsibility for this manual of rules. The manual is no longer a CBA document. It is now turned over in law and in practice to the Canadian Payments Association.

The point I am trying to make is this: This Act was drafted to apply only to banks. Here we have all these other institutions which do the same things as the banks do. Legally, under the statutes, they belong to the very same association. They also issue cheques; they also clear cheques with the banks and with each other, and yet they are not subject to the same provisions of the act. We have been asking "Why not?" for a long time. There should be a level playing field and consistency about these rules. At the present time, there are no rules that I know of between banks as such that do not include these other players; there are no such rules anymore. The exemptions which exist in section 309, which are being transferred over, were meant to apply to these necessary agreements between banks for the interchange of cheques for the operation of the payments system. That is why the exemptions are there and the only reason they are there. Banks cannot agree to charge a given rate of interest on a loan or a fee for a service or any other agreement whatsoever. However, they are allowed to have these agreements which apply to the payment system.

We are saying that those same exemptions should apply to the other institutions as well. We do not object to that, because they are all in the same game. However, we are saying that the issue should have been dealt with—and there has been all kinds of time to deal with that issue. Recently, the departmental officials have met with our legal officers, including the gentlemen who are with me today. We have had various discussions indicating that they are now coming around to this view, but that it is too late to deal with in this act. As I have previously said, I dealt with it under the regime of Mr. Ouellette, Mrs. Erola and the current minister, and we have made these same points over and over again. We would certainly like to see them dealt with. We do not see why they should not be dealt with. It is just common sense that there should be a standard application of law to all institutions that do the same thing.

Senator Barrow: Was there any indication from the officials as to why these things were not done?

Mr. MacIntosh: I do not think I really know why not. I have asked them in the presence of the minister on various occasions

[*Traduction*]

réal. Toutes ces institutions font maintenant partie de l'Association canadienne des paiements, qui est régie par un conseil d'administration. J'ai déjà été membre du conseil d'administration en tant que représentant d'une des cinq banques. Ce conseil est formé de cinq représentants des banques, de cinq représentants des quasi-banques, comme nous les appelons, et du président, qui est un représentant de la Banque du Canada. Toutes ces personnes forment le conseil d'administration de l'Association canadienne des paiements. C'est à ce conseil qu'incombe la responsabilité de la mise à jour du manuel de règlements. Ce manuel ne relève plus de l'ABC. C'est maintenant l'Association canadienne des paiements qui s'en charge, de par la loi et en pratique.

Le point que j'aimerais faire ressortir est le suivant: dans son libellé actuel, cette loi ne s'applique qu'aux banques. Mais il y a bien d'autres institutions qui accomplissent la même tâche que les banques. Juridiquement parlant, elles appartiennent à la même association. Elles émettent des chèques, elles compensent les effets des banques et ceux des autres institutions de leur catégorie, mais elles ne sont pas assujetties aux mêmes dispositions de cette loi. Il y a longtemps que nous nous demandons pourquoi. Les règles du jeu devraient être les mêmes pour tous, et il devrait y avoir cohérence entre ces règles. A l'heure actuelle, il n'y a pas, à ce que je sache, de règles qui concernent les relations entre les banques qui ne les englobent pas; il n'y en a plus. Les exclusions relatives à l'application de l'article 309, qui sont maintenant intégrées à cette loi, devaient s'appliquer aux accords nécessaires entre les banques concernant l'échange des chèques, et ce, pour le bon fonctionnement du système de paiement. C'est pour cette raison, et pour la seule d'ailleurs, que ces exclusions sont là. Les banques ne peuvent pas convenir entre elles d'exiger tel ou tel taux d'intérêt sur un prêt ou tel ou tel tarif pour un service donné. Il ne peut y avoir de telles ententes. Mais elles peuvent conclure des accords en ce qui concerne le système de paiement.

Nous prétendons que ces exclusions devraient s'appliquer aux autres institutions également. Nous ne nous y opposons pas, parce qu'elles sont soumises aux mêmes règles du jeu. Nous soutenons cependant qu'il aurait fallu en tenir compte, et il y aurait eu bien des moments pour le faire. Récemment, les autorités du ministère ont rencontré nos conseillers juridiques, dont mon collègue qui est avec moi aujourd'hui. Nous avons eu de sérieuses discussions au cours desquelles il nous a semblé les avoir convaincus de notre point de vue, mais il était trop tard pour en tenir compte dans la loi. Comme je l'ai déjà dit, nous en discutions même sous M. Ouellette, sous M^me^ Erola, comme sous le ministre actuel, et il y a longtemps que nous répétons les mêmes arguments. Nul doute que nous aimerions qu'on en tienne compte. Nous ne voyons pas pourquoi on ne le fait pas. Nous ne voyons pas pourquoi on n'en tient pas compte. Il est simplement logique que les mêmes normes s'appliquent aux institutions qui accomplissent la même tâche.

Le sénateur Barrow: Les fonctionnaires du ministère vous ont-ils signalé pourquoi ils ne font rien?

M. MacIntosh: Je ne sais vraiment pas pourquoi. Je leur ai demandé en présence du ministre à diverses occasions par le

[*Text*]

in the past. More recently, the reason has been that they did not have time.

Senator Barrow: On page 8 of your submission you say:

> "The CBA and government officials considered draft legislation and came close to an agreement on statutory language that would place all agreements between financial institutions on the same basis. Unfortunately, time did not permit the completion of these discussions before Bill C-91 was introduced."

Mr. David Phillips, Vice-President, Legal Affairs, Canadian Bankers' Association: We considered and discussed draft legislation with departmental officials. We were not able to agree on wording which was mutually acceptable to us. The government now takes the position that the objective which we set out in our legislation is something they would like to implement further on down the road, specifically at the time legislation is introduced reregulating the financial services sector of the economy.

Our position is that the amendment we have suggested in our brief is a very simple amendment. We know it has the support of the credit unions. The Canadian Credit Co-operative Society has written to the House of Commons committee in support of our suggestion. I believe we have some support among the trust companies. Unfortunately, they have not come forward and taken a strong stand one way or the other. It is a simple amendment. I think it makes sense in the context of the bill. I cannot see that it affects any other provisions in the bill. It is self-contained, and we think it is the sort of amendment which would greatly improve this bill, certainly as it applies to deposit-taking financial institutions. We see no reason why there should be a delay in considering it.

Senator Barrow: What is the amendment?

Mr. Phillips: The amendment is simply this: Instead of the word "bank" in section 33 of the Bill, the term "financial institution" should be used and there should be a definition of "financial institution" that includes banks, credit unions, trust companies and deposit-taking loan companies.

On page 24 of our brief, we have included a draft amendment which we feel accomplishes this objective.

Mr. MacIntosh: I would like to add a few words to the points Mr. Phillips has been making.

The importance of getting a level playing field on this has very much to do now with the fact that we are getting into these interchange agreements about plastics. The interchange of cheques is only part of the story. What is becoming even more important now is the Visa Card and Master Card agreements and what is called Interact. Interact is a new organization which takes in financial institutions, banks and non-banks who are in the preparatory stages of point-of-sale electronic transfer of funds. In this country there will be a network of transactions that are initiated at the merchant's counter electronically.

[*Traduction*]

passé. Récemment, ils m'ont répondu qu'ils n'avaient pas le temps.

Le sénateur Barrow: À la page 6 de votre mémoire, vous dites:

> L'ABC et les représentants de l'État ont exmainé quelques possibilités de textes législatifs et sont venus près de se mettre d'accord sur un énoncé qui mettrait sur le même pied tous les accords passés entre des institutions financières. Malheureusement, le temps n'a pas permis de conclure les discussions avant le dépôt du projet de loi.

M. David Phillips, vice-président, Affaires juridiques, Association des banquiers canadiens: Nous avons examiné et étudié divers textes législatifs avec les fonctionnaires du ministère. Nous n'avons pu nous entendre sur un libellé qui aurait satisfait les deux parties. Le gouvernement semble disposé à considérer que le point que nous soulevons devrait être intégré un peu plus tard, plus précisément au moment où l'on présentera un projet de loi sur la réglementation du secteur des services financiers.

Nous estimons que l'amendement que nous proposons est très simple. Nous savons que les coopératives de crédit y sont favorables. La Canadian Credit Co-operative Society a écrit au comité de la Chambre des communes pour appuyer notre suggestion. Je crois que certaines sociétés de fiducie nous appuient également. Malheureusement, elles n'ont pas jugé bon d'intervenir et présenter un point de vue ferme à ce sujet. C'est un amendement simple. Je crois qu'il est logique dans le contexte de ce projet de loi. À mon avis, il n'a aucune conséquence sur ses autres dispositions. Il a un but bien défini. C'est le genre d'amendement qui améliorerait beaucoup ce projet de loi, certainement en tout cas en ce qui concerne les institutions financières de dépôts. Nous ne voyons pas pourquoi cette modification serait reportée à plus tard.

Le sénateur Barrow: Quel serait cet amendement?

M. Phillips: Tout simplement ceci: Au lieu du mot «banque», dans l'article 33 du projet de loi, on utiliserait l'expression «institution financière». On inclurait ensuite dans la définition de l'expression «institution financière» les banques, les coopératives de crédit, les sociétés de fiducie et les sociétés prêteuses qui reçoivent des dépôts.

À la page 18 de notre mémoire, nous avons proposé un texte d'amendement qui, à notre avis, atteindrait cet objectif.

M. MacIntosh: J'aimerais ajouter quelques précisions au sujet des points soulevés par M. Phillips.

S'il importe tant d'établir des règles de jeu égales, c'est surtout à cause de la multiplication des accords d'échange relatifs aux cartes de crédit. La compensation des chèques est secondaire. Aujourd'hui, ce sont les accords qui sont conclus avec Interact au sujet de Visa et de Master Card qui prédominent de plus en plus. Interact est un nouvel organisme qui regroupe les institutions financières, bancaires ou non, qui s'apprêtent à installer dans les points de vente des comptoirs pour permettre le transfert électronique de fonds. Il y aura, au pays, un réseau de transactions qui seront initiées électroniquement à partir de chaque point de vente.

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At the present time I believe the Interact group includes all of the large banks, the caisses populaires organizations, the credit unions, and some of the major trust companies. That group has invited any financial institution who can meet the standards to come in. So it is not an exclusive club. Anybody can go into it who can meet the standards of the club.

I am concerned that unless the exemptions are broadly applied, we are going to get into trouble in the very rapid technological change that is going on in that field. It is highly technical. There are instruments that are going to sit on a merchant's counter where, when you buy a product, you have to tap in your own personal identification number. There have to be controls on that to ensure security of it, that you are going to keep it, that someone else is not going to get hold of it. It is a very technical business. The telecommunication links are highly technical and require all these agreements.

We are concerned that, if these exemptions are not broadly applied, then we will have to run off to the minister to get permission before there is a meeting. These meetings are going on all the time. They cannot wait for decisions to be made until a minister gives approval. It is very important that these exemptions be broad and be spelled out and that they apply to all the institutions.

Senator Barrow: Does this draft amendment cover what you are asking for?

Mr. MacIntosh: Yes, Senator.

Senator Godfrey: I have a supplementary question. Do I understand that there was a technical objection to the amendment that you drafted?

Mr. Phillips: We presented this amendment to the house committee. I was told by the department that they were not in a position to accept this amendment because they did not have time to study its impact on the rest of the bill.

Senator Godfrey: How long ago was this?

Mr. Phillips: We appeared about ten days ago or two weeks ago. What we are proposing is a very simple amendment.

Mr. MacIntosh: Just for clarity, Senator Godfrey, we have talked about this for three years, and I have never been told by any official what was wrong with our position.

Senator Barrow: On page 14 under "Regulations", you have brought up something we have discussed here before.

> "Proposed section 22 of the Act authorizes the Governor in Council to make regulations regulating the practice and procedure of investigations under the Act."

Also in that paragraph you say:

> "In our view, regulations made under the Competition Act should be subject to a similar requirement."

[*Traduction*]

A l'heure actuelle, je pense que le groupe Interact regroupe toutes les banques importantes, la fédération des caisses populaires, les coopératives d'épargne et de crédit et quelques-unes des principales sociétés de fiducie. Toutes les institutions financières capables de respecter les normes de ce groupe sont invitées à s'y joindre. Il ne s'agit donc pas d'un club sélect, puisque quiconque répond à ses normes peut y adhérer.

J'ai bien peur que si la portée des exemptions n'est pas élargie, la rapidité de l'évolution technologique dans ce secteur va nous causer des problèmes. C'est une question extrêmement technique. Les marchands disposeront d'instruments qui feront en sorte que, lorsque vous achèterez un produit, vous devrez introduire votre numéro d'identification personnel. Il devra y avoir des mesures de contrôle pour s'assurer de la sécurité de ce mécanisme, c'est-à-dire pour faire en sorte que personne d'autre n'utilise votre numéro à votre place. C'est un domaine très technique. Les liaisons par télécommunications sont extrêmement complexes et nécessitent des accords de tout genre.

Nous craignons si la portée des exemptions n'est pas élargie d'être obligés de nous adresser au ministre pour obtenir l'autorisation de tenir une réunion. Or, ces réunions sont fréquentes. Nous ne pouvons attendre le bon vouloir d'un ministre pour prendre des décisions. Il est très important que les dispositions relatives aux exemptions soient précises et s'appliquent à toutes les institutions.

Le sénateur Barrow: L'amendment proposé répond-il à vos attentes?

M. MacIntosh: Oui, sénateur.

Le sénateur Godfrey: J'ai une autre question. D'après ce que j'ai pu comprendre, il existe une objection technique à l'adoption de l'amendement que vous proposez?

M. Phillips: Nous avons présenté cet amendment au comité de la Chambre. Les représentants du Ministère m'ont fait savoir qu'ils n'étaient pas en mesure d'accepter cet amendment, parce qu'ils n'avaient pas le temps d'étudier ses répercussions sur le reste du projet de loi.

Le sénateur Godfrey: Il y a combien de temps de cela?

M. Phillips: Nous avons comparu il y a environ dix jours ou deux semaines. L'amendement que nous proposons est pourtant très simple.

M. MacIntosh: Juste pour votre gouverne, sénateur Godfrey, nous parlons de cet amendement depuis maintenant trois ans, et jamais personne n'a pu me dire ce qui cloche dans notre position.

Le sénateur Barrow: A la page 10 de votre mémoire sous la rubrique «Règlements», vous soulevez un point dont nous avons déjà discuté ici.

> «L'article 22 autorise le gouverneur en conseil à prendre des règlements régissant la pratique et la procédure des enquêtes effectuées en vertu de la loi.»

Vous dites aussi dans ce paragraphe:

> «A notre avis, les règlements établis aux termes de la Loi relative aux enquêtes sur les coalitions devraient faire l'objet d'une disposition semblable.»

[*Text*]

That is, that it be published in the Canada Gazette. It is my understanding that the government is now suggesting that all changes to be made by the Governor in Council be published and that a period of time be given so people can object to them. I believe I read that in the Globe and Mail this morning.

Mr. Phillips: My information is that the government did move an amendment to that effect in legislative committee. I have not seen the amendments to the bill. That, of course, was done subsequent to the preparation of our submission. If that is the case, then we applaud those amendments.

The Chairman: Senator MacDonald.

Senator MacDonald (Halifax): On page 9 of your brief you refer to the vagueness of not defining the term "financial policy" when you are talking about the exemption. Can you give me an example where a financial policy would not be sufficient to grant an exemption for bank agreements that, in your view, should be exempt?

Mr. MacIntosh: Senator MacDonald, our concern there is that the Director of Combines Investigation might decide that a question was not one of financial policy in his own mind, even though the Minister of Finance thinks it is. If the minister of Finance himself considers it to be a matter of financial policy, then I do not think it would be appropriate for an official in another department to say that, regardless of what the Minister of Finance thinks, he does not think it is a matter of financial policy.

Years ago I sat on a committee called the Winnipeg Committee. The Winnipeg Committee had to do with the fact that at that time the Central Bank was very concerned about the rapid rise of short-term interest rates. The Governor of the bank asked the Minister to stop the increase in rates by getting the banks to agree to pay no more than a certain amount, not to escalate the short-term rates. We had this committee that was authorized by the minister which met from time to time. We asked our chairman of that committee, while we sat in the room, to telephone the Governor of the Bank of Canada and tell him what we were doing, what we were going to agree to, and could he give us the permission of the minister. We would wait in the room until the Governor cleared it with the Department of Finance and came back. I think that agreement went on for two or three years. The minister chose to consider that a matter of financial policy, but supposing the Director of Combines said that it was not, that it was an offence because it was deliberately holding down interest rates against the public interest, then you are into a hassle between ministers. If the Minister of Finance has an overriding reason, we think that that should be enough.

There are times, as we have seen in the last year or two, when the minister certainly wants to have overriding power to intervene and make an agreement, or whatever it might be.

[*Traduction*]

C'est-à-dire, qu'ils devraient être publiés dans la Gazette du Canada. A ma connaissance, le gouvernement propose, à l'heure actuelle, que tous les changements que se propose d'apporter le gouverneur en conseil soient publiés, et que les intéressés disposent d'un certain délai pour s'y opposer. Je crois avoir lu cela ce matin dans le Globe and Mail.

M. Phillips: D'après les renseignements dont je dispose, le gouvernement a effectivement présenté un amendement en ce sens en comité législatif. Je n'ai cependant pas vu cet amendement dans le projet de loi. Cela a eu lieu, bien sûr, après la préparation de notre mémoire. Si tel est le cas, nous ne pouvons que nous en réjouir.

Le président: Sénateur MacDonald?

Le sénateur MacDonald (Halifax): A la page 7 de votre mémoire, vous déplorez l'imprécision de l'expression «politique financière» lorsque vous parlez de l'exemption. Pouvez-vous me donner un exemple où une politique financière ne suffit pas pour accorder une exemption à l'égard d'ententes bancaires qu'il faudrait, à votre avis, exempter?

M. MacIntosh: Sénateur MacDonald, nous craignons que le directeur des enquêtes sur les coalitions ne décide qu'une question ne relève pas, selon lui, de la politique financière, même si le ministre des Finances est d'un avis contraire. Si le ministre des Finances lui-même considère que cette question relève de la politique financière, je vois mal comment un représentant d'un autre ministère pourrait le contredire.

Il y a un certain nombre d'années, j'ai siégé à un comité appelé Comité de Winnipeg. Ce comité avait été constitué, à l'époque, parce que la Banque centrale s'inquiétait de la montée en flèche des taux d'intérêt à court terme. Le gouverneur de la banque avait demandé au ministre de freiner la hausse des taux d'intérêt en obtenant des banques qu'elles consentent à ne pas dépasser un certain seuil afin de ne pas prolonger l'escalade. Notre comité, dont la création avait été autorisée par le ministre, se réunissait à l'occasion. Nous avons demandé à notre président de téléphoner alors au gouverneur de la Banque du Canada, pendant que nous étions en réunion, pour le tenir informé de nos travaux et de nos décisions et pour lui demander d'obtenir pour nous l'autorisation du ministre. Nous attendions dans la salle de réunion jusqu'à ce que le gouverneur nous rappelle pour nous indiquer que nous avions le feu vert du ministre des Finances. Ce comité a fonctionné ainsi pendant deux ou trois ans. Le ministre avait choisi de considérer cette question comme relevant de la politique financière, mais que serait-il arrivé si le directeur des enquêtes sur les coalitions avait été d'un avis contraire et avait considéré ce genre de mesure comme un acte criminel puisqu'elle visait expressément à contenir la hausse des taux d'intérêt, à l'encontre de l'intérêt du public? Cela aurait créé toute une pagaille entre les ministres. Nous croyons que si le ministre des Finances trouve justifié d'exercer son pouvoir de révision, cela devrait suffire.

Ces deux dernières années, le ministre aurait certainement aimé pouvoir, à l'occasion, exercer son pouvoir de révision pour permettre la conclusion d'une entente ou autre.

[*Text*]

Senator MacDonald (Halifax): You do not think he should be given carte blanche?

Mr. MacIntosh: In financial matters, ultimately the sovereign power does have carte blanche of sorts to intervene. It is still subject to parliamentary approval, I think.

Mr. Phillips: I would like to add that the discretion for the minister to exempt agreements is not qualified in this manner under section 309 of the Bank Act right now. I cannot say that that has been used too frequently or in an improper manner. We do not see why that type of qualification should be placed on the exemption.

Senator MacDonald (Halifax): I accept the overall argument. I was just wondering what purpose is served by expanding the Finance Minister's authority to grant exemptions. Is it for social policy or some other reason, or just any reason?

Mr. MacIntosh: I would think, sir, that it would be hard to define what financial policy would be. In a lot of cases where we have had a financial crisis, that would clearly be something where he could intervene. I do not know how widely one would go; I just do not know.

Senator Buckwold: I would like to ask a question on the provision of section 63, which I think is important. Section 63 deals with the definition of a merger. If a bank foreclosed on a customer for a loan, that could be considered a merger.

As I read the notes to the proposed act, it says that the tribunal has jurisdiction to make orders relating to mergers or proposed mergers if they are found to be likely to prevent or lessen competition substantially. Would that not eliminate almost all of your concern? In dealing with ordinary business where a loan was called, it would not be likely to come under the act as they define it here. Perhaps you could explain that further.

Mr. Phillips: I would agree with you that it is not necessarily likely in any particular case that the Tribunal would be called upon to intervene in the transaction. Nevertheless, there is always an element of uncertainty associated with a transaction.

We are saying that a secured transaction, the taking of security, the initial portion of the secured transaction and the realization on security at the bank should be taken out of the concept of merger because it is not a merger. It is an ordinary secured transaction carried on in the ordinary course of business.

The selling of the security, once it has been taken as a legitimate point in which competition policy would take an interest, is obviously a concern for the tribunal. We are suggesting that this be made more precise in the language of the act. I think the drafting here is a little bit lazy. We have taken this huge concept of merger, but there has been no attempt to be precise in the drafting of the act and to specify what a merger is.

This also has pertinence in the prenotification provisions. It could be that a transaction that is quite ordinary could, never-

[*Traduction*]

Le sénateur MacDonald (Halifax): Vous ne croyez pas qu'il devrait obtenir carte blanche?

M. MacIntosh: Dans le domaine financier, les autorités suprêmes finissent toujours par avoir effectivement carte blanche. C'est toujours le Parlement qui décide en dernier recours.

M. Phillips: J'aimerais ajouter que le pouvoir discrétionnaire du ministre à l'égard des exemptions n'est pas précisé de cette façon dans la version actuelle de l'article 309 de la Loi sur les banques. Je ne puis dire si ce pouvoir a été utilisé trop fréquemment ou de façon excessive. Nous ne croyons pas nécessaire que ce genre de pouvoir s'applique aux décisions relatives aux exemptions.

Le sénateur MacDonald (Halifax): Dans l'ensemble, je suis d'accord avec vous. Je me demande seulement à quelles fins le pouvoir du ministre des Finances d'accorder des exemptions devrait être élargi? Est-ce aux fins de la politique sociale ou pour quelque autre raison?

M. MacIntosh: Je pense, monsieur, qu'il est difficile de définir ce qu'est la politique financière. Dans bien des cas de crise financière, le ministre a dû intervenir. J'ignore cependant dans quelle mesure il peut le faire.

Le sénateur Buckwold: J'aimerais poser une question au sujet des dispositions de l'article 63, qui me semblent importantes. Cet article définit le terme «fusionnement». Si une banque saisit les biens d'un client en remboursement d'une dette, cela pourrait être considéré comme un fusionnement.

Il est dit, dans les notes qui accompagnent le projet de loi, que le Tribunal a la compétence voulu pour rendre des ordonnances à l'égard des fusionnements, réalisés ou proposés, dans le cas où ceux-ci sont réputés empêcher ou diminuer sensiblement la concurrence. Cela n'est-il pas de nature à vous rassurer complètement? Dans le cours normal des affaires, lorsque le remboursement d'un prêt est demandé, cela n'est pas visé par la définition telle que formulée dans la loi. Peut-être pourriez-vous nous donner de plus amples explications à ce sujet.

M. Phillips: Je suis d'accord avec vous pour dire que, dans un cas semblable, le Tribunal ne sera pas nécessairement appelé à intervenir. Quoi qu'il en soit, toute transaction comporte un élément de doute.

Nous croyons qu'une transaction garantie par un titre, qui constitue la première partie de la transaction, puis la réalisation de ce titre, ne devrait pas être compris dans la notion de fusionnement parce qu'il ne s'agit pas d'un fusionnement. Il s'agit d'une simple transaction garantie conclue dans le cours normal des affaires.

La vente d'un titre, une fois qu'il est acquis, relève évidemment du tribunal, si elle contrevient à la politique en matière de concurrence. Il faudrait, à notre avis, que la formulation de la loi soit plus précise à cet égard. La version actuelle est un peu trop vague. La notion de fusionnement est très vaste, et il faudrait que la loi en tienne compte.

Cette remarque s'applique aussi aux dispositions relatives au préavis. Il peut arriver qu'une transaction très simple soit visée

[*Text*]

theless, trigger the prenotification provisions even though it is a simple taking of security. We do not see why a secured lender should be under that obligation when a transaction is not remotely connected to resembling a merger.

Senator Buckwold: It does not seem to be associated. When a loan is taken over or called, the business is not operated. The assets are disposed of as soon as possible so you can realize on your security.

Mr. MacIntosh: They have to be disposed of within two years in any event under the Act.

Senator Buckwold: That is why I still find it difficult to read into "merger" the definition that you people are putting on it. But perhaps I am looking at it in a much simpler way.

Mr. MacIntosh: We think it could be clarified so there is no ambiguity about the intention.

The Chairman: Senator Barrow.

Senator Barrow: On page 16 you say:

> The CBA is also concerned about the tribunal's broad authority under proposed subsection 51(2) to make an order prohibiting any or all of those engaging in a anticompetitive practice from doing so. This subsection permits the tribunal to order one or more persons to divest shares or assets, as may be necessary in the opinion of the tribunal, to overcome the effects of the anticompetitive practice.

Then you go on to say:

> We therefore recommend that this section be amended to allow the Minister of Finance to comment on any proposed divestiture order.

Why does it say "to allow the Minister of Finance to comment on any proposed divestiture order"? Are you going to permit him to override the—

Mr. Phillips: No, simply to intervene to give the tribunal the benefit of his view on the proposed order. Our thought was that a disposition order involving financial institutions could have some effect.

Senator MacDonald (Halifax): Do you not think you could do that in any case?

Mr. Phillips: We were not convinced, from examining the legislation, that there was an avenue for that type of intervention. Our suggestion is that something be included in the legislation that would permit that to be done.

Senator MacDonald (Halifax): I have been reluctant to ask this question because I know absolutely nothing about computers, I can assure you. I read an article the other day about the increasing trend in the area of computer crime. You seem to be suggesting the the computer system should have greater protection from the intrusion of law enforcement agencies than

[*Traduction*]

par les dispositions relatives au préavis, même s'il s'agit de la simple acquisition d'un titre. Nous ne voyons pas pourquoi un prêteur garanti devrait être assujetti à cette exigence si une transaction ne s'apparente que de loin à un fusionnement.

Le sénateur Buckwold: Je ne vois pas le rapport. Lorsqu'un prêt arrive à échéance ou que son remboursement est demandé, il n'y a pas de transaction. Les éléments d'actif sont liquidés dès que possible de façon que vous puissiez réaliser la valeur de votre titre.

M. MacIntosh: Selon la loi, les éléments d'actif doivent être liquidés dans les deux ans.

Le sénateur Buckwold: C'est pourquoi j'ai toujours du mal à voir comment le terme «fusionnement» peut être défini de la façon que vous proposez. Peut-être ai-je une vision trop simpliste des choses.

M. MacIntosh: Nous croyons que cette définition pourrait être éclaircie de façon qu'il n'y ait aucune ambiguïté quant à l'intention.

Le président: Sénateur Barrow.

Le sénateur Barrow: À la page 11 de votre mémoire, vous dites:

> «L'ABC s'inquiète également de ce que le paragraphe 51(2) accorde au tribunal des pouvoirs étendus afin de rendre une ordonnance visant à empêcher que l'une ou l'autre ou l'ensemble des personnes en situation d'agissement anticoncurrentiel poursuivent des activités. Le paragraphe autorise le tribunal à juger de la situation et à ordonner à ces personnes de se départir d'éléments d'actifs ou d'actions afin d'enrayer les effets de la pratique anticoncurrentielle.

Vous poursuivez en ces termes:

> «Nous recommandons par conséquent que ce paragraphe soit amendé afin de permettre au ministre des Finances de donner son opinion sur toute ordonnance de cession.»

Pourquoi dites-vous «afin de permettre au ministre des Finances de donner son opinion sur toute ordonnance de cession»? Voulez-vous qu'il jouisse d'un pouvoir de révision sur . . .

M. Phillips: Non, nous voulons simplement qu'il puisse faire profiter au tribunal de son avis au sujet de l'ordonnance proposée. Nous croyons, en effet, qu'une ordonnance de cession mettant en cause des institutions financières peut produire quelque effet.

Le sénateur MacDonald (Halifax): Ne croyez-vous pas que vous pourriez faire cela dans n'importe quel cas?

M. Phillips: Nous ne sommes pas convaincus, à première vue, que le projet de loi permet ce genre d'intervention. Nous préférerions qu'une disposition expressément prévue à cette fin soit ajoutée au projet de loi.

Le sénateur MacDonald (Halifax): J'ai hésité avant de poser cette question, parce que je ne connais absolument rien aux ordinateurs. J'ai lu un article, l'autre jour, au sujet de l'accroissement de la fraude informatique. Vous semblez dire que le secteur informatique devrait être davantage protégé que les autres contre l'ingérence des organismes chargés de faire

[*Text*]

other areas. Could you explain that to me? Is this a dangerous precedent? I do not understand this particular part at all.

Mr. MacIntosh: It is a bull-in-the-china-shop question. It is question of outsiders not being familiar with the highly technical and sensitive equipment in a data centre, going into it and being able to use it on their own say so. That would be very dangerous. A lot of this equipment and the software that goes with it could be seriously harmed and thus impair the ability of a bank to continue its day-to-day operations. If someone goes in and starts putting mag tapes on the wrong disk drive and that sort of thing, you could have what would be a very considerable disaster for the bank. We are saying that the people who operate that place should control its use.

Senator MacDonald (Halifax): It is not a matter of the invasion of personal privacy. You are talking about someone ruining the whole system.

Mr. MacIntosh: We are talking about an investigator who might have a little knowledge but not enough knowledge, going in and operating the equipment.

Mr. Phillips: Clause 14(3) of the bill permits the owner of a computer system to apply to a court for an order limiting the search. The problem that we foresee is the question of what happens between the time the investigator enters and the two or three days down the road when this application can be brought before a judge limiting the search. We think there is a provision missing in the bill. The bill should have a provision that states where the owner of poremises has indicated that he wants to apply for an order limiting the search, that any further use of the system by the investigator should cease.

There is an analogous position in the bill right now. Clause 17(7) with respect to solicitor-client privilege provides that where a person raises a question of solicitor-client privilege, the investigator shall afford that person an opportunity to deal with that issue. We are simply saying that that kind of a provision should also be included in clause 14. Where the owner of computer premises indicates that he wants to apply for an order limiting a search, then further investigation using the computer system should come to a halt at that point until a opportunity is provided to hear the application.

Mr. MacIntosh: These days, computer centres of big banks and other financial institutions are like military headquarters intelligence. They are highly secure places nowadays. They are handling millions of transactions per day. Because of that and because of the cost of the equipment, the irreplaceable nature of the facilities in a short period of time, they are highly secure. They have all kinds of physical controls; they have surveillance cameras everywhere. You cannot walk through a door without the right plastic. In fact, if you do go through a door there is an audit trail that you went through that door at that moment. They are highly sophisticated places nowadays.

[*Traduction*]

appliquer la loi. Pourriez-vous m'expliquer cela? N'est-ce pas un précédent dangereux? Je ne comprends pas du tout cette partie de votre exposé.

M. MacIntosh: C'est un peu comme si vous faisiez entrer un éléphant dans un magasin de porcelaine. Si vous permettez à des gens de l'extérieur, qui ne connaissent rien au matériel informatique, d'entrer dans un centre de données et d'utiliser le matériel à leur gré, cela peut être catastrophique. Une grande partie de ce matériel et du logiciel qui l'accompagne peuvent être suffisamment endommagés pour compromettre l'aptitude d'une banque à poursuivre ses activités quotidiennes. Si quelqu'un commence à placer des bandes magnétiques dans les mauvaises unités de disques ou à commettre d'autres genres d'erreurs, vous risquez de saboter le fonctionnement d'une banque, en la privant de tout contrôle sur ses activités.

Le sénateur MacDonald (Halifax): Il n'est pas question ici d'ingérence dans la vie privée. Vous parlez là de sabotage de tout un système.

M. MacIntosh: Nous parlons là d'un enquêteur qui peut avoir une certaine connaissance du matériel informatique, mais qui n'est pas suffisamment aguerri pour se permettre une quelconque initiative.

M. Phillips: L'article 14(3) du projet de loi permet au propriétaire d'un ordinateur de présenter une requête auprès d'un tribunal afin d'obtenir une ordonnance pour limiter la portée de la perquisition. Nous nous inquiétons cependant de ce qui peut arriver dans les deux ou trois jours qui séparent le moment où l'enquêteur se présente sur place et celui où la cause peut être entendue par un juge. Nous croyons qu'il manque une disposition au projet de loi. Celui-ci devrait en effet préciser que, lorsque le propriétaire du local a fait part de son intention de présenter une requête en vue d'obtenir une ordonnance pour limiter la portée de la perquisition, l'enquêteur doit interrompre ses recherches dans le système informatique.

Il y a déjà une disposition semblable dans ce même projet de loi. L'article 17(7), qui traite du secret professionnel, prévoit que lorsque quelqu'un soulève l'existence d'un secret professionnel, l'enquêteur doit lui donner l'occasion de présenter son objection. Nous disons simplement qu'il devrait aussi exister une disposition semblable à l'article 14. Lorsque le propriétaire d'un ordinateur fait part de son intention de présenter une requête en vue d'obtenir une ordonnance pour limiter la portée d'une perquisition, toutes les recherches faites dans le système informatique devraient être interrompues jusqu'à ce que la cause en question soit entendue.

M. MacIntosh: De nos jours, les centres informatiques des grosses banques et des autres institutions financières sont comme des services de renseignements militaires. Ce sont des endroits qui sont très surveillés. Ces centres traitent des millions de transactions par jour. Pour cette raison et parce que le matériel coûte cher et qu'on ne peut rapidement le remplacer, ces installations sont très bien protégées. Toutes sortes de moyens de surveillance ont été prévus: des caméras omniprésentes; des cartes plastifiées sans lesquelles on ne peut franchir une porte et si même on peut la franchir, une filière de vérification enregistre immédiatement de qui il s'agit et l'heure de la

[*Text*]

The banks are sensitive about people tramping in there who do not know what they are doing.

The Chairman: Senator Godfrey.

Senator Godfrey: It is my recollection that when the Combines people raided a company years ago they walked in because they did not what to give the company a chance to remove a lot of the files. I can remember in one case where they had some inkling that this might happen, and they had all the files beautifully selected with all the incriminating documents on the desk; an hour later they were too late. What is the practical effect if you have to wait three days before you can look at a computer? Would it not be quite easy to eliminate a lot of the information on the computer that might prove embarrassing. There is a very recent case, for instance, with Southam where the man tore up the document and put it in his wastepaper basket beside him. He tore it up into such small pieces that he though it was all right. But they managed to show a lot of patience and put it back together again.

Mr. MacIntosh: I think there would be a quick way to eliminate the data, and that would be to go through the tape library which, in some cases, in the banks, is probably a room three times as large as this with shelves that are six feet high and as far as you can see. If you walk through there with a big magnet, you would wipe out all the files. The reconstruction of the files of course would be simply colossal. For that reason, institutions do not have only one set of files; they have back-up files. They have what are called son files, father files and grandfather files. They have today's files and yesterday's file and the day before files, and they are not stored in the same location any more. We are talking about the survival of the place electronically if the files went.

It seems to me the problem is more a question of having hands-on people who operate the place cand calling for data that investigators might want. But it would be a very serious practical problem.

The Chairman: Senator Anderson.

Senator Anderson: There was some concern that these computer systems did not belong to the parties that were being checked. Do all the banks have one system or does each bank have their own system?

Mr. MacIntosh: All the banks have their own systems.

Senator Anderson: There is no overall system that serves all of them?

Mr. MacIntosh: No, there is not, Senator Anderson. The only point where they interface is at the end of the day. They have a bottom line interconnecting a very small network. It is only 110 personal computers that interconnect the financial institutions, and at the end of the day they settle with each other.

The Chairman: If there are no further questions, I would like to thank the witnesses for their interesting testimony today. I am sure members of the committee will want to the examine the minister on some of these matters when he appears here.

[*Traduction*]

visite. Ces endroits ont atteint un haut degré de complexité. Les banques prennent ombrage des intrusions intempestives.

Le président: Sénateur Godfrey.

Le sénateur Godfrey: Je me souviens que lorsque les enquêteurs ont fait une incursion dans une société, il y a des années, ils sont entrés sans crier gare, car ils ne voulaient pas que la société puisse retirer un grand nombre de dossiers. Je me rappelle même que dans un cas, ils avaient une vague idée que cela se produirait, et ils ont pu agir à temps pour saisir tous les dossiers incriminants; une heure plus tard, ils n'auraient rien trouvé. À quoi sert-il d'attendre trois jours avant d'examiner un ordinateur? Entre-temps, ne peut-on pas assez facilement supprimer de l'appareil un bon nombre de renseignements susceptibles d'être compromettants. Tout récemment, par exemple, chez Southam, quelqu'un a déchiré en mille morceaux le document recherché et l'a jeté à la poubelle. Il se croyait ainsi en sécurité. Mais les enquêteurs ont fait preuve de beaucoup de patience et ont reconstitué le tout.

M. MacIntosh: On pourrait aisément faire disparaître les données. Il suffirait d'aller à la bibliothèque des enregistrements sur cassette, qui parfois dans les banques, est probablement trois fois plus grande que cette pièce-ci et pleines d'étagères hautes de 6 pieds. Muni d'un puissant aimant, on pourrait effacer toutes les bandes. La reconstitution des dossiers serait alors une entreprise colossale. C'est pourquoi les institutions gardent d'autres copies de leurs dossiers; elles ont des dossiers d'appoint. Il y a les dossiers du jour, ceux de la veille et de l'avant-veille, et ils ne sont plus tous conservés au même endroit. Nous parlons de la survie du matériel électronique si les dossiers disparaissaient.

Il s'agirait donc plutôt d'avoir sur place un personnel qui assure le fonctionnement du service et qui puisse réclamer les données que les enquêteurs peuvent désirer, mais ce serait pratiquement impossible.

Le président: Sénatrice Anderson.

Le sénateur Anderson: On a craint un moment que ces systèmes informatisées n'appartiennent pas aux parties qui faisaient l'objet d'une enquête. Y a-t-il un seul système pour toutes les banques ou bien chacune d'entre elles en possède-t-elle un?

M. MacIntosh: Toutes les banques ont leur propre système.

Le sénateur Anderson: Il n'y a pas de système global qui les desserve toutes?

M. MacIntosh: Non, sénatrice Anderson. Ces systèmes ne se recoupent qu'à la fin de la journée. Ils ont un circuit qui relie ensemble un très petit réseau. Il n'y a que 110 ordinateurs personnels qui relient entre elles les institutions financières, et à la fin de la journée, ils se raccordent.

Le président: S'il n'y a plus d'autres questions, j'aimerais remercier les témoins de leur intéressant témoignage d'aujourd'hui. Je suis sûr que les membres du Comité voudront saisir le ministre de certaines de ces question, lorsqu'il comparaîtra ici.

[*Text*]

The next witnesses are representatives from the Association of Canadian Franchisors. A copy of their brief that was submitted to the Minister of Consumer and Corporate Affairs has been distributed to members of the committee. The Association of Canadian Franchisors have a brief opening statement to make which will be made by Mr. John Gillespie, who is President of the Association. Mr. Gillespie spends his working day, I take it, as President of Pizza Pizza Limited. Mr. Gillespie will perform the introduction of his colleagues and then proceed to make a statement.

Mr. John Gillespie, President, Association of Canadian Franchisors: Thank you, Mr. Chairman. My colleagues with me today are Mr. Harold Knifton, President of IGA Canada Limited; Kenneth Fong, Vice-President of McDonald's Restaurants of Canada Limited and our counsel, Mr. Wayne McCracken.

We are pleased to be given the opportunity to appear before you today to express the Association's concerns with Bill C-91 as it pertains to franchising.

At the outset, I must tell you that our association is astounded and disturbed at the rapidity with which this government has proceeded with this very, very important bill. As if to underline our immense concern in this respect, we understand the bill may receive third reading in the house tomorrow. The Select Committee of the House has already reported on the bill after only three weeks of hearings on a three days-a-week basis.

Mr. Chairman, this bill will dramatically change the rules of competition in Canada and those new rules will be with us for a very long time. Bill C-91 itself represents the result of 19 years of debate and discussion about a new competition policy for Canada. Despite that, based upon the information we have about the House Select Committee's report, that committee, after its brief consideration of the matter, has recommended fundamental and sweeping changes be made to the bill. We do not believe that sufficient attention has been paid to the legitimate concerns of business in general and the franchising community in particular.

We certainly hope that our appearance before you today can go some considerable way towards balancing the views which have been before Parliament to date in relation to Bill C-91.

In order to better put our association's position in its proper context, let me take a brief minute to describe franchising to you. Franchising is a dynamic and growing business format in Canada today.

In your day-to-day lifesytles you have no doubt vistited and bought a product or service from a franchisee whether it was a quart of milk at a convenience store, a quick meal or dinner at a restaurant, a fill-up at a service station or travel arrangements. The franchise business format has become an increasingly popular way to carry on business. The franchising community in Canada accounts for approximately 45 per cent of all retail sales in Canada. These sales are generated by the

[*Traduction*]

Les prochains témoins sont des représentants de l'Association canadienne des franchiseurs. Les membres du Comité ont reçu copie du mémoire que ces derniers ont présenté au ministre de la Consommation et des Corporations. M. John Gillespie, président de l'Association, fera une brève déclaration préliminaire. M. Gillespie est, dans la vie de tous les jours, si j'ai bien compris, président de Pizza Pizza Limited. Il nous présentera ses collègues et fera ensuite sa déclaration.

M. John Gillespie, président, Association canadienne des franchiseurs: Merci, monsieur le président. Je suis accompagné aujourd'hui de M. Harold Knifton, président de IGA Canada Limited; Kenneth Fong, vice-président de McDonald's Restaurants of Canada Limited et par notre avocat, M. Wayne McCracken.

Nous sommes heureux d'avoir l'occasion aujourd'hui de comparaître devant vous pour exprimer les points de vue de l'Association sur les articles du projet de loi C-91 qui ont trait au franchisage.

Pour commencer, je dois vous dire que notre association est stupéfaite et troublée par la rapidité avec laquelle le gouvernement étudie ce très important projet de loi. Nous sommes consternés d'apprendre que le projet de loi pourra franchir demain l'étape de la troisième lecture à la Chambre. Le Comité spécial de la Chambre en a déjà fait rapport après trois semaines seulement d'audiences de trois jours chacune.

Monsieur le président, ce projet de loi bouleversera les règles qui régissent la concurrence au Canada et nous en imposera de nouvelles qui nous régiront très longtemps. Le projet de loi C-91 lui-même est le résultat de 19 années de débats et de discussions en vue d'élaborer une nouvelle politique de la concurrence pour le Canada. Or, d'après ce que nous avons appris, le Comité législatif de la Chambre, après avoir brièvement considéré la question, a recommandé, dans son rapport, que des changements fondamentaux et radicaux soient apportés au projet de loi. Nous ne croyons pas qu'il ait suffisamment tenu compte des préoccupations légitimes du monde des affaires en général et de celui du franchisage en particulier.

Nous espérons vraiment réussir aujourd'hui à mieux éclairer le Parlement qu'il ne l'a été jusqu'à présent sur la teneur du projet de loi C-91.

Afin de mieux situer la position de notre association dans son contexte approprié, permettez-moi de vous décrire brièvement en quoi consiste le franchisage, qui représente une forme d'entreprise dynamique et de plus en plus répandue dans le Canada d'aujourd'hui.

Dans votre vie de tous les jours, vous avez sans nul doute acheté d'un franchisé un produit ou un service, ne serait-ce qu'un litre de lait au magasin du coin, un petit repas ou un dîner au restaurant; vous avez sans doute aussi fait le plein d'essence ou pris des dispositions de voyage chez un franchisé. Le franchisage est devenu un moyen de plus en plus populaire de se lancer en affaires. Ce système au Canada compte pour près de 45 p. 100 de toutes les ventes au détail. Ces ventes sont

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franchisee, who could be your corner grocer or your hair stylist, formerly known as your barber.

Mr. Chairman, we propose to highlight for your committee the two areas of major concern which Bill C-91 causes for the franchising community. Those areas are merger and abuse of dominant position.

Members of the committee, the day-to-day business of franchising is "merging", as that concept is defined in the bill. The very essence of franchising, granting a franchise, constitutes a merger as defined in the bill. Other day-to-day aspects of franchising such as the reacquisition of a franchised business by reason of termination of the franchise relationship; and the nonrenewal of a franchise relationship also constitute a merger within the bill.

Therefore, as you can see, the problem is that the definition of "merger" is so broad that it encompasses a large number of small business transactions which are, in essence, franchising of the franchise business.

In order to alleviate this situation we are recommending that the legislation exempt franchise transactions.

The next area of concern relates to the lack of a precise standard when a tribunal is to decide whether or not a proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially. Because the word "substantially" is not defined in the bill, it provides an atmosphere of uncertainty for all Canadian businesses. Gentlemen, you may be surprised to learn, as we were, that "substantially" does not mean "major". In fact it may simply mean "perceptible". In order for business to proceed with confidence and certainty, we recommend that "substantial lessening of competition" should mean a "major" lessening of competition in both the merger and abuse of dominant position sections of the bill.

The second branch of uncertainty lies in the preclearance procedure. Briefly, the bill provides a preclearance procedure where parties to a proposed merger may seek preclearance. In this situation, if a party decides to seek preclearance, the Director is not obliged to issue a preclearance certificate, even if the Director agrees he would not challenge the merger. Once again business is fraught with the uncertainty of its actions, even though the parties had enough foresight to request a preclearance in accordance with the provisions of the bill. In this case, we recommend that the Director should be obliged to issue a preclearance certificate if he is satisfied that he would not have any grounds to challenge the merger. To leave a person in the untenable position of not being able to rely on the preclearance mechanism in the bill is tantamount to a reward without a benefit—the benefit of certainty. Surely persons should have the benefit of their forethought.

As an adjunct to the prenotification provision, the bill proposes to prescribe the method of calculating the amount of assets and gross sales for prenotification. We believe the proposed methods of calculating assets and gross sales thresholds should be incorporated into the legislation to give a further

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générées du franchisé qui pourrait fort bien être votre épicier du coin ou votre coiffeur.

Monsieur le président, nous nous proposons d'exposer à votre Comité les deux principales craintes que le projet de loi C-91 inspire au monde du franchisage. Il s'agit du fusionnement et de l'abus de la position dominante.

Mesdames et messieurs, l'essence même de notre travail de franchisage est le «fusionnement» tel qu'il est défini dans le projet de loi. En soi, le franchisage ou l'octroi d'une franchise, constitue un fusionnement comment le définit le projet de loi. Les autres aspects courants, comme le rachat d'une franchise à la fin d'un contrat et le non-renouvellement d'une franchise constituent également un fusionnement aux termes du projet de loi.

Par conséquent, comme vous pouvez le voir, il est déplorable que la définition de «fusionnement» soit si vague qu'elle englobe un grand nombre de transactions de petites entreprises, qui relèvent essentiellement du franchisage.

Pour corriger cette situation, nous recommandons que le projet de loi exempte les transactions de franchisage.

Nous déplorons aussi l'absence de critères précis qui aideraient un tribunal à décider si un projet de fusionnement a ou aura l'effet d'empêcher ou de diminuer sensiblement la concurrence. Étant donné que le terme «sensiblement» n'est pas défini dans le projet de loi, les gens d'affaires ne sauront pas trop à quoi s'en tenir. Messieurs, vous serez peut-être aussi étonnés que nous d'apprendre que «sensiblement» ne signifie pas «considérablement», mais simplement «perceptiblement». Pour que les gens d'affaires puissent administrer avec confiance et certitude, nous recommandons de préciser qu'il faudrait que la concurrence soit «considérablement» diminuée, plutôt que «sensiblement,» tant dans le cas des fusionnements que dans celui de l'abus de position dominante.

Un autre élément qui porte à confusion est la procédure d'autorisation préalable. En bref, le projet de loi prévoit ce genre de procédure lorsque les parties à un projet de fusionnement cherchent à obtenir une autorisation préalable. Or, quiconque décide de se prévaloir de cette possibilité n'obtient pas nécessairement l'autorisation du directeur, qui n'est pas tenu de délivrer un certificat d'autorisation préalable, même s'il convient de ne pas contester le fusionnement. Une fois de plus, les administrateurs auront peur de faire des faux pas même s'ils ont eu la sagesse de demander une autorisation préalable conformément aux dispositions du projet de loi. Dans un tel cas, nous recommandons que le directeur soit tenu de délivrer un certificat d'autorisation préalable s'il estime n'avoir aucune raison de contester le fusionnement. Laisser une personne dans la position insoutenable de ne pouvoir se fier au mécanisme d'autorisation préalable prévu dans le projet de loi, revient à la cautionner sans jamais lui en donner la certitude. Il faudrait certainement la récompenser de sa prévoyance.

En complément aux dispositions sur l'avis à donner au Directeur, le projet de loi propose de prescrire par règlement la méthode de calcul pour évaluer les éléments d'actif, et les ventes brutes concernant les transactions devant faire l'objet d'un avis. Nous estimons que les méthodes de calcul devraient être

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measure of certainty to the franchising community and the business community at large.

We have three points to make regarding abuse of dominant position.

Firstly, we understand that the House Select Committee has recommended the following: A company can be attacked for supposedly abusing its market power even if the company did not intend that its conduct lessen competition. In other words, anticompetitive intent is to be removed from the abuse section. This represents a fundamental change in the treatment of business conduct and is absolutely unacceptable to our association.

In order to understand why we oppose this amendment without reservation, it is vital to recognize that the abuse section, although couched in the civil law, is essentially a punitive provision. After all, under that section, a company can be dissolved or order to divest assets or shares. We submit that it is simply unfair and not right to subject a business, large or small, to that kind of Draconian penalty in the case of conduct by which the business did not intend to reduce competition.

We further note that even in the United States which has the toughest antitrust laws in the world, the equivalent legal rule requires that the government prove that the company involved intended to lessen competition.

We simply cannot agree that there are compelling reasons for Canada to move from a relatively unenforceable criminal monopoly section to a civil section which is substantially more extreme than that of the United States.

Secondly, we strongly recommend that the exemptions for the four "intellectual" property statutes—Copyright Act, Industrial Design Act, Patent Act and Trade Marks Act—be extended to include other types of confidential information and know-how which are the embodiment of any franchise system. If a franchisor or franchisee were ordered to disclose this confidential information and know-how, which it had spent millions of dollars in testing, nurturing, developing and advertising, such disclosure would ultimately lead to the demise of the franchise system.

Finally, we reiterate that the bill should state that "substantial" means "major", not "perceptible", as we previously suggested.

In closing, we have made a number of general comments in our submission relating to the bill. We do not propose to review those in these opening remarks because they are contained in our submission.

Mr. Chairman, we feel most strongly that the bill, if amended in accordance with the report of the House Select Committee, would be a bad law for business of all sizes and for the consumer. We urge all concerned to carefully consider the potent implications of Bill C-91 and to ensure that the bill which is enacted is realistic, workable and, above all, reasonable and fair to everyone.

[*Traduction*]

incorporées dans le projet de loi afin que les milieux du franchisage et des affaires en général sachent à quoi s'en tenir.

Nous avons trois observations à formuler au sujet de l'abus de position dominante.

Premièrement, nous savons que le Comité législatif de la Chambre a recommandé qu'une société puisse être accusée d'avoir tenté de contrôler le marché même si elle n'avait pas l'intention de diminuer la concurrence. Autrement dit, l'intention anticoncurrentielle sera retranchée de l'article sur l'abus. Il s'agit là d'un changement fondamental dans la façon d'aborder la conduite des entreprises, changement que notre association juge absolument inacceptable.

Pour bien comprendre pourquoi nous nous opposons sans réserve à cet amendement, il faut à tout prix que vous reconnaissiez que l'article relatif à l'abus, même si on le retrouve dans le droit civil, représente essentiellement une disposition pénale. Après tout, aux termes de cet article, une société peut être dissoute ou obligée de se départir de son actif ou de ses actions. Nous croyons qu'il est simplement injuste et incorrect de soumettre une entreprise, petite ou grande, à une peine aussi sévère, si elle n'avait jamais eu l'intention de diminuer la concurrence.

Remarquez en outre que même aux États-Unis, où les lois anti-trust sont les plus sévères au monde, l'article équivalent exige que le gouvernement prouve que la société en cause avait eu l'intention de diminuer la concurrence.

Nous ne voyons simplement pas ce qui oblige le Canada à se départir d'une disposition du Code criminel relativement peu applicable pour la remplacer par un article du code civil considérablement plus sévère qu'aux États-Unis, pour prévenir les monopoles.

Deuxièmement, nous recommandons fortement que l'exclusion de l'exercice d'un droit aux termes des quatre lois sur la propriété «intellectuelle»—la Loi sur le droit d'auteur, la Loi sur les dessins industriels, la Loi sur les brevets et la Loi sur les marques de commerce—soit étendue aussi à d'autres types d'information et de savoir-faire confidentiels inhérents à tout système de franchisage. Tout franchiseur ou franchisé qui serait forcé de divulguer ces renseignements et ce savoir-faire, qui ont exigé des millions de dollars d'investissements pour leur mise à l'essai, leur conception, leur amélioration et leur publicité, se verrait automatiquement exclus du système de franchisage.

Enfin, nous répétons que le projet de loi devrait préciser que le terme «sensiblement» signifie «considérablement», et non perceptiblement, comme on l'a déjà laissé entendre.

En terminant, j'aimerais dire que notre mémoire contient un bon nombre d'observations générales sur le projet de loi, que nous n'avons pas l'intention de reprendre dans cette déclaration préliminaire.

Monsieur le président, nous sommes convaincus que le projet de loi, s'il était amendé conformément au rapport du Comité législatif de la Chambre, nuirait à toutes les entreprises, peu importe leur taille, et aux consommateurs. Nous pressons tous les intéressés d'examiner avec soin les éventuelles répercussions du projet de loi C-91 et de s'assurer que le projet de loi qui

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Those, Mr. Chairman and members of the committee, constitute our major concerns with the bill before you. We would now be pleased to try and answer any questions you may have or make any clarifications.

The Chairman: Thank you very much, Mr. Gillespie. I will invite senators to put questions to you. If you wish to refer any of those questions to one of your colleagues, please feel free to do so.

Senator Barrow: I would like to ask, as I asked the previous witnesses, this question: Did you have an opportunity to discuss these matters with officials of the department last fall?

Mr. Gillespie: Yes, sir.

Senator Barrow: And you brought these various matters to their attention?

Mr. Gillespie: Yes, sir.

Senator Barrow: Did they give you a reason or did they have any comments as to why they were not going to include them?

Mr. Gillespie: Senator Barrow, I do not understand the reasoning for the technical end, and I will refer that to our counsel. From a layman's point of view, I was given the understanding that this bill would not affect our type of business, the franchise business; therefore, we should not need be concerned with mergers and these types of issues. Yet, we still feel that there is a large degree of uncertainty there. We have not gotten what I would consider a straight answer as far as I am concerned as a layman.

Mr. Fong: If I may pick up on my colleague's answer, we did deal with merger; we did deal with the minister's representatives, and we submitted a draft exemption. We felt that exemption was the way to proceed with the broad definition of "merger". We understand that it is the position of the minister that this is the law of general application and, therefore, no exemption to "merger" on behalf of franchising would be considered.

Senator Barrow: In other words, if we gave one to you we would have to give it to other similar organizations?

Mr. Fong: I believe the rationale is that they feel it would be a loophole, perhaps in the act, in that other businesses would attempt to circumvent the act by structuring their businesess as a franchise system and, therefore, be exempted under the provisions of the act.

Senator Barrow: If you were assured that it was not intended to include franchising—

Mr. Gillespie: That is correct.

Mr. Wayne McCracken, Special Counsel, Association of Canadian Franchisors: Mr. Chairman, my understanding of the department's position is that, whereas on the one hand as

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sera adopté, soit réaliste, applicable et surtout, raisonnable et juste pour tout le monde.

Monsieur le président et messieurs les membres du comité, je viens donc de vous exposer nos principales craintes au sujet de ce projet de loi. Il nous fera maintenant plaisir d'essayer de répondre à vos questions ou de préciser nos points de vue, au besoin.

Le président: Merci beaucoup, monsieur Gillespie. J'inviterai les sénateurs à vous poser des questions. Si vous désirez laisser à l'un de vos collègues, le soin de répondre à l'une ou l'autre des questions, n'hésitez pas à le faire.

Le sénateur Barrow: J'aimerais vous poser une question que j'ai déjà posée aux témoins précédents: Avez-vous eu l'occasion de discuter de vos points de vue avec les hauts fonctionnaires du ministère l'automne dernier?

M. Gillespie: Oui, monsieur.

Le sénateur Barrow: Et vous avez porté ces diverses questions à leur attention?

M. Gillespie: Oui, monsieur.

Le sénateur Barrow: Vous ont-ils dit ou expliqué pourquoi ils n'allaient pas en tenir compte?

M. Gillespie: Sénateur Barrow, je ne comprends pas l'argument technique qui nous a été donné, et je m'en remettrai donc à notre avocat. En tant que profane, on m'avait donné l'impression que ce projet de loi ne toucherait pas notre genre de commerce, le franchisage; par conséquent, nous n'avions pas à nous préoccuper des fusionnements et de ce type de questions. Pourtant, nous estimons que ces dispositions portent beaucoup à confusion. Nous n'avons pas reçu ce qu'un profane comme moi appellerait une réponse nette.

M. Fong: Si je puis expliciter la réponse de mon collègue, nous avons effectivement traité des fusionnements; nous en avons parlé avec les représentants du ministre, et nous leur avons présenté un projet d'article, exemptant ce genre d'activité. Nous estimions que c'était la meilleure façon de procéder, compte tenu du caractère vague de la définition de «fusionnement». Le ministre nous a laissé entendre qu'il s'agissait d'une loi d'application générale et, que par conséquent, il n'était pas question d'exclure le franchisage de la définition de «fusionnement».

Le sénateur Barrow: Autrement dit, si nous l'avions fait pour vous, nous aurions été obligés de le faire pour des entreprises similaires?

M. Fong: Je crois plutôt que le ministère voulait éviter tout échappatoire. En effet, d'autres entreprises auraient pu tenter de coutourner la loi en se structurant sur le modèle du système de franchisage et l'exemption aurait alors pu valoir pour elles.

Le sénateur Barrow: Et l'on vous a garanti qu'on n'avait pas l'intention d'inclure les franchises . . .

M. Gillespie: C'est exact.

M. Wayne McCracken, conseiller spécial, Association canadienne des franchiseurs: Monsieur le Président, si je comprends bien la position du ministère, les exemples cités par

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the association presented examples of franchising transactions, granting of franchises and termination of franchises which the association was concerned were mergers under the definition, the department acknowledged that, technically, those were mergers but went on to say: "They are only mergers because we need a broad net and we would never go after you even though you are caught."

That is the primary position of the department and is the one which Mr. Gillespie has already put to you.

Secondly, Mr. Fong has entirely accurately indicated that the department is concerned that any exemption might lead to distortion of business organizations to try to take advantage of the exemptions by fashioning their affairs as franchising operations, but essentially the message that the association got when I was president was: "Don't worry about it. You are caught, but we would never go after you", which is why we are concerned. That kind of assurance is not very comfortable if somebody does, in fact, go after you.

I should like to add one more thing. The question, I believe, was broader than just the merger section in relation to intent, about which we felt very strongly and made vigorous submissions. The bill that you are examining did alleviate our concern, because the abuse clause required anticompetitive intent. However, within the past five days the Select Committee of the House of Commons has reported, indicating that the intent should be removed. Our response on that aspect of the bill is: We made representations that I know were made by other business organizations and were met satisfactorily, except the Lord has taken that away within the past five days. Consequently, we are obliged to retable our concern.

The Chairman: Senator Godfrey.

Senator Godfrey: Is this proposed amendment a government amendment?

Mr. McCracken: The Select Committee was an all-party committee and I had the pleasure of appearing before it a couple of weeks ago. I don't know whether the report was a unanimous or a majority report, but nonetheless it is available and has not yet, to my knowledge, been adopted by the government.

I believe you have more information and better information on this than I do.

The Chairman: I was speculating, perhaps unwisely, that if the majority of the members of the committee approved these amendments the government would be well disposed, but one never knows.

Senator Godfrey: On that point, Mr. Chairman, usually the amendments made in committee are proposed by members of the government. Is the amendment in that category or not?

Mr. McCracken: I believe I can respond with some knowledge on that; the answer is negative. The bill, as tabled—and I

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l'association, les contrats de frachise, et notamment les modalités d'octroi et de résiliation des franchises, pourraient être considérés, comme l'appréhende notre association, comme des fusionnements aux termes de la définition donnée dans le projet de loi. Le ministère a reconnu que techniquement, ils étaient effectivement des fusionnements, simplement parce qu'il fallait bien poser des balises quelque part, mais qu'en pratique, il n'y avait rien à craindre même si strictement, il y aurait matière à poursuite.

Telle est fondamentalement la position que défend le ministère, celle dont M. Gillespie vous a déjà saisi.

Deuxièmement, M. Fong nous a clairement indiqué que le ministère craignait qu'en excluant certains cas, les entreprises soient tentées d'en tirer parti, en ajustant leurs pratiques administratives de façon à pouvoir être considérées comme des franchises. Mais essentiellement, l'assurance que notre association a reçue, du moins lorsque j'étais président, était qu'il ne fallait pas trop s'en faire, car même s'il y avait matière à poursuite, on ne nous poursuivrait jamais. Ce qui nous inquiète, c'est que ces garanties se révélent moins rassurantes si, effectivement, on nous poursuivait.

Permettez-moi d'ajouter autre chose. La notion d'intention, à laquelle nous tenons beaucoup, comme nous l'avons indiqué clairement dans notre mémoire, déborde, je crois, le cadre de l'article sur les fusionnements. Le projet de loi que vous étudiez nous a vraiment rassurés, car nous avons constaté que la notion d'abus sous-tendait une intention de diminuer sensiblement la concurrence. Malheureusement, il n'y a pas plus de cinq jours, le comité législatif de la Chambre des communes recommandait dans son rapport de faire disparaître toute notion d'intention. Incidemment, nous vous signalons que nos critiques, comme à ma connaissance celles d'autres organismes, avaient été bien accueillies, mais que les autorités ont décidé de n'en pas tenir compte il n'y a pas plus de cinq jours. Il nous faut donc vous les exposer à nouveau.

Le président: Sénateur Godfrey, à vous la parole.

Le sénateur Godfrey: Ce projet d'amendement vient-il du gouvernement?

M. McCracken: Ce comité législatif regroupait des représentants de tous les partis et j'ai eu le plaisir d'y témoigner il y a quelques semaines. Je ne sais pas si son rapport est unanime ou majoritaire, mais je sais néanmoins que ce rapport existe, mais qu'il n'a pas encore été adopté par le gouvernement, si je ne m'abuse.

Vous en savez probablement plus long que nous à ce sujet.

Le président: Je me disais, peut-être à tort, que le gouvernement souhaite probablement que la majorité des membres du comité approuve ces amendements, on ne sait jamais.

Le sénateur Godfrey: À ce sujet, Monsieur le Président, habituellement les amendements formulés en comité sont proposés par les membres du gouvernement. Cet amendement fait-il partie de cette catégorie ou non?

M. McCracken: Je crois être bien placé pour répondre à votre question. La réponse est: non. Dans le libellé initial de

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will be very specific in order not to drift into areas of speculation—required in clause 51 that anticompetitive intent be an essential element for a company to be successfully attacked for abusing market power. That concept was put forward by the minister. The Select Committee recommended that that element—which was not a throw away but was a critical element in that clause—which, as honourable senators know, was developed after 19 years of debate—some of which was rancorous—be eliminated from the clause, thereby frankly turning it around 180 degrees from the position put forward by the government when it tabled the bill.

Senator Barrow: You go on to say that under clause 74 parties to a proposed merger can seek preclearance from the director, but he is not obliged to issue a preclearance certificate.

Has that been taken up with the officials from the department?

The Chairman: If the answer to that last question is going to be lengthy, I think we had better wait until after the vote to hear it.

The committee stands in recess for a few minutes.

—*Upon resuming:*

The Chairman: I again call the meeting to order. I regret the interruption and the inconvenience to our witnesses, but such are the ways of legislative bodies.

I think Mr. Fong was about to answer a question—

Mr. Gillespie: Mr. Chairman, if I could just have a moment. When both Mr. Fong and Mr. McCracken were making comments, it triggered something with me when I was standing out in the hall and I thought perhaps I should bring it to your attention. As an association, our problem has been that this intent question has been a moving target. When we first made our original submission, we addressed the question of intent. Our second submission did not talk about intent, because it was felt that it was there in the bill and it was not moving anywhere. We have discovered within the last five days that, all of a sudden, intent has been removed from that bill. I would like to say that intent is a major part of our submission and we are concerned. It is a moving target and we do not know exactly where it is going at this stage, but we do not want to lose sight of the intent issue. Thank you, Mr. Chairman.

The Chairman: Mr. Fong, I believe you were about to reply to a question from Senator Barrow. Do you remember what the question was?

Mr. Fong: Yes, I do. The answer to the question is that we brought up the issue with the minister's representatives. They acknowledged the issue but they did not reply to it, either affirmatively or negatively. Mr. McCracken may have some comments.

Senator Barrow: I have one other question. You refer to clause 81 of the bill providing a method of calculating assets and gross revenue thresholds and so on, and you suggest that we submit that the calculation basis for the assets and gross revenue thresholds should be developed and included in the bill

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l'article 51,—et je serai très précis afin de ne pas me lancer dans une discussion portant sur des points qui ne sont que pure spéculation—il faut absolument qu'il y ait intention de se livrer à des pratiques anticoncurrentielles pour qu'une transaction soit interdite afin d'empêcher qu'elle donne lieu à un abus de position dominante. C'est le principe qu'a défendu le ministre. Le comité législatif a recommandé que cette notion—qui n'avait rien d'insignifiant mais qui était fondamentale—qui avait été intégrée, comme vous le savez, après 19 ans de débats, parfois acerbes, soit biffée de l'article, effectuant une véritable volte-face par rapport à la position que le gouvernement avait défendue lorsqu'il a déposé le projet de loi.

Le sénateur Barrow: Vous dites ensuite qu'aux termes de l'article 74, les parties à un fusionnement proposé peuvent demander au directeur de rendre une décision préalable mais que celui-ci n'est pas obligé d'émettre un certificat.

Cette disposition a-t-elle fait l'objet d'une entente avec les fonctionnaires du ministère?

Le président: Si vous prévoyez que votre réponse sera longue, nous aurions avantage à procéder au vote d'abord.

Le comité suspend ses travaux pour quelques minutes.

Après reprise:

Le président: Je vous rappelle à nouveau à l'ordre. Je m'excuse auprès de notre témoin de cette interruption, mais elle était obligatoire dans la pratique parlementaire.

Je crois que M. Fong s'apprêtait à répondre à une question . . .

M. Gillespie: Monsieur le président, me permettez-vous de dire un mot. En entendant MM. Fong et McCracken pendant que j'étais dans le corridor, j'ai été frappé par un point que j'aimerais porter à votre attention. Le problème, c'est qu'en tant qu'association, cette notion d'intention n'a pas toujours revêtu la même importance. Lors de notre première déposition, nous avions abordé cette question. La deuxième fois, nous ne l'avons pas fait, car nous estimions qu'elle était inscrite dans le projet de loi et qu'elle était là pour rester. Nous avons constaté, il n'y a pas plus de cinq jours, qu'on l'a tout simplement biffée du projet de loi. Je me permets de vous dire que nous y tenons et que cette volte-face nous inquiète. Comme on change d'idée à tout venant, on ne sait pas à quoi s'en tenir. Mais nous tenons beaucoup à cette question. Merci beaucoup, monsieur le président.

Le président: Monsieur Fong, je crois que vous vous apprêtiez à répondre à la question du sénateur Barrow. Vous souvenez-vous quelle était cette question?

M. Fong: Oui. J'allais dire que nous avions signalé la chose aux représentants du ministre. Ils s'étaient montrés conscients de la situation mais ils n'ont pu nous donner de réponse, ni affirmative ni négative. Peut-être M. McCracken a-t-il quelque chose à dire là-dessus.

Le sénateur Barrow: J'ai une autre question. Vous avez mentionné que dans l'article 81, il était question d'une façon d'évaluer les éléments d'actif et les revenus bruts, et vous nous avez suggéré de proposer que la méthode de calcul soit précisée dans le projet de loi. Ne serait-il pas plus approprié de le faire

[*Text*]

itself. Why would it not be just as satisfactory to have it done by regulation, which is normally the way to do something like that, is it not?

Mr. McCracken: Mr. Chairman, we made that recommendation because of concern which the association had that some not normally-accepted basis for calculating gross assets and gross revenues—or one or the other of them—might be developed for the purposes of this bill. We felt that we would be much better off as businessmen if we knew ahead of time in the legislation what the basis of calculation was, whether it be book value or, as some rumours had it, at one time, the department or some people within the department were thinking of fair market value, which of course is not a number which businesses normally carry.

In our submission we suggested that the basis of calculation, in order that it could be public for us and for Parliament, be not by regulation in the bill, and, if the proposed basis was something like fair market value, that it receive appropriate comment, which, certainly for many business representations, would be highly negative. That is the reason for the submission. We are simply afraid that a basis which may involve unusual kinds of calculations may be proposed, and of course that could be done without the full comment, focus and light of day by regulation, compared to having it in the bill itself. That is the reason for the submission.

Senator Barrow: If, as I said before, there is a suggestion that these regulations will be published ahead of time in order to give people such as yourselves an opportunity to comment on them, would that not be satisfactory?

Mr. McCracken: In the view of the association, it would not be nearly as satisfactory, because the response might well be—as in my experience with respect to other bills the response has been when a regulation is publicized in advance—that if the affected businesses object to the whole or part or method of expression of the regulation, the response might well be: "Like it or lump it."

On the other hand, in parliamentary debate I assume that if a strange basis of calculation were posited or proposed by the government in the bill, one would have, I would expect, organizations such as chartered accountants and so on applying their minds to the issue and providing the benefit of their thinking.

Senator Barrow: I thought that was the purpose in suggesting that these proposed regulations be published, so that the government can receive comments on them ahead of time before enacting them.

Mr. McCracken: Mr. Chairman, I agree that that is the purpose of prior publication. However, it is the position of the association that perhaps adverse comment can more easily be avoided in the case of promulgation of regulations than in the case of the enactment of a provision in a statute.

Senator Godfrey: I just have a supplementary question. Have these regulations been published?

Mr. McCracken: Mr. Chairman, at this point we have no idea what the basis of calculation of these critical measures will be. I repeat what I said, and I put it no higher than

[*Traduction*]

par règlement, comme on le fait normalement dans ce genre de situation?

M. McCracken: Monsieur le président, notre association a formulé cette recommandation car elle craignait que pour l'application du projet de loi on ait recours à une méthode qui n'est pas généralement admise pour l'évaluation des éléments d'actif et des revenus bruts. Nous croyons qu'en tant qu'hommes d'affaires, il serait préférable de savoir ce qui nous attend. La loi devrait préciser à notre avis, la méthode de calcul, qu'il s'agisse de la valeur aux livres ou, comme certains prétendent, dans le ministère ou ailleurs, de la juste valeur marchande, donnée que les entreprises ne comptabilisent pas pour la plupart.

Dans notre mémoire, nous avons suggéré que cette méthode de calcul ne soit pas précisée dans le règlement mais bien dans le projet de loi, afin qu'elle soit connue, aussi bien des entreprises que du Parlement; et si l'on a l'intention de s'en remettre à la juste valeur marchande, qu'on permette aux entreprises de dire ce qu'ils en pensent. Je ne crois pas qu'ils en pensent grand bien. Voilà pourquoi nous avons exprimé ce point de vue dans notre mémoire. Nous craignions tout simplement qu'on propose une formule inhabituelle, et que les intéressés n'aient pas l'occasion de dire ce qu'ils en pensent, si celle-ci est définie dans le règlement plutôt que dans le projet de loi. Voilà notre opinion.

Le sénateur Barrow: Si, comme je l'ai déjà mentionné, le règlement était publié à l'avance afin de permettre à des personnes comme vous d'en critiquer l'à-propos, cela ne serait-il pas convenable?

M. McCracken: Nos membres ne seraient pas aussi satisfaits, car, d'après l'expérience que j'ai eue des autres projets de loi où l'on a publicisé le règlement à l'avance, il se pourrait qu'on réponde aux entreprises qui se sentent lésées et qui s'opposent à l'ensemble ou à une partie du règlement que si le règlement ne leur plaît pas, on n'y peut rien.

Par contre, si jamais le gouvernement proposait une méthode de calcul insolite dans le projet de loi, les organismes tels l'Association des comptables agréés se pencheraient sur la question et donneraient leur éclairage aux parlementaires.

Le sénateur Barrow: C'était mon but en proposant que le règlement soit publié à l'avance, afin que le gouvernement puisse entendre les commentaires des parties intéressées avant de le promulguer.

M. McCracken: Monsieur le président, bien que j'admette que c'est pour cette raison qu'on le publierait d'avance, notre association estime qu'il est peut-être plus facile d'éviter la critique négative pour un règlement que pour un projet de loi.

Le sénateur Godfrey: J'aurais une question supplémentaire. Ce règlement a-t-il été publié?

M. McCracken: Monsieur le président, nous n'avons actuellement aucune idée de ce que sera la base de calcul relative à cette disposition importante. Je le répète, et ce n'est qu'une

[*Text*]

rumours, that some people were seriously thinking of adopting a figure which is unknown to the businesses for which I act, and that is fair market value in order to determine whether or not one would have to prenotify. It was that kind of concern that led to the association's feeling it would be far wiser to present the contemplated basis for public debate in Parliament.

Senator Godfrey: I might just make one comment on that, because we have been impressing upon the government in certain cases that they should publish the regulations at the same time as the bill in order that you can look at what they have in mind. Certainly in the so-called gating bill, they did that and, as a result of the Senate committee studying the regulations, the committee said that those regulations should, in fact, be in the act and I think the minister is intending to do that. Whereas, if the committee had not seen the regulations, we would not have asked him to do that. As it is, they will now be part of the act.

Mr. Fong: I think we agree wholeheartedly with that.

Senator Barrow: That is what I was leading up to in finding out what your objections were. In the past, as Senator Godfrey has said, we have suggested that these regulations be included in the act rather than as separate regulations.

Senator Godfrey: Or, in the alternative, that we should at least see them at the same time as we are considering the act so that we know what the government has in mind.

Senator Barrow: I notice that you have picked up on another matter. In your brief you say:

> To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy . . .

In other words, the bill identifies one of the purposes of the Competition Act as doing that. You say it should be all sizes. Was that ever questioned before?

Mr. McCracken: Mr. Chairman, I would like to ask the senator, through you, whether he is asking me if the association has questioned that before?

Senator Barrow: Yes, that is exactly what I am asking.

Mr. McCracken: The association has not questioned that before, because the first time it appeared was in Bill C-91. In reviewing the bill, the association, and I as counsel, could not help but be struck by the presence of reference to small and medium-sized business, which rather underlined business which was not favoured with equitable treatment, if one wants to be extreme in interpreting the purpose of the bill. Hence our recommendation that the bill refer to equitable opportunity to participate on the part of businesses of all sizes.

Senator MacDonald (Halifax): Mr. Gillespie, I did not hear what you said in your oral comment. You made a reference to the United States.

[*Traduction*]

rumeur, mais certaines personnes auraient sérieusement l'intention d'adopter un critère qui n'est pas courant dans l'entreprise où je travaille, soit la juste valeur marchande, pour déterminer si la transaction doit faire l'objet d'une décision anticipée. C'est cette crainte qui a porté notre association à croire qu'il serait beaucoup plus sage de soumettre toutes les modalités de cette disposition au débat public au Parlement.

Le sénateur Godfrey: J'aimerais ajouter quelque chose, si vous me le permettez. Nous avons, dans certains cas, fait pression sur le gouvernement pour qu'il publie le règlement en même temps que le projet de loi, pour permettre à toutes les parties de bien connaître les intentions du gouvernement. Je sais qu'on l'a fait récemment. Je crois savoir qu'après avoir étudié un certain règlement, le Comité sénatorial a réussi à convaincre le ministre de l'intégrer à la loi et que ce dernier s'apprêterait à le faire. Si le comité n'avait pas connu la teneur du règlement, il n'aurait pas pu exprimer ce voeu. Il reste que ce règlement sera incorporé à la loi.

M. Fong: Nous sommes tout à fait d'accord avec ce que vous dites.

Le sénateur Barrow: C'est ce que j'essayais de savoir en vous demandant de préciser votre point de vue. Par le passé, comme le sénateur Godfrey l'a dit, nous avons souvent demandé que le règlement soit intégré à la loi plutôt que publié à part.

Le sénateur Godfrey: Si c'est impossible, on voudrait au moins en prendre connaissance en même temps qu'on étudie la loi, de façon qu'on puisse connaître quelles sont les intentions du gouvernement.

Le sénateur Barrow: Je remarque que vous avez relevé un autre point. Dans votre mémoire, vous dites:

> Pour assurer aux petites et moyennes entreprises une occasion égale de participer à l'économie canadienne . . .

En d'autre termes, le projet de loi reconnaît que c'est un des buts poursuivis par la Loi sur la concurrence. Vous dites que cela devrait s'appliquer à toutes les entreprises, peu importe leur taille. A-t-on déjà soulevé cette question?

M. McCracken: Monsieur le président, j'aimerais demander au sénateur s'il veut savoir si notre association a déjà soulevé cette question.

Le sénateur Barrow: Oui, c'est ce que je demande.

M. McCracken: Notre association ne l'a jamais soulevée, car c'est la première fois que ce principe est inscrit dans le projet de loi. En examinant le projet de loi, notre association et moi-même, comme conseiller juridique, ne pouvions être autrement que frappés de la référence aux petites et moyennes entreprises, qui ne bénéficieraient pas particulièrement d'un traitement équitable, du moins si l'on interprète le projet de loi, dans son sens le plus strict. De là, notre recommandation que le projet de loi stipule clairement que toutes les catégories d'entreprises aient également la chance de participer à l'économie.

Le sénateur MacDonald (Halifax): Monsieur Gillespie, je n'ai pas très bien entendu ce que vous avez dit. Vous avez parlé des États-Unis?

[*Text*]

Mr. Gillespie: Yes sir.

Senator MacDonald (Halifax): I did not quite get what you said. Would you tell me what you said? There is no reference to the United States in your brief.

Mr. Gillespie: Senator, it comes back to the issue of intent. Our concern was that, with intent now, as we have been informed, being recommended then being removed from the bill, we wanted to compare it with the antitrust laws that are in force in the U.S., which I have been told are very strong and very tough. Since that is the rule or the law that comes close to what is being proposed in Canada, I would like to point out that they have intent there, but that intent is missing in this proposed amendment to Bill C-91. That was the purpose of my comment.

Senator MacDonald (Halifax): As counsel of this association you have obviously studied the American legislation in this regard?

Mr. McCracken: That is correct.

Senator MacDonald (Halifax): Does it fall under the "fair trade" laws of the various states, or what does it come under in the U.S.?

Mr. McCracken: Mr. Chairman, I will answer the question directly and also add something which perhaps we should have said earlier. The applicable U.S. law is the monopolization provision of the Sherman Act. The section which prompted our comparative reference to U.S. law is the so-called abuse of dominant position section in Bill C-91. I repeat, the correlative section in the U.S. antitrust law is the monopolization provision of the Sherman Act. I provided the clerk of your committee with a document which I prepared on behalf of another of my clients, Grocery Product Manufacturers of Canada, which was supplied to the Select Committee of the house, dealing with the issue of intent when we recognized that that suddenly had become an issue within the last week and a half. In that document there is a reference at the second last page to GPMC, Grocery Products Manufacturers of Canada, Task Force on Competition Policy. At the third and second last pages, I have outlined in some detail the U.S. legal position. I do not think that I could do any better justice to it or deal with it any more succinctly orally than what has been done in this document. However, to put it simply, in the U.S., whether it be under criminal or civil proceedings in relation to monopolization, because it is punitive the law there recognizes that an intention or objective of lessening competition must be established before a company can be successfully attacked for monopolizing behaviour. That, of course, is the position that appears in the bill before you, if it were not for the amendment.

The Chairman: I am sure you realize that the preponderance of evidence before the house committee and even before this committee disagrees with you. Witnesses here have sought to have that clause eliminated. However, that does not necessarily make them right or you wrong.

[*Traduction*]

M. Gillespie: Oui.

Le sénateur MacDonald (Halifax): Je n'ai pas trop saisi ce que vous avez dit. Pourriez-vous répéter? Il n'est pas question des États-Unis dans votre mémoire.

M. Gillespie: Sénateur, je vous reporte à notre discussion sur la notion d'intention. Nous nous disions qu'en supprimant toute notion d'intention, comme le recommande le comité législatif, du moins d'après ce que nous avons appris, il ne faudrait pas trop s'écarter des lois anti-coalitions en vigueur aux États-Unis qui, paraît-il, sont très exigeantes et très sévères. Puisque c'est la règle ou la loi qui se rapproche le plus de ce que l'on propose d'instaurer au Canada, j'aimerais signaler que l'intention y est prévue, contrairement à l'amendement proposé au projet de loi C-91. Voilà ce que je voulais dire.

Le sénateur MacDonald (Halifax): En tant qu'avocat de l'association, avez-vous étudié la législation américaine qui traite de la question?

M. McCracken: En effet.

Le sénateur MacDonald (Halifax): La question relève-t-elle des lois relatives au commerce équitable des divers États?

M. McCracken: Monsieur le président, je vous répondrai directement et j'ajouterai peut-être un commentaire que j'aurais dû faire plus tôt. La législation américaine qui s'applique est la disposition relative aux monopoles de la Loi Sherman. C'est l'article du projet de loi C-91 qui porte sur l'abus de position dominante qui nous a incités à faire des comparaisons avec la législation américaine. Je le répète, l'article corrélatif de la loi antitrust américaine est celui de la Loi Sherman qui porte sur les monopoles. J'ai remis au greffier de votre comité un document qui porte sur l'intention et que j'ai rédigé pour le compte d'un autre de mes clients, les Fabricants canadiens de produits alimentaires, lorsque nous nous sommes rendu compte que la question était soudainement devenue un problème ces dix derniers jours. Le document a ensuite été remis au Comité législatif de la Chambre. J'ai exposé en détail la position juridique des États-Unis à l'avant-dernière et à l'avant avant-dernière pages de ce document, dont il est précisé à l'avant-dernière page qu'il émane du groupe de travail chargé de la politique en matière de concurrence, lequel a été mis sur pied par les Fabricants canadiens de produits alimentaires (GPMC). Je doute pouvoir mieux traiter de la question ou vous l'exposer plus succinctement de vive voix que je ne l'ai fait dans ce document. Toutefois, en termes simples, que le monopole soit assujetti au code pénal ou civil, la loi américaine étant punitive, elle reconnaît que l'intention ou l'objectif de réduire la concurrence doit être établi avant qu'une entreprise ne soit accusée de comportement monopolistique. Bien entendu, c'est la position qu'expose le projet de loi dont vous êtes saisis, hormis l'amendement.

Le président: Vous savez sans doute que la plupart des preuves qui ont été soumises au comité de la Chambre et à notre comité vont dans le sens contraire. Les témoins qui ont comparu devant nous ont essayé de faire supprimer cette disposition. Toutefois, ils n'ont pas raison pour autant, ni vous, tort.

[*Text*]

Mr. McCracken: In the document which I mentioned and which was belatedly circulated after your break for the vote, I have endeavoured to deal with the issue as completely as possible. In extensive long-term discussions that I have had with the administrators of the Combines Act, on no occasion have I been advised that nonintentional conduct is the kind of thing that the administrators are looking to attack. This is born out rather clearly when one peruses the list of anti-competitive acts which the bill contains, each one of which requires the objective or aim of lessening competition. When I put to departmental officials that I would be most interested in knowing what kind of unintentional conduct they might consider attacking in view of the fact that the bill permits attack upon unintentional conduct, I was met by silence.

The groups that have appeared before the Select Committee, to the extent that I am familiar with the testimony—and I am not familiar with all of it—have complained about intentional conduct. What I am saying is that I do not think that the legal reality of the position of the groups who oppose an intentional requirement is very well founded. I can assure you, Mr. Chairman, that if you are a corporation with a significant market share and being attacked for supposedly anti-competitive conduct—to go to the extreme—in which the government is seeking to desolve your corporation and if your conduct was not intentionally anti-competitive, you would feel that the law was not well-conceived if it can result in the dissolution of a company for unintentional conduct. It goes then to the point that this is a punitive, albeit civil, section and that intention should be an essential element.

Senator MacDonald (Halifax): Mr. Chairman, I can assure that I would not have asked Mr. Gillespie the question if I had had this document.

Mr. McCracken: Again, I apologize for not circulating that document. It was prepared for another association, and as I did not know the flow of questioning that would come up at this hearing, I did not table it.

Senator MacDonald (Halifax): Did you tell the other association that you had prepared this document?

The Chairman: It was the Grocery Products Manufacturers Association.

Mr. McCracken: The document was prepared for the Grocery Product manufacturers of Canada. The association is a significant one with some 170 members who manufacture virtually everything that one sees and purchases when one walks into a cornerstore or the largest supermarket in Canada, ranging from Scott Paper Company, General Foods, Proctor and Gamble, and the list goes on.

Senator MacDonald (Halifax): Would you be satisfied with a holus-bolus introduction of the American legislation with respect to franchise operations?

Mr. McCracken: With respect to the point of objective, the association was satisfied with the bill that was tabled by the government which, I underline again, was the result of 19 years of debate, battle, fight—many of the people in this room being parties to some or all of that. We are distressed, as Mr.

[*Traduction*]

M. McCracken: Dans le document que je vous ai mentionné et qui vous a été distribué un peu tardivement après que vous ayez levé la séance pour voter, j'ai tenté de traiter de la question le plus exhaustivement possible. Dans toutes les nombreuses et longues discussions que j'ai eues avec les administrateurs de la Loi sur les coalitions, on ne m'a jamais avisé de ce que les administrateurs cherchaient à condamner un comportement non intentionnel. Cela devient plutôt apparent si on consulte la liste des lois interdisant les agissements anti-concurrentiels que contient le projet de loi, chacune prévoyant l'objectif ou l'intention de réduire la concurrence. Lorsque j'ai fait savoir aux fonctionnaires du ministère que j'étais très curieux de savoir quel genre de comportement non intentionnel ils songeaient à condamner, puisque le projet de loi le leur permettrait, je n'ai obtenu que silence de leur part.

De ce que j'ai appris des témoignages, les groupes qui ont comparu devant le Comité législatif se sont plaints de la clause relative au comportement non intentionnel. En fait, je doute que la position juridique des groupes qui s'opposent à la nécessité de prouver l'intention soit bien fondée. Je peux vous assurer, monsieur le président, que si vous étiez un entrepreneur jouissant d'une part considérable du marché et qu'on vous accusait d'agissements anti-concurrentiels, pour aller à l'extrême, que le gouvernement essayait de mettre fin à vos activités alors que vous n'aviez pas d'intention anti-concurrentielle, vous aussi seriez d'avis que la loi est mal faite si elle peut entraîner la dissolution d'une entreprise pour cause d'un comportement non intentionnel. Il s'agit donc d'un article punitif, bien qu'il relève du droit civil, et l'intention devrait être un critère essentiel.

Le sénateur MacDonald (Halifax): Monsieur le président, je vous assure que je n'aurais pas posé cette question à M. Gillespie si j'avais eu ce document.

M. McCracken: Je vous demande pardon encore une fois de ne pas vous l'avoir communiqué. Il avait été rédigé pour une autre association et, ne sachant pas dans quel sens iraient les questions aujourd'hui, je ne l'ai pas déposé.

Le sénateur MacDonald (Halifax): Avez-vous informé l'autre association de ce que vous aviez rédigé ce document?

Le président: Il s'agissait des Fabricants canadiens de produits alimentaires.

M. McCracken: Le document a été rédigé à l'intention des Fabricants canadiens de produits alimentaires. Cette association est importante et compte 170 membres qui fabriquent presque tout ce que l'on voit et achète aussi bien chez le dépanneur que dans le plus gros supermarché du Canada, notamment Scott Paper, General Foods et Proctor and Gamble.

Le sénateur MacDonald (Halifax): Seriez-vous en faveur d'adopter globalement les mesures législatives américaines relatives au franchisage?

M. McCracken: En ce qui concerne l'objectif visé, l'association était satisfaite du projet de loi qu'avait déposé le gouvernement après, je le répète, 19 années de débats, de controverses et de litiges, auxquels beaucoup de personnes ici présentes ont participé. Nous sommes profondément peinés, comme l'a dit

[*Text*]

Gillespie said in his opening comments, that the select committee has removed an element which evidently the government felt was an important component of the bill when it was tabled.

Senator Barrow: On the last page of the document you presented are the initials BCNI. What does that stand for?

Mr. McCracken: Mr. Chairman it stands for the Business Council on National Issues, which is a major association of chief executive officers of major corporations doing business in this country.

Senator Barrow: I felt that that should be clear for the record. There are four organizations that support your submission, are there not?

Mr. McCracken: More properly, the number is at least six. They consist of the four organizations whose submissions are quoted in the document. In addition the senator has referred to the Grocery Products Manufacturers of Canada which is the association which presented this document and, finally, of course, the Association of Canadian Franchisers, which is appearing before you today.

Senator Godfrey: In reading your submission the other day I put a question mark above the word "substantial." You made a flat statement, and I did not understand your verbal argument. Could you repeat it, please?

Mr. Gillespie: We learned that "substantial" may mean something of much lesser extent than what we were told or led to believe it to mean. I have forgotten the actual meaning.

Senator Godfrey: It will mean what the courts decide that it will mean. Did you look up the definition in the dictionary? Could you give me some more detail on why you have arrived at this view?

Mr. Fong: We looked up the word "substantial" in the dictionary. The meaning ranges anywhere from approximately, to more or less, to essentially, to something of substance. We are prepared to leave with you our research.

Mr. McCracken: Mr. Chairman, I would like to expand on this point, which is critical to this bill. The word "substantial" is the competitive test which determines whether or not something is an abuse of dominant position, whether or not a merger can be prohibited. It is the key. Based upon our research, "substantial" does not mean what I thought it meant while I was involved in discussions about this piece of legislation; namely, major. Indeed, in one dictionary, the Compact Oxford Dictionary, the nineth preferred definition of substantial is, "of ample or considerable amount" which comes the closest to mean what, based on my daily usage of the word, I though it meant.

The reason I am expanding on this is that the vagueness becomes magnified if one looks at the French word used to translate "substantially". The French word is not "substantiellement", which means "in a major way"; the French word is "sensiblement", which means "perceptible, noticeable". For temperature they say "sensiblement". In other words, the tem-

[*Traduction*]

M. Gillespie dans sa déclaration d'ouverture, de ce que le Comité législatif ait supprimé un élément que, manifestement, le gouvernement considérait comme un important élément du projet de loi à l'époque où il l'a déposé.

Le sénateur Barrow: A la dernière page du document que vous avez présenté figurent les lettres BCNI. Que représentent-elles?

M. McCracken: Monsieur le président, ce sont les initiales du Conseil d'entreprises pour les questions d'intérêt national, qui est une association d'envergure des présidents directeurs généraux des grandes sociétés qui font des affaires dans le pays.

Le sénateur Barrow: J'estimais qu'il y avait lieu de le préciser. Quatre organismes appuient votre mémoire, n'est-ce pas?

M. McCracken: Au moins six, plus précisément. Il s'agit des quatre organismes dont les mémoires sont cités dans le document, ainsi que des Fabricants canadiens de produits alimentaires, qui ont soumis ce document dont a fait mention le sénateur, et, enfin, de l'Association canadienne des franchiseurs, qui comparaît devant vous aujourd'hui.

Le sénateur Godfrey: En lisant votre mémoire l'autre jour, j'ai mis un point d'interrogation au-dessus du mot «*substantial*». Vous ne vous êtes pas expliqué dans votre déclaration, et je n'ai pas compris le sens de votre exposé oral. Pouvez-vous répéter, s'il vous plaît?

M. Gillespie: Nous avons appris que le qualificatif «*substantial*» peut avoir une portée bien inférieure à ce que l'on nous a dit ou laissé entendre. J'ai oublié le sens qu'il revêt en réalité.

Le sénateur Godfrey: Cela signifie que les tribunaux décideront de sa signification. Avez-vous consulté le dictionnaire? Pouvez-vous m'expliquer plus précisément pourquoi vous avez adopté ce point de vue?

M. Fong: Nous avons cherché la définition de «*substantial*» dans le dictionnaire. Selon les cas, il peut vouloir dire «à peu près», «plus ou moins» ou «appréciable». Nous sommes disposés à vous confier notre recherche.

M. McCracken: Monsieur le président, j'aimerais développer ce point, qui est essentiel au projet de loi. Le terme «*substantial*» permet de déterminer si une entreprise abuse de sa position dominante et s'il y a lieu d'interdire un fusionnement. Il est la clé. D'après nos recherches, «*substantial*» n'a pas le sens que je lui attribuais lorsque je participais aux discussions sur ce projet de loi, c'est-à-dire «important». De fait, le *Compact Oxford Dictionary* donne comme neuvième définition de «*substantial*»: «*of ample or considerable amount*», ce qui se rapproche le plus du sens que je lui attribuais, dans le quotidien.

Si je veux développer la question, c'est que l'imprécision s'amplifie si l'on compare la traduction française qui n'est pas «substantiellement», qui signifie «d'une façon importante», mais «sensiblement», qui signifie «perceptible, visible». En français, on utilise «sensiblement» pour parler de la température, lorsqu'elle a baissé suffisamment pour que je puisse remarquer

[*Text*]

perature has gone down enough that I can notice that it has gone down. As Mr. Gillespie said in his opening comments, once one considers that the French and English meanings have as equal force in law, the likely preferred meaning of the word "substantial", in light of the presence of the French translation of "sensiblement", is that a substantial lessening of competition is one that one can notice.

In Bill C-29, which is the predecessor legislation to Bill C-91, tabled by Mrs. Erola, that potential problem was identified and dealt with in the merger section. The merger test in that bill was "significant" lessening of competition. The word "significant" is just as vague as the word "substantial".

Subsection (2) of section 31.74 of Bill C-29 said:

> For the purposes of the merger section, the court shall not find a merger prevents or lessens competition significantly unless it finds that the merger is likely to have a major and not insubstantial effect on competition.

That was a recognition by the department and the minister that it was necessary to give some definitional anchor to this indefinite word "significant". The word "substantial" is equally indefinite, and we have submitted the same reasons, that it requires an anchor, for example, an indication that it means "major".

Senator Godfrey: I would regard "substantial" in the ordinary meaning, and I would have assumed that the courts would also. However, your reference to the French is very compelling. Is there another word in French that would be significant?

Mr. McCracken: Mr. Chairman, in the present Combines Investigation Act, which is in force, the concept of substantially lessening competition appears in certain sections of reviewable practices, specifically section 31.4. The English test, for example, as to whether or not tied selling or market restriction can be prohibited is whether among other things those practices lessen competition substantially. This is the same test as is proposed to be applied to merger and abuse in the new bill. The present translation of the English word "substantially" with respect to one of the practices is "substantiellement", which my French assistant's research indicates that it means of major importance—for example, the kind of weight and importance that I give to something that I describe as being "substantially", in normal conversation, as Senator Godfrey appears to do. However, in the current law, "substantially" in another of those sections is translated as "sensiblement". To the best of my knowledge, and I participated in the debate concerning those amendments, that point was not even noticed—certainly not by this lawyer or by his colleagues.

At present we have two French words used to define the same English word in two different sections. The proposed amendments use the French word "sensiblement", and I will be pleased to tell you what the dictionaries tell us the word means. The word "sensiblement" is the translation of the word

[*Traduction*]

qu'elle a baissé, par exemple. Comme l'a dit M. Gillespie dans sa déclaration d'ouverture, si l'on considère que le sens d'un terme français est légalement tout aussi valable que le sens anglais, on serait porté à conclure que «*substantial*» désigne, compte tenu de la traduction «sensiblement», une réduction de la concurrence qui soit perceptible.

Dans le projet de loi C-29, qui a précédé le projet de loi C-91 et qu'a déposé M^me^ Erola, ce problème potentiel avait été cerné et résolu en ce qui concerne les fusionnements. Dans ce projet de loi, il fallait déterminer si le fusionnement entraînait une réduction qui est, selon le terme anglais, «*significant*». Ce terme est tout aussi vague que «*substantial*».

Le paragraphe (2) de l'article 31.74 du projet de loi C-29 se lisait comme suit:

> Pour les fins de l'article sur le fusionnement, la cour ne conclut pas qu'un fusionnement réalisé empêche ou diminue la concurrence de façon relativement importante sauf si elle est convaincue que ce fusionnement a une influence majeure et non insubstantielle sur la concurrence, ou qu'il aura vraisemblablement cette influence.

Le ministre et le ministère reconnaissaient ainsi qu'il était nécessaire de mieux définir le terme «*significant*», plutôt vague. Le terme «*substantial*» est tout aussi vague, nous appuyant sur les mêmes arguments, nous prétendons qu'il faut préciser qu'il signifie «important».

Le sénateur Godfrey: Je serais porter à donner à «*substantial*» son sens ordinaire, tout comme, à mon avis, les tribunaux le feraient. Toutefois, votre référence au texte français est très fondée. Existe-t-il en français un autre terme plus pertinent?

M. McCracken: Monsieur le président, dans la Loi relative aux enquêtes sur les coalitions, en vigueur à l'heure actuelle, certains articles portant sur les pratiques pouvant faire l'objet d'un examen, l'article 31.4 en particulier, évoquent la réduction sensible de la concurrence. Dans la version anglaise, la vente concertée ou la restriction des marchés, par exemple, peut être interdite si ces pratiques ont, entre autres choses, pour effet de réduire sensiblement la concurrence. C'est ce même critère qu'il est proposé d'appliquer aux fusionnements et aux abus dans le nouveau projet de loi. Pour l'une de ces pratiques, «*substantially*» est traduit par «substantiellement», ce qui, d'après mes adjoints francophones à la recherche, signifie «d'importance majeure», c'est-à-dire qui a l'ampleur et l'importance que j'attribuerais à «*substantial*», dans le cours normal de la conversation, comme semble le faire le sénateur Godfrey. Toutefois, dans la loi actuelle, «*substantially*» est traduit par «sensiblement» dans un autre article. A ma connaissance, et j'ai participé au débat entourant ces amendements, ce point n'a même pas été soulevé, certainement pas par moi ni par mes collègues.

A l'heure actuelle, il est deux mots qui sont utilisés en français pour traduire le même terme anglais dans deux articles différents. On utilise le terme «sensiblement» dans les amendements proposés, et je serais heureux de vous donner la définition qui figure aux dictionnaires. Le terme «sensiblement» tra-

[*Text*]

"substantially". In addition, the department and government has chosen to get rid of the French word "substantiellement" and change it to "sensiblement".

Regarding "sensiblement", *Robert-Collins* defines it as being "approximately more or less or noticeably". *Harrap's* defines "sensiblement" as meaning "appreciably, palpably, perceptibly". The definition of *Larousse* is described as follows "d'une manière appréciable, notable". For "temperature" they say "sensiblement". As I tried to describe to you, I can notice that it is cooler today than it was yesterday. The word "substantiellement" means "of real weight or importance". In *Larousse* "substantiellement" means "important, considerable".

The sum of all this legalese in talking about words is this: The word "substantially", which determines the amount by which competition must be lessened, in order for practices to be prohibited under the abuse or merger sections, does not have a definite meaning in the English language, contrary to what I thought, of being of "real weight or importance". Secondly, on repeated occasions the minister has indicated that the kinds of mergers and conduct he wants to attack as being abusive are those that are really of real importance. Thirdly, the French word used to translate "substantially" means "perceptibly or noticeably". I therefore submit that certainly a foreseeable result, if not the only result, which courts may develop in giving content to the word "substantially" is that it means some lessening of competition, certainly enough that one can notice, but not necessarily a great or major lessening of competition.

Senator Godfrey: My reaction is that the problem can be solved more simply. It worries me a bit that we may be going too far. If we use the proper French word, they will then use the English word along with the French to mean something more than the way I understand the word "substantially". Has that been suggested to the department?

Mr. McCracken: Not by this association or by this counsel.

The Chairman: Of course, we do not know in what language the drafting was originally done.

Senator Godfrey: With regard to the committee that deals with regulations, half of our time is spent in correcting translation.

Senator MacDonald (Halifax): Mr. Chairman, I realize that this is irrelevant to an excellent presentation. I was impressed to hear about the 45 per cent of retail sales represented by

Mr. Gillespie: It is $48 billion per year, senator.

Senator MacDonald (Halifax): How many are there in Canada?

Mr. Gillespie: Franchise outlets?

Senator MacDonald (Halifax): No, not outlets; how many franchisors?

Mr. Gillespie: Systems? It is our calculation that there are about 1,200 to 1,400. We have never really been able to get a

[*Traduction*]

duit «*substantially*». En outre, le ministère et le gouvernement out préféré se débarrasser de «substantiellement» en faveur de «sensiblement».

Quant à «sensiblement», le dictionnaire bilingue Robert-Collins en donne la définition suivante: «*Approximately, more or less, noticeably*». Le Harraps propose «*appreciably, palpably, perceptibly*» comme traduction à «sensiblement». D'après le Larousse, il signifie «d'une manière appréciable, notable». En français, on applique l'adverbe «sensiblement» à la température. Comme j'ai essayé de vous l'expliquer, je peux trouver qu'il fait plus frais aujourd'hui qu'hier. Le terme «substantiellement» signifie «de poids ou d'importance véritable». D'après le Larousse, «substantiellement» signifie «important, considérable».

Bref, la raison de ce jargon juridique est la suivante: Le terme «*substantially*» qui détermine la mesure dans laquelle la concurrence doit être réduite pour que soient interdites les pratiques faisant l'objet des dispositions relatives aux abus ou aux fusionnements, n'a pas, en anglais, le sens que je lui donnais, c'est-à-dire «qui a un poids réel ou une véritable importance». Deuxièmement, à maintes reprises, le ministre a précisé que le fusionnement ou la conduite qu'il jugeait abusifs étaient ceux qui présentaient une réelle importance. Troisièmement, le terme français utilisé pour traduire «*substantially*» veut dire «d'une manière appréciable, notable». Je pense donc, en définitive, que les tribunaux interpréteront certainement, sinon uniquement, le terme «*substantially*» comme étant une réduction de la concurrence, qui bien qu'elle soit notable, ne sera pas nécessairement importante.

Le sénateur Godfrey: Quant à moi, le problème peut être réglé plus simplement. Je crains que nous n'allions trop loin. Si nous utilisons le terme français approprié, le terme correspondant en anglais aura un sens plus fort que celui de «*substantially*» comme je l'interprète. Le ministère a-t-il été saisi de cette question?

M. McCracken: Non, ni par cette association ni par moi.

Le président: Nous ignorons bien sûr quelle a été la langue de rédaction.

Le sénateur Godfrey: Le comité des règlements passe la moitié de son temps à corriger les traductions.

Le sénateur MacDonald (Halifax): Monsieur le président, nous nous écartons de l'excellent exposé que nous avons entendu. J'ai été très intéressé d'apprendre qu'environ 45 p. 100 des ventes au détail représentées par—

M. Gillespie: Il s'agit de 48 milliards de dollars par an, sénateur.

Le sénateur MacDonald (Halifax): Combien y en a-t-il au Canada?

M. Gillespie: De franchises?

Le sénateur MacDonald (Halifax): Non, de franchiseurs?

M. Gillespie: De réseaux? D'après nos calculs, il y en a environ entre 1 200 et 1 400. Nous n'avons jamais pu en détermi-

[*Text*]

good handle on the number of systems. We have been told that there are about 40,000 individual outlets in Canada where the $48 billion of sales turnover occurs.

Senator Buckwold: Are you referring to the percentage that you do in the lines that you franchise out, or are you referring to the total retail business?

Mr. Gillespie: We are talking about all of the retail sales that flow through the franchise outlets in Canada. It represents around 45 per cent of retail sales in Canada. It is about $48 billion. We are talking about small business. I think that is the issue that hopefully we have tried to get across.

Senator Buckwold: Automobile sales?

Mr. Gillespie: Anything that flows through a franchisee's outlet has been tabulated into that $48 billion worth of sales. But those are franchisees. We are not talking big business in this particular case. We are talking small business.

Senator MacDonald (Halifax): You said there were 1,200 systems.

Mr. Gillespie: Franchise systems.

Senator MacDonald (Halifax): I only want to know the parent.

Mr. Gillespie: That is the parent. There are 1,200 systems—small and large systems. People starting out may have two or three retail outlets and they may feel that they wish to franchise because they have a concept and they want to roll that concept across Canada. So they start to franchise and license out their expertise—which is part of the whole concept of franchising. So an individual who wishes to get into that particular line of retail business will then license the rights of his business from the franchisor.

Senator MacDonald (Halifax): So if there were 1,200, obviously the overwhelming majority of those would be Canadian.

Mr. Gillespie: As I understand it, they are all Canadian corporate companies.

Senator MacDonald (Halifax): I meant Canadian in their origin.

Mr. Gillespie: Yes, senator.

Senator Anderson: I go back to the word "substantial". One could say there are substantial PCBs in one's drinking water—one part per million—but one would not say that would be "substantial".

Mr. Gillespie: As a businessman, senator, I guess it is the uncertainty that is causing me the problem. I started my business back in 1970. I have developed that business and now I am faced with a great deal of uncertainty as well as added costs to try to handle combines the way it is coming down.

In the discussions I have had with the officials they told me that they wanted the net to be very wide but that I should not worry about being caught because of that and, quite frankly, that scares the hell out of me.

Senator Anderson: Is there any system at all over the top of franchisors?

[*Traduction*]

ner avec certitude le nombre. On nous a dit qu'il y avait environ 40 000 franchisés au Canada dont le chiffre d'affaires global s'élevait à 48 milliards de dollars.

Le sénateur Buckwold: Est-ce le chiffre d'affaires des franchisés ou de tout le commerce de détail?

M. Gillespie: Nous parlons de toutes les ventes de détail effectuées par les franchisés du Canada, qui représentent environ 45 p. 100 des ventes au détail réalisées par de petites entreprises. Il s'agit d'environ 48 milliards de dollars. Je pense que c'est ce que nous avons toujours cherché à démontrer.

Le sénateur Buckwold: Et les ventes d'automobiles?

M. Gillespie: Toutes les ventes effectuées par des franchisés sont comprises dans le chiffre de 48 milliards de dollars. Mais il s'agit de franchisés. Ce ne sont pas de grosses mais de petites entreprises.

Le sénateur MacDonald (Halifax): Vous avez dit qu'il y avait 1 200 réseaux.

M. Gillespie: Des réseaux de franchisage.

Le sénateur MacDonald (Halifax): Je veux seulement savoir qui sont les franchiseurs initiaux.

M. Gillespie: Ce sont eux. Il y a 1 200 réseaux, petits et grands. Les franchiseurs qui se lancent en affaires peuvent avoir déjà deux ou trois points de vente et vouloir accorder des franchises parce qu'ils ont une idée qu'ils veulent concrétiser dans tout le Canada. Ils commencent donc à concéder une marque ou un brevet pour l'exploitation de leur idée initiale, ce qui fait partie de toute cette notion de franchisage. Par conséquent, celui qui désire exploiter ce genre de commerce de détail devra obtenir un brevet du franchiseur.

Le sénateur MacDonald (Halifax): On peut espérer que ces 1,200 franchiseurs sont majoritainement canadiens.

M. Gillespie: Si je comprends bien, ce sont des entreprises constituées en sociétés au Canada.

Le sénateur MacDonald (Halifax): Je voulais dire canadiens d'origine.

M. Gillespie: Oui, sénateur.

Le sénateur Anderson: Je reviens au terme «*substantial*». On pourrait dire en français que l'eau potable contient une quantité appréciable de PCB, soit une partie par million, sans toutefois conclure que c'est une grosse quantité.

M. Gillespie: En tant qu'homme d'affaires, sénatrice, j'ai l'impression que c'est l'incertitude qui est à l'origine du problème. Je me suis lancé en affaires en 1970. J'ai pris de l'expansion depuis, et maintenant je fais face à beaucoup d'incertitude et à des coûts additionnels pour essayer de me conformer aux diverses lois relatives aux coalitions.

Certains fonctionnaires m'ont dit qu'ils ne voulaient pas trop serrer la vis et qu'il ne fallait pas craindre d'être poursuivi pour cela, mais très franchement, j'en ai une peur bleue.

Le sénateur Anderson: N'y a-t-il aucune organisation qui coiffe les franchiseurs?

[*Text*]

Mr. Gillespie: No, there is not.

Senator Anderson: Each one is separate?

Mr. Gillespie: We would like to make it the Canadian Association of Franchisors, but, no, there is none.

The Chairman: Again, I thank the witnesses for their testimony. As I told the previous witnesses, we will have occasion to raise some of these issues with the minister when he appears before the committee on June 11.

Would the representatives of Stelco Inc. please come to the witness table.

A brief was provided by Counsel for Stelco Inc., Blake Cassels & Graydon. I believe all members of the committee have copies of that.

Stelco is represented by Mr. R. E. Heneault, Executive Vice-President, who is sitting on my right, and Mr. Warren Grover, Q.C., Counsel, Blake, Cassels & Graydon. I thank the witnesses for their patience in waiting several hours while we listened to the testimony of other witnesses. I should like Mr. Grover and Mr. Heneault to make brief opening statements.

Mr. Warren Grover, Q.C., Counsel, Stelco Inc.: Thank you, Mr. Chairman. We are delighted to be here. We would have waited two more hours. We enjoyed hearing the testimony of the other witnesses.

With your permission, Mr. Chairman, we will make a joint presentation, with Mr. Heneault introducing specific examples that are within Stelco's experience and myself talking to my background in this area, which is that I taught the subject in law school since 1965 and have a fair background of where many of these clauses come from and know about many of the problems. I have been involved since this legislation was first introduced in 1971, when I did a brief for the Canadian Bar Association.

Mr. Chairman, what we are really talking about today are two points, and the committee may find out quickly that they may merge into one.

In my letter to Mr. Wilson—and I assume you all have copies of it—I suggested two revisions. First, I suggested that there should be what I call a "forward merger exemption". I want to make that as a clear distinction from what I call the "any old joint venture" exemption which the minister keeps saying is somewhat similar. I think they are different.

Secondly, I suggest that there should be a procedure for preclearance by cabinet. In this oral submission I will cover those suggestions in inverse order, if I can, Mr. Chairman.

Speaking, then, first to some sort of cabinet preclearance, I believe, Mr. Chairman, that the separation of the executive from the courts—which, although not part of our Constitution is part of the Constitution in the United States that we have all learned so much about—is a salutory concept. We are not recommending that the executive have any power to over-

[*Traduction*]

M. Gillespie: Non.

Le sénateur Anderson: Chaque réseau est donc indépendant?

M. Gillespie: Nous aimerions créer une association canadienne des franchiseurs, mais il n'y a rien de tel à l'heure actuelle.

Le président: Une fois de plus, je remercie les témoins de leur exposé et de leur témoignage. Comme je l'ai dit aux témoins précédents, nous aurons l'occasion, le 11 juin, lors de la comparution du ministre, de soulever avec lui certaines de ces questions.

Je prierais maintenant les représentants de Stelco Inc. de s'avancer à la table des témoins.

Un mémoire nous a été fourni par les avocats de Stelco Inc., Blake Cassels & Graydon. Tous les membres du Comité devraient en avoir copie.

Stelco est représentée par M. R. E. Heneault, vice-président administratif, qui est à ma droite, et par M. Warren Grover, c.r., avocat au cabinet Blake, Cassels & Graydon. Je remercie les témoins de leur patience car ils ont attendu plusieurs heures que nous en ayons fini avec les témoins précédents. Je prierais M. Grover et M. Heneault de nous faire de brèves déclarations préliminaires.

M. Warren Grover, c.r., avocat, Stelco Inc.: Merci, monsieur le président. Nous sommes ravis d'être ici. Nous aurions pu attendre encore deux autres heures. Nous avons écouté avec plaisir les témoins qui nous ont précédés.

Avec votre permission, monsieur le président, nous ferons un exposé conjoint, c'est-à-dire que M. Heneault présentera des exemples précis, tirés de l'expérience de Stelco, et je puiserai dans mes propres expériences passées dans le domaine. En effet, j'enseigne depuis 1965 cette matière dans une faculté de droit; je connais les détails d'un bon nombre des dispositions de la loi et je suis au courant des nombreux problèmes qu'elles suscitent. J'ai été mêlé de près à la question dès l'adoption de cette loi en 1971, lorsque j'ai présenté un mémoire au nom de l'Association du Barreau canadien.

Monsieur le président, nous abordons en fait aujourd'hui deux points qui, comme le Comité s'en rendra compte rapidement, se confondent en un seul.

Dans ma lettre à M. Wilson, dont je présume que vous avez copie, je proposais deux amendements. Je proposais d'abord d'instituer une exemption pour les fusions ascendantes qu'il faut à tout prix distinguer de ce que j'appelle «les anciennes coentreprises» dont le ministre ne cesse de dire qu'il s'agit à peu près de la même chose. C'est tout à fait différent, à mon avis.

Deuxièmement, je proposais une procédure d'approbation préalable par le Cabinet. Je traiterai maintenant de ces deux propositions dans l'ordre inverse, si vous le permettez, monsieur le président.

En ce qui concerne donc l'autorisation préalable du Cabinet, j'estime, monsieur le président, que la séparation des pouvoirs exécutif et judiciaire est un concept salutaire qui bien qu'il n'ait pas été repris dans notre Constitution, figure dans celle des États-Unis que nous connaissons si bien. Nous ne recommandons pas que l'exécutif ait le pouvoir de casser le jugement

[*Text*]

rule a tribunal or a court. That is not the proposal, although that has been the straw man put up—that is, the executive overruling courts.

I might say, Mr. Chairman, the executive does have the power in this country to overrule a tribunal such as the Canadian Radio Television and Telecommunications Commission, but that is not really new. That is not where we are coming from at all. What we do propose, Mr. Chairman, is that the executive—and let me use the word "executive" for a minute—could, on its own motion, effectively bless a proposed combination and require the director to issue a preclearance certificate under clause 74. What I am saying is that he would say "In this case the director, for reasons of specific benefit to this country, should issue a preclearance certificate."

Let me give you two or three examples where I think it is obvious that the director could not issue a preclearance certificate because he can only consider competition.

If a major oil company—could I suggest PanCanadian—decides to buy a large piece of the oil and gas properties owned by Dome Petroleum, thereby easing Dome's prodigious debt load and contributing to the future viability of the Canadian oil industry, I suggest that the director under the statute could not possibly say that had no significant impact on competition because it does—there are two major oil companies merging. What I am saying, though, is that there may be an overall benefit to Canada that the executive might well consider to be beneficial to the overview of the economy of this country.

In that situation, I would suggest that the executive could instruct the director to issue a preclearance certificate. There would be no compulsion—no hearings—but if so advised it could do that. I think that that is an appropriate—

Senator Godfrey: If the minister is ordered to do it, he is under a compulsion.

Mr. Grover: He is, but there would be no compulsion on the executive to hear from anybody or for it to do anything. In other words, there would be no formal proceeding, and if you look at the amendment I suggest, if the cabinet so desired, the minister would issue such an order.

That takes it off his back, if you like, and he needs that.

I have not decided in my mind, nor is my client hung up on whether the executive approval should be a matter for the cabinet or for the minister. My personal preference is for ministerial approval, but I have based my written submission on cabinet approval. I know how time consuming it is to seek cabinet approval. I was once the senior legal advisor for the Foreign Investment Review Agency, and cabinet just about bogged down in the early stages reviewing applications, which is perhaps why I tend to think of the minister. But that is not important. I leave that to the decision-makers, in the sense that it is not fundamental to our submission whether it is ministerial or cabinet—what is important is that it be someone who

[*Traduction*]

d'un tribunal ou d'une cour. Certainement pas, mais c'est le genre d'épouvantail qui fait craindre que l'exécutif ne passe outre aux décisions des tribunaux.

En fait, monsieur le président, l'exécutif a le pouvoir dans ce pays de passer outre à une décision d'un tribunal comme le Conseil de la radiodiffusion et des télécommunications canadiennes, mais même là, il n'y a rien de vraiment nouveau. Nous ne nous situons absolument pas sur ce plan. Ce que nous proposons, monsieur le président, c'est que l'exécutif, et permettez-moi d'employer ce terme un instant, pourrait de lui-même, donner son assentiment à un projet de fusionnement et demander au directeur de délivrer un certificat d'autorisation préalable, aux termes de l'article 74. Il n'aurait qu'à dire que dans tel ou tel cas et pour des raisons compatibles avec l'intérêt du pays, le directeur devrait délivrer un certificat d'autorisation préalable.

Laissez-moi vous donner deux ou trois exemples de cas où il est évident que le directeur ne pourrait délivrer un tel certificat parce qu'il ne peut considérer autre chose que la concurrence.

Si une importante société pétrolière, disons PanCanadian, décide d'acheter une bonne part des terres pétrolières et gazières de Dome Petroleum, allégeant du même coup le prodigieux fardeau de la dette de Dome et contribuant à la viabilité future de l'industrie pétrolière canadienne, j'estime que, selon la loi actuelle, le directeur ne pourrait nier que cette transaction affecte sensiblement la concurrence, parce que c'est un fait. Deux grandes sociétés pétrolières seraient en train de fusionner. D'autre part, ce que je tiens à vous signaler, c'est qu'il pourrait en résulter un bénéfice global pour le Canada, dont l'exécutif serait en mesure d'apprécier l'importance pour l'économie du pays.

Dans cette situation, l'exécutif pourrait donner au directeur l'instruction de déliver un certificat d'autorisation préalable. Aucune contrainte ne serait exercée, aucune audience ne serait tenue, mais s'il en recevait l'instruction, c'est ce qu'il pourrait faire. C'est, à mon avis, une façon appropriée . . .

Le sénateur Godfrey: Si le ministre en recevait l'ordre, il y aurait obligation.

M. Grover: Oui, mais l'exécutif lui ne serait tenu d'entendre qui que ce soit, ni d'agir d'une manière quelconque. Autrement dit, il n'y aurait pas de procédure officielle, et si vous examinez l'amendement que j'ai proposé, vous verrez qu'il n'y aura d'ordre que si le cabinet le désire.

Il sera soulagé de cette responsabilité, si vous voulez, et il en a besoin.

Je ne suis pas encore fixé car mon client ne sait trop encore si cette approbation donnée par l'exécutif devrait être la prérogative du cabinet ou des ministres. Personnellement je préfère que ce soit un ministre, mais dans mon mémoire j'ai présumé qu'il s'agirait du cabinet. Je sais tout le temps qu'il faut consacrer pour obtenir une approbation du cabinet. J'ai déjà été conseiller juridique principal à l'Agence de révision de l'investissement étranger, et j'ai pu constater que le cabinet s'empêtrait dès les premiers stades de l'examen des demandes, ce qui fait peut-être que j'ai tendance à préférer que ce soit un ministre. Mais passons. Je m'en remets aux décideurs, en ce sens que notre mémoire ne repose pas essentiellement sur le fait que ce

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will take the wider view and take it off the back of the director, who can only consider competition. There is nothing else he is allowed to consider.

My friend Mr. Heneault is currently involved in considering whether Stelco should enter into what I would call a forward merger with other entities to build an electrogalvanized steel fabrication plant in Canada. The capital cost is high—certainly too high for Stelco alone—but the opportunity for Canada is a real one. I will ask Mr. Heneault to explain this.

Mr. R. E. Heneault, Executive Vice-Prseident, Stelco Inc.: Mr. Chairman and senators, my purpose is to provide some specific examples, by way of background, of our concern with regard to the current legislation, and the necessity for amendments to provide some leeway or flexibility and less restrictive activity. The case that I will summarize briefly I would stress is only an example. There are no bricks and mortar, much less any steel, in place. This is a conceptual thing brought about by the recent announcement involving major expansion by General Motors in Oshawa.

Automotive manufacturers, in their wisdom, have looked down the road and seen the possibility of a change in steel products to be used in exposed parts on automobiles. Those who have a vehicle undoubtedly share concern about the life of it, which is affected by road conditions and so on. The manufacturers envisage going to a product known as "electrogalvanized", to be used in what are described as exposed parts—panels, fenders, and so on.

At the present time there is no electrogalvanized product for automotive production use made in Canada. There is galvanizing capacity in Canada and Stelco is one of the major producers. It is produced by what is known as a hot dipped process, which simply means taking hot rolled sheet steel and putting it through a bath of zinc. It produces a spangled surface that senators may have seen in ductwork, siding and so on. This differs from electrogalvanized product, which seems to be the future choice for all automobile manufacturers, in that the process provides a smooth finish and, once painted, no spangle shows through. It is, therefore, adequate for exposed automotive parts.

As I have mentioned, there are no facilities here in Canada that will produce that product. There are five such electrogalvanized units in the United States. Most of them are owned in joint ventures or, as my colleague would say, forward mergers. I like that. Each unit produces between 200,000 and 400,000 tonnes per year—some of them produce up to 700,000 tonnes annually. The estimated demand in Canada at present is about 100,000 tonnes. That means that a company such as ours could produce what is known as a substrade of the cold rolled steel and send it to the United States for electrogalvanizing, after

[*Traduction*]

sera un ministre ou le cabinet—ce qui importe, c'est que quelqu'un ayant une vue d'ensemble des choses prenne la décision à la place du directeur qui, lui, ne peut que juger l'aspect concurrentiel. Il n'est d'ailleurs autorisé à juger rien d'autre.

Mon ami M. Héneault est actuellement chargé de déterminer si Stelco devrait se lancer dans ce que j'appellerais une fusion ascendante avec d'autres sociétés pour construire au Canada une usine de fabrication d'acier zinqué électrolytiquement. Le coût en capital est élevé, certainement beaucoup trop pour que Stelco se lance seul dans cette entreprise, mais il s'agit vraiment d'une occasion unique pour le Canada. Je demanderais à M. Héneault d'expliquer.

M. R. E. Héneault, vice-président administratif, Stelco Inc.: Monsieur le président et honorables sénateurs, je veux vous donner des exemples précis, tirés du passé, pour vous mieux faire comprendre ce que nous ressentons à l'égard de ce projet de loi et comment nous souhaiterions le voir amendé pour nous laisser une certaine marge de manœuvre et de flexibilité tout en restreignant moins notre activité. Le cas que je résumerai brièvement n'est qu'un exemple et j'insiste sur ce point. Aucune brique n'a encore été posée et, à plus forte raison, aucune poutre en acier n'a été installée. Il s'agit d'une idée qu'a provoquée dernièrement l'annonce d'importants travaux d'agrandissement chez General Motors à Oshawa.

Les fabricants d'automobiles, dans leur sagesse, ont fait preuve de prévoyance et se sont avisés de la possibilité d'un changement dans les produits d'acier utilisés dans les parties exposées des automobiles. Tout propriétaire de voiture s'intéresse certainement à la vie utile de son véhicule, qui dépend des conditions des routes etc. Les fabricants songent adopter un produit zinqué électrolytiquement qui serait utilisé pour recouvrir les parties exposées—il s'agirait de la carosserie, des pare-chocs etc.

À l'heure actuelle, le Canada ne fabrique aucun produit électrogalvanisé pour la production d'automobiles. La galvanisation existe pourtant au Canada et Stelco est l'un des principaux chefs de file dans ce domaine. Il s'agit d'une technique de trempage de feuilles d'acier roulées et chauffées, dans un bain de métal en fusion, le zinc en l'occurrence. Les feuilles de métal présentent ensuite une surface pailletée comme celle que les sénateurs ont sans doute vue dans les canalisations, la tôle etc. Le produit zinqué électrolytiquement est différent. Il semble que ce soit le produit que rechercheront dans l'avenir tous les fabricants d'automobile car cette technique permet d'obtenir un fini lisse qui une fois peint ne laisse plus paraître de paillettes. Il est donc tout à fait adéquat pour les pièces d'automobile extérieures.

Comme je l'ai mentionné, il n'existe au Canada aucune usine qui fabrique ce produit. Il y a cinq de ces usines de zingage électrolytique aux États-Unis. La plupart d'entre elles sont la propriété d'entreprises en coparticipation ou, comme mon collègue dirait, en fusion ascendante. J'aime cette expression. Chaque unité produit entre 200 000 et 400 000 tonnes par année—et certaines d'entre elles en produisent jusqu'à 700 000 par année. La demande au Canada est actuellement évaluée à environ 100 000 tonnes. Ce qui veut dire qu'une entreprise comme la nôtre pourrait produire ce qu'on appelle

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which we would bring it back for sale to customers in this country.

I am sure that senators are aware that the enforcement of competition policy is somewhat uneven internationally. The United States, which developed a rigid position in the sixties and seventies, has now softened that position to some degree.

In any event, recognizing the limited market here in Canada and the need to be competitive, in order to produce this product it would be necessary to consider a joint venture involving at least one or two other partners. We understand that the proposed legislation would inhibit this, somewhat. When they consider that the minimal expenditure involved is $100 million, senators will see the reason for our concern. Surely this is the sort of thing that should be able to be approved expeditiously by the cabinet or, perhaps, by the minister involved—not in the fashion of the recent experience with FIRA. Specifically, our concern is that, under Bill C-91, there is no mechanism to obtain such approval quickly, and we think there should be.

Mr. Grover: Mr. Chairman, I said before that the problem with the director's override in section 74 is that he can only consider matters involving competition. That is clear. The proposed amendment that we had in mind would allow the minister or the cabinet, depending on which level you feel is appropriate, to put in other considerations which the director simply cannot put in.

Perhaps I could provide another example which has to do with the O&Y takeover of Gulf. Honourable senators will recall that Petro-Canada bought from Gulf the western downstream—that is, Ontario and west—at the retail service station level; Quebec and east was sold to Ultramar, with Olyimpia & York retaining the top or the upstream. My point is that O&Y was not in the oil business so there is no competitive problem with the upstream. Petro-Canada's acquisition of the downstream would certainly have had a substantial impact on competition. Ultramar's acquisition of the downstream in Quebec and east, where that company is a major factor in the market—particularly in Quebec—would have had a substantial impact on competition. The director could not have approved those transactions; in my view there would be no mechanism by which to do so. Perhaps they should never have been approved, but I believe that the government decided they should have been approved. In fact, they were approved under the Foreign Investment Review Act. I think that Mr. Sinclair Stevens got involved at that point. In any event, my point is that there should be a mechanism in place by which to do that, and I think that the O&Y example was a classic case.

[*Traduction*]

un substrat d'acier laminé à froid, qu'elle enverrait ensuite aux États-Unis pour le faire transformer par zingage électrolytique, avant de le réimporter au Canada pour le vendre aux consommateurs d'ici.

Je suis sûr que les sénateurs sont conscients que l'application de la politique en matière de concurrence est assez inégale d'un pays à l'autre. Les États-Unis, dont la politique était assez rigoureuse dans les années 60 et 70, ont maintenant assoupli leur position dans une certaine mesure.

Quoi qu'il en soit, compte tenu des limites du marché canadien et de la nécessité d'être concurrentiel, il faudrait, pour pouvoir fabriquer ce produit, envisager de créer une entreprise en coparticipation réunissant au moins un ou deux autres partenaires. Nous constatons cependant que le projet de loi actuel va quelque peu nous mettre les bâtons dans les roues à cet égard. Les sénateurs vont comprendre notre inquiétude lorsqu'ils se rendront compte que le montant des dépenses minimales requises s'élève à 100 millions de dollars. C'est certes là le genre de transaction qui devrait être approuvée rapidement par le cabinet ou, peut-être par le ministre responsable—et surtout pas à la manière retenue récemment par l'AEIE. Nous déplorons, en particulier, que le projet de loi C-91 ne prévoit aucun mécanisme pour obtenir rapidement cette approbation.

M. Grover: Monsieur le président, j'ai dit plus tôt que le problème au sujet du pouvoir de révision du directeur prévu à l'article 74 réside dans le fait qu'il ne peut se pencher que sur la question de la concurrence. C'est clair. L'amendement que nous proposons permettrait au ministre ou au cabinet, selon le niveau que vous jugez convenable, de tenir compte d'autres considérations que le directeur n'est tout simplement pas en mesure d'évaluer.

Peut-être puis-je donner un autre exemple qui porte sur la prise de contrôle de Gulf par la société O&Y. Les honorables sénateurs se rappelleront que Petro-Canada a acheté de Gulf ses opérations en aval pour l'Ouest—c'est-à-dire, l'Ontario et l'Ouest—au niveau de détail; les opérations au Québec et dans l'Est ont été cédées à Ultramar, tandis que la société O&Y a gardé le contrôle des principales opérations, c'est-à-dire les opérations en amont. Ce que je veux souligner, c'est que la société O&Y n'avait aucun intérêt dans l'industrie pétrolière. La prise de contrôle des opérations en amont par cette entreprise ne posait donc aucun problème de concurrence. Par contre, l'acquisition par Petro-Canada des opérations en aval va certainement avoir des répercussions importantes sur la concurrence. Par ailleurs, l'acquisition par Ultramar des opérations en aval au Québec et dans l'Est, où cette entreprise occupe une bonne part du marché—en particulier au Québec—va aussi avoir des effets considérables sur la concurrence. Le directeur n'aurait pu approuver ces transactions; à mon avis, il n'existe aucun mécanisme qui lui aurait permis de le faire. Ces transactions n'auraient peut-être jamais dû être approuvées, mais je crois que le gouvernement en a décidé autrement. En fait, elles ont été approuvées en vertu de la Loi sur l'examen de l'investissement étranger. Je crois que M. Sinclair Stevens est même intervenu à ce moment. Quoi qu'il en soit, j'estime qu'il devrait y avoir un mécanisme pour permet-

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Our first suggestion was to permit forward mergers, and by that I want to be specific as to what I mean. I mean the establishment of a new facility that would make a new product, be located in a new geographic area or make an old product but with a new technology. Galvanized steel, for example, is an old product, but electrogalvanized is, in my view, a new technology producing that product. To me, the establishment of that sort of facility should not be reviewable at all. Our suggestion is that it should not even need to go to the minister—it should not need to go to anybody.

Let me again call on Mr. Heneault, who will put forward an example of a similar thing that exists today in Canada, perhaps because we have a totally ineffective competition level.

Mr. Heneault: Some 15 or 20 years ago our market analysis indicated that there was a sizeable market for a particular product known as prepainted steel. It is very simple—it is cold rolled galvanized steel that is prepainted. Senators have probably seen it in everything from garden sheds to industrial siding that is painted before it is put up. That is prepainted steel.

Our market surveys indicated, however, that while it looked like a good potential market, there was not enough business to justify the expenditure. As senators are probably aware, the steel business is a very capital intensive business. You can do nothing for nothing. As unpalatable as it may seem—or seemed to us at the time—there was one other organization, our major competitor, who was sniffing around in the same market and facing the same problems. Perhaps there is another term for it, but the only alternative was a "convenience wedding" so to speak. Therefore we went into a joint venture company to produce this product on a single line, because if one of us went we knew the other one would go and therefore we said, "Why not put one in together?" and away we went.

There are now four lines at this particular organization. Each one of us would like to see the other partner out, but neither partner wants to go. However, the proof indeed is what has happened in the marketplace. We have had a very successful operation in this particular area, but we created a first in Canada. This was a unique product and both of us are proud of it.

The Chairman: When you say "we", you mean all of the partners?

Mr. Heneault: Yes, the two partners. The other company, which will remain nameless, and Stelco, which is the important one.

Senator Godfrey: Why do you say it will remain nameless?

Mr. Heneault: Only because I do not wish to advertise their product.

[*Traduction*]

tre cela. D'ailleurs, je suis d'avis que l'exemple de la société O&Y était un cas type.

Nous proposerions premièrement d'autoriser les fusions ascendantes. Par là, je veux dire qu'il faudrait permettre l'établissement d'une nouvelle usine qui fabriquerait un nouveau produit dans une nouvelle région géographique ou qui fabriquerait un produit déjà existant à l'aide de nouveaux moyens technologiques. L'acier galvanisé, par exemple, est un produit qui existe déjà, mais le zingage électrolytique est, à mon avis, une nouvelle technique pour fabriquer ce produit. Selon moi, l'implantation de ce genre d'usine ne devrait faire l'objet d'aucun examen. Nous estimons qu'elle ne devrait pas nécessiter l'approbation du ministre—ni de personne d'autre.

Permettez-moi de donner la parole à M. Heneault, qui va vous donner un exemple d'une situation semblable qui existe au Canada aujourd'hui, peut-être parce que notre niveau concurrentiel est tout à fait insatisfaisant.

M. Heneault: Il y a environ 15 ou 20 ans, une analyse du marché nous avait permis de constater qu'il existait un vaste créneau pour un produit particulier connu sous le nom d'acier pré-peint. Il s'agit en fait d'acier galvanisé laminé à froid qui est recouvert au préalable d'une couche de peinture. C'est le matériel qui sert à la fabrication des remises de jardin et des parois en tôle recouverte d'une couche de peinture.

Notre étude de marché indiquait toutefois que même s'il existait un marché potentiel important pour ce produit, celui-ci n'était pas suffisant pour justifier les dépenses à encourir pour la construction de l'usine. Comme les sénateurs le savent peut-être, l'industrie de l'acier exige énormément de capitaux. Vous n'avez rien pour rien. Aussi peu attirant que ce projet semblait l'être—ou nous semblait l'être à l'époque—, notre principal concurrent lorgnait lui aussi dans cette direction et faisait face aux mêmes problèmes. Peut-être y aurait-il une meilleure façon de décrire la situation, mais nous avons jugé qu'un «mariage de raison» s'avérait la meilleure solution à nos problèmes. Nous avons donc créé une entreprise en participation pour fabriquer ce produit sur une seule chaîne, parce que nous savions que si l'un d'entre nous abandonnait, l'autre n'allait pas tenir le coup. Nous nous sommes dit qu'il valait mieux unir nos forces et c'est ce que nous avons fait.

Nous avons maintenant quatre chaînes de fabrication. Chacun d'entre nous voudrait que l'autre partenaire abandonne, mais aucun n'est intéressé à lâcher prise. Notre réussite sur le marché est toutefois concluante. Nous avons non seulement ouvert une brèche, mais nous avons aussi été à l'origine d'une première au Canada. Notre produit est unique et nous en sommes tous les deux fiers.

Le président: Lorsque vous dites «nous», vous voulez dire tous les partenaires?

M. Heneault: Oui, les deux partenaires, c'est-à-dire l'autre société, dont je vais taire le nom, et Stelco, qui est le partenaire important.

Le sénateur Godfrey: Pourquoi taisez-vous le nom de l'autre partenaire?

M. Heneault: Parce que je ne veux pas lui faire de publicité.

[*Text*]

Senator MacDonald (Halifax): You said four lines. You meant four lines in the one joint venture. You do not mean that there are another three joint ventures going?

Mr. Heneault: No. At that single plant, we started with one line.

Senator MacDonald (Halifax): There is still one single plant?

Mr. Heneault: Yes, there is still one single plant but there are four coating lines in that period of time.

Senator Buckwold: It may have been very successful, but from the point of view of the consumer, or from the point of view of what this law is all about, would it not have been better to have two plants with two lines each?

Mr. Heneault: Of course if we had had two plants at that time, both of them just could not have survived.

Senator Buckwold: But this thing took off.

Mr. Heneault: Yes, because of the availability of the product; because of market promotion and because of our pushing the market, for instance, in agricultural buildings and so on. I think the consumer is better off because of that product.

Senator Buckwold: I have no way of knowing if you are correct in that position, but I know the objective of the law, and that is to protect consumers and give them the very best deal that they can get.

Mr. Heneault: Senator, on the other hand, if the law as it is pending, as I understand it, had been applied, the procedure involved would have meant that those lines probably would not have been built. Certainly we would not have built one; the competition would not have built one, so where would the consumer have been then? As it is now, there is a new product that obviously meets a market need that was not being serviced at that time. At least that would be our perspective.

Senator Buckwold: That is a fair response, I think, except that now that the market has grown so big that you are able to say you have four product lines that are successful, you would think that perhaps someone else might want to get into the business, and probably will.

Mr. Heneault: And probably will.

Senator Godfrey: But if one of you had started one plant and got in ahead in Canada, then presumably the only other target would have been the U.S.

Mr. Heneault: That is right.

Senator Godfrey: So if you were doing well and they saw that you were doing well and they got into the business, as it turned out, there would be more competition if you had two plants with two lines apiece. At least there would be some competition, whereas now there is none.

[*Traduction*]

Le sénateur MacDonald (Halifax): Vous avez parlé de quatre chaînes de fabrication. Vous voulez dire que ces quatre chaînes relèvent d'une seule et même entreprise. Il n'y a pas trois autres co-entreprises.

M. Heneault: Non. A cette même usine, nous avons commencé par une chaîne . . .

Le sénateur MacDonald (Halifax): Y a-t-il toujours une seule usine?

M. Heneault: Oui, il y a toujours une seule usine, mais nous avons maintenant quatre chaînes d'application de l'enduit.

Le sénateur Buckwold: Votre entreprise est peut-être une réussite, mais du point de vue du consommateur ou dans l'optique du présent projet de loi, n'aurait-il pas été préférable d'avoir deux usines dotées chacune de deux chaînes de fabrication?

M. Heneault: S'il y avait eu deux usines, à l'époque, aucune d'elles n'aurait survécu.

Le sénateur Buckwold: Mais votre entreprise a quand même prospéré.

M. Heneault: Oui, en raison de la disponibilité du produit et de la promotion que nous avons faite pour forcer le marché—par exemple, pour accroître l'utilisation de notre produit dans la construction de bâtiments de ferme, etc. Je pense que le consommateur profite beaucoup de notre produit.

Le sénateur Buckwold: Je n'ai aucun moyen de vérifier le bien-fondé de votre position, mais je sais que la loi vise à protéger les consommateurs et à leur permettre de conclure les meilleurs marchés possible.

M. Heneault: Sénateur, si la loi, telle qu'elle est formulée à l'heure actuelle et telle que je la comprends, avait été appliquée, ces chaînes de fabrication ne seraient probablement jamais entrées en exploitation. Ni nous ni notre concurrent n'aurait pu avoir sa chaîne de fabrication. En quoi le consommateur aurait-il alors été plus avantagé? A l'heure actuelle, il existe sur le marché un nouveau produit qui répond manifestement à un besoin que personne n'était parvenu à satisfaire jusqu'ici. C'est du moins notre point de vue.

Le sénateur Buckwold: Votre position se défend, sauf que maintenant que le marché est suffisamment vaste pour que vos quatre chaînes de fabrication fonctionnent à pleine capacité, vous devez bien vous imaginer que quelqu'un d'autre va probablement essayer d'obtenir sa part du gâteau.

M. Heneault: Probablement.

Le sénateur Godfrey: Si l'un de vous a implanté une usine et s'est taillé une place sur le marché canadien, il vise probablement maintenant le marché américain.

M. Heneault: C'est exact.

Le sénateur Godfrey: Donc, si la prospérité de votre entreprise incite d'autres fabricants à se lancer dans la course, comme cela semble vouloir être le cas, il y aura plus de concurrence, en particulier s'il y a déjà deux usines dotées chacune de deux chaînes de fabrication. Il y aura, à tout le moins, une certaine concurrence, alors qu'à l'heure actuelle, il n'y en a aucune.

[*Text*]

Mr. Heneault: Except when you have to determine priorities in a capital investment kind of program, you are certainly not going to put money into a facility that is going to operate at 50 per cent capacity. You have to put it in where the demand is already there or you see the potential for such a product. We probably would have left it to someone else. I do not think we would have gone that way. In Canada, where there are really only three major integrated producers, you have to pick your spots.

Senator Godfrey: As I recall, there was not problem with combines at that time?

Mr. Heneault: No.

Senator Godfrey: You got a good legal opinion from a very good law firm?

Mr. Heneault: I forget the name of the law firm, senator, as a matter of fact.

Senator Godfrey: I know who Dofasco used.

Mr. Grover: Mr. Heneault's Bayco example is, of course, subject to the charge that, "Where there is a new product coming on the market, why would you not have two lines?" There is always poised competition from the U.S. or other places, particularly in an environment that is becoming more and more one of free trade. I think one has to recognize that. I also think that one must recognize that, if you are talking about some sort of abuse of dominant position which is in clause 50 of the new statute, and incidentally is derived from section 86 of the Treaty of Rome, that has no real reference in the U.S. under section 2 of the Sherman Act. The abuse of dominant position section has been amended to take out what I consider was the double intent by the Commons committee, and if this joint venture is abusing its position later on, you can attack it quite easily under clause 50, if it is into that position. However, when these things start, I suggest that they should not feel threatened in their infancy, and they are threatened by clause 50 after they misbehave if they have grown to fruition, if you understand my submission.

Incidentally, there is no exemption now that covers such a situation. There is a joint venture exemption but it is designed for the natural resources industry. It does not cover corporations. You cannot have corporations in a joint venture. The Bayco example would be and could be attacked under the U.S.-type of jurisprudence if you look at the first example I gave you, which is the famous Penn-Olin case, the sodium cloride case in the U.S. What I am saying is that a person, knowing of the Penn-Olin decision and knowing of the decisions in the European community, would worry about going into that sort of thing. My submission to you is that we should not be worried about that when they are in their infancy, and that is why I talk about forward ventures.

Mr. Chairman, I also suggest that particular recognition should be given to the introduction of new technology and, in that regard, perhaps I could ask Mr. Heneault to tell us about

[*Traduction*]

M. Heneault: Sauf que vous devez établir vos priorités d'investissement. Vous n'allez pas investir de l'argent dans une usine qui va fonctionner à 50 p. 100 de sa capacité. Vous devez placer votre argent là où la demande existe déjà ou là où vous croyez qu'il existe un créneau potentiel pour un produit. Si nous nous étions trouvés dans une situation semblable, nous aurions probablement cédé notre place à quelqu'un d'autre. Je ne pense pas que cela se serait passé de cette façon. Au Canada, où il n'y a que trois gros fabricants, vous devez choisir vos créneaux.

Le sénateur Godfrey: Si je me rappelle bien, il n'y avait aucun problème de coalition à l'époque?

M. Heneault: C'est exact.

Le sénateur Godfrey: Vous avez sollicité un avis juridique auprès d'un bon cabinet d'avocats?

M. Heneault: Effectivement, mais j'ai bien peur d'avoir oublié le nom du cabinet en question.

Le sénateur Godfrey: Je sais à quel cabinet Dofasco a eu recours.

M. Grover: L'exemple de Bayco donné par M. Heneault nous porte, bien sûr, à nous interroger au sujet de la nécessité d'avoir deux chaînes de fabrication, chaque fois qu'un nouveau produit est lancé sur le marché. Il y a toujours les concurrents américains et autres qui sont prêts à se lancer dans la course, en particulier depuis que le climat favorise la libéralisation du commerce. Je pense que c'est un fait qu'il faut reconnaître. Je crois aussi que lorsque nous parlons d'un quelconque abus de position dominante, aux termes de l'article 50 de ce projet de loi—qui, incidemment, est inspiré de l'article 86 du Traité de Rome—cela n'a aucun rapport avec les dispositions de l'article 2 de la Loi Sherman. L'article portant sur l'abus de la position dominante a été modifié pour satisfaire à ce que je considère comme étant une double intention de la part du comité des Communes. Si l'entreprise en participation abuse éventuellement de sa position, vous pouvez facilement la poursuivre en vertu de l'article 50, si cela est justifié. Si vous me comprenez bien, une jeune entreprise ne devrait pas être assujettie à cet article, à moins qu'une fois bien établie, elle ne s'expose à des mesures de rétorsion en raison de ses agissements.

Incidemment, il n'existe aujourd'hui aucune mesure d'exception applicable à une telle situation. L'exemption prévue dans le cas des coentreprises s'applique uniquement à l'industrie des ressources naturelles. Elle n'englobe pas les sociétés. Il n'y a pas de coentreprise constituées en sociétés. L'exemple de Bayco aurait pu être remis en question en vertu de la jurisprudence américaine, en particulier si l'on considère la célèbre affaire Penn-Olin qui mettait en cause la fabrication du chlorure de sodium. Compte tenu de la décision prise dans cette affaire et de la position adoptée par la Communauté européenne, n'importe qui aurait hésité avant de se lancer dans la fabrication de ce produit. Je suis donc d'avis, qu'il ne faut pas s'inquiéter de cela dans le cas de nouvelles entreprises. C'est d'ailleurs pour cela que je parle de fusionnements ascendants.

M. le président, je proposerais aussi que l'on tienne compte de l'apparition de nouvelles technologies. A cet égard, j'inviterais peut-être M. Heneault à nous faire part de son troisième

[*Text*]

his third example, which relates to a company called Moly-Cop which does exist, or is proposed.

Mr. Heneault: I think this is a particularly telling, pertinent example. Moly-Cop is a joint venture formed last year between Stelco and Armco, a U.S. integrated steelmaker for the manufacture of grinding media—in other words, grinding balls and grinding rods used principally by the mining industry to make little ones from big ones. In other words, various types of ore are thrown into kilns and so on and this grinding media does exactly that.

We have been in the grinding ball business in our plant in Edmonton for a good number of years, producing forged steel balls from two inches in diameter to five inches in diameter. However, the technology of making grinding media, both balls and rods, has advanced rapidly in recent years and Armco in the U.S. and worldwide is the leader because of its technology, principally a heat-treating process, in the production of this particular product.

It became apparent to us that, unless we were able to acquire that technology, which was a heat-treating process, our participation in the marketplace would be greatly eroded in perhaps five or six years, which would mean that the grinding media would be produced in the U.S. and sent here to Canada.

We had discussions with Armco, came to an agreement about a joint venture and went ahead. As a matter of fact, this September, we will be starting this new facility in Kamloops, British Columbia. It is now in the early stages of contruction. It is an $11 million project. That is not of the magnitude of these other projects we were talking about, but it means 60 to 70 new jobs. We think this is a unique kind of example of the activity that is probably going to be on the increase in our industry in particular, simply because of the numbers involved in trying to do anything and because of the advances in technology which Mr. Grover mentioned earlier.

Mr. Grover tells me that we could be attacked under this new legislation. If so, we would not have built this facility or, frankly, we would have built it in the United States and serviced the Canadian market. But we are a Canadian company serving the Canadian market and we want to continue in that fashion. We want to develop our business in Canada and do not, frankly, want the passage of this bill to complicate our business activity.

Mr. Grover: In closing, we suggest that the type of forward merger or joint venture I am talking about should be exempted from the bill. We have put forward a recommendation to that effect in terms of an exemption that could be introduced quite easily.

It is conceivable that the legislation could stipulate that with ministerial preapprovals you could do this. To me, you should not need a ministerial fiat to introduce debate, if you like, but the most important thing is clearly to have some system where, if it is for the significant benefit of Canada, either the minister

[*Traduction*]

exemple qui met en cause une société fictive ou réelle du nom de Moly-Cop.

M. Heneault: Je crois que cet exemple est particulièrement éclairant. La société Moly-Cop est une entreprise en participation constituée l'an dernier par Stelco et Armco, qui est un fabricant américain d'acier, en vue de la fabrication d'engins de broyage—en d'autres termes, des boulets et des barres de broyeur utilisés principalement dans l'industrie des mines pour réduire le minerai en petits morceaux pour le faire fondre.

Notre usine de fabrication de boulets de broyeur d'Edmonton est en exploitation depuis un certain nombre d'années. Nous produisons des boulets d'acier forgé de deux à cinq pouces de diamètre. Toutefois, la technologie utilisée pour fabriquer ces pièces a rapidement évolué ces dernières années. La société américaine Armco est le chef de file mondial en raison de la technologie qu'elle utilise—en particulier son traitement thermique—pour fabriquer ce produit.

Nous avons vite compris qu'à moins de nous procurer cette technologie, c'est-à-dire ce procédé de traitement par la chaleur, notre participation au marché s'amenuiserait progressivement au cours des cinq ou six prochaines années de sorte que cette pâte de meulage serait produite aux États-Unis, puis expédiée au Canada.

Nous en avons discuté avec la société Armco, avec laquelle nous avons conclu une entente visant la mise sur pied d'une entreprise en coparticipation. Effectivement, c'est en septembre que nous ouvrirons les portes de cette nouvelle usine à Kamloops, Colombie-Britannique. Elle est présentement en construction. C'est un projet de 11 millions de dollars qui, s'il n'a pas l'importance de ces autres projets dont nous parlions tantôt, n'en créera pas moins 60 à 70 nouveaux emplois. Nous croyons que ce cas illustre idéalement les initiatives répétées que connaîtra probablement notre industrie, surtout à cause ce ce qu'il en coûte pour essayer d'accomplir quelque chose et à cause aussi des progrès technologiques que M. Grover a mentionnés plus tôt.

Il me dit que nous pourrions tomber sous le coup de cette nouvelle mesure législative. S'il en est ainsi, nous n'aurions pas construit cette nouvelle usine ou alors, nous l'aurions érigée aux États-Unis pour desservir le marché canadien. Notre société canadienne dessert un marché canadien et nous ne voulons pas que cette situation change. Nous voulons développer notre commerce au Canada et, franchement, nous ne voulons pas que l'adoption du présent projet de loi vienne nous compliquer la vie.

M. Grover: Je suggère, en terminant, de soustraire au projet de loi le genre d'entreprise en coparticipation dont je viens de vous parler. Nous avons fait, en ce sens, une recommandation qui pourrait facilement être incorporée à la loi.

Il est concevable en effet que le texte de la loi autorise ce genre de coentreprise avec l'approbation préalable du ministre. À mon avis, il ne devrait pas être nécessaire d'obtenir l'autorisation du ministre. Mais il faut avant tout, si le Canada en tirera un avantage net, établir un système prévoyant, au besoin, étude préalable du projet par le ministre ou son cabi-

[*Text*]

or the cabinet could preclear something if they felt so inclined. I suggest that is the most important part of our submission.

Senator Godfrey: I am completely confused about the distinction between your first example which would require ministerial approval and your second example where you say you should not have to do that but there should be an exemption. What is the difference? You have a brand new process in Canada for this product so why do you think that requires ministerial approval whereas the painting of it does not?

Mr. Grover: Under the present act there would be no way of getting it through. I suggest to you that both of those should not need any approval.

One of the concepts I mentioned as an example would be where you have an existing business where someone, say took over Dome or John Deere took over Massey-Ferguson. I would have thought that anyone would jump out of his skin with joy, but I cannot understand how the director could approve it, because it would eliminate a competitor.

Senator Godfrey: Both are, in fact, in the same category, is that correct?

Mr. Grover: Yes, those happen to be in the same category.

Senator MacDonald (Halifax): You were thinking out loud when you said that your client does not have any particularly strong views on this but you mentined your experience with respect to the bog-down that can occur. Surely, with the example you used, you would not trust that decision to a single minister; it would have to be a cabinet decision.

Mr. Grover: I understand where you are coming from. Perhaps I could just use Mr. Heneault's examples. The decsions regarding the $11 million ball mill in Kamloops I probably would trust to a minister. If you are talking about a tremendous set-up of over $100 million to electroplate cars, I agree that that decision should be made at the cabinet level. It is hard to know where you make those distinctions and that is why it would be a good idea, in our submission, if the infancy matter did not require ministerial approval. Then giant endeavours would need cabinet approval. In other words, you would require cabinet approval but not for small new industries. My worry about cabinet approval is that everyone and his brother will be seeking cabinet approval.

Senator MacDonald (Halifax): What is the difference in the set up in this act with respect to the tribunal and the CRTC?

Mr. Grover: While I do not purport to be an expert on the CRTC, I believe the CRTC has no appeal rights to a court, but there is an override by cabinet of any decision by the CRTC at least on the telecommunications side, which is the only side with which I am familiar.

There is an appeal from the tribunal to a court of appeal on questions of law. That is how it is structured. If you had a

[*Traduction*]

net. C'est là je crois l'aspect le plus important de nos recommandations.

Le sénateur Godfrey: Je suis entièrement perdu dans cette distinction que vous faites entre le premier exemple que vous avez donné, qui nécessiterait l'approbation du ministre, et le second, où vous dites que cette autorisation ne serait pas nécessaire mais au sujet duquel la loi devrait prévoir une exemption. Quelle est au juste la différence? Vous avez, au Canada, un procédé entièrement nouveau pour ce produit; alors, pourquoi croyez-vous que la fabrication de ce produit exigerait une approbation du ministre tandis qu'elle ne serait plus nécessaire lorsqu'il s'agirait de le peindre?

M. Grover: Il serait absolument impossible de le faire approuver, aux termes de la loi actuelle. Je suggère que, dans l'un et l'autre cas, l'approbation devrait être inutile.

Dans l'un des exemples que j'ai donné, une entreprise existante prend possession de, disons, Dome, ou bien John Deere de Massey-Ferguson. J'aurais cru qu'on sauterait de joie à cette idée, mais je ne puis comprendre comment le directeur approuverait cette mesure du fait qu'elle supprimerait un concurrent.

Le sénateur Godfrey: Les deux sont effectivement dans la même catégorie, n'est-ce pas?

M. Grover: Oui, ces deux choses se trouvent dans la même catégorie.

Le sénateur MacDonald (Halifax): Vous avez extériorisé votre pensée quand vous avez dit que votre client n'a rien décidé sur ce point mais vous avez parlé par expérience de la congestion qui pourrait se produire. Dans le cas que vous avez cité, vous ne vous en remetteriez sûrement pas à la décision d'un seul ministre, mais plutôt à celle du cabinet tout entier.

M. Grover: Je vois ce que vous entendez. Je pourrais peut-être utiliser les exemples donnés par M. Heneault. Pour le moulin à boulets de 11 millions de dollars de Kamloops, je m'en remettrais probablement à la décision du ministre. Mais s'il s'agit d'une entreprise de zingage électrolytique de plus de 100 millions de dollars, je conviens qu'il faudrait s'en remettre alors à la décision du cabinet. Il n'est pas facile de décider où tracer la ligne de démarcation et c'est pourquoi il serait bon que, dans nos recommandations, nous n'exigions pas l'approbation du ministre au stade initial. Nous pourrions alors, dans nos entreprises plus importantes, exiger l'approbation du cabinet. Bref, il faudrait obtenir l'approbation du cabinet, mais non pour de petites entreprises. L'ennui avec cette approbation du cabinet c'est que tout le monde et son père voudront l'obtenir.

Le sénateur MacDonald (Halifax): Quelles sont les différentes dispositions prises dans cette loi à l'égard du tribunal et du CRTC?

M. Grover: Je ne prétends pas être expert à propos du CRTC mais il n'a, je crois, aucun droit d'en appeler au tribunal et le cabinet peut renverser toute décision du CRTC, du moins sur le rapport des télécommunications, qui est le seul domaine que je connaisse.

Il y a pour le tribunal recours possible à un tribunal d'appel sur des questions de loi. Telle est la structure. Si ce projet de

[*Text*]

cabinet override in this statute, you would have an override of the Federal Court of Appeal rather than of a tribunal. So far as I am aware it has not been our tradition to have cabinet override court decisions.

Senator MacDonald (Halifax): What happened to the Edmonton plant?

Mr. Heneault: It is still operating. Are you asking me if there is still the possibility of shrinkage?

Senator MacDonald (Halifax): Yes.

Mr. Heneault: No because one of the positive impacts was that the Edmonton plant, which is essentially a steel-making plant, is supplying the steel and now there is a guaranteed increased load. Rather than have the impact of reducing while the ball mill is no longer in place, the steel-making facility expanded.

Senator MacDonald (Halifax): Why would you not have put the new plant closer to Edmonton?

Mr. Heneault: That was considered in our logistics studies and so on. Kamloops was attractive because of its proximity to the mining industry in B.C., our primary users of this particular product. Of course, it was a shipment problem.

Senator Godfrey: Mr. Grover, while you are here I should like to glean some of your expert knowledge regarding the definition of the word "substantially." Have you given that any thought? Do you have any opinions you would like to share with the committee?

Mr. Grover: In the letter I wrote to the committee I pointed out that the word "substantially" is in the Clayton Act, which contains the U.S. merger provisions. I suggest, if you are looking for jurisprudence on what the word "substantially" means, it is very likely that our courts will look to what the U.S. courts have said the word means. "Substantially" has not been read in the United States to mean "unduly."

On the other hand the statute in the merger provisions itself, if you look at Section 65, you will see that it has set out that the tribunal should consider international competition in a merger situation. In effect, you do have a broadening of the market so that the word "substantially" looks at a broad market and not too narrow a market.

I would be on shaky ground to pretend that I knew what the word "sensiblement" means in that juxtaposition in a text in Canada. I do know that it is used in the present text, but my French is not good enough to say that they have mistranslated it.

Senator Godfrey: Have there not been decisions in the United States that the word "substantially" must mean "very significant" or "major"?

Mr. Grover: The United States works on the basis of a competitive market, if you are thinking in terms of two competitors. In 1984 the Department of Justice published some merger guidelines that set out what they considered to be attackable mergers. In other words, things that are substantial. I think I have a copy of the document in my brief case, and I can leave it with you. Essentially, they go on what are called HHIs which is the Herfindahl-Hirschman Index. Initially, it

[*Traduction*]

loi conférait au cabinet un droit dérogatoire, il serait exercé par la Cour fédérale plutôt que par un tribunal. Or, autant que je sache, il n'a jamais été coutumier pour le cabinet de renverser les arrêts de nos tribunaux.

Le sénateur MacDonald (Halifax): Qu'est-il arrivé de l'usine d'Edmonton?

M. Heneault: Elle fonctionne toujours. Voulez-vous savoir si elle risque de perdre de l'importance?

Le sénateur MacDonald (Halifax): Oui.

M. Heneault: Non; car étant donné que l'usine d'Edmonton, est essentiellement une aciérie, elle fournit maintenant de l'acier et est assurée d'une demande plus élevée. De sorte que, plutôt que de se voir réduite en importance, tandis que le moulin à boulets a fermé ses portes, l'usine d'Edmonton a agrandi ses installations en vue de la fabrication d'acier.

Le sénateur MacDonald (Halifax): Pourquoi n'avoir pas construit la nouvelle usine plus près d'Edmonton?

M. Heneault: Cet aspect a été analysé dans nos études logistiques. Kamloops offre l'avantage d'être près de l'industrie minière de la Colombie-Britannique, notre principal débouché. Naturellement, il s'agissait d'un problème d'expédition.

Le sénateur Godfrey: Puisque vous êtes parmi nous, M. Grover, j'ai recours à vos lumières pour définir le mot «substantially». Y avez-vous songé? Avez-vous à ce sujet quelques observations à nous communiquer?

M. Grover: Dans la lettre que j'ai adressée au comité, j'ai signalé que le mot «substantially» se trouve dans la Loi Clayton, qui régit les fusionnements aux É.-U. Si vous voulez savoir ce que dit la jurisprudence au sujet du mot «substantially» il est probable que, le cas échéant, nos tribunaux s'en remettraient à l'interprétation des tribunaux américains. «Substantially» ne signifie pas aux États-Unis «indûment».

D'autre part, si l'on s'en rapporte aux dispositions mêmes de fusionnement, l'article 65, on voit que le tribunal a décidé que pour les fusionnements, il convenait de tenir compte de la concurrence internationale. Effectivement, il se produit une expansion du marché, de sorte que le mot «substantially» s'applique à un marché étendu et non pas restreint.

Je serais bien mal avisé de prétendre savoir ce que signifie le mot «sensiblement» dans un texte de loi canadien. Je sais qu'il est utilisé dans le présent texte, mais mes connaissances en français ne sont pas assez bonnes pour me permettre de dire qu'il traduit mal l'idée.

Le sénateur Godfrey: N'y a-t-il pas, aux États-Unis, des décisions voulant que le mot «substantially» signifie très appréciable ou très important?

M. Grover: Les États-Unis se fondent sur un marché concurrentiel, s'il est question de deux concurrents. En 1984, le Département de la justice a publié, sur le fusionnement, certaines lignes directrices qui énoncent ce qu'il considère comme des fusionnements pouvant prêter à controverse. Bref, des fusionnements qualifiés de «substantial». Je crois avoir dans ma serviette un exemplaire de ce document que je puis vous laisser. Le ministère procède en somme suivant le HHI, c'est-à-

[*Text*]

may seem to be a difficult concept but really it is not. You take the percentage of everybody who is in the industry. That is, the top man may have 32 per cent and the next man may have 12 per cent. You square those percentages and add them up. If they come to over 1,800 the industry has become too concentrated. If your merger would move the industry into that range, it is attackable. If the industry is already in that range and if the merger would move it up 50 points on the HHI, it is attackable. Generally, if it is between 1,200 points and 1,800 points and if you move it up over 100 points, the Justice Department now says that it is attackable. I could be wrong on the latter point because I am going by memory. What I am saying is that in the United States today, the real position of "substantially" is determined by a mathematical formula within horizontal mergers. That is, mergers between competitors.

Senator Barrow: My question is in connection with your proposed Governor in Council override. If you put that proposal in the bill, what is to prevent large corporations with sufficient political clout from approaching the government directly and requesting an order in council, rather than going through the usual channels, and should it be done in that way?

Mr. Grover: In my submission the governor in council would develop a procedure so that he would not have to listen to what he did not want to listen to. However, if we are talking about large institutions with political clout, the Governor in Council, as I understand orders in council, must be publicly promulgated and, therefore, is publicly accountable. The cabinet of the country is publicly accountable. I am suggesting that if it is of significant benefit to Canada, somebody ought to be able to say so, and it may be because it is labour intensive. It is helping labour.

Senator Barrow: But when an order in council comes through, it is a fait accompli, is it not.

Mr. Grover: I believe so, but the Governor in Council is entitled to take into consideration anything he wants in getting there. I suggest that a procedure be set up whereby he would receive advice from sources of more than one person. I presume that if such a procedure were in place, the minister responsible for the statute would have a small staff who would then put to the Governor in Council what they thought were the facts of the situation, if the Governor in Council wanted to hear the case at all.

Senator Barrow: There are a lot of assumptions there.

Mr. Grover: I think they have the experience within the Governor in Council. For example, they developed a procedure with FIRA whereby they headed back into a cabinet committee and then back to the commissioner, who developed a small staff for handling those things. So I think that there is experience.

[*Traduction*]

dire le *Herfindahl-Hirschman Index*. Ce concept peut sembler difficile au début, mais il ne l'est pas en réalité. On prend le pourcentage de tous ceux qui sont dans l'industrie; 32 p. 100 pour l'un et 12 p. 100 pour le suivant, etc. On élève au carré ces pourcentages pour ensuite les additionner. Si le résultat dépasse 1 000, l'industrie est devenue trop concentrée. Si le fusionnement range l'industrie dans cette catégorie, elle peut être poursuivie. Si elle se trouve déjà dans cette situation et que le fusionnement l'élève de 50 points sur l'échelle HHI, elle devient passible de procédures. Généralement, cela se situe entre 1 200 points et 1 800 points; et si la hausse dépasse 100 points, le Département de la justice dit maintenant que des poursuites peuvent être intentées. Je puis faire erreur quant au dernier chiffre, car je parle de mémoire. Je dis en somme qu'aux États-Unis, en ce moment, la portée réelle du mot «substantial» est déterminée par une formule mathématique pour les fusionnements horizontaux, c'est-à-dire des fusionnements entre concurrents.

Le sénateur Barrow: Ma question porte sur l'annulation par décision du gouverneur en conseil. Si vous incorporez cette proposition dans le projet de loi, comment les corporations qui ont assez d'influence politique seront-elles empêchées de s'adresser directement au gouvernement pour lui demander un arrêté en conseil, plutôt que d'utiliser les voies normales; et devrait-il en être ainsi?

M. Grover: Dans la proposition que je fais, le gouverneur en conseil établirait une procédure qui lui permettrait de n'entendre que ce qu'il veut bien. Toutefois, si l'on parle de sociétés importantes qui exercent une grande influence politique, le gouverneur en conseil, si j'ai bien compris ce qu'on entend par un arrêté en conseil, doit annoncer la chose publiquement. Il est donc responsable envers le public. Le cabinet est responsable envers la population. Je suggère que, si la chose est assez avantageuse pour le Canada, quelqu'un devrait être en mesure de le dire et il se peut que l'industrie en cause soit une industrie de main-d'œuvre. C'est-à-dire qui aide la main-d'œuvre.

Le sénateur Barrow: Mais lorsqu'un arrêté en conseil est publié, on se trouve, n'est-ce pas, devant le fait accompli.

M. Grover: D'accord, mais le gouverneur en conseil est autorisé pour cela à prendre en considération tout ce qu'il juge digne d'intérêt. Je suggère qu'une procédure soit établie prévoyant qu'il sera conseillé par plus d'une personne. Le ministre responsable de la mesure législative disposerait d'un petit personnel qui communiquerait au gouverneur en conseil les faits pertinents s'il veut entendre le cas en conseil.

Le sénateur Barrow: Il y a là-dedans beaucoup de suppositions.

M. Grover: Le bureau du gouverneur en conseil possède déjà à ce sujet une certaine expérience. Par exemple, il a déjà établi pour l'AEIE une procédure prévoyant l'examen par un comité du Cabinet, puis un rapport au commissaire, qui dispose d'un petit nombre de fonctionnaires chargés de régler des problèmes de ce genre. La question n'est donc pas nouvelle.

[*Text*]

Senator MacDonald (Halifax): I would like to make a comment on that point. With all due respect to Senator Barrow, I think it would be ludicrous —and it has nothing to do with political clout at all—for anybody to put his head in the jaws of a tribunal, knowing full well what he had in mind would not be passed. There would have to be a straight avenue to the person who would be making the decisions.

Senator Barrow: People have been known to do it before the CRTC.

Senator MacDonald (Halifax): I do not kow how well it has served them.

Senator Godfrey: I must say with regard to the proposal on the order in council that I just read Donald Johnston's book, which outlines the decision the priorities and planning committee took without any prior warning to okay the $1.6 billion purchase by Petro-Canada of BP. So, from a practical point of view, decisions on large transactions should be made by cabinet.

The Chairman: If there are no futher questions, I will thank Mr. Grover and Mr. Heneault for their patience this afternoon.

Honourable senators, are you agreed that we should hear from the minister on June 11?

Hon. Senators: Agreed.

The Chairman: After we hear from the minister, there will be no further witnesses.

The committee adjourned.

[*Traduction*]

Le sénateur MacDonald (Halifax): J'aimerais faire une observation à ce sujet. Sauf le respect que je dois au sénateur Barrow, il serait ridicule—et cela n'a rien à faire avec l'influence politique—d'imaginer que quelqu'un se risquera devant un tribunal, sachant très bien qu'il n'obtiendra pas gain de cause. Il faudrait pouvoir s'adresser directement à la personne qui prend les décisions.

Le sénateur Barrow: D'autres l'ont fait devant le CRTC.

Le sénateur MacDonald (Halifax): Mais j'ignore avec quel succès.

Le sénateur Godfrey: Au sujet de la proposition concernant l'arrêté en conseil, je viens de lire le livre de Donald Johnston, qui expose la décision que le comité des priorités et de la planification a prise, sans avertissement préalable, d'approuver l'achat de BP par Petro-Canada, pour la somme de 1,6 milliard de dollars. Aussi, d'un point de vue pratique, les décisions au sujet des transactions importantes devraient être laissées au Cabinet.

Le président: S'il n'y a pas d'autres questions, je vais remercier M. Grover et M. Héneault de la patience dont ils ont fait preuve cet après-midi.

Honorables sénateurs, êtes-vous d'accord pour que nous entendions le ministre, le 11 juin?

Des voix: D'accord.

Le président: Après quoi, il ne restera plus de témoin.

La séance est levée.

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WITNESSES—TÉMOINS

From the Canadian Bankers' Association:

Mr. Robert M. MacIntosh, President;

Mr. T. G. O'Connor, Chairman, Legal Affairs Committee; Associate General Counsel, Toronto-Dominion Bank;

Mr. David Phillips, Vice-President, Legal Affairs.

From the Association of Canadian Franchisors:

Mr. John Gillespie, President; President, Pizza Pizza Ltd.;

Mr. Harold Knifton, President, Independent Grocers' Association;

Mr. Ken Fong, Member, Government Liaison Committee; Vice-President, McDonald's Restaurants of Canada Ltd.;

Mr. Wayne McCracken, Special Counsel.

From Stelco Inc.:

Mr. R. E. Heneault, Executive Vice-President;

Mr. Warren Grover, Q.C., Counsel, Blake, Cassels and Graydon.

De l'Association des banquiers canadiens:

M. Robert M. MacIntosh, président;

M. T. G. O'Connor, président, Comité des affaires juridiques; conseiller général associé, Banque Toronto-Dominion;

M. David Phillips, vice-président, Affaires juridiques.

De l'Association canadienne des franchiseurs:

M. John Gillespie, président; président, «Pizza Pizza Ltd.»;

M. Harold Knifton, président, «Independent Grocers' Association»;

M. Ken Fong, membre, Comité de relations gouvernementales; vice-président, Les restaurants McDonald du Canada Ltée;

Me Wayne McCracken, conseiller juridique spéical.

De Stelco Inc.:

Mr. R. E. Heneault, vice-président exécutif;

Me Warren Grover, c.r., conseiller juridique, Blake, Cassels et Craydon.

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This is Exhibit “22” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

HOUSE OF COMMONS DEBATES

OFFICIAL REPORT

FIRST SESSION—THIRTY-THIRD PARLIAMENT

35 Elizabeth II

VOLUME X, 1986

COMPRISING THE PERIOD FROM THE SECOND DAY OF JUNE, 1986
TO THE TWENTY-FOURTH DAY OF JULY, 1986

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HOUSE OF COMMONS

Monday, June 2, 1986

The House met at 11 a.m.

ROUTINE PROCEEDINGS

[*Translation*]

CANADIAN PARLIAMENTARY DELEGATION

PRESENTATION OF REPORT

Mr. Jim Hawkes (Calgary West): Mr. Speaker, pursuant to Standing Order 101, I have the honour of tabling, in both official languages the report of the official parliamentary delegation that visited Belgium from May 11 to May 17, 1986.

* * *

QUESTIONS ON THE ORDER PAPER

Mr. Doug Lewis (Parliamentary Secretary to President of the Privy Council): Mr. Speaker, I ask that all questions be allowed to stand.

Mr. Speaker: Is it agreed?

Some Hon. Members: Agreed.

GOVERNMENT ORDERS

[*English*]

CANADA DEPOSIT INSURANCE CORPORATION ACT

MEASURE TO AMEND

Hon. Barbara McDougall (Minister of State (Finance)) moved that Bill C-86, an Act to amend the Canada Deposit Insurance Corporation Act, be read the third time and passed.

She said: I am pleased to be present in the House for third reading of this Bill. I do want to thank Hon. Members who brought the Bill through report stage with responsibility and speed.

As we all know, the Canadian financial system withstood a series of major shocks over the past several years and this has caused concern for many Canadians with savings in financial institutions. Hon. Members are aware that the Government is committed to a revitalization of the economy and that an important aspect of our agenda in this regard is the comprehensive reform of financial institutions legislation. The Government's Green Paper on financial institutions and the parliamentary reports on financial institution legislation are very important elements of this process. While we are continuing our efforts to develop a broad public policy response to these issues, we must act without delay in dealing with certian specific problems.

[*Translation*]

The amendments to the Canada Deposit Insurance Corporation Act contained in Bill C-86 are aimed at protecting small depositors, while the proposed regulatory powers would directly contribute towards stabilizing the financial system. In addition, the Bill before the House today increases the number of members of the board of directors of the Canada Deposit Insurance Corporation, which will have up to four additional members from outside the public service. This amendment is the result of a recommendation by the Wyman Committe which suggested increasing the number of private sector representatives on the board of directors of the Corporation.

[*English*]

The proposal that there be private-sector representation on the board was also supported by the reports prepared by the Senate banking committee as well as the report of the House finance committee. It is anticipated that the private-sector board members will complement the existing public-sector representatives by bringing to the board a wide range of expertise.

As a result of the failure of several financial institutions, the deposit insurance system has experienced substantial losses. The extent of the losses that CDIC absorbed are such that its accumulated financial resources were depleted. Moreover, these losses will continue to impede the restoration of the deposit insurance fund. Indeed, without an increase in insurance premiums, the deposit insurance fund's deficit would continue to increase. This would be true even if the CDIC did not incur any additional losses in the future since funds still have to be borrowed to finance past deficits.

It is my view, and I hope all Members of the House support me in this regard, that the deposit insurance system is far too important an instrument of government policy and public protection to have its ability to meet its mandate threatened. For this reason, Bill C-86 raises the premiums paid by member institutions of the Canada Deposit Insurance Corporation from the present level of one-thirtieth of 1 per cent to one-tenth of 1 per cent of insured deposits. This increase in premium levels would begin the lengthy process of reducing the size of the CDIC deficit.

It is not surprising at this time that the Government asks for really extraordinary powers in an attempt to recoup some of these lost millions of dollars. I am sure there must be the odd Member of the Conservative Government who is somewhat embarrassed because, after all, the Conservative Party made a big to-do about the injustices and inequities of some of the tactics being employed when the Liberals were in power. I think a fair number of them want to see some honest reform and changes in Revenue Canada and in the tax collection procedure. With this particular Bill, they have had to revert to some of the Gestapo tactics used in the past.

I understand the Government needs some extraordinary powers in order to save some of those lost revenues. Every day we read about another scandal. In today's *Globe and Mail* there was an article about two computer companies. One company was apparently from somewhere in the United States. It set up a dummy company in Canada with a Canadian front person and was able to collect millions of dollars in tax credits from the federal Government. Apparently, the whole thing was a total scam. The Government wants these extraordinary powers in order to be able to go out and collect as much of that money it can before the money flees the country. We cannot oppose the Government on that. The more money the Government can recover from that program, the better it is. However, the point I want to make is that it was a scandalous program to begin with. The Tory half cure of October 10, 1984, did not help matters at all. We are now faced with giving the Government in this particular instance those extraordinary powers. It is a sad situation. It is sad for the Government, it is sad for Parliament and it is sad for the country. I do not think there will be much debate on this matter nor do I think there will be much disagreement, but I did feel it important that these points be raised in debate.

• (1530)

The Acting Speaker (Mr. Charest): Questions or comments? Debate? Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Charest): Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: On division.

Motion agreed to and Bill read the third time and passed.

* * *

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House proceeded to the consideration of Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, as reported (with amendments) from a legislative committee.

The Acting Speaker (Mr. Charest): As Hon. Members are aware, there are 14 report stage motions on the Notice Paper in amendment to Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof. Motions Nos. 1, 2 and 6 were moved and negatived in committee. After reviewing the committee proceedings, the Chair will select Motion No. 6 and Motions Nos. 1 and 2 will be dropped from the Notice Paper.

Motions Nos. 4 and 5 attempt to reach into the parent Act and appear to be beyond the scope of the Bill. It would be my intention to rule these motions out of order. Therefore, Motions Nos. 1 and 2 are not selected. Motion No. 3 will be debated and voted on separately. Motions Nos. 4 and 5 give the Chair procedural difficulty.

Motions Nos. 6, 7 and 8 will be debated and voted on separately. Motions Nos. 9 and 10 will be grouped for debate but voted on separately. Motions Nos. 11 and 12 will be debated and voted on separately. Motions Nos. 13 and 14 will be combined for debate. A vote on Motion No. 13 will be applied to Motion No. 14.

If Hon. Members wish to make procedural arguments on Motions Nos. 4 and 5, it would be my intention to hear such arguments when those motions would otherwise be called.

Mr. John R. Rodriguez (for Mr. Orlikow) moves:

Motion No. 3

That Bill C-91, be amended in Clause 21 by striking out lines 33 to 35 at page 9 and substituting the following therefor:

"persons but not in respect of commercial activities engaged in by the corporation that are subject to specific regulation under federal or provincial statute."

He said: The purpose for introducing this particular amendment is to ensure that operations that fall under provincial regulatory bodies would remain outside the purview of this Act. When the Bill was in committee, it was suggested by departmental advisers that the existing jurisprudence with respect to this matter supported the view that provincial regulatory bodies would be outside the Combines Investigation Act under the regulated conduct exemption. We accepted the Government's legal opinion, but why not put in writing what the Government so obviously intends?

We have attempted to put forward an amendment that spells out the intentions of the Government. Our amendment would ensure that provincially or federally-regulated Crown corporations would continue to answer to their own regulatory authorities as it pertains to competition issues. For example, the Manitoba Telephone Company is regulated by provincial regulations and by federal regulations. Therefore, this particular Act ought not to supersede those regulations that are in force and provide protection for consumers.

We have heard a lot about the Government respecting the rights of provincial jurisdictions. Government Members are great on provincial rights rhetoric. They should accept the right of the provinces to continue to regulate their own public utilities and agencies. In fact, the amendment does respect the right of the provinces to regulate their own public utilities and agencies, so that there would be no requirement for the provisions of this Act to apply. It seems to us that if it were to apply, it would interfere in provincial jurisdiction. That certainly was the view of the New Brunswick Telephone Company, for example, which wrote to the committee.

At the moment, a court case on this very issue is proceeding. Is it really wise at this point in time to push ahead with this intrusion when the courts have not yet ruled on that case? It seems to me that that is another reason for this amendment to be supported by the House. We would urge Hon. Members to support Motion No. 3 which clearly respects provincial jurisdiction over regulatory authority for public utilities and agencies under their jurisdiction.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, there is absolutely no need for this proposed amendment to Clause 21. Clause 21 only provides that Crown corporations engaged in commercial activities in competition with other firms will be subject to the competition Act.

I can assure the House that regulated or regulatory bodies acting pursuant to valid federal or provincial legislation will continue to be exempt from competition law. The proposed motion runs the risk of bringing a great deal of uncertainty to this important area, and therefore I recommend that it be rejected.

• (1540)

Mr. Mike Cassidy (Ottawa Centre): Mr. Speaker, I heard the Parliamentary Secretary's point, and I do not think that his defence of Clause 21 is at all convincing. The Act, as it is proposed right now, would create the kind of uncertainty about which he spoke. The proposed clause would make the Act binding upon Crown corporations "in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons". How can that be defined? In fact, it is similar to asking how many angels can stand on the head of a pin. Is a Crown corporation, which currently occupies some form of monopoly and therefore is not in competition at this time, not in potential competition should rules and regulations change to allow competition in the future? Is it perhaps not in competition because it is providing goods or services which are competing for the dollars of consumers in a particular province, dollars which might be spent on some other products, goods or services?

For example, let us look at Ontario Hydro and Hydro Quebec. We could start by saying that those corporations are not in competition with other persons, neither actual nor potential, because of the monopoly over hydroelectric generation in those provinces. On the other hand, looking at it from a different perspective, hydroelectric energy is in competition with every other factor in the energy field. It is in competition with diesel oil for bus transportation in the cities. It is in competition with gasoline for the generation of power in rural areas. It is in competition with gasoline, potentially, if we consider the development which is now taking place in the area of electric automobiles. Certainly it is in very vigorous competition with natural gas and fuel oil in the case of home heating. Therefore, what is being stated here is that the federal Government is seeking to pass a Bill which would put it in a position to regulate, to prosecute, to fine heavily, and to influence otherwise the activities of Crown corporations such as Ontario Hydro and Hydro Quebec which have never come under combines regulations before because they have in fact been Crown corporations and have not been treated in the same way as private sector corporations.

We could put together quite a strong case. We are talking about the largest Crown corporations which in Ontario, for example, come under the regulation of the Ontario Energy Board. Quebec has its own mechanisms, and I am sure other provinces have similar mechanisms for controlling their hydroelectric utilities.

We are talking about businesses which are in the public sector for reasons every Canadian knows. We are talking about businesses which are extremely close to provincial Governments and are reviewed and surveyed very closely by provincial Governments since their heavy borrowings form a charge on the borrowing capacity of provincial Governments. For example, there are precedents in Ontario where the provincial Government has stepped in on the hydroelectric utility and said that it must cut back because it would not be given the borrowing authority at which it was looking. Now the federal Government is saying that it does not care about that. It does not have confidence that provincial Governments will be responsible in these particular areas. Therefore it intends to bring in another layer of regulation, and this will be regulation through the courts.

In view of the fact that they exercise a monopoly power, it can and may well extend to such things as whether or not the prices charged by a monopoly or by a corporation are in restraint of trade, are unconscionable or are unreasonable. We have a situation where potentially the federal jurisdiction could poke its nose into a very important area of rate regulation which has in fact been left in the hands of the provinces. If we are to do that, I would suggest that the Government, which talked about reconciliation with the provinces when it assumed office just two short years ago, had better sit down and start talking with the provinces. The Government should tell them that through the back door it is now giving the federal authority the power to interfere in rate setting by provincial utilities, be they telephone utilities in the western provinces or hydroelectric utilities in Ontario.

Let us take the telephone utilities in Manitoba and Saskatchewan as an example. Are they not in competition, either actual or potential, with CNCP Telecommunications for long

distance services? Are they not in competition with some of these other value added services which are now offering long distance services to corporations or are allowing companies to use American long distance networks to get around Canadian long distance rates? In other words, competition exists there as well. Are telephone companies not in actual or potential competition with messenger services, with telegraph services, with people going down the street and knocking on their neighbours' doors, or with somebody in an office going down to the next floor to talk with a business supplier rather than getting in touch with him by telephone? Are they not in competition, for that matter, with Canada Post which also offers many services in that particular area?

We do not know what definition the courts might apply to this particular area, but competition, either actual or potential, exists. The Parliamentary Secretary and the Government are opening this particular area of uncertainty with a vengeance. I have an explanation for that. I believe that the Government quite deliberately and quite ideologically is out to do everything possible to frustrate public enterprise. I believe that if there is a hidden agenda, it is in the fact that the Government has systematically shown that it will not deal equally with corporations which happen to be publicly owned if they are Crown corporations of a province. We saw that earlier on in the life of the Government.

[*Translation*]

We saw that very early in the life of this Government, following the September 1984 election, in the way the Department of Regional Industrial Expansion dealt with the Domtar company in the province of Quebec. After having granted all sorts of supports to private pulp and paper companies in the province of Quebec, the Government refused to provide the same treatment to Domtar. Why? Because Domtar was controlled by the Quebec Government, either through the *Société générale de financement*, the *Caisse de dépôt et placement*, or the *Caisse de retraite*.

We are left wondering, Mr. Speaker, why this Government is so prejudiced against Crown corporations or commercial corporations controlled by a provincial Government. I believe it is because of their ideology and that through Clause 21 of Bill C-91, the Government demonstrates once again that it is prejudiced against Crown corporations, because this Clause, as introduced by the Government, threatens provincially-controlled Crown corporations or commercial corporations with all sorts of uncertainties, because it will affect all corporations controlled by Her Majesty in right of a province where there is actual or potential competition with others, supposedly the other corporations of the private sector and even perhaps other Crown corporations.

And as I said, Mr. Speaker, this actual or potential competition probably exists for all Crown corporations and all corporations controlled by a provincial Government. I suggest, therefore, that this is a measure deliberately introduced by the Government to allow the Federal Government to come in through the backdoor in an operational area which has been traditionally a provincial responsibility. If you, as a Conservative Government, really meant what you said when you promised a reconciliation with the provinces, you will have either to accept the amendment moved by my friend the Hon. Member for Nickel Belt (Mr. Rodriguez) or give up this Clause altogether.

• (1550)

[*English*]

Mr. Cyril Keeper (Winnipeg North Centre): Mr. Speaker, I must say that the clause before the House disturbs me. I am glad my colleague brought forward an amendment to clarify it. What I find disturbing about the application of federal competition legislation to Crown corporations is illustrated by the example of the Manitoba Telephone System.

We are all aware that very large communication companies want to open up the field of communications, particularly in the area of telephone services, to competition. They promise as a result of this lower rates and better service. We know that this type of move to competition has already taken place to the south of us in the United States.

What we in the New Democratic Party are disturbed and worried about is that, if this area were opened up to competition, you would have increased rates and fragmented and less service for ordinary people in the city and towns. Right now Manitoba Telephone System, by virtue of the fact that it has a monopoly, is able to use some of the revenues from long distance calls which are undertaken and paid for by large companies to subsidize the local service. This means that a local telephone service is able to supply service at a much more reasonable rate than if those revenues were lost through opening it up to greater competition. This has real implications, particularly for those people on low incomes. Many people cannot afford to have telephones. Many people on social assistance cannot afford to have telephones, yet telephones are a basic necessity in a modern society. Any action taken by the Government that may lead to greater competition in this sector could and probably would result in increased rates thus making it much more difficult for poor people to have this basic service.

We received a copy of a letter which was sent to the Minister of Consumer and Corporate Affairs (Mr. Côté) which outlines the concerns of the Manitoba Government. I want to put this letter on the record. The Minister in Manitoba, in referring to the legislation before the House, said that he was concerned with two aspects of the Bill. In part his letter reads:

> 1. The legislation does not ensure that the regulated activities of Crown corporations such as the Manitoba Telephone System (MTS) are adequately protected from review under this Act.
>
> 2. The legislation provides a mandate to an agency of your department—

That is the federal Department.

> —to intervene on its own initiative on policy matters before federal and provincial boards and commissions.

Adjournment Debate

With regard to exempting regulated business activities from the purview of this Act, I am aware of your department's opinions that existing jurisprudence will provide this exemption, but this is merely a legal opinion—

Let me emphasize that the Minister said "this is merely a legal opinion".

—based on current jurisprudence. If the federal Government believes that the regulated industries should be excluded, the legislation should be explicit in this regard. To avoid possible litigation over competition issues within regulated environments, the Act should include a new section which would exempt regulated activities in general, or at the very least, section 2.1 should specify that regulated business actitivies undertaken by Crown corporations are explicitly exempt.

This has aroused the concern of the duly elected Government of Manitoba and it has been brought to the attention of the federal Minister of Consumer and Corporate Affairs. I would hope the amendment we have put forward will be accepted so that the concerns raised by the Government of Manitoba could be addressed by the Government.

[*Translation*]

Mr. Speaker, this provision of the Bill worries me because there is a danger that it would open telephone services to competition. Experience has shown that a monopoly in this sector of our economy is more appropriate to meet the needs of our population than a competitive system. We have seen in Manitoba, with the Manitoba Telephone System, that we can provide a good service and use the revenues from the profitable part of these activities to subsidize other activities. It is important to maintain a good telephone service at very low rates so that everyone will be able to afford the telephone.

Mr. Speaker, my colleague has proposed a very important amendment to clarify this section so that the Competition Tribunal Act will not apply to crown corporations and telephone services in Manitoba.

PROCEEDINGS ON ADJOURNMENT MOTION

[*Translation*]

SUBJECT MATTER OF QUESTIONS TO BE DEBATED

The Acting Speaker (Mr. Charest): It is my duty, pursuant to Standing Order 66, to inform the House that the questions to be raised tonight at the time of adjournment are as follows: The Hon. Member for York East (Mr. Redway)—Consumer and Corporate Affairs— Profits of wheat millers; the Hon. Member for Don Valley East (Mr. Attewell)—Government Expenditures—Monitoring of examination of task force options; the Hon. Member for York West (Mr. Marchi)—Refugees—a) New determination process. b) Portuguese visas inquiry.

GOVERNMENT ORDERS

[*Translation*]

BUSINESS OF THE HOUSE

The Acting Speaker (Mr. Charest): I would also like to call the attention of the House to the fact that, as most of you know, tomorrow will be an allotted day and we had anticipated to debate a Bill standing in the name of the Hon. Member for Algoma (Mr. Foster). As tomorrow will be an allotted day, this Bill will be put back on the Order Paper in its proper order.

* * *

[*English*]

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House resumed consideration of Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, as reported (with amendments) from a legislative committee; and Motion No. 3 (Mr. Orlikow) (p. 13869).

Mr. Don Blenkarn (Mississauga South): Mr. Speaker, the section to bring Crown corporations under the provisions of the Bill is one of the most progressive sections in the Bill. The amendment made in committee has met the approval of the provinces of Manitoba, Saskatchewan and Alberta. The provinces, generally speaking, are content to have their Crown corporations—and we are dealing with those Crown corporations that deal in the market-place—be subject to the strictures of this Bill. In the normal course to suggest, for example, that there is something peculiar about a Crown corporation that suddenly does not have to worry about competition legislation surely is not appropriate.

[*Translation*]

The Acting Speaker (Mr. Charest): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Charest): The question is on motion No. 3. Mr. Rodriguez, for Mr. Orlikow, moved:

That Bill C-91, be amended in Clause 21 by striking out lines 33 to 35 at page 9 and substituting the following therefor:

"persons but not in respect of commercial activities engaged in by the corporation that are subject to specific regulation under federal or provincial statute."

Does it please the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: On division.

The Acting Speaker (Mr. Charest): Agreed to on division.

• (1600)

[*English*]

Mr. Ouellet: Just as a point of clarification, have we approved Motion No. 3 or rejected it on division?

The Acting Speaker (Mr. Charest): That is a very good point. The motion has been rejected on division.

Motion No. 3 (Mr. Orlikow) negatived.

The Acting Speaker (Mr. Charest): I will recognize the Hon. Member for Papineau (Mr. Ouellet) to make representations on Motions Nos. 4 and 5.

[*Translation*]

Mr. Ouellet: At your request, Mr.Speaker, I may explain that Motion No. 4 to amend the Combines Investigation Act would have the effect of providing that victims of offences under the Combines Investigation Act are awarded triple damages. The main purpose is of course to discourage companies and individuals from adopting policies that prevent competition.

Motion No. 5 is a motion that would allow for class actions. In other words, a group of people who have suffered damages as a result of an action to prevent competition could get together and sue as a group under the provisions of this legislation.

It is too bad that in Bill C-91, the Government failed to include this aspect which I feel is absolutely essential to discourage companies that may have an anti-competitive bias.

The problem we have at the practical and procedural level is that Section 31.1 of the Combines Investigation Act was to be amended by Bill C-91, but the Government informed us in committee that through an oversight, Section 31.1 of the Combines Investigation Act had not been amended.

I therefore submit, Mr. Speaker, that if we adopt Bill C-91, we will have new legislation which creates a tribunal. This Bill is quite clear in that its purpose is to establish the Competition Tribunal.

However, we will have a text that refers Section 31.1 to a commission, while there will be no reference to the commission in the rest of the legislation.

Mr. Speaker, I therefore submit that the Commission referred to in Section 31.1 is the Restrictive Trade Practices Commission, which is repealed by Bill C-91 and replaced by the new Competition Tribunal.

Mr. Speaker, we believe it is absolutely essential the Governement amend Section 31.1 so that it no longer refers to a non-existent commission.

In any event, I can understand that this is embarrassing, probably a mistake on the part of the Government, but if the Parliamentary Secretary wants to I am sure he will obtain the unanimous consent of the House to make this minor amendment to section 31.1 of the Act. Then it will be possible for me to move my two amendments, one concerning triple damage, the other concerning class action.

I expect the full co-operation of the Government to seek the unanimous consent of the House to amend section 31.1 as it should be amended.

[*English*]

Mr. Domm: Mr. Speaker, that was an admirable try, but I remind the Hon. Member for Papineau (Mr. Ouellet) that we spent considerable time in the legislative committee dealing with Bill C-91 changing definitions within the Bill from "commission" to "tribunal". We have, in effect, a tribunal which replaces many of the responsibilities of the former commission. For that reason, I support the position taken by the Chair that these matters refer to Section 31(1) of the Combines Investigation Act which is not part of Bill C-91. I do not see how an amendment to a section not open for discussion can be debated in the House. I apply the same rationale to Motion No. 5. Section 31(1), to which the proposed motion refers, is not part of Bill C-91 and I, therefore, question whether such a motion is receivable by the Chair.

The Acting Speaker (Mr. Charest): The Hon. Member for Papineau (Mr. Ouellet) asked for unanimous consent to introduce Section 31(1) and the Hon. Parliamentary Secretary has answered that there is not unanimous consent within the House. The rationale is that a part of the Bill which is not before the House cannot be amended. Therefore, Motions Nos. 4 and 5 will be rejected.

Motions Nos. 6, 7, and 8 will be debated and voted upon separately.

[*Translation*]

Hon. André Ouellet (Papineau) moved:

Motion No. 6.

That Bill C-91, be amended in Clause 47 by adding immediately after line 14 at page 41 the following:

"(7) For the purposes of subsection (4) in its application to market restriction, where there is an agreement between the "first" person and the "second" person, both defined in subsection (6), whereby these persons are deemend to be affiliated for the purposes of subsection (6) in respect of food or drink, and where the "first" person supplies or causes to be supplied to the "second" person food or drink in a packing or container other than a packing or container produced or made by the "second" person in his own plan and where this food or drink is distributed in this packing or container by the "second" person in association with the trade mark mentioned in subsection (6), the "first" person and "second" person are deemed, in respect of this distribution, to be affiliated."

He said: Mr. Speaker, I want to move this amendment because I think that the survival of a very important industry, the Canadian Soft Drink Association, may be at stake if we ignore the representations made to the parliamentary committee.

In a way the amendment I am proposing completes the 1976 amendment made to the competition legislation which indeed enabled this highly specialized industry to continue to survive in small villages, small communities, and remote areas of Canada.

PUBLIC

It is a rather special industry. The Canadian Soft Drink Association membership is made up of 149 owners-bottlers and 67 industry suppliers. In fact it is a federation of provincial associations which operates throughout Canada, particularly in remote areas. They are small businessmen, entrepreneurs who, although they do not employ thousands of people, as our major Canadian industries do, provide something like 10, 15 or 30 jobs. But being located as they are in small towns or villages, those 30 or 15 jobs are just as important, if not more important, than a larger industry employing 2,000 people in Montreal or Toronto.

I cannot understand why the Conservative Government has not as yet accepted the representations made by those Canadian bottlers. Indeed, to quote from the brief submitted by that association:

"The Canadian Soft Drink Industry consists of local independent bottlers and franchise houses who face intense inter-brand competition and who provide the consumer with a wide range of soft drink choices. The territorial limitations have provided incentives to bottlers to make investments for production, distribution and marketing. These have resulted in substantial and effective inter-brand competition".

I am quoting from a brief that was submitted to the Committee.

"The members of the industry, to quote the brief, are proud of this competitive performance".

The proposed addition of clause 49.(7) of Bill C-91 is merely remedial in its scope. If adopted, the amendement—and the amendment I am putting forward, Mr. Speaker, is word for word the amendment that was suggested by that association—it would preserve and strenghten the territorial provisions and ensure the further growth of the community-based soft drink industry.

Such is the gist of the message—to maintain at the local level small industries that offer stable employment in a number of Canadian regions. Coming as you do from the Eastern Townships, Mr. Speaker, you know there are bottlers who provide meaningful jobs in your own area.

The association came here to suggest that if this amendment does not pass, their industry could disappear. Why is that?

I am still quoting from their brief to point out why conditions in that industry could take a turn for the worse.

"In local markets, the franchise bottler competes with other local bottlers of other national trademarked soft drinks as well as with regional brands and private labels such as Loblaws' No-Name."

And the representative told us:

"—drawn up in Ontario." He is thus referring to Loblaw's. However, we have been told that we could also mention Sobies, Steinberg, Provigo, or even Safeway and SuperValu in Western Canada. Competition also exists with many other beverages, for instance, various types of milk, and fruit-flavoured milk, juices, fruit juices, powders and crystals, mineral water and iced tea.

Now then, the association wanted to point out that there is some very strong and powerful competition in that area. And the amendment, the proposed addition of Clause 49(7) would warrant the injection of new capital and would prevent the erosion of savings and energy which the bottler has invested in his business during his lifetime. By strengthening Clause 49(7),the proposed amendment would enable to maintain the deconcentrated local structure of the soft drink industry, and would prevent a high concentration following the upstream integration of a small number of national corporations in the manufacturing sector and the downstream integration of large national chains of grocery stores at the retail level.

Clearly, those small businessmen, those small bottlers are concerned that large foodstore chains like Steinberg's, Provigo, Sobeys, Safeway or Loblaw's, because of their great purchasing power, may obtain reductions either from Coca Cola or Pepsi Cola or other companies and get all their supply let us say from Toronto, and so by pass local trade in all parts of the country. This would mean that the bottler in Sherbrooke, or Chicoutimi, or Saint-Hyacinthe, or whatever, will no longer bottle his usual soft drinks because there will be no local soft drink market in Sherbrooke, or Chicoutimi, or Saint-Hyacinthe, for the soft drinks will be shipped on a massive scale from Toronto, and the large food chains will truck them to their subsidiaries to be put on their shelves in all the small communities, in all the small centre across the land.

I feel this is a genuine concern for our soft drink bottlers, and if we are not watchful enough to give them adequate protection, it will lead to the disappearance of those small dealers we are familiar with in our respective areas, who earn a decent living and who provide locally decent jobs to scores of workers. They will simply be engulfed by big business and a few years down the road will no longer be able to survive.

Among the people who came here to meet us was Mr. René Tremblay, whose firm "Liqueurs Saguenay Ltée" was established in Chicoutimi by his father in 1927. He submitted it is clear that his business can be very seriously endangered in the Saguenay-Lac-Saint-Jean area if this amendment is not accepted by the Government.

I know that the bottlers'problem is a very limited one when you relate it to the overall problems addressed by Bill C-91. However, it remains an important business sector in Canada, an important association which deserves to be maintained and protected and I call on the Government to open its eyes, to recognize the danger and avoid the destruction of such an industry by agreeing to the amendment.

• (1610)

[*English*]

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, I would like to assure the Hon. Member for Papineau

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(Mr. Ouellet) and others that a great deal of time was spent on the subject of soft drink bottlers and distributors in Canada. However, the motion now before us concerning the extension of the current market restrictions which appears in Clause 49(7) of Bill C-91 is unchanged from Section 31(4)(7) of the Combines Investigation Act. What does market restriction mean? Well, this practice could take away forms, but it normally describes situations where a manufacturer grants exclusive territorial rights to each of its customers who, as a result, do not compete with each other. I would note the practice of market restriction is only prohibited where it substantially lessens competition. An exemption known as the bottlers exemption, which is Clause 49(7) applies to agreements between a supplier and another person whereby the latter is supplied with ingredients that he processes by the addition of labour and material into an article of food or drink sold in association with a trademark.

Bill C-91 does not propose to change the existing legislation on this matter. However, the Canadian soft drink association made representations before the legislative committee to the effect that the law should be amended to extend the exemption to articles not processed by the second person, a bottler. The existing exemption was put in place in 1975 because it was deemed necessary to preserve the marketing system which had prevailed in that industry for many years, and that is in the bottling industry.

However, the Government does not believe that it would be appropriate to broaden the existing exemption. Broadening the current exemption would have an anti-competitive effect on the market, which is obviously contrary to the objectives of an effective competition act.

Although in a given territory bottlers that are associated with different soft drink companies compete against each other, competition between franchise bottlers marketing the same trade name has traditionally not existed. In recent years new competitive forces have emerged in the market-place. Food wholesalers and retailers and chain stores have sold canned soft drinks at very low prices. This has resulted in intra-brand competition at the wholesale and at the retail level.

If the current exemption was to be broadened the law would allow exclusive territorial agreements to apply to canned soft drinks that the bottlers do not process themselves, but only distribute. Such agreements could prevent wholesalers from obtaining canned soft drinks directly from the manufacturers, and could effectively increase the price at which such distributors are able to obtain the product. This would reduce the overall level of price competition in the market leaving consumers to pay higher prices for soft drinks.

• (1620)

I believe these developments would be prejudicial to the interests of the other distributors of soft drinks and to the interests of consumers. For these reasons this Government believes that in the context of a law designed to promote competition the broadening of the current market restriction exemption would not be appropriate.

Mr. Speaker: Is the House ready for the question?

Some Hon. Members: Question.

Mr. Speaker: The question is on Motion No. 6 standing in the name of Mr. Ouellet. Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

Mr. Speaker: All those in favour please say yea.

Some Hon. Members: Yea.

Mr. Speaker: All those opposed please say nay.

Some Hon. Members: Nay.

Mr. Speaker: In my opinion, the nays have it.

And more than five Members having risen:

Mr. Speaker: Pursuant to Standing Order 114(11) the record division on the proposed motion stands deferred.

[*Translation*]

The discussion is now on Motion No.7

Hon. André Ouellet (Papineau) moved:

That Bill C-91, be amended in Clause 47 by adding immediately after line 11 at page 42 the following:

"(i) restriction, by a supplier, of the available margin to his customers ("intermediate customer"), by inciting, requiring or compeling an intermediate customer to resell the products bought by an intermediate customer from a third party ("last favored customer"), under arrangements or terms resulting in discounts, rebates, allowances, price concessions or other advantages ("bonuses") offered directly or indirectly to a last favored customer for purchase of identical products intended to be resold to other third parties that are not favored."

Mr. Speaker, I should like to explain briefly why I think that Bill C-91 should be amended. Indeed, by way of this motion, I would like to add another business practice under the clauses dealing with the abuse of a dominant position.

The reason why I am an introducing this amendment which will provide, if passed, for another abusive practice on the part of a firm in a dominant position is that we have become aware that in dealings between large automobile manufacturers and their authorized dealers, the latter were unfairly treated considering the special treatment granted to vehicle leasing firms.

The low-purchase cost of vehicles for what are commonly referred to as fleets, and I am referring to car rental companies, is an incentive for these companies to purchase vehicles above and beyond their needs and to sell them at the retail level, where they are competing directly with the dealer.

The car rental owner does not have the same constraints as the dealer, who has to consider the fact he has a very substantial inventory. He needs employees to operate his business, and he has a substantial capital investment in land, buildings and equipment.

I was informed that the typical dealer has an investment of three or four million dollars, and on top of that, he has to follow the orders of the car manufacturer, otherwise he is guilty of breach of contract.

The individual who purchases cars has neither these expenses nor the constraints related to the expenses I mentioned earlier. He does benefit from all kinds of advantages and subsidies, such as discounts on the purchase price, which in some cases may vary from $500 to $800 and at times even exceed $1,000 for luxury cars.

He also has access to free optional equipment or protection of purchase value, guaranteed resale value, and finally, shared advertising costs.

Obviously, dealers do not have access to such benefits.

In committee we listened to a submission presented by the Federation of Automobile Dealer Associations of Canada, which proposed an amendment to Bill C-91. In fact, the wording of Motion No. 7 you have before you, Mr. Speaker, follows word for word the recommendation made by the Federation.

I think we should emphasize that as a result of this favourable bias towards companies that purchase car fleets, the consumers suffer because they do not receive the subsidies they should receive.

A U.S. study of the cost of subsidies to rental companies established that the average unit price of vehicles sold in the United States could have been reduced by U.S. $265 in 1985 and by U.S. $243 in 1984.

Mr. Speaker, I think that at this point I will have to interrupt my speech. I believe that an Order of the House provides that the Minister of Finance (Mr. Wilson) is to speak at 4.30 p.m. I have not finished my comments on this amendment, but with the Chair's permission, I will get back to this later during debate.

• (1630)

[*English*]

Mr. Speaker: It being 4.30 p.m., pursuant to order made earlier this day, the House will revert to tabling of documents. Prior to recognizing the Hon. Minister of Finance (Mr. Wilson) who is to table a document in accordance with that order, I have received a request from the Hon. Minister of Transport (Mr. Mazankowski) that he would also like to table a document at this time. The earlier order was specific. Therefore, at the Minister's request, I seek consent of the House that the Hon. Minister of Transport be allowed to table a document at this time.

Some Hon. Members: Agreed.

ROUTINE PROCEEDINGS

[*English*]

AIR CANADA

FLIGHT ATTENDANT—TABLING OF COMPLAINT

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, I thank all Hon. Members for allowing me this opportunity. Earlier this afternoon a question arose in the House about the original letter that was sent to my office from a Mrs. Donna Ford. I have the original here.

While I would be prepared to table it, there are some difficulties because in the event that this may be required as an exhibit for legal purposes, it would be difficult to extract. I have the original copy in my hands and anyone who is interested can look at it. I am prepared to table certified copies of it and it can become part of the sessional papers of the House.

Furthermore, on May 30, the Hon. Member for Regina West (Mr. Benjamin) raised a question about there being three documents that were forwarded as part of the package for a response from Air Canada. He indicated that one was missing and wanted to know what that document contained. That too is included in the package of documents. I would be prepared to table them now and offer all Hon. Members an opportunity to witness the original letter which I have in my hands.

Mr. Deans: Mr. Speaker, I rise on a point of order, not with respect to the Minister's tabling of documents. I want to make it clear to him that at no time did I express any concern about his having known about the documents in advance or having personally intervened.

* * *

WAYS AND MEANS

TABLING OF NOTICE OF MOTION

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, pursuant to the provisions of Standing Order 84(1), I have the honour to lay upon the Table copies in both official languages of a notice of a Ways and Means motion to amend the Customs Tariff.

Mr. Speaker: Pursuant to order made earlier this day, we will proceed to Statements by Ministers.

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Mr. Lewis: Yes, I would like to revert to tabling of documents in order to table the response to three petitions.

Mr. Speaker: Is there such consent?

Some Hon. Members: Agreed.

* * *

[*Translation*]

PETITIONS

GOVERNMENT RESPONSE

Mr. Doug Lewis (Parliamentary Secretary to President of the Privy Council): Mr. Speaker, pursuant to Standing Order 106(8), I have the honour to table in both official languages the response of the government to the three following petitions: 331-534, 331-563 and 331-564.

GOVERNMENT ORDERS

[*Translation*]

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House resumed from Monday, June 2, consideration of Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, as reported (with amendments) from a legislative committee; and Motion No. 7 (Mr. Ouellet) (p. 13875).

Hon. André Ouellet (Papineau): Mr. Speaker, I interrupted my speech last Monday so that the Minister of Finance (Mr. Wilson) could make a statement. I was then speaking about an amendment recommended by the Federation of Automobile Dealer Associations of Canada, which feels that the rights of its members have been abused and which submitted to the Parliamentary Committe an amendment which would meet their requirements. During my intervention on Monday, I reminded the House that a U.S. study of the cost of subsidies to rental companies has established that the average unit price of vehicules sold in the United States could have been reduced by $265 in 1985 and $243 in 1984. According to FADA, based on comparable figures for Canada and sales of about 1.3 million cars, the potential total savings would have been about $297 million. These are savings to which Canadian consumers unfortunately did not have any access. Indeed, if the dealers and owners of car fleets have the same benefits, several options would be open to us.

The first option would be to reduce the purchase cost of cars, which would mean a substantial savings for the consumer, or maintain the present cost but allow car manufacturers to install safety mechanisms such as inflatable bags which cost about $273 per unit, which would enhance the safety of motor vehicle users.

Incidentally, I have a particular interest in Bill C-91 because I am also replacing my hon. friend from Saint-Michel—Ahuntsic (Mrs. Killens), who, as you know, had a car accident and since then has been unable to come to the House to do her work. I have been asked to replace her in the House as the consumer critic.

If Canadian automobiles had been provided with inflatable bags, the Hon. Member for Saint-Michel—Ahuntsic would not have had the kind of accident she did and she would not have gone through a period that was very painful, both for her and her family. Mr. Speaker, I think it is important for this draft amendment, which is in fact being presented by the Federation of Automobile Dealer Associations of Canada, to be accepted by the House, because the evidence is there that this practice by manufacturers, who are of course in a dominant position in the automobile market, harms customers generally and dealers in particular, who cannot grant all their customers these potential savings.

I hope I have been able to convince my Government colleagues, especially the Parliamentary Secretary to the Minister of Consumer and Corporate Affairs (Mr. Domm) and also perhaps the Minister of Transport (M. Mazankowski), who should certainly be anxious to see the automobile industry treat Canadian consumers in a more civilized manner.

Finally, I would like to read a letter I received from Mr. Dan Donnelly, President of Dan Donnelly Ottawa Ford here in Ottawa. His letter is typical of about 100 letters we have received on the same subject. It is very short. I just want to read one paragraph, and I quote:

[*English*]

There is an insidious disease in the automobile business, and it is called fleet subsidies.

I have been a dealer for over 15 years and worked in Dealerships for 25 years and have never heard anybody praise or agree to the principle of fleet subsidies.

I would ask you to support the attached amendments to Bill C-91. This was prepared by the Federation of Automobile Dealer Associations of Canada, and has the backing of its dealers.

In the Consumer price of the car, he has to subsidize for the free packages that are given to the fleet buyer. The retail customer does not buy or get these fleet packages and this results in a rapid depreciation of his vehicle. I could go on outlining the reason that fleet subsidies is unfair to the Consumer and only benefits few fleets like Budget, Avis and Hertz.

Fleet subsidies are abhorred by 90 per cent of dealers. These dealers who employ over 90,000 Canadians and have tremendous investments in property, equipment, etc. are against this practice because it costs our consumers money.

[*Translation*]

In concluding, I have read to you what one dealer thinks, who speaks for hundreds and thousands of other dealers, and I hope the Government will accept this amendment.

[*English*]

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, it is a pleasure for me to respond to the proposed amendment to Bill C-91 as presented by my friend in the Opposition. I am particularly sensitive to the concerns of automobile dealers since some time ago I owned an automobile dealership. I was also a district sales manager for a major car manufacturer. The proposed motion is designed to address a genuine problem encountered by the automobile dealers in competition with rental companies for the sale of automobiles. It is also a matter that the dealers take quite seriously. I would

like to report to the House that the Government has put a lot of time into studying this issue. Detailed discussions of this matter were held with representatives of the Federation of Automobile Dealer Associations during the consultation process. Moreover, the dealers made their case to and received quite a sympathetic hearing from all members of this parliamentary legislative committee. I personally, and the Government, do not think that amending the abuse of dominant provision, as the proposed motion recommends, is the way to deal with this issue.

• (1120)

The Federation of Automobile Dealer Associations complains that American car manufacturers offer substantial discounts and allowances on new cars to major leasing or rental companies, such as Avis, Hertz, Budget, et cetera. The list is quite lengthy. The franchise dealers do not benefit from the same discounts. As a result they argue that they are put at a disadvantage on the sale of cars that are, in some cases, new or almost new. This practice, which is described in this motion is, however, not an anti-competitive act, as described in Section 50 of the Bill. This is the crux of the problem, how to address what appears on the part of the automobile dealers to be an inequity, and what is concurred in by the legislative committee to be the same.

How do you address it in Bill C-91, the purpose of which is not intended to do anything more than protect competition and encourage competition. The franchising system, which is the one that I think most directly affects this action—the franchising of these dealers and the contractual relations between the car manufacturer and franchise dealer—is where the problem starts. It would be only fair to advise the House that these cars that are sold to the leasing companies are put through franchise dealers. So this is clearly not a case of selling direct to the leasing companies, who in turn receive the invoice and bill it out at whateve price they choose. These cars are sold through franchise dealers.

I suggest that the problem, as unfair as it might seem to a lot of people, consumers and dealers, is really a matter that falls under franchising. Therefore, while I have a lot of sympathy with the automobile dealers' problem, I do not think it properly should be dealt with in the Competition Tribunal Act.

The legislative committee also devoted a significant part of its public hearings and deliberations to the abuse of a dominant position in the market-place. Some changes were made, some amendments were accepted. I am now convinced that this provision contains the scope necessary to prevent anti-competitive conduct without discouraging aggressive and pro-competitive initiatives.

The motion before us proposes to add to the list of anti-competitive acts contained in Section 50. However, I would like to point out to everyone, including the automobile dealers, that this list is not restrictive, and is primarily intended to provide guidance to the tribunal. Therefore, nothing prevents the application of the law to any other practice of anti-competitive acts that substantially can be proven to lessen competition.

In conclusion, I want to reiterate that another avenue will need to be pursued by the car dealers if they wish to address this particular problem peculiar to their franchising arrangement with the car manufacturers. I therefore ask the House to reject the motion.

Mr. David Orlikow (Winnipeg North): Mr. Speaker, I rise to indicate my support for the amendment. When we look at the way that business operates in Canada we see tremendous advantages to the large companies as compared to the small companies. What we are seeing is an increasing concentration and increasing power by large corporations.

What this amendment says, if I understand it correctly, is that in the leasing of cars the practice which the automobile manufacturers have followed of giving special and large discounts to the large companies which are in the automobile rental business, which obviously gives those companies a substantial competitive edge over the large number of small companies, is clearly that the director would have the authority and the power to at least look at the practices which are followed, and if he saw that this power was being used to lessen competition he would have the right to hold an investigation. I can see every reason for supporting this amendment and no real reason for opposing it.

Mr. Don Boudria (Glengarry—Prescott—Russell): Mr. Speaker, I am pleased to speak on this amendment to Bill C-91. I would like to start off by congratulating the Hon. Member for Papineau (Mr. Ouellet) for his initiative in moving this amendment.

Yesterday morning I had a telephone call from my constituent, Grégoire Automobiles of 378 Notre Dame Street, in Embrun, Ontario. Of course, I recommend to all Members that if they want to buy a good car they can go to my riding and do so there. More importantly at this point, I want to raise with you the fact that Mr. Raymond Grégoire of Grégoire Automobiles telephoned me yesterday morning to lobby for this particular amendment. I think it is very significant that automobile dealers are concerned about some of the discounting practices that go on. Mr. Grégoire was explaining to me that large automobile rental and leasing firms now purchase cars cheaper than he can as a dealer.

Obviously what you are thinking at this point is that this is certainly unfair competition, and you would be quite right to think that. Mr. Grégoire would agree with that. What he was telling us yesterday morning was that the present practices are extremely unfair. They allow these large fleet operators, leasing companies, Budget, Avis and Hertz, and all those other folks, to purchase automobiles, use them for an extensive period of time and then sell them back and compete both in the used car market, and in the new one really, because they are not purchasing from the dealers, in such a manner that it affects business for everyone else.

The important thing here is that we all know that to operate a business, it takes a certain amount of dollars. The dollars that Budget and Hertz and those other big guys are not paying are paid by you and I and our constituents. The profitability for the car companies must be there some place. So for every dollar that they save, it is a dollar more that the average Canadian has to pay in order that those companies get the profit they are going to end up getting in any case.

• (1130)

I know that others have spoken on this before, but I would like to read a portion of the summary of the Federation of Automobile Dealer Associations of Canada that was given to me by Mr. Raymond Grégoire whom I identified earlier. It states in part:

> FADA members are concerned about a special pricing situation which, within the industry, is known as "fleet subsidies". Such subsidies (discounts) are provided by motor vehicle manufacturers on vehicles which go into the lease/rental market; but are not provided for vehicles going into the sales market (for the general public). The lease/rental market is characterized by companies such as Budget, Hertz, Avis, and others, who purchase vehicles for their lease/rental fleets.
>
> The vehicle manufacturers provide subsidies (discounts) to such lease/rental companies of up to a value of $1,000 or more per vehicle.

[*Translation*]

Mr. Speaker, the question which ought to be raised at this time is whether car manufacturers can afford to give the $1,000 discount. Why should it not be given to Canadian consumers? Why should it not be given to people in my riding who earn only $10,000, $15,000 or $20,000 a year and who have to buy new cars? These people could use a bargain a lot more than the owners or shareholders of companies such as Hertz, Budget, Avis and other major car rental companies.

Mr. Speaker, all I can say is that the Hon. Member for Papineau (Mr. Ouellet) has taken the right approach and deserves congratulations for the proposition he made this morning. Hopefully all Members of the House, regardless of political affiliation, will think about consumers and forget about their own partisan concerns for a few minutes—

Mr. Masse: The Liberals have never done that!

Mr. Boudria: —and think about Canadian consumers, the taxpayers who sent us to this House to represent them.

I see the Minister of Communications (Mr. Masse) over there—

Mr. Masse: I have never seen you not being partisan. There! I have never seen this in 20 years of political life, it is awful!

Mr. Boudria: I urge him as well to rise above his usual partisan approach—

Mr. Masse: Check your facts and consider past history. You will see it never happened.

Mr. Boudria: Mr. Speaker, the Minister of Communications is getting all excited about this.

I urged him to rise above such partisan considerations and think in terms of the well-being of Canadian consumers.

Mr. Speaker, the Liberal Party is not alone in making this request, the Federation of Automobile Dealers of Canada seeks justice for consumers.

I hope the Minister of Communications will take the floor in a few minutes and support the proposition made by the Hon. Member for Papineau.

Mr. Speaker, I hope the Minister of Energy, Mines and Resources (Miss Carney) will also support this measure once she has calmed down after losing control a few minutes ago.

In concluding, Mr. Speaker, as I was saying a moment ago—

[*English*]

The Acting Speaker (Mr. Paproski): Order, please. There is no need to reflect on what is happening in the chamber. The Hon. Member has risen to make a speech. I wish he would give it.

Mr. Gauthier: Mr. Speaker, I rise on a point of order. The Hon. Member was making a speech but he was disturbed by what was going on in the House. He was just commenting on what happened.

The Acting Speaker (Mr. Paproski): If the Hon. Member was disturbed, he could have risen on a point of order asking that the Hon. Minister not disturb him in this debate. That is not what he said. It is the way he reflected on another Member in the House. I would call him to order as I would call anyone else to order in this respect. Therefore, I hope he will just carry on with debate in a quiet and calm manner.

Mr. Boudria: Mr. Speaker, I take note of your comments and, of course, accept them. I am sure the Minister of Energy, Mines and Resources (Miss Carney) also accepts them in the same light.

I support the initiative of my colleague, the Hon. Member for Papineau in his amendment to Bill C-91. I want to stress to all Members of the House that this initiative has the support of the Federation of Automobile Dealer Associations of Canada because it is a good amendment. I hope that all Members will pass this amendment unanimously because I am sure it would please all our constituents.

[*Translation*]

Mr. Jean-Robert Gauthier (Ottawa—Vanier): Mr. Speaker, since I seconded this motion, I think a few comments would certainly be appropriate.

This amendment was proposed by the Hon. Member for Papineau (Mr. Ouellet) in an attempt to correct or prevent a business practice that is unfair to car dealers because it gives preferential treatment to operators of car rental companies.

According to representatives of the Federation of Automobile Dealer Associations of Canada, the FADA, the practice means that fleet purchases are subsidized, which is certainly not in the interests of the car dealers themselves.

[*English*]

I have also been approached by members of the Federation of Automobile Dealer Associations of Canada. I have a letter from Dan Donnelly, who is a friend of mine and also a dealer in Ottawa who owns Ottawa Ford Sales. Let me quote this letter:

> There is an insidious disease in the automobile business, and it is called fleet subsidies.
>
> I have been a dealer for over 15 years and worked in dealerships for 25 years and have never heard anybody praise or agree to the principle of fleet subsidies.
>
> The manufacturers are in a web of their own making and are unable to get out of it.
>
> Fleet subsidies are abhorred by 90 per cent of dealers. These dealers who employ over 90,000 Canadians and have tremendous investments in property, equipment, etc. are against this practice because it costs our consumers money.

Therefore, we are talking about jobs and the cost to consumers. The letter goes on:

> In the consumer price of the car, he has to subsidize for the free packages that are given to the fleet buyer. The retail customer does not buy or get these fleet packages and this results in a rapid depreciation of his vehicle. I could go on outlining the reason that fleet subsidies is unfair to the consumer and only benefits few fleets like Budget, Avis and Hertz.
>
> I would ask you to support the attached amendments to Bill C-91. This was prepared by the Federation of Automobile Dealer Associations of Canada, and has the backing of its dealers.
>
> Your help with this problem will be appreciated.

It is signed by Dan Donnelly, President of Ottawa Ford.

[*Translation*]

Mr. Speaker, obviously, the low cost of acquiring vehicles for fleets, for people who buy in large numbers and especially car rental companies, is actually a kind of subsidy, the cost of which is reflected in the prices charged by the car dealer, who does not have the same volume of sales and cannot offer the same terms. This means, as Mr. Donnelly says in his letter, that the consumer pays a subsidy when he buys a vehicle through normal channels, in other words from a car dealership. And the motion presented by the Hon. Member for Papineau, which proposes to include a provision in the legislation that will prevent this kind of transaction, would seem entirely reasonable and logical, because if we are talking about 90,000 jobs, we are also talking about protecting the consumer, and I think the House of Commons should come out in favour of both jobs and the consumer.

Mr. Speaker, we know that the car rental operator or volume dealer, the one who rents cars, does not have the same constraints as the dealer. I think Hon. Members are aware that a car dealer has some very high costs, especially his inventory, which come under operating costs and are a major item on the dealer's books.

Inventory is therefore an important item. The car dealer also has personnel working for him, in the various buildings he has to carry out repairs and do body-work, and all this equipment is very expensive, and the car dealer has to finance all this, and obviously, his costs will have to be calculated in the profits he makes and the prices he charges the customer.

Therefore, for the sake of fairness and justice, and to prevent abuses from automobile fleet leasing businesses which get special privileges from the manufacturers, we feel that this amendment is important and should be adopted by the House in order to caution not just car manufacturers against such preferential treatment on volume sales, but also to encourage car dealers to maintain the quality of services and to keep vehicle prices as low as possible by not adding subsidies which of course must be paid in view of the comments made in support of the motion.

Accordingly, Mr. Speaker, to conclude, I simply wish to remind the House that we are dealing with a trade practice that is not quite acceptable, and although it is not illegal, it does not serve the interests of consumers, and I hope the House will support the amendment.

• (1140)

[*English*]

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The question is on Motion No. 7 standing in the name of the Hon. Member for Papineau (Mr. Ouellet). Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion the nays have it.

And more than five Members having risen:

The Acting Speaker (Mr. Paproski): Pursuant to Standing Order 114(11), the recorded division on the proposed motion stands deferred.

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 8

That Bill C-91, be amended in Clause 47 by striking out line 36 at page 51 and substituting the following therefor:

"graphs (*a*) to (*c*), including the concentration of corporate ownership by one or more individuals to levels which the Director finds excessive,".

He said: Mr. Speaker, there is no greater problem that is necessary for this Parliament to deal with, to study the implications of what is happening and to come up with policies which will meet the needs of the Canadian people, than the increasing concentration and power of conglomerates. The response of the Government and that of the Minister in particular, has been to duck this question.

A number of witnesses appeared before the committee and told us that Bill C-91 does not deal with corporate concentration as it stands now, and it certainly should. We heard as well from persons such as Professor Stanbury, one of the most knowledgeable academics studying the question of competition law. He reminded us of the potential adverse consequences of excessive concentration of economic power. Professor Stanbury quoted the President of Cadillac Fairview Corporation, Mr. Ghert, who listed these potential adverse consequences as follows: first, the ability to misallocate resources by restricting output and raising prices; second, redistribution of income from the firm's customers to its owners; third, firms with excessive power can become inefficient and wasteful; fourth, a high level of concentration reduces the number and diversity of decision makers in the economy; fifth, large concentrations may be unresponsive to regulatory agencies and have the ability to influence public policy; and sixth, corporate ?PAGE 13991 concentration may stimulate greater Government intervention as a countervailing power.

Professor Stanbury painted a rather frightening scenario as to what can happen when large financial conglomerates are dominated by large non-financial enterprises. He pointed out the concern that these large groups will be able to use their power to advance the interests of some customers or suppliers and/or penalize others, undermine the position of rivals in ways inconsistent with maximizing the wealth of one's own shareholders, provide excess rewards, pecuniary or otherwise, to the top management coalition that effectively controls the corporation, or use economic power to influence public policy via the political process, that is, expenditures on lobbying, advocacy advertising, public relations and campaign contributions, and to have the ability to redirect corporate locational decisions. None of these problems are dealt with in the Bill before us.

The question the amendment seeks to have reviewed is not one which lends itself to a handy formula. We recognize that we are dealing with a highly complex problem. The merging of Imasco and Genstar was the merger of two large companies into the tenth largest in Canada with its own captive financial arm that has already been self-dealing on behalf of its parent. Such a transaction should be reviewed. We believe the director should have considerable discretion in choosing the conglomerate merger he wants to bring to the tribunal. The amendment which I am proposing would give a director that discretion.

• (1150)

The amendment I am proposing is not one which comes from the far left. It deals with the type of problem which was raised by a number of the witnesses who appeared before the committee, including Professor Stanbury. It deals with the type of problem that Jack McArthur, who writes on business and financial affairs for *The Toronto Star*, dealt with in a column which appeared in that newspaper on March 23, 1986. He pointed out in the article that we have multi-company mammoths bidding for more, for example, the Reichmann group and Power Corporation. He pointed out that the Reichmanns seek control of Hiram Walker Resources and its $6 billion empire. We know that that proposal, indeed that control, has now been obtained by the Reichmanns and part of that control is being challenged by Allied-Lyons.

Mr. McArthur also points out in his article that the Reichmann holdings, among others, include a vast real estate operation, Gulf Canada and Abitibi, the world's largest maker of newsprint. He points out that Abitibi and Gulf ranked in the top 50 on last year's list of our largest industrial corporations. He then points to other large conglomerates such as Canadian Pacific, which he says is one of our largest in transportation, mining, forest products, oil and gas, among other things. Bell is biggest in telephones and technology, significant in real estate through its ownership of Daon and Bell Canada Enterprises and large in computer retailing where its Computer Innovations has bought out a competitor. He says that we have the Edper-Brascan Bronfmans who are far-flung in mining, forest products, insurance, trust operations, oil and gas and others. Weston-Loblaw has scores in the ranks, including leading food processors and suppliers of goods to food processors and others. The Thomson conglomeracy has newspapers, insurance, real estate, oil and gas and The Bay, Simpons and Zellers stores. Power Corporation has Consolidated Bathurst in forest products and containers, Great West Life, Montreal Trust and Investors Group. He states:

> Most have links with one or more of the others, some worth hundreds of millions of dollars. This raises the fear that some of the inter-empire competition won't be hot.

That is precisely why I have moved the amendment I have moved. He continues:

> All are ambitious for takeovers. Ottawa fuels the fire by showing it will stand for almost anything. It seems to throw cold water only if a case causes enough controversy to be embarrasing politically.

I point to the opposition of some Conservative members of the finance committee to the takeover of Genstar and Canada Trust by Imasco. Mr. McArthur states:

> This is an aimless, unprincipled way of proceeding—and can't last, which is why the ambitious are shopping feverishly.

Competition Tribunal Act

Our judgments should concern: the likely future degree of competition in an industry; the possibility of national dominance by a few multi-billion-dollar pools of capital that inhibit productive variety in decision-making and investing, and intimidate those who deal with them by their very size.

It's vital that strands of ownership linking different industries in the same groups must not now or in the future interfere with normal competitive ways of buying and selling.

When 50 companies from 10 different industries are in the same bunch, will they be inclined to buy and sell their goods and services with blood-relatives? That would discriminate against independents. Plenty of that goes on already.

It has been said that nine or ten corporations control almost 50 per cent of the stock traded on the Toronto Stock Exchange. He states, and I will conclude on this note:

This is not an attack on the empire-builders. They are doing what's allowed and presumably saying what they hope will be their future action.

It simply recognizes that certain promises are not binding or enforceable on management or owners. Owners change too and suppose a "bad guy" takes over?

This is why I have moved the amendment on behalf of the New Democratic Party. We say that the country needs laws which will give the agency the power it needs to monitor business operations and to see that we have real competition which will benefit the consumer. We say that without this amendment the director and the agency will not have the power or the ability to do the job which they are supposed to do as a result of this Bill.

Mr. Ian Waddell (Vancouver—Kingsway): Mr. Speaker, I would like to speak to this matter just to take up some of the points made by the Hon. Member for Winnipeg North (Mr. Orlikow). At the outset I want to say that my colleague, who is a senior Member of the House, has put an incredible effort over the years, and especially in the last little while, into competition Bills and the competition area. He has proposed an amendment which I think is sensible. It is pragmatic. It grows out of the evidence that was presented to the legislative committee, as I understand it, which is the way amendments should come to the House. I hope the Government will accept it.

He said in his speech that the agency which monitors competition needs some strength. When I was listening to the Hon. Member I thought of an area in which I am interested, that is, the energy area. The petroleum monitoring agency in the energy field could use some strength in order to ensure some real competition in the oil industry, or at least to force some of the oil giants to pass on the savings in gasoline prices that should go to consumers but that are not going to consumers right now.

I see that the Minister of Energy, Mines and Resources (Miss Carney) is in the House. I call her energy policy "back to the future". That is what the energy policy of this Government is. It is going back to an old system in the hopes of tackling the future which is quite different.

I will give Hon. Members an example with respect to problems concerning the lack of competition in the energy industry which are addressed through this amendment, and similar parallels in general business. The Hon. Member for Winnipeg North mentioned the increased concentration of business, and in that vein he mentioned the Reichmanns who bought Gulf. It is curious to consider what happened in the last year or so. Mickey Cohen, a former Deputy Minister of Energy, made the energy policy for the last Liberal Government. After that he moved on to a more senior position as Deputy Minister of Finance. In that capacity he helped to make the business, tax and economic policies of the Government. He then went on to a better job, a better paying and bigger job, when he went to work for the Reichmanns in the private sector. The Reichmanns bought Gulf with some nice tax advantages. It was called the "Little Egypt Bump" which allowed them to make a deal with Norcen Energy in order to receive some tax advantages.

The key to corporate takeovers today is the taxation system. One has to look at taxes and what are the tax advantages. My colleague in his speech a few moments ago quoted the words of Jack McArthur who said that the ambitious are shopping feverishly for takeovers. Nowhere else is that happening more than in the oil industry in western Canada which is in desperate straits because of the low world price of oil. A great many Canadian companies are tottering on the brink of takeover. They are ripe for the picking. This tremendous danger exists. Of course, the Minister of Energy, Mines and Resources has refused to consider any bridging mechanism for the short term for these Alberta companies and has literally left them on their own. Some of them are not going to be able to survive; some of them will be taken over and there will be increased competition in the industry.

• (1200)

The reason there are high gasoline prices in Canada right now is of the lack of competition. There are 600 sellers in Alberta selling crude oil to four big buyers. There is an incredible corporate concentration in this sector. Yesterday I spoke to representatives of the Independent Petroleum Association of Canada who told me that the Canadian producer is getting the lowest price, in the world. The Canadian producer is getting the spot oil price which in some cases is below world price, while the Canadian consumer at the other end is paying beyond world price. Why is this? I see the Minister of Energy, Mines and Resources is present in the House. I would ask her why this is. No, I will tell her why. It is because there is no proper competition in the oil industry.

I would like to describe the energy policy of the Government very briefly. It is to deregulate and go back to the marketplace. In that way, the Government expects that there will be a lot of investment by the companies and that 300,000 jobs will be created. The motorists, the producers and everyone else would all get a break and everything would be rosy. Instead, we got the worst, not the best, of all possible worlds. One of the reasons for this is the world oil price. Let us be fair, however; there is another reason.

Why are Canadian gasoline prices higher than American prices? One reason is that we have higher taxes, but if we calculate the taxes in we will see that Canadian motorists are

still paying more than American motorists. We are told by the Minister of Energy, Mines and Resources that this is because the oil takes a while to work its way through the system. In other words, it takes time to move the crude oil from the West to the East through the pipelines. Do Americans have shorter pipelines for the same distances? The Canadian people are not crazy. They see that there is this difference in prices.

The difference in prices exists because we cannot have a free market energy policy without a free market. There is insufficient competition. There are occasional bursts of competition, like the gasoline wars in Toronto, but the problem is that there are four major companies which control the market. They are simply not passing on the savings and they are making money in the retailing and refining sectors. It is not even the gas station operators who are benefiting from the increased margin, but the retailers.

I hope this amendment will help provide for an agency that will determine whether or not there is competition in the market-place. It is amazing that I should have to make a Conservative argument for free competition, but if Conservative Members are not going to make this argument and are not going to accept the amendment the least they can do is accept a competitive system if there is to be a competitive energy policy. That is completely logical. That is my argument in favour of this particular amendment, Mr. Speaker.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, this issue was raised by the Hon. Member for Winnipeg North (Mr. Orlikow) on a number of occasions before the legislative committee. There has been a great deal of discussion on this matter and we discussed it in the House at second reading stage.

As I have indicated to the Hon. Member, the proposed competition Act deals very specifically with conglomerate mergers to the extent that they raise competition issues. If there is any other aspect of conglomerate mergers which the House believes should be addressed through legislation, such as concentration of individual ownership or corporate assets control of financial institutions by non-financial corporations, they should be dealt with in the context of other appropriate legislation.

I remind Hon. Members that we are dealing with competition legislation and we are prepared to look at anything which lessens competition. That is why we have set up a tribunal and that is why many of these concerns expressed by members of the Opposition will have a chance to be aired before a tribunal. That never happened before. That is why there is a general consensus among organizations and individuals that this competition legislation is long overdue. However, this amendment is not the way to address the situation. Therefore, I recommend that the Hon. Member's motion be defeated.

Mr. John Parry (Kenora—Rainy River): Mr. Speaker, I would like to rise to support my colleague's amendment to Bill C-91 because I believe it addresses one of the major problems in corporate Canada, a problem that the Bill does not address at this particular time. That problem is the reality of corporate concentration.

When looking at the history of attempts to regulate corporate concentration, and particularly to regulate the rightly perceived ill effects of corporate concentration, there has been excessive attention in the regulations to the formal rather than the real aspects. Because there can be such a variance between the formal appearance of corporate concentration and the actual reality of it, I believe is appropriate to include discretionary powers in the hands of the director, and that is what this amendment is attempting to do.

There has been no calculus developed which can effectively measure and define the nature of corporate concentration of power. We see the way corporate power is concentrated in Canada today. My hon. colleague spoke of the 9 or 10 families involved. We see the way in which interlocking boards of directors have shareholding charts that cover interlocking companies, each holding the other's shares. We see the degree to which the influence of a single individual, a single family or a single holding company can permeate an entire industry and indeed spread horizontally into a number of industries. We see the way in which non-financial, financial, industrial and commercial holdings can be mixed in a corporate network or intercorporate structure. After seeing all that, I believe that any Canadian who is concerned about the way in which economic power is exercised should support a measure which provides for some discretion in the hands of the Government.

The key words are concern about the exercise of economic power. We are talking about the regulation of economic power ?PAGE 13993 by the Government power. Indeed, I am sure that Progressive Conservative Members would argue very strongly that there must be limits on the exercise of Government power over the economic power of the country. That is not a position that I would find untenable on ideological grounds. But I must caution the Government that in rejecting this amendment it will not only be fulfilling part of its ideological agenda but will essentially be limiting the effect of Bill C-91 on the formal basis of corporate concentration rather than assessing and addressing the reality of corporate concentration, and the reality of the exercise of economic power through intercorporate, corporate, conglomerate, holding company and *Zaibatsu*, to use the Japanese term, practices.

• (1210)

My colleagues, the Hon. Member for Winnipeg North, (Mr. Orlikow) and the Hon. Member for Vancouver—Kingsway (Mr. Waddell), made some very telling arguments and gave some very good examples of the way in which corporate power is concentrated in Canada. Rather than go into the specifics, as they did, I should like to caution the House and lay down some of the ways in which, if the amendment is rejected, companies will be able to treat Bill C-91 with the sort of high disdain and gay abandon they have always been able to address the Government's somewhat emasculated predecessors.

There are situations of corporate concentration in Canada today which are almost like the Gordian knot. It would take a sword thrust at the organizational chart to unravel the reality of intercorporate control. After all, there is no limit under Canadian law. Indeed, it is difficult to see how there could be a limit. However, because there is no limit on the chain of corporate ownership present in the current or proposed legislation—that is, a holding company owing a share in a second company or a second company owing a share in a third company and so on and so forth—we have a situation whereby any mathematical formulae, any calculus, or any written restriction can be and will be circumvented. After all, we have a myriad of examples of the ingenuity of the corporate sector and its legal advisors in circumventing any such control any time it has been proposed in any jurisdiction in Canada or in any other country.

If we do not have some discretionary power, I fear we could see Canada's economy ending up in the sort of situation which is prevalent and indeed very common in Latin American and Central American countries. I am referring to the situation where the control of the economy is divided almost half and half between a small number of foreign companies, almost always American-based multinationals, and a very small number of local families, local trusts, or local combines which control the other 30 per cent or 50 per cent of the so-called domestically controlled economy. By rejecting this amendment we would be essentially subscribing Canada's vote to the sort of system in which corporate power goes largely unfettered. Therefore, it is my belief that there must be some discretionary power.

We require a director of combines control and investigation who could go beyond the mere analysis of mathematical formulae, the analysis of percentages of shareholdings, and the analysis of calculus, whether it be that proposed by the security commission, 10 per cent, 50 per cent, 51 per cent, or the formulae of what constitutes effective control, and could look at reality, the influence of individuals, families, and trusts on the activities, decisions, and investment placements of corporations within the great Canadian market-place. If there are no discretionary powers, the formulized regulations contained in the Bill will soon be circumvented by the ingenuity of the corporations.

I think that was well said in the article from which my hon. colleague quoted, indicating that it was not an attack upon people who build financial and corporate empires. There are people who have the instinct or the urge to control or to bring more and more under their ownership umbrella. On a higher plane, there are those people with the urge to make something more profitable from something which is less profitable, and those with the urge to indulge in the forms of corporate synergy where one can assemble a conglomerate such that the members of the companies of the comglomerate rarely have to deal outside each other. However, let us not deceive ourselves into believing that those personal or corporate interests will coincide with the public interest.

This amendment addresses the public interest. It is designed to ensure that the people of Canada, through their Government, will have some say in the way in which corporate power is concentrated and exercised in Canada. That is why I urge this honourable House to support the amendment.

[*Translation*]

Hon. André Ouellet (Papineau): Mr. Speaker, I would like to take part in the debate to commend my colleague for Winnipeg North (Mr. Orlikow) for moving this amendment. If accepted by the Government, it would improve Bill C-91 significantly in my view. A number of witnesses who appeared before the Committee said, with regret that Bill C-91 did not address in any way the issue of concentration in Canada and the increasingly important conglomerate situation in this country. I would like to quote the distinguished lawyer Gordon E. Kaiser, who had this to say before the Standing Committee, and I quote:

[*English*]

Finally, the Bill, as it stands, does not deal with the large conglomerate mergers involving financial and non-financial institutions which are currently taking place.

He continued by referring to the Leader of the Official Opposition (Mr. Turner) and saying:

I notice that Mr. Turner has been speaking to this subject on a number of occasions with success. This proposed legislation provides an opportunity to deal with the matter rather than postponing it for another 16 years.

[*Translation*]

I think Mr. Kaiser is absolutely right. It is important that we take this opportunity to address the issue of concentration and conglomerates, rather than waiting I do not know how many years for another legislation, before we discuss the matter.

Someone else, a businessman this time, had this to say in a *Toronto Star* report. Mr. Bernard Ghert, from Cadillac Fairview, discussed at length some of the dangers we will be faced with if we do not solve the problems of conglomerate mergers, especially those involving financial and non-financial corporations. So here is a businessman, not an academic nor an Opposition MP, but someone directly involved in business, the president of a large corporation, who brings to our attention the increasingly serious problem of conglomerates and concentration in Canada.

Also, Professor Stanbury from the Institute of Political Research, who testified before the Standing Committee on April 29, 1986, suggested, and I quote:

I now wish to turn to the matter of conglomerates. Proposed sections 63 an 64 can only deal with horizontal and vertical mergers because the test incorporated is a substantial lessening of competition. Strictly speaking, conglomerate mergers cannot be touched by Bill C-91, although mergers involving conglomerates—each has a firm in the same industry or they

are vertically related—could be addressed under the terms of the bill. But this was not enough, added Professor Stanbury. The purpose of the amendment moved by our colleague the Hon. Member for Winnipeg North would precisely permit to correct this anomaly in the legislation. I cannot help remembering the remarks made by the Leader of the Liberal Party, the Leader of the Opposition in this House, when he said on April 9, and I quote: "We have witnessed an escalating takeover fever in the last number of months resulting in, we believe, an overconcentration of corporate power in Canada". In his remarks during debate on second reading of Bill C-91, the Leader of the Opposition emphasized that the Government should address this issue immediately and try to find solutions to the overconcentration problem.

The Leader of the Opposition reminded the House that the Governement, in its discussion everywhere in Canada, had claimed that Canadians needed large multinationals in this country to compete with foreign multinationals and that although this argument could be valid to a certain point, it was necessary to have corporations powerful enough to meet the competition head-on both on the domestic and foreign markets. But, according to the Leader of the Opposition, if corporations of this type must exist as the Government claims, this does not mean that the recent takeovers in Canada confirm this argument that it is essential to have large companies on the domestic market.

I cannot help but reflect openly on the extensive concentration which exists in the food industry in Canada and wonder whether the disappearance of our small corner stores and grocery stores and their replacement by large food chain stores have really benefited Canadian consumers. We have only to look at the prices we pay today for food and ask ourselves whether the consumer was not better served by the small corner store than he now is by large chains which make us pay for their big stores, their nice displays and their pretty packaging, because the consumer has to pay a high price for all this window dressing. Of course, the consumer did not shop in a nice environment when he went to the corner store. He did not have nice things to look at as he does today in the large chains, but I think that he left the store with more money in his pockets than he does now.

Because of corporate takeovers, bigger and bigger corporations are forgetting that quality often comes in small packages. We have to wonder about some of the recent takeovers. As the Leader of the Opposition said on April 9: "Where are the new jobs? Will two merging companies be more efficient after their merger and do these takeovers really improve competition in Canada?" And most important, is Canadian technology improved by these takeovers? Actually, Mr. Speaker, we realize that takeovers often result only in a loss of jobs for the workers whose employer is absorbed by the larger company. These takeovers bring about rationalization, and very often, this means, not more jobs and more work, but fewer jobs in a specific area. Very often, it also means a loss of efficiency and technology because big companies, like big Governments, are not necessarily very efficient.

We must ask ourselves to what extent the Government is taking the right approach when seeking to promote corporate concentration in Canada and support large and big Canadian companies.

That is why I endorse the motion introduced by the Hon. Member for Winnipeg North (Mr. Orlikow), and I think that as far as the director of investigations is concerned there is no absolute rule. Obviously, certain large companies may be in the interest of Canada.

I believe that concentration in certain sectors is essential and necessary in Canada. But I would like independent officials, I would like the Competition Tribunal which is to be established to be in a position to make an impartial assessment of each take-over and say on occasion: No, this is too big and not in the interest of Canada. Even though it may not bear directly on competitiveness, the very size of the company poses an immediate threat and we must put a stop to that.

I conclude by saying that the amendment of the Hon. Member for Winnipeg North would improve the Bill and I hope the Government will support it.

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

The Hon. Member for Grand Falls—White Bay—Labrador (Mr. Rompkey).

• (1220)

[*English*]

Hon. William Rompkey (Grand Falls—White Bay—Labrador): Mr. Speaker, I want to support this amendment because I think it addresses one of the most serious problems we have in the country at the moment. There is a shuffling of corporate directorships taking place which, I suggest to you, is at the expense of one of the main planks in the Government's platform, the creation of jobs. In fact, rather than seeing the creation of new jobs in Canada we are seeing a closer and closer integration of the interlocking directorships, something which is probably more apparent and prevalent in Canada than in many other countries. That has been adequately documented by people like Peter Newman. Even some people in the corporate world admit that that is going on and that it is not good or healthy for the economy of Canada. I refer particularly to the takeover of financial institutions by other sectors in the corporate world and the conflict of interest which that engendered.

In Mr. Newman's article he quotes Mr. Ghert of Cadillac-Fairview who, in his conversation with Mr. Newman, said:

> When one entity is both a creditor and an owner of equity in a company, there is an obvious conflict of interest.

That is probably one of the most dramatic instances of corporate concentration and takeovers acting detrimentally. It is an over-all problem. We are essentially seeing the shuffling of directorships and stocks among a very few people to the detriment of the majority of the population. Rather than that kind of bridge playing or finessing of shares by corporate directors, we need some imagination from the corporate sector.

I read a speech earlier today by the President of the National Research Council. He put out some very interesting statistics comparing Canada to other countries in the area of research and development. The amount that is being spent in this country by corporations and government on research and development is miniscule compared to that which is being spent by countries like Japan and West Germany, our major competitors.

We are moving into a very competitive situation in the world economy. Our relationships are getting more personal and closer all the time. We are heading into a very tough international economy. Rather than shuffling stock and carrying out takeovers, we require some imagination of large corporations in Canada to create the technology and jobs which are needed. Although that is what is required, it is not what is happening.

• (1230)

I also want to make this point. About 80 per cent of all new jobs in Canada are going to be created by small business. I am talking about businesses whose annual income is something like $2 million and employees numbering in the tens. That is the kind of business we have to look to for the creation of new jobs. That has been adequately documented by John Bulloch and any number of other people speaking on behalf of small business in Canada. Yet smaller companies are being squeezed out of the market-place, if not gobbled up, by the corporate takeovers that are now going on.

The real threat as a result of the kind of corporate concentration which is now going on is the threat to small business. Another effect I see deals with the regions. Not only is there a concentration of economic power in a smaller number of companies, there is a concentration of economic power in certain regions, indeed certain cities, to the detriment of most other regions. Those of us who come from rural Canada and represent small communities know the great danger in being at the mercy of a giant corporation. We have seen it over and over again. In my own Province of Newfoundland the giant corporation Bowater saw its mill in Corner Brook as being at the lower end of the chain. It did not do any R and D, reinvestment or retooling. It did not keep up to date with technology. As a result, the mill was not competitive. It did not matter to that giant corporation but it mattered to the community concerned. Then that giant corporation closed the mill down, pulled out and left the city at the mercy of whoever. More and more we are at the mercy of large corporations. We feel it more and more in the rural regions and small communities. The mill was taken over by a smaller company and is operating today, but not under the aegis of that large corporation. That is why I see a real danger here.

I can point to other examples in certain regions where people have been at the mercy of large corporations. They see us merely as a cog in the wheel, an unimportant contributor to their financial success. However, the mill or plant concerned means a lot to its local community.

Another effect of all this concentration of corporate power is the effect on consumers. Obviously in this situation competition is lessened. The incentive to improve service or products is lessened. That has an effect on prices. Take oil and gasoline for example. Gasoline prices in the U.S. went down much more rapidly than in Canada because there is a great deal more competition in the U.S. Here we have really only four major refineries, Esso, Gulf, Texaco and Petro-Canada. There is less incentive to change because of the lack of competition.

I believe there is room as well as a need for big business. Obviously there are projects which can go ahead only through the use of massive amounts of capital. However, I think the pendulum has swung too far. The situation is too serious and curbs have to be put in place in the interests of the small businessman and the consumer. I support this amendment because I believe it brings a measure of balance to the Bill which is not there now. I urge my colleagues to support this and other amendments which will be forthcoming because they will give us a better Bill, one that is in the interests of all business in Canada, particularly small business and, in the final analysis, in the interests of the Canadian consumer.

Mr. Nelson A. Riis (Kamloops—Shuswap): Mr. Speaker, I want to make a few comments in the debate on this important amendment put forward by my colleague from Winnipeg North. We are discussing today probably one of the most important issues for the Canadian economy, that of corporate concentration. I want to begin by reminding the House of a unanimous motion put forward twice by the Standing Committee on Finance and Economic Affairs not many weeks ago dealing with the Imasco takeover of Genstar. That transaction also involved the takeover of Canada Trust which was, as a result of expansion, one of the largest financial institutions in Canada.

The concern raised by the committee dealt with a non-financial corporation taking over and controlling a financial institution. In other words, a corporate conglomerate now had its own lending institution. At the same time, as we all know, it is planned that trust companies expand their commercial lending activities. Traditionally, of course, they had been very restricted in that area, but I think it is the will of everyone, quite frankly, to bring more competition to this part of the economy.

The committee thought about it for many weeks. We heard from many experts in the field of corporate concentration, and corporate activity generally. While not being quite unanimous, certainly the overwhelming majority indicated that the Imasco takeover was not in the best interests of Canada and Canadians. For an industrial conglomerate to have its own financial institution at its disposal would give it more economic power and, by implication, more social and political power. We have heard many times in this House and elsewhere how the major companies listed on the Toronto Stock Exchange, the TSE 300, the most powerful companies in Canada, are controlled by a handful of families. In other words, we have a sort of economic mafia, in the most positive sense of that term, extneding its tentacles, and more and more power is falling into fewer and fewer hands.

We have heard some very eloquent comments today from Members outlining their views and their concerns. All of us have seen the national and international chains coming into our community, large and small, and phasing out the small, independent, family-owned business operations. I am sure we are all concerned about this. I know that someone as sensitive to the needs of their community and constituency as you are would have noticed that the national shoe chains will come in and that the independent shoe operator there in downtown Edmonton, or in downtown Red Deer or Kamloops, wherever it may be, is eventually phased out of business because he buys 400 pairs of, let's say ladies and girls shoe a year, whereas a national chain will buy 50,000 pairs a month.

• (1240)

When you have to meet head to head with that kind of a conglomerate, and you are a family-owned shoe retail outlet, there is absolutely no way that you can really compete in economic terms. You can offer better more personalized service, but when it comes to hard, cold pricing it is almost impossible, if not impossible for that small family oriented business to compete with the national or multi-national chains.

This is becoming a way of life in our country. It is now up to Parliament, that reflects the best interests of our country, to decide what is it that we want for our future Canada? Do we want a Canada run by a handful of families and a handful of large multinational conglomerates, or do we want to encourge the development of small independent Canadian enterprise? That is the issue.

Quite frankly, I am rather amazed that my Conservative friends across the aisle are not all standing in unison wanting to speak to this motion. My colleague from Winnipeg North (Mr. Orlikow) said that we want the small independent enterprise to succeed in Canada. We want to see equal competition in the market-place. We thrive as a country when we have independent Canadian businesses working head to head with each other in competition, providing opportunities for Canadians.

I do not think there is anybody in this House who could say unquestionably that it is in the best interests of Canada, the Candaian economy and the people of Canada to have the emergence of large conglomerates getting larger and larger with more power in fewer and fewer hands. In a sense we are taking competition out of the market-place. We are saying if we do not agree with this particular amendment that we do not want to see more competition, we want to see less competition. We do not have to look very far to see lessened competition. Have you noticed, for example, the competition in the banking system, how all the banks offer quite significantly different interest rates? No, you have not seen that. When you get the list out every day you notice that for a deposit of $5,000 that every financial institution, certainly the big five banks, have virtually identical interest rates. Have you noticed when you go down to fill up your car with gasoline the tremendous range in pricing at the pumps across the country? No, you have not, because when you look at the oil or gas production in Canada it is done by essentially four firms. While they do not price fix, while there is not a formal cartel or formal monopoly, it is very close to that. I suspect if you poked and scratched long enough in some of those areas you could almost make a case for the cartel approach to oil pricing, particularly for the retailer.

What I am saying is you do not find competition with gasoline for all of our vehicles. You do not find real competition in terms of the services you get from our chartered banks. You do not find competition in the food area when you see so much of it now controlled, or the country divided up, with one corporation in the food producing area taking western Canada, and somebody else taking eastern Canada, and so on.

For a Government that prides itself, at least in theory, on supporting the concept of competition and fairness in the market-place, I am amazed that my Conservative friends are not in their places today in support of this particular motion.

Some people who know the business well, and I don't have to go beyond Cadillac-Fairview Corporation, a corporation that knows the world of corporate concentration well, when they appeared before the Finance Committee went on at some length trying to point out to Members of Parliament the pitfalls of increased corporate concentration, particularly when that corporate concentration includes financial and non-financial institutions as part of the same corporate conglomerate family.

When Cadillac-Fairview stands up and says, take heed of our warnings, Members of Parliament watch very carefully how you proceed on this issue, then it was no surprise to me that the finance committee unanimously—Liberals, Conservatives, New Democrats—said we advise the Government, and particularly in the case of the Imasco takeover, the Minister of State for Finance (Mrs. McDougall), not to allow corporate concentration in the same family of financial and non-financial institutions. It was unanimous and it was felt very strongly by Members. We debated the issue in the House and I do not think there was a single Member of Parliament who spoke in favour of allowing that particular transaction to take place. It is taking place, because when push came to shove the Minister of State for Finance caved in and allowed that transaction. Some of the Conservative Members in the finance committee, with all due respect to my colleagues, said that this seemed to be a good move by the Minister. I do not think it was much of a move at all. The proof of the pudding has been seen in the last few days; even with restrictions in place the corporations can get around this particular, almost self-dealing type of activity.

I am pleased to stand in support of this motion as an effort to reduce corporate concentration in Canada.

Competition Tribunal Act

Mr. Bill Attewell (Don Valley East): Mr. Speaker, I do want to say a number of things about comments that have been made recently by my honourable colleagues on the other side. As they know, I serve on the finance committee and also served on the Committee that studied Bill C-91, the Competition Bill. I do not think this amendment should be passed, and I would like to explain why. As you will see from my remarks, I am very strongly in favour of tackling this issue of financial institutions being owned by non-financial institutions. As well, my opinions are very clearly on the record regarding the problems that are emerging in this country as a result of the corporate concentrations of huge conglomerates in the hands of a very few people.

Just to address the first matter, as a member of the finance committee I was very concerned when the Imasco offer was made. Members of the committee were equally concerned earlier when Genstar went after Canada Trust. This is a very well run trust company, one of the best in Canada. It is large in size with intermediary assets of some $22 billion. To all intents and purposes it really is a bank, and I think the Chief Executive Officer of that fine institution, Mr. Lahn, has had that objective all along.

Here we have a situation where we did not have the legislation in place to actually block this move. The Minister of State for Finance, as she explained, was considering many different aspects and many different reports. One of the main reports she is awaiting is that of Chief Justice Estey, and it should be along within a matter of weeks. Then the Department will be in a position to come forward with proper legislation, not only on the issue of financial corporations being owned by non-financial, but other aspects of ownership as well. Our committee in its unanimous recommendation last fall had to deal with a sliding scale of ownership levels; when an institution had assets beyond X level, and I think the top level was $40 billion, the maximum ownership would be at a 10 per cent level, similar to banks. In light of some of the facts that have come to light in the last few weeks and months I think it is fair to say we may want to rethink those exact levels. I, for one, am still in favour of that basic concept. I do not think we should throw the baby out with the bath water.

Many smaller trust companies in this country owe their existence to one or two shareholders getting them started. They also owe their continued existence to some of those shareholders coming to the front when they needed some extra capitalization. Thanks to those original investors we have quite a number of what I call small and medium-sized trust companies? While we must be careful not to over-react, certainly when an institution attains assets of $5 billion or more, we should consider a similar ownership structure.

• (1250)

It is also time to deal with the situation of non-financial companies owning financial companies. This is disallowed in the United States. Many different laws could be drafted to prohibit the abuse of deposits or trust funds, but in times of crisis the temptation may be too great for some management. However, I do not believe it is proper to include this matter in this legislation. It is a critical matter which the Minister of State will address in legislation some time this fall.

I have a number of views about the question of corporate concentration of power in this country. Our Party supports free enterprise and believes that success should be rewarded. We do not believe that "big is bad". The United States is a leader of free enterprise in the world in many respects, yet that country has found it necessary to introduce legislation from time to time when certain companies through legal means acquired awesome economic power and clout in the market-place and began to block entry into business, which had an impact on pricing. That country has introduced legislation from time to time to break up these huge conglomerates.

We must address that problem, but not in the Bill before us. Perhaps it could be the subject of a royal commission such as the Bryce Royal Commission commissioned in 1975 when there was some concern about the Power Corporation making a bid for Argus. With all due respect to those two corporations, this commission took place 10 years ago and those companies are peanuts compared to the size of the corporations in existence today. The final conclusion of that Royal Commission, which took place between 1975 and 1977, was that there was not a problem in terms of widespread corporate concentration in Canada. However, it is an issue today and Canadians expect the Government to deal with it.

There are many aspects to this problem of corporate concentration of power. For instance, a number of charitable organizations across the country have indicated that the number of corporations from which they can seek donations are declining. Since many of these companies are owned by a larger corporation, the charitable organizations are told that they give at the corporate level. Some might suggest that this is an obscure instance, but I suggest it is very important in terms of the donations required by many charitable organizations throughout the country.

A major concern about corporate concentration of power is the loss of jobs. Let us consider the case of a merger involving a company with a network of branch plants. All too often these mergers result in branch plants being closed, with the loss of jobs. The head office will rationalize that there is no need for two computer departments or a need for two comptrollers. While this rationale may be logical, the result is that hundreds of people are put out on the street. I have talked to many men and women, some in their mid-fifties, who might have been virtually married to a corporation for a number of years and have built strong loyalties, only to find themselves on the street after a reorganization or merger. Given their age, many of them have tough prospects for assuming a similar position.

We should thoroughly examine this situation, perhaps through a royal commission, but it should not be addressed in this Bill. It is too complex an issue to be dealt with quickly. We should deal with this question soon in view of the enormous

powers that have been assumed, all in a very legal way. These corporations enjoy some very large tax breaks, as in the case of O&Y which was mentioned today. While that particular loophole has been closed, there are other examples, such as the excessive use of non-voting stock, either common or preferred, which gives some of these groups enormous borrowing power. The major banks in this country have put awesome amounts of money at the disposal of these conglomerates. While these actions are legal, we must address a number of critical questions arising from this whole process.

While large world-scale corporations are essential and desirable if we are to compete in the world market-place in which we belong, we must also consider the pricing impact of these large corporations on average Canadians. If we get to the point where there are too few choices for Canadians this can lead to an insidious pricing network that is not fair, and the consumer will suffer as a result of a lack of choice.

In summary, two very critical issues have been addressed in this last hour. They are the ownership of financial institutions by non-financial institutions and the concentration of power in Canada. Neither of these issues has its place in Bill C-91 which deals with mergers and a number of other important subjects. Those two issues are too critical to be included in Bill C-91. They are most deserving of attention by the Minister of State for Finance (Mrs. McDougall), that is, regulations on financial institutions. Perhaps a royal commission or other body should examine these very important problems.

Might it be in order to call it one o'clock, Mr. Speaker?

The Acting Speaker (Mr. Paproski): I believe there is a disposition to call it one o'clock. It being one o'clock, I do now leave the chair until two o'clock this day.

At 12:58 p.m. the House took recess.

AFTER RECESS

The House resumed at 2 p.m.

STATEMENTS PURSUANT TO S.O. 21

[*English*]

NUCLEAR ARMAMENTS

SALT II TREATY—UNITED STATES POSITION

Hon. Warren Allmand (Notre-Dame-de-Grâce—Lachine East): Mr. Speaker, on Sunday, June 1, Secretary Shultz and Secretary Weinberger repeated, and more clearly stated, that the United States would no longer abide by the 1979 SALT II Treaty, a landmark treaty to limit strategic nuclear weapons which took years to negotiate.

This statement was made two days after Canada and the other NATO allies in Halifax expressed their disagreement with the position of the United States. This unilateral decision by the United States could lead to a massive escalation in the arms race and significantly threaten the peace and existence of all nations, not just the U.S. and the Soviet Union.

In these grave circumstances I urge the Secretary of State for External Affairs (Mr. Clark), with his NATO allies, to make further representations to the United States to abandon this dangerous unilateral adventure.

* * *

HUMAN RIGHTS

EL SALVADOR—TREATMENT OF HUMAN RIGHTS WORKERS

Mr. Dan Heap (Spadina): Mr. Speaker, in El Salvador, Michel Salinas and at least seven other Salvadoran human rights workers have recently been kidnapped, tortured, or arrested by the notorious Treasury Police. On May 31 Michel Salinas is reported to have confessed to being a member of the FMLN and named other individuals and organizations in El Salvador and other countries, including Canada, as being part of the FMLN.

The Canadian Government must act now to ensure an open international window on this situation. We cannot allow the silencing of voices on the gross and systematic human rights violations of the Duarte regime. We must press the Salvadoran Government to give the charges on which these arrested human rights workers are being held and make them public; permit Michel Salinas to meet with a reputable international human rights group to ensure her confession was voluntary and not as a result of torture as has been the case with so many others; release those arrested workers on bail or bond; set an early trial date for the accused and permit international observers, including one from Canada, to attend the trial of the accused.

* * *

MEMBERS OF PARLIAMENT

COLUMNIST'S COMMENTS ON OPPOSITION MEMBERS

Mr. Paul Gagnon (Calgary North): Mr. Speaker, in Sunday's *Calgary Sun*, columnist and former Mayor, Rod Sykes, commented on the conduct of the Opposition toward the former Minister of Regional and Industrial Expansion. He said: "I've read everything I can find but I can't find a serious accusation of substance". It was, as Mr. Sykes writes, "The volume of general purpose mud thrown at him day after day by the news media and a bloodthirsty and irresponsible parliamentary opposition that made it impossible for him to do his job".

Certainly Mr. Sykes is not alone in realizing that the protracted histrionics of the Opposition have only served to deprive Canada of an exceptionally talented and capable Minister. This columnist is so well qualified that the Liberals selected him as their candidate in Calary East in the 1984 election.

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S.O. 21

HEALTH

ALS DISEASE—APPEAL FOR RESEARCH FUNDS

Mr. W. Paul McCrossan (York-Scarborough): Mr. Speaker, tomorrow, Friday, June 6, is National Amyotrophic Lateral Sclerosis flower day. This fatal disease, often known as Lou Gerhrig's disease, still has not had its causes determined. However, medical research is now focusing on whether the disease is a viral one or is of toxic origin similar to lead poisoning.

ALS is a degenerative disease of the nervous system which most frequently strikes men over the age of 30, often beginning with mere weakness in a hand, arm, or leg, and progressing as nerve cells supplying the muscles are lost. For this reason, ALS is sometimes referred to as "motor neuron disease".

In the next two days a blue cornflower, similar to the one I am wearing, will be distributed in shopping malls across the country to those who make a donation to the ALS Fund. I encourage all Canadians to help with donations which will be used to conduct research into the causes of this deadly disease.

* * *

LABOUR RELATIONS

EDMONTON MEATPACKING PLANT DISPUTE

Ms. Sheila Copps (Hamilton East): I rise to ask our Prime Minister (Mr. Mulroney) to intervene directly with his good and great friend and former candidate for the Progressive Conservative leadership, Mr. Peter Pocklington, in the bitter and escalating dispute with his employees at the Gainers meatpacking plant in Edmonton. It is quite clear that Mr. Pocklington refuses to recognize the rights of his employees who are only seeking parity with other meatpacking workers in companies such as Canada Packers.

Given the great and good relationship between the Prime Minister and Mr. Pocklington, and the fact that Mr. Pocklington withdrew from the leadership race to throw his support behind the Prime Minister, and given the Prime Minister's own alleged record in labour management relations, surely he can phone his friend, Mr. Pocklington, and ask him to back off on this bitter and escalating dispute so that employees of his company can have what is their just due, that is, parity with other workers, and we can back off this escalating history of labour disputes in relation to Mr. Pocklington.

[*Translation*]

WOMEN

POSITION OF WOMEN IN BUSINESS WORLD

Mr. Guy St-Julien (Abitibi): Mr. Speaker, the position held by women in the business world and the Government of Canada is becoming every day more a significant fact of life.

During the ceremony held to pay tribute to the Business Woman of the Year in Abitibi, Mrs. Pierrette Corriveau, Executive Director of *La Vitrerie Mont-Laurier* was chosen as the business woman of the year in the Amos area, and Mrs. Jacqueline Tinor, owner of *Le Nettoyeur Royal* was similarly honoured for the Val-d'Or area.

Mr. Speaker, these business women are stimulating examples for our community and it is essential to emphasize the contribution of women of such caliber, because there is no difference between businessmen and businesswomen as far as the success of their respective businesses is concerned.

Mr. Speaker, the same can be said about the offices of Ottawa Cabinet Ministers. We have very competent women Chiefs of Staffs, like Mrs. Louise Bertrand, from the Secretary of State of Canada.

Mr. Speaker, I could continue for hours providing other examples of such value.

* * *

• (1405)

[*English*]

LABOUR RELATIONS

SITUATION IN ALBERTA

Mr. Rod Murphy (Churchill): Mr. Speaker, I also have a statement with regard to the labour situation in Alberta. I hope it will be a less partisan one.

Labour-management relations in the Province of Alberta are reaching crisis proportions. I feel great regret when I see the anti-union, anti-worker stance that has been taken by the Government in that province. I urge the Government to prevail upon its provincial counter-part in Alberta to rescind the regressive labour legislation and to introduce legislation that will protect workers from ruthless labour practices.

A recent example of the labour climate in Alberta occurred when 160 members of the RCMP appeared at a picket-line outside a struck plant in Fort McMurray on provincial election day. I have written to the Solicitor General (Mr. Beatty) requesting an investigation into the actions of the RCMP on that day in terms of expense, wisdom, and necessity of this action. With no obvious provocation, why would the Alberta Attorney General bring in 160 policemen, complete with dogs and riot gear? Workers must have confidence that those who write the laws, the laws themselves, and the enforcement of law—

Mr. Speaker: Order, please. Sixty seconds.

* * *

ENVIRONMENTAL AFFAIRS

REVIEW OF CANADA-UNITED STATES ISSUES

Mr. Andrew Witer (Parkdale—High Park): Mr. Speaker, June 1 marked the beginning of Canadian Environment Week, an occasion of great importance to all Canadians.

The recent environmental review of Canada-U.S. border issues concluded by the Minister of the Environment (Mr. McMillan) and the Administrator of the American Environmental Protection Agency has brought new focus to concerns regarding acid rain and Great Lakes water quality. I am pleased to see that the agreement concluded by the Minister recognizes the immediate need for action on this front, and that the joint energies of two Governments will be focused on this problem.

Parkdale—High Park residents are aware of the urgency of these issues and the important impact prompt action will have on the quality of life we bequeath our children. Living on the very shores of Lake Ontario, Torontonians are closely affected by the results of environmental neglect and are cognizant of the need for close co-operation between all levels of Government if we are to achieve an effective solution.

On behalf of my constituents, and all Canadians, I urge the Minister to continue his work and to intensify efforts to provide a clean and safe environment in which to live and raise our children.

Mr. Speaker: Order, please. Sixty seconds.

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[*Translation*]

ENVIRONMENTAL AFFAIRS

ACTION REQUIRED TO PRESERVE QUALITY OF LIFE

Mr. Maurice Tremblay (Lotbinière): On May 30, Mr. Speaker, the Minister of the Environment, the Hon. Tom McMillan, invited all Canadians to do something during Environment Week to convince all citizens of the role they can play individually and collectively to protect, preserve and enhance our common heritage.

This morning, Mr. Speaker, 90 young people 11 to 14 years of age, from *Collège Clarétain* in Victoriaville, presented Mr. Francis Kinnely, an official from the United States Embassy in Ottawa, with a petition expressing the concern of over 86,000 young Quebecers for the damage acid rains have caused to their environment.

These young people have been responding for nearly two years to the Government's request to exert pressure to indicate their dissatisfaction with the acid rain threat.

A copy of this petition will be sent to Mr. McMillan, the Minister of Environment, whom I invite, together with all these young people, to continue their action in order to improve our environment and preserve our quality of life.

* * *

[*English*]

CANADIAN JOBS STRATEGY

FORESTRY SECTOR JOBS DEVELOPMENT PROGRAM

Mr. Len Hopkins (Renfrew—Nipissing—Pembroke): Mr. Speaker, 11 per cent of Canadians in the workforce are employed either directly or indirectly by the forestry sector. It is a renewable resource which, if properly managed, will continue to employ many Canadians in the years to come. To this end the Government announced last fall, as part of its Canadian Jobs Strategy, a budget of $6 million in the 1985-86 fiscal year for the Forestry Sector Job Development Program, a program with the stated objective of improving forest management skills. Funding only became available in January of this year. We forgave the Government as we have come to expect such tardiness.

Without explanation, and only several short months after funding was first made available, the Government abruptly announced that funding for the 1986-87 fiscal year would be cut back by two-thirds. Students in training at the Petawawa National Forestry Institute, for example, will be turned away with their forestry course only half finished. The action of the Minister of Employment and Immigration (Miss MacDonald) displays a complete lack of direction.

* * *

• (1410)

AGRICULTURE

DOMESTIC PRICE OF WHEAT—COMMITTEE RECOMMENDATION

Mr. Geoff Wilson (Swift Current—Maple Creek): Mr. Speaker, the Committee on the Pricing of Domestic Wheat today recommended retention of the current two-price wheat system and an increase to $10 per bushel for that 8 per cent of Canadian production consumed in Canada by humans. The $10 price will represent a welcome shot in the arm for a productive sector of Canadian agriculture which faces an unprecedented world price collapse due to a subsidized trade war between the U.S. and the EEC.

S.O. 21

The report of the committee, recognizing that a higher domestic wheat price is not in itself sufficient to meet the problem, also suggested that deficiency payments be considered, that Canada seek inclusion of agriculture as a specific item at the next round of GATT talks, and that Canada continue to strive for a new international grains agreement.

I am pleased to have been part of this committee which was formed as a result of my Private Member's Motion of last December. The entire process leading up to the report demonstrates that back-bench Members of Parliament can have meaningful input, input which can and does influence government policy.

Some Hon. Members: Hear, hear!

* * *

AGRICULTURE

FARM FINANCE REVIEW PANELS—CALL FOR ESTABLISHMENT

Mr. Vic Althouse (Humboldt—Lake Centre): Mr. Speaker, in spite of the worsening farm crisis brought on by falling world grain prices, the House has yet to see action taken by the Government on its promise to provide farm finance review panels. After the election, we saw the so-called Grey-Bruce experiment. A report was presented but no action was taken. Prior to Christmas the Minister of Agriculture (Mr. Wise) said that he would present legislation with teeth, prior to Christmas, yet again we saw no legislation. In February the Minister of Finance (Mr. Wilson) presented his Budget and promised farm debt review panels, yet no legislative proposals were made and no action taken.

The end of April saw the Prime Minister (Mr. Mulroney) enter the Conservatives' phoney war against farm debt with a promise that farm debt panels would be in place before the end of June. No legislation has been presented and no action has been taken. Today a committee recommended a $10 per bushel price for domestically consumed wheat. Will this recommendation be acted upon any faster than the oft-repeated promise to establish debt review boards?

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[*Translation*]

CANADA POST CORPORATION

POST OFFICE AT POINTE-AU-CHÊNE, P.Q.—METHOD OF AWARDING CONTRACT

Mrs. Lise Bourgault (Argenteuil—Papineau): Mr. Speaker, as a result of a practice which I would describe as internal patronage on the part of a Crown corporation, namely the Canada Post Corporation, the post office of Pointe-au-Chêne in my riding will be operated by the wife of the postmaster of a neighbouring community located roughly 35 kilometres from this municipality. This lady has gained experience by helping her husband now and then, and she has also carried out minor contracts for Canada Post. She gained her experience indirectly and today she can obtain a permanent commission contract on the strength of the work she has done in the past.

Mr. Speaker, I do not have anything against this lady but I denounce this system which condones such abuses. In a municipality where jobs are scarce, I deplore the fact that Pointe-au-Chêne men and women cannot hope to get this interesting job which might support another needy family. Mr. Speaker, I hope the Minister and the Canada Post Corporation president will meet with the union and abolish this conflict of interests practice which sullies the reputation of the corporation and therefore does disservice to postal employees and the members—

Mr. Speaker: Order, please. The 60 seconds have expired.

* * *

[*English*]

CROWN CORPORATIONS

SEQUEL TO PRIVATIZATION OF DE HAVILLAND

Mr. Bill Attewell (Don Valley East): Mr. Speaker, the Government remains committed to the process of the privatization of Crown corporations which are not essential to the achievement of public policy. Several months ago de Havilland Aircraft was sold to the Boeing company of Seattle. Canadians will recall the doom, gloom, and fear tactics used by the Liberals and the NDP about the loss of jobs. As we predicted, the new owners have instilled long-term confidence in de Havilland and new orders are now on the upswing.

Three major sales totalling $410 million and up to 46 Dash 8 turboprops were made this week by de Havilland. Richard Barton of Time Air of Lethbridge, Alberta, whose recent order was worth $110 million, said:

> We view the company with more confidence with the Boeing reputation behind it.

Thanks to the healthier order book, 4,850 workers at de Havilland are now secure. More jobs will be created thanks to Boeing's world-wide sales network.

* * *

HOUSE OF COMMONS

PRESENCE IN GALLERY OF BRITISH COLUMBIA MINISTER OF INDUSTRY AND SMALL BUSINESS DEVELOPMENT

Mr. Speaker: May I draw the attention of Hon. Members to the presence in our galleries today of the Hon. Robert McClelland, Minister of Industry and Small Business Development for British Columbia.

Some Hon. Members: Hear, hear!

PRESENCE IN GALLERY OF ZAMBIAN MINISTER OF STATE FOR NATIONAL COMMISSION OF DEVELOPMENT PLANNING

Mr. Speaker: I also wish to draw the attention of Hon. Members to the presence in the gallery of Mr. Lavu Mulimba, Minister of State for the National Commission of Development Planning for Zambia.

Some Hon. Members: Hear, hear!

PRESENCE IN GALLERY OF UNITED STATES SECRETARY FOR HOUSING AND URBAN DEVELOPMENT

Mr. Speaker: As well, I wish to draw the attention of Hon. Members to the presence in the gallery of Hon. Samuel R. Pierce, Jr., United States Secretary for Housing and Urban Development.

Some Hon. Members: Hear, hear!

• (1415)

ORAL QUESTION PERIOD

[*English*]

TRADE

CANADIAN LUMBER EXPORTS—U.S. INDUSTRY'S PETITION SEEKING COUNTERVAIL DUTY

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, in the absence of the Prime Minister and of the Secretary of State for External Affairs, my question is directed to the Deputy Prime Minister. He knows that Monday will be the deadline for a decision by the Secretary of Commerce of the United States, on behalf of the President, to react to the countervail petition of the American lumber industry against Canadian lumber. Will the Prime Minister be telephoning the President of the United States in order to impress upon him the importance of that decision for the survival of the Canadian lumber industry? Will that be arranged before a decision is taken by the Secretary of Commerce on behalf of the President?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, as the Hon. Member knows, a number of representations have been made to the United States Government. My colleague, the Secretary of State for External Affairs, met with his counterpart, Mr. Shultz, last Friday. As well, I have spoken with Secretary Baker, and there was a meeting yesterday which included Members of Parliament. I think it is quite clear to the United States what is our position on this matter. The decision will be taken in due course, but it will be based upon full knowledge of the position of the Government of Canada.

[*Translation*]

INQUIRY WHY PRIME MINISTER DOES NOT TELEPHONE UNITED STATES PRESIDENT CONCERNING CANADIAN FOREST INDUSTRY

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, I have a supplementary. The Minister of Finance knows perfectly well that the Secretary of Commerce and the Secretary of the Treasury are both designated by the President, and that this is about the discretionary powers of the President. Why is the situation not important enough for the Prime Minister of this country to call the President of the United States personally and show him how important the matter is, not only for British Columbia but for the forestry sector across Canada?

[*English*]

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, I think the response of the Prime Minister to the decision taken on the shakes and shingles matter a week and a half ago, as well as the representations to which I referred in my previous response, make very, very clear to the President, to the administration, and to Congress, the position this Government has taken. We are very concerned about the decision which is on the table right now and will be following it very closely. We have stated our position very clearly.

PRIME MINISTER'S POSITION

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, does the Minister recognize that the over-reaction of the Prime Minister to the presidential decision on shakes and shingles is no substitute for proper action before the fact? It does not matter how loudly one slams the door after the horses have left the barn. Why will the Prime Minister not act before the decision is taken, before we get another excessive, bombastic reaction to a negative decision?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, the rhetoric of the Leader of the Opposition will not fool anyone. People are very clear in this country, as well as in the United States, on the concern of this Government about the decision which is in the mill right now. We have made very clear the importance of the softwood lumber industry in Canada to the Province of British Columbia in particular. That has been conveyed very clearly to the United States. Its decision will be taken in full knowledge of the position which this Government is taking.

ATTENDANCE OF MEMBERS OF PARLIAMENT AT WASHINGTON MEETING

Mr. Brian Tobin (Humber—Port au Port—St. Barbe): Mr. Speaker, my question is for the Acting Prime Minister. The Minister will know that because of the serious nature of the U.S. threat against Canada's softwood lumber industry, opposition MPs will welcome any opportunity to participate in meaningful meetings to formulate the defence of that industry. Yesterday's meeting in Washington was not meaningful; it was high farce. Why did the Government seek to use two ?PAGE 14004 opposition MPs and a Government MP as props for a Canadian media photo opportunity in Washington yesterday, rather than take constructive action to influence American public opinion and American political leaders about the grave nature of the U.S. threat against the Canadian softwood lumber industry?

• (1420)

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, if the Hon. Member did not have anything to contribute to that meeting, he need not have joined the contingent which went to Washington.

Some Hon. Members: Right on.

Mr. Wilson (Etobicoke Centre): The Ambassador made the point very clearly that we view this decision with the utmost gravity and are watching it very closely. The administration is very aware of the importance of this industry to Canada and will be watching very closely what happens over the next few days.

Mr. Tobin: Mr. Speaker, the seriousness and importance of the meeting were indicated by the lack of presence of anyone from the Government at the meeting yesterday.

REPRESENTATIONS MADE BY CANADIAN AMBASSADOR

Mr. Brian Tobin (Humber—Port au Port—St. Barbe): Why has the Government arranged an unprecedented, high-profile, last minute and futile plea by a Canadian Ambassador a few days before, as the Government knows, a high-profile "no" is going to be issued by the U.S. administration? Is the Government preparing to shoot the messenger?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, one of the things which is very important in this issue is for Hon. Members not to play politics and undermine the position—

Mr. Tobin: You played politics yesterday.

Mr. Wilson (Etobicoke Centre): —taken by the Government of Canada in defending the interests of those in western Canada whose livelihood depends on this particular industry.

Some Hon. Members: Hear, hear!

Mr. Wilson (Etobicoke Centre): The position the Government has taken is very clear. It was presented by my colleague, the Secretary of State for External Affairs, to Mr. Shultz.

Mr. Tobin: You should be ashamed.

Mr. Wilson (Etobicoke Centre): I have presented it directly to Mr. Baker. My colleague, the Minister for International Trade, has presented the position to trade representative Mr. Yeutter. All of these positions have been stated very clearly, and the Hon. Member knows that.

VIEWS OF PRIME MINISTER

Mr. Jim Fulton (Skeena): Mr. Speaker, my question is also for the Acting Prime Minister. Yesterday in Washington Ambassador Gotlieb presented legal arguments to Secretary of Commerce Baldrige. Here in the House the Secretary of State for External Affairs made legal arguments on natural justice and double jeopardy. The decision will be made before Monday. This is the last political window which is open. The Minister has made it clear that everyone in Cabinet who has some responsibility has made their position known. Why has the Prime Minister not made his views known on this very important countervailing action?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, I do not know how many times I have to answer this question. It is very, very clear to the U.S. administration what the position of this Government has been, and it will continue to be stated in the strongest possible way.

Mr. Orlikow: What does Brian say?

REQUEST THAT PRIME MINISTER TELEPHONE UNITED STATES PRESIDENT

Mr. Jim Fulton (Skeena): Mr. Speaker, it is clear that the Prime Minister did not phone on shakes and shingles and we lost. Will the Acting Prime Minister call the Prime Minister in Quebec City and ask him to call the President? This has to be from the Prime Minister to the President and no other way.

Some Hon. Members: Hear, hear!

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, I do not know that I need to respond to that question as it is exactly the same as the first question. I will say to the Hon. Member that the Government has been following this matter very closely from the early days of a possibility of a countervail action being initiated by the United States lumber industry. We will continue to follow this situation. The positions have been stated very clearly to the U.S. administration.

Mr. Fulton: Mr. Speaker, it is clear that it is about time we stopped following this issue and saw some leadership from that side of the House.

Some Hon. Members: Hear, hear!

Mr. Fulton: I will tell you that tomorrow afternoon I am not going to go back to British Columbia or northern Ontario and tell the forest workers of the country that the Prime Minister of the country did not have the guts to phone the President of the United States about this issue.

Mr. Speaker: Order, please. Order!

Some Hon. Members: Hear, hear!

Mr. Speaker: The Hon. Member's comments are out of order. Does he simply have a question?

REQUEST THAT PRIME MINISTER TELEPHONE UNITED STATES PRESIDENT

Mr. Jim Fulton (Skeena): Mr. Speaker, will the Acting Prime Minister phone the Prime Minister in Quebec City today and plead with him, beg with him, to phone the President and tell him to get this off the agenda?

Mr. Speaker: Order. Order, please!

Some Hon. Members: Hear, hear!

Mr. Speaker: Order, please. I appreciate that the Member takes this seriously. I will allow, the answer but that is the same question again.

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, that sort of bombast is not going to help the matter one little bit. The Hon. Member is looking for leadership. That leadership has been taken by the Government and the Prime Minister—

Mr. McCurdy: Where is he?

Mr. Wilson (Etobicoke Centre): —in initiating the talks with the United States leading to, if possible, a comprehensive trade agreement which will avoid, to the extent possible, this type of situation. If the Hon. Member is looking for leadership, he has got it and he should recognize it.

Mr. Riis: Sell out.

• (1425)

FEDERAL-PROVINCIAL MEETINGS

Hon. Herb Gray (Windsor West): Mr. Speaker, my question is directed to the Deputy Prime Minister. Alberta's Intergovermental Affairs Minister, Mr. Horsman, said yesterday that on Monday the provinces had reached a compromise deal with the federal Government on free trade which included, and I quote, "a ministerial meeting every month with Joe Clark". Would the Minister explain why a federal spokesman contradicted Mr. Horsman by saying, and I quote, "But it's not so". Who is telling the truth, Mr. Horsman or the federal Government?

Hon. Erik Nielsen (Deputy Prime Minister and Minister of National Defence): Mr. Speaker, the Prime Minister, who attended that meeting personally, is the only person who can answer that kind of detailed question. However, I expect that what the Official Opposition House Leader is doing, in all probability, is distorting the true nature of the facts.

GOVERNMENT POSITION

Hon. Herb Gray (Windsor West): Mr. Speaker, I think what the Deputy Prime Minister is doing is directly attacking, and I regret this, the credibility of the Alberta Minister of Intergovernmental Affairs. Will he now reconfirm his Government's promise to the provinces to hold monthly ministerial meetings with them on the free trade talks? Will he reconfirm this promise which was stated publicly to the press by Mr. Horsman? Why is he trying to contradict it?

Hon. Erik Nielsen (Deputy Prime Minister and Minister of National Defence): I am not trying to contradict at all, Mr. Speaker. I do question the accuracy of what the Opposition House Leader is saying. The Prime Minister has every intention of living up to whatever commitments he made in that meeting.

REQUEST THAT PRIME MINISTER CONTACT UNITED STATES PRESIDENT

Mr. Steven W. Langdon (Essex—Windsor): Mr. Speaker, the President cannot veto anything that happens concerning softwood lumber after this petition is accepted by Mr. Baldrige so this is a crucial three days. I ask the Deputy Prime Minister or the Minister of Finance why the Prime Minister will not use these last precious hours of political leverage personally to contact the person he has called—

Mr. Speaker: Order, please.

Mr. Langdon: —Canada's best friend?

Mr. Speaker: I am sorry, that is the same question again. I will allow the answer but it is the last time.

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, I have responded to that question. The points have been made on many occasions. This is a quasi-judicial process.

Mr. Deans: Not yet.

Mr. Wilson (Etobicoke Centre): We have made the points very clear concerning the technical and legal elements of the process, so they will be fully taken into account at the time any decision is made. We have also made clear to the administration the importance of this in a political, economic, and regional sense. That is fully understood by the Government of the United States and it will be taken into account when that decision is made.

Mr. Langdon: The Government is trying to use a legal scapegoat which it does not yet have the right to use.

[*Translation*]

INQUIRY IF PRIME MINISTER IS AFRAID TO TELEPHONE UNITED STATES PRESIDENT

Mr. Steven W. Langdon (Essex—Windsor): Mr. Speaker, my supplementary is the conclusion I must make: Why is the Prime Minister afraid to call the President of the United States?

[*English*]

Mr. Speaker: Order. That is simply the same question. The Hon. Member for Westmorland—Kent.

[*Translation*]

EMPLOYMENT

ATTITUDE OF DEPUTY MINISTER TOWARD NEW BRUNSWICK

Mr. Fernand Robichaud (Westmorland—Kent): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. Mr. Speaker, I must say that I was in a state of shock when the April 10 memo, signed by Mr. Lussier and Mr. Edwards, was released. The unemployment rate in New Brunswick is now 15 per cent, and in the Acadian peninsula, according to the memo, it is 23.8 per cent. My question is as follows: Could the Minister explain why her department is prepared to use blackmail, and do so at the expense of the unemployed in New Brunswick, to force the Premier of New Brunswick to sign an agreement? Mr. Speaker, I think this is absolutely appalling.

• (1430)

[*English*]

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, I would like to get some facts on the table in this matter. First of all I want to tell you, Sir, and Members of the House, that I did not see the memo in question until last night. At no time have I had a telephone call from Premier Hatfield on this matter.

Second, even though the Leader of the Opposition does not want to hear an explanation I feel that it is proper to give it. I want to tell the House that the planning phase for the Community Futures Program in the Acadian peninsula was signed and was approved in February of this year, well before the memo in question.

Third, negotiations for a National Training Act agreement had been going on since the latter part of last year, and I understand they are near conclusion. At no time was there ever any mention—

Mr. Speaker: Order, please. The Minister is embarking on a statement.

[*Translation*]

INQUIRY WHEN MINISTER WILL AUTHORIZE DISTRIBUTION OF FUNDS

Mr. Fernand Robichaud (Westmorland—Kent): Mr. Speaker, will the Minister immediately provide funds for employment development throughout the province, since those funds belong to the people of New Brunswick, and should never at any time be used for political purposes? When will she be releasing those funds?

[*English*]

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, the memo of April 10 was a suggestion of accelerating the processes in these two negotiations. I want to say I will do that every time I can where unemployment is 24 per cent, or, indeed, with regard to Community Futures Program the planning stage of which has been approved elsewhere in the country.

I can assure you that what we approved and what we are negotiating at no time involved a proposal for the additional expenditure of moneys other than those which would be contemplated under the Community Futures Program and the regular programs of the Canadian Jobs Strategy. We will see that they are put into effect in the Acadian peninsula because we do understand that with a rate of 24 per cent unemployment there is action that is needed.

* * *

TRADE

CANADIAN LUMBER EXPORTS—UNITED STATES PRESIDENT'S LETTER TO U.S. SENATOR

Mr. Nelson A. Riis (Kamloops—Shuswap): Mr. Speaker, my question is directed to the Deputy Prime Minister. On May 8 the President of the United States sent a letter to Senator Packwood indicating a plan to take unilateral action against the Canadian softwood industry if necessary. Would he explain what our Prime Minister did in response to that letter and that indication of intent by the President of the United States?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, the Hon. Member has distorted the letter that was written by the President to Senator Packwood. He should know that, before he gets an answer to that question.

PROPOSAL THAT PRIME MINISTER INTERVENE

Mr. Nelson A. Riis (Kamloops—Shuswap): Mr. Speaker, I think the record will speak for itself that the letter the President wrote essentially said, if necessary, he would take unilateral action.

Yesterday in reply to me the Secretary of State for External Affairs said that the Government is going to do everything open to it to represent the Canadian forest industry at this critical moment. We have made a proposal today for the Prime Minister of Canada to intervene. Is that not an option open to the Government?

Mr. Speaker: Order, please. This is a long preamble.

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, the Hon. Member has distorted the President's letter again in his preamble. I am not going to respond to a question where that Hon. Member, if I might use that phrase very loosely, is going to use distortions of that order.

Mr. Speaker: Order, order. The Chair does not like to intervene during Question Period, but the Hon. Minister is, in effect, imputing motives to the Hon. Member. I must ask him to withdraw the implication that the Member is deliberately distorting something. That is what the Chair heard. I ask you to withdraw that implication.

Mr. Wilson (Etobicoke Centre): Mr. Speaker, I did not use the word intentionally at all. I will withdraw any implications, but I let it stand that I will not—

Mr. Speaker: Order. The Hon. Member for York—South Weston.

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CANADIAN JOBS STRATEGY

NEW BRUNSWICK JOB-CREATION FUNDING

Mr. John Nunziata (York South—Weston): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. It concerns the memo that was written by one of her Deputy Ministers. This memo was received in her office on April 10, 55 days ago. It reflects the Minister's cynical attitude towards job creation in Canada. My question to the Minister—

Mr. Speaker: Order, please. I am going to allow the question, but I am having some trouble with the comments that are going back and forth between the sides personally about individuals. May I please have the question?

Mr. Nunziata: Would the Minister not agree that it is improper, inappropriate, and unacceptable for her Department to use federal public funds for job creation in a partisan, political fashion to assist her friend Richard Hatfield?

Hon. Flora MacDonald (Minister of Employment and Immigration): Yes, Mr. Speaker, I would agree that is improper if that is what was being done. I can assure the Hon. Member that that is not what is being done.

DEPUTY MINISTER'S MEMORANDUM

Mr. John Nunziata (York South—Weston): Mr. Speaker, the Minister, in a previous answer, indicated that she only saw the memo last night. Is the Minister suggesting that a memo written by her Deputy Minister 55 days ago and received in her office 55 days ago was not brought to her attention until last night?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, the content or the issue dealt with in the memo has been raised a number of times with me. I want to assure the Hon. Member that the action that we have taken in this regard is to move the processes forward. What we are saying is we want to accelerate the process of implementing the full Community Futures Program in the Acadian peninsula, and we want to accelerate the agreements with regard to the National Training Act. Those discussions have been ongoing, and I am hoping that they will very shortly be near a successful conclusion.

Mr. Speaker: Order, please.

FUNDING OF JOB CREATION IN NEW BRUNSWICK

Mr. John R. Rodriguez (Nickel Belt): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. It deals with the same issue. First we had a previous Minister in the same Department who tried to use taxpayers' money to recruit young Conservatives for the Government. Now we have, within the Minister's Department, another attempt to use taxpayers' money to get a Conservative elected.

Mr. Speaker: Order, please. The Hon. Member's preamble is too long. Your question, please?

Mr. Rodriguez: Mr. Speaker, will the Minister not agree with me that funding for the unemployed in New Brunswick ought to be on the basis of the need for jobs rather than political greed for office?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, the economic region in question, the Acadian peninsula of New Brunswick, has an unemployment rate of 24 per cent. That is the highest of the five economic regions in New Brunswick. We have been discussing with that economic region the implementation of a Community Futures Program. We have also been applying other programs under the Canadian Jobs Strategy. We are doing what we can to alleviate the unemployment situation in that area. We will continue to do so.

MINISTER'S POSITION

Mr. John R. Rodriguez (Nickel Belt): Mr. Speaker, in light of the seriousness of the unemployment in New Brunswick, why then would the Minister attach the whole need to grant the moneys for unemployment programs in New Brunswick to whether, in fact, Mr. Hatfield will be re-elected?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, I think that that statement is utterly uncalled for and does not in any way reflect what I am doing. What I am trying to do in the Canadian Jobs Strategy is to ensure that those areas of the country which need the help the most receive it. That is what we have been trying to do.

If Hon. Members know of the operations of either the lead corporations or the Community Futures Program they know that it takes up to the better part of a year to get that program fully implemented in any one part of the country. What we have been trying to do is to accelerate that.

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WAR CRIMINALS

DESCHÊNES COMMISSION—DELAY IN SUBMITTING REPORT

Mr. Andrew Witer (Parkdale—High Park): Mr. Speaker, my question is directed to the Minister of Justice. Recent reports have indicated that the Deschênes Commission has requested a further six-month extension of its mandate with a view to somehow negotiating Soviet compliance with the six Canadian rules of evidence, and completing a written report. Will the Minister advise the House whether he has received such a request, and if so, will an extension will be granted, and for what purpose?

• (1440)

Hon. John C. Crosbie (Minister of Justice and Attorney General of Canada): Mr. Speaker, the Deschênes Commission did not actually request a six month extension. They wrote some weeks ago, giving us a progress report on the work they have done. They are doing a very thorough job, as the Hon. Member knows. They said they could not finish all of their work as they thought it should be done by the end of June of this year. They then set out certain options. Due to the illness of Mr. Justice Deschênes for some three months, we advised Mr. Justice Deschênes today that we would grant a further three month delay to submit the report by September 30.

As the Hon. Member knows, the U.S.S.R. did not respond to their requests to take certain evidence there. It was five months before they responded and they have not met all of the conditions that were set down. They violated the conditions by giving out to the public and the press the names of two persons who were among those to be investigated. The complete range of conditions—

Mr. Speaker: Order, please. The Hon. Minister may want to complete this answer under Statements.

Mr. Crosbie: That is the position with respect to the U.S.S.R.

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CANADIAN JOBS STRATEGY

RELEASE OF FUNDING

Hon. Warren Allmand (Notre-Dame-de-Grâce—Lachine East): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. In a poll released today we are told that only 28 per cent of Canadians are satisfied with the Government's job-creation programs. When will the Minister start listening to ordinary Canadians and stop playing political games with these programs? With the unemployment rate at 9.6 per cent nationally and 24 per cent in the Acadian Peninsula, when will she restore the jobs budget to the same level as last year and release the moneys frozen by her Department all over the country?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, we must be doing something right with the Canadian Jobs Stategy because that is reflected in the increased number of jobs created in the last year and a half—some 630,000 jobs.

Some Hon. Members: Hear, hear!

Miss MacDonald: I want to tell the Hon. Member that, although a number of his colleagues have insisted today that we should not proceed with job creation and training in the Acadian Peninsula—

Mr. Gray (Windsor West): We never said that.

Miss MacDonald: —we will do so, as we will do whether it is in Cape Breton, sections of Newfoundland, or as we did with single industry towns like Sault Ste. Marie, Trail, and other places where unemployment is so high.

Some Hon. Members: Order.

Miss MacDonald: We will continue to operate in that way.

PUBLIC OPINION POLL

Hon. Warren Allmand (Notre-Dame-de-Grâce—Lachine East): Mr. Speaker, when will the Minister start telling the whole truth—

Some Hon. Members: Order.

Mr. Allmand: —start telling the whole truth—

Some Hon. Members: Oh, oh!

Mr. Speaker: Order, please.

Mr. Hnatyshyn: Once a week, Warren.

Mr. Crosbie: Out for the day. Queen for the Day.

Mr. Speaker: Order, please, including the Minister of Justice. The Hon. Member knows that I must ask him, as I asked the Minister of Finance, to withdraw the imputation that is in that statement and simply proceed with his question. The Hon. Member will please withdraw that imputation.

Mr. Allmand: Mr. Speaker, I did not know that the whole truth or the half truth was wrong, but the Minister knows—

Some Hon. Members: Order.

Mr. Speaker: Does the Hon. Member withdraw the imputation that the Chair has taken from his comment?

Mr. Allmand: Mr. Speaker, I do not know what I should withdraw but I will withdraw it at your request. I do not think I said anything wrong. The Minister knows that while many jobs are being created, many good jobs are being lost. The ones that are being created are often low paid, part-time, temporary and non-unionized—

Mr. Speaker: Order, please. For the last time, does the Member have a question, please?

Mr. Allmand: When will the Minister come clean with Canadians and tell them the whole truth and recognize the dissatisfaction indicated by today's poll?

Some Hon. Members: Hear, hear!

Some Hon. Members: Order.

Mr. Speaker: The Chair did not draw the same imputation from that comment that it did from the earlier one, because of the way the Hon. Member put it. I will allow the Minister to answer, but I ask all Members to realize that we get close to personal language sometimes, which we should not do.

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, the Member has suggested that jobs being created in this country are not meaningful. I ask him to go out and talk to some of the people who have received jobs.

Mr. Allmand: I have.

Miss MacDonald: I can tell you that they are very pleased that they now have a Government through which jobs are being created for a change, instead of being lost as they were under the previous Government. I would also say to him that 76 per cent of the new jobs that have been created are full-time jobs, where people have an opportunity to go back into the job market full-time.

DEPUTY MINISTER'S MEMORANDUM

Mr. Ian Deans (Hamilton Mountain): Mr. Speaker, my question is directed to the same Minister. What kind of political direction has been given to her Ministry that would lead the Deputy Minister to conclude that it would be appropriate to use public funds to assist Richard Hatfield's re-election?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, as I mentioned earlier, I did not see that memo until last night. I have been in Toronto all this morning speaking to a gathering there. I have asked to see the official in question later this afternoon because I think that there are a number of constructions that can be put on that memorandum. I would like to know the construction that he puts on it. I do not intend to prejudge his activities until I have had an opportunity to speak to him.

MEMORANDUM ADDRESSED TO MINISTER

Mr. Ian Deans (Hamilton Mountain): Mr. Speaker, what is wrong with the inner office operations that she does not see a memo directed to her, which states quite clearly, as I read it, that she should use public funds to assist Richard Hatfield's re-election? That memo is signed and sent by her Deputy Minister.

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, I have already said that I did not see that memorandum until last night. I also want to assure the Hon. Member that it was not a question of doing something other than would have been done under the normal routine of the Canadian Jobs Strategy. That is what we were talking about and what was discussed with me, and had nothing to do with regard to the memo, elections, phone calls or anything else—none of which happened. We are talking about a situation which was fantasy.

Mr. Speaker: Order, please.

Miss MacDonald: I want to tell the Hon. Member that what we have been doing is discussing—

Mr. Speaker: Order. The Minister may want to make a statement.

FORESTRY SECTOR JOB DEVELOPMENT PROGRAM

Mr. Len Hopkins (Renfrew—Nipissing—Pembroke): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. A short time ago the Minister of Employment and Immigration announced the creation of a Forestry Sector Job Development Program with the stated objective being to improve forest management skills. Why did the Minister, who only recently announced the creation of this program, change her mind and decide to cut the program funding from $6 million in 1985-86 back to $2 million in 1986-87? Why the about-face from a Government that has made all kinds of promises to the forestry sector of Canada?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, we are funding many forestry projects across the country. I have had representations from members of his Party indeed to cut them back and I have resisted that in many cases. I want to assure the Hon. Member that the projects that we have under way in the forestry sector will improve skills and allow people to practise silviculture, to help with conservation, and in fact to beef up in many quarters the amount of money that is going into forestry.

Mr. Hopkins: Maybe we will have another answer on Monday.

PETAWAWA NATIONAL FORESTRY INSTITUTE COURSE

Mr. Len Hopkins (Renfrew—Nipissing—Pembroke): Mr. Speaker, my supplementary question is directed to the same Minister. What logic did the Minister use when she decided to cut off, as of July 4, a forest management skills development program involving a large number of students at the Petawawa National Forestry Institute instead of allowing them to complete the course as of the planned date, January 4, 1987? Why such irrational decisions just to simply quit everything in midstream?

• (1450)

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, we have some 14,000 projects under way in the country which employ people, train people, and provide them with skills. I do not have all the details of each and every one of those projects in my head. However, if the Hon. Member will give me the details of the project in question, I will be glad to look into it for him.

PUBLIC 3760

Oral Questions

CROWN CORPORATIONS

SEQUEL TO PRIVATIZATION OF DE HAVILLAND

Mr. Bob Horner (Mississauga North): Mr. Speaker, my question is directed to the Acting Minister of Regional Industrial Expansion. Despite demands by the Opposition that the de Havilland aircraft company remain a Crown corporation, the Government sold it to Boeing Corporation last December. Can the Minister tell us if there have been mass lay-offs at de Havilland as the Opposition predicted and, I believe, hoped for?

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, the short answer to that question is no. Rather than mass lay-offs, there have been mass sales and an increase in the number of jobs as a result of the announcement made a couple of weeks ago regarding de Havilland building components for the Super-747. That will create some 250 jobs.

Just in the last couple of days we had the announced sales and options for some 46 Dash-8s to Canadian airlines—

Some Hon. Members: Hear, hear!

Mr. Mazankowski: —the largest being a sale to Air Ontario. That should silence the critics opposite once and for all.

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AGRICULTURE

PRICE OF DOMESTIC WHEAT—COMMITTEE RECOMMENDATION

Mr. Lorne Nystrom (Yorkton—Melville): Mr. Speaker, my question is directed to the Minister of Agriculture. In a rare spirit of unanimity, the Special Committee on the Pricing of Domestic Wheat tabled its report at 11 o'clock this morning. Would the Minister tell us whether or not he agrees with our principal recommendation that the price of domestic wheat be raised from $7 a bushel to $10 a bushel beginning August 1?

Hon. John Wise (Minister of Agriculture): Mr. Speaker, I appreciate the question and since the committee, of course, was the creation of this House, I am sure all Hon. Members of the House would want to join with me in extending our congratulations to that Standing Committee under the chairmanship of the Hon. Member for Crowfoot. As the Hon. Member indicates, the report was just tabled this morning. We took that undertaking to establish the committee very seriously, and we will be giving very careful consideration to the recommendations of the committee report tabled earlier today.

DEFICIENCY PAYMENT RECOMMENDATION

Mr. Lorne Nystrom (Yorkton—Melville): Mr. Speaker, keeping in mind that farmers are in their worst crisis since the 1930s, would the Minister tell us whether or not he would also consider the recommendation for a deficiency payment which was made by the committee this morning? And can he tell us when that decision will be made? The farmers want to know.

Hon. John Wise (Minister of Agriculture): Mr. Speaker, the official record to date would indicate that we have taken some 235 initiatives in providing benefit to the agricultural industry of over $5 billion.

Mr. Nystrom: A deficiency payment, John?

Mr. Wise: In keeping with the support the Government has provided to the agricultural industry, at the last meeting at which the Prime Minister met the farm leaders across the country he indicated that, indeed, it was a very serious problem, that farmers were facing their most serious financial crisis in 50 years, and that the Government was prepared to do more.

Mr. Nystrom: Deficiency payment?

Mr. Wise: The Hon. Member points to two issues, first, a deficiency payment and the other, of course, unless he has forgotten, additional stabilization payments. I must say that those are two options which, indeed—

Mr. Speaker: Order, please. The Minister is being long.

Mr. Hnatyshyn: This is very important.

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THE ADMINISTRATION

NEWSPAPER ARTICLE

Ms. Sheila Copps (Hamilton East): Mr. Speaker, my question is directed to the Acting Minister of Regional Industrial Expansion. Could he tell us whether he is aware of an article in the *Toronto Sun* today which reports:

> Frank Stronach, chairman and co-founder of Magna International Corp., confirmed yesterday "we are committed" to the loan arranged by Anton Czapka, co-founder of the auto parts company?

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, I have not yet read the *Sun* this morning.

Some Hon. Members: Oh, oh!

Mr. Speaker: Order, please. I will allow the supplementary question but I must remind the Hon. Member that on these matters there is a judicial inquiry which has certain customs surrounding it.

PROPOSED SALE OF CANADAIR

Ms. Sheila Copps (Hamilton East): Mr. Speaker, given the admission by the Chairman that Magna is directly involved in the loan, will the Minister agree to suspend all discussions about the sale of Canadair, which directly involves Magna, at least until the Parker Inquiry has been completed?

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, I would have thought the Hon. Member would have accepted your admonition and conducted herself accordingly.

Ms. Copps: I am asking about Canadair.

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CANADIAN JOBS STRATEGY

DEPUTY MINISTER'S MEMORANDUM

Mr. Rod Murphy (Churchill): Mr. Speaker, my question is directed to the Minister of Employment and Immigration. In a response to a previous question the Minister said she had not seen the memo from her Associate Deputy Minister for 55 days. Can she explain to the House why a memo to her from a very senior person within her Department was not delivered to her personally within that time period?

Hon. Flora MacDonald (Minister of Employment and Immigration): Mr. Speaker, I can assure the Hon. Member that the subject in question, that is, whether or not Community Futures should be proceeded with in the Acadian Peninsula and in other parts of New Brunswick, was one of ongoing discussions. Therefore, the question of how Community Futures would be applied, whether in New Brunswick, in the Acadian Peninsula, or in other parts of the country, was a subject with which I was familiar.

TREATMENT OF MEMORANDUM

Mr. Rod Murphy (Churchill): Mr. Speaker, my supplementary question is directed to the same Minister. If anyone in her office believed this memo was in any way different from the policy of the Government, why would they not show that memo to the Minister?

Mr. Nystrom: In 55 days?

Hon. Flora MacDonald (Minister of Employment and Immigration): Because, Mr. Speaker, as I said, the memo dealt with—as I saw it last night—the question of how one accelerates—

Mr. Tobin: How to help Richard.

Miss MacDonald: —the processes in two sets of negotiations which were going on in New Brunswick. We had tried to say to the Province of New Brunswick, "we want to see these negotiations speeded up". We wanted to deal with them more quickly.

Ms. Copps: Blackmail.

Miss MacDonald: That is what we have been trying to do. That was the subject of the memo. I suppose, in looking at it, it was decided that because we were already proceeding along that track it was not necessary to give me a memo as well to that effect.

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[*Translation*]

TRADE

REQUEST FOR CLARIFICATION OF NEW TARIFFS ON BOOKS AND MAGAZINES

Mr. Guy St-Julien (Abitibi): Mr. Speaker, I have a question for the Minister of Finance.

Mr. Speaker, some French-speaking media in Quebec have claimed that French-speaking readers will be penalized by the tariffs you have announced on books last Monday, because they would only apply to French-language books.

Could you clarify the situation for Quebecers, and tell us on which books and periodicals those new tariffs apply?

Hon. Michael Wilson (Minister of Finance): Mr. Speaker, those tariffs apply to English-language books only. No French-language book or periodical of any origin will be affected by those new tariffs.

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SHIPYARDS

REQUEST FOR EXPLANATION OF VERSATILE VICKERS LAY-OFFS

Mr. Jean-Claude Malépart (Montreal—Sainte-Marie): Mr. Speaker, I have a question for the Acting Minister of Regional Industrial Expansion.

This morning, there were 50 new layoffs at the Versatile Vickers plant, for a total of 300 in the last three weeks. Can the Minister tell the House whether those job losses are the direct consequence of the request made by the Government to Mr. Saunders to rationalize Quebec's shipyards?

[*English*]

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, the answer is no.

[*Translation*]

ALLEGED MANDATE OF MR. SAUNDERS TO RATIONALIZE SHIPYARDS—AWARDING OF CONTRACTS TO THREE SHIPYARDS IN QUEBEC—GOVERNMENT POSITION

Mr. Jean-Claude Malépart (Montreal—Sainte-Marie): Mr. Speaker, since the Minister says that the answer is no and since Mr. Saunders has said that he was forced by the Government to do this dirty work, would the Minister be willing to cancel the mandate of Mr. Saunders to rationalize the shipbuilding industry? Second, would the Government be willing to give out contracts to provide employment for the workers of the three Quebec shipyards?

PUBLIC

Point of Order—Mr. Fulton

[*English*]

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, the mandate is an illusion of the Hon. Member.

Mr. Crosbie: Of which he has many.

[*Translation*]

INQUIRY CONCERNING WHICH MINISTER IS RESPONSIBLE FOR SHIPBUILDING AND IF GOVERNMENT INTENDS TO WITHDRAW MR. SAUNDERS' ALLEGED MANDATE

Mr. Mike Cassidy (Ottawa Centre): Mr. Speaker, my question is for the same Minister. Can he explain the contradiction between the statement of the Minister of State for Small Businesses, who says that there have been no instructions, and the statement made last Wednesday by this same Minister, who then confirmed that the Governement had asked Mr. Saunders to prepare a plan for rationalizing the shipbuilding industry in Quebec?

Which Minister is responsible for the shipbuilding industry? Finally, is the Government planning to withdraw its instructions to Mr. Saunders?

• (1500)

[*English*]

Hon. Don Mazankowski (Minister of Transport): Mr. Speaker, it is unfortunate that the Hon. Member across the way does not listen to answers. I have said before, and he knows, that there needs to be some rationalization in the shipbuilding industry. That rationlization is being discussed among all the players within the shipbuilding industry itself. That should certainly be clear enough to him. All the players in the shipbuilding industry are involved in the discussions.

Mr. Cassidy: Supplementary question, Mr. Speaker.

Mr. Speaker: Order, please. It is three o'clock.

I have received a note with respect to a desire to raise a point of order by the Hon. Member for Skeena arising out of Question Period.

* * *

POINT OF ORDER

REQUEST TO REVERT TO MOTIONS

Mr. Jim Fulton (Skeena): Mr. Speaker, I would like to test the House to see if there is unanimous consent to revert to Motions to consider the following motion:

That this House endorse the view of the Secretary—

Mr. Gauthier: How did he get the floor?

Mr. Speaker: I think the Hon. Member knows that a motion under a point of order is improper. Therefore it is difficult to ask to revert to Motions under a point of order. That is my dilemma. I have to rule that the Hon. Member is not raising a point of order. He may have a matter he wishes to raise when he has the floor on debate. Does the Hon. Member have a point of order?

Mr. Fulton: Yes. What I am asking for, Mr. Speaker, and I have discussed this with both the House Leaders, is whether or not there is unanimous consent to revert to Motions so I can put a very brief motion to the House.

Hon. Ray Hnatyshyn (President of the Privy Council): Mr. Speaker, there was a discussion but there was no resolution to that discussion.

Mr. Speaker: The House indicated earlier that at three o'clock it wished to revert to Statements by Ministers. That was agreed to at the time. Therefore, reverting to Statements by Ministers, the Hon. Minister of Agriculture (Mr. Wise).

ROUTINE PROCEEDINGS

[*English*]

THE ENVIRONMENT

WORLD ENVIRONMENT DAY

Hon. John Wise (Minister of Agriculture): Mr. Speaker, I have been informed that any of the difficulties which might have occurred this morning have been dealt with. Therefore, that allows me to proceed on behalf of my colleague, the Hon. Minister of the Environment (Mr. McMillan), to make the following statement on his behalf.

Today is World Environment Day and, as Hon. Members know, it was the intention of the Minister of the Environment, the Hon. Member for Hillsborough, to make a statement to the House marking both the day and Environment Week. Late yesterday, however, the Minister was called home to be with his wife at the birth of their child.

Some Hon. Members: Hear, hear!

Mr. Wise: I therefore have the pleasant task of making the following statement on his behalf.

In the past 10 days Canada has played host to the World Commission on Environment and Development, the Brundtland Commission, as well as the World Conservation Strategy. Next week the Fate of the Earth Conference opens in Ottawa. Senior politicians, officials and non-government organizations have been discussing vital international problems in the environment. My colleague, the Minister of State for External Relations (Mrs. Vézina), was warmly received by the Brundtland Commission when she assured its members that Canada is emphasizing the need for environmental awareness in assessing foreign aid projects.

The past week has been marked by the presence of people from all over the world, people who have given us new perspectives and a new understanding of the global scope of pollution and of environmental concerns in other countries.

At the national level there can be no doubt that the major polluters in Canada include companies that manufacture, use and dispose of chemical compounds in violation of good sense, good citizenship and good corporate behaviour. They need to be dealt with—and dealt with harshly—through tougher laws and regulations and through more vigorous enforcement of the laws and regulations already on the Government statute books.

However, realistically, if every company in Canada were to become environmentally responsible this very day only part of the equation necessary to improve the Canadian environment would be in place. Individual citizens, through decisions they make daily, have a profound effect on the environment. That is why the focus on individual responsibility for clean air, on the dangers of misfueling and of mismanagement of hazardous home products, is so vital. The sorry fact is that today a million Canadians are using leaded gas in cars designed for unleaded fuel. Another one-half million deliberately tamper with their catalytic converter systems. In so doing they damage their cars, their environment and the health of their children.

Since repeated research has shown that Canadians are firmly committed to a better environment, even if that involves some economic sacrifices, the key to change is education. We do not want to talk to those already convinced, but to the millions of people who may not be aware of how they personally can make a difference in our goals of cleaner, safer air, water and soil.

Therefore, I invite Members on all sides of the House to join me in getting two messages across. First, the most serious international tragedies of our day, for example in Ethiopia, are the direct result of environmental problems. Canadians who have opened their hearts, as well as their purses, should learn more about how the world can avoid future catastrophes. Second, Canadians should be given the opportunity to learn how they as individuals can make their immediate environment better.

I assure Hon. Members that my Department and I stand willing to offer information and assistance to any interested persons or groups on this specific matter.

Some Hon. Members: Hear, hear!

Hon. Chas. L. Caccia (Davenport): Mr. Speaker, it is regrettable that the Minister of Agriculture (Mr. Wise) for whom I have the highest respect and esteem, particularly in terms of his courage and action with respect to controlling and banning pesticides where possible, has been given the impossible task of reading what I would describe as a non-statement.

Page 1 is simply a diary of social activities, inclusive of one mistake. The Fate of the Earth Conference does not open next week; it opened this week. Page 2 sets out toothless verbiage which rambles endlessly. On Page 3 the absent Minister trots into the House the notion that education would be the substitute for Government action. Perhaps he does so in order to justify the $1 million advertising campaign in a manner that creates the impression that advertising will substitute and solve the problem, when the onus is entirely on the Government and not on the advertising agencies. When it comes to day-to-day environmental issues the Tory logic seems to boil down to: "You, the citizens, do the job for us, the Government, while we spend your money on advertising and get the public relations benefits".

With respect to the message that Canadians were expecting, it seems to me that Canadians would prefer substance as opposed to this kind of stuff. They would like to know when the Government will act in putting crimes against the environment into the Criminal Code instead of the Minister of the Environment (Mr. McMillan) pointing the finger at the culprits and the industries without taking any further action.

I suspect Canadians would like to see an equalization of the price of gasoline at the pump between leaded and unleaded gasoline. That will resolve the problem of misfueling, something the advertising campaign will not do. Canadians would like to see a launching of a real plan along the Niagara River, the one that was promised by the predecessor of the present Minister of the Environment for the clean-up there.

I suspect that the message Canadians would like to hear today would be one with respect to action in reinstating, for instance, the Guelph Toxicology Centre that was wiped out by the Minister of Finance (Mr. Wilson) in November of 1984, thus giving the toxic issue Government support and the scientific impact it deserves.

Canadians would like to see a reinstatement of the Canadian Wildlife Service. They would like to see a strengthening of the environmental protection services which have been weakened in the past two years by the Government. Canadians would like to see an assurance as to the growth and expansion of our national parks system by way of new sites and new facilities. The list is endless.

Since you are pointing to me that I should conclude, Mr. Speaker, I will conclude by saying this. So far with respect to acid rain there has been no U.S. reduction from which we have been able to benefit. With respect to scientific research, there have been retreats and cuts. With respect to scientists in Environment Canada, there has been muzzling. On PCB research, which was promised by the predecessor of the present Minister of the Environment, in terms of the destruction and research, there has been no action at all. On the removal of lead from gasoline, the action has been delayed. I hate to conclude with these remarks but, nearing the end of Environment Week, the Government has shown that it is merely concerned with one thing, and that is public relations.

• (1510)

Mr. Bill Blaikie (Winnipeg—Birds Hill): Mr. Speaker, I would like to begin by extending, on behalf of everyone, congratulations to the Minister on the reason for his having to return to Prince Edward Island. I know the birth is imminent; I do not know whether it has happened or not. In any event, we wish mother, child and father well.

Having said that about the Minister, I want to say a word about his performance in his portfolio. I think he had an easy go of it at the start because he followed the Hon. Member for Rosemont (Mrs. Blais-Grenier). There was a great willingness within the environmental community and the House to give him the benefit of the doubt for some time. I must say with a great deal of personal regret that that honeymoon is coming to an end.

A pattern in environmental policy is beginning to emerge. This pattern consists of many things, some of which have already been mentioned; including the gag order on the Department, the failure to restore cuts made by the former Minister to the toxicology centre, the wildlife service and others, the cessation of traditional assistance to environmental groups, the fact that we celebrated the anniversary of Canada's National Parks without the creation of a single new National Park, the acceptance by the Minister of no American action on acid rain and the Niagara River, the acceptance by the Minister of positions of which he was formerly critical in this latter respect, and the tendency to lean on advertising as a solution.

We saw $1 million spent on Environment Week itself, something I was reluctant to criticize in principle because I have nothing against attempting to stimulate public awareness of the environment. However, when this is juxtaposed with the failure to spend in other areas where it is very important to spend money, one must be a bit skeptical. A million dollars is being spent on advertising to discourage Canadians from using leaded gas when a simple adjustment to the tax structure might have had a more immediate effect, and might even have raised a few dollars for the Government. In all this we see a disturbing trend of having the responsibility shifted from Government to individuals, and we see this in the statement the Minister just made.

The Government talks about what individuals need to do. I do not quarrel with the fact that all individual Canadians have a part to play, but it would be a serious mistake indeed if during Environment Week, statements that tend to downplay the role of Government in protecting the environment were to go by without comment. It is not simply a question of education and individual lifestyles. It is a fact that if all of the companies referred to in the statement started being environmentally responsible today most of our problems would be solved. However, they are not going to do that until Canada has a Government that is willing to stand up to the vested corporate and bureaucratic interests that are making money out of pollution and are meeting their short-term economic goals. That is where the fundamental contradiction in the Conservative Party's policy on the environment lies.

The Government cannot have an economic philosophy based on deregulation and on letting business do its own thing if it hopes to meet our environmental concerns. Companies that pollute for short-term economic goals are doing the very thing which, through other rhetoric, the Conservative Government is encouraging them to do.

I believe the position we heard today from the Minister of Agriculture (Mr. Wise) on behalf of the Minister of the Environment (Mr. McMillan) is riddled with errors. Sure, the Ethiopian example is an environmental problem, but many of the environmental problems in the Third World and elsewhere are related to economic problems. They are related to the things Third World countries have to do because of their debt relationships and the kinds of economies they have developed as a result of investment patterns on the part of the First World. These are fundamental global economic questions which we are not going to solve until Canada has a Government that is willing to resist the way the market-place works both here and abroad. That is not the kind of Government we have now.

If Canadians, as a result of this week and perhaps even as a result of the advertising campaign, are concerned about the environment and want a political solution to that concern, I say to them that they are not going to find it on that side of the House.

The Acting Speaker (Mr. Paproski): I wish to inform the House that because of the Ministerial statement Government Orders will be extended by 14 minutes, beginning at 5 p.m.

GOVERNMENT ORDERS

[*English*]

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House resumed consideration of Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, as reported (with amendments) from a legislative committee; and Motion No. 8 (Mr. Orlikow) (p. 13991).

Mr. Jean-Robert Gauthier (Ottawa—Vanier): Mr. Speaker, in taking part in this debate, I would like to make a few comments about the amendment put forward by my colleague, the Hon. Member for Winnipeg North (Mr. Orlikow).

[*Translation*]

Mr. Speaker, motion No. 8 asks the following:

That Bill C-91—

—now under consideration—

—be amended in Clause 47 by striking out line 36 at page 51 and substituting the following therefor:

PUBLIC

"graphs (*a*) to (*c*), including the concentration of corporate ownership by one or more individuals to levels which the Director finds excessive,».

[*English*]

The amendment speaks of corporate concentration, and that is the point I would like to address in my brief remarks. Preventing interlocking directorships and corporate concentrations *per se* is a preoccupation of many Hon. Members of Parliament including myself. I believe the finance committee has eloquently addressed that subject and is dealing with the approach of self-dealing that flows from the concentration of power.

I would like to remind the House that some useful comments were put to the committee and indeed cited in the House. I would like to cite one comment which put forward very adequately and eloquently the point I wish to make. Mr. Justice Wyzanski of the U.S. Federal Court had this to say:

Concentration of power, no matter how beneficially they appear to have acted, nor what advantages they seem to possess, are inherently dangerous. Their good behaviour in the past may not be continued; and if their strength were hereafter grasped by presumptuous hands, there would be no automatic check and balance from equal forces in the industrial market . . . Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise.

I think that comment puts it better than I could. Indeed, we must address the question of corporate concentration. I would like to congratulate the Hon. Member for Winnipeg North for giving us the opportunity to make a few comments about it.

I believe that free enterprise is better protected and expressed if we do not allow corporate giants to be created. As I said, the *status quo* could become a difficult and dangerous problem. Therefore, we have an obligation to state clearly that Parliament views the concentration of powers in the corporate field as a dangerous and possibly difficult situation with which to deal.

• (1520)

In conclusion, we will support this amendment and vote in favour of it.

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The House has heard the terms of the motion. All those in favour of the motion will please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed will please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion the nays have it.

And more than five Members having risen:

The Acting Speaker (Mr. Paproski): Pursuant to Standing Order 114(11), a recorded division on the proposed motion stands deferred.

Competition Tribunal Act

The House will now proceed to the consideration of Motions Nos. 9 and 10 which have been grouped for debate and will be voted upon separately.

Hon. André Ouellet (Papineau) moved:

Motion No. 9

That Bill C-91, be amended in Clause 47 by adding immediately after line 32 at page 53 the following:

"(*f*) any history of anti-competitive behaviour on the part of any party to the merger or proposed merger;"

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 10

That Bill C-91, be amended in Clause 47 by adding immediately after line 42 at page 53 the following:

"(*i*) and to the extent to which concentration of corporate ownership is in the public interest, by avoiding conflicts of interest between merged financial and non-financial commercial operations, and by providing lower prices, innovation, employment and other public benefits through economic efficiency."

[*Translation*]

Mr. Ouellet: In my opinion, Mr. Speaker, the clauses concerning mergers are probably among the most important of this Competition Tribunal Act. I am glad that mergers no longer come under criminal law.

As I was saying, Mr. Speaker, the clause concerning mergers in Bill C-91 is probably one of the most important in this Bill. I am delighted that the Government has elected to follow-up on this recommendation that mergers no longer come under criminal law but under civil law. In this operation, however, the Government seems to have overlooked a number of factors which the previous Bill introduced by former Minister Judy Erola had taken into account. That is why, during the Parliamentary Committee study, I moved a number of amendments to increase the number of factors. As a matter of fact, Bill C-29 contained no fewer than 12 factors to be considered at the time of a merger while the original Bill C-91 presently before us contained only six. During the Committee hearings, several witnesses came forward to indicate that this part of the legislation was not as strong and adequate as former Bill C-29. I am glad to see that the Government has accepted two amendments which I had moved at the time, that is, any likelihood that the merger or proposed merger will or would result in the removal of a vigourous and effective competitor, and the second amendment, the nature and extent of change and innovation in a relevant market. Those amendments are important because they allow for a specific identification of the factors to be considered in cases of mergers. I appreciate the Government wanted to condense the 12 factors in Bill C-29 into the six factors in this legislation. But it is my view that the Act should include among the factors that may be considered, not only those that might encourage the tribunal to accept the merger but also to list a number of factors that could lead the court to reject the merger. It is with that in mind that I proposed this series of amendments.

PUBLIC 3766

Now, there is another factor on which I am calling the attention of the House today, and which is just as important in my view. It is the one you just read, Mr. Speaker, under which any history of anti-competitive behaviour on the part of any party to the merger should be considered by the Tribunal.

I know some Hon. Members opposite will say this may never happen again, and that a company which might have broken the law in the past could very well show an exemplary behaviour afterwards. But unfortunately this is not always the case. With this amendment, I am trying to establish a factor under which people in the Tribunal might consider whether indeed they are dealing with a company that in the past has exercised good will, prudence and respect for the laws of the land or whether the Tribunal is dealing with a company which in the past has had an anti-competitive behaviour.

As I understand it, the purpose of Bill C-91 is not to closely scrutinize every single merger. Only those involving turnovers in excess of $400 million will be looked at. In a similar vein, I believe that as a result of this amendment the members of the tribunal would weigh this factor only in cases where there is strong evidence of prior anti-competitive behaviour which is deemed to have been constant or important enough to be taken under consideration. Naturally, companies which may have erred in the past but which showed good will afterwards will be allowed to merge. But since the tribunal is a new jurisdiction, I would suggest that our duty as legislators is to facilitate the job of the tribunal members and indicate to them that, in our opinion as legislators, the anti-competitive behaviour of a party to the merger, or of one of the two companies involved, may be considered on the same basis and in the same way as any other factor which is already included in the Bill as introduced by the Minister.

I think it is important—and I will conclude on this note—for the Government to realize that the absence of this factor is not a problem which can simply be disregarded. Adding such prior anti-competitive behaviour as a factor is not a cranky suggestion.

In my remarks on second reading I said there was nothing to justify the absence of certain factors. Several witnesses raised this point in briefs to the committee, particularly Professor Stanbury and the Consumers' Association of Canada. Mr. Speaker, I would remind you that four or five of my colleagues who took the floor in the second reading debate expressed regret that this factor was not included among those considered in this part of the legislation.

Therefore I urge the Government to give serious consideration to this amendment. I hope it will be accepted so that my NDP colleagues and I might give our support to this measure.

[*English*]

Mr. Orlikow: Mr. Speaker, I am proposing that Clause 47 of Bill C-91 be amended as follows:

"(*i*) and to the extent to which concentration of corporate ownership is in the public interest, by avoiding conflicts of interest between merged financial and non-financial commercial operations, and by providing lower prices, innovation, employment and other public benefits through economic efficiency."

• (1530)

The new subsection which I am proposing would provide a means by which the appropriateness of conglomerate mergers could be judged. The public interest test, which is used by many public regulatory agencies, which I have included in this amendment, was proposed by competition lawyer Gordon Kaiser in his testimony to the committee. He said in part:

It is essential that there be a facility or mechanism to have these transactions reviewed with proper public input prior to their consummation. The proper test, of course, is not whether competition is being limited substantially in a specific product market but whether the transactions are in the public interest generally. A number of regulatory tribunals review acquisitions involving regulated companies and determine whether the acquisitions are in the public interest.

The remaining parts of the test which I am proposing would deal with some of the conglomerate issues on which the committee heard a good deal of testimony from a number of witnesses including the Canadian Labour Congress, the Consumers Association, Professor Brecher, Professor Stanbury and Mr. Kaiser. The following are some of the issues which could be dealt with if this amendment were included in the Bill: First, divorcing financial and non-financial operations of conglomerate business and commercial lending agencies. This would be done to ensure that Genstar buying Canada Permanent and Imasco buying Genstar to get Canada Trust would be considered for the anti-competitive aspects which they will undoubtedly generate, namely the ability to self-deal with other people's money to advance corporate interests in a way which no competitor is able to do. I understand that we are dealing with conglomerate corporations which now control assets of $50 billion or more. They are as big or bigger than some of the big five banks.

We also propose that conglomerate mergers be judged by the public benefits which they could and should provide. For example, do they provide lower prices, innovation in the market-place, more employment and other benefits which the companies should be only too happy to tell us about if that is what they are going to achieve? What we have seen in conglomerate mergers to date is not very reassuring. We have seen big pay-outs to senior executives and board members for their stock options. The Genstar twins have denied press reports that they could clear $40 million or $50 million each in the Imasco takeover of Genstar. However, they have been very careful not to tell anyone how much they will in fact be able to make.

Let us look at what is happening in the battle to take over Hiram Walker. The three top officers of Hiram Walker have been guaranteed a salary of $500,000 a year for the next three years whether or not they stay with the company after the takeover is completed. Besides that, they have been given options to buy shares in the company for substantially less than the market price. They will be able to make several million dollars each in that way. It is too easy for companies simply to strip the assets and sell them in order to get back the money they spent in acquisition costs. This amendment would emphasize public benefit in conglomerate mergers and all mergers would benefit from having such a test applied.

PUBLIC

Members of Parliament, the Government and the people of Canada should be asking what questions we should be asking in regard to conglomerate concentration and what questions the director of investigation and the tribunal should ask on our behalf in regard to conglomerate mergers if they are to take their jobs seriously and get the information they need in order to judge, as we believe they should be able to, whether a takeover of a large corporation by another corporation in a different field is of benefit to the people.

Fortunately, the House of Commons Finance Committee will be examining the officers of Brascan and Genstar next week. My colleague, the Member of Parliament for Kamloops—Shuswap (Mr. Riis), who is our spokesperson on finance, has prepared a list of questions, which he has already sent to the officers of Brascan, which he wants them to answer when they appear before the committee next week. The questions he asks should be asked by the people of Canada, the Government, the director of investigation and the tribunal whenever a large corporation proposes to take over another large corporation.

I will put these questions on the record. We propose that Brascan, or any corporation in this situation, should answer the following questions. What are the companies in which Brascan has an equity position that results in effective control of that company? What is the percentage of voting shares that Brascan holds in each case? When were these companies acquired? What was the price paid at the time of acquisition for each of these companies? What were the strategic benefits to the company as they perceived them to be that led to these acquisitions, i.e. tax benefits, diversification, etc.? What tax savings were there, if any, in making each of these acquisitions?

I remind Members of the House and the Parliamentary Secretary that in the takeover of Gulf by Olympia & York they were able to use the Egyptian bump to benefit to the extent of some $500 million in tax savings. Most Canadians would appreciate a very small fraction of such a tax benefit.

What benefits were paid to senior officers of the acquired companies? I have already mentioned the benefits which the officers of Genstar and Hiram Walker are going to get. What was the number of employees in each of the acquired companies before the acquisition? What is the number of employees in each of the acquired companies today? In other words, are there more people or less people working for these companies? If there are less people, of what benefit is that to the country?

How much money was allocated for each company for research and development before the takeover? How much money is being allocated by each of these companies for research and development today? In other words, are they doing any more in the way of research and development to make the companies, and therefore the country, more efficient, innovative and able to compete in international markets? Has there been any reduction in the cost of production by any of these companies since they were acquired? Has there been any reduction in prices to consumers by any of these companies since their acquisition?

We should be asking some very important questions on behalf of all Canadians. What benefits or improvements in their lives, if any, result from the mergers we have seen in recent years, or do all the benefits go to the initiators and promoters of these mergers? We have been told that we must move from the resource-based industries which have been the foundation of the economy of this country for most of the years that it has been a country. We have told that they must become more efficient and innovative and move to newer fields of endeavour to which the world is moving in communications, computers, steel, aluminum and ceramics. If we are to provide jobs for Canadians in the labour market now and those entering it in the very near future, that is what we have to do. Yet, instead we see our captains of industry and finance increasingly involved in takeovers, a policy which has been described as paper entrepreneurship. It benefits only a few powerful individuals and corporations.

• (1540)

Where is the effort to help the small independent businesses which we know have provided most of the new jobs in recent years? Where are the plans to help the slow growth regions of Canada? They are certainly not in the thinking of these conglomerates. That is why we believe the kind of amendment I have moved is of crucial importance if this Bill is to do what it is supposed to do.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, being as brief as I can, I would first like to address Motion No. 9 presented by the Hon. Member for Papineau (Mr. Ouellet). The motion recommends that the tribunal consider, as a factor in its deliberations on whether or not to allow a merger, the history of the anti-competitive behaviour of the parties to the merger. This was deleted from the list of factors which appeared in Bill C-29 introduced by the previous Government because past behaviour is not necessarily a good indication of future behaviour. I suggest to the House that the tribunal may consider any other relevant factor, including the past behaviour of parties to the merger. For that reason I recommend that the House reject Motion No. 9.

As to Motion No. 10 moved by the Hon. Member for Winnipeg North (Mr. Orlikow) it recommends adding to the list of factors for the tribunal to consider under the merger provision a factor which, as drafted, has no place in this Bill. It deals primarily with concentration of ownership and control of financial institutions by non-financial corporations. As I already indicated, if this House believes those issues should be added by legislation, they should be dealt with in other appropriate legislation. The motion also includes factors which are already explicitly included and are implicit considerations the tribunal will most certainly take into account where it is appropriate. For those reasons I recommend that the House reject Motion No. 10.

Competition Tribunal Act

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The question is on Motion No. 9 standing in the name of the Hon. Member for Papineau (Mr. Ouellet). Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour of the motion please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it.

And more than five Members having risen:

The Acting Speaker (Mr. Paproski): Pursuant to Standing Order 114(11), the recorded division on the proposed motion stands deferred.

The next question is on Motion No. 10 standing in the name of the Hon. Member for Winnipeg North (Mr. Orlikow). Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it.

And more than five Members having risen:

The Acting Speaker (Mr. Paproski): Pursuant to Standing Order 114(11), the recorded division on the proposed motion stands deferred.

The discussion is now on Motion No. 11.

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 11

That Bill C-91, be amended in Clause 47 by adding immediately after line 20 at page 60 the following:

"79.1(1) The Director

(*a*) upon his own initiative may, and upon direction from the Minister shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product that may be subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade, and

(*b*) upon direction from the Minister shall carry out a general inquiry into any matter that the Minister certifies in the direction to be related to the policy and objectives of this Act.

(2) It is the duty of the Tribunal to consider any evidence or material brought before it under subsection (1) together with such further evidence or material as the Tribunal considers advisable and that such evidence or material be made public by the Tribunal unless the Tribunal decides it is in the public interest that the evidence or material be kept confidential."

He said: Mr. Speaker, I would remind the Parliamentary Secretary that both Professor Irving Brecher and Professor David McQueen made the plea that independent inquiries should continue to be carried out on competition issues. This amendment, suggested by the Consumers' Association, would bring back from the old law the Section 47 inquiries which the director could undertake on investigation of a monopolistic situation. In the hearings which the committee held to discuss this Bill, Professor Brecher testified as follows:

It is argued in the blue book of the Department of Consumer and Corporate Affairs that, since the Tribunal is a judicial or quasi-judicial body, there is no need to have a general research section; hence, it should be repealed. This, to my mind, is about as good a *non sequitur* as one could find. I do not see how one follows from the other.

It is true there is a reference to the Commission in section 47, but that could certainly be deleted. It is still important, indeed vital, I believe, for the Director and for the Minister to be able to sponsor or to launch or to encourage general inquiries into the state of competition and to problem areas like conglomerates, problems in the media, mass media industry, and a variety of other things which are extremely important in this field.

So I urge in the strongest possible terms that reconsideration be given to this and that section 47 in the appropriate place be restored to the Bill.

This is the appropriate place. Professor McQueen, in a written submission to the committee, said:

—I see no good reason for depriving the new tribunal of the power now exercised by the Restrictive Trade Practices Commission to conduct general inquiries into competition matters. Some of those published inquiries are among the most informative documents we possess in this field in Canada. The inquiry into prescription drugs and their prices was a particular standout in that respect. Such inquiries should continue to be sponsored by some detached and credible body, and I do not see why that body should not be this tribunal, supported by a modest staff.

The Consumers' Association is a very responsible organization, although often, in my view, too cautious. However, this is an amendment which it suggests and it is supported by Professor Brecher and Professor McQueen. Both of those people are highly respected academics who have spent a great deal of time and effort in thinking about the problem of competition and how to ensure that we have real competition and people benefit from it. Both suggest that we need this kind of authority for the tribunal and the Director of Investigations to be able to do their jobs adequately in order to protect the interests of Canadians in a more effective way. Yet we see the Government refusing to agree to what we consider to be a very moderate and sensible proposal. Because the Government is taking that very narrow approach we are very skeptical that it is really very serious about getting this law passed and giving the tribunal and the director the ability to do the job which the Bill requires them to do.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, we are dealing with Motion No. 11 and Motion No. 12 moved by the Hon. Member for Winnipeg North (Mr. Orlikow). I would like to suggest that Motion No. 11 would in effect reinstitute the research inquiry power in the Act under the provision dealing with the Competition Tribunal. The reason Section 47 of the Combines Investigation Act was repealed—

• (1550)

The Acting Speaker (Mr. Paproski): I would like to bring to the attention of the Hon. Parliamentary Secretary that we are dealing with Motion No. 11 only. He said Motions Nos. 11 and 12. I think that he should just stay with Motion No. 11, if I may suggest it to the Hon. Parliamentary Secretary. I think that we are going to be voting on it separately, so therefore I would appreciate it very much if he would stay with Motion No. 11. That will keep the ball game straight here, and then we can carry on with Motion No. 12 next.

Mr. Domm: I am still on Motion No. 11, so I will refrain from mentioning Motion No. 12 until later.

The reason Section 47 of the Combines Investigation Act was repealed was to ensure that the tribunal's function would be strictly adjudicative. Not only is this desirable in terms of the impartiality of the tribunal, but I suggest to the House that it helps guarantee its constitutionality. In the future, should situations arise where research inquiries into the state of competition in a particular industry are necessary, the Government then can rely on general provisions of the Inquiries Act for creation of an ad hoc commission of inquiry. For these reasons I urge the House to reject Motion No. 11.

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The question is on Motion No. 11. Mr. Orlikow moved:

Motion No. 11

That Bill C-9l, be amended in Clause 47 by adding immediately after line 20 at page 60 the following:

"79.1(1) The Director

(*a*) upon his own initiative may, and upon direction from the Minister shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product that may be subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade, and

(*b*) upon direction from the Minister shall carry out a general inquiry into any matter that the Minister certifies in the direction to be related to the policy and objectives of this Act.

(2) It is the duty of the Tribunal to consider any evidence or material brought before it under subsection (1) together with such further evidence or material as the Tribunal considers advisable and that such evidence or material be made public by the Tribunal unless the Tribunal decides it is in the public interest that the evidence or material be kept confidential."

Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it.

Some Hon. Members: On division.

The Acting Speaker (Mr. Paproski): I declare the motion lost.

Motion No. 11 (Mr. Orlikow) negatived.

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 12

That Bill C-91, be amended in Clause 47

(*a*) by striking out line 26 at page 62 and substituting the following therefor:

"rations would exceed 15 mil-".

(*b*) by striking out line 34 at page 62 and substituting the following therefor:

"(*i*)would exceed $15 million":

He said: Mr. Speaker, I am not very optimistic that the Government will agree to support this amendment. Let me just point out to the Parliamentary Secretary that both the Consumers' Association and the Canadian Federation of Independent Business prefer the $15 million figure which I am proposing in this amendment, as it takes into account a number of smaller businesses which are often merger targets. They believe that the $35 million ceiling which is in the Bill at the present time, is too high. The Government amendments for acquisitions which must be reported to the Director of Investigation simply limit the amount to Canadian assets, which may make much larger companies unreviewable. That is all the more reason to adopt the views of the Consumers' Association of Canada and the Canadian Federation of Independent Business.

As I say, I am puzzled as to why the Government would not incorporate in the Bill this proposal made, not by me originally, but by the Consumers' Association and the CFIB. As this debate continues I become more and more convinced that the Government has no real intention or desire to see this Bill work effectively in dealing with a monopoly situation.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, on Motion No. 12 the Hon. Member is proposing to amend the pre-notification provision for the acquisition of voting shares by reducing the threshold from $35 million to $15 million. I have difficulty understanding why the Hon. Member is suggesting that the threshold for the acquisition of voting shares should be different from the one for the acquisition of assets, as this will surely be the effect of this proposal.

I believe that the effect of this motion will be to create confusion, and it may provide an incentive to restructure transactions to avoid pre-notification. For these reasons I cannot support this motion.

Mr. Nelson A. Riis (Kamloops—Shuswap): Mr. Speaker, I do not plan to prolong this debate unnecessarily, but since my colleague from Winnipeg North spoke very briefly I thought I would simply add a few comments to fill up his time allotment.

I think that there are two points that have to be made. One is the fact that in certain parts of Canada traditionally the size of corporations tends to be smaller. I am referring, of course, to the corporations existing in the hinterlands where we are very concerned about the level or need for competition and the concern of what continuous corporate amalgamations, takeovers and mergers mean in terms of lessening competition in the hinterland regions of the country.

When you consider that both the Consumers' Association and the Canadian Federation of Independent Business suggested a $15 million figure, I suspect that that was one of the concerns that they had in mind.

When you look at what is going on today in the Province of Alberta, and you look at the mergers that are taking place there, almost by definition most of the mergers that are taking place these days are in the category around the $15 million mark. These tend to reflect the small Canadian independent companies that, under the present situation in the traditional oil patch are simply finding it impossible to continue and are essentially at the mercy of any company which wishes to come in and take them over.

Considering that this simply aids and abets the process of the takeover of small Canadian companies, it is something that we should consider when we vote on this particular amendment.

The other point that my colleague from Winnipeg North made was that the government amendments for acquisition, which must be reported to the Director of Investigation, simply limit the amount to those assets that are in Canada. Now, what this means then is that if a corporation has a small asset base in Canada but a large asset base in Hong Kong, Japan, the Phillipines or some other country, it will not come under scrutiny. In other words, it will not be considered a company with a large enough asset base here in Canada. Consequently, the Director of Investigation will not be alerted to this particular takeover or merger.

We find that to be rather illogical when you consider that the role of the multinationals surely is one that we all are interested in and concerned about in terms of the impact that this has in terms of enlarging their sphere of influence in our own economy. Of all the western industrialized nations, we happen to have significantly more foreign ownership and foreign control of our economy than any other country. This will simply say that if you are a multinational corporation with a small Canadian asset base, if you wish to make acquisitions in Canada you will not be subject to the watchful eye of the Director of Investigation. For that reason, my honourable friend from Winnipeg North decided that this was an appropriate motion for our consideration.

Mr. Domm: Mr. Speaker, we are now dealing, I guess, with debate on Motions Nos. 13 and 14, and I will put my remarks together—

The Acting Speaker (Mr. Paproski): I have not dispensed with No. 12. Order, please.

Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The question is on Motion No. 12. Mr. Orlikow moved:

Motion No. 12

That Bill C-91, be amended in Clause 47

(*a*) by striking out line 26 at page 62 and substituting the following therefor:

"rations would exceed 15 mil-".

(*b*) by striking out line 34 at page 62 and substituting the following therefor:

"(*i*)would exceed $15 million":

Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it.

Some Hon. Members: On division.

The Acting Speaker (Mr. Paproski): I declare the motion lost.

Motion No. 12 (Mr. Orlikow) negatived.

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 13

That Bill C-91, be amended in Clause 47 by striking out line 21 at page 77 and substituting the following therefor:

"tribunal, may, and".

PROCEEDINGS ON ADJOURNMENT MOTION

[*Translation*]

SUBJECT MATTER OF QUESTIONS TO BE DEBATED

The Acting Speaker (Mr. Paproski): It is my duty, pursuant to Standing Order 66, to inform the House that the questions to be raised tonight at the time of adjournment are as follows: the Hon. Member for Etobicoke—Lakeshore (Mr. Boyer)—External relations—Size of Polish consulate in Etobicoke—Lakeshore; the Hon. Member for Broadview—Greenwood (Ms. McDonald)—Health—Ban on tobacco advertising requested. (*b*) Hazardous products designation inquiry; the Hon. Member for Montreal—Sainte-Marie (Mr. Malépart)—Benefits for widows and widowers aged 60 to 64 years—Exclusion of single, divorced and separated persons.

• (1600)

GOVERNMENT ORDERS

[*English*]

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House resumed consideration of Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, as reported (with amendments) from a legislative committee; and Motion No. 13 (Mr. Orlikow) (p. 14021).

The Acting Speaker (Mr. Paproski): I must also include Motion No. 14 which has been grouped for debate.

Mr. David Orlikow (Winnipeg North) moved:

Motion No. 14

That Bill C-91, be amended in Clause 47 by striking out lines 7 to 9 at page 78 and substituting the following therefor:

"tribunal, may make representations to and"

He said: Mr. Speaker, I moved these amendments because we look on this Bill as pemitting further federal intrusion into areas which come under provincial jurisdiction. They deal in part with the same subject in Motion No. 3.

The amendments were put forward in a letter from Mr. Mackling, the Minister for Telecommunications in Manitoba, to the federal Minister of Consumer and Corporate Affairs (Mr. Côté). Part of the letter explains the reason for this amendment and demonstrates the concern of the Government of Manitoba about a situation that occurred some time ago.

I suggest to the Parliamentary Secretary that the same concern would be expressed at least by the Governments of Saskatchewan and Alberta because there was an occasion when CN-CP attempted to enter into competition for long distance telephone business with the existing trans-Canada system. This involved the whole question of telephone rates and the relationship of household rates, small business rates, and local service rates to long distance rates.

The former Director of Investigation took it upon himself to make a case for permitting CN-CP to enter into the long distance telephone business.

The Manitoba Government, acting for the publicly owned Manitoba Telephone System, was very disturbed by that intervention. Therefore, the Minister from Manitoba wrote to the federal Minister of Consumer and Corporate Affairs. I want to quote part of his letter which explains Manitoba's concerns. He said in part:

With regard to the mandate given to the Director of Investigation and Research in sections 97 and 98—

These are sections of the Act still in effect.

—my predecessor in this portfolio, Hon. Eugene Kostyra, has sent you copies of correspondence identifying the Government of Manitoba's concern with the role played by the Director on his own initiative in telecommunications regulatory hearings. The introduction of competition into telecommunications services has the potential for such an enormous impact on all telecommunications users, it is a policy matter which should be decided by Ministers, not through the regulatory process. The Government of Manitoba has joined with your colleague, the Honourable Marcel Masse, and the majority of other provincial governments in determining that telecommunications policy should be established not by regulatory agencies, but rather through federal-provincial co-operation at the ministerial level. It is therefore unacceptable for an agency of the federal Department of Consumer Affairs to be given a mandate to access public funds on its own initiative to advocate one approach to industrial organization policy without regard for other aspects, such as consumers' interests and the development of an efficient and cost-effective telecommunications system. Regulators such as the CRTC and the Manitoba PUB—

That is, Public Utility Board.

—are charged with the responsibility of reviewing each case in the public interest, and they have established procedures to provide financial assistance to any independent intervenors who provide worthwhile input to regulatory hearings, regardless of the interests which they represent. Under this system, there is no evidence that those who advocate competition within the industry are in any way underrepresented or unable to present their case adequately, and there is no evidence that the Director is making effective use of taxpayers' funds by participating in the CRTC's hearings on his own initiative.

With respect to section 98, the Government of Manitoba would find it totally unacceptable for an agency of the federal Government to intervene on his own initiative to provide policy recommendations in a provincial regulatory hearing.

It is our contention that, if the federal government wishes to comment on provincial policies, such debate should take place between and among elected officials. Honourable Marcel Masse joined with all provincial and territorial Ministers responsible for telecommunications to establish a co-operative process to review telecommunications policy across Canada. The inevitable effect of Bill C-91 in its present form would be to complicate and perhaps jeopardize these important and sensitive discussions. Therefore, I respectfully urge you to:

1. Ensure that regulated activities of Crown Corporations are explicitly excluded from the purview of the Competition Act, and

2. Eliminate the Director's mandate in sections 97 and 98 to expend public funds to make representations on his own initiative in respect of competition to boards, commissions or tribunals.

We consider this to be a very important matter. The Government of Manitoba made representations on the question of telecommunications to the federal Ministers who were involved. I am certain that other provinces would do the same if, for example, the director were to intervene in the activities of marketing boards. The provincial Governments which set up marketing boards that try to meet the needs of producers and consumers would be just as upset as the Government of Manitoba was when the director intervened in the telecommunications question.

It is my recollection that when we were discussing this matter in committee we were told that this question, which was raised by the Government of Manitoba, had been dealt with, and that the clause of the present Bill met the concerns raised by the Government of Manitoba. Since that was my information, I let it go through. However, after going through this clause by clause, we heard from the Government of Manitoba that it is not satisfied. Since the Government is not satisfied and I believe it has made a very valid case for its position, I moved the amendments which we are now discussing.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, I will deal with Motion No. 13 first. The existing legislation gives the director the right to make representations for federal boards, commissions or other tribunals on his own initiative.

The effect of the Hon. Member's motion would be that the director would only be allowed to make such representations at the request of the particular board, commission or tribunal or on direction from the Minister. The Government does not believe it would be appropriate to restrict the powers of the director in this way, as it would not serve the over-all public interest in competition. I would strongly urge the House to reject this motion.

Let me move on to Motion No. 14. This proposed amendment would unnecessarily lessen the ability of the director to intervene before provincial regulatory boards to advocate competition considerations where relevant. This could lead to less competition in some provincially regulated industries.

There is no rationale for such an amendment since Bill C-91 requires that the director obtain the consent of the provincial board when he, on his own initiative, intends to make representations before it. Therefore, any abuse of the director's ability to intervene is prevented. For that reason, I suggest that the House reject Motion No. 14.

• (1610)

The Acting Speaker (Mr. Paproski): Is the House ready for the question?

Some Hon. Members: Question.

The Acting Speaker (Mr. Paproski): The question is on Motion No. 13. Mr. Orlikow moved:

Motion No. 13

That Bill C-91, be amended in Clause 47 by striking out line 21 at page 77 and substituting the following therefor:

"tribunal, may, and".

Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it. I declare the motion lost.

Motion No. 13 (Mr. Orlikow) negatived.

The Acting Speaker (Mr. Paproski): The next question is on Motion No. 14. Mr. Orlikow moved:

Motion No. 14.

That Bill C-91, be amended in Clause 47 by striking out lines 7 to 9 at page 78 and substituting the following therefor:

"tribunal, may make reprsentations to and".

Is it the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Some Hon. Members: No.

The Acting Speaker (Mr. Paproski): All those in favour of the motion please say yea.

Some Hon. Members: Yea.

The Acting Speaker (Mr. Paproski): All those opposed please say nay.

Some Hon. Members: Nay.

The Acting Speaker (Mr. Paproski): In my opinion, the nays have it. I declare the motion lost.

Motion No. 14 (Mr. Orlikow) negatived.

The Acting Speaker (Mr. Paproski): The House will now proceed to taking the deferred divisions at the report stage of the Bill now before the House.

Call in the Members.

• (1640)

And the division bells having rung:

Mr. Speaker: Order, please. The first vote will be on Motion No. 6. Mr. Ouellet, seconded by Mr. Gauthier, moved:

Motion No. 6

That Bill C-91, be amended in Clause 47 by adding immediately after line 14 at page 41 the following:

"(7) For the purposes of subsection (4) in its application to market restriction, where there is an agreement between the "first" person and the "second" person, both defined in subsection (6), whereby these persons are deemed to be affiliated for the purposes of subsection (6) in respect of food or drink, and where the "first" person supplies or causes to be supplied to the "second" person food or drink in a packing or container other than a packing or container produced or made by the "second" person in his own plan and where this food or drink is distributed in this packing or container by the "second" person in association with the trade mark mentioned in subsection (6), the "first" person and "second" person are deemed, in respect of this distribution, to be affiliated."

The House divided on Motion No. 6 (Mr. Ouellet), which was negatived on the following division:

(*Division No. 266*)

YEAS

Members

Allmand	Gauthier	Orlikow
Althouse	Heap	Ouellet
Berger	Isabelle	Parry
Blaikie	Langdon	Prud'homme
Boudria	Malépart	Riis
Cassidy	Marchi	Robinson
Copps	McCurdy	Rodriguez
Deans	McDonald (Broadview-Greenwood)	Rompkey
de Corneille	Murphy	Rossi
Finestone	Nunziata	Waddell—32.
Foster		
Fulton		

NAYS

Members

Attewell	Daubney	Hardey
Bertrand	de Cotret	Hicks
Blais-Grenier	Della Noce	Hnatyshyn
Bourgault	Desjardins	Hockin
Boyer	Dick	Horner
Brightwell	Domm	Howie
Brisco	Dorin	Hudon
Browes	Edwards	James
Caldwell	Ellis	Jardine
Champagne (Saint-Hyacinthe-Bagot)	Epp (Provencher)	Johnson (Bonavista-Trinity-Conception)
Champagne (Champlain)	Fennell	Joncas
Cochrane	Forrestall	Kindy
Comeau	Gagnon	King
Corbett	Gass	Ladouceur
Cossitt	Greenaway	La Salle
Crouse	Grisé	Lawrence
Dantzer	Guilbault (Drummond)	Lesick
Darling	Hamilton	Lewis
Mailly	Oberle	Stackhouse
Mantha	Oostrom	Taylor
Mazankowski	Paproski	Towers
McCain	Peterson	Tremblay (Lotbinière)
McCrossan	Pietz	Tupper
McCuish	Plamondon	Turner (Ottawa-Carleton)
McDougall (St. Paul's)	Plourde	Vankoughnet
McKenzie	Price	Vincent
McKinnon	Ravis	Warner
Merrithew	Reid	Weiner
Moore	St-Julien	Wilson (Swift Current-Maple Creek)
Nielsen	Schellenberg (Nanaimo-Alberni)	Wise—92.
Nowlan	Sparrow	

Mr. Speaker: I declare the motion lost.

Perhaps I should advise the House that the other motions are Motions Nos. 7, 8, 9, and 10. Is there a disposition in this regard?

Mr. Deans: Mr. Speaker, there have been discussions and I believe it would be possible, if Your Honour checked, to apply the vote just taken to the remaining votes and to have them recorded as if they were actually taken.

Mr. McDermid: Mr. Speaker, I rise on a point of order.

Mr. Speaker: Let us do this simply. I take it the Hon. Member for Brampton—Georgetown (Mr. McDermid) is rising on a point of order to indicate that he missed the previous vote and that he wishes to be counted in the remaining votes.

Mr. McDermid: Exactly, Mr. Speaker.

Mr. Speaker: Similarly with the Hon. Minister of Energy, Mines and Resources (Miss Carney) and with the Hon. Member for Blainville—Deux-Montagnes (Mrs. Landry)?

Miss Carney: Yes, Mr. Speaker.

Mrs. Landry: Yes.

Mr. Speaker: Is the Hon. Member for Cape Breton—The Sydneys (Mr. MacLellan) seeking the floor for the same purpose?

Mr. MacLellan: Yes, Mr. Speaker.

Mr. Speaker: I take it the Hon. Member for Cape Breton—The Sydneys wants his vote recorded in the affirmative and the other three in the negative. Therefore it is understood that with those additions, the vote on Motion No. 6, as amended, will apply to Motions Nos. 7, 8, 9, and 10.

The next vote is on Motion No. 7. Mr. Ouellet, seconded by Mr. Gauthier, moved:

Motion No. 7

That Bill C-91, be amended in Clause 47 by adding immediately after line 11 at page 42 the following:

"(*i*) restriction, by a supplier, of the available margin to his customers ("intermediate customer"), by inciting, requiring or compelling an intermediate customer to resell the products bought by an intermediate customer from a

Competition Tribunal Act

third party ("last favoured customer"), under arrangements or terms resulting in discounts, rebates, allowances, price concessions or other advantages ("bonuses") offered directly or indirectly to a last favoured customer for purchase of identical products intended to be resold to other third parties that are not favoured."

The House divided on Motion No. 7 (Mr. Ouellet), which was negatived on the following division:

(*Division No. 267*)

YEAS

Members

Allmand	Gauthier	Nunziata
Althouse	Heap	Orlikow
Berger	Isabelle	Ouellet
Blaikie	Langdon	Parry
Boudria	MacLellan	Prud'homme
Cassidy	Malépart	Riis
Copps	Marchi	Robinson
Deans	McCurdy	Rodriguez
de Corneille	McDonald (Broadview-Greenwood)	Rompkey
Finestone	Murphy	Rossi
Foster		Waddell—33.
Fulton		

NAYS

Members

Attewell	Greenaway	McKinnon
Bertrand	Grisé	Merrithew
Blais-Grenier	Guilbault (Drummond)	Moore
Bourgault	Hamilton	Nielsen
Boyer	Hardey	Nowlan
Brightwell	Hicks	Oberle
Brisco	Hnatyshyn	Oostrom
Browes	Hockin	Paproski
Caldwell	Horner	Peterson
Carney	Howie	Pietz
Champagne (Saint-Hyacinthe-Bagot)	Hudon	Plamondon
Champagne (Champlain)	James	Plourde
Cochrane	Jardine	Price
Comeau	Johnson (Bonavista-Trinity-Conception)	Ravis
Corbett	Joncas	Reid
Cossitt	Kindy	St-Julien
Crouse	King	Schellenberg (Nanaimo-Alberni)
Dantzer	Ladouceur	Sparrow
Darling	Landry	Stackhouse
Daubney	La Salle	Taylor
de Cotret	Lawrence	Towers
Della Noce	Lesick	Tremblay (Lotbinière)
Desjardins	Lewis	Tupper
Dick	Mailly	Turner (Ottawa-Carleton)
Domm	Mantha	Vankoughnet
Dorin	Mazankowski	Vincent
Edwards	McCain	Warner
Ellis	McCrossan	Weiner
Epp (Provencher)	McCuish	Wilson (Swift Current-Maple Creek)
Fennell	McDermid	Wise—95.
Forrestall	McDougall (St. Paul's)	
Gagnon	McKenzie	
Gass		

Mr. Speaker: I declare the motion defeated.

The next vote is on Motion No. 8. Mr. Orlikow moved:

Motion No. 8

That Bill C-91, be amended in Clause 47 by striking out line 36 at page 51 and substituting the following therefor:

"graphs (*a*) to (*c*), including the concentration of corporate ownership by one or more individuals to levels which the Director finds excessive,"

The House divided on Motion No. 8 (Mr. Orlikow), which was negatived on the following division:

(*Division No. 268*)

YEAS

Members

Allmand	Gauthier	Nunziata
Althouse	Heap	Orlikow
Berger	Isabelle	Ouellet
Blaikie	Langdon	Parry
Boudria	MacLellan	Prud'homme
Cassidy	Malépart	Riis
Copps	Marchi	Robinson
Deans	McCurdy	Rodriguez
de Corneille	McDonald (Broadview-Greenwood)	Rompkey
Finestone	Murphy	Rossi
Foster		Waddell—33.
Fulton		

NAYS

Members

Attewell	Greenaway	McKinnon
Bertrand	Grisé	Merrithew
Blais-Grenier	Guilbault (Drummond)	Moore
Bourgault	Hamilton	Nielsen
Boyer	Hardey	Nowlan
Brightwell	Hicks	Oberle
Brisco	Hnatyshyn	Oostrom
Browes	Hockin	Paproski
Caldwell	Horner	Peterson
Carney	Howie	Pietz
Champagne (Saint-Hyacinthe-Bagot)	Hudon	Plamondon
Champagne (Champlain)	James	Plourde
Cochrane	Jardine	Price
Comeau	Johnson (Bonavista-Trinity-Conception)	Ravis
Corbett	Joncas	Reid
Cossitt	Kindy	St-Julien
Crouse	King	Schellenberg (Nanaimo-Alberni)
Dantzer	Ladouceur	Sparrow
Darling	Landry	Stackhouse
Daubney	La Salle	Taylor
de Cotret	Lawrence	Towers
Della Noce	Lesick	Tremblay (Lotbinière)
Desjardins	Lewis	Tupper
Dick	Mailly	Turner (Ottawa-Carleton)
Domm	Mantha	Vankoughnet
Dorin	Mazankowski	Vincent
Edwards	McCain	Warner
Ellis	McCrossan	Weiner
Epp (Provencher)	McCuish	Wilson (Swift Current-Maple Creek)
Fennell	McDermid	Wise—95.
Forrestall	McDougall (St. Paul's)	
Gagnon	McKenzie	
Gass		

Mr. Speaker: I declare the motion defeated.

The next vote is on Motion No. 9. Mr. Ouellet moved:

Motion No. 9

That Bill C-91, be amended in Clause 47 by adding immediately after line 32 at page 53 the following:

"(*f*) any history of anti-competitive behaviour on the part of any party to the merger or proposed merger;"

The House divided on Motion No. 9 (Mr. Ouellet), which was negatived on the following division:

(*Division No. 269*)

YEAS

Members

Allmand, Althouse, Berger, Blaikie, Boudria, Cassidy, Copps, Deans, de Corneille, Finestone, Foster, Fulton, Gauthier, Heap, Isabelle, Langdon, MacLellan, Malépart, Marchi, McCurdy, McDonald (Broadview-Greenwood), Murphy, Nunziata, Orlikow, Ouellet, Parry, Prud'homme, Riis, Robinson, Rodriguez, Rompkey, Rossi, Waddell—33.

NAYS

Members

Attewell, Bertrand, Blais-Grenier, Bourgault, Boyer, Brightwell, Brisco, Browes, Caldwell, Carney, Champagne (Saint-Hyacinthe-Bagot), Champagne (Champlain), Cochrane, Comeau, Corbett, Cossitt, Crouse, Dantzer, Darling, Daubney, de Cotret, Della Noce, Desjardins, Dick, Domm, Dorin, Edwards, Ellis, Epp (Provencher), Fennell, Forrestall, Gagnon, Gass, Greenaway, Grisé, Guilbault (Drummond), Hamilton, Hardey, Hicks, Hnatyshyn, Hockin, Horner, Howie, Hudon, James, Jardine, Johnson (Bonavista-Trinity-Conception), Joncas, Kindy, King, Ladouceur, Landry, La Salle, Lawrence, Lesick, Lewis, Mailly, Mantha, Mazankowski, McCain, McCrossan, McCuish, McDermid, McDougall (St. Paul's), McKenzie, McKinnon, Merrithew, Moore, Nielsen, Nowlan, Oberle, Oostrom, Paproski, Peterson, Pietz, Plamondon, Plourde, Price, Ravis, Reid, St-Julien, Schellenberg (Nanaimo-Alberni), Sparrow, Stackhouse, Taylor, Towers, Tremblay (Lotbinière), Tupper, Turner (Ottawa-Carleton), Vankoughnet, Vincent, Warner, Weiner, Wilson (Swift Current-Maple Creek), Wise—95.

Mr. Speaker: I declare the motion defeated.

The next vote is on Motion No. 10. Mr. Orlikow moved:

Motion No. 10

That Bill C-91, be amended in Clause 47 by adding immediately after line 42 at page 53 the following:

"(*i*) and to the extent to which concentration of corporate ownership is in the public interest, by avoiding conflicts of interest between merged financial and non-financial commercial operations, and by providing lower prices, innovation, employment and other public benefits through economic efficiency."

Competition Tribunal Act

The House divided on Motion No. 10 (Mr. Orlikow), which was negatived on the following division:

(*Division No. 270*)

YEAS

Members

Allmand, Althouse, Berger, Blaikie, Boudria, Cassidy, Copps, Deans, de Corneille, Finestone, Foster, Fulton, Gauthier, Heap, Isabelle, Langdon, MacLellan, Malépart, Marchi, McCurdy, McDonald (Broadview-Greenwood), Murphy, Nunziata, Orlikow, Ouellet, Parry, Prud'homme, Riis, Robinson, Rodriguez, Rompkey, Rossi, Waddell—33.

NAYS

Members

Attewell, Bertrand, Blais-Grenier, Bourgault, Boyer, Brightwell, Brisco, Browes, Caldwell, Carney, Champagne (Saint-Hyacinthe-Bagot), Champagne (Champlain), Cochrane, Comeau, Corbett, Cossitt, Crouse, Dantzer, Darling, Daubney, de Cotret, Della Noce, Desjardins, Dick, Domm, Dorin, Edwards, Ellis, Epp (Provencher), Fennell, Forrestall, Gagnon, Gass, Greenaway, Grisé, Guilbault (Drummond), Hamilton, Hardey, Hicks, Hnatyshyn, Hockin, Horner, Howie, Hudon, James, Jardine, Johnson (Bonavista-Trinity-Conception), Joncas, Kindy, King, Ladouceur, Landry, La Salle, Lawrence, Lesick, Lewis, Mailly, Mantha, Mazankowski, McCain, McCrossan, McCuish, McDermid, McDougall (St. Paul's), McKenzie, McKinnon, Merrithew, Moore, Nielsen, Nowlan, Oberle, Oostrom, Paproski, Peterson, Pietz, Plamondon, Plourde, Price, Ravis, Reid, St-Julien, Schellenberg (Nanaimo-Alberni), Sparrow, Stackhouse, Taylor, Towers, Tremblay (Lotbinière), Tupper, Turner (Ottawa-Carleton), Vankoughnet, Vincent, Warner, Weiner, Wilson (Swift Current-Maple Creek), Wise—95.

Mr. Speaker: I declare the amendment defeated.

Hon. Ray Hnatyshyn (for the Minister of Consumer and Corporate Affairs and Canada Post) moved that the Bill be concurred in.

Motion agreed to.

Mr. Hnatyshyn (for the Minister of Consumer and Corporate Affairs and Canada Post) moved that the Bill be read the third time and passed.

• (1650)

BUSINESS OF THE HOUSE

WEEKLY STATEMENT

Hon. Ray Hnatyshyn (President of the Privy Council): Mr. Speaker, I am sorry to interrupt this debate because I know Members will want to speak on it, but I think this is an appropriate time for me to announce the business of the House. I thank all Members for their co-operation in proceeding to third reading. I think there may be a disposition to conclude third reading today.

On that basis, the first item of business tomorrow will be second reading of Bill C-95, the Bill with respect to the archives. Following second reading of that Bill, Bill C-90, an Act respecting pension plans, will be called. Should debate on Bill C-90 be concluded prior to four o'clock in the afternoon, it would be my intention to call Bill C-103. We have an understanding that if the Minister of State for Finance (Mrs. McDougall) completes her remarks, and it is the will of the House at that time, we would adjourn business for the day at that point.

Monday and Tuesday of next week will be the two final days of Supply in the current trimester. Pursuant to our new rules this means that the House will meet for an extended sitting on Tuesday.

With respect to the rest of the week, I have been meeting with my colleagues in the opposition Parties to discuss the legislation on the Order Paper to see what legislation might be passed prior to the adjournment of the House at the end of this month. I hope that as those negotiations proceed I will be in a position to report to the House the order of business. Hopefully we can deal with a reasonable package of legislation.

Mr. Ian Deans (Hamilton Mountain): Mr. Speaker, I just want to clarify one matter. While it is true that we have agreed it would be possible to adjourn after the Minister's speech on Bill C-103, it is not absolutely essential that that occur. It may be that Members will wish, because of the time available, to proceed with it beyond the Minister's speech. I just wanted to be sure no one misunderstood.

GOVERNMENT ORDERS

[*English*]

COMPETITION TRIBUNAL ACT

MEASURE TO ENACT

The House resumed consideration of the motion of Mr. Côté (Langelier) that Bill C-91, an Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, be read the third time and passed.

Mr. Gauthier: Mr. Speaker, I rise on a point of order. I know that we are going to proceed to 5.14 p.m. by extension of the allotted time. I think there is some kind of arrangement that all three Parties will share equally in the time. I take it that the Parliamentary Secretary, the Member speaking for the Liberals and the Member speaking for the NDP will get equal time for debate in the time remaining until 5.14.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, I would like to confirm that that is my understanding of how the debate on third reading will proceed. It is a pleasure to speak to Members of this House on the subject of Bill C-91, the proposed Competition Act and Competition Tribunal Act.

Mr. Speaker: Order, please. In fairness to the Hon. Parliamentary Secretary, would those who have other meetings to go to please do so. Order, please.

Mr. Domm: Thank you, Mr. Speaker. We are dealing with third reading of the proposed Competition Act and Competition Tribunal Act. I am sure that many Hon. Members share with me a real sense of achievement. We are making major changes to the Competition Act which reflect the excellent co-operation of all Parties as we have considered hundreds of representations and many letters and telegrams from persons interested in being involved in the decision on this Bill. There is no question in my mind that the amendments approved by the committee and reconfirmed in this House will enhance the effectiveness of the proposed law.

This new competition law is aimed at enhancing trade, assisting Canadian industry in meeting foreign competition at home and abroad and, most important, protecting small business and consumers, placing greater reliance on market forces and the private sector for economic renewal and strengthening the market-place as the trend toward deregulation continues.

Careful review and consideration of past attempts at competition law reform and a dedication to consultation from the blueprint stage have been instrumental in producing the Bill which is before us today. First, the new competition law will establish a Competition Tribunal to adjudicate non-criminal competition matters. Second, with respect to mergers and abuse of dominant position, the Bill proposes to repeal the existing criminal law provisions replacing them with civil law provisions. Third, the Bill will substantially increase the maximum penalty for conspiracy designed to lessen competition. Fourth, bank mergers and agreements will be subject to the new law as will Crown corporations which compete with private business.

As I said at the beginning of my remarks, with the Bill now back in the House we are witnessing the combination of a democratic process that has involved discussion, consultation and a thorough review of the legislation at committee. The amendments accepted by the committee clearly indicate a commitment by its members to take into account the concerns of Members of this House and those expressed by individuals, groups and organizations. Because such reform is now long overdue, I want to assure Hon. Members, and particularly the Hon. Member for Papineau (Mr. Ouellet), and the business community, that the Government is prepared to put the merger provisions into effect when the Bill receives Royal Assent.

This Bill owes its effectiveness to the many who took a very active part in the reform process. The diligence of the Members of this House, of committee members and interested parties from all sectors has given us the potential to help ensure increased economic benefits for all Canadians. I now urge this House to support this Bill so that we may realize that potential as soon as possible.

The Acting Speaker (Mr. Paproski): Before I recognize the Hon. Member for Papineau (Mr. Ouellet), I would indicate to Members that there are some people here who would like to hear the debate that is going on. If Members have other conversations to carry on, would they please take them behind the curtain.

[*Translation*]

Hon. André Ouellet (Papineau): Mr. Speaker, I am pleased to rise in the House to deal on third reading with Bill C-91. During consideration of this Bill by a Parliamentary Committee, we have come to realize that beyond political differences, it is sometimes possible for a group of Members to work together to improve a legislation.

On behalf of my Party, at the second reading stage, I had indicated that, in my opinion, this Bill was not the appropriate response to the competition problems in the Canadian economy, but that we all agreed that this Bill was a step in the right direction and that it was certainly better than the current legislation. We said at a time that we would try to move amendments in Committee to improve the legislation.

In light of the efforts made in Committee, I must say that I was agreeably surprised by the Government and by the Minister and his Parliamentary Secretary in particular, because they have accepted a fair number of the amendments I have proposed on behalf of organization representatives, consumers or individuals interested in Bill C-91 who appeared as witnesses before the Committee.

In its final form, Bill C-91 is not perfect, but thanks to the amendments proposed and accepted, I am more convinced now that this legislation is superior to the existing one. Therefore, I strongly believe that we would act irresponsibly if, as Members of this House, we did not take this opportunity to approve this Bill and give Canada and Canadians a legal frameworks in the area of competition. That is why, as Members of the Opposition, contrary to what happened in the past, we are willing to help the Government and cooperate with it to expedite the adoption of this Bill.

My position is especially important because, throughout the consideration of this Bill, one of my greatest concerns was to ensure that the interests of small and medium size businesses, and above all those of Canadians consumers would be taken into account. Mr. Speaker, my extensive political experience, especially as Minister, former Minister of Consumer and Corporate Affairs, have convinced me that the current Minister of Consumer and Corporate Affairs (Mr. Côté) must have received additional representations from pressure groups, first of all on the Bill, and then during the study in Committee which saw the Bill being amended a number of times to reinforce its provisions.

I must state for the record that I am pleased with the attitude taken by the Minister of Consumer and Corporate Affairs. I want to congratulate him for standing up, and I want to tell the Minister to keep up the good works. I wish the Minister will not worry too much if he is assailed by people who are dissatisfied with the Bill, and indeed that he will not backtrack under pressures from some important pressure groups in Canada that might be a little disappointed at the passing of Bill C-91.

Especially, I ask the Minister not to backtrack because the legislation that will go through this House now will be sent to the Senate. This will be the last opportunity for large pressure groups to try and minimize the impact of the Act, and I hope the Minister will resist those last minute pressures.

• (1700)

To conclude, I would like to use my last remaining seconds to mention the most valuable help provided to me by some people. I would like to thank especially Mr. Mel Cappe, from Consumers and Corporate Affairs, who has been available, very open and very cooperative throughout the discussion of the Bill.

I would also like to thank Professor Stanbury, from the University of British Columbia, who for a number of years has been a leader in the analysis of this legislation in the academic community and who has inspired our work in Committee.

I would also like to thank Solicitor Gordon Kaiser, whose very important and worthwhile evidence has helped me in the consideration and preparation of the amendments to the Bill.

I must also mention the evidence given by Mr. Daniel Martin Bellemare, who is from the school of that great promoter of American consumers' rights, Ralph Nader, and brought to the Committee a refreshing point of view.

I also wish to thank Mr. Larry Wilson, who agree to give evidence and express the views of a member of a Commission responsible for examining the Competition Act and occasionally ruling on it.

I would have liked the Chairman or other senior members of the Restrictive Trade Practices Commission to give evidence on behalf of the Commission. Apparently this was impossible for a number of reasons, but, at any rate, I am grateful for the thrust and the quality of Mr. Wilson's evidence.

Finally I would like to say that as a Member I was asked on very short notice to replace my colleague from Saint-Michel—Ahuntsic (Mrs. Killens) who would have looked after this matter. I also got her assistant, Mr. Maurice Gingues, who works for the Member for Saint-Michel—Ahuntsic and who did not spare any effort to help me do my job. Mr. Gingues did not work with newspaper clippings as is often done, he did serious research and I must say he was of great help to me in drafting the amendments I introduced in committee.

I also want to thank Miss Carolyn Green of the Liberal Party research office who made an outstanding comparison between this Bill C-91 and previous Bills introduced by the Liberal Party on various occasions. This background work gave us a much better idea of Bill C-91.

It is rather interesting to note that, in many respects, the Bill we are about to adopt is much like the Bill our colleague Mr. Basford had introduced in the late 60s. Indeed I might sum up the main elements of that Bill, Bill C-256, which at the time met with strong opposition from business circles. What was this famous Bill all about? First, the transfer of offences related to monopolies and mergers from criminal to civil courts; second, the creation of a new tribunal empowered to prevent mergers and certain domineering practices of major companies; third, the registration of domestic mergers involving sales of more than $5 million at that time; fourth, provisions allowing exemptions for companies operating outside Canada and others which wanted to specialize their products on the domestic market; fifth, criteria related to the proceedings and the decision-making process of the Tribunal which would have been authorized to issue rulings before mergers or other potentially anti-competitive practices actually took place.

Those are some of the elements of Bill C-256 which I am glad to see today in Bill C-91, and others which 15 years later can still be described as being ahead of their time. Mr. Speaker, if over the years the Liberal Government was unable to pass legislation in the field of competition as it wanted to, it may be that at the time the Opposition was not quite as co-operative as we are prepared to be today. I am delighted about this historic moment when we will finally have competition legislation which deals with mergers, and particularly with the anti-competitive behaviour and practices of certain major companies, which have cornered the Canadian market.

I commend the Minister for his flexibility, I thank him for accepting several of the amendments introduced by the Liberal Party, and I can assure you that we will vote in favour of this legislation which, I believe, will serve the interests of the Canadian public, the Canadian consumers, small and medium-size businesses, in a word, in the best interests of the whole country.

● (1710)

[*English*]

Mr. David Orlikow (Winnipeg North): Mr. Speaker, when this Bill was brought forward it was given very lukewarm support by a number of organizations and individuals. After studying it they came to the conclusion that it was better than nothing and the law which had been in place for a number of years was really worth virtually nothing. When those organizations and individuals first looked at the Bill they said it was so bad they could not support it as it was then. Among those organizations were the Petroleum Marketers' Association, representing small business people in the petroleum business, and Professor Irving Brecher, a career student of competition law. However, as we heard testimony from witnesses appearing before the committee, particularly those putting forward the views of small business, there were some amendments which persuaded some groups to support the Bill even though they were not satisfied. We tried to support those groups by moving amendments which were proposed by the Consumers' Association, by Professor Stanbury, by the independent petroleum marketers, but unfortunately most of the amendments which we put forth on their behalf were turned down.

We were not surprised about that because the history of competition reform in Canada is, to say the least, a sad one. This Bill is the fifth attempt to get a Bill. The first four attempts were made by the former Liberal Government. Not one of them got to the House, not one of them was passed. The reason this happened was the powerful business and financial interests who have the most say—in fact some people would argue, with a good deal of merit, that they have more power and more decision-making say about what happens in this country than the Parliament of Canada.

We are not surprised that this Bill does not do as much as it should because we know that while the Conservative Party, before it became the Government, promised that it would consult very widely, in fact, when it came to this Bill the Minister's real consultations took place only with the Big Five; the Business Council on National Issues, the Canadian Chamber of Commerce, the Canadian Manufacturers' Association, the Grocery Products Manufacturers' Association and the Canadian Bar Association. What they wanted was essentially incorporated in this Bill. The proof of that is the fact that they really did not oppose this Bill as they had the other four Bills.

When we knew the Government intended to bring forth a Bill, we tried to persuade the Minister to have real consultation. We sent him a list of organizations with which he should consult. We sent him a list of seven academics who had done major studies of competition programs and competition policies and what was needed to be in the competition Bill. Their views were not really considered. They were not incorporated into this Bill. Any Member who disagrees merely needs to look at the record of the committee hearings.

The biggest missing factor, one which is of the utmost importance, is the question of conglomerates and mergers. These have been taking place at an accelerated rate. The Government, as far as I can see, has no intention to deal with this, despite the fact that there is no evidence that the mergers which have taken place add anything to the productivity of this country, add anything to new forms of production or add anything to increased employment. I say to the Government that we are bitterly disappointed with this Bill.

PUBLIC

The Acting Speaker (Mr. Paproski): It is the pleasure of the House to adopt the motion?

Some Hon. Members: Agreed.

Motion agreed to and Bill read the third time and passed.

PRIVATE MEMBERS' BUSINESS—MOTIONS

[*Translation*]

REGIONAL INDUSTRIAL DEVELOPMENT

SUGGESTED GOVERNMENT INTERVENTION IN INDUSTRIAL DECLINE OF EAST MONTREAL

Mr. Jean-Claude Malépart (Montreal—Sainte-Marie) moved: That, in the opinion of this House, the Government should consider the advisability of intervening in the matter of the industrial decline of the eastern sector of Montreal by designating the said area (Zone 4), and by granting contracts to Versatile-Vickers, Bombardier, C.S.W. and other endangered industries.

He said: As you have just mentioned, Mr. Speaker, this is a positive, not a negative motion. It invites all the Members of this House to ask the Government to help the people of Eastern Montreal who, for various reasons, have been affected by industrial closures.

First, I would like to give some background of the events in Eastern Montreal. Following the announcement of the closure of the Gulf refinery, of Bombardier, of the Vickers shipyards, of Canadian Steel Wheel, of Canadian Foundry, of SKD and of Daoust, and at the request of the Bombardier people and my colleague for Papineau (Mr. Ouellet), certain Liberal Members, including the Hon. Member for Saint-Denis (Mr. Prud'homme) and the Hon. Member for Mount Royal (Mrs. Finestone), accepted to support the Bombardier workers in their representations to the Government to obtain contracts and avoid the closure of their plant.

Being a responsible opposition and at the request of my colleagues, we indicated to the Bombardier employees and all the other workers that, to avoid their efforts being viewed only as a protest, a Survival Committee for Eastern Montreal should be established to oppose the closure of these seven plants and the loss of 5,000 direct and indirect jobs. This Survival Committee was created eight months ago. It has had seven meetings. Last week, at its seventh meeting, we looked at the economic situation in Eastern Montreal. I would like to note that the members of the Survival Committee are mostly workers, representatives of the employees of these industries, citizens, representatives of the industrial community, representatives of the commercial association of Sidac Masson, and Eastern Montreal politicians at the municipal, federal and provincial levels.

I would like to take this opportunity to congratulate the representatives of the workers, such as Mr. Chouinard, Mr. Baril from the Gulf refinery, Mr. Beaubien from Vickers and Mr. Dugas who represented the workers of Bombardier, Canadian Steel Wheel and Canadian Foundry. Thanks to the work and efforts not only of the Survival Committee, but most important, of the employees and employers of these industries, we were able to avoid the closure of Bombardier. Instead of 450 jobs, there are now 650 at Bombardier, and the possibility of 100 more.

At Canadian Steel Wheel, there are still 200 jobs, and at Canadian Foundry, 100. This last industry is threatened. I have some solutions to propose.

Unfortunately, as concerns Versatile-Vickers, as of last week, 300 employees had lost their jobs in the space of three weeks, and the union president told me that, by July, the other 350 jobs would have disappeared if the Government did not take action to provide shipbuilding contracts for the company.

As concerns the Gulf refinery, Mr. Speaker, I want to congratulate some of the Conservative Members for their efforts, but unfortunately, the refinery is now closed. The whole country saw what happened. We even saw a Minister resign because of the decision of the Government, and another Conservative Member of Parliament has recently decided to resign and sit as an independant.

Mr. Speaker, I would like to congratulate the Hon. Member for Rosemont (Mrs. Blais-Grenier) and the Hon. Member for Terrebonne (Mr. Toupin) on their dedication to the cause of helping the people of Montreal East.

Mr. Speaker, in looking back, if there had been no intervention by anyone at all in the case of Montreal East, we would have lost 2,370 jobs outright. We have been able to save or prevent the loss of 1,500 jobs which are still there today.

• (1720)

Regarding the matter of the Gulf refinery, Mr. Speaker, we owe a special word of thanks to the Government of Quebec and its Minister of Natural Resources (Mr. Caccia) who, immediately after the federal Government's negative reaction, was alone in taking a positive stance and making representations to management, and at this very moment, there is a possibility of preventing the loss, of saving 100 jobs, and further negotiations are going on to save another 150 jobs.

Mr. Speaker, that is the situation today. In my speech this afternoon, I am speaking on behalf of the citizens of Montreal East, of several Members and municipal councillors from Montreal East and of the Liberal caucus—I am reminded of this by my hon. friend from Saint-Denis (Mr. Prud'homme). I must say that at our last meeting, everyone agreed that as far as Montreal East was concerned, the federal Government had failed.

This is Exhibit “23” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

First Session
Thirty-third Parliament, 1984-85-86

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Banking, Trade and Commerce

Chairman:
The Honourable LOWELL MURRAY

Wednesday, June 11, 1986

Issue No. 50

First Proceedings on:

Bill C-91, "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof"

APPEARING

The Honourable Michel Côté, P.C., M.P., Minister of Consumer and Corporate Affairs

WITNESSES:
(See back cover)

Première session de la
trente-troisième législature, 1984-1985-1986

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Banques et du commerce

Président:
L'honorable LOWELL MURRAY

Le mercredi 11 juin 1986

Fascicule nº 50

Premier fascicule concernant:

Projet de loi C-91, «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois»

COMPARAÎT

L'honorable Michel Côté, c.p., député, ministre de la Consommation et des Corporations

TÉMOINS:
(Voir à l'endos)

28446—1

STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Lowell Murray, *Chairman*
The Honourable Ian Sinclair, Q.C., *Deputy Chairman*

The Honourable Senators:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (or Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (or Doody)
Kelly	Sinclair
Kirby	Walker

**Ex Officio Members*

(Quorum 4)

COMITÉ SÉNATORIAL PERMANENT DES BANQUES ET DU COMMERCE

Président: L'honorable Lowell Murray
Vice-président: L'honorable Ian Sinclair, c.r.

Les honorables sénateurs:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (ou Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (ou Doody)
Kelly	Sinclair
Kirby	Walker

**Membres d'office*

(Quorum 4)

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ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate, Wednesday, June 11, 1986:

"Pursuant to the Order of the Day, the Honourable Senator MacDonald (*Halifax*) moved second by the Honourable Senator Barootes, that the Bill C-91, intituled "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator MacDonald (*Halifax*) moved seconded by the Honourable Senator Barootes, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce."

The question being put on the motion, it was—
Resolved in the affirmative."

ORDRE DE RENVOI

Extrait des Procès-verbaux du Sénat du mercredi 11 juin 1986:

«Suivant l'Ordre du jour, l'honorable sénateur MacDonald (*Halifax*) propose, appuyé par l'honorable sénateur Barootes, que le Projet de loi C-91, intitule: «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois», soit lu la deuxième fois.

Après débat,
La motion, mise aux voix, est adoptée.

Le projet de loi est alors lu la deuxième fois.

L'honorable sénateur MacDonald (*Halifax*), propose, appuyé par l'honorable sénateur Barootes, que le projet de loi soit déféré au Comité sénatorial permanent des banques et du commerce.

La motion, mise aux voix, est adoptée.»

Le greffier du Sénat
Charles A. Lussier
Clerk of the Senate

MINUTES OF PROCEEDINGS

WEDNESDAY, JUNE 11, 1986
(64)

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce met at 3:30 p.m. this day, the Chairman, the Honourable Senator Lowell Murray, presiding.

Members of the Committee present: The Honourable Senators Anderson, Barrow, Flynn, Godfrey, MacDonald (*Halifax*), Murray and Sinclair. (7)

Other Senators present: The Honourable Senators McElman and Molson.

In attendance: From the Library of Parliament, Research Branch, Economics Division: Mr. Basil Zafiriou, Acting Chief.

Also in attendance: The Official Reporters of the Senate.

Appearing: The Honourable Michel Côté, Minister of Consumer and Corporate Affairs.

Witnesses:

From the Department of Consumer and Corporate Affairs:

Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination;

Mr. Morris Rosenberg, Director, Legal Branch;

Mr. Julien Béliveau, Chief of Staff.

The Committee in compliance with the Order of Reference dated June 11, 1986, proceeded to consider the Bill C-91, intituled: "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof".

The Minister made a statement and answered questions in collaboration with the other witnesses.

At 4:18 p.m. the Committee proceeded *in camera*.

The Honourable Senator MacDonald (*Halifax*) moved that the above-mentioned Bill be reported without amendment, but with observations, as the Seventeenth Report of the Committee and that pursuant to Rule 78(1), the Report be tabled in the Senate.

The question being put on the motion, it was—
Resolved in the affirmative.

At 4:43 p.m., the Committee adjourned to the call of the Chair.

ATTEST:

PROCÈS-VERBAL

LE MERCREDI 11 JUIN 1986
(64)

[*Traduction*]

Le Comité sénatorial permanent des banques et du commerce se réunit aujourd'hui à 15 h 30 sous la présidence de l'honorable sénateur Lowell Murray (président).

Membres du Comité présents: Les honorables sénateurs Anderson, Barrow, Flynn, Godfrey, MacDonald (*Halifax*), Murray et Sinclair. (7)

Autres sénateurs présents: Les honorables sénateurs McElman et Molson.

Aussi présent: De la Bibliothèque du Parlement, Service de recherche, Division de l'économie: M. Basil Zafiriou, chef.

Aussi présents: Les sténographes officiels du Sénat.

Comparaît: L'honorable Michel Côté, ministre de la Consommation et des Corporations.

Témoins:

Du ministère de la Consommation et des Corporations:

M. M. S. Cappe, sous-ministre adjoint, bureau de la coordination des politiques;

Me Morris Rosenberg, directeur, contentieux;

M. Julien Béliveau, chef de cabinet.

Conformément à son ordre de renvoi du 11 juin 1986, le Comité poursuit l'examen du projet de loi C-91: «Loi constituant le tribunal de la concurrence et modifiant la Loi relative aux enquêtes et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois».

Le ministre fait une déclaration et répond aux questions avec les autres témoins.

A 16 h 18, le Comité poursuit ses délibérations à huis clos.

L'honorable sénateur MacDonald (*Halifax*) propose que le Comité fasse rapport du projet de loi sans modification mais avec des observations, et que conformément au l'article 78(1) du Règlement, le dix-septième rapport soit déposé au Sénat.

La motion, mise aux voix, est acceptée.

A 16 h 43, le Comité suspend jusqu'à nouvelle convocation du président.

ATTESTÉ:

Le greffier du Comité
Timothy Ross Wilson
Clerk of the Committee

EVIDENCE

Ottawa, Wednesday, June 11, 1986

[*Text*]

The Standing Senate Committee on Banking, Trade and Commerce met this day at 3:30 p.m. to give consideration to the subject-matter of Bill C-91, "Competition Tribunal Act".

Senator Lowell Murray (*Chairman*) in the Chair.

The Chairman: Le comité est saisi du projet de Loi C-91 sur la concurrence. Up until a few moments ago, this bill was before the committee in the form of a prestudy. However, the minister and his officials will be, I trust, gratified to know that a few moments ago the persuasive powers of Senator MacDonald (Halifax) prevailed in the Senate. The bill receiving second reading in our chamber and is now formally before us.

Our principal witness today is le Ministre de la Consommation et des Corporations l'Honorable Michel Côté, député de la circonscription de Langelier depuis 1984. The minister is accompanied by M. Julien Béliveau, Chief of Staff; Mr. Morris Rosenberg, Director of the Legal Branch, Department of Consumer and Corporate Affairs; and Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination, Department of Consumer and Corporation Affairs.

Le Ministre fera une brève déclaration, after which I will ask senators to put their questions with regard to this bill. Before proceeding, I might say that when we have heard from the minister and you have completed your questioning, I will ask the committee to continue in camera for the purpose of considering our report on this matter.

Le Ministre de la Consommation et des Corporations.

The Honourable Michel Coté, P.C., M.P., Minister of Consumer and Corporate Affairs: Thank you, Mr. Chairman. I am happy to hear that the bill has received second reading.

I welcome this opportunity to appear before this committee in order to discuss Bill C-91, the proposed Competition Act and Competition Tribunal Act.

Mr. Chairman, I am going to be brief with my remarks and will then welcome any questions the honourable senators may have.

I will outline the highlights of the bill and then will touch on some of the amendments which were adopted in the House of Commons.

Mr. Chairman, this bill takes a balanced approach to competition law reform. This balance was achieved by building on previous legislation and then undertaking extensive consultation with those who would be most affected by a new competition law.

Generally, this new competition law is aimed at enhancing trade, assisting Canadian industry in meeting foreign competition at home and abroad, protecting small business and consumers, placing greater reliance on market forces and the private sector for economic renewal, and strengthening the marketplace as the trend toward deregulation continues.

TÉMOIGNAGES

Ottawa, le mercredi 11 juin 1986

[*Traduction*]

Le Comité sénatorial permanent des banques et du commerce se réunit aujourd'hui à 15 h 30 pour étudier la teneur du projet de loi C-91, «Loi constituant le Tribunal de la concurrence».

Le sénateur Lowell Murray (*président*) occupe le fauteuil.

Le président: The Bill C-91 on competition has been tabled before the Committee. Il y a quelques instants à peine, ce projet de loi était encore à l'étape de l'étude préliminaire. Toutefois, le ministre et ses collaborateurs se réjouiront d'apprendre que les pouvoirs de persuasion du sénateur MacDonald (Halifax) ont prévalu au Sénat. Le projet de loi est maintenant à l'étape de la deuxième lecture au Sénat, et nous en sommes officiellement saisis.

Notre principal témoin aujourd'hui est The Minister of Consumer and Corporate Affairs, the Honourable Michel Côté, member for Langelier since 1984. Le ministre est accompagné de M. Julien Béliveau, chef de cabinet; M. Morris Rosenberg, directeur du Contentieux, ministère de la Consommation et des Corporations et M. M. S. Cappe, sous-ministre adjoint, Bureau de la coordination des politiques, ministère de la Consommation et des Corporations.

The Minister will make some brief remarks, après quoi je demanderai aux sénateurs de poser leurs questions au sujet du projet de loi. Auparavant, lorsque nous aurons entendu le ministre et que vous aurez posé vos questions, je demanderai au comité de poursuivre à huis clos afin d'étudier notre rapport à ce sujet.

The Minister of Consumer and Corporate Affairs.

L'honorable Michel Côté, C.P., député, ministre de la Consommation et des Corporations: Merci, monsieur le président. Je me réjouis d'apprendre que le projet de loi a franchi l'étape de la deuxième lecture.

Je suis heureux de comparaître devant ce comité pour discuter du projet de loi C-91 sur le Tribunal de la concurrence.

Monsieur le président, je ferai un bref exposé, après quoi je répondrai aux questions des honorables sénateurs.

J'aborderai les points les plus importants du projet de loi et ensuite certains des amendements adoptés à la Chambre des communes.

Monsieur le président, ce projet de loi prévoit une réforme pondérée de la Loi sur la concurrence. Cet équilibre a pu être atteint en se basant sur les lois antérieures et ne procédant à des consultations poussées avec les parties qui seront le plus touchées.

Dans l'ensemble, cette nouvelle loi vise à favoriser le commerce, aider l'industrie canadienne à faire face à la concurrence étrangère au Canada et à l'extérieur, protéger la petite entreprise et les consommateurs, faire davantage confiance aux forces du marché et au secteur privé pour assurer la relance

[*Text*]

By helping create such a healthy climate, this law will bring benefits to virtually every sector of our economy. It will benefit small and medium-sized business by providing increased opportunities to participate in the marketplace. Larger enterprises will benefit because of a greater emphasis on efficiency and international competition. And consumers will see a marketplace that yields vastly improved products, prices and services.

Bill C-91 will reform competition law in the following ways:

First, the new competition law will establish a Competition Tribunal to adjudicate noncriminal competition matters. Comprised of judges and lay people with expertise in business, economics and public affairs, the Tribunal will provide an effective means of dealing with complex competition cases in a fair, open and consistent manner. On points of law there will be a full right of appeal to the Federal Court of Appeal.

Second, with respect to mergers and abuse of dominant position, the bill proposes to repeal the existing criminal law provisions, replacing them with civil law provisions. This is because it has become apparent, through experience, that using a criminal venue is not appropriate or particularly effective. With respect to mergers, we are usually dealing with legitimate transactions that might or might not impair healthy competition. We should not be so concerned with imprisonment or fines, but rather with protecting the public interest by establishing rules and enforcing them. With respect to monopolies, the Act as now written can only deal with the most obvious and serious abuses of dominant position. But under civil law, we will be in a far better position to deter abusive practices, while at the same time allowing those who enjoy dominance because of superior performance to continue their success.

Third, the bill will substantially increase the maximum penalty for conspiracy designed to lessen competition. But it will also make the law more flexible in special circumstances that may be in the public interest, such as specialization and export agreements.

Fourth, bank mergers and agreements will be subject to the new law, as will crown corporations which compete with private business.

I would now like to address some of the amendments that were adopted by the Legislative Committee after hearing the representations of witnesses who appeared before them, some of whom also appeared before your committee.

The proposed legislation contains several amendments which serve to strengthen it and make it more effective and enforceable.

For example, the National Association of Tobacco and Confectionery Distributors appeared before you to express the concern that the bill did not provide enough protection against unfair trade practices connected with loss-leader selling. In

[*Traduction*]

économique et renforcer le marché dans un contexte de déréglementation.

En contribuant à créer un climat aussi favorable, cette loi sera bénéfique à presque tous les secteurs de notre économie. Elle aidera les petites et moyennes entreprises en leur assurant de meilleures possibilités de participer aux échanges commerciaux. Les grandes entreprises en tireront également profit en raison de l'accent mis sur le rendement et la concurrence à l'échelle internationale. Les consommateurs trouveront sur le marché des produits considérablement améliorés, à meilleur prix et des services de meilleure qualité.

Le projet de loi C-91 modifie la Loi sur la concurrence à plusieurs égards:

Premièrement, la nouvelle Loi sur la concurrence crée un Tribunal de la concurrence qui sera saisi des questions de concurrence non criminelles. Composé de juges et de juristes spécialisés dans le commerce, les questions économiques et les affaires publiques, le Tribunal pourra régler les questions de concurrence complexes avec équité, souplesse et constance. Pour ce qui est des points de droit, il y aura plein droit d'appel à la Division des appels de la Cour fédérale.

Deuxièmement, en ce qui concerne les fusions et les abus de position dominante, le projet de loi abroge les dispositions actuelles du Code criminel et les remplace par des dispositions de droit civil. Cela résulte du fait qu'on a constaté que le recours au criminel n'est pas approprié ni particulièrement efficace. Quant aux fusions, elles concernent habituellement des transactions légitimes qui pourraient nuire ou ne pas nuire à la concurrence. Notre principale préoccupation ne doit pas porter sur l'emprisonnement ou les amendes, mais sur la protection de l'intérêt public en établissant des règles et en les appliquant. En ce qui concerne les monopoles, la loi dans sa forme actuelle ne régit que les cas les plus graves et les plus évidents d'abus de position dominante. Mais en vertu du droit civil, il sera beaucoup plus facile de déceler les pratiques abusives, tout en permettant à ceux qui occupent une position dominante en raison de leur rendement supérieur de continuer dans cette voie.

Troisièmement, le projet de loi prévoit une peine beaucoup plus lourde en cas de complot en vue de diminuer la concurrence. Par contre, la loi sera plus souple dans des circonstances spéciales impliquant l'intérêt public, par exemple les accords de spécialisation et d'exportation.

Quatrièmement, les fusionnements et accords entre banques seront régis par la nouvelle loi, tout comme les sociétés de la couronne qui font concurrence à l'entreprise privée.

J'aimerais maintenant parler de certains amendements qui ont été adoptés par le comité législatif après qu'il a entendu certains témoins qui ont également comparu devant votre comité.

Le projet de loi contient plusieurs modifications qui visent à renforcer la loi, à la rendre plus efficace et à en faciliter l'application.

Par exemple, les représentants de l'Association nationale des distributeurs de tabac et de la confiserie ont comparu devant vous pour dénoncer le fait que le projet de loi n'assurait pas une protection suffisante contre les pratiques commerciales

[*Text*]

order to eliminate that concern, the law has been amended so that dominant firms cannot use loss-leader selling as a means of disciplining or eliminating competitors.

Two other important amendments have been made in response to concerns expressed in committee by small and medium-sized business. We have deleted the requirement that the "object" of the practice used by a dominant firm was to lessen competition. And we have amended the bill so that a firm can no longer use superior competitive performance as an absolute defence against preventing or lessening competition. Now it is simply one factor to be considered by the Competition Tribunal in rendering a decision on whether competition has been substantially reduced.

The bill has also been amended to lower the threshold for prenotification. Prenotification is now a requirement for proposed transactions involving firms with assets or sales in excess of $400 million. This new prenotification threshold allows the monitoring of large transactions to ensure effective enforcement of the law, and at the same time avoids undue paper burden for the small and medium-sized business sectors.

Another important amendment has been made, Mr. Chairman, to provide deterrence of attempts to reduce competition by way of conspiracy. The fine for conspiracy has been raised to $10 million, compared with only $1 million as provided in the present Combines Investigation Act. This amendment has been made to convey a clear signal to the courts that Parliament takes such offences very seriously indeed, and considers them contrary to the spirit that should prevail in a healthy, competitive economy.

As you know, the government is committed to putting the merger provisions into effect just as soon as Bill C-91 receives Royal Assent. We want to do so in order to get on with the job of working toward a revitalized and competitive marketplace.

A recent letter I received from the Canadian Manufacturers' Association states,

> The 17-year debate should be brought to an early conclusion. We therefore urge you and your colleagues in Parliament to ensure passage of C-91 quickly.

I, too, Mr. Chairman, would like to stress the importance of getting Bill C-91 written into law without further delay.

Mr. Chairman, I would be happy to answer any questions that honourable senators may have.

The Chairman: Thank you, Mr. Minister. As you are aware, we have heard from six important witnesses, in addition to members of your own department. We have also received numerous representations on this bill. Senators will no doubt have a number of questions which they will want to put to you. We will begin with Senator Godfrey, followed by Senator Barrow.

[*Traduction*]

déloyales, notamment la vente à perte. Pour remédier à cette situation, la loi a été modifiée de manière que les entreprises occupant une position dominante ne puissent avoir recours à cette pratique pour nuire à leurs concurrents ou les éliminer.

Deux autres modifications importantes donnent suite aux préoccupations exprimées en comité par des petites et moyennes entrepises. Nous avons supprimé les dispositions prévoyant qu'une pratique employée par une entreprise occupant une position dominante doit avoir pour «objet» d'amoindrir la concurrence, et nous avons modifié le projet de loi de manière qu'une entreprise ne puisse plus utiliser le rendement concurrentiel supérieur comme défense absolue contre l'empêchement ou l'amoindrissement de la concurrence. Il s'agira dorénavant simplement d'un facteur dont devra tenir compte le Tribunal de la concurrence avant de décider si la concurrence a été sensiblement amoindrie.

On a également amendé le projet de loi afin d'abaisser le seuil en cas préavis. Le préavis est obligatoire pour les projets de transaction concernant des entreprises qui ont des avoirs ou des ventes de plus de 400 millions de dollars. Cette nouvelle exigence permettra de contrôler les transactions importantes de manière à assurer le respect de la loi tout en évitant une paperasse excessive pour les petites et moyennes entreprises.

Il y a également, monsieur le président, un autre amendement qui vise à empêcher les complots visant à diminuer la concurrence. L'amende en cas de complot, qui est actuellement et 1 million de dollars en vertu de la Loi relative aux enquêtes sur les coalitions, est portée à 10 millions. Cette mesure vise à faire en sorte que les tribunaux sachent bien que le Parlement considère ce genre d'infraction comme très grave et contraire à l'esprit qui doit prévaloir dans une économie saine et concurrentielle.

Comme vous le savez, le gouvernement s'est engagé à appliquer les dispositions concernant les fusions dès que le projet de loi C-91 aura reçu la sanction royale. Nous voulons le faire afin de commencer au plus tôt à revitaliser le marché et à le rendre plus concurrentiel.

Dans une lettre qu'elle m'a envoyée récemment, l'Association des manufacturiers canadiens déclare:

> Il faut mettre un terme à ce débat vieux de 17 ans. C'est pourquoi nous vous demandons, à vous et à vos collègues du Parlement, de faire en sorte que le projet de loi C-91 soit rapidement adopté.

Je tiens également, monsieur le président, à souligner qu'il est important que le projet de loi C-91 ait force de foi dans les plus brefs délais.

Monsieur le président, je serais heureux de répondre aux questions des honorables sénateurs.

Le président: Merci, monsieur le ministre. Comme vous le savez, nous avons entendu six importants témoins, en plus de vos collaborateurs. Nous avons également reçu de nombreux mémoires au sujet de ce projet de loi. Les sénateurs ont certainement des questions à vous poser. D'abord le sénateur Godfrey, suivi du sénateur Barrow.

[*Text*]

Senator Godfrey: I suppose one of the most important words in the bill is the word "substantially". I have no problem with that word whatsoever. However, we did have counsel appear before us, and he took the trouble to look up that word in the dictionary. The word "substantial" means not just what I think it means—which is the ordinary meaning of "substantial"—but also means anything that is perceptible. He said that he was worried that if you combined one of the definitions of "substantial" in the english dictionary with the French text, it could be argued that the word "sensiblement" means perceptible or noticeable. That is one of the definitions of "substantial", although not the ordinary definition. Because this is very important, it worries me that counsel may appear before the Supreme Court of Canada and say that equal weight has to be given to the French text. There was another word, which he referred to previously, which meant something more like "substantial". I have forgotten what it is.

The Chairman: Substantiellement.

Senator Godfrey: I would like your comments as to why you used this word in the French text rather than the word "substantial".

Mr. Coté: First, let me say that the word "substantially" was used to death in the Act.

Secondly, other countries, such as the United States and Australia, are using that word in their legislation.

On the French side of it, the word "sensiblement" has the closest meaning to the word "substantially". That is the closest translation we could find to be comparable to the word "substantially".

Senator Godfrey: My question is this: Do you agree with counsel who appeared before us who said that "sensiblement" means "perceptible" or "noticeable" and not really "substantial". Is that the technical French definition of the word? He said that you did use the word "substantiellement" previously. Is he right or wrong?

Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination, Department of Consumer and Corporate Affairs: Mr. Chairman, we also have done a dictionary search. The word "substantially" is used in the existing Combines Investigation Act, and it is translated by both words. In one place, the word "sensiblement" is used, and in another place the word "substantiellement" is used. I am sure we could ask a number of scholars to come here to argue the benefits or merits of those two words.

I believe you are right, Senator Godfrey, that it will go to litigation in the end; there is no doubt about that. However, one has to recognize that if there is a dispute with regard to the interpretation of the two words, the benefit will go to the respondent. If the threshold of the word "sensiblement" were interpreted to be lower, and we do not think it would be, then the benefit of the English would accrue to the parties who were being challanged.

Senator Godfrey: If there are two definitions of the English word and one would bring it down, then it would go to the benefit of the Crown because they say it has to be perceptible or

[*Traduction*]

Le sénateur Godfrey: Je suppose qu'un des termes les plus importants du projet de loi est le mot «substantially» (sensiblement). Je n'y vois aucune difficulté. Toutefois, un conseiller qui a comparu devant nous en a vérifié le sens dans le dictionnaire. Le terme «substantial» a non seulement le sens auquel je pense, c'est-à-dire son sens courant, mais il a aussi le sens d'appréciable. Il a dit qu'il craignait que si on combinait une des définitions de «substantially» du dictionnaire anglais avec le texte français, certains pourraient soutenir que le terme «sensiblement» a aussi le sens de appréciable ou évident. C'est une des définitions de «substantial» mais ce n'est pas son sens courant. Étant donné que ce terme est important, je crains que des conseillers ne soutiennent devant la Cour suprême du Canada qu'il faut accorder une importance égale au texte français. Il a également fait référence à un autre terme qui sonnait davantage comme «substantial», mais je l'ai oublié.

Le président: Substantiellement.

Le sénateur Godfrey: J'aimerais savoir pourquoi vous avez employé ce terme dans le texte français plutôt que le terme substantiel.

M. Côté: D'abord, je dois vous dire que le terme «sensiblement» est employé d'innombrables fois dans la loi.

Deuxièmement, c'est le terme qui figure dans les lois de certains autres pays comme les États-Unis et l'Australie.

En ce qui concerne le texte français, le terme «sensiblement», est celui dont le sens se rapproche le plus de «substantially». C'est la traduction la plus fidèle que nous ayons pu trouver pour «substantially».

Le sénateur Godfrey: Ma question est la suivante: Êtes-vous d'accord avec le conseiller qui a comparu devant nous et qui a dit que «sensiblement» a le sens de «appréciable» ou «évident» et pas vraiment le sens de «substantiel». Est-ce la définition du terme en français? Il a dit que vous avez déjà utilisé le terme «substantiellement». Est-ce vrai ou faux?

M. M. S. Cappe, sous-ministre adjoint, Bureau de la coordination des politiques, ministère de la Consommation et des Corporations: Monsieur le président, nous avons également effectué des recherches dans le dictionnaire. Le terme «substantially» figure dans l'actuelle loi relative aux enquêtes sur les coalitions et il est traduit par les deux mots. A un endroit, on trouve le terme «sensiblement» et ailleurs le terme «substantiellement». Nous pourrions certainement demander à des lettrés de venir nous entretenir des significations de ces termes.

Je pense que vous avez raison, sénateur Godfrey, la question ira en litige en fin de compte; cela ne fait aucun doute. Toutefois, on doit reconnaître que s'il y a un différend quant à l'interprétation des deux termes, l'avantage ira au défendeur. Si le seuil du mot «sensiblement» est interprété comme étant inférieur—mais je ne pense pas qu'il le serait—alors l'avantage de l'anglais irait aux parties contestées.

Le sénateur Godfrey: S'il y a deux définitions du mot anglais et que l'une rabaisse ce seuil, alors l'avantage irait à la Couronne, car on dit qu'il faut qu'il y ait réduction perceptible

[*Text*]

noticeable in the amount of lessening of competition. I do not think that is the intention.

Mr. Cappe: That is right. In the dictionary searches, we found a quantitative measure implicit in the notion of the word "substantially". The word "sensiblement" imports a comparable sense of quantity, so it is not just a noticeable or perceptible difference.

Mr. Coté: The word "substantiellement" is not necessarily the equivalent of the word "substantially".

Senator Godfrey: Fine. I am not a French scholar.

Mr. Coté: Neither am I.

Senator Godfrey: We had a complaint from one of the witnesses with regard to clause 14. Clause 14 would authorize persons with a search warrant to use any computer system. The clause also provides that a party whose premises are being searched can apply for a court order limiting the conduct of the computer search. There is no provision, however, requiring suspension of the search while an order is being sought. They may raid the premises on Friday and not get an order until Monday morning, so it may take a while. What is your comment with regard to that.

Mr. Cappe: Mr. Chairman, the provision allows for the judge who issues the warrant in the first instance to put terms and conditions on the warrant so that he, in the first instance, can limit the exercise of the warrant.

When a party goes back to that judge, or a judge of the same court, to get further conditions put on, clearly that judge has the jurisdiction to amend his initial warrant. Therefore, we believe that that power is effectively already there. If a judge chose to stop the director from proceeding, he could do so.

The other factor to consider, though, is that as a practice, it is done already. When counsel notifies us that they are going to proceed against us to challenge the warrant, frequently there will be an accord reached between counsel for the director and counsel for the person being searched. A reasonable solution prevails in all those circumstances.

The important point is that the judge, at first instance, can place conditions. Furthermore, on reapplication by the respondent, if you like, the judge can also issue a ban or an order to cease.

Senator Godfrey: The Canadian Bankers' Association argues that under the definition of "merger" in the Act, the acquisition by a banker of security for a loan could constitute an actual merger. What is your reaction to that?

Mr. Cappe: The purpose of that section is to merely cover acquisitions. When an acquisition is subject to the law, it does not mean it is subject to an order. It will not stop banks foreclosing on defaulted mortgages or loans but, rather, it says that those things qualify as mergers. In circumstances where a bank does acquire a real corporation and may foreclose on a number of corporations in a particular sector, we think there should be an opportunity, in the most egregious circumstances, for the Tribunal to be able to deal with the matter.

[*Traduction*]

ou notable de la concurrence. Je ne pense pas que ce soit l'objet visé.

M. Cappe: C'est juste. D'après les recherches que nous avons faites dans les dictionnaires, le mot «substantially» comporte un aspect quantitatif. Le terme «sensiblement» véhicule aussi une notion de quantité; il ne signifie pas seulement notable ou perceptible.

M. Côté: Le mot «substantiellement» n'est pas nécessairement l'équivalent de «substantially».

Le sénateur Godfrey: Bien. Je ne suis pas un lettré français.

M. Côté: Ni moi.

Le sénateur Godfrey: Un des témoins a formulé une plainte concernant l'article 14. Celui-ci autorise des personnes ayant un mandat de perquisition à utiliser tout ordinateur se trouvant dans les locaux. Il stipule aussi qu'une personne dont les locaux font l'objet d'une perquisition peut demander au juge de rendre une ordonnance limitant l'usage de l'ordinateur. Toutefois, rien n'exige que la perquisition soit suspendue tant que l'ordonnance n'a pas été rendue. Il pourrait arriver qu'on perquisitionne des locaux un vendredi et qu'une ordonnance ne soit rendue que le lundi matin. Quelles sont vos observations à ce sujet?

M. Cappe: Monsieur le président, la disposition prévoit que le juge établira d'abord les conditions du mandat; donc, il peut en premier lieu en limiter l'utilisation.

Si une partie retourne devant le juge ou un juge du même tribunal pour qu'il établisse d'autres conditions, il est clair que ce juge a compétence pour modifier le mandat initial. En conséquence, nous estimons que ce pouvoir est déjà prévu. Si un juge voulait empêcher le directeur de procéder, il pourrait le faire.

L'autre facteur à considérer, toutefois, c'est que dans la pratique, on le fait déjà. Lorsque l'avocat nous avise qu'on va contester le mandat, il arrive fréquemment qu'un accord soit conclu entre l'avocat du directeur et celui de la personne dont les locaux sont perquisitionnés. Dans tous ces cas, une solution raisonnable est adoptée.

L'important, c'est que le juge peut en premier lieu imposer des conditions. En outre, si le défendeur revient à la charge, si vous voulez, le juge peut aussi prononcer une interdiction ou rendre une ordonnance de cessation.

Le sénateur Godfrey: L'Association des banquiers canadiens soutient que d'après la définition de «fusion» figurant dans la loi, l'acquisition, par un banquier, de garanties de prêts pourrait constituer une fusion. Qu'en pensez-vous?

M. Cappe: Cet article ne vise que les acquisitions. Lorsqu'une acquisition est assujettie à la loi, cela ne signifie pas qu'elle soit assujettie à une ordonnance. Cette disposition n'empêchera pas les banques de procéder à des saisies pour défaut de remboursement d'un prêt ou d'une hypothèque; elle dit qu'il peut s'agir de fusion. Si une banque acquiert une société immobilière, il se peut qu'elle saisisse un certain nombre de sociétés d'un secteur particulier et nous pensons que dans les cas limites, le tribunal doit pouvoir agir.

[*Text*]

Under the Bank Act, I believe, they have to divest within two years. However, not all loans come from banks and not all foreclosures are made by banks. Therefore, it is appropriate, in the circumstances, to allow the Tribunal to have jurisdiction. Having jurisdiction does not mean they will stop all those foreclosures.

Senator Godfrey: Witnesses on behalf of Stelco Corporation Inc. appeared before us. They argued that the exception provisions in the "merger" section should be expanded to permit corporations to establish jointly a new business they called a forward merger in an area where none of the participating corporations were already substantially engaged. That sounds sensible. They cited what had happened in the past, that there had been a joint venture with Dofasco, and that they might want to do the same thing again. Do you have a comment about that concern?

Mr. Cappe: Again, the question is one of jurisdiction and not orders. We are not saying that the Tribunal would, in every circumstance, stop such an order, but rather, where two corporations were to combine in such a joint venture—

Senator Godfrey: This is for a completely new business.

Mr. Cappe: A new business, I agree. The Tribunal should be able to assess whether competition is lessened as a result. One can conceive of situations where two corporations are about to integrate forward or downstream or upstream into producing a new business that they were not in at that time, each doing it separately, and instead they say, "Why do we have to get into this business and compete with each other? Why don't we just get together and form one new company and do it together."

Again, that does not necessarily lessen competition. In the example of Bayco that Stelco referred to, that is a good example of competition not being lessened as a result. On the other hand, one could conceive of situations where competition could be lessened. The only question at hand is whether the Competition Tribunal should have jurisdiction over those forward mergers. In the interest of fairness, this is a general law of general application and those acquisitions or those new businesses, if you like, should be subject to the law.

Senator Godfrey: The witnesses on behalf of Stelco also argued that cabinet should have the power to be exempt from the review of certain transactions deemed to be of significant benefit to Canada; A similar proposal was also strongly endorced by the CBA. What are your comments on that?

Mr. Coté: That would probably cause prejudice to the justice system. As you know, the Tribunal will be composed of judges and lay members. It is not the philosophy of this government to allow cabinet to override a decision after a matter has been examined and judged by judges.

Senator Godfrey: I think the witnesses said that this would be before it is considered by the Tribunal, and it might be in the national interest. Therefore, they should at least have the power, in certain circumstances. They were very explicit that it should not be used as an override.

[*Traduction*]

Aux termes de la Loi sur les banques, il faut s'en départir avant deux ans. Toutefois, tous les prêts ne sont pas consentis par des banques et toutes les saisies ne sont pas le fait de banques. En conséquence, il est opportun dans les circonstances de permettre au tribunal d'intervenir. S'il a compétence pour ce faire, cela ne veut pas dire qu'il empêchera toutes les saisies.

Le sénateur Godfrey: Des représentants de la société Stelco ont comparu devant nous. Ils soutenaient que les dispositions d'exception prévues à l'article des fusions devraient être élargies pour permettre à des sociétés de créer conjointement une nouvelle entreprise dans un domaine où aucune elles n'exerçait déjà une activité appréciable. Cela me semble sensé. Ils ont dit ce qui était déjà arrivé, que Dofasco avait créé une coentreprise et pourrait vouloir le refaire. Avez-vous une observation au sujet de cette préoccupation?

M. Cappe: Encore une fois, c'est une question de compétence et non d'ordonnance. Nous ne prétendons pas que le tribunal empêcherait dans tous les cas une telle ordonnance, mais plutôt que si deux sociétés doivent s'unir dans une coentreprise . . .

Le sénateur Godfrey: On parle d'une entreprise complèment nouvelle.

M. Cappe: Une nouvelle entreprise, je suis d'accord. Le tribunal devrait pouvoir déterminer si la concurrence s'en trouve réduite. On peut concevoir des cas où deux sociétés sur le point de procéder à une intégration à terme, en aval ou en amont, pour créer une nouvelle entreprise dans un secteur où elles n'exerçaient pas d'activité auparavant, chacune faisant ses affaires de son côté, décideraient finalement de former une nouvelle société au lieu de se concurrencer.

Encore une fois, cela ne réduit pas nécessairement la concurrence. Le cas Bayco mentionné par la Stelco est un bon exemple de situation où la concurrence ne s'en est pas trouvée diminuée. Par ailleurs, on peut concevoir des cas où elle le serait. Il s'agit simplement de savoir si le Tribunal de la concurrence doit avoir compétence sur les fusions à terme. Dans l'intérêt de la justice, c'est une loi générale d'application générale et ces acquisitions ou nouvelles entreprises, si vous voulez, doivent être assujetties à la loi.

Le sénateur Godfrey: Les témoins de la Stelco ont également fait valoir que le cabinet devrait avoir le pouvoir d'exempter d'un examen certaines transactions réputées être sensiblement avantageuses pour le Canada; une proposition semblable avait été préconisée par l'ABC. Quelles sont vos observations à ce sujet?

M. Côté: Ce serait probablement sensible au système judiciaire. Comme vous le savez, le tribunal sera composé de juges et de profanes. Le gouvernement n'a pas pour principe de permettre au cabinet d'intervenir après qu'une affaire a été entendue et réglée par des juges.

Le sénateur Godfrey: Je pense que les témoins ont dit qu'il pourrait intervenir avant qu'un tribunal étudie une affaire, et que ce pourrait être dans l'intérêt national. Il devrait donc en avoir le pouvoir dans certaines circonstances. Les témoins ont

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Mr. Coté: With a law such as this, we have to take into consideration large and small businesses. More often than not, small businesses do not have access to cabinet. Therefore, we have to ensure that we have a fair system and that all cases are consistently treated the same way. That is why we have set up such a Tribunal. We feel that the Tribunal will have the capacity to render a good decision.

The Chairman: Senator Sinclair, with a supplementary question.

Senator Sinclair: The reason you have put this into the Act is so you will have an even playing field for large and small businesses?

Mr. Coté: We want to ensure that all cases will be treated the same way. Perhaps large businesses have access to cabinet, while small businesses do not. If a small business in a designated area does not have access to cabinet, we want to ensure that there is equality for everyone.

That is only one of the reasons for having such a Tribunal.

Senator Sinclair: Mr. Minister, if the statute provides that, in such circumstances, you could get a pre-exemption, if I could put it that way, whether you are large or small you can understand the statute. You do not have to have access to cabinet if the statute says that in certain circumstances there can be pre-exemption.

Mr. Coté: What is the necessity of having such a Tribunal if the cabinet can interfere before the Tribunal sits?

Senator Sinclair: Mr Minister, based on the experience of some of us, getting involved in these kinds of actions are rather expensive; lawyers cost money.

Mr. Coté: You must remember, senator, that we have a director who examines all cases. Therefore, if these businesses feel that they would like to get an advance ruling under Bill C-91, they could get it.

Senator Sinclair: I understand that. You do not have to go through cabinet, then?

Mr. Coté: That is right. I do not feel there is a necessity to go to cabinet.

The Chairman: Senator Godfrey.

Senator Godfrey: The Canadian Federation of Independent Business argued that the requirement to show the intent to lessen competition would render this section of the act unenforceable. In your opening remarks, you referred to an amendment to delete the requirement that the "object" of the practice used by a dominant firm was to lessen competition. Does that satisfy their concerns?

Mr. Coté: Yes.

The Chairman: Thank you, Senator Godfrey. When I was introducing the witnesses, I neglected to draw your attention to

[*Traduction*]

été très explicites: il ne devrait pas être question de pouvoir casser une décision.

M. Côté: Dans une loi comme celle-ci, nous devons tenir compte des grandes et des petites entreprises. Le plus souvent, les petites n'ont pas accès au cabinet. En conséquence, nous devons nous assurer que le système est juste et que tous les cas sont toujours traités de la même manière. C'est pourquoi nous avons mis sur pied ce tribunal. Nous estimons qu'il sera en mesure de rendre de bonnes décisions.

Le président: Sénateur Sinclair, une question supplémentaire.

Le sénateur Sinclair: Vous l'avez prévu dans la loi pour que les grandes et les petites entreprises soient un même pied d'égalité?

M. Côté: Nous voulons nous assurer que tous les cas seront traités de la même manière. Les grandes entreprises ont peut-être accès au cabinet, mais ce n'est pas le cas des petites. Si une petite entreprise d'un secteur désigné n'a pas accès au cabinet, nous voulons nous assurer qu'elle a les mêmes chances que les autres.

Ce n'est qu'une des raisons pour lesquelles nous avons prévu la création de ce tribunal.

Le sénateur Sinclair: Monsieur le ministre, si la loi prévoit qu'en pareilles circonstances, on peut obtenir une exemption préalable, si je puis dire, c'est clair pour tous, qu'il s'agisse d'une grande ou d'une petite entreprise. Il n'est pas nécessaire d'avoir accès au cabinet si la loi dit qu'en certaines circonstances, il peut y avoir exemption préalable.

M. Côté: Quelle est la nécessité de ce tribunal si le cabinet peut intervenir avant que le tribunal siège?

Le sénateur Sinclair: Monsieur le ministre, d'après l'expérience de certains d'entre nous, se lancer dans ces types d'entreprises est assez coûteux; retenir les services d'un avocat coûte cher.

M. Côté: Vous devez vous rappeler, sénateur, qu'un directeur examine tous les cas. Donc, si ces entreprises veulent obtenir une décision à l'avance conformément au projet de loi C-91, elles le peuvent.

Le sénateur Sinclair: Je comprends. Il n'est pas nécessaire de passer par le Cabinet, alors?

M. Côté: C'est juste. Je ne vois pas la nécessité de le faire.

Le président: Sénateur Godfrey.

Le sénateur Godfrey: La Fédération canadienne des entreprises indépendantes a soutenu que la nécessité de prouver qu'il y a eu intention de réduire la concurrence rendrait cet article de la loi inapplicable. Dans votre déclaration préliminaire, vous avez parlé d'une modification qui supprimerait la nécessité de prouver que les pratiques d'une entreprise dominante avaient pour «objet» de réduire la concurrence. Cela répond-il à leurs préoccupations?

M. Côté: Oui.

Le président: Merci, sénateur Godfrey. Lorsque j'ai présenté les témoins, j'ai négligé de vous signaler qu'étaient aussi pré-

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the presence in the committee room of the minister's parliamentary secretary, Mr. Bill Dome, the Member of Parliament for Peterborough, and the Deputy Minister of Consumer and Corporate Affairs, Mr. Mark Daniels. The Department has not only fielded an impressive team today, but has brought reinforcements.

Senator Barrow: Mr. Chairman, clause 74 of the bill says:

> (1) Where the Director is satisfied by the party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 64, he may issue a certificate to the effect that he is so satisfied.

Why does it not say that he "shall" issue a certificate, if he is requested to do so?

Mr. Cappe: Mr. Chairman, the provision reads as it does because there was a concern that an obligation of the director to issue a certificate would have the effect of inhibiting him, and that he would always use the argument that the facts were not total and fully present. So he could never issue a certificate. This gives him the ability to interpret the merger law and to use his judgment as to when the facts are such that he does or does not have sufficient grounds to apply. Further—and perhaps Mr. Rosenberg would like to comment—in the end it is our understanding that, if someone were to apply to the Federal Court for an order of mandamus, there is a chance that the director might well be forced to issue such a certificate if he was recalcitrant and did not. So there is recourse to the Federal Court.

Mr. Morris Rosenberg, Director, Legal Branch, Department of Consumer and Corporate Affairs: It is possible that there would be a recourse to the Federal Court. The emphasis in Clause 74(1) is to have flexibility in the way this act is enforced. The use of the word "shall" is putting some sort of a duty on the director to do it, and that could lead to rigidity in the system. When he refused to do it, we could find ourselves in litigation, with people arguing in the courts that he had an obligation in many cases to do it. That would lead to the kind of situation Mr. Cappe was mentioning earlier, where he would find ways at the front end of saying that he was just not satisfied. Leaving it with this kind of flexibility and discretion and assuming that it is going to be administered in good faith, as it has to be to have the confidence of the business community, is the most workable solution in our view.

Senator Sinclair: Mr. Minister, one of the major changes in this legislation is to move control over banks from the Bank Act to the Combines Investigation Act. That is done by transferring Section 309, the result of which is to bring into play people who are not accustomed to banks, and yet at the same time it introduces differentiations between various deposit-taking institutions. As a matter of policy, why do you have those differences?

Mr. Cappe: I would like to provide some background, senator. The section merely changes the enforcement of those sections and not the substance of them, as you alluded to. The

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sents dans la salle le secrétaire parlementaire du ministre, M. Bill Dome, député de Peterborough, ainsi que le sous-ministre de la Consommation et des Corporations, M. Mark Daniels. Le ministère nous a dépêché aujourd'hui toute une équipe et même des renforts.

Le sénateur Barrow: Monsieur le président, selon l'article 74 du projet de loi,

> 1) Lorsqu'une ou plusieurs parties à une transaction proposée convainquent le directeur qu'il n'aura pas de motifs suffisants pour faire une demande au Tribunal en vertu de l'article 64, le directeur peut délivrer un certificat attestant cette conviction.

Pourquoi ne pas dire qu'il «doit» délivrer un certificat si on le lui demande?

M. Cappe: Monsieur le président, la disposition est ainsi libellée parce qu'on craignait qu'obliger le directeur à délivrer un certificat aurait pour effet de l'inhiber et qu'il invoquerait toujours l'insuffisance des faits. Il pourrait donc ne jamais délivrer de certificat. Il est en mesure d'interpréter la loi relative aux fusions et d'utiliser son jugement pour déterminer si les faits sont tels qu'il a des motifs suffisants de faire une demande. En outre—et M. Rosenberg aimerait peut-être faire des observations à ce sujet—nous croyons finalement que si quelqu'un devait demander à la cour fédérale une ordonnance de *mandamus*, cette dernière pourrait l'obliger à délivrer un certificat s'il doit le faire mais qu'il était récalcitrant et ne l'a pas fait. Il y a donc possibilité de recours auprès de la cour fédérale.

M. Morris Rosenberg, directeur du contentieux, ministère de la Consommation et des Corporations: Il pourrait y avoir contestation devant la cour fédérale. Le paragraphe 74(1) a surtout pour objet de prévoir l'application flexible de la loi. Le libellé de la disposition montre clairement qu'il est du devoir du directeur d'examiner les demandes de certificats et cela pourrait entraîner une sclérose du système. S'il refusait de le faire, il pourrait y avoir litige, les réclamants arguant dans de nombreux cas, que le directeur était obligé de le faire. Cela mènerait à des situations du genre de cette dont M. Cappe a parlé tout à l'heure, c'est-à-dire que le directeur dirait qu'il avait toujours des raisons de ne pas être convaincu. A notre avis, la solution la plus pratique est de laisser tout cela à la discrétion du directeur, comme le prévoit le projet de loi, en présumant qu'il appliquera la loi de bonne foi, ce qu'il devra d'ailleurs faire pour gagner la confiance des milieux d'affaires.

Le sénateur Sinclair: Monsieur le ministre, l'un des principaux changements que permettra ce projet de loi sera que les banques ne seront plus régies par la Loi sur les banques, mais par la Loi relative aux enquêtes sur les coalitions. Il a suffi de transférer l'article 309, ce qui a eu pour résultat de faire intervenir des personnes qui n'ont pas l'habitude des activités des banques et d'établir des distinctions entre les divers établissements de dépôt. En principe, pourquoi avez-vous établi ces distinctions?

M. Cappe: Je vais vous expliquer, sénateur. Comme vous l'avez dit, l'article ne fait que modifier l'application de ces dispositions et non leur fond. Il est certain que si l'Inspecteur

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rationale is clearly that while the Inspector General of Banks is the expert on banking and solvency of banks, he is not the expert on competition matters and does not profess to be. Where there is a matter of competition, the Director of Investigation and Research, who is expert on competition, should be able to assess it, and the Competition Tribunal or courts should be able to have jurisdiction.

The question remains that when there are financial policy matters at hand, the Minister of Finance has the ability to shut out the Combines Act and say that this is important enough and it must proceed.

As to the point you referred to earlier about the different laws applying to different institutions, I believe it was Mr. MacIntosh or Mr. Phillips of the Canadian Bankers' Association who appeared before this committee and indicated the extensive consultations we had had with them and with other organizations and financial institutions, and our attempt to rationalize, if you like, the law. In a sense, time ran out and we were unable to conclude that discussion. However, that was not an indication of an unwillingness to do so. The matter is not lost yet.

Senator Sinclair: Do I understand you are suggesting that in due course the minister will look with favour on bringing in an amendment to make it even?

Mr. Coté: I would like to see what my colleague the Minister of State for Finance, Mrs. McDougall, will do with her Green Paper. We may have to take additional steps at a later time.

Senator Sinclair: As I understand it, in the past when a committee such as this believed that an amendment would be appropriate to make the legislation equitable, rather than move that the legislation be amended, the minister gave an undertaking that the legislation would receive his careful consideration regarding such amendment. That generally satisfied the members of the committee.

Mr. Coté: There is no problem with that at all, senator.

Senator Sinclair: The existing legislation, as was pointed out, is a failure. It has not been changed to meet new market conditions. Business people in the past, including myself, have spent hours before parliamentary committees in an attempt to have that legislation amended.

What assurances have we that you will take a look at the bill as it evolves to make what I call "normal changes"?

Mr. Coté: You have my commitment to make these amendments to the legislation. I think that is sufficient enough. I am committed to do whatever needs to be done in the future.

Senator Sinclair: The question of market dominance is going to be delineated by cases. It is in the light of that I am asking you whether you have a committee within the department to review this or whether you have given certain instructions to people to keep on top of things. What is the situation?

[*Traduction*]

général des banques est l'expert en matière d'activités bancaires et de solvabilité des banques, il n'est pas spécialiste des questions de concurrence et ne prétend pas l'être non plus. Lorsqu'il est question de concurrence, le directeur des enquêtes et recherches, qui est l'expert en la matière, devrait pouvoir évaluer la situation, et le Tribunal de la concurrence ou les tribunaux en général devraient être compétents pour statuer.

Il demeure que lorsqu'il est question de politique financière, le ministre des Finances est autorisé à déclarer que la politique est assez importante pour que la Loi relative aux enquêtes sur les coalitions ne s'applique pas.

Quant à votre question de tout à l'heure au sujet des diverses lois qui régissent diverses institutions financières, je crois que lorsqu'il a témoigné devant le comité, M. MacIntosh, ou était-ce M. Phillips, de l'Association des banquiers canadiens, a parlé des consultations exhaustives que nous avions eues avec l'Association et d'autres organismes et institutions financières afin de rationaliser la loi, si je peux m'exprimer ainsi. En un sens, nous avons manqué de temps et nous n'avons pas pu mener nos entretiens à terme. Cependant, cela ne signifiait aucunement que nous ne voulions pas en parler. Tout n'est pas encore perdu.

Le sénateur Sinclair: Dois-je comprendre qu'à votre avis, le ministre devrait accepter, en temps voulu, de modifier la loi pour éliminer ces différences?

M. Côté: J'ai hâte de voir l'effet qu'aura le Livre vert de ma collègue, la ministre d'État aux Finances, M^me^ McDougall. Nous pourrions devoir intervenir de nouveau un peu plus tard.

Le sénateur Sinclair: Si je comprends bien, par le passé, lorsqu'un comité comme le nôtre estimait qu'il fallait amender un projet de loi pour le rendre équitable, le ministre, au lieu de proposer des amendements, s'engageait à en étudier sérieusement la possibilité. En général, le comité estimait que c'était suffisant.

M. Côté: Cela ne pose aucun problème, sénateur.

Le sénateur Sinclair: Comme quelqu'un l'a déjà dit, la loi actuelle ne fait plus le poids parce qu'elle n'a pas été modifiée pour tenir compte de l'évolution du marché. Par le passé, les représentants du milieu des affaires, et moi-même avons passé des heures devant les comités parlementaires à essayer de la faire modifier.

Quelle assurance avons-nous que vous étudierez le projet de loi au fur et à mesure de l'évolution du marché pour y apporter ce que j'appellerais des «changements normaux»?

M. Côté: Je vous donne ma parole que je le ferai. Je crois que c'est suffisant. Je m'engage à faire tout ce qui s'avérera nécessaire.

Le sénateur Sinclair: Ce sont les tribunaux qui détermineront, dans chaque cas, si une entreprise poursuivie détient une position dominante dans le marché. Cela dit, je voudrais savoir si le ministère a constitué un comité interne pour étudier ces questions ou s'il a chargé certaines personnes de suivre chaque affaire de près.

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Mr. Coté: We will certainly see how the legislation performs. We will evaluate the performance of the legislation in a few years. We will see how the market evolves. I think that Canada is a great country. We want to bring this great country to an international competitive level. We want to ensure that we will be able to compete on an international level. We would not have thought about putting an international factor into a Combines Act ten years ago. We must do that now because of the trade barriers in place, and because of the trade talks that are taking place. Canada has to be more and more competitive. It has many businesses, both big and small. They deserve a more open market. They deserve to have an act that allows them to go into specialized agreements for export purposes in order to bring more benefits to the Canadian people.

That is what I am trying to achieve by putting the two main factors into the bill; first of all, the international aspect and, secondly, a fair system and a quicker way of dealing with transactions. Those are the two main elements of the bill.

We have changed the investigatory powers of the director. We have dealt with the abuse of the dominant position to protect other businesses, and we have dealt with the bank to ensure that everyone is being treated in the same manner as crown corporations are treated. This is a tremendous improvement over what we had. We used what was good in Bill C-29. I think it is a matter of bringing in a law that the Canadian economy needs.

Senator Sinclair: I do not disagree with that, Mr. Minister, but in view of what you have said about the Competition Tribunal and the need to have things move forward in an orderly, equitable and fair manner, I have raised with some of your officials—and I raise with you now that you have brought it up—why you have given the chairman, in the light of a tie, an overriding vote, which is quite unusual. Perhaps you could take a look at that in light of past experience.

Mr. Cappe: As we discussed prior to the meeting, Senator Sinclair, the system in the Competition Tribunal Act is based on the model of the Restrictive Practices Court in the United Kingdom. In the RPC in the UK they use exactly the same system; they have lay members and judges. The chairman has the casting vote. Presumably if the chairman of the Tribunal is astute enough not to appoint an even number of members to panels, then that will not be a problem. In the event that there is a death of a member sitting on a panel, or circumstances which arise where a tie is the result, it is the most expeditious way to deal with it to avoid having a retrial and allow for a dispute resolution mechanism—which is essentially the chairman having an extra vote.

Senator Sinclair: The difficulty with that is just by following what someone else does does not necessarily make it right.

[*Traduction*]

M. Côté: Nous allons d'abord voir quels résultats la loi donnera, et dans quelques années, nous évaluerons son effet. Nous suivrons également l'évolution du marché. Je crois que le Canada est un grand pays, et nous voulons qu'il soit compétitif à l'échelle internationale. Nous voulons nous assurer qu'il le deviendra. Il y a dix ans, nous n'aurions pas songé à faire intervenir un facteur international dans la Loi relative aux enquêtes sur les coalitions. Aujourd'hui, nous devons le faire en raison des obstacles tarifaires et des négociations sur la libéralisation du commerce qui sont imminentes. Le Canada doit devenir plus compétitif. Il compte de nombreuses entreprises, grandes et petites, qui méritent un marché plus libre et une loi qui leur permettra de passer des ententes spécialisées d'exportation susceptibles d'apporter davantage de retombées économiques à la population canadienne.

C'est ce que j'essaie de réaliser en introduisant ces deux principaux facteurs dans le projet de loi; d'abord, l'aspect international et ensuite, un système équitable et plus rapide de règlement des transactions. Voilà les deux principaux éléments de ce projet de loi.

Nous avons modifié les pouvoirs d'enquête du directeur. Nous avons légiféré contre l'abus de position dominante pour protéger d'autres entreprises, nous avons négocié avec les banques pour nous assurer que toutes les entreprises sont traitées sur le même pied que les sociétés d'État. C'est une énorme amélioration par rapport à ce que nous avions. Nous avons utilisé ce qui était bon dans le projet de loi C-29. A mon avis, il s'agissait de tenir compte dans une loi des besoins de l'économie canadienne.

Le sénateur Sinclair: Je ne suis pas contre cela, monsieur le ministre, mais compte tenu de ce que vous avez déclaré sur le Tribunal de la concurrence et sur la nécessité de faire avancer les choses de façon équitable et ordonnée, j'ai soulevé cette question avec certains de vos fonctionnaires, et je vous la pose maintenant puisque vous en faites état: pourquoi avez-vous accordé au président du tribunal un vote prépondérant en cas d'égalité des voix, ce qui est tout à fait inhabituel? Vous pourriez peut-être examiner cette affaire à la lumière de l'expérience passée.

M. Cappe: Comme nous en avons discuté avant la séance, sénateur Sinclair, le système prévu par la Loi sur le Tribunal de la concurrence se fonde sur le modèle du Tribunal des pratiques restrictives du Royaume-Uni. Ce pays a exactement le même système: des «autres membres» et des juges. Le président a un vote prépondérant. On présume que s'il est suffisamment astucieux pour ne pas nommer un nombre pair de membres, il n'aura pas à s'en servir. Par contre, en cas de décès d'un membre ou d'égalité des voix, la façon la plus rapide de régler la question est d'éviter un nouveau procès et de prévoir un mécanisme de règlement des conflits—ce qui est essentiellement la raison pour laquelle le président a un vote prépondérant.

Le sénateur Sinclair: La difficulté, c'est que le fait d'adopter la solution retenue par d'autres ne rend pas nécessairement meilleure cette solution.

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Mr. Cappe: We took the best of that. We did not take every word in the RPC act. We took what we thought was necessary to make the system work.

Senator Sinclair: Ties in very complicated situations have happened before and people have had to start over again. Really what that means is that the person bringing the prosecution loses. Perhaps I could ask the minister to take another look at that again.

The Chairman: The final name on my list is the sponsor of the bill, Senator MacDonald. You are not going to filibuster your own bill, are you?

Senator MacDonald (Halifax): No, Mr. Chairman. I merely want to tell the minister how much I have appreciated the briefings that his office and his officials have given to me. They have been very helpful.

I do have one question for Mr. Cappe. As I understand it, a person can go to the director and get a ruling in advance. Hopefully that will be easier than getting an advance ruling from the Department of National Revenue. Presumably one can get an advanced ruling, and as long as the facts stand up, one is indemnified, one is home free. I think the question I forgot to ask is: What happens if the director gives a negative ruling? Does a person then go before the Tribunal?

Mr. Cappe: There is no provision for a respondent, if you like, to go before the Tribunal. If a person gets a negative decision from the director and that person thinks the director is wrong, they can go ahead. The director is not a regulator; he does not tell a person what to do. He merely says "If you go ahead, I will start an inquiry."

In the circumstances, a person can decide—and people do decide—not to listen to the director and take their chances, as it were. Ultimately, the only recourse the director has is to challenge that person and take that person before the Tribunal. Ultimately, he has to shut up or put up.

Mr. Coté: Being an accountant, in the past when I was in the private sector we sometimes challenged advanced tax rulings. We challenged the Minister of Revenue, but our success rate was very poor.

Senator MacDonald (Halifax): In the case of a person taking it to a higher court, if you will—there being no cabinet override—the only way one could get around a ruling of the Tribunal is through a section of the Financial Administration Act. But what might be small in Toronto would be very, very big in Cape Breton. I understand that the final thing would be special legislation that would get around the business of no cabinet override—special legislation that would permit something even though the Tribunal had indicated something else.

Mr. Cappe: Yes, an act of Parliament or something like that.

[*Traduction*]

M. Cappe: Nous avons retenu uniquement le meilleur de la loi britannique; nous ne l'avons pas reprise mot pour mot. Nous n'avons gardé que ce que nous estimions nécessaire pour établir un système viable.

Le sénateur Sinclair: Il s'est déjà produit des situations très complexes d'égalité des voix, où il a fallu tout recommencer. Ce que cela veut dire en fait, c'est que la personne qui intente la poursuite perd sa cause. Je pourrais peut-être demander au ministre de réexaminer cet aspect de la question.

Le président: Le dernier nom qui figure sur ma liste est le parrain du projet de loi, le sénateur MacDonald. Vous n'allez pas faire obstruction à votre propre projet de loi, n'est-ce pas?

Le sénateur MacDonald (Halifax): Non, monsieur le président. Je tiens à dire au ministre à quel point j'ai aimé les séances d'information que son bureau et ses fonctionnaires nous ont données. Elles nous ont été très utiles.

J'ai une question à poser à M. Cappe. Si j'ai bien compris, une personne peut demander une décision préalable. Souhaitons que cela soit plus facile que d'obtenir une décision préalable du ministère du Revenu national. A supposer qu'on puisse obtenir une décision préalable et que les arguments soient valables, on reçoit les assurances souhaitées et l'on a toute la latitude voulue. Voilà toutefois la question que j'ai oublié de poser: Qu'arrive-t-il si le directeur rend une décision négative? L'intéressé comparaît-il alors devant le tribunal?

M. Cappe: Il n'y a pas de dispositions prévoyant la comparution devant le tribunal. Si une personne obtient une décision négative du directeur et qu'elle estime que celui-ci a tort, elle peut poursuivre l'affaire. Le directeur n'a pas de pouvoir de réglementation; il ne dit pas à une personne ce qu'elle doit faire mais simplement qu'il entreprendra une enquête si elle veut aller plus loin.

Dans ces circonstances, on peut refuser de s'en tenir à la décision du directeur et courir le risque, et c'est ce que certains font. En fin de compte, le seul recours du directeur est de contester les agissements de cette personne et de porter la question devant le tribunal. Il accepte la situation ou il marque son opposition.

M. Côté: Lorsque j'étais comptable dans le secteur privé, nous avons parfois contesté des décisions préalables en matière fiscale. Nous avons contesté le ministre du Revenu, mais notre taux de succès était plutôt pitoyable.

Le sénateur MacDonald (Halifax): Si une personne fait appel à une instance supérieure, dans la mesure où le Cabinet ne peut renverser une décision du tribunal, la seule façon de contourner celle-ci est d'invoquer une disposition de la Loi sur l'administration financière. Ce qui revêt peu d'importance à Toronto peut prendre d'énormes proportions au Cap-Breton. Je pense que la meilleure solution serait d'adopter une mesure législative spéciale qui résoudrait le problème occasionné par le fait que le Cabinet ne peut renverser une décision, et qui permettrait certaines situations même si le tribunal s'est prononcé autrement.

M. Cappe: En effet, une loi du Parlement ou autre mesure.

[*Text*]

The Chairman: Thank you, Senator MacDonald. There being no further questions, il me reste qu'à exprimer mes remerciements au ministre and to his officials for their testimony here today. The committee will continue *in camera*; the witnesses are excused.

The committee continued *in camera*.

[*Traduction*]

Le président: Je vous remercie, sénateur MacDonald. Comme il n'y a pas d'autres questions, il ne me reste qu'à exprimer mes remerciements au ministre et à ses fonctionnaires pour le témoignage qu'ils nous ont présenté aujourd'hui. Le comité poursuivra ses travaux à huis clos; les témoins peuvent se retirer.

La séance se poursuit à huis clos.

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WITNESSES—TÉMOINS

From the Department of Consumer and Corporate Affairs:

Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination;

Mr. Morris Rosenberg, Director, Legal Branch;

Mr. Julien Béliveau, Chief of Staff.

Du ministère de la Consommation et des Corporations:

M. M. S. Cappe, sous-ministre adjoint, bureau de la coordination des politiques;

Me Morris Rosenberg, directeur, contentieux;

M. Julien Béliveau, chef de cabinet.

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Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

First Session
Thirty-third Parliament, 1984-85-86

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Banking, Trade and Commerce

Chairman:
The Honourable LOWELL MURRAY

Tuesday, June 17, 1986

Issue No. 51

Second Proceedings on:

Bill C-91, "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof"

SEVENTEENTH REPORT
OF THE COMMITTEE

Première session du
trente-troisième parlement, 1984-1985-1986

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Banques et du commerce

Président:
L'honorable LOWELL MURRAY

Le mardi 17 juin 1986

Fascicule nº 51

Deuxième fascicule concernant:

Projet de loi C-91, «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois»

DIX-SEPTIÈME RAPPORT
DU COMITÉ

STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Lowell Murray, *Chairman*
The Honourable Ian Sinclair, Q.C., *Deputy Chairman*

The Honourable Senators:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (or Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (or Doody)
Kelly	Sinclair
Kirby	Walker

**Ex Officio Members*

(Quorum 4)

COMITÉ SÉNATORIAL PERMANENT DES BANQUES ET DU COMMERCE

Président: L'honorable Lowell Murray
Vice-président: L'honorable Ian Sinclair, c.r.

Les honorables sénateurs:

Anderson	MacDonald (*Halifax*)
Barrow	*MacEachen (ou Frith)
Buckwold	Murray
Flynn	Perrault
Godfrey	*Roblin (ou Doody)
Kelly	Sinclair
Kirby	Walker

**Membres d'office*

(Quorum 4)

Mr. Basil Zafiriou, Acting Chief, Economics Division, Research Branch, Library of Parliament.

M. Basil Zafiriou, chef intérimaire, Division de l'économie, Service de recherche, Bibliothèque du Parlement.

Le greffier du Comité
Timothy Ross Wilson
Clerk of the Committee

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ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, June 11, 1986:

"Pursuant to the Order of the Day, the Honourable Senator MacDonald (*Halifax*) moved, seconded by the Honourable Senator Barootes, that the Bill C-91, intituled "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof" be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator MacDonald (*Halifax*) moved, seconded by the Honourable Senator Barootes, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

ORDRE DE RENVOI

Extrait des Procès-verbaux du Sénat du mercredi 11 juin 1986:

«Suivant l'Ordre du jour, l'honorable sénateur MacDonald (*Halifax*) propose, appuyé par l'honorable sénateur Barootes, que le Projet de loi C-91, intitulé: «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois», soit lu la deuxième fois.

Après débat,
La motion, mise aux voix, est adoptée.

Le projet de loi est alors lu la deuxième fois.

L'honorable sénateur MacDonald (*Halifax*) propose, appuyé par l'honorable sénateur Barootes, que le projet de loi soit déféré au Comité sénatorial permanent des banques et du commerce.

La motion, mise aux voix, est adoptée.»

Le greffier du Sénat
Charles A. Lussier
Clerk of the Senate

REPORT OF THE COMMITTEE

Tuesday, June 17, 1986

The Standing Senate Committee on Banking, Trade and Commerce has the honour to present its

SEVENTEENTH REPORT

Your Committee, to which was referred the Bill C-91, intituled: "An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof" has, in obedience to the Order of Reference of Wednesday, June 11, 1986, examined the said Bill and now reports the same without amendment, but with the following observations:

In accordance with the Order of Reference, your Committee heard from the Honourable Michel Côté, P.C., M.P., Minister of Consumer and Corporate Affairs and officials from the department on June 11, 1986. We had previously been authorized by the Senate on April 17, 1986 to study the subject-matter of the above-mentioned Bill (see Appendix A for a complete list of witnesses and Appendix B for a list of submissions received).

Proceedings of the Competition Tribunal

Clause 12(2)b provides that in the event of an equally divided opinion among the members of the Tribunal, the presiding member may have a casting vote to determine the question. Certain Committee members questioned the justification for giving double weight to the views of one member of the Tribunal in these circumstances, which would have the effect of upholding applications which might otherwise fail.

Anti-competitive agreements between financial institutions

Existing law against agreements in restraint of trade treats banks differently from non-bank financial institutions. Non-banks are subject to section 32 of the *Combines Investigation Act*, which prohibits any agreement in restraint of trade that has the effect of lessening competition "unduly". Agreements between banks, on the other hand, are governed by section 309 of the *Bank Act*, which imposes an absolute prohibition against specified inter-bank agreements relating to services provided and prices charged. Bill C-91 would transfer section 309 from the *Bank Act* to the *Competition Act* (as section 33), but would otherwise retain the differential treatment of agreements between banks and agreements between other financial institutions.

In their submission to the Committee, the Canadian Bankers' Association argued that this differential treatment is not justified by the current realities in financial markets, where increasingly non-bank financial institutions provide services similar to banks and where some non-banks are larger than all but the largest banks. The distinction also makes it difficult for banks and non-bank financial institutions to participate in agreements relating to the payments system: section 309 permits banks to make agreements between themselves in relation to common systems and facilities; section 32 contains no spe-

RAPPORT DU COMITÉ

Le mardi 17 juin 1986

Le Comité sénatorial permanent des banques et du commerce a l'honneur de présenter son

DIX-SEPTIÈME RAPPORT

Le Comité, auquel, a été déféré le projet de loi C-91, intitulé: «Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois» a, conformément à l'ordre de renvoi du mercredi 11 juin 1986, examiné ledit projet de loi et en fait maintenant rapport sans amendement, mais l'assortit des observations suivantes:

Conformément à l'ordre de renvoi, le Comité a entendu, le 11 juin 1986, les témoignages de l'honorable Michel Côté, c.p., député, ministre de la Consommation et des Corporations et de hauts fonctionnaires de ce ministère. Nous avions précédemment reçu du Sénat, le 17 avril 1986, l'autorisation d'étudier la teneur du projet de loi précité (voir la liste complète des témoins à l'annexe A et la liste des mémoires reçus à l'annexe B).

Procédures devant le Tribunal de la concurrence

L'alinéa 12(2)b) prescrit que le président de séance peut trancher toute question si les opinions sur celle-ci sont également partagées entre les membres. Certains membres du comité trouvent injustifié de donner, dans pareil cas, plus de poids au point de vue de l'un des membres du tribunal qu'aux autres, ce qui aurait pour effet de faire droit à des demandes qui auraient autrement été rejetées.

Accords anti-concurrentiels entre institutions financières

La loi actuelle interdisant les accords de nature à restreindre la concurrence, traite les banques différemment des institutions financières non bancaires. Les institutions non bancaires sont assujetties à l'article 32 de la *Loi relative aux enquêtes sur les coalitions*, qui interdit tout accord visant à restreindre «indûment» la concurrence. Par contre, les accords interbancaires sont régis par l'article 309 de la *Loi sur les banques*, qui interdit absolument certains accords entre banques concernant les services et les frais au client. Le Projet de loi C-91 a donc pour effet de soustraire l'article 309 à la *Loi sur les banques* et de l'intégrer à la *Loi sur la concurrence* (article 33), tout en continuant de distinguer entre les accords interbancaires et les accords conclus entre d'autres institutions financières.

Dans le mémoire qu'elle a présenté au Comité, l'Association des banquiers canadiens soutient que cette distinction ne se justifie plus dans l'état actuel des choses puisque les services offerts par les institutions financières non bancaires s'apparentent de plus en plus à ceux des banques et que certaines de ces institutions ont pris plus d'ampleur que toutes les banques exceptées les plus importantes. Cette distinction fait également en sorte que les banques et les institutions financières non bancaires peuvent difficilement participer à des accords financiers concernant le système des paiements: l'article 309 permet aux banques de conclure entre elles des accords relativement aux

cific exemptions that would allow non-bank financial institutions to participate in such agreements.

Extensive consultations on this issue have taken place between the Department of Consumer and Corporate Affairs and the Canadian Bankers' Association. The Minister advised your Committee that this issue is still under consideration, but he wishes to wait for pending legislation concerning the regulation of financial institutions before making a final decision on the matter.

Your Committee has reviewed Billl C-91 in accordance with the Orders of Reference and, except as noted above, has no comments to make on the Bill.

systèmes et services qu'elles partagent; l'article 32 ne contient aucune exemption permettant expressément aux institutions financières non bancaires de participer à des accords de ce genre.

De vastes consultations ont eu lieu sur ce sujet entre le ministère de la Consommation et des Corporations et l'Association des banquiers canadiens. Le ministre a indiqué au Comité que la question était toujours à l'étude, mais qu'il voulait attendre l'adoption de la loi concernant la réglementation des institutions financières avant de prendre une décision définitive sur la question.

Le Comité a examiné le projet de loi C-91, conformément aux ordres de renvoi et, hormis ce qui précède, n'a aucune autre observation à formuler.

APPENDIX A

LIST OF WITNESSES

On the subject-matter of Bill C-91:

Wednesday, April 30, 1986: (*Issue #44*)

Department of Consumer and Corporate Affairs:

Mr. Mark Daniels, Deputy Minister;

Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination and Acting Assistant Deputy Minister, Bureau of Competition Policy;

Mr. Morris Rosenberg, Director, Legal Branch.

Wednesday, May 7, 1986: (*Issue #46*)

Canadian Federation of Independent Business:

Mr. J. Bennett, Vice-President, Legislative Affairs;

Mr. Richard Graham, National Affairs Officer.

Wednesday, May 14, 1986: (*Issue #47*)

National Association of Tobacco and Confectionery Distributors:

Mr. William Marcus Jr., President; President, W. Marcus Enterprises;

Mr. Lucien Maréchal, Treasurer; Controller, Brault Clément Inc.;

Mr. Paul D. Tripp, Past President; Mark Tripp Ltd.;

Mr. Roland LeRose, President, West Kootenay Wholesale Ltd.;

Mr. Ronald G. Atkey, P.C., Q.C., Counsel; Osler, Hoskin & Harcourt;

Mr. Philippe H. Louette, Executive Vice President.

Canadian Bar Association:

Mr. John C. Clarry, Q.C., Chairman, Special Committee on the Combines Investigation Act;

Mr. Julian Chipman, Q.C.;

Mr. T. B. O. McKeag, Q.C.;

Mr. Bruce C. McDonald;

ANNEXE A

LISTE DES TÉMOINS

Sur la teneur du Projet de loi C-91:

Le mercredi 30 avril 1986: (*Fascicule nº 44*)

Ministère de la Consommation et des Corporations:

M. Mark Daniels, sous-ministre;

M. M. S. Cappe, sous-ministre adjoint, Bureau de la Coordination des politiques et sous-ministre adjoint intérimaire, Bureau de la Politique de concurrence;

Me Morris Rosenberg, directeur du Contentieux.

Le mercredi 7 mai 1986: (*Fascicule nº 46*)

Fédération canadienne de l'entreprise indépendante:

M. J. Bennett, vice-président, Affaires législatives;

M. Richard Graham, agent des Affaires nationales.

Le mercredi 14 mai 1986: (*Fascicule nº 47*)

Association Nationale des Distributeurs de Tabac et de la Confiserie:

M. William Marcus Jr., président; president, «W. Marcus Enterprises»;

M. Lucien Maréchal, trésorier; contrôleur, Brault Clément Inc.;

M. Paul D. Tripp, ancien président; «Mark Tripp Ltd.»;

M. Roland LeRose, président, «West Kootenay Wholesale Ltd.»;

Me Ronald G. Atkey, c.p., c.r., conseiller juridique; Osler, Hoskin & Harcourt;

M. Philippe H. Louette, vice-président exécutif.

Association du Barreau canadien:

Me John C. Clarry, c.r., président, Comité spécial sur la Loi relative aux enquêtes sur les coalitions;

Me Julian Chipman, c.r.;

Me T. B. O. MacKeag, c.r.;

Me Bruce C. McDonald;

Mr. W. V. Monopoli, Legislation Director.

Wednesday, May 28, 1986: (*Issue #48*)

Canadian Bankers' Association:

Mr. Robert M. MacIntosh, President;

Mr. T. G. O'Connor, Chairman, Legal Affairs Committee; Associate General Counsel, Toronto-Dominion Bank;

Mr. David Phillips, Vice-President, Legal Affairs.

Association of Canadian Franchisors:

Mr. John Gillespie, President; President, Pizza Pizza Ltd.;

Mr. Harold Knifton, President, Independent Grocers' Association;

Mr. Ken Fong, Member, Government Liaison Committee; Vice-President, McDonald's Restaurants of Canada Ltd.;

Mr. Wayne McCracken, Special Counsel.

Stelco Inc.:

Mr. R. E. Heneault, Executive Vice-President;

Mr. Warren Grover, Q.C., Counsel, Blake, Cassels & Graydon.

On Bill C-91:

Wednesday, June 11, 1986 (*Issue #50*)

Appearing:

The Honourable Michel Côté, P.C., M.P., Minister of Consumer and Corporate Affairs.

Department of Consumer and Corporate Affairs:

Mr. M. S. Cappe, Assistant Deputy Minister, Bureau of Policy Coordination;

Mr. Morris Rosenberg, Director, Legal Branch;

Mr. Julien Béliveau, Chief of Staff.

APPENDIX B

SUBMISSIONS

The Committee received submissions from the following groups and individuals:

ASSOCIATION OF CANADIAN FRANCHISORS, Toronto, Ontario

BUSINESS COUNCIL ON NATIONAL ISSUES, Ottawa, Ontario

CANADIAN BANKERS' ASSOCIATION, Toronto, Ontario

CANADIAN BAR ASSOCIATION, Ottawa, Ontario

CANADIAN BUSINESS EQUIPMENT ASSOCIATION, Willowdale, Ontario

CONSUMERS' ASSOCIATION OF CANADA, Ottawa, Ontario

Me W. V. Monopoli, directeur de la législation.

Le mercredi 28 mai 1986: (*Fascicule nº 48*)

Association des banquiers canadiens:

M. Robert M. MacIntosh, président;

M. T. G. O'Connor, président, Comité des affaires juridiques; conseiller général associé, Banque Toronto-Dominion;

M. David Phillips, vice-président, Affaires juridiques.

Association canadienne des franchiseurs:

M. John Gillespie, président; président, «Pizza Pizza Ltd.»;

M. Harold Knifton, président, «Independent Grocers' Association»;

M. Ken Fong, membre, Comité de relations gouvernementales; vice-président, Les restaurants McDonald du Canada Ltée;

Me Wayne McCracken, conseiller juridique spécial.

Stelco Inc.:

M. R. E. Heneault, vice-président exécutif;

Me Warren Grover, c.r., conseiller juridique, Blake, Cassels & Graydon.

Sur le Projet de loi C-91:

Le mercredi 11 juin 1986 (*Fascicule nº 50*)

Comparaît:

L'honorable Michel Côté, c.p., député, ministre de la Consommation et des Corporations.

Ministère de la Consommation et des Corporations:

M. M. S. Cappe, sous-ministre adjoint, Bureau de la Coordination des politiques;

Me Morris Rosenberg, directeur, Contentieux;

M. Julien Béliveau, chef de cabinet.

ANNEXE B

MÉMOIRES

Le comité a reçu des soumissions des groupes et particuliers suivants:

ASSOCIATION CANADIENNE DE COMMERCIALISATION DES PRODUITS PÉTROLIERS, Toronto (Ontario)

ASSOCIATION CANADIENNE DES FABRICANTS D'ÉQUIPEMENT DE BUREAU, Willowdale (Ontario)

ASSOCIATION CANADIENNE DES FRANCHISEURS, Toronto (Ontario)

ASSOCIATION DES BANQUIERS CANADIENS, Toronto (Ontario)

ASSOCIATION DU BARREAU CANADIEN, Ottawa (Ontario)

ASSOCIATION DES CONSOMMATEURS DU CANADA, Ottawa (Ontario)

GOWLING & HENDERSON, Toronto, Ontario

LANG, MICHENER, CRANSTON, FARQUHARSON & WRIGHT, Toronto, Ontario

NATIONAL ASSOCIATION OF TOBACCO & CONFECTIONERY DISTRIBUTORS, Montreal, Quebec

PETROLEUM MARKETERS ASSOCIATION OF CANADA, Toronto, Ontario

STELCO INC., Toronto, Ontario

WILSON, MR. LAWRENCE R., Ottawa, Ontario

ASSOCIATION NATIONALE DES DISTRIBUTEURS DE TABAC ET DE LA CONFISERIE, Montréal (Québec)

CONSEIL D'ENTREPRISES POUR LES QUESTIONS D'INTÉRÊT NATIONAL, Ottawa (Ontario)

GOWLING & HENDERSON, Toronto (Ontario)

LANG, MICHENER, CRANSTON, FARQUHARSON & WRIGHT, Toronto (Ontario)

STELCO INC., Toronto (Ontario)

WILSON, M. LAWRENCE R., Ottawa (Ontario)

Respectfully submitted,

Respectueusement soumis,

Le président

LOWELL MURRAY

Chairman

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HOUSE OF COMMONS

Issue No. 1

Wednesday, April 23, 1986

Chairman: Marcel Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 1

Le mercredi 23 avril 1986

Président: Marcel Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

APPEARING:

The Honourable Michel Côté
Minister of Consumer and Corporate Affairs

COMPARAÎT:

L'honorable Michel Côté
Ministre de la Consommation et des Corporations

WITNESS:

(See back cover)

TÉMOIN:

(Voir à l'endos)

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First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

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LEGISLATIVE COMMITTEE ON BILL C-91

Chairman: Marcel Tremblay

COMITÉ LÉGISLATIF SUR LE PROJET DE LOI C-91

Président: Marcel Tremblay

MEMBERS/MEMBRES

Pierre Cadieux
Bill Domm
Bill Kempling
Robert Howie
Paul W. McCrossan
David Orlikow
André Ouellet

(Quorum 4)

Le greffier du Comité

Dave Cook

Clerk of the Committee

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ORDER OF REFERENCE

Thursday, April 10, 1986

ORDERED,—That Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, be referred to a Legislative Committee

ATTEST

pour Le Greffier de la Chambre des communes

MICHAEL B. KIRBY

for The Clerk of the House of Commons

ORDRE DE RENVOI

Le jeudi 10 avril 1986

IL EST ORDONNÉ,—Que le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, soit déféré à un Comité législatif.

ATTESTÉ

MINUTES OF PROCEEDINGS

WEDNESDAY, APRIL 23, 1986
(2)

[*Text*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 3:35 o'clock p.m., this day, the Chairman, Marcel Tremblay, presiding.

Members of the Committee present: Bill Kempling, Robert Howie, Paul W. McCrossan, David Orlikow and André Ouellet.

Other Members present: Robert Horner and Blaine A. Thacker.

Marcel Tremblay announced his appointment as Chairman of the Committee pursuant to Standing Order 70.

The Order of Reference dated Thursday, April 10, 1986, being read as follows:

ORDERED,—That Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, be referred to a Legislative Committee.

Appearing: The Honourable Michel Côté, Minister of Consumer and Corporate Affairs.

Witness: *From the Department of Consumer and Corporate Affairs*: G. Ménard.

The Minister made a statement and answered questions.

At 5:15 o'clock p.m., the Committee adjourned to the call of the Chair.

PROCÈS-VERBAL

LE MERCREDI 23 AVRIL 1986
(2)

[*Traduction*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, aujourd'hui à 15 h 35, sous la présidence de Marcel Tremblay, (*président*).

Membres du Comité présents: Bill Kempling, Robert Howie, Paul W. McCrossan, David Orlikow, André Ouellet.

Autres députés présents: Robert Horner, Blaine A. Thacker.

Marcel Tremblay annonce sa propre nomination à la présidence du Comité, conformément à l'article 70 du Règlement.

Lecture de l'ordre de renvoi du jeudi 10 avril 1986 est donnée en ces termes:

IL EST ORDONNÉ,—Que le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, soit déféré à un Comité législatif.

Comparaît: L'honorable Michel Côté, ministre de la Consommation et des Corporations.

Témoin Du ministère de la Consommation et des Corporations: G. Ménard.

Le Ministre fait une déclaration et répond aux questions.

A 17 h 15, le Comité s'ajourne jusqu'à nouvelle convocation du président.

Le greffier du Comité

Dave Cook

Clerk of the Committee

EVIDENCE

(*Recorded by Electronic Apparatus*)

[*Texte*]

Wednesday, April 23, 1986

• 1534

Le président: À l'ordre!

Il me fait plaisir de présider ce Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois.

Nous avons aujourd'hui l'honneur de recevoir l'honorable Michel Côté, ministre de la Consommation et des Corporations. M. le ministre nous fera un bref exposé, ce qui laissera amplement de temps pour les questions. Tout de suite après, je vous ferai part des cinq ou six décisions qui ont été prises lors des deux séances du Comité directeur que nous avons tenues jusqu'à maintenant.

Sans plus tarder, je cède la parole à l'honorable Michel Côté.

L'honorable Michel Côté (ministre de la Consommation et des Corporations): Merci, monsieur le président.

Chers collègues, je suis heureux d'avoir l'occasion de me présenter devant le Comité pour examiner le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois.

Monsieur le président, je suis persuadé que ce projet de loi permettra à tous les Canadiens de tirer profit des effets bénéfiques de la concurrence.

• 1535

Le projet de loi C-91 est un projet dont le Canada a grandement besoin. Il possède tous les éléments pour assurer la vigueur de la concurrence au Canada et pour encourager la compétitivité canadienne, si je peux m'exprimer ainsi, au niveau du commerce international. C'est le projet de loi qu'il nous faut parce qu'il tient compte de tous les secteurs du monde des affaires. C'est un projet de loi qui protège les intérêts des consommateurs et des producteurs. C'est un projet de loi qui cadre également très bien avec ce nouvel environnement juridique créé par la Charte des droits et libertés.

Bref, monsieur le président, c'est un projet de loi équilibré, du fait qu'il n'est pas le fruit de la création exclusive du gouvernement. Comme vous le savez, il a été rédigé et élaboré en consultation avec les secteurs touchés. C'est là un aspect important de la genèse du projet de loi C-91. C'est un aspect que le Comité doit connaître parfaitement avant de commencer ses délibérations.

Dans le cadre de l'élaboration du projet de loi, il était de la plus haute importance pour moi que la consultation ait lieu avant que la Chambre ne soit saisie du projet de loi. Et c'est ainsi que ça s'est passé. Le projet de loi dont vous êtes saisis a

TÉMOIGNAGES

(*Enregistrement électronique*)

[*Traduction*]

Le mercredi 23 avril 1986

The Chairman: Order, please.

I am pleased to chair this legislative committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other acts in consequence thereof.

We are honoured to have with us today the Honourable Michel Côté, Minister of Consumer and Corporate Affairs. The Minister will make a brief statement and this will give us quite a bit of time to ask questions. Right afterwards, I will mention five or six decisions which have been taken during the two steering committee meetings we had up to now.

I now give the floor to the Honourable Michel Côté.

Hon. Michel Côté (Minister of Consumer and Corporate Affairs): Thank you, Mr. Chairman.

I am pleased to have this opportunity to appear before the committee to consider the subject matter of Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other acts in consequence thereof.

Mr. Chairman, I am confident that this bill will provide all Canadians with effective legislation to ensure that the benefits of competition are available to everyone.

Bill C-91 is the right bill for Canada. It does what needs to be done to keep competition vigorous in Canada, if I may express myself in those terms, it will also promote Canadian competitiveness in world trade. It is the right bill because it is suited to all sectors of the business community, large and small. It is the right bill because it protects the interests of consumers and producers. It is the right bill because it conforms with the new legal environment created by the Charter of Rights and Freedom.

In short, Mr. Chairman, this is a balanced bill, because it is not the solitary creation of government. As you know, it has been developed in close consultation with all those sectors of Canadian life affected by it. This is an important aspect of Bill C-91 development. It is one that I believe the committee should understand fully before beginning its deliberations.

As part of the process in developing this bill, it was of vital importance to me that consultation takes place before the bill came to the House for consideration. And it has happened that way. The bill now before you has been the subject of what I

[*Text*]

fait l'objet de ce que je crois être la consultation la plus vaste à laquelle ait jamais été soumise une proposition du gouvernement dans l'histoire de cette législation. D'ailleurs, j'aimerais mentionner qu'un des mes prédécesseurs à titre de ministre de la Consommation et des Corporations, M. Ouellet, qui est avec nous aujourd'hui, a aussi encouragé la tenue de vastes consulations dans le cadre de la réforme de la Loi sur la concurrence qui a débuté en 1981. Je suis parti des consultations qui avaient été entreprises à ce moment-là et j'ai élargi le processus à un plus grand nombre d'intéressés.

Mr. Chairman, during second-reading debate questions arose as to the consultation process we undertook in developing this bill. It was suggested that only limited views were heard, basically those of big business.

Let me deal with this misconception, if I might use that word. First of all, we began our consultation effort in the late fall and winter of 1984-85. In these months, I conferred informally with representatives of consumer groups, small business, large business organizations, academics, farmers, labour, economic and legal experts.

This was followed by a meeting with my counterparts in provincial and territorial governments. Having identified all the concerns of these groups, a consultation paper was distributed to over 500 specific groups and individuals. These documents spelled out the needs, the issues and the options, and it did so in some detail. The response was very gratifying.

We received more than 100 briefs from all the regions of Canada and from the provinces. In addition, hundreds of letters and messages from private groups and citizens were received as well.

Ce processus nous a permis d'en arriver à un ensemble de propositions équilibrées que la plupart sinon tous les groupes jugent raisonnables et fort efficaces.

Bien qu'ils puissent avoir des réserves sur certains aspects du projet de loi, tous les groupes sont d'accord pour dire que le projet de loi C-91 représente une nette amélioration par rapport à la loi actuelle et qu'il devrait être adopté par le Parlement dans les plus brefs délais.

Certains soutiennent que ce projet de loi est le fruit de la grande entreprise et que ses dispositions traduisent uniquement ses intérêts. Monsieur le président, ces gens ont tort. Rien n'est plus faux, comme pourra le constater le Comité. Le Congrès du travail du Canada, l'Association des consommateurs du Canada et les petites entreprises, entre autres, ont insisté pour que les décisions du Tribunal ne puissent être renversées par le gouverneur en conseil. Le projet de loi C-91 reflète entre autres ce point de vue particulier. Les petites entreprises, surtout les détaillants de pétrole indépendants, voulaient que la disposition relative aux abus sur la position dominante s'applique dans les cas où deux sociétés ou plus dominent le marché. Là encore, monsieur le président, le projet de loi prévoit une telle disposition. Les petites entreprises voulaient aussi une augmentation considérable de l'amende maximale

[*Translation*]

believe is the most thorough consultation received by any government proposal in recent history. I want to mention as well that one of my predecessors, Mr. Ouellet, who is present today, also encouraged consultation, in the reform of competition legislation in 1981. I have built on this consultation initiative and enlarged the process to include a broader range of interest groups.

Monsieur le président, lors du débat de deuxième lecture, on a soulevé des interrogations sur la façon dont les consultations avaient été menées. On a laissé entendre que nous avions prêté l'oreille à des intérêts particuliers, principalement à ceux des grandes entreprises.

Laissez-moi dissiper ce malentendu. Tout d'abord, nous avons entrepris le travail de consultation à la fin de l'automne et au début de l'hiver 1984-1985. Au cours des mois qui ont suivi, je me suis entretenu avec des groupes de consommateurs; des représentants de petites et grandes entreprises, d'organisations, de syndicats; des universitaires; des exploitants agricoles et des spécialistes en droit et en économie.

J'ai ensuite rencontré mes homologues des administrations provinciales et territoriales. Après avoir pris connaissance des préoccupations des groupes énumérés, un document de consultation a été distribué à pas moins de 500 groupes et individus. Ce document exposait en détail les besoins, les problèmes et les options. La réponse à ce document fut des plus satisfaisante.

Nous avons reçu plus de 100 mémoires de toutes les régions du Canada. Les provinces nous ont aussi fait connaître leurs vues. Des centaines de lettres et de messages de groupes privés et de citoyens nous sont aussi parvenus.

Consultation continued all through the summer. In the end, we achieved a balanced package that most if not all groups agreed was reasonable and effective.

While there may be concerns as to specific aspects of the bill, all groups agree that C-91 provides significant improvements to the existing legislation and should be accepted by Parliament as soon as possible.

It was suggested, erroneously, that this bill is the product of big business and that its provisions only reflect their interests. Mr. Chairman, these people are wrong, nothing could be further from the truth, as this committee will soon hear. The Canadian Labour Congress, the Consumers Association and the small business groups insisted on the competition tribunal without powers for Governor in Council to override tribunal decisions. This, among other things, is reflected in C-91. Small business groups, especially the petroleum marketers, wanted the abuse of dominant position provision to apply to situations where two or more firms dominate a market. Mr. Chairman, this is also in the bill. Small business groups wanted to substantially increase maximum fine for conspiracy convictions, and we have proposed $5 million. Big business, meanwhile, wanted a different merger test from what is in the bill

[*Texte*]

dans les cas de conspiration. Nous avons proposé une amende de 5 millions de dollars. Les grandes entreprises voulaient des critères différents pour l'évaluation des fusionnements. Nous étions d'avis, nous, que ces critères auraient eu pour effet d'affaiblir l'efficacité de cette loi. Ils ont exprimé également des réserves quant au préavis, au tribunal et à la domination conjointe.

• 1540

Je trouve un réconfort dans le vote en deuxième lecture qui a vu non seulement la Chambre adopter les principes de la politique de concurrence prônés dans le projet de loi C-91, mais aussi les députés libéraux se prononcer avec le gouvernement en faveur de ces principes. Le débat de deuxième lecture était d'un grand intérêt et plusieurs des points qui ont été soulevés devront d'ailleurs être examinés par le Comité.

Mr. Chairman, I am committed to the balanced package of interrelated elements to make up Bill C-91. Let me briefly tell you about some of its main features.

It is widely recognized that the major weakness in the existing competition legislation is the assessment of complex economic activity in a criminal law setting. This means that in the past the courts had to determine beyond any reasonable doubt if a merger was against the public interest. In the 75 years of the act's existence this has been impossible to prove, Mr. Chairman. This bill proposes a balanced approach. Merger will now become a civil reviewable matter rather than a criminal offence. A special competition tribunal will be created to provide expediency and fairness together with expertise in decision-making.

Le projet de loi propose une disposition civile rigoureuse sur les fusionnements. Il sera plus facile, entre autres, de prouver qu'un fusionnement est illégal, et les critères d'examen de ces fusionnements seront également renforcés.

En vertu de la loi proposée, les parties aux fusionnements de grande envergure devront présenter un préavis obligatoire avant de procéder à de telles transactions. Ceci permettra au gouvernement de faire préalablement un examen soigné des fusionnements et de prendre les mesures nécessaires pour interrompre les transactions dommageables.

Le Comité a devant lui une tâche importante. M. Ouellet, par exemple, a dit qu'il présenterait des modifications au projet de loi. Je tiens à vous assurer que je suis très ouvert aux propositions qui préservent l'équilibre atteint par le projet de loi, et j'espère que le Comité évaluera les modifications proposées dans cette optique.

En terminant, je vous rappellerai que le projet dont nous sommes saisis s'est édifié sur un accord plus large que tous ceux que nous avons connus jusqu'à présent, accord qui a pris naissance avec le gouvernement précédent. Notre tâche, à ce Comité, est de parachever ce projet de loi. Améliorons les détails si nous le pouvons, mais veillons surtout à ne pas rompre l'équilibre déjà atteint.

[*Traduction*]

which, in our opinion, would substantially weaken the effectiveness of this Act. Reservations were also expressed by them as to the pre-notification provisions, the tribunal and joint dominance.

I find comfort in the vote following the second reading debate, which not only saw the House adopt the principles of competition policy as espoused by Bill C-91, but also saw the Liberal members vote with the Government in favour of these principles. The quality of the debate at second reading was very high. Many interesting ideas and concerns were raised which you, as a committee, will have to consider.

J'attache une grande importance au fait que le projet de loi C-91 constitue un ensemble équilibré d'éléments interdépendants. Permettez-moi de vous parler brièvement de certaines de ses grandes caractéristiques.

Il est largement reconnu que la principale faiblesse de l'actuelle législation en matière de concurrence réside dans l'évaluation d'activités économiques complexes dans un cadre de droit criminel. Cela signifie que par le passé, la Cour devait prouver «au-delà de tout doute raisonnable» qu'un fusionnement allait à l'encontre de l'intérêt public. En 75 ans, la Loi actuelle n'a donné lieu à aucune condamnation dans une affaire de fusionnement. Le projet de loi C-91 propose une nouvelle approche: les fusionnements seront considérés comme ressortissant au droit civil et non plus au droit criminel et un Tribunal de concurrence sera créé pour assurer que les décisions seront rendues avec équité et rapidité.

The bill proposes a tough civil law on mergers. Not only are we diminishing the burden of proving a merger is illegal, we are also considerably strengthening the merger test provisions.

Under the proposed legislation, parties to large mergers must also fulfil mandatory prenotification requirements before completing such mergers. This will provide for an effective review of mergers before they are completed, and allow the government to take steps to block harmful transactions.

You, as members of this committee, have an important task ahead of you. Mr. Ouellet, for instance, has stated that he will be presenting amendments to the bill. I wish to assure all of you that I have an open mind to those suggestions for change that will preserve the essential elements that balance this bill. I hope that the committee will conduct its work from this perspective.

The bill before us has been built on a wider base of agreement than we ever seen before, an agreement that started with the previous government. Our task here in committee is to fine-tune and perfect the bill. But in doing so, let us take care not to upset the balance already achieved.

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Monsieur le président, je vous rappelle que le gouvernement s'est engagé à faire adopter ce projet de loi le plus tôt possible au cours de la présente session. Nous nous occupons ici de la législation sur la concurrence. Une saine concurrence n'intéresse pas seulement les avocats d'entreprises et les universitaires. La Loi sur la concurrence contribue à régler le climat économique. Elle est en soi un facteur de notre productivité nationale, de notre mieux-être et de notre niveau de vie. La triste vérité est que la loi que nous avons aujourd'hui est non seulement inadéquate, mais également un handicap économique. En tant que législateurs, il est de notre devoir de tenter de corriger cet handicap.

Les Canadiens ont attendu très longtemps, monsieur le président, peut-être même trop longtemps. Il est maintenant temps de terminer cette tâche pour le bien de tout le pays.

Je vous remercie.

Le président: Merci, monsieur le ministre.

Monsieur Ouellet, s'il vous plaît.

M. Ouellet: Merci, monsieur le président.

• 1545

Je voudrais d'abord dire au ministre qu'il est évident, comme le disait le chef de notre parti, M. Turner, que nous allons nous, du Parti libéral, tenter d'améliorer à certains égards le projet de loi. Nous croyons dès le départ que ce projet de loi est une nette amélioration par rapport à la loi actuelle. Par conséquent, il est important que les législateurs qui siègent à ce Comité étudient le projet de loi avec attention et minutie, mais aussi avec une certaine célérité afin qu'il soit adopté le plus tôt possible. Il est clair que la loi actuelle est boiteuse à bien des égards. Tout ce qui peut se faire pour l'améliorer est un pas dans la bonne direction.

Le chef libéral, M. Turner, a bien expliqué que la concentration du pouvoir économique n'est certainement pas dans l'intérêt des Canadiens. Ce projet de loi, d'une certaine façon, traite de cette question, mais nous croyons qu'il mérite d'être modifié afin qu'il soit plus efficace et qu'il réponde vraiment aux attentes de ceux et celles qui craignent cette trop forte concentration économique au pays. Je remercie le ministre d'avoir demandé aux membres du Comité d'accueillir avec une certaine sympathie certains des amendements qui seront proposés.

J'aimerais demander au ministre s'il s'est assuré que les articles de son projet de loi ayant trait au nouveau Tribunal de la concurrence sont fondés sur des assises constitutionnelles solides. Le projet de loi, évidemment, décriminalise un important aspect de ce dont traite la Loi sur la concurrence. Ce qui devient de nature civile, par la force des choses, devient d'intérêt provincial. Lorsqu'il s'agit d'actes criminels, il est certain que la compétence fédérale est absolue, mais dans le domaine civil, ce sont naturellement les autorités civiles qui ont priorité. Par conséquent, je crains que les articles concernant votre Tribunal soient les premiers attaqués devant les tribunaux en raison de leur inconstitutionnalité, ce qui pourrait paralyser tout le processus pendant des mois, sinon des années,

[*Translation*]

Mr. Chairman, in closing I want to stress the commitment of this government to passing this bill as soon as possible in this session of Parliament. We are dealing here with competition law. The quality and relevance of competition is a matter that concerns more than just corporate lawyers and academics. Competition law helps set the economic climate. It is in itself a factor in our national productivity, economy growth and our standard of living. And the disturbing truth is that the law we have today is not only inadequate—it is an economic handicap. As legislators, it is our responsibility to remove that handicap.

Mr. Chairman, let us finally get this work finished and behind us.

Thank you.

The Chairman: Thank you, Mr. Minister.

Mr. Ouellet, please.

Mr. Ouellet: Thank you, Mr. Chairman.

First of all, I would like the Minister to be aware of the fact that we in the Liberal party are obviously going to attempt to improve this bill in a number of ways, as the leader of our party, Mr. Turner, has said. But let it be said at the outset that we believe this bill to represent a great improvement over the current legislation. For this reason, it is important that legislators sitting on the committee give in-depth consideration to the bill, while at the same time trying to move quickly so that it can be passed into law as soon as possible. There is no doubt the current legislation is awkward in many ways. Anything that can be done to improve it is obviously a step in the right direction.

The Liberal leader, Mr. Turner, has made it clear that the concentration of economic power in the hands of a few is certainly not in the interests of Canadians. While this bill does address that issue in a sense, we believe some amendments to it are required to make it more effective and more responsive to those who are concerned about excessive concentration of economic power in Canada. I would just like to thank the Minister for having asked the members of the committee to give a sympathetic hearing to a number of the amendments to be brought forward.

I would like to ask the Minister whether he has been assured that those provisions of the bill relating to the new Competition Tribunal have a sound constitutional foundation. The bill does, of course, decriminalize an important aspect of the activities coming under the Competition Act. Anything which may now come under civil law will necessarily become a matter of provincial jurisdiction. Criminal acts, however, are clearly and absolutely under federal jurisdiction, but in the case of civil matters, civil authorities will naturally have control. As a result, I am concerned that the provisions relating to your new Competition Tribunal will be the first to be attacked in the courts for being unconstitutional, which could paralyse the entire process for months and even years on

[*Texte*]

avant que la Cour suprême établisse si, oui ou non, le Tribunal a juridiction et autorité.

M. Côté (Langelier): Monsieur le président, nous avons la ferme conviction que la création de ce Tribunal de la concurrence jouira de la reconnaissance de tout le système judiciaire. D'ailleurs, le ministère de la Justice nous a donné une opinion en ce sens. Nous n'excluons pas la possibilité qu'il puisse y avoir contestation, mais le jugement, dans un tel cas, devrait nous être favorable.

M. Ouellet: Je sympathise avec le ministre, parce qu'à l'époque où j'occupais d'autres fonctions, j'ai été souvent très désappointé par des décisions judiciaires. Je ne suis pas sûr que le ministre devrait être confiant à ce point. Consentirait-il à partager cet avis juridique avec les membres du Comité afin que ceux-ci puissent l'examiner d'un peu plus près?

• 1550

Je dois lui faire remarquer que si la Commission sur les pratiques restrictives du commerce est abolie et que le nouveau Tribunal devient le seul recours en ce qui concerne une partie de la loi, cela pourra créer un chaos énorme pendant un certain temps et entraîner des conséquences assez graves pour les fusions qui pourraient se faire pendant la période intermédiaire.

Est-ce que le ministre a pris des mesures pratiques pour s'assurer qu'il n'y aura pas d'incertitude? Est-ce que son ministère a envisagé la possibilité d'un renvoi à la Cour suprême pour être absolument sûr de la base de sa proposition législative?

M. Côté (Langelier): Je dois d'abord dire que je reconnais l'expérience de mon collègue en la matière. Permettez-moi de simplement répéter que le ministère de la Justice nous a donné l'assurance que le modèle de tribunal que nous proposons est valable et tout à fait constitutionnel. Je voudrais également ajouter qu'une série de jugements des différentes cours supérieures ont fort probablement appuyé l'opinion du ministère de la Justice. Je prends quand même vos commentaires en considération, monsieur Ouellet.

M. Ouellet: En ce qui concerne le Tribunal, ce qui a semblé agacer un certain nombre de personnes, c'est l'élément mixte de juges et de membres temporaires qui feraient bénéficier ce nouveau Tribunal de leur expertise. Ce qui saute aux yeux, c'est le danger de mettre ces personnes à temps partiel dans une situation de conflit d'intérêts intenable. On pourrait également avoir énormément de difficulté à trouver des experts qui sont dans l'action commerciale de tous les jours, qu'il s'agisse d'avocats, de comptables ou d'experts en économie. Si ces gens-là sont appelés à juger d'un cas qui implique de très grosses compagnies, ils devront sans doute se priver pendant un certain temps de faire affaire avec ces entreprises; autrement, leur crédibilité et leur honnêteté pourraient être mises en doute.

Le ministre ne serait-il pas plus sage s'il pensait à assurer une plus grande stabilité à son Tribunal et s'il envisageait de

[*Traduction*]

end before the Supreme Court could decide whether or not the Competition Tribunal had jurisdiction and was empowered to act.

Mr. Côté (Langelier): Mr. Chairman, we are firmly convinced that this new Competition Tribunal will be appreciated throughout our judicial system. Indeed, the Department of Justice put forward that very view. We do not dismiss the possibility that its authority may be challenged, but in such a case, the court's decision should be in our favour.

Mr. Ouellet: I sympathize with the Minister, because at the time that I was fulfilling other duties similar to his own, I was often very disappointed with the decisions handed down by the courts. I am not certain that the Minister should be quite so confident. Would he agree to share this legal opinion with the members of the committee so that they may have a closer look at it?

I should point out to him that if the Restrictive Trade Practices Commission is abolished and the new Tribunal becomes the only recourse under one part of the legislation, this could create utter chaos for some time, and have serious consequences for mergers taking place during the interim.

Has the Minister taken practical steps to ensure there will be no uncertainty? Has his department considered the possibility of putting the matter before the Supreme Court in order to be absolutely certain that this legislation is sound?

Mr. Côté (Langelier): First of all, let me say that I recognize my colleague has some experience in this regard. I would simply like to repeat that the Department of Justice has assured us that the model of tribunal being proposed is not only valid, but constitutionally appropriate. Let me add that a series of decisions handed down by a number of higher courts probably formed the basis for the opinion given to us by the Department of Justice. Needless to say, I will certainly take your comments into consideration, Mr. Ouellet.

Mr. Ouellet: With respect to the tribunal itself, what seems to have upset a number of people is the fact that it will include both judges and temporary members who will place their expertise at the disposal of the tribunal. There is, however, a glaring problem here, in that there is some danger that part-time members would be in an untenable conflict of interest situation. There also may be some difficulty finding experts who are involved in these fields on a daily basis, be they lawyers, accountants or economists. If they are called on to render a decision in a case involving very large companies, they will undoubtedly have to avoid having dealings with these companies for a certain period of time; otherwise, their credibility and honesty might be questioned.

Would it not be wiser for the Minister to try and give greater stability to the Tribunal by appointing at least a

[*Text*]

nommer à tout le moins un certain nombre de membres permanents dont la totale impartialité ne pourrait pas être mis en cause et dont l'indépendance d'esprit pourrait être protégée, ce qui assurererait également une certaine continuité dans les jugements que ce Tribunal rendra?

• 1555

M. Côté (Langelier): Vous savez, monsieur Ouellet que la création de ce Tribunal de concurrence sera établi selon le choix de juges. Ce choix se fera selon les voies du système judiciaire.

Nous pensons associer des laïcs à ce système. Cela préservera le respect des cours et du système judiciaire actuel. Si des laïcs font partie de ce tribunal, ils devront être impartiaux et sélectionnés pour leur expertise et non à la suite de conflits d'intérêts passés ou futurs. Ce caractère d'impartialité sera respecté par le juge qui choisira les membres d'une commission ou d'un panel. On assurera ainsi la consistance que vous soulevez. On obtiendra également des prises de décision plus rapides que celles qui existent à l'heure actuelle.

M. Ouellet: L'article 68 de la Loi dit:

> La présente loi ou telle de ses dispositions ou toute disposition de la Loi relative aux enquêtes sur les coalitions telle que modifiée ou édictée par la présente loi, entre en vigueur à la date et aux dates fixées par proclamation.

Cela veut dire en réalité que les nouvelles règles du jeu, depuis que le projet de loi a été déposé, en décembre 1985, sont connues. Mais la loi n'est pas encore en vigueur; il faudra quelques mois et peut-être même une année. Or, dans le domaine des fusions, en particulier, et peut-être dans certains autres aspects de la loi, il est évident que le milieu des affaires visé par les nouvelles modalités de la loi sera porté à agir très rapidement pour ne pas tomber sous le coup de cette loi. Ne pensez-vous pas qu'il serait plus juste que la loi s'applique à compter du 17 décembre 1985?

M. Côté (Langelier): Je ne serais pas prêt à aller jusque là parce que cela change un peu les règles du jeu . . .

M. Ouellet: Cela change les règles du jeu, bien sûr . . .

M. Côté (Langelier): Cela change les règles du jeu. C'est une espèce de rétroactivité que vous suggérez. Nous en sommes au mois d'avril. Si on reculait au mois de décembre 1985, on pourrait donner à croire que le gouvernement a l'intention, ou avait l'intention, de s'adresser à une transaction en particulier de façon à la bloquer ou à la faire réexaminer. Je suis aussi d'avis que cet élément de rétroactivité pourrait être mis en doute par les différentes cours. Il faut aussi considérer que le monde des affaires, monsieur Ouellet, a des attentes. Je pense que ce projet de loi a été présenté et étudié, et on a consulté, comme je l'ai dit, les différents groupes, les différentes associations. Cela se voit comme un tout qui doit être implanté dès qu'il est approuvé. Si on veut qu'il soit applicable le plus rapidement possible, faisons en sorte qu'il soit adopté le plus rapidement possible. Cependant, l'effet de la rétroactivité,

[*Translation*]

certain number of permanent members whose complete impartiality could never be questioned and whose independence could therefore be protected, thereby ensuring a certain continuity in the decisions rendered by the Tribunal?

Mr. Côté (Langelier): As you know, Mr. Ouellet, the members of the competition Tribunal will be chosen by judges. This selection will proceed on the basis of the usual judicial process.

We are, however, considering involving laymen in the system. This would have the affect of maintaining respect for the courts and for the current judicial system. Any laymen who are chosen to be part of the competition Tribunal will have to be impartial, and will certainly be selected for their expertise, not for any past or future conflict of interest. The need for such impartiality will certainly be respected by the judge who chooses the members of a commission or panel. In this way, we will guarantee the kind of consistency you have mentioned. We will also be able to get rulings more quickly than we can nowadays.

Mr. Ouellet: Clause 68 of the bill reads as follows:

> 68. This Act or any provision thereof, or any provision of the Combines Investigation Act, as amended or enacted by this Act, shall come into force on a day or days to fixed by proclamation.

What this really means is that the new ground rules have been known ever since the bill was tabled in December of 1985. Needless to say, the bill has not yet come into force; it may be some months, and possibly even a year, before it does. But as far as mergers, in particular, are concerned—and perhaps even other areas covered by the legislation—there is no doubt that business circles which are to be affected by the new provisions of the bill will be tempted to act quickly in order to avoid having to comply with the new provisions. Do you not think it would fairer for the bill to be considered to have come into force on December 17, 1985?

Mr. Côté (Langelier): I would not be prepared to go that far, because that would change the ground rules somewhat . . .

Mr. Ouellet: It would change the rules, that is true . . .

Mr. Côté (Langelier): There is no doubt that it would change the rules. You are suggesting that the bill be retroactive. This is now the month of April, and if we were to give it the force of law as of December of 1985, the impression might be left that the government intends, or had intended, to deal with a particular transaction, in order to block it or review it. I also think that a decision to make the bill retroactive could be challenged in the courts. We must not forget, Mr. Ouellet, that the business world has certain expectations. This bill was put forward for consideration; in other words, as I already said, we consulted various groups and associations prior to drafting it. It is seen as a coherent whole which should be put in place as soon as it has been approved. If we want it to come into force as quickly as possible, we should do everything we can to make sure that it is passed without delay. However, making the bill

[*Texte*]

de reculer au 16 ou 17 du mois de décembre, date à laquelle j'ai déposé le projet de loi, amènerait de telles perceptions.

• 1600

M. Ouellet: Je vous fais remarquer que votre collègue, M^me^ McDougall, a dit en Chambre, que sa Loi sur les institutions financières serait applicable dès que l'ébauche du projet de loi sera rendue publique, soit en décembre dernier.

M. Côté (Langelier): C'est cela qui le distingue, monsieur Ouellet. Quand M^me^ McDougall a annoncé son projet de loi, elle a annoncé clairement ses couleurs en disant que le projet de loi sera effectif à partir du 29 novembre. Je ne l'ai pas fait. Dire, aujourd'hui, qu'il s'applique à compter du 17 décembre, serait contraire aux bonnes discussions que nous avons eues avec les différents milieux d'affaires et les associations de consommateurs.

C'est la perception que j'en ai.

M. Ouellet: Enfin, je ne ne veux pas abuser, on reviendra là-dessus. Je pense que vous avez montré vos couleurs; vous les avez assez montrées le 17 décembre. Vous croyez à votre loi et vous croyez que certaines fusions ne devraient pas se faire et que si elles doivent se faire, ce sera en fonction des nouvelles règles de votre projet de loi. C'est un tort que vous ne vouliez pas, dès maintenant, avertir le milieu des affaires que les nouvelles règles du jeu devraient prendre effet dès maintenant. Sinon vous pourriez, théoriquement, dans les prochaines six semaines, avoir toute une série de fusions qui en vertu de votre loi ne pourraient plus se faire dans huit ou dix mois.

M. Côté (Langelier): Un dernier commentaire, monsieur le président, pour répondre à M. Ouellet. Je comprends sa position et je réitère encore la perception que cet effet rétroactif donnerait. Dans notre système parlementaire, très peu de lois ont un effet rétroactif. Lorsqu'on dépose un projet de loi, on ne peut tout de même pas, au Comité parlementaire ou en deuxième lecture, annoncer un effet rétroactif. Les règles du jeu seraient changées et cela risquerait de mettre en question beaucoup d'autres éléments négociés depuis le début. Si on déplace la date d'entrée en vigueur du projet de loi, on peut bien remettre en question beaucoup d'autres aspects négociés de bonne foi. Alors, l'adoption du projet de loi est tout simplement remise en doute. Comme je l'ai dit et comme vous l'avez souligné, monsieur Ouellet, ce projet de loi est fondé sur plusieurs éléments qui existaient dans le projet de loi C-29. On a été cherché ce qu'il y avait de bon; on a, jusqu'à un certain point, apporter les nuances que nous pensions nécessaires compte tenu de l'évolution du marché depuis le projet de loi C-29. Nous sommes convaincus aujourd'hui d'avoir un projet de loi raisonnable dont le Canada a besoin. Vous avez mentionné tout à l'heure qu'il est nécessaire.

Si on remet tout le principe en question et tout ce qui a été discuté et entendu, on risque d'attendre un autre 15 ans.

[*Traduction*]

retroactive to December 16 or 17, the date on which I tabled the bill, would result in the kind of perception I have already mentioned.

Mr. Ouellet: I would just like to point out that your colleague, Mrs. McDougall, said in the House that the Financial Institutions Act would come into force as soon as a draft of the bill had been made public, in other words, last December.

Mr. Côté (Langelier): And that is precisely the difference, Mr. Ouellet. When Mrs. McDougall announced her bill, she gave a clear statement of her intentions when she said the bill would be effective as of November 29. I, on the other hand, did not do that. If I were now to decide the bill would be retroactive to December 17, I would be going against the very useful discussions I had with representatives of various business concerns and consumers' associations.

That is my view of things.

Mr. Ouellet: Well, I do not intend to press the point now, but I may come back to it later. I think you have already made your intentions very clear; you made them clear last December 17. You believe in this bill, and you believe that some mergers should not be allowed to take place—or at least, if they are to take place, they will have to comply with the new rules introduced in your bill. I think you are wrong to be unwilling to let business circles know right now that the new ground rules will take effect immediately. Theoretically, then, in the next six weeks, a whole series of mergers could take place which would not be permitted eight or ten months from now under the provisions of your new bill.

Mr. Côté (Langelier): One last comment, Mr. Chairman, in response to Mr. Ouellet. I understand his position, but I would just like to repeat what the general perception would be if we were to make this legislation retroactive. In our parliamentary system, very few bills are retroactive. When a bill is tabled, it is simply not done to announce to a parliamentary committee or at the second reading stage that the bill will be retroactive. It would have the effect of changing the ground rules and possibly calling into question some of the other provisions which were negotiated from the outset. If we were to decide now to change the date of the bill's coming into force, we could very well decide to change our minds on many other things that were negotiated in good faith. In that case, whether the bill should be passed at all could be questioned. As I said and as you yourself pointed out, Mr. Ouellet, this bill is based on certain provisions which were part of Bill C-29. We extracted the best from it; of course, we did a certain amount of fine tuning, where necessary, given that the market has evolved since Bill C-29 was introduced. There is no doubt in our minds today that this bill is a reasonable bill and one Canada very much needs. You yourself said earlier that it was needed.

If we question the principle on which it is based and everything that has already been discussed and agreed upon, we run the risk of having to wait another 15 years.

[*Text*]

The Chairman: I will now allow Mr. McCrossan to ask questions. Mr. McCrossan, please.

Mr. McCrossan: Thank you, Mr. Chairman. I guess I have a couple of practical questions concerning some transactions that are in the marketplace right now or have recently taken place.

• 1605

I would just use the proposed acquisition by Olympia & York of Hiram Walker, which may or may not go through today—I am not sure what is happening in the market today—as an example and ask you to compare what you could do under three circumstances, the first circumstance being the current law, this law not in effect whatsoever, the second circumstance being this law was passed a month ago, or whatever, and is now in force and the deal is now pending. What powers would you as a Minister have or the Competition Tribunal have?

Of course the third circumstance is that this law becomes a law say a month from now, and the deal was completed today. What powers would you have or the Competition Tribunal have relative to that acquisition under this law, even though the acquisition took place prior to the law, given the concentration in the energy sector, where we have Home Oil, Interprovincial Pipe Line, Consumers' Gas, and Gulf Canada all concentrated under one ownership, assuming this deal goes through?

I wonder if you could explain the difference then between the current law, this law if it were adopted prior to the transaction, and this law if it were adopted a month from now.

Mr. Côté (Langelier): I think it is very difficult for me to answer that, because I do not want to prejudge the Competition Tribunal. I think what we are trying to do with these amendments . . . I think we have a project bill that is more precise and gives mechanisms to the director to have a better look at any proposed transactions or acquisitions. The Competition Tribunal is one of them; the pre-notification clause is another one; the abuse of dominant position is another one.

We think we have set up in the bill mechanisms where we allow the director to have all the tools in hand to better assess the results of any transaction. It is hard for me to say what would happen if today we have C-91 adopted and 30 days from now you have a Hiram Walker type of thing.

Mr. McCrossan: Okay. I am not asking you to prejudge that particular transaction at all. If this bill were the law, would you as the Minister have any right to intervene?

Mr. Côté (Langelier): Myself personally?

Mr. McCrossan: Yes.

Mr. Côté (Langelier): No.

[*Translation*]

Le président: Je vais maintenant donner la parole à M. McCrossan pour poser des questions. Allez-y, monsieur McCrossan.

M. McCrossan: Merci, monsieur le président. J'ai un certain nombre de questions pratiques au sujet de certaines transactions qui sont actuellement en train de se faire ou qui ont été conclues tout récemment.

Permettez-moi de me servir du projet d'acquisition *Hiram Walker* par *Olympia & York*, qui pourrait ou non devenir réalité aujourd'hui—je ne suis pas certain de ce qui se passe sur le marché aujourd'hui—pour vous demander de ce que vous feriez dans trois cas. Premièrement, si la nouvelle loi n'est pas adoptée et que la loi actuelle reste en vigueur; deuxièmement, si la nouvelle loi avait été adoptée il y a un mois par exemple, qu'elle soit maintenant en vigueur et que la transaction soit en suspens. Quels pouvoirs auriez-vous en tant que ministre ou quels pouvoirs auraient le Tribunal de la concurrence?

Le troisième cas évidemment est le suivant: la nouvelle loi a été adoptée il y a un mois disons, et la transaction se fait aujourd'hui. Quels pouvoirs vous ou le Tribunal de la concurrence auriez-vous concernant cette acquisition en vertu de la nouvelle loi, même si l'acquisition a eu lieu avant son adoption, étant donné la concentration qui existe dans le secteur énergétique, puisque nous avons *Home Oil*, *Interprovincial Pipe Line*, *Consumers's Gas* et *Gulf Canada*, tous concentrés dans les usines d'un seul propriétaire, en supposant que cette transaction soit acceptée?

Pourriez-vous nous dire quelle différence il y a entre la loi actuelle et la nouvelle loi, si elle était adoptée avant que la transaction ait lieu, et si elle était adoptée dans un mois.

M. Côté (Langelier): Il m'est très difficile de répondre, car je ne peux pas préjuger ce que fera le Tribunal de la concurrence. Ce que nous essayons de faire par le biais de ces modifications . . . nous avons, je crois, un projet de loi qui est beaucoup plus précis et qui donne au directeur les mécanismes nécessaires afin de mieux examiner tout projet de transaction ou d'acquisition. Le Tribunal de la concurrence est un de ces mécanismes, l'article concernant le préavis en est un autre et également celui concernant l'abus de position dominante.

Nous croyons avoir prévu dans ce projet de loi des mécanismes qui permettront au directeur d'avoir en main tous les outils pour mieux évaluer les résultats de toute transaction. Il m'est difficile de vous dire tout ce qui se produirait si aujourd'hui le projet de loi était adopté et que dans trente jours nous avions une transaction du type *Hiram Walker*.

M. McCrossan: Bien. Je ne vous demande pas de préjuger ce genre de transaction. Si le projet de loi était adopté, est-ce que vous, en tant que ministre, auriez le droit d'intervenir?

M. Côté (Langelier): Moi-même personnellement?

M. McCrossan: Oui.

M. Côté (Langelier): Non.

[*Texte*]

Mr. McCrossan: No, you would have no power to intervene prior to the deal being consummated. Would anyone else have a right to intervene prior to a deal going through?

Mr. Côté (Langelier): You know that because of the volume of that kind of transaction, these assets . . .

Mr. McCrossan: They are over $4 billion.

Mr. Côté (Langelier): Yes.

Mr. McCrossan: Under sections 81 to 85 I was talking about.

Mr. Côté (Langelier): Right. So they will have to pre-identify the division. Then the director will look at it. If he is of the opinion that it is lessening competition and there would be no efficiency gained, then he could ask the tribunal.

Mr. McCrossan: What is the process then? Do they seek an injunction to stop the deal from going through? I mean, the deal can still march on.

Mr. Côté (Langelier): He would go with an injunction first, and secondly he would ask for an order to the tribunal to disallow the transaction.

Mr. McCrossan: I see.

Mr. Côté (Langelier): Then the tribunal will examine the transaction, will have the hearings from everywhere, and it would disallow or allow the transaction. If it disallowed a transaction and the parties do not agree with it, then they have the courts to go to. All right?

Mr. McCrossan: Now in the United States if there is a major transaction there is a pre-notification. Is that the same sort of thing, where the companies have to pre-notify and receive a ruling that there will not be a lessening of competition?

Mr. Gilles Ménard (Legislative Branch, Department of Consumer and Corporate Affairs): Well, with Bill C-91 there will be in Canada something similar to the U.S. practice in the sense that there will be pre-notification. But the criteria set out for that provision are much simpler in Canada than they are in the U.S., and they certainly do not create the same sort of paper burden to comply with that.

• 1610

Mr. McCrossan: Right, okay. I understand that the bill deals with concentration in the marketplace. If I could refer to one other transaction in the energy sector, I believe it refers to situations where two companies effectively dominate a market.

In certain provinces or regions of this country, as a result of the Petro-Can purchase of Gulf, it appears to certain observers that between them, Petro-Can and Esso dominate certain regional markets.

[*Traduction*]

M. McCrossan: Non, vous n'auriez pas le pouvoir d'intervenir avant que la transaction soit conclue. Est-ce que quelqu'un d'autre aurait le droit d'intervenir avant cela?

M. Côté (Langelier): À cause du volume que représente ce genre de transaction, des actifs . . .

M. McCrossan: Ils s'élèvent à plus de quatre milliards de dollars.

M. Côté (Langelier): Oui.

M. McCrossan: Je vous posais la question en songeant aux articles 81 à 85.

M. Côté (Langelier): Bien. Il leur faudrait donc identifier à l'avance le secteur, le directeur étudiera la question et, s'il est d'avis qu'il y a affaiblissement de la concurrence et qu'il n'y a pas de gains en efficience, il peut s'adresser au tribunal.

M. McCrossan: Quelle est la procédure par conséquent? Est-ce qu'ils doivent obtenir une injonction pour arrêter la transaction avant qu'elle soit conclue? Je veux dire par là que la transaction peut toujours se poursuivre.

M. Côté (Langelier): Il peut demander d'abord une injonction et ensuite il peut demander une ordonnance du tribunal pour rejeter la transaction.

M. McCrossan: Je vois.

M. Côté (Langelier): Le tribunal ensuite étudiera la transaction, tiendra des audiences et rejettera ou acceptera la transaction. Si elle est rejetée, et que les parties ne sont pas d'accord, ils peuvent s'adresser aux tribunaux. Ça va?

M. McCrossan: Aux États-Unis, s'il s'agit d'une transaction importante, il y a préavis. Est-ce que c'est la même chose, est-ce que les sociétés doivent donner un préavis, et attendre qu'on leur dise qu'il n'y aura pas affaiblissement de la concurrence?

M. Gilles Ménard (Direction de l'élaboration de la loi ministère de la Consommation et des Corporations): Nous aurons au Canada, avec le projet de loi C-91, une pratique semblable à celle qui existe aux États-Unis, à savoir qu'il y aura préavis. Mais les critères régissant les préavis sont beaucoup plus simples au Canada qu'ils ne le sont aux États-Unis et n'imposent certainement pas la même masse de paperasseries.

M. McCrossan: D'accord, merci. Je crois comprendre que le projet de loi porte sur la concentration des sociétés sur le marché. Si vous me permettez de parler d'une autre transaction dans le secteur de l'énergie, je crois que le projet de loi traite de cas où deux sociétés occupent effectivement une position dominante sur le marché.

Certains observateurs estiment que Petro-Canada et Esso occupent une position dominante sur certains marchés régionaux, dans certaines provinces ou régions, depuis l'acquisition de Gulf par Petro-Canada.

[*Text*]

Mr. Olikow: How about Irving in New Brunswick?

Mr. McCrossan: You can pick your example in your time, I guess.

These situations exist now. The bill will be passed next month. What powers with respect to those situations are created under the bill? Does the fact that they pre-existed mean that the bill has no impact at all on those situations? Indeed, as a result of the bill passing, could either company be ordered, for example, to dispose of certain service stations?

Mr. Côté (Langelier): My first reaction—maybe Mr. Ménard could add some comments to it—but I think you are talking about the section on abuse of dominant position. There has to be an abuse. It is not only that you might dominate your sector, your market, but you have to abuse it in order to have an offence under this bill.

If such is the case, then we will act upon the abuse of dominant position, but I do not think we have any power to dismantle or to say that because you have a dominant share of the market, this share should be reduced in any specific regions.

It is not because of Irving, for instance. It is not because they are strong in New Brunswick or in the Maritimes. The fact that they own or they just control, let us say, more than 50% of the market is not an abuse of their dominant position.

Mr. McCrossan: Just to make this my last question, because I do not want to abuse my own monopoly powers at this point in time.

There certainly have been recent reports that in those provinces where those two companies dominate the market, the refiners' margins have increased substantially as the price of world oil falls. Indeed, they have been less responsive to market conditions than in markets where the two companies do not have the same concentration.

Could one imagine, for example—I am not sure of the process. Does the Consumers' Association of Canada raise this with the tribunal and say they think that the fact that prices are not falling where these two companies control the market is an abuse? How does the process work? Who is responsible for initiating an investigation?

Mr. Côté (Langelier): First of all, if the director sees that by himself in the newspaper and he believes there could be facts, then he could investigate himself.

If six Canadian citizens think that for a specific region—they are consumers. It has happened before. If you remember, that happened in Quebec when Ultramar acquired Gulf. Mr. Ouellet asked the director to commence such an inquiry. If six Canadian citizens feel there is an abuse, they can, at any time, ask the director to act upon that. That is the way it works.

[*Translation*]

M. Orlikow: Ne faudrait-il pas ajouter Irving au Nouveau-Brunswick?

M. McCrossan: Vous choisirez, à votre tour, l'exemple qui vous convient.

Ces situations existent à l'heure actuelle. Le projet de loi sera adopté le mois prochain. Quels pouvoirs le projet de loi accorde-t-il à l'égard de ces situations? L'existence de ces situations avant l'adoption du projet de loi exclut-elle toute possibilité d'intervention? En fait, quand le projet de loi sera adopté, pourra-t-on, par exemple, ordonner à une société de se dessaisir de certaines stations-services?

M. Côté (Langelier): M. Ménard pourra compléter ma réponse mais je crois, à première vue, que vous voulez parler de l'article sur l'abus d'une position dominante. Il doit y avoir abus. Il n'y a aucune infraction en vertu du projet de loi du seul fait qu'une société occupe une position dominante dans un secteur ou sur un marché; il doit y avoir abus.

Dans pareil cas, nous pourrions intervenir en vertu des dispositions sur l'abus d'une position dominante mais je ne crois pas que nous ayons le pouvoir d'imposer le dessaisissement ou la réduction du contrôle d'une société du seul fait qu'elle occupe une position dominante sur un marché donné.

Nous ne pouvons pas intervenir à l'égard de la société Irving, par exemple, du seul fait qu'elle a un gros chiffre d'affaires. Le fait qu'elle soit solidement implantée au Nouveau-Brunswick ou dans les Maritimes ne suffit pas. Il n'y a pas abus d'une position dominante du seul fait que cette société possède ou contrôle plus de 50 p. 100 du marché.

M. McCrossan: Ce sera ma dernière question puisque je ne veux pas abuser du monopole que j'exerce.

Certains ont soutenu récemment que dans les provinces où ces deux sociétés occupent une position dominante, les marges bénéficiaires des raffineurs ont augmenté considérablement en raison de la chute du prix du pétrole. En fait, elles ont réagi moins rapidement aux forces du marché que dans les régions où ces deux sociétés n'occupent pas une position dominante.

Pourrait-on imaginer, par exemple . . . je ne sais pas au juste comment cela fonctionne. L'Association des consommateurs canadiens doit-elle essayer de convaincre le tribunal qu'il y a abus du fait que les prix ne baissent là où ces deux sociétés contrôlent le marché? Comment est-ce que cela fonctionne? À qui appartient l'initiative d'engager une enquête?

M. Côté (Langelier): D'abord, le directeur pourrait lui-même décider d'enquêter s'il prenait connaissance, par les journaux, de l'existence de certains faits pouvant justifier la tenue d'une enquête.

Six consommateurs canadiens pourraient prendre l'initiative s'ils croient qu'une certaine région . . . cela s'est déjà vu. Vous vous souviendrez que cela s'est fait au Québec lorsque Ultramar a fait l'acquisition de Gulf. M. Ouellet a demandé au directeur de faire enquête. Si six citoyens canadiens estiment qu'il y a abus, ils peuvent, en tout temps, demander au directeur d'intervenir. Voilà comment fonctionne le système.

[*Texte*]

Mr. McCrossan: But the test is much stricter now than it was under current legislation. That is the point.

Mr. Côté (Langelier): Oh yes. Right now it is a civil law instead of a criminal matter.

Mr. McCrossan: Right.

The Chairman: Mr. Orlikow.

• 1615

Mr. Orlikow: I did not know whether to laugh or cry when I heard both the Minister and Mr. Ouellet urge quick passage of this bill. We have not had legislation for 25 years or more. The former Liberal government had four draft bills. They got so many complaints from the business community that they never brought one to the House in any serious way.

Mr. Ouellet: I just want to correct my good friend. We have legislation. The last one was 10 years ago. So it is not 25.

Mr. Orlikow: Well, it was not very effective, and . . .

Mr. Ouellet: That is why we want to improve it.

Mr. Orlikow: —now we have this bill, and we have very serious doubts about the consultation or the supposed unanimity and support for the bill. I want to say to the Minister and to the Official Opposition that we have no intention of letting this bill go quickly. We want a substantial number of witnesses. I will indicate the kind of witnesses, and we are going to look at this bill very, very carefully.

Just on the question of the consultation, I wonder if the Minister could give me the names of the advisory committee he had deal with this bill in some considerable detail?

Mr. Côté (Langelier): We can table it. I do not have it right now.

Mr. Orlikow: Could the Minister tell me if were they all business people. Were there any representatives of farm, labour, or academic groups on that advisory committee?

M. Côté (Langelier): Monsieur le président, je saisis le point de mon collègue. Pendant certaines périodes de questions, j'ai reçu les questions de mon collègue qui laissaient croire qu'il y avait eu très peu de consultations et que les consultations que nous avions eues avaient eu lieu surtout avec de grosses entreprises. Je voudrais tout simplement lui mentionner que cela n'a jamais été le cas. En fait, comme je l'ai mentionné, ce projet de loi est basé sur une très vaste consultation. Tout au cours de l'été, nous avons eu l'occasion, avec les fonctionnaires de mon ministère, de discuter en détail des différentes ébauches avec des groupes d'intérêts privés. Je vais tout simplement mentionner les conseils d'entreprises pour les questions d'intérêt national, la Chambre de commerce du Canada, l'Association des consommateurs du Canada . . .

[*Traduction*]

M. McCrossan: Mais les critères du projet de loi sont beaucoup plus rigoureux que ceux de la loi actuelle. Voilà l'aspect essentiel.

M. Côté (Langelier): Ah, oui. Le projet de loi en fait une affaire civile plutôt que criminelle.

M. McCrossan: C'est exact.

Le président: Monsieur Orlikow.

M. Orlikow: Je ne savais pas si je devais rire ou pleurer en entendant le ministre et M. Ouellet réclamer tous deux l'adoption rapide de ce projet de loi. La loi n'a pas été modifiée depuis plus de 25 ans. L'ancien gouvernement libéral a présenté quatre projets de loi. Il a reçu tellement de plaintes de la part des hommes d'affaires qu'aucun de ces projets de loi n'a pu franchir toutes les étapes.

M. Ouellet: Je tiens à rétablir les faits. Nous avons une loi. La dernière a été adoptée il y a dix ans. Cela ne fait donc pas 25 ans.

M. Orlikow: Enfin, cette loi n'était pas très efficace et . . .

M. Ouellet: Voilà pourquoi nous voulons l'améliorer.

M. Orlikow: . . . nous avons ce projet de loi et nous avons de sérieures réserves quant aux consultations qui ont pu être faites et quant à la prétendue unanimité entourant ce projet de loi. Je tiens à dire au ministre et à l'Opposition officielle que nous n'avons pas l'intention de permettre que ce projet de loi soit adopté rapidement. Nous voulons entendre un nombre appréciable de témoins. Je vous indiquerez quels témoins nous souhaitons entendre et je vous dis que nous allons examiner ce projet de loi très, très attentivement.

Sur cette question de la consultation, je me demande si le ministre pourrait me donner les noms des membres du comité consultatif chargé d'examiner ce projet de loi en détail?

M. Côté (Langelier): Nous pouvons déposer cette liste. Je ne l'ai pas avec moi.

M. Orlikow: Le ministre peut-il me dire si tous ces membres sont des hommes d'affaires? Ce comité consultatif comprenait-il des représentants du secteur agricole, des syndicats et des universités?

Mr. Côté (Langelier): Mr. Chairman, I know what my colleague is getting at. During some question periods, my colleague asked questions that gave the impression that the consultation process was very limited and that we had consulted mainly large businesses. I would simply like to say that such was never the case. In fact, as I have already stated, this bill is the result of wide consultations. Throughout the summer, myself and officials from my department had in-depth discussions on the various drafts with private interest groups. Let me just mention the Business Council on National Issues, the Canadian Chamber of Commerce, the Consumers' Association of Canada . . .

[*Text*]

Mr. Orlikow: Mr. Chairman, if I could interrupt, the Minister is not answering my question. It was reported in the business newspapers, I think in both *The Financial Post* and *The Financial Times*, that the Minister had an advisory committee studying this bill in great detail. I am not talking about government officials. I ask the Minister: Did he have an advisory committe? If he had an advisory committee, who were the people on the advisory committee?

M. Côté (Langelier): Comme je l'ai expliqué ou comme j'essaie de l'expliquer, nous avons d'abord commencé par faire des consultations et, avec les résultats des consultations qui nous sont parvenus, nous avons créé un groupe d'étude qui a eu la particularité de résumer ces opinions et ces commentaires qui étaient reçus pour faire en sorte de respecter les opinions de tout le monde. Ce comité consultatif s'est assuré que les intérêts de toutes les parties étaient justement représentés et que chacun des commentaires particuliers étaient introduits dans ce projet de loi. Les membres du comité, bien sûr, sont des personnes qui ont, de façon régulière, dû tenir compte de ces éléments de fusionnement. Si mon collègue le souhaite, je peux lui fournir les noms des membres de ce comité.

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Il y a d'abord M. Thomas Kendell, de *Kendell and Crosbie*; M. Eric Rice, de Campbell, Froh, May & Rich, de Colombie-Britannique; M. Bill McKeown, avocat, de Stephens, French & McKeown; M. Alan Cooke, de Cooke, Shandling; M. Marcel Côté, président de Secor Incorporé; M. Brian Finlay, de Weir & Foulds; M^me^ Diane Cohen; M. Ron Atkey, avocat chez Osler, Hoskin, Harcourt; M. Grant Murray, vice-président de IBM Canada Ltée et M. Marc Régnier, qui est vice-président des Entreprises diversifiées et chef du contentieux de CIP Inc.

Le président: Cette réponse détaillée vous satisfait?

Mr. Orlikow: It answers my question. It tells me, Mr. Chairman, that there are no representatives of labour on that advisory committee, no representatives of the farm or co-operative movement on that committee, and with the exception of Ms Cohen, who was at one time a professor at a university but who has not been one for a long time . . .

As the Minister knows, I wrote him and gave him a list of professors in universities in many parts of Canada who have done a substantial amount of work in the field of competition policy. I ask the Minister: From how many of those did he hear, and how many of them would support this bill? I know, and I am sure the Minister knows, that Professor Stanbury of the University of British Columbia, who is an acknowledged expert in this field and who has appeared on *Sunday Morning* and several other programs, had some pretty sharp criticisms of this bill. I just wonder what kind of consideration was given to the views of those academics. I am sure there are other academics, besides the ones whose names I gave to the Minister, who have opinions about this subject and about the quality of this bill.

[*Translation*]

M. Orlikow: Monsieur le président, si vous me le permettez, le ministre ne répond pas à ma question. On a pu lire dans les pages financières, et particulièrement dans le *Financial Post* et le *Financial Times*, que le ministre avait chargé un comité consultatif d'examiner ce projet de loi en détail. Je ne parle pas de fonctionnaires fédéraux. Je pose la question au ministre: avait-il un Comité consultatif? Si oui, qui en étaient les membres?

Mr. Côté (Langelier): As I have explained or am trying to explain, we had a first round of consultations, and when the results of these started coming in we created a study group whose mandate it was to collate all the opinions and comments in order to ensure that all points of view were taken into account. This advisory committee made sure that the interests of all parties were fairly represented and that special comments were integrated into the bill. The members of the committee are obviously people who regularly have to deal with various considerations related to mergers. If my colleague wishes it, I can provide him the names of the members of that committee.

They are: Mr. Thomas Kendell, from Kendell and Crosby; Mr. Eric Rice, of Campbell, Froh, May and Rich, of British Columbia; Mr. Bill McKeown, a lawyer with Stevens, French, and McKeown; Mr. Allan Cooke, of Cooke, Shandling; Mr. Marcel Coté, President of Secor Incorporated; Mr. Brian Findlay of Weir and Foulds; Mrs. Diane Cohen; Mr. Ron Atkey, lawyer with Osler, Oskin, Harcourt; Mr. Grant Murray, Vice-President of IBM Canada Ltd., and Mr. Mark Rigné who is Vice-President of *Entreprises diversifiées* and Head of the Law Division at CIP Inc.

The Chairman: Does this detailed answer satisfy you?

M. Orlikow: Cela répond à ma question. Cela me dit, Monsieur le président, qu'il n'y avait, sur ce comité consultatif, aucun représentant syndical, aucun représentant du secteur agricole ou du mouvement coopératif et, à l'exception de M^me^ Cohen qui a déjà été professeur d'université mais qui a cessé de l'être il y a longtemps . . .

Comme le sait le Ministre, je lui ai écrit et je lui ai fourni une liste de professeurs d'universités de nombreuses régions du Canada qui ont une expérience appréciable en ce qui concerne la politique de la concurrence. Voici ma question au Ministre: combien d'entre eux ont fait connaître leur point de vue et combien d'entre eux appuieraient ce projet de loi? Je sais et je suis certain que le Ministre sait que le professeur Stanbury de l'Université de la Colombie-Britannique, expert reconnu dans ce domaine et qui a participé à l'émission *Sunday Morning* et à plusieurs autres émissions, a fait des critiques assez acerbes au sujet de ce projet de loi. Je me demande dans quelle mesure on a tenu compte du point de vue de ces universitaires. Je suis certain que d'autres universitaires, en plus de ceux dont j'ai remis les noms au Ministre, ont une opinion sur cette question et sur la qualité du projet de loi.

[*Texte*]

M. Côté (Langelier): Monsieur le président, je ne sais pas où mon collègue veut en venir, mais pour un projet de loi il n'y a jamais eu autant de consultations.

Premièrement, je tiens à souligner que le comité consultatif a justement été créé pour nous aider. C'était pour faciliter l'élaboration des différentes dispositions du projet de loi parce que c'est un projet de loi qui est quand même complexe et qui contient plusieurs considérations d'ordre technique.

Comme je le mentionnais, nous avons diffusé un document de consultation. Nous avons reçu des opinions de plus de 20 associations et regroupements. J'ai mentionné à mon collègue quelques-uns de ces membres: par exemple, le Congrès du travail du Canada, le Conseil canadien du commerce de détail, l'Association des consommateurs et l'Alliance des épiciers indépendants. Si on pense que ce ne sont pas là des associations qui peuvent représenter les consommateurs du Canada . . . On s'est aussi assuré qu'on avait des universitaires spécialisés en droit et en économie qui, eux aussi, ont donné leurs opinions. Toutes ces opinions ont été réunies par le comité consultatif.

L'Association des consommateurs du Canada, dans son énoncé, mentionne que ce projet de loi

is a major improvement over current legislation, says the Consumers' Association of Canada, urging that the bill get the highest priority.

Le projet de loi reçoit l'appui de l'Association des consommateurs du Canada. Si mon collègue se préoccupe tellement de cette question, je peux l'assurer d'avance que nous avons reçu les doléances de tous ces groupements d'intérêts; nous les avons prises en considération. Le comité consultatif avait la responsabilité de réunir tous les éléments pertinents. Et plusieurs des éléments qui avaient été proposés par l'Association des consommateurs du Canada y sont énumérés. Par exemple,

corporate mergers and monopolies will become civil rather than criminal matters, making it more enforceable.

• 1625

A new tribunal with no Cabinet override will handle non-criminal matters. Consumer groups will have a role in nominating tribunal members.

In all these kinds of recommendations, Mr. Chairman, we have made sure they were part of this project, so we have respected the consumers' concerns and interests as well as we did with the different university academics.

Mr. Orlikow: Mr. Chairman, it is my impression that . . .

Le président: Monsieur Orlikow, j'ajouterai, pour le bénéfice des membres, que je recevais de vous il y a quelques minutes une liste d'universitaires et d'économistes qui devraient être entendus et cette liste sera remise à notre Comité de direction.

Mr. Orlikow: Mr. Chairman, if I may continue.

The Chairman: Yes.

[*Traduction*]

Mr. Côté (Langelier): Mr. Chairman, I do not know what my colleague is getting at but there has never before been such wide consultation on a bill.

I must point out, first of all, that this advisory committee was created for the very purpose of facilitating our work. Their mandate was to facilitate the drafting of the various provisions of the bill, which is quite complex and incorporates various technical considerations.

As I mentioned, we distributed a discussion paper. We received comments from over 20 groups and associations. I listed several of them for my colleague's benefit, for example, the Canadian Labour Congress, the Canadian Retailers Council, the Consumers Association and the Independent Grocers' Alliance. If those associations are not able to represent Canadian consumers, I do not know who can; we also afforded academics specialized in law and economics an opportunity to express their views. The Advisory Committee collated all those views.

The Consumers Association of Canada, in its brief is of the opinion that the bill

constitue une amélioration appréciable par rapport à la loi actuelle, et demande instamment que l'on y accorde la plus haute priorité.

The Consumers Association of Canada supports the bill. If my colleague is so concerned about this, I can assure him right now that we have heard the concerns of all these interest groups and that we have taken them into consideration. The Advisory Committee had the mandate to collate all relevant information. Several of the proposals made by the Consumers Association of Canada are listed. For example,

les fusions de sociétés et les monopoles relèveront du droit civil plutôt que du droit pénal et les lois seront donc plus facile à exécuter.

Un nouveau tribunal s'occupera des affaires non-pénales et le Cabinet ne sera pas habilité à renverser ses décisions. Les groupes de consommateurs pourront participer au choix des membres du tribunal.

Monsieur le président, nous avons veillé à intégrer toutes ces recommandations au projet de loi de façon à tenir compte des préoccupations et des intérêts des consommateurs et des universitaires.

M. Orlikow: Monsieur le président, j'ai l'impression que . . .

The Chairman: Mr. Orlikow, I would add, for the benefit of members, that I received from you a few minutes ago a list of academics and economists who should be heard and this list will be referred to our steering committee.

M. Orlikow: Monsieur le président, si je vous demandais de me permettre de continuer.

Le président: Oui.

[*Text*]

Mr. Orlikow: I am not going to pursue this line at this time, except to tell the Minister that according to the information which I got from one organization, which has several million members—the Canadian Labour Congress—the consultation with them was, to say the least, very brief and very perfunctory.

They certainly had no real opportunity, from what I have heard, and they are one of the organizations which I am sure will be here, or will want to testify; to really discuss the provisions of the bill.

I want to raise another matter with the Minister, which I think is very important. *The Toronto Star* on March 19, 1985, reported that nine families control 53% of the Toronto Stock Exchange's widely watched list of the 300 major companies and the same news story quotes that great left-wing radical, the President of the Canadian Bankers' Association, Robert MacIntosh, as saying "The amount of concentration is dangerous".

I ask the Minister . . . we have had the spectacle in the last few weeks of Imasco, which has a strong interest in tobacco, in drug stores, owns companies in the United States, took over Genstar, which has interests in building materials, in Canada Trust—they are determined, obviously, to continue further acquisitions.

Or we have the matter which was raised by a Conservative member, Mr. McCrossan—what is happening now with Hiram Walker. We have a contest between Bell Canada, which was a telephone company, but in recent years has taken a major position in TransCanada Pipelines, in B.C. Development, which was formerly Daon Developments and Computer Innovations, and they are competing with the Reichmanns who in recent years took over Gulf Canada, Abitibi-Price, MacMillan Bloedel, Trilon Financial Corporation, Cadillac Fairview.

Now, is the Minister concerned about this tremendous concentration of wealth and power by a very few individuals, and if he is, will he tell me what there is in this bill which will give the government any authority to stop the further takeovers of so much more of the major corporations in this country by those who want to do it? What is there in this bill that would prevent it?

Mr. Côté (Langelier): Mr. Chairman, if I may say so, this bill deals with competition and in it, we are trying to bring about amendments which will enhance competition in this country. What does this mean? It means that we are creating opportunities for investment and jobs and bringing about the economic renewal that everybody is expecting. We are on the road to doing that. I think our record proves that already, after 18 months.

• 1630

I think my colleague is very preoccupied with concentration. Concentration, Mr. Chairman, means big. We think big when we think about concentration. However, big does not neces-

[*Translation*]

M. Orlikow: Je ne vais pas m'attarder sur cette question maintenant mais je tiens à dire au ministre que d'après les renseignements que j'ai obtenus d'une des organisations, qui compte plusieurs millions de membres, à savoir le Congrès du travail du Canada, elle a été consultée très brièvement et de façon très symbolique, et c'est peu dire.

D'après les échos que j'en ai eus, le Congrès n'a certainement pas eu la possibilité de participer réellement et je suis certain qu'il demandera à comparaître afin de discuter sérieusement des dispositions du projet de loi.

J'aimerais soulever avec le ministre une autre question qui m'apparaît très importante. Le 19 mars 1985, le *Toronto Star* rapportait que neuf familles contrôlent 53 p. 100 des actions des 300 grandes sociétés cotées à la bourse de Toronto et dont le cours est le plus étroitement surveillé, et le même article cite ce grand radical de gauche, le président de l'Association des banquiers du Canada, Robert MacIntosh, qui aurait dit: «Le degré de concentration est dangereux».

J'aimerais que le ministre me dise . . . ces dernières semaines, nous avons assisté à la prise de contrôle de Genstar, qui a des intérêts dans les matériaux de construction et dans Canada Trust, par Imasco qui a des intérêts considérables dans le tabac et les pharmacies et qui possède des sociétés aux États-Unis; Imasco semble de toute évidence déterminée à faire de nouvelles acquisitions.

Il y a aussi l'exemple soulevé par un député conservateur, M. McCrossan, à savoir le cas de Hiram Walker. La lutte est engagée entre Bell Canada qui est une entreprise de services téléphoniques mais qui a acquis une participation appréciable dans TransCanada Pipelines et B.C. Development, anciennement Daon Developments, et dans Computer Innovations, d'une part, et les Reichmann, d'autre part, qui ont pris le contrôle ces dernières années de Gulf Canada, Abitibi-Price, MacMillan Bloedel, Trilon Financial Corporation et Cadillac Fairview.

J'aimerais savoir si le ministre est inquiet de cette énorme concentration de richesses et de pouvoirs entre les mains de quelques personnes et, si oui, peut-il me dire quelles dispositions du projet de loi, s'il en est, donnent au gouvernement le pouvoir de bloquer de nouvelles prises de contrôle d'un si grand nombre de grandes sociétés de ce pays? Quelles dispositions du projet de loi permettraient de faire obstacle à cela?

M. Côté (Langelier): Monsieur le président, si je peux me permettre de le dire, le projet de loi traite de la concurrence et les amendements que nous proposons visent à améliorer la concurrence dans ce pays. Qu'est-ce que cela signifie? Cela signifie que nous créons de nouvelles possibilités d'investissement et de nouveaux emplois et que nous favorisons la relance économique qu'attendent tous les Canadiens. Nous avons déjà fait des progrès à cet égard. Je pense que notre bilan, après 18 mois, le prouve.

Je crois que mon collègue s'inquiète sérieusement de la concentration. Monsieur le président, quand on parle de concentration, on songe à de grosses sociétés. Quand nous

[*Texte*]

sarily mean bad. We have set up in this bill mechanisms to allow for a review of any proposed transaction but we want to make sure that it does not lessen competition. That is what we should be concerned with, not concentration.

If the director or the tribunal examines any proposed transaction, whether it is a concentration or not, which has the effect of lessening competition with no efficiency gained, then the transaction should be disallowed. We are not concerned at this time about the concentration of the nine families he is referring to.

Mr. Orlikow: Mr. Minister, you are not concerned at this time, and we are talking about this time. Unfortunately, we did not have these discussions 10 years ago when instead of 50% it probably was 40%. We are not talking of what will happen 10 years from now. You are not concerned about the fact that nine or ten families control about 50% of the major corporations. At what point would you become concerned? Would you become concerned if it was 60% instead of 50% or 75%, or would it have to go to 90% that these companies would control before you would become concerned? Or would you ever become concerned?

Mr. Côté (Langelier): I am not saying I am not concerned, Mr. Chairman. I am saying this bill deals with competition and not with concentration. That is what I think. I am not saying that personally I am not concerned about some concentration in the marketplace. What I am saying is that this bill deals with the competition aspect.

We are here to make sure we are providing the legislation, the proper mechanisms, to enhance competition in this country. That is what we are here for.

The Chairman: We have plenty of time to come back to you, Mr. Orlikow, afterwards. Mr. Howie, please. You have a short question, I guess.

Mr. Howie: Thank you very much.

I just have a couple of points, if I could deal with the bill for a change, Mr. Minister.

My understanding is that the decisions of the tribunal are absolute and final and there is no appeal to the Governor in Council, the Cabinet, and if there were, the decisions stand by themselves and cannot be overturned by Governor in Council rulings. Am I correct in that?

Mr. Côté (Langelier): There is no Cabinet override, but there are appeals. If the tribunal disallows a transaction, then either of the two parties to the proposed merger could address their concerns to the judicial courts.

Mr. Ménard: The Federal Court.

Mr. Côté (Langelier): To the Federal Court.

Mr. Howie: To the Federal Court but not to the . . .

Mr. Côté (Langelier): Not to the Cabinet.

[*Traduction*]

pensons aux grandes sociétés, nous voyons tout de suite le spectre de la concentration. Toutefois, gros et mauvais ne sont pas synonymes. Dans ce projet de loi, nous avons mis en place des mécanismes qui permettront l'examen de transactions projetées, mais notre but c'est d'éviter toute réduction de la concurrence. Voilà ce qui doit nous préoccuper et non pas la concentration.

Si le directeur ou le tribunal examine une transaction qui a pour effet de restreindre la concurrence sans gain d'efficacité, la transaction devrait être interdite, qu'il y ait ou non concentration. Nous ne nous inquiétons pas pour l'heure de la concentration entre les mains des neuf familles dont il a parlé.

M. Orlikow: Monsieur le ministre, vous n'êtes pas inquiet pour l'heure, et nous parlons justement de la situation actuelle. Malheureusement, nous n'avons pas entrepris ces discussions il y a 10 ans quand le taux de propriété était de 40 plutôt que de 50 p. 100. Nous ne parlons pas de ce qui arrivera dans 10 ans. Vous n'êtes pas inquiets du fait que 9 ou 10 familles contrôlent environ 50 p. 100 des grandes sociétés. Quand allez-vous vous en inquiéter? Est-ce que cela vous préoccupera quand le taux de propriété atteindra 60, 75 ou 90 p. 100 plutôt que 50 p. 100? Cela finira-t-il par vous inquiéter un jour?

M. Côté (Langelier): Je ne dis pas que cela ne me préoccupe pas, Monsieur le président. Je dis que le projet de loi traite de la concurrence et non pas de la concentration. Voilà ce que je pense. Je ne vous dis pas que je ne m'inquiète pas personnellement du degré de concentration qui existe sur le marché. Ce que je vous dis, c'est que le projet de loi traite de la concurrence.

Notre mandat c'est d'adopter une loi et des mécanismes susceptibles d'améliorer la concurrence au Canada. Voilà notre mandat.

Le président: Monsieur Orlikow, vous aurez le temps de poser d'autres questions au prochain tour. Monsieur Howie, s'il vous plaît. Vous avez une courte question à poser, je crois.

M. Howie: Merci.

Monsieur le ministre, j'aimerais aborder quelques points et parler enfin du projet de loi, contrairement à ceux qui m'ont précédé.

Je crois comprendre que les décisions du tribunal sont finales et qu'aucun appel ne peut être interjeté auprès du gouverneur en conseil ou du Cabinet et que ces décisions ne peuvent être infirmées par le gouverneur en conseil. Ai-je bien compris?

M. Côté (Langelier): Il est possible d'en appeler, mais le Cabinet ne peut renverser ces décisions. Si le tribunal interdit la conclusion d'une transaction quelconque, les deux parties au projet de fusion peuvent en appeler aux tribunaux.

M. Ménard: À la Cour fédérale.

M. Côté (Langelier): À la Cour fédérale.

M. Howie: À la Cour fédérale mais pas . . .

M. Côté (Langelier): Pas au Cabinet.

[*Text*]

Mr. Howie: Right. I am very pleased to see you responded to the small business community and put the abuse of dominant position provision in the bill. I think it is extremely important and if you use the common law preponderance of evidence tests, it should enable a great deal more justice to be done for the little people in the country.

My understanding is that any citizen can write to the director and draw an alleged abuse to his attention and then the director can proceed to investigate it and place it before the tribunal. Is that correct?

Mr. Côté (Langelier): Yes.

Mr. Howie: Alternatively, any six citizens can file a petition and it will then, as a right, go before the tribunal. So there are two routes.

Mr. Côté (Langelier): No. The fact that the six citizens sign a petition forces the director to investigate. He has no choice.

Mr. Howie: Precisely.

Mr. Côté (Langelier): He has to go.

Mr. Howie: One citizen could bring it to his attention and he could, of his own volition, go, but if six bring it to his attention, he has to. Is that correct?

Mr. Côté (Langelier): Yes.

Mr. Ouellet: That was already there.

• 1635

Mr. Howie: Yes. I think the weakness in the past has been that it is very difficult to get six citizens to deal with abuse of a dominant position. It is hard to prove, and it is difficult to get the citizens to stand up and take on a giant corporation. It is nice to know that we can force a directorate to act. I think it is a good provision.

Mr. Ouellet: No, but it is not a new provision.

Mr. Howie: No, but it is a good provision. That is all. I just wanted to clarify those two points.

The Chairman: Okay. Thank you, Mr. Howie. Mr. Ouellet, please.

M. Ouellet: Je voudrais revenir aux questions que M. McCrossan a posées tout à l'heure au sujet de la transaction de Gulf Canada qui essaie de prendre le contrôle d'Hiram Walker. Le ministre a répondu à son collègue conservateur que le directeur pourrait maintenant être prévenu de cette transaction, ce qui, à mon avis, est un élément utile. Mais ce n'est pas suffisant, parce que, bien sûr, si les modalités de la loi ne sont pas telles que le directeur puisse agir d'une façon plus autoritaire que dans le passé, même s'il est prévenu à l'avance qu'une fusion se fera, cela ne l'avancera pas beaucoup puisqu'il n'y aura pas plus de chances que dans le passé d'empêcher que la transaction ne se fasse si les modalités de la loi sont telles qu'il y a tellement de clauses échappatoires que les compagnies

[*Translation*]

M. Howie: Bon. Je suis très heureux de constater que vous avez tenu compte des commentaires des petits entrepreneurs et que vous avez ajouté au projet de loi une disposition sur les abus de positions dominantes. J'estime que c'est extrêmement important et que les Canadiens ordinaires pourront espérer être traités avec beaucoup plus de justice dans la mesure où on fera appel aux règles de la Common Law sur la supériorité des preuves.

Je crois comprendre que n'importe quel citoyen peut écrire au directeur et lui signaler un abus présumé et que le directeur peut faire enquête et en saisir le tribunal. Est-ce exact?

M. Côté (Langelier): Oui.

M. Howie: De la même façon, six citoyens canadiens peuvent présenter une pétition et se présenter, de droit, devant le tribunal. Voilà deux mécanismes.

M. Côté (Langelier): Non. Le fait que six citoyens signent une pétition oblige le directeur à faire enquête. Il n'a pas le choix.

M. Howie. Exactement.

M. Côté (Langelier): Il doit faire enquête.

M. Howie: Si un seul citoyen lui signale un cas d'abus, il peut prendre l'initiative de faire enquête, mais si six citoyens ensemble le lui signalent, il doit agir. Est-ce exact?

M. Côté (Langelier): Oui.

M. Ouellet: Cette disposition existe déjà dans la loi.

M. Howie: Oui. Je crois que la faiblesse, par le passé, c'est qu'il était très difficile de trouver six citoyens pour s'opposer à l'abus d'une position dominante. C'est difficile à prouver et c'est difficile de convaincre les citoyens d'attaquer une grosse compagnie. C'est bon de savoir que l'on peut obliger un conseil de direction à agir. Je crois que c'est une bonne disposition.

M. Ouellet: Non, mais ce n'est pas une nouvelle disposition.

M. Howie: Non, mais c'est une bonne disposition. C'est tout. Je voulais tout simplement éclaircir ces deux points.

Le président: Parfait. Merci, monsieur Howie. Monsieur Ouellet, s'il vous plaît.

Mr. Ouellet: I would like to come back to the question that Mr. McCrossan was putting before concerning the Gulf Canada transaction, the attempt to take control of Hiram Walker. The Minister, in answer to his Conservative colleague, said that the director could now be advised beforehand of the transaction which, to my mind, is something useful. But it is not enough because, of course, if the provisions of the Act are not such that the director can act with more authority than in the past, even though he is advised in advance that there is a merger in the works, he will not be that much further ahead because he will not have any more opportunity than before to prevent the transaction if the Act is so full of loopholes that the companies who do want to merge will be able to find all kinds of excuses to do so.

[*Texte*]

qui veulent faire des fusions pourront le faire sous différents prétextes.

Je voudrais savoir du ministre quels sont les pouvoirs supplémentaires que son projet de loi donne au directeur des enquêtes. Qu'est-ce que le directeur des enquêtes n'avait pas dans le passé et qu'il aura maintenant pour empêcher une fusion qui serait contraire à l'intérêt public ou à la concurrence canadienne?

M. Côté (Langelier): D'abord au niveau du préavis, il y a un énorme changement. À l'heure actuelle, le directeur doit souvent intervenir une fois la transaction conclue. Il a alors énormément de difficulté à obtenir la documentation, les renseignements nécessaires de sorte que, avec la proposition du préavis, on devient à ce moment-là une banque de données et on est en mesure d'évaluer au départ, avant que la transaction ne survienne, si effectivement il y a des effets positifs. Et il y a une espèce de collaboration, monsieur Ouellet, qui va s'établir ou qui devrait s'établir du fait de ce préavis.

Toujours relié à cet aspect, dans d'autres cas où la transaction est inférieure au niveau fixé de 500 millions, il y a ce qu'on appelle l'*advance ruling* qui peut être donné. Cela donne donc au directeur des pouvoirs au moins de négociation, de discussion et d'intervention avec les compagnies et si les compagnies sont déjà engagées dans un processus de discussion qui entraînera un fusionnement qui devrait être normalement efficace et qui devrait augmenter cette concurrence; il est évident que ces compagnies seront disposées à donner et à fournir les éléments nécessaires au directeur pour que cette transaction soit acceptée et donne les résultats positifs escomptés.

M. Ouellet: Je suis d'accord que le processus de préavis est un progrès important. Je ne le conteste pas, je trouve que c'est excellent que le directeur puisse maintenant recevoir des préavis.

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Ce que je veux savoir de vous et ce que vous ne m'avez pas dit, c'est l'autre aspect. Une fois qu'il est avisé, quels sont les pouvoirs supplémentaires pour empêcher que la transaction ne se fasse? Bien sûr, s'il juge que la transaction ne devrait pas se faire, il pourra demander une injonction pour la bloquer et il pourra aller devant le tribunal. Mais tout cela il doit le faire en fonction de certains critères. Quels sont ces critères nouveaux, plus importants, qui donnent plus de pouvoir au directeur pour bloquer la fusion?

M. Côté (Langelier): Premièrement, la grande différence, vous l'avez soulignée tout à l'heure, c'est que maintenant l'infraction est civile et non pas criminelle. Donc, cela sera beaucoup plus facile d'intervenir.

Deuxièmement, il y a toujours les injonctions provisoires qui peuvent être données. Tous ces éléments nouveaux permettent au directeur d'avoir plus de latitude. Il y a aussi le test lui-même qui est important.

M. Ouellet: Le transfert de l'aspect criminel à l'aspect civil est certainement un élément qui va favoriser et faciliter le travail du directeur. Mais je voudrais attirer votre attention

[*Traduction*]

So I would like to know, from the Minister, what supplementary powers his bill confers upon the director. What is it the director did not have in the past and will now have to prevent a merger which might be contrary to the public interest or to Canadian competition?

Mr. Côté (Langelier): First of all, there is an enormous change in the timing. Presently, the director often cannot act until the transaction has been completed. He then has all kinds of problems getting the documents and the necessary information. So with this proposal for advance notice, at that point you become a sort of a data bank and you can evaluate at the outset, before the transaction happens, whether there are positive effects. And there is a kind of co-operation, Mr. Ouellet, that is going to be established or should be established because of this notice.

Also tying into that aspect, in other cases where the transaction is below the $500 million ceiling that has been set, you can ask for what we call an "advance ruling". That at least gives the directors some power of negotiation, discussion and intervention with the companies and if the companies are already engaged in a process of discussion leading to a merger, which should normally be efficient and should increase competition, it is clear that those companies will certainly be ready to give the director the necessary information for this transaction to be accepted and lead to the hoped-for positive results.

Mr. Ouellet: I agree that the notice process is important progress. I am not contesting that fact and I do find it is excellent that the director can now be forewarned.

What I want to know from you, and what you have not yet told me about, is the other aspect. Once he has been notified, what supplementary powers does he have to prevent the transaction from happening? Of course, if in his judgment the transaction should not go through, he could ask for an injunction to stop it and he can go before a court. But all that must be done according to certain criteria. What are these new and more important criteria which give more power to the director to stop a merger?

Mr. Côté (Langelier): First of all, the great difference that you pointed out before is that now the offence is a civil one and not a criminal one. So it will be much easier to intervene.

Secondly, you can always get a temporary injunction. All these new elements give more latitude to the director. There is also the test itself which is important.

Mr. Ouellet: The transfer from the Criminal Code to the civil part is certainly an element which is going to help the director's work and make it easier. But I would like to draw

[*Text*]

sur une réponse que vous avez donnée tout à l'heure à M. Orlikow, en disant que la principale préoccupation de votre projet de loi c'était la concurrence et non pas la concentration. Or il est généralement reconnu qu'il est beaucoup plus facile à une firme omniprésente d'abuser un peu de sa situation omniprésente que n'importe quelle autre. On n'a pas besoin de penser à de très grosses compagnies qui abusent du marché. On peut simplement penser au petit magasin général du petit village qui est le seul qui vend de la nourriture et des biens de consommation à la population de ce petit village. Ces gens-là sont prisonniers d'un seul vendeur et ce seul vendeur peut abuser de sa situation privilégiée qui fait qu'il domine le marché.

Avec la nouvelle loi, d'après vous, la compagnie Gulf Canada, qui est quand même une des grandes compagnies pétrolières canadiennes, le fait qu'elle veut acheter Hiram Walker, qui est très impliqué et très diversifié dans le secteur des ressources naturelles et du transport du gaz naturel et qui est aussi propriétaire de Home Oil, une des importantes sociétés pétrolières au pays, est-ce que cette fusion en vertu de votre nouvelle loi serait acceptable ou pas? Vous ne voulez pas vous substituer au tribunal mais sans vous demander de passer un jugement, est-ce qu'il y a des critères dans votre loi qui font que cette transaction serait contestée ou est-ce que, en vertu de votre loi telle qu'elle est, cette transaction passerait comme du beurre dans la poêle?

M. Côté (Langelier): Je suis certain qu'à titre de ministre de la Consommation, vous avez déjà eu à examiner le phénomène de la concentration. Il y a eu la Commission Bryce qui s'est penchée là-dessus déjà en 1970. Et à ce moment-là on s'inquiétait déjà du phénomène de concentration de Power Corporation, par exemple, de Argus, puis la Commission avait conclu qu'elle n'était pas particulièrement préoccupée par cette question. Elle reconnaissait l'évolution dans cette direction, mais elle n'était pas préoccupée outre mesure par cela.

Je pourrais dire également que, dans le projet de loi, au niveau des abus de position dominante il y a quand même certaines clauses qui aident le marchand dans une région particulière qui doit souffrir les abus d'un de ses concurrents plus importants. S'il y a des abus, des mécanismes permettront d'intervenir.

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Et finalement, dans le test de la concurrence lui-même, lorsqu'on parle, par exemple, de la réduction sensible de la concurrence, on s'assure par là que les effets d'une transaction qui amènererait un phénomène de concentration sera examiné comme tel.

M. Ouellet: Dans votre loi, vous avez . . .

M. Côté (Langelier): . . . pour compléter, c'est examiné, monsieur Ouellet, non pas en termes de concentration mais en termes de concurrence. C'est ce que j'ai voulu spécifier à M. Orlikow tout à l'heure. Ce n'est pas que je ne suis pas préoccupé par la concentration, mais on est ici pour parler de concurrence. Donc, toute transaction quelle qu'elle soit, qu'elle soit à l'intérieur d'un phénomène de concentration ou pas, si elle réduit substantiellement ou sensiblement la concurrence et

[*Translation*]

your attention to an answer you gave before to Mr. Orlikow when you said that the main concern addressed by your bill was competition and not concentration. Now it is generally recognized that it is far easier for an omnipresent firm to abuse a situation than for any other. You do not even have to go to a very big company for that. You simply have to think about the one general store in a village, which sells food and consumer goods to the population of that village. Those people are the prisoners of a sole vendor, who can abuse the privileged situation he has in dominating that market.

With the new legislation, in your opinion, Gulf Canada, which is one of the big Canadian petroleum companies, and the fact that it wants to buy Hiram Walker, which is very involved and very diversified in the area of natural resources and natural gas transport and which is also the owner of Home Oil, one of the country's big petroleum companies . . . so would this merger be acceptable or not with your new bill? Now you do not want to do the work of the courts, but without asking you to pass judgment on this thing, are there any criteria in your bill which mean that this transaction *prima facie* would be contested or, with your new bill as it is now written, would this transaction simply go through like a hot knife through butter?

Mr. Côté (Langelier): As Minister of Consumer Affairs, I am sure that you have already had to examine the whole phenomenon of concentration. There was the Bryce Commission that looked at that in 1970. Even at that time, there was some worry about the concentration going on with Power Corporation, for example, or Argus, and the commission came to the conclusion that it was not particularly concerned about it. It did recognize that there was a trend in that direction, but it was not overly worried.

I could also say that in the bill, concerning abuse of a dominant position, there are certain clauses which do help the merchant in a particular region who is being cut out by one of his bigger competitors. If there is abuse, there are certain mechanisms that will allow intervention.

Finally, in the competition test itself, where you talk about substantially lessening competition, for example, we are ensuring in that way that the effects of a transaction which would bring about a phenomenon of concentration would be examined as such.

Mr. Ouellet: In your legislation, you have . . .

Mr. Côté (Langelier): . . . to conclude, it is looked at, Mr. Ouellet, not in terms of concentration but in terms of competition. That is what I wanted to point out to Mr. Orlikow before. It is not that I am not concerned about concentration, but we are here to talk about competition. So any transaction, whatever it may be, whether it constitutes a bid for concentration or not, if it does substantially lessen competition and does

[*Texte*]

qu'elle n'apporte pas de gain en efficacité, à ce moment-là, le gouvernement doit avoir une législation qui lui permette d'intervenir.

M. Ouellet: Mais votre critère qui dit qu'une fusion aurait pour effet de diminuer sensiblement la concurrence, comment votre directeur ou même le tribunal pourra-t-il l'évaluer? Est-ce qu'il ne serait pas plus facile d'avoir un critère dans votre loi disant qu'une transaction faite dans une région donnée du pays, qui créerait une dominance excessive . . .

M. Côté (Langelier): Ce n'est pas nécessairement mauvais . . .

M. Ouellet: . . . pourrait être un critère pour refuser la fusion?

M. Côté (Langelier): Justement, monsieur Ouellet. Je pense que le fait qu'on ait une position dominante dans une région donnée, si je prends votre exemple, ne se traduira pas nécessairement par une réduction de la concurrence qui aurait pour effet d'enlever des gains. Peut-être que ce phénomène-là apportera des gains en efficacité, c'est bien possible. Dans le projet de loi le C-29, vous aviez une liste d'une douzaine de facteurs devant être considérés. Nous avons repris ces facteurs et nous les avons réduit à cinq ou six, et on en a ajouté un ou deux. Mais cela laisse quand même assez d'éléments au directeur pour réexaminer la question. C'est d'une compréhension plus facile, plus claire, plus précise. On a un mécanisme. Je ne dis pas qu'il n'y a pas place pour de l'amélioration; vous savez comment c'est complexe. Je pense que le projet de loi C-29 disait:

> une diminution de la concurrence de façon relativement importante,

Et on allait plus loin, on interprétait cela de façon majeure et non insubstantielle. Où va-t-on avec l'interprétation? C'est trop compliqué. Alors, on a essayé de faciliter cela en donnant tout le mécanisme des pouvoirs d'intervention.

M. Ouellet: Est-ce que vous avez été conseillé par l'actuel directeur des enquêtes et coalitions pour la rédaction de ces parties de la loi?

M. Côté (Langelier): Lequel? Voulez-vous dire M. O'Farrell?

M. Ouellet: Oui.

M. Côté (Langelier): M. O'Farrell a participé d'une façon très sommaire. Quand il est entré en fonction le projet de loi était assez avancé. Je l'ai déposé au mois de décembre et il est entré en fonction au mois de septembre.

M. Ouellet: Je ne veux pas vous poser une question embarrassante, mais je voudrais savoir quelque chose. Je vous donne le précédent: vous savez que votre collègue des transports a déposé un document qui doit radicalement transformer le domaine des transports et, en particulier, abolir la Commission canadienne des transports ou Comité des transports. On avait demandé à la Commission des transports de venir témoigner sur le document du ministre.

[*Traduction*]

not bring about any gain in efficiency, then at that point the government must have legislation allowing it to intervene.

Mr. Ouellet: But your criterion, whether a merger would substantially lessen competition: how is your director or even the tribunal going to be able to evaluate it? Would it not be easier to have a criterion, in your legislation, specifying that a transaction occurring in a given region of the country and which would result in a dominant position . . .

Mr. Côté (Langelier): That is not necessarily bad . . .

Mr. Ouellet: . . . might be a reason to refuse the merger.

Mr. Coté (Langelier): That is just it, Mr. Ouellet. I think that the fact that you have a dominant position in a given region of the country, to use your example, will not necessarily translate into a lessening of competition leading to a loss in gains. Perhaps there will be gains in efficiency, that is quite possible. In Bill C-29, you had a list of some dozen factors that had to be considered. We looked at those factors and reduced them to five or six, then added one or two more. But that still gives the director enough elements to re-examine the question. As far as comprehension goes, it is easier, clearer and more precise. We have a mechanism. I am not saying that there is no room for improvement, you know how complex all this is. I think that Bill C-29 said:

> Lessening competition relatively substantially.

And it went even further than that. It was interpreted as being major and not unsubstantial. How far can you take that? It is too complicated. So we tried to make it easier by setting up the whole mechanism for powers of intervention.

Mr. Ouellet: Did you have the benefit of the advice of the present Director of Combines Investigations in drafting those parts of the acdt?

Mr. Côté (Langelier): Which one? Do you mean Mr. O'Farrell?

Mr. Ouellet: Yes.

Mr. Côté (Langelier): Mr. O'Farrell had very little to do with it. When he took up his position, the bill was already well along. I tabled it in December and he arrived in September.

Mr. Ouellet: I do not want to put an embarrassing question to you, but I would like to know something. I will give you the precedent: You know that your colleage in Transport tabled a document which is going to radically change the whole area of transportation and, more particularly, do away with the Canadian Transport Commission or the Transport Committee. The Canadian Transport Commission was asked to come and give testimony regarding the Minister's document.

[*Text*]

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Avez-vous objection à ce que le Comité invite le président ou des membres de la Commission des pratiques restrictives à venir exprimer leurs vues sur le projet de loi?

Le président: Étant donné que les noms des personnes sensibilisées ou susceptibles de participer à nos discussions doivent d'abord être présentés au Comité de direction, je transmettrai votre suggestion à ce comité.

M. Ouellet: Oui, mais je veux être sûr que le ministre ne cherchera pas à les empêcher de venir, s'ils veulent venir. Je veux savoir s'il a des objections majeures à ce que le président ou les membres de la Commission viennent témoigner.

M. Côté (Langelier): C'est un gouvernement de limpidité, monsieur Ouellet.

M. Ouellet: Bravo! Est-ce que vous avez la même attitude pour l'ancien directeur des enquêtes qui pourrait être un témoin utile et le directeur actuel?

M. Côté (Langelier): La décision leur appartient.

The Chairman: I will now ask Mr. Thacker to ask questions.

Mr. Thacker: Thank you, Mr. Chairman. I do not have the privilege of sitting on this legislative committee, and I therefore thank my colleagues for giving me a minute to explore one concept with the Minister.

There is a provision in the Income Tax Act that provides for advance rulings, which saves a whole lot of money. It saves people doing something and then being caught in a trap.

Mr. Côté (Langelier): I have used that in the past.

Mr. Thacker: I have used it as well.

Is there a power in the director or the tribunal to give sort of a pre-clearance vis-à-vis a merger? How would that system work? How involved do the two companies have to become in terms of combining assets, etc., or having agreements before they would trigger the . . . ?

Mr. Ménard: I guess they would have to come to the director before they complete their transaction. Otherwise, it is useless to ask for an advance certificate. So, I guess at some early stage they would have to seek the views of the director. If they received the certificate from the director, then they can avoid the whole preunification process.

Mr. Thacker: How detailed would that merger have to be? I am thinking only in terms of time of officials, cost for accountants and lawyers to do documentation.

Mr. Ménard: Of course, you have to provide the necessary information for the director to make the assessment as to whether that merger would raise any problems under the Competition Act.

To answer your question exactly, I am not certain of exactly how many details and how firm the commitment is between

[*Translation*]

Would you object to the committee inviting the chairman or the members of the Restrictive Trade Practices Commission of Canada to express their views on the bill?

The Chairman: Since the names of the people who might want to participate in our discussions must first be submitted to the steering committee, I will forward your suggestion to that committee.

Mr. Ouellet: Yes, but I want to be sure that the Minister will not try to prevent them from coming if they want to do so. I would like to know if there are major objections to their testifying.

Mr. Côté (Langelier): Our government is an open one, Mr. Ouellet.

Mr. Ouellet: Wonderful! And do you react the same way towards the former director of investigations, who would be a useful witness, as well as the present director?

Mr. Côté (Langelier): The decision is theirs.

Le président: Je demanderais à M. Thacker de poser ses questions.

M. Thacker: Merci, monsieur le président. Je n'ai pas le privilège de siéger normalement à ce Comité législatif et je remercie par conséquent mes collègues de me permettre pendant quelques instants d'explorer un concept avec le ministre.

La Loi de l'impôt sur le revenu prévoit la possibilité de rendre des décisions préalables, ce qui fait économiser pas mal d'argent et évite à certaines personnes de se prendre au piège.

M. Côté (Langelier): Je m'en suis servi dans le passé.

M. Thacker: Moi aussi.

Le projet de loi prévoit-il que le directeur ou le tribunal puissent rendre des décisions préalables dans les cas de fusionnement? Comment un tel système pourrait-il fonctionner? Dans quelle mesure deux sociétés qui voudraient fusionner doivent-elles avoir de l'actif en commun, et caetera; quelles doivent être leurs ententes pour que cela déclenche . . . ?

M. Ménard: En fait ces deux sociétés devraient présenter leur cas au directeur avant de finaliser l'opération de fusionnement, sans quoi tout cet exercice serait inutile. Une fois le certificat émis par le directeur, ces deux sociétés peuvent éviter tout le processus préalable.

M. Thacker: Dans quelle mesure doit-on fournir tous les détails du fusionnement? Je me pose des questions en ce qui concerne le temps que les fonctionnaires peuvent consacrer à cette étude, les coûts des comptables et des avocats.

M. Ménard: Il faut évidemment fournir les renseignements nécessaires pour que le directeur puisse évaluer la situation et décider si le fusionnement poserait des problèmes aux termes de la Loi sur la concurrence.

Pour répondre précisément à votre question, je ne pourrais vous dire tous les détails qui doivent être fournis ni à quel point

[*Texte*]

the two parties, but I am sure the director would not want to hear cases that are just pure fiction or speculative.

Mr. Thacker: Is it correct then that the clearance certificate would be based upon the proposal and say that if you do this and this strictly, then it would be acceptable?

Mr. Ménard: Yes, you are right.

Mr. Thacker: Thank you, Mr. Chairman. I have not had an occasion to read the bill, so I was interested in this. Those are all the questions I have.

The Chairman: Mr. Orlikow.

Mr. Orlikow: I put it to the Minister that even if this bill were to give the Canadian people the protection against companies taking actions which would lessen competition, which I do not believe it does, it seems to me that what this bill does is to lock the stable door after the horse has been stolen.

In recent years, Mr. Chairman, the kind of acquisitions we have had are not the traditional ones which this bill would supposedly deal with. The acquisitions we have had have not been of a steel company buying another steel company so that it can get control of the market or a paper company buying another paper company.

What we have had are conglomerate mergers. We have had people who are quite expert and knowledgeable look at this bill, and they tell us that there is nothing in this bill which would permit the government to prevent mergers.

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The Minister says he is not concerned about bigness if bigness brings more efficiency. Well, Mr. Minister, I am very doubtful that these mergers, which have created these giant conglomerates, bring efficiency. I propose—and I am sure we will discuss it in the steering committee—that we call a number of these conglomerate companies. I would like to ask them about what has happened since they took over some of the companies—whether they are more efficient, whether they hire more people, whether they do more research and development. I am very doubtful.

Let me ask you a few questions about this bill. As I say, we had some people who are quite knowledgeable in this field look at this bill. On April 7, when I asked you a question . . . I asked you why conglomerate mergers are not subject to the Canadian competition law, because that is not in this bill. You said:

> The new bill gives the director of investigation and the members of the Competition Tribunal the possibility of examining such transactions first and of taking action if need be.

That is what you said.

[*Traduction*]

les deux partis doivent s'être engagés. Mais je suis sûr que le directeur ne voudrait pas se pencher sur des cas de pure fiction ou spéculation.

M. Thacker: Est-il exact que le certificat serait décerné à la suite de la présentation de la proposition et que celle-ci serait acceptée pourvu que l'on se conforme à telle ou telle disposition?

M. Ménard: Vous avez raison.

M. Thacker: Merci, monsieur le président. Je n'ai pas eu la possibilité de lire le projet de loi, mais cela m'intéressait. Ce sont là toutes les questions que je voulais poser.

Le président: Monsieur Orlikow.

M. Orlikow: Je prétends, monsieur le ministre, que même si ce projet de loi donnait à la population canadienne toute la protection voulue en matière de concurrence, et je ne crois pas que ce soit le cas, il me semble que l'on est en train de fermer ici la cage après que l'oiseau s'est envolé.

Au cours des dernières années, monsieur le président, le genre d'acquisitions que nous avons connues n'étaient pas les acquisitions traditionnelles que ce projet de loi est censé traiter. Il ne s'agissait pas d'une société sidérurgique qui en achetait une autre pour avoir le contrôle du marché ou d'une compagnie de papier en achetant une autre.

Ce que nous avons au Canada ce sont des fusions entre conglomérats. Certaines personnes très au courant de toute cette question et qui ont étudié le projet de loi nous disent que rien dans celui-ci ne permettrait au gouvernement d'empêcher les fusionnements.

Le Ministre dit qu'il ne se préoccupe pas de l'importance de certaines entreprises pourvu que cela ne réduise pas l'efficacité. Monsieur le ministre, je doute fort que ces fusionnements, qui ont permis de créer ces conglomérats géants, aient assuré l'efficacité. Je propose—je suis sûr que nous discuterons de cette question au Comité de direction—de demander à un certain nombre de ces conglomérats de venir témoigner. J'aimerais leur poser certaines questions, afin de savoir ce qui s'est passé depuis le fusionnement de ces diverses compagnies, si l'efficacité s'en est accrue, si l'on a augmenté le personnel, s'il y a plus de recherche et de développement qui se fait. J'en doute fort.

J'aimerais poser quelques questions au sujet du projet de loi. Comme je le dis, certaines personnes qui s'y connaissent bien dans ce domaine ont étudié celui-ci. Le 7 avril, lorsque je vous posais une question . . . Je vous ai demandé pourquoi la fusion de ces grands conglomérats ne relève pas de la Loi sur la concurrence, car je ne vois rien à ce sujet dans le projet de loi. Vous avez répondu de la façon suivante:

> Le nouveau projet de loi donne au directeur des enquêtes et aux membres du Tribunal de la concurrence la possibilité d'étudier de telles opérations pour ensuite prendre des dispositions au besoin.

C'est ce que vous avez dit.

[*Text*]

We had some people look at this bill, and I put their questions and their critique to you. They said that this bill only requires notification for mergers of companies with $500 million in assets or sales. They ask under what part of the bill a conglomerate merger can be effectively reviewed by the tribunal. They say that section 64 defines an illegal merger if it lessens competition substantially in four areas: (*a*) trade, industry, or profession—that is a horizontal transaction; (*b*) among the sources from which a trade, industry, or profession obtains a product—that is a vertical operation; (*c*) among the outlets through which a trade, industry, or a profession disposes of a product—again, a vertical operation; or (*d*) otherwise than as described in the above paragraphs.

Do any of these provisions deal with a company such as Imasco, about which Mr. McCrossan asked some questions? Do any of these provisions give the government or the director the right not only to look at what is happening in the contest to take over Hiram Walker, but to do . . . ? Suppose he comes to the conclusion that it is not in the interests of the people of Canada. What authority does he have, since these are conglomerate mergers? What authority does he have?

Mr. Côté (Langelier): Again, Mr. Chairman, I have to answer that by saying that this is a bill that deals with competition. We are making sure that we have a mechanism here to allow the director first, with the pre-notification, to have a look and a review of a proposed acquisition. We give him a chance to look over and examine the circumstances and the conditions of any proposed deal.

There is the section of abuse of dominant position that allows the director to act on any abuse. Again, it is not a bill that has to deal with the concentration by itself. If it happens to be the case that a proposed transaction under any concentration of conglomerate mergers lessens competition and there is no efficiency gained—and the director will judge if there is an efficiency gain or not—then he will act upon that. That is what I mean.

So in fact we are going to deal with the concentration, but inside the bill and with a competition mind—that is how we have to deal with that. If a specific transaction, Mr. Orlikow, between two conglomerates would not enhance competition like the bill suggests it should, then it should be disallowed—not because it is a concentration, but because of the competition I expect of it, nothing else. So that is why I am saying that I want to assure you that by such we are dealing with the concentration, but it is not a bill that has to deal with it; it is a bill that is there for the competition aspect.

• 1700

Mr. Orlikow: If, for example, Power Corporation, which owns, among other things, Consolidated-Bathurst, Great-West

[*Translation*]

Nous avons demandé à certaines personnes d'étudier ce projet de loi et j'aimerais vous parler de leur réactions, de leurs questions et de leurs critiques. D'après ces personnes, le projet de loi ne prévoit un avis que dans le cas du fusionnement de sociétés ayant un actif ou des ventes de 500 millions de dollars. De cette façon, où le projet de loi se penche-t-il sur le fusionnement des conglomérats? Quel article autorise le tribunal à faire des études à ce sujet? D'après ces personnes toujours, l'article 64 définit un fusionnement illégal comme un fusionnement qui diminue sensiblement la concurrence, et ce dans quatre domaines: *a*) dans un commerce, une industrie ou une profession—il s'agit là d'une opération horizontale; *b*) entre les sources d'approvisionnement desquelles un commerce, une industrie ou une profession se procurent un produit—il s'agit là d'une opération verticale; *c*), entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoulent un produit—autre opération verticale; ou *d*) autrement que selon ce qui est prévu aux alinéas *a*) à *c*).

Ces dispositions touchent-elles une société comme Imasco, par exemple, au sujet de laquelle M. McCrossan a posé quelques questions? Ces dispositions donnent-elles au gouvernement ou au directeur le droit non seulement de se pencher sur ce qui se passe dans le contexte de l'acquisition de Hiram Walker, mais également . . . ? Supposons que la conclusion soit la suivante, ce n'est pas dans l'intérêt du peuple canadien. De quelle autorité le directeur ou le gouvernement se prévalent-ils puisqu'il s'agit de fusionnements de conglomérats?

M. Côté (Langelier): Monsieur le président, je vous signale à nouveau qu'il s'agit ici d'un projet de loi portant sur la concurrence. Nous voulons nous assurer que nous avons un mécanisme qui permette au directeur d'abord, et grâce à l'avis, d'étudier une acquisition prévue. En d'autres termes, nous lui donnons la possibilité d'étudier les différentes circonstances et les conditions d'une proposition de marché.

Il y a également l'article concernant l'abus de la position dominante, qui prévoit que le directeur peut prendre des dispositions en pareil cas. Je vous le répète, il ne s'agit pas ici d'un projet de loi qui porte sur la concentration elle-même. Si une transaction donné tendant à la concentration ou au fusionnement de conglomérats diminue la concurrence au détriment de l'efficacité—et le directeur jugera également de cette question d'efficacité—le directeur prendra des dispositions. C'est là où je veux en venir.

Ainsi donc, nous allons nous occuper de la concentration, mais dans le cadre du projet de loi et en tenant compte de la concurrence. Si une opération bien précise entre deux conglomérats avait pour résultat de diminuer la concurrence, celle-ci devrait être interdite, non parce qu'il s'agit d'un problème de concentration, mais à cause des répercussions que cela pourrait avoir sur la question de la concurrence, et rien d'autre. C'est pourquoi je tiens à vous assurer que nous réglons ici la question de la concentration; mais ce n'est pas l'objet du projet de loi. En effet, celui-ci couvre la question de la concurrence.

M. Orlikow: Si la société *Power*, par exemple, qui possède entre autre chose la *Consolidated-Bathurst*, la *Great-West*

[*Texte*]

Life, Investors Group, Montreal Trust Co, etc., and also is in the media business—it already owns the largest French-language newspaper in Canada and several others and it owns other media outlets . . . When it applies to take over a large radio station, which would give it a pretty dominant position in terms of dissemination of information in Montreal, the second biggest city in Canada, is that not of concern to the Government of Canada?

Mr. Côté (Langelier): Again if you are talking about the communication aspect of it, you have some boards there that have to deal with that. The CRTC, for instance, turned down the deal on Télé-Métropole—or the proposed bill. I think that again we have mechanisms there to deal with that on the competition aspect of it. We are concerned with this, but with the competition aspect, nothing else.

Mr. Orlikow: We have companies like the Weston organization, which owns food companies at every level of the food industry, from companies that buy livestock and process them through wholesalers right down to the supermarket that sells to the consumer. This gives them tremendous advantages over the small independent grocer. Is the government concerned about that kind of concentration and that kind of operation? Is there anything in this bill that would give the government an opportunity to even look at this kind of situation?

Mr. Côté (Langelier): Mr. Chairman, again I do not want to sound like a broken record, but it is exactly the same thing that I have answered so many times today and before. We have a bill here that is more precise, clearer, that deals again with efficiency in the marketplace. We are there to enhance competition, to bring economic renewal, create jobs and investment opportunities, and we have to make sure we have the legislation that deals with that.

If inside any proposed transaction there is a concentration factor, we are going to look at it, but with a competition mind and again—like I said to Mr. Ouellet before—with the pre-notification sections, with the abuse of dominant positions, the monopolies, the fines we have put in place. We have increased the fine on conspiracies; we have increased the fines from $2 million to $5 million. Again, the efficiency tests will really give us all the mechanisms and tools to the director to act upon any proposed deal that will not create the benefit we think it should. I want to assure Mr. Orlikow of that preoccupation that we have.

The Chairman: Mr. Howie, please.

Mr. Howie: What effect will the application of the bill have on the banking sector, Mr. Minister?

Mr. Côté (Langelier): Well, as you know, the bill deals with every merger. Regarding the bank, it involves section 309 which deals with services and charges that could be made . . .

[*Traduction*]

Life, l'*Investors Group*, *Montreal Trust Co*, et caetera, et qui oeuvre également dans le domaine des médias—en effet, elle possède le plus important quotidien de langue française au Canada et plusieurs autres, ainsi que d'autres entreprises médiatiques . . . lorsqu'elle se montre désireuse d'acheter une importante station de radio, ce qui lui donnerait une position dominante en ce qui concerne la dissémination d'informations à Montréal, la deuxième ville canadienne, cela ne préoccupe-t-il pas le gouvernement du pays?

M. Côté (Langelier): Là encore, si vous parlez ici de l'aspect communication, il y a des commissions qui s'occupent de ce genre de choses. Le CRTC a par exemple rejeté la transaction visant Télé-Métropole . . . ou le projet de loi. Comme je l'ai déjà dit, nous disposons d'un certain nombre de mécanismes qui nous permettent déjà de nous occuper de l'aspect concurrence. Nous sommes préoccupés par cela, mais dans le contexte de la concurrence, et rien de plus.

M. Orlikow: Il y a des entreprises comme la société Weston, qui possèdent des compagnies alimentaires à chaque niveau de l'industrie, depuis les entreprises qui achètent du bétail pour ensuite faire affaire avec les vendeurs en gros jusqu'aux supermarchés qui vendent directement aux consommateurs. Cela donne à la société Weston des avantages énormes par rapport aux petites épiceries indépendantes. Le gouvernement est-il préoccupé par ce genre de concentration, ce genre de système? Y a-t-il dans ce projet de loi une disposition qui permettrait au gouvernement d'examiner ce genre de choses?

M. Côté (Langelier): Monsieur le président, j'ai l'impression que le disque est rayé. Je vous ai déjà répété plusieurs fois la réponse ici aujourd'hui, et lors de réunions précédentes. Nous avons ici un projet de loi qui est plus précis et plus clair et qui traite de l'efficacité sur le marché. Nous sommes ici pour amener une relance de la concurrence et un renouvellement économique, pour créer des emplois et des possibilités d'investissement, et nous devons faire en sorte d'avoir des lois qui couvrent toutes ces situations.

S'il intervient dans une transaction donnée un élément de concentration, nous allons nous y pencher, mais ce dans le contexte de la concurrence et, comme je le disais tout à l'heure à M. Ouellet, il y a des dispositions en matière d'avis préalable, d'abus de position dominante, de monopole, et nous avons d'autre part instauré un système d'amendes. Nous avons augmenté les amendes payables en cas de conspiration. En effet, celles-ci sont passées de deux à cinq millions de dollars. Là encore les différents critères de mesure de l'efficacité donneront aux directeurs tous les outils et tous les mécanismes nécessaires pour qu'ils puissent intervenir dans toute transaction proposée qui ne débouchera pas sur les avantages escomptés. Je tiens à assurer M. Orlikow que nous sommes très préoccupés par cela.

Le président: Monsieur Howie, je vous prie.

M. Howie: Monsieur le ministre, quelle incidence le projet de loi aurait-il sur le secteur bancaire?

M. Côté (Langelier): Comme vous le savez, le projet de loi s'appliquerait à tous les fusionnements. En ce qui concerne la banque, il s'agit de l'article 309 qui traite des services et des

[*Text*]

that would have conspiracies between banks to charge anything to their clientele and things like that. It also deals with any bank mergers, but if that happened, the Minister of Finance, for the public interest, could override it, or ask the Cabinet to allow the transaction.

• 1705

Mr. Howie: In addition to increasing the fine, how does the bill strengthen the conspiracy provision in the act?

Mr. Côté (Langelier): I think it puts more importance on the intention of the mergers, or the people who want to do the mergers.

Mr. Howie: Did you consciously decide against changing the unduly lessening competition test? Why does it still remain unchanged?

Mr. Côté (Langelier): Would you repeat the question, because I did not get it?

Mr. Howie: The test of unduly lessening competition appears to still remain. Did you decide that it could not be improved on? Did you address that question?

Mr. Côté (Langelier): Yes, we did. We did not change it.

Mr. Howie: You are quite satisfied with it.

Mr. Côté (Langelier): Yes. It cannot be improved.

Mr. Howie: You felt it could not be improved?

Mr. Côté (Langelier): Everything can be improved, I might say, but we found out that the ones we had there were really answering the needs of what we were trying to achieve.

Mr. Howie: The bill seems to be proposing a very extensive scheme of investigatory powers including searches in civil matters. Did you feel that was essential?

Mr. Côté (Langelier): If you remember, in certain cases the courts really put in jeopardy the investigatory powers, so we had to change it. We are really trying to put some focus on certain things. I think we achieved through the amendments we are bringing in.

Mr. Howie: Thank you, Mr. Minister.

The Chairman: I accept the next question from Mr. Ouellet as being the last one.

M. Ouellet: Monsieur le ministre, tout à l'heure, vous avez énuméré une série d'aspects de la loi qui sont des améliorations. Mais il y a quelques éléments qui nous semblent boiteux et toute la section qui a trait aux fusions nous apparaît un peu faible. Et je voudrais savoir pourquoi vous avez essayé de prendre certains facteurs du projet de loi C-29 pour les refaire.

[*Translation*]

frais qui pourraient être imposés . . . cela couvre les situations où les banques pourraient conspirer entre elles pour l'établissement de leurs tarifs, et caetera. Enfin cela couvre les fusionnements de banques, mais si cela se faisait, le ministre des Finances pourrait, en invoquant des raisons d'intérêt public, imposer sa décision ou demander au Cabinet d'autoriser la transaction.

M. Howie: Outre l'augmentation des amendes, comment le projet de loi renforce-t-il les dispositions de la Loi en matière de conspiration?

M. Côté (Langelier): Je pense qu'il met davantage l'accent sur les intentions des partis concernés par les fusionnements.

M. Howie: Avez-vous sciemment décidé de ne pas modifier le critère utilisé pour mesurer si les fusionnements vont empêcher ou diminuer sensiblement la concurrence? Pourquoi ce critère est-il demeuré le même?

M. Côté (Langelier): Je n'ai pas très bien suivi. Pourriez-vous répéter votre question, s'il-vous-plaît?

M. Howie: Le critère visant à mesurer si un fusionnement réalisé ou proposé va empêcher ou diminuer sensiblement la concurrence a été retenu. Avez-vous décidé qu'il n'était pas possible de l'améliorer? Avez-vous examiné cette question?

M. Côté (Langelier): Oui. Nous n'y avons rien changé.

M. Howie: Vous êtes donc satisfait de ce qui était déjà prévu, n'est-ce pas?

M. Côté (Langelier): Oui. L'on ne pourrait améliorer cela.

M. Howie: Vous aviez le sentiement qu'il ne serait pas possible d'améliorer ce critère, n'est-ce pas?

M. Côté (Langelier): N'importe quoi peut être amélioré, mais nous avons convenu que les critères déjà en place étaient suffisants pour satisfaire aux exigences visées.

M. Howie: Le projet de loi semble proposer tout un régime de pouvoirs d'enquête, dont un droit de perquisition dans le cadre de dossiers civils. Pensez-vous que c'était là quelque chose d'essentiel?

M. Côté (Langelier): Vous vous souviendrez que dans certains cas les tribunaux ont sérieusement menacé les pouvoirs d'enquête, et c'est pourquoi nous avons dû changer cela. Nous essayons de faire ressortir certaines choses. Je pense que nous y sommes parvenus grâce aux amendements que nous avons proposés.

M. Howie: Merci, monsieur le ministre.

Le président: Je permettrai à M. Ouellet de poser une autre question, mais ce sera la dernière.

Mr. Ouellet: Mr. Minister, early on, you gave a list of various aspects of the bill you consider to be improvements. There are nevertheless a certain number of elements which seem to us to be faulty and the whole section dealing with mergers is in our view quite weak. I would like to know why you endeavoured to retain some of the elements contained in

[*Texte*]

En réalité, ce n'est pas tout à fait ce qui est arrivé. Vous en avez laissé tomber un certain nombre.

Suivant votre réponse, à partir d'une quinzaine de facteurs, vous avez décidé de resserrer cette partie de la clause qui a trait aux fusions en n'en gardant que cinq ou six. Or, il m'apparaît évident que le projet de loi C-91, par rapport à C-29, quant à cette partie de la loi, devient beaucoup plus faible que l'ancien projet de loi. Je me demande pourquoi vous avez laissé tomber certains de ces facteurs qui, à mon avis, étaient assez fondamentaux pour permettre, encore une fois, au directeur des enquêtes d'avoir des pouvoirs appropriés pour bloquer une fusion. Pourquoi avez-vous laissé tomber à peu près une demi-douzaine de facteurs qui étaient dans le projet de loi C-29?

• 1710

M. Côté (Langelier): D'abord, je voudrais vous rassurer, monsieur Ouellette. Les 12 facteurs du projet de loi C-29 ont été ramenés à 5. Entre autres, un des facteurs du projet de loi C-29, le 31.(7)(4), disait que l'élément de la taille relative des entreprises devait être considéré. Nous disons que ce n'est plus nécessaire puique le nouveau paragraphe du projet de loi C-91 traite explicitement de la concentration et des parts de marché. On donne une plus grande importance à ce facteur. Vous mentionniez également . . .

M. Ouellet: Les produits compétitifs, par exemple . . .

M. Côté (Langelier): Voilà: la conduite passée des firmes. Pour nous la conduite passée n'est pas toujours garante de l'avenir. Dans le projet de loi C-91, nous parlons de tout autre facteur pertinent à la concurrence dans un marché. La conduite passée des entreprises n'est pas un facteur d'une importance capitale mais il pourrait être pris en considération.

M. Ouellet: Ne pensez-vous pas qu'il serait plus approprié de le dire explicitement dans la loi? Vous nous avez dit, en répondant à des questions cet après-midi, que ce qui est important pour vous, ce n'est pas qu'une firme soit dominante; en soi, ce n'est pas mal. Supposons qu'on accepte cette position. Dans une demande de fusion qui amènerait une situation où une compagnie serait dans une position excessivement dominante, vous dites que ce n'est pas nécessairement mauvais. Ce n'est pas mauvais en soi. Mais si une concentration excessive n'est pas mauvaise et que le tribunal, par ailleurs, connaît des faits indiquant que, dans le passé, cette compagnie installée dans une autre région, a abusé de sa position dominante, qu'est-ce qui nous dit qu'elle n'abuserait pas dans cette nouvelle région également.

Il m'apparaît clair que l'action passée d'une compagnie doit être jugée par le tribunal et devrait, à mon avis, être un facteur fort important pour décider si on permet ou si on ne permet pas la fusion.

M. Côté (Langelier): Je peux prendre, par exemple, monsieur Ouellet, un des facteurs. Vous aviez dans le projet de loi C-29 le facteur F qui traitait de la possibilité de voir disparaître un concurrent dynamique et efficace. Ce facteur

[*Traduction*]

Bill C-29 and rewrite them—although that is not really what happened; you dropped a certain number of them.

According to what you stated earlier, your wish was to tighten up the sections dealing with mergers, and of the 15 factors there were at the beginning, you only kept five or six. It seems to me, however, that compared to Bill C-29, Bill C-91 is much weaker in this area. I fail to understand why you dropped some of these factors which, to my mind, were strong enough to enable the director of the tribunal to prevent mergers he found inappropriate. Why did you choose to drop half a dozen of the factors set out in Bill C-29?

Mr. Côté (Langelier): I would first of all like to reassure Mr. Ouellet. The 12 factors included in Bill C-29 were reduced to five. Section 31.(7)(4) of Bill C-29, for example, stipulated that the relative size of the companies should be a consideration. What we are saying is that this is no longer necessary because of the new section in Bill C-91 dealing explicitly with concentration and market share. Greater importance is given to this factor. You also mentioned . . .

Mr. Ouellet: Products which are in competition one with the other, for example . . .

Mr. Côté (Langelier): Take for example the past performance of the companies in question. In our view, past performance is not necessarily a guarantee, one way or the other, for the future. In Bill C-91, all the factors which pertain to competition in the market come into play. The past conduct or performance of companies is not a very important element, but it could nevertheless be taken into consideration.

Mr. Ouellet: Do you not think it would be more appropriate to state that explicitly in the bill? In answer to a certain number of questions this afternoon, you stated that whether or not a company is in a dominant position or not is not important to you. It is not a problem or a bad thing in itself. Let us say, for the moment, that we agree with that position. Take a merger request which would bring about a situation in which one company would be in a clearly dominant position: you say that that would not necessarily be a bad thing. It is not per se a bad thing. But even if excessive concentration is not bad, suppose the tribunal knows of evidence that in the past this very same company, in another area, used its dominant position in an abusive way. What is to say that it will not do the same thing all over again in this new area?

It is clear to my mind that a company's past performance should be judged by the tribunal and that it should be an important factor in deciding whether or not a merger should go ahead.

Mr. Côté (Langelier): Mr. Ouellet, let me take one of the factors as an example. In Bill C-29 you had factor F, which dealt with the possibility of seeing a dynamic and efficient competitor disappear. This factor was not considered necessary

[*Text*]

n'est pas nécessaire dans le projet de loi C-91. Lorsqu'on parle de réduction sensible de la concurrence, on y fait implicitement référence. Il est inclus dans un des facteurs qu'on y a inséré. J'ai parlé tout à l'heure de la taille relative des entreprises. Il y a douze facteurs. On peut les prendre un par un pour les discuter, mais dans l'ensemble, il nous apparaît que l'essentiel des douze points du projet de loi C-29 se retrouvent regroupés ou implicitement inclus dans ces facteurs énumérés ou dans le facteur F qui évoque tout autre facteur pertinent à la concurrence dans un marché. Donc, par exemple, la conduite passée de l'entreprise serait examinée par le directeur ou par le tribunal. Voilà ce que je veux dire.

Le président: Avec ce qui a été mentionné au début, avec votre permission et pour le bénéfice de tous, j'aimerais reprendre quelques points qui ont fait l'objet de discussions et de décisions aux réunions du Comité de direction qui ont eu lieu les 17 et 21 avril.

• 1715

Considérant que des groupes de pression, soit au niveau des consommateurs ou des entreprises privées ont régulièrement pignon sur rue à Ottawa, et pour ceux qui ne sont pas à Ottawa, ils sont à proximité, à Montréal ou Toronto, et afin d'être pratiques, on a décidé que les séances du Comité, à moins de cas très spéciaux, se tiendraient ici à Ottawa.

Pour tous ceux qui ont montré un intérêt, ou manifesté le désir d'agir comme témoins dans le cadre de ce projet de loi-là, les demandes seront dirigées au Comité directeur qui en fera l'étude et l'analyse et soyez assurés que nous porterons une attention très particulière aux groupes qui n'apporteront qu'un «dédoublement»; et ceux qui voudront venir répéter ce qu'on aura déjà entendu, on acceptera leurs documents écrits, mais ils ne seront pas entendus.

Afin de rencontrer nos échéanciers, on est disposés à siéger un minimum de trois jours par semaine, à raison de deux réunions par jour et il a aussi été décidé que les groupes qui viendront nous faire une présentation devront déposer leurs documents dans les deux langues officielles, 48 heures avant la tenue de la séance. Chaque témoin aura 15 minutes pour faire son exposé et aura droit à une heure pour des questions, approximativement.

J'ai bien l'intention, compte tenu de mon expérience et ceux qui ont travaillé avec moi dans le passé le savent, d'observer scrupuleusement l'heure de début d'une réunion, tout comme l'heure de fin de réunion.

Il a été aussi discuté que le président aura le pouvoir de décider du minutage attribué aux différents partis comme aux représentants du gouvernement et j'ai bien l'intention d'éviter toute question répétitive. Toute question répétitive sera retirée et on passera à un autre intervenant.

Il a de plus été décidé qu'on fera tout en notre possible et on y mettra toutes nos énergies en conséquence pour que les audiences se terminent le ou vers le 16 mai 1986.

Ces décisions-là ont été prises lors des réunions des 17 et 21 avril derniers.

[*Translation*]

in Bill C-91. But when we talk about preventing or lessening competition substantially, we are implicitly referring to that. That whole aspect is covered by one of the other factors we included. I spoke earlier about the relative size of companies. There are 12 factors. We could discuss them one by one, but we are of the opinion that the 12 factors contained in Bill C-29 have been consolidated or implicitly included in those explicitly set out, such as factor F, which deals with any other factor pertaining to competition in the marketplace. Thus, the past performance of the company would be examined by the director or by the tribunal. That is what I meant to say.

The Chairman: Given what was mentioned at the beginning and for the benefit of all of us here, with your permission, I would like to go back to a certain number of issues which were the subject of discussions and of decisions during the meetings the steering committee held on April 17 and 21.

Given that most consumer or private sector pressure groups are set up in Ottawa and that those that are not are close by, in Montreal or in Toronto, and in order to be as practical as possible, we have decided that except in very special cases the committee's hearings would be held here in Ottawa.

The requests of all those who have shown an interest in the matter or who have asked to appear during our study of the bill will be sent on to the steering committee which will analyse them. Let me assure you that we will pay special attention to the case of those groups which will be overlapping with others. And as far as the groups which would simply be repeating what we would have already heard, we will accept their briefs, but they will not be heard.

In order to meet our deadlines, we have agreed to sit a minimum of three days a week, at the rate of two meetings a day. It has further been decided that the groups appearing will have to supply their briefs and other documents in both official languages 48 hours before the time set for the meeting. Each witness will be granted 15 minutes for his or her presentation and this will be followed by approximately one hour for questions.

As in the past, and those of you who have already worked with me are well aware of this, it is my full intention to ensure that the committee start and finish its meetings on time.

It has also been agreed that the chairman will set the number of minutes allotted to the different parties and to members from the government side and it is my intention to avoid all repetitions in the questions. Any question which is simply a repeat will be disallowed and the floor will go on to the next person on the list.

It has further been decided that we will do our utmost to finish up our hearings by May 16, 1986.

All the decisions I have just explained were decided upon during the meetings we held on April 17 and 21.

[*Texte*]

Monsieur le ministre, nous étions très heureux de vous avoir aujourd'hui.

Monsieur Orlikow.

Mr. Orlikow: I want to make one point clear. You said that you expect groups to submit their briefs in advance.

The Chairman: Yes.

Mr. Orlikow: I understand that, and you want them in both languages.

The Chairman: Yes. The clerk informed me that he will take all the measures required in order to have this document in both official languages.

Mr. Orlikow: Well, that is just the point I was going to make, because I am certain there are a number of individuals and certainly some of the academics who are not . . .

The Chairman: Generally speaking, we will accept very few exceptions. Generally speaking, all those who are interested in making a presentation will have to do it in both official languages.

Mr. Orlikow: Am I correct that if individuals submit in either of the official languages in advance that . . .

The Chairman: Yes, it will be translated by the House of Commons.

Mr. Orlikow: Okay, fine.

The Chairman: Mr. Minister, do you want to say something else?

Mr. Côté (Langelier): Just in conclusion, Mr. Chairman, for the benefit of one of their colleagues and some comments I heard, there was some preoccupation that we were bringing some changes for the regulated activities. I want to make sure here that this bill deals with the corporations

qui sont mandataires de Sa Majesté et aussi les activités commerciales qu'ils exercent. Donc, en ce sens-là, je ne veux pas apporter de changement à la loi actuelle relativement aux activités réglementées, et aux associations réglementées. Je veux bien qu'on comprenne qu'on s'adresse à certaines corporations et il n'y a pas de changement avec ce qui existe à l'heure actuelle.

Le président: Je prends bonne note de votre remarque et je pense que ce point a déjà été apporté au Comité de direction, et un peu tout le monde était de cette opinion-là.

• 1720

M. Ouellet: Monsieur le président, je regrette, le ministre vient de faire une précision à la suite d'une intervention d'un député; c'est le point de vue du ministre et je prend sa remarque comme étant un éclaircissement sur une intervention précédente, mais ça n'a rien à faire avec le travail de notre Comité directeur . . .

[*Traduction*]

Mr. Minister, it was a pleasure to have you with us here today.

Mr. Orlikow.

M. Orlikow: J'aimerais qu'une chose soit bien claire. Vous avez dit vous attendre à ce que les différents groupes déposent à l'avance leur mémoire auprès du Comité.

Le président: Oui.

M. Orlikow: Je comprends cela, et vous voulez également que ces mémoires vous soient fournis dans les deux langues.

Le président: Oui. Le greffier m'a fait savoir qu'il prendra toutes les mesures nécessaires pour veiller à ce que ces documents soient fournis dans les deux langues officielles.

M. Orlikow: C'est justement là ma question. Je suis certain qu'il y a beaucoup de personnes dont certains universitaires qui ne sont pas . . .

Le président: De façon générale, nous ne ferons que très peu d'exceptions. De façon générale, tous ceux qui souhaitent me faire un exposé devront le faire dans les deux langues officielles.

M. Orlikow: Ai-je raison de penser que si les intervenants déposent leur mémoire à l'avance dans l'une ou l'autre des deux langues officielles . . .

Le président: Oui, le document sera alors traduit par la Chambre des communes.

M. Orlikow: Très bien.

Le président: Monsieur le ministre, auriez-vous autre chose à dire?

M. Côté (Langelier): Monsieur le président, en guise de conclusion et pour la gouverne d'un de vos collègues . . . d'aucun semble craindre que nous amenions des changements au niveau des activités réglementées. Je tiens à ce que le projet de loi s'applique aux sociétés

which come under Her Majesty, and the bill would apply also to all the commercial activities of these companies. In that sense, therefore, I do not wish to bring any changes to the existing legislation concerning regulated activities and regulated associations. I would hope that it is clear that we are dealing here with only certain corporations and that I am not suggesting any other departures from the system as it now exists.

The Chairman: I have taken note of your remark and I believe that this issue has already been brought up with the steering committee. It seemed that everyone was of that opinion.

Mr. Ouellet: Excuse me, Mr. Chairman, but the Minister has just added something following a member's comment. What we have just heard is the Minister's opinion, and I take his remark as being a further explanation concerning a matter brought up earlier, but that has nothing to do with the work of our steering committee . . .

[*Text*]

Le président: Quant aux choix des groupes qui vont être invités . . .

M. Ouellet: . . . Pas du tout.

Le président: D'accord! On se comprend bien.

Monsieur le ministre, merci de votre présence; je pense qu'autant les explications que les réponses ont su plaire à l'ensemble des membres; c'est de bon augure pour nos travaux futurs. Merci beaucoup.

La séance est levée.

[*Translation*]

The Chairman: As for the selection of those groups which will be invited . . .

Mr. Ouellet: . . . Not at all.

The Chairman: Very well. We understand each other.

Mr. Minister, thank you for having come to meet with us. I believe that both your explanations and your answers satisfied most members, and this augurs well for the future work of the committee. Thank you very much.

This meeting now stands adjourned.

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WITNESS—TÉMOIN

At 3:30 p.m.:

From the Department of Consumer and Corporate Affairs:
G. Ménard.

A 15 h 30:

Du ministère de la Consommation et des Corporations:
G. Ménard.

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HOUSE OF COMMONS

Issue No. 2

Thursday, April 24, 1986

Chairman: Marcel Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 2

Le jeudi 24 avril 1986

Président: Marcel Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

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RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

WITNESSES:

(See back cover)

TÉMOINS:

(Voir à l'endos)

First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

26133—1

LEGISLATIVE COMMITTEE ON BILL C-91

Chairman: Marcel Tremblay

COMITÉ LÉGISLATIF SUR LE PROJET DE LOI C-91

Président: Marcel Tremblay

MEMBERS/MEMBRES

Bill Attewell
Pierre Cadieux
Bill Domm
Bill Kempling
Robert Howie
David Orlikow
André Ouellet

(Quorum 4)

Le greffier du Comité

Dave Cook

Clerk of the Committee

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MINUTES OF PROCEEDINGS

THURSDAY, APRIL 24, 1986
(3)

[*Text*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 9:35 o'clock a.m., this day, the Chairman, Marcel Tremblay, presiding.

Members of the Committee present: Bill Domm, Robert Howie, David Orlikow and André Ouellet.

Witnesses: *From the Petroleum Marketers Association of Canada*: William P. McKeown, Q.C., Legal Counsel; Murray Hogarth, President, Pioneer Petroleums Limited; Bob Allen, Vice-President, Pioneer Petroleum (Central) Limited; Rick Hammond, Owner, T.G. Hammond Limited, St. Marys, Ontario.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 (*See Minutes of Proceedings and Evidence dated Wednesday, April 23, 1986, Issue No. 1*).

The witnesses made statements and answered questions.

At 11:20 o'clock a.m., the Committee adjourned to the call of the Chair.

PROCÈS-VERBAL

LE JEUDI 24 AVRIL 1986
(3)

[*Traduction*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres loi, se réunit aujourd'hui à 9 h 35, sous la présidence de Marcel Tremblay, (*président*).

Membres du Comité présents: Bill Domm, Robert Howie, David Orlikow, André Ouellet.

Témoins: *De l'Association canadienne de commercialisation des produits pétroliers*: William P. McKeown, c.r., conseiller juridique, Murray Hogarth, président, *Pioneer Petroleums Limited*; Bob Allen, vice-président, *Pioneer Petroleum (Central) Limited*; Rick Hammond, propriétaire, *T.G. Hammond Limited*, St. Marys (Ontario).

Le Comité reprend l'étude de son ordre de renvoi du jeudi 10 avril 1986. (*Voir Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule nº 1*).

Les témoins font des déclarations et répondent aux questions.

À 11 h 20, le Comité s'ajourne jusqu'à nouvelle convocation du président.

Le greffier du Comité

Dave Cook

Clerk of the Committee

EVIDENCE

(*Recorded by Electronic Apparatus*)

[*Texte*]

Thursday, April 24, 1986

• 0933

The Chairman: Good morning, everybody and a warm welcome to Mr. Conrad and his team. I will leave Mr. Conrad to introduce his team later on. A few members will join us in a few minutes—for instance, Mr. Ouellet and one member from the government.

I very much appreciate your being here. Yesterday, you confirmed your appearance. As already discussed, if you agree, we will give you 10 to 15 minutes to make your presentation. This will leave plenty of time for the questions. We intend to close this session at 10.40 a.m., if you do not have any objection. Mr. Conrad, please.

Mr. James R. Conrad (Executive Vice-President, Petroleum Marketers Association of Canada): Thank you, Mr. Chairman. We are very pleased to have this invitation to appear before this committee on a bill which is of utmost importance to the Petroleum Marketers Association of Canada. We have prepared a point-form submission on the topics we plan to speak to. I understand it has been agreed we will have a written submission quickly prepared for the consideration of the committee.

• 0935

With me today are Mr. William P. McKeown Q.C., legal counsel to the association; Mr. Murry Hogarth, President of Pioneer Petroleums Ltd. in Burlington; and Mr. Bob Allen, of First Pioneer Petroleum (Central) Ltd. of Scarborough.

I believe the committee is quite aware who the independent petroleum marketers are. Their activities are in the downstream sector of the Canadian petroleum industry. Their activities comprise all of the facets of the downstream sector. They market the full range of petroleum products, from propane to asphalt. They are independently owned and operated and a key criteria is that they own the product in the ground, so they are free to set their own selling prices in response to their perceptions of the market.

These independent petroleum marketers are represented in the United States by the Petroleum Marketers Association of America, a group of 12,000 independents who claim to market 60% of the gasoline and 80% of the home heating oil. We maintain close liaison with the PMAA and regularly attend their board of directors meetings in Washington.

The Petroleum Marketers Association of Canada is smaller in membership, not only by the nature of the size of the country but also because there are fewer independents pro rata.

TÉMOIGNAGES

(*Enregistrement électronique*)

[*Traduction*]

Le jeudi 24 avril 1986

Le président: Bonjour, messieurs et bienvenue à M. Conrad et aux membres de son équipe. Je demanderai à M. Conrad de nous présenter les membres de la délégation un peu plus tard. Quelques autres députés se joindront à nous dans quelques minutes, notamment M. Ouellet et un autre député de la majorité.

Je suis très heureux que vous soyez des nôtres ce matin. Hier, vous avez confirmé votre comparution. Si vous êtes d'accord, nous vous accorderons dix ou quinze minutes pour votre exposé comme nous en avons discuté. Cela nous laissera suffisamment de temps pour les questions. Nous avons l'intention de lever la séance à 10 h 40, si vous n'avez aucune objection. Monsieur Conrad, s'il vous plaît.

M. James R. Conrad (vice-président exécutif, Association canadienne de commercialisation des produits pétroliers): Merci, monsieur le président. Nous sommes très heureux d'avoir été invités à comparaître devant le Comité pour examiner un projet de loi de la plus grande importance pour notre association. Nous avons préparé un exposé en style télégraphique, énumérant les points que nous voulons aborder. Comme convenu, nous préparerons rapidement un mémoire plus étoffé que nous ferons parvenir au Comité.

M'accompagnent aujourd'hui M. William P. McKeown, c.r., conseiller juridique de l'Association; M. Murray Hogarth, président de *Pioneer Petroleums Ltd.* de Burlington; et M. Bob Allen, de *First Pioneer Petroleum (Central) Ltd.* de Scarborough.

Je crois que les membres du Comité savent très bien qui sont les détaillants indépendants de produits pétroliers. Ils exercent leurs activités en aval de l'industrie pétrolière canadienne. Ces activités englobent tous les aspects du secteur pétrolier en aval. Ils assurent la commercialisation de la pleine gamme de produits pétroliers, du propane à l'asphalte. Il s'agit d'entreprises appartenant à des propriétaires indépendants et exploitées par eux, et dont le principal critère est la propriété du produit dans le sol afin que ces entreprises puissent fixer leur propre prix de vente en fonction du marché.

Les vendeurs indépendants de produits pétroliers sont représentés aux États-Unis par la *Petroleum Marketers Association of America*, groupe de 12,000 vendeurs indépendants, qui prétendent commercialiser 60 p. 100 de l'essence et 80 p. 100 du mazout résidentiel. Nous entretenons des rapports très étroits avec la PMAA et nous assistons régulièrement aux réunions de leur conseil d'administration à Washington.

L'Association canadienne de commercialisation des produits pétroliers est de taille plus restreinte en raison de la taille de notre pays, mais aussi en raison du nombre moins élevé de vendeurs indépendants par rapport à la population totale.

[*Texte*]

The independents economically are the competitive factor in the marketplace. They are innovative, entrepreneurial, cost-efficient, productive; they create jobs, they import and export the full range of products and so they are an immense benefit to consumers.

Politically, they are independent. They provide stability in local communities and they are generally family owned with several generations typically being active in the businesses.

There are numbers of stragegic issues on the minds of independent petroleum marketers as they proceed in their business activities. One is in terms of supply—whether they should get supplies from Canadian or American refiner suppliers; whether they should buy spot or term; whether they should buy from a major or an independent refiner.

One of our ongoing concerns, which has been articulated over many years, is the price discrimination we experience in the marketplace. Perhaps I could ask Mr. Hogarth to decribe this concern to you.

Mr. Murry Hogarth (President, Pioneer Petroleums Ltd.): The problem the independent has in the marketplace is generally derived from a unique problem. The problem is that the independent has to both buy from and compete with the same refiner. This has been a problem for the 30 years I have been in the business. The question is: What is a fair price?

Over the years, we have experienced situations where through one means or another Pioneer—as one of the largest contract buyers of petroleum products in Ontario—has found itself paying subtantially more in some cases than small major brand dealers who are purchasing from the same refiner. So the problem we end up with is the ability of the major refiner to squeeze a margin so that you are not aware and you are off balance continuously as to whether you are going to be in business.

• 0940

Our concerns have been reasonably continuous over a number of years. We have had situations where, because of this margin squeeze and the uncertainty attached to it, Pioneer as a business has been forced at times over the years to look at selling its business to a major. In some cases we were not assured that the negotiations were being influenced by our price at the refinery. So you can see the unique position we are in.

I think the independents in Canada are relatively few. There appears to be a lot of competitive action out there, but a lot of the competitors are major brand refiners posing under private brand names, like Beaver or Regent or Gain or whatever.

The problem then is what is fair. What we define as being fair is we think there should be a transfer price to the independents at exactly the same price they would transfer to

[*Traduction*]

Sur le plan économique, les indépendants apportent un élément de concurrence sur le marché. Ils sont novateurs, ont l'esprit d'entreprise, sont soucieux des coûts et très productifs; ils créent des emplois, importent et exportent la pleine gamme de produits et apportent donc des avantages appréciables aux consommateurs.

Sur le plan politique, ils sont sans affiliation. Ils apportent un élément de stabilité dans les collectivités locales et oeuvrent généralement au sein d'entreprises familiales, où l'on retrouve habituellement des membres de plusieurs générations.

Dans le cadre de leurs activités commerciales, les vendeurs indépendants de produits pétroliers se préoccupent d'un certain nombre de questions d'importance stratégique. Les conditions d'approvisionnement ne sont qu'une de ces préoccupations: doivent-ils s'approvisionner auprès de raffineurs canadiens ou américains? Doivent-ils acheter au comptant ou à terme? Doivent-ils s'approvisionner auprès de grandes raffineries ou de fournisseurs indépendants?

Depuis de nombreuses années, nous nous inquiétons de la discrimination au niveau des prix, à laquelle nous nous heurtons sur le marché. Je pourrais peut-être demander à M. Hogarth de vous donner plus de détails à ce sujet.

M. Murray Hogarth (président, *Pioneer Petroleums Ltd.*): Le principal problème que connaissent les indépendants sur le marché tient au fait que les raffineries sont en même temps fournisseurs et concurrents. Depuis 30 ans que je travaille dans ce secteur, cela nous a toujours créé des problèmes. La question est la suivante: qu'est-ce qui constitue un prix équitable?

Au fil des ans, *Pioneer*, l'un des plus importants acheteurs à contrat de produits pétroliers en Ontario, s'est vu obligée, d'une façon ou d'une autre, de payer un prix sensiblement plus élevé que les petits détaillants de grands produits de marque, qui s'approvisionnent auprès du même raffineur. Notre problème tient donc au fait que les principaux raffineurs sont en mesure de comprimer à tel point les marges bénéficiaires que les indépendants ne savent jamais, du jour au lendemain, s'ils réussiront à se maintenir à flot.

Nos sujets de préoccupation sont essentiellement les mêmes depuis bon nombre d'années. Au fil des ans, la compression des marges bénéficiaires et le climat d'incertitude attribuable à cette pratique ont amené *Pioneer* à envisager à maintes reprises de vendre ses intérêts à une des grandes entreprises. Dans certains cas, nous ne savions pas si notre prix à la raffinerie aurait une incidence sur les négociations. Vous voyez donc dans quelle situation particulière nous nous trouvons.

Je pense que les indépendants sont peu nombreux au Canada. La concurrence peut sembler assez vive sur ce marché, mais un grand nombre des concurrents sont des grandes raffineries qui donnent à leurs produits des marques privées telles que Beaver, Regent, Gain et d'autres encore.

Il s'agit donc de déterminer ce qui est équitable. Pour notre part, nous croyons que le prix de transfert fait aux indépendants doit être exactement le même que le prix qui serait

[*Text*]

their marketing network, the lowest possible cost for that contract volume. That is a kind of mechanism we think the major refiners can set up and should set up.

The opening of the border to product coming in from the U.S. since June 1 of last year has partially resolved the problem of the independents in Ontario or in Canada having to deal exclusively with Canadian refiners.

Mr. Conrad: Thank you, Mr. Hogarth. I wonder, Mr. Allen, if you would spend a minute just describing what the current southern Ontario market looks like in terms of a margin squeeze, just the numbers, because I think that would be of interest to the committee.

Mr. Bob Allen (Vice-President, Pioneer Petroleums Ltd.): Thanks, Jim. I will just give a bit of brief background before we get into it. For those who do not know anything about Pioneer, the Pioneer group of service stations, which go under the name of Pioneer, Cango, Number One gas bars, and Go Gas bars, have approximately 250 outlets in Ontario, from western Ontario to Cornwall, north to Thunder Bay. We were Gulf Canada's largest customer in Canada, and now we are Petro-Can's largest customer due to that acquisition.

What we find is that the wholesale cost to a company like us today from a Petro-Can, for instance, is 35¢ a litre, all taxes in. Now, our average retail price in Ontario today is approximately 36.7¢. There is no way in the world we can make that number work.

Now, we are probably a little bit more fortunate than others that because of our size we are more spread out. If there is a price war say in London, hopefully Toronto may be a little higher or Peterborough may be a little higher or Thunder Bay. But a small independent—and most of them are small, say 12 to 14 outlets, and they are usually concentrated in one area—can be squeezed virtually out of business.

I see Mr. Domm is here, and I know he is well aware of the situation. In fact, two years ago, with a company called Seabrook Petroleums in Peterborough, he was a customer of Petro-Canada and he was forced to buy gas at 3¢ a litre at times higher than Petro-Can was selling it at their own stations in Peterborough. Now, Mr. Seabrook is like all independents. It is a family company. He was in business for over 30 years. He had only two options, either to go broke or to sell. Now Pioneeer bought Seabrook Petroleums two years ago and is now operating those outlets. But throughout Ontario—and I am sure Canada is no different—the independents are being eliminated one by one.

[*Translation*]

consenti aux stations de réseaux de commercialisation, à savoir le prix le plus bas possible pour le volume du produit acheté à contrat. Voilà le genre de mécanisme que les grandes raffineries pourraient et devraient, à notre avis, mettre en place.

L'ouverture de la frontière aux produits américains depuis le 1er juin de l'an dernier a apporté une solution partielle aux problèmes des indépendants de l'Ontario et du Canada, qui devaient, auparavant, traiter exclusivement avec les raffineurs canadiens.

M. Conrad: Merci, monsieur Hogarth. Monsieur Allen, je me demande si vous pourriez prendre une minute pour décrire la situation qui prévaut actuellement sur le marché du Sud de l'Ontario en ce qui concerne la compression de la marge bénéficiaire et pour fournir certaines données chiffrées susceptibles d'intéresser les membres du Comité.

M. Bob Allen (vice-président, *Pioneer Petroleums Ltd.*): Merci, Jim. Avant d'entrer dans les détails, j'aimerais d'abord présenter un aperçu général de la situation. Pour la gouverne de ceux qui ne connaissent pas la société Pioneer, je vous signale qu'elle regroupe environ 250 stations-service faisant affaire sous divers noms commerciaux: *Pioneer*, *Cango*, *Number One gas bars* et *Go Gas bars*, de l'Ouest ontarien jusqu'à Cornwall et vers le Nord jusqu'à Thunder Bay. Nous étions le principal client de *Gulf Canada* et, depuis l'acquisition, nous sommes le principal client de Petro-Canada.

Nous constatons qu'une société comme la nôtre doit, par exemple, payer à Petro-Canada un prix de gros de 35c. le litre, toutes taxes comprises. Or, notre prix au détail moyen en Ontario, aujourd'hui, se situe aux environs de 36,7c. Vous admettrez que nous ne pouvons absolument pas arriver dans nos affaires avec de tels chiffres.

Malgré cela, nous sommes peut-être plus chanceux que d'autres puisque le nombre de nos stations nous permet de diversifier nos marchés. S'il y a une guerre des prix à London, par exemple, nous pouvons espérer vendre à un prix un peu plus élevé à Toronto, à Peterborough ou à Thunder Bay. Mais les petites entreprises indépendantes, et la plupart d'entre elles ne comptent qu'entre 12 et 14 stations-service habituellement concentrées dans une seule région, peuvent être contraintes de fermer leurs portes en raison de la compression des marges bénéficiaires.

Je vois là M. Domm, et je sais qu'il sait ce qui en est. En fait, il y a deux ans, le propriétaire de *Seabrook Petroleums* de Peterborough s'approvisionnait auprès de Petro-Canada et était obligé d'acheter de l'essence à un prix parfois supérieur de 3c. le litre au prix auquel Petro Canada vendait cette essence dans ses propres stations de Peterborough. Or, la situation de M. Seabrook était comparable à celle de tous les indépendants. Il s'agit d'une entreprise familiale. Il était en affaires depuis plus de 30 ans. Il n'avait que deux choix: faire faillite ou vendre. *Pioneer* a racheté *Seabrook Petroleums* il y a deux ans et exploite maintenant ces stations-service. Partout en Ontario, et le même phénomène se produit sans doute ailleurs au Canada, les indépendants sont en train d'être évincés un à un.

[*Texte*]

• 0945

There was another one two weeks ago, Comet Petroleums, in Barrie, Ontario, that had been in business for over 30 years and has now sold its interest in the gasoline business. One by one they are being eliminated by a major company.

As Murray suggested and says, we have a dilemma. Our competitors are also our suppliers. What they do is they target you. For instance, they might hit you in Exeter, Ontario, today and they will bang away at you and wear you down, where they will sell their gas at their own outlets more cheaply than we can buy it from these same competitors. Then they will move, say, from Exeter to Scarborough; and then from Scarborough to Peterborough; and from Peterborough to wherever.

What is happening is that the dealers, the major dealers, for instance, might own their land, and a major oil company will supply the equipment and all the ground equipment, maybe guarantee, say, 4¢ a litre no matter what the price. So where you have a situation where a dealer may drop the price, say, to 36¢ a litre, he is getting his 4¢ guarantee, so he is buying it for 32¢, while we are in a position where you either have to compete with them at the street level to retain your market volume, or, if you do not, if you try to maintain your margin, then you are faced with losing your volume; and once the volume is gone, it does not come back. Either way . . . if you compete with them on the down side, with no margin, you end up going broke; if you do not compete with them, you lose your volume and you go broke. So the answer is the same, no matter how you cut it.

Mr. Conrad: Mr. Chairman and gentlemen, we congratulate the Minister on bringing this forward. This is an historic opportunity for Parliament in the context of the McGrath reforms. There is an opportunity to bring a workable bill back to third reading.

I would urge you to keep to your timetable. We badly need this bill strengthened in the way that we are going to suggest and recommend to you, and to get it out at third reading with a certainty before the summer recess; because the government always has the option to adjourn. If they adjourn before this receives third reading, then we have lost so much. So many people have been contributing over many, many years to attempts to reform.

What I want to put on the minds of this committee, as representatives of Parliament, is that if we fail now, then we all lose. We lose as the independents, because we do not get something that is useful and helpful; and I suggest to you that Parliament loses credibility, because what is at issue now is can Parliament reform and strengthen our anti-trust laws? So we have a strong urging to you to move with the pace, consider seriously our amendments, which hopefully you will support, and then bring the bill to third reading.

Mr. McKeown will speak to the amendments we want to suggest to you. This is not a shopping list of amendments. This is the minimum we believe is necessary to have a realistic and workable bill.

[*Traduction*]

Il y a deux semaines encore, une autre compagnie qui existait depuis 30 ans, Comet Petroleums, de Barrie en Ontario, a vendu ses intérêts dans l'essence. L'une après l'autre, elles sont éliminées par les grosses compagnies.

Comme Murray vous l'a dit, nous nous heurtons à un dilemme. Nos concurrents sont également nos fournisseurs. Ils s'attaquent à nous de façon systématique. Un jour ils attaquent à Exeter, en Ontario, et ils ne lâchent pas prise tant que nous ne déclarons pas forfait. Ils vendent leur essence dans leurs stations de détail à meilleur marché que nous ne pouvons leur acheter l'essence à eux. Ensuite, d'Exeter, ils passent à Scarborough, puis de Scarborough, à Peterborough, puis ailleurs.

Les détaillants, les principaux détaillants, sont parfois propriétaires du terrain; une grosse compagnie pétrolière leur fournit le matériel, tout le matériel au sol, et leur garantit quelque chose comme 4c. le litre, quelque soit le prix. Il peut arriver que le détaillant baisse son prix, par exemple à 36c. le litre, mais comme il a sa garantie de 4c., il achète à 32c. Dans ces conditions, nous sommes forcés de les concurrencer au détail pour retenir notre part du marché, et si nous ne le faisons pas, nous perdons du terrain. Quand on perd du terrain, on ne peut pas le récupérer. D'une façon ou de l'autre, quand on essaie de les concurrencer à la baisse, sans marge, on court à la faillite. Quand on n'essaie pas de les concurrencer, on perd du terrain et on court à la faillite. Par conséquent, cela revient au même.

M. Conrad: Monsieur le président, messieurs, nous félicitons le ministre d'avoir soumis ce projet de loi. Pour le Parlement, dans le contexte des réformes McGrath, c'est une occasion historique. C'est une occasion de produire un bill convenable pour la troisième lecture.

J'espère que vous allez respecter votre échéancier; nous avons un besoin urgent de ce bill avec les amendements que nous allons vous recommander, et il faudrait qu'il passe en troisième lecture avant les vacances d'été, car le gouvernement a toujours la possibilité d'ajourner. Si on ajourne avant la troisième lecture de ce bill, nous aurons perdu beaucoup. Il y a tant de gens qui depuis des années essaient d'obtenir des réformes.

Que les membres de ce comité, qui représentent le Parlement, comprennent bien un chose: si nous échouons maintenant, nous y perdrons tous. Nous y perdrons parce que nous sommes indépendants et parce que nous n'obtiendrons pas une mesure qui serait utile, mais le Parlement y perdrait également de sa crédibilité, car c'est l'habilité du Parlement à réformer et à renforcer nos lois anti-trust qui est en cause. Nous vous prions donc instamment de suivre le mouvement, d'étudier sérieusement nos amendements, et d'envoyer le bill en troisième lecture.

Monsieur McKeown va vous parler des amendements que nous voulons vous soumettre; ce n'est pas une liste de commissions, c'est le minimum nécessaire pour rendre ce bill applicable et utile.

[*Text*]

The present abused system, in our opinion, and with our advice, is unenforceable, because there are simply too many hurdles to get through. It is our considered opinion that there will be no cases before the tribunal with the present abuse of dominant-position provisions.

Mr. William McKeown, Q.C. (Legal Counsel, Petroleum Marketers Association of Canada): Mr. Chairman, members of the committee, I think this question of unenforceability of the abuse section has arisen because of the concern with respect to a remedy of dissolution. Previous abuse sections have not had as much intent and object requirements as the present proposed sections 50 and 51.

• 0950

We are not unsympathetic to the concern about the remedy of dissolution and we would be quite prepared to leave the section as is when the remedy of dissolution is sought. However, it is essential that there be a way of stopping anti-competitive acts by monopolists or joint monopolies.

It is well known in Canada that many industries are what are called oligopolistic industries controlled by two, three or four firms. If those major firms all use the same anti-competitive practices, one sees the disappearance of the independent firm, not for reasons of inefficiency but because these four firms are protecting their monopoly.

We want to see effective restraints on the abuse of dominant position and we cannot have an effective law if all four requirements of sections 50 and 51 have to be met. As I stated earlier, the new bill raises the requirement of object in paragraph 51.(1)(*b*) and while I appreciate that in law, intent and object are differentiated, they are still very similar.

In the United States, for example, if you can show either effect, which is required under paragraph 51.(1)(*c*), or intent, then that is sufficient to establish the defence of monopolization.

Accordingly, we recommend very strongly to this committee that paragraph 51.(1)(*b*) should be deleted. We think it is necessary also to stress the need for the clause to prevent abuses by both monopolies and oligopolies. We have some concern with respect to the wording of paragraph 51.(1)(*a*) where it states:

> (*a*) one or more persons substantially or completely control . . .

Lawyers have argued ever since the Canadian General Electric large lamp case about the meaning of one or more persons, whether one has to establish that several persons are in agreement before the section would be applicable.

We do not think there should be this doubt left in the legislation and we would recommend that similar wording to what is now in subsection 4.(1) of the act be used where we talk about major firms or . . . to change the wording to "anti-competitive practices" are widespread in the market.

[*Translation*]

Nous considérons que le système actuel n'est pas applicable, car il y a tout simplement trop d'obstacles. Nous sommes convaincus que les dispositions actuelles concernant l'abus de positions dominantes ne provoqueront pas de poursuites devant les tribunaux.

M. William McKeown, c.r. (conseiller juridique, Association canadienne de commercialisation des produits pétroliers): Monsieur le président, membres du comité, si l'on s'est interrogé sur l'applicabilité de l'article relatif aux abus, c'est à cause de la possibilité d'une ordonnance de dissolution. Les articles antérieurs sur les abus n'avaient pas les mêmes exigences en matière d'intentions et d'objectifs que les projets d'article 50 et 51 que vous étudiez aujourd'hui.

Nous comprenons les inquiétudes causées par l'ordonnance de dissolution, et lorsque cette ordonnance est demandée, nous serions tout à fait disposés à conserver l'article sous sa forme actuelle. Toutefois, il faut absolument prévoir un moyen de mettre fin à des agissements anti-concurrentiels des monopoles ou des regroupements monopolistes.

Tout le monde sait qu'au Canada il y a beaucoup d'industries qui sont des oligopoles, c'est-à-dire qui sont contrôlées par deux, trois ou quatre firmes. Si toutes ces grosses compagnies font appel aux mêmes pratiques anti-concurrentielles, il faut prévoir la disparition des compagnies indépendantes, non pas parce qu'elles sont inefficaces, mais parce que ces quatre compagnies protègent leur monopole.

Nous voulons une protection efficace contre l'abus de position dominante et c'est impossible si l'on est tenu de respecter les quatre exigences des articles 50 et 51. Comme je l'ai dit plus tôt, le bill impose une exigence de but à l'alinéa 51.(1) *b*), et je comprends que dans la loi, l'intention et le but sont deux choses distinctes, mais elles n'en sont pas moins très voisines.

Aux États-Unis, par exemple, si vous pouvez prouver un effet, comme cela est prévu par l'alinéa 51.(1) *c*), ou l'intention, cela est suffisant et constitue une défense contre un monopole.

Par conséquent, nous recommandons à ce comité de supprimer l'alinéa 51.(1) *b*). Il faut insister également sur l'importance de l'article destiné à prévenir les abus des monopoles et des oligopoles. La formulation de l'alinéa 51.(1) *a*) nous cause une certaine préoccupation, et je cite:

> *a*) qu'une ou plusieurs personnes contrôlent sensiblement ou complètement . . .

Depuis l'affaire de la grosse lampe de *General Electric Canada*, les avocats ont toujours considéré qu'il était nécesaire d'établir que plusieurs personnes éaient d'accord avant de pouvoir appliquer l'article.

A notre avis, il ne faut pas que ce doute persiste et nous recommandons un libellé semblable à celui du paragraphe 4.(1) de la loi, lorsqu'il est question de grosses entreprises ou bien de prévoir le cas où les «agissements anti-concurrentiels» sont généralisés sur le marché.

[*Texte*]

• 0955

In other words, if the three or four firms that comprise the oligopoly are engaged in the same anti-competitive acts, we feel that the tribunal should have jurisdiction to make an order either to stop the acts or to change the acts so they are no longer anti-competitive.

We have concern also with the definition of anti-competitive acts in proposed section 50. Many of the anti-competitive acts require that the act be done for the purpose of impeding or preventing the customer's entry into or expansion in a market. Again, we do not feel that it should be necessary to show intent as well as effect. There is a well-known legal principle that persons are intended to follow the natural consequences of their acts, and to say that there is no evidence of intention when the only effect of the acts would be to prevent the customer's entry into the market or expansion seems to me to be raising the stakes far higher than would be acceptable if we are really serious about preventing concentration of power and abuse of power in this country.

In view of time limitations, I will not go through each individual anti-competitive practice.

I wish to refer to one other clause in the abuse section, and that is proposed subsection 51.(4), which provides an absolute defence if the actions of the monopolist or shared monopolist, or whatever terminology you wish to use, is the result of superior competitive performance. We feel that this is unacceptable. It could be a factor in deciding whether there has been a restraint, but to make it an absolute defence does not give the tribunal any alternative even though the restrictive practices may be proved beyond any doubt.

For example, you could have a situation where company A is found to have implemented freight equalization, made a practice of it on a competitor's plan, and documentation is presented to the tribunal which states that A's specific purpose was to eliminate B, who does not have a deep pocket to resort to for financing, and it is very clear that they are going to eliminate B from the market. The tribunal also in this case would find that A controls the market, or is a major firm in the market if our suggestions are followed, and the effect and object are to lessen competition substantially.

If all those matters have been proved to the tribunal's satisfaction, it does not seem reasonable then to allow company A to come along and say that they were doing this because of superior competitive performance. We understand the arguments with respect to efficiency in the case of merger, where you are trying to balance in effect the economic advantages and disadvantages; but the efficiency argument is certainly much less of a factor in the case of monopolies, and I urge the committee to recommend that, at the most, efficiency be considered as a factor and not as an absolute defence in the abuse section.

[*Traduction*]

Autrement dit, si les trois ou quatre firmes qui composent l'oligopole se livrent aux mêmes agissements anti-concurrentiels, nous pensons que le tribunal devrait avoir la possibilité de leur ordonner, soit de mettre fin à ces agissements, soit de les modifier pour qu'ils ne soient plus anti-concurrentiels.

Nous sommes également préoccupés par la définition des agissements anti-concurrentiels dans l'article 50. Beaucoup d'agissements anti-concurrentiels doivent avoir pour but d'empêcher un client de pénétrer un marché ou de prendre de l'expansion. Encore une fois, il ne devrait pas être nécessaire de démontrer l'intention en plus de l'effet. Il y a un principe juridique bien connu qui veut que les personnes suivent les conséquences naturelles de leurs actes; prétendre qu'il n'y a pas de preuve d'intention quand les seuls effets des agissements en question seraient d'empêcher un client de pénétrer un marché ou de prendre de l'expansion, serait à mon sens augmenter la mise de façon exagérée si nous voulons vraiment empêcher la concentration ou l'abus des pouvoirs dans ce pays.

Comme nous n'avons pas beaucoup de temps, je n'étudierai pas en détail chaque pratique anti-concurrentielle.

Je me réfère à un autre paragraphe de l'article sur les abus, c'est-à-dire le projet de paragraphe 51.(4), qui prévoit une défense absolue si les agissements du monopole ou de l'oligopole, je ne sais pas quelle terminologie vous utilisez, sont le résultat d'une efficience économique supérieure. Nous considérons que cela est inacceptable. Cela pourrait constituer un facteur pour décider qu'il y a eu restriction, mais s'il s'agit d'une défense absolue, le tribunal n'a pas le choix, même s'il est possible de prouver sans le moindre doute qu'il y a eu pratique restrictive.

Par exemple, il se pourrait qu'une compagnie À ait mis en place un système de péréquation du fret, qu'elle en ait fait une pratique en imitant un plan d'un concurrent, et l'on peut supposer que des documents sont soumis au tribunal qui confirment que le but précis de la compagnie À était d'éliminer la compagnie B qui n'a pas de réserves financières suffisantes et qui va être forcée de céder la place. Dans ce cas, le tribunal déterminerait également que la compagnie À contrôle le marché, ou bien qu'elle est une compagnie importante sur le marché si nos suggestions sont retenues, et dans ce cas, l'effet et le but sont de diminuer considérablement la concurrence.

Si toutes ces choses sont établies à la satisfaction du tribunal, il ne semble pas raisonnable de permettre à la compagnie À d'invoquer son efficience économique supérieure. Nous comprenons les arguments au sujet de l'efficience dans le cas d'une fusion, lorsqu'on essaie de contrebalancer les effets des avantages et des désavantages économiques. Mais l'argument de l'efficience est certainement beaucoup moins valable dans le cas des monopoles; nous prions donc le Comité de recommander que l'efficience soit considérée comme un facteur dans le meilleur des cas, et non pas comme une défense absolue dans l'article sur les abus.

[*Text*]

• 1000

I think perhaps we have overextended our time, Mr. Chairman, but I would be pleased to elaborate on any of the points.

The Chairman: Thank you very much. Mr. Ouellet will be the first one to ask questions.

M. Ouellet: Merci, monsieur le président.

Je voudrais d'abord remercier les représentants de l'Association canadienne de commercialisation des produits pétroliers d'être venus nous rencontrer ce matin. C'est une association qui, à mon avis, a un intérêt très important dans ce projet de loi. Je sais que votre association veut qu'on renforce la Loi sur la concurrence depuis déjà plusieurs années. Les suggestions que vous nous faites aujourd'hui sont très pertinentes. J'espère que mes collègues, tant conservateurs que néo-démocrates, ont écouté très attentivement ce que vous avez dit sur les amendements importants à apporter au projet de loi et sur la nécessité de l'adopter le plus rapidement possible.

Je voudrais vous féliciter d'être venus en nombre important et, en particulier, d'avoir retenu les services d'un avocat éminent dont la réputation et la connaissance de la Loi sur la concurrence sont depuis longtemps reconnues. Je suis sûr que ses propositions précises d'amendements au projet de loi nous seront très utiles dans nos délibérations futures.

Vous avez abordé tout à l'heure une question qui me préoccupe, mais je voudrais y revenir parce qu'elle est assez fondamentale. Du projet de loi et des propos que le ministre a tenus, il se dégage une certaine impression, à savoir que plus une compagnie est grande, plus elle peut être efficace. D'après vous, cela est-il vrai dans votre secteur d'activité? Dans quelle mesure le facteur d'efficacité que l'on retrouve dans la loi peut-il jouer dans votre domaine d'activité économique?

Mr. Conrad: Thank you, Mr. Ouellet, for those supportive remarks. On the efficiency question, Mr. McKeown dealt with our concerns on having superior competitive performance be an absolute defence. As you have said, this flows from the philosophy that the bigger would be naturally more efficient. It is a fundamental recommendation that superior competitive performance not be an absolute defence.

I am wondering, Mr. Hogarth or Mr. Allen, if you could speak to how you feel you are more efficient, in what ways you are more efficient, how you manage your firm to be a more efficient competitor to the majors.

Mr. Hogarth: I think it goes without saying that smaller firms have to be more competitive and more efficient to survive. If we do not have a much lower cost in our marketing organization than our major competitors do, then we cannot compete because they have the efficiencies of scale that we do not have. So we need to have the efficiencies of being small, being very light and so on. I am satisfied, given everybody coming out of the starting gate at the same time and with the same objectives, we can compete very favourably with anybody in the field.

[*Translation*]

Monsieur le président, nous avons peut-être abusé de votre temps, mais je suis prêt à développer certaines choses si vous le souhaitez.

Le président: Merci beaucoup. C'est M. Ouellet qui va commencer les questions.

Mr. Ouellet: Thank you, Mr. Chairman.

First of all, I want to thank the representatives of the Petroleum Marketers Association of Canada for meeting us this morning. I believe that this bill is of great interest to your association, which has for many years been lobbying for a strengthening of the anti-trust legislation. The suggestions you have brought us this morning are quite relevent. I do hope that my colleagues, the Tories as well as the New Democrats, have been listening closely to what you said concerning the necessary amendments and also the urgency of passing this bill as soon as possible.

I want to congratulate you for coming out in force, and in particular, and especially for retaining the services of a very respected lawyer, a lawyer whose knowledge of anti-trust laws is well established. I am quite sure that the specific amendments he suggested will be very useful to us in our work.

You have raised a concern of mine, and I do want to discuss it because it is quite fundamental. From the bill itself, and from the Minister's comments, we get the feeling that the bigger a company, the more efficient it can be. Do you think this is true in your field of endeavour? What is the importance of this performance factor that we have in the bill in your field of economic endeavour?

M. Conrad: Merci, monsieur Ouellet, pour ces encouragements. A propos de l'efficience, M.McKeown vous a dit que nous n'aimions pas l'idée de faire de l'efficience économique supérieure une défense absolue. Comme vous l'avez dit, cela viendrait du principe qui veut que plus une compagnie est grosse, plus elle est efficiente. Une de nos recommandations fondamentales veut que l'efficience économique supérieure ne constitue pas une défense absolue.

Peut-être que M. Hogarth ou M. Allen pourront vous expliquer dans quelle mesure ils jugent que leurs compagnies sont efficicentes, pour quelles raisons, et comment ils font pour rester un concurrent efficient des grosses compagnies.

M. Hogarth: Il va sans dire que les petites firmes doivent être plus concurrentielles et plus efficientes pour survivre. Si nos coûts ne sont pas bien inférieurs à ceux de nos principaux concurrents, nous ne sommes pas à la hauteur car nous n'avons pas l'avantage de la taille qu'ils ont. Nous devons donc jouer sur l'avantage de notre petite taille, sur notre légèreté, etc. A condition que tout le monde soit à la barrière en même temps, et que les objectifs soient les mêmes, je suis convaincu que nous pouvons nous mesurer à n'importe qui dans notre secteur.

[*Texte*]

• 1005

Mr. Ouellet: I would like to ask you a specific question about proposed section 50 of the bill. You have, in a document released in December, indicated to us your reading of poposed section 50 was giving way to a narrow legal definition, and this clause would not help you. For instance, if I read paragraph 50.(*a*), page 39 of the bill, it says:

> squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

You were saying usually the situations which concern the members of your association, the independents, is that they are already in the market and they are squeezed. It is not a question of allowing you to come into the market, but a question of squeezing you out of the market. How would you change the wording of this clause? I was thinking by having "or expansion" in was all right, but you feel these words are not enough. Would you like to see something different there?

Mr. Conrad: Yes, Mr. Ouellet. The first three lines are fine because it raises the dual distribution problem, which is fundamental. Mr. Hogarth described the situation in which our supplier is also our competitor in the marketplace. What happens is the clause goes on to flow too narrow, as we have said, because of the situation Mr. Allen talked about in Exeter. He is there and he has got his major supplier competing with prices at retail, at or below what they are prepared to sell to him at wholesale.

It is not a question of "entry into", and he is not trying to build more stations in Exeter, so our very genuine concern is... The director has to look at the law as it is written, *comme vous le savez*. He cannot wish to help us if the law does not, in fact... He has to have reason to believe under the act, so we do indeed have some suggestions here. I will let Mr. McKeown speak to that.

Mr. McKeown: I think perhaps, Mr. Ouellet, our primary concern relates more to the word "purpose", which imports intent. As you are well aware, it is extremely difficult to prove in law what the purpose was, because most actions taken by companies can be justified in several different ways. To show that what might be called the real purpose or the real intent of the action was to impede or prevent the customer's entry or expansion is very difficult.

Whether it is possible to do anything other than to change "purpose" to say "effect", which I think would be a considerable advancement... As I stated earlier, certain actions have a natural consequence, the effect of which can be ascertained by an independent party without looking into the mind of the person engaging in those actions. I think it would be a good advancement to substitute "effect" for "purpose".

[*Traduction*]

M. Ouellet: J'ai une question à vous poser à propos de l'article 50 du bill. En décembre dernier, vous nous avez soumis un document dans lequel vous nous disiez que l'article 50 donnait lieu à une définition légale bien trop restreinte, et ne vous serait pas utile. Par exemple, si je lis l'alinéa 50.a), à la page 39 du bill:

> la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

Vous nous disiez que le problème pour les membres de votre association, c'est qu'ils sont déjà installés sur le marché mais qu'on cherche à les en évincer. Autrement dit, il n'est pas question de vous permettre de pénétrer le marché, mais le problème, c'est que vous vous faites éjecter. Comment est-ce que vous modifieriez le libellé de cet article? Je pensais qu'en ajoutant «empêcher de prendre de l'expansion» cela suffirait, mais apparemment, vous trouvez que ce n'est pas assez. Vous aimeriez autre chose?

M. Conrad: Oui, monsieur Ouellet. Les trois premières lignes vont très bien, car elles posent le problème de la double distribution, un problème fondamental. M. Hogarth vous a décrit la situation où notre fournisseur est également notre concurrent sur le marché. Le problème, c'est qu'ensuite, l'article devient trop restrictif, comme nous l'avons dit à cause de la situation que M. Allen vous a décrite, en prenant l'exemple d'*Exeter*. Il est sur place, et ses principaux fournisseurs le concurrencent au détail; ils vendent sur le marché de détail à un prix inférieur à celui qu'ils sont prêts à lui accorder, à lui, en gros.

Ce n'est donc pas une question d'«entrée» et ils n'essaient pas de construire de nouvelles stations à *Exeter*, par conséquent nous sommes vraiment inquiets... le directeur doit tenir compte de la loi telle qu'elle existe, *as you know*. Il ne peut pas espérer nous aider si la loi ne fait rien pour nous. Selon la loi, il doit être convaincu, et par conséquent, effectivement, nous avons des suggestions. Je vais demander à M. McKeown de vous en parler.

M. McKeown: Monsieur Ouellet, c'est plutôt le «but» qui traduit l'intention qui nous inquiète. Comme vous le savez, il est très difficile de prouver en droit quel a été le but d'une action, parce que les actions des compagnies peuvent souvent se justifier de plusieurs façons différentes. En effet, il est très difficile d'établir que le véritable but ou la véritable intention d'un acte a été d'empêcher le client d'entrer sur un marché ou de prendre de l'expansion.

A mon sens, il serait infiniment préférable de remplacer le terme «but» par le terme «effets» et je ne sais pas s'il y a d'autres possibilités... comme je l'ai dit plus tôt, certaines actions ont des conséquences naturelles, dont les effets peuvent être établis par une tierce partie sans aller lire dans le cerveau des responsables de l'action en question. Ce serait déjà un grand progrès de remplacer «but» par «effets».

[*Text*]

• 1010

Mr. Ouellet: In other words, what you were telling us earlier about proposed paragraph 50.(*b*) is the same thing for paragraph 50.(*a*) or, for that matter, for paragraph 50.(*c*). Everywhere the word "purpose" is mentioned here, it should be replaced by "effect".

Mr. McKeown: That is correct, except if you are going to try to get dissolution. Then I think a director should have to show intent, because that is a very serious remedy. When we are talking about just stopping a practice, it does not have the same serious effects on a company.

Mr. Ouellet: Thank you. From your earlier memo, which was published in December, you had some comments about proposed paragraph 50.(*d*), where it said:

> use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

You were under the impression that in fact they are not temporary activities. It is more or less of a general nature. Unless I missed this, I do not think you referred to this in your presentation earlier. Do you have any amendment to suggest to this paragraph, too?

Mr. McKeown: Yes. As I say, because of the time limits, I was unable to cover each of the anti-competetive acts, but as was stated earlier by Mr. Conrad, many of the majors have these fighting brand stations permanently in effect, such as beaver and gain.

We feel that on a temporary base, it should be eliminated from the section. I have some problem with the word "introduced" because we might end up in the same position as we are now in with the consignment section, where it is argued that the consignment practices have been in effect prior to the passage of the consignment section in 1976. Therefore, it cannot be held to be introduced for that purpose, because they are already there prior to passage of the legislation.

I have the same problem here, but if one leaves the word "introduced", we may find that the effectiveness of this paragraph is in effect gutted for the same reason.

As you are also aware, the consignment section has not been tested, but I think one of the reasons is that most people feel that it just will not pass that barrier.

Mr. Ouellet: Just one more question, Mr. Chairman. I would like to have our witness briefly comment on the proposal of establishing a tribunal. Are you generally favourable to this approach? Secondly, maybe Mr. McKeown could comment on the judge and other people—laymen, if you could use the expression—on the tribunal.

Finally, the question of whether or not an association like yours, or a member of your association, should have the possibility to directly intervene to the tribunal. As you know, it is only through the director that you could go to the tribunal. Would your association like to be able to have a third party go to the tribunal?

[*Translation*]

M. Ouellet: Autrement dit, ce que vous nous avez dit tout à l'heure au sujet de l'alinéa 50.b) vaut également pour l'alinéa 50.a) et aussi, d'ailleurs, pour l'alinéa 50.c). Chaque fois qu'il est question de «but», il faudrait remplacer le terme par «effets».

M. McKeown: Exactement, sauf si l'on essaie d'obtenir la dissolution. Dans ce cas, il faudrait qu'un directeur soit tenu de prouver l'intention, car c'est une sanction beaucoup plus grave. Quand il s'agit seulement de mettre fin à une pratique, ça n'a pas les mêmes répercussions sur la compagnie.

M. Ouellet: Merci. Dans votre mémoire publié en décembre, vous parliez du projet d'alinéa 50.d), et je cite:

> l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

Vous aviez l'impression qu'il ne s'agissait pas vraiment d'activités temporaires. C'est plus ou moins généralisé. Je me trompe peut-être, mais je crois que vous n'êtes pas revenu sur cette question aujourd'hui. Est-ce que vous avez des amendements pour cet alinéa également?

M. McKeown: Oui. Comme je l'ai dit, faute de temps, je n'ai pas pu parler de tous les agissements anti-concurrentiels, mais comme M. Conrad l'a dit tout à l'heure, il y a beaucoup de grosses compagnies qui commercialisent des marques de combat en permanence, par exemple Beaver et Gain.

Nous pensons que la mention «temporaire» devrait être supprimée. Le terme «*introduced*» dans la version anglaise m'inquiète, car nous risquons de nous retrouver dans la même position qu'avec l'article sur les ventes par voie de consignation, qui fait une distinction pour les pratiques de consignation qui étaient en vigueur avant l'adoption de l'article sur les ventes par voie de consignation en 1976. Par conséquent, on ne peut considérer que cela a été introduit dans ce but, puisque cela existait déjà avant l'adoption de la loi.

Dans ce cas, c'est le même problème, mais si on conserve le terme «*introduced*», cela pourrait neutraliser cette disposition.

Comme vous le savez également, l'article relatif aux ventes par voie de consignation n'a pas encore été mis à l'épreuve, entre autres parce que beaucoup de gens pensent qu'il ne surmontera pas cet obstacle.

M. Ouellet: Monsieur le président, une dernière question. J'aimerais que notre témoin nous parle de la proposition de création d'un tribunal. Est-ce que d'une façon générale vous êtes d'accord avec cette démarche? Deuxièmement, j'aimerais que M. McKeown nous parle du juge et des profanes—pardonnez-moi l'expression—qui constitueront le tribunal.

Enfin, dites-moi si, à votre avis, une association comme la vôtre, ou un membre de votre association, devrait avoir la possibilité d'intervenir directement devant le tribunal. Comme vous le savez, normalement, vous devez passer par le directeur. Est-ce que votre association aimerait qu'une tierce partie puisse aller au tribunal?

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Mr. McKeown: Mr. Ouellet, on the question of the tribunal, that was not a suggestion of this association. We were not consulted on that matter. On previous submissions we have made, we preferred the courts.

But that being said, we do not think it is a substantial question, because if the law is weak, nothing will get before either the courts or the tribunal. The strategic question is this: Are we going to have a strong law that will go either before a tribunal or the courts?

Now, given that the tribunal is in this legislation, then we are satisfied to live with it. We do not see any real problems, as long as the law is strong. Right now, it will have nothing to do. It is an academic question.

Nothing will get there because the director *ne peut pas rêver en couleur*. He cannot bring things that he wishes to unless the law allows him to.

I think one of the reasons for lesser concern about the tribunal is that this is a sort of mixed animal, you might say, in a sense that it is trying to combine some of the best features of the courts, which people were looking for, and some of the best features of the tribunal.

Some people might say what it has achieved is the opposite, but I think we are quite prepared to think it should work out all right. We are not strongly either in favour or opposed, let us put it that way.

Now, you mentioned the mixture of judges and lay people. Again, it is trying to combine the fairness that is associated with the judiciary with the expertise, I guess, that lay people could bring to such a tribunal. I do not think we have any strong feelings, one way or the other on that.

On the question of intervention, I might say two things: one, yes, we think parties who are injured by these practices, or any of the other civil practices, who can show direct injury, should have access to the tribunal. We feel this would also alleviate the need for the government to devote more resources to the enforcement of this act, if more of the act was self-enforcing by private individuals.

But I think we feel more strongly on another point, which is related to it. We feel there should be some provision here for what might be called the pre-trial procedure, similar to what is used in the province of Ontario.

I am not sure if Quebec has a similar procedure. Both parties can bring a summary of their position, with respect to facts and law, before a judge. The judge indicates to the parties how, if he or she were hearing the case, the case would be decided.

It is not binding on the parties and the judge who hears this pre-trial proceeding is not allowed to sit at the trial itself. We think it would be very helpful to the enforcement of this legislation if the matters could be dealt with at an early stage. As Mr. Hogarth has said, when an independent is bleeding, it

[*Traduction*]

M. McKeown: Monsieur Ouellet, en ce qui concerne le tribunal, la suggestion ne vient pas de notre association. Nous n'avons pas été consultés à ce sujet. Dans nos interventions antérieures, nous avons indiqué notre préférence pour les instances judiciaires de droit commun.

Cela dit, nous ne pensons pas qu'il s'agit là d'une question de fond, car si la loi comporte des lacunes, rien ne sera porté devant un tribunal judiciaire ou devant le Tribunal de la concurrence. La question qu'il faut se poser est la suivante: Allons-nous adopter une loi impérative qui se tiendra tant devant le tribunal que devant les instances normales?

Étant donné que le tribunal est prévu dans cette loi, nous nous en contentons. Cela ne nous pose aucune difficulté, tant que la loi demeure impérative. Pour l'instant, le tribunal n'aura rien à faire. Son utilité demeure purement théorique.

Il ne sera saisi d'aucune cause parce que le directeur ne peut pas rêver en couleur. Il ne peut pas saisir le tribunal de n'importe quelle cause, à moins que la loi ne l'y autorise.

Je crois qu'une des raisons pour lesquelles il ne faut pas trop s'inquiéter du tribunal est qu'il s'agit en quelque sorte d'une bête hybride, qui retient les meilleurs éléments d'un tribunal judiciare, avec les meilleurs éléments d'un tribunal administratif.

D'aucuns soutiendront que c'est tout à fait le contraire, mais nous sommes convaincus que tout ira pour le mieux. Disons simplement que nous ne sommes ni pour ni contre.

Vous avez aussi mentionné le mélange de juges et de profanes. Encore une fois, il s'agit de combiner l'équité que l'on associe avec le système judiciaire et l'expertise que les autres membres pourrait apporter à ce tribunal. Nous n'avons pas d'opinion arrêtée sur la question.

Pour ce qui est de l'intervention, je dois dire deux choses: premièrement, j'estime effectivement que les personnes qui s'estiment lésées par ces agissements ou par tout autre pratique civile et qui peuvent prouver qu'elles en ont subi un préjudice direct, devraient avoir accès au tribunal. À notre avis, si la loi prévoyait un plus grand nombre de mesures de police par les particuliers, cela éviterait au gouvernement d'avoir à consacrer davantage de ressources à cette fin.

Cependant, nous avons des idées plus arrêtées au sujet d'un autre élément connexe. Nous estimons qu'il faudrait prévoir dans la loi une procédure d'instruction préliminaire, un peu comme ce qui se passe en Ontario.

Je ne suis pas certain si le Québec a établi un système semblable. Ainsi, les deux parties peuvent présenter à un juge le résumé de leur position respective sur les points de fait et de droit. Le juge sera alors en mesure de leur indiquer comment il rendrait sa décision s'il devait être saisi de l'affaire.

Cette procédure ne lie aucunement les partis et le juge chargé de l'instruction préliminaire n'est pas autorisé à présider le procès lui-même. Nous pensons que ce serait très utile pour l'application de la loi de faciliter ainsi le règlement des litiges à une étape préliminaire. Comme M. Hogarth l'a

[*Text*]

is not going to be of much assistance to the independent if the application comes before the tribunal two years later.

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So we would certainly favour a pre-trial procedure, and we would perhaps give that more priority than the intervention. But we certainly are very much in favour of intervention. I think what we are trying to do is give some sort of list of priorities, I guess, and we know that at this late stage there is only so much that can be changed in the legislation.

Le président: Monsieur Howie, s'il vous plaît.

M. Howie: Merci, monsieur le président.

Thank you very much, gentlemen, for coming this morning. You have touched on some very important matters and your comments have been very helpful. I would like to ask for your help in expanding on a few things that you have identified.

In your business you are very much on the front line, and you have indicated that you have had extensive personal experience, particularly with the abuse of dominant position that we have set out in the bill. I have found that your remarks showed an experience and were of very great help to me.

I would like to ask you if you feel the decriminalization is going to improve significantly the abuse of dominance provision over the existing criminal monopoly provision that we have in the bill. We were under the impression that it is going to be a tremendous help. What is your view on it?

Mr. Conrad: There is no question, yes.

Mr. McKeown: There is no doubt that both monopoly and merger, being economic questions, do not belong in the criminal courts. However, while we feel that the mergers sections is pretty good as it stands, we have great reservations about whether or not the abuse section is going to be enforceable. I think part of the problem has been this concern about the remedy of dissolution, and we would like to see that put in one category and then the question of getting orders or just amending practices be dealt with in another category so that the switch from criminal to civil would achieve the purpose you stated.

Mr. Howie: Going back to your comments on proposed section 51, which seems to me to be the key section, I took the inference that the bill appears to apply to the joint dominance situations largely because it is relatively unlikely that a market would be dominated by a single firm, so we are into the joint dominance situation. I wonder if you would be good enough to share with me your comments on how to improve the definition and identification of joint dominance situations.

Mr. McKeown: My view would be that instead of relying on the words "one or more persons", which comes from the present criminal section . . .

[*Translation*]

dit, lorsqu'une société indépendante a été lésée, il ne lui sert à rien d'attendre deux ans avant que son affaire passe en justice.

C'est pour cela que nous sommes en faveur d'une audition préalable au procès et à notre avis, c'est peut-être même plus important que l'intervention même. Cela ne veut pas dire pour autant que nous ne sommes pas en faveur de l'intervention. Je pense que nous sommes plutôt en train d'essayer d'établir une liste de priorités et nous savons fort bien qu'à cette étape tardive, peu de changements pourront être apportés au projet de loi.

The Chairman: Mr. Howie, please.

Mr. Howie: Thank you, Mr. Chairman.

Messieurs, je vous remercie d'être venus ce matin. Vous avez soulevé des points assez importants et vos remarques nous seront très utiles. J'aimerais bien que vous développiez quelque peu votre pensée concernant certains points que vous avez mentionnés.

Vous êtes tout à fait à l'avant-garde dans votre domaine d'affaires et vous nous avez laissé entendre que votre expérience est assez exhaustive, particulièrement en ce qui concerne l'abus de position dominante, dont il est question dans le projet de loi. Vos commentaires témoignaient de votre expérience et m'ont été très utiles.

Croyez-vous que la décriminalisation risque de renforcer considérablement la disposition relative à l'abus de position dominante, comparativement à la disposition actuelle du projet de loi concernant le monopole criminel? Nous étions d'avis que ce serait très avantageux. Qu'en pensez-vous?

M. Conrad: Sans aucun doute; je suis entièrement d'accord avec vous.

M. McKeown: Il est évident que les questions de monopole et de fusion, étant des questions d'ordre économique, non rien à faire dans les tribunaux criminels. Toutefois, si nous estimons que l'article sur les fusions est acceptable tel quel, nous ne sommes pas du tout convaincus que l'article sur l'abus pourra être applicable. Je crois qu'une partie du problème tient au remède proposé, à savoir la dissolution. Nous voudrions que ce remède soit inclus dans une catégorie, et que les ordonnances et les modifications de pratique fassent l'objet d'une autre catégorie, de sorte que le changement des poursuites du criminel au civil se fassent comme vous l'aviez prévu.

M. Howie: Revenons à vos remarques au sujet de l'article 51 proposé, qui me semble être le principal article de ce projet de loi. Lorsque vous avez dit que le projet de loi semblait s'appliquer aux situations de dominance conjointe, j'ai compris que cela tenait essentiellement au fait qu'il est assez peu probable qu'un marché soit dominé par une seule entreprise. Pourriez-vous partager avec nous vos idées sur la façon d'améliorer la définition et l'identification des situations de dominance conjointe.

M. McKeown: À mon avis, au lieu d'utiliser l'expression «une ou plusieurs personnes», qu'on retrouve à l'article..

[*Texte*]

Mr. Howie: That is in paragraph (*a*), right?

Mr. McKeown: In paragraph (*a*), that it be more satisfactory to deal with it as it is dealt with under Part IV.1. A number of civil sections were introduced in 1976, as you may recall, and in those they talk about "major suppliers", for which we would have to use "major firms" and "practices widespread in the market". Again, you just say "anti-competitive acts widespread in the market". We feel this would eliminate the possibility that the tribunal would say that "one or more persons" means one or more persons acting in concert or acting in agreement, and that is our real concern.

As I say, Mr. Justice Pinel's remarks have been taken both ways by lawyers, and I think it is fair to say that it is uncertain. I would not rule out that it might be effective for joint dominance, but I also would not want to guarantee it.

Mr. Howie: Would you share that view too, sir?

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Mr. Conrad: Yes. My worry is that if something like this is going to be subject to a judicial decision and if the judicial decision is that one or more persons does not cover the joint dominance position then we do not have an abuse section any more because it is one of the absolute defences. So that is why we worry so much about one or more persons. It is the uncertainty, and we have to get certainty into it, or a much greater degree of certainty, so we have an enforceable abuse section.

Mr. Howie: What would your personal recommendation for improvement be?

Mr. Conrad: Mr. McKeown articulated . . .

Mr. Howie: Are you both in agreement with that, that you would set out the situation . . .

Mr. Conrad: Yes.

Mr. Howie: —the practice, I think you mentioned, Mr. McKeown, rather then referring to the persons? "Persons" includes corporations.

Mr. McKeown: Yes, you use major firm or you use anti-competitive acts that are widespread in the market so in other words you look and if the three or four firms that control the market are all engaging in identical anti-competitive practices then there would be jurisdiction. The one or more persons is really designed to give jurisdiction to a tribunal; you then decide whether the anti-competitive acts in this situation are truly designed to effect substantially the lessening of competition.

Mr. Howie: Thank you very much.

To move on to paragraph 51.(1)(*b*)—I think, Mr. McKeown, you touched on it in your remarks—I think it is important that we distinguish between anti-competitive acts and aggressive pro-competitive behaviour, and I am not sure that is always easy to do. For example, a better distribution network

[*Traduction*]

M. Howie: Il s'agit du paragraphe *a*), n'est-ce pas?

M. McKeown: C'est cela, au paragraphe *a*). Je pense qu'il serait plus pratique de faire comme à la partie IV.1. Vous vous souviendrez qu'en 1976, un certain nombre d'articles ont été ajoutés sur les poursuites au civil, dans lesquels on parle de «principaux fournisseurs», auxquels il faudrait substituer «principales compagnies», et de «pratiques généralisées dans le marché» auxquelles, il faudrait substituer «agissements anti-concurrentiels généralisés dans le marché». À notre avis, cela éviterait la possibilité que le tribunal décrète que «une ou plusieurs personnes» signifie une ou plusieurs personnes agissant de concert, car c'est ce qui nous inquiète vraiment.

Comme je l'ai déjà dit, les remarques du Juge Pinel ont déjà été interprétées des deux façons par les avocats, et je ne crois pas me tromper en disant que c'est assez incertain. Je ne dis pas que ça pourrait être efficace pour les monopoles conjoints, mais je ne saurais le garantir.

M. Howie: Êtes-vous du même avis, monsieur?

M. Conrad: Oui. Ce qui m'inquiète, c'est que si le tribunal décide qu'une ou plusieurs personnes ne représentent pas une position dominante, l'article sur l'abus de cette position perd toute son utilité. C'est pourquoi nous insistons tellement sur «une ou plusieurs personnes». La situation est ambigüe, et il faudrait un degré de certitude beaucoup plus grand pour que l'article sur l'abus soit applicable.

M. Howie: Que recommanderiez-vous pour améliorer cet article?

M. Conrad: M. McKeown a expliqué . . .

M. Howie: Êtes-vous tous les deux d'accord qu'il faudrait préciser la situation . . .

M Conrad: Oui.

M. Howie: . . . ou la pratique, c'est le terme que vous avez employé, je pense, monsieur McKeown, plutôt que de faire allusion aux personnes? Les «personnes» comprennent les entreprises.

M. McKeown: Par exemple, si trois ou quatre entreprises ou une seule grande entreprise qui contrôle le marché se livre largement à des pratiques anticoncurrentielles, le tribunal peut alors intervenir. La notion d'une ou plusieurs personnes est destinée à ouvrir le champ de compétence du tribunal qui doit décider si les agissements anticoncurrentiels ont vraiment pour but de diminuer sensiblement la concurrence.

M. Howie: Merci beaucoup.

À propos de l'alinéa 51.1*b*) auquel vous avez fait allusion dans vos remarques, monsieur McKeown, je pense qu'il est important que nous fassions la distinction, même si ce n'est pas toujours facile, entre les agissements anticoncurrentiels et la concurrence vigoureuse. Par exemple, l'établissement d'un

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may allow a firm to out-distance its rivals in the marketplace, but would you consider this to be anti-competitive or an anti-competitive act, or a reasonable pro-competitive behaviour? I would like to have your assistance with this line of demarcation in identifying it. I think this is extremely important.

Mr. McKeown: I quite agree with you. It is certainly one of the most important things in the abuse section because we do not want to eliminate pro-competitive acts. I think that, when we were discussing with Mr. Ouellet, one of the problems of trying to change the word "expands" is that it could lead to pro-competitive acts being caught by this section.

But I do not feel that the acts that are set out there now are used in pro-competitive situations. It is very difficult to imagine a case of somebody buying up scarce facilities or resources, for example, required by a competitor.

We have had the recent example in Montreal of the acquisition of a refinery to preclude independents from getting that refinery and having access.

So it is hard for me to see that buying a plant to prevent your competitor from getting it and using it is pro-competitive. I think the tribunal, if it is composed of the type of persons contemplated, are going to be able to tell the difference between pro-competitive acts and anti-competitive acts, and I think the ones listed here give the tribunal a pretty good indication of what is truly anti-competitive.

I know that you are going to hear from many people that some of these acts can be pro-competitive, but it is very difficult for me to see where they would be.

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Mr. Howie: Given the situation set in proposed subsection 51.(1) and your comments on it earlier, you feel the real test is going to be in the judgment call by the tribunal, that is the real strength of the bill, and you are fairly satisfied with these situations in proposed subsection 51.(1), subject to his comments.

Mr. McKeown: Yes. You are talking about proposed section 51?

Mr. Howie: Subsection 51.(1).

Mr. McKeown: I think I recommended the deletion of paragraph 51.(1)(*b*).

Mr. Howie: Yes, you commented on that earlier.

Mr. McKeown: I think I have also recommended the deletion of purpose and the substitution of the effect in proposed section 50.

Mr. Howie: Yes, you cut those two.

Mr. McKeown: Yes, I feel it is certainly not going to be easy to enforce it, but I think it would be the type of bill which would meet the needs of the Canadian economy. As the members well know, everybody is very concerned about some of the concentrations of power and we want to be able to at leastget at some abuses under this bill. I do not think it would be very enforceable, if at all, as it now stands.

[*Translation*]

meilleur réseau de distribution peut permettre à une entreprise de distancer ses rivaux sur le marché; faut-il alors parler d'agissements anticoncurrentiels ou de bonnes pratiques de concurrence? J'aimerais que vous nous aidiez à établir la ligne de démarcation. Je pense que c'est extrêmement important.

M. McKeown: Je suis tout à fait d'accord avec vous. C'est l'une des notions certes les plus importantes de cet article, car nous ne voulons pas éliminer les activités de bonne concurrence. Quand nous discutions avec M. Ouellet de changer l'expression «participation accrue», l'un de nos problèmes était d'éviter que les activités de bonne concurrence tombent sous le coup de l'application de cet article.

Mais je ne crois pas que les agissements dont il est question puissent servir à la concurrence. Il est très difficile d'imaginer que quelqu'un achète des services ou des ressources rares dont aurait besoin, par exemple, un concurrent.

Nous avons eu l'exemple, récemment, de l'achat d'une raffinerie à Montréal pour empêcher les indépendants de s'en emparer.

J'ai donc du mal à comprendre comment on peut parler de concurrence quand quelqu'un achète une usine pour empêcher un concurrent d'en faire l'acquisition et de l'utiliser. S'il est composé du type de personnes déjà envisagé, le tribunal pourra faire la distinction entre les agissements pro-concurrentiels et anti-concurrentiels, et la liste établie ici donne un assez bon aperçu de ce qui est vraiment anti-concurrentiel.

Je sais que bien d'autres témoins vous diront que ces agissements peuvent être favorables à la concurrence, mais moi, j'ai énormément de difficulté à voir comment.

M. Howie: D'après ce que vous avez dit au sujet du paragraphe 51.(1), le véritable test repose sur la décision du tribunal, ce qui constitue la force du projet de loi, et vous êtes relativement satisfait des dispositions prévues dans ce paragraphe.

M. McKeown: Oui. Vous parlez de l'article 51?

M. Howie: Du paragraphe 51.(1).

M. McKeown: J'ai recommandé, je pense, de supprimer l'alinéa 51.(1)*b*).

M. Howie: Oui, vous en avez parlé tout à l'heure.

M. McKeown: Je pense que j'ai également recommandé de supprimer la mention de finalité et d'effet à l'article 50.

M. Howie: Oui, vous l'avez mentionné.

M. McKeown: Elle ne sera certainement pas facile à appliquer, mais j'estime que cette loi est de nature à répondre aux besoins de l'économie canadienne. Comme les députés le savent, tout le monde s'inquiète de la concentration des pouvoirs, et la loi que nous avons devant nous nous permettra peut-être de nous attaquer à certains abus. Dans sa forme

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Mr. Howie: Are you satisfied with the other abuses which are set out in proposed subsection 51.(1)?

Mr. McKeown: Yes. I am satisfied, if you get rid of the intent part.

Mr. Howie: Certainly you will correct me, but my interpretation of what you mentioned in proposed subsection 51.(4) is that the efficiency defence is too broad. I would like to ask you: Is superior competitive performance, the phrase in the proposed ssction, precise enough? And does it make sense that a law designed to promote competition should encourage economic efficiency? Have you got any precise suggestions on this?

Mr. McKeown: Yes. I think it does make sense that the law should encourage economic efficiency. I think my main concern with proposed subsection 51.(4) is that it is an absolute defence, if you can show efficiency. I do not think a firm which is truly efficient needs to resort to the type of abusive or restrictive practices set out in proposed section 50 in order to be efficient. I just do not see the connection.

Efficiency is much more inter-connected in mergers. I guess my preference would be to totally do away with any efficiency defence and abuse, but I do not think it is realistic to seek that at this stage. I certainly think it is very realistic to at least demand that the tribunal only consider it as a factor and not have it as an absolute defence.

Efficiency is a lawyer's and economist's dream. You can argue efficiency for six months without any problem. I do not see why a tribunal should have to be subject to this if they do not feel it is relevant to the case at hand. I think it is very important.

Although I am not dead against the words "superior competitive performance" go, I think you might use better words such as "superior skill industry and foresight", which was used in the IBM case in the United States. But I do not feel the words are as important as the need to get rid of this absolute defence, because although efficiency is extremely important in considering mergers, I do not see it as having the same all-encompassing importance.

We could argue about what is efficient, I guess everyone would have a different view, but certainly it is a very relevant factor in mergers, less so in monopoloy.

Mr. Howie: Thank you very much. I appreciate your comments. Thank you, Mr. Chairman.

Le président: Monsieur Orlikow.

• 1035

Mr. Orlikow: In your statement, second page, you talk about the need for reform and you say that Canada's laws are weak or nonexistent as compared with those of Japan, the United States, the United Kingdom, and West Germany. We do not have the time today, but I would appreciate it you could

[*Traduction*]

actuelle, la loi est très difficilement applicable, si elle l'est du tout.

M. Howie: Êtes-vous satisfait des autres situations d'abus énoncées dans le paragraphe 51.(1)?

M. McKeown: Oui, cela me satisfait pourvue que la notion d'intention soit retirée.

M. Howie: Vous me corrigerez si je me trompe, mais vous avez semblé dire que la notion d'efficience économique supérieure prévue au paragraphe 51.(4) est trop vaste. D'après vous, l'expression *efficience économique supérieure* que l'on retrouve dans le paragraphe susmentionné est-elle suffisamment précise? Et, est-il logique qu'une loi visant à favoriser la concurrence encourage l'efficience économique? Avez-vous des suggestions précises à cet égard?

M. McKeown: Oui. Je crois sensé que la loi encourage l'efficience économique. Ma principale préoccupation au sujet du paragraphe 51.(4) c'est que l'efficience constitue une défense absolue. Je ne crois pas qu'une entreprise véritablement efficiente ait besoin de recourir aux pratiques abusives ou restrictives du type mentionné à l'article 50. Je ne vois tout simplement pas le rapport.

L'efficience intervient beaucoup plus dans les fusions. Quant à moi, je préférerais que la défense et les abus fondés sur l'efficience soient éliminés complètement, mais je ne crois pas que cela soit réaliste à ce stade-ci. Mais il est sûrement très réaliste d'exiger au moins que le tribunal ne considère l'efficience que comme un facteur de défense et non comme une défense absolue.

L'efficience, c'est le rêve des avocats et des économistes. Vous pouvez en parler pendant six mois sans problème. Je ne vois pas pourquoi un tribunal serait appelé à trancher si cette notion n'est pas pertinente. C'est très important.

Bien que je ne sois pas carrément contre l'expression *efficience économique supérieure*, je préférerais une autre expression qui a été utilisée chez IBM aux États-Unis: *savoir faire, industrie et intelligence supérieure*. Mais je ne crois pas que les mots soient aussi importants que le besoin d'éliminer la notion de défense absolue, car bien que l'efficience soit extrêmement importante dans les fusions, je ne crois pas qu'elle l'emporte sur tout.

Tout le monde a sa façon de percevoir l'efficience; c'est certainement un facteur très important dans les fusions, mais moins dans les monopoles.

M. Howie: Merci beaucoup. Je vous remecie pour vos commentaires. Merci monsieur le président.

The Chairman: Mr. Orlikow.

M. Orlikow: À la deuxième page de votre déclaration, vous parlez du besoin d'une réforme, et vous dites que les lois du Canada sont soit faibles, soit inexistantes, par rapport à celles du Japon, des États-Unis, du Royaume-Unis et de l'Allemagne de l'Ouest. Nous n'avons pas beaucoup de temps pour cela

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supply me and other members of the committee with their relevant laws on this subject.

Two paragraphs down you talk about political consensus and you say all MPs are concerned about increased concentration. I would suggest to you, Mr. Conrad, that you look at the transcript of yesterday's meeting, when we had the Minister there. I pointed out to the Minister that nine families now control 50% of all the major stock traded on the Toronto Stock Exchange. He did not seem concerned about that. When I asked him whether he would be concerned if the number, instead of 50%, were 60%, 75%, or 90%, he did not seem concerned about that either. So I wish you were right, but I suggest to you that the evidence is that you are not correct that all members are concerned.

Because we are limited in time, I am going to ask you a question which ordinarily I would have asked you at the end of my questions first, and then go on to some others. Let me ask you a very simple question. You know that I and my party and the many other people who are conversant with the history of anti-combines legislation have been very dissatisfied with what we have had up until now, as you have been, and many of them are not very happy with this bill. Yet you say this bill is important, you want it passed by the end of June. Will you want it passed by the end of June if the bill is not amended to include the amendments which you suggest are very important?

Mr. Conrad: No, sir.

Mr. Orlikow: So without that, if we oppose this bill and take our time if these amendments are not there, you will not be angry with us.

Mr. Conrad: We much prefer the scenario where we have all-party support and there is an immense amount of goodwill, so we move expeditiously to the amendments we are proposing and still meet the June timetable for third reading and proclamation.

Mr. Orlikow: But if they are not there?

Mr. Conrad: If the bill goes in as it is, the abuse section, in our opinion . . . our representation is that it is unenforceable.

Mr. Orlikow: In your letter to Members of Parliament of February 23 you said:

> Wholesale rack prices for gasoline and home heating oil in the international marketplace, including the U.S., have fallen as fast as crude oil; but not in Canada.

Then again you say:

> The critical question is why isn't international competition working in Canada? Why are wholesale rack prices higher in Canada than in the U.S.A.?

You say the answer is that:

> The major petroleum companies, due to their oligolipolistic market power, and with considerable support by

[*Translation*]

aujourd'hui, mais j'aimerais que vous nous envoyiez, à moi et aux autres membres du Comité, la loi pertinente de ces pays.

Deux paragraphes plus loin, vous dites qu'il y a consensus politique et que tous les députés s'inquiètent de la concentration accrue des intérêts économiques. Monsieur Conrad, je vous suggérerais de jeter un coup d'oeil sur les délibérations de la réunion d'hier à laquelle participaient le ministre. Je lui ai fait remarquer que 50 p. 100 de toutes les actions échangées à la bourse de Toronto étaient contrôlées par neuf familles. Cela n'a pas semblé le préoccuper. Je lui ai demandé si cela le préoccuperait que les neuf familles aient le contrôle de 60, 75, ou 90 p. 100 des actions échangées à la bourse, et cette perspective ne semblait pas l'inquiéter. J'aimerais bien que vous ayez raison, mais d'après les témoignages que nous avons entendus hier, il n'est pas vrai que tous les députés sont préoccupés.

Vu que nous n'avons pas beaucoup de temps, je vais vous poser une question que je ne poserais pas ordinairement à ce stade-ci. C'est une question très simple. Vous savez que mon parti et moi-même et bien d'autres qui connaissons bien les lois concernant les coalitions, sommes très mécontents, comme vous d'ailleurs, des lois que nous avons eues jusqu'à présent, et même du projet de loi que nous avons devant nous. Vous dites cependant que ce projet de loi est important et que vous voudriez qu'il soit adopté d'ici à la fin juin. Voudriez-vous qu'il soit adopté avant la fin juin s'il ne renferme pas les amendements que vous estimez très importants?

M. Conrad: Non monsieur.

M. Orlikow: Donc, si nous nous opposons au projet de loi, si nous faisons de l'obstruction parce que les amendements n'y sont pas intégrés, vous ne serez pas fâchés contre nous.

M. Conrad: Nous préférerions certainement que tous les partis appuient le projet de loi et montrent de la bonne volonté pour que les amendements que nous proposons soient étudiés et acceptés pour permettre l'adoption en troisième lecture et la proclamation de la loi avant la fin juin.

M. Orlikow: Mais si les amendements ne sont pas acceptés?

M. Conrad: Dans sa forme actuelle, avec l'article concernant l'abus, nous estimons que la loi est inapplicable.

M. Orlikow: Dans votre lettre du 23 février, adressée aux députés fédéraux, vous dites:

> Les prix en gros de l'essence et de l'huile de chauffage ont baissé aussi rapidement que les prix du pétrole brut sur les marchés internationaux, notamment aux États-Unis, mais pas au Canada.

Ensuite, vous dites:

> La question est la suivante: pourquoi la concurrence internationale ne fonctionne-t-elle pas au Canada? Pourquoi les prix en gros sont-ils plus élevés au Canada qu'aux États-Unis?

Et vous donnez la réponse:

> Grâce à leur pouvoir économique et politique, et grâce à l'appui considérable du Ministre Pat Carney, les principales

[*Texte*]

Minister Pat Carney, are able to delay decreases in wholesale prices.

It is now two months later. Can you bring us up to date on where prices stand between Canada and international markets, particularly in gasoline, diesel fuel, heating oil, and perhaps jet fuel—kerosene? In other words, have things improved for the consumer since February when you made those observations?

Mr. Hogarth: Perhaps, Mr. Orlikow, I can help you there. As a large buyer of petroleum products in Ontario, we have been tracking very carefully the prices in the U.S., and it is just in the last two or three days that the prices in the U.S., in New York state, Pennsylvania, laid into Ontario have become comparable with the Canadian rack prices now.

• 1040

Mr. Orlikow: I am not sure I understand.

Mr. Hogarth: In other words, it is just now that the Canadian refiners have dropped their wholesale prices to levels that are close to being competitive with the New York prices.

Mr. Orlikow: So if I go . . .

Mr. Hogarth: This is at wholesale.

Mr. Orlikow: At wholesale.

Mr. Conrad: The independent's buying price.

Mr. Orlikow: You mean the price at which you buy from . . .

Mr. Hogarth: From refiners.

Mr. Orlikow: So if I go to fill my tank in Winnipeg on Friday, taking into account the adjustment for the difference in federal and provincial taxes in Canada as compared to federal and state taxes in the United States, I should be getting my gas at the same price as . . . Would I get my gas at the same price as I would if I were filling it up down across the line, 80 miles from Winnipeg?

Mr. Hogarth: I am not sure about Winnipeg at this time, but certainly in Ontario . . .

Mr. Orlikow: Well, let us take Toronto and Buffalo.

Mr. Hogarth: In Buffalo the prices currently are around 75¢ to 78¢ per gallon. If you take out the tax differential in Ontario, then the current pump prices in Ontario that are between 35¢ and 37¢ per litre would likely be slightly less than Buffalo.

Mr. Orlikow: Why did it take so long for that to take place?

Mr. Hogarth: Well, the problem is in comparing. In Buffalo, that 75 to 78 is U.S. cents per U.S. gallon. If we translate that into Canadian dollars per litre and take approximately the differential of 12¢ per litre in taxes that are paid in Ontario that are not paid in New York State, then the price is comparable.

[*Traduction*]

pétrolières peuvent attendre avant de rabaisser les prix en gros.

Cela fait deux mois que vous avez écrit cette lettre. Pouvez-vous nous dire comment se comparent aujourd'hui les prix du Canada et ceux du marché international, particulièrement en ce qui concerne l'essence, le diesel, le mazout, peut-être même le carburant pour les jets, le kérosène? En d'autres termes, la situation s'est-elle améliorée pour le consommateur depuis février?

M. Hogarth: Je peux peut-être répondre à cette question, monsieur Orlikow. En tant que gros acheteur de produits pétroliers en Ontario, nous avons suivi de très près le cours des prix aux États-Unis, et cela fait seulement deux ou trois jours que les prix aux États-Unis, dans l'état de New York, en Pennsylvanie, sont comparables aux prix canadiens.

M. Orlikow: Je ne saisis pas très bien.

M. Hogarth: Autrement dit, les raffineries canadiennes viennent tout juste de rabaisser le prix de leurs produits en gros à un niveau à peu près concurrentiel par rapport aux prix de New York.

M. Orlikow: Cela veut dire que si je . . .

M. Hogarth: C'est le prix de gros.

M. Orlikow: Ah, le prix de gros.

M. Conrad: Les prix que paient les indépendants.

M. Orlikow: Vous voulez dire le prix que vous payez . . .

M. Hogarth: Le prix que demandent les raffineries.

M. Orlikow: Cela veut dire que si je vais faire le plein à Winnipeg, vendredi, compte tenu des rajustements pour la différence des taxes fédérales et provinciales au Canada par rapport aux taxes fédérales et d'États aux États-Unis, je devrai payer le même prix que . . . Est-ce que je paierai le même prix que si je fais le plein de l'autre côté de la frontière, à 80 milles de Winnipeg?

M. Hogarth: Je ne saurais vous dire pour Winnipeg, mais en Ontario . . .

M. Orlikow: Eh bien, prenons l'exemple de Toronto et de Buffalo.

M. Hogarth: À Buffalo, les prix se situent entre 75 et 78c. le gallon. Si l'on ne tient pas compte de la différence de taxes en Ontario, le prix à la pompe se situe actuellement entre 35 et 37c. le litre, ce qui est un peu moins cher qu'à Buffalo.

M. Orlikow: Pourquoi a-t-il fallu attendre si longtemps pour que cela se produise?

M. Hogarth: Le problème réside dans les comparaisons. À Buffalo, le prix de l'essence est de 75 à 78c. US par gallon américain. Traduits en dollars canadiens par litre, si l'on tient compte des 12c. de taxes par litre payés en Ontario et pas dans l'État de New York, les prix se comparent.

[*Text*]

Mr. Orlikow: But this has only happened in the last couple of days.

Mr. Hogarth: I would say that within the last week or two that is the case.

Mr. Orlikow: But the price in the United States went down quite a bit earlier, did it not?

Mr. Hogarth: Yes. The refiners in the United States work on a last-in, first-out basis for their refining operation on inventory. The refiners in Canada continue to work on a last in, last out basis. So they say they bought the product 80 or 90 days ago in Edmonton and therefore the product price does not come down until that passes through the system.

Mr. Orlikow: Apparently today the Shell annual report came out and they admitted that gas prices have been 5¢ a litre too high. Who skimmed that profit?

Mr. Hogarth: I am not sure. It has been a moving target since January 1. So it was 5¢ a litre too high when?

Mr. Orlikow: I am not sure about that.

Mr. Hogarth: I am not sure either. Certainly the prices on January 1 were about 51¢ in Ontario, and currently the average Ontario price would be in the high 30s.

Mr. Orlikow: As late as last week, when I was home in Winnipeg, the newspapers were reporting that—I am speaking from memory, so I may be wrong about Petro-Canada—but certainly Esso was selling gasoline to customers south of the border, in the United States, cheaper than they were selling it to Canadian customers. Can you explain why they would do that, and how that can do anything but hurt the Canadian consumer?

Mr. Hogarth: I think Esso would have to speak to that question. Certainly there has been some considerable amount of volume in the last two or three months that has not been purchased from Canadian refiners because they were not competitive with the market available in the U.S.

Mr. Orlikow: So you mean Canadian . . .

Mr. Hogarth: The Canadian rack prices, as defined by Imperial Oil in their statement to the petroleum inquiry last October, did not stay competitive with imports.

Mr. Orlikow: So it was cheaper to buy from the United States.

Mr. Hogarth: It was cheaper to buy from the United States. It is only in the last few days that those prices have come to a level where they are approaching the U.S. prices.

• 1045

Mr. Orlikow: That does not make much sense to me. Surely there must be some cost to the companies that are shipping to the United States and shipping further than to the potential Canadian customer, and some cost to the American producer in shipping it into Canada rather than selling it to their customers in the United States. It seems to me it did not make

[*Translation*]

M. Orlikow: Mais cela fait seulement quelques jours que les prix se comparent.

M. Hogarth: Je dirais que c'est le cas depuis environ une semaine ou deux.

M. Orlikow: Mais les prix aux États-Unis ont baissé beaucoup plus vite, n'est-ce pas?

M. Hogarth: Oui. Les raffineries aux États-Unis ne fonctionnent pas de la même façon que celles du Canada en ce qui concerne le prix des stocks en inventaire. Au Canada, le produit acheté il y a 80 ou 90 jours à Edmonton à tel prix doit être écoulé avant que les prix ne puissent changer.

M. Orlikow: Dans son rapport annuel rendu public aujourd'hui, Shell avoue que les prix de l'essence ont été de 5c. le litre trop élevés. Qui a empoché les profits?

M. Hogarth: Je ne sais pas. Les prix changent depuis le 1er janvier. Alors, quand les prix étaient-ils de 5c. trop élevés?

M. Orlikow: Je ne sais pas exactement.

M. Hogarth: Moi non plus. Le 1er janvier, en Ontario, l'essence était environ à 51c. le litre, et aujourd'hui, le prix moyen n'atteint pas tout à fait les 40c.

M. Orlikow: Pas plus tard que la semaine dernière, lorsque j'étais chez moi, à Winnipeg, je lisais dans les journaux que—je risque de me tromper si je parle de Petro-Canada—mais la compagnie Esso, à tout le moins, vendait son essence au sud de la frontière, aux États-Unis, moins cher qu'au Canada. Pourquoi la compagnie ferait-elle cela? Et cette pratique peut-elle avoir un effet autre que celui de léser le consommateur canadien?

M. Hogarth: Je pense qu'il faudrait poser la question à Esso. Je sais qu'au cours des deux ou trois derniers mois, les raffineries canadiennes ont perdu des ventes considérables aux mains des marchés américains, parce qu'elles n'étaient pas concurrentielles.

M. Orlikow: Vous voulez donc dire que les prix canadiens . . .

M. Hogarth: Le prix de vente en gros au Canada, tel que coté par Imperial Oil dans son rapport sur l'industrie pétrolière en octobre dernier, n'était pas concurrentiel sur le marché des importations.

M. Orlikow: Il était donc meilleur marché d'acheter aux États-Unis.

M. Hogarth: C'était meilleur marché aux États-Unis. Cela fait seulement quelques jours que les prix, au Canada, se sont rapprochés des prix américains.

M. Orlikow: Je n'y comprends rien. Cela doit quand même revenir plus cher pour les entreprises canadiennes de transporter l'essence jusqu'aux États-Unis, plutôt que de l'écouler au Canada, et vice versa, ça doit revenir plus cher aux producteurs américains de transporter leur essence jusqu'au Canada plutôt que de la vendre sur place aux États-Unis. Cela me

[*Texte*]

any sense in terms of efficiency. It was the customer on both sides who had to pay something extra for this ridiculous situation.

Mr. Hogarth: The major refiners, working on the premise that their cost of crude is on a last-in, last-out basis, would support the argument that their costs were higher and they had to wait the 80 or 90 days for the pass-through. In the meantime, of course, they were not being competitive with the free market system as was existent last June.

Mr. Orlikow: But obviously there is no free market system. If they insist on selling in Canada at price A and they are able to sell in the United States at price A minus a certain number of cents, then obviously, since I assume they are not losing money when they sell it in the United States, they could have reduced the price in Canada.

Mr. Hogarth: I am not sure at what price they sold it in the U.S., but I would assume they likely had an inventory problem and had to get rid of product.

Mr. Orlikow: What is the nature of the oligopoly we are dealing with here? Why are you convinced they are working in concert against the best interests of your members and the consuming public? Is it the same oligopoly that was described in the Bertrand report with vertical horizontal integration in a large number of anti-competitive practices?

Mr. Conrad: Mr. Orlikow, the existence of an oligopoly is an economic fact. There is a small number of refiners in Canada. What we want, just to reiterate, is a strong abuse system so that these oligopolies do not abuse their dominant position and that the independents can do what they do well, which is pass on their superior cost efficiency to consumers in the form of better service or lower prices. We keep coming back to the solution being a strong abuse of dominant position section that clearly, or with as much certainty as we can, covers the joint dominant situation.

Mr. Orlikow: Your reaction to the bill initially was negative in terms of the complexities to get convictions for anti-competitive behaviour, but now you are expressing some faith that the bill can be improved. Do you think the problem of gasoline marketing and pricing, and the problem of dealing with what is known as conscious parallelism in pricing, is capable of being remedied by a bill such as this, particularly if the government does not agree to the amendments you have suggested?

Mr. McKeown: You have raised a number of different points when you bring in the question of conscious parallelism. I think the proposed amendments in the conspiracy section will assist in attacking conscious parallelism where there is something more. I guess lawyers refer to it as conscious parallelism plus. I do not think the fact there is identical pricing means anything in and of itself. In some industries if you have the same product, such as cement—there is a notable quote where Mr. Wilson said "cement is cement is cement"—you are not going to get people paying different prices for a product that is homogeneous. But I think where there has been some indication of, perhaps agreement is not necessarily the

[*Traduction*]

paraît tout à fait inefficace, et c'est certainement les consommateurs qui font les frais de cette situation ridicule.

M. Hogarth: Les principaux raffineurs qui calculent leur coût de revient du brut en fonction des dernières livraisons vous diraient que leur coût était plus élevé, car ils doivent attendre de 80 à 90 jours pour écouler leur stock. Entre-temps, les règles du marché n'étaient pas d'application, comme c'était le cas en juin dernier.

M. Orlikow: Mais justement, il n'existe pas de marché libre. Si les raffineurs vendent au Canada à un prix A, alors qu'aux États-Unis, ce prix est À moins un certain montant, et vu qu'ils ne vendent pas à perte aux États-Unis, il est évident qu'ils auraient pu réduire leur prix au Canada.

M. Hogarth: Je ne sais pas quel était leur prix de vente aux États-Unis, mais peut-être avaient-ils un problème de stock à écouler.

M. Orlikow: S'il s'agit en fait d'un monopole, qu'est-ce qui vous fait croire qu'ils agissent de concert contre l'intérêt de vos propres membres, ainsi que des consommateurs en général? S'agit-il d'un même monopole décrit dans le rapport Bertrand, monopole qui a procédé à une intégration tant horizontale que verticale, mettant ainsi en pratique toute une série de mesures susceptibles de restreindre la concurrence?

M. Conrad: L'existence de ce monopole au Canada ne fait aucun doute, car le nombre de raffineurs, chez nous, est fort restreint. Il est donc indispensable de prendre des mesures pour empêcher ces monopoles de profiter abusivement de leur situation dominante, afin de laisser aux indépendants le soin d'assurer un service meilleur à des coûts inférieurs, grâce notamment à leur rentabilité supérieure. Il est donc essentiel de faire jouer l'article interdisant de profiter abusivement d'une situation dominante.

M. Orlikow: Au début, vous n'avez pas dit grand bien du projet de loi en raison de la difficulté d'obtenir des condamnations ou des mesures anti-compétitives, alors que maintenant, vous semblez dire que le projet de loi pourrait être amélioré, malgré tout. À votre avis, les problèmes de la commercialisation et des prix de l'essence, ainsi que de la fixation concertée des prix par les fournisseurs, pourraient-ils être résolus par un projet de loi comme celui-ci, même si le gouvernement n'acceptait pas vos amendements?

M. McKeown: Le problème de la fixation concertée des prix pose une série de questions. Les projets d'amendements aux articles relatifs à la coalition devraient permettre de sévir contre la fixation concertée des prix. Mais en soi, le fait que les prix soient identiques ne signifie rien. Ainsi, tout le monde vend le ciment au même prix, car les clients refuseraient de payer des prix différents pour un produit identique. Mais en cas d'entente entre les sociétés, on devrait pouvoir obtenir une inculpation de coalition avec pas plus de difficulté qu'en 1976. C'est ainsi qu'Aramco a été condamnée. Par contre, la décision rendue par la Cour suprême du Canada dans l'affaire du sucre et de la compagnie d'assurances Aetna a tout remis en

[*Text*]

correct word, arrangements between the companies, that in those cases, I think, we will be returning to the law prior to 1976, and the chances of getting a conviction under the conspiracy section will be as good as they were at that time. In the Aramco case, there was a conviction. In the large lamp case, there was a conviction. The Supreme Court of Canada came along in the sugar case and the Aetna insurance case and threw the law into disarray. It is arguable what the Supreme Court said, but I think these sections make it very clear what the law was prior to those two cases and I think it would be a big advance to get that into place.

• 1050

There is no bill that is going to resolve all the problems that oligopolies constitute. The reality is that there are certain industries, even in the United States, which are constantly before the courts, but there is no satisfactory remedy. It is very difficult. There is no way that I am aware of, and I think I can say that the economists are aware of, determining whether the price has been reached by market forces or by agreement. You just cannot look at a price and say it must have been reached by agreement or that it must have been reached by market forces. I mean, there is no such thing as an absolute fair price.

Mr. Orlikow: More than 30 years ago, when I was a member of the Winnipeg City Council, we had the hydro call for bids on electrical equipment and we had identical bids from three companies. I and others lodged a complaint. It went all the way to an inquiry by Mr. Goldenberg. He found that there was, but 35 years later they are still doing the same thing, still getting identical bids. So it is pretty tough to get anywhere and the courts have been, what shall I say— maybe one should not criticize the courts, but I am not a lawyer so I suppose I can do it—the courts have been less than enthused about interpreting our legislation up to now in a way which would make it effective. So I have to ask you . . . I note that many academics would be happy if the bill simply dealt with blatant price fixing and market sharing, without putting in words such as "unduly". If words like unduly are in the bill, is it not going to make convictions under the new bill almost as difficult, almost as impossible to get as it has been with the present bill?

Mr. McKeown: I agree with you that deletion of the word "unduly" would be an advance, but as I say, I do not know if at this late stage it is realistic. I think with the . . .

Mr. Orlikow: What do you mean by "at this late stage"?

Mr. McKeown: Well, we are here after second reading and after, I guess, numerous bills have been introduced over the past few years, none of which since 1971 have put in offences per se. I would not be opposed to having it. You know, businessmen are always talking about the Holy Grail of certainty being an essential in legislation, and certainly it would make the legislation more certain, but that is not the type of certainty they are seeking. I think if the amendments which relate to the conspiracy are put back in, the director's record in prosecutions prior to 1975 was pretty good. I believe convictions were sought in something like 80% of the cases which went to court. I think the law was working quite well up

[*Translation*]

question. Quelles que soient les conséquences de la décision rendue par la Cour suprême, ces articles, quant à eux, sont parfaitement clairs, et leur application constituerait un progrès certain.

D'ailleurs, aucun projet de loi n'est suffisant pour résoudre tous les problèmes posés par l'existence des oligopoles. Ainsi, bien que des poursuites soient intentées sans arrêt contre certaines industries, aux États-Unis notamment, on ne parvient pas à s'en sortir, car la situation est fort complexe. Personne, pas même les économistes, ne peut prouver qu'un prix a été fixé de façon concertée ou, au contraire, établi par les facteurs du marché. En réalité, il n'existe pas un juste prix.

M. Orlikow: Il y a plus de trente ans, lorsque je siégais au conseil municipal de Winnipeg, la compagnie d'électricité avait lancé un appel d'offres pour la fourniture d'équipement électrique, et trois entreprises avaient soumissionné à des prix identiques. Des poursuites ont été intentées et, à l'issue d'une enquête, M. Goldenberg est arrivé à la conclusion qu'il y avait entente, ce qui n'empêche que 35 ans plus tard, les soumissions à prix identique n'ont pas disparu. Il est donc manifestement difficile d'obtenir des résultats, et il semblerait que les tribunaux n'ont pas fait preuve d'un zèle excessif pour interpréter la loi de façon à obtenir des résultats tangibles. Je constate que de nombreux universitaires se contenteraient d'un texte de loi portant uniquement sur des cas avérés de fixation des prix et de partage des marchés, sans aller jusqu'à utiliser l'expression «indûment». Or, l'inclusion de cette expression rendrait l'obtention de condamnations aux termes de la nouvelle loi aussi difficile qu'aux termes de l'ancienne, ne pensez-vous pas?

M. McKeown: Ce serait certainement un progrès si on laissait tomber l'expression «indûment», mais je pense que c'est un peu tard maintenant. J'estime . . .

M. Orlikow: Que voulez-vous dire par là?

M. McKeown: Le bill est déjà passé en deuxième lecture et, de plus, aucun des projets de loi déposés depuis 1971 ne comportait une définition des situations délictueuses. Je ne m'y opposerais certainement pas. Les hommes d'affaires prétendent que dans une loi, tout doit être sûr et certain, et dans le cas qui nous occupe, cela lèverait effectivement certaines ambiguïtés, mais une certitude absolue n'est pas de ce monde. Il ne faut pas oublier en effet qu'avant 1975, le nombre de poursuites était déjà tout à fait satisfaisant, et sur le nombre de poursuites intentées, des condamnations étaient prononcées dans plus de 80 p. 100 des cas. Donc, jusqu'à cette date, la loi fonctionnait fort bien. Ce n'est qu'à la suite de l'affaire du

[*Texte*]

to that time. The problems were generated by the sugar case and the Nova Scotia insurance case which have changed the convictions now to as low as 42%, I believe it was, in the first three or four years of the 1980s.

• 1055

I think we can at least get back to where we were. This identical pricing is a very frustrating thing, and as a politician on city council, I can appreciate it is very disconcerting to get these identical bids. But on some products I think just the sheer market forces are going to force identical bids. And you cannot pass a law saying identical bids are automatically an offence.

Mr. Orlikow: Do you think they come just by floating out of the air? Do you not think either they get together or else?—to take an example, Exxon says: This is our price and if you guys cut this price we will run you out of business.

Mr. McKeown: Well, they have market information. They know what people have bid on previous tenders and they are going to take it into consideration in any new bid. In a lot of these cases, the companies have a pretty good idea of their competitor's costs and it is going to be very difficult to avoid identical pricing in tenders.

I think with the amendments being made, we will at least get at some of the worst situations. I just do not think we can come up with a perfect law. What we need is something which will be effective and the present law is not. We can create a perfect world overnight, though it would be nice to do so.

Mr. Hogarth: May I just say a word to Mr. Orlikow? Amendments to the conspiracy section are not our bottom line, because it is a criminal section. You have to prove beyond a reasonable doubt: it takes an inordinate length of time. What you see in front of you is an association of independents who experience problems in the marketplace.

Our bottom line is a strong abuse system in the civil jurisdiction, where evidence only has to be presented, the rules of evidence are more relaxed and there only has to be proof to a reasonable probability, and where there is some hope of speed. We do not want a situation where lawyers argue before a court or tribunal why someone went bankrupt or why he sold out. We want to preserve competition now and so we focus on strengthening the civil abuse sections.

Le président: Monsieur Orlikow, vous avez déjà pris 25 minutes. Je dois maintenant donner la parole à M. Domm.

Mr. Domm: I will try to make my comments very brief, in the interest of the fact that it is now 11 a.m. and we are past the time slotted for our hearing. However, I will do it in two or three minutes and ask perhaps one or two questions that will require a yes or no or perhaps a brief comment.

[*Traduction*]

sucre et de celle de la compagnie d'assurances de la Nouvelle-Écosse que le taux de condamnation est tombé à 42 p. 100 au début des années 80.

Il faudrait donc essayer à tout le moins de revenir à la situation d'avant 1975. Je conçois fort bien que des prix identiques soient suspects ou que des soumissions à des prix identiques puissent paraître suspectes aux membres d'un conseil municipal. Mais pour certains produits, c'est inévitable, par le seul jeu des facteurs du marché. On ne peut quand même pas adopter une loi interdisant purement et simplement des soumissions à prix identiques.

M. Orlikow: Si les prix sont identiques, ce n'est quand même pas par pure coïncidence. Il faut soit que les fournisseurs se concertent, soit . . . comme dans le cas de Exxon, qui menace d'acculer à la faillite tout détaillant qui essaierait d'abaisser les prix.

M. McKeown: Les compagnies, grâce aux renseignements à leur disposition, savent à quels prix les contrats précédents ont été enlevés, et elles peuvent donc se faire une idée assez précise des prix pour les nouveaux contrats. La plupart des compagnies sont d'ailleurs au courant des prix payés par leurs concurrents, si bien qu'il est très difficile d'éviter les soumissions à prix identiques.

Ces amendements devraient permettre de nous attaquer aux cas les plus flagrants. Aucune loi n'est parfaite. Il nous faut des mesures efficaces, ce qui n'est pas le cas de la loi actuellement en vigueur. Malheureusement, la perfection n'est pas pour demain.

M. Hogarth: Je voudrais faire remarquer à M. Orlikow que l'essentiel, pour nous, n'est pas un amendement à l'article relatif aux coalitions, car cela relève du criminel. En pareil cas, il faut prouver avec une quasi-certitude, ce qui prend énormément de temps. En tant que fournisseurs indépendants, nous avons en ce moment de grosses difficultés.

Ce que nous voulons, c'est que les poursuites, en cas d'abus, puissent être intentées au civil, où il ne faut pas, comme au criminel, avoir une quasi-certitude, de façon à ce que les décisions puissent être rendues dans des délais raisonnables. Il ne s'agit pas d'attendre que les avocats puissent exposer devant un tribunal les raisons qui ont poussé un détaillant à la faillite ou à se débarrasser de son affaire. C'est maintenant qu'il faut sauvegarder la concurrence et, à cette fin, il faut renforcer les dispositions civiles de la loi.

The Chairman: Mr. Orlikow, you have had 25 minutes already; so I now give the floor to Mr. Domm.

M. Domm: Je vais essayer d'être bref, vu qu'il est déjà 11 heures et qu'en principe, nous aurions dû terminer. Je vais donc essayer de m'en tenir à deux ou trois minutes, et vous pourrez répondre par oui ou par non à mes questions.

[*Text*]

• 1100

I must clear up a couple of things that have been said. First, I think what has been expressed by Mr. Ouellet generally is the opinion of the government, that there is a degree of urgency about the legislation. I would not want to leave the impression that the government is of the opinion they wish to drag this process out past the summer. We would like to see it back for report and third reading before the end of June.

That is not to discredit Mr. Orlikow in his questions, when he asked if we oppose this bill ad infinitum, if you do not get all your amendments, would you support us. Let there be no illusion about the . . .

Mr. Orlikow: That is not what I said.

Mr. Domm: You said, "if we oppose this bill, would you support that if you do not get all of your amendments?" That is more correctly what Mr. Orlikow said. Let us be under no illusions that it has been stated in *Hansard*, in the House of Commons at second reading, that it is the intent of the NDP, through their spokesman, to filibuster this bill at all cost as long as is necessary. That process we will face.

My only comment is that over a long period of time—I think it is 75 years—we have tried to address the competition legislation. We are not dealing in this piece of legislation with items such as dominant position from a standpoint of amalgamations of companies; for example, a drug store buying a clothing store. We are dealing with competition in the marketplace. Therefore, when the Minister was referred to earlier by Mr. Orlikow as saying that the Minister is not concerned about concentration in the marketplace, what the Minister was talking about is that this Bill C-91 does not deal specifically with the item of concentration—of family ownership, corporate ownership; it deals with competition legislation. Presently, the Department of Finance is dealing with such items as concentration of ownership.

When we get that out of the way, I am sure what we all are interested in is the interest of progress on this item—and I was in the fuel oil business for 16 years. I was a retailer, a distributor and a marketer, so I know all the gentlemen at the table and I appreciate their concerns over some of the things that have been caused by mergers without the ability of pre-notification. I want to ask you two questions.

Does the pre-notification, as outlined in our legislation, allowing hearings to be held with 21 days to report, address not all of your problems but some of your problems, as it pertains to these types of mergers that might have a negative impact on the retailing of petroleum products? Is the pre-notification an area you have positive feelings about or negative feelings about? Does it meet some of your concerns that you expressed earlier?

I am going to ask the two questions because you can perhaps answer both of them at the same time.

The other question I would like to ask you, having personally experienced this in the fuel oil business, concerns the frustrations that I had in having nowhere to go. No peers or fellow businessmen had anything to say about what was

[*Translation*]

Tout d'abord, une mise au point. M. Ouellet exprimait l'avis du gouvernement lorsqu'il disait que cette loi est maintenant urgente. N'allez donc surtout pas croire que le gouvernement a l'intention de faire traîner les choses au-delà de l'été. Nous espérons au contraire que le projet de loi passera en troisième lecture et à l'étape du rapport avant la fin du mois de juin.

M. Orlikow a d'ailleurs demandé si, au cas où les amendements ne seraient pas adoptés, nous appuierions son parti, qui a décidé de s'opposer à ce projet de loi par tous les moyens.

M. Orlikow: Ce n'est pas ce que j'ai dit.

M. Domm: M. Orlikow a dit notamment: «si nous nous opposons à ce projet de loi, est-ce que vous serez d'accord si tous les amendements ne sont pas adoptés?» Vous pourrez constater en lisant le *Hansard* que le porte-parole du NPD a déclaré, lors de la deuxième lecture, que son parti avait l'intention de faire de l'obstruction systématique.

Or, cela fait 75 ans que l'on cherche à améliorer la loi régissant la concurrence. Il n'est pas question, dans ce projet de loi, de situations telles que des positions dominantes qui peuvent se présenter en cas de fusions, lorsque, par exemple, une pharmacie décide d'acheter un magasin de vêtements. Il s'agit uniquement de concurrence sur le marché. Lorsque M. Orlikow affirmait plus tôt que le ministre ne s'intéresse pas à la concentration, c'est faux, car en réalité, le Bill C-91 ne porte justement pas sur la concentration en tant que telle, mais plutôt sur la concurrence. D'ailleurs, le ministère des Finances est justement en train d'étudier la concentration de la propriété.

Il s'agit donc de faire progresser la situation, et je suis bien placé pour la connaître, car pendant 16 ans, j'ai moi-même été détaillant et distributeur d'essence, et je connais personnellement tous les témoins. Je comprends donc parfaitement les difficultés auxquelles ils sont confrontés à la suite des fusions sans possibilité de notification préalable. Je voudrais maintenant vous poser quelques questions.

Est-ce que cette notification préalable, définie dans le projet de loi, qui prévoit notamment la tenue d'audiences et le dépôt d'un rapport dans un délai de 21 jours, serait susceptible de résoudre une partie au moins des difficultés provoquées par ces fusions, fusions entraînant des effets préjudiciables sur la vente au détail de l'essence? Est-ce que cette notification préalable serait, à votre sens, un progrès ou non?

Je vais vous poser ma deuxième question, et vous pourrez ensuite répondre aux deux.

Par ailleurs, le fait qu'il n'existe aucune instance devant laquelle les détaillants puissent faire valoir leur cas est extrêmement frustrant.

[*Texte*]

happening in the marketplace. There was nowhere to go when these things occurred—the tribunal.

I would like to know what the bottom line is as you see it in the tribunal. Do the lay persons on the tribunal satisfy you? At times, you have expressed concerns about Orders in Council appointing those persons. We have offered the ability of an appointed group to select persons to go on the tribunal, such as a committee or a board. If you support the principle of lay persons on the tribunal and the idea of a tribunal, would you add something to it? Would you tell us what is your most serious concern about the tribunal, and is it serious enough that you feel the tribunal is nonproductive?

• 1105

Mr. Conrad: Why do you not start?

Mr. McKeown: I do not think that the pre-notification provisions will directly affect this association, in the sense that it is hard to determine that there are many independents whose assets would exceed $35 million. The level of pre-notification is perhaps too high. Certainly the levels are higher in Canada than they are in the United States. We have this $500 million base figure for the two, the buyer and the seller, whereas, the Americans have $200 million. As we all know, the Canadian economy is much smaller than the American.

But I do not see it as a serious problem. I would like to see it lowered a little bit, but I think the fact that it is the substance of the merger section should be of assistance. Presumably, if a merger does not fall within the pre-notification provisions, and an independent is injured by it, the independent will make his concerns known to the director. The director does have jurisdiction, notwithstanding the fact that it does not come within a pre-notification.

A pre-notification is just a way of making sure that the director knows about some of the larger mergers. It does not preclude action on mergers that fall into a category much less than the $500 million. As I say, as far as this association is concerned, we would like to see some dropping in the level of pre-notification, but it is not one of the high priorities.

Mr. Conrad: On the pre-notification, of course, we were concerned when suppliers sold out, such as when Gulf sold to Petro-Canada. That was of great concern to us. On the tribunal, the tribunal . . .

Mr. Domm: Excuse me for interrupting, but would this offer the opportunity for the kind of input that you are looking for, or is it going to miss the Gulf merger with Petro-Canada? My understanding is that it would cover that. It would certainly . . .

Mr. Ouellet: Maybe you missed this, but earlier in commenting, they suggested that a third party could go to the tribunal. It would not be left exclusively to the director. In this case, for instance, the director might not move. But if they are aware of it, their association should be allowed, or someone who could be affected by the merger, to go directly to the

[*Traduction*]

Je voudrais donc savoir ce que vous pensez de ce tribunal et, plus particulièrement, de la disposition portant sur les autres membres nommés par le gouverneur en conseil, car je crois que vous avez exprimé certains doutes quant à l'opportunité des nominations par décret du conseil. Le choix des membres du tribunal pourrait éventuellement être confié à une commission. Si tant est que vous êtes d'accord avec le principe du tribunal et de la nomination d'un certain nombre de ses membres par le gouverneur en conseil, avez-vous d'autres idées? Quels sont, à votre avis, les principaux défauts de ce tribunal, et ces défauts sont-ils graves au point où ils le rendraient inopérant?

M. Conrad: Allez-y.

M. McKeown: La disposition sur la notification au préalable ne nous intéresse pas vraiment, car je ne pense pas qu'il y ait beaucoup d'indépendants ayant un actif de plus de 35 millions de dollars. Le niveau prévu pour la notification au préalable est sans doute trop élevé. D'ailleurs, ces niveaux sont supérieurs au Canada à ce qu'ils sont aux États-Unis. On parle d'un montant de 500 millions de dollars pour l'acheteur et le vendeur, alors qu'aux États-Unis, ce montant est de 200 millions. Or, le marché canadien est plus petit que le marché américain.

Néanmoins, ce n'est pas un problème grave, je pense. Même si le niveau pourrait être rabaissé, le fait que cette mesure figure dans l'article sur les fusions devrait en soi être utile. Si une fusion ne relevait pas des dispositions sur la notification au préablable et qu'un indépendant subissait des préjudices à cause de cette fusion, l'indépendant signalerait sans doute le cas à l'administrateur. L'administrateur pourrait, pour sa part, agir, même si cela ne relevait pas de l'article sur la notification au préalable.

La notification au préalable a pour objet de porter à l'attention de l'administrateur les fusions les plus importantes. Mais cela n'empêche nullement des poursuites en cas de fusions portant sur moins de 500 millions de dollars. Nous aimerions donc que le niveau pour la notification au préalable soit rabaissé, mais ce n'est pas une question essentielle.

M. Conrad: Toujours au sujet de la notification au préalable, c'est des cas comme la reprise de Gulf par Petro-Canada que nous trouvons préoccupants. Pour ce qui est du tribunal . . .

M. Domm: Est-ce que ces mesures seraient d'application dans le cas d'une fusion comme celle de Gulf et de Petro-Canada? Je crois bien que oui.

M. Ouellet: Ils avaient dit que des tiers pouvaient porter plainte devant le tribunal et que cela n'incombe pas uniquement à l'administrateur. Même si l'administrateur décide de ne rien faire, l'association, ou un tiers qui serait touché par la fusion, devrait pouvoir porter plainte devant le tribunal. Ce serait déjà une mesure fort utile.

[*Text*]

tribunal. That would be helpful. That was an earlier suggestion they made.

Mr. Conrad: The tribunal is fine. We just do not want to enter into the debate of the lay versus legal. To a certain extent, it is how many angels dance on the head of a pin. It is fair and—now, the advisory council, of course, only advises the Minister. I think that is appropriate. The Minister makes the decision . . . that is very helpful. The key is speed, and that is why we would urge you to give great weight to what Mr. McKeown was saying in concerns of pre-trial provisions, that there is an opportunity for interim orders.

• 1110

Speed is why we like the decriminalization, the civil provisions. We support the urgency. Just so the record is clear, I understood Mr. Orlikow to ask if there were no amendments whatsoever would we have a degree of urgency, and the answer was no.

But that is not the scenario we see. We see that there is an immense amount of goodwill. We see that the Minister said clearly yesterday that he is open to amendments, and we are very hopeful and optimistic that this is indeed what will happen—that the ball will move forward and this committee will say yes, we were there when a new anti-trust bill came in.

Mr. Domm: Fine. Thank you very much.

Le président: Merci, monsieur Domm.

En mon nom personnel ainsi qu'au nom de tous les membres du Comité, je vous remercie. Il a été très agréable de vous rencontrer. L'Association canadienne de commercialisation des produits pétroliers devrait être fière de ses représentants. Vous avez présenté des arguments très valables et vous avez très bien répondu aux questions. Votre témoignage nous sera sûrement très utile lorsque nous aurons à formuler des amendements à ce projet de loi.

Mr. Conrad, Mr. McKeown, Mr. Hogarth, and Mr. Allen, it is a very great pleasure for us to have you here. I understand that your submission will be available in both official languages in the near future. Thank you very much for coming here, and good luck for your request.

Mr. Conrad: Thank you.

Mr. Ouellet: Are we going to continue with the steering committee?

The Chairman: Yes. For the record, I declare this meeting adjourned.

[*Translation*]

M. Conrad: Nous voudrions simplement éviter de couper les cheveux en quatre en ce qui concerne les membres du tribunal nommés, d'une part, par le ministre de la Justice et, d'autre part, par le gouverneur en conseil. Le conseil consultatif est là pour donner des conseils au ministre, ce qui est normal. C'est au ministre de prendre une décision. L'essentiel, c'est qu'une décision soit rendue rapidement, et c'est pourquoi M. McKeown a insisté sur l'importance d'ordonnances provisoires lors de la notification au préalable.

C'est donc pour que les choses puissent aller plus vite que nous sommes en faveur d'une procédure civile plutôt que criminelle. M. Orlikow a demandé plus tôt si, en l'absence d'amendements, la situation nous paraîtrait tout aussi urgente, à quoi je peux répondre que non.

Mais, à mon avis, tout le monde a fait preuve de beaucoup de bonne volonté. Le ministre a d'ailleurs souligné hier qu'il est tout disposé à accepter certains amendements, et nous espérons donc que le Comité adoptera le projet de loi et qu'il pourra ainsi s'honorer d'avoir été à l'origine de cette nouvelle loi anti-trust.

M. Domm: Parfait, je vous remercie.

The Chairman: Thank you, Mr. Domm.

I would like to thank you personally as well as in the name of all the members of the committee. It was very nice meeting you. The Petroleum Marketers Association of Canada should be proud of its representatives. You have made very strong arguments and you have given very good answers to the questions. Your testimony will be very useful to us when we will be drafting amendments to this bill.

Messieurs Conrad, McKeown, Hogarth et Allen, nous sommes très heureux de vous avoir eu parmi nous. Il paraît que vous nous ferez parvenir prochainement le texte de votre exposé dans les deux langues officielles. Je vous remercie donc d'être venus, et bonne chance.

M. Conrad: Merci.

M. Ouellet: Est-ce que le comité directeur va maintenant siéger?

Le président: Oui. La séance est levée.

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WITNESSES—TÉMOINS

From the Petroleum Marketers Association of Canada:

William P. McKeown, Q.C., Legal Counsel;

Murray Hogarth, President, Pioneer Petroleums Limited;

Bob Allen, Vice-President, Pioneer Petroleum (Central) Limited;

Rick Hammond, Owner, T.G. Hammond Limited, St. Marys, Ontario.

De l'Association canadienne de commercialisation des produits pétroliers:

William P. McKeown, c.r., conseiller juridique,

Murray Hogarth, président, *Pioneer Petroleums Limited*;

Bob Allen, vice-président, *Pioneer Petroleum (Central) Limited*;

Rick Hammond, propriétaire, *T.G. Hammond Limited*, St. Marys (Ontario).

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HOUSE OF COMMONS

Issue No. 3

Tuesday, April 29, 1986

Chairman: Marcel R. Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 3

Le mardi 29 avril 1986

Président: Marcel R. Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequences thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

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RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

WITNESS:

(See back cover)

TÉMOIN:

(Voir à l'endos)

First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

26154—1

LEGISLATIVE COMMITTEE ON BILL C-91

Chairman: Marcel R. Tremblay

COMITÉ LÉGISLATIF SUR LE PROJET DE LOI C-91

Président: Marcel R. Tremblay

MEMBERS/MEMBRES

Bill Attewell
Pierre Cadieux
Bill Domm
Robert Howie
Paul McCrossan
David Orlikow
André Ouellet

(Quorum 4)

Le greffier du Comité

Lucie Gratton

Clerk of the Committee

Pursuant to S.O. 94(5)

On Wednesday, April 23, 1986:
Paul McCrossan replaced Bill Attewell.

On Tuesday, April 29, 1986:
Bill Attewell replaced Bill Kempling.

Conformément à l'article 94(5)

Le mercredi 23 avril 1986:
Paul McCrossan remplace Bill Attewell.

Le mardi 29 avril 1986:
Bill Attewell remplace Bill Kempling.

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MINUTES OF PROCEEDINGS

TUESDAY, APRIL 29, 1986
(4)

[*Text*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 9:40 o'clock a.m., this day, the Chairman, Marcel R. Tremblay, presiding.

Members of the Committee present: Bill Attewell, Pierre Cadieux, Bill Domm, Robert Howie, David Orlikow and André Ouellet.

Witness: *From the Institute for Research on Public Policy*: Professor W.T. Stanbury.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 relating to Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof (*See Minutes of Proceedings and Evidence dated Wednesday, April 23, 1986, Issue No. 1*).

Clause 1 is allowed to stand.

The Chairman called Clause 2.

The witness made a statement and answered questions.

At 11:15 o'clock a.m., the Committee adjourned to the call of the Chair.

PROCÈS-VERBAL

LE MARDI 29 AVRIL 1986
(4)

[*Texte*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, ce jour à 9 h 40, sous la présidence de Marcel R. Tremblay, (*président*).

Membres du Comité présents: Bill Attewell, Pierre Cadieux, Bill Domm, Robert Howie, David Orlikow et André Ouellet.

Témoin: *De l'Institut de recherches politiques*: Professeur W.T. Stanbury.

Le Comité reprend l'étude de son ordre de renvoi du jeudi 10 avril 1986 relatif au projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois (*Voir Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule no. 1*).

L'article 1 est réservé.

Le président met en délibération l'article 2.

Le témoin fait une déclaration puis répond aux questions.

A 11 h 15, le Comité s'ajourne jusqu'à nouvelle convocation du président.

Le greffier du Comité

Lucie Gratton

Clerk of the Committee

EVIDENCE

(*Recorded by Electronic Apparatus*)

[*Texte*]

Tuesday, April 29, 1986

• 0942

Le président: À l'ordre!

Aujourd'hui, nous avons l'honneur et le plaisir de recevoir le professeur W. Stanbury, de l'Institut de recherches politiques. Il nous fera un exposé d'une durée de 15 minutes; ce qui laissera amplement de temps aux membres du Comité pour poser des questions.

Monsieur Stanbury.

Professor W. Stanbury (Institute for Research on Public Policy): Thank you very much, Mr. Chairman and members. I appreciate very much this opportunity to appear in front of the committee. I want to thank the staff for duplicating my rather extensive paper very quickly yesterday and making it available to members. The good news is that I will not read the paper. I will highlight certain points in it and then we can discuss it in more detail upon your questions.

As a caveat, let me note at the outset that IRPP does not take a position on public policy matters; rather, it funds research and publishes research. So I speak for myself, although I have benefited in the past from grants and so forth to assist in the publication of my work on competition policy.

I want to focus only on three issues today: conspiracy, mergers, and the abuse of dominant position. Before I go into detail, I want to make my overall position on Bill C-91 very clear. I support passage of the bill. However, in my view I would like to strengthen it very substantially.

When I go to judge the bill, I look at two different standards. The first is the standard of what we have now; by that standard Bill C-91 represents a substantial improvement. The problem is that the standard of what we have now is very low indeed. The second standard is the standard of what I would call a truly effective competition policy. By that standard, Bill C-91 is full of very substantial deficiencies, and I am going to try to identify those for you today. But let me be clear. Overall, I would support passage of the bill, but I would prefer to see it amended to strengthen it substantially.

Let me deal first with merger provisions, first with respect to the matter of civil law. There is unanimous support by every person I know in the competition policy research community to support moving to civil rather than criminal law. Criminal law was simply the wrong tool for the job. Why? Because mergers *a priori* may be good, bad, indifferent, or they may contain

TÉMOIGNAGES

(*Enregistrement électronique*)

[*Traduction*]

Le mardi 29 avril 1986

The Chairman: Order, please!

It is an honour and a pleasure for us to welcome today Professor W. Stanbury, from the Institute for Research on Public Policy. Professor Stanbury is going to have a 15-minute statement, which will leave us more than enough time to ask him our questions.

Mr. Stanbury.

M. W. Stanbury (professeur, Institut de recherches politiques): Je vous remercie beaucoup, monsieur le président, et je remercie aussi les membres du comité de cette occasion qui m'est donnée de déposer devant vous. Je voudrais remercier le personnel du comité qui a eu l'obligeance de faire reproduire très rapidement hier mon exposé assez volumineux et de vous le distribuer. Je vous rassure immédiatement, je ne vais pas vous lire ce document mais me contenter d'en faire ressortir certains éléments, après quoi nous pourrons en discuter d'une façon plus détaillée lorsque vous poserez vos questions.

Je commencerai immédiatement par une réserve en vous disant que l'Institut de recherces politiques ne prend jamais position en matière de politique officielle. L'Institut se contente de financer et de publier des travaux de recherche. Je suis donc mon propre porte-parole, même si à plusieurs reprises j'ai déjà bénéficié de subventions de recherches pour m'aider à publier mes travaux sur la politique dans le domaine de la concurrence.

Aujourd'hui, j'aimerais me concentrer sur trois éléments seulement: la collusion, les fusions et l'abus de positions privilégiées. Avant de passer en détails, je voudrais préciser très clairement ma position à propos du projet de loi C-91. Je préconise son adoption mais, à mon sens, il faudrait le renforcer très considérablement.

Si je veux passer jugement sur le projet de loi, je me base sur deux normes différentes. La première est celle que nous avons actuellement, et le projet de loi C-91 représente déjà une notable amélioration par rapport à cette norme. Le problème est que la norme actuelle est très faible. La seconde norme est ce que j'appellerais une politique véritablement efficace en matière de concurrence. De ce point de vue là, le projet de loi C-91 est bourré de lacunes très graves et je vais essayer de vous les exposer aujourd'hui. Cela dit, je serai très clair: Dans l'ensemble, je serais d'accord pour que ce projet de loi soit adopté mais je préférerais qu'il soit modifié de manière à le renforcer considérablement.

Je vais commencer par vous parler des dispositions relatives aux fusions, et en premier lieu sous l'angle du droit civil. Tout ceux que je connais et qui s'occupent de recherche en matière de politique sur la concurrence sont unanimement d'accord pour déjudiciariser ce domaine et le faire relever du droit civil. Le droit pénal n'était pas du tout indiqué. Pourquoi? Parce que

[*Texte*]

elements of both good and bad. The point is that we need a policy process to carefully assess the actual and potential impacts of mergers on competition, and the current criminal law provisions are totally inadequate and ineffective for that job. By the way, that has been clear since 1960, in my view.

Second, I wish to discuss the definition of a merger. Proposed section 63 of Bill C-91 speaks of "control over or significant interest in" another firm. The problem is do the words "significant interest" amount to what economists and others talk about as effective control? It is not clear that it does. It seems to me that operationally the term "significant interest" should be revised to mean effective control. I would point out that the word "control" itself is defined in proposed subsection 80.(4).

Third, I wish to review the matter of substantial lessening of competition. This is the fundamental test contained in the merger provisions of Bill C-91. It should be appreciated that the interpretation of these words is inherently a matter of judgment that the tribunal will have to exercise upon the facts in each case.

I would urge this committee and I would urge the Minister to reject the entreaties of some of the members of the so-called "gang of five" that would require a two-part test with respect to mergers, the first part being a substantial lessening of competition and the second part being that there be no substantial competition remaining. If that change were adopted, it would amount to a single competitor remaining or potential competitor test, and the result is a tremendous weakening of the bill over what it is now.

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I would note in passing, furthermore, that in establishing a substantial lessening of competition the list of factors in clause 65 is substantially shorter than that in the predecessor Bill C-29. The types of things that have been eliminated are the behavourial aspects of previous behaviour, and I notice that exactly that type of thing, dealing with object or intent, has in fact been incorporated into the abuse of dominant position. My point would be that the list of factors should be enlarged over what is proposed in Bill C-91.

I now wish to turn to the matter of conglomerates. Proposed sections 63 and 64 can only deal with horizontal and vertical mergers because the test incorporated is a substantial lessening of competition. Strictly speaking, conglomerate mergers cannot be touched by Bill C-91, although mergers involving conglomerates—each has a firm in the same industry or they are vertically related—could be addressed under the terms of the bill.

[*Traduction*]

a priori une fusion peut être une bonne chose, une mauvaise chose, une chose neutre ou encore être à la fois bonne et mauvaise. Le fait est qu'il nous faut un instrument de politique qui nous permettrait d'analyser très soigneusement les retombées réelles et possibles des fusions au niveau de la concurrence, et les dispositions actuelles du droit pénal sont totalement insuffisantes et inefficaces à cet égard. Incidemment, j'ajouterais qu'à mon avis cela est parfaitement évident depuis 1960.

En second lieu, j'aimerais vous parler de la définition d'une fusion. Le projet d'article 63 du projet de loi C-91 parle du «contrôle . . . ou . . . intérêt relativement important» dans une autre entreprise. Le problème est dû à l'expression «intérêt relativement important»: Est-ce que cette expression est équivalente à ce qu'entendent, notamment les économistes, lorsqu'ils parlent de contrôle véritable? Ce n'est pas évident. Il me semble que du point de vue opéraitonnel l'expression «intérêt relativement important» devrait être revu de manière à ce qu'elle veuille effectivement dire un contrôle véritable. Je signalerais d'ailleurs que le terme «contrôle» à proprement parler est défini dans le projet de paragraphe 80(4).

En troisième lieu, je voudrais parler du problème de l'affaiblissement notable de la concurrence. Il s'agit en effet du critère fondamental qui sous-tend les dispositions du projet de loi en matière de fusion. Il faut bien comprendre que l'interprétation de ces termes est intrinsèquement une question de jugement, un jugement que le tribunal va devoir former, dans chaque cas d'espèce, en fonction des faits.

Je demande donc instamment au comité, comme au Ministre d'ailleurs, de rejeter les invites de certains de ceux qu'on appelle la «bande des cinq» qui préconiseraient un critère en deux parties pour toutes les fusions, la première étant un amoindrissement important de la concurrence et la seconde étant qu'il ne reste aucune concurrence importante. Si ce changement était adopté, le critère retenu serait basé sur le fait qu'il reste un seul concurrent ou un concurrent possible, ce qui affaiblirait énormément le projet de loi.

Je signale en passant que la liste des facteurs figurant à l'article 75, facteurs qui servent à déterminer si la concurrence a sensiblement diminué, est beaucoup plus courte que la liste figurant au projet de loi précédent, c'est-à-dire le C-29. Le nouveau projet de loi ne prend plus en compte le comportement antérieur et je constate également que l'objet ou l'intention ont été incorporés à la notion d'abus de la position dominante. J'estime que la liste des facteurs que renferme le projet de loi C-91 devrait être plus complète.

J'aimerais maintenant discuter des conglomérats. Les articles 63 et 64 visent exclusivement les fusions horizontales et verticales, du fait que le critère prévu est fondé sur une réduction sensible de la concurrence. Au sens strict, les fusions de conglomérats ne sont aucunement touchées par le projet de loi C-91, bien que les fusions où participent des conglomérats, dont chacun aurait une composante dans le même secteur ou qui serait lié verticalement, pourraient l'être.

[*Text*]

However, a take-over such as the one we have recently witnessed by Imasco of Genstar could not be addressed by the tribunal in Bill C-91. I would point out, by the way, that in that merger the 34th largest non-financial enterprise is acquiring the 47th largest, and the result will be a firm ranking approximately number 10 on *The Financial Post* 500 next year.

With respect to the matter of aggregate concentration, I would refer you to the points I have made on page 11 of my brief and on pages 26 and 27. In addition, I would refer you to *The Toronto Star* of April 28, 1986, in which Mr. Bernard Ghert of Cadillac Fairview discusses in some detail some of the potential dangers of failing to deal with conglomerate mergers, particularly those involving financial and non-financial firms. Members of this committee, I think, are thoroughly aware of those kinds of concerns.

My next point deals with the question of no public process to assess conglomerates. I discuss on pages 28 to 30 of my brief the process that has been used to deal with the Imasco and Genstar affair, and I am worried about the implications that process has had with respect to competition policy.

If I may, I would like to refer specifically to some points on pages 30 and 31. What does the recent history in this affair mean for competition policy?

First, it means that some of the most important mergers, those involving non-financial enterprises and financial institutions, will not be addressed by Bill C-91 and the Competition Tribunal.

Second, it means that the process by which such mergers are evaluated will be confidential and involve direct bargaining between a Cabinet Minister and the companies involved. There will be no public hearings to gather evidence. There will be no public report that citizens can read and judge for themselves. There will be no specific criteria in legislation that will be used to weigh the benefits and costs of a proposed merger.

Third, it probably means that all the other major trust companies owned by non-financial companies will not be touched when the legislation and its regulations are finally enacted. I hope I am wrong in that prediction.

Fourth, the process outlined by Mrs. McDougall will mean the further exercise of ministerial discretion, based on whatever criteria and evidence the Minister wishes to address. The public will have to be content with newspaper stories and the press releases of Ministers. I think that is grossly inadequate with respect to large conglomerates. Later on I could suggest to you an alternative procedure to try to address the matter of conglomerate mergers.

Now I come to the matter of the efficiency defence. Proposed section 68 of Bill C-91 clearly contemplates a trade-

[*Translation*]

Toutefois, au terme du projet de loi C-91, le tribunal de la concurrence ne pourrait se pencher sur une prise en charge semblable à celle survenue récemment, c'est-à-dire la prise en charge de Genstar par Imasco. Soit dit en passant, cette prise en charge de la 47ième entreprise non financière en importance par la 34ième mènera à la création d'une entreprise qui se situera environ au dixième rang parmi les 500 principales sociétés figurant sur la liste que publiera le *Financial Post* l'an prochain.

Pour ce qui est de la concentration cumulative, je vous renvoie aux pages 11, 26 et 27 de mon mémoire. En outre, je vous renvoie au *Toronto Star* du 28 avril 1986, dans lequel M. Bernard Ghert de Cadillac Fairview discute de façon assez exhaustive certains des dangers qui nous attendent si nous ne réglons pas le problème des fusions de conglomérats, particulièrement celles touchant des entreprises financières et non financières. Je crois que les membres du Comité sont tout à fait conscients de ces dangers.

J'aimerais maintenant discuter de l'absence d'un processus dont le but serait d'évaluer les conglomérats. Aux pages 28 à 30 de mon mémoire, je discute du processus utilisé dans l'affaire Imasco-Genstar et je m'inquiète des répercussions de ce processus sur la politique en matière de concurrence.

Si vous le permettez, je lirai certains extraits des pages 30 et 31. Quelles seront les répercussions de cette affaire sur la politique en matière de concurrence?

Tout d'abord, la décision prise signifie que certaines des fusions les plus importantes, unissant des entreprises non financières et des entreprises financières, ne seront pas visées par le projet de loi C-91 et ne feront pas l'objet d'un examen par le tribunal de la concurrence.

Deuxièmement, cette décision signifie que ces fusions seront évaluées confidentiellement et qu'elles entraîneront des négociations directes entre un ministre du Cabinet et les entreprises intéressées. Il n'y aura pas d'audiences publiques en présence de témoins, il n'y aura pas de rapport que les Canadiens pourront lire afin d'arriver à leurs propres conclusions et la Loi ne prévoiera pas de critères précis servant à équilibrer les avantages et les inconvénients d'un projet de fusion.

Troisièmement, cette décision signifie probablement que toutes les autres grandes sociétés de fiducie appartenant à des entreprises non financières ne seront pas visées par la loi et son règlement. C'est une anticipation qui, je l'espère, ne se concrétisera pas.

Quatrièmement, le processus esquissé par Mme McDougall étendra les pouvoirs discrétionnaires du ministre, en fonction des critères et des faits que celui-ci jugera bon de retenir, tandis que le public devra se contenter des reportages dans les média et des communiqués ministériels. C'est une procédure qui me semble totalement inadéquate devant l'importance des grands conglomérats. Si vous le voulez, je pourrai plus tard vous décrire une procédure qui, selon moi, nous permettrait de réglementer les fusions de conglomérats.

J'aimerais maintenant discuter de la défense basée sur les gains en efficience. Il est clair que l'article 68 du projet de loi

[*Texte*]

off between gains in efficiency and the lessening of competition. This raises a number of difficult questions. The first and most important is the matter of incommensurability—namely, that the tribunal will be asked to deal and make a judgment between a lessening of competition, which will probably result in higher prices, and gains in efficiency, which are real savings to society. These are not comparable kinds of things because one involves a redistribution of income and the other involves real gains in terms of the savings of resources.

Second, there is an inherent and unavoidable value judgment that the tribunal must make in dealing with proposed section 68. The sad part is that Parliament has given no guidance to the tribunal as to its priorities, as to the weights to be applied to the lessening of competition and gains in efficiency.

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Finally, there is a serious problem as to the word "likely"—namely, how likely must these gains be, highly likely, or just a "low probability", to use a phrase that economists would be familiar with?

Finally, I would note, why are increases in exports or decreases in imports singled out in proposed section 68 versus simply the lower costs of goods sold only in Canada? It seems to me that is an invitation to potential abuse.

Let me turn now to the problem of abuse of dominant position. Again, I have a series of points.

First, let me emphasize that the provision in propoosed sections 50 and 51 amounts to a four-part test. I have outlined that test on page 51 of my brief. The test is as follows: first, that one or more persons substantially or completely control a class or species of business throughout Canada or in a region; second, that the firms have engaged in, or are engaging in, a practice of anti-competitive acts; third, that the object of the practice is to lessen competition; and fourth, that the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

My summary of those requirements is to ask this committee how many camels can pass through the eye of a needle. I think the effect of those four criteria will mean the director will almost never succeed in cases in which I think it is legitimate for him to do so. I would ask this committee whether or not the Minister is engaged, frankly, in an act of symbolic politics with this proposed section.

Let me address now the matter of substantial or complete control. What has happened here is that the drafters of the bill have taken the first criterion and adapted it from clause 2 of the existing Combines Investigation Act. The result is that we

[*Traduction*]

C-91 permet l'établissement d'un compromis entre les gains en efficience et la diminution de la concurrence, compromis qui soulève de nombreuses questions épineuses. Le plus important problème est celui de l'incommensurabilité, c'est-à-dire le fait que le tribunal sera appelé à se prononcer sur une diminution de la concurrence, d'une part, qui pourrait entraîner une augmentation des prix, et des gains en efficience, d'autre part, qui représente des économies réelles pour la société. Ces deux choses ne sont pas comparables, car l'une exige une redistribution de revenu et l'autre de réelles économies en ce qui concerne les ressources.

Deuxièmement, pour appliquer l'article 68, le tribunal de la concurrence devra inévitablement porter un jugement de valeur. Malheureusement, le Parlement n'a pas indiqué au tribunal quels sont ses priorités et il ne lui a pas indiqué comment établir un équilibre entre la diminution de la concurrence et les gains en efficience.

Enfin, l'expression «vraisemblablement» est la source de graves problèmes, car on peut se demander en effet quel est le niveau de vraisemblance, ou s'agit-il plutôt d'une faible probabilité, pour reprendre une expression chère aux économistes?

Finalement, je me demande pourquoi l'article 68 mentionne expressément l'augmentation des exportations ou la réduction des importations, plutôt que la réduction du coût des produits vendus uniquement au Canada, ce qui me semble plus simple? Il me semble que cette disposition ouvre la porte à tous les abus.

J'aimerais maintenant présenter une série d'arguments concernant l'abus de position dominante.

Tout d'abord, j'estime que les articles 50 et 51 constituent, en réalité, un critère à quatre éléments, que j'ai résumés à la page 51 de mon mémoire. Voici ces quatre éléments: premièrement, qu'une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à l'échelle du Canada ou dans une de ses régions; deuxièmement, que les entreprises en question se livrent, ou se sont livrées, à des agissements anti-concurrentiels; troisièmement, que le but de ces agissements est de restreindre la concurrence; et quatrièmement, que ces agissements ont, ont eu ou auront vraisemblablement pour effet d'empêcher ou de restreindre sensiblement la concurrence sur un marché.

C'est comme si je demandais au Comité de faire la quadrature du cercle. En effet, je crois que ces quatre critères sont tels que le directeur ne pourra presque jamais obtenir gain de cause, même là où ses inquiétudes seraient justifiées. En toute franchise, je me demande si le ministre se livre à des actes politiques symboliques.

J'aimerais maintenant passer aux questions du contrôle substantiel ou complet. En fait, les rédacteurs du projet de loi ont adapté le premier critère tiré de l'article 2 de la Loi relative aux enquêtes sur les coalitions et l'ont inséré dans le projet de loi. En conséquence, nous n'avons pas une idée très

[*Text*]

do not have a clear idea as to what constitutes joint or shared dominance in this bill.

For example, if you have parallel practices by the four leading firms who together account for, say, 80% of the market, does that mean they "control the market"? It is not clear that they do. Moreover, it is not clear whether the director will be required to prove that the firms jointly agreed to engage in a set of parallel anti-competitive practices. I think that needs to be clarified substantially to make the bill effective.

Now we come to the matter of defining the market. Paragraph 51.(1)(*a*) speaks of a "class or species of business". On the other hand, paragraph 51.(1)(*c*) speaks of a "market". The problem is, are these the same terms, or just different terms for the same thing? I think we need to clarify them both; and I would argue that the phrase that should be substituted in both cases is "the relevant market".

I do not want to see a snare, trap, or delusion inserted in the bill merely by the failure to recognize the slight difference in the use of terminology in two different places in the same proposed section. I think that is a technical amendment everyone could support, and I think it would reduce a lot of legal bickering.

Let me turn now to the matter of adverse effects and intent. Paragraph 51.(1)(*b*) speaks of the object of anti-competitive practices. That was number 3 of the four criteria I referred to earlier. As I understand it, the position of the Bureau of Competition Policy is that one can distinguish the intent of individuals versus the objects of practices. I would argue, as I have in the brief on page 57, that that distinction is artificial, to say the least. My point would be that what we have introduced into this bill in proposed section 51 is a combined test of having to show the evil intent of the accused in these anti-competitive practices and an adverse effect, namely a substantial lessening of competition.

It is interesting that in the current section 34 regarding predatory practices—and I would refer you here to the Hoffman-LaRoche case—that section only requires either an adverse effect or the intent to lessen competition substantially. Why are we putting both tests into the new proposed sections 50 and 51?

Let me deal now with the matter of practice. Paragraph 51.(1)(*b*) requires that the tribunal find that the firm or firms have engaged in "a practice of anti-competitive acts". This term is not defined. How long must the set of acts that are subject to the order have carried on? Must they be, to use the prostitution example, pressing and persistent? How extensive must these acts be in terms of competitors, the number of competitors affected, or the geographic scope of a national enterprise?

[*Translation*]

claire de ce qui constitue, aux termes de ce projet de loi, la dominance conjointe ou partagée.

Si, par exemple, quatre entreprises importantes représentant 80 p. 100 du marché se livrent à des pratiques parallèles, est-ce que cela signifie qu'elles contrôlent le marché? Ce n'est pas du tout clair. Qui plus est, le projet de loi ne stipule pas clairement si le président du tribunal devra prouver que les entreprises en question se sont entendues entre elles dans le but de se livrer à des pratiques parallèles et anti-concurrentielles. Si nous voulons que ce projet de loi soit efficace, il va falloir apporter des éclaircissements importants à cette disposition.

Maintenant, nous arrivons à la définition de marché. L'alinéa 50.(1)*a*) fait mention d'une «catégorie ou espèce d'entreprise», tandis que l'alinéa 51(1)*c*) fait mention d'un «marché». Il y a lieu de se demander si ces deux expressions sont synonymes et si elles s'appliquent à la même réalité. Je crois qu'il y aurait lieu de tirer les choses au clair dans les deux cas et j'estime qu'il conviendrait d'y substituer, dans les deux cas, l'expression «le marché pertinent».

Je m'en voudrais de ne pas signaler ce piège, ou cette échappatoire, que renferme le projet de loi, à cause des écarts de terminologie dans deux alinéas d'un même article. Je crois que tous seraient d'accord pour apporter cet amendement d'ordre technique, d'autant plus qu'il faciliterait de beaucoup le travail des juristes.

J'aimerais maintenant aborder la question des répercussions nocives et de l'intention. L'alinéa 51(1)*b*) mentionne le but des pratiques anti-concurrentielles et c'est le troisième élément du critère que j'ai évoqué tout à l'heure. Si j'ai bien compris, le Bureau de la politique en matière de concurrence estime pouvoir faire la distinction entre l'intention des personnes en cause, par opposition au but de certaines pratiques. Comme je l'explique à la page 57 de mon mémoire, ces distinctions me semblent tout au moins artificielles. Personnellement, je crois que l'article 51 devrait comporter un critère formé de plusieurs éléments, qui obligerait le tribunal à démontrer que l'accusé, s'étant livré à des pratiques anti-concurrentielles, avait des intentions blâmables et que ces pratiques ont eu des répercussions nocives, à savoir une restriction sensible de la concurrence.

Il est intéressant de noter que l'article 34 de la loi en vigueur, qui concerne les pratiques déloyales—et je vous renvoie en passant à l'affaire Hoffman-LaRoche—exige que soient démontrées, soit les répercussions négatives, soit l'intention de réduire sensiblement la concurrence. Or, je me demande pourquoi les articles 50 et 51 du projet de loi C-91 exigent que soient réunis ces deux critères.

J'aimerais maintenant parler desdites pratiques. Aux termes de l'alinéa 51(1)*b*), le tribunal doit conclure que l'entreprise ou les entreprises se sont livrées «à une pratique d'agissement anti-concurrentielle». Toutefois, cette expression n'est pas définie. Pendant combien de temps doivent durer ces agissements? Pour reprendre l'exemple de la prostitution, les responsables doivent-ils s'y être livrés avec insistance et persistance? Quels doivent être l'ampleur de ces agissements, le nombre de concurrents touchés, ou la superficie de la région où l'entreprise est implantée?

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I would point out to you that there is somewhat comparable phraseology in the act as it exists. Paragraph 34.(1)(*b*) refers to engaging in a policy, whereas subsection 38.(9) refers to making a practice. It seems to me that there is need for clarification on that score.

Now we come to the matter of the superior competitive performance defence. The act provides that the tribunal cannot make an order where substantial lessening of competition is the result of superior competitive performance. This phrase is not defined. Bill C-29, brought forward in 1984, referred to superior economic efficiency. There is a serious danger that if the phrase "superior competitive performance" is adopted we will have a tautology; namely, that the firm which succeeds in the marketplace over the bodies of its victims will use the bodies as evidence of its superior competitive performance. I do not think that is what Parliament intended in this bill.

I would suggest that we revert to the test in Bill C-29 and define what we mean by "superior economic efficiency", which in my view would include new products, new processes and new methods of organization in the marketplace.

With respect to the matter of anti-competitive acts, it is important to appreciate that not in every context are those acts anti-competitive. They may under certain circumstances be in fact pro-competitive. However, whether or not they are pro- or anti-competitive depends on the context in which they occur. That context is defined by the dominance of those engaged in those acts—namely, substantial or complete control; second, whether or not they are making a practice of the acts, and again there is the problem of defining practice; third, whether there is an object or intent, or the design of the acts; and then, finally, whether or not adverse consequences flow from those acts—namely, a substantial lessening of competition.

I would urge the committee to think about Professor Fisher's test with respect to these anti-competitive acts—namely, that the conduct should not be condemned if it is just what competition would lead us to expect; that is to say, it is no more restrictive than is necessary to achieve the legitimate competitive objectives of the parties.

Let me turn now to the matter of conspiracy, first the matter of "unduly". Bill C-91, like its predecessor, Bill C-29, in 1984, fails to eliminate the qualifying adjective "unduly" in this most important section of the Combines Act. I would remind the committee that in the United States section 1 of the Sherman Act prohibits all agreements in restraint of trade, and I have the exact quotation on page 74 of my brief. But the courts have also developed a two-pronged approach to dealing with conspiracies. The first prong declares to be illegal per se price fixing, market sharing, and entry-barring agreements plus a few others. All other agreements are subject to what is called in the United States the rule of reason, which would be very much like our "unduly" provision in the existing section 32.

[*Traduction*]

Je vous signale que la loi actuellement en vigueur renferme également des expressions comparables. En effet, à l'alinéa 34.(1)*b*), il est question de s'adonner à une politique, tandis que le paragraphe 38.(9) parle de s'adonner à une pratique. Il me semble qu'il y aurait lieu de tirer les choses au clair.

Passons maintenant à la question du rendement concurrentiel supérieur. Le projet de loi stipule que le tribunal ne peut rendre une ordonnance lorsque la réduction sensible de la concurrence est le résultat d'un rendement concurrentiel supérieur, expression qui n'est pas définie. Le projet de loi C-29, déposé en 1984, mentionne l'efficience économique supérieure. Si l'expression «rendement concurrentiel supérieur» est retenue, il y a de bonnes chances pour que les entreprises qui s'emparent des marchés justifient l'élimination de leurs concurrents en faisant valoir que celle-ci démontre précisément leur rendement concurrentiel supérieur. Je ne crois pas que le gouvernement ait déposé ce projet de loi dans le but d'encourager ce genre de cercle vicieux.

J'estime qu'il faudrait retenir le critère que renferme le projet de loi C-29 et définir en quoi consiste une «efficience économique supérieure». À mon sens, cela comprendrait de nouveaux produits, de nouveaux procédés et de nouvelles méthodes mises en oeuvre sur les marchés.

Pour ce qui est des agissements anti-concurrentiels, il est important de comprendre que de tels agissements ne sont pas anti-concurrentiels dans tous les contextes. En effet, dans certains cas, ils peuvent favoriser la concurrence. Pour décider s'ils favorisent ou entravent la concurrence, il faut se reporter au contexte, qui est fonction du niveau de dominance de ceux qui se livrent à ces agissements. Il faut donc se demander si le contrôle exercé est substantiel ou complet, si les intéressés se livrent à ces pratiques régulièrement, encore faudrait-il définir «pratiques», si l'objet ou l'intention étaient blâmables et, finalement, si ces agissements entraînent des conséquences négatives, c'est-à-dire une restriction sensible de la concurrence.

J'encourage fortement le Comité à se pencher sur le critère proposé par M. Fisher, à savoir que les agissements ne sont pas blâmables s'ils correspondent tout à fait aux lois de la concurrence, c'est-à-dire qu'ils ne sont pas plus limitatifs que ne l'exige la réalisation des objectifs légitimes des concurrents en présence.

Je passerai maintenant à la question des complots, particulièrement à l'expression «indûment». Le projet de loi C-91, comme son prédécesseur déposé en 1984, c'est-à-dire le projet de loi C-29, retient l'adjectif qualificatif «indûment». Aux États-Unis, l'article 1 de la loi dite *Sherman Act* interdit tous les accords visant à limiter le commerce et, à cet égard, je vous renvoie à la page 74 de mon mémoire. Toutefois, les tribunaux ont adopté une approche à deux volets lorsqu'ils ont dû trancher au sujet des complots. En premier lieu, les tribunaux ont déclaré que la fixation des prix, le partage des marchés et les accords visant à interdire l'accès au marché sont, de facto, interdits. Aux États-Unis, tous les autres accords doivent être réputés raisonnables, aux termes d'une disposition qui

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In my view, there is no valid philosophical or practical case for allowing any degree of price fixing. Price fixing and market sharing agreements serve absolutely no socially beneficial purpose.

I would point out to the committee that the proposed section 33 in Bill C-91 shows that a per se approach can in fact be used, at least with respect to agreements among banks. If we are prepared to enforce that standard on the banks—and I think we should—we should also enforce it on all other firms in the economy.

I strongly endorse the proposals of 1981 put forward by the then Minister, Mr. André Ouellet, which incorporated a per se approach with respect to three types of agreements. I have expanded on that on page 73 of my brief.

A per se approach would remove uncertainty, a matter the business community has continually charged the Combines Act is subject to, and it would recognize the fact that price fixing agreements or market sharing agreements are simply devices to tax consumers to benefit the shareholders of the firms engaged in them.

Finally, I would point out that bid rigging, which is analogous to price fixing, has been illegal per se in Canada since 1976, in section 32.2.

My second point under conspiracy deals with the matter of inferring an agreement. Subsection 32(1.2) of section 32 provides that the court may infer the existence of an agreement from "circumstantial evidence with or without evidence of direct communication". I would point out to the committee that this merely plugs a hole created in the act by the Supreme Court of Canada in the Atlantic Sugar case in 1980; I go into that in more detail at page 76 of the brief.

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The thing I would emphasize is that this merely puts the law back to what it was in the 1860s. This has been a very well established law in Canada and in Great Britain from the 1860s.

Finally, I would note about this clause that the phrase under here describing "for greater certainty" regarding the question of proof is entirely superfluous and I would suggest reflects the paranoia of certain business leaders and their counsel.

Now I come to the matter of intent. Proposed subsection 1.(3) eliminates what has been described as the "double-intent test", read into the law by the Supreme Court of Canada in the Aetna Insurance case in 1977 and the Atlantic Sugar case in 1980. You can see the details on page 78 of my brief.

The new test for the Crown is to prove that the accused entered the agreement with the intention of lessening competi-

[*Translation*]

ressemble beaucoup à l'article 32 en vigueur, où on retrouve l'expression «indûment».

A mon sens, aucune raison, de principe ou de pratique, ne justifie la fixation des prix, si minime soit-elle. La fixation des prix et les accords prévoyant le partage d'un marché n'entraînent aucun avantage social.

L'article 33 du projet de loi C-91 ouvre la porte à une approche basée sur les accords de facto, du moins en ce qui concerne les banques. Si le gouvernement est disposé à soumettre les banques à un tel règlement, ce qui me semble souhaitable, il devrait être tout aussi disposé à l'imposer aux autres secteurs de l'économie.

J'appuie vigoureusement les propositions faites en 1981 par le ministre de l'époque, M. André Ouellet, propositions qui faisaient intervenir une approche de facto à l'égard de trois types d'accords. Pour complément d'informations, vous pourrez consulter la page 73 de mon mémoire.

Une telle approche éliminerait les incertitudes, dont le secteur privé s'est plaint sans cesse dans le contexte de la Loi sur les coalitions, et elle reconnaîtrait que les accords de fixation des prix ou le partage d'un marché sont tout simplement des moyens permettant aux actionnaires des entreprises qui s'adonnent à ces pratiques de s'enrichir au détriment des consommateurs.

Finalement, je vous signale que les accords préalables entre soumissionnaires, qui ne sont rien d'autre qu'une méthode de fixation des prix, sont interdits au Canada depuis 1976, en vertu de l'article 32.2.

Toujours sur cette question des complots, j'aimerais maintenant discuter du paragraphe 32(1.2), qui stipule que la Cour peut «déduire l'existence du complot . . . en se basant sur une preuve circonstantielle, avec ou sans preuve directe de communication . . . ». Cette disposition n'aura pour effet que de supprimer une échappatoire créée par le jugement de la Cour suprême du Canada rendu en 1980 dans l'affaire de *Atlantic Sugar*, que j'explique en détail à la page 76 de mon mémoire.

Ceci ne ferait que nous reporter à la loi telle qu'elle était en vigueur au Canada et en Grande-Bretagne depuis 1860.

Enfin, toujours au sujet de ce même article, l'expression «pour plus de certitude», concernant la preuve, est tout à fait superflue et ne fait que traduire la paranoïa de certains hommes d'affaires et de leurs conseillers juridiques.

J'en arrive maintenant au projet d'alinéa 1.(3), qui a été qualifié de «test de la double intention» et qui est entré en vigueur à l'issue de la décision de la Cour suprême du Canada dans l'affaire de l'*Aetna Insurance*, de 1977, et de l'*Atlantic Sugar*, de 1980. Vous trouverez les détails à ce sujet à la page 78 de mon mémoire.

La Couronne devra désormais prouver que l'inculpé a conclu un accord avec l'intention d'indûment réduire la

[*Texte*]

tion unduly . . . Sorry; that was part of the double-intent test. The important thing to appreciate is that previously—and this is well established in a series of Supreme Court cases—*mens rea*, or guilty intent, was established "when it was shown that the accused intended to enter, and did enter, into the very arrangement found to exist".

The important point to appreciate is that again we are being forced to plug a hole established or created by the Supreme Court of Canada. It is a very necessary one to do, but it should not be seen as a gigantic victory for competition policy. It is simply necessary in light of previous Supreme Court decisions.

Fines: There is a proposal in the bill to raise the maximum fine from $1 million to $5 million. I would note that in Bill C-29 the proposal was to raise it to $2 million. I find this terribly ironic, because between 1952 and 1975 there was no maximum at all on what the court could impose following a conviction.

On page 81 of my brief I provide you with data on the average size of the fines per firm convicted for a number of years. In fact, I have done this right back to the origins of the act in 1889. You will notice that even in the last two years the average fine per convicted firm under section 32, the bid-rigging section, is only $71,000. Now, it may be that $5 million will give the courts something to shoot at; but my point is that unless the Crown adopts an economic approach to sentencing and is able to convince the courts to adopt it as well, we will still continue to see the situation in Canada where frankly crime pays. The fact is that you have more to fear from your lawyer's bills in a combines case than you do from the penalties awarded by the judges.

To give you an idea that other jurisdictions take the matter of fines seriously, I would refer you to *The Globe and Mail* of April 28, 1986, page 13, in particular a fine in the European Common Market plastics case, in which 15 firms were fined a total of U.S.$56.2 million for price-fixing and market-sharing over the period 1977 to 1983, and one firm in particular was fined U.S.$10 million. That would sting. We have had nothing like that in Canada, even though we have had some rather remarkably successful price-fixing cases.

I have two more additional points. First, the matter of export exemptions. It is quite clear that the intent of the Minister in the bill is to broaden this exemption very greatly. There is a danger, however, that in broadening it as far as he has, the domestic market will be adversely affected. It is a matter of great intricacy as to how this proposed section will be interpreted and so on, but I would just note that we may have gone too far in this, although drafting an improvement is hard to do. The difficulty is continually to pay attention to the impact on the domestic market.

One final point, and that deals with the matter of regulated conduct. The fact is that there is nothing in the bill to deal with the problem of regulated conduct. A gigantic loophole has been created by the Jabour case, decided by the Supreme Court of Canada in 1982. I have made copies of my article for the committee, and they are available for the members.

[*Traduction*]

concurrence . . . Je m'excuse, cela faisait partie du test de double intention. Or, auparavant, comme il découle toute une série de décisions de la Cour suprême, l'intention coupable était établie «lorsqu'il était prouvé que l'inculpé avait effectivement conclu l'accord dont l'existence a effectivement été prouvée».

Nous devrons donc à nouveau combler une lacune créée par la Cour suprême du Canada. C'est une chose tout à fait essentielle et cela constituerait une victoire énorme en matière de politique de la concurrence. C'est tout à fait indispensable à la lumière des décisions déjà rendues par la Cour suprême.

Amendes: un projet de loi propose de porter l'amende maximum de 1 million à 5 millions de dollars. Vous remarquerez que le Bill C-29 proposait déjà de porter ce maximum à 2 millions. Ceci est d'autant plus ironique qu'entre 1952 et 1975, il n'existait pas de plafond aux amendes imposées par les tribunaux à la suite d'un verdict de culpabilité.

Vous trouverez à la page 81 de mon mémoire des données relatives au montant moyen des amendes par entreprise imposées au cours d'un certain nombre d'années; j'ai ainsi remonté jusqu'au début de la loi, c'est-à-dire à 1889. À ce propos, vous constaterez qu'au cours des deux dernières années, le montant moyen des amendes infligées aux entreprises condamnées aux termes de l'article 32 était de 71,000$ seulement. Un plafond de 5 millions de dollars renforce bien entendu la main du tribunal. Mais à moins que la Couronne n'adopte une approche économique et ne parvienne à convaincre les tribunaux d'en faire autant, rien ne va changer, et les crimes resteront payants au Canada. Les notes d'honoraires des avocats sont souvent plus lourdes que les amendes infligées par les juges.

A ce propos, un article paru le 28 avril dernier à la page 13 du *Globe and Mail* fait état d'une amende totale de 56,2 millions de dollars U.S. infligée à 15 entreprises du Marché commun pour fixation de prix et partage de prix sur une période allant de 1977 à 1983, une de ces entreprises s'étant vu infliger une amende de 10 millions de dollars U.S., ce qui est loin d'être négligeable. Nous n'avons jamais eu rien de semblable au Canada, même si les tribunaux ont réussi à infliger des verdicts de culpabilité dans des affaires de fixation de prix.

Je voudrais maintenant passer aux exemptions pour exportation. Il est tout à fait évident que le ministre voudrait élargir ces exemptions. Toutefois, une exemption aussi généreuse risque d'avoir des effets préjudiciables sur le marché national. On ne peut pas savoir comment cet article sera interprété, mais je crains que nous ne soyons allés trop loin, bien qu'il soit difficile maintenant de remanier cet article. Il sera en effet difficile de suivre de façon permanente les répercussions sur le marché national.

J'en arrive enfin à la question de la conduite réglementée, question à laquelle rien n'est consacré dans le présent projet de loi. Une lacune énorme a par ailleurs été écrite à l'issue de l'affaire Jabour, sur laquelle la Cour suprême du Canada s'est prononcée en 1982. J'ai mis à votre disposition des copies de mon article consacré à cette affaire.

[*Text*]

What I am concerned about here is the fact that we are undertaking—and I certainly strongly support it—a process of deregulation of a number of industries. In particular, Mr. Mazankowski is coming forward with a bill based on his discussion paper called *Freedom to Move*, which will deal with airlines, railroads, marine transportation, trucking, and so on.

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My worry is the following: If we engage in a partial deregulation, we may have a situation where firms will be subject neither to direct government regulation over price and entry rate of return nor to the Combines Investigation Act, given the decision in the Jabour case. This problem has not even been acknowledged in this bill, and in my view this represents a major deficiency.

Now, if I may, Mr. Chairman, I would like to finish by quoting the patron saint of economists. This point is the matter of the successors who will follow me in appearing before you, praying for a whole variety of amendments and changes in the bill. If I can quote Adam Smith, he said:

> The proposal of any new law or regulation of commerce which comes from this order, namely from businessmen and manufacturers, ought always to be listened to with great precaution and ought never to be adopted till after having been long and carefully examined not only with the most scrupulous but with the most suspicious attention.

So I would urge that upon you when you listen to the members of the "gang of five" who wish further to weaken this bill, which, as I said at the beginning, is already weak, although an improvement over what we have now. Thank you, Mr. Chairman. Thank you, members.

Le président: Merci, monsieur Stanbury.

A cause du grand nombre de sujets dont vous avez traités, on a presque doublé le temps initialement alloué. M. Ouellet posera la première question.

M. Ouellet: Merci, monsieur le président. J'apprécie que vous ayez permis à M. Stanbury de faire un exposé un peu plus long qu'à l'habitude. La qualité de son document, de quelque 100 pages, est très étoffé et mérite qu'on lui donne tout le temps voulu.

Je pense que ce document devra faire l'objet d'une étude attentive des membres du Comité. J'ose aussi espérer que le ministre lui-même lui portera une grande attention. Il contient une série de suggestions fort importantes pour améliorer sensiblement le projet de loi C-91.

Vous avez couvert tellement de points, monsieur Stanbury, qu'il m'est difficile, dans le temps qui m'est attribué, de vous poser toutes les questions que je souhaiterais. Je commencerai par la fin. Vous avez mentionné, à la fin de votre exposé, l'omission du ministre à traiter, dans son projet de loi, des conséquences du *Jabour Case*.

Je pense que vous avez parfaitement raison. À la suite de cette décision de la Cour suprême, il est maintenant évident qu'il y a un trou béant dans notre législation. Il faudrait

[*Translation*]

Nous sommes en effet en train de déréglementer une série de secteurs, ce que j'approuve en principe. M. Mazankowski doit déposer prochainement un projet de loi régissant les transports aériens, ferroviaires, maritimes et routiers, et ceci à la suite de son document de travail intitulé: *Aller sans entraves*.

Or, je crains qu'en cas de déréglementation partielle, et à la lumière de la décision rendue dans l'affaire Jabour, les entreprises ne soient assujetties ni à une réglementation directe de l'État ni aux dispositions de la Loi relative aux enquêtes sur les coalitions. Cette question, dont il n'est pas fait état dans le projet de loi, constitue une lacune importante, à mon avis.

Je voudrais, pour terminer, monsieur le président, citer le plus grand économiste de tous les temps, car après moi, toute une série de témoins comparaîtront devant vous pour préconiser toutes sortes d'amendements au projet de loi. Je vais donc, si vous me le permettez, vous citer Adam Smith, qui disait ce qui suit:

> La proposition de toute nouvelle loi ou réglementation commerciale de la part d'hommes d'affaires et de fabricants devrait toujours être examinée avec la plus grande circonspection et entérinée seulement après avoir été examinée avec soin avec une attention scrupuleuse et méfiante.

Ceci en guise de mise en garde, pour vous préparer à entendre les membres de la «bande des cinq» qui voudraient affaiblir un projet de loi qui, ainsi que je l'ai expliqué au début, ne pèche déjà pas par trop de rigueur, même s'il constitue un progrès par rapport à ce que nous avons actuellement. Merci.

The Chairman: Thank you, Mr. Stanbury.

Because of the great number of points which you raised, you ended up taking twice as much time as we had planned. Mr. Ouellet will now be the first questioner.

Mr. Ouellet: Thank you, Mr. Chairman. I appreciate the fact that you gave Mr. Stanbury more time than usual for his presentation. His document, more than 100 pages long, contains a great deal of material and merits a detailed study.

This document will have to be examined in depth by committee members. I hope that the Minister himself will take it under consideration as it contains all kinds of important suggestions to improve Bill C-91.

You have raised so many points, Mr. Stanbury, that it will be difficult for me in my allotted time to ask all the questions I had in mind. You mentioned at the end of your presentation that the bill does not refer at all to the Jabour Case.

You are quite right in saying that in view of the Supreme Court decision in this case, we have a major gap in the legislation. So, it is imperative that the government do

[*Texte*]

absolument que le gouvernement intervienne à cet égard. Vous avez mentionné le *Jabour Case* sans trop préciser de quoi il s'agissait. Pour informer les membres du Comité et ceux qui liront le procès verbal et le compte rendu des témoignages, il faudrait rappeler qu'il s'agit d'une cause impliquant un avocat de la Colombie-Britannique qui voulait publier ses tarifs et faire de la publicité pour annoncer ses services. Le barreau de la Colombie-Britannique s'y est opposé. Il a fallu aller en cour et la Cour suprême a reconnu qu'il s'agissait d'un service réglementé et que le barreau avait le droit d'empêcher un de ses membres d'avoir des tarifs différents, et de faire de la publicité pour annoncer ses services et ses tarifs.

Or, il m'apparaît évident, pour un nombre important d'organismes professionnels régis par des lois fédérales ou provinciales, qu'il pourrait y avoir des abus dans la fixation des prix, et ce au détriment des consommateurs. Et cela également, quant à l'admission de nouveaux membres dans ces organismes ou dans ces associations professionnelles, il pourrait y avoir des conflits. La loi fédérale devrait être beaucoup plus claire puisque la *Jabour Case* a créé cette incertitude.

• 1010

Une loi fédérale, comme le projet C-91, pourrait-il avoir une portée qui affecterait non seulement les organismes ou associations sous juridiction fédérale mais aussi les associations provinciales? Il y a un problème de juridiction constitutionnelle. Une loi fédérale peut-elle contraindre une agence commerciale provinciale de produits de la ferme, par exemple, ou une association professionnelle détenant une charte provinciale? Comment peut-on donner la suprématie à la loi fédérale? Comment amenderiez-vous le projet de loi C-91, pour redonner à la loi de la concurrence cette autorité qu'elle a perdue par décision de la Cour suprême?

Prof. Stanbury: You have raised a series of rather difficult points, Mr. Ouellet. I do not come before you as a constitutional lawyer, but as an economist.

I would point out, and I am sure you are fully aware, that in Bill C-42 and Bill C-13, in 1977, there was an effort to try to address some of these matters to deal specifically with the composition of the membership of these bodies that were delegated by the provinces or the federal government to regulate professions, occupations, or alternatively, marketing boards. It struck me that no one seriously challenged the constitutionality of that division. There was some discussion, but no one really said they were convinced it would be unconstitutional. Now, those were pre-charter days, and the rules now have changed, and it may be that the charter would provide a different interpretation.

The real concern I have is what happens when you delegate two private bodies, such as the bar association or the benchers—in this case a sub-group of the bar association—the authority to regulate under very general provisions in the provincial statute. They may tolerate or impose regulations which in fact go far beyond that which may have been intended by the legislature.

[*Traduction*]

something about it. However, in mentioning the Jabour Case, you did not go into any detail. I would mention, therefore, for the information of committee members and of those who will be reading the records, that this case concerned a British Columbia lawyer who wished to publish his rates and advertise his services. The British Columbia Bar Association opposed this move and, finally, the Supreme Court ruled that this concerned regulated service and that, therefore, the Bar was entitled to prevent one of its members from having different rates and from publicizing both his rates and his services.

It is quite obvious that a great number of professional organizations regulated either by federal or provincial legislation could be guilty of abusive price fixing to the detriment of consumers. There might also be conflicts in admitting new members in these organizations or professional associations. Federal legislation should therefore be much clearer in light of the uncertainty created since the Jabour Case.

Might not Bill C-91 have implications not only for associations coming under federal jurisdiction but for those coming under provincial jurisdiction? For example, could federal legislation be enforced on a provincial agricultural marketing board or a professional association holding a provincial charter? What must be done to give federal legislation precedence over provincial legislation? What would you do to amend Bill C-91 in order to give it back the teeth which it lost after the Supreme Court decision?

M. Stanbury: Vous venez de soulever des questions plutôt difficiles, monsieur Ouellet. N'oubliez pas que je suis un économiste, et non pas un spécialiste du droit constitutionnel.

Vous vous souviendrez certainement qu'en 1977, les Bills C-42 et C-13 se sont justement attaqués à ce problème de la composition des instances chargées par les provinces ou le gouvernement fédéral de réglementer certaines professions, occupations ou offices de commercialisation. À l'époque, personne n'a mis en cause la constitutionnalité de cette division. Il en a sans doute été question, mais personne n'a prétendu que c'était inconstitutionnel. Bien entendu, à cette époque, nous n'avions pas encore la charte et, depuis lors, les règles ont changé, et il se pourrait que la charte donne une autre interprétation.

La question se pose de savoir ce qui arrive quand une institution privée, tel le barreau, est autorisée à réglementer aux termes de dispositions fort générales dans une loi provinciale. Une institution pourrait, en pareil cas, tolérer ou imposer des règlements qui iraient bien au-delà de ce qui aurait été prévu par le législateur.

[*Text*]

In the United States you can only have the state-action exemption, as it is called, if there is what is called active supervision of that—let us take the occupational group, because it has been lawyers who have been involved in that particular situation—by an agency of the state. If you take the example in Bates and Osteen versus the State of Arizona, the state delegated to the Supreme Court of Arizona the responsibility to supervise the advertising by lawyers. And so there was a very clear delegation as to what the criteria were, and there was clearly a state public agency engaged in that supervision.

Now contrast that to a very broad statutory provision in the Legal Professions Act in British Columbia, which in turn delegates to the benchers, virtually all of whom, by the way, are lawyers who are members of the group being regulated, to regulate almost whatever they wish. They in turn, in this case of Mr. Jabour, sought to prevent him from advertising his fees.

I see a very profound distinction between those two cases. The Supreme Court of Canada did not in Jabour. And so what I fear is we are in effect going to give up enormous autonomy to those so-called self-regulating groups, whether they be marketing boards or whether they be the legal profession or any other regulated occupation, and put them beyond the reach of the Combines Investigation Act. The result would be that we are going to have what amounts to private price fixing under, admittedly, a very broad mandate by a provincial government. Now whether a federal effort to try to constrain that *à la* Bill C-42 and Bill C-13—I think they were section 4.1, if I recall, and section 4.2—would be constitutional today, I do not know. I would have to defer to legal experts to give you advice on that.

What I am trying to do is point out the problem, say that Parliament has really not addressed itself to this issue, and in particular get Parliament to look forward to the day of substantial deregulation, but will probably not go to the point of totally deregulating the industry and therefore perhaps bringing it under the Combines Investigation Act or its successor, the Competition Act.

• 1015

What I say is if there is some part remaining, some shred remaining, will the firms in that industry or the individuals be exempt from the act? And I fear that under *Jabour* they will be and then we will have the problem that neither public regulation will control them, nor competition policy. I would say that is a very undesirable circumstance.

In the United States, for example, there has been a very clear effort made to move the transition from regulation to competition policy, or anti-trust policy as they call it. I refer you to the airlines example. They have actually prosecuted a couple of airline executives who got together on the telephone to discuss raising the fares after a price war. I do not think we could do that in Canada, under the *Jabour* provision, as I read it. I could be wrong, but I am trying to raise this question for this committee and for Parliament generally.

M. Ouellet: Merci.

[*Translation*]

Aux États-Unis, seules les agences de l'État sont habilitées à réglementer les associations de ce genre, comme celles des avocats notamment. Ainsi, dans l'affaire Bates et Osteen contre l'État de l'Arizona, l'État a délégué à la Cour suprême de l'Arizona le droit de surveiller la publicité faite par les avocats. Donc, la délégation de pouvoirs était tout à fait claire, et c'était à l'État de contrôler les agissements de l'association en question.

Par contre, les dispositions très générales de la Legal Professions Act de la Colombie-Britannique permettent aux membres du barreau—qui, tous, pratiquement, font partie de l'association réglementée—de réglementer en fait ce qu'ils veulent. Dans l'affaire Jabour, l'association a essayé d'empêcher M. Jabour de faire de la publicité pour ses honoraires.

Ce sont deux affaires tout à fait différentes. Après la décision de la Cour suprême, nous risquons de donner carte blanche à ces associations qui se réglementent elles-mêmes, qu'il s'agisse d'offices de commercialisation, d'associations de professions libérales, ou autres, si bien qu'elles échapperaient aux dispositions de la Loi relative aux enquêtes sur les coalitions. Des associations privées seraient de ce fait autorisées à fixer leurs barèmes de prix, et ce, en application des lois provinciales. Je ne sais pas si, actuellement, les article 4.1 ou 4.2 des Bills C-42 et C-13 seraient déclarés constitutionnels ou non. Il faudrait vous adresser à des experts.

Je voudrais simplement insister sur le fait que le Parlement ne s'est pas penché sur cette question, et même si la déréglementation va sans doute connaître des progrès sensibles à l'avenir, il est peu probable que ce secteur soit entièrement déréglementé et qu'il soit donc assujetti aux dispositions de la Loi relative aux enquêtes sur les coalitions ou de la nouvelle loi sur la concurrence.

S'il ne reste ne fût-ce qu'une parcelle de réglementation, cela voudra-t-il dire que ce secteur ne sera pas assujetti aux dispositions de la loi? C'est ce qui est à craindre depuis l'affaire Jabour, et dans ce cas, il ne serait assujetti à aucune réglementation, quelle qu'elle soit, ce qui n'est certainement pas souhaitable.

Aux États-Unis, par contre, on a cherché à faire le pont entre la réglementation et les lois anti-trust. Ainsi, dans le cas des compagnies d'aviation, des poursuites ont été intentées contre deux PDG de compagnies d'aviation qui ont discuté par téléphone de la possibilité de relever les tarifs aériens à l'issue d'une guerre des prix. Or, je ne pense pas que ce soit possible au Canada depuis l'affaire Jabour. Je me trompe peut-être, mais, quoi qu'il en soit, c'est une question que je voulais signaler à votre attention.

Mr. Ouellet: Thank you.

[*Texte*]

En lisant votre document hier soir, j'ai constaté, à plusieurs endroits dans le texte, que vous vous plaignez de l'imprécision du projet de loi C-91. Je l'ai constaté et cela m'amène certains points d'interrogation sur l'interprétation que le tribunal ou les cours donneraient à cette loi. Je pense, en particulier, à une série de mots ou d'expressions utilisés dans le projet de loi C-91 qui peuvent prêter à différentes interprétations de la part des tribunaux.

Vous suggérez dans votre mémoire que la loi soit plus précise. Elle devrait, dans l'article du début, inclure une définition très claire d'un certain nombre de mots clés du projet de loi C-91. Cela me paraît assez important. Je me demande quels sont ces mots clés que vous trouvez les plus importants et je voudrais savoir si vous seriez prêt à aider ce Comité dans la définition de ces mots clés? Je ne sais pas dans quelle mesure vous pourriez nous aider dans ce travail de définitions que je crois absolument essentielles.

Prof. Stanbury: Thank you, Mr. Ouellet. It is quite clear that I have pushed hard, not just this time but in previous times, to get the drafters of the legislation to be more precise when they introduce new terminology, where at all possible. It is not that I distrust the tribunal, but I would like to save a lot of time and energy and I would like the will of Parliament to be clear to the tribunal or to the courts. I am not drawing any adverse inferences on that account.

I would be happy to go through and highlight some of those again, if you like. Yes, I would certainly be prepared to assist the committee in any way I could with that. I should point out, however, that at your request I was appointed to a committee in I think it was 1981 where we were trying to draft legislation in an earlier incarnation and there were long discussions with officials of the Department of Justice who resisted very strongly the idea of incorporating more formal definitions into the bill itself.

I do not know whether it is a philosophical concern or a matter of policy regarding the drafting of statutes and so on, but I can assure you that it is not just a question of a few people sitting down and coming up with definitions. I think there is a policy problem there and I cannot really say why they refused to do that. But if you like, I could spend a moment now and take a look at some of the provisions.

The first one I would raise with you, as I already have, is the matter of control and significant interest with respect to mergers. Now, control is defined already in section 80.(4). I do not see any problem with that. The problem is what does "significant interest" mean? In the brief, I point out that in the case of Brascan they have quite a number of interests in which they have 40-odd per cent. If you were to ask most people in the industry or in the financial community whether or not they have effective control, I think they would say yes.

• 1020

On the other hand, I give the example of Unigesco Inc., which just recently acquired 20% of Provigo. Now, according to *The Globe and Mail*, this is going to give the owner of Unigesco effective control. I do not know. My point is that significant interest could be 15% or 20% of the equity if the

[*Traduction*]

While reading your presentation last night, I noticed that you underlined the lack of precision in Bill C-91. This leads me to wondering how the courts might interpret this legislation. There are expressions used in Bill C-91 which might be variously interpreted by the courts.

You are suggesting that the bill should be more precise. It should at the beginning include a very clear definition of a number of key words which crop up throughout Bill C-91. What are these key words, and would you be prepared to help the committee in defining them?

M. Stanbury: Ce n'est pas la première fois que je fais un gros effort pour convaincre les rédacteurs d'un projet de loi de faire preuve de plus de précision lorsqu'ils introduisent une nouvelle terminologie. Ce n'est pas que je me méfie du tribunal, mais cela épargnerait du temps si le tribunal ou les tribunaux en général avaient une idée claire et précise de la volonté du Parlement.

Je suis tout à fait disposé à aider le Comité à effectuer ce travail. Je vous rappellerais toutefois que c'est à votre demande que j'ai été nommé en 1981 à un comité chargé à l'époque de rédiger un ancêtre du présent projet de loi. Or, les fonctionnaires du ministère de la Justice se sont fermement opposés à inclure des définitions plus précises dans ce projet de loi.

Je ne sais pas s'il s'agit d'une question de principe ou non; toujours est-il qu'il ne suffit pas que quelques personnes se réunissent pour essayer d'élaborer les définitions. J'ai l'impression que c'est une question de principe, car je n'arrive pas à comprendre pourquoi ils ont refusé d'inclure des définitions plus précises. Examinons, si vous le voulez bien, ces dispositions d'un peu plus près.

Commençons par la question du contrôle et de l'intérêt significatif en matière de fusion. L'expression «contrôle» est définie à l'article 80.(4), et cela ne pose aucun problème, à mon sens. Mais que signifie l'expression «intérêt significatif»? Par exemple, Brascan possède 40 p. 100 des actions de toute une série d'entreprises. Si vous demandez à n'importe qui dans les milieux industriels ou financiers si cela lui donne le contrôle effectif, je pense qu'il vous répondrait oui.

D'un autre côté, prenez l'exemple d'Unigesco Inc., qui vient d'acquérir 20 p. 100 de Provigo. Selon le *Globe and Mail*, cela donnera au propriétaire d'Unigesco Inc. le contrôle effectif. Je ne suis pas sûr. Je veux dire par là que 15 à 20 p. 100 des actions peuvent suffire pour contrôler une société, si le reste est

[*Text*]

rest of it is widely held. In light of the fact that the concept of effective control is defined in other statutes, particularly with respect to securities legislation, I would suggest that we could clarify this quite quickly by adopting something like that.

Now, I admit it is rather arbitrary and that all of them are. The question is: It may be arbitrary but clear, and I think that would be an improvement here. It could be on a reversible proposition; in other words, if you acquire 51%, there is legal control. It is not ambiguous. If you acquire what I have called effective control, which might be 20%-odd, you would then have the opportunity to rebut that and say no, I do not have control. Therefore, it is not a merger that would come within the provisions of the bill. I do not think it is beyond the wit of men and women to redraft this to make it clear.

A substantial lessening of competition—I do not think you can define that precisely. That is a judgment call. So I would say that anybody who thinks he can go much further there is being a little bit naive. That phrase, by the way, is used substantially in other jurisdictions; for example, section 7 of the Clayton Act uses it. The interpretation of that term in the United States has changed fairly substantially over time, and I think it has reflected the current theories and the current beliefs about what is right or wrong about corporate power. I would be quite happy to leave that phrase to the tribunal because I do not think we can go any better.

With respect to the efficiency defence, there the clarification is not so much of definition but of saying to the tribunal what priorities Parliament puts upon efficiency as opposed to lessening of competition. It is a judgment call; there is no technical way that can be handled by numbers or anything of that sort. But Parliament could say . . .

Let me just give you an historical example. In Bill C-256 the efficiency defence could be used only if the firms under review could show that at least part of the gains in efficiency were going to be passed on to consumers, you may recall. There is no such provision here. It seems to me that Parliament is indicating its priorities, that there is a difference in priorities there. I am not saying that we should adopt that; I am saying Parliament should decide and give instructions to the tribunal as to what values it wants the tribunals to adopt. The tribunal has to adopt a value—it cannot avoid it—in dealing with proposed section 68 of the bill.

When you come to the abuse of dominant position, substantial or complete control, Mr. Ouellet, earlier you tried to introduce a structural test, and the business community became extremely upset about that. There are ways of doing that by making it rebuttable. Now, as I say, in my view business has a certain degree of paranoia about such tests; nevertheless, on this point I happen to agree with the businessmen who ask: What does control mean in this context? Does it mean we have to be in agreement to adopt these practices, or does it mean that, by reason of conscious parallelism, we merely have adopted these practices which the tribunal

[*Translation*]

largement dispersé. Étant donné que le concept du contrôle effectif est défini dans d'autres textes de lois, particulièrement ceux concernant les valeurs, je pense qu'il serait possible de clarifier ce point très rapidement en prenant ces textes pour modèles.

Je reconnais que toute limite sera forcément arbitraire mais, au moins, elle sera claire et je pense que ce serait un progrès. On pourrait d'ailleurs prévoir un double seuil; autrement dit, si quelqu'un acquiert 51 p. 100, il prend contrôle juridique. Il n'y a là aucune ambiguïté. Quelqu'un acquiert ce que j'appelle le contrôle effectif, qui peut tourner autour de 20 p. 100, on pourrait lui donner l'occasion de réfuter l'affirmation et d'établir qu'il n'exerce pas le contrôle, et qu'il ne s'agit donc pas d'une fusion à laquelle cette loi s'applique. Je ne pense pas que la rédaction d'un texte dans ce sens dépasse les capacités intellectuelles des hommes ou des femmes.

En ce qui concerne la diminution sensible de la concurrence—je ne vois pas comment l'on pourrait définir cela précisément. C'est affaire de jugement. Quiconque pense pouvoir aller plus loin fait preuve de quelque naïveté. Cette phrase, d'ailleurs, figure à peu près dans les mêmes termes dans les législations étrangères, par exemple à l'article 7 du *Clayton Act*. L'interprétation de ces termes aux États-Unis a considérablement évolué dans le temps et a reflété les théories et les croyances du moment quant à ce qui est bien ou ce qui est mal en matière de pouvoir des sociétés. Je veux bien m'en remettre pour cette phrase à l'interprétation des tribunaux, car je ne pense pas qu'il soit possible de faire mieux.

En ce qui concerne la défense par invocation de l'argument de l'efficience, il ne s'agit pas tant de préciser la définition mais d'indiquer au tribunal quelle priorité le Parlement attribue à l'efficience, par opposition à la réduction de la concurrence. C'est affaire de jugement. Il n'existe aucun seuil technique que l'on puisse prescrire. Mais le Parlement pourrait dire . . .

Prenons un exemple puisé dans le passé. Dans le Projet de loi C-256, l'argument de l'efficience ne pouvait être invoqué que si les entreprises en question pouvaient établir que les gains en efficience seraient au moins partiellement répercutés sur le prix de vente au détail. Rien de tel ici. Il me semble que le Parlement indique ici ses priorités, qu'il y a là une différence de priorité . Je ne dis pas qu'il faille adopter cela, je dis que le Parlement devrait décider et donner des instructions au tribunal quant aux valeurs qu'il souhaite lui voir adopter. Le tribunal ne peut manquer d'adopter une valeur—il ne peut l'éviter—en interprétant le projet d'article 68 du projet de loi.

En ce qui concerne l'abus de position, de contrôle substantiel ou complet, l'État a déjà tenté d'introduire un critère structurel et cela a déclenché un tollé parmi les milieux d'affaires. Il y a un moyen d'y parvenir, à condition de prévoir une procédure de réfutation. Évidemment, comme je l'ai dit, les milieux d'affaires se montrent plutôt paranoiaques dès qu'il est question de ce genre de mesures; néanmoins, j'ai tendance à être d'accord ici avec ceux qui demandent: que signifie la notion de contrôle dans ce contexte? Cela signifie-t-il qu'il fallait que nous soyons d'accord pour adopter ces pratiques ou cela signifie-t-il que, par un parallélisme conscient, nous nous

[*Texte*]

subsequently finds collectively were dominant because the top four have 70% or 80% of the market—very common in this country—and the practices are parallel? What does Parliament intend? I think Parliament can say what it intends.

Earlier versions of this legislation, for example, required that the practices be closely parallel, I think, or closely similar or something like that. There was a phrase used . . .

Mr. Howie: Widespread market or something like that?

Prof. Stanbury: That was in a different provision, I think. But certainly there was more detail as to what was intended. So we can quibble about the words, but when there is a kind of vacuum, I think we ought to try to occupy it and specify what we mean, or what you mean as legislators.

Under defining the market in the abuse thing, I have drawn this distinction between class or species of business. Now, why is that in there? I can tell you. The draftsman simply took the old section 2 and zapped it in there, and that goes back to 1935. I am not necessarily saying old things are bad, but then why would you then use "market" later on? Now, there is going to be enough dispute about what is the relevant market, and there has to be a dispute about that; that is not avoidable. But why do we use two different terminologies here? Do we mean the same thing? I say to my students if they mean the same thing then say so and be precise where possible. That point, I think, has been raised by businessmen and they are quite correct on that.

• 1025

Why do we use the word "object" with respect to anti-competitive practices? Do we mean intent? I would argue that only natural human beings can form the concept of intent. I do not think a practice can have an object. I think human beings can have an object. It is just absolutely silly to think the practice can have an object independently of the human beings who direct the corporation's activities or actually perform the acts.

Why are we using that terminology? If the purpose is to create a paradise for lawyers, then why do we not say so? They call the charter a full employment act for lawyers. This may be the next . . .

An hon. member: It has the effect . . .

Prof. Stanbury: I do not want to impute evil tendencies in that regard.

Again, what is a practice in anti-competitive acts? The Supreme Court said that street solicitation had to be pressing and persistent. Do you have to be pressing and persistent here? What does it mean? There is a meaning to that in other sections of the proposed act. There was not even any clarifica-

[*Traduction*]

sommes contentés d'adopter ces pratiques, le tribunal jugeant ultérieurement que nous étions collectivement dominants parce que les quatre principaux concurrents détenaient 70 ou 80 p. 100 du marché—ce qui est très courant dans notre pays—et qu'ils suivent des pratiques parallèles? Que souhaite le Parlement? Je pense que le Parlement peut indiquer ce qu'il souhaite.

Les versions antérieures de cette législation, par exemple, exigeaient que les pratiques soient étroitement parallèles, ou étroitement similaires, ou quelque chose comme cela. Il y avait là une phrase . . .

M. Howie: Marché largement réparti, ou quelque chose comme cela?

M. Stanbury: Cela se trouvait dans une disposition différente, je crois. En tout cas, le texte était beaucoup plus précis. On peut se disputer sur les mots mais lorsqu'il y a un vide complet, je pense qu'il faut tenter de combler et d'indiquer ce que l'on veut dire, ou ce que vous voulez dire en tant que législateurs.

Dans la définition du marché de la disposition sur l'abus, on établit cette distinction entre les catégories d'entreprises. Pour quelle raison? Je peux vous le dire. Les rédacteurs ont simplement pris l'ancien article 2 et l'ont réinséré ici, et il remonte à 1935. Je ne dis pas que tout ce qui est ancien est mauvais, mais pourquoi reprendre le terme «marché» plus loin? Il va déjà y avoir suffisamment de différends sur la question de savoir ce qu'est le marché concerné, et cela est inévitable. Pourquoi employer deux termes différents ici? Veut-on dire la même chose? Je dis toujours à mes étudiants que s'ils veulent bien la même chose, alors qu'on le dise de la même façon et que l'on soit aussi précis que possible. Je pense que les hommes d'affaires ont fait ressortir cela et ils ont tout à fait raison.

Pourquoi utiliser le mot «object» dans la version anglaise, à l'égard des agissements anti-concurrentiels? Entend-t-on par là l'intention? Je dirais que seul des êtres humains naturels peuvent avoir une intention. Je ne pense pas qu'un agissement puisse avoir une intention, seul des êtres humains peuvent avoir des intentions. Il me paraît absolument ridicule de penser qu'un agissement puisse avoir une intention indépendamment de l'être humain qui dirige les activités de la société ou qui accomplit effectivement les agissements.

Pourquoi employer ce terme? Si l'on veut créer un paradis pour les avocats, pourquoi ne pas le dire? On a qualifié la charte de lois de plein emploi des avocats. Celle-ci sera peut-être la suivante . . .

Une voix: Cela a pour effet . . .

M. Stanbury: Je ne veux imputer nulle intention . . .

Encore une fois, qu'est-ce qu'un agissement, dans la législation sur la concurrence? La Cour Suprême a tranché que la sollicitation de rue devait être pressante et persistante. Faut-il ici que les agissements soient pressants et persistants? Qu'est-ce que cela veut dire? D'autres articles donnent un sens

[*Text*]

tion in the blue book saying we expect that the courts will follow that interpretation. Fine. Other parts of the proposed act refer to engaging in a policy. Is a policy the same as a practice? I do not know.

Mr. Ouellet: It was your point that we cannot expect the court to follow government intentions, because there is a tendency in court not to refer to evidence that has been given before a parliamentary committee or even debates of the House of Commons. Therefore, the only way to really have a direct influence on the court is to be as precise as possible in the law and therefore define whatever key words that we are going to use. Is this what you wanted to say?

Prof. Stanbury: Yes, because there is a complete difference in policy here between the United States and Canada. In the United States it is legitimate for a court or a tribunal to go back and look at the debates of the House of Representatives or the various congressional committees and so on. Here it is not deemed appropriate, and I will give you a good example of where the court went wrong on this point.

I was called to testify at the Jabour case, at the trial level, and I pointed out that very clearly from the parliamentary committee hearings and by statements of the Minister in the House—this gentleman, when he was the Minister—that stage one was designed to include all services, including professional services. Yet we had the statement by the court that Parliament never intended that.

The Minister gave repeated speeches. The officials gave speeches. Opposition members stood in the House during the debate on second reading and said this is a wonderful and important part of the bill—namely, that it is going to cover all of these services, including lawyers' services. Yet we have the court saying that is not what Parliament intended. My job in front of them was to review the history for them and say I am afraid you have made a mistake on this point. But yes, my intent is if Parliament wants to make it clear, do it in the bill.

Mr. Ouellet: I think I do not want to abuse my time. I have many more questions, but I will pass for the time being to allow some of my colleagues to ask questions.

Le président: Je comprends, compte tenu de votre qualité de recherchiste et de votre profondeur au niveau de la documentation, qu'il est difficile pour vous de répondre dans un délai très court.

Je vous demanderais quand même d'accélérer le débit de vos réponses afin de permettre à plus de membres de poser des questions. Je donne la parole à monsieur Howie.

Mr. Howie: Thank you very much. Professor Stanbury, I want to thank you very much for coming here today. I think that I have learned more from you in the past 10 or 15 minutes than I have in a very long period of time, and I am very grateful to you for it. If you were not included in the initial group that helped draft the act, then someone has marbles in his head.

[*Translation*]

à cette notion. Il n'y avait même pas de clarification dans le livre bleu qui aurait indiqué aux tribunaux quelle interprétation donner. Bien. D'autres parties du projet de loi parlent de suivre une politique. Est-ce qu'une politique est la même chose qu'un agissement? Je ne sais pas.

M. Ouellet: Vous disiez que nous ne pouvons pas attendre des tribunaux qu'ils suivent les intentions du législateur car ils ont tendance à ignorer les témoignages donnés devant un comité parlementaire ou même les débats intervenus à la Chambre des Communes. Par conséquent, la seule façon d'influencer directement les jugements des tribunaux est de rédiger un texte de loi aussi précis que possible et de définir toutes les notions clés que l'on emploie. Est-ce là ce que vous cherchez à nous faire comprendre?

M. Stanbury: Oui, car il y a une différence énorme à cet égard entre la coutume des tribunaux américains et canadiens. Aux États-Unis il est tout à fait légitime pour un tribunal de consulter les débats à la Chambre des Représentants ou dans les divers comités du congrès etc. Ici cela ne se fait pas et je vais vous donner un bon exemple d'erreur d'un tribunal qui est due à cela.

J'ai été appelé à témoigner dans l'affaire Jabour, en première instance, et j'ai établi très clairement, en me fondant sur les travaux du comité parlementaire et sur les déclarations du ministre à la chambre que l'intention du législateur était d'inclure tout les services, et notamment les services professionnels, dans la phase un. Pourtant, le tribunal a tranché que le Parlement n'en avait jamais eu l'intention.

Le ministre a fait maints discours sur le sujet, les hauts-fonctionnaires aussi. Les députés de l'opposition sont intervenus à la Chambre en deuxième lecture et ont dit que cela était un élément merveilleux et essentiel du projet de loi, que celui-ci allait couvrir tout les services, y compris les services des avocats. Or, nous avons là un tribunal disant que ce n'était pas l'intention du Parlement. Il m'a fallu faire l'historique de cette mesure devant le tribunal et lui dire qu'il s'était trompé là-dessus. Donc, oui, le Parlement doit préciser sa volonté dans le texte de la loi.

M. Ouellet: Je ne veux pas prendre trop de temps. J'ai encore beaucoup d'autres questions mais je vais m'en tenir là pour le moment, afin de permettre à certains de mes collègues de poser également des questions.

The Chairman: I appreciate that, being a researcher and having very extensive knowledge, it is difficult for you to provide short answers.

However, I would ask you to try to be more concise when answering so as to allow more members to ask questions. I give the floor to Mr. Howie.

M. Howie: Merci. Professeur Stanbury, merci infiniment d'être venu aujourd'hui à notre Comité. J'ai énormément appris en vous écoutant durant ces 10 ou 15 dernières minutes et je vous en suis extrêmement reconnaissant. Si vous ne faisiez pas partie du groupe de rédacteurs de cette loi, c'est que quelqu'un n'a pas toute sa tête.

[*Texte*]

I would like to ask you a few questions if I could. Do you feel that the decriminalization put into this bill is going to improve the abuse of dominance provision over the existing criminal monopoly provision?

Prof. Stanbury: Yes, very substantially. That does not mean that I think that the current provisions are adequate. I have obviously been critical of them. But in switching from criminal to civil there is a substantial improvement, as it is even more so with respect to the merger section.

• 1030

Mr. Howie: How do you feel we could best distinguish between anti-competitive acts and aggressive pro-competitive behaviour? This has been a bit of a problem for me as I read the act. I appreciate the comments you made on it. Perhaps you could help me with that problem.

Prof. Stanbury: I think the only way the tribunal can draw that distinction is by looking at the context in which they occur. In my notes I noted, as the act will provide, that you are going to have to take a look at the number of firms in their relative market position, the dominance or substantial complete control. You are going to have to take a look whether they are making it a practice, that it is not just simply an episodic kind of thing. There is a provision in there regarding object or intent, or intent or design or purpose, etc., and then there is the question of the adverse effects.

As I say, I am critical of putting in the intent provision. I think you could put it in the aletrnative, the way we have now in predatory pricing. I think it is the combination of those things that draws the distinction. So in listing the practices . . . The practices themselves may be pro-competitive. Critics have said this, and I completely concur. I can imagine the circumstances I have indicated here with respect to fighting brands. In a stodgy market, if a new aggressive competitor comes in and says look, we are going to go in where the margins are the biggest, we are going to cut the price, we are going to lower the service level, we are going to provide something we think consumers will respond to and force prices down, that is terrific.

Now, it can be used in a different context as I have described here to have highly adverse consequences. There is no way out; the tribunal must look at the range of facts, keeping in mind this context argument, and then make a judgment. That cannot be avoided.

Mr. Howie: I think you mentioned parallelism is as one of the other aspects there.

Prof. Stanbury: My problem comes in the multi-firm case. Parallelism is extremely common. In an oligopolistic structure it is rational behaviour. Now, you have to distinguish between parallelism and agreement, or even the capacity to infer the existence of an agreement, which is dealt with in section 32. What I would be worried about here is if mere parallelism, without anything else, would constitute control or effective

[*Traduction*]

J'aimerais vous poser quelques questions. Pensez-vous que la décriminalisation de l'abus de position dominante dans ce projet de loi constitue un progrès par rapport au texte actuel sur les monopoles, qui en fait une infraction criminelle?

M. Stanbury: Oui, très sensiblement. Cela ne signifie pas que je juge ces dispositions adéquates. Je les ai manifestement critiquées. Par contre, le fait de passer d'une sanction pénale à une sanction civile constitue une amélioration considérable, et ce l'est encore davantage dans le cas des fusions.

M. Howie: Comment pensez-vous que nous pourrions le mieux distinguer entre les agissements anti-concurrentiels et le comportement pro-concurrentiel agressif? Cela me pose quelques problèmes, lorsque je lis la loi. J'apprécie ce que vous en avez dit et vous pourriez peut-être résoudre mon problème.

M. Stanbury: Je pense que la seule façon dont le tribunal puisse établir cette distinction sera de se pencher sur le contexte dans lequel ces agissements interviennent. J'ai lu dans mes notes que le tribunal va devoir tenir compte, comme d'ailleurs la loi le prévoit, du nombre d'entreprises présentes dans un marché donné, les positions dominantes ou de contrôle substantiel qui existe. Il devra déterminer si les agissements en question sont courants ou simplement quelque chose d'épisodique. Il y a également les dispositions concernant l'intention ou le but, etc. et il y a ensuite le critère des conséquences préjudiciables.

Comme je l'ai dit, je suis opposé à l'insertion du critère d'intention. Je pense que l'on pourrait reprendre ici les mêmes critères que dans le cas des prix déloyaux. C'est la combinaison de tous ces facteurs qui permet d'établir les distinctions. En faisant donc la liste des agissements . . . les agissements en eux-mêmes peuvent être pro-concurrentiels. Certaines critiques l'ont déjà fait ressortir et je suis tout à fait d'accord. On peut imaginer toutes sortes de circonstances, comme je le dis ici dans mon exemple des marques commerciales concurrentes. Vous pouvez avoir un nouveau concurrent très agressif se présenter sur un marché déjà bien tenu, livrer concurrence sur les produits où les marges sont plus fortes, couper les prix, réduire le niveau de service, offrir quelque chose que les consommateurs vont bien accueillir et contraindre ainsi à une chute des prix; cela est parfait.

Mais, la même chose dans un contexte différent pourrait avoir des conséquences extrêmement néfastes. Il n'y a pas d'issue: le tribunal doit partir des faits, se pencher sur le contexte avant de se faire une opinion. C'est inévitable.

M. Howie: Je pense que vous avez mentionné le parallélisme comme l'un des critères.

M. Stanbury: Le problème se pose dans le cas de firmes multiples. Le parallélisme est chose extrêmement courante. Dans une structure oligopolistique, c'est un comportement rationnel. Evidemment, il faut distinguer entre le parallélisme et l'entente, ou même la possibilité de déduire l'existence d'une entente donnée à l'article 32. Là où je m'inquièterais c'est si le parallélisme, sans autre agissement, constituait le contrôle ou

[*Text*]

control the way it is described here, substantial or complete control. If Parliament intends that, then it should say so. That will bring us back to the fight that occurred on C-13 and C-42. There it said that it had to be closely similar and it said that parallelism was sufficient.

I personally do not have as much of fear about that as say businessmen do, but then I am not going to be personally subject to the act. So people can legitimately disagree about it. What I worry about is that it is so open that the tribunal could say we will take "control" to be "agreement". Well, I am not sure Parliament intended that. If Parliament intends something else it should say so, and narrow the scope of discretion. There is already plenty of discretion here, and necessary discretion for the tribunal to decide, as I say, the contextual question, whether on balance it constitutes a substantial lessening.

Mr. Howie: That was my next question. But before I get on to that, I gather that a more precise and better articulated definition would be a major step in the direction you are advocating to clarify this situation.

Prof. Stanbury: Yes. By the way, I think we can learn by looking at the previous bills. One of the things of having gone through this so many times is that actually some good ideas have been dropped, and I think we might go back with profit and look at those.

Mr. Howie: Now, in respect to "unduly" lessening competition that you mentioned, do I understand you correctly? Would you remove "unduly" entirely and replace it with the "per se" approach?

Prof. Stanbury: Yes.

Mr. Howie: Completely?

Prof. Stanbury: Completely. Excuse me. I should clarify that a bit with respect to three types of agreements essentially. I would adopt the approach proposed by Mr. Ouellet in 1981, in his document called *A Framework for Discussion*. Essentially it says that if it is a garden-variety price fixing, market sharing, or entry-barring agreement, we will adopt a "per se" approach to those. Now, obviously that is subject to a diminuous provision. We are not worrying about two newsboys in Pouce Coupe—that kind of argument. The legal community raises it. It is just a total red herring.

With respect to all other types of agreements, you would proceed the way you do now; namely, the "unduly" test would prevail. It is ordinary price fixing or market sharing; there is no social redeeming value to these agreements, and they should be struck down.

The U.S. has simply followed this practice since the 1890s. I do not see why we cannot move 85 years later to adopt the same approach.

Mr. Howie: You mentioned the Sherman bill, I think, in your notes that you gave us. I am thinking of self-dealing and conflict of interest that could result from non-financial institutions controlling or taking over financial institutions. Do

[*Translation*]

le contrôle effectif comme il est décrit ici, le contrôle complet ou substantiel. Si c'est ce que le Parlement souhaite, alors il doit le dire. Cela nous ramènerait à la bataille qui est intervenue au sujet des projets de loi C-13 et C-42 qui stipulaient que le parallélisme était suffisant.

Personnellement, je n'y suis pas autant opposé que les hommes d'affaires, mais évidemment je ne serai pas personnellement touché. Il est donc légitime que l'on y soit opposé. Ce qui m'inquiète c'est que la définition est si vague que le tribunal pourrait assimiler le «contrôle» à une «entente». Je ne suis pas certain que le Parlement le souhaite. Si le Parlement souhaite autre chose, il doit le dire et réduire l'attitude du tribunal. Le tribunal a déjà énormément de latitude dans toute cette question du contexte pour décider s'il y a diminution sensible.

M. Howie: C'était justement ma prochaine question. Avant d'y venir, je suppose qu'une définition plus précise et mieux articulée constituerait une amélioration majeure, dans le sens d'une plus grande clarté que vous souhaitez.

M. Stanbury: Oui. D'ailleurs, on pourrait prendre modèle sur les projets de loi précédents. Avec toutes ces modifications successives, on a fini par laisser tomber quelques bonnes idées et je pense que l'on pourrait utilement les reprendre.

M. Howie: Maintenant, en ce qui concerne la «réduction indue» de la concurrence que vous avez mentionnée, vous avez bien compris? Vous supprimeriez entièrement «indue» pour y substituer l'approche «en soi»?

M. Stanbury: Oui.

M. Howie: Complètement.

M. Stanbury: Complètement. Veuillez m'excuser. Il faudrait que je précise un peu cela concernant les trois types d'entente. J'adopterais l'approche proposée par M. Ouellet en 1981, dans son document intitulé *Cadre de discussions*. Essentiellement, il y proposait l'adoption de l'approche «en soi» dans les cas de partage de marché ou d'obstacles à l'entrée sur le marché d'un concurrent. Evidemment, le critère serait celui d'une diminution de la concurrence. On ne s'inquiéterait pas ici des deux livreurs de journaux de Pouce Coupe, ni de ce genre de situation. C'est un argument que les juristes invoquent, mais il est tout à fait fallacieux.

En ce qui concerne tous les autres types d'entente. on procèderait comme à l'heure actuelle, à savoir que le critère du caractère «indu» s'appliquerait. Ordinairement, il intervient dans les cas ordinaires de fixation du prix et du partage du marché, entente qui n'a aucune valeur sociale rédemptrice et qui doivent donc être bannis.

Les États-Unis ont suivi cette pratique toute simple depuis les années 1890. Je ne vois pas pourquoi, 85 années plus tard, nous ne pourrions pas en faire autant.

M. Howie: Vous avez mentionné la loi Sherman dans les notes que vous avez distribuées. Je songe aux transactions intéressées et aux conflits d'intérêt qui pourraient résulter du contrôle d'établissements financiers par des sociétés non

[*Texte*]

you feel this type of thing should be dealt with under this act, or under legislation dealing with regulatory reform in the financial sector?

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Prof. Stanbury: I certainly think it may be preferable to deal with it separately. I want to distinguish between the problem of conglomerates in general, which may involve financial and non-financial. If you like, I can go through a process I think Parliament might want to consider, which might involve the use of the tribunal but in a different context than with respect to mergers.

I think the matter of self-dealing and Chinese walls and all that problem should be dealt with perhaps better in the financial legislation, except that when you have these take-over possibilities involving conglomerates then you are going to have a problem of sort of division of labour. Which body is going to be responsible? That will have to be clarified.

My concern is that a number of the things people are discussing will amount to what I would call private regulatory procedures, rather than public ones. My particular concern is to see that we include in this bill or in another one as part of the overall changes an opportunity for a serious public review and assessment of the large conglomerate mergers. I can sketch that for you if you like.

Here is a general approach with respect to conglomerates. First a new section of this act or a new act would require some kind of a threshold for review. In other words, we are not talking about nickel-and-dime operations; we are talking very large situations. So some kind of a threshold with respect to sales or assets or number of companies involved, something of that sort.

Second, Parliament needs to establish a set of criteria against which to assess those mergers. Let me emphasize that the criteria proposed in the bill would be totally inadequate, the reason being that many of these things do not involve direct competion or vertical relationships. That is the definition of a conglomerate. But I think there are quite a number of criteria that Parliament would want to think about in this regard.

Third, in my view it needs a public body to examine the evidence, to hold a hearing, to call forth executives, to ask experts to testify and so forth, to assess whether or not the merger should go forward. As I say, a public body. If you wish to delegate that to the competition tribunal, I think that would be a logical thing to do. But they would be operating under either a separate act, or separate part of the act with a separate set of criteria regarding conglomerates.

Fourth, in my view this body should make a public report to Parliament. You could have a variation here and say it should be without recommendations, merely assess the likely consequences of a conglomerate against the criteria, or it could be asked to make a recommendation. That is a matter of taste

[*Traduction*]

financières. Pensez-vous qu'il faille prohiber ce genre de choses dans cette loi ou dans le cadre de la législation réformant la règlementation du secteur financier?

M. Stanbury: Je pense qu'il serait préférable de le faire séparément. Il faut distinguer entre le problème des conglomérats en général, qu'ils contôlent ou non des groupes financiers. Si vous voulez, je peux vous décrire un processus qui intéresserait peut-être le Parlement, qui fait intervenir un tribunal mais dans un contexte différent que dans le cas des fusions.

Je pense qu'il vaudrait mieux traiter de la question des transactions intéressées et des murs chinois et ce genre de choses dans la législation financière, sauf que lorsque vous avez ces prises de contrôle de la part de conglomérats, vous aurez un problème de juridiction. Quel tribunal sera compétent? Il faudra le préciser.

Le problème c'est que les mesures que l'on envisage seraient ce que j'appelle des procédures réglementaires privées, plutôt que publiques. Ce qui compte à mes yeux, c'est d'inclure dans ce projet de loi, ou dans un autre faisant partie de la réforme d'ensemble, la possibilité d'un contrôle de l'État sur les grandes fusions d'entreprises. Je peux vous faire une esquisse, si vous le souhaitez.

Voilà donc quelle pourrait être l'approche générale à l'égard des conglomérats. D'abord, un nouvel article de cette loi, ou une loi nouvelle, établirait un seuil à l'autorisation administrative. Autrement dit, il ne s'agit pas de scruter toutes les petites fusions, mais uniquement les fusions de grosses sociétés. Il faudrait donc prévoir un seuil, selon le chiffre d'affaires ou selon l'actif des sociétés concernées, quelque chose de cet ordre.

En deuxième lieu, le Parlement devrait adopter un ensemble de critères d'évaluation de ces fusions. Je dois vous dire tout de suite que les critères contenus dans ce projet de loi seraient tout à fait inappropriés, la raison étant que la plupart de ces fusions ne mettent pas en jeu la concurrence directe ni des relations verticales. Cela est la définition du conglomérat. Je pense qu'il y a toute une série de critères que le Parlement pourrait adopter à cet égard.

Troisièmement, à mon sens, il faudrait instaurer un organisme public qui procèderait à l'examen, tiendrait des audiences, convoquerait les dirigeants, demanderaient des avis d'experts, etc. avant d'autoriser ou de refuser une fusion. Il faudrait que ce soit un organisme public. Si vous voulez déléguer cette fonction au tribunal de la concurrence, cela me paraîtrait assez logique. Mais il faudrait qu'il applique alors une loi distincte, ou une partie distincte de la même loi, énonçant un ensemble distinct de critères intéressant les conglomérats.

Quatrièmement, cet organisme devrait être tenu de faire publiquement un rapport au Parlement. On pourrait introduire une variation, que ce rapport ne contienne pas de recommandations et se contente d'évaluer les conséquences probables d'une fusion, à la lumière des critères; on pourrait également

[*Text*]

and so on. Finally, the Cabinet would decide, having had the public report, and the Minister responsible would make a statement in the House explaining the reasons for the decision.

There is obviously much more detail needed, but there is a sketch of a procedure which I think would be workable. Ultimately, I think it has to boil down to the government of the day making a judgment call on these matters, because we are dealing with fundamental value judgments. How much power should be in the hands of which individuals? Should people be allowed to have these extensive linkages between the financial and the non-financial community? That is a judgment call. I think that should be up to Parliament—or in this case the government of the day—and then accountable to Parliament.

Mr. Howie: I read in Richard Gwyn's column—and I am not being commercial by mentioning his name—his suggestion that over half of the stocks traded on the Toronto Stock Exchange were owned by five Canadian families, which ties in with what you have just said. It raises a question that maybe it is desirable, maybe it is not, but maybe we should take a look at it. I do not know whether this bill is the forum or not.

Prof. Stanbury: This bill cannot look at it. That is the first thing.

Mr. Howie: Right.

Prof. Stanbury: On page 11 of my brief, I provided you some more data on aggregate concentration. Just to give you a statistic, in 1982 the largest 100 non-financial enterprises accounted for 38.5% of all sales in the Canadian economy.

Mr. Howie: Then, of course, in Canada . . .

Mr. Ouellet: I have a point of clarification. You say this bill cannot. What do you mean by that? This bill does not . . .

Mr. Howie: He mentioned there was a section he would have to put in it to enlarge it. As it now exists, it cannot look at this type of thing. It looks at competition, not concentration.

I did not mean to answer your question, sir. Maybe you had better . . .

Mr. Ouellet: No, no, no. I think it is a very important question. I would like the witness to elaborate, because I think the answer he is giving you is an important one.

• 1040

Are you saying that the competition law does not deal with concentration?

Prof. Stanbury: It does within specific industries. It does not address conglomerate or overall concentration. This is what economists call "macro-concentration": the fraction of output, say, accounted for by the largest 50 or 100 firms across the economy.

[*Translation*]

lui demander, au contraire, d'inclure une recommandation, cela est question de préférence. Enfin, le Cabinet trancherait, aux vues du rapport du tribunal et le ministre responsable ferait une déclaration à la Chambre expliquant les raisons de sa décision.

Il reste évidemment encore pas mal de détails à régler, mais voilà donc une esquisse d'une procédure possible. Finalement, ce sera le gouvernement qui devra trancher sur ces questions, car ce qui est en cause ce sont des jugements de valeur fondamentaux. Quel pouvoir faut-il donner à qui? Faut-il permettre ces rapports intimes entre sociétés financières et sociétés non financières? Cela est affaire de jugement. Je pense qu'il incombe au Parlement de décider—ou, en l'occurrence, au gouvernement du moment, responsable devant le Parlement.

M. Howie: J'ai lu dans la rubrique de Richard Gwynn—et ce n'est pas pour lui faire de la publicité que je mentionne son nom—que plus de la moitié des actions négociées à la Bourse de Toronto sont détenues par cinq familles canadiennes, ce qui amène à se poser les questions que vous venez d'indiquer. Peut-être est-ce une bonne chose, peut-être est-ce une mauvaise chose, en tout cas, il faut y réfléchir. Je ne sais pas si ce projet de loi constitue le bon cadre ou non.

M. Stanbury: Ce projet de loi ne peut être un cadre de cette réflexion. Voilà la première chose.

M. Howie: Oui.

M. Stanbury: À la page 11 de mon mémoire, je vous donne quelques données sur la concentration. Pour vous citer un chiffre, en 1982, les 100 entreprises non financières les plus grosses cumulaient à elles seules 38,5 p. 100 du chiffre d'affaires de toute l'économie canadienne.

M. Howie: Évidemment, le Canada . . .

M. Ouellet: Une précision. Vous dites que le projet de loi ne peut pas. Qu'entendez-vous par là? Ce projet de loi ne . . .

M. Howie: Il disait qu'il faudrait ajouter une disposition pour en élargir la portée. À l'heure actuelle, le projet de loi n'est pas applicable à ce genre de choses puisqu'il porte sur la concurrence, et non sur la concentration.

Excusez-moi, monsieur, je ne voulais pas répondre à votre question. Peut-être voulez-vous . . .

M. Ouellet: Non, Non. Je pense que c'est une question très importante. J'aimerais que le témoin précise sa pensée car je pense que la réponse qu'il vous donne est de très grande importance.

Vous dites que la législation sur la concurrence ne traite pas de la concentration?

M. Stanbury: Sauf dans certains cas précis. Dans l'ensemble, elle ne traite pas des conglomérats, de la concentration d'ensemble. C'est ce que les économistes appellent la «macro-concentration»: la partie de la production totale accaparée par les 50 ou les 100 entreprises les plus grosses d'un pays.

[*Texte*]

If we have a merger involving Chrysler and Ford, this bill will address it, because there is competition in the automobile industry. Obviously you take into account imports and so forth. But if we have Chrysler buying Brascan, unless they are in competition in one industry at least, or there is a vertical relationship—that is to say, one firm buys from another or sells to another—it cannot be addressed in Bill C-91. So if you take the Imasco-Genstar deal, as I point out in the brief, because there is no horizontal or vertical relationship—I am using their annual reports and there may be something finer I cannot see—that cannot be touched.

I am saying to you that I think Parliament should give serious consideration to a forum to evaluate such mergers. It will need a broader set of criteria than are proposed in the bill. The bill is dealing with another thing—namely, industry-level concentration, not macro-concentration.

As I point out in the brief, we are taking number 34 and we are adding it to number 47 and we are going to create a new number 10, approximately. Is that good or bad? Well, in some cases it may have some advantages; it may have disadvantages. Ultimately it is a value judgment. There is no public forum today to evaluate such mergers. I say that is a major gap in our policy.

Mr. Howie: How about barristers and doctors and professional organizations? In so far as it is constitutionally possible—I am aware of the division of powers—what is the desirability of having this bill encompass them? Would you leave it alone the way it is, or would you go at it separately?

Prof. Stanbury: No, I would incorporate it as amendments to this bill along the lines that were proposed in 1977 for Bills C-42 and C-13. Now, that may have to be modified in light of legal opinions regarding the new charter and in light of *Jebour*. My point would be that I want to move in that direction. Moreover, I want to go a little further and have Parliament say how we will move from regulation to deregulation or partial deregulation to coming under the supervision of the Combines Act or its successor. And that is not being addressed. If you read Mr. Mazankowski's *Freedom to Move* paper, there is no discussion in there either.

So all I am saying is there is a policy problem here confronting us, because I am quite confident he is going to come in with a bill which is going to spur deregulation. I favour it. When I was at the Economic Council, I helped push like heck for that. But what I want to make sure of is that when we are doing it we integrate our deregulatory policy and our competition policy.

Mr. Howie: I want to thank you very, very much, professor. You have come a long way and you have been a big help to us.

[*Traduction*]

Si une fusion intervient entre Chrysler et Ford, ce projet de loi la couvrirait car ils sont concurrents dans le secteur automobile. Évidemment, il faudrait tenir compte des importations, etc. Mais si Chrysler achète Brascan, à moins qu'ils ne soient concurrents dans au moins un secteur, ou qu'il y ait des liens verticaux—c'est-à-dire que l'une des sociétés achète ou vende à l'autre—le projet de loi C-91 ne serait pas applicable. Si vous prenez la transaction Imasco-Genstar, comme je le souligne dans le mémoire, du fait de l'absence de relations horizontales ou verticales, elles seraient exemptes—mais évidemment je me fie à leurs rapports annuels et il y a peut-être des aspects subtils qui m'échappent.

Mon avis est que le Parlement devrait envisager sérieusement d'instaurer un forum où ces fusions pourraient être évaluées. Il faudra adopter pour cela un ensemble de critères plus large que ceux contenus dans ce projet de loi. Celui-ci traite d'autre chose, à savoir la concentration au niveau des secteurs industriels individuels et non de la macro-concentration.

Comme je le fais remarquer dans le mémoire, on prend le numéro 34, on lui ajoute le numéro 47 et l'on essaie de créer un nouveau numéro 10, en gros. Est-ce bon ou mauvais? Dans certains cas il peut y avoir des avantages, dans d'autres des inconvénients. Au bout du compte, tout revient à un jugement de valeur. Il n'existe pas aujourd'hui de forum public où de telles fusions puissent être examinées. Je dis que cela est une grosse lacune dans notre système.

M. Howie: Qu'en est-il des avocats, des médecins et des associations professionnelles? Au cas où ce serait constitutionnellement possible—j'ai conscience de la division des pouvoirs—dans quelle mesure est-il souhaitable que ce projet de loi s'applique à eux? Est-ce que vous laisseriez les choses en état ou en feriez-vous une loi distincte?

M. Stanbury: Non, j'intégrerai des amendements dans ce projet de loi, dans la ligne de ce qui était proposé en 1977 dans les projets de loi C-42 et C-13. Peut-être faudrait-il modifier légèrement ces dispositions au vu de la charte et du jugement dans l'affaire *Jebour*. C'est dans cette direction qu'il faudrait aller. J'irais même plus loin pour faire préciser au Parlement comment l'on passerait de la réglementation à la déréglementation ou à la déréglementation partielle, autrement dit, comment le secteur des transports passerait sous la supervision de la Loi sur les coalitions ou de celle qui lui succèdera. Cela n'est indiqué nulle part. Si vous lisez le document de M. Mazankowski, «Aller sans entraves», il n'en est question nulle part.

Il y a donc ici un problème de politique qui nous confronte car je suis bien certain qu'il va introduire un projet de loi sur la déréglementation. J'y suis tout à fait favorable. Lorsque je travaillais au Conseil économique, j'ai beaucoup oeuvré dans ce sens. Par contre, il s'agit de bien harmoniser notre politique de déréglementation et notre politique de concurrence.

M. Howie: Je vous remercie infiniment, professeur. Vous êtes venu de loin et vous nous avez beaucoup aidé.

[*Text*]

Mr. Orlikow: Professor Stanbury, last March I wrote to you and to several other academics, asking for your views on this subject, because there were plenty of stories that the Minister was looking at this and that he had an advisory committee. I wrote to the Minister suggesting that you and others be consulted. At the same time, I understand that you wrote to the Minister suggesting a meeting with a group of academic experts in the field. I understand that this meeting was scheduled for May, but it did not happen. Is my information correct? Do you know why it did not take place?

Prof. Stanbury: First, it did not take place. I received a wire from the officials saying the Minister had another appointment. When I asked if we could reschedule the meeting I was told that the bill was going to be introduced in June and that the Minister's schedule would not permit a meeting with academics between I guess it was April or May and the time when he proposed to introduce it. The schedule would simply not permit it.

Mr. Orlikow: So you and the others were never really consulted.

Prof. Stanbury: They may have been consulted individually. No one I know who participates in the research in this field was consulted, to my knowledge. But they may have been consulted privately. I do not know.

• 1045

Mr. Orlikow: I would like to repeat the request I made at the meeting with the Minister. I would like the names and the background of the advisory committee he told us he had. He read off the names. I would like that list. We have been told that the group, or at least some of the members, had one primary goal, and that was to get a workable section that would deal with conspiracy to fix prices, bar entry and share markets, and particularly to get the word "unduly", which has in the past prevented the existing section from being effective, removed. To your knowledge, was there any consideration of that point of view?

Prof. Stanbury: I do not know. I personally pressed that. I wrote a letter to the Minister and pointed that out following his March paper. He circulated about a 20-page paper quite widely, and I wrote a short letter, about three or four pages, and I made that critical comment again. I have made it repeatedly in articles and testimony. I think my views are fairly well known on that subject. Whether that issue was even raised in the consultations I do not know.

Mr. Orlikow: But the word "unduly", which you people consider to be very important in the way the courts deal with cases, is still there?

Prof. Stanbury: Yes.

Mr. Orlikow: We have had some questions about conglomerate mergers. You probably have not seen the transcript of the meeting we had with the Minister last week, but in an exchange between the Minister and myself in which I pressed him on that we told him, as Mr. Howie has mentioned, that a

[*Translation*]

M. Orlikow: Professeur Stanbury, je vous ai écrit au mois de mars dernier, ainsi qu'à plusieurs autres spécialistes, pour vous demandez vos vues sur ce sujet car j'entendais dire alors que le ministre se penchait là-dessus et qu'il avait constitué un comité consultatif. J'ai écrit au ministre pour lui recommander de vous consulter, ainsi que quelques autres. Je crois savoir qu'en même temps vous lui avez écrit pour lui proposer de rencontrer un groupe d'experts de ce domaine. Je crois savoir que cette rencontre devait avoir lieu au mois de mai mais qu'elle n'a pas eu lieu. Mes renseignements sont-ils exacts? Savez-vous pourquoi la rencontre n'a pas eu lieu?

M. Stanbury: Premièrement, elle n'a pas eu lieu. J'ai reçu un télégramme disant que le ministre avait d'autres engagements. Lorsque j'ai demandé si l'on pouvait fixer une nouvelle date, on m'a dit que le projet de loi serait déposé en juin et que le calendrier du ministre ne permettait pas de tenir une rencontre entre le mois d'avril ou de mai et la date prévue pour le dépôt du projet de loi. Le ministre était trop pris.

M. Orlikow: Si bien que vous-même et les autres n'avaient pas vraiment été consultés.

M. Stanbury: Peut-être ont-ils été consultés individuellement. Aucune des personnes que je connais n'a été consulté, que je sache. Peut-être l'ont-ils été en privé. Je ne sais pas.

M. Orlikow: Je voudrais réitérer la demande que j'ai formulée lorsque le ministre est venu. Je voudrais connaître les noms et les qualifications des membres du Comité consultatif qu'il nous a dit avoir constitué. Il a lu la liste des noms. Je voudrais cette liste. Il nous a dit que ce groupe, ou du moins certains de ses membres, avaient un objectif principal, à savoir la supression du mot 'indûment' qui nuisait par le passé à l'efficacité de la disposition actuelle, et la mise en place d'une disposition pratique traitant du complot pour fixer les prix, interdire l'entrée sur le marché et partager le marché. À votre connaissance, ce point de vue a-t-il été pris en considération?

M. Stanbury: Je ne sais pas. C'est ce que j'ai réclamé personnellement. J'ai écrit une lettre au ministre pour insister là-dessus après son document de mars. Il a distribué assez largement un document d'une vingtaine de pages et je lui ai écrit une courte lettre, de trois ou quatre pages, où j'ai de nouveau fait valoir cela. Je l'ai répété dans des articles et dans des témoignages. Je crois que mes vues sur la question sont bien connues. Je ne sais pas si cette question a été soulevée dans les consultations qu'il a tenues.

M. Orlikow: Mais ce terme «indûment», que vous les spécialistes jugez très important pour la manière dont les tribunaux tranchent ces affaires, est toujours là?

M. Stanbury: Oui.

M. Orlikow: Il y a eu quelques questions sur les fusions de conglomérats. Vous n'avez probablement pas lu le procès-verbal de la réunion que nous avons eu avec le ministre la semaine dernière mais, dans un échange entre le ministre et moi-même où j'insistais là-dessus, nous lui avons dit, ainsi que

[*Texte*]

few companies control 50% of the major shares traded on the Toronto Stock Exchange, and he did not seem concerned about that. I tried to press him on whether 75% or 90% control would concern him, and really he said that was not his concern. It certainly was not his concern in this bill. He said that this bill does not deal with concentration, that it deals with competition.

Given the kind of economic activity we have had in recent years and in recent months with these tremendous take-over bills, do you think we can deal with competition when in fact what is happening in recent years is not one steel company taking over another steel company so they have less competition or one paper company taking over another paper company but you have these tremendous conglomerates just growing much bigger? What effect, if any, on competition do these take-overs have?

Prof. Stanbury: The Minister is quite right when he says that he is concentrating essentially on the effects on competition within individual markets, and I think that is very important, and I think that is the first order of business. But as you have pointed out, these very large mergers—and I have provided a list of them on page 10 of my brief to give you some historical perspective on them—are changing the aggregate level of concentration and reducing the number of hands in which large-scale economic decisions are being made. I think it is a major gap, and I have said that I think new legislation is needed and I have sketched how I think it could function.

I think there are consequences we do not really understand here. What worries me is that, for example, in the Bureau of Competition Policy, as far as I know, relatively little research is being done. There is no major inquiry under way to try to examine the consequences of this, and I would say this is a major omission.

I am personally engaged in research on a book now which is going to focus on corporate power at the aggregate kind of level and ask some of those questions and compare it to the United States and so on. I would be the first to say that very little economic theory could be brought to bear on aggregrate concentration or conglomerate effects, although the performance of conglomerates has been studied quite extensively in the United States. Many of the advantages claimed for them do not show up in the empirical research—namely, that they are much more efficient and so forth and so on.

• 1050

We know even less about the connections between the non-financial and the financial enterprises, the kind of thing that the Genstar-Imasco deal exemplifies. Remember, before that we had Genstar acquiring Canada Trustco, and before that we had Genstar acquiring Canada Permanent, and now they are rolling them all into one.

Mr. Orlikow: Is it not true that in the United States some of the major corporations—for instance the oil companies a few years ago, when they were really rolling in profits, purchased non-energy corporations and now are selling them off, because

[*Traduction*]

M. Howie l'a mentionné, qu'une poignée d'entreprises contrôlent 50 p. 100 des actions échangées à la Bourse de Toronto et cela n'a pas eu l'air de l'inquiéter. J'ai insisté, demandant si une proportion de 75 ou de 90 p. 100 l'inquiéterait, et il a dit que ce n'était pas son problème. Il n'a certainement pas fait l'objet de ce projet de loi. Il nous a dit que ce projet de loi ne porte pas sur les concentrations, mais uniquement sur la concurrence.

Vu l'activité économique que nous constatons ces dernières années et ces derniers mois, avec ces énormes prises de contrôle, pensez-vous qu'il soit possible de préserver la concurrence alors que ce que l'on voit aujourd'hui, ce n'est plus une compagnie sidérurgique prenant le contrôle d'une autre, ou un fabricant de papier fusionnant avec un autre pour réduire la concurrence dans son secteur, mais des énormes conglomérats qui ne cessent pas de grossir? Quels sont les effets sur la concurrence de ces prises de contrôle?

M. Stanbury: Le ministre a tout à fait raison lorsqu'il dit qu'il se concentre sur les effets sur la concurrence à l'intérieur de marchés individuels, et c'est très important, c'est vraiment la première priorité. Par contre, comme vous le faites remarquer, ces énormes fusions—et j'en ai donné une liste à la page 10 de mon mémoire afin que vous ayez une perspective historique—accroissent la concentration globale et réduisent donc le nombre des acteurs qui prennent les décisions économiques de grande envergure. Je pense qu'il y a là une lacune majeure et j'ai dit qu'une législation nouvelle est nécessaire, et j'ai même fait une esquisse de son fonctionnement.

Je pense qu'il y a là des conséquences que nous ne comprenons pas très bien. Ce qui m'inquiète, par exemple, c'est que le Bureau de la politique de concurrence ne fait guère de recherche là-dessus. Aucun effort concerté n'est fait pour tenter de cerner les conséquences de cette tendance et je dirais que c'est là une omission grave.

J'ai personnellement entamé des recherches en vue d'écrire un livre sur la concentration du pouvoir économique, où je pose certaines de ces questions et établi une comparaison avec les États-Unis, etc. Je suis le premier à reconnaître l'absence presque totale d'une théorie économique concernant la concentration globale ou les effets des conglomérats, encore que le fonctionnement des conglomérats ait été très largement étudié aux États-Unis. Un grand nombre des avantages qu'ils réclament n'apparaîssent pas dans la recherche empirique—par exemple qu'ils sont beaucoup plus efficaces.

Nous en savons encore bien moins au sujet des liens entre les entreprises non-financières et les entreprises financières, ce que met en lumière la transaction *Genstar-Imasco*. Souvenez-vous qu'avant cela *Genstar* avait fait l'acquisition de *Canada Trustco*, et même avant de *Canada Permanent*, et maintenant tout se trouve regroupé en une seule entreprise.

M. Orlikow: N'est-il pas vrai qu'aux États-Unis certaines sociétés importantes—les sociétés pétrolières par exemple—ont acheté il y a quelques années, alors qu'elles faisaient beaucoup de profit, les sociétés non-énergétiques et que maintenant elles

[*Text*]

they have realized they really do not know how to run them? They are selling them off with tremendous losses.

Prof. Stanbury: In some cases that is true, and there has been a substantial amount of divestiture going on along with the merging boom. That is absolutely correct. In fact, I have some data from the First Boston Corporation listing some of those, distinguishing between the types of take-over versus divestiture that have been going on in the last few years.

Mr. Orlikow: Is there any evidence that these take-overs lead to more jobs, more research and development, more new technologies? We are told that is what we need in this country. Is there any evidence that these take place, or must we assume that the only really beneficiaries of all these take-overs are the major stockholders, the wheeler-dealers?

Prof. Stanbury: If you look at the financial market data, it seems that most of the benefits go to the acquired company, in terms of the increase in share price between what it was trading for before the tender offer and afterwards.

With respect to more jobs, if the conglomerates are correct that they will operate more efficiently, we would expect there to be fewer jobs to get the same job done. With respect to R and D and technological change and so forth, it is important to appreciate that by moving, say, into the financial services industry and increasing the degree of competition there . . . There have been some innovation and new approaches tested, in some cases by non-financial owners.

The issue becomes are there other ways of getting that, ways that perhaps would not have some of the potentially adverse consequences? The fact is, though, we do not have adequate research to really draw strong conclusions about the performance of these conglomerates—good, bad, or indifferent. One of the things that should be done is a very substantial project to analyse that.

If you look at the work of the Bryce commission, now almost a decade old, it simply did not answer that question. It really did not do it, and I am rather sad to say that. I would say that we need major research efforts right now to examine the effects of the ones that have already occurred in this country. But to my knowledge, it is not happening.

Mr. Orlikow: Can you outline your difficulties with conglomerate mergers, and can you suggest ways in which this bill could deal with them?

Prof. Stanbury: First, the bill cannot deal with conglomerate mergers unless two of the firms involved under the umbrella of conglomerate A and conglomerate B are in the same industry or have a vertical relationship to each other. Let me just give you an example.

Mr. Orlikow: Did you say cannot or does not?

[*Translation*]

les vendent, car elles se rendent compte qu'elles ne peuvent pas les administrer? Ces ventes leur font subir des pertes énormes.

M. Stanbury: C'est vrai dans certains cas, mais avec l'explosion des fusions, il y eu également beaucoup d'abandons. C'est tout à fait juste. De fait, j'ai des données de la *First Boston Corporation* au sujet de certains de ces abandons, et on fait la distinction entre les prises de contrôle par opposition aux abandons que l'on connaît depuis quelques années.

M. Orlikow: Est-ce qu'on a des preuves que ces prises de contrôle créèent des emplois, davantage de recherche et de développement, et de nouvelles technologies? On nous a dit que c'était ce qu'il nous fallait ici. Est-ce qu'on a des preuves que cela se produit effectivement, ou doit-on supposer que les seuls qui profitent vraiment de ces prises de contrôle sont les actionnaires importants, les brasseurs d'affaires?

M. Stanbury: Il semble que, si on étudie les données du marché financier, la société acheteuse en profite surtout, puisque les actions valent plus cher après la transaction qu'elles ne valaient précédemment.

Pour ce qui est de la création d'emplois, si les conglomérats ont raison de prétendre qu'ils fonctionneront de façon plus efficace, on peut supposer qu'il faudra moins d'emplois pour effectuer le même travail. Quant à la recherche et au développement et aux changements technologiques, par exemple, il faut se rendre compte que l'implication dans une industrie du service financier et l'augmentation de la concurrence . . . Les propriétaires qui ne sont pas des financiers ont mis à l'essai certaines méthodes innovatrices et certaines approches nouvelles.

La question qui se pose est celle-ci: Y a-t-il d'autres façons d'atteindre ces objectifs, sans entraîner de conséquences probablement défavorables? Il n'en demeure pas moins, cependant, que nous n'avons pas la possibilité de faire les recherches voulues pour tirer de véritables conclusions quant au rendement de ces conglomérats—qu'il soit bon, mauvais ou indifférent. Il faudrait vraiment élaborer un projet très important pour en faire l'analyse.

Voyez ce qu'a fait la Commission Bryce, qui date maintenant de près d'une décennie, elle n'a pas apporté de réponse à cette question. Elle n'a tout simplement pas pu le faire, et j'en suis navré. Je prétend qu'il faudrait intensifier la recherche pour étudier les effets les transactions que nous avons déjà connues au pays. À ma connaissance, il ne s'en fait pas.

M. Orlikow: Pouvez-vous me dire quelles difficultés pourraient découler des fusions de conglomérats, et de quelle façon le projet de loi peut-il les solutionner?

M. Stanbury: Premièrement, le projet de loi ne peut traiter de la question des fusions de conglomérats à moins que deux des sociétés relevant du conglomérat A et du conglomérat B fassent partie de la même industrie ou être dans une relation verticale l'une envers l'autre. Permettez-moi de vous donner un exemple.

M. Orlikow: Avez-vous dit que le projet de loi ne peut pas traiter de ces questions ou ne le fait pas?

[*Texte*]

Prof. Stanbury: Sorry . . . does not, the way it is drafted.

Mr. Orlikow: Can you suggest ways in which it could?

Prof. Stanbury: I sketched out for the other member what would be required to draw some new legislation and it would require either a new section in this bill or a new bill to be able to address conglomerates along the lines I have suggested. And that has to be co-ordinated with what you are proposing to do with respect to financial and non-financial linkages, because all of these things are connected and the question is an adequate devision of labour.

Now, with respect to your point about the effects of conglomerates, we do not really have hard research. I have asked whether or not the diversification obtained by means of conglomerate is socially more or less efficient than what individual shareholders could achieve by simply buying shares in other companies themselves. The evidence from the United States suggests that it is not more efficient. In some cases some firms are clearly more efficient. They get rid of old management. They come in and they adopt new technology . . .

Mr. Orlikow: But some of them pay a pretty heavy price, like in the Hiram Walker case, to the top officers—$1.5 million each for the next three years, whether they work or not, plus a block of shares at a very low price. They make a big capital gain. I do not know what that does for the shareholder. It is fine for those officers, but I think the shareholders get screwed.

• 1055

Prof. Stanbury: I think there are more important questions than that. I am not saying that a million and a half is not a noticeable number; but I think what we should look at is the costs of operation before and after—whether or not the enterprise is more efficient, whether it makes more effective use of capital.

One of the other general questions I would raise is do these conglomerates, which have linkages between the financial and the non-financial sector, become largely independent of the capital market? You see, one of the great theories is that if managers perform badly there is what I call "the revenge of the capital market": someone will come in and buy them up. If in fact they are controlled by somebody else, and in a legal sense you cannot make a tender offer and get control, then I would have to ask whether or not conglomerates are really going to achieve the kind of objectives that have been touted for them.

Mr. Orlikow: Can we spend a moment or two on the whole question of financial corporations being taken over by non-financial corporations? You said some things about this. The point you raise on page 27 about the implications of financial conglomerates are profoundly disturbing. You close on page 30 with four implications for competition policy, all bad.

[*Traduction*]

M. Stanbury: Excusez-moi . . . ne le fait pas, de la façon dont il est rédigé.

M. Orlikow: Pourrez-vous nous faire des suggestions pour qu'il en traite?

M. Stanbury: J'ai esquissé rapidement pour votre député ce qu'il faudrait comme nouveau libellé, ce serait soit un nouvel article dans le projet de loi ou un nouveau projet de loi qui traiterait des conglomérats de la façon dont je l'ai suggéré. Il faut également que ce soit coordonné avec ce que vous avez proposé concernant les liens financiers et non-financiers, étant donné que toutes ces choses sont reliées et qu'il s'agit de répartir efficacement le travail.

Quand à la question que vous avez soulevée concernant les effets des conglomérats, je vous avoue que nous n'avons pas vraiment fait de recherche. J'ai demandé si la diversification obtenue par voie de conglomérat était plus ou moins efficace sur le plan social que ce que pourraient réaliser les actionnaires par eux-mêmes en achetant tout simplement des actions dans d'autres sociétés. D'après les preuves qu'on a aux États-Unis, il semble que ce ne soit pas plus efficace. Dans certains cas, il est évident que certaines maisons sont plus efficaces. Elles se départissent de l'ancienne administration. Elles commencent en adoptant une nouvelle technologie . . .

M. Orlikow: Certaines comme *Hiram Walker*, paient très cher leurs administrateurs—1,5 million de dollars chacun pour les trois prochaines années, qu'ils travaillent ou non, en plus d'un bloc d'actions à très bas prix. Ces gens réalisent un gain de capital élevé. Je ne sais pas quel effet cela peut avoir sur les actionnaires. C'est très pour ces directeurs, mais je pense que les actionnaires se font avoir.

M. Stanbury: À mon avis, il y a des questions plus importantes que cela. Je ne dis pas qu'un million et demi dollars n'est pas un chiffre important, mais je crois que nous devrions examiner les coûts de l'opération, avant et après—que l'entreprise soit ou non plus efficace, qu'elle fasse ou non une meilleure utilisation du capital.

Je voudrais soulever une autre question générale, au sujet des conglomérats; est-ce que ceux qui ont des liens avec le secteur financier et non financier deviennent dans une large mesure indépendants du marché des capitaux? L'une des grandes théories, c'est que si les gestionnaires n'ont pas de bons résultats, il se produit ce qu'on appelle «la revanche du marché des capitaux». Quelqu'un va se présenter pour les racheter. Si, de fait, ils sont contrôlés par quelqu'un d'autre, et qu'on ne peut, du point de vue légal, présenter une offre pour obtenir le contrôle, je me demande si, oui ou non, les conglomérats vont vraiment pouvoir réaliser le genre d'objectifs prévus pour eux.

M. Orlikow: Pourrions-nous, pendant un instant ou deux, parler de la question des sociétés financières reprises par des sociétés non financières? Vous avez dit certaines choses à ce sujet. La question que vous soulevez à la page 27 au sujet des répercussions des conglomérats financiers est très troublante. Vous terminez en mentionnant à la page 30 quatre effets que

[*Text*]

I would also like to ask if Bill C-91 should deal with this kind of concentration, in your view. The old Anti-combines Act refers to the pricing on insurance as part of the conspiracy section. Should the pricing of financial services be included in this bill as an offence against competition, or does this belong with the Bank Act and the Trust Companies Act?

Prof. Stanbury: First, it is not just the price of insurance that is included in the act now. Since 1976 all services have been under the act, so there is no question that a conspiracy to fix the price of other financial services would be subject to it. Moreover, the new section 33 of the bill will address the question of agreements among banks to fix interest rates either on deposits or on loans. That is being transferred from the Bank Act to the Competition Act and would come under the supervision or the enforcement of the Director of Investigation and Research. I strongly support that change.

But let us understand that if trust companies cartelized to rig the price of deposits, or something like that, they are already subject to the act. We have the following anomaly, however. If the banks rig the interest rates on deposits, it is a per se illegal offence; if the trust companies do it, it has to be an undue lessening. Now, I find that to be utterly ridiculous.

Mr. Orlikow: It is pretty obvious from the experience we have had with the failure of the two banks that the regulatory agencies we have, both the Inspector General of Banks and the Superintendent of Insurance, did not have sufficient staff. Even if the act had given them more power, they simply did not have the resources to really do a job of monitoring what was happening. Are we going to have the same problem with the head of the anti-combines . . . ?

Prof. Stanbury: I do not think historically you could make a strong case that there have been inadequate resources. In certain periods we certainly were very frugal, etc. I have not heard loud and long laments by the director in the annual report, or in other public speeches or something like that, saying that he does not have the resources to do the job. The resources devoted to the activity have grown quite substantially over time, and I think appropriately. Moreover, there are other ways to try to increase the enforcement activity. For example, we could facilitate private prosecutions and private civil actions more than we do.

Section 31.1, which became effective in 1976, provides for a single damage action. Well, the United States, since 1890, has had treble damage provisions. And I would suggest to you that treble damages are a real incentive for private firms to bring cases where they feel they have been the subject of, say, predatory pricing, or they have been disadvantaged by a price-fixing cartel. The data in the United States indicates that 95% of all anti-trust cases are brought by private litigants. And one

[*Translation*]

cela peut avoir sur la politique de concurrence, qui sont tous mauvais.

Je voudrais demander si le projet de loi C-91 devrait traiter, à votre avis, de ce genre de concentration. L'ancienne loi anti-coalition mentionne l'établissement des prix pour l'assurance comme faisant partie de l'article sur les complots. Est-ce que l'établissement des prix des services financiers devrait être mentionné dans ce projet de loi comme étant une atteinte à la concurrence, ou cela relève-t-il de la Loi sur les banques et de la Loi sur les compagnies fiduciaires?

M. Stanbury: Premièrement, ce n'est pas seulement le prix de l'assurance qui est inclus présentement dans la loi. Depuis 1976, tous les services relèvent de la loi; par conséquent, il n'y a pas de doute qu'un complot visant à fixer les prix d'autres services financiers tomebrait sous le coup de la loi. De plus, il est question dans le nouvel article 33 du projet de loi des accords conclus entre les banques pour fixer les taux d'intérêt soit sur les dépôts, soit sur les prêts. Cette question est transférée de la Loi sur les banques à la Loi sur la concurrence et est du ressort du directeur des enquêtes et de la recherche. Je suis tout à fait en faveur de ce changement.

Toutefois, il faut comprendre que si les sociétés de fiducie forment un cartel pour manipuler les prix des dépôts, ou quelque chose du genre, elles tombent déjà sous le coup de la loi. Cependant, nous faisons face à l'anomalie suivante. Si les banques manipulent les taux d'intérêt sur les dépôts, c'est en soi un acte illégal; si les sociétés de fiducie le font, il doit s'agir d'une diminution indue. Je trouve cela tout à fait ridicule.

M. Orlikow: Après avoir vécu la faillite de deux banques, on ne peut que conclure que nos organismes de réglementation, l'inspecteur général des banques et le surintendant des assurances, ne disposent pas d'un personnel suffisant. Même si la loi leur avait accordé plus de pouvoir, ils n'avaient tout simplement pas les ressources voulues pour vraiment surveiller la situation. Allons-nous faire face au même problème avec le chef des enquêtes sur les coalitions . . . ?

M. Stanbury: Je ne pense pas qu'on puisse prétendre, en remontant dans le temps, que nous n'avions pas les ressources nécessaires. A certaines périodes, il nous a fallu certainement être très économes, par exemple. Dans son rapport annuel, je ne crois pas que le directeur se soit beaucoup plaint—ni dans d'autres discours publics, ou ailleurs—du fait qu'il ne disposait pas des ressources nécessaires pour faire son travail. Les ressources consacrées à cette activité ont augmenté de façon très importante au cours des ans, et aussi de façon très appropriée, je crois. De plus, il y a d'autres moyens pour essayer de renforcer les méthodes d'application. Nous pourrions par exemple faciliter, plus que nous le faisons actuellement, les poursuites privées et civiles.

L'article 31.1, qui est entré en vigueur en 1976, prévoit des poursuites pour dommages-intérêts simples. Depuis 1890, aux États-Unis, on peut engager des poursuites pour dommages-intérêts triples. Et je pense que les dommages-intérêts triples encouragent véritablement les sociétés privées à engager des poursuites lorsqu'elles estiment avoir fait l'objet, disons, d'une fixation de prix malhonnête, ou avoir subi un préjudice de la part d'un cartel fixant les prix. D'après les données qu'on a aux

[*Texte*]

of the reasons they can bring a price-fixing case is because they only have to show the existence of an agreement, at which point section 1 has been proved, and then they go on to the matter of showing damages. The incentive is caused by the fact that they get triple the damages they can prove, and that really is a serious penalty to those people who go around fixing prices.

Now, in Canada . . .

Mr. Orlikow: We do not have that.

• 1100

Prof. Stanbury: No, we do not have it. We have single damages. We proposed in 1971, in a classic Canadian compromise, to have double damages in Bill C-256, but that one did not go anywhere.

Mr. Orlikow: I presume the "gang of five" would fight that pretty hard.

Prof. Stanbury: I suspect they would, yes. However, let me qualify that. The Canadian Bar Association is a member of the "gang of five". Lawyers would have a field day if we had treble-damage actions in Canada, so they may feel differently.

Mr. Orlikow: Could I ask you about gasoline pricing? We recently had an interesting session with the Petroleum Marketers Association of Canada, the independents. They are quite firm that they want amendments they think are needed on abuse of dominant position. On page 46 of your brief, you are quite firm that:

> The Director of Investigations' major inquiry into petroleum marketing found five predatory practices used by the majors to curb the independents.

Do you think the bill can handle these market abuses? Are you surprised at the slowness with which the director's report has been handled under the present law? Do you think the new bill would give faster remedies? We are talking about practices that happened years ago, which still have not really gotten to the courts and been dealt with.

Prof. Stanbury: In fact, we had a few cases on predatory pricing and price discrimination in the 1960s in front of the courts. What I would worry about is that in theory these would be subject to the new proposed sections 50 and 51. However, with the four criteria that are specified in the bill, I would go back to my metaphor: How many camels can you pass through the eye of a needle? I am not sure the director would succeed.

I think one of the bases for your complaint about this is the fact that they did not prosecute in these cases following the petroleum inquiry; instead, they used the route of a major public inquiry and so forth. Now time has gone on so long, and

[*Traduction*]

États-Unis, il semble que 95 p. 100 des causes antitrust sont portées devant les tribunaux par des plaideurs privés. Et l'une des raisons pour lesquelles ils peuvent le faire, c'est qu'ils n'ont qu'à démontrer l'existence d'un accord, et à ce moment-là, l'article 1 est prouvé, puis à établir l'existence des dommages. Il s'agit d'un encouragement du fait que les sociétés obtiennent une triple indemnisation pour les dommages prouvés, et cela frappe durement ceux qui veulent fixer les prix.

Au Canada, actuellement . . .

M. Orlikow: Nous n'avons pas cela.

M. Stanbury: Non, nous n'avons pas cela, nous n'avons qu'une disposition pour dommages simple. Nous avons proposé en 1971, un compromis canadien classique, des dommages doubles dans le cadre du projet de loi C-256, mais nous n'avons pas eu de succès.

M. Orlikow: Je suppose que «la bande des cinq» serait tout à fait contre.

M. Stanbury: Je suppose que oui. Toutefois, permettez-moi d'ajouter que l'Association du Barreau canadien fait partie de «la bande des cinq». Les avocats y trouveraient leur compte si nous avions des poursuites en dommages triples au Canada et ils voient peut-être les choses sous un jour différent.

M. Orlikow: Puis-je vous poser une question au sujet de l'établissement du prix de l'essence? Nous avons eu récemment une réunion intéressante avec la Petroleum Marketers Association of Canada, des indépendants. Ils veulent vraiment obtenir les amendements qu'ils croient nécessaires au sujet de l'abus de position dominante. Vous dites de façon très ferme à la page 46 de votre mémoire,

> Le directeur des enquêtes qui a fait une enquête importante au sujet de la commercialisation du pétrole s'est rendu compte que les responsables utilisaient cinq pratiques malhonnêtes pour freiner les activités des indépendants.

Croyez-vous que le projet de loi puisse résoudre ce problème d'abus de marché? Êtes-vous étonnés qu'on soit si lent à donner suite au rapport du directeur dans le cadre de la loi actuelle? Croyez-vous que le nouveau projet de loi apporterait plus rapidement des remèdes? Nous parlons de pratiques qui remontent à quelques années, et pour lesquelles il n'y a pas encore eu de procès.

M. Stanbury: En réalité, nous avons eu quelques causes au sujet de l'établissement malhonnête des prix et de la discrimination en matière de prix qui se sont retrouvés devant les tribunaux au cours des années 60. Ce qui m'inquiéterait c'est qu'en théorie on tomberait sous le coup des articles proposés 50 et 51. Toutefois, à cause des quatre critères prévus dans le projet de loi, je rappelle cette métaphore: Combien de chameaux peuvent-ils passer par le chas d'une aiguille? Je ne suis pas sûr que le directeur pourrait réussir.

Vous fondez votre plainte sur le fait qu'il n'y a pas eu poursuites dans ces causes suite à l'enquête sur les questions pétrolières; on a plutôt décidé notamment de faire une enquête publique importante. Mais il y a de cela si longtemps et le

[*Text*]

the market has changed substantially; it seems evident that they are not going to bring cases based on the evidence discussed in that report.

In theory, these things are covered by proposed sections 50 and 51. In practice, the way it is drafted, I think it will be all but impossible to get an order because you have to prove complete control; you have to prove a practice of anti-competitive acts; you have to prove that the object of those acts was to lessen competition; and then you have to prove that the effect was to lessen competition substantially. I do not think you can get through all those hoops and win, except very infrequently.

Mr. Orlikow: I have one comment and then one last question. My comment is this: I am assuming that, although you said you support this bill, you are not very enthused about it unless there are major changes. From that I want to ask you a question: If the committee could find a way to hire you to make suggestions as to how the bill could be improved, could you find the time? Would you be interested?

Prof. Stanbury: Yes, I would be prepared to help the committee. I would be prepared to help the department. Until now, it has not shown a great deal of enthusiasm for such assistance.

Mr. Orlikow: That is why I have asked about the committee rather than the department.

Le président: Je donne la parole à M. Ouellet pour une courte question. J'anticipe une courte réponse. Nous continuerons avec M. Domm qui nous parlera au nom du ministère.

M. Ouellet: En réponse à M. Howie qui demandait si l'article que l'on appelle maintenant la dominance du marché était une amélioration à la loi actuelle, je pense que vous avez répondu oui. Je ne voudrais pas qu'on laisse l'impression que cela, tel quel, est du bon beurre et que ça répond à toutes les questions.A la page 58 de votre mémoire, vous dites:

> In conclusion, I believe that the total effect of the four criteria is that it will be all but impossible for the Director of Investigation and Research to obtain an order for abuse of dominant position, even on the balance of probability tests used in civil law.

Ceci me semble la conclusion de vos remarques sur l'article traitant de la dominance. Vous êtes le deuxième témoin à dire la même chose. L'Association de commercialisation des produits pétroliers du Canada a été très claire sur ce sujet. M. Conrad qui a témoigné, nous a dit que, sans amendement, cet article n'aurait aucune valeur. Il est peut-être bon que cette partie relève maintenant du domaine civil plutôt que du domaine criminel; mais, tel que c'est rédigé, ce n'est pas assez fort pour permettre au directeur des enquêtes de poursuivre, avec succès, des compagnies qui abuseraient de leur position dominante. Êtes-vous d'accord avec cette déclaration de M. Conrad?

[*Translation*]

marché a tellement changé; il est certain qu'ils ne vont pas présenter des causes fondées sur les preuves dont il est question dans le rapport.

En théorie, ces questions tombent sous le coût des articles proposés 50 et 51. En pratique, à cause du libellé, je crois que ce serait tout à fait impossible d'obtenir une ordonnance, car il faut prouver le contrôle total; il faut prouver qu'il y a eu pratique d'actes anti-concurrentiels, il faut prouver que ces actes avaient pour objet d'affaiblir la concurrence et aussi prouver que le résultat est un affaiblissement important de la concurrence. Je ne crois pas, sauf dans de rares cas, qu'on puisse passer à travers tout cela et gagner.

M. Orlikow: Je voudrais faire une remarque et poser ensuite une dernière question. Voici ma remarque: Même si vous appuyez le projet de loi, je suppose qu'il ne vous enthousiasme pas beaucoup à moins qu'on n'y apporte des changements importants. C'est pourquoi je voudrais vous poser cette question, si le Comité trouvait le moyen de vous embaucher pour obtenir de vous des suggestions sur la façon d'améliorer le projet de loi, auriez-vous le temps de le faire? Seriez-vous intéressé?

M. Stanbury: Oui, je serais disposé à aider le Comité. Je serais prêt à aider le ministère. Jusqu'à maintenant, on n'a pas fait preuve de beaucoup d'empressement pour obtenir cet aide.

M. Orlikow: C'est la raison pour laquelle je vous ai parlé du Comité plutôt que du ministère.

The Chairman: I will now give the floor to Mr. Ouellet for a short question. I anticipate also a short answer. We will then go to Mr. Domm who will speak for the department.

Mr. Ouellet: In answer to Mr. Howie, who was asking if the section now called the dominants of the market is an improvement over the present act, I believe you answered yes. I would not like to leave that impression that all is well, and that this answers all the question. On page 58 of your brief, you say:

> Pour terminer, je crois que l'effet global des quatre critères fera qu'il sera tout à fait impossible pour le directeur des enquêtes et de la recherche d'obtenir une ordonnance pour abus de position dominante, même en regard des tests de probabilité utilisés dans le droit civil.

It seems to me that this is the conclusion of your remarks on the section dealing with dominants. You are the second witness to say that. The Petroleum Marketers Association of Canada was very clear on this subject. According to Mr. Conrad, without this amendment, the section has no real value. It might be a good thing for this section to be under the civil law rather than the criminal law. However, the way the section is written, the director of enquiries does not have enough power to prosecute successfully the companies which abuse their dominant position. Do you agree with Mr. Conrad?

[*Texte*]

• 1105

Prof. Stanbury: Yes, I do. You have summarized my position very clearly. In fact, it is almost a toss-up whether if you passed proposed sections 50 and 51 as they are currently drafted versus the current section 33 you are really that much better off.

It is an open question. I guess on faith I would try it because I know what we have had in the past, and I have described the rather sad record. But it has not been a total shut-out as we have with respect to mergers.

I give you a history of the cases on page 49. I am just hoping that Parliament will amend that section and make it tougher, more effective, and at the very least reverse the clock and go back to Bill C-29. I would like to go and make that tougher, but if you do only one thing then just rip out the current sections and staple in the ones on Bill C-29 of 1984.

The Chairman: Mr. Domm.

Mr. Domm: First let me express my appreciation for the time you have spent away from beautiful British Columbia to come down to Ontario, which is enjoying some of your weather at an early date in the year. I know you will be anxious to get back there to take part in the opening of Expo on Friday.

I think I should make just one brief comment and perhaps have the opportunity of your response to the comment. I do not think we are going to hear complete unanimity from the 20 or 30 groups and 20 or 30 individuals that will be appearing before our board. I think that the idea of the best possible being the goal of this particular piece of legislation is realistic and it is only realistic as long as we can get a reasonably general consensus. All of the things you are looking for would improve the bill from a certain viewpoint, and I find it hard to find serious criticism for most of your suggestions other than that we hear the other side in a great number of cases and the proposals made are at conflict, one with the other.

I think we would like to be able to take your brief into very serious consideration by the department, see what might be able to be implemented from your proposals in the form of amendments, where we would at the same time not destroy what for 20 or 30 years we have been searching for, and that is change to the Competition Act, which is badly in need of attention.

Because we would not be able to include all of your suggestions and you might only see a portion of them in its amended form when it goes back for report stage, I would not want to have you leave the meeting feeling that we do not intend on a more regular basis as a government to continue to review it. I think that if we can move in a gradual fashion there would be a general consensus among all parties that we have continually to review the competition legislation on a more regular basis than we have in the past.

I am most concerned about the tribunal. I think it could become one of the most controversial clauses in this bill if we

[*Traduction*]

M. Stanbury: Oui, je suis d'accord. Vous avez très bien résumé mon point de vue. En fait, il n'est pas certain que les articles 50 et 51 du projet de loi permettront d'obtenir de meilleurs résultats que l'article 33 actuel.

La question reste sans réponse. En fait, on ne perd rien à essayer puisque, dans le passé, les résultats n'ont pas été très brillants. Cependant, cela n'a pas été le fiasco complet que nous avons connu pour les fusions.

Je fais l'historique des cas à la page 49. J'espère seulement que le Parlement modifiera cet article pour le rendre plus rigoureux, plus efficace et pour, à tout le moins, faire machine arrière et revenir au projet de loi C-29. J'aimerais que le projet de loi soit beaucoup plus rigoureux, mais, si vous ne faites qu'une chose, on devrait retirer les présents articles et les remplacer par ceux du projet de loi C-29 de 1984.

Le président: Monsieur Domm.

M. Domm: Laissez-moi tout d'abord vous dire que nous vous sommes reconnaissants d'avoir quitté la belle province de la Colombie-Britannique pour venir en Ontario, où la température ressemble surtout cette année à la vôtre. Je sais que vous êtes pressé d'y retourner pour participer à la cérémonie d'ouverture d'Expo, vendredi.

Je voudrais faire simplement une courte remarque et avoir le privilège peut-être d'entendre vos commentaires. Je ne crois pas que nous obtiendrons l'unanimité des 20 ou 30 groupes et des 20 ou 30 personnes qui comparaîtront devant nous. Je pense qu'il est réaliste de vouloir que ce projet de loi ait comme objectif de trouver la meilleure solution possible, mais cela n'est réaliste que dans la mesure où nous puissions obtenir un consensus assez général. Tout ce que vous envisagez améliorerait le projet de loi et je crois qu'il est difficile de trouver des critiques sérieuses au sujet de vos suggestions sauf que les députés d'opposition nous disent que, dans un grand nombre de cas, les propositions entrent en conflit l'une avec l'autre.

Nous aimerions que votre mémoire soit étudié très sérieusement par le Ministère, afin de voir si on ne pourrait pas présenter vos propositions sous forme d'amendements, tout en prenant garde de ne pas détruire ce que nous cherchons depuis 20 ou 30 ans, c'est-à-dire de modifier la Loi sur la concurrence dont il faut sérieusement s'occuper.

Étant donné que nous ne pouvons pas incorporer dans le projet de loi toutes vos suggestions, et que vous en retrouverez une partie peut-être sous forme modifiée, à l'étape du rapport, je ne voudrais pas que vous quittiez cette réunion en ayant l'impression que le gouvernement n'a pas l'intention de poursuivre plus régulièrement l'étude de la loi. Je crois que nous pouvons procéder de façon progressive pour obtenir le consensus de tous les partis afin que nous puissions plus régulièrement que par le passé examiner la Loi sur la concurrence.

La question du tribunal me préoccupe surtout. Il s'agit, à mon avis, d'un des articles qui feront l'objet des plus sérieuses

[*Text*]

are looking at what down the road we might experience as a committee. If there was one change that you thought most important as it pertains to the tribunal, what would that be?

• 1110

Prof. Stanbury: I had certainly thought of that question—namely that all members, including the judicial members, are to be part-time, and whether or not it will be the highest priority in their lives.

Rather, I would ask for a clarification regarding the matter of appeals. Now, I am not a lawyer. I have checked with two or three in the UBC Law School, and they say to me the way the rules of the Federal Court, which will be the rules with respect to the tribunal—the rules respecting appeals to the Federal Court—are, it would be possible in theory at least, to have an appeal on facts. If that is the case—and I do not know for sure, Mr. Domm—I would consider that to be totally undermining the idea of a specialized quasi-judicial tribunal, because it would mean the business community could have it two ways: they could come into the tribunal, and if they did not succeed, they could then appeal to the courts and they could fight the issue *de nouveau*; namely, they could introduce all the factual evidence and play the game again.

That is not, I think, what Parliament intends. If it is, I think the rules regarding appeal need to be clarified. I may not fully understand the rules of the Federal Court regarding appeals. You will have to get legal counsel to advise you. But if it is possible, the way they are drafted now, to appeal on facts, I think it would destroy the effectiveness of the tribunal.

The other change I would urge on you is one not to accept—namely, an appeal to the Cabinet from the decisions of the tribunal. You are being pressed, or you will be pressed, by other bodies. I believe the Canadian Manufacturers' Association is very strong on this point, and I would say that will vitiate the tribunal completely.

My views have been on record for a long time on that. I dealt with the issue at the Economic Council, and the council was persuaded that there should not be appeals to the Cabinet and so on. However, I appreciate, as you implied by your earlier statement, that you will hear a variety of witnesses, you will hear a variety of conflicting views, and you will have to make a judgment. I think to participate in public policy is to recognize that you do not win them all. It is just an opportunity to participate that I think some of us wish, to debate and argue the points. Ultimately Parliament will decide.

[*Translation*]

controverses au sein du comité. Quel serait le changement le plus important, à votre avis, à apporter au tribunal.

M. Stanbury: J'ai certainement réfléchi à la question de savoir si tous les membres, y compris ceux qui exercent des fonctions judiciaires, doivent être des membres à temps partiel et s'ils devraient accorder la première priorité à ce travail.

Personnellement, je préférerais avoir une certaine précision en ce qui concerne la question des appels. Je ne suis pas avocat, mais j'ai vérifié auprès de deux ou trois spécialistes de la Faculté de droit de l'Université de la Colombie-Britannique. Ces personnes me disent que, selon les règles de la Cour fédérale en matière d'appels, règles qui s'appliqueront à ce tribunal, il serait possible, en théorie du moins, de présenter un appel portant sur les faits. Si tel est le cas—et je ne suis pas tout à fait sûr que ce le soit, monsieur Domm—j'estime que cela serait au détriment d'un tribunal spécialisé quasi judiciaire, car cela signifierait que le milieu des affaires pourrait obtenir gain de cause de deux façons: d'abord, les hommes d'affaires pourraient se présenter devant le tribunal, et au cas où celui-ci rendrait une décision qui ne les arrangerait pas, ils pourraient ensuite faire appel devant les tribunaux judiciaires et défendre leur cas en présentant de nouveau les faits.

Je ne crois pas que ce soit là ce que le Parlement désire. Si c'est le cas, il me semble alors que les règles concernant la procédure d'appel doivent être précisées. Il se peut que je ne comprenne pas tout à fait les règles de la Cour fédérale concernant les appels. Vous voudrez sans doute à cet égard obtenir l'avis d'experts juridiques. Cependant, selon le libellé actuel, s'il est possible de faire appel sur des questions de faits, il me semble que cela détruirait l'efficacité de ce tribunal.

J'aimerais également vous demander de rejeter un autre changement, c'est-à-dire la possibilité de faire appel auprès du Cabinet de décisions du tribunal. Certains organismes demanderont votre appui à ce sujet. Je crois que l'Association des manufacturiers canadiens voudrait voir adopter cette modification, mais je puis vous dire que cela remettra tout à fait en question la raison d'être du tribunal.

J'ai fait connaître mon point de vue sur cette question depuis longtemps. J'ai traité de ce problème au Conseil économique et le Conseil était persuadé que l'on ne devrait pas pouvoir faire appel auprès du Cabinet. Cependant, comme vous l'avez laissé entendre précédemment, vous entendrez différents témoins ayant un point de vue tout à fait opposé et vous devrez prendre une décision. Participer à la politique publique, c'est reconnaître que l'on ne peut gagner sur tous les tableaux. Cela donne simplement la possibilité de participer au débat, mais, en fin de compte, c'est le Parlement qui prendra la décision.

[*Texte*]

The Chairman: On behalf of my colleagues and members of this committee, it was a great pleasure for us to have you here today. It is very clear that your experience is there. I can tell you it would be a great pleasure for me to be one of your students, one day, in British Columbia. Thank you for coming.

La séance est levée.

[*Traduction*]

Le président: Au nom de mes collègues, membres du comité, je vous dis que cela a été un grand plaisir pour nous de vous avoir reçu ici aujourd'hui. Vous avez beaucoup d'expérience, et je puis vous dire que je serais très heureux d'avoir la possibilité d'être un jour votre étudiant en Colombie-Britannique. Je vous remercie.

The meeting is adjourned.

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WITNESS—TÉMOIN

At 9:30 a.m.:

From the Institute for Research on Public Policy:
Professor W.T. Stanbury.

A 9 h 30:

De l'Institut de recherches politiques:
Professeur W.T. Stanbury.

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HOUSE OF COMMONS

Issue No. 4

Thursday, May 1, 1986

Chairman: Marcel R. Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 4

Le jeudi 1er mai 1986

Président: Marcel R. Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequences thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

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RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

WITNESSES:

(See back cover)

TÉMOINS:

(Voir à l'endos)

First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

26172—1

LEGISLATIVE COMMITTEE ON BILL C-91

Chairman: Marcel R. Tremblay

COMITÉ LÉGISLATIF SUR LE PROJET DE LOI C-91

Président: Marcel R. Tremblay

MEMBERS/MEMBRES

Pierre Cadieux
Bill Domm
Bob Horner
Paul McCrossan
David Orlikow
André Ouellet

(Quorum 4)

Le greffier du Comité

Lucie Gratton

Clerk of the Committee

Pursuant to S.O. 94(5)

On Thursday, May 1, 1986:
Ron Stewart replaced Bill Attewell;
Alan Redway replaced Pierre Cadieux;
Pierre Cadieux replaced Alan Redway;
Bob Horner replaced Ron Stewart.

Conformément à l'article 94(5) du Règlement

Le jeudi 1er mai 1986:
Ron Stewart remplace Bill Attewell;
Alan Redway remplace Pierre Cadieux;
Pierre Cadieux remplace Alan Redway;
Bob Horner remplace Ron Stewart.

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ERRATUM

The following Minutes of Proceedings should have appeared in Issue No. 1

THURSDAY, APRIL 17, 1986
(1)

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met *in camera* at 11:30 o'clock a.m., this day, the Chairman, Marcel R. Tremblay, presiding.

Members of the Committee present: Bill Attewell, Bill Domm and André Ouellet.

The Committee proceeded to consider its Order of Reference.

It was agreed,—That the Committee print 1,000 copies of its *Minutes of Proceedings and Evidence*.

It was agreed,—That a sub-committee on Agenda and Procedure be constituted pursuant to S.O. 98(3)(*b*), to consist of the Chairman, plus two representatives from the government and one representative from each opposition party; and that the quorum of the Sub-committee shall be three members provided that one representative from an opposition party be present.

It was agreed,—That the Sub-committee on Agenda and Procedure be authorized to select the witnesses to appear before the Committee.

It was agreed,—That the Chairman be authorized to hold meetings, to receive evidence and to authorize the printing thereof when a quorum is not present, provided that at least one other Member be present.

It was agreed,—That at the discretion of the Chairman, reasonable travelling and living expenses be reimbursed to witnesses invited to appear before the Committee.

The Committee adjourned to the call of the Chair.

Le greffier du Comité

Dave Cook

Clerk of the Committee

ERRATUM

Le procès-verbal suivant aurait dû paraître dans le fascicule nº 1

LE JEUDI 17 AVRIL 1986
(1)

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, aujourd'hui à huis clos, à 11 h 30, sous la présidence de Marcel R. Tremblay, (*président*).

Membres du Comité présents: Bill Attewell, Bill Domm et André Ouellet.

Le Comité entreprend l'étude de son ordre de renvoi.

Il est convenu,—Que le Comité fasse imprimer 1000 exemplaires de ses *Procès-verbaux et témoignages*.

Il est convenu,—Qu'un sous-comité du programme et de la procédure soit constitué conformément à l'article 98(3)*b*) du Règlement et qu'il se compose du président, de deux représentants du gouvernement et d'un représentant de chaque parti de l'opposition; et que le quorum du Sous-comité soit établi à trois députés, pourvu qu'un représentant d'un parti de l'opposition soit présent.

Il est convenu,—Que le Sous-comité du programme et de la procédure soit autorisé à choisir les témoins qui comparaîtront devant le Comité.

Il est convenu,—Que le président soit autorisé à tenir des séances, à recevoir des témoignages et en autoriser l'impression en l'absence d'un quorum, pourvu qu'au moins un autre député soit présent.

Il est convenu,—Qu'à la discrétion du président, le Comité rembourse aux témoins les frais de déplacement et de séjour raisonnables qu'entraîne leur comparution devant le Comité.

Le Comité s'ajourne jusqu'à nouvelle convocation du président.

MINUTES OF PROCEEDINGS

THURSDAY, MAY 1, 1986
(5)

[*Text*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 10:50 o'clock a.m., this day, the Chairman, Marcel R. Tremblay, presiding.

Members of the Committee present: Bill Domm, Paul W. McCrossan, David Orlikow, André Ouellet, Alan Redway and Ron Stewart.

In attendance: *From the Library of Parliament*: Margaret Smith, Research Branch.

Witnesses: *From the Business Council on National Issues*: Thomas P. d'Aquino, President and Chief Executive Officer; William F. McLean, Co-Chairman, Competition Task Force; William Rowley, Legal Advisor.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 relating to Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof (*See Minutes of Proceedings and Evidence dated Wednesday, April 23, 1986, Issue No. 1*).

On Clause 2

The witnesses made statements and answered questions.

At 12:00 o'clock p.m., the Committee adjourned until 3:30 o'clock p.m., this day.

AFTERNOON SITTING
(6)

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 3:35 o'clock p.m., this day, the Chairman, Marcel R. Tremblay, presiding.

Members of the Committee present: Pierre Cadieux, Bill Domm, Robert Howie and André Ouellet.

Witnesses: *From the Canadian Bar Association*: John Clarry, Chairman, Special Committee on the Combines Investigation Act; Bruce McDonald, Member, Special Committee on the Combines Investigation Act. *From the Canadian Manufacturers' Association*: J. Laurent Thibault, President; Ivan Feltham, Vice-President, Canadian General Electric.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 relating to Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof. (*See Minutes of Proceed-*

PROCÈS-VERBAUX

LE JEUDI 1er MAI 1986
(5)

[*Texte*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, aujourd'hui à 10 h 50, sous la présidence de Marcel R. Tremblay, (*président*).

Membres du Comité présents: Bill Domm, Paul W. McCrossan, David Orlikow, André Ouellet, Alan Redway et Ron Stewart.

Aussi présente: *De la Bibliothèque du parlement*: Margaret Smith, Service de recherche.

Témoins: *Du Conseil d'entreprises sur les questions d'intérêt national*: Thomas P. d'Aquino, président et chef de la direction; William F. McLean, coprésident du groupe de travail sur la concurrence; William Rowley, conseiller juridique.

Le Comité reprend l'étude de son ordre de renvoi du jeudi 10 avril 1986 relatif au projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois (*Voir Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule nº 1*).

Article 2

Les témoins font une déclaration puis répondent aux questions.

A 12 h 00, le Comité s'ajourne jusqu'à 15 h 30 aujourd'hui.

SÉANCE DE L'APRÈS-MIDI
(6)

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, aujourd'hui à 15 h 35, sous la présidence de Marcel R. Tremblay, (*président*).

Membres du Comité présents: Pierre Cadieux, Bill Domm, Robert Howie et André Ouellet.

Témoins: *De l'Association du Barreau canadien*: John Clarry, président, Comité spécial sur la Loi relative aux enquêtes sur les coalitions; Bruce McDonald, membre, Comité spécial sur la Loi relative aux enquêtes sur les coalitions. *De l'Association des manufacturiers canadiens*: J. Laurent Thibault, président; Ivan Feltham, vice-président, *Canadian General Electric*.

Le Comité reprend l'étude de son ordre de renvoi du jeudi 10 avril 1986 relatif au projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois (*Voir*

ings and Evidence dated Wednesday, April 23, 1986, Issue No. 1).

On Clause 2

John Clarry made a statement and with Bruce McDonald, answered questions.

At 4:45 o'clock p.m., the sitting was suspended.

At 5:30 o'clock p.m., the sitting resumed.

J. Laurent Thibault and Ivan Feltham made a statement and answered questions.

At 6:38 o'clock p.m., the Committee adjourned until Tuesday, May 6, 1986.

Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule nº 1).

Article 2

John Clarry fait une déclaration, puis lui-même et Bruce McDonald répondent aux questions.

A 16 h 45, le Comité interrompt les travaux.

A 17 h 30, le Comité reprend les travaux.

J. Laurent Thibault et Ivan Feltham font une déclaration et répondent aux questions.

A 18 h 38, le Comité s'ajourne jusqu'au mardi 6 mai 1986.

Le greffier du Comité

Lucie Gratton

Clerk of the Committee

EVIDENCE

(*Recorded by Electronic Apparatus*)

[*Texte*]

Thursday, May 1, 1986

• 1046

The Chairman: I would ask the members of the government to please take their seats. We are pleased to have the Business Council on National Issues as witnesses today. I introduce you to the Co-Chairman, Task Force on Competition Policy, Mr. William F. McLean, and the President and Chief Executive Officer, Thomas P. d'Aquino. Good morning, Mr. d'Aquino. We also have legal adviser William Rowley. Thank you for coming. The time allocated to witnesses is usually 15 minutes to make their presentation. That will leave plenty of time for questions. That will leave about one hour. If you want to start now, we are ready.

Mr. William F. McLean (Co-Chairman, Task Force on Competition Policy, Business Council on National Issues): That is fine. Ladies and gentlemen, the Business Council on National Issues is pleased to have the opportunity to appear before this committee. The committee has already received our brief, since we believed you should have a complete statement of our views for the record. It is rather long and we do not intend to use your time by reading it. I will try rather to give you a very brief summary, which will allow time for questions.

For the last several years the business council has spent a good deal of time and effort on the question of amendments to the Combines Investigation Act. Over a period of 15 or 16 years there have been several bills or proposals to amend the act. The approach was until recently seen by many to be technocratic and confrontational. During the past three or four years, the previous government and the present goverment engaged in extensive consultation with many organizations, the business council among them, to see if a consensus could be reached on amendments to the act which preserve the objectives of the department and at the same time would generally be acceptable to all groups in the community.

As far as the business council was concerned, the consultative process began by trying to gain a clear understanding of the objectives of the department and the reasons for those objectives. The objectives of the department were not in question. Rather, further discussion focused on the mechanism to meet these objectives in the most efficient way and with the least possible disruption to ordinary business activities, while at the same time protecting Canadian businesses' ability to compete in world markets.

• 1050

These discussions were detailed and extensive. Having regard to the complexities of the field addressed, Bill C-91 is a

TÉMOIGNAGES

(*Enregistrement électronique*)

[*Traduction*]

Le jeudi 1er mai 1986

Le président: J'aimerais que les députés de la majorité prennent leur place. Nous sommes heureux d'accueillir aujourd'hui le Conseil d'entreprises sur les questions d'intérêt national. Permettez-moi de vous présenter le coprésident du Groupe de travail sur la concurrence, M. William F. McLean, ainsi que le président-directeur général, Thomas P. d'Aquino. Bonjour, monsieur d'Aquino. Nous accueillons également votre conseiller juridique, M. William Rowley. Merci d'être venus. Généralement, nous allouons 15 minutes aux témoins pour qu'ils fassent leur déclaration liminaire. Cela laisse tout le temps qu'il faut pour les questions. Cela nous laissera environ une heure. Si vous voulez bien commencer, nous sommes prêts.

M. William F. Maclean (coprésident du Groupe de travail sur la concurrence, Conseil d'entreprises sur les questions d'intérêt national): Très bien. Mesdames et messieurs, le Conseil d'entreprises sur les questions d'intérêt national vous remercie de votre invitation à comparaître. Nous vous avons déjà envoyé notre mémoire, car il nous a semblé utile de vous communiquer la somme de nos réflexions pour que vous puissiez la verser aux dossiers. C'est un document assez long et nous n'avons pas l'intention d'occuper tout votre temps en le lisant. Je vais plutôt essayer de vous en faire un bref résumé, ce qui laissera plus de temps pour les questions.

Cela fait déjà plusieurs années que le Conseil d'entreprises consacre une grande partie de son temps et de ses énergies aux propositions de modification de la Loi relative aux enquêtes sur les coalitions. Depuis 15 ou 16 ans, plusieurs projets de loi visant à modifier cette loi ont vu le jour. Pendant longtemps ces propositions ont été considérées par beaucoup comme purement technocratiques et négatives. Au cours des trois ou quatre dernières années, le gouvernement actuel et le gouvernement précédent se sont lancés dans une opération générale de consultation avec de nombreuses organisations, y compris le Conseil d'entreprises, pour déterminer s'il serait possible de parvenir à un consensus sur des modifications qui, tout en satisfaisant les objectifs du ministère, auraient l'agrément général de tous les intéressés.

En ce qui nous concerne, par le biais de ces consultations, nous avons commencé par essayer de comprendre quels étaient exactement les objectifs du ministère et les motifs de ces objectifs. Ces objectifs ne posaient pas de problème. La discussion a plutôt porté sur les moyens devant permettre d'atteindre ces objectifs de la manière la plus efficace, avec un minimum de répercussions perturbatrices sur les activités des intéressés, tout en protégeant la compétitivité des entreprises canadiennes sur les marchés mondiaux.

Ces discussions ont été longues et détaillées. Compte tenu de la complexité de ce domaine, il faut se féliciter du résultat et

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good piece of work and the legislative draftsmen are to be congratulated. The bill contains many improvements over the present law and over past attempts at amendment. The directors' extraordinary powers of investigation and enforcement have been made the subject of appropriate judicial control and oversight, consistent with requisite charter provisions. The bill deals with the issue of monopoly or market dominance in an appropriate and successful manner. The dominant firm owes a special duty not to engage in anti-competitive behaviour. However, the bill recognizes that competition laws are designed to protect competition, not competitors.

Given Canada's reliance on external trade, the effort to broaden the export exemption to the conspiracy provision is welcome. Even so, in our brief we suggest that a slight further change might wisely be made. Provision has been made for full appeals from the new tribunal. The failure of earlier proposals to recognize the importance of this has been at the root of much conflict.

Finally, a whole series of earlier notions have disappeared. Gone, for example, are conspiracies and shared monopolies achieved through closely parallel conduct which was short of agreement. Gone too are unworkable and unrealistic market share tests and reverse onus provisions for mergers and dominant firms.

Despite the general agreement that a good piece of work has been done, our members believe there remain some important points of concern with the bill. The most important of these relate to the merger provisions.

The Canadian economy depends very heavily on exports. In the current environment, we see growing competition in Canadian markets by strong competitors from other countries. At the same time, Canadian producers face increasingly tough competition in their traditional export markets. Declining tariffs as a result of GATT agreements will subject Canadian industry to much more intense competition than in the past.

The current initiative for freer trade with the United States, by far our largest export customer, will intensify these trends. On top of this, Canada has a small domestic market which in most cases is unable to support a scale of production that is fully competitive by world standards.

In the current atmosphere and for the foreseeable future, we believe it will undoubtedly be necessary to restructure many Canadian industries in order to remain or become competitive with foreign producers, with foreign producers' products in our own markets and to achieve productivity levels which will allow us to compete adequately in export markets. A most important mechanism for this necessary restructuring will undoubtedly be mergers.

[*Traduction*]

féliciter les rédacteurs du projet de loi C-91. Il contient de nombreuses améliorations par rapport à la loi actuelle et par rapport aux tentatives passées de modification. Les pouvoirs extraordinaires d'enquête et de police du directeur sont assujettis au contrôle judiciaire et juridictionnel conformément aux dispositions applicables de la Charte. La question des monopoles ou des abus de position dominante est réglée de manière très satisfaisante. La firme occupant une position dominante a le devoir tout particulier d'éviter tout agissement monopoliste. Cependant, le projet de loi reconnaît que l'objet des lois sur la concurrence est de protéger la concurrence et non pas les concurrents.

Vu l'importance du commerce extérieur pour le Canada, nous applaudissons à l'effort visant à exempter les exportations de la disposition sur les complots. Malgré cela, nous suggérons dans notre mémoire qu'il serait peut-être judicieux d'apporter une petite modification supplémentaire. Dorénavant les appels devant le nouveau tribunal ne seront plus limités. Les projets précédents péchaient sur ce plan, d'où les nombreuses protestations.

Finalement, toute une série de notions précédentes ont disparu. Ont disparu, par exemple, les complots et les oligopoles résultant d'activités très parallèles mais sans entente. Ont disparu également les critères non réalistes et inapplicables servant à mesurer les parts de marché ainsi que les dispositions relatives au fardeau de la preuve pour les fusions et les firmes en position dominante.

Bien que nos membres se félicitent d'une manière générale du résultat, ils estiment toujours que certaines questions importantes n'ont pas été réglées à leur satisfaction. La plus importante concerne les dispositions sur les fusionnements.

L'économie canadienne dépend fortement des exportations. Dans l'environnement actuel, nous constatons que les marchés canadiens sont de plus en plus envahis par des concurrents venant de l'étranger. Simultanément, les producteurs canadiens doivent lutter contre une concurrence de plus en plus dure sur leurs marchés d'exportation traditionnels. La réduction des barrières douanières décrétée par les derniers accords du GATT soumettra l'industrie canadienne à une concurrence beaucoup plus intense que par le passé.

L'initiative de libéralisation des échanges commerciaux avec les États-Unis, de loin notre plus gros client à l'exportation, intensifiera ces tendances. En outre, le marché du Canada étant petit, dans la plupart des cas, notre production est insuffisante pour que nous soyons compétitifs sur le plan international.

Compte tenu du climat actuel et de son évolution prévisible, nous sommes persuadés qu'il sera nécessaire à de nombreuses industries canadiennes de se restructurer pour continuer à concurrencer ou pour concurrencer les producteurs étrangers, les produits étrangers sur nos propres marchés et pour atteindre des niveaux de productivité qui nous permettront d'être vraiment compétitifs sur les marchés d'exportation. Il est indubitable que les fusionnements représenteront un des outils les plus indispensables à cette nécessité de restructuration.

[*Text*]

In all of these circumstances we strongly believe that the test of "lessen competition substantially" proposed in the merger provisions, is a wrong policy choice and a risky one for the future health of the Canadian economy.

No one can accurately foresee how a tribunal will interpret the words "lessen competition substantially". Should they be interpreted to mean anything more than a minor lessening, this could well impair the ability of Canadian industry to restructure itself to meet international competition. We therefore believe that a better policy choice and a more logical test is one which would assess the state of competition after the merger, rather than one which measures the degree of lessening of competition resulting from the merger. Such a test would provide that the tribunal would not intervene if substantial competition continued to exist after a merger.

• 1055

All of this is made even more relevant because of the current proposals of the American government to move away from a test of substantial lessening of competition to a test which identifies anti-competitive harm with the ability to exercise market power. Market power is defined by the bill as the ability of more than one firm to maintain prices above competitors' levels for a significant period of time. This proposed U.S. change would constitute a very high threshold for intervention.

The merger provisions of Bill C-91 deal with public interest and competition and do not permit any other consideration to be brought to bear on any situation whatever the circumstances. The Director of Investigation will be obliged to apply the law on mergers guided only by the provisions of the act. It is not possible to foresee the variety of circumstances which may exist affecting mergers in Canada. In some unusual cases it may be important to give weight to public interest considerations other than the effect on competition.

We therefore believe that it is highly desirable to give the Cabinet authority to approve a merger at any time, whether before or after a decision by the competition tribunal. This authority would clearly only be used in a tiny minority of cases, but they might be very important cases. If exercised after a tribunal decision, it would not substitute the decision of the Cabinet for the decision of the tribunal. The tribunal may only judge on the basis of the effect on competition while the Cabinet, if it so decided, might allow the merger to proceed based on other public interest considerations despite the effect on competition.

The provisions of the bill dealing with joint ventures are a considerable improvement over past attempts. Nevertheless, there are a good many members of the business council who believe that difficulties remain. Two amendments are recommended for consideration: first, the removal of the seemingly illogical exclusion of incorporated joint ventures from the

[*Translation*]

Dans toutes ces circonstances, nous sommes intimement persuadés que le critère de diminution sensible de la concurrence proposé dans les dispositions sur les fusionnements est une erreur susceptible de mettre en danger la santé de l'économie canadienne à l'avenir.

Personne ne peut prédire avec certitude comment les tribunaux interpréteront ce critère de diminution sensible de la concurrence. S'ils décidaient de placer la barre au plus bas, les possibilités de restructuration de l'industrie canadienne pour faire face à la concurrence internationale seraient d'autant réduites. Nous pensons en conséquence qu'il serait plus logique et plus avisé de mesurer le degré de concurrence après le fusionnement, plutôt que de mesurer le degré de diminution de la concurrence susceptible de résulter du fusionnement. Un tel critère préviendrait que le tribunal intervienne si un degré de concurrence suffisant continue à prévaloir après un fusionnement.

Tout ceci revêt une importance d'autant plus grande que le gouvernement américain se propose actuellement de remplacer le critère de diminution sensible de la coucurrence par un critère voyant dans l'aptitude à exercer un pouvoir de marché une atteinte à la libre concurrence. Le pouvoir de marché est défini par le projet de loi comme étant l'aptitude de plus d'une firme à maintenir des prix supérieurs au niveau des concurrents pendant une période de temps certaine. Cette proposition américaine ferait monter très considérablement le seuil d'intervention.

Les dispositions sur les fusionnements du projet de loi C-91 prennent uniquement en compte l'intérêt public et la concurrence et excluent toute autre considération, quelles que soient les circonstances. Le directeur des enquêtes aura l'obligation d'appliquer les règles sur les fusions dans le cadre restrictif des dispositions de la loi. Il est impossible de prévoir toute la gamme des circonstances pouvant justifier des fusionnements au Canada. Dans certains cas exceptionnels, il peut arriver qu'il soit important de donner plus de poids aux considérations d'intérêt public qu'aux effets sur la concurrence.

En conséquence, nous estimons très souhaitable d'investir le Cabinet du pouvoir d'approuver un fusionnement, que ce soit avant ou après la décision du tribunal de la concurrence. Il est clair que ce pouvoir ne serait utilisé que dans une toute petite minorité de cas, mais ces cas pourraient être très importants. Si ce pouvoir est exercé après que le tribunal a rendu sa décision, la décision du Cabinet ne serait pas substituée à la décision du tribunal. Le tribunal ne peut se prononcer qu'en se fondant sur les conséquences pour la concurrence alors que le Cabinet, s'il en décide ainsi, peut autoriser la fusion à la lumière d'autres considérations d'intérêt public malgré les effets sur la concurrence.

Les dispositions du projet de loi concernant les entreprises à risques partagés constituent une amélioration considérable par rapport aux tentatives passées. Néanmoins, un bon nombre des membres du conseil d'entreprises pensent que des difficultés demeurent. Nous recommandons deux amendements à votre réflexion: Premièrement, la supression de l'exclusion apparam-

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exemption in proposed section 67; second, the extension of the exemption to cover joint ventures which create new businesses, whether or not the joint venture agreement provides for the termination of the new business. These are our principal concerns with Bill C-91.

The business council has enlisted a number of people from their members who have studied the provisions of the bill in great detail over a considerable period of time. As a consequence, even though we have not commented on each of the main provisions of the act we do have a close familiarity with most of the amendments. If because of this we can be of any help to the committee on any section of the bill we would be very glad to do so.

Ladies and gentlemen, this morning we are offering you our thoughts and recommendations on how we believe the bill before you could be improved. But let me make one point clear: the Business Council on National Issues wishes to see a bill implemented in this session of Parliament. We believe it is time, after many years of debate, to have this matter behind us.

We thank you for the opportunity to appear and now offer to answer any questions of the committee members.

The Chairman: Mr. Ouellet.

Mr. Ouellet: Mr. Chairman, I would like first to thank the Business Council on National Issues for appearing before us today. I would like, with your permission, to have my personal thanks expressed to Mr. Mclean, Mr. d'Aquino, and Mr. Rowley for discussions they had with me in my previous capacity. I indeed indicated during the discussion in the House on second reading that I have considered the attitude of the Business Council on National Issues in relation to competition policy as being very positive, that I personally believe their positive approach to change to the law was what allowed movement and a true consultation process to be implemented between representatives of a number of companies in Canada and the government, particularly the officials of the Department of Consumer and Corporate Affairs. I want to repeat what I have said in the House and thank these gentlemen for their openness, their frankness. Although we have not all the time agreed on objectives, they have always been very courteous and very open.

• 1100

I believe their presentation here outlined the fundamental difficulty that exists in amending the law; that is, that there are such diverse interests and views represented, that it is difficult to have a balanced legislation that could please everybody. I think it is an impossible task. Obviously some aspects of the legislation please your organization, but others you are not too happy with; I think that is natural.

[*Traduction*]

ment illogique des sociétés à risques partagés de l'exemption proposée à l'article 67; deuxièmement, l'extension de cette exemption aux entreprises à risques partagés créatrices de nouvelles entreprises, que l'acte constitutif prévoie ou non une durée déterminée pour la nouvelle entreprise. C'est un résumé des principaux problèmes que nous voyons dans le projet de loi C-91.

Le Conseil d'entreprises a requis les services d'un certain nombre de ses membres pour étudier en détail et en profondeur les dispositions du projet de loi. En conséquence, même si nous ne commentons pas chacune des principales dispositions de la loi, le contenu de la majorité des modifications proposées nous est très familier. C'est pourquoi, si vous avez des questions à poser au sujet de n'importe quel article du projet de loi, nous nous ferons un plaisir de vous répondre.

Mesdames et messieurs, nous vous avons offert ce matin nos réflexions et nos recommandations sur la manière dont vous pourriez améliorer ce projet de loi. Cependant, ne vous méprenez pas: le Conseil d'entreprises sur les questions d'intérêt national souhaite qu'un tel projet de loi soit adopté pendant cette session du Parlement. Nous pensons que le temps est venu, après de nombreuses années de discussion, de régler cette question une fois pour toutes.

Nous vous remercions de nous avoir invités à comparaître et nous sommes maintenant prêts à répondre à vos questions.

Le président: Monsieur Ouellet.

M. Ouellet: Monsieur le président, j'aimerais tout d'abord remercier le Conseil d'entreprises sur les questions d'intérêt national d'avoir répondu à notre invitation. J'aimerais, avec votre permission, remercier personnellement MM. McLean, d'Aquino et Rowley des échanges fructueux que nous avons eus lorsque j'occupais mes fonctions précédentes. J'ai d'ailleurs indiqué pendant le débat de deuxième lecture à la Chambre que l'attitude du Conseil d'entreprises sur les questions d'intérêt national concernant la politique de la concurrence m'était toujours apparue très positive et que personnellement, j'estimais que c'était cette attitude positive qui avait permis de sortir de l'impasse et d'engager un véritable processus de consultation entre les représentants d'un certain nombre de compagnies canadiennes et le gouvernement, tout particulièrement les fonctionnaires du ministère de la Consommation et des Corporations. J'aimerais répéter ce que j'ai dit à la Chambre et remercier ces messieurs pour leur franchise et leur ouverture d'esprit. Même si nous n'avons pas toujours été d'accord quant aux objectifs à viser, vous avez toujours été très courtois et très ouverts.

Il me semble que votre exposé a très bien fait ressortir la difficulté fondamentale que pose la modification de la loi. En effet, les intérêts et les points de vue sont si variés qu'il est très difficile d'avoir une loi équilibrée qui plaise à tout le monde. Je dirais même que c'est une impossibilité. Certains aspects de la loi plaisent à votre organisme tandis que d'autres ne vous arrangent pas beaucoup, et je trouve cela naturel.

[*Text*]

I would like to concentrate on one aspect of your recommendations that has to do with the Cabinet override. You said on page 13 of your presentation:

> Industrial restructuring is fundamental to the future of the Canadian economy and mergers are an important part of the restructuring process.

You therefore recommend that major mergers that could be rejected by the tribunal on competition grounds should nonetheless be able to proceed if Cabinet—that is, the government—after considering the national interest, believes they should do so. I would like to know if in the same spirit you will recognize the reverse; that is, that Cabinet should also have the right to block a merger, although such merger might not be anti-competitive, if after considering the national interest, Cabinet believes such mergers should not go forward.

Mr. William McLean: I think I would have to say that I agree with that. I am not a technician and therefore I do not know whether such a provision would properly be included or logically be included in a competition bill, but in principle I see no reason why it should not work both ways.

Mr. Ouellet: Okay.

Mr. Thomas d'Aquino (President and Chief Executive Officer, Business Council on National Issues): Mr. Chairman, to the Hon. Mr. Ouellet, I just want to add one other thing. We believe the Cabinet override is not something that should be exercised in a whimsical way. We are talking here about very important and exceptional circumstances. So one would have to assume that the public policy issues that would be involved, both in the Cabinet overriding in a positive or a negative sense, the decision of the tribunal would have to be one that was exceptional and manifestly in the public interest.

So we are not suggesting here something that would give the Cabinet the privilege to do this simply because one or two representations may have been made, but an exceptional case.

Mr. William McLean: We are not really talking about any sort of automatic review procedure. It is impossible for probably anyone to foresee what circumstances must arise and I think we are nervous about having the government's hands tied in cases in which they felt strongly about national interest considerations other than competition.

Mr. Ouellet: I appreciate this. Again I have to stress that I appreciate your frankness in recognizing that in fact in some exceptional case this could go both ways. Indeed, you have alluded to the fact that this legislation might not be the ideal place to deal with it. Do you think the exceptions you are asking for should be put in this legislation? Should it not be put somewhere also . . . ?

[*Translation*]

J'aimerais vous interroger au sujet de l'une de vos recommandations, qui traite du droit de véto du Cabinet. Vous dites à la page 13 de votre mémoire:

> La restructuration de l'industrie est essentielle à l'avenir de l'économie canadienne et les fusionnements sont un élément important de ce processus de restructuration.

Ce que vous recommandez, donc, c'est que les fusionnements importants qui pourraient être rejetés par le tribunal pour des raisons de concurrence pourraient néanmoins aller de l'avant si le Cabinet, c'est-à-dire le gouvernement, après étude de l'élément intérêt national, décidait qu'il n'y voit aucun problème. J'aimerais savoir si vous accepteriez que l'inverse se produise, toujours dans le même esprit. Autrement dit, seriez-vous d'accord pour que le Cabinet ait le droit de bloquer un fusionnement, même si celui-ci ne porte pas atteinte à la concurrence, si après étude de l'aspect intérêt national, le Cabinet est d'avis que le fusionnement en question ne serait pas bon?

M. William McLean: J'imagine que je serais d'accord. Cependant, je ne suis pas spécialiste en la matière et je ne sais donc pas si pareille disposition devrait logiquement être incluse dans une loi concernant la concurrence, mais en principe, je ne vois pas pourquoi cela ne pourrait pas fonctionner dans les deux sens.

M. Ouellet: Très bien.

M. Thomas d'Aquino (président-directeur général du Conseil d'entreprises sur les questions d'intérêt national): Monsieur le président, en réponse à la question de M. Ouellet, j'aimerais ajouter quelque chose. Nous pensons que le droit de veto du Cabinet ne devrait pas pouvoir s'exercer de façon fantaisiste. Il est question ici de circonstances très importantes et tout à fait exceptionnelles. L'on doit donc supposer que, pour que le Cabinet recoure à son droit de veto dans un sens ou dans l'autre, la décision prise par le tribunal doit en être une qui a un caractère tout à fait exceptionnel et qui cadre manifestement avec l'intérêt public.

Nous ne voudrions pas d'un système en vertu duquel le Cabinet aurait le privilège d'exercer ce droit de veto tout simplement parce que une ou deux interventions auraient été faites. En effet, il faudrait qu'il s'agisse d'un cas vraiment exceptionnel.

M. William McLean: Nous ne parlons pas vraiment d'un quelconque processus de contrôle automatique. Il nous est difficile à tous de prévoir quelles circonstances pourraient se dessiner à l'avenir, et je pense que l'on ne voudrait pas que le gouvernement soit limité dans les mesures qu'il pourrait prendre dans le cas de questions d'intérêt national d'importance autres que la concurrence.

M. Ouellet: J'apprécie vos remarques. J'aimerais de nouveau souligner que j'apprécie la franchise dont vous avez fait preuve en reconnaissant que dans certains cas exceptionnels, cela pourrait aller dans les deux sens. Vous avez même dit que le projet de loi n'est peut-être pas le mécanisme idéal pour régler ce genre de choses. Pensez-vous qu'il faille prévoir dans le projet de loi les exceptions dont vous avez fait état? Ne faudrait-il pas également prévoir ces situations dans . . . ?

[*Texte*]

• 1105

Mr. William McLean: I am sorry; I am not quite sure I understand the question, sir.

Mr. Ouellet: In answering me, you said you were not too sure this Cabinet responsibility should be given within the competition legislation.

Mr. William McLean: Honestly, it is not unwillingness to answer on my part, but I think I would have to rely on someone with more expertise in the law to answer that question. I am just not competent.

Mr. William Rowley (Legal Adviser, Business Council on National Issues): Mr. Ouellet, I do not think there would be a concern in the business council membership if that override possibility were in fact in this legislation. From a legal perspective, it seems to me a logical place for it to be put. What was being suggested is simply a legislative ability built in, and while it is the natural place, I suppose one could take the approach that has been taken in the Financial Administration Act and use other legislation. But I do not think one way or the other is particularly important.

Mr. Ouellet: Thank you. Mr. Chairman, I understand our time is limited, so I will stop at this time. If there is time remaining at the end of the session, I might come back. Thank you.

The Chairman: Mr. McCrossan, *s'il vous plait.*

Mr. McCrossan: Thank you, Mr. Chairman. My questions relate to your arguments about the pre-test or post-test on merger and the example you cite of four companies with a 25% share, with two of them merging. I do not think that is a particularly well chosen example, and I am drawn to think of the recent expansion of Petro-Canada in acquiring Gulf and the resultant drop in competition.

I think it is evident to everyone in this country, at least in Ontario, that when two companies end up with over a 50% share in several markets, particularly in western Ontario, it is very difficult to judge in advance whether or not there will be a reduction in competition. Indeed, there are national reasons why such a take-over might have been considered. But after the fact it is pretty evident that there has been a significant reduction in competition as a result of the dominant position of Esso and Petro-Can.

So it seemed to me that what you were looking at in your brief was judging the position after it occurred, and if there was evidence that there was a reduction in the merger, then some sort of step backwards . . . But I wonder if that could ever work.

[*Traduction*]

M. William McLean: Excusez-moi, mais je ne suis pas certain d'avoir bien compris la question.

M. Ouellet: Dans la réponse que vous m'avez donnée, vous avez dit ne pas être convaincu de l'opportunité de définir cette responsabilité du Cabinet dans un projet de loi portant sur la concurrence.

M. William McLean: Ce n'est pas que j'essaie de m'esquiver, mais je préférerais laisser répondre quelqu'un qui soit plus compétent que moi en matière de questions juridiques. Je ne suis tout simplement pas compétent dans ce domaine.

M. William Rowley (conseiller juridique, Conseil d'entreprises sur les questions d'intérêt national): Monsieur Ouellet, je ne pense pas que cela ennuyerait les membres du Conseil si ce droit de veto était en fait prévu dans la loi. D'ailleurs, d'un point de vue purement juridique, il me semble qu'il serait logique d'y prévoir ce droit. Tout ce qui est prévu, c'est que ce pouvoir existe en vertu de la loi, et même si c'était tout à fait naturel de définir ce pouvoir dans le projet de loi dont le Comité est saisi, l'on pourrait dire que ce droit de veto est déjà reconnu par la Loi sur l'administration financière. Quoi qu'il en soit, je ne pense pas que cela revête beaucoup d'importance, que cela aille dans un sens ou dans l'autre.

M. Ouellet: Merci. Monsieur le président, si j'ai bien compris, nous ne disposons pas de beaucoup de temps, et je vais donc m'arrêter là. S'il nous reste cependant un peu de temps à la fin de la réunion, je demanderai peut-être à avoir la parole de nouveau. Merci.

Le président: Monsieur McCrossan, *please.*

M. McCrossan: Merci, monsieur le président. Mes questions porteront sur les arguments que vous avez avancés relativement aux critères devant intervenir avant et après les fusionnements, et vous avez justement cité l'exemple de quatre sociétés, avec une part de 25 p. 100, dont deux fusionnent. Je ne pense pas que cet exemple soit très bon, et je suis amené à me pencher sur ce qui s'est passé récemment dans le cadre de l'expansion de la société Petro-Canada. En effet, celle-ci a acheté la société Gulf, et cela a débouché sur une diminution de la concurrence.

Tout le monde, au moins en Ontario, sait que lorsque deux sociétés se retrouvent avec une part de 50 p. 100 sur plusieurs marchés, surtout dans l'Ouest de l'Ontario, il est très difficile de savoir à l'avance s'il y aura ou non réduction de la concurrence. Il y a d'ailleurs plusieurs raisons d'ordre national qui pourraient être invoquées pour justifier ce fusionnement. Quoi qu'il en soit, l'on s'est rendu compte après coup que la situation dominante d'Esso et de Pétro-Canada avait amené une réduction sensible de la concurrence.

Il me semble que dans votre mémoire, vous parliez de situations où l'on jugerait de la position dominante de la société concernée après coup, où, s'il y avait des preuves que le fusionnement avait amené une réduction de la concurrence, il serait possible de faire marche arrière . . . Mais je me demande si ce serait vraiment faisable.

[*Text*]

Mr. William McLean: If that is the impression we have left with the brief then we have written it badly, because that is not what we are proposing. In any case, whatever the test, in many cases, maybe in most cases, the tribunal is going to be faced with attempting a judgment on what the result of a prospective merger will be. They will have to try to forecast that. What we are saying is that rather than setting a test which faces the tribunal with the question of whether or not the merger would reduce competition substantially if it proceeded, face them instead with the question: If the merger proceeds, after the merger is completed will substantial competition continue to exist in the market? They are both prospective questions. I do not see any necessity for the tribunal to judge what the future result of an action will be.

• 1110

Mr. McCrossan: There seems to be a very big qualitative difference in those tests, at least as I see them. If we think of the computer industry, for example, you could argue that if nobody is left but IBM, Honeywell and Burroughs, there will be substantial competition because those firms will be out there knocking each other, even if there are only three left. Whereas the test as written would basically prohibit IBM, because of its dominant position, from gobbling up all the small computer manufacturers right now.

Mr. William McLean: You are now moving to a different section, sir, with respect . . .

Mr. McCrossan: That is right. What are you recommending and what is its practical implication? It seems to me that the practical implication of what you are recommending is far less desirable than the practical implication of the way the bill is written.

Mr. William McLean: Obviously on a subject such as this there is plenty of room, as we have long since discovered, for difference of opinion. We believe the test we are proposing is more logical. Obviously a great many people do not agree with us.

Either test will probably work under the best of circumstances. What is concerning us is what we believe to be the risk the proposed test carries. Let me illustrate this by saying that the law in the United States uses a test that is almost exactly similar to the substantial listening test, and the courts in the United States—it has changed rather dramatically recently, but in previous years in the United States the courts interpreted the test in one case to mean indeed they would attack a merger of one firm which had a 2% share with another one that had a 4% share. In other words, they took a rather *de minimis* interpretation.

We believe if such an interpretation were taken account of—we are not saying it would be—it could do serious damage to the ability of Canadian industry to achieve competitive-sized units.

[*Translation*]

M. William McLean: Si c'est cela que vous avez compris, alors nous nous sommes mal exprimés dans notre mémoire, car ce n'est pas cela que nous proposons. Quels que soient les critères utilisés, dans bien des cas, et sans doute dans la plupart, le tribunal va devoir essayer de deviner quelles seront les conséquences d'un fusionnement donné. Il devra essayer de faire des prévisions. Nous, ce que nous disons, c'est qu'au lieu d'établir un système de critères obligeant le tribunal à se poser la question de savoir si le fusionnement amènera ou non une réduction sensible de la concurrence, il serait peut-être préférable d'opter pour une formule en vertu de laquelle le tribunal se poserait la question suivante: si le fusionnement se réalise, continuera-t-il d'y avoir par la suite une concurrence considérable sur le marché? Il s'agit de deux questions hypothétiques. Je ne vois pas la nécessité pour le tribunal de juger des résultats éventuels d'une mesure.

M. McCrossan: Il semble y avoir, du moins à mon avis, une distinction très importante dans la qualité de ces essais. Prenons le cas par exemple du secteur informatique, on pourrait toujours prétendre que s'il ne reste plus personne d'autre que IBM, Honeywell et Burroughs, la concurrence sera considérable, car ces deux maisons essaieront de se descendre mutuellement, même s'il n'y en a que trois qui demeurent. Alors que sous sa forme actuelle, ce critère empêcherait fondamentalement IBM d'avaler dès maintenant tous les petits fabriquants d'ordinateurs dès maintenant grâce à sa position dominante.

M. William McLean: Il s'agit d'un article différent, monsieur, concernant . . .

M. McCrossan: C'est juste. Que recommandez-vous et quels en sont les effets pratiques? J'ai l'impression que, sur le plan pratique, ce que vous recommandez est beaucoup moins souhaitable que l'incidence précise qu'aurait le projet de loi sous sa forme actuelle.

M. William McLean: Un sujet comme celui-ci prête bien sûr à controverses. Le critère que nous proposons nous semble plus logique. Il est certain que beaucoup ne sont pas d'accord avec nous.

L'un ou l'autre des deux critères peut très bien s'appliquer dans les meilleurs cas. Ce qui nous préoccupe c'est qu'à notre avis les critères proposés présentent un risque. Je vous donne un exemple, la loi américaine prévoit une épreuve qui est presque semblable à celle d'une écoute substantielle, et les tribunaux américains—il y a eu récemment un changement sérieux, mais il est arrivé que les tribunaux américains estiment qu'il pourraient condamner la fusion d'une firme ayant 2 p. 100 d'actions avec une autre qui en avait 4 p. 100. Autrement dit, il s'agissait là d'une interprétation *de minimis*.

Nous croyons que si cette interprétation était retenue—nous ne disons pas qu'il en sera ainsi—on pourrait sérieusement entraver la compétitivité de l'industrie canadienne.

[*Texte*]

Mr. McCrossan: Well, I am very sympathetic to that argument . . .

Mr. William McLean: This is our argument. That is all, and whether we have precisely the right solution is another question.

Mr. McCrossan: Obviously we have to develop world-scale industry in Canada, and as a trade-off from that you have to look at what happens to the domestic situation in Canada.

I think on page 9 in your brief you say at the bottom of the page, in the last sentence on the page:

> In no country is there evidence that bureaucratic involvement in this process is economically constructive or necessary to sustain the vigour of these competitive forces.

My understanding of the situation in Japan with MITI, the Ministry of International Trade and Industry, is that is exactly what happens and they are a rather outstanding success. So when you say there is no evidence whatsoever, I would find it pretty hard to believe that you really mean it. Looking at Japan or South Korea or Taiwan . . .

Mr. William McLean: That may be a little too rhetorical.

Mr. McCrossan: —they have done exactly that and they have been outstanding successes.

Mr. William McLean: You answer that, Tom.

Mr. d'Aquino: Well, Mr. Chairman, if we really want to get down to the nitty gritty, the Japanese example would not be a bad one, because in fact the involvement is not by legislation or by Cabinet, it is simply . . .

Mr. McCrossan: By old boys network . . .

Mr. d'Aquino: —done in the way of what I would call some very constructive urging. But the decisions are made—very important—by the industries themelves, and indeed we would be . . .

Mr. Orlikow: I do not accept that at all.

Mr. d'Aquino: Mr. Chairman, we would be delighted if the Government of Canada would be prepared to give us the benefit of the doubt and let us make those decisions. So if we want to go to the Japanese model, let us take a good hard look at it.

Mr. McCrossan: It is not my understanding of the Japanese model, but I think I have used up my time. Thank you.

• 1115

The Chairman: I will go to Mr. Orlikow and then to Mr. Redway.

Mr. Orlikow: Mr. Chairman, we have had a number of attempts to have bills passed by former governments, but they did not bring them forward and they did not pass the legisla-

[*Traduction*]

M. McCrossan: Je comprends très bien cet argument . . .

M. William McLean: C'est notre argument. C'est tout. Quant à savoir si nous avons la bonne solution, c'est une tout autre question.

M. McCrossan: Nous devons en arriver à obtenir au Canada, bien sûr, une industrie d'envergure internationale, mais en échange il faut voir ce qui peut arriver à notre marché interne.

A la page 9 de votre mémoire vous dites au bas de la page, la dernière phrase.

> On ne trouve dans aucun pays la preuve qu'une participation bureaucratique au processus soit économiquement constructive ou nécessaire pour une vigueur soutenue de ces forces concurrentielles.

Je crois comprendre qu'au Japon, c'est exactement ce qui se produit avec le ministère du commerce international de l'industrie, et que le succès y est éclatant. Par conséquent, lorsque vous prétendez qu'il n'y a aucune preuve, il m'est difficile d'accepter que vous le croyez vraiment. On n'a qu'à voir ce qui se passe au Japon ou en Corée du Sud ou à Taïwan . . .

M. William McLean: C'est peut-être une affirmation un petit peu trop théorique.

M. McCrossan: . . . c'est exactement ce qu'on a fait et leurs succès sont remarquables.

M. William McLean: Vous répondez, Tom.

M. d'Aquino: Et bien monsieur le président, si nous voulons vraiment en arriver aux choses sérieuses, je dirais que le modèle japonais n'est pas mauvais étant donné que la participation ne passe ni par la loi ni par le Cabinet; elle se fait tout simplement . . .

M. McCrossan: Par le jeu des relations . . .

M. d'Aquino: D'une façon que je qualifierais de pression constructive. Toutefois ce sont les industries elles-mêmes qui prennent les décisions—très importantes—, et en réalité nous serions . . .

M. Orlikow: Je ne suis pas du tout d'accord.

M. d'Aquino: Monsieur le président, nous serions ravis si le gouvernement du Canada était disposé à nous donner le bénéfice du doute et à nous laisser prendre les décisions. Si nous voulons suivre le modèle japonais, il faut d'abord bien l'étudier.

M. McCrossan: Ce n'est pas de cette façon que je vois le modèle japonais, mais il ne me reste plus de temps, je crois. Je vous remercie.

Le président: Je vais donner la parole à M. Orlikow, et ensuite à M. Redway.

M. Orlikow: Monsieur le président, nous avons essayé à plusieurs reprises de faire adopter des projets de loi par les gouvernements prédédents, mais ils ne les ont pas déposés et ils

[*Text*]

tion. It is pretty common knowledge that it was to a large extent because of the very strong opposition to those bills by the kinds of people who belong to your organization. Is that a fair belief?

Mr. William McLean: Tom, perhaps you could answer that. You are more competent than I on that.

Mr. d'Aquino: Mr. Chairman, this is very much not the case. It depends on how far back the hon. member wants to go. But there is, sitting to his right, a member of a former Cabinet who has already told this committee that were it not for the very positive will of this organization, Mr. McLean and many other people like him, in 1981, this new process of consultation may not have begun.

Let it be on the record that this organization in 1979, when combines policy was not an issue in the country, went to enormous lengths and devoted a great number of resources to not only doing a major policy study on competition but going so far as to draft a new combines bill, which was passed on to various Ministers of Consumer and Corporate Affairs. As Mr. Ouellet has said, our commitment to the idea of a new bill goes as far back as 1980. And he knows and other members of this committee I am sure know that we have been strong supporters of the idea of getting the bill through.

I remind you of what Mr. McLean just said at the conclusion of his remarks. He said that while we have offered some qualifications, let there be no mistake that this organization would like to see a new combines bill before the conclusion of this session of Parliament.

Mr. Orlikow: I do not question that. I am questioning the kind of bill and what is in it. I have been told by representatives of the CLC, who will appear somewhat later, that the amount of consultation that they had in the preparation of this bill is very minimal.

We had Professor Stanbury here the other day, who is one of the outstanding academic experts in this field. He and another university economist were supposed to have a meeting with the Minister, but the Minister just never found the time to see them. So I would like to ask, did your organization meet with departmental officials of any kind following the presentation of your initial brief?

Mr. William McLean: I am sorry . . . ?

Mr. Orlikow: You made a presentation, an initial brief, to the Minister. The question I am asking is between that time and the time the bill was tabled, did the representatives of yor organization meet with departmental officials, following presentation of the initial brief?

Mr. William McLean: I guess if you style our report, which we submitted to Mr. Ouellet some years ago, as an initial brief, yes, we met with departmental officials many times after that, and we met with them at the request of the Ministers then in office. I guess in office is the right word.

[*Translation*]

n'ont pas adopté de loi. Il est bien connu que c'est dû surtout au fait que le genre de personnes qui appartiennent à votre organisation s'opposaient fortement à ces projets de loi. Est-ce que j'ai raison de le croire?

M. William McLean: Tom, vous pourriez peut-être répondre à cette question. Vous êtes plus compétent que moi en la matière.

M. d'Aquino: Monsieur le président, ce n'est pas du tout cela. Cela dépend à quelle période veut remonter le député. Toutefois, il a à sa droite un membre d'un ancien cabinet qui a déjà déclaré à votre Comité que, n'eût été la volonté très ferme de cette organisation, de M. McLean et de bien d'autres personnes comme lui, en 1981, cette nouvelle méthode de consultation n'aurait pas vu le jour.

Permettez-moi de dire publiquement que l'organisation, en 1979, lorsque la politique sur les coalitions n'était pas discutée au pays, a beaucoup fait et a consacré des ressources considérables non seulement pour faire une étude importante sur la politique en matière de concurrence, mais a même rédigé un nouveau projet de loi sur les coalitions qui a été transmis à divers ministres de la Consommation et des Corporations. Comme l'a dit M. Ouellet, notre engagement envers la rédaction d'un nouveau projet de loi remonte à 1980. Et il sait, de même que d'autres membres du Comité, j'en suis certain, que nous avons toujours appuyé sans ambages l'idée de faire adopter un projet de loi.

Je vous rappelle ce que vient de dire M. McLean à la fin de ses remarques. Il a déclaré que même si nous avions certaines réserves, ne nous y trompons pas, l'organisation aimerait qu'il y ait une nouvelle loi sur les coalitions avant la fin de cette session du Parlement.

M. Orlikow: Je ne le mets pas en doute. Ce que je remets en question, c'est le genre de projet de loi que nous aurions et ce qu'il contiendrait. Des représentants du Congrès du travail du Canada m'ont dit—ils comparaîtront un peu plus tard—qu'on les a très peu consultés pour la rédaction du projet de loi.

Nous avons entendu l'autre jour le professeur Stanbury, l'un des experts universitaires les plus reconnus dans ce domaine. Lui-même et un autre économiste universitaire censés rencontrer le ministre, mais celui-ci n'a jamais pu se libérer. Je vous pose donc la question suivante: est-ce que votre organisation a rencontré des hauts fonctionnaires du ministère après avoir présenté son premier mémoire?

M. William McLean: Excusez-moi . . . ?

M. Orlikow: Vous avez présenté un premier mémoire au ministre. Je vous demande si, entre le moment où vous avez présenté ce mémoire et le moment où le projet de loi a été déposé, des représentants de votre organisation ont rencontré des hauts fonctionnaires du ministère.

M. William McLean: Si vous considérez que notre rapport présenté à M. Ouellet il y a quelques années était un premier mémoire, je vous répondrai que, oui, nous avons rencontré des hauts fonctionnaires du ministère à plusieurs reprises après cela, et nous les avons rencontrés à la demande des ministres

[*Texte*]

Mr. Orlikow: The Minister tabled draft legislation in December. Between December and the time the bill was presented to Parliament, were you able to examine and comment on any draft legislation with officials of the department?

Mr. William McLean: I am nervous about my memory, but . . .

Mr. Orlikow: Maybe Mr. d'Aquino can . . .

Mr. William McLean: Yes. I do not think I met with anybody after that.

Mr. Orlikow: I was asking if any representatives of your organization met with departmental officials.

Mr. William McLean: I am sure there have been conversations, possibly telephone calls, about words and aspects of the bill. It is a highly technical bill and certainly everybody wants to be sure the language is clear and means what it is supposed to mean. I am sure there have been conversations, but any set of meetings with the officials, no; they terminated before the bill was tabled.

Mr. Orlikow: Did you suggest, either in meetings or in telephone conversations, any changes to the wordings of any sections of this bill, by yourself or in concert with any other group, and were any of these suggestions adopted?

• 1120

Mr. William McLean: Well, no, not that I know of. But the suggestions we have made are contained in our presentation here this morning and we have . . .

Mr. Orlikow: Mr. Chairman, that is not the question I am asking. I think this is very important. We heard from Mr. Stanbury, and if any member of the committee feels I am misinterpreting what Professor Stanbury said they will correct me. Professor Stanbury said that he wrote to the Minister and offered to meet with the Minister or officials of his department to go over his suggestions, and no such meeting was held.

So I am trying to find out whether this organization or its members had different treatment. I think it is very important, because there is a conception among many people in this country that the business community has more influence than anybody else. So I would like a yes or no answer. Were there meetings or discussions about the wording of the bill, or any proposals like that?

Mr. d'Aquino: Mr. Chairman, perhaps I can try to put this question to rest. The hon. member should know and I am sure supports the idea that in a democracy taxpayers, interest groups, individuals such as Professor Stanbury, everybody has the right to petition their government. If they do not do it, or if they do not take the time to do it, then too bad for them.

[*Traduction*]

alors en fonction. Je crois que c'est le terme à utiliser, en fonction.

M. Orlikow: Le ministre a déposé le projet de loi en décembre. Entre le mois de décembre et le moment où le projet de loi a été présenté au Parlement, avez-vous pu l'étudier et en discuter avec des hauts fonctionnaires du ministère?

M. William McLean: Je ne voudrais pas que ma mémoire me joue des tours, mais . . .

M. Orlikow: Peut-être que M. d'Aquino pourrait . . .

M. William McLean: Oui. Je ne crois pas avoir rencontré quelqu'un après cela.

M. Orlikow: Je vous demandais si des représentants de votre organisation ont rencontré des hauts fonctionnaires du ministère.

M. William McLean: Je suis certain que nous avons eu des conversations, peut-être téléphoniques, au sujet du libellé et de certains aspects du projet de loi. Il s'agit d'un projet de loi très technique, et tous veulent bien sûr s'assurer que le libellé est clair et signifie bien ce qu'il est censé signifier. Je suis sûr que nous avons eu des conversations, mais nous n'avons pas rencontré les hauts fonctionnaires après le dépôt du projet de loi.

M. Orlikow: Avez-vous proposé, lors de réunions ou de conversations téléphoniques, des changements au libellé du projet de loi, de votre propre initiative ou de concert avec d'autres groupes, et est-ce que certaines de vos propositions ont été adoptées?

M. William McLean: Non, pas à ma connaissance. Toutefois, nous avons fait des suggestions dans notre exposé de ce matin et nous avons . . .

M. Orlikow: Monsieur le président, ce n'est pas la question que j'ai posée. C'est extrêmement important. Nous avons entendu M. Stanbury, et si un membre du Comité a l'impression que j'interprète de façon erronée le professeur Stanbury, il peut me reprendre. Le professeur a déclaré avoir écrit au ministre pour lui offrir de le rencontrer, lui ou ses hauts fonctionnaires, afin de revoir ses suggestions, mais il n'y a eu aucune réunion.

Par conséquent, j'aimerais savoir si cette organisation ou ses membres ont été traités de façon différente. Je crois que c'est très important, car bien des gens, au pays, ont l'impression que les gens d'affaires ont plus d'influence que n'importe qui d'autre. J'aimerais donc qu'on réponde par un oui ou par un non à ma question. Est-ce qu'il y a eu des réunions ou des discussions au sujet du libellé du projet de loi, ou des propositions, par exemple?

M. d'Aquino: Monsieur le président, je pourrais peut-être répondre à cette question. Le député devrait savoir—et je suis sûr qu'il endosse cette notion—que dans une démocratie, les contribuables, les groupes d'intérêts, les particuliers comme le professeur Stanbury, tous ont le droit de présenter des requêtes

[*Text*]

I just want to say that up until the time the bill was tabled there were a substantial number of discussions with members of the department, some initiated by the department and some initiated by us. That should not surprise anyone. If there are indeed other organizations in the country who did not take advantage of beating down doors or making telephone calls, then it is too bad for them. They are not exercising their democratic rights.

On the subject of individuals who were consulted or were not consulted, my reading of the Minister's testimony before this committee says that the Minister consulted with at least 500 groups, or 500 groups were given an opportunity to testify. I do not know how many of those 500 testified. But Mr. Orlikow, I would be enormously surprised and even disappointed if individuals wrote, telephoned, called, made representations and were not heard. I would be enormously surprised. We would be disappointed, but that is the government's problem, not ours.

On the final point of individuals such as Professor Stanbury, I have discussed our proposals with Professor Stanbury on a number of occasions. Professor Stanbury's views are extremely well known to anyone who is interested in the subject of combines, and I presume the government would be well aware of those. I have no idea whether Mr. Stanbury had access to the government or not. But if he did not, I think it is regrettable.

Mr. Orlikow: I still would like an answer to my question. After the draft bill was tabled last December and before it was brought in its final form to Parliament, were there discussions between representatives of your organization and the Minister or departmental officials about individual clauses and sections of the bill? Will you answer yes or no?

Mr. William McLean: Yes, there were. There were discussions about the very subjects that are in our brief. We urged the department to make changes that we think are constructive. They did not agree with us. They have not agreed with us.

Mr. Orlikow: Let me just finish by saying that in my view this organization had opportunities to express their views to the department on what should be in the bill, which other organizations and people like Professor Stanbury did not have.

Mr. Redway: Perhaps Mr. Domm's point is right on this issue.

Mr. Domm: Thank you very much. I appreciate the opportunity to interject here. I will be very brief so that we can go on to other questions from other members of the committee.

I want to make two points very clear. A lack of communication between the department, between the Minister and the interested parties was inferred. Mr. Chairman, I want to assure you that this group has been very active in the past. It

[*Translation*]

à leur gouvernement. S'ils ne le font pas, ou s'ils ne prennent pas le temps de le faire, c'est bien dommage pour eux.

Je voudrais souligner que jusqu'à ce que le projet de loi soit déposé, il y a eu un grand nombre de discussions avec les gens du ministère, certaines à la demande du ministère et d'autres à notre demande. Personne ne devrait en être surpris. S'il y a d'autres organisations au pays qui n'ont pas profité du fait qu'elles pouvaient frapper aux portes ou téléphoner, c'est bien dommage pour elles. Elles n'ont pas exercé leurs droits démocratiques.

Au sujet des particuliers qui ont été ou non consultés, j'ai lu le témoignage du ministre devant le Comité, et il a dit avoir consulté au moins 500 groupes, ou 500 groupes ont eu l'occasion de témoigner. Je ne sais pas combien parmi ces 500 l'ont fait. Toutefois, monsieur Orlikow, je serais extrêmement surpris, et même déçu, que des particuliers aient écrit, téléphoné, fait des démarches, se soient déplacés, et n'aient pas été entendus. J'en serais très surpris. Nous serions déçus, mais c'est le problème du gouvernement, et non pas le nôtre.

Quant aux particuliers comme le professeur Stanbury, j'ai discuté de nos propositions avec lui à plusieurs reprises. Les opinions du professeur Stanbury sont extrêmement bien connues de tous ceux qui s'intéressent aux coalitions, et j'imagine que le gouvernement les connaît bien également. Je ne sais pas si M. Stanbury s'est adressé ou non au gouvernement. S'il ne l'a pas fait, c'est bien regrettable.

M. Orlikow: Je voudrais quand même qu'on réponde à ma question. Après que le projet de loi eut été déposé, en décembre dernier, et avant qu'il ne soit présenté sous sa forme finale au Parlement, y a-t-il eu des discussions entre des représentants de votre organisation et le ministre ou des hauts fonctionnaires du ministère au sujet de certains articles du projet de loi? Voulez-vous répondre par un oui ou un non?

M. William McLean: Oui, il y en a eu. Il y en a eu sur les points qu'on retrouve dans notre mémoire. Nous avons exhorté le ministère à apporter des modifications à notre avis constructives. Il n'était pas de cet avis. Les hauts fonctionnaires n'étaient pas d'accord.

M. Orlikow: Permettez-moi de terminer en disant qu'à mon avis, cette organisation a eu l'occasion de faire connaître au ministère ses opinions sur ce que devrait contenir le projet de loi, occasion que n'ont pas eue d'autres organisations et des gens comme le professeur Stanbury.

M. Redway: Peut-être que M. Domm a raison à ce sujet.

M. Domm: Merci beaucoup. J'apprécie l'occasion que vous me donnez d'intervenir. Je serai très bref, afin que nous puissions entendre les autres questions des autres membres du Comité.

Je voudrais bien éclaircir deux points. On a laissé entendre qu'il y avait eu un manque de communication entre le ministère, entre le ministre et les parties intéressées. Monsieur le président, je tiens à vous assurer que ce groupe-ci a été très

[*Texte*]

has submitted briefs to the Ministry and has been in continual dialogue with departmental officials. It was also alluded by Mr. Orlikow that the Canadian Labour Congress might not have been consulted. I can assure this committee through you, Mr. Chairman, that we made approaches to the Canadian Labour Congress. They did not respond; they had no desire to make comment. Our departmental officials visited the Canadian Labour Congress in order to get a response; we visited them. And I want it made perfectly clear to everyone on the committee, including the representatives who have taken a great deal of their time to be here today, that we appreciate their input. I am sure Mr. Ouellet did in years gone by, and we do today. That is all I wish to say.

• 1125

Le président: Monsieur Redway.

Mr. Redway: Thanks very much, Mr. Chairman. I have three areas on which I want to question our witnesses.

The first has to do with respect to this question of a Cabinet override. My own personal experience with a Cabinet override comes from my municipal background and experience in the Province of Ontario, where zoning matters, after going through numerous municipal hearings and council decisions, used to go on, and still do, to the Ontario Municipal Board. Subsequently there used to be an appeal to Cabinet—there no longer is, but there used to be—and that meant not that there were a limited number of issues that went to the Cabinet, but virtually everything once a decision was made by the OMB went to Cabinet for a decision.

The other thing that comes to my mind is a few years ago, when we still had the death penalty in this country, virtually every sentence of death went for review to the Cabinet. In both cases it bogged down the processes of government considerably. It seemed to me not to serve any useful purpose whatsoever. Mind you, I have taken advantage of the OMB Cabinet appeal to my municipality's advantage in the past.

Mr. Ouellet: Too often.

Mr. Redway: However, I would like your comments on that aspect, because it seems to me it opens up a Pandora's box; second, it is very destructive to the process of government.

Mr. William McLean: I understand your point clearly, and I agree with you that it can be very destructive. That is not what we are trying to propose. I think it is probably within the wit of man to write such a provision so those sorts of things would not happen. What we are proposing is that in extraordinary cases, and at the decision of the Cabinet, they could review it, not that there is any automatic appeal to a Cabinet. We are just nervous about tying the hands of the persons who are responsible for the performance of the country.

[*Traduction*]

actif par le passé. Il a présenté des mémoires au ministère et a continuellement dialogué avec des hauts fonctionnaires du ministère. M. Orlikow a laissé entendre que l'on n'aurait peut-être pas consulté le Congrès du travail du Canada. Je puis vous assurer, monsieur le président, que nous avons fait des démarches auprès du Congrès du travail du Canada, mais celui-ci n'a pas répondu. Il ne souhaitait pas intervenir. Des représentants du ministère sont allés sur place, au congrès, pour essayer d'obtenir une réponse. J'aimerais qu'il soit clair dans l'esprit de tous les membres du Comité, y compris les députés qui ont sacrifié de leur temps pour venir ici aujourd'hui, que nous apprécions le travail qu'ils font. C'était le cas de M. Ouellet il y a quelques années, et la situation est la même pour nous aujourd'hui. C'est tout ce que j'avais à dire.

The Chairman: Mr. Redway.

M. Redway: Merci beaucoup, monsieur le président. Il y a trois questions au sujet desquelles j'aimerais interroger les témoins.

Tout d'abord, la question du droit de veto du Cabinet. Si je me fie à ma propre expérience dans le domaine municipal et au niveau de la province de l'Ontario, les questions de zonage, après avoir fait l'objet de plusieurs audiences et décisions du conseil municipal, aboutissent toujours devant la Commission municipale de l'Ontario. Autrefois, cela était suivi d'un appel déposé devant le Cabinet . . . mais ce n'est plus le cas. Dans le cadre de ce système, presque toutes les décisions prises par la Commission municipale de l'Ontario finissaient par aboutir devant le Cabinet.

Un autre exemple qui me vient à l'esprit est le suivant: il y a quelques années, lorsqu'il y avait encore la peine capitale, presque toutes les condamnations à mort étaient examinées par le Cabinet. Dans les deux cas, tout cela ralentissait de beaucoup le travail du gouvernement et les différents mécanismes. Il me semble que ces mécanismes n'étaient pas utiles du tout. J'avouerais cependant avoir déjà recouru à la procédure d'appel d'une décision de la Commission municipale de l'Ontario devant le Cabinet, et ce, à l'avantage de ma municipalité.

M. Ouellet: Trop souvent.

M. Redway: J'aimerais néanmoins savoir ce que vous pensez de cet aspect-là de la chose, car il me semble que cela ouvrirait une boîte de Pandore. Deuxièmement, cela détruit le processus gouvernemental.

M. William McLean: Je vous comprends parfaitement, et je conviens que cela peut être destructif. Mais ce n'est pas là ce que nous proposons. Il me semble qu'il devrait être possible de rédiger une disposition de façon à ce que ce genre de chose ne puisse pas se produire. Ce que nous disons, c'est qu'il serait bon que le Cabinet puisse intervenir dans le cadre de cas extraordinaires. Nous ne recommandons pas qu'il y ait automatiquement appel devant le Cabinet. Tout simplement,

[*Text*]

Mr. Redway: Do you envisage in that sort of a situation, with an arbitrary decision on the part of the Cabinet to review, that the parties involved would have any right to make submissions, or would it just be an arbitrary review and policy decision?

Mr. William McLean: I do not think we envisage that the persons would have any automatic right at all to the Cabinet, or to the . . .

Mr. Redway: It is strictly an arbitrary decision?

Mr. William McLean: No. Well, I presume the Cabinet would not make an arbitrary decision. Presumably the Cabinet would have important public policy grounds before they would think of . . .

Mr. Redway: It sounds like a Star Chamber sort of situation.

Mr. Ouellet: Who would do it? The Minister of Finance, the Minister of International Trade? You know, an item does not come to Cabinet without being brought by someone. Who would do it, then?

Mr. d'Aquino: Mr. Chairman, I do not want you to think we just simply said we want an override and not have given any idea of how it might be done. The only thing we have not done, because we have left that to the wisdom and the imagination of the Minister of Consumer and Corporate Affairs and his many very competent advisers . . . We are aware of some of the problems. For example, the idea of should there be hearings; should there be an automatic access process to ensure that the concerns of Mr. Orlikow are not offended that only the so-called powerful and the rich have access, but others do not, we are very sensitive to all of those. This is why I said at the outset that the Cabinet override has to be exercised rarely, has to be exercised prudently. You know from your own political experience that if the terms and conditions of the override are clearly understood in public policy terms to be exceptional cases in the national interest, it will be a very foolish Cabinet indeed that will decide to intervene at the drop of every hat or every time a particular economic decision happens to go one way or the other.

• 1130

Only the political process and the natural political constraints in society—which all of you are more than aware of—will really have to rule there. It is this we would consider the principal constraint on the Cabinet's activity.

What sort of language do you actually use to ensure it is very rare and very exceptional? We have not given any time to this, but I just want the hon. member to know we did not seize on this recommendation unthinkingly.

[*Translation*]

nous ne voudrions pas que les personnes responsables de l'administration du pays soient trop limitées.

M. Redway: Dans pareilles situations, envisageriez-vous que les parties concernées aient le droit de se défendre, ou bien ne s'agirait-il que d'un processus tout à fait arbitraire, ne relevant que du Cabinet?

M. William McLean: Je ne pense pas que nous envisagerions que les gens puissent automatiquement faire appel au Cabinet . . .

M. Redway: La décision serait donc purement arbitraire?

M. William McLean: Non. En tout cas, je suppose que le Cabinet ne prendrait pas de décision arbitraire. J'imagine que le Cabinet s'appuierait sur des motifs d'intérêt public importants avant de songer à . . .

M. Redway: Cela me fait penser à la Chambre étoilée.

M. Ouellet: Qui le ferait? Le ministre des Finances, le ministre du Commerce international? Vous savez, ces affaires n'atterrissent pas toutes seules devant le Cabinet. Qui déposerait le dossier devant le Cabinet?

M. d'Aquino: Monsieur le président, je ne voudrais pas que vous pensiez que tout ce que nous voulons, c'est qu'il y ait un droit de veto, et que nous n'avons pas du tout réfléchi à la façon dont cela pourrait se faire. Tout ce que nous n'avons pas fait, parce que nous préférons nous en remettre à la sagesse et à l'imagination du ministre de la Consommation et des Corporations et de ses conseillers très nombreux et très compétents . . . Nous sommes au courant de certains des problèmes. La question, par exemple, de savoir s'il faudrait prévoir des audiences, ou mettre en place un processus d'accès automatique afin d'éviter, comme le disait M. Orlikow, que seuls les riches et les puissants y aient accès. Nous sommes très sensibles à tous ces problèmes, et c'est pourquoi j'ai dit dès le départ que ce droit de veto du Cabinet ne devrait être exercé que très rarement et très prudemment. Vous-même, à titre d'homme politique, savez très bien que si le gouvernement précise, pour la gouverne du public, qu'il ne va pas revenir sur une décision du tribunal, sauf dans des cas exceptionnels où il y va de l'intérêt de la nation, le Cabinet ne serait pas très malin, effectivement, s'il décidait par la suite d'intervenir chaque fois qu'il ne serait pas satisfait d'une décision quelconque.

C'est donc en tenant compte des réalités et des contraintes politiques que nous impose normalement la société—que tous vous connaissez très bien d'ailleurs—que ces décisions devront être prises. C'est cela, il nous semble, qui va représenter la principale contrainte pour le Cabinet en ce qui concerne toute ingérence éventuelle.

Quant à savoir comment il faudrait formuler le texte législatif qui va prévoir un tel pouvoir, pour qu'il ne puisse être exercé que dans des cas très rares et exceptionnels, eh bien, nous n'avons pas vraiment songé à cette question-là; par

[*Texte*]

Mr. Redway: I do not want to pursue this area with you exhaustively, but I would just comment frankly that I think what you are suggesting is self-defeating. If you define this very carefully you are going to eliminate these very special circumstances you are talking about. But if you do not define it, you are going to create a horrible situation, which the courts will want to define at some stage under the Canadian Charter of Rights and Freedoms.

We have seen cases in the Province of Ontario, for instance, with censorship activity on the part of a censor board, where the courts have said you cannot just tell them they can censor whatever they want; you have to define this very carefully. And it seems to me this will defeat your whole purpose.

I would like to turn now to a second point to do with the joint venture aspect here. You have suggested incorporated joint ventures should be allowed in this exception. If we allowed this, would it not really allow a merger to take place and a real loophole and exception to the whole law? We might as well not have the law at all if we allow incorporated joint ventures, because it is really a merger or an amalgamation and would therefore be exempt.

Mr. Rowley: I would be happy to answer this one. The position of the Business Council on National Issues is that it is simply not logical to have an exemption for unincorporated joint ventures which meet certain conditions, but not for incorporated joint ventures which meet the same conditions. Simply because it is incorporated does not lead to your concern, because the other conditions are that the venture would have a termination and would not proceed but for the exemption.

Mr. Redway: You would incorporate a company which self-destructed at the end of so many years, is that it?

Mr. William McLean: The fact is that the decision of whether or not a joint venture is incorporated or unincorporated is driven by all sorts of considerations, such as tax considerations and everything else. If the other conditions which provide this exemption are met, we fail to see the distinction between whether it is incorporated or whether it is unincorporated, in respect of its effect on competition.

Mr. Redway: My third question really relates to your original proposition about the definition of what the test here should be. Are we worried about a restriction of competition? Basically and philosophically I guess this is what all economists talk about when they talk about the evils of mergers and monopolies—the restriction of competition.

[*Traduction*]

contre, je ne voudrais pas que l'honorable député ait l'impression qu'il s'agit là d'une recommandation un peu irréfléchie.

M. Redway: Bien que je ne veuille pas prolonger indûment le débat là-dessus, je crois sincèrement que votre recommandation ne va pas atteindre le but visé. Si la formulation est trop précise, on va nécessairement éliminer les circonstances exceptionnelles auxquelles vous avez fait allusion. Par contre, si la définition est trop vague, cela créera une situation intenable, et les tribunaux vont vouloir définir ce pouvoir discrétionnaire, à un moment donné, par rapport à la Charte canadienne des droits et libertés.

Dans la province d'Ontario, par exemple, nous avons déjà vu des décisions prises par une commission de censure au sujet desquelles les tribunaux ont décidé que les instances gouvernementales n'avaient pas le droit d'autoriser cette commission à faire ce qu'elle voulait; qu'il fallait absolument définir très étroitement ce genre de pouvoir discrétionnaire. Ainsi, j'ai vraiment l'impression que votre recommandation va à l'encontre du but qu'elle est censée atteindre.

Je voudrais maintenant soulever un autre point en ce qui concerne les entreprises à risques partagés. Vous avez proposé qu'une entreprise constituée en société soit également exclue dans le cadre de cet article. Si nous retenions votre proposition, ne serions-nous pas en train de créer une véritable échappatoire et de permettre un fusionnement aux termes de cet article? À quoi servirait le projet de loi si nous devions exclure également les entreprises constituées en société, puisqu'à ce moment-là, elles seraient exclues des dispositions de la loi, et qu'un fusionnement pourrait avoir lieu?

M. Rowley: Je vais essayer de répondre à votre question. La position du Conseil des entreprises sur les questions d'intérêt national est la suivante: nous trouvons illogique d'exclure les entreprises à risques partagés non constituées en sociétés qui répondent à certains critères, mais de ne pas exclure les entreprises à risques partagés constituées en sociétés qui répondent aux mêmes critères. Le simple fait qu'elles soient constituées en sociétés ne devrait pas vous préoccuper, puisqu'il y a les autres critères, à savoir que les activités prennent fin à l'expiration du projet ou du programme, ou que ce projet ou programme n'aurait pas eu lieu autrement.

M. Redway: Autrement dit, on pourrait constituer en société une entreprise qui se dissoudrait au bout d'un certain nombre d'années, c'est bien cela?

M. William McLean: En fait, la décision de constituer une entreprise à risques partagés en société est fonction de toutes sortes de facteurs, par exemple, des considérations fiscales, et autres. Si l'entreprise remplit toutes les autres conditions, nous ne voyons pas pourquoi il faudrait distinguer entre les entreprises constituées en sociétés et celles qui ne le sont pas, lorsqu'il s'agit d'évaluer leur effet sur la concurrence.

M. Redway: Ma troisième question rejoint votre proposition originale quant à la définition des critères. Il s'agit de savoir si, oui ou non, nous voulons éviter de diminuer la concurrence. Sur le plan des principes, c'est justement cela qui inquiète les économistes—la possibilité que la concurrence soit diminuée—

[*Text*]

There had been other concerns expressed recently as a result of some of the mergers taking place. I guess *The Globe and Mail* has commented on the concentration of power in 10 groups in the economy. In the banking legislation there is also a provision for a dispersal of ownership and no more than 10% ownership and this sort of thing. What would your opinion be if something like this was also included in this legislation, or perhaps in further legislation on the subject?

Mr. William McLean: It seems to me anyway this legislation is directed at the preservation of competition in one way or another, or the encouragement of competition, however you wish to put it. If mergers such as the ones you have generally referred to affect competition, they are indeed within the compass of this legislation. If they do not affect competition, I think we are talking about a different set of criteria to judge by, and I do not think I am competent to comment very helpfully on it.

• 1135

I suggest that should you try to capture such a wide universe in this bill, we will never have a bill. I am afraid this subject is also one which is undoubtedly complex and needs to be thought through very carefully. I would strongly urge if those subjects need consideration, they should be considered separately.

Mr. Redway: You would not be prepared to dismiss it out of hand as a subject matter of subsequent legislation, rather than including it in this legislation.

Mr. William McLean: Honestly, I have no opinion on it. I am not well enough informed; I do not know the facts of any of the particular cases. I have spent some time trying to understand the competition law, but . . .

Mr. Redway: Does this mean if and when a subsequent bill was put forward we would not have any submissions from your organization on it?

Mr. William McLean: No, I would not say that was the case at all, but they probably would not be from me.

The Chairman: Mr. Ouellet.

Mr. Ouellet: I think I would like to pursue along the line which has just been talked about in relation to the joint venture exemption. The second point you made, which is on top of page 12, speaks of:

> The extension of the exemption to cover ventures which create new businesses, whether or not the joint venture agreement provides for termination of the new business.

I would be interested to know—and maybe you have done this work—how would you amend the clause to allow this to

[*Translation*]

quand ils parlent des maux que sont les fusionnements et les monopoles.

Un certain nombre de fusionnements qui ont eu lieu récemment ont justement suscité des inquiétudes. A ce sujet, le *Globe and Mail* a parlé de la concentration du pouvoir économique dans 10 groupes particuliers. La Loi sur les banques prévoit, par exemple, que le contrôle soit réparti entre plusieurs personnes, dont aucune n'aurait un intérêt de plus de 10 p. 100, et d'autres protections de ce genre. Que pensez-vous de la possibilité de prévoir une disposition semblable dans ce projet de loi, ou peut-être dans un autre projet de loi sur le même sujet?

M. William McLean: Il me semble que ce projet de loi cherche à préserver ou, du moins, à encourager la concurrence d'une façon ou d'une autre. Si les fusionnements auxquels vous avez fait allusion influent sur la concurrence, il faudrait nécessairement qu'ils respectent les dispositions de ce projet de loi. Si, au contraire, ils n'ont aucun effet sur la concurrence, il faudrait une autre série de critères, et je ne me considère pas comme compétent pour vous dire lesquels seraient appropriés.

À mon avis, si vous essayez de tout englober dans ce projet de loi, ce dernier risque de ne jamais voir le jour. Comme le sujet est sans doute très complexe, il faudrait probablement consacrer un certain temps à son étude. Je vous conseille fortement de vous pencher sur ces questions dans le cadre d'un examen distinct, si vous estimez qu'elles méritent une étude plus approfondie.

M. Redway: Donc, vous n'excluez pas la possibilité que cela fasse l'objet d'un projet de loi distinct, plutôt que de le comprendre dans ce projet de loi.

M. William McLean: À vrai dire, je n'ai pas d'opinion là-dessus. Je ne suis pas vraiment au courant de la situation, ni des dossiers particuliers. J'ai consacré un certain temps à l'étude du droit en matière de concurrence, pour essayer de mieux le comprendre, mais . . .

M. Redway: Dois-je comprendre que si nous décidons de présenter un projet de loi à l'avenir pour traiter de cette question-là, votre organisme ne se prononcera pas là-dessus?

M. William McLean: Non, pas nécessairement. Je dis tout simplement que ce n'est pas moi qui vais me prononcer là-dessus.

Le président: Monsieur Ouellet.

M. Ouellet: Je voudrais poursuivre la discussion sur cette question d'exclusion des entreprises à risques partagés. Au sujet de votre deuxième point, au haut de la page 12, vous dites ce qui suit:

> Les entreprises à risques partagés qui créent de nouvelles activités commerciales devraient également être exclues, que l'entente entre les deux parties prévoie ou non que ces activités prendront fin à un moment donné.

J'aimerais savoir—et vous y avez peut-être déjà songé—comment vous modifieriez l'article en question pour que cela

[*Texte*]

take place without making it open to mergers which in reality should not be accepted. Where do you draw the line? I am afraid these suggestions open a very wide gap. I am trying to find out how you justify such an exemption without making the entire clause on merger almost unapplicable.

Mr. Rowley: Again, I think we could stand to be misunderstood on this point, but what we envisage is a situation where two companies are involved, A and B, neither of which are in a particular business, but which wish to incorporate a new corporation to start a new business. It is likely there is not going to be an effect on competition in any event, and it is likely the merger test is not going to be offended.

Mr. William McLean: There is no chance for change of control.

Mr. Rowley: Yes. However, because the merger definition is expensive, and because in Canada we want to encourage ventures which neither one nor the other party can take on themselves, we say permit it through a joint venture exemption which meets the other tests. If you would look at paragraph 67.(1)(*a*), you will see it says the project or program—and in this case it would be the new business—would not have taken place in the absence of the new venture. The point is this: company A will not do it themselves and company B will not do it themselves, so unless you have the joint venture it will not happen. We think this is the protection.

Mr. Ouellet: Thank you.

• 1140

Mr. Stewart: I am interested in pursuing another avenue. In the real world I am a wholesale distributor, so I have gone through a great deal of loss-leader selling, predatory pricing, and dominant position in the marketplace. That has been my life story: fighting the big guy, if you will. This is particularly true in Canada in the tobacco, food, and gasoline industries. So what I would really like to say is many of the small wholesale distributors and small retailers are now being forced out of business. All you have to do is look at the statistics on it.

If you look at the Combines Investigation Act, in section 34 it says it is an offence to engage in predatory pricing policies or selling products at lower prices in one area of the country than another. We know exactly that has happened in the gasoline industry, as an argument. I believe Mr. Conrad was before this committee before, putting his views forth. Section 35 also prohibits the granting to a purchaser of an allowance for advertising purposes that is not offered on proportionate terms to competing purchasers; and that happens flagrantly throughout Canada.

[*Traduction*]

ne laisse pas la possibilité que des fusionnements puissent avoir lieu qui ne sont pas acceptables en réalité. Comment doit-on décider lesquels doivent être exclus et lesquels ne doivent pas être exclus? Je crains fort que vos propositions ne soient trop larges. J'essaie de voir comment une telle exclusion serait possible sans que l'article sur les fusionnements ne soit plus applicable.

M. Rowley: Encore une fois, je pense qu'on nous a peut-être mal compris, mais nous envisageons une situation où deux compagnies, A et B, dont aucune n'a des activités commerciales particulières, décident de constituer en société une nouvelle entreprise pour lancer certaines activités commerciales. Il est fort probable que l'effet sur la concurrence soit nul et que les critères relatifs au fusionnement ne soient pas enfreints à ce moment-là.

M. William McLean: Il n'y a pas de possibilité de changement de contrôle.

M. Rowley: Exact. Cependant, étant donné que la définition de fusionnement est assez large, et que nous désirons, au Canada, encourager les entrepreneurs à se mettre ensemble pour lancer ce genre d'entreprise, nous pourrions exclure les entreprises à riques partagés si elles remplissaient les autres conditions. Si vous regardez l'alinéa 67.(1)*a*), vous allez voir qu'on dit qu'un «projet ou programme de cette nature»—c'est-à-dire les nouvelles activités commerciales, en l'occurrence—«n'aurait pas eu lieu ... sans l'association d'intérêts». Autrement dit, ni la compagnie A ni la compagnie B ne peuvent lancer ces activités seules, et ainsi, le projet n'aurait pas lieu s'il n'y avait pas d'entreprise à risques partagés. À notre avis, cela assure une certaine protection.

M. Ouellet: Merci.

M. Stewart: Je voudrais soulever une tout autre question. Comme je suis grossiste de métier, je sais ce que c'est que les ventes à perte et les prix anticoncurrentiels, ainsi que les avantages qui reviennent à ceux qui ont une position dominante sur un marché. D'ailleurs, j'ai passé toute ma vie à lutter contre les grandes compagnies. Ces activités sont particulièrement courantes au Canada dans les industries du tabac, des aliments et de l'essence. Mais ce qui m'inquiète le plus, c'est qu'il arrive de plus en plus souvent que les petits détaillants soient poussés à la faillite à cause de cela. Il suffit de regarder les statistiques pour le constater.

Mais d'après l'article 34 de la Loi relative aux enquêtes sur les coalitions, le fait de se livrer à des pratiques anticoncurrentielles en vendant des produits à des prix excessivement bas, ou en les vendant moins cher dans une région du pays que dans une autre, constitue une infraction. Or, nous savons très bien que c'est justement ce qui est arrivé dans l'industrie du pétrole. Je crois que M. Conrad, qui a comparu devant ce Comité, nous a clairement indiqué son point de vue là-dessus. De plus, l'article 35 interdit le versement d'une remise à un acheteur à des fins de réclame ou de publicité si une somme proportionnelle n'est pas offerte aux acheteurs qui lui font concurrence; or, c'est une pratique courante au Canada.

[*Text*]

So what I would like to ask you, in your position, is do you believe the provisions of the proposed legislation that is before us respecting predatory pricing and dominant position are adequate to safeguard any person in business in Canada?

Mr. William McLean: Yes, I believe they are. I am not quite clear whether we are talking about a problem with the proposed legislation or a problem with the enforcement of the legislation. Whatever the legislation, I think you have to assume, for purposes of a discussion such as this, that an appropriate enforcement policy is in place. But yes, I believe these provisions are sufficient to offer the protection required.

Mr. Stewart: You do not believe the proposed legislation should have an amendment in place that puts teeth into sections 34 and 35 of the Combines Investigation Act?

Mr. Rowley: Section 34 and section 35 are existing criminal sections, and just from the perspective of a lawyer who advises businesses, on both sides, I can tell you that we certainly see a good many clients who are concerned that they abide by those sections. This new legislation, however, adds dominant position, and it is a civilly enforced remedy, which gives the director a further weapon in his fight against practices such as predatory pricing; because clearly it is open to the court, and I would assume the court would interpret anti-competitive acts as predatory pricing. So it is a new weapon.

Mr. William McLean: The standard of proof required of the director has been substantially reduced.

Mr. Stewart: You can pick up the newspaper this morning, if you will, and see in the tobacco industry, for argument's sake, where cigarettes are being sold right now by major chains under cost.

Mr. William McLean: I bought a pack this morning and I did not get that kind of a deal.

Mr. Stewart: Did you not get your five free?

Mr. William McLean: No, but I did not go to a chain.

Mr. Stewart: You do really believe if a small retailer, for argument's sake, or a small wholesaler, were to bring his case before this tribunal, it would have the teeth in it to make sections 34 and 35 stick?

Mr. Rowley: Sections 34 and 35 are criminal provisions, and they have to be advanced by the Attorney General. That is, of course, a discretionary remedy, and the Attorney General makes his own decisions. This new section, the dominant position section, can be brought as of right by the director against an enterprise which occupies a dominant position and is engaging in anti-competitive acts such as you describe. Certainly there is plenty of power in the tribunal to take corrective action. It can engage in prohibition orders, and in cases where competition has been detrimentally affected, it can order restructuring to prevent it in the future.

[*Translation*]

J'aimerais savoir si, d'après vous, les dispositions du projet de loi dont nous sommes saisis relatives aux prix anticoncurrentiels et à la position dominante suffisent pour protéger une homme d'affaires au Canada.

M. William McLean: Oui, je crois qu'elles le sont. Je ne sais pas s'il s'agit d'un problème dans la formulation du projet de loi, ou plutôt d'un problème d'application de la loi. Quelles que soient les dispositions de la loi, nous devons présumer, pour les besoins de notre discussion, qu'il existe déjà une politique appropriée visant à faire respecter la loi. Mais pour répondre à votre question, je dirais que ces dispositions assurent une protection suffisante.

M. Stewart: Ne pensez-vous pas qu'il faudrait peut-être modifier les articles 34 et 35 de la Loi relative aux enquêtes sur les coalitions afin de renforcer le pouvoir de la loi?

M. Rowley: Les articles 34 et 35 concernent les actes qui sont actuellement considérés comme des actes criminels, et en tant qu'avocat qui conseille les hommes d'affaires dont les positions sont parfois contraires, je peux vous dire que bon nombre de nos clients veulent s'assurer qu'ils respectent les dispositions de ces deux articles. Cependant, le nouveau projet de loi ajoute le nouvel élément de la position dominante, ce qui offre un nouveau recours civil à celui qui veut lutter contre ce genre de pratiques déloyales, comme les prix anticoncurrentiels; ce sera aux tribunaux de décider de ces questions-là, et je présume que le fait de vendre un produit à un prix excessivement bas serait considéré comme un acte anticoncurrentiel. Ce projet de loi prévoit donc une nouvelle arme.

M. William McLean: De plus, les conditions quant aux preuves que doit présenter le directeur ont été sensiblement réduites.

M. Stewart: Si vous lisez le journal de ce matin, par exemple, vous allez voir que dans l'industrie du tabac, certaines grandes chaînes vendent leurs cigarettes à un prix inférieur au prix coûtant.

M. William McLean: Eh bien, j'en ai acheté un paquet ce matin, mais pas à un prix aussi intéressant que cela.

M. Stewart: Vous n'en avez pas eu cinq gratuites?

M. William McLean: Non, mais je ne les ai pas achetées dans une grande chaîne.

M. Stewart: Donc, vous semblez croire que si un petit détaillant, ou même un petit grossiste, présentait ses doléances devant le tribunal de la concurrence, il serait protégé par les articles 34 et 35 de la loi actuelle?

M. Rowley: Les articles 34 et 35 concernent les actes criminels, et ils doivent donc être invoqués par le procureur général. C'est un recours discrétionnaire, évidemment, et c'est au procureur général de prendre ses propres décisions à cet égard. Par contre, le nouvel article sur la position dominante peut être invoqué par un directeur contre une entreprise dans une position dominante qui se livre à des pratiques anticoncurrentielles, comme celles que vous décrivez. Il ne fait aucun doute que le tribunal a le pouvoir de prendre des mesures rectificatives. Il peut, par exemple, rendre une ordonnance interdisant de telles activités lorsque celles-ci ont nui à la

[*Texte*]

Mr. Ouellet: Could I ask just a supplement to this one? Mr. Rowley, as a lawyer, would you think it should be possible not only for the director but for the party affected to go directly to the tribunal?

• 1145

Mr. Rowley: Well I am not sure that is really a lawyer's question, but I will give you a response. The director is a public official and I think we give to our public officials the right to enforce public laws. We do not generally hire private sheriffs, and I think that is a risk you are running.

Mr. Ouellet: But if a party has been affected, normally, in a civil matter, a party could hire a lawyer and go to court. In this case the decision has been made not to go to court but to refer these questions to a tribunal. So should a party affected, as the one described by my colleague, be entitled to hire a lawyer and go to the tribunal, instead of having to rely exclusively on the decision or the judgment of the director who might or might not have the time to proceed?

Mr. Rowley: In my experience the director generally does have the time and takes very careful recognition of complaints of this sort. The decision was made in Bill C-29, the predecessor to this legislation, and in this legislation, to rely on the director. I do believe it was the right decision in both bills. I think we should look to our public officials to enforce public laws and not to private individuals.

Mr. Ouellet: Thank you.

The Chairman: *Monsieur Stewart, avez-vous terminé? Monsieur Orlikow, s'il vous plaît.*

Mr. Orlikow: We are being told, lectured to—editorials appearing almost every day—that if we are going to succeed in the world of the 1980s and 1990s that we are going to have to be more efficient and more innovative and we are going to have to have more research and development; otherwise we are going to be left behind, not only in international competition but even in competition in our own market.

The business activity we have seen in recent years is not the traditional one of a steel company buying a smaller steel company which might lead to less competition, or a paper company buying another paper company and so on. What we have seen is a tremendous expansion in the activities of conglomerates—companies buying companies in areas and fields in which they were never involved. When this happens, it does not seem to be very much in the way of more efficiency, more innovation, any more research and development, or more jobs. In fact, usually it leads to fewer jobs.

[*Traduction*]

concurrence, et il peut également ordonner une restructuration pour empêcher qu'elles ne se répètent à l'avenir.

M. Ouellet: Me permettez-vous de poser une question complémentaire? Monsieur Rowley, puisque vous êtes avocat, pensez-vous qu'il faudrait permettre non seulement au directeur, mais à la personne touchée, de se présenter directement devant le tribunal?

M. Rowley: Je ne suis pas certain que c'est à un avocat qu'il appartient de répondre à cette question, mais je vous répondrai quand même. Le directeur est un fonctionnaire, et il me semble que, en tant que tel, il est autorisé à assurer l'exécution des lois. Généralement, nous ne retenons pas les services de shérifs privés, et je crois que c'est le risque que vous courez.

M. Ouellet: Oui, mais si une partie fait l'objet de poursuites au civil, elle peut retenir les services d'un avocat et s'en remettre à la décision de la cour. Dans le cas qui nous occupe, il a été décidé de ne pas s'en remettre à la cour, mais plutôt de demander à un tribunal de trancher. Or, la partie intéressée, comme celle décrite par mon collègue, devrait-elle être en droit de retenir les services d'un avocat pour plaider sa cause devant le tribunal, plutôt que de se reporter uniquement à la décision du directeur, qui n'a pas toujours le temps de donner suite à l'affaire?

M. Rowley: D'après mon expérience, le directeur prend généralement tout le temps requis et examine minutieusement toutes les plaintes semblables. Le projet de loi précédent, c'est-à-dire le C-29, de même que le C-91, stipulent tous deux qu'il faut s'en remettre au directeur, et je crois que cela a été la bonne décision. Il appartient aux fonctionnaires d'assurer l'exécution de la loi, et non aux particuliers.

M. Ouellet: Merci.

Le président: *Mr. Stewart, have you finished? Mr. Orlikow, please.*

M. Orlikow: Tous les jours, les journaux nous rebattent les oreilles en nous disant que si nous voulons survivre pendant les années 80 et 90, il va falloir être plus efficaces et plus novateurs et consacrer davantage à la recherche et au développement, sinon, nous serons les perdants, non seulement sur les marchés internationaux, mais également sur le marché canadien.

Au cours des dernières années, la situation a beaucoup évolué, et il ne s'agit plus maintenant d'entreprises sidérurgiques, par exemple, qui se portent acquéreurs de petites entreprises du même secteur, ce qui pourrait réduire la concurrence, ou encore d'entreprises de pâtes et papiers qui font de même dans leur propre secteur. Au contraire, nous avons été témoins d'une très grande intensification des activités des conglomérats, qui ont fait l'acquisition d'entreprises dans des secteurs et des domaines qui n'ont rien à voir avec l'activité principale de l'acheteur. Il me semble que cela n'améliore pas tellement l'efficacité, que cela ne favorise pas les approches novatrices, que cela n'encourage pas la recherche et le développement et que cela ne crée pas d'emplois. En fait, il y a habituellement perte d'emplois.

[*Text*]

I wonder what your opinions are about whether we ought to be concerned about this tremendous increase in the concentration of a very few individuals or corporations, the tremendous growth in power of the conglomerates we have seen in recent years, whether you are concerned about it.

Mr. William McLean: I do not think I am well enough informed to know whether I am concerned or whether I am not, quite frankly. I do have a view, however, that an attempt to try to deal with that in any way in this act would delay the process forever, and I would advise strongly against that.

On the other matter, if it needs to be examined carefully then by all means, let us examine it carefully, but outside of the context of this act.

Mr. Orlikow: We have had some recent experience in the financial field. We have seen Genstar, for example, take over Canada Trust, and now Imasco taking over Genstar. If I am not mistaken, I think it was Mr. McCrossan who pointed out that Genstar was able to pay for its acquisition of Canada Permanent by mortgaging some assets to The Permanent in return for money and using the money to buy the trust company.

• 1150

The individual shareholder was not able to get in on that. There is a good deal of concern among small investors that somehow, in all this wheeling and dealing, the benefits are going to a few people or a few companies at the top and they are being left out. They are raising questions. Is this not something we should be perhaps considering here?

Mr. William McLean: Well, as far as considering it here is concerned, I think this is competition legislation we are discussing. I do not see that the circumstances you comment on have a direct effect on competition.

I do not think I am a competent judge of whether it should be considered. I am neither a director nor a shareholder. I do not have any knowledge of any of the companies you have mentioned or of the facts of the mergers. So I am sorry; I am not trying to be unhelpful, but I do not think I am a competent witness on that subject.

Mr. Orlikow: I wonder if Mr. d'Aquino would like to say something on this subject. It seems to me, and I know I am not alone, that this question is one which is of more and more concern—not just to people in this country, but all over the world, because this merger madness as it is being called is an international situation now.

Mr. d'Aquino: Mr. Chairman, I guess the only way I would try to deal with this question is to say this is an important subject for another time. I think it is extremely important that we not allow this issue. Mr. Orlikow is right, there is a great deal of public comment and public concern about this kind of activity, some of it informed and some of it not very well informed, in my view.

We are very concerned that this issue, as broad as it is and as emotional as it has become, not be allowed to interfere with a very important set of proposals which are before us right

[*Translation*]

Croyez-vous qu'il faudrait s'inquiéter de cette concentration beaucoup plus prononcée de la propriété entre les mains de quelques personnes ou sociétés, c'est-à-dire les conglomérats, qui sont devenus beaucoup plus puissants depuis quelques années?

M. William McLean: Je ne connais pas suffisamment la situation pour vous répondre. Je crois cependant que toute tentative en vue de régler ce problème au moyen de ce projet de loi entraînerait des retards à l'infini, et je m'opposerais fortement à une telle initiative.

Quant à l'autre question, si elle doit faire l'objet d'un examen minutieux, que cela se fasse, mais pas en vertu de ce projet de loi.

M. Orlikow: Dans le domaine financier, nous avons été témoins récemment du rachat de Canada Trust par Genstar, et ensuite du rachat de Genstar par Imasco. Sauf erreur, c'est M. McCrossan qui a signalé que Genstar a levé les fonds requis pour l'acquisition de Canada Permanent en hypothéquant certains éléments d'actif auprès de Permanent, et que Genstar a reçu en contrepartie des liquidités qu'elle a utilisées pour acheter la fiducie.

Les actionnaires n'ont pu tirer profit de cette transaction et les petits investisseurs s'inquiètent de ce que quelques personnes ou quelques entreprises puissantes en retirent tous les bénéfices, au détriment des plus petits. Ne faudrait-il pas que le Comité se penche sur cette question?

M. William McLean: Je crois que le Comité est appelé à étudier un projet de loi sur la concurrence, et je ne vois pas en quoi la situation que vous avez décrite a des répercussions directes sur celle-ci.

Je ne crois pas être en mesure de décider si le Comité devrait ou non se pencher sur cette question, car je ne suis ni membre d'un conseil d'administration, ni actionnaire. Je ne connais pas les entreprises dont vous avez parlé, ni les fusions en question. Je m'excuse, mais je ne crois pas pouvoir me prononcer.

M. Orlikow: Je me demande ce qu'en pense M. d'Aquino. Je ne suis pas seul à croire que cette question devient de plus en plus inquiétante, non pas seulement au Canada, mais partout dans le monde, car la folie de la fusion se fait sentir à l'échelle internationale.

M. d'Aquino: Monsieur le président, je crois que cette question doit être débattue ultérieurement, et devant une autre instance. Il est absolument essentiel de contrer cette tendance, et M. Orlikow a raison de dire que le public s'inquiète grandement et que certaines de ces inquiétudes sont fondées, tandis que d'autres ne le sont pas.

C'est une question très vaste, qui suscite beaucoup d'émotion, mais nous avons voulu faire en sorte qu'elle ne nuise pas à l'examen du projet de loi C-91. Nombreux sont ceux et celles

[*Texte*]

now. So many people have worked so hard and for so long to try to get them into place. I do not think it is in the public interest, the national interest, not to have a modernization of our competition laws. As I said, Mr. Orlikow, perhaps it is something we might discuss at another time and another place.

Mr. Orlikow: But it seems to me that by passing this law without dealing with what is happening in the take-over of more and more companies by the conglomerates we are locking the stable door after the horses have been stolen. As far as I can tell, most of the economic activity that will affect ordinary people is being carried on by the conglomerates. We are not getting the kinds of traditional mergers of one company in a field buying another company and therefore lessening competition, which I mentioned earlier; we are getting the other kind, and this bill does not deal with it. You are suggesting the bill should not deal with it.

Mr. d'Aquino: Mr. Chairman, I would say two things. First of all, I would argue very strongly that there are all sorts of mergers and acquisitions going on among small enterprises all across this land every day. Unfortunately, we do not pay enough attention to that kind of economic activity. If you have listened to our colleague, John Bulloch, he would tell you where the vast majority of economic activity is in this country. It is in the small enterprises of this country. So let us not become . . .

Mr. Orlikow: But I suggested those are not the ones that really hurt people. Two little guys getting together does not adversely affect very many people.

Mr. d'Aquino: Mr. Orlikow, when you say that activity may not hurt people, you are quite right. It helps a great number of people, because that is where the vast majority of jobs in this country are being created. So let us not be obsessed with the activities of a few big people. They can ignore where the real economic activity is.

On the issue of whether this bill should address it, I suggest to you that if this committee, this government, and the country lose the opportunity to see very important improvements made in the law after all this time, which are going to protect an awful lot of little people, I do not think any of us will be exercising our responsibilities correctly. There is nothing that will prevent a government, at some future time, that happens to say fine, we have a good piece of legislation in place right now . . . But we are concerned about another public policy issue. I know of no government in the past that has ever hesitated from acting after the so-called barn door is closed. This is one self-contained barn. But there will be other barns, no doubt.

• 1155

The Chairman: I will accept a last question from Mr. Orlikow and then Mr. Domm will make a brief summary.

[*Traduction*]

qui ont travaillé fort et pendant longtemps dans le but de préparer ce projet de loi, et je ne crois pas qu'il serait dans l'intérêt national d'abandonner la modernisation de notre législation en matière de concurrence. Comme je l'ai dit tout à l'heure, il serait peut-être opportun de discuter de cette question plus tard et devant une autre instance.

M. Orlikow: Mais il me semble qu'en adoptant cette loi sans nous attaquer aux rachats de plus en plus fréquents par les conglomérats, nous agissons après que les coupables ont pu s'enfuir. Selon mes renseignements, la plupart des activités économiques qui auront des répercussions sur les Canadiens sont organisées par les conglomérats. Comme je l'ai dit tout à l'heure, il ne s'agit pas tout simplement, de nos jours, de fusions traditionnelles, réunissant deux entreprises dans un même secteur, ce qui réduit la concurrence, mais plutôt de rachats par de grands conglomérats, phénomène auquel ce projet de loi ne s'attaque pas, et auquel il ne devrait pas s'attaquer, selon vous.

M. d'Aquino: Monsieur le président, deux choses. En premier lieu, d'innombrables fusions et rachats de petites entreprises se produisent chaque jour, d'un océan à l'autre. Malheureusement, nous n'accordons pas suffisamment d'attention à ce type d'activités économiques. M. Bulloch nous a dit tout à l'heure que la majeure partie de l'activité économique au pays est attribuable aux petites et moyennes entreprises. Il ne faudrait pas . . .

M. Orlikow: Oui, mais je veux vous faire comprendre que ce ne sont pas ces activités qui sont nocives. Les répercussions de la fusion de deux petites entreprises ne sont pas vraiment très importantes.

M. d'Aquino: Monsieur Orlikow, vous avez tout à fait raison de dire que ce type d'activités n'ont pas tellement de répercussions nocives. Elles sont plutôt positives, car c'est dans ce secteur que la vaste majorité des emplois sont créés. Pourquoi cette obsession face aux activités de quelques grandes sociétés qui peuvent se permettre de ne pas tenir compte de l'activité économique?

Quant à savoir si le projet de loi devrait prévoir une solution au problème, je crois que nous serions tous coupables de nous être soustraits à nos responsabilités si le Comité, le gouvernement et le Canada rataient l'occasion qui leur est offerte d'améliorer la loi dans le but de protéger un très grand nombre de Canadiens, qui ont besoin de cette protection. Rien n'empêche le gouvernement de décider ultérieurement que c'est merveilleux, que la loi en vigueur est excellente . . . Ce qui nous préoccupe, c'est une autre question, qui tient à la politique fédérale. Les gouvernements, sans exception, n'ont jamais hésité à agir après la fuite des coupables. De toute façon, les modalités prévues sont immuables.

Le président: M. Orlikow pourra poser une dernière question, après quoi M. Domm fera un résumé.

[*Text*]

Mr. Orlikow: Mr. d'Aquino, are you aware of the fact that when the independent distributors in the gasoline field were here they made it very clear that unless this bill were amended in very specific ways, which they were proposing, that they would rather the bill not be passed?

Mr. d'Aquino: Yes, Mr. Chairman, I am aware of the position of that particular organization and that particular economic group. I am glad we live in a democratic society. They have made their points very strongly and very effectively. They have been listened to in the past. And just as we have tried to make our views . . . We have not agreed with all aspects of this bill, but we have not said because you will not give us a, b, c, or d, we will do everything we possibly can to stop this bill from being introduced. We want this bill passed, Mr. Chairman. Naturally we would like those considerations that we have put forward taken into account, but if they are not taken into account we still feel that a bill will be in the national interest and we will support it.

The Chairman: Mr. Domm, please.

Mr. Domm: Yes, Mr. Chairman. I would just like to assure the representatives of the Business Council on National Issues that we will take your concerns into consideration. I will also assure you that there will be amendments before we come to a conclusion in our deliberations in committee.

Our efforts will be to try to find the kind of consensus that will allow us to proceed with the bill in order that we can pass the bill during our present mandate—term in office and session. To do that, I think any reasonable person on the committee would realize that there will be certain areas in which we will not be able to satisfy everyone. However, I can point out that it was not all negative when the independent petroleum dealers were here. It was not a *carte blanche* condemnation of the legislation and a wish to see nothing there looking for amendments. They would prefer to see all of their amendments, as I am sure you would too. But I think they are realistic enough to know that we are not going to get them all.

Mr. Chairman, I cannot add anything more, other than one, perhaps, repetitive point: I agree with you in one area at the end, when you said that this bill is not dealing with aggregate concentration or control of our country by a few major persons or corporations. We are trying to improve competition in this country. We hope this bill will do that, and we hope we can see it passed in the House during this session.

The Chairman: On behalf of our members, Mr. McLean, Mr. d'Aquino, and Mr. Rowley, I wish to thank you for coming here. I appreciate your short but effective answers.

M. d'Aquino: Merci, monsieur le président.

The Chairman: I now adjourn the meeting until 3.30 p.m.

M. Ouellet: Monsieur le président, avant de lever l'assemblée, je voudrais une information au sujet des délibérations de cet après-midi et de la semaine prochaine. Afin de préparer notre calendrier de travail des prochains jours, serait-il possible

[*Translation*]

M. Orlikow: Monsieur d'Aquino, saviez-vous que les distributeurs indépendants d'essence ont comparu devant le Comité et ont indiqué qu'avant d'être adopté, il faudrait que le projet de loi soit modifié de façon substantielle?

M. d'Aquino: Oui, monsieur le président, j'ai pris connaissance de la position de cet organisme. Heureusement, nous vivons dans une société démocratique, et chacun peut faire valoir son point de vue, comme ils l'ont fait, de façon très efficace. Nous avons toujours donné l'attention voulue à leur point de vue, qui est tout aussi valable que le nôtre. Nous ne croyons pas que le projet de loi soit parfait, mais nous n'avons pas menacé de le saboter si le gouvernement n'accepte pas certaines de nos exigences. Monsieur le président, nous sommes en faveur de l'adoption de ce projet de loi. Bien entendu, nous tenons à ce que notre point de vue soit pris en compte, mais, s'il ne l'est pas, nous persistons à croire que ce projet de loi est dans l'intérêt national, et nous continuerons de l'appuyer.

Le président: Monsieur Domm, s'il vous plaît.

M. Domm: Merci, monsieur le président. Je tiens à faire savoir aux représentants du Conseil d'entreprises sur les questions d'intérêt national que nous tiendrons compte de leur point de vue. Je puis également vous assurer que d'ici à la fin des travaux du Comité, des amendements seront sans doute apportés au projet de loi.

Notre but est de dégager un consensus, pour ensuite adopter le projet de loi pendant notre mandat et pendant la présente session. Tous les membres du Comité savent sans doute qu'il n'est pas possible de satisfaire les désirs de chacun. Cependant, je tiens à signaler que les représentants des vendeurs indépendants de produits pétroliers ne se sont pas limités à des critiques. Ils ne se sont pas opposés unilatéralement au projet de loi, mais ils ont plutôt préconisé certains amendements, comme vous pourriez le faire aussi. Cependant, ils ont été réalistes et ont compris qu'il faut faire la part des choses.

Monsieur le président, je me contenterai de répéter que je crois comme vous que ce projet de loi ne vise pas la concentration cumulative ou le contrôle qu'exerceraient sur notre pays quelques personnes ou grandes entreprises. Nous essayons d'améliorer la concurrence au pays, nous espérons que ce projet de loi nous permettra d'atteindre cet objectif et nous espérons qu'il sera adopté à la Chambre des communes pendant la session en cours.

Le président: Messieurs McLean, d'Aquino et Rowley, je tiens à vous remercier au nom des membres du Comité. Vos réponses courtes, mais pertinentes, ont été fort appréciées.

Mr. d'Aquino: Thank you, Mr. Chairman.

Le président: La séance est levée jusqu'à 15h30.

Mr. Ouellet: Mr. Chairman, before adjourning the meeting, I would like some information about the meetings to be held this afternoon and next week. In order for us to establish our

[*Texte*]

de savoir, maintenant ou cet après-midi, si on recevra d'autres témoins?

Le président: On projetais une réunion du Comité directeur, après la réunion de cet après-midi.

M. Ouellet: Bon, d'accord.

The Chairman: The meeting is adjourned.

[*Traduction*]

work plans for the next few days, would it be possible to know, now or this afternoon, if we will be hearing other witnesses?

The Chairman: The steering committee was planning to sit this afternoon after the full committee meeting.

Mr. Ouellet: Fine.

Le président: La séance est levée.

AFTERNOON SITTING

• 1533

The Chairman: Order, please. We are pleased to have with us today members from the Canadian Bar Association. Both are members of the Special Committee on the Combines Investigation Act, Mr. John Clarry and Mr. Bruce MacDonald.

I understand you have already been informed that you have 15 minutes for a presentation. That will leave plenty of time for questions, and we intend to do these two items within our 15 minutes. Do you agree with that?

Mr. John Clarry (Chairman, Special Committee on the Combines Investigation Act, Canadian Bar Association): Yes.

The Chairman: Go ahead.

Mr. Clarry: Mr. MacDonald and I, Mr. Chairman, as you indicated, are members of the special committee of the Canadian Bar Association that was appointed to consider amendments to the Combines Investigation Act. There are eight members in the committee, coming from all across Canada, and with varying composition the committee has been reviewing changes in the Combines Investigation Act since 1971.

We prepared a submission on Bill C-91, and I understand that copies of that have been made available to all the members of your committee. While this has not been formally approved by the executive committee of the Bar Association, I have every confidence that it will be when they meet this coming weekend. We have also prepared a short summary of the submission, which may be helpful for reference.

In commenting on competition legislation the Bar Association attempts to avoid taking positions on matters of political or economic policy. Our object is to try to look at the legislation having in mind legal considerations and matters such as fairness, consistency and workability. Perhaps for that reason some of our comments may be more technical than you would find in the submissions from some other parties.

• 1535

We prepared briefs on Bill C-29 in 1984, and a brief in response to the Minister's consultation paper in 1985, and we are pleased to see that a great many of the comments which we made in those briefs have been taken into account in Bill C-91.

SÉANCE DE L'APRÈS-MIDI

Le président: La séance est ouverte. Nous sommes heureux d'accueillir aujourd'hui les représentants de l'Association du Barreau canadien. M. John Clarry et M. Bruce MacDonald appartiennent au comité spécial sur la Loi relative aux enquêtes sur les coalitions.

Messieurs, on vous a déjà dit que vous disposiez de 15 minutes pour faire un exposé. Ainsi, nous aurons tout le temps nécessaire pour vous poser des questions, car nous devons entendre d'autres témoins après vous. Êtes-vous d'accord?

M. John Clarry (président, Comité spécial sur la loi relative aux enquêtes sur les coalitions, Association du Barreau canadien): Oui.

Le président: Allez-y.

M. Clarry: M. MacDonald et moi-même, comme vous l'avez dit, sommes membres du Comité spécial de l'Association du Barreau canadien qui a été formé pour étudier d'éventuelles modifications à la Loi relative aux enquêtes sur les coalitions. Le comité est composé de huit membres, venant de toutes les régions du Canada, et bien qu'il y ait eu rotation des membres, le comité étudie ces éventuelles modifications à la loi depuis 1971.

Nous avons préparé un mémoire sur le Bill C-91 et tous les membres du comité l'ont reçu. Notre mémoire n'a pas encore été approuvé officiellement par le Comité de direction de l'Association du Barreau mais tout nous porte à croire qu'il l'obtiendra quand le comité se réunira le week-end prochain. Nous avons préparé un bref résumé de notre mémoire que vous trouverez peut-être utile de consulter.

L'Association du Barreau, dans ses remarques au sujet de la loi concernant la concurrence, essaie de ne pas prendre position sur des questions politiques ou d'orientation économique. Notre propos est d'étudier le projet de loi dans un cadre strictement juridique, en en vérifiant l'équité, la cohérence et l'aspect pratique. C'est pour cette raison que vous trouverez sans doute nos remarques plus techniques que celles que vous présenteront d'autres groupes.

Nous avons préparé des mémoires en 1984 à l'occasion du Bill C-29 et nous avons répondu au document de consultation du Ministre en 1985. Nous sommes heureux de constater que beaucoup de nos remarques sont reprises dans les articles du projet de loi C-91.

[*Text*]

We were also given the opportunity last summer to participate, along with three or four business groups, in a consultation group dealing with some of the issues in the legislation, with representatives of the department. And while our concerns were not necessarily the same as the other groups, in our opinion it was a very worthwhile opportunity to exchange views.

In the time available I will not go through the brief in detail, but what I would like to do is identify the points we have raised and indicate very briefly what our point of view is.

We continue to prefer the regular courts to an administrative tribunal, even of the kind proposed. But having said that, we find the competition tribunal proposed in the bill is more satisfactory, from our point of view, than the kinds of tribunals which have been proposed in earlier legislation. On a technical point, we note that we think the presiding officer at a panel of the tribunal should not have a second or casting vote, but that matters coming before the tribunal should be decided simply by a majority.

The principal concern we have with the tribunal, and have had with the proposals over the years, is in respect to the calibre of persons who would be appointed to it. And I do not think there is anything further that can be done in the legislation. We simply wish to reiterate that it will be a continuing obligation of the government to ensure that the proper kind of member is appointed to this tribunal because the success or failure of it, we think, will depend on that.

In connection with the tribunal, we propose in our brief that in certain limited circumstances, refusal to deal and refusal to supply by a foreign supplier and delivered pricing, individuals who are affected by these practices should have a right to apply directly to the tribunal for relief. As the bill stands, and indeed as the present act stands, it is only the Director of Investigation and Research who is entitled to bring an application to the tribunal. Also, in proceedings before the tribunal we propose that where an individual firm is before the tribunal in connection with some reviewable practice, the firm should have the right to add, as another party, any of its competitors who are engaging in the same kind of practice, if they are not already before it.

I think the principal matter of policy probably raised in our brief is our recommendation that the act should contain provisions which would enable the Cabinet to exempt specific transactions from the provisions of the act by order in council. There may be two kinds of circumstances where this would be desirable. There may be cases where projects which are desirable in the national interest cannot be tested purely by competition guidelines. And it may be necessary in the interests of the economy generally, to override the provisions of the act.

The other circumstances are where, in order that a major project may go ahead, the parties want assurance that they will not be subject to attack under the Competition Act. They may have legal opinions but we all know how difficult it is for lawyers to be categorical on a number of matters under the

[*Translation*]

L'été dernier, nous avons eu l'occasion de participer avec trois ou quatre groupes d'hommes d'affaires à une séance de consultation où les enjeux de ce projet de loi étaient à l'ordre du jour et à laquelle participaient également des fonctionnaires du ministère. Nos préoccupations ne sont pas nécessairement les mêmes que celles des autres groupes mais à notre avis, l'expérience a été fort fructueuse en permettant un échange d'opinions.

Étant donné que je dispose de peu de temps, je ne vais pas vous parler de tous les détails que contient le mémoire et je vais me contenter de soulever les points saillants, ce qui vous permettra de connaître rapidement notre point de vue.

Nous maintenons qu'il vaudrait mieux avoir recours à un tribunal ordinaire plutôt qu'à un tribunal administratif, même du type proposé. Cela dit, nous pensons que le tribunal de la concurrence proposé dans le projet de loi convient mieux que les tribunaux proposés dans les projets de loi précédents. Du point de vue technique, nous estimons que le président d'un panel du tribunal ne devrait pas avoir de vote prépondérant car les questions dont sera saisi le tribunal devraient être tranchées à la majorité.

Notre principale inquiétude concernant le tribunal, et cette inquiétude ne remonte pas à hier, concerne la compétence des gens qui y seront nommés. Je ne pense pas que l'on puisse ajouter quoi que ce soit dans les dispositions de la Loi. Nous voudrions tout simplement rappeler qu'il faudra que le gouvernement se sente obligé en permanence de veiller à ce que des membres compétents soient nommés à ce tribunal parce que son succès en dépend.

Toujours au sujet du tribunal, nous proposons dans notre mémoire que dans certains cas spécifiés, par exemple, refus de vendre, refus par un fournisseur étranger, prix à la livraison, les personnes lésées pourraient avoir le droit de saisir directement le tribunal de leur cause. Dans le projet de loi, comme du reste dans les dispositions actuelles, seul le directeur des enquêtes et de la recherche a le droit de saisir le tribunal d'une demande. En outre, nous proposons que pendant les procédures, quand certaines pratiques d'une société sont revues par le tribunal, cette société devrait avoir le droit, d'adjoindre à sa cause, à titre de partie supplémentaire, tout autre concurrent qui s'adonne à la même pratique qu'elle, si ce ou ces concurrents ne comparaissent pas déjà.

La principale question de politique soulevée dans notre mémoire tient à notre recommandation selon laquelle le Cabinet dispenserait certaines transactions des dispositions de la Loi par décret du conseil. Il pourrait y avoir deux genres de cas où cela serait souhaitable. Ce serait par exemple le cas où les projets contribueraient à l'intérêt national alors que les directives sur la concurrence ne pourraient pas constituer les seuls critères. Ainsi, il pourrait se révéler nécessaire, dans l'intérêt de l'économie en général, de passer outre aux dispositions de la Loi.

D'autre part, dans certains cas, afin qu'un grand projet puisse démarrer, les parties pourraient vouloir la garantie qu'elles ne feront pas l'objet d'une attaque en vertu des dispositions de la Loi sur la concurrence. Il est vrai que les parties peuvent toujours demander des avis juridiques mais

[*Texte*]

act. We discuss this at some length in the submission and I would just like to make it clear that what we are talking about are specific, and they would not be many, but specific exemptions for a project to enable it to go ahead. We are not talking about giving absolution to someone who may have otherwise contravened the act in normal business conduct.

We are generally pleased with the revision of the act in the sections dealing with the investigatory powers of the Director of Investigation and Research. In our submission we have made some detailed recommendations. In particular, we think where a judge has an application made to him for an order requiring someone to attend for examination or return of documents under clause 9, not only should he be satisfied that there is an inquiry in progress but he should also be given full information about the nature of the inquiry and its subject matter and scope. This should be in the material presented to him and this information should be conveyed to the party against whom the order is made.

• 1540

In the case of a search without warrant, for which there is provision, we think this should be restricted to those circumstances where there is a danger of loss or destruction of documents. The bill as it stands now says exigent circumstances "include" where there is a danger of loss or destruction. We think this should be the only case where it is provided for.

In the case of oral examination of witnesses in the course of an inquiry, regardless of the outcome of the present case in the Supreme Court of Canada, we think counsel who are entitled to be at such an examination should have the right to cross-examine witnesses.

We, and others I am sure, are concerned with the novel provisions dealing with search and seizure directed to data contained in a computer system. I understand the purpose and the reason of these provisions and indeed they may provide a model for other legislation. But we would like to be sure there are adequate safeguards.

We are concerned in particular with the cost some parties may be put to in performing, carrying out such a search. We think either there should be a direction in the legislation that the cost to which parties are put would be borne by the director—a proposal which the director certainly was not very enthusiastic about—or at least there should be a provision in subclause 14.(3), where a judge can make an order regarding a computer search, making it clear he can make an order as to who will bear the costs of the search.

We are also concerned that in searching data accessible by computer, data which belongs to someone other than the person whose premises are being searched would be subject to

[*Traduction*]

nous savons tous combien il est difficile pour des avocats de se prononcer de façon catégorique sur nombre de détails contenus dans la Loi. Nous discutons de cet aspect en détail dans notre mémoire mais je voudrais bien préciser que cela ne concerne que des cas très particuliers, peu nombreux, et qu'il faudrait que les dispenses soient spécifiques dans le cas d'un projet afin de lui permettre de démarrer. Il ne s'agit pas ici de donner la solution à quelqu'un qui, à d'autres égards, aurait contrevenu aux dispositions de la loi lors d'une pratique d'affaires courante.

De façon générale, nous sommes satisfaits des révisions apportées aux articles concernant les pouvoirs du directeur des enquêtes et de la recherche. Notre mémoire contient des recommandations détaillées à cet égard. En particulier, nous estimons que, lorsqu'un juge reçoit une requête lui demandant d'émettre une ordonnance qui exige une déposition orale ou une déclaration écrite en vertu de l'article 9, non seulement doit-il être convaincu qu'une enquête est en cours, mais aussi faut-il qu'il ait en mains tous les renseignements voulus sur la nature de l'enquête, sur sa teneur et sa portée. Cela doit faire partie des documents qu'on lui soumet et de l'information transmise à la partie visée par l'ordonnance.

Quant aux perquisitions exécutées sans mandat, dont il est question dans une des dispositions de la loi, nous estimons qu'elles devraient se limiter aux cas où il y a risque de perte ou de destruction de documents. Le projet de loi précise qu'une situation urgente comprend notamment les cas où il y a risque de perte ou de destruction d'éléments de preuve. À notre avis, c'est le seul motif qui devrait justifier l'exécution d'une perquisition sans mandat.

Au chapitre de l'interrogation des témoins appelés à comparaître au cours d'une enquête, indépendamment de la décision que rendra la Cour suprême du Canada, nous estimons que les avocats, qui sont autorisés à assister à ces audiences, devraient avoir le droit de contre-interroger les témoins.

Nous-mêmes, comme d'autres d'ailleurs, j'en suis sûr, avons des réserves au sujet des nouvelles dispositions relatives aux perquisitions et saisies de données se trouvant dans un ordinateur. Je comprends l'objet et la raison d'être de ces dispositions qui pourraient même servir de modèle pour d'autres lois. Mais nous devons être assurés d'avoir des garanties adéquates.

Nous nous préoccupons, en particulier, des coûts que pourrait représenter pour certaines parties l'exécution de pareilles perquisitions. La loi devrait soit préciser que les frais engagés par les parties doivent être absorbés par le directeur—proposition que ce dernier n'a certainement pas accueilli avec enthousiasme—soit, à tout le moins, renfermer une disposition au paragraphe 14.(3), permettant au juge de rendre une ordonnance précisant clairement qui doit absorber les coûts de la perquisition d'un système informatique.

Nous craignons en outre qu'en cherchant des données se trouvant dans un ordinateur, il est possible que soit récupérées des données n'appartenant pas à celui dont les locaux sont

[*Text*]

being retrieved. An extreme example would be a service bureau, where most of the data belongs to the customers of the service bureau. Our submission is that where the data belongs to some party other than the party in charge of the premises, notice should be given to the owner of the data.

We also think it is a very useful provision in subclause 14.(3) that a judge may make orders as to how a computer search will be conducted. We think it should be made explicit in the legislation that any person in charge of premises being searched, if they indicate they want to apply to a judge for further directions, be given the opportunity before the search is carried on.

Section 45 of the Combines Investigation Act, apart from the technical amendment, is not proposed to be amended by the bill. This is a section you may or may not be familiar with. It is fairly far-reaching in providing that documents which are found on premises in the course of an investigation are prima faci deemed to be proof of the contents of the documents against any participants, any people who are charged; and it is deemed anything said or done is done with the authority of the owner and so on.

Without getting into a detailed discussion of the section, our concern is it may not be consistent in all respects with the Canadian Charter of Rights and Freedoms. The Minister indicated in relation to the investigation provisions that they had attempted to ensure they were consistent with the charter and we think they are. Section 45 is in a different part of the act and is not otherwise being amended. We feel it should be carefully reviewed and brought into line with the charter, and we have some suggestions with respect to this.

There is a subclause in the provisions dealing with abuse of dominant position which rather puzzles us and concerns us. Subclause 51.(3) says:

> In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

We certainly do not disagree with the proposition.

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Our reason for concern is that since it appears only in that one section of the act, it may leave an inference that a tribunal in other circumstances would not similarly make the order interfering only to the extent necessary. We think either the provision should be removed, or at the very least a similar provision should be put in section 64 dealing with mergers.

There is a limitation period of three years in the section dealing with abuse of dominant position. One of the unsatisfactory aspects of enforcement of the Combines Act in the past has been that proceedings have been conducted in connection with practices that have ceased many years before, and we

[*Translation*]

perquisitionnés. Un exemple extrême serait celui d'un cabinet d'affaires dont la majeure partie des données appartient aux clients de l'entreprise. Nous proposons que, lorsque les données récupérées appartiennent à quelq'un d'autre que celui dont les locaux sont perquisitionnés, le propriétaire des dites données devrait en être avisé.

Nous estimons en outre que la disposition du paragraphe 14.(3) disant qu'un juge peut rendre une ordonnance précisant les conditions et les modalités d'exécution d'une perquisition d'ordinateur est une disposition très utile. À notre avis, la loi devrait expliciter que toute personne responsable des locaux perquisitionnés doit pouvoir demander au juge d'établir les modalités d'exécution de la perquisition avant qu'elle ne soit entamée.

L'article 45 de la Loi relative aux enquêtes sur les coalitions, outre l'amendement technique, n'est pas modifié par le projet de loi. Vous le connaissez peut-être; c'est un article d'assez vaste portée qui dit que les documents trouvés sur les lieux d'une perquisition sont réputés être, *prima facie*, un élément de preuve contre tout participant, toute personne inculpée; et tout ce qui est dit ou fait est réputé l'être avec l'autorisation du propriétaire, et ainsi de suite.

Sans trop vouloir nous attarder sur cet article, nous craignons qu'il ne soit pas entièrement conforme à la Charte canadienne des droits et libertés. Le ministre a fait savoir qu'on avait veillé à ce que les dispositions relatives aux enquêtes soient conformes à la charte, et nous croyons qu'elles le sont. Cependant, l'article 45 se trouve dans une autre partie de la loi et sa teneur n'en a pas été modifiée. Il faudrait revoir attentivement cet article pour le rendre conforme à la charte; et nous avons des suggestions à vous faire à cet égard.

Une des dispositions concernant les abus de position dominante nous intrigue et nous préoccupe. Le paragraphe 51.(3) dit:

> Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait à des conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Nous ne sommes certainement pas contre cette proposition.

Ce qui nous inquiète, c'est que cette disposition n'apparaît que dans ce seul article, ce qui pourrait donner à entendre que, dans d'autres circonstances, le tribunal ne rendrait pas une ordonnance limitant l'intervention à ce qui est nécessaire seulement. Soit que la disposition serait retirée, soit qu'une disposition analogue serait incorporée à l'article 64 portant sur les fusions.

Les dispositions relatives à l'abus de position dominante prévoient un délai de trois ans. L'un des aspects insatisfaisants de l'application de la Loi relative aux enquêtes sur les coalitions est que les procédures portent toujours sur des pratiques

[*Texte*]

think in the case of these provisions the limitation period should be one year.

We are concerned generally about the overlapping between the provisions in the civil proceedings section, Part VII, and the criminal procedures in Part V. The same set of circumstances may provide an opportunity for the director to either proceed by criminal proceedings or civil proceedings.

There are some provisions which have been put in the bill to make sure there is no duplication of proceedings. We suggest in our submission that these provisions should be broadened, and indeed, no proceedings should be started under Part V where proceedings have already been started under Part VII in respect of substantially the same facts, and vice versa.

In the case of the merger provisions, looking at the exemption for joint ventures, we question why that exemption has to be limited to unincorporated joint ventures. It appears to us that there may be valid reasons why a joint venture is conducted in corporate form. There should not be a distinction.

We also think in the merger provisions that the limitation period of three years should be shortened to one year, at least in cases where the director has received notification under the pre-notification provisions.

And as a complementary proposal, we recommend that parties be allowed to voluntarily give notification to the director, even if they would not be required to under the terms of Part VIII. In this way they could assure themselves with a one-year limitation period that if they were not attacked within a year the merger would not be attacked.

We are concerned about the overlap of the Investment Canada Act and the Competition Act, and in our submission we propose provisions whereby if a merger is deemed to be of net benefit to Canada it would not subsequently be open to attack by the director.

In section 32 we recognize that attempts have been made in the exemptions applicable to export agreements to facilitate the formation of export consortia, but we are concerned there is still such doubt in the application of the provisions of this exemption that exporters may be reluctant to rely on them. In that connection we think our proposal for an Order in Council exemption for specific transactions or projects would assist in meeting that situation.

The provisions of the Competition Tribunal Act—that is the act setting up the tribunal—provide that regulations under the act must be published in advance so that the public may make comments on them before they are actually promulgated. There is not a similar provision in the Competition Act, and yet there are two or three very significant provisions for regulations to be made under that act, and we think it is important the same opportunity for review of proposed regulations in advance of their promulgation should be available.

[*Traduction*]

qui n'ont plus cours depuis plusieurs années, et à notre avis, la limite devrait être fixée à un an.

Il y a aussi, de façon générale, le chevauchement entre les dispositions relatives aux poursuites au civil, à la partie VII, et celles concernant les poursuites au criminel, à la partie V, qui nous préoccupent. Certaines circonstances pourraient permettre au directeur de procéder aussi bien au criminel qu'au civil.

Le projet de loi renferme certaines dispositions pour éviter tout chevauchement de procédures. Nous demandons dans notre mémoire que soient élargies ces dispositions, qu'en fait aucune procédure ne soit entamée en application de la partie V lorsque d'autres procédures en vertu de la partie VII sont déjà en cours à propos essentiellement des mêmes faits, et l'inverse aussi.

En ce qui concerne les dispositions relatives aux fusions, nous nous demandons pourquoi l'exception pour les entreprises à risques partagés se limitent aux entreprises non constituées en corporation. Il peut y avoir de très bonnes raisons de constituer en corporation des entreprises à risques partagés. Cette distinction ne devrait pas exister.

De plus, la limite de trois ans devrait être réduite à un an, du moins dans les cas où le directeur a reçu un avis au terme des dispositions prévues à cet égard.

Nous recommanderions en plus que les parties puissent donner volontairement un avis au directeur, même si elles ne sont pas tenues de le faire en application des dispositions de la partie VIII. Ainsi, elles pourraient avoir l'assurance que si la fusion n'a pas été contestée dans le délai d'un an, il n'y aura plus rien à craindre.

Dans notre mémoire, nous relevons le problème du chevauchement entre la Loi d'Investissement Canada et la Loi de la concurrence, et nous proposons l'établissement d'une disposition prévoyant que, si une fusion est considérée dans l'intérêt du Canada, elle ne peut être contestée par le directeur.

A propos de l'article 32, nous reconnaissons que des efforts ont été faits sur le plan des exceptions relatives aux accords d'exportation pour faciliter l'établissement de consortiums d'exportation, mais nous craignons qu'il subsiste encore suffisamment de doutes quant à l'application de ces dispositions et que les exportateurs hésiteront peut-être à s'y fier. À cet égard, nous croyons qu'une exception établie en vertu d'un décret du conseil pour des transactions ou projets bien spécifiques contribuerait à résoudre ce problème.

Les dispositions de la Loi sur le tribunal de la concurrence—c'est-à-dire la loi constituant le tribunal—prévoient que les règlements découlant de la loi doivent être publiés à l'avance, pour que le public puisse les analyser avant qu'ils ne soient promulgués. La Loi sur la concurrence ne renferme pas de dispositions de cette nature, même si elle comprend deux ou trois dispositions très importantes relatives à l'établissement de règlements. Pour nous, il est important d'avoir un processus d'examen des règlements avant leur promulgation.

[*Text*]

At the close of our submission we made mention of some concerns as to the French language text of the bill, and also note the fact there may well be attacks on the constitutional validity of the tribunal and some provisions of the bill.

We have also attached an appendix to our submission which deals with some more technical matters which I could go over if you wish me to.

That is just an overview, Mr. Chairman, of our submission.

• 1550

The Chairman: Thank you, Mr. Clarry. I will go right away to Mr. Ouellet. Do you want to talk first?

M. Ouellet: Monsieur le président, je vous remercie.

Je voudrais remercier les très éminents avocats qui, au nom du Barreau canadien, viennent témoigner devant nous, aujourd'hui. Ceux qui ont été associés aux amendements à la Loi sur la concurrence reconnaîtront deux avocats qui ont une longue expérience et une connaissance appréciable de la Loi de la concurrence.

Nos invités ont mentionnés qu'un comité du Barreau canadien s'occupait de cette question et que ce comité comptait à peu près huit membres. Pourrions-nous connaître les noms des autres membres. Ont-ils travaillé à la préparation de cette soumission?

Mr. Clarry: Mr. Ouellet, to answer your last question first, all members worked on the submission, both at a meeting when it was discussed and the position was developed, and also reviewing the drafts of the submission. The members are, going from east to west: Mr. Keith Eaton in Nova Scotia; Mr. Julian Chipman in Montreal; Mr. Colin Irving in Ottawa; in Toronto, Mr. MacDonald and myself, Mr. Oliver McKeag and Mr. William McKeown; and from Vancouver, Mr. John Howard. I think this makes up our eight.

M. Ouellet: À votre connaissance, ces avocats représentent-il les associations ou sont-ils membres d'une des associations suivantes: l'Association canadienne de commercialisation des produits pétroliers ou la Fédération canadienne d'entreprises indépendantes?

Mr. Clarry: I am not sure, but I am sure your record will show. I think Mr. McKeown appeared before the committee last week; I think it is the Petroleum Marketers Association of Canada, but I am not sure of the exact name.

M. Ouellet: D'accord.

Vous avez mentionné au début que le mémoire n'a pas encore été approuvé par le Barreau. Est-ce à cause de l'urgence de venir témoigner devant notre Comité ou parce que le Barreau n'a pas tenu de séance depuis que votre mémoire a été préparé? C'est un document semi-officiel que vous nous présentez.

[*Translation*]

A la fin de notre mémoire, nous relevons certains problèmes inhérents à la version française du projet de loi, et nous signalons le fait que la constitutionnalité du tribunal et de certaines dispositions du projet de loi pourrait être contestée.

Nous avons aussi une annexe dans laquelle nous abordons certaines questions de nature un peu plus technique que je pourrais vous exposer si vous y tenez.

Voilà, monsieur le président, un aperçu général de notre mémoire.

Le président: Merci monsieur Clarry. Monsieur Ouellet, voulez-vous commencer?

Mr. Ouellet: Mr. Chairman, thank you.

I would like to thank the expert lawyers who are appearing before us today for the Canadian Bar Association. Those who have been associated with reviewing the Competition Act recognize in them two people with great expertise and vast knowledge in the field.

Our witnesses mention that an eight member committee of the Canadian Bar Association was studying the matter. Could they give us the names of the other members? And did those other members take part in the preparation of this brief?

M. Clarry: Monsieur Ouellet, je vais d'abord répondre à votre deuxième question. Tous les membres du Comité ont travaillé à la préparation de notre mémoire et ils ont participé à la discussion et à la rédaction du mémoire, de même qu'aux révisions des diverses ébauches. Ces membres sont, d'est en ouest: M. Keith Eaton, de Nouvelle-Écosse; M. Julian Chipman de Montréal; M. Colin Irving, d'Ottawa; et de Toronto, MM. MacDonald et moi-même, de même que MM. Oliver McKeag et William McKeown. Il y a aussi M. John Howard, de Vancouver. Vous avez donc la liste des huit membres.

Mr. Ouellet: To your knowledge, do those lawyers represent the following associations or are they members thereof: the Petroleum Marketers Association of Canada or the Canadian Federation of Independent Business?

M. Clarry: Je n'en suis pas sûr mais je sais que vous constaterez en lisant le compte rendu de vos réunions que M. McKeown a comparu devant les membres du Comité la semaine dernière à titre de représentant de l'Association canadienne de commercialisation des produits pétroliers, si je ne me trompe pas.

Mr. Ouellet: Very well.

You mentioned at the beginning that your submission had not yet been approved by the Bar. Is it because it was urgent to come and testify before the committee or is it because the Bar has not had a meeting since your submission was prepared? You are thus presenting a semi-official document.

[*Texte*]

Mr. Clarry: Well, it is for both the reasons you mentioned, sir. I had asked the bar association office to attempt to arrange our appearance next week because the regular meeting of the executive committee is this coming weekend. I believe your committee wished to deal with the matter more quickly.

We are satisfied from discussion with the members of the executive committee, all of whom have seen it, and the fact that it has been approved by the legislation and law reform committee of the bar association that approval will be forthcoming, so I am sure you can accept this as a submission of the Canadian Bar Association.

M. Ouellet: D'accord.

Je suis un peu déçu de l'exposé du Barreau. J'espérais, mes collègues aussi, sans doute, obtenir une consultation gratuite de votre part sur la constitutionnalité du tribunal de la concurrence. Vous en parlez si brièvement! Cela ne nous éclaire pas beaucoup. Et vous nous faites peur en disant que cette question devra faire l'objet d'étude en Cour suprême; que les tribunaux trancheront la question.

• 1555

C'est peut-être injuste de ma part de vous demander immédiatement un jugement de fond sur la constitutionnalité du tribunal. Mais, de prime abord, ce tribunal pourrait-il se justifier constitutionnellement? Ne serait-il pas plus prudent de se référer à la Cour suprême pour clarifier les choses? Cela éviterait, ultérieurement, d'entamer des dépenses importantes pour les personnes qui mettraient en doute la constitutionnalité du tribunal; cela éviterait aussi de faire perdre un temps précieux au Parlement canadien, en passant une loi inconstitutionnelle?

Mr. Clarry: If you trace the Canadian Bar Association's submissions over the years, you will find that 10 years ago, more or less, we took a much stronger position on the constitutionality and we did recommend a reference to the Supreme Court of Canada. Because of decisions of the Supreme Court in the last ten years, the majority view of the members of the committee is that the legislation will be upheld. We recognize though that lawyers will fight every time they have a constitutional issue in the hope that it may provide some salvation for their client. For that reason, because one cannot say categorically that it is protected, we just anticipate that it will become a matter of litigation.

I think the fact that we did not make the point of saying in our submission, that in our view there were grave doubts as to the constitutional validity, it reflects the consensus view of the committee that this was not an issue we thought should be pursued. I think also we felt—and I would ask Mr. MacDonald perhaps if he has any different view—that a reference to the Supreme Court of Canada is not the most satisfactory way of resolving these issues because it gets there without any factual sort of basis to the simple question of law. Do you want to add anything to that, Bruce?

Mr. Bruce MacDonald (Canadian Bar Association): No, I have nothing to add to what Mr. Clarry has said. I presume

[*Traduction*]

M. Clarry: Et bien, c'est pour ces deux raisons-là. Le bureau de l'Association du Barreau m'a demandé de faire le nécessaire pour que nous comparaissions la semaine prochaine étant donné que la réunion d'usage du comité de direction était prévue pour le week-end prochain. Je pense que votre Comité voulait nous entendre avant.

Étant donné les discussions que nous avons eues avec les membres du comité de direction, qui ont tous pris connaissance du mémoire, et puisque il a été approuvé par le comité législatif et de réforme du droit de l'association, vous pouvez avoir l'assurance que ce mémoire contient le point de vue de l'Association du Barreau canadien.

Mr. Ouellet: Very well.

I am a little bit disappointed in the Bar's submission. My colleagues and I were perhaps hoping for a free consultation on the constitutionality of the competition tribunal. You do not say much about it and that informs us very little. Furthermore, you scare us in saying that the matter should go before the Supreme Court and that the Courts will have to settle it.

It is perhaps unfair of me to ask you for a quick judgment on the constitutionality of the tribunal, but, first of all, can the tribunal be justified relative to the Constitution? Would it not be wiser to refer the matter to the Supreme Court for clarification? This would do away with major legal costs down the line for people who might want to challenge the constitutionality of the tribunal. It might also save the Canadian Parliament from wasting precious time passing an unconstitutional law.

M. Clarry: Si vous examinez les mémoires de l'Association du barreau canadien depuis 10 ans, vous constaterez que nous nous sommes prononcés sur la constitutionnalité, et que nous avons, en fait, recommandé d'en saisir la Cour suprême du Canada. Étant donné les décisions rendues par la Cour suprême depuis 10 ans, la majorité de nos membres estiment que la loi serait confirmée. Mais, nous savons que les avocats vont lutter pour aider leurs clients, chaque fois que survient une question de constitutionnalité. Pour cette raison, nous estimons que ce sera matière à litige car on ne peut pas se prononcer catégoriquement.

Dans notre mémoire nous n'avons pas parlé de la constitutionnalité, car la majorité de nos membres estiment que la loi serait maintenue. Nous avons aussi estimé—et je demanderai à M. MacDonald s'il est d'un avis différent—que le fait d'en saisir la Cour suprême du Canada n'est pas nécessairement la façon la plus satisfaisante de résoudre ces questions, car il n'existe pas encore de preuves. Voulez-vous ajouter quelque chose, Bruce?

M. Bruce MacDonald (Association du Barreau canadien): Non, je n'ai rien à ajouter à ce que vient de dire M. Clarry. Je

[*Text*]

the Department of Justice will have its own views as to how significant the constitutional questions are, and what the appropriate thing to do would be. Some people do have their questions about the constitutional validity of aspects of the legislation, but as Mr. Clarry indicated, I think the majority view on our committee was that it would probably be upheld in the light of relatively recent decisions by the Supreme Court.

M. Ouellet: Merci.

J'aimerais poser une question plus spécifique sur le tribunal. Nos témoins nous expliqueraient-ils pourquoi leurs recommandations limitent l'appel? J'ai accueilli favorablement la suggestion que les tierces parties auraient directement accès au tribunal. C'est une suggestion fort à propos. Mais je me demande pourquoi vous limitez l'appel à quelques pratiques anti-compétitives et non à toutes les infractions à la loi?

Mr. Clarry: Our reason for this was that these were situations where what was involved was not so much the regulation or the regulation to enforce competition, but injury by certain practices to certain individuals—refusal to supply, and refusal to sell on a delivery basis satisfactory to the individual. We are concerned that if it was opened wide, because of the rather untried concepts in the act, you would lose any benefit of a consistent development of policy by the Bureau of Competition Policy and it would become a vehicle for harassment. We actually could foresee, after five years perhaps of experience with matters coming before the tribunal in some of the areas, that it could then be broadened because there would be a base of precedent that you could go on.

M. Ouellet: En parlant de la composition du tribunal, vous avez fait quelques remarques sur l'importance d'avoir des gens de qualité, des experts qui pourraient être appelés à siéger sur ce tribunal.

• 1600

Quelles suggestions apportez-vous pour garantir le calibre des membres du tribunal? Que pensez-vous des membres à temps partiel? Est-ce pratique? Peut-on obtenir des gens compétents s'ils siégent à temps partiel? Par exemple, vous deux qui connaissez profondément cette loi, laisseriez-vous votre cabinet d'avocats pour trois, quatre ou six mois entendre une cause? Arriverait-il que les avocats les plus compétents en la matière soient automatiquement exclus? Ils ne peuvent pas s'engager dans une cause sans savoir si elle durera une semaine ou six mois! Comment nous assurer d'un calibre de première valeur sur un tribunal semblable?

Mr. Clarry: On the question of part-time members, I appreciate the problems you raise. In fact however, to give an example, the Ontario Securities Commission has two full-time members and four or five part-time members, and they face these same problems you have referred to.

They seem to be able to schedule their hearings, and the individuals schedule their time, so that they can accommodate to it. Frequently they are people who have retired early; they are not people who are aged, but they are people who have

[*Translation*]

tiens pour acquis que le ministère de la Justice a sa propre perspective sur la constitutionnalité et la façon la plus appropriée à procéder. Certains s'inquiètent de la constitutionnalité de divers aspects de la loi, mais comme l'a dit M. Clarry, je pense que la majorité de nos membres estiment que la loi serait confirmée, étant donné les décisions récentes de la Cour suprême.

Mr. Ouellet: Thank you.

I would like to ask a more specific question about the tribunal. I wonder if the witnesses would explain why they recommend limiting appeal. I was in favour of the suggestion that third parties would have direct access to the tribunal. It is a very appropriate suggestion. But I am wondering why you would limit appeal to certain anti-competitive practices and to infractions of the law?

M. Clarry: Si nous l'avons recommandé, ce n'était pas à cause des règlements sur la concurrence, mais à cause du préjudice de certaines pratiques—par exemple, le refus d'approvisionner, ou le refus de vendre sous des conditions de livraison acceptables pour l'intéressé. Nous nous préoccupons du fait que cela pourrait devenir un moyen de harcèlement, car certains aspects de la loi n'ont pas encore été mis à l'épreuve et vous n'aurez pas une politique évoluée qui pourrait être suivie par le bureau de la politique de concurrence. Après cinq années d'expérience avec le tribunal, il serait possible d'élargir le mandat, car vous aurez un précédent.

Mr. Ouellet: With reference to the composition of the tribunal, you made some remarks about the importance of having high calibre people, or experts who could be called upon to sit on the tribunal.

What do you suggest we should do to ensure that the members of the tribunal have all the necessary qualifications? What do you think of part-time members? In your view, is it practical? Is it possible to get competent people who will only work part-time? For example, both of you have a thorough knowledge of the act; would you be willing to leave your law firm for three, four or even six months to hear a case? Is it possible that the most knowledgeable lawyers in the field be automatically excluded? After all, they cannot commit themselves to a case without knowing whether it will last a week or six months. How do we make sure that the members of such a tribunal will be top notch?

M. Clarry: Je comprends le problème que vous soulevez au sujet des membres à temps partiel. En fait, je vais vous donner un exemple. La Commission des valeurs mobilières de l'Ontario compte deux membres à temps plein et quatre ou cinq membres à temps partiel, qui ont les mêmes problèmes dont vous parliez.

Ils semblent pourtant capables d'organiser leur calendrier d'audiences de façon à répondre aux besoins. Souvent, ce sont des personnes qui ont pris leur retraite anticipée; ce ne sont pas des personnes âgées, mais elles ont atteint un certain seuil dans

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reached a certain point in their professional life to enable them to do that. Some of them are university professors. It does seem that it can be done; but I agree with you, there is a problem. However, we think it is workable and perhaps preferable to taking somebody and telling him this is his full-time job, without knowing if there will be enough interesting work to really occupy him.

M. Ouellet: Je voudrais parler de la proposition traitant de l'appel au cabinet. Vous la suggérer dans votre mémoire. Vous dites que le conseil des ministres pourrait, s'il juge qu'une fusion est d'intérêt national, même si elle avait des effets négatifs sur la concurrence, permettre qu'elle se fasse.

Seriez-vous prêts à accepter l'inverse? Dans des cas où une fusion n'aurait pas d'effets négatifs sur la concurrence, reconnaissez-vous au conseil des ministres le même droit de regard sur toute fusion d'importance, même si elle n'était pas dans d'intérêt national?

Mr. Clarry: Before answering that, I would like to comment on . . . I think you have understood our brief. It is an exemption that would be granted before any proceedings; it is not a Cabinet override in the sense of a decision coming out of the tribunal and the Cabinet then setting it aside. We are proposing that this would be something done, if it was done at all, before any proceedings were commenced.

I think, though, what we are dealing with is that any legislation is an interference with the freedom of the citizen to go about his business. We can recognize the government interfering where there are guidelines set out in legislation as to when and where such interference could be made; but to have a wide-open power in the government, without any standards being set, to simply say that cannot be done, is not something we have considered. But my reaction would be that is further than we think you should go in a free country.

• 1605

Mr. Ouellet: In other words, what you are telling me is that you do not want Cabinet to override; you want Cabinet to sidestep, in a way. But if you argue for this . . . Despite a merger creating lowering of competitions, you would not object to the same Cabinet actions on a huge merger that might not necessarily reduce competition?

Mr. Clarry: I think there would have to be legislation which in effect said what the evil was that Cabinet was entitled to act against in making such an order, so that anyone entering into that kind of transaction would know that it was subject to prohibition for certain reasons and on certain grounds. As I say, I am just giving a personal reaction. It is not something we considered at all.

Mr. Ouellet: This is a very interesting presentation and there are a lot of questions I want to ask. I might ask one more and then I will come back later on.

In relation to the questions of Investment Canada versus competition law, you seem to give priority in a sense to the Investment Canada Act. This surprised me and I would like you to explain this a little further. As you know, before the

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leur vie professionnelle qui leur permet de le faire. Certains sont des professeurs d'université. Cela peut arriver; mais j'en conviens, le problème existe. Toutefois, je crois que c'est une solution plus pratique et même préférable à la possibilité de nommer quelqu'un au tribunal à temps plein, sans savoir s'il y aura suffisamment de travail pour l'occuper.

Mr. Ouellet: I would now like to discuss the proposal concerning appeals to Cabinet. You said that the Cabinet could allow a merger to proceed if it is in the national interest even though it may have negative effects on competition.

Would yo be willing to accept the opposite? If a merger would not have any negative effects on competition, do you believe the Cabinet should have the same powers for any important merger, even though it may not be in the national interest?

M. Clarry: Avant de vous répondre, j'aimerais ajouter un commentaire. Je crois que vous avez bien compris notre mémoire. Il s'agit bien d'une exemption qui serait accordée avant toute poursuite; il ne s'agit pas de donner au Cabinet un droit de veto sur les décisions émanant du tribunal. Nous proposons que ce droit de regard soit en vigueur, le cas échéant, avant que les poursuites ne soient entamées.

En fait, le noeud du problème est que toute loi nuit à la liberté que les citoyens ont d'entreprendre diverses activités. Il est évident que le gouvernement peut intervenir lorsque des lignes directrices sont établies en vertu de lois spécifiant les circonstances où l'intervention est justifiée; mais de là à donner au gouvernement des pouvoirs illimités, sans le moindre critère qui lui permettrait d'interdir certaines activités, ce n'est pas une solution que nous avions envisagée. Mais spontanément, je dirais que ce serait aller un peu plus loin que justifiable dans un pays libre.

M. Ouellet: En d'autres termes, vous me dites que vous ne voulez pas que le Cabinet ait le droit de veto, mais plutôt qu'il ait le droit de contourner la question. Mais si c'est ce que vous revendiquez . . . Donc, vous ne vous opposeriez pas à ce que le Cabinet intervienne, qu'il s'agisse d'une fusion risquant de diminuer la concurrence ou non?

M. Clarry: Je crois qu'il faudrait que la loi stipule clairement les circonstances dans lesquelles le Cabinet aurait le droit d'intervenir, afin que quiconque entreprend ce type de transaction sache bien qu'elle est sujette à un rejet pour diverses raisons et divers motifs. Je le répète, c'est mon opinion personnelle. Il ne s'agit pas d'une position formulée par notre association.

M. Ouellet: Cette discussion est très intéressante et j'aurais beaucoup de questions à vous poser. Je vous en pose une dernière, et je reviendrai au deuxième tour.

Lorsqu'il s'agit d'établir un lien d'importance entre Investissement Canada et les lois sur la concurrence, vous semblez, d'une manière, donner la priorité à la Loi sur Investissement Canada. Cela me surprend et j'aimerais avoir des explications.

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recent amendment, FIRA, the previous act, had a clause that indeed allowed the action of the director of combines—almost a veto power to a transaction's taking place. The final decision was not one of the Minister but one of Cabinet, the entire Cabinet.

The new Investment Canada Act leaves it exclusively in the hands of the Minister responsible for the act, with his responsibility to look at a number of factors, but no factor is more predominant than another. The view of the province or the view of the director of combines or the view of other parties is of equal value. They are all presented to the Minister who made up his mind and decided. There is no appeal to Cabinet. That is the end of it.

What you said surprised me, and I will tell you why. Basically, it will be easier to have a merger from foreign investment that could in fact have an effect on competitions in Canada, or kick out of business some Canadian companies with really no hearings, with no evaluations going through the tribunal. It will be strictly a judgment call by the Minister of Trade, who might be right or might be wrong. There will be no way of hearing the evidence.

Unless I misunderstood you, you are telling us that it will be much easier for a foreign company to buy a Canadian company than for a Canadian company to buy another Canadian company, and it makes me a little uneasy.

Mr. Clarry: There would be a slight difference in the case of a foreign company, but the essence of our proposal is that the director would have to act, decide to attack it, bring it before the tribunal, before the Minister was deemed to have decided it was of net benefit to Canada. If the director acted in that way . . . The tribunal might have made an interim order forbidding it going ahead and the matter would be dealt with on its merit.

• 1610

From the situation of a purely Canadian merger, the difference would be that time constraint. If the director had not acted before the Minister was deemed to have decided it was a net benefit, then he would be precluded from acting later. But he would have the same opportunity to go to the tribunal immediately and get an interim order to stop it, as in the case of a Canadian tribunal.

Mr. Ouellet: Yes, but if a merger in Canada takes place at a certain level, there is a notification process and there is a certain period of time for the director to act. Or there are even pre-notifications that companies are in fact entitled to, so therefore chances are that the director will learn about this merger at the time of the merger, if not in advance.

Under FIRA—well, it is now the new regime of Investment Canada—it could take place possibly without the knowledge of

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Comme vous le savez, avant le récent amendement, la loi précédente concernant l'Agence d'examen de l'investissement étranger renfermait une disposition qui donnait effectivement au directeur des enquêtes sur les coalitions une espèce de droit de veto sur les transactions. La décision finale ne revenait pas à un seul ministre, mais à tout le Cabinet.

En vertu de la nouvelle Loi sur Investissement Canada, c'est uniquement au ministre responsable de son application qu'il revient de prendre ces décisions après avoir examiné un certain nombre de facteurs. Cependant, aucun facteur n'est plus important qu'un autre. Il doit évaluer sur un même pied l'opinion de la province, du directeur des enquêtes sur les coalitions ou de toute autre partie. Il doit examiner tous les arguments présentés et rendre sa décision. Aucune décision ne peut faire l'objet d'un appel au Cabinet. La décision du ministre est finale.

Ce que vous avez dit m'a surpris, et je vais vous dire pourquoi. Essentiellement, il sera plus facile de procéder à des fusions comprenant des investissements étrangers et qui risquent d'avoir des répercussions sur la concurrence au Canada, ou même de faire disparaître certaines compagnies canadiennes, car le tribunal n'a pas pour mandat d'évaluer ce genre de fusion. C'est au ministre du Commerce qu'il reviendra de rendre une décision, et il risque de se tromper. Il sera alors impossible de faire valoir les divers arguments.

Si je vous ai bien compris, vous dites qu'il sera beaucoup plus facile pour une compagnie étrangère d'acheter une compagnie canadienne que pour une compagnie canadienne d'acheter une autre compagnie canadienne. Je vous avoue que cela m'inquiète un peu.

M. Clarry: Il y aura une légère différence dans le cas d'une compagnie étrangère, mais ce que nous proposons en fait, c'est que le directeur soit habilité à intervenir contre la fusion avant qu'elle ne passe devant le tribunal, avant que le ministre n'ait à déterminer si la fusion en question représente un avantage pour le Canada. Si le directeur agissait ainsi . . . Le tribunal pourrait rendre une ordonnance provisoire interdisant la fusion, ce qui permettrait d'étudier l'affaire selon son mérite.

Du point de vue d'une fusion purement canadienne, la différence vient des restrictions de temps. Si le directeur n'avait pas agi avant que le ministre n'ait présumément décidé que la fusion comportait des avantages nets, il ne pourrait pas le faire plus tard. Cependant, il aurait le droit de demander immédiatement au tribunal de rendre une ordonnance provisoire interdisant la fusion, comme dans le cas d'un tribunal canadien.

M. Ouellet: Oui, mais si une fusion se produit au Canada à un certain niveau, il existe un processus de notification et le directeur a donc un certain délai pour agir. Les compagnies ont d'ailleurs aussi le droit de faire des prénotifications, et il est donc possible que le directeur n'apprenne la fusion qu'au moment même où elle se produit, sinon à l'avance.

En vertu de l'AEIE—qui est maintenant le nouveau régime d'Investissement Canada—la fusion peut se produire sans que

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the Director of Investigation and Research, and then he could be short-circuited.

Mr. Clarry: Sir, our proposal is that at the time a party applies to Investment Canada they would notify the director in the same way they would under the pre-notification provisions, to give him the same information that he would get under those provisions, regardless of whether or not the merger was above the threshold, so that . . .

Mr. Ouellet: I appreciate the clarification because this not exist under the current Investment Canada Act.

Mr. Clarry: No.

Mr. Ouellet: You know, in order to implement your suggestion we would have to amend the Investment Canada Act and give greater prominence to the Director of Investigation and Research than he actually now has in the Investment Canada Act.

Mr. Clarry: Yes, although we thought it could be done entirely within the Competition Act, in the amendments to the Combines Investigation Act.

Le président: M. Cadieux, suivi de M. Howie.

M. Cadieux: Monsieur le président, je veux rassurer mon collègue de l'opposition que ce n'est pas du temps qu'il abuse mais de bonnes questions. Je dois admettre que ces sujets un peu chauds qui sont peut-être plus pertinents pour le Barreau canadien, ont été fort bien touchés.

J'aimerais poser une question. Si on regarde vos deux propositions, celle d'exempter certaines transactions et celle d'accorder une priorité à Investissement Canada sur le tribunal, est-ce que, prises ensemble, elles ne diminuent pas de beaucoup l'impact souhaité pour cette loi qui traite des questions de compétition?

Mr. Clarry: We find the problem of reconciling the Investment Canada Act with the Competition Act a very troublesome one. We recognize that our proposal would give a foreign merger some slight advantage in timing. But I do not think we intend to give priority to the Investment Canada Act. We are trying to achieve a result where we will not have two branches of government coming out with contrary decisions.

If the director considers there is a substantial lessening of competition, then he would take it to the tribunal and it would be dealt with in the same way as a domestic merger would, regardless of what the Minister under Investment Canada thinks. The only difference is that he would have to act more quickly. He would not have a year or two to act.

M. Cadieux: En d'autres mots, pour éviter la possibilité de deux décisions contradictoires, vous suggérez presque que ce soit une course au fil d'arrivée. Ainsi, le directeur devra décider d'amener la cause devant le tribunal, empêchant le

[*Traduction*]

le directeur des Enquêtes et de la Recherche ne soit au courant, ce qui lui couperait l'herbe sous le pied.

M. Clarry: Ce que nous proposons, monsieur, c'est qu'au moment où l'intéressé présente une demande à Investissement Canada, il doit également aviser le directeur, comme il le ferait en vertu des dispositions de prénotification, et lui communiquer les mêmes renseignements qu'il le ferait en vertu de ces dispositions, que la fusion soit au-dessus du seuil ou non, afin que . . .

M. Ouellet: Je vous remercie de cette précision, car cela n'existe pas en vertu de la présente Loi sur Investissement Canada.

M. Clarry: En effet.

M. Ouellet: Vous savez, afin de mettre en vigueur votre proposition, il nous faudrait modifier la Loi sur Investissement Canada de façon à donner plus d'importance au Directeur des enquêtes et de la recherche qu'il n'en a actuellement en vertu de cette loi.

M. Clarry: Oui, mais nous pensions que cela pourrait se faire entièrement par le biais de la Loi sur la concurrence, par les amendements de la Loi relative aux enquêtes sur les coalitions.

The Chairman: Mr. Cadieux, followed by Mr. Howie.

Mr. Cadieux: Mr. Chairman, I would like to reassure my colleague from the opposition that he is not wasting our time as much as he is wasting good questions. I must admit that the rather touchy matters he has brought up, matters which concern the Canadian Bar Association more closely, have been quite interesting.

I have a question. If we look at your two proposals, the one exempting certain transactions and the one giving Investment Canada priority over the competition tribunal, do you not think that, together, they greatly diminish the impact that this act should have on competition?

M. Clarry: Nous avons énormément de difficulté à concilier la Loi sur Investissement Canada à la Loi sur la concurrence. Nous savons bien que notre proposition donnerait un léger avantage à une fusion étrangère du point de vue du temps. Mais ce n'est pas notre intention de donner la priorité à la Loi sur Investissement Canada. Nous essayons plutôt d'éviter que deux directions gouvernementales ne prennent des décisions contradictoires.

Si le directeur estime qu'il y a une diminution considérable de la concurrence, il devra soumettre l'affaire au tribunal, qui examinerait les données de la même façon qu'il le ferait pour une fusion d'intérêts canadiens, peu importe ce qu'en pense le ministre chargé d'Investissement Canada. La seule différence serait qu'au lieu d'avoir un an ou deux pour agir, il devrait le faire plus rapidement.

Mr. Cadieux: In other words, to avoid two contradictory decisions, you are almost suggesting that it become a race down to the wire. Thus, the director would have to decide to bring a case to the tribunal, not allowing the Minister respon-

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ministre responsable d'Investissement Canada de déterminer si la décision est au bénéfice net du Canada?

Mr. Clarry: That is what would happen, in a sense. I believe at the present time, and certainly under the Foreign Investment Review Act, the director was able to make recommendations on the competition aspects of an investment proposal, but as it were they were dealt with internally.

• 1615

M. Cadieux: À titre de recommandation seulement, et non pas avec la possibilité d'arrêter la décision éventuelle du ministre responsable d'Investissement Canada!

Pour revenir à votre suggestion d'exempter certaines transactions. Il est bien évident qu'il faudrait inclure un article quelconque dans le texte de la loi pour permettre au cabinet d'exempter certaines transactions. Mais les critères que vous avez suggérés brièvement, celui de l'intérêt national, d'une part, ou de projets considérables, d'autre part . . . Avez-vous des critères permettant une évaluation des projets et assistant ceux qui veulent faire des projets? Comment déterminer s'il s'agit de l'intérêt national? Quand un projet est-il considérable pour justifier une demande au Cabinet en vue d'une exemption? Est-ce qu'on ne crée pas deux systèmes dans la même loi où les gens essaieront des deux côtés?

Mr. Clarry: I appreciate what you are concerned with. I think we perceive this as something to be used only in fairly rare circumstances. We can see many safeguards being put into it: a requirement that Cabinet state clearly what the national interest is and provide a full report on it, a tabling in Parliament of any such exemption. I am not sure how many guidelines one could write into it, apart from some objectives, some areas in which this power could be exercised.

As I mentioned earlier, the reason we suggest it is for one thing: there are so many new and rather vague concepts in the act, it seems to us unfortunate not to have any safety valve where something should be done. But these carefully worked out economic guidelines will not fit it.

M. Cadieux: Je comprends le but de votre suggestion. Le pouvoir suprême du cabinet, dans certaines circonstances, serait peut-être souhaitable. Et, tant et aussi longtemps que nous serons au pouvoir, nous utiliserions de tels pouvoirs de façon très conservatrice. Il n'y a pas de doute, sur ce point. Mais, d'un autre côté, n'est-ce pas placer les divers intervenants sur des paliers différents? Certains auraient accès à des décisions du cabinet et à des exemptions; alors que d'autres, par manque de moyens ou par n'importe quelle autre circonstance seraient obligés de fonctionner dans le système. On risque de créer de l'inéquité dans certaines circonstances.

Mr. Clarry: We have in mind something which would be a major national project or a major export consortium, for example, not an individual business decision. But I recognize

[*Translation*]

sible for Investment Canada to determine whether the merger would be to Canada's advantage?

M. Clarry: D'une certaine manière, c'est ce qui arriverait. Je crois qu'à l'heure actuelle, comme c'était le cas en vertu de la Loi sur l'examen de l'investissement étranger, le directeur peut faire des recommandations sur les aspects concurrentiels d'une proposition d'investissement, sauf que la décision est interne.

Mr. Cadieux: But this is only a recommendation, which does not preclude in any way the decision which the Minister responsible for Investment Canada could make.

To come back to your proposal of exempting certain transactions, it seems obvious to me that there should be a clause in the bill allowing the Cabinet to exempt certain transactions. But the criteria which you suggested briefly, national interest on one hand, or importance of the project on the other . . . Have you thought of criteria which would enable an assessment of the project, and which would help the decision makers? How do you decide upon the national interest? How do you decide that a project is important enough to warrant some application to the Cabinet in order to get an exemption? Are you not going to have two systems in the same act, with people trying both ways?

M. Clarry: Je comprends très bien vos hésitations. On n'y aurait recours qu'à titre exeptionnel. On pourrait par ailleurs assortir ces dispositions d'un certain nombre de mesures de précaution, exigeant notamment que le Cabinet dise très clairement ce qu'est en l'occurrence l'intérêt national, qu'il fasse un rapport exhaustif sur la question, et qu'il dépose une demande à cet effet au Parlement. Je ne sais pas exactement jusqu'où l'on pourrait aller dans ce sens, si ce n'est qu'on pourrait au moins essayer de définir un certain nombre d'objectifs, ou de situations qui justifieraient le recours à ce type de prérogative.

Comme je l'ai dit tout à l'heure, la loi comporte toute une série de nouvelles notions qui sont encore assez vagues, et il serait malheureux qui nous n'ayons aucune porte de sortie en cas de nécessité. Mais je ne pense pas que l'on puisse régler le problème en définissant dans le détail toute une série de critères économiques.

Mr. Cadieux: I do understand your proposal. The overriding power of the Cabinet, in certain circumstances, might, as a matter of fact, be something desirable. And as long as we will be in power, we would use that prerogative in a very prudent manner. I have no doubt about it. On the other hand, are you not creating some kind of inequity? Some people would have access to Cabinet decisions and exemptions; others, because they do not have the same access, or for whatever reason, would have to operate within the system. So there is a risk.

M. Clarry: Nous pensons à des cas assez particuliers, de l'ordre du projet d'importance nationale, comme par exemple la formation d'un consortium très important pour l'exportation; c'est-à-dire des cas dépassant le strict niveau des intérêts

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some of the problems you are raising. It is a matter of balancing, and also . . .

Mr. Cadieux: You mentioned a few moments ago in answer to my colleague how difficult it is to get lawyers to give final commitments or guaranteed commitments when you are dealing with major national interests. I am sure if you have 10 lawyers in the same room—and I am a lawyer, so maybe I can speak from experience—you might get 10 different definitions of what is a major national interest.

Mr. Clarry: It is Cabinet that would make the decision.

Mr. Cadieux: There are probably a lot of lawyers in Cabinet too.

Mr. MacDonald: Mr. Cadieux, one example of the sort of problem which arises—and I am sure you are fully familiar with it—has to do for example with the recent sale of the downstream assets of Gulf Canada. The portion east of Quebec went to a company not subject to the Combines Investigation Act. Since the company happened to be publicly owned, the purchase was approved by the government as in the national interest of Canada, despite the fact that the director expressed some very dim views of this particular transaction.

Had the transaction been subject to the act, it might under this bill have come before this tribunal and been assessed on much narrower public interest criteria than it was in fact assessed on. It might have been prohibited instead of being approved.

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The half of the Gulf downstream assets east of Ontario went to a company that happened to be foreign owned. Under the Investment Canada Act, the government decided that acquisition was likely to be of net benefit to Canada. Had that company not been foreign owned, had it been domestically owned, the same economic effect internally would have taken place. It might have, had it proceeded under this act without an override or an examption, arrived at a different result, as a result of its being assessed by narrow criteria.

This was the sort of problem we had in mind, I think, when we were trying to cope with a way of rationalizing these different processes so that you got the same result, quite apart from the fortuitous nature of the purchaser, whether it was publicly owned or foreign owned or privately owned by Canadians.

Mr. Ouellet: I may make a short comment to your submission. The example you are giving is an excellent one. The decision that has been taken by the Minister was his own decision and was subject to a lot of criticisms and tangled with favouritisms. It was very difficult, in the public light, to be appreciated and understood.

If it had been sent to the tribunal, the decision would have been made by an independent body and the transaction might have taken place the same way but with no attack on the

[*Traduction*]

privés. Mais je comprends très bien les questions que vous posez. C'est une question d'équilibre, mais également . . .

M. Cadieux: Dans une réponse à l'un de mes collègues vous avez dit il y a quelques instants qu'il était difficile de demander aux avocats de se prononcer, et d'obtenir un avis de ces derniers, lorsque l'on abordait la question des intérêts nationaux. Je pense effectivement que vous pourriez avoir dix avocats dans la même pièce—je suis d'ailleus moi-même avocat, et je parle d'expérience—qui donneraient chacun une définition différente de cette notion d'intérêt national primordial.

M. Clarry: Ce serait le Cabinet qui prendrait la décision.

M. Cadieux: Il y sans doute beaucoup d'avocats au sein du Cabinet.

M. MacDonald: Monsieur Cadieux, je vais vous donner un exemple du type de problèmes qui peuvent surgir. Vous n'êtes sans doute pas sans savoir que Gulf Canada a récemment cédé certains de ses réseaux de distribution. Ce qui se trouve à l'est de Québec a été racheté par une société qui ne tombe pas sous le coup de la loi relative aux enquêtes sur les coalitions. Étant donné que cette société était une société d'État, l'achat a été approuvé par le gouvernement, comme transaction d'intérêt national, et ceci en dépit d'un avis plutôt négatif du directeur.

Si la transaction était tombée sous le coup de la loi, d'après les nouvelles dispositions du projet de loi le tribunal aurait été saisi, et il est probable que des critères beaucoup plus sévères auraient été appliqués. Finalement la transaction aurait peut-être été interdite au lieu d'être approuvée.

La moitié des éléments d'actif résultant de la transaction de Gulf à l'est de l'Ontario allait à une compagnie appartenant à des intérêts étrangers. En vertu de la Loi d'investissement Canada, le gouvernement a déterminé que la transaction était nettement avantageuse pour le Canada. S'il s'était agi d'une compagnie canadienne plutôt que qu'étrangère, les retombées économiques internes auraient été les mêmes. La situation aurait pu tourner différemment s'il n'avait pas été prévu dans la loi une exception où cette possibilité de veto, si des critères étroits avaient présidé à l'évaluation du dossier.

C'est le genre de problème que nous avions à l'esprit lorsque nous cherchions à rationaliser les différents processus pour permettre d'arriver aux mêmes résultats, indépendamment de la nature aléatoire de l'acheteur: c'est-à-dire une entreprise publique, étrangère, ou appartenant à des intérêts canadiens privés.

M. Ouellet: Je me permets de faire un commentaire à ce propos. Votre exemple est excellent. La décision a été prise par le ministre. Elle a suscité énormément de critiques, et on a parlé de favoritisme. Ce fut une décision très difficile que le public a eu du mal à apprécier et comprendre.

Si le dossier avait été confié au tribunal, la décision aurait été celle d'un organisme indépendant, et la transaction aurait pu tout aussi bien se produire, sans pour autant que le

[*Text*]

government for the decision, because the decision would have been accepted as one which had been truly aired in public by a tribunal, and a decision arrived at in the best interests of the country by an independent tribunal. While in this case it was decided behind closed doors, exclusively by the Minister.

Mr. MacDonald: I would think, Mr. Ouellet, it is a matter of trading off the disadvantages of that type of process against the advantages of a broader range of public interest criteria than could really be assessed and applied by a body such as the competition tribunal.

M. Cadieux: Les suggestions seraient probablement fort bien reçues, dépendamment du côté où on est, celui du gouvernement ou celui de l'opposition. Vous avez peut-être résolu le problème en disant que vous avez des avantages d'un côté et des désavantages de l'autre; on pourrait aussi dire qu'entre deux maux, on choisit le moindre. Mais c'est une suggestion intéressante.

J'aimerais traiter de la constitutionnalité du tribunal. Si j'ai bien compris votre réponse, la majorité des membres de votre comité croyaient que la loi serait déclarée *intra vires* par le tribunal, serait maintenue, donc comme valable.

Pouvez-vous nous dire quelles opinions ont été émises chez vous et qui risqueraient d'être maintenues pour déclarer cette loi inconstitutionnelle?

Mr. Clarry: There would be the argument, I suppose—and I have not prepared myself on the constituional arguments—that this does not really fall within the peace, order and good government, or the trade and commerce power, because while section 1 of the act purports to say that it is for the general regulation of trade and so on, it is really regulating individual businesses and individual transactions, and therefore it is not criminal law and it should not be sustained. The argument would be made that the tribunal is not one of the courts contemplated by the provisions of the Constitution Act as one where you have federally appointed judges.

Bruce, have you anything to add on that?

Mr. MacDonald: No. I think those are the basic arguments that would be made. It falls on the provincial side of the historic trade and commerce line. If you had a practice or a merger which really was occurring almost entirely within a province, that would be the one line. The other would be, of course, whether the competition tribunal was a section 96 or a 101 court.

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Mr. Cadieux: This brings me to the constitution of the tribunal itself, the fact you have some judicial appointees and some members of the tribunal who would not be part of the judiciary. Do you see any problem there?

Mr. MacDonald: Like Mr. Clarry, I have not really prepared myself on this question, but I can think of nothing

[*Translation*]

gouvernement ne soit exposé à des critiques, parce que, dans l'esprit de la population, le dossier aurait été examiné par un tribunal indépendant qui aurait fondé sa décision sur l'intérêt du pays. Dans ce cas-ci, la décision a été prise en privé, exclusivement par le ministre.

M. MacDonald: M. Ouellet, je pense que cela revient à remettre dans la balance, d'un côté, les inconvénients de ce type de processus et, d'un autre côté, les avantages de l'application de critères plus larges relatifs à l'intérêt public que pourrait peser et apprécier une institution comme le tribunal de la concurrence.

Mr. Cadieux: Your suggestion could probably be well received, depending on which side you are on—on the government side or that of the opposition. You may have solved the problem by saying that you have the advantages of one process and the disadvantages of the other; but one could also say that you have to choose the lesser of two evils. But it is an interesting suggestion.

I would like to discuss the constitutionality of the tribunal. If I understood your answer correctly, the majority of your committee believed that the legislation would be judged *intra vires* by the tribunal—that it would be sustained, thus applicable.

Could you tell us what arguments your members gave that would support a claim of unconstitutionality?

M. Clarry: Je ne me suis pas préparé en ce qui concerne les arguments constitutionnels, mais je suppose qu'on pourrait dire que la loi ne découle pas du principe de la paix, de l'ordre et du bon gouvernement, ou qu'elle ne relève pas des pouvoirs en matière de commerce, parce que, bien que l'article premier de la loi dise que celle-ci a pour objet, de façon générale, de réglementer notamment le commerce, elle réglemente en fait les entreprises individuelles et les transactions individuelles, et par conséquent, ne devrait pas être maintenue puisqu'elle ne relève pas du droit criminel. Un autre argument dirait que le tribunal n'est pas un de ceux prévu dans la loi constitutionnelle auxquels sont affectés des juges nommés par le gouvernement fédéral.

Bruce, avez-vous quelque chose à ajouter là-dessus?

M. MacDonald: Non. Ce sont essentiellement les arguments qui pourraient être invoqués. C'est le point de vue provincial en ce qui concerne le commerce. Si des pratiques ou une fusion se déroulaient pratiquement exclusivement au sein d'une province, cela serait plutôt simple. Évidemment, il faudrait déterminer si le tribunal de la concurrence est un tribunal aux termes de l'article 96 ou de l'article 101.

M. Cadieux: J'aimerais parler de la composition du Tribunal: il se composera de juges et de personnes qui ne représentent pas le secteur judiciaire. Est-ce que cela vous convient?

M. MacDonald: Tout comme M. Clarry, je ne m'étais pas vraiment préparé à répondre à cette question; cependant je ne

[*Texte*]

offhand from constitutional law which would prevent appointing this sort of a person to a body. I believe there are some other bodies, perhaps not entirely analogous, which have non-judicial members on them, and I personally know of no constitutional reason why this would make it improper.

Mr. Cadieux: Note that the expropriation tribunal in Quebec, for instance, has a non-judicial appointee on the tribunal.

With respect to the decisions of the tribunal, you would be against the casting vote of the chairman of the tribunal in the case of a draw if I understand correctly. You would also recommend appeals only upon certain circumstances. Am I right?

Mr. Clarry: No, I do not think we have any quarrel with the provisions for appeal. As a matter of fact, the full right of appeal to the Federal Court of Appeal is a principle we have consistently put forward. The casting vote... We feel it should behave as other courts behave. If you have a three-man court... If you have an even number on the court then there is no casting vote.

M. Cadieux: Merci, monsieur le président.

Le président: Merci, monsieur Cadieux.

Monsieur Howie.

Mr. Howie: After the two previous questioners all the good questions are gone, but there are a couple of points I might ask you to help us with. Do you feel the decriminalization of the offences in the act by using civil law criterion is a good measure?

Mr. Clarry: Yes, we think it is an improvement. The worry was the constitutional aspect of it. If you get that out of the way, we think it is a preferable way of dealing with it.

Mr. Howie: On the constitutional aspect, I think it has pretty well been clarified by my colleagues, but do you foresee a constitutional problem if we enact non-criminal civil laws relating to competition?

Mr. Clarry: As we have discussed, we can anticipate some counsel arguing the constitutional question, especially if they have nothing else to argue, but in our view it should be sustained.

Mr. Howie: In your brief it seems to me you recommended a Cabinet exemption on the basis of industrial strategy, international trade and the economy as a whole. Such an exemption, in your brief, would be granted before any proceedings under the act were commenced. I have a little problem with this. I wonder if you could clarify it for me. If the Cabinet is given the power to decide when the act will apply, do you not think it would undermine the whole purpose of the act?

[*Traduction*]

peux pas vraiment penser à une disposition de la loi constitutionnelle qui pourrait empêcher ces personnes de faire partie d'un groupe quelconque. Je crois qu'il y a d'autres organismes, qui ne sont pas nécessairement semblables, dont les membres ne sont pas tous des juges et, à mon avis, il n'y a pas de raison constitutionnelle de s'opposer à la composition du Tribunal.

M. Cadieux: Il est vrai que le tribunal des expropriations du Québec comporte un membre qui n'est pas juge.

En ce qui a trait aux décisions du tribunal, si j'ai bien compris vous vous opposez à ce que le président du tribunal tranche la question si les opinions sont partagées. Vous dites également qu'il ne devrait y avoir appel que dans certaines circonstances. Est-ce bien compris?

M. Clarry: Nous ne nous opposons pas à la disposition sur les appels. De fait, le plein droit d'en appeler devant la Cour d'Appel fédérale est un principe que nous avons toujours proposé. Pour ce qui est de la voix prépondérante du président... Nous sommes d'avis que le Tribunal devrait fonctionner comme les autres tribunaux. Si le tribunal compte trois membres.. S'il y a un nombre pair de membres il n'y a pas de problème.

Mr. Cadieux: Thank you, Mr. Chairman.

The Chairman: Thank you, Mr. Cadieux.

Mr. Howie.

M. Howie: Les deux personnes qui m'ont précédé ont posé toutes les bonnes questions. J'aimerais cependant vous demander de m'en dire un peu plus long sur une ou deux questions. Êtes-vous d'avis que la décriminalisation des infractions prévues dans loi, grâce à l'utilisation des critères du droit civil, est une bonne idée?

M. Clarry: Oui, nous croyons qu'il s'agit d'une nette amélioration. Nous nous préoccupions de la validité constitutionnelle de cette disposition. Si vous écartez ce problème, il s'agit définitivement de la meilleure façon de percevoir ces infractions.

M. Howie: Mes collègues ont obtenu beaucoup de précision sur l'aspect constitutionnel de cette question; j'aimerais cependant savoir si vous pensez que nous aurons des problèmes constitutionnels lorsque nous adopterons des lois civiles, non criminelles, portant sur la concurrence?

M. Clarry: Comme nous l'avons signalé, certains conseillers juridiques mettront peut-être en doute la «constitutionnalité» de cet aspect, particulièrement s'ils n'ont pas d'autres arguments; cependant nous ne croyons pas que cela posera de problèmes.

M. Howie: Vous semblez recommander dans votre mémoire des exceptions du Cabinet visant les stratégies industrielles, le commerce international et l'économie générale. Vous dites dans votre mémoire qu'une telle exception serait accordée avant que l'on prenne des mesures aux termes de la loi. Cela me préoccupe un peu. J'espère que vous pourrez m'éclairer. Si le Cabinet peut décider des circonstances dans lesquelles on pourra appliquer la loi, ne croyez-vous pas que cela minera en quelque sorte l'objet-même de cette loi?

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Mr. Clarry: I would not think so, because most of the matters which are going to be dealt with under the act are things occurring in the ordinary conduct of business by firms which may be merging or marketing or whatever. With respect to them, the act is unaffected.

As we said in our brief, we are not intending to provide absolution to people who are just doing things they should not be doing or which would be anti-competitive under the act. It is directed only at situations where, as a matter of government policy, some project is, in the interest of the government, of sufficient importance that even though the parties . . . Let us say it actually would not meet the guidelines; it would substantially lessen competition. On the other hand, there are other objectives. Competition is a great criterion for the ordinary conduct of business and the operation of the economy. But there are other things—the interests of regional economic development, for instance, might be one—where competition alone may not provide the whole answer. This is what we have in mind.

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Mr. Howie: It is a good point. Thank you very much. Another point you make is that a direct right to apply to the tribunal for the relief provided in the act should be available to all persons directly affected by refusals to spy, by deliberate pricing and by abuses of dominant position.

You point out that the essence of these practices is injury to specific persons rather than to competition in the market. Now the residents already have a right to cause an inquiry to be made by the director under sections 7 and 8. Do you feel this is not a satisfactory means of bringing private interests to the attention of the tribunal?

Mr. Clarry: Perhaps if I could just correct you, you said we advocated this in the case of abuse of dominant position. We do not as of now. We think the concept should be clarified; perhaps sometime in the future it might. There are two advantages perhaps, and I think Mr. MacDonald may have other thoughts too. One is that there is a fair overload of work in the director's office; I am sure the people in the director's office would tell you they are bombarded with individuals who are suffering at the hands of their competitors and look to him for salvation. In these cases, if you can take the burden off his office and let the people who think they have a grievance deal with it, it might be more satisfactory.

I guess it really all boils down to this. It takes some of the burden off him and enables the individual who thinks he is aggrieved, without having to first of all sell the director on his case and then leave it to the director to pursue it, to do it directly. Bruce, do you want to add to this?

Mr. MacDonald: As for this problem of direct access, the sections to which Mr. Clarry alludes are sections where an injury to competition does not have to be found before relief is granted. Relief is granted if other conditions are met that

[*Translation*]

M. Clarry: Je ne crois pas, puisque la plupart des questions qui seront visées par la loi sont des choses qui se produisent de façon bien normale chez les sociétés qui doivent se fusioner ou qui veulent mettre un produit sur le marché ou peu importe. ?a ne change rien à la loi.

Comme nous l'avons signalé dans notre mémoire, nous n'avons pas l'intention de libérer de tout blâme ceux qui font des choses qu'ils ne devraient pas faire ou qui seraient jugées anti-concurrentielles aux termes de la loi. On ferait des exceptions seulement dans les cas où, conformément à une politique gouvernementale, un projet est jugé, par le gouvernement, être suffisamment important pour que . . . Supposons qu'on ne respecte pas les lignes directrices; il y aurait beaucoup moins de concurrence. De l'autre côté, il y a d'autres objectifs. La concurrence est un critère très important pour les affaires et l'économie. Mais il y a d'autres choses—les intérêts du développement économique régional par exemple—qui viennent se rajouter parfois à la concurrence. Et c'est ce à quoi nous pensons.

M. Howie: C'est vrai. Merci beaucoup. Vous dites également dans votre mémoire que toutes les personnes qui sont touchées directement par une décision comme le refus de faire de l'espionnage, l'établissement de prix ou les abus d'une position dominante devraient pouvoir en appeler directement au tribunal pour obtenir la réparation prévue dans la loi.

Vous dites que ce type de pratique nuit directement à des personnes précises plutôt qu'à la concurrence sur le marché. Les résidents peuvent déjà demander que le directeur procède à une enquête aux termes des articles sept et huit. Ne croyez-vous pas qu'il s'agit là d'un bon moyen d'attirer l'attention du tribunal sur les intérêts privés?

M. Clarry: J'aimerais vous corriger, si vous me le permettez, puisque vous dites que nous proposons cette façon de procéder lorsqu'il y a abus d'une position dominante. Ce n'est pas ce que nous faisons maintenant. Nous croyons que le concept devrait être précisé; on le fera peut-être à l'avenir. Je crois qu'il existe peut-être deux avantages, et M. MacDonald a peut-être d'autres idées là-dessus. Tout d'abord, il y a déjà surcharge de travail au bureau du directeur; je suis convaincu que ceux qui y travaillent vous diraient qu'un grand nombre de particuliers qui se croient victimes de leurs concurrents se tournent vers le directeur pour recevoir de l'aide. Dans ces cas, si vous pouvez libérer le bureau du directeur de ce fardeau et laisser qui croient qu'il y a eu pratique déloyale s'en occuper, les choses iraient peut-être mieux.

Cela revient à libérer le directeur et à laisser le particulier, qui se croit lésé, s'occuper directement du problème sans devoir d'abord convaincre le directeur du bien fondé de la situation pour que celui-ci accepte de s'en occuper. Bruce, voulez-vous ajouter quelque chose?

M. MacDonald: Pour ce qui est de l'accès direct, les dispositions auxquelles fait allusion M. Clarry sont celles qui stipulent qu'il peut y avoir réparation avant que les membres du tribunal jugent qu'il y a eu tort. Il y a réparation si l'on respecte d'autres modalités qui portent peut-être indirectement

[*Texte*]

relate perhaps indirectly to competition, but "no injury to competition" is a necessary precondition to relief.

In those situations, there seemed to us that a special case could be made for permitting direct access to the tribunal for a number of reasons. One is that "refusal to supply", "refusal of obtaining supply from a foreign supplier" or "delivered pricing" all affect supply matters, which are very critical to any business. You cannot possibly move fast enough when there is a problem of supply to a particular business.

Direct access would avoid the delays involved in going through the director's office and would permit the person who is hurting to direct the evidence and the argument himself before the tribunal. Generally this might be more satisfactory to him.

If you decriminalize the monopoly section, you diminish the role of private initiative in the enforcement process because the right of private action under subclause 31.(1) is also gone with the decriminalization. It seemed to us in those situations there might be a special case to be made for permitting direct access.

I am also reminded just as I talk of the recent Supreme Court of Canada decision in Kamloops and Nielsen where you recall a private person was able to sue the public authorities in the City of Kamloops for refusal to enforce a municipal by-law the principal purpose of which was to prevent economic injury to a person. If one applied this rationale to the situation, you can see the Supreme Court also approves this general principle. There may be special enforcement obligations where the gist of the section or the legislation is to prevent harm to an individual.

Mr. Howie: I suppose also the earlier action would, to a degree, mitigate the damage the individual might suffer too.

Mr. MacDonald: That is a very good point.

Mr. Howie: Thank you very much, Mr. Clarry and Mr. MacDonald. Thank you for coming. Thank you, Mr. Chairman.

Le président: Merci, monsieur Howie. Une dernière question de M. Ouellet. M. Domm donnera ensuite sa conclusion.

Monsieur Ouellet.

Mr. Ouellet: Gentlemen, I notice in your brief that you try to avoid multiplicity of proceedings. Why do you want to ensure that someone who is at contravention of the current legislation should not be attacked on all aspects of his failures? In other proceedings, I suspect that someone who is guilty of a number of offences could be charged for all the offences. Why, in relation to anti-competitive behaviour, do you feel that the director of combines should initiate procedures only with regard to one offence and not of the others?

[*Traduction*]

sur la concurrence, mais pour qu'il y ait réparation il faut absolument prouver qu'il y a eu agissement anticoncurrentiel.

Dans ces circonstances, il nous semble que pour diverses raisons on pourrait permettre un accès direct au tribunal. Par exemple, le refus de fournir un produit, le refus de se procurer un produit auprès d'un fournisseur étranger ou les problèmes au niveau du prix à la livraison; toutes ces questions touchent l'approvisionnement, et c'est évidemment un aspect très important de toute entreprise. Il est impossible de prendre des mesures trop rapidement lorsqu'on parle des problèmes d'approvisionnement d'une entreprise.

S'il y avait accès direct, ou qu'un retard ne serait occasionné puisqu'il ne faudrait plus passer par l'entremise du bureau du directeur; la personne qui se trouve lésée pourrait s'adresser elle-même au tribunal et présenter ses preuves. Dans l'ensemble, je crois que le plaignant serait heureux de cette situation.

Si vous décidez de décriminaliser les dispositions visant les monopoles, vous diminuez en quelque sorte le rôle de l'initiative privée à l'égard du processus de mise en vigueur parce que le droit visant les mesures privées prévu au paragraphe 31.(1) disparaît également en raison de la décriminilisation. Je crois que dans ces circonstances il faudrait permettre l'accès privé.

Cela me fait penser à la décision qu'à récemment rendue la Cour Suprême du Canada à l'égard de l'affaire Kamloops et Nielsen; vous vous souviendrez qu'un particulier a pu poursuivre le gouvernement de la ville de Kamloops parce qu'il avait refusé d'assurer l'application d'un règlement municipal qui visait à protéger la population contre des torts économiques. Si l'on se servait du même raisonnement, la Cour Suprême pourrait fort bien accepter ce principe général. Il se pourrait fort bien qu'il existe des obligations aux termes d'une disposition qui vise vraiment à protéger les particuliers.

M. Howie: Je suppose que cela réduirait en quelque sorte le tort subi par ce particulier.

M. MacDonald: C'est un bon commentaire.

M. Howie: Merci beaucoup, monsieur Clarry et monsieur MacDonald. Je tiens à vous remercier d'être venus. Merci, monsieur le président.

The Chairman: Thank you, Mr. Howie. We will have a last question from Mr. Ouellet then Mr. Domm will conclude.

Mr. Ouellet.

M. Ouellet: Monsieur, j'ai remarqué que, dans votre mémoire, vous cherchez à diminuer le plus possible le nombre d'étapes. Pourquoi voulez-vous empêcher de «reprocher» à celui qui va à l'encontre de la loi actuelle toutes ces infractions? En d'autres circonstances, je crois que lorsqu'une personne est coupable de plusieurs infractions, elle peut-être inculpée pour chacune d'entre elles. Pourquoi lorsqu'il s'agit d'activités contrevenant aux dispositions sur la concurrence, le directeur responsable des enquêtes sur les coalitions ne devrait prendre des mesures qu'en ce qui a trait à une des infractions?

[*Text*]

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Mr. Clarry: It is not so much one offence as criminal rather than civil proceedings. For instance, in abuse of dominant position, if it is a joint monopoly situation where you have two or three competitors, if you have the opportunity—and the evidence would support it—of prosecuting them criminally and if the director decides to so but then finds the case is not going very well, he may decide to switch over and try the civil proceedings, where there may be a different burden of proof and a different way of attacking.

The perception of the members of our committee was that this was unfair to the subject. They should not be subjected to first one set of proceedings and then to another. In the criminal proceedings, if he proceeds with them, he will get everything he wants; he can get a prohibition order if he is successful as well as a fine and whatever other relief he can get. Similarly, if he decided that he was wanting only to have the practice discontinued, he could proceed on the civil basis. But it was the view of the committee that it was unfair to subject an individual or a business to what would appear to be harassment.

Mr. Ouellet: You mean harassment at the same time or harassment . . . ?

Mr. Clarry: Consecutively.

Mr. Ouellet: Consecutively. In other words, you therefore want the director to make up his mind and to have only kick of the can.

Mr. Clarry: That is right.

Mr. Ouellet: Is it not possible, in the course of his functions, that the director is led to believe that one infraction has been committed and then, in exercising his responsibility and his duty, go on to make an investigation and find a more serious offence? Under your propositions, he will then be unable to prosecute the more serious offence that he has discovered.

Mr. Clarry: He probably would not make his decision on which route to go until his investigation was through and until the oral examinations and seizure of documents and so on. It is based on proceedings based substantially on the same facts. So if new circumstances arise or are discovered, it would not apply in that case.

Mr. Ouellet: I will give you an example. Let us say that there is a merger and that in the course of his duties in looking at the merger he decides to bring the case to the tribunal. He has a certain period of time; there is a timetable established in which to act. In the course of looking at the merger in more depth, he may realize there has been conspiracy and this company was on the point of merging with another one or has been involved in a serious conspiracy for price fixing. I am surprised that the Canadian Bar Association will not allow the director of combines to launch on the face of his new evidence prosecutions for price fixing.

[*Translation*]

M. Clarry: Ce n'est pas une question d'une infraction plutôt qu'une autre, mais surtout de mesures civiles plutôt que criminelles. Par exemple, lorsqu'on abuse d'une position dominante, s'il s'agit d'une situation de monopole mixte, où il y a deux ou trois concurrents, si vous avez l'occasion—et les preuves—de les poursuivre devant un tribunal pénal, et si le directeur décide de procéder de cette façon mais s'aperçoit que les choses ne se déroulent pas tellement bien, il se pourrait qu'il décide d'opter pour un procès civil où le fardeau de la preuve et les méthodes employées sont peut-être un peu différents.

Les membres du Comité estiment que ce n'est pas juste envers la personne visée. Elle ne devrait pas faire l'objet d'un procès civil puis d'un procès criminel. S'il y a procès criminel, s'il décide de procéder de cette façon-là, il obtiendra tout ce qu'il veut; il peut obtenir une interdiction, une amende ou toute sorte d'autre type de réparation. De la même façon, s'il voulait simplement qu'on mette fin à ces activités, il pourrait décider d'opter pour les mesures civiles. Le Comité est d'avis qu'il n'est pas juste qu'un particulier ou une entreprise soit soumise à une telle pratique, qui pourrait facilement ressembler à du harcèlement.

M. Ouellet: Vous parlez de harcèlement au même moment ou bien de harcèlement . . . ?

M. Clarry: Ces mesures se produiraient les unes après les autres.

M. Ouellet: Consécutivement. En d'autres termes, vous voulez que le directeur prenne une décision et qu'il n'ait qu'une chance de poursuivre ce contrevenant.

M. Clarry: C'est exact.

M. Ouellet: N'est-il pas possible que le directeur soit informé d'une infraction quelconque et que, plus tard, en s'acquittant de ses responsabilités et de ses fonctions, lors d'une enquête, il découvre une infraction plus grave? Si l'on adopte ce que vous proposez, il ne serait pas alors en mesure de poursuivre le contrevenant en fonction de l'infraction la plus grave.

M. Clarry: Le directeur ne déciderait probablement pas quelle méthode employer tant qu'il n'aurait pas terminé l'enquête, les entrevues, la saisie de documents et ainsi de suite. La décision est fondée sur tous ces facteurs. Ainsi, s'il découvrait d'autres problèmes après avoir décidé de la marche à suivre, il ne pourrait rien à faire.

M. Ouellet: Permettez-moi de vous donner un exemple. Il y a eu une fusion; le directeur étudie la fusion et décide de saisir le tribunal de cette affaire. Il dispose d'une certaine période; on a prévu un calendrier. Lors d'une étude plus approfondie, il constate qu'il y a eu complot et qu'une société était sur le point de fusionner avec une autre ou qu'elle a comploté pour établir certainx prix. Je suis surpris de constater que l'Association du barreau canadien n'est pas disposée à permettre au directeur chargé de l'enquête sur les coalitions, de poursuivre le contrevenant parce qu'il a comploté pour établir les prix.

[*Texte*]

Mr. Clarry: I think in the example you have given, it would not be substantially the same facts. He did not have those facts when he started the merger proceedings, and the facts on which the merger proceedings were based did not include those new facts. So I would think the section would not apply.

• 1640

Mr. Ouellet: Well, I think it will have to be very carefully drafted.

Mr. Clarry: Yes, if they are not substantially the same facts, presumably he would go into the tribunal in his merger case and set out all the facts he was relying on and they would not include this price-fixing conspiracy.

Mr. Cadieux: If I understand correctly, assuming we were drafting that clause in which you refer, if they were not substantially the same facts, we could not use the word *essentiellement* in the French.

Mr. Domm: I do not know.

Le président: Monsieur Domm, pour la conclusion.

Mr. Domm: I feel that two or three of the questions I was going to raise have been sufficiently answered and I would just like to point out how pleased I am that this organization of CBA, representing some 30,000 judges and lawyers, students and notaries is as disposed as it is to accept the constitutional merit without a stronger case, because I was expecting to hear that we could look forward to further discussion on it. So it relieves me, and I am sure it will relieve the Minister, that your association is not taking a strong position on the constitutionality of the tribunal. This is what we were hoping to hear.

Mr. Ouellet: I am sorry. I thought the Parliamentary Secretary was going to seek a pledge on behalf the Canadian Bar that they will never challenge the constitutionality of the tribunal in court.

Mr. Clarry: We cannot bind our members.

Mr. Ouellet: What about you two?

Mr. Cadieux: That would really be interpreted as a conspiracy.

Le président: Il nous a fait grand plaisir de vous entendre. Nous avons peut-être précipité cette session. Mais nous apprécions grandement que vous ayez pu vous ajuster à notre horaire. Soyez assurés que vos commentaires ont été bien entendus et qu'on se penchera sérieusement sur vos suggestions. Merci d'être venus.

Mr. Clarry: Thank you very much, Mr. Chairman and gentlemen.

Le président: Avec votre permission, nous «pauserons» pour quelques minutes.

[*Traduction*]

M. Clarry: Les choses sont différentes dans l'exemple que vous avez donné. Le directeur ne connaissait pas tous les faits lorsqu'il a commencé à étudier la fusion; les faits sur lesquels son enquête était fondée ne comprenaient pas ces nouveaux aspects que vous venez de signaler. L'article ne me paraît donc pas s'appliquer.

M. Ouellet: Eh bien, il faudra le rédiger très soigneusement.

M. Clarry: Oui. S'il ne s'agit pas essentiellement des mêmes faits, la personne s'adressera au tribunal dans sa cause de fusion et précisera tous les faits sur lesquels elle se fondait, sauf cette conspiration pour fixer les prix.

M. Cadieux: Si j'ai bien compris, à supposer que nous rédigions cet article, s'il ne s'agissait pas essentiellement des mêmes faits, nous ne devrions pas utiliser le terme «essentiellement» dans la version française.

M. Domm: Je l'ignore.

The Chairman: Mr. Domm, your conclusion.

M. Domm: Je crois qu'on a déjà répondu à deux ou trois des questions que j'allais poser, et je me contenterai donc de vous faire part de mon plaisir de voir que l'Association du Barreau canadien, qui regroupe environ 30,000 juges, avocats, étudiants et notaires, reconnaît sans problème le mérite constitutionnalité du tribunal, alors que je m'attendais à d'autres exigences de sa part et, partant, à d'autres discussions. Je suis donc très soulagé, comme d'ailleurs le ministre j'en suis sûr, que votre association ne soit pas plus exigente pour reconnaître la constitutionnalité du tribunal. C'est ce que nous espérions.

M. Ouellet: Je m'excuse. Je croyais que le secrétaire parlementaire allait demander au Barreau canadien de s'engager à ne jamais contester la constitutionnalité du tribunal devant les cours canadiennes.

M. Clarry: Nous ne pouvons prendre un tel engagement.

M. Ouellet: Et qu'en est-il de vous deux?

M. Cadieux: Cela serait vraiment considéré comme une conspiration.

The Chairman: We were very pleased to hear from you Mr. Clarry. We have perhaps expedited these proceedings, but we are nevertheless very grateful to you that you could accommodate yourself to our schedule. Rest assured that your comments were well taken, and that we will study your proposal seriously. Thank you for coming.

M. Clarry: Merci beaucoup, monsieur le président et messieurs.

The Chairman: With your permission, we will now take a break for a few minutes.

[*Text*]

• 1645

• 1730

Le président: Je m'excuse auprès de l'Association canadienne des manufacturiers pour ce délai. Cela vous permet de comprendre que certaines journées de nos horaires sont chambardés. On n'y peut rien.

We intend to give you 15 minutes for an opening statement, and then that will leave plenty of time for questions. Can you tell us when you want to leave, and make some arrangement to delay your plane?

Mr. J. Laurent Thibault (President, Canadian Manufacturers' Association): I think about an hour would accommodate us.

Le président: Nous avons le plaisir de recevoir M. Laurent Thibault, président de l'Association, M. Ivan Felthan, vice-président, et M. Gordon Lloyd, directeur législatif.

Monsieur Thibault.

M. Thibault: Merci, monsieur le président. À ma gauche, M. Feltham, vice-président et conseiller juridique à *Canadian General Electric* et président de notre comité sur la politique concurrence. A ma droite, M. Lloyd, directeur de la législation au personnel de l'AMC.

I shall just make a couple of opening comments, if I may. The CMA has a very broad base of membership, as you know. We have about 3,300 members across the country and I guess in total they must produce some three-quarters of the total manufacturing output.

It is interesting to note as well that three-quarters of our members employ less than 100 people, and there is no question that they—that all manufacturers—have the same kinds of concerns as they relate to this particular topic, in terms of their position in a given market.

Just by way of introduction, I would certainly like to re-emphasize that we very much appreciate the consultative process that the government has entered into regarding competition policy reform. It has now resulted in Bill C-91. I think it is an example of how good results, even excellent results, can be attained by good constructive consultation when people roll up their sleeves and really attack the problem in a very constructive way.

I think it is important to put Bill C-91 in a sort of broader economic context. We regard this bill as a very important piece of economic legislation. It of course sets the rules on how companies must restructure to meet increasing international competition, and it very much affects their attempts to be more productive.

It is critically important to recognize that there is increasing internationalization today in every industry, as Canadian

[*Translation*]

The Chairman: I apologize to the Canadian Manufacturers Association for the delay. This way you will understand that sometimes our schedules are upset. There is nothing we can do about it.

Nous avons l'intention de vous accorder 15 minutes pour faire votre déclaration liminaire, ce qui nous laissera beaucoup de temps pour les questions. Pouvez-vous nous dire quand vous voulez partir et prendre les dispositions nécessaires pour retarder votre vol?

M. J. Laurent Thibault (président, Association des manufacturiers canadiens): Je crois qu'une heure nous suffirait.

The Chairman: We have the pleasure tonight of welcoming Mr. Laurent Thibault, Chairman of the Association, Mr. Ivan Feltham, Vice-Chairman, and Mr. Gordon Lloyd, Legislative Director.

Mr. Thibault.

Mr. Thibault: Thank you, Mr. Chairman. To my left, is Mr. Feltham, Vice-Chairman and Legal Counsel for Canadian General Electric, and Chairman of our Committee on Competition Policy. To my right, is Mr. Lloyd, Director of Personnel Legislation at the Canadian Manufacturers Association.

Si vous permettez, je vais faire quelques remarques préliminaires. Vous n'ignorez pas que l'Association des manufacturiers canadiens compte de nombreux membres, environ 3,300 dans tout le pays, et qu'ils représentent au total les trois quarts de la production manufacturière totale.

Il est intéressant de noter que les trois quarts de nos membres emploient moins de 100 personnes, et que tous les manufacturiers ont les mêmes préoccupations au sujet de cette question précise, compte tenu de leur situation dans un marché donné.

En guise d'introduction, je tiens à souligner de nouveau que nous sommes très heureux que le gouvernement tienne une consultation au sujet de la réforme de la politique relative à la concurrence. Il en est résulté le projet de loi C-91. Ce texte est un exemple des excellents résultats que ces processus de consultation peuvent donner lorsqu'on s'attaque vraiment au problème d'une façon très constructive.

Cela dit, il me semble important de replacer le projet de loi C-91 dans une perspective économique plus vaste. Nous sommes d'avis que ce texte législatif est très important sur le plan économique car il indique comment les entreprises doivent se restructurer pour faire face à une concurrence internationale de plus en plus vive, et parce qu'il a aussi des répercussions sur leur productivité.

Il est primordial de reconnaître, au moment où les manufacturiers canadiens effectuent des changements, que, dans

[*Texte*]

manufacturers make these changes. That internationalization of trade will continue to accelerate whether we pursue freer trade with the U.S. or proceed on the broader basis of multilateral negotiations within the GATT. So Canada must have a competition policy, a competition law, that facilitates the corporate restructuring that companies will need, and need now, to undertake in order to successfully compete in what is truly a global village.

The most recent available data shows that Canadian manufacturers still average as much as 25% below the productivity levels in the United States. This difference in productivity is due to a large extent to the difference in scale in terms of specialization and technology. Catching up and closing this gap is a major objective of Canadian manufacturing, and that of course will require a very considerable amount of restructuring, often through mergers of course, specialization, export agreements, joint ventures and other similar instruments.

In the context of the environment we find ourselves in, we consider this particular bill to be very important. Indeed a significant breakthrough of Bill C-91 is that it has been developed in the explicit recognition that our companies must restructure in order to be globally competitive. We think that the long debate of some 17 years, I guess, to reform Canada's competition law can indeed be brought to a successful conclusion.

Mr. Chairman, I would like to ask Mr. Feltham to review our brief on the bill with you. That brief basically outlines some of the achievements we think have resulted from the very excellent consultations we have had and it outlines a few of the key points where we think further improvement can be made.

• 1735

Mr. Ivan Feltham (Vice-President, Canadian General Electric): Mr. Chairman, gentlemen, thank you for the opportunity to address our brief. I understand, Mr. Chairman, that you have copies of it before you and that they have been circulated. Mindful of the time, I would propose merely to refer to the main items in the brief with a view to permitting plenty of opportunity for discussion, and for us to have the opportunity to respond, if we can, to the concerns that members of the committee may have.

I should like to begin by referring to the very constructive consultative process that Mr. Thibault has already referred to, which went into producing both this bill and its predecessor, Bill C-29. This bill is a reflection of many years of discussion and many inputs, and it reflects many achievements that I think should be noted before we move to the suggestions we have for improvement in the bill.

If I may, Mr. Chairman, gentlemen, I would just like to refer very briefly to what we consider to be the main achievements, which indeed are listed in our brief. However, let me just refer to them very, very quickly.

[*Traduction*]

chaque industrie, on assiste à une internationalisation croissante. Cette internationalisation du commerce continuera d'ailleurs à s'accélérer, que nous cherchions à négocier le libre-échange avec les États-Unis ou que nous nous engagions dans des négociations multilatérales au sein du GATT. Le Canada doit donc disposer d'une politique et d'une loi relatives à la concurrence qui facilitent la restructuration dont auront besoin les entreprises, et dont elles ont déjà besoin, pour être concurrentielles sur un marché qui est de plus en plus international.

D'après les données les plus récentes, les niveaux de productivité des manufacturiers canadiens sont, en moyenne, inférieurs de 25 p.100 à ceux des États-Unis. Cet écart dépend dans une large mesure de la différence entre les deux pays sur les plans de la spécialisation et de la technologie. L'industrie manufacturière canadienne s'est d'ailleurs fixée comme l'un de ses objectifs prioritaires, de combler cet écart, ce qui bien entendu exigera très souvent des refontes de structure, des fusions, davantage de spécialisation, des ententes relatives aux exportations, des entreprises en co-participation et d'autres initiatives.

Dans les circonstances actuelles, nous considérons le projet de loi C-91 comme une mesure très importante. Un de ses aspects significatifs est d'ailleurs que son élaboration a explicitement tenu compte de la nécessité dans laquelle se trouvent nos entreprises de refondre leurs structures afin d'être plus concurrentielles. Le long débat—17 ans, je crois—qui a précédé la rédaction de ce texte semblent avoir porté fruit.

Monsieur le président, j'aimerais demander à M. Feltham de parcourir avec vous notre mémoire sur le projet de loi. Il donne les grandes lignes de certaines des réalisations qui résultent des consultations fructueuses que nous avons tenues et il donne aussi une idée de domaine où il conviendrait d'apporter encore d'autres améliorations.

M. Ivan Feltham (vice-président, *Canadian General Electric*): Monsieur le président, messieurs, je vous remercie de nous donner l'occasion de discuter avec vous de notre mémoire. Je crois savoir que vous en avez reçu des exemplaires d'avance et qu'ils ont été distribués. Compte tenu du peu de temps dont nous disposons, je proposerai donc tout simplement de me reporter aux points saillants de ce texte afin que nous ayons le plus de temps possible à consacrer à la discussion et au sujet qui préoccupe les membres du Comité.

J'aimerais d'abord mentionner le processus de consultation très utile auquel l'étude de ce projet de loi et son prédécesseur, le projet de loi C-29, a donné lieu comme le précisait M. Thibault. L'actuel projet de loi est donc le fruit de longues années de discussion et de nombreux apports, et constitue déjà une réalisation intéressante à plusieurs titres même si nous allons proposer quelques améliorations.

Si vous permettez, monsieur le président, messieurs, je me reporterai maintenant brièvement à ces réalisations principales, qui sont énumérées dans notre texte. Je serai très bref.

[*Text*]

First of all, we have a Competition Tribunal which does combine the benefits of a court and an expert adjudication panel; second, we see developed in the bill a code to govern the investigatory powers of the director, which we believe to be consistent with the most recent and modern developments of principles as embodied in the Canadian Charter of Rights and Freedoms.

The bill gives recognition that competition is international as well as domestic in today's marketplace, and provides suitable emphasis to that very important feature to which the president, Mr. Thibault, has already referred.

The bill recognizes the desirability of regulating mergers and the potential abuses by companies dominant in the markets through civil law instead of through criminal law measures, which were proven deficient in the past.

The bill recognizes that it is desirable to develop exemptions from the conspiracy prohibitions that will enable Canadian manufacturers to move ahead on export arrangements, which would be otherwise discouraged if it were not for this special recognition in the bill.

The bill also recognizes that in assessing the market behaviour of dominant firms, their intentions need to be a key element in judging whether or not their market practices are indeed anti-competitive, as distinct from being pro-competitive.

It is our view, Mr. Chairman, gentlemen, that the bill successfully bridges the concerns of small and large companies, of consumers and producers, and employees, and indeed gives recognition to the need to have an effective administrative process. Indeed, we submit to you that the bill fully reflects the objectives set out in subclause 1.(1) of the bill, which is the first time that a statement of purpose has been embodied in this legislation.

However, as I indicated—and this will be evident to you from perhaps the opportunity you have already had to glance at our brief—from CMA's perspective, there are three main issues we would like to have the opportunity to address with you. These issues were addressed during consultations that preceded the tabling of the bill, but in our view the bill has not met the desirable objectives in those respects.

In summary, they are that the merger review test—I will just refer to it briefly as the merger test—should be based on the vitality of the market after the proposed merger, rather than on the proposed substantial lessening test. Second, we submit that the merger provisions should be clarified to ensure that they do not apply to the establishment of new business activity. Third, we submit that the Cabinet should reserve the power to exempt or allow mergers when broad public interest considerations would outweigh, in the judgment of the Cabinet, adverse effects on competition.

First, with regard to the merger test, it is our submission that it should be based on the vitality of the market after the proposed merger. The test in the bill would attempt to measure a reduction of competition, which in our respectful submission

[*Translation*]

D'abord, nous nous dotons d'un tribunal de la concurrence qui réunit les avantages d'un tribunal et d'un organisme de spécialistes en arbitrage. En second lieu, le projet de loi comporte un code régissant les pouvoirs d'enquête du directeur, ce qui nous paraît être conforme avec les récentes interprétations des principes de la Charte canadienne des droits et libertés.

Le projet de loi reconnaît aussi que la concurrence est un phénomène international aussi bien qu'interne dans le monde d'aujourd'hui, et souligne suffisamment cet aspect très important, que M. Thibault a d'ailleurs déjà mentionné.

Le projet de loi reconnaît qu'il est préférable de réglementer les fusions et les abus éventuels de la part des grandes sociétés, par l'entremise de procédures civiles plutôt que criminelles, ces dernières s'étant révélées insatisfaisantes par le passé.

Le projet de loi reconnaît encore que certaines exemptions des interdictions relatives au complot sont justifiées et qu'elles permettront aux manufacturiers canadiens d'arriver à davantage d'arrangements en matière d'exportation. Cela aurait été impossible sans cette reconnaissance explicite du projet de loi.

Aussi, pour ce qui est d'évaluer le comportement des entreprises de position dominante par rapport au marché, le projet de loi précise que les intentions de ces dernières sont un élément fondamental permettant de juger si leurs agissements sont défavorables à la concurrence ou au contraire favorables.

A notre avis, monsieur le président, messieurs, le projet de loi tient véritablement compte des préoccupations de petites et grandes entreprises, des consommateurs et des producteurs ainsi que des employés, tout en reconnaissant le besoin de disposer de processus administratifs efficaces. Nous estimons que ce texte législatif se conforme tout à fait à ses objectifs, tels qu'ils sont précisés au paragraphe 1 de l'article 1. C'est d'ailleurs la première fois que de tels objectifs figurent dans une loi.

Malgré cela, si vous avez lu notre mémoire, vous avez remarqué qu'à notre avis, il reste trois questions à discuter. Elles ont d'ailleurs déjà fait l'objet de délibérations lors des consultations qui ont précédé le dépôt du texte législatif, mais d'après nous, le projet de loi n'atteint quand même pas les objectifs qu'il s'était fixés à cet égard.

Pour résumer, les tests relatifs à l'examen des fusionnements doivent se fonder sur la vitalité du marché après le regroupement proposé plutôt que sur le test de diminution substantielle. Deuxièmement, les dispositions relatives aux fusionnements doivent être éclaircies afin qu'elles ne s'appliquent pas à l'établissement de nouvelles entreprises. En troisième lieu, à notre avis, le cabinet doit se réserver le pouvoir d'accorder des exemptions ou de permettre des fusionnements lorsque d'importantes considérations d'ordre public l'emportent, à son avis, sur une diminution de la concurrence.

Pour ce qui est d'abord de ce test relatif au fusionnement, d'après nous il doit se fonder sur la vitalité du marché ultérieurement à ce regroupement. Or d'après le projet de loi, le test s'efforcera de mesurer une diminution de la concurrence, ce

[*Texte*]

will give the wrong signal to the tribunal. The interests of consumers, the interests of all the citizens of Canada, I think are very well set out in the purpose of the bill. Those purposes can be achieved by assessing the state of the market after the merger is completed, instead of attempting to measure some reduction in competition resulting from a particular merger. This will be especially important in the context of increasing competition from overseas. Let it noted that this competition is occurring and is increasing. The prospect for freer trade, for enhancement of trade and the reduction of trade barriers between Canada and the United States, is only one factor in a much broader picture. Canadian manufacturing is facing ever increasing competition, and we need all the opportunity we can get to strengthen our ability to maintain productive activity in this country through amalgamation of firms in Canada.

• 1740

In support of that proposition, we would submit that the change to the civil standard of proof from the criminal standard will in fact be a very substantial change toward permitting an effective merger review law. The change in standard has not been given the attention it deserves, rather the focus has been too much on the inadequacy as perceived in the existing law. One of the inadequacies of the existing law has been the fact that it did require the administrative authorities to overcome the criminal law test.

The removal of this, the reduction of the challenge if you like, to the administrative authorities, to the civil law test of our submission, will go a long distance. Indeed, it will be adequate to overcome the deficiencies in the existing law if coupled with a provision in the bill, in the law, which would test the state of the market after the merger has been implemented.

In terms of how the legislation should be put together, I would say that the state of the market after the merger should be elevated from merely one of the factors, which is its present status in the bill, to a defense or a charge that the merger ought to be prevented or re-organized. Our recommendations in this respect are set out in more detail on pages 5 and 6 of the bill.

In the same vein our second major policy concern is it should be made clear, much clearer than it is now in the bill, that merger reviews should not apply to the establishment of new business activity. In the Canadian context, new business activity can often best be established by joint ventures. We are now looking forward to the need to consolidate our strength in Canadian industry, and particularly in Canadian manufacturing.

Public concerns and competition policy concerns about companies putting existing businesses together in traditional mergers do not apply when companies get together to establish new business activities. Subjecting the establishment of new business activities to the type of review which legitimately may

[*Traduction*]

qui à notre avis ne fournira pas au tribunal ce dont il a besoin. Les intérêts des consommateurs et même ceux de tous les citoyens canadiens sont bien précisés dans les objectifs du projet de loi. Or on peut les atteindre en évaluant la situation du marché une fois la transaction conclue, plutôt que d'essayer de mesurer une réduction quelconque de la concurrence qui résulterait d'un fusionnement particulier. Voilà qui sera particulièrement important dans le cadre de l'intensification de la concurrence étrangère. Il est à noter que cette concurrence existe et qu'elle s'intensifie. Les perspectives d'une libéralisation et d'une intensification des échanges et d'une réduction des obstacles qui lui font entrave entre le Canada et les États-Unis ne sont qu'un seul des nombreux facteurs qui circonscrivent un cadre beaucoup plus général. Le secteur secondaire canadien a à faire face à une concurrence de plus en plus vive et il nous faut mettre tout en oeuvre pour pouvoir rester productifs grâce notamment à des amalgames d'entreprises.

À l'appui de cette proposition, nous soutenons que la déjudiciarisation sera un progrès très notable qui ouvrirait sur une législation efficace dans le domaine de l'étude des fusions. Cette déjudiciarisation n'a pas encore reçu toute l'attention qu'elle méritait, étant donné qu'on s'est surtout axé sur les carences de la législation actuelle. L'une de celles-ci est le fait qu'il faut que les pouvoirs administratifs se plient aux exigences du droit pénal.

L'abrogation de cette mesure qui, en quelque sorte, amoindrirait l'importance du défi qui se pose aux pouvoirs administratifs, et le passage à une législation de droit civil comme nous le préconisons seront un progrès bienvenu. Cela même suffirait à pallier les carences de la législation actuelle, pourvu que le projet de loi, que la loi, précise que l'état du marché doit être évalué après que la fusion ait eu lieu.

Pour ce qui est de l'assemblage proprement dit de la législation, j'ajouterais que l'état du marché après la fusion ne devrait pas simplement être, comme c'est le cas dans le projet de loi actuel, l'un des facteurs en cause, mais devrait plutôt servir d'élément à charge ou à décharge selon lequel la fusion en question devrait être refusée ou réorganisée. Nos recommandations dans ce sens figurent en plus de détails aux pages 5 et 6 du projet de loi.

Dans la même veine, le deuxième élément important en matière de politique est qu'il faudrait bien préciser, beaucoup mieux que ne le fait actuellement le projet de loi, que les études de fusion devraient exclure les nouvelles activités commerciales. Dans le contexte canadien, toute nouvelle activité commerciale a souvent les meilleures chances de succès lorsqu'il s'agit de co-entreprise. Actuellement, nous pensons à la nécessité qu'il y a de renforcer notre industrie nationale, notamment le secteur secondaire.

Lorsque l'homme de la rue et les pouvoirs publics qui s'occupent de la concurrence s'inquiètent du cas d'entreprises qui regroupent des secteurs déjà existants dans le cadre de fusion classique, il ne doit pas en être de même lorsqu'il s'agit d'entreprises qui se regroupent pour lancer de nouvelles

[*Text*]

be imposed on mergers, would not encourage, but would hinder such desirable corporate entrepreneurial behaviour by subjecting it to the uncertainty of merger review.

In this context we recommend that the joint venture exemption be extended to joint ventures which create new business activities, and to joint ventures between companies where there is no existing competition between them.

In addition, with regard to the joint venture exemption of the proposed section 67 of the bill, we would also suggest that there is no basis for distinction between unincorporated and incorporated joint ventures, and that the exemption should apply to all joint ventures regardless of the form.

We also submit that the detailed provision of the bill which requires joint ventures to terminate on the completion of a project is too narrowly construed, and this is more fully explored in out brief. Indeed the details with regard to that are set out on pages 9 and 10 of the brief, and will be available for detailed review by the committee and by your staff.

If I might move on, Mr. Chairman, to our third major policy concern. As I indicated in my introduction, it is our submission to you that the Cabinet should reserve the power to exempt or allow worthwhile mergers when public interest considerations outweigh adverse effects on competition.

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We see this as a safety valve. The provisions of the bill focus exclusively on competition. The director will have no choice in choosing the situations to address and bring before the tribunal. The tribunal likewise will have no choice but to apply competition policy considerations.

In the fullness of experience in Canada, it is very likely there will be rare cases where, despite an adverse effect on competition, it will otherwise be in the public interest for such mergers to proceed. We suggest Cabinet should be given the authority to act in appropriate rare situations.

To implement this recommendation, we recommend that section 13 of the Tribunal Act be amended to enable Cabinet review to allow mergers the tribunal has disallowed. If this is unwieldy for reasons relating to the composition of the tribunal, we would be frank to say an alternative which would not be as satisfactory but would be workable is a provision for exemption of a merger before it goes before the tribunal, in much the same way section 66 of the bill already provides that bank mergers will be exempted from the review provision on a

[*Translation*]

activités commerciales. Le fait de soumettre les cas de ce genre à une étude du genre de celle qu'on pourrait légitimement imposer dans les cas des fusions entraverait, plutôt qu'il ne l'encouragerait, cet esprit d'initiative souhaitable de la part des entreprises en assujettissant ces dernières à toutes les incertitudes d'une étude de dossier de fusion.

Dans ce contexte, nous recommandons que l'exemption accordée aux co-entreprises le soit également dans le cas des co-entreprises visant à créer de nouvelles activités commerciales ainsi qu'aux co-entreprises réunissant des entreprises existantes mais qui ne sont pas en concurrence réciproque.

En outre, pour ce qui est de l'exemption accordée aux co-entreprises dans le cadre du projet d'article 67, nous soutenons également qu'il n'y a pas lieu de faire la distinction entre les co-entreprises constituées en société et non constituées en société, et que l'exemption en question devrait s'appliquer également à toutes, indépendamment de leur statut corporatif.

Nous soutenons également que les dispositions détaillées du projet de loi qui exigent des co-entreprises qu'elles se terminent dès lors que le projet qui est leur objet a été mené à terme se prêtent à une interprétation beaucoup trop étroite, et nous en parlons d'ailleurs de façon plus détaillée dans notre mémoire. D'ailleurs, les détails à ce sujet figurent aux pages 9 et 10 du mémoire en question, et le Comité et ses collaborateurs pourront en faire à leur tour une analyse détaillée.

Si vous me permettez de poursuivre, monsieur le président, j'aimerais passer à notre troisième grand point. Comme je le disais dans mon introduction, nous soutenons que le Cabinet devrait se réserver le pouvoir d'exempter ou d'autoriser les fusionnements valables lorsque l'intérêt public l'emporte sur les conséquences préjudiciables pour la concurrence.

Nous considérons cela comme une soupape de sûreté. Les dispositions du projet de loi portent exclusivement sur la concurrence. Le directeur n'aura pas le choix lorsqu'il lui faudra déterminer quels cas instruire et soumettre au tribunal. Pour sa part, le tribunal non plus n'aura pas le choix, il devra trancher en fonction de considérations relatives à la politique sur la concurrence.

Compte tenu de la plénitude de l'expérience canadienne, il est très vraisemblable que rares seront les cas où, malgré des conséquences préjudiciables pour la concurrence, il pourrait être de l'intérêt général d'autoriser des fusions de ce genre. Selon nous, le Cabinet devrait avoir le pouvoir d'intervenir dans les très rares cas de ce genre.

Pour mettre en oeuvre cette recommandation, nous recommandons que l'article 13 de la Loi sur le tribunal soit modifiée de manière à permettre au Cabinet, après étude, d'autoriser les fusionnements que le tribunal a refusés. Si cela se révèle malcommode pour des raisons tenant à la composition du tribunal, nous vous le disons avec franchise, une solution qui ne serait peut-être pas aussi satisfaisante mais qui serait néanmoins commode, serait de permettre l'exemption d'un fusionnement avant son passage devant le tribunal, un peu comme l'article 66 du projet de loi qui prévoit déjà qu'un fusionnement

[*Texte*]

certificate in appropriate circumstances by the Minister of Finance.

Our brief also addresses several other issues and one concern which is not strictly related to the field of competition policy. With regard to the delivered pricing provision, our brief goes in some detail to explain why we suggest the provisions of the bill do not clearly implement the expressed policy set out in the Minister's guide.

First, with regard to the so-called delivered pricing provision, we submit the provision should not be triggered by an isolated incident. We recognize it is possible to interpret the section to that effect as it stands now, but if this is the policy, our submission is that it ought to be made clear.

Also, recognizing the concern of a number of our customers who might be adversely affected, we submit if plant pick-up is allowed for one class of customer, it should have to be allowed for all others in that class or level of trade, but not for other classes of customers. Again, looking to the expressed policy of the provision, we suggest allowing intervention beyond this base would be unnecessarily broad.

Thirdly, in this context it is our understanding that the delivered pricing provisions are not intended to prohibit companies from differentiating between customers on grounds other than terms and conditions relating to delivery, as other areas of the existing statute regulate those practices now. We submit this provision, likewise, is not sufficiently clear, and since it does not appear inconsistent with the policy of the statute, we submit a change to clarify it would be desirable. The details in this respect are set out on page 14 of our brief.

With regard to export agreements, it is a matter of great concern, I think, in relation to the need for Canadian industry to improve its export performance. Having regard to the statement in the Minister's guide, the uncertainty of whether an export agreement will have spill-over consequences in the domestic market may be a deterrent to the formation of export consortia. Therefore, he goes on to say, by repealing a particular provision of paragraph 32(5) , Parliament will clarify that the unintended ancillary effects of export agreements in the domestic markets do not offend the conspiracy provisions.

• 1750

With respect. we feel the provision of Bill C-91 still does not make that adequately clear. With relatively modest changes to subsections 32.(4) and 32.(5), the expressed intention of the

[*Traduction*]

de banques peut être exempté sous réserve de la délivrance, par le ministre des Finances, d'un certificat dans les circonstances qu'il juge appropriées.

Notre mémoire porte également sur plusieurs autres questions et sur un sujet de préoccupation qui n'a pas, à proprement parler, trait à la politique de la concurrence. Pour ce qui est de la disposition sur le prix livré, notre mémoire explique non sans détail la raison pour laquelle nous pensons que les dispositions du projet de loi ne suivent pas clairement la politique expresse dont fait état le guide du minitre.

Pour commencer, en ce qui concerne toujours cette disposition sur le prix livré, nous soutenons qu'elle ne devrait pas pouvoir être invoquée dans le cas d'un incident isolé. Nous savons qu'il est toujours possible d'interpréter cet article dans ce sens si l'on s'en tient à son libellé actuel, mais s'il s'agit effectivement de la politique officielle, nous soutenons qu'il faudrait le préciser plus clairement.

De plus, pour faire suite aux préoccupations d'un certain nombre de nos clients qui risqueraient d'être touchés par ce genre de disposition, nous soutenons que si une prise en charge à l'usine est autorisée pour une catégorie de clients, elle devrait l'être pour tous les autres dans le même secteur commercial, sans pour autant l'être pour les autres catégories de clients. Encore une fois, si nous en revenons à la politique explicite prévue par cette disposition, notre position est qu'en permettant une intervention plus étendue, on élargirait inutilement le champ d'application.

Troisièmement, toujours dans le même contexte, nous sommes portés à croire que les dispositions relatives au prix livré n'ont pas pour objet d'interdire aux entreprises de faire de différence entre leurs clients si ce n'est pour ce qui est des modalités et conditions de livraison, étant donné qu'il y a d'autres secteurs de la loi actuelle qui règlementent déjà la chose. Dans le même ordre d'idées, nous soutenons que cette disposition n'est pas suffisamment claire et étant donné qu'elle ne semble pas contrevenir à la politique énoncée par la loi, nous sommes d'avis qu'il serait souhaitable d'apporter une modification pour la rendre plus précise. Le détail de cette recommandation figure à la page 14 de notre mémoire.

Pour ce qui est maintenant des ententes à l'exportation, c'est un élément particulièrement important à mon sens, compte tenu du fait que l'industrie canadienne doit améliorer ses résultats à l'exportation. Vu la déclaration qui figure dans le guide du ministre, l'incertitude qui règne quant à la question de savoir si une entente à l'exportation aura ou non des retombées sur le marché intérieur risque de faire obstacle à la création de consortiums travaillant pour l'exportation. Par conséquent, il poursuit en disant que, par l'abrogation d'une disposition du paragraphe 32(5) le Parlement se chargera de préciser que toutes les répercussions connexes mais involontaires d'une entente à l'exportation sur le marché intérieur ne contreviennent aux dispositions relatives à la collusion.

Nous estimons que le projet de loi C-91 n'est pas suffisamment clair là-dessus. On pourrait, en modifiant légèrement les paragraphes 32.(4) et 32.(5) respecter davantage l'intention

[*Text*]

draftsmen, the expressed intention of the government through the guideline paper, could remove the uncertainty and offer the kind of encouragement to Canadian manufacturers to act collectively to enhance their export markets.

The way it stands now, Mr. Chairman, as we see it, a group of manufacturers who get together to export may inadvertently violate the law, notwithstanding that when they put their export agreement together, they had a clear cut and well-founded intention to comply in all respects with the provisions of that section. The way it stands at the moment, if circumstances turn out to be contrary to their expectations, as we see it, they could lose the benefit of the export exemption. Having regard to the great importance of that provision to encouraging Canadian exporting, we submit that it requires amendment. We submit this could be achieved by the amendments which are set out on page 17 of our brief.

We have one other matter, which I referred to indirectly earlier, that we would like to draw to your attention. This is beyond the narrow confines of competition policy, but it refers to the recognition in the bill, in proposed section 10, that a person whose conduct is being enquired into, is assisted by counsel. The provision is of course there to recognize the fairness to him; indeed, you might say it is his constitutional right, as reflected in the Canadian Charter of Rights and Freedoms, to be represented by counsel. Therefore, it seems to us to be inconsistent that his counsel in those circumstances should not have the opportunity to cross-examine people who are speaking about the matters with respect to which the inquiry is proceeding.

Gentlemen, we thank you for this opportunity to summarize our views, and indeed it has been a very brief summary. We shall be please to pursue any issues you may wish to raise with us. In conclusion, though, we urge that the debate about this stage of competition law be brought to an early conclusion. Thank you.

Le président: Merci, monsieur Feltham. Je demande à M. Ouellet s'il veut bien débuter la période de questions. Monsieur Ouellet.

M. Ouellet: Merci, monsieur le président.

Je remercie les témoins de l'Association des manufacturiers canadiens pour leur participation à cette séance de cet après-midi. Nous nous excusons du retard causé par le vote en Chambre. Nous sommes revenus pour écouter les vues de votre Association et vous poser quelques questions.

I would like to refer first of all to recommendation 3, which is on page 11 of your brief.

To implement this recommendation we recommend that Section 13 of the Competition Tribunal Act be amended to enable Cabinet to review and allow mergers that the Tribunal disallows.

If we were to agree with this, would you object if we also said that the section be amended to enable Cabinet to review and disallow mergers that the Tribunal might allow.

[*Translation*]

des rédacteurs, l'intention annoncée par le gouvernement dans le guide, éliminer l'incertitude et encourager les manufacturiers canadiens à s'unir pour exporter davantage.

Dans l'état actuel du projet de loi, monsieur le président, il nous semble qu'un groupe de manufacturiers qui uniraient leurs efforts pourraient, sans le savoir, être en contravention de la loi, même si en concluant l'entente, ils avaient la ferme intention d'agir en toute légalité. Si leurs prévisions sont démenties, il nous semble qu'ils risquent de se voir refuser l'exemption pour exportation. Compte tenu du rôle essentiel que doit jouer cette disposition législative dans la promotion des exportations canadiennes, nous estimons qu'elle doit être amendée. Nous estimons qu'elle peut remplir le rôle pour lequel elle a été prévue avec les amendements que nous proposons à la page 17 de notre mémoire.

Nous aimerions attirer votre attention sur une autre question à laquelle j'ai fait brièvement allusion tout à l'heure. Cela n'entre pas dans le cadre précis de la politique en matière de concurrence, mais a trait à la reconnaissance dans le projet de loi, à l'article 10, au droit d'une personne faisant l'objet d'une enquête d'être assistée par un avocat. Cette disposition a été prévue en reconnaissance du droit de toute personne à un processus équitable; en fait, on peut même dire que le droit de se faire représenter par conseil est un droit constitutionnel, garanti par la Charte canadienne des droits et libertés. Par conséquent, il nous semble contradictoire que cet avocat ne puisse pas dans ces circonstances contre-interroger les personnes qui témoignent dans le cadre de l'enquête.

Messieurs, nous vous remercions de nous avoir permis de vous donner un bref apperçu de notre point de vue, et c'est effectivement un bref apperçu. Nous répondrons avec plaisir à toutes vos questions. Mais pour conclure, nous vous exhortons à clore le débat sur cette loi régissant la compétition le plus tôt possible. Merci.

The Chairman: Thank you, Mr. Feltham. I will ask Mr. Ouellet to start the questioning, if he wishes. Mr. Ouellet.

Mr. Ouellet: Thank you, Mr. Chairman.

I would like to thank the representatives of the Canadian Manufacturers Association for coming here this afternoon. We apologize for the delay due to the vote in the House. We have come back to listen to the views of your association and to ask you a few questions.

Je voudrais que nous parlions tout d'abord de votre recommandation no. 3, à la page 11 de votre mémoire.

Pour que cette recommandation soit applicable, nous demandons que l'article 13 de la Loi constituant le tribunal de la concurrence soit modifiée de façon à habiliter le Cabinet à revoir les décisions du tribunal à autoriser des fusionnements que celui-ci a interdites.

Si nous acceptions cette recommandation, vous opposeriez-vous à ce que nous donnions également au Cabinet l'autorité de revoir et d'interdire des fusionnements que le tribunal a autorisés.

[*Texte*]

Mr. Feltham: Mr. Chairman and members, we of course reflected on that question at considerable length. Our submission to you is that the apparent fairness of a parallel balanced approach to that is not justified in the circumstances; it is not necessary. Our thinking in that respect is we have imposed through the statute what might be described in the broadest sense as a regulatory mechanism to regulate competition in the marketplace.

• 1755

The underlying thought is that citizens' corporations and so on should be free to act within the framework of the market without restriction, except to the extent it impinges on the public welfare. This is a situation in which, notwithstanding the adverse impact on competition, it would be desirable that Cabinet should allow a merger.

It would seem to us the converse situation would not involve the same considerations. But if it is desirable that there be opportunities for the appropriate government authority to intervene to prevent mergers—notwithstanding that they would pass the screen of the competition bill—it would be appropriate for other legislation which sets out specific principles to this end.

Mr. Ouellet: I fail to understand why the public welfare would work in one respect and not in the other. I might agree with you that this legislation might not be the appropriate legislation to give this type of authority to Cabinet, but if we argue that Cabinet has an overall view of what is in the best public interests of Canada, surely this perspective should not be curtailed only in one direction.

Granted, I suspect the rule of the game should be known in advance to the business community, but if it were known and if some criteria were drafted appropriately, what would be your objections to Cabinet not allowing a merger to take place?

Mr. Feltham: I think our fear would be that it would be drawing us towards what has been described as a domestic investment review agency, to an extent which is unnecessary. You have to recognize our response is very pragmatic. In the entire environment of our legislative structure in Canada, we do see a number of situations where there is provision for overview at the Cabinet level in a number of selected industries, and there is obviously a logic with respect to providing for the principle to go both ways.

However, with regard to the purpose of this particular bill, our submission is that while a safety valve is desirable in this direction, it is not evident a safety valve should be specifically provided for in the other direction of comprehensive application to all industries in Canada. But if it is desirable in certain industries or in certain types of situations not encompassed within the framework of the competition law that there be some overview of concentration, we submit this would be a different matter.

Mr. Ouellet: I see. Do you accept the tribunal as it is proposed? Do you believe the tribunal could pass sound judgment, and is in fact a good approach? I do not think you have elaborated very much in this regard.

[*Traduction*]

M. Feltham: Monsieur le président, membres du comité, nous avons bien sûr réfléchi longuement à cette question. Nous estimons que l'apparence d'équité que donnerait cette approche n'est pas justifiée dans les circonstances; elle n'est pas nécessaire. Notre point de vue est que la loi impose ce que l'on pourrait définir au sens large comme un mécanisme de réglementation de la concurrence.

Le principe sous-jacent est que les sociétés privées et autres devraient être libres d'agir dans le cadre du marché sans restriction aucune, tant que cela ne nuit pas au bien-être public. Il s'agit de cas où, malgré l'effet négatif que cela peut avoir sur la concurrence, il serait bon que le Cabinet permette un fusionnement.

La situation inverse n'entraîne pas, à notre avis, les mêmes considérations. Mais s'il s'avère que dans certains cas, l'autorité compétente devrait pouvoir intervenir pour empêcher un fusionnement—bien qu'il respecte les exigences de la loi sur la concurrence—il faudrait alors adopter à cette fin une autre loi établissant les principes à observer.

M. Ouellet: Je ne comprends pas pourquoi l'intérêt public joue dans un sens et pas dans l'autre. Je conviendrais peut-être avec vous que cette loi n'est pas nécessairement le meilleur instrument pour donner ce genre d'autorité au Cabinet, mais si nous établissons le principe que le Cabinet a une vue générale de ce qui représente l'intérêt public canadien, il me semble que cela ne devrait pas aller dans un sens seulement.

Bien entendu, il faudrait que les milieux d'affaires soient informés à l'avance des règles du jeu, mais cela fait, et si l'on établit des critères appropriés, quelles seraient vos objections à ce que le Cabinet puisse interdire un fusionnement?

M. Feltham: Nous craignons que cela ne nous rapproche davantage qu'il ne serait nécessaire de ce que l'on appelé une agence d'examen des investissements nationaux. Vous devez reconnaître que nous sommes très pragmatiques. La structure législative canadienne prévoit que dans certaines situations, le Cabinet a droit de regard sur un certain nombre de secteurs donnés et il semble évidemment logique que cela doive fonctionner dans les deux sens.

Cependant, en ce qui concerne l'objectif du projet de loi qui nous occupe ici, nous disons que s'il est bon d'avoir une soupape de sécurité dans ce sens, il n'en découle pas nécessairement qu'une soupape de sécurité soit nécessaire dans l'autre sens pour l'ensemble des industries canadiennes. Mais si dans certains secteurs, ou dans certains cas qui ne sont pas prévus par la loi sur la concurrence, il peut paraître nécessaire d'avoir un droit de regard sur les concentrations, ce serait alors une tout autre question.

M. Ouellet: Je vois. Acceptez-vous le principe du tribunal tel qu'il est proposé? Estimez-vous que le tribunal puisse rendre de bonnes décisions, et pensez-vous en fait que ce soit une

[*Text*]

Mr. Feltham: No. We have not elaborated on it. We mentioned it very briefly early in the brief. I must say the length and detail of our brief is intended to be a reflection of the enormous amount of paper which has been generated on these subjects over the years. We intentionally confined it to just a few pages in the hope we would recognize the strengths of the bill and focus on a few major concerns.

The position of the manufacturers' association—and it has been thoroughly reviewed by the board of directors and indeed by the legislation committee and special committees of the association; there has been very substantial participation by our interested members in the formulation of the association's position—is that the tribunal as proposed in the bill is a satisfactory mechanism, with regard to the variety of concerns and positions expressed. I would be the first to recognize the business community has changed its view on this matter over the years, as you will recall yourself. This seems to be where we have come to, but our net reaction is, yes, it is workable.

• 1800

Mr. Ouellet: I am glad you qualify your statements regarding the tribunal, and you are quite right to say there have been mixed feelings. Yet if you are now telling me you are accepting the concept of the tribunal, I do not think you can have it both ways. Why do you ask the Cabinet to second-guess the tribunal? If the expertise is there as the appropriate due process takes place at the tribunal level, you either have faith in the tribunal or you do not. Why do you want another appeal to Cabinet?

Mr. Feltham: We have faith in the tribunal insofar as the criteria of this statute are concerned, and as I mentioned earlier, the statute is confined to competition considerations. With regard to mergers, and indeed anything else which is relevant, the considerations are enumerated in the section itself. Some of the earlier versions of the statute had a longer list, some of which may be relevant in particular circumstances.

We contemplate Cabinet review, or Cabinet reversal, if you like, of the ultimate decision of the tribunal would not occur solely on the same grounds. The proposition is that there may be situations in the future in which other considerations not encompassed within notions of competition policy will be relevant. It would only be in situations in which such other considerations were relevent that we would contemplate the Cabinet seeing fit to intervene.

It is not suggested to be a straight-line appeal, so to speak, from the tribunal. We are comfortable with the proposition as set out in the bill that so far as appeals are concerned from the decision of the tribunal, on whatever appropriate grounds, they would go through the regular judicial process through the Federal Court of Appeal and beyond, if appropriate.

M. Ouellet: Monsieur le président, me reste-t-il encore du temps? Je ne veux pas abuser de mon temps de parole, mais

[*Translation*]

bonne façon de procéder? Je ne crois pas que vous vous soyez beaucoup étendu là-dessus.

M. Feltham: Non, nous ne l'avons pas fait. Nous en avons parlé très brièvement au début du mémoire. Il faut vous dire que si notre mémoire n'est pas plus long ni plus détaillé, c'est qu'on a déjà écrit sur ces sujets-là ces dernières années. C'est intentionnellement que nous nous en sommes tenus à quelques pages, dans l'espoir de relever les principaux points positifs du projet de loi, et de présenter nos principaux soucis.

L'Association des manufacturiers juge—et la question a été étudiée en profondeur par le conseil d'administration ainsi que par le comité législatif et les comités spéciaux de notre association, avec une importante participation de tous nos membres qui s'intéressent à l'élaboration de nos politiques—que le tribunal proposé est un mécanisme satisfaisant d'après les diverses préoccupations et positions exprimées. Je serais le premier à reconnaître que les milieux d'affaires ont changé d'avis sur ces questions au fil des ans, comme vous vous en souviendrez. Nous semblons être arrivés à cette conclusion que finalement, oui, le mécanisme peut fonctionner.

M. Ouellet: Je suis heureux que vous ayez précisé vos remarques concernant le tribunal, et vous avez tout à fait raison de dire que l'on n'a pas toujours été positif. Mais si vous dites maintenant accepter le principe d'un tribunal, vous ne pouvez pas jouer sur deux tableaux en même temps. Pourquoi demander au Cabinet d'infirmer les décisions du tribunal? Si le tribunal a la compétence nécessaire et que la loi soit respectée, ou bien vous avez confiance en ce tribunal, ou bien vous n'en avez pas. Alors pourquoi vouloir la possibilité d'appel au Cabinet?

M. Feltham: Nous faisons confiance au tribunal en ce qui concerne les critères législatifs, comme je l'ai dit tout à l'heure, tant que l'on s'en tient à des considérations de concurrence. Pour ce qui est des fusionnements, et en fait de toutes autres questions pertinentes, les considérations dont il doit être tenu compte sont énumérées dans la loi même. Certaines versions antécédentes en prévoyaient davantage, et certaines pourraient encore être pertinentes dans certaines circonstances.

Nous n'envisagerions pas que le contrôle du Cabinet, ou l'infirmation de la décision du tribunal par le Cabinet, si vous préférez, se fonde exclusivement sur les mêmes critères. Il pourrait, à l'avenir, y avoir des cas où entrent en jeu des considérations qui n'ont pas été prévues dans le cadre de la politique sur la concurrence. Ce ne serait que dans ces situations-là, lorsque d'autres considérations entrent en jeu, que nous envisagerions que le Cabinet puisse intervenir.

Nous ne demandons pas un droit d'appel automatique, si l'on peut dire, contre les décisions du tribunal. Nous jugeons satisfaisant le processus prévu par la loi, selon lequel les appels des décisions du tribunal, fondés sur quelque motif légitime que ce soit, suivraient la procédure de droit commun, par la Cour d'appel fédérale et plus loin, si nécessaire.

Mr. Ouellet: Mr. Chairman, do I still have some time? I would not want to go beyond my allocated time, but I would

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[*Texte*]

j'aimerais poser une autre question à nos témoins, sur un autre aspect de leur mémoire. Merci.

Vous nous avez dit que vous vous réjouissiez de l'effort de ce projet de loi pour décriminaliser l'abus de dominance dans les fusions. Vous semblez croire que c'est une approche beaucoup plus rationnelle. Pourquoi insistez-vous pour que l'intention, qui est un élément de la criminalité, soit important dans la preuve, dans l'article qui a trait aux abus de position dominante?

Si nous regardons l'approche civile, il me semble que les éléments de preuve devraient tenir compte de cette nouvelle réalité du droit civil et non pas garder les mêmes exigences retrouvées au chapitre criminel.

Mr. Feltham: With respect to the provision on abuse of dominance, we understand it does provide certain elements of the situation for the civil standard which will be appropriate for a tribunal order or set out in that section. Satisfying the tribunal that each of the essential ingredients is present will require only a submission of evidence which will convince the tribunal on a balance of probabilities.

• 1805

With respect, I do not see in the section to any requirement that the "proof beyond a reasonable doubt" standard, which of course is appropriate for criminal proceedings, is embodied in the section.

Mr. Ouellet: The intent, the intent.

Mr. Feltham: With respect, I think the tribunal will be in a position to infer intent from the evidence based only on the balance of probabilities and not on proof beyond a reasonable doubt. With respect, I do not see it as importing the *mens rea* concept of the criminal law to the extent that we customarily expect it to be proven by the prosecution before it is appropriate that a person be convicted of a criminal offence.

Mr. Thibault: Gordon, do you want to answer?

Mr. Gordon Lloyd (Director, Legislation, Canadian Manufacturers' Association): Yes, I guess the only point I would add is the desirability of having what is being referred to an intent test in the abuse provisions. I think it is a necessary element to try to distinguish between what are procompetetive acts and what are anti-competitive acts. It is often a very difficult decision to make. I think proof of the need for such a test can be seen by looking at the list of the types of examples of activity that are brought to the tribunal's attention.

All of those specific examples have incorporated in them essentially an intent test that it is for the purpose of doing something anti-competitive. So, just as it is necessary, I think, to incorporate it into all of the specific examples, it is also necessary to incorporate it into the general section.

Mr. Ouellet: But is it absolutely necessary to do it? Is not the fact that an anti-competitive behaviour exists a reality of something that should be judged upon the fact that you should not impose an additional burden to the director to establish that there was also intent, not only a fact but an intent?

[*Traduction*]

like to ask another question on another aspect of the brief. Thank you.

You have said that you welcome the effort made in this bill to decriminalize the abuse of dominance in mergers. You seem to feel that this is a much more rational approach. Why do you insist that intent, which is a factor in criminality, be considered relevant as evidence of abuse of dominance?

It seems to me that if we are to take the civil law approach, the elements of proof should reflect the civil law and not retain the same criteria applied in criminal law.

M. Feltham: À notre avis, la disposition relative aux abus de position dominante prévoit certains critères de droit civil à prendre en condisération par le tribunal. Il suffira pour convaincre le tribunal que chacun des éléments essentiels est présent selon toute probabilité.

Sauf votre respect, cet article ne prévoit nullement la preuve «sans l'ombre d'un doute raisonnable», qui s'applique bien entendu en droit pénal.

M. Ouellet: Mais c'est l'intention qui compte.

M. Feltham: Excusez-moi, mais je pense que le tribunal pourra apprécier l'intention en se basant sur l'ensemble des probabilités, et non sur la preuve établie sans l'ombre d'un doute raisonnable. Je ne vois pas dans cette disposition la notion de l'intention criminelle, telle que la poursuite doit l'établir pour faire condamner quelqu'un.

M. Thibault: Est-ce que vous voulez répondre, Gordon?

M. Gordon Lloyd (directeur, Législation, Association des manufacturiers du Canada): Je voudrais simplement ajouter qu'il serait souhaitable de prévoir dans les dispositions sur les abus ce qu'on appelle le critère de l'intention. Il est nécessaire, en effet, d'essayer de faire la distinction entre ce qui constitue des actes en faveur de la concurrence et de ce qui constitue des actes contre la concurrence. C'est une décision qui est souvent très difficile à rendre. On se rendra aisément compte de la nécessité d'un tel test en examinant la liste des exemples d'activités portées à l'attention du tribunal.

Or, tous ces exemples contiennent un test qui démontre que l'intention était de se livrer à des agissements contre la concurrence. Il me paraît tout aussi nécessaire d'introduire ce test dans le corps de la loi que de l'introduire dans tous les exemples spécifiques.

M. Ouellet: Mais est-il indispensable de le faire? Un comportement hostile à la concurrence est un délit matériel, qui ne devrait pas être imposer au directeur un fardeau supplémentaire, à savoir la preuve qu'il y avait non seulement fait, mais également intention?

[*Text*]

Mr. Lloyd: I think the difficulty of distinguishing between whether or not the act was or was not for anti-competitive purposes lies in the fact you have to take into account the intention for which it was done.

Mr. Ouellet: Okay.

Mr. Feltham: If I might just elaborate briefly, there will be many, many instances in which aggressive behaviour, behaviour which will have a harmful effect on other competitors by virtue of its strength, will be perceived by those competitors to be anti-competitive, when it is merely a natural manifestation of competitive behaviour. It is for this reason that we have seen and have advocated the insertion of an explicit intention test to assist in, as Mr. Lloyd has indicated, enabling the tribunal to distinguish clearly between pro-competitive and anti-competitive behaviour.

Mr. Ouellet: My last question will have to do with joint ventures. I think it is well recognized that there is rather small domestic market if we look at Canada. In order to enhance and to help our Canadian manufacturers, the possibility to compete worldwide is very important. I think in the process of consultation that has been carried over the last few years in regard to easing the Combines Act to facilitate some joint ventures for international competitions in order to allow Canadian companies to better export products and services, the Combines Act had to accommodate some of these ventures.

You are coming to us with your brief and more or less are trying to suggest a series of amendments. You make me wonder whether you are not basically going to completely annul the merger clause of our legislation.

• 1810

How do you draft these amendments you are suggesting in a way not to completely turn all the joint ventures into mergers?

Mr. Feltham: Mr. Chairman, gentlemen, it is our submission that the joint venture exemption even as we recommend it would be very narrow. It is confined to joint ventures.

Let me back up just a moment and remark that it might be said that the kinds of joint ventures we are concerned about, namely new manufacturing activities and those that are otherwise limited, as set out in the section, where the risk is greater than any one participant might be able to bear and special circumstances of research and development.

It might be said that those would fall outside the scope of the merger definition in any event because a merger, although the definition is broad, is only subject to review if it is perceived to substantially lessen competition. From that, it would follow that these ventures which we submit do not substantially lessen competition but rather, have the converse effect; would not be caught by the provision even if there were no joint venture exemption.

[*Translation*]

M. Lloyd: La difficulté qu'il y a de dire si des agissements ont pour objet de porter atteinte à la concurrence ou non, réside dans le fait qu'on doit considérer l'intention dans laquelle l'acte a été commis.

M. Ouellet: Je vois.

M. Feltham: Permettez-moi de m'expliquer. Il y aura de nombreux cas dans lesquels un comportement agressif qui, en raison de sa vigueur, nuira à certains concurrents et sera considéré par eux comme étant préjudiciable à la concurrence, alors qu'il s'agit simplement d'une manifestation naturelle de compétitivité. C'est la raison pour laquelle nous avons préconisé l'insertion expresse d'un test d'intention pour aider, comme le disait M. Lloyd, le tribunal à faire la distinction entre comportements favorables et défavorables à la concurrence.

M. Ouellet: Ma dernière question porte sur les entreprises à risques partagés. Nous savons tous que le marché canadien est plutôt restreint. Pour élargir les possibilités et aider les fabricants canadiens, il est donc important de se lancer sur les marchés internationaux. Il a été nécessaire, dans les consultations qui ont eu lieu au cours des dernières années en vue d'assouplir la Loi relative aux enquêtes sur les coalitions, afin de permettre la constitution de certaines entreprises à risques partagés aux fins de concurrence internationale, ceci afin de faciliter aux sociétés canadiennes l'exportation des biens et services, que la Loi permette la constitution de certaines de ces entreprises à risques partagés.

Dans votre mémoire, vous nous proposez plus ou moins une série d'amendements et je me demande si vous n'allez pas nous demander de supprimer complètement de la loi l'article relatif aux fusionnements.

Quelle forme devraient prendre les amendements que vous proposez de façon à ne pas déclencher le fusionnement de toutes les entreprises à risques partagés?

M. Feltham: Monsieur le président, messieurs, même l'exemption pour entreprises à risques partagés, que nous recommandons serait très restrictive, car elle s'appliquerait uniquement à ces entreprises.

Permettez-moi de revenir en arrière un instant: le genre de d'entreprises à risques partagés, auxquelles nous pensons, à savoir les nouvelles industries et celles qui sont limitées par ailleurs, comme il est dit dans l'article, où les risques sont trop lourds pour un seul participant et où la recherche et le développement se font dans des circonstances spéciales.

Ces cas ne relèveraient de toute façon pas de la définition de fusionnement, car si large que soit cette définition, un fusionnement n'est susceptible de contrôle que s'il diminue considérablement la concurrence. Il s'ensuit que les entreprises à risques partagés que nous proposons ne diminuent pas de façon sensible la concurrence, et ont plutôt l'effet inverse et ne relèveraient pas de cette disposition, même s'il n'y avait pas d'exemption pour elles.

[*Texte*]

Within this context, our submission is that the joint venture exemption is of the nature of a clarification. For greater certainty, lest there be any doubt about it, these specifically limited types of situations ought not to be the subject of the same kind of review.

It will be clear that in order to determine whether the joint venture exemption applies, the tribunal will have to take jurisdiction once the director, of course, has made the decision to bring it before the tribunal to determine whether it falls within the joint venture exemption of section 67 or indeed, whether it falls within the efficiency defence of section 68.

Thus everything that is brought forward by the director will be subject to really the triple test: Is competition substantially lessened by the test that is in the bill? Is it a joint venture by definition and therefore exempt in any event? And whatever the answer to the first two questions is, is it a situation in which the efficiency defence should be applied?

Mr. Ouellet: Thank you.

The Chairman: Mr. Domm, please.

Mr. Domm: Mr. Chairman, I appreciate this opportunity and I have even greater pleasure in welcoming a gentlemen here who is a representative of Canadian General Electric, the largest industry in my riding of Peterborough.

I have some questions, though, that are of concern and I jotted them down prior to the meeting. One of them deals with the uncertainty which might be created in the eyes of other businesses if we entered into a tribunal, as you propose, that would reach a decision and then the Cabinet would override the decision.

I would like to have a couple of examples from you of where your particular provision that you mention in the Cabinet override has occurred which would give you reason to believe inclusion of the Cabinet override would be beneficial in competition legislation, if it had been there. What would we have been able to do in the past, had we had it?

Mr. Feltham: Mr. Chairman and gentlemen; Mr. Domm, may I say first of all that we in Canadian General Electric—just to digress from my role representing the Canadian Manufacturers" Association—are struggling very hard to maintain the strength of our business in your riding, as you well know and I think appreciate.

I think in answering your question, sir, I would have to borrow a leaf from the complaint which is heard often from the Bureau of Competition Policy, which is that the law has never prevented any merger in the history of Canada. We do not have an experienced base, therefore, on which I can point to a merger which was prevented by the application of the merger law.

However, I would suggest to you that the following kind of situation might well be one in which it would be appropriate that there be Cabinet intervention.

[*Traduction*]

Dans ce contexte, nous considérons que l'exemption des entreprises à risques partagés vise à préciser la situation. Pour qu'aucun doute ne subsiste, ce genre de situation expressément limitée ne devrait pas faire l'objet du même genre de contrôle.

Le tribunal, pour décider si l'exemption pour entreprises à risques partagés s'applique, doit se saisir de l'affaire lorsque le directeur, bien entendu, aura décidé de l'en saisir pour savoir si elle relève de l'article 67, à savoir les exceptions pour entreprises à risques partagés, ou de l'article 68, à savoir les exceptions dans les cas de gains en efficience.

Tous les éléments présentés par le directeur seront donc soumis à ce qui est en réalité un triple test: la concurrence est-elle considérablement diminuée selon le critère prévu par projet de loi? S'agit-il, par définition, d'une entreprise à risques partagés et qui est, de ce chef, exempte de toute façon? Et quelle que soit la réponse aux deux premières questions, s'agit-il d'une situation dans laquelle il convient d'invoquer l'argument de gains en efficience?

M. Ouellet: Je vous remercie.

Le président: Monsieur Domm.

M. Domm: Monsieur le président, je suis heureux de voir comparaître ces témoins, en particulier le représentant de Canadian General Electric, qui est l'industrie la plus importante de ma circonscription de Peterborough.

Je voudrais poser certaines questions qui me préoccupent et que j'ai notées avant la réunion. L'une porte sur l'incertitude dans laquelle pourraient se trouver d'autres entreprises si, comme vous le proposez, nous nous adressons à un tribunal qui rend un jugement et si le Cabinet, par la suite, infirme cette décision.

J'aimerais que vous me donniez quelques exemples pour me montrer les cas où s'applique la disposition particulière que vous mentionnez dans le cas d'infirmation par le Cabinet et qui vous donne raison de croire qu'il eût été bon de prévoir le cas d'infirmation par le Cabinet et qu'il faudrait le faire figurer dans la loi. S'il en avait été ainsi, comment est-ce que cela nous aurait permis d'intervenir?

M. Feltham: Monsieur le président, membres du Comité, monsieur Domm, je vais m'écarter légèrement de mon rôle de représentant de l'Association des manufacturiers du Canada pour vous rappeler combien *Canadian General Electric* lutte pour maintenir sa position dans votre circonscription, comme vous le savez certainement et êtes à même de l'apprécier.

Pour répondre à votre question, monsieur, je dois reprendre une plainte que l'on entend souvent de la part du Bureau de la politique de concurrence, à savoir que dans toute l'histoire du Canada, la loi n'a jamais empêché aucun fusionnement. Nous n'avons donc pas de précédent sur lequel nous fonder pour vous montrer comment l'application de la loi a empêché un fusionnement.

Je voudrais toutefois vous faire remarquer que, dans la situation suivante, il se pourrait fort bien que l'intervention du Cabinet soit indiquée.

[*Text*]

• 1815

One can imagine in a business in which the relevant market is regional that there might be two firms who are unable to sustain themselves because there just is not the business level in the region to support two firms. The most extreme case, which one of my legal colleagues in Toronto is fond of referring to, is the situation in, say, Fenelon Falls, Ontario, or some other small place where there happen to be two drug stores. Neither of them are doing adequately to sustain themselves because there just is not the custom to support them, but one could survive. For reasons in that kind of context, related to regional-development policy, the desirability of maintaining a business in a particular region, I could well imagine that, notwithstanding the reduction of a market from enjoying two competitors, two rivals in the market, to a single business operation, would by any standard be a substantial reduction of competition but still might well be a situation in which it would be desirable not to prevent that merger from occurring, because the alternative would be failure for both.

Mr. Domm: I still have some difficulty with that logic, and perhaps I am dwelling on it longer than I need to. But, to use your analogy, you had a couple of businesses, you use drug stores as an example, and they were going to merge and form one, and the tribunal came to the conclusion that this would lessen competition if the two drug stores went together. Even despite the fact that it would lessen competition, you would want the Cabinet to be able to make an assessment and override the decision and allow them to merge. I would like to know on what justification, because I cannot compare that to Canadian General Electric in the export-import business.

I am thinking of small companies that want to merge, and we are going to give Cabinet the authority to say they can even after a tribunal has ruled that it would be anti-competitive and it would lessen competition. My concern is that we make a mockery out of the tribunal if they weigh that evidence and then the Cabinet overrides it. Do you not think there would be a credibility gap between businesses, and what to expect, going through all of that and then being told that it is okay?

Mr. Feltham: The result, which does have that anomaly, flows from the fact that the bill is confined to a competition test. It isolates from the entire range of relevant considerations; everything else is excluded. It isolates the one consideration, competition in that marketplace. The inevitable result of that narrow focus is that there could well be situtions in which failure to permit the firms to merge would result in the failure of both.

If we told the one drug store to take a more significant activity, if one feels that is too minor, although it is pretty significant, I should imagine, to the people who depend on those stores and small markets . . . If one were to say to the one which looked as if it had the stronger opportunity, the better vitality, it cannot buy the other chap on, that would, in our submission, would be an undesirable result. If we were to give the tribunal the discretion to do that then we would be introducing another element in the bill, and I would not suggest, Mr. Chairman, that we would not welcome the introduction of that extra discretion through the tribunal itself.

[*Translation*]

On peut imaginer, dans un secteur où le seul marché est régional, le cas de deux entreprises auxquelles le marché régional n'assure pas suffisamment de débouchés. Prenons un cas extrême, celui que cite souvent l'un de mes collègues, avocat à Toronto: c'est celui de Fenelon Falls, en Ontario, ou de toute autre petite localité où il y a deux pharmacies. Aucun de ces deux magasins n'est rentable, parce qu'il n'y a tout simplement pas suffisamment de clientèle, et un seul pourrait survivre. Dans des circonstances de ce genre, en tenant compte de la politique de développement régional, j'imagine aisément que, malgré la réduction du marché due à la concurrence, deux rivaux qui exploitent le même créneau pourraient fusionner, ce qui, certes, diminuerait considérablement la concurrence, mais il serait peu avisé de s'opposer à cette fusion, car à défaut de s'unir, les deux risquent de périr.

M. Domm: Je vois toujours encore une objection à ce genre de raisonnement, mais je m'arrête peut-être à cette question plus que je ne devrais. Mais pour reprendre votre exemple, vous aviez donc deux entreprises, en l'occurrence des pharmacies qui allaient fusionner, et le tribunal décrète que si cela se produit, il y aura diminution de la concurrence. Malgré cela, vous voudriez que le Cabinet apprécie la situation, annule la décision du tribunal et autorise ces deux entreprises à fusionner. J'aimerais savoir quelle justification vous pouvez me donner, car ce cas ne se compare pas à celui de *Canadian General Electric* dans l'import-export.

Je songe aux petites sociétés qui veulent fusionner, et nous allons donner au Cabinet le pouvoir d'en décider ainsi, même après que le tribunal a décidé que cela ferait tort à la concurrence et la diminuerait. Un tel pouvoir donné au Cabinet tournerait en dérision le tribunal. Quel serait le prestige d'un tribunal si des entreprises, après s'être vu refuser le droit de fusionner par ledit tribunal, se le voyaient accorder?

M. Feltham: Cette anomalie est due au fait que le projet de loi se limite au critère de la concurrence, en laissant de côté toute une gamme d'autres facteurs, à l'exclusion de toute autre chose. Ce projet de loi ne s'attache qu'à une considération, celle de la concurrence sur le marché. La loi, en examinant la situation par le petit bout de la lorgnette, pourrait bien déboucher sur des situations où, la fusion ayant été refusée, les deux entreprises périclitent ensemble.

Si nous disions à l'une des pharmacies de chercher de nouveaux débouchés, d'élargir le marché si celui-ci est trop étroit, si cette question est importante, j'imagine, pour ceux qui vivent de ces magasins et d'une clientèle restreinte . . . Si l'on disait à celui qui semble avoir les meilleures chances, être le mieux placé, qu'il n'a pas le droit de racheter l'autre magasin, ce serait, à notre avis, un résultat adverse. Si nous permettions au tribunal d'en décider ainsi, nous introduirions un autre élément dans le projet de loi, et je crois pouvoir vous dire, monsieur le président, que nous aimerions laisser cela au

[*Texte*]

But we were foreclosed from pursuing that line of reasoning by the way in which the bill was developed.

Mr. Domm: There would be some benefit though, you would have to agree, in the fact that we do apply the efficiency defence as criteria, which would probably answer your concern about being able to function better economically in the market if they joined. The tribunal applies the efficiency defence as part of the criteria for the justification of the merger or the turning down of the merger. That would partially solve that problem.

Mr. Feltham: Indeed it would. The whole scheme is a system of overlapping considerations and indeed, with respect, I certainly accept your point there. Our submission is simply that in order to inject another element of certainty in this area, there should be provision for this extraordinary intervention by Cabinet.

• 1820

Mr. Domm: Perhaps I could pursue one other point, keeping in mind the clock and your time to get the flight back. You have made quite a strong case in support of "no substantial competition remaining" as the criteria of mergers, and you prefer it over the one we have included in Bill C-91, "substantial lessening of competition".

Now to get right to the question on my concern about yours versus ours, if we use the "no substantial competition remaining" test and if it was adopted in the legislation, the tribunal would have to define the minimum acceptable level of competition for a given market. My question is: Does the Canadian Manufacturers Association not believe that such a situation would make the law unenforceable?

Mr. Feltham: No, Mr. Chairman, Mr. Domm, we do not believe it would make the law unenforceable. We believe it would be easier to enforce. It would be easier to identify the circumstances in which mergers should be permitted to proceed without intervention than it will be in the situation that is conjured up by the bill. It says there should be whatever amounts to, in the eyes of the tribunal, a substantial lessening of competition, having regard to all the factors, including the state of competition in the market after the merger is implemented.

This seems to us to be a very imprecise measure. The only significant experience that is relevant is the experience of the United States over some 30 years in dealing with exactly those words. The position taken by the administration over the years and the position taken by the highest courts of the United States over the years has clearly changed very substantially from one decade to another, which merely demonstrates the imprecision of the concept.

By contrast, measuring the minimum acceptable level of competition, as you put it, sir, we suggest, while it is difficult because of the uncertainties, the imprecision of the whole concept of competition is a do-able exercise. It is a challenge which we can . . .

Mr. Ouellet: What would be the level?

[*Traduction*]

pouvoir d'appréciation du tribunal, mais nous en avons été empêchés par l'évolution qu'a connue le projet de loi.

M. Domm: Vous reconnaissez toutefois qu'il y aurait un certain avantage à prendre pour critère l'exception en cas de gains en efficience, ce qui répondrait sans doute à votre argument d'après lequel ces deux commerces ont tout intérêt à fusionner. Le tribunal invoquerait les gains en efficience pour justifier ou refuser, selon le cas, la fusion, ce qui résoudrait partiellement ce problème.

M. Feltham: Effectivement. Je reconnais la justesse de votre argument. Il importe effectivement de soupeser le pour et le contre d'intérêts qui se chevauchent. Nous pensons et ce, pour renforcer cette disposition, que le Conseil des ministres devrait imposer des règles régissant cette intervention qui sort de l'ordinaire.

M. Domm: Puis-je vous poser une autre question, tout en gardant à l'esprit que l'heure passe et que vous devez prendre un avion. Vous avez fait valoir, et de manière vigoureuse, que vous préféreriez que le critère régissant toute fusion soit «qu'aucune concurrence sensible demeure» au critère qui figure dans le bill C-91, soit «qui diminue sensiblement la concurrence».

Pour en venir à ma question, si le critère était «qu'aucune concurrence sensible demeure», et qu'il était adopté par le texte de loi, le tribunal devrait alors déterminer quel serait le degré minimum de concurrence pour un marché donné. Or, l'Association des manufacturiers canadiens ne pense-t-elle pas, que dans ce cas-là, la loi ne pourrait être appliquée?

M. Feltham: Non, monsieur le président, monsieur Domm, nous ne croyons pas que ce serait le cas. Au contraire, nous pensons qu'il serait plus facile de l'appliquer. Il serait plus facile de déterminer les circonstances dans lesquelles des entreprises pourraient fusionner sans intervention de l'État que d'après le scénario établi par le projet de loi. L'article en question décrète que, aux yeux du tribunal, la concurrence doit avoir diminué sensiblement après avoir pris en considération tous les facteurs en cause, y compris la concurrence réelle qui demeurerait après fusionnement.

Cette mesure nous semble très vague. On ne peut tirer de leçon que de l'expérience américaine qui se bataille avec ces mêmes mots depuis 30 ans. La position adoptée par le gouvernement et celle adoptée par les instances supérieures des États-Unis ont changé du tout au tout d'une décennie à l'autre, ce qui prouve que ce concept est trop imprécis.

Par contre, si l'on mesurait le degré minimum acceptable de la concurrence, comme vous le dites, monsieur, nous pensons que cela pourrait se faire, même si ce serait difficile en raison des incertitudes qui planent. C'est un défi que nous pourrions . . .

M. Ouellet: Quel serait ce degré?

[*Text*]

Mr. Domm: I was trying to get your opinion on who would be the judge of the lowest level the industry can attain, at which point it would fall into your category that it would not be allowed any more.

Mr. Thibault: I just might interject here, Mr. Chairman. Although we had originally said that we would like to catch that earlier flight, in view of the importance of this discussion, I think I would like to say that we would be pleased to extend our time for as long as you wish; we will just catch a later flight, so do not be concerned with the time. I think we should pursue this.

Mr. Domm: I am not just clear on how you set—and I am looking for guidance—the minimum level you can attain in a certain line of business, any farther down from which you are creating market conditions that would lessen competition.

Mr. Feltham: May I address this by speaking for just a few moments about it? Let us take ourselves back, if we may, to the purpose of competition policy.

We say the purpose of the act is to preserve competition in the market, but this is a second stage or second level of consideration. The fundamental purpose of competition policy, of competition, is to provide for all who wish to have services and goods a substantial significant variety of choice. Availability is important. Availability of quality goods is important. Availability of goods at prices that are reasonably related to different qualities of goods and service are the fundamental objectives.

• 1825

Therefore it seems to us that clearly the task of the tribunal under those circumstances is to apply the test which we submit would be the appropriate test, to weigh the evidence about the nature of the marketplace. It must determine which goods and services are involved and which ones will be available after the merger to those who wish to have them. There must be adequate choice at adequate prices, with quality that the individuals or the companies seeking those services wish to have at particular price levels.

One can fairly readily form a judgment with that kind of evidence spread out before one. One can thus conclude whether the interest of the public would be preserved in the purpose of competition policy in a particular market that would result after a proposed merger was completed.

Mr. Domm: Well, I suppose I could skip a couple of questions, but there is one I would like to bring to your attention for some consideration. Your organization has argued that the proposed test in Bill C-91 to substantially lessen competition is too strong; it may impede necessary restructuring. And I think you referred to one of the problems Canadian General Electric may be having in this regard, as you restructure your companies: the lessening of competition and the restructuring of your company in order to be competitive.

Now does the CMA not think that C-91 places sufficient importance on international competition with the purpose

[*Translation*]

M. Domm: J'essayais de savoir qui pourrait, à votre avis, déterminer en deça de quel seuil l'industrie ne pourrait aller, seuil à partir duquel ces fusions ne seraient plus autorisées.

M. Thibault: Excusez-moi de vous interrompre, monsieur le président. Nous savions qu'originellement nous préférerions prendre un vol plus tôt, mais compte tenu de l'importance de cette discussion, je crois que nous pourrions la poursuivre aussi longtemps que vous le désirerez; nous prendrons simplement un vol qui part plus tard, alors ne vous inquiétez pas de l'heure. Je crois que nous devrions poursuivre cette discussion.

M. Domm: Je ne sais tout simplement pas comment nous pourrions fixer, et je vous demande ce que vous en pensez, ce seuil minimum dans un secteur donné, seuil en deça duquel les conditions du marché seraient telles que la concurrence serait entravée.

M. Feltham: Puis-je répondre à cette question en en discutant quelques instants? Reportons-nous à l'objet même de la politique de concurrence.

Cette loi, disons-nous, a pour objet de préserver la concurrence sur les marchés, mais ce n'est là qu'un aspect secondaire. L'objet fondamental de cette loi est de donner à tous ceux qui désirent des biens et des services, la variété du choix. Cette variété de choix est importante. Il importe de pouvoir choisir des biens de qualité. Pouvoir choisir des biens à des prix qui sont fonction de la qualité des biens et services offerts; voilà les objectifs qui sont à la base de toute politique de concurrence.

Par conséquent, il nous semble, dans ces circonstances, que le tribunal devrait appliquer le critère que nous proposons, à savoir, mesurer la concurrence qui demeurerait. Le tribunal doit déterminer quels biens et services sont en cause et quels biens et services pourront se procurer ceux qui le désirent après fusionnement. Il doit y avoir suffisamment de choix à des prix compétitifs, la qualité de ces biens correspondant aux prix que désirent payer ceux qui requièrent ces services.

Toutes ces données devraient permettre aux responsables de prendre une décision. Le tribunal pourrait alors décider si l'intérêt du public serait préservé, du point de vue de la concurrence, si une fusion était autorisée.

M. Domm: Je pourrais peut-être passer outre à deux questions que je voulais vous poser, mais il y en a une dont je voudrais vous faire part. Votre Association a fait valoir que le critère énoncé dans le projet de loi C-91, soit diminuer sensiblement la concurrence, est trop strict; vous pensez qu'il pourrait empêcher des restructurations nécessaires. Et vous avez cité l'exemple de la *General Electric* du Canada qui pourrait avoir certaines difficultés à restructurer ses entreprises: la diminution de la concurrence et la restructuration d'une entreprise en vue d'être concurrentielle.

L'Association des manufacturiers canadiens ne pense-t-elle pas que le bill C-91 accorde suffisamment d'importance à la

[*Texte*]

clause, the efficiency defence and by the fact that international considerations are present in two of the factors? We have listed a number of factors and we have already entered into a discussion of perhaps adding some more when we go through second reading in the House of Commons. It was suggested that other factors could be added. We have no difficulty in considering factors, but we still have difficulty. I am still not clear on how you have reached that threshold beyond which the problem would be created if you merge. I do not know how you reach that threshold and I am still not clear on it. Maybe there is another answer or maybe you have given the only answer and I do not yet understand it.

I would like to point out that you mentioned about the Americans relaxing their merger tests. Would you not agree that even with the proposed changes in the United States to lessen their merger tests, the American law would still be tougher than the Canadian one, even with the lessening of their proposed merger tests in their competition and legislation?

Mr. Feltham: With respect, sir, I cannot agree that that would be the effect. The present state of the law in the United States is that a merger may be, shall we say, prevented or interfered with if it is judged to substantially lessen competition. Those are the words of the Clayton Act, and they have been the words for several decades.

The proposed change to the Merger Modernization Act of 1986, as it is called by the administration proposal to Congress, would substitute a test to prevent a merger only if it significantly enhanced the ability of the actors to exercise market power. The definition of market power indeed amounts to abusive market power, to significantly enhance prices over a substantial period of time. That is a very, very different test from the one which is proposed by us with regard to C-91. It is indeed a very substantially different test from . . .

Mr. Ouellet: Was it approved in the U.S.?

Mr. Feltham: No, these are the administrative proposals. I believe the administration delivered a package of five bills to Congress on February 19, one of which was the Merger Modernization Act. They described the bill for merger modernization which proposed to change the test with regard to mergers from substantial lessening of competition and to abandon, in the words of the background notes for the proposal addressed to Congress, the baggage which the words "substantial lessening of competition" had attracted over the years. It is our respectful submission to you, gentlemen, that we in Canada ought not to take that baggage on at this stage of our development.

• 1830

Mr. Ouellet: Would you answer more precisely what the Parliamentary Secretary has asked you? You are talking about potential amendments in the United States. They are not on the book yet.

[*Traduction*]

concurrence internationale vu l'article portant sur l'objet de cette loi, le critère de rentabilité et compte tenu que deux des facteurs portent sur des considérations d'ordre international? Une liste de facteurs figure dans la loi et nous songeons à en ajouter d'autres, vu les discussions que nous avons eues avec certains groupes, lorsque ce projet de loi passera en deuxième lecture. Certains nous ont proposé d'y ajouter d'autres facteurs. Nous n'y voyons aucun mal, mais des zones d'ombre demeurent. Je ne sais toujours pas comment vous avez déterminé ce seuil au-delà duquel des problèmes surviendraient en cas de fusion. Je ne sais pas comment vous avez fixé ce seuil et je ne comprends toujours pas. Peut-être une autre réponse pourrait m'être donnée, ou il se peut que vous m'ayez donné la seule réponse qui existe et que je ne l'aie toujours pas comprise.

Vous avez dit, d'autre part, que les États-Unis assouplissaient les critères de fusion. Ne pensez-vous pas que, même si les États-Unis assouplissaient leurs critères, la loi américaine serait toujours plus stricte que la loi canadienne?

M. Feltham: Excusez-moi, monsieur, mais je ne crois pas que ce serait le cas. La loi américaine actuelle décrète qu'une fusion peut ne pas être autorisée ou peut être entravée si elle a pour effet de diminuer sensiblement la concurrence. Ce sont ces mots qui figurent dans la *Clayton Act*, et ils n'ont pas changé depuis des dizaines d'années.

D'après les modifications proposées à la *Merger Modernization Act of 1986* par le gouvernement américain, proposition qui a été présentée au Congrès, une fusion ne serait interdite que si les protagonistes pouvaient exercer une plus grande emprise sur le marché. Par emprise sur le marché, entendons toute emprise abusive, qui aurait pour effet d'augmenter de façon sensible les prix pendant longtemps. Ce critère est très, très différent de celui que propose le projet de loi C-91. De fait, c'est un critère qui diffère du tout au tout . . .

M. Ouellet: Cette modification a-t-elle été adoptée aux États-Unis?

M. Feltham: Non, ce ne sont que des propositions avancées par le gouvernement. Je crois qu'il a présenté cinq projets de loi au Congrès, le 19 février dernier, dont ce *Merger Modernization Act*. On décrit ce projet de loi comme une modernisation ayant pour objet de modifier et d'assouplir le critère en matière de concurrence, et d'après les notes d'information qui accompagnent le projet de loi dont a été saisi le Congrès, ce que les mots «diminue sensiblement la concurrence», avaient attiré au fil des ans, serait abandonné. Nous pensons, messieurs, que le Canada ne devrait pas endosser ce fardeau à ce stade-ci.

M. Ouellet: Pourriez-vous répondre plus précisément à la question que vous a posée le secrétaire parlementaire? Vous avez dit que des amendements étaient envisagés aux États-Unis. Ils n'ont pas encore été adoptés?

[*Text*]

Mr. Feltham: No, indeed they are not.

Mr. Ouellet: Therefore, the American law is tougher than the Canadian law.

Mr. Feltham: I understood him to be referring in turn to our reference to proposed amendments in the United States. If I understood you correctly, perhaps I did not and if I did not I apologise, you suggested that even with those changes the law would be tougher in the United States.

Mr. Domm: That is my understanding.

Mr. Feltham: I addressed this point, and offered my professional opinion that just the converse would be the result of the implementation of those provisions in the United States. As things now stand, the administration of the law in the United States, both as applied by the highest court and also in the approach taken by the administrative authorities in the Department of Justice and the Federal Trade Commission, is considerably more generous with regard to mergers than was the case a decade ago when mergers involving as small a percentage as 5% of the market were struck down as being anti-competitive.

Mr. Ouellet: Is it 10% now?

Mr. Feltham: It is certainly not 50% yet, and there are many situations in Canada in which I submit that we should tolerate even a 50% concentration, having regard to the strength of remaining competition. If one conjures up the picture of one firm which has roughly 50% of the market and two others which have 25%, one might still have a very viable situation. We had some illustration of this sort of experience over the years in Canada. Some of us who were involved in the rationalization of the major appliance business would be very concerned that the implementation of the proposed test would have prevented what has turned out to be a very constructive merger and which has resulted in enhanced product choice and efficiency of production.

Mr. Domm: Mr. Chairman, I just went down some of these other comments, which I think I probably have had sufficient answers on three of them, but I would like to ask about one. It might not take very long to respond to. In your presentation you brought up the matter of delivered pricing, and your recommendation in the brief you presented was that we consider the possibility of an amendment to section 52, to ensure the delivered pricing provision applies only to situations where there is both a practise of delivering to some customers, and a practise of not delivering to others. Now, are the proposed changes really necessary, given that section 52 clearly defines delivered pricing as a practise of refusing a customer delivery?

Mr. Feltham: But one has to go on with respect to the rest of the clause, and it is not clear that the word practise applies to the rest of the clause, which relates to the possibility that one event of delivering to another customer would trigger the intervention of the tribunal or of the director. There might be a practise of not delivering to the complaining customer or potential customer, but not a practise of delivering to others. It is simply for clarification on that point which we submit the recommendation for change. We do not see that as a funda-

[*Translation*]

M. Feltham: Non, ils ne l'ont pas encore été.

M. Ouellet: Par conséquent, la loi américaine est plus stricte que la loi canadienne.

M. Feltham: Je croyais qu'il parlait des amendements proposés aux États-Unis. Je croyais vous avoir entendu dire, et excusez-moi si j'ai tort, que même compte tenu de ces changements, la loi américaine serait plus stricte que la loi canadienne.

M. Domm: C'est précisément cela.

M. Feltham: Oui, mais je vous ai fait valoir que ce serait justement l'inverse, si ces dispositions étaient adoptées aux États-Unis. À l'heure actuelle, la loi américaine qu'appliquent tant la Cour suprême que les autorités du ministère de la Justice et de la *Federal Trade Commission*, est beaucoup plus laxiste en matière de fusion que ce n'était le cas il y a 10 ans lorsque des fusions qui n'engagaient que 5 p. 100 du marché étaient taxées d'anticoncurrentielles.

M. Ouellet: Est-ce 10 p. 100 maintenant?

M. Feltham: Ce n'est pas 50 p. 100 encore, c'est certain, et permettez-moi de vous dire que devrions pouvoir tolérer, au Canada, même une concentration de 50 p. 100, si la concurrence qui demeure est vigoureuse. Si une entreprise détenait 50 p. 100 du marché et que deux autres en détenaient 25, la concurrence pourrait demeurer vive. Nous en avons vu des exemples au fil des ans au Canada. Ceux d'entre nous qui ont participé à la rationalisation du secteur des gros appareils ménagers auraient été très inquiets si ce nouveau critère avait entravé une fusion qui s'est révélée un succès et qui a entraîné une plus grande variété de choix et une rationalisation de la production.

M. Domm: Monsieur le président, je viens de parcourir la liste de mes questions, et j'ai reçu la réponse à trois d'entre elles, mais j'aimerais en poser une autre. La réponse ne sera peut-être pas longue. Dans votre exposé, vous avez fait allusion au prix à la livraison et vous recommandez que l'article 52 soit modifié pour que cette pratique s'applique uniquement lorsque des fournisseurs livrent des articles à certains clients et pas à d'autres. Or, je me demande si ces modifications sont vraiment nécessaires, étant donné que l'article définit le prix à la livraison comme étant la pratique de refuser à un client la livraison d'un article?

M. Feltham: Oui, mais il faut lire l'article dans son intégralité, et il n'est pas certain que le mot pratique s'applique au reste de l'article qui semble dire que si un fournisseur livre un article à un autre client, cette pratique déclencherait l'intervention du tribunal ou du directeur. Il se peut que le fournisseur ne livre pas un article à un client qui se plaint ou à un client éventuel, mais qu'il le livre à d'autres. Nous recommandons cette modification uniquement par souci de précision. Nous ne le considérons pas comme un problème de taille. Nous

[*Texte*]

mental matter. Indeed we believe, as you have implied that this is the intention of the section. Our members, who feel addressed by that provision, potentially addressed by it, have expressed concern that it be made clear.

• 1835

Le président: Merci, monsieur Feltham.

La Maison *Canadian General Electric* que vous représentez est sûrement très fière de vous avoir comme vice-président. Nous les comprenons.

Une voix: Merci.

Le président: Au nom de mes collègues, je vous remercie infiniment de votre présence. Je m'excuse encore une fois, du retard de 30 minutes dû à un appel pour voter en chambre. J'espère que votre horaire ne sera pas trop chambardé.

Merci beaucoup.

M. Thibault: Je voudrais dire qu'il nous a fait plaisir d'être reçus. Je félicite tous les gens qui ont participé.

Le président: Merci, monsieur Thibault.

S'il n'y a pas d'autres commentaires, j'ajourne le Comité jusqu'à mardi, le 6 mai, à 09h30.

Merci de votre présence.

[*Traduction*]

pensons effectivement, comme vous l'avez dit, que c'est là l'objet de cet article. Nos membres, que cet article vise ou pourrait viser, s'inquiètent de ce qu'il ne soit pas suffisamment clair.

The Chairman: Thank you, Mr. Feltham.

I am sure that Canadian General Electric, which you represent, is very proud of its Vice-President. We do agree.

An hon. member: Thank you.

The Chairman: On behalf of my colleagues, I thank you very, very much for coming. I apologize once more for the 30 minutes delay due to a vote. I hope that your schedule will not suffer too much.

Thank you very much.

Mr. Thibault: I would like to say that we were very pleased by your invitation. I congratulate all the participants.

The Chairman: Thank you, Mr. Thibault.

If there is no other comment, I declare the meeting adjourned until Tuesday, May 6, at 9.30 a.m.

Thank you for coming.

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WITNESSES—TÉMOINS

At 10:45 a.m.:

From the Business Council on National Issues:

Thomas P. d'Aquino, President and Chief Executive Officer;

William F. McLean, Co-Chairman, Competition Task Force;

William Rowley, Legal Advisor.

At 3:30 p.m.:

From the Canadian Bar Association:

John Clarry, Chairman, Special Committee on the Combines Investigation Act;

Bruce McDonald, Member, Special Committee on the Combines Investigation Act.

At 4:45 p.m.:

From the Canadian Manufacturers' Association:

J. Laurent Thibault, President;

Ivan Feltham, Vice-President, Canadian General Electric.

A 10 h 45:

Du Conseil d'entreprises sur les questions d'intérêt national:

Thomas P. d'Aquino, président et chef de la direction;

William F. McLean, coprésident du groupe de travail sur la concurrence;

William Rowley, conseiller juridique.

A 15 h 30:

De l'Association du Barreau canadien:

John Clarry, président, Comité spécial sur la Loi relative aux enquêtes sur les coalitions;

Bruce McDonald, membre, Comité spécial sur la Loi relative aux enquêtes sur les coalitions.

A 16 h 45:

De l'Association des manufacturiers canadiens:

J. Laurent Thibault, président;

Ivan Feltham, vice-président, *Canadian General Electric*.

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HOUSE OF COMMONS

Issue No. 5

Tuesday, May 6, 1986

Chairman: Marcel R. Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 5

Le mardi 6 mai 1986

Président: Marcel R. Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequences thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

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RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

WITNESSES:

(See back cover)

TÉMOINS:

(Voir à l'endos)

First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

26189—1

LEGISLATIVE COMMITTEE ON BILL C-91

Chairman: Marcel R. Tremblay

COMITÉ LÉGISLATIF SUR LE PROJET DE LOI C-91

Président: Marcel R. Tremblay

MEMBERS/MEMBRES

Bill Attewell
Pierre Cadieux
Bill Domm
Paul McCrossan
David Orlikow
André Ouellet
Ronald A. Stewart

(Quorum 4)

Le greffier du Comité

Lucie Gratton

Clerk of the Committee

Pursuant to S.O. 94(5)

On Tuesday, May 6, 1986:
Alan Redway replaced Robert Howie;
Ron Stewart replaced Alan Redway;
Bill Attewell replaced Robert Horner.

Conformément à l'article 94(5) du Règlement

Le mardi 6 mai 1986:
Alan Redway remplace Robert Howie;
Ron Stewart remplace Alan Redway;
Bill Attewell remplace Robert Horner.

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PROCÈS-VERBAUX

LE MARDI 6 MAI 1986
(7)

[*Texte*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, ce jour à 9 h 45, sous la présidence de Marcel R. Tremblay, (*président*).

Membres du Comité présents: Bill Attewell, Pierre Cadieux, Bill Domm, David Orlikow, André Ouellet et Ron Stewart.

Également présente: *De la Bibliothèque du parlement*: Margaret Smith, recherchiste.

Témoins: *De la Fédération canadienne de l'entreprise indépendante*: Richard Graham, agent des affaires nationales; Jim Bennett, vice-président des affaires législatives. *De l'Association canadienne de camionnage*: A.K. McLaren, directeur exécutif; Pat McGuire, président, *Inter City Truck Line*; Ralph Blackborow, directeur général, *Canadian Transportation Tariff Bureau Association*.

Le Comité reprend l'étude de son ordre de renvoi en date du jeudi 10 avril 1986 relatif au projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois (*Voir Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule nº 1*).

L'article 1 est réservé.

Le président met en délibération l'article 2.

Jim Bennett fait une déclaration, puis lui-même et le témoin répondent aux questions.

M. A.K. McLaren et Ralph Blackborow font une déclaration, puis eux-mêmes et le témoin répondent aux questions.

A 12 h 15, le Comité interrompt les travaux pour les reprendre à 15 h 30 aujourd'hui.

MINUTES OF PROCEEDINGS

TUESDAY, MAY 6, 1986
(7)

[*Translation*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 9:45 o'clock a.m. this day, the Chairman, Marcel R. Tremblay, presiding.

Members of the Committee present: Bill Attewell, Pierre Cadieux, Bill Domm, David Orlikow, André Ouellet, Ron Stewart.

In attendance: *From the Library of Parliament*: Margaret Smith, Researcher.

Witnesses: *From the Canadian Federation of Independent Business*: Richard Graham, National Affairs Officer; Jim Bennett, Vice-President of Legislative Affairs. *From the Canadian Trucking Association*: A.K. McLaren, Executive Director; Pat McGuire, President, Inter City Truck Line; Ralph Blackborow, General Manager, Canadian Transportation Tariff Bureau Association.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 relating to Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof (*See Minutes of Proceedings and Evidence dated Wednesday, April 23, 1986, Issue No. 1*).

Clause 1 is allowed to stand.

The Chairman called Clause 2.

Jim Bennett made a statement and with the witness answered questions.

A.K. McLaren and Ralph Blackborow made a statement and with the witness answered questions.

At 12:15 o'clock p.m., the Committee adjourned until 3:30 o'clock p.m.

Le greffier du Comité

Eugene Morawski

Clerk of the Committee

AFTERNOON SITTING
(8)

[*Text*]

The Legislative Committee on Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, met at 3:43 o'clock p.m., this day, the Chairman, Marcel R. Tremblay, presiding.

SÉANCE DE L'APRÈS-MIDI
(8)

[*Traduction*]

Le Comité législatif sur le projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois, se réunit, aujourd'hui à 15 h 43, sous la présidence de Marcel R. Tremblay, (*président*).

Members of the Committee present: Bill Attewell, Pierre Cadieux, Bill Domm, David Orlikow, André Ouellet and Ronald Stewart.

In attendance: *From the Library of Parliament*: Margaret Smith, Research Branch.

Witnesses: Mr. Daniel Martin Bellemare. Professor Donald N. Thompson of York University.

The Committee resumed consideration of its Order of Reference dated Thursday, April 10, 1986 relating to Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof (*See Minutes of Proceedings and Evidence dated Wednesday, April 23, 1986, Issue No. 1*).

On Clause 2

Daniel Martin Bellemare made a statement and answered questions.

Professor Thompson made a statement and answered questions.

At 5:38 o'clock p.m., the Committee adjourned to the call of the Chair.

Membres du Comité présents: Bill Attewell, Pierre Cadieux, Bill Domm, David Orlikow, André Ouellet, Ronald Stewart.

Aussi présente: *Du Service de recherche de la Bibliothèque du parlement*: Margaret Smith, recherchiste.

Témoins: Me Daniel Martin Bellemare. M. Donald N. Thompson, professeur de l'université York.

Le Comité reprend l'étude de son ordre de renvoi du jeudi 10 avril 1986 relatif au projet de loi C-91, Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois (*Voir Procès-verbaux et témoignages du mercredi 23 avril 1986, fascicule nº 1*).

Article 2

Daniel Martin Bellemare fait une déclaration et répond aux questions.

M. Thompson fait une déclaration et répond aux questions.

A 17 h 38, le Comité s'ajourne jusqu'à nouvelle convocation du président.

Le greffier du Comité

G.A. Sandy Birch

Clerk of the Committee

EVIDENCE

(*Recorded by Electronic Apparatus*)

[*Texte*]

Tuesday, May 6, 1986

• 0945

Le président: À l'ordre!

En attendant l'arrivée des témoins, M. Orlikow veut soulever une question de procédure. Monsieur Orlikow, on vous écoute.

Mr. Orlikow: Mr. Chairman, I want to put it on the record, and maybe it is good that the delegation is not here yet so we have a few minutes to discuss what I am going to raise. I want to say that I am very dissatisfied with what I think is the unnecessary and to me unacceptable speed with which this committee is trying to do its work. The witnesses we suggested are being telephoned by the clerk and are being informed that they will not be able to appear, that instead they are invited just to submit a brief.

Now, these are people—I am talking about the professors—who have done a lot of work in this field; they have a great deal of knowledge. We sent them the bill with a few explanatory notes. We hoped these people would have a chance, at least until the end of this month, to prepare a submission. Under the deadlines imposed by this committee, that is impossible. They cannot really make a contribution because they have other work to do. They need some time.

I will just take one example, Professor Irving Brecher. He is not a supporter of the NDP. On questions like free trade we happen to disagree completely, but he has done a tremendous amount of work in this field. He is very knowledgeable. He has done 25 years of study in this field. He gave a message to the clerk that he cannot make a submission under the circumstances he was told he would have to do it under. He has a real case to make. He would be doing this as a considerable public service, if we only take the time to let him complete the job and hear him out in person. Instead the committee says no, he has to submit a brief.

And what we are hearing is essentially a parade of groups who have a vested interest, and who have already, we believe, had considerable input in their discussions through the advisory committee. It will not hear, with the exception of Professor Stanbury and a few others, those people who can take a detached, analytical point of view.

We want to know what the hurry is. Why do we not want to hear these witnesses? Is it because the Minister wants to get the bill through quickly? Is it because the majority of this committee . . . ? Is that why the majority of the committee set up this schedule, or was it just a simple oversight? I ask, what is the big hurry? We waited 25 years without major reform of

TÉMOIGNAGES

(*Enregistrement électronique*)

[*Traduction*]

Le mardi 6 mai 1986

The Chairman: Order, please!

While we are awaiting the arrival of the witnesses, Mr. Orlikow would like to raise a point of order. Mr. Orlikow, you have the floor.

M. Orlikow: Monsieur le président, il est peut-être bon que les témoins ne soient pas encore arrivés car j'aimerais prendre quelques minutes pour soulever une question. Je tiens en effet à vous faire part de ma très grande insatisfaction face à la rapidité inutile et inacceptable, à mon avis, avec laquelle notre Comité essaie d'accomplir son travail. Le greffier a téléphoné aux témoins que nous avons proposés pour leur dire qu'ils ne pourront pas témoigner, et à la place, on leur demande de se contenter de soumettre un mémoire.

Or, certains de ces témoins, je songe ici aux professeurs, ont longuement oeuvré dans ce domaine; ils ont donc acquis des connaissances très étendues. Nous leur avons envoyé le projet de loi avec quelques notes explicatives, dans l'espoir qu'ils auraient le temps de préparer un mémoire, tout au moins d'ici la fin du mois. Cependant, en raison de l'échéance imposée par notre Comité, c'est maintenant impossible. Ils ne peuvent donc pas vraiment nous fournir leur contribution parce qu'ils ont d'autres choses à faire. Il leur faudrait donc un peu de temps.

Je ne vous citerai qu'un exemple, celui du professeur Irving Brecher. Je précise tout de suite qu'il n'appuie pas le NPD. Au sujet de questions comme le libre-échange, nous sommes même en désaccord complet, mais il a abattu un travail considérable dans le domaine qui nous occupe et s'y connaît vraiment très bien. Cela fait 25 ans qu'il étudie ce genre de questions. Enfin, il a fait savoir au greffier qu'il ne pouvait préparer un mémoire compte tenu des circonstances dans lesquelles on lui demandait de travailler. Or, il a vraiment des arguments très importants à nous présenter. Il nous rendrait donc grandement service ainsi qu'au public s'il participait à nos travaux, si seulement nous lui donnions suffisamment de temps pour terminer son texte et l'écouter en personne. À la place de cela cependant, le Comité a dit non, et il doit envoyer un mémoire.

La succession de groupes que nous entendons en ce moment ont des intérêts à sauvegarder, et ils ont déjà maintes fois pu faire valoir leurs points de vue par l'entremise du Comité consultatif. Toutefois, à l'exception du professeur Stanbury et de quelques autres, notre Comité n'entendra pas le témoignage de ceux qui envisagent la question avec un peu plus de distance et d'esprit analytique.

Nous voulons savoir pourquoi on est tellement pressé. Pourquoi ne veut-on pas entendre ces témoins? Est-ce parce que le ministre veut faire adopter le projet de loi dans peu de temps? Est-ce à cause de l'attitude de la majorité au sein de ce Comité? Est-ce pour cela qu'elle a adopté un tel calendrier de travail ou tout simplement par négligence? Je le répète donc, pourquoi est-on si pressé? Cela fait 25 ans qu'on n'a pas

[*Text*]

the Combines Investigation Act, why would a couple more weeks or a month make such a difference?

The Minister said he is prepared to listen to amendments. I do not know. We have not had any consideration of the proposals made by the independent marketers, or the proposals made by Professor Stanbury, and I know because I have a copy of a letter which went out last week to the Minister from the Manitoba Minister of Telecommunications that they are very concerned about several clauses of this bill. They want important amendments made. When are we going to discuss those?

So I say if we are going to work to this schedule we are not going to do the work as it should be done. I do not know why the committee is trying to rush this, because if we do not hear all these people, if we do not consider the amendments proposed, for example, by the independent marketers and by Professor Stanbury, and by governments—and Manitoba will not be the only government—then I want the committee to know that we will have a lot of amendments at the report stage. It will not pass quickly anyway. I think the committee should rethink what it is doing.

One last thing: I notice in the report with regard to witnesses that of the six conglomerates I suggested should be called, four of them have already indicated that they do not want to appear. Well, that is not acceptable to me, Mr. Chairman. In my view, unless we look at the whole question of what the conglomerates are doing, we are not going to do a job. I do not accept that they have a right to just say they do not want to come and therefore not come. I think we have a right to insist that they come.

• 0950

I want to put it on the record right now, Mr. Chairman, that I am very dissatisfied; and if I am dissatisfied and if steps are not taken to meet some of these suggestions I have made, I am not going to co-operate in getting this thing through quickly.

Le président: Je prends note du fait que vous avez l'intention d'envoyer au président une lettre exposant votre désaccord quant au processus de sélection des témoins.

J'aimerais vous rappeler que toutes les décisions relativement au choix des témoins sont prises par le Comité directeur. Le Comité directeur a siégé jeudi dernier. Vous étiez absent et le Nouveau parti démocratique n'était représenté par personne. On dit souvent que les absents ont tort. Ce proverbe s'applique au sein du Comité législatif étudiant le projet de loi C-91.

Je prends quand même note de vos remarques. Selon l'entente qui a été conclue, ce n'est qu'à la réception des mémoires qu'on peut décider si on va entendre les témoins par

[*Translation*]

modifié en profondeur la Loi relative aux enquêtes sur les coalitions, pourquoi ne peut-on nous accorder quelques semaines de plus?

Le ministre a dit être disposé à tenir compte de nos amendements. Nous n'avons pas étudié les propositions des organismes indépendants de commercialisation ni celles du professeur Stanbury, et je suis au courant car j'ai en main une copie d'une lettre que le ministre des Télécommunications du Manitoba a envoyée au ministre la semaine dernière, où il dit être très préoccupé par plusieurs dispositions de ce projet de loi. Le ministre demande également qu'on apporte des amendements substantiels. Or, quand allons-nous en discuter?

Si nous allons nous en tenir à notre calendrier actuel, nous n'allons pas faire le travail comme il devrait s'effectuer. Je ne comprends pas pourquoi le Comité essaie d'accélérer les choses à ce point, car si nous n'entendons pas ces témoins, si nous ne tenons pas compte des amendements proposés, comme par exemple ceux des organismes indépendants de commercialisation, du professeur Stanbury et des autres gouvernements provinciaux à part le Manitoba, alors je tiens à vous avertir que nous proposerons beaucoup d'amendements à l'étape du rapport. Le projet de loi ne sera donc pas adopté rapidement de toute façon. J'estime donc que le Comité devrait repenser à sa façon de procéder.

Une dernière chose: au sujet du rapport portant sur les témoins, j'ai remarqué que quatre des six conglomérats, dont j'avais proposé la venue nous ont déjà fait savoir qu'ils ne veulent pas témoigner. Eh bien, je ne puis accepter cela, monsieur le président. À mon avis, à moins d'étudier les pratiques de ces conglomérats, nous ne nous acquitterons pas de nos responsabilités de façon satisfaisante. Je n'accepte pas que ces derniers puissent tout simplement nous laisser savoir qu'ils ne veulent pas témoigner, et ne viennent donc pas. Je crois que nous avons le droit d'insister pour qu'ils comparaissent.

Je tiens donc à ce que vous sachiez que je suis très mécontent, et je veux que cela soit consigné au compte rendu. En outre, si on ne donne pas suite à certaines de mes propositions, je vais refuser de collaborer à l'examen et à l'adoption rapide de ce projet de loi.

The Chairman: I take note that you have told us your intention to send the chairman a letter expressing your disagreement concerning the way in which the witnesses are selected.

I would like to remind you that all the decisions pertaining to the choice of witnesses are taken by the steering committee. This committee sat last Thursday, and you were absent, and you were not represented by anyone from the New Democratic Party. It is often said that the absent are always in the wrong. This saying at any rate applies to the legislative committee studying Bill C-91.

Still, I take good note of your remarks. According to the agreement we came to, it is only once that we have received the briefs that we can decide if the witnesses should be heard,

[*Texte*]

la suite, tout dépendant du ou des sujets traités. Jusqu'à maintenant, ce ne sont pas les réunions du Comité directeur qui ont manqué. Je pense qu'on en a tenu une pratiquement après chaque réunion régulière. Nous avons, par l'entremise de notre greffière, M^me^ Gratton, accompli un travail extraordinaire en ce qui concerne la liste que vous avez déposée il y a environ deux semaines. Nous avons décrit en deux pages tous les efforts qui ont été faits par la greffière.

Vous avez, vous-même, envoyé une lettre à chacun pour l'inviter. De plus, on a décidé de communiquer directement avec chacune des personnes que vous vouliez qu'on entende. On a discuté de ce premier rapport à la dernière séance du Comité directeur, et on est d'avis qu'une révision de votre liste devra se faire régulièrement et qu'une décision appropriée devra se prendre en temps opportun lors de séances du Comité directeur.

M. Ouellet: Monsieur le président, permettez-moi de préciser certaines choses.

Je suis content que vous disiez qu'on fait périodiquement une révision de la liste de témoins qui peuvent être invités à comparaître. Dans le document qui nous a été donné, je lis ceci:

> steering committee has decided not to invite him, but to ask for a brief.

C'est dans la section concernant le professeur Brecher.

I think there is a mistake there. I do not think we have said that we are not going to invite him. I think what we said was that we were going to do what we have done with others; that is, ask them to submit a brief first, and then we will decide on the agenda. I do not know who prepared this, but it might be the reason for Mr. Orlikow's disappointment, and I share his view. I do not think we should automatically preclude Professor Brecher from appearing. I think the decision was to ask Professor Brecher to submit a brief and to decide at another meeting of the committee whether or not to ask him to come at a later date. It is the same thing for Mr. Wilson. He was asked, as was Professor Brecher, to submit a brief; and we said that at the next meeting we would decide whether or not to invite him.

• 0955

So when I look at the list . . . Mr. Orlikow has not said that . . . Professor Thompson is appearing today and Mary Lou Spence of the Co-operative Union of Canada will appear later on, I think next week. They were the only two people that were ready to come. So far from excluding anybody from the list submitted by Mr. Orlikow, we have accommodated those who were ready to come. In fact, your batting average is 100% at the present time.

Mr. Orlikow: First of all, Mr. Chairman, yes, I missed the steering committee meeting. But you have to remember, and members of the committee have to remember, that we only have one member on this committee, that all our members are involved in committee work. So it is often difficult to get a

[*Traduction*]

all that depending on the subjects touched by the briefs. Up to now, there has been no dearth of meetings of the steering committee. I think that we had a meeting after nearly each regularly scheduled committee meeting. Furthermore, through our clerk, Mrs. Gratton, we were able to accomplish a very considerable amount of work on the list submitted by you about two weeks ago. We have described the efforts made by our clerk on two pages.

You yourself have sent a letter to each of the witnesses to invite them. Moreover, we have decided to communicate directly with each of the persons that you wanted us to hear. We discussed this first report at the last meeting of the steering committee, and it was decided then that periodic revisions of your list will be necessary, and that an appropriate decision will have to be taken at the appropriate time, in those meetings of the steering committee.

Mr. Ouellet: Mr. Chairman, allow me to clarify certain things.

I am happy that you are of the opinion that the list of witnesses that can be invited should be periodically revised. In the document that was distributed to us, I read the following:

> Le comité de direction a décidé de ne pas l'inviter, mais de lui demander plutôt d'envoyer un mémoire.

This is in the part concerning Professor Brecher.

Je crois qu'on s'est trompé ici. Je ne crois pas que nous ayons décidé de ne pas l'inviter. Je crois que nous avons plutôt dit que nous allons faire dans son cas la même chose que pour les autres, c'est-à-dire lui demander d'abord d'envoyer un mémoire, après quoi nous allons décider de l'inviter ou non. J'ignore qui a préparé ce document, mais c'est peut-être la raison pour laquelle M. Orlikow est déçu, et je partage son avis. Je ne crois pas que nous devrions automatiquement exclure le professeur Brecher de la liste des témoins. Je crois qu'on a plutôt choisi de demander au professeur Brecher de nous soumettre d'abord un mémoire, puis de décider, lors d'une séance ultérieure, de l'inviter ou non à venir témoigner. La même remarque vaut pour M. Wilson. On lui a aussi demandé de nous envoyer un mémoire, et nous avons aussi remis à la prochaine séance la décision de l'inviter ou non.

Et quand je regarde la liste . . . M. Orlikow n'a pas dit que . . . le professeur Thompson comparaît aujourd'hui et Mary Lou Spence de la *Co-operative Union of Canada* comparaîtra plus tard, la semaine prochaine, je crois. C'est les deux seules personnes qui étaient prêtes à venir. Loin d'exclure quiconque de la liste soumise par M. Orlikow, nous avons décidé de recevoir ceux qui étaient prêts à venir. Au fait, pour l'instant, votre score est de 100 p. 100.

M. Orlikow: Pour commencer, monsieur le président, j'ai raté le Comité directeur. Mais vous devez vous souvenir, tout comme les membres du Comité, que nous n'avons qu'un seul député à ce comité, et que tous nos députés travaillent en comité. Nous avons donc parfois du mal à obtenir un rempla-

[*Text*]

replacement if you happen to be out of Ottawa—I am not out of Ottawa that much.

As far as the other is concerned, I think part of the reason people are saying that they are not prepared to come is because of the timeframe. They are told they have to come pretty quickly—even if they have done work on this over a period of years, they have to prepare a brief. They cannot do that in a day or two. So I will get back to some of these people and see whether they could come a little later.

As I say, Mr. Chairman, I am certainly not happy. I am not prepared to accept a simple no from these corporations as being final, that they do not want to come.

Le président: Remarquez que je prends connaissance en même temps que vous de la liste qu'on vous a soumise. Si on vous la soumet régulièrement, c'est pour que vous puissiez faire des commentaires et donner votre approbation. J'ai l'impression qu'en ce qui concerne le professeur Brecher, il y a eu une erreur. On va y voir immédiatement.

En ce qui concerne le délai pour l'audition des témoins, si j'ai bonne mémoire, à une des premières réunions du Comité directeur, il avait été entendu qu'on entendrait tous les témoins qui méritent d'être entendus et qui désirent l'être sur une période de trois semaines allant jusque vers le 15 mai.

Monsieur Domm, s'il vous plaît.

Mr. Domm: Mr. Chairman, I just wanted to clear up a couple of points. Really, I am not doing much more than confirming some of the things that you have already said.

I want it made abundantly clear that there is no intention to avoid hearing representations made before our committee. We have discussed this on three occasions at steering committee meetings. We are having another steering committee meeting after the conclusion of our last witnesses tonight. It would be an ideal opportunity for an update from Mr. Orlikow on some of the ones that he would like to hear.

Perhaps I need a little clarification on his statement that if he recommends a witness appear and the witness does not want to come he will not accept that. I do not know what that means. Does that mean the steering committee will be entertaining another direction, other than a request to appear?

If I have somebody whom I want to have before the committee, I go to the steering committee meeting and suggest their name. We all follow the same procedure. We send them a letter and ask them if they would like to make a brief or appear before the committee. We understand they have a topic of interest to us and to this piece of legislation. So they write back to the chairman and say no, I am sorry; I do not wish to appear. I accept that.

I do not think we are looking, as a committee, to force everybody to appear. What did you mean, Mr. Orlikow, when you said you are not going to accept the fact that they do not want to appear?

Mr. Orlikow: I happened to spend a little time one evening at the finance committee when Imasco-Genstar and several

[*Translation*]

çant quand nous sommes en dehors de la ville; et personnellement, je ne m'absente pas très souvent.

Quant à l'autre question, si les gens vous disent qu'ils ne sont pas prêts à venir, c'est à cause des délais. On leur dit qu'ils doivent venir très vite, même lorsqu'ils ont travaillé sur cette question pendant plusieurs années, il doivent préparer un mémoire. C'est impossible en un jour ou deux. Je contacterai ces gens-là, et je verrai s'ils peuvent venir un peu plus tard.

Monsieur le président, comme je l'ai dit, je suis loin d'être satisfait. Ces sociétés nous ont peut-être dit qu'elles ne veulent pas venir, mais je me refuse. à croire que c'est là leur dernier mot.

The Chairman: Like you, I am reading this list for the first time. This list is sent to you regularly to allow you to make comments and give your approval. I have a feeling that there was a mistake concerning Professor Brecher. We will see to it immediately.

Concerning the timeframe for witnesses, if I am not mistaken, at one of the first steering committee meetings we decided to hear all the worthwhile witnesses who wanted to be heard over a period of three weeks ending approximately May 15.

Mr. Domm, please.

M. Domm: Monsieur le président, je tiens à préciser une ou deux choses. En fait, je me contente de confirmer certaines choses que vous avez déjà dites.

Je tiens à préciser que nous n'avons jamais eu l'intention de décourager certaines personnes de comparaître. Nous avons discuté de cela à trois reprises en Comité directeur. Une autre séance du Comité directeur est prévue après la dernière comparution ce soir. Pour M. Orlikow, ce serait une occasion idéale de nous dire quels sont les témoins qu'il souhaite entendre.

J'aimerais qu'il explique une chose: il a dit que s'il recommandait la comparution d'un témoin et que si celui-ci refusait de comparaître, il n'accepterait pas cette décision. Je ne comprends pas. Veut-il dire que le Comité directeur pourrait faire d'autres démarches et ne pas se contenter de la demande de comparution?

Si je veux entendre un témoin en particulier, je m'adresse au Comité directeur, je suggère un nom. C'est une procédure que nous suivons tous. Nous leur envoyons une lettre pour leur demander s'ils souhaitent présenter un mémoire ou comparaître devant le Comité. Il est entendu qu'ils ont un sujet qui nous intéresse et qui est lié à ce projet de loi. Ils répondent au président, ils disent que non, ils sont désolés, ils ne souhaitent pas comparaître. Je n'y vois rien à redire.

Je ne vois pas comment notre Comité pourrait forcer tout le monde à comparaître. Qu'est-ce que vous avez voulu dire, monsieur Orlikow, quand vous avez dit que vous n'étiez pas prêt à accepter que les témoins refusent de comparaître?

M. Orlikow: Il se trouve que l'autre soir j'ai passé un moment au Comité des finances un jour où Imasco-Genstar et

[*Texte*]

others were there, and I do not think those companies were that enthused to appear. The committee, however, obviously felt it was important that they appear so they appeared. And they not only appeared, but were sworn before they gave the evidence. I am going to make inquiries as to how it was done, and I am going to come back to this committee and suggest we insist that several of these organizations come.

• 1000

I am not quite sure; I will have to check out how the finance committee did it. Maybe this committee will not agree with my feeling that at least a couple of those companies should be required to come, but this is what I have in mind. If the finance committee was able to do it because they felt it was important, I feel what I am suggesting is important, and when I find out precisely how they did it I will come to this committee and make the same suggestion.

Mr. Domm: If this is the answer, Mr. Chairman, then it is abundantly clear. I think we should meet as a steering committee on a regular weekly basis. We should refer the agenda for the following week. We should decide who is able to come and willing and ready to come. We should collectively, all three parties, have the opportunity to put it in place. It still leaves open to you all the other options you have suggested. One of those options is not to discuss in a fashion which takes up this part of our agenda when we have the steering committee set aside specifically and assigned the responsibility of setting the agenda by the committee. You are on the steering committee, and I would strongly urge you to attend.

Mr. Orlikow: I will attend, Mr. Chairman. Just to Mr. Domm, we are not taking up any of the time of this committee, because the witnesses are not here. We would either be sitting here waiting for them—and obviously they are not going to come—or we would adjourn and come back at 10.45 a.m., when the next set of witnesses is to be here.

Le président: On me dit que les témoins sont en route. Permettez-moi d'ajouter un dernier détail. M^me^ Gratton, notre distinguée greffière, a suivi à la lettre les directives du Comité directeur, à savoir d'être très accueillante, très aimable et d'essayer de sensibiliser chaque témoin à l'importance de sa participation à nos audiences. Autant que je sache, jamais on ne lui a dit d'essayer de forcer les témoins à témoigner. Si jamais le Comité directeur en décide autrement, on lui donnera de nouvelles directives. Mais je ne pense pas que ce soit le cas maintenant.

Mr. Orlikow: Mr. Chairman, just to make it clear, I certainly did not mean to imply the clerk did anything wrong. I think the clerk followed what she understood was the will of the committee, or at least of the steering committee. Nothing I said should be taken as a criticism of the clerk.

[*Traduction*]

plusieurs autres compagnies comparaissaient. Il ne m'a pas semblé que ces compagnies débordaient d'enthousiasme. Toutefois, le Comité a jugé qu'il était important de les entendre. Les représentants de ces compagnies ont donc comparu, et, non seulement ils ont comparu, mais ils ont prêté serment avant de témoigner. Je vais essayer de savoir comment le Comité a procédé, et quand nous en reparlerons ici, je proposerais que nous insistions pour que plusieurs de ces organismes comparaissent.

Je ne sais pas très bien comment le Comité des finances s'y est pris, je vais devoir vérifier. Le Comité ne sera peut-être pas d'accord avec moi mais il se trouve qu'à mon avis il y a au moins une ou deux de ces compagnies qui devraient être tenues de comparaître. Si le Comité des finances a réussi à le faire après avoir jugé que c'était important, ma suggestion me paraît tout aussi importante, et quand j'aurai déterminé exactement ce qu'ils ont fait, je viendrai vous faire la même suggestion.

M. Domm: Monsieur le président, si c'est la réponse, elle ne saurait être plus claire. Je pense que le Comité directeur devrait se réunir régulièrement toutes les semaines. Nous devrions en profiter pour discuter de l'ordre du jour pour la semaine suivante. Nous devrions décider qui peut venir et qui est prêt et disposé à venir. Collectivement, les trois partis devraient avoir la possibilité de participer. Cela ne vous enlève aucune des autres options que vous avez suggérées, et notamment celle de ne pas perdre de notre temps de réunion avec ça alors que, si l'on a mis sur pied le Comité directeur, c'est précisément pour qu'il s'occupe de l'ordre du jour. Vous faites partie du Comité directeur et je ne saurais trop insister pour que vous assistiez aux séances.

M. Orlikow: J'ai l'intention d'y assister, monsieur le président. À l'intention de M. Domm, nous ne gaspillons pas le temps du Comité puisque les témoins ne sont pas encore arrivés. Nous pourrions aussi bien être assis ici à les attendre, car de toute évidence, ils ne viendront plus maintenant, ou bien nous pourrions lever la séance jusqu'à 10h45 et revenir pour les témoins suivants.

The Chairman: I am told that the witnesses are on their way. One last thing, if you do not mind. Madam Gratton, our distinguished clerk, has followed to the letter the directions of the steering committee and has always been very open, very friendly, and has always tried to impress upon the witnesses the importance of their participation. As far as I know, she has never been told to force witnesses to come. If the steering committee were to decide otherwise, she would be given new directions. But I doubt that they will.

M. Orlikow: Monsieur le président, je n'ai jamais prétendu que la greffière avait fait quoi que ce soit de répréhensible. Je suis certain qu'elle a suivi la volonté du Comité, ou du moins du Comité directeur, et rien de ce que j'ai dit ne doit être considéré comme une critique à son endroit.

[*Text*]

M. Ouellet: Monsieur le président, je pense qu'il est assez intéressant de constater que les grandes compagnies canadiennes que M. Orlikow voulait soumettre à un interrogatoire se sont défilées.

Normalement, quand un projet de loi les préoccupe, les grandes compagnies canadiennes se font un plaisir de venir nous le dire. Je ne pense pas que M. Orlikow réussisse à forcer le président ou le représentant d'une compagnie à venir témoigner devant ce Comité si le projet de loi n'affecte pas directement la compagnie en question. Il citait le cas d'Imasco qui était allée devant un comité parlementaire. On sait pourquoi. Il s'agissait d'un projet de loi qui avait été présenté au moment de la transaction impliquant la compagnie Imasco. Par conséquent, cette compagnie avait un intérêt éminent et direct à venir témoigner.

M. Orlikow devra tout simplement prendre note du fait que les grandes compagnies qu'il aurait aimé interroger sur ce projet de loi ont révélé qu'elles n'étaient pas intéressées. Si elles ne sont pas intéressées, c'est que le projet de loi ne les affecte pas.

• 1005

Cela prouve ce que certains d'entre nous ont déjà fait valoir, à savoir que le projet de loi ne va pas aussi loin que l'on souhaiterait. En tout cas, il ne va pas aussi loin que le souhaiterait M. Orlikow.

Je veux simplement dire à M. Orlikow que, bien sûr, il serait agréable de pouvoir interroger une multitude de témoins. Cependant, en toute justice, non seulement pour les membres de ce Comité mais pour les groupes qui s'intéressent à ce projet de loi, ceux qui voulaient vraiment venir témoigner ou soumettre leurs points de vue ont eu amplement le temps de le faire. Le projet de loi a été déposé en décembre dernier, et nous sommes maintenant en mai. Prenons l'exemple de M. Stanbury. Il avait des choses à dire et il a rédigé un texte fort étoffé qu'il est venu nous soumettre. Je pense que sa contribution sera très utile aux membres de ce Comité.

S'il y a des professeurs qui ne sont pas prêts à venir témoigner en ce moment, c'est bien regrettable, mais ce n'est pas une raison pour retarder les travaux de ce Comité. Ils ont eu amplement le temps de se préparer depuis décembre dernier. C'est peut-être malheureux, car nous serons privés de leurs bonnes suggestions. Cependant, nous avons déjà entendu amplement de recommandations émanant d'un certain nombre d'associations et d'individus, professeurs ou avocats. À mon avis, nous avons maintenant un éclairage suffisant et assez complet sur le projet de loi pour prendre nos propres décisions.

Le président: Monsieur Cadieux, s'il vous plaît.

M. Cadieux: J'aimerais faire une remarque sur le programme du Comité. Je pense qu'il n'y a pas lieu de prolonger les travaux du Comité, du moins pour l'instant. Quant au plaidoyer non partisan de M. Ouellet et, plus particulièrement, quant à sa conclusion, à savoir que les compagnies ne viennent pas parce que le projet de loi ne les touche pas et ne va pas assez loin, c'est une conclusion qui n'est pas nécessairement partagée par tout le monde.

[*Translation*]

Mr. Ouellet: Mr. Chairman, it is quite interesting to note that the big Canadian corporations that Mr. Orlikow wanted to question have run for cover.

Usually, when they are worried about a bill, the big corporations are only too pleased to come and tell us. I doubt that Mr. Orlikow will be able to force the chairman or the representative of a corporation to come as a witness if the bill does not affect the company directly. He mentioned Imasco, which was called as a witness before a Parliamentary committee. We all know why. The bill had been tabled at the time of the Imasco deal and that corporation had every reason to come as a witness.

Mr. Orlikow must just accept that the big corporations that he wanted to question concerning this bill were not interested and said so. They are not interested, because the bill does not affect them.

This proves what some of us have already pointed out, and that is that the Bill does not go as far as we would like it to. In any case, it does not go as far as Mr. Orlikow would like.

I would simply like to mention to Mr. Orlikow that, of course, it would be nice to be able to question a whole bunch of witnesses. However, in all fairness, not only to the members of this committee but also to the groups affected by this Bill, those who were really interested in appearing before this committee to present their views have had ample time to do so. The Bill was tabled last December and this is May. Take Mr. Stanbury, for example. He had things to say, and so he wrote quite an exhaustive brief which he submitted to our committee. In my opinion, his contribution will be very helpful to our study.

If there are any professors who are not willing to appear before the committee at this point, that is too bad, but it is not a reason for postponing our study. They have had more than enough time to prepare since last December. It is probably regrettable, because they may have good ideas that we will not now hear. On the other hand, we have already received numerous recommendations from a certain number of associations as well as individuals, professors and lawyers. In my opinion, we now a have a sufficiently clear and precise picture of this Bill to make enlightened decisions.

The Chairman: Mr. Cadieux, please.

Mr. Cadieux: I would like to make one comment about the committee's agenda. I do not think it is necessary to prolong the proceedings, at least not at this point. As for the non-partisan arguments presented by Mr. Ouellet, and particularly his concluding remarks that the companies have not shown up because the Bill does not concern them and does not go far enough, I must point out to him that not everyone necessarily shares his opinion.

[*Texte*]

Le président: De plus, on me dit que les petits groupes membres de grosses associations ont l'impression que leurs revendications ont déjà été exposées par les groupes plus importants. Lors de notre première réunion, j'avais bien dit que l'on essaierait d'éviter tout dédoublement. J'avais également dit à ce moment-là que l'on éviterait toute question répétitive de la part des membres du Comité.

M. Cadieux: Monsieur le président, vous avez dit que les témoins étaient en route. Est-ce que cela veut dire qu'ils quittent Toronto ou bien . . . ?

Le président: Ils sont actuellement à Ottawa.

Mr. Orlikow: Mr. Chairman, if we could come more to the point, it is already almost 10.10 a.m. There certainly will not be any time to question them. What is the point of hearing them? Let them just file their briefs, like the professors who are filing their briefs.

Le président: S'ils arrivent à 10h15, ils auront 15 minutes pour faire leur exposé et nous aurons 15 minutes pour leur poser des questions. On ne permettra pas que leur retard dérange notre programme de la journée.

Mr. Ouellet: In fairness to these people, we should allow them to come in. We will just sit a little longer this morning, maybe. This is an important national association. There has probably been some plane delay in Toronto. The current government is probably improving its security techniques at airports, and that is why they are late.

Le président: On va les attendre pour connaître l'explication de leur retard.

M. Cadieux: Les voilà!

• 1010

Le président: Nous souhaitons la bienvenue aux deux représentants de la Fédération canadienne de l'entreprise indépendante. Je comprends qu'il ait pu y avoir une petite erreur dans l'ordre du jour qui vous a été communiqué, et vous êtes pardonnés. On va vous donner 15 minutes pour présenter votre mémoire et, en fonction de la qualité des interventions et en essayant d'éviter les questions répétitives, on va essayer de dépasser le temps qui vous avait été initialement alloué sans pour autant nuire de trop au témoin qui va vous succéder.

Messieurs, vous avez la parole.

Mr. Jim Bennett (Vice-President of Legislature Affairs, Canadian Federation of Independent Business): Gentlemen, we very much apologize for keeping you waiting. In some ways I think there is no other piece of legislation where it would be more appropriate that another delay should happen than the one with regard to competition.

We would like to say first and foremost how pleased we are to be here and to have the opportunity to speak to this bill, which we see as a tremendous improvement over the existing Combines Investigation Act. We think it is very important that this bill be passed with a few improvements, which we will suggest.

[*Traduction*]

The Chairman: Moreover, I am told that the smaller member groups of large associations feel that their positions have already been stated by the major groups. During our first meeting, I indicated clearly that we would try to avoid any duplication. I also stated at that time that we would avoid any repetitious questioning on the part of the committee members.

Mr. Cadieux: Mr. Chairman, you said that the witnesses were en route. Did you mean that they had just left Toronto, or are they . . . ?

The Chairman: They are in Ottawa.

M. Orlikow: Monsieur le président, je crois qu'il serait à propos de noter qu'il est déjà 10h10. Nous n'aurons certainement pas le temps d'interroger les témoins. Donc, à quoi bon les entendre? Pourquoi ne pas simplement leur demander de déposer leurs mémoires, comme les professeurs l'ont fait?

The Chairman: If they arrive at 10.15, they will have 15 minutes to present their brief, after which we will have 15 minutes to ask them questions. We will not allow this delay to change our agenda.

M. Ouellet: En toute justice pour ces gens, j'estime que nous devrions leur permettre de comparaître. Cela ne fera que prolonger quelque peu la séance de ce matin. Il s'agit tout de même d'une importante association nationale. Leur avion a peut-être été retardé à Toronto. Après tout, le gouvernement est en train d'améliorer ses mesures de sécurité aux aéroports, et c'est pour cela qu'ils sont en retard.

The Chairman: We will ask them for an explanation when they arrive.

Mr. Cadieux: There they are!

The Chairman: I would like to welcome the two representatives of the Canadian Federation of Independent Business. I am told that there may have been a slight error in the agenda you were given, and you are therefore forgiven. You will have 15 minutes to present your brief and, depending on the quality of the questions while trying to avoid being repetitious, we will try to give you a little extra time than what had been originally planned, without infringing too much on the next witness's time.

Gentlemen, you have the floor.

M. Jim Bennett (vice-président, Affaires législatives, Fédération canadienne de l'entreprise indépendante): Messieurs, nous vous prions sincèrement d'excuser notre retard. D'une manière, je crois qu'il convient au projet de loi sur le tribunal de la concurrence, plus qu'à tout autre projet de loi, de subir encore un autre retard.

Permettez-nous d'abord de vous exprimer à quel point nous sommes heureux d'être ici et d'avoir l'occasion de vous parler du projet de loi qui, à notre avis, constitue un grand pas en avant comparativement à la Loi relative aux enquêtes sur les coalitions. Nous croyons qu'il serait très important d'adopter ce projet de loi après quelques modifications que nous allons vous présenter.

[*Text*]

Some of the comments we make in the very short paper we have prepared speak to defending some of the clauses in Bill C-91 against the attack we expect from certain of the representatives of big business groups. I think I should point out that there are three main provisions we would like to speak to. One regards mergers, pre-notification, and abuse of dominant position. I should point out that the whole issue of competition policy is very important to our members and to the small business community.

In our latest national survey, when we interviewed close to 12,000 small business people across the country, almost a quarter of them nationally complained that unfair business practices were a serious problem for their business.

M. Richard Graham (agent des affaires nationales, Fédération canadienne de l'entreprise indépendante): En effet, au Québec, près de 26 p. 100 d'eux trouvent qu'un de leurs plus grands problèmes est la concurrence déloyale. C'est donc un problème assez important.

• 1015

Mr. Bennett: In some parts of the country, for example New Brunswick and Prince Edward Island, approximately 40% of the entrepreneurs who replied to the survey complained about unfair business practices. This is an area of the bill we would like to see improved and we will speak to it later.

I think I will touch briefly on some of the points in our paper. For example, we are very pleased there is no suggestion of a Cabinet override. As you will see, we have some concerns about the expertise of the expert committee, especially when dealing with the notion of an efficiency defence. We will deal with efficiency defence separately.

Since the Minister's Advisory Committee, in terms of naming these lay people to the tribunal, might help to deal with some of these problems, I think it is a step in the right direction. You will notice, however, that the legislation says the Minister "may" appoint an advisory committee. We are suggesting the nominees for the tribunal be reviewed by the parliamentary committee because we like that principle as part of the ongoing process of returning parliamentarians to a more central role in governing Canada. That is why we have put the suggestion in.

We also raise the question of the relationship between Investment Canada and the Combines Investigation Act in that we would not like to see a decision by the Minister responsible for Investment Canada, prejudice the deliberations of the tribunal. We have made a suggestion accordingly.

When it comes to mergers, we are pleased to see mergers move from criminal to civil proceedings but we have difficulties with the concept of an efficiency defence and we would like guidelines such as those proposed in the act for determining when competition is significantly reduced. We would like to see something similar to deal with the whole concept of an efficiency defence.

[*Translation*]

Certaines des observations que renferme notre très court document visent à protéger certains articles du projet de loi C-91 contre les critiques que nous prévoyons de la part de représentants des grosses compagnies. Je souligne que nous avons l'intention de discuter de trois principales dispositions. La première concerne le fusionnement, la seconde les avis préalables, et la troisième l'abus de la position dominante. Toute la question de la politique relative à la concurrence revêt une importance capitale pour nos membres ainsi que pour le secteur de la petite entreprise.

La dernière enquête nationale que nous avons menée auprès de quelque 12,000 petits entrepreneurs à travers le pays a révélé que près de 25 p. 100 d'entre eux estimaient que les pratiques déloyales nuisaient gravement à leur survie.

Mr. Richard Graham (National Affairs Agent, Canadian Federation of Independent Business): In the Province of Quebec, nearly 26% of businessmen polled feel that one of their biggest problems is unfair competition. This is therefore a rather serious problem.

M. Bennett: Dans certaines régions, notamment le Nouveau-Brunswick et l'Île-du-Prince-Édouard, près de 40 p. 100 des entrepreneurs interrogés se sont plaints des pratiques déloyales. C'est une partie du projet de loi qu'il faudrait améliorer et dont nous parlerons un peu plus tard.

Je vais maintenant effleurer quelques points soulevés dans notre mémoire. Par exemple, nous sommes très heureux de voir qu'il n'est pas question de donner un droit de veto au Cabinet. Comme vous le verrez, la compétence des membres du comité d'experts nous inquiète quelque peu, particulièrement lorsqu'il s'agit d'étudier les arguments relatifs à l'efficience. Nous parlerons de ces derniers séparément.

Le Comité consultatif du ministre sera chargé de nommer les autres membres au tribunal ce qui aidera sans doute à résoudre certains de ces problèmes, et nous croyons que c'est un pas dans la bonne direction. Cependant, le projet de loi précise que le ministre «peut» nommer un comité consultatif. À notre avis, il faudrait que le comité parlementaire examine les candidatures au tribunal, car c'est un élément positif du processus visant à donner aux parlementaires un rôle plus central dans l'administration de notre pays. C'est pour cela que nous avons inclus cette recommandation.

Nous mentionnons également le lien entre Investissement Canada et la Loi relative aux enquêtes sur les coalitions. Il ne faudrait pas que le ministre responsable d'Investissement Canada prenne une décision qui risque de nuire aux délibérations du tribunal. Nous avons donc formulé une recommandation à cet effet.

Pour ce qui est des fusionnements, nous sommes heureux de voir qu'ils ne relèveront plus du criminel mais plutôt du civil. Cependant, le principe des arguments relatifs à l'efficience n'est pas très clair, et c'est pourquoi nous voudrions que des directives soient élaborées pour l'expliquer, comme celles qui sont proposées dans le projet de loi pour déterminer quand la concurrence est considérablement réduite. Nous voudrions des

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[*Texte*]

We very much support the position taken in the bill that the concept of substantial competition remaining cannot work and cannot be allowed in our competition policy. Also, we like the approach the bill has taken with regard to joint ventures. They have to be subject to the same test as mergers or they will become replacementds for mergers. Our one concern, and I mentioned it earlier, is the concept of the threshold for pre-notification. We have strong support from our members in a mandate vote for the whole notion of pre-notification. The threshold of $500 million combined assets or sales seems very, very high, however, given that the U.S. has just recently increased theirs from $100 million to $200 million, so we would ask this committee to recommend the threshold be lowered.

Similarly, with the $35 million of assets or sales, when you put the sales concept in it seems to make more sense. With $10 million or $20 million in sales, there are some medium-sized companies which might benefit if they were taking over some smaller firms. I am thinking particularly of grocery distribution, where some of the medium-sized firms might have to get bigger just to stand up to the giants. When it comes to some of the high-tech firms, assets of even $10 million mean a firm had significant potential benefit for growth and benefit for the country. A recent study done for DRIE by David Birch shows that Canada has relatively few medium-sized firms. This is particularly a problem in Quebec. If we are going to be able to compete in some of the international export markets, we need more medium-sized firms. That is one of our concerns with the threshold.

• 1020

In the question of abuse of a dominant position, the mention of barrier to entry or new entrants into the market is I think especially important at this time in our history in terms of job creation. Many recent studies, including one released by the Minister of Finance, indicated the majority of jobs are being created by business start-ups, and the impact of barriers to entry can be very, very significant.

To this point, we have only received the proceedings of your first two meetings, and we wanted to endorse the remarks that Mr. McKeown made before this committee on this clause in terms of the necessity of getting rid of the test of object or intent when it comes to abuse of a dominant position. This clause will be unenforceable if that test is left in.

We have some concerns with this whole concept of superior competitive performance. It seems to be very much bordering

[*Traduction*]

lignes directrices semblables pour les arguments relatifs à l'efficience.

Nous appuyons très fermement la position énoncée dans le projet de loi selon laquelle le principe de la concurrence réelle restante ne peut fonctionner et ne doit pas être permis dans une politique canadienne de la concurrence. Nous sommes également d'accord avec l'optique concernant les entreprises à risques partagés. Ces entreprises doivent subir le même test que les fusionnements, autrement elles risquent de les remplacer. La seule chose qui nous embête, et je l'ai déjà mentionné, c'est le principe du seuil des avis préalables. Nos membres nous ont donné leur appui ferme dans un vote, pour toute la question des avis préalables. Toutefois, nous trouvons extrêmement élevé le seuil de 500 millions de dollars en éléments d'actifs combinés ou en vente, étant donné que les États-Unis viennent de porter leur seuil de 100 millions de dollars à 200 millions. Par conséquent, nous demandons au Comité de recommander l'abaissement du seuil.

De même, lorsqu'on parle de 35 millions de dollars en éléments d'actifs ou de ventes, l'inclusion du principe de la vente rend le tout plus logique. Si l'on parle de 10 millions de dollars ou de 20 millions de dollars en ventes, certaines compagnies de taille moyenne pourront en bénéficier si elles décident de prendre le contrôle de plus petites entreprises. Je pense notamment au secteur de distribution d'épicerie, où certaines des entreprises de taille moyenne risquent d'être obligées de grandir pour pouvoir faire face aux géants. Lorsqu'il s'agit des entreprises de haute technologie, des éléments d'actifs d'à peine 10 millions de dollars prouvent que l'entreprise a un bon potentiel de croissance et qu'elle peut donc avantager le Canada. Une récente étude menée par David Birch pour le compte du MEIR a révélé que le Canada compte peu d'entreprises de taille moyenne. La situation est particulièrement frappante au Québec. Si nous espérons pouvoir trouver une place solide dans les marchés d'exportation internationaux, nous devons créer un plus grand nombre d'entreprises de taille moyenne. C'est là une de nos préoccupations concernant le seuil.

Pour ce qui est de l'abus de la position dominante, j'estime qu'il est particulièrement important, en cette période de notre histoire où la création d'emplois est indispensable, de mentionner les obstacles à l'entrée ou les nouveaux entrepreneurs. Bon nombre d'études récentes, y compris une publiée par le ministre des Finances, révèlent que c'est grâce à l'établissement de nouvelles entreprises que sont créés la majorité des emplois. Les conséquences des obstacles à l'entrée sur le marché peuvent être considérables.

Jusqu'ici, nous n'avons reçu que les procès-verbaux de vos deux premières séances, et nous tenons à réitérer les observations que M. McKeown a faites devant votre Comité au sujet de la nécessité d'éliminer la preuve d'intention dans les cas d'abus de position dominante. Si cette preuve n'est pas supprimée, l'article sera impossible à appliquer.

Par ailleurs, toute la question de l'efficience économique supérieure nous préoccupe. Cela semble friser les arguments

[*Text*]

on an efficiency defence, and we understand some of the big business groups are pushing for an efficiency defence in this clause, and we want to flatly reject that. If someone alleges that it is superior competitive performance, but it still involves cheating, it is wrong as far as we are concerned.

When it comes to unfair practices, it should just be basically wiped out per se, and we do not see why this concept of superior competitive performance needs to be in—although our main target, I will be quite precise, is this notion of object.

We are pleased that a non-exhaustive list of practices has been included and we very much urge you to leave it in. We suggest that predatory pricing, which is in a different part of the act, should be included as an unfair practice when it is practised by a dominant firm. Again, it can be dealt with under civil rather than criminal proceedings.

Finally, we would suggest that among the penalties that the tribunal can award should be damages to the firm that has had the unfair practices used against them. In some cases, you are going to find the firm has likely been put out of business, and the fact that the tribunal orders the offending large firm to stop the practices is going to be no recompense to the entrepreneur and his or her employees who have been closed down.

When it comes to conspiracy, we, like many others, have some concerns as to why the term "unduly" has to be in there, but it is not an area where we really have any expertise.

We are very, very pleased and have been asking for a number of years that Crown corporations and banks have their activities in the Competition Act, and we are very, very pleased that clause is in there. We think, particularly in the case of Crown corporations... Our members have been complaining about unfair competition when Crown corporations use their subsidized premises or the taxpayers' support of them to support anti-competitive activities, particularly just totally undercutting the market.

The foregoing represents just the barest outline of our position, but we wanted to get as many items onto the record as possible in case our silence was interpreted as lack of concern or lack of support for some of the issues, and as I said, we think the bill is a strong improvement to the existing legislation and hopefully it can be improved upon further.

• 1025

Le président: Monsieur Ouellet.

M. Ouellet: Je remercie les représentants de la Fédération canadienne de l'entreprise indépendante pour leur mémoire. Je remarque qu'il y a une foule de propositions d'amendements qui auraient pour effet de renforcer la Loi sur la concurrence. Je les remercie pour ces propositions très précises et très succinctes.

[*Translation*]

relatifs à l'efficience, chose que certaines associations de gros entrepreneurs voudraient inclure dans cet article et que nous rejetons catégoriquement. Dès qu'il s'agit de pratiques malhonnêtes, même si on prétend qu'elles sont dues à une efficience économique supérieure, nous estimons que ce devrait être inadmissible.

En ce qui concerne les pratiques déloyales, il ne faudrait même pas en faire mention; nous ne voyons pas pourquoi il faudrait parler d'efficience économique supérieure—néanmoins, notre but premier est vraiment d'éliminer la preuve d'intention comme telle.

Nous nous réjouissons de voir que ce projet de loi contient une liste non exhaustive des pratiques déloyales et nous vous enjoignons de la maintenir. Nous vous recommandons par ailleurs d'inclure, ailleurs dans le projet de loi, les pratiques déloyales en matière de prix perpétuées par une entreprise qui cherche à dominer le marché. Cela permettrait, encore une fois, que ces questions relèvent du civil plutôt que du criminel.

Enfin, nous recommandons que le tribunal, en plus d'imposer des sanctions et des remèdes, exige que des dommages et intérêts soient octroyés aux entreprises qui sont victimes de pratiques déloyales. Dans certains cas, l'entreprise en question a déjà fait faillite, et il lui est peu avantageux, à elle ou à ses employés, que le tribunal ordonne à la grosse entreprise coupable de mettre fin à ces pratiques déloyales.

En ce qui concerne les complots, nous, comme bien d'autres, ne voyons aucune raison de laisser l'expression «indûment» dans cet article, bien qu'il ne s'agisse pas d'un domaine relevant de notre compétence.

Nous sommes particulièrement heureux de noter que la Loi sur la concurrence régira désormais les activités des sociétés de la Couronne et des banques. En ce qui concerne particulilèrement les sociétés de la Couronne... nos membres se sont souvent plaints de pratiques déloyales de la part de sociétés de la Couronne qui bénéficient de subventions pour leurs locaux ou du soutien des contribuables pour s'adonner à des agissements anti-concurrentiels, particulièrement en réduisant considérablement leurs prix par rapport au marché.

Ce qui précède constitue un résumé succinct de notre position. Nous voulions soulever le plus grand nombre de points possible devant votre Comité afin que vous n'interprétiez pas notre silence comme étant un manque d'intérêt ou de soutien de notre part envers certains des éléments que renferme le projet de loi. Je le répète, ce projet de loi représente un grand pas en avant, comparativement à la loi existante, et nous espérons qu'il sera possible de l'améliorer encore plus.

The Chairman: Mr. Ouellet.

Mr. Ouellet: I thank the representatives from the Canadian Federation of Independent Business for their brief. I noticed that their brief includes several proposals for amendment which would give more teeth to the Competition Tribunal Act. I thank them therefore for these very precise and succinct proposals.

[*Texte*]

Par expérience, je sais que les membres de votre association ont souvent présenté des plaintes ou fait des représentations au Ministère de la consommation et des corporations, en particulier au sujet de l'abus que font de leur position dominante certaines compagnies qui oeuvrent sur le marché canadien. Vous êtes une autre association nationale qui croit que cette partie de la loi n'est vraiment pas assez forte. En effet, vous dites à la page 3 de votre mémoire:

> En raison de ce quatrième obstacle et de la possibilité de justifier les pratiques déloyales ou non de l'efficience, cet article est impossible à appliquer.

C'est assez inquiétant, parce qu'il est clair que la question des monopoles est une question préoccupante lorsque l'on parle du libre marché. On a toujours valorisé les forces du marché au Canada, et il faut être impliqué avec de petites entreprises pour savoir jusqu'à quel point les forces du marché ne fonctionnent pas toujours d'une façon exemplaire.

Si votre association vient nous dire que toute la partie traitant des abus de position dominante est sans valeur, il va falloir la réécrire, parce qu'il s'agit d'une des parties les plus importantes de la loi. Si vous aviez à apporter un seul amendement à cette partie-là, quel serait votre choix, quelle serait d'emblée votre préférence?

Mr. Bennett: Our first choice to this clause and probably the most important change to the whole bill would be getting rid of this concept of these practices having the object or the intent of creating a barrier or driving competitors out of the market. If they have that effect and they are acts which are proscribed by the Competition Act, there should be no uncertainty, no need to prove it was done deliberately.

If one of the large petroleum companies or Genstar in its building supply division starts selling to its own tied outlets at prices far below those of its customers, if it starts cutting out customers and disrupting the markets they have already built up with predatory pricing, the actions themselves should be enough.

You know, this may well be considered by some economists and some large business representatives as superior competitive activities, but what it will result in is a reduction in choice for the consumers. It will end up putting small businesses in many of the towns and cities across the country out of business if these large firms are allowed to do this. We saw in the petroleum industry, for example, that the number of independents has been decimated, and I think the dual distribution system has been one of the primary reasons for this.

• 1030

In a short answer, getting rid of the concept of object is our number one priority in our appearance before you.

M. Ouellet: Merci. Monsieur le président, je n'abuserai pas de mon temps de parole pour permettre à d'autres membres du Comité de poser des questions à nos invités de ce matin.

Le président: Merci, monsieur Ouellet.

[*Traduction*]

I know that the members of your Association often made representations to the Department of Consumer and Corporate Affairs, particularly concerning abuse of dominant position by some companies on the Canadian market. Your federation is another national association which believes that this part of the act does not have enough teeth. On page 3 of your brief you say:

> With this fourth hurdle, and with the notion of an efficiency defence for unfair practices, the section becomes unenforceable.

It is something rather frightening because it is clear that the question of monopoly is a question which is rather serious in a free market. Market forces have always been given prominence in Canada, but the people who have been involved with small enterprises know to what degree these forces do not always work in an exemplary way.

If your Association comes and tells us that the part on abuse of dominant position is flawed, we will have to draft it again, because it is one of the most important parts in the act. If you could only bring in one amendment to that part of the act, what would you give preference to.

M. Bennett: Le changement le plus important à cet article et sans doute le plus important pour tout le projet de loi serait de se débarrasser de cette notion selon laquelle ces méthodes ont pour objet de créer une barrière au commerce ou d'évincer la concurrence; de telles méthodes sont répréhensibles, elles sont proscrites par la Loi sur la concurrence et elles devraient être répréhensibles quelles que soient les intentions motivant leur utilisation.

Si une des grandes sociétés pétrolières ou la division de la construction de Genstar commence a vendre à leurs propres entreprises de détail à des prix inférieurs à ceux de la concurrence, s'ils perturbent le marché en pratiquant des prix déloyaux, les actions parlent d'elles-mêmes.

Il est possible que certains économistes ou certaines très grandes entreprises considèrent qu'il s'agit là d'activités qui s'exercent à un très haut niveau de concurrence, mais le résultat sera quand même que cela réduira le choix pour les consommateurs. Le résultat sera en effet que beaucoup de petites entreprises se verront acculées à la faillite si l'on permet à ces grandes sociétés de procéder de cette façon. C'est le cas notamment de l'industrie pétrolière où les indépendants ont été véritablement décimés et je crois que le double système de distribution a été une des raisons principales de cette situation.

Bref, notre priorité numéro un en ce qui concerne notre comparution devant vous est de recommander que l'on supprime cette preuve d'intention.

Mr. Ouellet: Thank you. Mr. Chairman, I do not want to take up all the time so that other members of the committee will be able to ask questions from our guests this morning.

The Chairman: Thank you, Mr. Ouellet.

[*Text*]

Monsieur Stewart.

Mr. Stewart: I happen to have John Bulloch as a summer constituent of mine, so I feel I am in good hands.

I would like to congratulate you on the brief, and also say that I agree on your threshold of pre-notification.

Now I would like to get into a more personal note, the abuse of dominant position. There were witnesses here before from business, and I began by telling them that I am an independent wholesale distributor in the real world outside of politics, and have had a lot to do with predatory pricing and the abuse of dominant position, if you will, mainly in tobacco. Also, your remarks on the gasoline industry . . . A close friend of mine in the Barry area has just sold out to a large oil company purely because of the things you have just mentioned. So I would like to agree with what you are saying about predatory pricing and hope that this committee will see fit to put that in, as against the abuse of dominant position, in an amendment to the bill.

I would also just like to ask you one question. What are your concerns regarding price-cutting per se? It is outlined in the Combines Investigation Act, but I have not seen anybody addressing it here.

Mr. Bennett: Mr. Stewart, we have not looked at that in any great detail. You run into an area . . . You can have an awful lot of economists argue both sides, that especially in the distribution network there are some efficiencies to be made through volume, and how you can break out what is a real volume discount versus what is unfair price-cutting is difficult. That is why the concept of predatory pricing . . . If we can show that one of the largest distributors has a general price it is selling at of let us say $100, but in an area such as Barry, where it wants to take over a particular market, it is selling it for $40, and it turns out it is far below their cost and it is consistent loss-leadering . . .

One aspect of price-cutting is loss-leadering, which is covered in provincial legislation. I know that in western Canada in particular our members are facing a lot of difficulty through loss-leadering in bread by some of the super chains, which would not be allowed in Quebec. We are trying to get the provincial governments out there to bring in legislation more in line with the Quebec legislation, because if you put the independent corner stores out of business, it is not going to be long before . . . not only is the choice of products reduced, but you will not have the same loss-leadering that the giant grocery stores are engaged in now.

[*Translation*]

Mr. Stewart.

M. Stewart: Je trouve que je suis entre de bonnes mains puisque John Bulloch habite pendant l'été dans ma circonscription électorale.

J'aimerais vous féliciter pour votre mémoire et dire également que je suis d'accord avec ce que vous recommandez concernant le seuil à partir duquel les fusions doivent faire l'objet d'un préavis.

J'aimerais maintenant passer à une note plus personnelle, la question de l'abus de la position dominante. Des témoins du milieu des affaires ont comparu avant vous devant le Comité. Je commencerai toujours en leur signalant que je suis un grossiste indépendant et un distributeur lorsque je ne suis pas en politique. Je connais par conséquent particulièrement bien la question des pratiques déloyales ainsi que toute la question de cet abus de position dominante, surtout dans le domaine du tabac. Vous avez également fait certaines remarques au sujet de l'industrie pétrolière . . . un de mes bons amis à Barry vient de vendre à une grande société pétrolière précisément à cause des difficultés que vous avez mentionnées. Je suis par conséquent d'accord avec ce que vous dites concernant les pratiques déloyales et j'espère que le Comité pourra amender le projet de loi sur cette question de l'abus de la position dominante.

J'aimerais également vous poser une autre question. Que pensez-vous de la sous-enchère en tant que telle? La Loi relative aux enquêtes sur les coalitions stipule certaines dispositions à ce sujet, mais personne n'a jamais parlé de cette question ici.

M. Bennett: Monsieur Stewart, nous n'avons pas étudié cette question en grands détails. Des économistes peuvent vous défendre le pour et le contre, en disant que, spécialement dans le réseau de distribution, certaines déficiences peuvent être réalisées grâce au volume; il est difficile d'établir une distinction entre ce qui représente une diminution de prix grâce au volume ou tout simplement de la sous-enchère, et donc des pratiques déloyales. C'est la raison pour laquelle le concept de pratiques déloyales . . . s'il est possible de prouver qu'un des plus grands distributeurs vend généralement son produit à 100$, mais dans une région comme Barry, où il veut mettre la main sur un marché particulier, il le vend à 40$, ce qui est considérablement inférieur aux coûts, ce qui représente donc une vente à perte pour attirer la clientèle . . .

De telles méthodes font partie de la politique visant à faire de la sous-enchère, et les lois provinciales ont d'ailleurs prévu des dispositions à ce sujet. Je sais que dans l'Ouest du Canada en particulier, certains de nos membres ont pas mal de difficultés à cause des ventes-réclames de pain par certaines chaînes, ce qui ne serait pas permis au Québec. Nous essayons d'inciter les gouvernements provinciaux de ces provinces à légiférer en la matière, à l'instar du Québec, car si les petits magasins de quartier font faillite, il ne faudra pas attendre longtemps avant . . . non seulement le choix sera réduit, mais les grands magasins offriront moins d'articles en réclame, c'est certain.

[*Texte*]

Mr. Stewart: One final question: Do you feel a predatory pricing clause in this bill as it sits now would have enough teeth in it with the tribunal to cover loss-leadering?

Mr. Bennett: No, I do not think it would. I am not enough of a legal expert to know if you could ever get loss-leadering into the federal legislation. Is it not because the different jurisdictions have to be... ? I think it has to be in provincial...

At the same time, the predatory pricing sector... It is 34.(1), is it, in the current one, about dominant firm, monopoly, or a joint monopoly? If you find that, I think the tribunal should be able to look at that under the abuse of dominant position and award damages and bring the other remedial activities suggested in Bill C-91.

• 1035

Le président: Monsieur Orlikow.

Mr. Orlikow: Thank you. You made the point that when a small company has been harmed through unfair practices by larger corporations, you felt they should be able to get compensation. How do you feel about the possibility that consumers who have overpaid because of unfair and illegal practices by large corporations should have the right to be compensated as much as the companies who have been hurt?

Mr. Bennett: In principle, I have no difficulty with that. I am trying to think of the mechanism. I know, for example...

Mr. Orlikow: The right to class action would do that.

Mr. Bennett: Yes. If you recall, the excise tax increase that went into effect in 1979 and was then rolled back... they were trying to figure out how to get the money back to the consumers, especially in the grocery distribution area, where I think a lot of this would go on, trying to identify the customers... Perhaps if they have receipts or something like that, you would be able to deal with it, but I think it would be difficult. As I say, I have no difficulties with the principle at all.

Mr. Orlikow: Like several other witnesses, do you have difficulties with the abuse of the dominant position clause? I think there is agreement among those who have objections to this bill that it would be very difficult to get a decision which would prove abuse of dominant position as the bill is drafted.

The Petroleum Marketers Association of Canada has said that unless amendments are made—and they made suggestions as to what the amendments should be—they would not be able to support the bill. Is this clause similarly important to your members? Are you able to suggest improved wording to this?

[*Traduction*]

M. Stewart: Une dernière question: estimez-vous qu'un article portant sur les méthodes déloyales de fixation des prix donnerait suffisamment de force à la loi pour couvrir ces ventes-réclames?

M. Bennett: Non, je ne le crois pas. Je ne suis pas suffisamment spécialisé en matière juridique pour savoir si la question des articles-réclames et de la vente à perte pourait faire l'objet de dispositions législatives au niveau fédéral. Il y a là une question de compétence, n'est-ce-pas? Est-ce que cela ne doit pas relever de la compétence provinciales...

Ces pratiques déloyales se retrouvent, si je ne me trompe, à l'heure actuelle, dans la loi à l'article 34.(1) qui vise les monopoles ou les monopoles conjoints. Une fois de telles pratiques établies, je crois que le tribunal devrait pouvoir étudier la question dans le cadre de l'article sur la position dominante, accorder des dommages et intérêts à la partie lésée et prévoir d'autres sanctions et remèdes proposées par le Bill C-91.

The Chairman: Mr. Orlikow.

M. Orlikow: Merci. Vous dites que lorsqu'une petite compagnie a subi des préjudices de la part d'une société plus importante qui a eu recours à des méthodes déloyales, cette petite compagnie devrait obtenir des dommages et intérêts. Que pensez-vous de la possibilité que les consommateurs qui ont payé trop précisément parce que ces grandes compagnies ont eu recours aux mêmes méthodes obtiennent réparation comme ces sociétés.

M. Bennett: Je serais d'accord avec cela en principe, mais comment procéder?

M. Orlikow: Il pourrait y avoir recours collectif par exemple.

M. Bennett: Oui. Vous vous souviendrez sans doute de l'augmentation de la taxe d'accise qui est entrée en vigueur en 1979 et qui a été retirée par la suite. On s'était demandé comment pouvoir rembourser les consommateurs et particulièrement le secteur de l'épicerie: ce serait faisable pourvu que l'on ait des reçus, mais ce serait difficile. Cependant comme je l'ai dit, je trouve que ce serait bien en principe.

M. Orlikow: Avez-vous, comme plusieurs autres témoins, des difficultés à accepter cet article concernant l'abus de la position dominante? Les personnes qui ont des objections à formuler à l'endroit du projet de loi estiment qu'il serait très difficile d'obtenir une décision qui prouverait l'abus de cette position dominante si l'on s'en tient au libellé actuel du projet de loi.

L'Association canadienne de commercialisation des produits pétroliers estime qu'elle ne pourra appuyer le projet de loi sans amendements. Cette association a d'ailleurs fait des suggestions quant aux amendements possibles. Cet article est-il également important pour vos membres? Pouvez-vous proposer aussi des amendements?

[*Text*]

Mr. Bennett: If the committee felt it were necessary, we would like to work with our legal adviser to come forward with proposed wording.

It is important. As I say, this is our number one priority. At the same time, on reading the testimony of the Petroleum Marketers Association, we would also like to see this legislation pass. We would like to see Crown corporations brought under the act. We would like to see the banks brought under the act as soon as possible.

From our discussions with the Minister, it would seem that he and his colleagues are prepared to make some adjustments on the recommendations of your committee. I would hope this would be one that could be made, so that this bill could be passed before the end of the session.

Mr. Orlikow: There has been a good deal of discussion suggesting that in Canada we lack the knowledge to evaluate what is happening in competitive terms as a result of a very large number and very large conglomerate mergers and takeovers. This bill does not deal with that. When we questioned him about this, the Minister said that this bill was not designed to do that.

From the perspective of your members, what happens, particularly in the financial field, when a financial conglomerate is formed? Do they feel pressure, for example, to do business with other parts of the conglomerate in terms of related financial service?

Mr. Bennett: That is a concern we have, Mr. Orlikow, and we are very much looking forward to the expected legislation on financial institutions this fall. We appeared before the committee when they were looking at the green paper. I think we will be further polling our members in terms of the whole concept of the limitation of ownership of financial institutions. If banks, to use the generic term for lending institutions, also have insurance vehicles, many of our members have indicated they feel a certain amount of pressure. It is sort of a "moral-suasion". There is no gun really being held to their head. They just feel they might be treated a little bit better if they do take the insurance that the lending institution is offering to them. We have some concerns about that, but that does not really relate to this bill.

• 1040

I think Richard Graham assisted at that.

Mr. R. Graham: We in fact found through the banking survey that where there was more competition and a greater number of smaller financial institutions the service to our members was considerably better. The Province of Quebec faired best, because it had a number of smaller regional financial institutions.

[*Translation*]

M. Bennett: Si le Comité estimait que c'était nécessaire, nous pourrions travailler avec notre conseiller juridique et vous faire une proposition concrète.

C'est important. Comme je l'ai dit, il s'agit là de la priorité numéro 1 à notre avis. Nous avons lu les témoignages de l'Association canadienne de commercialisation de produits pétroliers et nous aimerions également que cette loi soit adoptée. Nous aimerions que les sociétés d'État soient assujetties à la loi, et de même pour les banques et ce le plus rapidement possible.

A la suite des discussions que nous avons eues avec le ministre, il semble que lui-même et ses collègues seraient prêts à faire certaines modifications sur la recommandation de votre Comité. J'espère que vous pourriez par conséquent recommander une telle modification, ce qui permettrait au projet de loi d'être adopté avant la fin de la session.

M. Orlikow: On a beaucoup discuté du fait que nous ne pouvons au Canada évaluer ce qui se passe dans le domaine de la concurrence à cause du grand nombre de fusions et de mainmises. Ce projet de loi ne traite pas de cette question. Lorsque nous lui avons posé la question, le ministre nous a dit que ce n'était pas là l'objet du projet de loi.

Pourriez-vous nous dire à votre avis ce qui se passe dans le domaine financier, en particulier lors de la formation d'un conglomérat financier? La pression est-elle forte pour faire affaire avec d'autres parties du conglomérat pour d'autres services financiers connexes?

M. Bennett: C'est là une de nos préoccupations et nous attendons avec impatience la Loi sur les institutions financières qui sera présentée cet automne. Nous avons comparu devant le Comité lors de l'étude du Livre vert. Nous ferons à nouveau un sondage auprès de nos membres qui portera sur tout le concept de la limitation de la propriété des institutions financières. Si les banques, pour utiliser le terme générique qui s'applique aux institutions de prêts, si les banques donc commencent à s'occuper d'assurances, beaucoup de nos membres nous ont déjà fait savoir que cela les mettait quelque peu sous pression. Il s'agit là d'une espèce de persuasion morale, pour ainsi dire, même s'il ne s'agit pas d'une question de vie ou de mort. En fait, dans une telle situation, le fait de souscrire une assurance qui vous est proposée par une institution prêteuse, vous place dans une catégorie plus avantageuse aux yeux de ces dernières. Nous nous préoccupons de cette question, qui ne relève cependant pas de cette loi à l'étude.

Richard Graham pourrait vous en parler.

M. R. Graham: En fait, à la suite de notre enquête sur les banques, nous nous sommes rendu compte que lorsqu'il y avait une plus grande concurrence, lorsqu'il y avait un plus grand nombre de petites institutions financières, nos membres étaient nettement mieux servis. La situation était la meilleure dans la province de Québec qui a un certain nombre de petites institutions financières régionales.

[*Texte*]

Mr. Orlikow: How would you feel if the concentration of financial services is done in such a way so that they are not just financial services companies, but they are also in non-financial businesses? Is that a combination you would find difficult?

Mr. R. Graham: Yes. We have some concern with that because the bank a business deals with has so much effect on its business that a business person would feel—if not specifically told to feel—under a lot of pressure to do his other dealings with that bank which offered the other services, even if that particular institution might not be the best place to go for the services.

Mr. Orlikow: You would then worry about Trilon and its relationships with all sorts of other companies—Imasco, Canada Trust—with all the involvement of Imasco in all sorts of other businesses, which might be in competition with some of your members.

Mr. Bennett: I think we very much share the concern of this committee, and the concern of many of the members of the House, about the whole question of concentration in the financial services market. Although it is not directly the subject of this particular legislation, we do look forward to coming before either this committee or whichever committee deals with the draft legislation.

Again, on the abuse of the dominant position, I think we share a general concern that concentration not be allowed to continue. Like the Minister and the previous Ministers before him, we recognize there are situations where bigness in itself is not necessarily bad. Some of our steel companies, for example, do very, very well and they do compete.

However, I think the committee would be well advised not to put too much weight on this whole concept of world size, as opposed to world class, when it comes to many of the manufacturing areas. When you are told that a lot of our manufacturers have to become huge to be able to compete, that is basically an argument based on the technologies of the 1950s and 1960s. In some industries, such as steel and petrochemicals, etc., that is true; but in an awful lot of the new areas between CAD/CAM, robotics, you are looking at sizes of plants well below 200 employees which are world class.

Therefore, the concept of economies of scale on a lot of the manufacturing is not anywhere near as relevant as it was 20 years ago, because specialized productions differentiating products for special markets is far more important, with the exception of a few standardized goods.

The whole notion of economies of scale as an underlying part efficiency defence mergers . . . I think some of the groups you have heard or will hear are going to put a lot more emphasis on that than the concept really deserves.

The Chairman: Mr. Redway, please.

[*Traduction*]

M. Orlikow: Et que penseriez-vous d'une concentration de services financiers qui offrent en même temps des services non financiers. Estimez-vous que ce genre de combinaison serait difficile?

M. R. Graham: Oui. Nous nous préoccupons d'une situation de ce genre car les banques avec lesquelles les entreprises font affaire ont une telle influence que les hommes d'affaires se trouveraient presque obligés de traiter pour les autres services avec la banque, même si celle-ci n'imposait pas ce choix. Et pourtant, la banque en question n'est peut-être pas le meilleur choix en l'occurrence.

M. Orlikow: Par conséquent, vous vous préoccupez sans doute de la situation dans le cas de Trilon et de ses rapports avec toutes sortes d'autres sociétés, Imasco, Canada Trust . . . étant donné qu'Imasco participe à toutes sortes d'autres entreprises qui pourraient être en concurrence avec certains membres de votre organisation.

M. Bennett: Nous partageons très certainement les préoccupations du Comité ainsi que de nombreux députés surtout de cette question de la concentration du marché des services financiers. Même si ce n'est pas directement l'objet de ce projet de loi, nous serions heureux de témoigner devant ce Comité ou devant tout autre comité qui étudirait la proposition.

Au sujet de l'abus de la position dominante, nous nous préoccupons, à l'instar de beaucoup, de cette concentration et nous espérons qu'elle ne pourra pas continuer. Comme le ministre actuel et les ministres qui l'on précédé, nous nous rendons compte qu'il existe des situations où le fait d'être une entreprise importante n'est pas nécessairement mauvais en soi. Certaines aciéries par exemple ont un excellent chiffre d'affaires et peuvent se faire concurrence.

Cependant, je crois qu'il conviendrait que le Comité n'insiste pas trop sur la taille, mais bien sur l'importance des entreprises par rapport à celle d'autres pays dans le domaine des produits manufacturés. Prétendre que nos industries doivent être extrêmement importantes pour être compétitives, c'est raisonner comme on raisonnait au cours des années 50 et 60 et dans le contexte de la technologie de l'époque. Dans certains secteurs comme celui des aciéries et des produits pétrochimiques, c'est vrai, mais dans beaucoup de nouveaux domaines, CAD/CAM, la robotique etc., des usines de moins de 200 employés sont des usines qui peuvent très bien se comparer à celles d'autres pays.

Par conséquent, le concept d'économies d'échelle a perdu beaucoup de sa pertinence par rapport à il y a 20 ans étant donné qu'à l'exception de certains produits normalisés, on assiste à l'heure actuelle à une différenciation de la production destinée à différentes sortes de marchés. C'est ce la qui est important à l'heure actuelle.

En fait, je crois que certains groupes que vous avez entendus ou que vous allez entendre vont sans doute mettre beaucoup plus l'accent qu'il ne faudrait le faire sur cette question d'économies d'échelle dans le contexte de l'efficience et pour justifier l'importance des fusions.

Le président: Monsieur Redway.

[*Text*]

Mr. Redway: Thank you, Mr. Chairman. There are three areas I wanted to get some clarification on. The first has again to do with the abuse of the dominant position, and the wording you might be suggesting.

We are referring to page 40, paragraph 51.(1)(*d*), I guess. I was wondering if you were really suggesting the elimination of the words "and the object of the practice is to lessen competition".

Mr. Bennett: That is right.

Mr. Redway: Is that what you . . .

• 1045

Mr. Bennett: I have a statement prepared by our legal adviser that talks about eliminating that in this area.

Mr. Redway: Is there any . . .

Mr. Bennett: When Mr. McKeown was before the committee for the petroleum marketers, he specifically referred to eliminating that. We very much endorse that proposal.

Mr. Redway: So that would eliminate the concept of intent, of establishing intent?

Mr. Bennett: Exactly.

Mr. Redway: And it would very much bring it into line with the concept of a civil offence, as opposed to a criminal offence.

Mr. Bennett: Yes, it would.

Mr. Redway: Secondly, just to follow up for a minute on the comments relating to the concentration of power, your comments were related to the aspect of concentration of financial services only as opposed to concentration generally in all areas. As you were polling your members on this area of concentration, I wondered whether you also contemplated doing it in a broader sense, rather than in just the financial services. Considering the aspect of diversification of ownership, regardless of size, there is a different concept there—in my mind, anyway. You can have a huge company, just like you have huge banks, but there is some restriction on the percentage of ownership by any one individual, corporation, or group.

Mr. Bennett: I can think of certain circumstances where manufacturing firms, some of relatively good size—we have some members, by the way, with over 500 employees—are often family-owned, private businesses. I think they would take amiss any suggestion that they not be allowed to keep the family business in the family. I think the argument could well be made that in most sectors, and I can think of some of them that are in manufacturing . . .

Mr. Redway: You are talking about the Bronfman man there?

Mr. Bennett: No, I am not. I am thinking of something like E.D. Smith, or similar firms of that size where there is a

[*Translation*]

M. Redway: Merci, monsieur le président. J'aimerais poser certaines questions afin d'obtenir des précisions dans trois domaines. Tout d'abord, je voudrais parler de cette question de l'abus de la position dominante et j'aimerais savoir quel libellé vous aimeriez suggérer.

Je me rapporte à la page 40, alinéa 51.(1)*b*). Suggérez-vous d'éliminer «dont le but est de réduire la concurrence».

M. Bennett: C'est exact.

M. Redway: Est-ce cela que vous . . .

M. Bennett: J'ai ici un texte préparé par notre conseiller juridique qui parle justement de son élimination.

M. Redway: Y a-t-il . . .

M. Bennett: Lorsque M. McKeown a déposé devant le Comité pour le compte des distributeurs de produits pétroliers, il a expressément mentionné l'élimination de cela, et nous nous rallions à cette proposition.

M. Redway: Cela éliminerait donc la notion d'intention, de la fixation de l'intention?

M. Bennett: Précisément.

M. Redway: Et il y aurait dès lors alignement, en quelque sorte, sur la notion de délit civil, par opposition à celle de délit pénal.

M. Bennett: En effet.

M. Redway: En second lieu, pour faire suite quelques instants à ce qui a été dit à propos de la concentration des pouvoirs, vous avez signalé l'élément de concentration des services financiers en faisant la distinction avec la concentration générale dans tous les secteurs. Lorsque vous avez sondé vos membres à ce sujet, avez-vous également pensé à le faire dans un sens plus large, au lieu de vous limiter aux services financiers? Étant donné la diversification de la propriété, indépendamment de l'envergure proprement dite, la notion, en l'occurrence, est toute différente, du moins pour moi. On peut, par exemple, avoir une énorme entreprise, une banque par exemple, mais où la concentration de la propriété entre les mains de quelques-uns est limitée.

M. Bennett: Je peux penser au cas de certaines entreprises du secteur secondaire, assez importantes d'ailleurs, et soit dit en passant, nous avons des membres qui comptent plus de 500 employés, qui sont souvent des entreprises familiales, des entreprises privées. Je pense que j'accepterais mal qu'on leur interdise de conserver l'entreprise entre les mains familiales. On pourrait fort bien, je pense, soutenir que dans la plupart des secteurs, et certains me viennent à l'esprit dans le secteur secondaire . . .

M. Redway: Vous parlez de la famille Bronfman?

M. Bennett: Pas du tout. Je pense à E.D. Smith, ou à d'autres entreprises du même genre et du même calibre qui

[*Texte*]

concentration of ownership. I do not think it as large a problem in most other sections. We are not contemplating pulling our members on anything other than the financial institutions because that will be subject of legislation this coming fall.

It concerns everybody because that is an area whih is so central to all other business activities. I cannot think of very many other sectors it would worry as much. Perhaps you could argue that a provincial utility like a telephone company is as important. Does the government own it, is it very narrowly held, or is it very broadly held? I am not sure.

Mr. Redway: Would it not bother you if 10 families dominated the country regardless of whether they controlled financial institutions or not?

Mr. Bennett: Yes, it definitely would.

Mr. Redway: It would bother you as long as they were not E.D. Smith, eh?

Mr. Bennett: I am not sure that one could dominate the country to that extent without getting into the financial institutions area. But as I said, I am not an economist. I could well be wrong.

Mr. Redway: The other area I just wanted to touch on has to do with your idea of who comes first, the tribunal's decision or Investment Canada's decision. Have you some examples where that has casued a problem in the past? I think it was a case of Okanagan Helicopter, where it relates to the old FIRA and Combines Investigation legislation. As I understand it, after several attempts to get through FIRA, there was a successful attempt, but it was turned down under the Combines Investigation legislation. So that did not seem to create the problem you are referring to.

Mr. Bennett: Under the former circumstances, I do not think there was a problem. What we are outlining here is basically the situation, as I understood it, in the mid 1970s.

• 1050

The thing that alarmed us was a suggestion, which might be nothing more than a rumour, that if the Minister responsible for Investment Canada had approved a foreign investment it would not even be allowed to go to the tribunal. As far as we are concerned that would be totally unacceptable, because it would make Canadian firms second-class citizens when it came to dealing with the Competition Act. So we wanted to raise the issue and say that the practice, as we have seen it, of a review of foreign investment by the provinces and by the Combines Investigation Branch seems to us to be very appropriate.

Investment Canada is, I suppose, either a corporate immigration service, considering how that outfit is operating in

[*Traduction*]

présentent une telle concentration au départ. Dans la plupart des autres cas, je ne pense pas que le problème se pose à ce point-là. Nous n'envisageons nullement d'entraîner nos membres dans quoi que ce soit d'autre, si ce n'est dans ce secteur précis des institutions financières, étant donné qu'il y aura de toute façon à l'automne une loi à ce sujet.

Mais tout le monde est préoccupé par le fait que ce secteur est précisément vital pour toutes les autres activités commerciales. Je ne vois vraiment pas beaucoup d'autres secteurs qui risqueraient d'être autant ennuyés. Vous pourriez dire, certes, qu'une régie de service public, par exemple une compagnie de téléphone, est tout aussi importante. Est-ce que c'est le gouvernement qui en est propriétaire, s'agit-il d'une entreprise à forte concentration ou à faible concentration? Je l'ignore.

M. Redway: Cela ne vous embêterait pas de voir 10 familles dominer le pays, qu'il y ait ou non contrôle des institutions financières de leur part?

M. Bennett: Certainement que cela m'ennuierait.

M. Redway: Sauf si c'est E.D. Smith, hein?

M. Bennett: Je ne pense pas qu'on puisse vraiment dominer un pays à ce point-là sans avoir le contrôle des institutions financières, mais, comme je le disais, je ne suis pas économiste, et il se peut que je me trompe.

M. Redway: J'aimerais également aborder un autre secteur, et j'en reviens à ce que vous disiez à propos de la prééminence, celle de la décision du tribunal ou celle d'Investissement Canada. Avez-vous des cas de ce genre qui auraient présenté des problèmes dans ce sens? Il y a eu l'affaire de l'Okanagan Helicopter, qui s'articulait dans le cadre de l'ancienne Loi sur l'examen de l'investissement étranger et de la Loi sur les enquêtes relatives aux coalitions. Si j'ai bien compris le dossier, après avoir essayé plusieurs fois de recevoir l'aval de l'agence, la firme avait enfin réussi, mais la décision avait fini par être infirmée en raison de la Loi sur les enquêtes relatives aux coalitions. Cela ne semble donc pas vraiment susciter le genre de problème auquel vous faites allusion.

M. Bennett: Jadis, je ne pense pas effectivement qu'il y avait de problème. Ce que nous disons ici vaut essentiellement pour la situation qui prévalait au milieu des années 70.

Ce qui nous a mis la puce à l'oreille, c'est une simple suggestion, une rumeur peut-être, tout au plus, disant que si le ministre responsable d'Investissement Canada approuvait un investissement étranger, le tribunal ne pourrait même pas en être saisi. À notre avis, ce serait parfaitement intolérable, étant donné que les entreprises canadiennes se trouveraient reléguées au deuxième rang pour ce qui a trait à la Loi sur la concurrence. Nous voulions donc en parler pour pouvoir vous dire que, selon nous, il est tout à fait souhaitable que les investissements étrangers continuent à être examinés par les provinces et par la Direction des enquêtes sur les coalitions.

Investissement Canada est, j'imagine, soit un service d'immigration destiné aux entreprises, à en juger d'après la

[*Text*]

its own market, or if you are a little more cynical it is perhaps a corporate welcome wagon; but it is not doing the same kind of screening as the director and then perhaps the tribunal will do when it comes to the implications of a take-over.

Mr. Redway: It is not really a case of who deals with it first. It is not a chicken-and-egg situation in your view, is it? Or is it?

Mr. Bennett: Well, it could be. If one of the senior Ministers of the Crown is responsible for Investment Canada, as is the case now, and he comes out and says that this particular take-over by this Japanese firm or whatever it happens to be is just terrific for the Canadian economy, I think it is going to have some impact on the deliberations of the tribunal.

Mr. Redway: Well, what about the Okanagan Helicopter? I guess nobody said it was terrific for the Canadian economy perhaps, but eventually, as I understand it, they did not object to the take-over situation as far as FIRA was concerned. But then it went on and there was an objection raised later on; that was one of the concerns, as I understand it, in the case—that the procedure was so long and you had to go through so many approval stages that you were destroying any efforts to . . .

Mr. Bennett: One of the things that I noticed in reading through the legislation is the suggestion that you could get some pre-notification, some of these things they are talking about, fast-tracking, 7 days and 21 days and this type of thing, so that perhaps the same kind of procedure or the same kinds of timeframes could be adapted on some of the foreign ones. Again, it is not an area in which I have enough experience with the details of the Okanagan Helicopter or the other ones to comment.

It used to be that full Cabinet would have to decide on a FIRA investment; you now have one Minister. If you have one Minister coming out and saying that a particular investment is just terrific for the country and perhaps some of his colleagues do not even agree let alone the tribunal, I think you have a case where you do have, if not chicken and egg, maybe the cart before the horse.

Mr. Redway: Okay. Mr. Ouellet probably knows how much influence Cabinet used to have on those decisions.

Mr. Ouellet: I remember that the Director of Combines used to have a lot of clout.

Mr. Redway: I am talking about the old FIRA arrangement. How often did the Cabinet Ministers read the material that was put before them?

[*Translation*]

façon dont cet organisme fonctionne dans son propre marché, ou encore, soyons un peu plus cynique, un comité d'accueil pour entreprises étrangères. Quoi qu'il en soit, ces activités de filtrage et de tamisage ne ressemblent en rien à celles auxquelles se livre le directeur, auxquelles se livrera sans doute le tribunal aussi, si tant est qu'il s'agit d'examiner toutes les incidences possibles d'une prise de contrôle.

M. Redway: Mais ce n'est pas vraiment une question de prééminence. À votre avis, ce n'est pas vraiment un cercle vicieux; est-ce que je me trompe?

M. Bennett: Cela pourrait fort bien devenir un cercle vicieux. Si l'un des ministres les plus importants a la responsabilité d'Investissement Canada, comme c'est le cas actuellement, et s'il déclare par exemple que telle ou telle prise de contrôle par une entreprise japonaise, admettons, est absolument extraordinaire pour l'économie nationale, j'imagine que cette déclaration va influer sur les délibérations du tribunal.

M. Redway: Et que se passerait-il dans le cas de l'*Okanagan Helicopter*? Dans ce cas-là, personne n'a dit que c'était extraordinaire pour l'économie du Canada, mais, en fin de compte, si j'ai bien compris le dossier, il n'y a pas eu opposition à la prise de contrôle, du moins du point de vue de l'Agence d'examen de l'investissement étranger. Ce n'est que plus tard que l'opposition s'est manifestée, et d'ailleurs, c'est l'une des choses, me semble-t-il, qui a posé un problème dans ce cas-là: la procédure était tellement longue, il fallait passer par tellement de paliers et de niveaux que l'on finissait par détruire tous les effets . . .

M. Bennett: En parcourant le projet de loi, j'ai remarqué notamment qu'il peut y avoir préavis, vous savez ce genre de choses dont ils parlent, la pré-enquête rapide, 7 jours, 21 jours, vous me suivez, de sorte que peut-être pourrait-on adopter le même genre de procédure, le même genre d'échéancier, pour les entreprises étrangères. Mais encore une fois, je n'ai pas suffisamment l'expérience de la chose, je ne connais pas suffisamment les détails de l'affaire d'*Okanagan Helicopter*, notamment, pour pouvoir me prononcer.

Jadis, c'était le Cabinet qui devait décider en séance plénière du sort d'un investissement aux termes de la Loi sur l'examen de l'investissement étranger, alors qu'actuellement, il n'y a qu'un ministre qui en est responsable. À supposer qu'un ministre déclare que tel ou tel investissement est absolument merveilleux pour le Canada, même si certains de ses collègues ne sont pas d'accord, et à plus forte raison le tribunal, le cercle n'est peut-être pas tout à fait vicieux, mais au moins pourrait-on dire que l'on aurait mis la charrue avant les boeufs.

M. Redway: D'accord. M. Ouellet sait sans doute à quel point le Cabinet pouvait avoir de l'influence dans les décisions de ce genre.

M. Ouellet: Je me souviens que le directeur des coalitions avait énormément de poigne.

M. Redway: Non, je veux parler de ce qui se passait jadis avec la Loi sur l'examen de l'investissement étranger. Arrivait-il souvent aux ministres de lire les dossiers qu'on leur soumettait?

[*Texte*]

Mr. Ouellet: Every time.

Le président: Je demanderais au secrétaire parlementaire de faire des remarques de conclusion.

Mr. Ouellet: As a matter of fact, sometimes it was taking too much time in Cabinet.

The Chairman: Mr. Domm.

Mr. Domm: Mr. Chairman, I will make my interjection brief.

First of all, let me compliment the Canadian Federation of Independent Business for the active role they have played in one of the most crucial, negative effects on small business that we have out there in the marketplace today, and that is the burden of paperwork. I think over the years you have spoken out very strongly in support of lessening the burden of paperwork, and that prompts my only interjection.

They have found in the United States that they have had to raise the pre-notification volume from $100 million to $200 million, and there was some effort made down there to make it even higher. They found it created an undue pressure on the medium-sized businesses to appear before boards or whatever—in our case, a tribunal—under the pre-notification requirement.

• 1055

What you are doing seems to be converse to the thrust of your message, and that is to lessen paperwork. If you want us to reduce the threshold, I think in your brief, to $10 million or $20 million . . .

Mr. Bennett: That is of the target firm involved with one of the larger firms.

Mr. Domm: Yes. You must also appreciate the difficulty that would create. When you say the target firm, what global figure of pre-notification of the combined assets of the two are you shooting for if $10 million to $20 million is the target of the small firm?

Mr. Bennett: It is $200 million.

Mr. Domm: So you would settle for $200 million . . .

Mr. Bennett: Yes.

Mr. Domm: —as not creating undue paperwork for the intermediate business.

Mr. Bennett: When we take a look at it, Mr. Domm, in 1983 there were only 447 profitable companies that had assets of more than $100 million. You are not talking about tying up an awful lot of what we call medium-sized firms.

Again, one of the reasons why we do not have enough medium-sized firms in the area is that a lot of the large plants, the conglomerates and the foreign multinationals have bought them up just as they started to become very profitable and

[*Traduction*]

M. Ouellet: Ils n'y manquaient jamais.

The Chairman: I would like to ask the Parliamentary Secretary to make his closing comments.

M. Ouellet: En fait, parfois, cela absorbait beaucoup trop longtemps le Cabinet.

Le président: Monsieur Domm.

M. Domm: Monsieur le président, je serai bref.

Pour commencer, j'aimerais féliciter la Fédération canadienne de l'entreprise indépendante pour le rôle très actif qu'elle a joué à l'endroit d'un des éléments les plus cruciaux et aussi les plus négatifs qui puissent actuellement se trouver sur le marché du travail pour la petite entreprise, et j'entends par là le fardeau de la paperasserie. Cela fait déjà plusieurs années que vous défendez vigoureusement la notion d'un allégement de la bureaucratie, ce qui motive d'ailleurs cette unique intervention de ma part.

Les États-Unis se sont rendu compte qu'ils avaient dû faire passer de 100 à 200 millions de dollars le seuil nécessaire pour le préavis, et les Américains ont même essayé de relever encore davantage ce seuil. Ils se sont rendu compte que pour les entreprises de moyenne envergure, il était particulièrement onéreux de devoir comparaître devant les commissions ou les offices—chez nous, ce serait devant le tribunal—comme le prescrit le préavis.

Ce que vous faites semble aller à l'encontre de ce que vous prêchez, c'est-à-dire une diminution de la paperasserie. Si vous voulez réduire le seuil à 10 ou 20 millions de dollars, comme vous semblez le dire dans votre mémoire . . .

M. Bennett: Dans le cas de la firme visée par une firme plus importante.

M. Domm: C'est cela. Vous devez bien comprendre le genre de problème que cela poserait. Lorsque vous parlez de l'entreprise visée, l'entreprise cible, quel est le chiffre global des actifs combinés pour les deux auquel vous pensez pour le préavis si le chiffre de 10 à 20 millions de dollars est utilisé pour la petite entreprise?

M. Bennett: Deux cent millions de dollars.

M. Domm: Vous accepteriez donc 200 millions de dollars . . .

M. Bennett: En effet.

M. Domm: . . . et selon vous, cela ne créerait pas une paperasserie abusive pour l'entreprise de moyenne envergure.

M. Bennett: À y réfléchir, monsieur Domm, en 1983, il n'y avait que 447 entreprises rentables ayant plus de 100 millions de dollars d'actifs. Nous ne parlons pas ici d'un nombre excessif de ce que nous appelons les entreprises de moyenne envergure.

Je le répète, l'une des raisons pour lesquelles nous n'avons pas suffisamment d'entreprises de moyenne envergure ici, c'est que bon nombre des grosses entreprises, les conglomérats et les multinationales étrangères, les ont rachetées à mesure qu'elles

[*Text*]

they have become branches rather than independent medium-sized companies.

Mr. Domm: But you qualify that by saying that the profitable firms . . . Well, we know, and you probably know as well as anyone, that mergers occur in non-profitable firms for obvious reasons of tax advantage. When you add in the non-profitable firms and you look at the merger and acquisition of non-profitable firms and the paperwork curtailed in pre-notification, I would find it hard to justify lowering, but rather raising, the level.

Mr. Bennett: Raising from $500 million? Come on!

Mr. Domm: No, not raising from $500 million, raising from $200 million.

Mr. Bennett: Well, as you say, that argument might have been made in the United States. We think that even in today's much better market than 1983, given the growth that has taken place since then, looking at combined assets of $200 million probably fewer than 3,000 firms could conceivably be involved in this at all. You are not looking at an awful lot of paperwork.

In terms of the firm, whether it is $20 million in assets or $35 million in assets "and" sales rather than "or" sales, those small firms are not going to be involved in the paperwork. It is the firm that is trying to take them over that will be doing it, and they have the law firms and they have the technical advisers to deal with it.

So our argumentation on paperwork . . . We will be back again, by the way, with Mr. Hnatyshyn's committee, or ministry, and Mr. Nielsen's report. I think they have given us and you and your colleagues an awful lot more leeway and a new entrée to go after paper burden.

But a pre-notification with combined assets . . . I am dealing only with assets. If you are going to use assets and sales you might want it higher, $350 million assets and sales, but we wanted to look at assets because some medium-sized firms have pretty good sales volumes but, as you say, not much in the way of profit margins, and that is why we were looking more at assets than at sales.

Mr. Domm: Thank you very much, Mr. Chairman.

The Chairman: Mr. Graham and Mr. Bennett, on behalf of all members we appreciate the point of view of the Canadian Federation of Independent Business. Thank you for coming, and have a good day.

[*Translation*]

commençaient à devenir rentables, après quoi elles sont devenues des filiales de ces grosses entreprises plutôt que des entreprises de moyenne envergure qui soient indépendantes.

M. Domm: Il n'empêche que vous allez plus loin en disant que les entreprises rentables . . . Quoi qu'il en soit, nous savons, et vous savez d'ailleurs probablement aussi bien que n'importe qui, qu'il y a également des fusions qui intéressent des entreprises non rentables et qui sont manifestement effectuées pour des raisons fiscales. Si vous ajoutez donc à cela les entreprises non rentables, si vous pensez à toutes les fusions et à tous les rachats d'entreprises non rentables et à toute la paperasserie que le préavis permet d'éviter, il est assez difficile de justifier, dirais-je, une diminution plutôt qu'un relèvement du seuil.

M. Bennett: Un relèvement du seuil? Dépasser les 500 millions de dollars? Vous rigolez!

M. Domm: Non, pas à partir de 500 millions de dollars, à partir de 200 millions de dollars.

M. Bennett: Comme vous le dites, c'est exactement l'argument que l'on aurait pu utiliser aux États-Unis. À notre avis, même à l'heure actuelle, le marché étant nettement meilleur qu'en 1983, compte tenu de la croissance qui s'est produite depuis lors, avec un total combiné d'actifs de 200 millions de dollars, il n'y aurait probablement même pas 3,000 entreprises qui pourraient se trouver touchées. Ce n'est pas vraiment une paperasserie très considérable.

Pour ce qui est de l'entreprise, qu'il s'agisse de 20 millions, de 35 millions d'actifs «et» de chiffre d'affaires plutôt que «ou» de chiffre d'affaires, ces petites entreprises n'auront rien à voir avec cette paperasserie. C'est l'entreprise qui essaie de les racheter qui va devoir subir cette paperasserie, et les entreprises en question ont des cabinets d'avocats et des conseillers techniques et juridiques pour le faire.

Notre argument, donc, à propos de la paperasserie . . . Soit dit en passant, nous reviendrons pour le comité de M. Hnatyshyn, ou son ministère, et pour le rapport de M. Nielsen. Je pense qu'ils nous ont donné, ainsi qu'à vous et à vos collègues, énormément de marge de manoeuvre et une nouvelle façon de nous attaquer à ce problème de la paperasserie.

Mais dans le cas d'un préavis lorsque les actifs combinés . . . Je ne parle ici que des actifs. Si vous voulez parler de l'ensemble des actifs et du chiffre d'affaires, peut-être voudrez-vous effectivement un seuil plus élevé, 350 millions de dollars au total, mais nous voulions uniquement tenir compte des actifs, étant donné que certaines entreprises de moyenne envergure ont un assez bon chiffre d'affaires et, comme vous le disiez vous-même, d'ailleurs, leurs marges bénéficiaires sont assez faibles, et c'est la raison pour laquelle nous insistons davantage sur les actifs que sur le chiffre d'affaires.

M. Domm: Merci beaucoup, monsieur le président.

Le président: Monsieur Graham et monsieur Bennett, j'aimerais vous dire, au nom de tous les membres du Comité, que nous avons bien compris le point de vue de la Fédération canadienne de l'entreprise indépendante. Nous vous remercions d'être venus et nous vous souhaitons bon retour.

[*Texte*]

M. Bennett: Merci beaucoup.

Le président: Avec votre permission, nous allons ajourner pour quelques minutes. Après la pause, nous entendrons les gens de l'Association canadienne de camionnage.

• 1100

• 1104

The Chairman: I will now introduce Mr. McLaren, the Executive Director of the Canadian Trucking Association; Mr. Pat McGuire, the President of Inter City Truck Line; and Mr. Ralph Blackborow, the General Manager of the Canadian Transportation Tariff Bureau Association. All of these gentlemen represent the Canadian Trucking Association. You will have about 15 minutes to make your presentation and then one hour or so for the questions.

• 1105

Mr. A.K. McLaren (Executive Director, Canadian Trucking Association): Thank you very much, Mr. Chairman. Gentlemen, it is a pleasure to be before the committee. I want to apologize at the outset for getting our submission in so late. It is pretty hard to keep up with what is going on on the Hill these days, and a constant struggle to churn out more and more paper, going in more and more directions.

Mr. Chairman, we have a fairly narrow point to deal with today; it is just one aspect of Bill C-91, but an important issue for the trucking industry. Indeed, our concerns in this area span my 18 years with the association, because when I joined in January 1968 one of the first phone calls I had was from a trucker in western Canada saying: "What do I do? The Combines Investigation people are in looking at my books". I asked him why they were there, and he said it had something to do with tariffs. I asked him what tariffs were, and he explained it. Having practised law but not specializing in this area, I can remember asking myself what I was getting into.

However, our concern in this area with respect to clause 32 in relation to the long-established collective rate-making activity, and publishing tariffs certainly goes back; there is an historical base to the practice emanating out of historical railway practices both in Canada and the United States. The implication in the United States under the Sherman Act is that collective rate-making—i.e., publications of tariffs, comprehensive tariffs—were protected from the requirements of the Sherman Act by specific exemptions. U.S. transportation deregulation in the late 1970s and early 1980s somewhat changed this. The privilege the railways in the States had of entering into collective rates was withdrawn entirely. The privilege in trucking was somewhat limited in scope to general tariff increases.

[*Traduction*]

Mr. Bennett: Thank you very much.

The Chairman: With your permission, we are going to break for a few minutes. After the break, we are going to hear from the Canadian Trucking Association.

Le président: Je vous présente maintenant M. McLaren, directeur exécutif de l'Association canadienne du camionnage, M. Pat McGuire, président de *Inter City Truck Line*, et M. Ralph Blackborow, directeur général de l'Association canadienne du bureau de la tarification des transports. Ces trois messieurs représentent l'Association canadienne du camionnage. Messieurs, vous avez un quart d'heure environ pour nous faire votre exposé, après quoi nous consacrerons une heure environ aux questions.

M. A.K. McLaren (directeur exécutif, Association canadienne du camionnage): Merci beaucoup, monsieur le président. Messieurs, c'est un plaisir pour nous de comparaître devant vous. J'aimerais immédiatement vous présenter des excuses si nous vous avons remis notre texte si tard. Il est très difficile, de ce temps-ci, de suivre tout ce qui se passe sur la Colline; nous sommes sollicités de toute part pour produire sans cesse des documents dans des domaines de plus en plus nombreux.

Monsieur le président, nous allons parler aujourd'hui d'un élément très précis, d'un seul aspect du projet de loi C-91, mais qui est très important pour l'industrie du camionnage. De fait, depuis 18 ans que je travaille pour l'association, il s'agit d'un élément qui nous a toujours préoccupés: lorsque j'ai commencé à l'association, en janvier 1968, l'un des premiers coups de téléphone que j'ai reçus venait d'un camionneur de l'Ouest qui me demandait: «Que dois-je faire? Les gens des enquêtes sur les coalitions sont en train d'éplucher mes livres». Je lui ai demandé pourquoi ils étaient là, et il m'a répondu qu'il s'agissait des tarifs. Je lui ai demandé ce qu'étaient ces tarifs, et il me l'a expliqué. J'étais avocat, mais ce n'était pas ma spécialité, et je me souviens fort bien m'être demandé dans quelle galère je m'étais fourré.

Quoi qu'il en soit, ce qui nous intéresse ici, c'est l'article 32 et ses répercussions sur une de nos activités de longue date, la détermination collective des tarifs et leur publication. C'est une pratique qui a des antécédents historiques, en ce sens qu'elle remonte aux premiers temps des chemins de fer au Canada comme aux États-Unis. Aux États-Unis, en vertu de la Loi Sherman, la tarification collective, c'est-à-dire la publication des tarifs et des tarifs globaux, était expressément exclue des dispositions de la loi en question. La déréglementation des transports qui a eu lieu aux États-Unis à la fin des années 70 et au début des années 80 a un peu changé la situation. Aux États-Unis, le privilège que les chemins de fer avaient de procéder à une tarification collective leur a été supprimé et,

[*Text*]

This is really what we do in Canada now; it is what we are concerned with trying to protect. Our concern with exposure under clause 32 led us to try on various occasions to have legislative protection built into the act, somewhat like the Shipping Exemption Act provision. Several times the issue went to Cabinet. Several times it ended up in heated debate, but nothing happened and the matter has been referred to study on several occasions without any conclusive, definitive decisions or conclusions really being reached.

Collective rate-making in trucking does involve carriers, and often very large groups of carriers, coming together and agreeing on price. There is no question about it, we do not deny it and we do not pretend we can hide behind the implication that no agreement takes place. The fact is we sell the result of the agreement to shippers and they are very glad in many cases to have it.

We have here—and Mr. Blackborow will touch on it in a minute—how a tariff works and the various elements of the tariff to give you some concept of the paper-flow implications.

We say this, though: There are six major tariff bureaus across the country, and according to a study we did a few years ago those tariff bureaus produce something in the order of 16 million sheets of paper a year. This would be in the index in a general tariff, or in independent action tariffs, which are when individual truckers depart from the general tariff.

If every trucker in the country had to produce the same information and tried to disseminate this information to the same constituency which subscribes to the existing bureau tariffs, we would be into well over a billion sheets of paper being issued and disseminated annually. It would be an impossible situation. The cost would be prohibitive and the value of the information would be nil. It would just be more than would be useful to anybody.

So we have a problem. Our concern with clause 32 is outlined in detail in a legal memorandum prepared by CTA counsel, which is attached enclosed with our submission. I will not go into it in great detail. I would simply refer committee members to the summary at the end of it, and I assume this is an issue which counsel to the committee and the department would want to refer to in more detail.

• 1110

To summarize very, very briefly what the legal opinion says, it is the following: Section 32 of the Combines Investigation Act is founded on criminal conspiracy, and therefore *mens*

[*Translation*]

dans le cas du camionnage, ce privilège a été en partie limité à des augmentations générales des tarifs.

C'est précisément ce que nous faisons actuellement au Canada, et c'est ce que nous voulons protéger. Les dispositions de l'article 32 sont précisément la raison pour laquelle nous avons souvent tenté d'obtenir par voie législative certaines garanties, un peu comme les dispositions homologues de la Loi dérogatoire sur les conférences maritimes. Plusieurs fois, le Cabinet en a été saisi. Plusieurs fois, le dossier a provoqué des discussions animées, mais rien ne fut fait. À plusieurs reprises, la question a été mise à l'étude sans qu'aucune décision ou conclusion définitive ou péremptoire n'ait été prise.

Dans le domaine du camionnage, la tarification collective est arrêtée par les camionneurs, souvent des groupes très importants de transporteurs routiers, qui se réunissent pour s'entendre sur une tarification. Cela ne fait aucun doute, c'est ainsi que les choses se passent, nous ne le nions pas et nous ne voulons en aucun cas prétendre qu'il n'y a pas entente. Il est vrai que le résultat de cette entente, nous le vendons aux transitaires, qui, très souvent d'ailleurs, en sont très heureux.

Nous avons ici—et M. Blackborow vous en parlera dans quelques instants—un exemple de la façon dont cette tarification fonctionne et les divers éléments qui entrent en ligne de compte, le tout vous donnant une certaine idée du déroulement des choses sur papier.

Mais nous vous disons également ceci: nous avons au Canada six principaux bureaux de tarification et, à en croire une étude que nous avons effectuée il y a quelques années, ces bureaux de tarification produisent environ 16 millions de feuilles de papier par an. Cela se présente sous la formule d'un index de tarification générale ou de toute une série de tarifications indépendantes qui sont les variantes du tarif général appliqué par les camionneurs eux-mêmes.

Si chaque transporteur routier du Canada devait produire le même genre de dossier et tenter de le communiquer à la clientèle actuelle des bureaux de tarification, cela reviendrait à devoir publier et transmettre tous les ans plus d'un milliard de feuilles de papier. Ce serait absolument infaisable. Cela coûterait les yeux de la tête, et les renseignements ainsi communiqués ne vaudraient quasiment rien. Ce serait beaucoup trop pour ce dont nous avons vraiment besoin.

Il y a donc un problème. Ce qui nous embête dans l'article 32, nous vous l'avons exposé d'une façon détaillée dans une communication juridique préparée par notre expert-conseil, que nous avons ajoutée en annexe à notre mémoire. Je ne vais pas vraiment entrer dans les détails, mais j'aimerais simplement signaler aux membres du Comité le sommaire de cette communication qui se trouve à la fin du texte, et j'imagine qu'il s'agit là de quelque chose que le conseiller juridique du Comité et celui du ministère voudront aborder d'une façon plus détaillée.

Pour résumer très rapidement les conclusions du conseiller juridique, l'article 32 de la Loi sur les enquêtes relatives aux coalitions repose sur la notion de collusion criminelle et par

[*Texte*]

rea—i.e., criminal intent—is a necessary ingredient of a section 32 conviction. In some conspiracy cases, the agreement itself or the effect of the agreement will reveal the required *mens rea*. In other cases, the agreement itself may not reveal the required *mens rea* or even the true nature of the agreement. In such cases, the court must inquire not only into the existence of the agreement, which we can hardly deny when we publish it and sell it, but into the reason for or the nature of the agreement in order to determine whether there is evidence of anti-competitive purpose.

Subsection 32.(1.3), which is the provision that concerns us, would establish that it is necessary only to prove that the parties entered into an agreement as the sole evidentiary standard to establish appropriate *mens rea*. In preparing trucking tariffs, we not only agree on the tariff after consultation with shippers at all times, but we publish it and sell it to the shippers. It is a useful document because it is a key element in the contractual relationship formed between carriers and shippers.

Now, such a minimum standard of proof was never the law in Canada with respect to the Combines Investigation Act offences, according to our legal counsel. Elimination of the *mens rea* requirement in section 32 turns the provision into a per se offence approach, and counsel suggests that it might even be a violation of section 7 of the Charter of Rights and Freedoms.

Now, I have touched on the historical rationale of collective rate-making. The process involves developing a freight classification for what is otherwise an intangible product—i.e., a freight service that may involve nothing more than a phone call from a shipper to a carrier to come and pick up freight when a freight bill is signed. But that freight bill almost invariably will not refer to price; that is determined later, using the tariff rules, the tariff index, getting the correct classification, seeing what special rules of carriage may have applied to the particular system, and then rating the tariff. It happens tens of thousands of times a day, using that tariff as the basis subsequently for determining what the price is.

The general freight tariff is arrived at by carriers meeting periodically, and generally the general freight tariffs are reviewed in a comprehensive manner about twice a year. Shippers are invited to all these meetings where discussions take place and they are provided with the back-up information.

The general freight tariff permits independent actions, which means that once you have a general tariff in place with the index and the reference and the rules, carriers are then free—and they do—to depart from the general tariff, using

[*Traduction*]

conséquent du *mens rea*, c'est-à-dire l'intention criminelle qui devient dès lors un préalable essentiel pour obtenir une condamnation aux termes de l'article 32. Dans certains cas de collusion, l'entente elle-même ou ses conséquences révèlent *ipso facto* l'intention criminelle. Dans d'autres cas, l'entente à proprement parler ne la révélera pas nécessairement, pas plus d'ailleurs que la nature même de l'entente en question. Dans certains cas, le tribunal doit découvrir non seulement qu'il existe une entente, ce que nous pouvons difficilement nier lorsque nous la publions et la vendons, mais également la motivation ou la nature de l'entente pour pouvoir déterminer s'il y a effectivement une preuve d'intention préjudiciable à la concurrence.

Le paragraphe (1.3) de l'article 32, qui est la disposition législative qui nous intéresse, porterait qu'il suffirait de prouver que les parties ont conclu une entente pour que le tribunal puisse conclure à l'intention criminelle. Lorsque nous préparons nos tarifs de transport routier, non seulement nous entendons-nous à ce sujet après avoir consulté les transitaires, mais encore, nous les publions ces tarifs et nous les vendons aux transitaires. C'est un document utile étant donné qu'il représente un élément fondamental du rapport contractuel entre l'expéditeur et le transitaire.

Cela dit, une telle norme probante minimum n'a jamais eu force de loi au Canada dans le cas des délits aux termes de la Loi sur les enquêtes relatives aux coalitions, d'après ce que nous dit notre conseiller juridique. La disparition, dans l'article 32, du critère de l'intention criminelle transforme cet article en une disposition axée sur le délit à proprement parler, et notre conseiller juridique est d'avis que cette façon de faire pourrait même être une violation de l'article 7 de la Charte des droits et libertés.

Je vous ai dit quelques mots de la perspective historique de la tarification collective. Cette façon de procéder repose sur l'établissement d'une classification du fret pour ce qui serait sinon un produit intangible, c'est-à-dire un service d'acheminement qui pourrait fort bien se limiter à un coup de téléphone entre un transitaire et un transporteur pour que ce dernier vienne prendre livraison d'un envoi moyennant simple signature d'une facture pour services de transport. Mais cette facture, pratiquement dans tous les cas, ne mentionne pas le prix: en effet, celui-ci est déterminé ultérieurement à partir des règles de tarification, de l'index de la tarification, en partant de la classification appropriée, compte tenu des règles particulières qui peuvent s'appliquer au réseau utilisé, après quoi, la tarification est établie. C'est le genre de chose qui se produit des milliers de fois par jour, et la tarification sert donc ultérieurement à calculer le prix du transport.

La tarification générale du fret est déterminée à l'occasion de réunions périodiques des transporteurs et, en général, à fond quelque deux fois par an. Les transitaires sont invités à toutes ces réunions et on leur donne tous les renseignements nécessaires à l'appui des décisions prises.

La tarification générale permet toutefois des initiatives indépendantes, ce qui veut dire que dès lors que le tarif général est là avec son index, ses références et ses règles, les transporteurs ont tout loisir—et ils ne s'en privent pas—de déroger à

[*Text*]

independent actions depending on the particular market conditions, competitive conditions, requirements of particular shippers. The very large document here that Mr. Blackborow will touch on is the independent action tariff. It is much bigger than the general freight tariff.

So the concept gets something on paper, but it has flexibility and allows price competition to exist despite the fact that there has been such an agreement, and as I say, it is done in open forum. The discussion that takes place is done with shippers present, and shippers have an opportunity to provide input. For example, at the current moment there is a great dispute on across the country between shipper groups and their various bureaus on whether or not we should be taking off fuel surcharges, because one reads in the paper that the price of fuel is going down and what have you. The truckers, on the other hand, will establish that this may be true with the price of U.S. fuel and the price of gasoline, but it is not true with the price of diesel fuel, at least so far.

So it is an open system, but it does involve this element of agreement in order to achieve an orderly process of defining and determining where the best price can be obtained and in rating freight bills, which is part of the contractual relationship.

The system is changing. Collective rate-making in transportation used to be under rate regulation; indeed, it still is for the railways under section 279 of the Railway Act. But under the proposed transportation bill Mr. Mazankowski is bringing in, that privilege will be removed. About half the provinces regulated rates for trucking tariffs, the other half did not. Where rates were protected by having to be approved, section 32 generally would have no application. But that concept of rate approval is being removed. The concept of enhanced competition in transportation is taking place. We have to face up to that; indeed, we are.

• 1115

In the last six years there has been a one-third increase in the number of general truckers across Canada. So even before the formal change in regulation to deregulate has happened, the transportation boards are in fact greatly increasing the level of competition in the industry.

So our concern specifically is that subsection 32(1.3) places an interpretation on the *mens rea* aspect of section 32 of the intent of the parties, which, when coupled with the second part of the test, which is the "does it unduly limit competition" aspect, really puts us in an impossible position. If subsection 32(1.3) proceeds, the indication is that it would put the industry in a position where we probably could not continue this practice.

The other side of the section 32 test, undueness, is very difficult to interpret and imply in transportation. This is

[*Translation*]

cette tarification générale en prenant des initiatives indépendantes qui sont fonction des conditions particulières de leur marché, de l'état de la concurrence ou des exigences particulières des transitaires. Le gros document que vous avez ici et dont M. Blackborow vous dira quelques mots est précisément la tarification des initiatives indépendantes, et vous constaterez que c'est un document beaucoup plus volumineux que la tarification générale.

La notion existe donc sur papier, mais ce n'est pas une notion rigide. Elle permet à la concurrence de jouer au niveau des prix malgré l'existence de l'entente de base et, comme je le disais, cela se fait en assemblées tout à fait ouvertes. La discussion a lieu en présence des transitaires qui ont, eux aussi, l'occasion d'y participer. Ainsi, il y a à l'heure actuelle un litige notable qui oppose les groupes de transitaires et leurs divers bureaux qui se demandent si nous ne devrions pas abolir les surtaxes sur le carburant, étant donné tout ce qu'on peut lire dans les journaux à propos de la diminution du prix du carburant, et que sais-je encore. En revanche, les camionneurs diront que, bien sûr, le prix du carburant a diminué aux États-Unis, mais il n'en va pas de même pour l'instant de celui du mazout.

C'est donc un système parfaitement libre, mais il faut quand même qu'il y ait un minimum d'entente pour que nous puissions arriver à définir et à déterminer les meilleurs prix possibles et à classifier la tarification du fret, ce qui fait partie bien entendu des éléments contractuels.

Mais le système change. La tarification collective en matière de transport relevait auparavant de la réglementation des tarifs, et c'est d'ailleurs toujours le cas pour les chemins de fer conformément à l'article 279 de la Loi sur les chemins de fer. Mais le projet de loi sur les transports déposé par M. Mazankowski propose l'abolition de ce privilège. La moitié environ des provinces taxaient le tarif du transport routier, l'autre moitié non. Lorsque les tarifs sont protégés parce qu'ils doivent être approuvés de cette façon, l'article 32 ne s'applique pas. Mais cette notion de l'approbation des tarifs va être abolie, remplacée par la notion d'une intensification de la concurrence dans le secteur des transports. Cela, nous devons l'admettre et nous l'admettons d'ailleurs.

Depuis six ans, le nombre de camionneurs faisant du transport général au Canada a augmenté d'environ un tiers. Ainsi, même avant que la déréglementation ne commence, les offices et commissions des transports ont déjà commencé à intensifier la concurrence dans notre secteur.

Ce qui nous inquiète donc surtout, c'est que le paragraphe (1.3) de l'article 32 donne de l'élément moral de l'infraction visé à l'article en question une interprétation qui, alliée au deuxième critère, c'est-à-dire la notion d'«empêcher ou diminuer la concurrence indûment», rend notre position intenable. Si le paragraphe en question est adopté sous sa forme actuelle, nous devrions selon toute vraisemblance abandonner cette façon de faire.

L'autre élément du critère de l'article 32, l'action indue, est très difficile à interpréter et à appliquer dans le secteur des

[*Texte*]

because it is very difficult to determine what constitutes a particular transportation market. These tariffs apply regionally; they apply long-haul across the country; they apply to specific commodity movements between two points; and they can apply generally to general commodities in a broad, geographic area.

Defining market can be breached in any number of ways: number of shipments, tonnage, tonne-miles, revenues earned, what have you. The for-hire trucking industry certainly does not have a monopoly in any market which it serves. If it does, it is by accident and on a very micro basis and probably temporarily.

Private trucking, which accounts for about two-thirds of the tonnage hauled in the total trucking industry, is always there. A shipper has the alternative of hauling his own freight or now, the even greater facility of leasing a truck and driver to haul his own freight, if he does not want to actually get into owning trucks.

We are up against forwarders. We are up against the railways and we are up against other forms of competition, including non-bureau general common-carrier truckers. Many truckers who participate in the collective rate-making process also prepare and file their own specific tariffs independently of that process and then there are other specialty truckers, contract truckers who do not pretend to offer service to a broad base of shippers but deal specifically with individual shippers under particular contract who are competitors with the general rate tariff.

Now with this background, Mr. Chairman, I think I might turn over to Mr. Blackborow and ask him if he could in a very few minutes try and summarize just how the process works by referring to the specific Ontario-based tariff, showing you what the documents look like and then referring to some supplementary documentation which we distributed to the committee this morning. Thank you.

The Chairman: Go ahead.

Mr. Ralph Blackborow (General Manager, Canadian Transporation Tariff Bureau Association): Thank you. Mr. Chairman, gentlemen, the Canadian Transportation Tariff Bureau Association is an association without share capital. It was organized under the laws of Canada in 1963. It has three main areas of rate of filing activity: within Ontario, between Ontario and Quebec, between Ontario and western Canada and Quebec and western Canada. We also have a group of carriers who are bulk shippers; they use the tankers and the hopper cars we see on the road and also automobile carriers. But the greatest extent of our rate-filing activity is in general freight.

[*Traduction*]

transports. En effet, il est très difficile de déterminer ce qui constitue au juste un marché dans le domaine des transports. Les tarifs ont une vocation régionale, ils s'appliquent également au transport à grande distance à l'échelle nationale, ils s'appliquent au transport de certains produits bien déterminés d'un point à un autre et ils peuvent également s'appliquer aux marchandises en général dans une région géographique assez vaste.

La définition de marché peut être contournée de plusieurs façons: nombre d'envois, tonnage, nombre de tonnes par mille, niveau de bénéfices, que sais-je encore. L'industrie du camionnage commercial n'a certainement pas le monopole dans un marché qu'elle dessert. Si elle en avait un, ce serait purement fortuit, temporaire sans doute, et certainement à une échelle très limitée.

Le camionnage privé qui représente environ deux tiers du tonnage transporté par l'ensemble de l'industrie, est omniprésent. Un expéditeur peut toujours transporter ses propres cargaisons, mais il peut aussi céder à la facilité et louer un camion et un chauffeur pour le faire s'il préfère ne pas avoir son propre parc.

Nous nous heurtons contre les courtiers en transport, contre les chemins de fer et contre tous les autres concurrents dont les camionneurs indépendants non affiliés. Nombreux sont les camionneurs qui participent au processus de tarification collective et qui préparent également à notre intention leurs propres tarifs, mais il y en a d'autres, spécialisés ceux-là, qui travaillent à contrat, qui ne veulent pas offrir leurs services d'une façon générale aux expéditeurs, préférant traiter directement avec certains d'entre eux dans le cadre d'un contrat spécifique, et ceux-là sont nos concurrents pour ce qui est de notre tarif général.

Après cette explication, monsieur le président, j'aimerais demander à M. Blackborow d'essayer de résumer en quelques minutes la façon dont les choses se passent dans la réalité à partir de la tarification établie pour l'Ontario, de vous montrer à quoi ressemblent les documents et d'évoquer également certains autres documents de référence que nous vous avons fait distribuer ce matin. Je vous remercie.

Le président: Allez-y.

M. Ralph Blackborow (directeur général, Association canadienne du Bureau de tarification des transports): Merci, monsieur le président. Messieurs, l'Association canadienne du Bureau de tarification des transports est une association sans capital-actions, qui a été créée en 1963 sous le régime des lois canadiennes. Ses activités s'exercent dans trois secteurs principaux de tarification: le transport en Ontario, le transport entre l'Ontario et le Québec, le transport entre l'Ouest et l'Ontario et le Québec respectivement. Nous avons également un groupe de transporteurs qui font du transport en vrac: ce sont les camions-citernes et les camions-trémies que nous voyons sur nos routes, et ce sont également les camions qui servent au transport des voitures. Mais dans la grosse majorité des cas, nos activités de tarification valent pour le transport général.

[*Text*]

You have a list of the tariffs that are published by our bureau. If one were to have a complete set of tariffs, on the left-hand column it would show 5,474 pages—a lot of tariffs. The distribution is on the right-hand side. To our members we have 3,356 and to the public 5,210. Our total subscription list then is 8,566.

Last year our tariff page revisions totalled 14,274, so you can understand very readily that there is an enormous amount of paperwork involved in the tariffs and their distribution. Our tariffs are used as a reference library, I will call it, not only by our members and the subscribers, but also as a starting point for non-bureau carriers. The smaller shippers who do not have a traffic department or have a very limited traffic department can engage the services of audit firms who specialize in transporation, and those audit firms subscribe to a good number of our tariffs also.

• 1120

This tariff is a pretty hefty one. Number 1091 is the local Ontario tariff. Number 1090 is also effective on specific commodity-rated items that move within Ontario east of Longlac. Number 9050 is a rules tariff, and it governs the application of every other tariff we have. Every tariff refers to this particular tariff for rules and regulations respecting the movement of freight other than those items that are specified in the specific tariff. There are specific rules in the tariff that may overrule the 9050 tariff, which is a general tariff that would be issued to meet specific instances.

Now, just let me give you a few examples of what is contained in 9050: regulations regarding the blocking and bracing of shipments; cartage charges; COD services where a shipment goes out COD; detention of motor vehicles, where a driver and a tractor are held up waiting for delivery over a certain number of hours; exclusive use of a vehicle, where the shipper wants his goods and no other goods in that particular vehicle; over-dimension freight, over-length, over-width, over-height; a protective service for summer and winter goods, where you need heating in the wintertime and sometimes cooling services in the summertime; and stop-off in transit, where a shipment may be en route, say, from Toronto to Peterborough and stopped off in Oshawa for partial loading or unloading. These are particular items that govern the normal handling of freight and they are in this particular tariff number 9050.

We have the yellows and the greens here, and I do not want to get into too great a detail. These tariffs, of course, are used by highly trained, highly skilled technicians, and it would be unfair to expect a layperson to come in off the street and understand them. My purpose in bringing these two particular groups of tariffs is to try to explain to you the difference between an open tariff and an independent action tariff.

An open tariff, which is the yellow sheets, is open to any carrier licensed to serve either the origin, destination or by an interline. The big tariff, the green sheets, shows the rates that are applicable via a single carrier or maybe one or two

[*Translation*]

Vous avez ici la liste des tarifs qui est publiée par notre bureau. Si vous vouliez un jeu complet de tarifs, celui qui figure dans la colonne de gauche, vous auriez 5,474 pages, ce qui est beaucoup. Vous voyez à droite la numérotation pour la distribution. Il y en a 3,356 pour nos membres et 5,210 pour le public, de sorte que notre liste tire à 8,566 exemplaires.

L'an dernier, nous avons apporté 14,274 révisions à notre tarif, de sorte que, vous le comprendrez facilement, la paperasserie que représentent la tarification et la publication des tarifs est impressionnante. Nos tarifs sont utilisés comme référence, si vous voulez, non seulement par nos membres et les abonnés, mais aussi par les transporteurs non affiliés qui s'en servent comme repère. Les petits expéditeurs qui n'ont pas un service de transport, ou qui n'ont que des effectifs très limités à cette fin, peuvent recourir à des bureaux de vérification spécialisés dans les transports. Ces bureaux se servent aussi d'un bon nombre de nos tarifs.

Ce tarif-ci est assez volumineux. Le tarif portant le numéro 1091 est celui de l'Ontario. Le tarif 1090 s'applique également à certains articles bien précis, transportés en Ontario à l'est de Longlac. Le tarif numéro 9050 est un tarif général qui régit l'application de tous nos autres tarifs. Chaque tarif renvoie à celui-ci pour les règles et règlements touchant le transport de marchandises autres que celles visées par un tarif particulier. Un tarif peut renfermer des règles précises pouvant avoir préséance sur le tarif 9050, c'est-à-dire le tarif général applicable à certains cas.

Permettez-moi maintenant de vous donner quelques exemples de ce que renferme le tarif 9050: règlement concernant l'arrimage des chargements; droits de camionnage; services de transport de marchandises payables à la livraison; arrêt des véhicules à moteur, lorsqu'un chauffeur et un camion sont retenus pendant un certain nombre d'heures en attendant la livraison; utilisation exclusive d'un véhicule, lorsque l'expéditeur tient à ce que seuls ses biens et pas d'autres soient transportés dans un véhicule; charge trop longue, trop large ou trop haute; service de protection des biens l'été et l'hiver, lorsqu'il faut chauffer ou climatiser le véhicule selon la saison; escale en cours de route, lorsqu'un chargement expédié de Toronto à destination de Peterborough doit s'arrêter à Oshawa, par exemple, soit pour charger ou décharger de la marchandise. Ce sont toutes des règles régissant le transport normal de marchandises que l'on retrouve dans le tarif 9050.

Nous avons ici des feuilles jaunes et des feuilles vertes; mais je ne veux pas entrer trop dans les détails. Ces tarifs sont évidemment utilisés par des techniciens hautement qualifiés et compétents, et on ne peut pas s'attendre à ce que le profane y comprenne quelque chose. Si je vous présente ces deux groupes de tarifs particuliers, c'est pour tenter de vous expliquer la différence entre un tarif ouvert ou général et un tarif indépendant et particulier.

Le tarif ouvert, sur les feuilles jaunes, est ouvert à tout transporteur ayant son permis pour desservir soit les lieux d'origine et de destination soit un endroit entre les deux. Le gros tarif, sur les feuilles vertes, montre les tarifs appliqués par

[*Texte*]

independent carriers who want to generally—not always, but generally—charge a lower rate than what is applicable in the regular tariff. We have examples of these, if you wish to go through them.

All right. We want to take the ale. The regular tariff, the green sheet, shows ale—and I do not want to become too exact here—but item number 4040 shows ale. It is on the third-last page. We have just taken a few specifics here. We have liquors, beverages, etc. Between Toronto we have taken Arnprior at 95¢, and Kingston at 63¢. And if we go to the independent action tariff—this is a completely different one now—this is a . . .

• 1125

Mr. Domm: Just a question of clarification: I followed you on the ale, but I do not follow you on the pricing.

Mr. Blackborow: You have a Hutton Transport section there, sir, the green sheet, with ale . . .

Mr. McLaren: It is the third-last green sheet. The front part is the index for the item, and then the specific tariff item is attached, and if you go to the third sheet from the back you get the specific tariff item.

Mr. Domm: I have it.

Mr. Blackborow: As I say, it is extremely complicated, and for a lay person it is almost impossible.

The Chairman: Mr. Blackborow, I would ask you not to go into too much detail. You have exceeded already by 10 minutes the allocated time.

Mr. Blackborow: I would just point out, sir, that there is a difference in rates between the open items, which are the yellow sheets, applicable to all carriers. Named carriers are in the green sheets, and the rates are generally lower. There are several examples in here of that.

Mr. Attewell: Excuse me. Is the Kingston example in the yellow as well, or is that comparison meaningful?

Mr. Blackborow: Kingston is in the yellow sheets. Is that what you mean, sir?

Mr. Attewell: I guess my question is tracking the Kingston . . .

Mr. Blackborow: Kingston is here in the yellow sheet, the second-last sheet. You have 63¢ versus 78¢.

Mr. McLaren: The point is that the green sheet represents the independent action tariff of a specific carrier serving that market. He specializes in that area. He may have a back-haul situation. There may be a lot of reasons. But that is an independent action tariff that varies the general tariff where the agreement has taken place between the carriers.

[*Traduction*]

un seul transporteur ou peut-être un ou deux transporteur indépendants qui, de façon générale, mais pas toujours, pratiquent un tarif inférieur au tarif ordinaire. Nous avons des exemples de cela, si vous voulez en passer quelques-uns en revue.

Bon. Prenons le cas de la bière. Le tarif ordinaire, sur la feuille verte, a une rubrique intitulée bière, c'est le numéro 4040. Vous trouverez cela à l'antépénultième page. Nous avons pris quelques exemples sprécifiques: l'alcool, les boissons, etc. Entre Toronto et Arnprior, 95c., et Kingston 63c. Si nous prenons le tarif indépendant—c'est complètement différent—c'est . . .

M. Domm: Un éclaircissement: je vous ai suivi lorsque vous parliez de la bière, mais je ne vous suis plus pour les prix.

M. Blackborow: Vous voyez ici, monsieur, sur la feuille verte, une section sur Hutton Transport, avec une ligne pour la bière . . .

M. McLaren: C'est à l'antépénultième page du fascicule vert. La première partie est un index des produits, puis suivent les tarifs spécifiques que vous retrouverez à l'antépénultième page.

M. Domm: Je vois.

M. Blackborow: Comme je l'ai dit, c'est extrêmement compliqué, presque impossible à comprendre pour le profane.

Le président: Monsieur Blackborow, je vous demanderais de ne pas trop entrer dans les détails. Vous avez déjà dépassé de 10 minutes le temps qui vous était alloué.

M. Blackborow: Je tiens simplement à vous faire remarquer, monsieur, qu'il y a une différence de tarif pour les articles ouverts, que l'on retrouve sur les feuilles jaunes et qui s'appliquent à tous les transporteurs. Sur les feuilles vertes, vous avez le nom des transporteurs dont les tarifs sont généralement inférieurs. Vous trouverez plusieurs exemples de cela sur ces feuilles.

M. Attewell: Excusez-moi. L'exemple que vous avez donné de Kingston se trouve-t-il aussi dans les feuilles jaunes, ou la comparaison est-elle pertinente?

M. Blackborow: Vous trouverez l'exemple de Kingston dans les feuilles jaunes. C'est bien ce que vous avez demandé, monsieur?

M. Attewell: J'essaie de retrouver Kingston . . .

M. Blackborow: Vous trouverez Kingston à l'avant-dernière page des feuilles jaunes. Vous voyez 63c. contre 78c.

M. McLaren: C'est simplement pour dire que la feuille verte représente le tarif particulier d'un transporteur desservant un marché bien précis dans lequel il se spécialise. Il n'est peut-être pas obligé de revenir lège. De nombreuses raisons peuvent expliquer ces tarifs. Il s'agit donc d'un tarif indépendant, différent du tarif général établi par suite d'une entente intervenue entre les transporteurs.

[*Text*]

The Chairman: Thank you, Mr. Blackborow, Mr. McLaren.

Je peux vous dire que les traducteurs savent maintenant que pour être rentable, dans l'industrie du camionnage, on doit rouler et rouler vite.

Bravo aux traducteurs! Vous avez bien fait votre travail.

Mr. McLaren: I apologize for going so quickly, Mr. Chairman. Maybe after 18 years of arguing a point it just sort of spills out.

The Chairman: I understand that. Mr. Ouellet.

Mr. Ouellet: Mr. Chairman, I want to indicate to Mr. McLaren that I have indeed read with interest his presentation, and more particularly the memorandum presented by the lawyer for the association, Mr. Lemieux, who is a long-time friend of mine—and by the way, an excellent lawyer—who indeed has touched upon some of the major court decisions that I believe have forced the government to rewrite section 32.

When the court decided particularly on the Aetna Case and on the Atlantic Sugar Case, the majority view has indeed changed substantially what was considered to be the rule of law in relation of proof to be presented in this particular section. I do not have to remind you that a very prominent judge dissented in both cases. In the Aetna Case, Chief Justice Laskin dissented and presented for the minority a very important argument.

• 1130

Similarily, in relation to the Atlantic Sugar case, Mr. Justice Estey submitted a very important minority point of view. Therefore, I think it is absolutely natural at this time, when the government is readdressing this particular legislation, that the government is trying to clarify for the court the intent of the legislator vis-à-vis clause 32, vis-à-vis conspiracy.

I think to say, as has been said in your memorandum submitted to us, a minimum standard of proof was never the law in Canada with respect to the Combines Investigation offence and is based on misreading of the legislation is a little far-fetched. Mind you, I appreciate in law there are always two points of view, and I do not blame your associations for presenting your case. Clearly, you have every right to do so.

The best evidence, I would submit to you, for the fact that the law is not properly written and has to be changed and clarified is your own submission, because on page 4 of your submission you refer to a court case which originated in 1979. On paragraph 3 of your submission on page 4 you said:

> the then Director of Combines Branch sought and obtained authorization to lay charges pursuant to Sec. 32 against truckers participating in collective ratemaking activities in western Canada.

Later on, you say:

[*Translation*]

Le président: Merci, monsieur Blackborow. Monsieur McLaren.

I can tell you that the translators know now that to be efficient in the trucking industry, you have to work and work fast.

Congratulations, translators! You did a good job.

M. McLaren: Je m'excuse d'être allé aussi vite, monsieur le président. On se laisse peut-être emporter quand ça fait 18 ans qu'on présente le même argument.

Le président: Je comprends. Monsieur Ouellet.

M. Ouellet: Monsieur le président, je tiens à signaler à M. McLaren que j'ai lu avec beaucoup d'intérêt son mémoire, et plus particulièrement celui présenté par l'avocat de l'association, M. Lemieux, qui est un ami de longue date—et, soit dit en passant, un excellent avocat—et qui a cité certaines grandes jurisprudences qui ont, je crois, forcé le gouvernement à reformuler l'article 32.

Quand la cour a rendu sa décision dans les causes Aetna et Sucre Atlantique, le jugement majoritaire a changé substantiellement ce qui était considéré comme la règle du droit concernant la preuve à administrer en application de cet article. Je n'ai pas à vous rappeler qu'un juge très éminent a rendu des conclusions dissidentes dans les deux cas. Dans l'affaire Aetna, le juge en chef Laskin, dissident, a présenté un argument minoritaire très important.

De la même façon, dans l'affaire Sucre Atlantique, le juge Estey a donné un avis minoritaire très important. En conséquence, je pense qu'il est tout à fait naturel que, dans la révision de cette loi, le gouvernement veuille clarifier, pour le bénéfice des tribunaux, l'intention du législateur concernant l'article 32 relatif au complot.

Je pense qu'il est un peu exagéré de dire, comme vous l'avez fait dans le mémoire que vous nous avez présenté, qu'un minimum de preuve n'a jamais été ce qu'exigeait la loi au Canada en ce qui concerne les infractions visées par la Loi relative aux enquêtes sur les coalitions et que cela est dû à une mauvaise interprétation de la loi. Soit dit en passant, je comprends qu'en droit, il y ait toujours deux points de vue, et je ne blâme pas vos associations de faire valoir leur point de vue. Vous êtes parfaitement dans vos droits.

Le meilleur argument pour dire que la loi n'est pas bien formulée et qu'elle doit être changée et clarifiée, c'est vous qui le donnez dans votre mémoire. A la page 4, vous parlez d'une action en justice qui a commencé en 1979. Au troisième paragraphe de la page 4 de votre mémoire, vous dites:

> le directeur des enquêtes sur les coalitions de l'époque avait demandé et obtenu l'autorisation d'intenter, en application de l'article 32, des poursuites contre des camionneurs impliqués dans un complot visant à fixer les prix dans l'Ouest canadien.

Plus loin, vous dites:

PUBLIC

[*Texte*]

The charges against truckers ... serving western Canada has not reached the preliminary hearing stage yet.

I understand it has not reached the preliminary hearing stage yet because of a number of representations made by your lawyers as points of procedure and delays of all kinds.

Clearly, I think not only in respect to this case but also in respect to a number of cases it would be more natural to have a law that would allow things to proceed more quickly for both sides, the accuser and the accused. I think these long delays are not healthy for justice. I would submit to you—and I would like to get your view in this regard—do you not think it would be better to have a law which allows a quick process and a speedly resolution of any different points of view which arise rather than having these long procedures which go on for years and years?

Mr. McLaren: The quick answer to the question is that if you are improving the procedures in criminal prosecution by eliminating the *mens rea* concept, no, I would not agree with you, and I am not sure an awful lot of people would, which is our specific concern with proposed subsection (1.3).

Let me just backtrack a bit. The comment you referred to on page 2 of our submission, "such a minimum standard of proof was never the law of Canada" comes straight out of the lawyer's submission after he went through all the cases. When you take the Sugar case and the Aetna case, there has been a case since then—it was the trial judge decision in the Southam case—which said there is no double standard problem. There was and still is only one standard, so the problem foreseen by the Combines Branch in the Sugar and Aetna cases, our lawyer says, really is not there. Then he says, if I understand him correctly, the test the Combines Branch would like to have is the test which comes out of the container materials decision. As our lawyer points out, the wording which came out of the majority decision in that particular case—it might have been unanimous, I am not sure—was based on the facts in the case, which were very straight-forward. The manufacturers of container cartons had set up a company to market all their production and they had created a virtual monopoly.

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What our lawyer is saying is that when you get a result which is so obvious, then it is pretty hard to deny what the intent of the parties was, but there can be other situations where the fact there is an agreement, and we are not disputing there is an agreement, we are not disputing ... You see, proposed subsection 32.(1.2) also was an attempt to correct some of the difficulty with the Aetna and the Atlantic Sugar case. I think particularly in the sugar case, and you can correct me if I am wrong, one of the implications was that you were going to an implied agreement; there was not the direct evidence of an agreement. We have no problem with that, because we produce the darn thing and sell it to the victims, if

[*Traduction*]

Les poursuites intentées contre les camionneurs ... desservant l'Ouest du Canada n'ont pas encore atteint le stade de l'audition préliminaire.

Si cette affaire n'est pas rendue plus loin, c'est justement parce que vos avocats ont soumis un certain nombre de conclusions, fondées sur des points de procédure notamment.

Je pense qu'il serait plus naturel d'avoir une loi qui permette une procédure plus expéditive pour les deux parties en cause: l'accusateur et l'accusé, pas seulement dans ce cas-ci, mais dans bien d'autres. Les causes qui traînent en longueur ne servent pas bien la justice. Ne pensez-vous pas qu'il vaudrait mieux avoir une loi permettant une procédure expéditive et un règlement rapide de toute divergence de points de vue plutôt que ces longues procédures qui durent des années et des années?

M. McLaren: Pour répondre brièvement à votre question, si vous cherchez à améliorer la procédure concernant les poursuites au criminel en supprimant l'élément moral, eh bien non, je ne suis pas d'accord avec vous, et je ne suis pas sûr qu'il y en ait beaucoup qui partageraient votre opinion en ce qui concerne le paragraphe 1.3.

J'aimerais revenir sur quelque chose que vous avez dit tout à l'heure. L'extrait que vous avez tiré de la page 2 de notre mémoire: «le minimum de preuves n'a jamais été la règle de droit au Canada» est une expression que nous avons relevée dans le mémoire de notre avocat, rédigé après qu'il eut vérifié toutes les jurisprudences. Outre les jurisprudences Sucre Atlantique et Aetna, il y a eu depuis la cause Southam où le juge a décrété qu'il n'y voyait pas deux poids deux mesures. Il n'y avait et il n'y a toujours qu'une seule norme, et notre avocat dit que le problème que prévoit la Direction des enquêtes sur les coalitions dans les causes Sucre Atlantique et Aetna, n'existe pas. Ensuite, si je comprends bien, il dit que la Direction des enquêtes sur les coalitions aimerait pouvoir invoquer la décision concernant les matériaux des conteneurs. Comme le fait remarquer notre avocat, la décision majoritaire dans cette cause—et ce fut peut-être même une décision unanime, je n'en suis pas sûr—était fondée sur les faits, lesquels étaient très simples. Les fabricants de carton pour conteneurs avaient établi une compagnie pour mettre en marché toutes leurs productions et avaient créé un monopole de fait.

Ce que veut dire notre avocat, c'est que quand les résultats sont aussi patents, il est assez difficile de ne pas reconnaître l'intention des parties en cause, mais que dans d'autres situations, lorsqu'il y a effectivement un accord, et nous ne prétendons pas le contraire ... voyez-vous, le projet de paragraphe 32.(1.2) vise à remédier à certaines difficultés que suscitent les causes Aetna et Sucre Atlantique. Je pense en particulier à cette dernière cause, et vous me corrigerez si je me trompe, mais le problème était qu'on invoquait un accord implicite, sans preuve directe d'un accord comme tel. Nous n'y voyons pas d'objection, parce que c'est nous qui produisons la marchandise et qui la vendons aux victimes, si je puis m'expri-

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that is the right word to us. So we have no argument at all that there is an agreement. It is open and the shippers participate in the discussion. We have no problem with that aspect, with a clarification on proposed subsection 32.(1.2), in terms of problems with Aetna and the Atlantic Sugar case.

On proposed subsection 32.(1.3), however, our lawyer is saying it virtually turns it into a per se offence, that you cannot look at why the parties entered into an agreement. He feels that goes too far, that it virtually eliminates the *mens rea* aspect from what is a criminal prosecution, and that going back to the container material decision one has to keep in mind the facts in the case, which clearly indicated the intent must have been there when they created a monopoly. I do not think we fall into that same category.

He goes on to say you must have reference to the particular facts to determine what the intent of the parties was, but that intent, *mens rea*, is still a factor. He says proposed subsection 32.(1.3) eliminates any relevance of intent. That is our concern.

Mr. Ouellet: Mr. Chairman, I would like to say to Mr. McLaren that I would not quarrel with his presentation if he were coming before our committee and saying because of a peculiar situation his industry should have an exemption; to me, that would be a logical approach. But to come to quarrel with a clause which deals with conspiracy and try to argue with us that we should not clarify this clause is very difficult to understand. He is telling us and acknowledging that in fact under the Sherman Anti-Trust Act in the United States it is a per se offence to enter into agreement respecting pricing. So if it is true in the U.S., why would it not be true in Canada also? You could argue that in the U.S. some accommodation has been made for your industry to be excused of this clause. Why are you not presenting the same argument here for us? I might agree or disagree with your presentation, but to come and argue about the per se offence is very difficult to swallow, I have to say.

Mr. McLaren: Mr. Ouellet, the answer to that is you have disagreed, because you were the Minister of Consumer and Corporate Affairs, I believe, when Otto Lang tried to do just that. The matter did go to Cabinet and was referred back to a study and the Department of Consumer and Corporate Affairs was involved in the study. It was just when that study of the situation was supposed to be getting going that charges were laid, just after the change of government in 1979. So we have tried on three or four occasions to have some specific accommodation made.

We are prepared to live with the implications of clause 32. Yes, we would like clarification because of the "undueness" aspect. We cannot deny there is agreement. There is no point in it. The undueness aspect, though—i.e., market-share test—is so difficult to apply in transportation. It is so difficult to apply. You could have truckers in a general freight Ontario tariff covering the whole province, and on a macro-basis there

[*Translation*]

mer ainsi. Nous ne disputons donc pas le fait qu'il existe un accord. C'est ouvert, et les expéditeurs participent à la discussion. Nous ne voyons pas de problème de ce côté-là, nous n'avons pas d'objection à ce qu'on veuille clarifier le paragraphe 32.(1.2), eu égard aux problèmes suscités par les causes Aetna et Sucre Atlantique.

Notre avocat estime que le projet de paragraphe 32.(1.3) fait de l'existence d'un accord une infraction matérielle, sans avoir égard aux motifs ayant incité les parties à s'entendre. Pour lui, la loi va trop loin; elle supprime pratiquement l'élément moral dans une poursuite au criminel, et pour en revenir à la décision concernant le matériau des conteneurs, il ne faut pas oublier qu'il était parfaitement clair que l'intention y était de créer un monopole. Je ne crois pas que nous tombions dans la même catégorie.

Notre avocat poursuit en disant qu'il faut tenir compte des faits avant de déterminer quelle était l'intention des parties, ce qui n'enlevait rien à l'importance de l'intention, de la «mens rea». Il dit que le paragraphe 32.(1.3) élimine toute considération de l'intention. C'est ce qui nous préoccupe.

M. Ouellet: Monsieur le président, permettez-moi de dire à M. McLaren que je ne contesterai pas ce qu'il nous dit, s'il venait devant notre Comité pour nous exposer pourquoi son industrie devrait bénéficier d'une exception, compte tenu de sa situation particulière. À mon avis, ce serait plus logique comme démarche. Mais je comprends très mal qu'on vienne critiquer un article portant sur les complots et tenter de nous convaincre qu'il n'est pas opportun de clarifier cet article. Le témoin nous dit et reconnaît que sous le régime de la *Sherman Anti-Trust Act* des États-Unis, le fait de conclure un accord pour fixer les prix constitue une infraction. Si c'est une infraction aux États-Unis, pourquoi n'en serait-il pas ainsi au Canada? Vous pourriez dire qu'aux États-Unis, certaines exceptions ont été prévues à l'intention de votre industrie pour ce qui est de cet article. Pourquoi ne nous présentez-vous pas le même argument ici, à nous? Je peux souscrire ou non à votre argumentation, mais je trouve cela très difficile à avaler que vous avanciez l'argument de l'infraction matérielle découlant de l'existence d'un accord.

M. McLaren: Monsieur Ouellet, le fait est que vous avez déjà manifesté votre désaccord, parce que vous étiez ministre de la Consommation et des Corporations, je pense, lorsque Otto Lang a justement essayé de faire passer cette idée. Le dossier s'est rendu au Cabinet et il a été renvoyé pour qu'une étude soit faite, et le ministère de la Consommation et des Corporations a participé à cette étude. C'est justement lorsque l'étude de la situation était sur le point de commencer que des poursuites ont été intentées, juste après le changement de gouvernement en 1979. Nous avons donc essayé trois ou quatre fois de trouver un arrangement.

Nous sommes prêts à composer avec les dispositions de l'article 32. Oui, nous aimerions que soit clarifiée la notion de «indûment». Nous ne pouvons pas nier le fait qu'il existe un accord. Il serait inutile de chercher à le faire. Mais la notion de «indûment»—c'est-à-dire le critère de la part du marché—est tellement difficile à appliquer dans le domaine des transports. Cette notion est très difficilement applicable aux transports.

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is no way they have over half the market or 60% or 70% or whatever it is.

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Even the definition of "undueness" as to what part of the market is involved is wide open, other than the amendment (1.1) that was put in back in 1976, which says it does not mean you have to have the whole market. But you could have 70 truckers in the general freight tariff in Ontario who certainly are not acting in an undue manner; but on a given day, on a particular route, for a particular shipper, if one trucker went bankrupt or for another reason went out of business, you might well have one or two carriers belonging to this tariff who through circumstances beyond their control end up with more than half the market, or even temporarily 100% of the market, on that given day, on a micro-basis.

So there is a real practical problem, which is what we have tried for 18 years to have resolved. Consumer and Corporate Affairs, when we have raised it at the policy level, have always said *nyet*—no way—we are not prepared to see exceptions made to this law. So we have seen the example of the Shipping Conferences Exemption Act and the number of times it has come back.

If we could get what was in the Shipping Conferences Exemption Act . . . It is what we do now. Even the new things that are talked about being put in there are how we conduct this already. It is open. It involves shipper input. They argue like hell. We come out with a tariff item. But then people start taking independent action on top of that, individually, without anybody else telling them they have to or arguing them out of it. They take independent action, which now accounts for most of the traffic that moves. So you have this agreement to facilitate a regime of conveying complex information which is critical to the whole process of contract and whatever. Then you have, still, open competition.

But we cannot get an exemption, because people are not prepared . . . Consumer and Corporate Affairs have been adamantly opposed to any kind of a compromise. So all we can deal with is the technical legal argument that if this amendment goes through, it applies to us, certainly. But if we are right in our interpretation of what 1.3 does, it certainly goes beyond our concern. It has general application.

Mr. Ouellet: I hesitate to throw this additional ring into the discussion, but I happened to sit on the transport committee that travelled across Canada to receive briefs from a number of trucking companies, the trucking associations, and the shippers on *Freedom to Move*, which is a document issued by the Minister of Transport, who intends to deregulate the transport industry. Indeed, everywhere we went—and there is

[*Traduction*]

Vous pourriez avoir des camionneurs visés par un tarif général s'appliquant à toute la province de l'Ontario, et sur une base macro, ils ne pourraient jamais représenter plus de 50, 60 ou 70 p. 100 du marché.

Même la définition de «indûment» est tout à fait libre quelle que soit la portion du marché à laquelle elle s'applique, sauf pour l'amendement (1.1) apporté en 1976, qui stipule que cela ne signifie pas qu'on a le marché au complet. Il pourrait y avoir 70 camionneurs qui n'agissent pas de façon indue en ce qui concerne le tarif général pour le transport des marchandises en Ontario; mais un jour, sur une route donnée, et pour un certain expéditeur, si un camionneur faisait faillite ou abandonnait les affaires pour toute autre raison, il se pourrait très bien qu'un ou deux transporteurs qui demandent le même tarif se trouveraient, à cause de circonstances, à contrôler plus de la moitié du marché, ou même temporairement la totalité du marché, ce jour-là, et pour une très courte durée.

Par conséquent, il y a un problème pratique réel, que nous tentons de solutionner depuis 18 ans. Le ministère de la Consommation et de la Corporation a toujours répondu, lorsqu'on soulevait la question au niveau politique: «nyet—il n'en est pas question—nous ne sommes pas disposés à faire exception à la loi. Nous connaissons l'exemple de la Loi dérogatoire sur les conférences maritimes et le nombre de fois qu'elle a été invoquée.

Si nous pouvions obtenir ce que prévoit la Loi dérogatoire sur les conférences maritimes . . . C'est ce que nous faisons présentement. Les nouvelles dispositions que nous voulons incorporer à la Loi ont déjà cours. C'est tout à fait libre. L'expéditeur peut faire son apport. Ils argumentent à qui mieux mieux. Nous présentons un article concernant les tarifs. Toutefois, il se trouve que les gens commencent à prendre des mesures indépendantes en plus de cela, individuellement, sans que personne ne leur dise ce qu'ils doivent faire ou ne pas faire. Ils prennent donc des mesures de façon indépendante, et c'est comme cela maintenant que se fait en grande partie le trafic. Il y a donc cet accord qui vise à faciliter l'échange des renseignements complexes qui est essentiel à l'ensemble du contrat par exemple. On a toujours quand même une concurrence tout à fait libre.

Cependant, nous ne pouvons obtenir d'exemptions, car les gens ne sont pas disposés . . . Le ministère de la Consommation et des Corporations est resté sourd à tout compromis. Tout ce dont nous pouvons discuter c'est l'argument légal techique portant que si l'amendement est adopté, il s'applique à nous bien sûr. Toutefois, si nous avons raison d'interpréter comme nous le faisons le paragraphe 1.3, il va au-delà de nos intérêts, il est d'application générale.

M. Ouellet: J'hésite à lancer cet autre élément dans la discussion, mais il se trouve que j'ai siégé au Comité des transports qui a sillonné le Canada pour recevoir les mémoires d'un certain nombre de sociétés de camionnage, d'associations de camionnage et des expéditeurs concernant le document «Aller sans entraves» publié par le ministère des Transports qui vise à déréglementer l'industrie des transports. Partout où nous

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ample reference to it in the minutes of our meetings—we were told there is no possibility of deregulating this industry unless the Combines Investigation Act is strengthened. We need a much stronger Combines Investigation Act if the government is going to go ahead with deregulation of the transport industry in Canada. So how do we cope with this?

Mr. McLaren: I would like to see the specific references to the trucking aspect in those discussions. I did not go across the country, but I certainly read an awful lot of the submissions, and I cannot offhand recall shippers' submissions saying we need the Combines Investigation Act changed. They wanted deregulation, because that in itself means more competititon.

Mr. Ouellet: The truckers?

Mr. McLaren: No, but deregulation . . .

Mr. Ouellet: Well, the truckers did not want deregulation.

Mr. McLaren: That is not quite true. The truckers are not opposed to regulatory reform or significant deregulation. It is happening already, in practice. We cannot stop it. We know it is happening. It is how it is done that we are concerned with. The fact is that we are going to end up with a hyper-competitive industry, and we are going to end up with an industry that is going to follow the U.S. example and the Australian example after deregulation, and that is that a few very large national companies are going to emerge from it. And this is another concern we have for smaller truckers. Very large companies, like the rail "duopoly" or . . .

Mr. Ouellet: You are precisely saying what we heard all along: that the big ones will eat the small ones and there will be less competition, and indeed we need a stronger competition law to prevent this from happening.

Mr. McLaren: Well, that deals with other aspects of this bill. Abuse of dominant position is proposed sections 50 and 51—that kind of thing. But deregulation is supposed to improve competition, and it will. You will get hyper-competition, but out of it you will probably get concentration. That is a very important point for the argument we are making today, because a large trucking company making more than $200 million serving a national market, a $25-billion Crown corporation like CP Limited or a Crown corporation like CN all have a huge advantage in preparing in-house comprehensive tariffs and then marketing to their customers over the smaller regional trucker who may compete with those large national carriers on part of the market. He has a terrible time trying to prepare and disseminate tariff information on a comprehensive basis. That is another reason why we think it is important to have flexibility.

[*Translation*]

sommes allés—et on en parle d'abondance dans les comptes rendus de nos réunions—on nous a dit qu'il n'est pas possible de déréglementer cette industrie à moins que la loi relative aux enquêtes sur les coalitions soit renforcée. Nous avons besoin que cette loi soit beaucoup plus rigoureuse si le gouvernement doit procéder à une déréglementation de l'industrie des transports au Canada. Comment faire?

M. McLaren: J'aimerais à voir ce qu'on a dit précisément dans ces discussions concernant le camionnage. Je n'ai pas visité le pays, mais j'ai certainement lu beaucoup d'exposés à ce sujet, et je ne peux, pour l'instant, me rappeler que les expéditeurs aient dit qu'il nous fallait modifier la Loi relative aux enquêtes sur les coalitions. Ils voulaient la déréglementation, car cette dernière signifie une plus grande concurrence.

M. Ouellet: Les camionneurs?

M. McLaren: Non, mais la déréglementation . . .

M. Ouellet: Eh bien les camionneurs ne voulaient pas la déréglementation.

M. McLaren: Ce n'est pas tout à fait vrai. Les camionneurs ne s'opposent pas à une réforme réglementaire ou une déréglementation importante. C'est déjà ce qui se fait dans la pratique. Nous ne pouvons l'arrêter. Nous savons que cela se produit. Ce qui nous préoccupe c'est la façon dont cela est fait. En réalité, nous allons finir par avoir une industrie hyperconcurrentielle, et une industrie qui va suivre l'exemple des Américains et des Australiens après la déréglementation, autrement dit quelques grosses sociétés nationales émergeront. Voilà ce qui inquiète également les petits camionneurs. De très grosses sociétés comme le «duopole» du rail ou . . .

M. Ouellet: Vous dites exactement ce que nous avons toujours entendu: que les gros mangeront les petits et qu'il y aura moins de concurrence, en réalité il nous faudrait une loi sur la concurrence plus forte pour empêcher que cela se produise.

M. McLaren: Cette question a trait à d'autres aspects du projet de loi. L'abus de position dominante, par exemple, se retrouve aux articles proposés 50 et 51. Toutefois, la déréglementation est censée améliorer la concurrence, et ce sera le cas. On obtiendra cette hyperconcurrence, mais il en résultera probablement une plus grande concentration. C'est un point très important pour l'argument que nous présentons aujourd'hui, puisque une grosse société de camionnage qui fait plus de 200 millions de dollars de chiffre d'affaires en desservant le marché national, une société de la Couronne de 25 milliards de dollars comme CP Limitée ou une autre comme CN, disposent toutes d'un avantage énorme lorsqu'elles préparent les tarifs généraux internes pour obtenir ensuite le marché de leurs clients aux dépens du petit camionneur régional qui doit concurrencer ces gros transporteurs nationaux pour une part du marché. Le petit camionneur a beaucoup de difficultés à préparer et à donner des renseignements sur les tarifs sur une base globale. Voilà une autre raison pour laquelle il est important, à notre avis, d'avoir une certaine souplesse.

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All we are saying with proposed subsection 32.(1.3) is that it goes too far. It eliminates any reference to why you do it, what the practice is, whether it is anti-competitive—does it have the intent of being anti-competitive and is the result anti-competitive? We are saying that in our case we want to be free to put that in front of the court if we are challenged.

Regarding the case out west, you are right. There were interventions that held the case up. One of the groups intervening was CN Trucking, who was arguing that as a Crown corporation the whole act did not apply to them. That took a couple of years.

We are not blaming anyone for the delay; we are just saying it is there. There is no rhyme or reason why the Combines Investigation went after truckers in western Canada as opposed to other parts of Canada where the same practices are carried out. The challenge came, as I say, right in the middle of a proposed study of the whole area.

We will have to face that, and we are prepared to face it because we are not unduly limiting competition. At the same time, we want to be able to explain to a court more or less what we have tried to explain to you today, what the beneficial attributes of this are and where price flexibility and competition still enters into it. We think (1.3) would eliminate that opportunity. That is what we are saying and I think that is what our council is saying.

The Chairman: Mr. Domm, please.

Mr. Domm: Thank you, Mr. Chairman. I would like to return just for a moment to the idea of collective rate-making. I would like to know how it works. The question I have in mind is this: What type of regulatory scheme will approve the rate set by this process? Once you tell me how you set the rate, what process is put in place to approve that rate?

Mr. McLaren: Subject to what my colleagues have to say, I touched on the implication. The rates are formulated in several ways through the collective rate-making process in the tariff bureau, which collects cost information. Once or twice a year they will put that together and propose an adjustment to a general tariff. There is then a meeting between the carriers and the shippers with the justification of the cost information being given to the shippers. They are free to comment before the carriers make a decision on whether they will change a rate. Then individual carriers who have agreed to that general rate may take independent action.

In Ontario, there is no rate regulatory requirement at all; there is only a rate-filing requirement, and even that is likely to be done away with under deregulation. In Manitoba, Saskatchewan and British Columbia, there has been a rate review process, or even in the case of Manitoba and Saskatchewan, a prescribed rate process. You do not increase your rate

[*Traduction*]

Tout ce que nous disons, c'est que le paragraphe proposé 32.(1.3) va trop loin. Il ne mentionne pas du tout les raisons pour lesquelles on procède de cette façon, quelle est la pratique, si elle est anti-concurrentielle—est-ce que son intention est d'être anti-concurrentielle, et arrive-t-elle à ses fins? Disons que, dans notre cas, nous voulons être libres de porter, le cas échéant, cette cause devant les tribunaux.

Au sujet de la cause dans l'Ouest, vous avez raison. La cause a été retardée du fait de certaines interventions. Un des groupes qui intervenait était le CN Camionnage, qui prétendait qu'en tant que société de la Couronne, la loi entière ne s'appliquait pas à eux. La cause a duré deux ans.

Nous ne blâmons personne du retard, nous disons simplement ce qui en est. Nous ne voyons pas pouquoi les responsables des enquêtes sur les coalitions se sont acharnés sur les camionneurs de l'ouest du Canada et non pas sur ceux d'autres régions où les mêmes pratiques avaient cours. Je le répète, cette contestation est arrivée au beau milieu d'un projet d'étude de tout ce domaine.

Nous devrons y faire face, et nous sommes disposés à le faire, car nous ne limitons pas indûment la concurrence. Nous voulons en même temps pouvoir expliquer au tribunal à peu près ce que nous avons essayé de vous expliquer aujourd'hui, à savoir, quels sont les avantages et où la souplesse en matière de prix et la concurrence s'appliquent toujours. Nous croyons que le paragraphe (1.3) ferait disparaître cette possibilité. Voilà ce que nous prétendons et ce que prétend, je crois, également notre conseil.

Le président: Monsieur Domm, s'il vous plaît.

M. Domm: Merci, monsieur le président. Je voudrais revenir un instant à la notion de l'établissement des taux collectifs. J'aimerais savoir comment ça fonctionne. Voici les questions que je me pose: quel mécanisme de réglementation permettra d'approuver les tarifs établis de cette façon? Une fois que vous m'aurez dit comment vous établissez le tarif, quelle méthode adopterez-vous pour le faire approuver?

M. McLaren: Sous réserve de ce que vont dire mes collègues, j'ai fait allusion aux conséquences. Les tarifs sont élaborés de plusieurs façons selon la méthode de l'établissement des tarifs collectifs au Bureau des tarifs, qui compile les renseignements sur les coûts. Une ou deux fois par an, le Bureau regroupe tous les renseignements et propose un rajustement du tarif général. Il y a ensuite réunion entre les transporteurs et les expéditeurs pour justifier les renseignements sur les coûts remis aux expéditeurs. Ces derniers peuvent faire leurs commentaires avant que les transporteurs prennent une décision pour modifier ou non le tarif. Chaque transporteur qui a accepté ce tarif général peut prendre ensuite ses propres mesures.

Il n'y a pas en Ontario d'exigences concernant la réglementation des tarifs; il faut simplement déposer le tarif, et même cette dernière exigence disparaitra probablement s'il y a déréglementation. Il y avait un processus d'examen des tarifs au Manitoba, en Saskatchewan et en Colombie-Britannique, et même, dans le cas du Manitoba et de la Saskatchewan, un

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and then go to get it approved. The government tells you what to do. In Quebec and Newfoundland, there is also a rate approval mechanism. All of that is going as part of deregulation. Half the provinces have a rate approval mechanism of one kind or another. Half of them do not and have only a rate-filing requirement where your rate is filed in a public place. It is a public document for everyone to see.

Mr. Domm: If we could make the assumption that the conspiracy provision does not apply and that there is no other regulatory scheme which controls the collective rate-making activities, what kind of protection is there for the consumer to ensure there will not be any abuses?

Mr. McLaren: Section 32 applies . . . there is no quetion. Ultimately, it is the level of competition in the industry which dictates that. I think at one place in the submission I point out that even without a formal change to deregulation, there has been a one-third increase in the number of common carrier truckers in the last six years. When you take into consideration recession and hyper-inflation, that is not bad for a regulated or unregulated industry. There is a lot of competition there. When formal deregulation comes in, there will be more.

• 1150

The point is we are not really arguing section 32 should be taken out. What we want is clarification of how it applies. We have been in discussion for two years with the combines director and his staff over guide lines as to what is acceptable under section 32 and what is not.

I have a copy of our proposal. It is an industry proposal and it has involved discussions with the Bureau of Competition Policy. They have not approved it. I would not want to give the wrong impression, but I have copies of what is in that draft. It is presently before the director for his consideration.

We are not saying section 32 should not apply. We are saying we want clarification of how it applies, because we say what we do is essential and important. Maybe 10 or 15 years from now, when everything is electronic, it will not be as important. But there is certainly no other way to convey the same comprehensive information in a rational, usable form at the present time, so we are in a box.

Section 32 certainly still applies. We are only saying proposed subsection (1.3) goes too far in eliminating the element of the intent of the parties in entering into such an agreement. That is all we are saying. The *mens rea* aspect, proposed subsection (1.3), goes too far. That is all we are dealing with in our submission.

We are not saying the undueness test should not apply. At least we are not saying it now. We have tried to have some legislative compromise but it has proved to be impossible. So what we are now doing is trying to have an informal under-

[*Translation*]

tarif imposé. Vous n'augmentez pas votre tarif pour le faire approuver par la suite. Le gouvernement vous dit quoi faire. Il y a également au Québec et à Terre-Neuve un mécanisme d'approbation des tarifs. Tout cela disparaîtra dans le cas d'une déréglementation. La moitié des provinces dispose d'un mécanisme quelconque concernant l'approbation des tarifs. L'autre moitié n'exige que le dépôt du tarif, qui se fait à un endroit public où tout le monde peut le consulter.

M. Domm: Si on supposait que cette disposition concernant le complot ne s'applique pas et qu'il n'y a pas d'autre système de réglementation pour contrôler l'établissement des tarifs collectifs, comment le consommateur pourra-t-il savoir qu'il n'y a pas d'abus?

M. McLaren: L'article 32 s'applique . . . il n'y a pas de doute. En fin de compte, c'est le niveau de concurrence dans l'industrie qui l'impose. J'ai souligné dans mon exposé que, même sans déréglementation officielle, le nombre de transporteurs a augmenté d'un tiers au cours des six dernière années. Si l'on tient compte de la récession et de l'énorme inflation que nous avons connues, ce n'est pas si mal pour une industrie réglementée ou non réglementée. Il y a beaucoup de concurrence dans ce secteur. Lorsque la déréglementation sera officielle, il y en aura davantage.

En réalité, nous ne prétendons pas que l'article 32 devrait disparaître. Nous voulons des précisions sur son application. Nous discutons depuis deux ans avec le directeur des enquêtes sur les coalitions et son personnel au sujet des lignes directrices pour savoir ce qui est acceptable et ce qui ne l'est pas en application de l'article 32.

J'ai un exemplaire de notre proposition. Il s'agit d'une proposition de notre industrie, qui fait suite aux discussions que nous avons eues avec le Bureau de la politique de concurrence. Le Bureau n'a pas approuvé cette proposition. Je ne voudrais pas vous induire en erreur, mais j'ai des exemplaires de cette ébauche. Elle est entre les mains du directeur qui doit l'étudier.

Nous ne prétendons pas que l'article 32 ne devrait pas s'appliquer. Nous voulons savoir comment il s'applique, car à notre avis, notre travail est essentiel et important. Dans 10 ou 15 ans peut-êre, lorsque tout se fera électroniquement, il ne sera pas aussi important. Mais pour le moment, il n'y a tout simplement pas d'autres façons de transmettre les mêmes renseignements complets sous forme rationnelle et utilisable, nous sommes donc dans une impasse.

L'article 32 s'applique certainement. Nous disons simplement que le projet de paragraphe (1.3) va trop loin en excluent l'intention des parties qui concluent un tel accord. C'est tout ce que nous disons. Pour ce qui ont de l'élément moral, le projet de paragraphe (1.3) va trop loin. C'est tout ce que nous disons dans notre exposé.

Nous ne prétendons pas que le concept d'«indûment» ne devrait pas s'appliquer. Ce n'est pas ce que nous disons, du moins pas pour le moment. Nous avons essayé d'obtenir un compromis législatif, mais cela n'a pas été possible. Nous

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standing with the Bureau of Competition Policy as to where the parameters are of legally acceptable practise under section 32, within the scope of the collective rate-making system. That is what we are trying to do now.

We think proposed subsection (1.3) would destroy the possibility of that if it was implemented. By removing the concept of *mens rea*, the intent, it really puts the practice, which we acknowledge is on the edge of section 32, over the line. We do not know what we will do if that provision goes through.

Mr. Domm: Thank you very much.

Mr. Attewell: Mr. Chairman, could I just ask a supplementary question? Mr. Domm, the first part of your question was on the process. How often are these tariffs adjusted? When you have a special situation, such as your liability insurance rates which just went through the ceiling this past year, would that cause new tariff rates?

Mr. Blackborow: Yes it did, sir. We had a public meeting. We sent out notification through the ICTL, CMA, and any body who has asked us to keep them abreast of what is going on in the transportation field. We had a meeting of our carriers with the public in attendance.

We went through the complete story of reinsurance, liability costs increasing, the amount of liability being decreased tremendously, and the premium cost being raised out of proportion. The public was there when the carriers said . . . And the carriers do not know in advance what he is going to say or what the other carrier sitting beside him is going to say. They all have a discussion of what is going to be there.

The public, particularly the CMA and the CITL representatives, put up quite an argument, but carriers decided to put a 4% insurance premium on the rates to take care of that specific problem. We call it an insurance surcharge.

Mr. Attewell: I have just one other thing along the same general lines. I have not looked at statistics on your industry in years, but as I recall it used to be one of the most profitable in terms of return on equity. I have some cost-accounting background, and you can often back into a desired rate of return on assets or on equity if you normally start with a tariff like that. For instance, if the banks of this country make 70 basis points after tax on their assets with a leverage of 20 to 1 or 21 to 1, they end up making 14% to 15% on their common equity. If you are in a tariff-setting process, like you are doing, it would seem to me that behind the scenes that must generate on average a certain type of return to the owners or shareholders. I am just kind of curious what that amounts to.

[*Traduction*]

essayons donc maintenant d'obtenir du Bureau de la politique de concurrence un éclaircissement officieux des critères relatifs aux agissements légalement acceptables au regard de l'article 32, en matière de tarification collective. Voilà ce que nous essayons de faire présentement.

Nous pensons que le projet de paragraphe (1.3) rendrait la chose impossible s'il était adopté. En excluant l'élément moral, on fait une infraction de cette pratique qui, nous le reconnaissons, est déjà à la limite de l'article 32. Nous ne savons pas ce que nous allons faire si cette disposition est adoptée.

M. Domm: Merci beaucoup.

M. Attewell: Monsieur le président, puis-je poser une question complémentaire? Monsieur Domm, la première partie de votre question portait sur le processus. À quels intervalles est-ce que ces tarifs sont rajustés? Des circonstances exceptionnelles, comme par exemple le cas des primes d'assurance-responsabilité qui ont monté en flèche l'an dernier, donnent-elles lieu à de nouveaux tarifs?

M. Blackborow: Oui, monsieur. Nous avons tenu une réunion publique. Nous l'avions annoncée à l'ICTL, à l'AMC, et à tous ceux qui nous avaient demandé de les tenir au courant de ce qui se passait dans le domaine des transports. Nous avons tenu une réunion avec nos transporteurs et le public pouvait y assister.

Nous avons discuté de toute la question de la réassurance, de la hausse des primes d'assurance-responsabilité, de la chute de la somme assurée et de la hausse disproportionnée des primes. Le public était présent lorsque les transporteurs ont déclaré . . . je dois souligner que les transporteurs ne savaient pas à l'avance ce qu'ils allaient dire ou ce que dirait leur voisin. Ils ont discuté de toutes qui allait se passer.

Le public, et en particulier les représentants de la CMA et de la CITL, s'y sont opposés vigoureusement, mais les transporteurs ont décidé d'ajouter une prime d'assurance de 4 p. 100 au tarif, à cause de ce problème. Nous l'appelons une surtaxe d'assurance.

M. Attewell: Je voudrais poser une autre question dans la même veine. Je n'ai pas examiné les statistiques de votre industrie depuis des années, mais si je me souviens bien, elle était peut-être l'une des plus rentables. J'ai une certaine expérience en matière de comptabilité des coûts, et on peut très souvent atteindre le taux de rendement voulu sur l'actif ou sur l'avoir propre si l'on commence avec un tarif de ce genre. Ainsi par exemple, si les banques du pays ont 70 points de base après impôt sur leur actif et que le coefficient d'endettement soit de 20 pour 1 ou 21 pour 1, elles réalisent en fin compte un bénéfice de 14 à 15 p. 100 sur l'actif net commun. Si vous voulez établir les tarifs, c'est bien ce que vous faites, il doit y avoir derrière tout cela, en moyenne, un rendement quelconque pour les propriétaires ou les actionnaires. Je serais curieux de savoir ce qu'est cette moyenne.

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Mr. Blackborow: In the case of the insurance, it was really a cost pass-through. There was no increase in the . . .

Mr. Attewell: Oh, I understand that. But on the normal setting, it must pump out at the bottom line a certain rate of return. I know averages can be deceiving, but it must have some notion behind the whole process of generating an adequate return to the owners. I am wondering what that is, what your target is.

Mr. Blackborow: We try to establish, before interest and taxes, 93% operating ratio. That is a ratio of expense to revenue. That is before interest and taxes.

Mr. Pat McGuire (President, Inter City Truck Line, Canadian Trucking Association): I wonder if I could comment on that.

Mr. Blackborow: Sure. Go ahead.

Mr. McGuire: As someone who operates a company in trucking, I agree with your comment that several years ago we did have targeted return on equity and assets. Today, it has been obscured by competition. We are staying in business, based on meeting the competitive force day by day. And particularly, on a changing volume availability basis, that business has dissected itself phenomenally in the past five years to where we now do not have common carriers per se who carry all types or weights of shipment. Today, the truckload marketplace has divided itself from the common carrier, general commodity carrier business significantly, to the point that we are continuing to try to keep our head above water on the operating ratio concept that Ralph has mentioned. He should also have mentioned we have not achieved the 93% operating ratio target, ever. We are more commonly in the 97% to 99%. We are a very marginal business today.

Mr. Attewell: This comment a few minutes ago of a one-third increase in the number of—I forget how you put that—number of firms, is that just numerically the number of firms? That is not one-third more of capacity for the industry.

Mr. McLaren: No. These are fairly recent statistics we have developed. Since 1978, there has been a one-third increase in the total number of class I, II and III carriers. That does not, of course, take into consideration amalgamations or internal growth of individual companies. That has been . . .

Mr. Attewell: What would the capacity increase have been in the industry?

Mr. McLaren: I do not know that there had been . . . during the same period, a 67% increase in industry revenues. Now, part of that is inflationary. We also have tracked, and I cannot

[*Translation*]

M. Blackborow: Dans le cas des assurances, il s'agissait tout simplement de faire face au coût. Il n'y a pas eu d'augmentation dans . . .

M. Attewell: Je comprends cela. Toutefois, normalement, lorsqu'on établit des tarifs, on doit prévoir un certain taux de rendement en fin de compte. Je sais que les moyennes peuvent être trompeuses, mais on doit avoir une idée, lorsqu'il est question d'établir des tarifs, du genre de rendement prévu pour les propriétaires. Je me demande ce qu'est ce rendement, quel est l'objectif.

M. Blackborow: Nous essayons d'établir, avant les intérêts et l'impôt, un coefficient d'opération à 93 p. 100. Il s'agit du coefficient dépenses-recettes. C'est le coefficient avant les intérêts et les impôts.

M. Pat McGuire (président, *Inter City Truck Line, Association canadienne du camionnage*): Me permettez-vous de faire une remarque à ce sujet?

M. Blackborow: Certainement. Allez-y.

M. McGuire: J'ai une société de camionnage, et je conviens avec vous qu'il y a plusieurs années nous établissions le rendement en fonction de l'avoir propre et de l'actif. De nos jours, ce n'est pas possible à cause de la concurrence. Si nous sommes toujours en affaires c'est que nous réussissons à faire face à la concurrence au jour le jour. À cause surtout d'une base de disponibilité de volume changeante, l'entreprise a énormément changé au cours des cinq dernières années, et à un tel point qu'il n'y a plus maintenant de transporteurs bien spécifiques pour transporter des envois de toutes sortes et de tous poids. De nos jours, le marché du camionnage s'est dissocié des transporteurs réguliers, des transporteurs de produits en général, et ce de façon importante, au point que nous arrivons de peine et de misère à réaliser, comme l'a dit Ralph, le coefficient d'exploitation. Il aurait également dû mentionner que nous n'avons pas réalisé le coefficient d'exploitation à 93 p. 100, nous ne l'avons jamais atteint. Nous en réalisons habituellement 97 à 99 p. 100. Notre entreprise est très marginale présentement.

M. Attewell: On a fait une remarque, il y a quelques minutes au sujet d'une augmentation du tiers du nombre de . . . je ne me souviens pas exactement du terme . . . du nombre d'entreprises, s'agit-il simplement du nombre d'entreprises sur le plan numérique? Il ne s'agit pas d'un tiers de plus comme capacité pour l'industrie.

M. McLaren: Non. Ce sont des statistiques très récentes que nous avons mises au point. Depuis 1978, il y a eu un tiers d'augmentation dans le nombre total des transporteurs de catégorie 1, 2 et 3. On ne tient pas compte, bien sûr, de la fusion ou de la croissance interne des sociétés prises individuellement. C'était . . .

M. Attewell: Quelle serait l'augmentation de la capacité pour l'industrie?

M. McLaren: Je ne sais pas s'il y a eu . . . pendant la même période une augmentation de 67 p. 100 des recettes de l'industrie. En partie, elle est due à l'inflation. Nous avons

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remember the exact numbers, the increase in tonne miles during that same period, which were substantial and which is a measure of activity. But certainly the one-third increase in the total number of carriers for what people keep telling us is a mature industry is an indication that the entry regulatory system, certainly in recent years, has not been operated on a closed-shop basis. It has been quite the opposite. About 95% of all applications to boards for licenses and extensions are granted. So there has been both an increase in absolute numbers and certainly an increase in the capacity of the total industry.

Mr. Attewell: Is your industry . . . ? Can you measure capacity levels? What is your unused capacity now? Is that measurable?

Mr. McGuire: Unfortunately, we do not have a common statistical data base that would give us the opportunity to measure capacity. But our employment levels certainly indicate a dispersion of capacity. We are today, in my company, for example, operating at 1979 levels of employment. And I can tell you, our facilities are utilized at about the 50% level. And that is one of the difficulties in trying to obtain a respectable return on assets, and a reflection of the increased competition.

Mr. Attewell: Thank you, Mr. Chairman.

The Chairman: Mr. Orlikow, *finalement*.

Mr. Orlikow: I can understand your feeling that deregulation and some of the provisions in this bill will make it very tough for the smaller companies, related to increasing domination by very large corporations, probably U.S. corporations. However, it is interesting that just at this time, when we see the opening up of the possibilities for the large corporations to take over, the CNR is getting out of the business. It is selling—actually giving away—its trucking business.

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I am concerned about the provisions of this bill and that proposal of the Minister of Transport, that *Freedom to Move*. What happens in a province like Manitoba, where we have a provincial agency that licenses routes and so on? Georgraphically, we have a large province, but we have a small population outside of metropolitan Winnipeg. The licensing board tries to see that the trucking companies that service some of these areas—the interlake area, the area from Winnipeg up to Dauphin and then on to Flin Flon and so on—have enough business to exist. What is going to happen, if you have deregulation, to the activities of that licensing agency and that regulatory agency, and to the companies that are now trying to continue to exist?

Mr. McLaren: Mr. Orlikow, we could be here for a long time trying to answer that question. Deregulation is not going to be total. The provincial boards will still be in existence. The provinces can regulate somewhat differently intra-provincially

[*Traduction*]

également retracé, je ne me souviens pas des chiffres exacts, l'augmentation par tonne-milles au cours de la même période qui donne une idée de l'activité. Evidemment, l'augmentation du tiers du nombre total de transporteurs pour une industrie bien établie comme disent les gens, est un indice que le système, au cours des dernières années, a quand même fait preuve d'ouverture. C'est tout à fait évident. Quatre-vingt-quinze p. 100 environ de toutes les demandes adressées aux commissions pour obtenir des permis et des prolongations ont été accordées. Il y a donc eu à la fois une augmentation en chiffres absolus et une augmentation, certainement, de la capacité de l'ensemble de l'industrie.

M. Attewell: Est-ce que votre industrie . . . ? Pouvez-vous mesurer les niveaux de capacité? Quelle est votre capacité inutilisée présentement? Est-ce qu'on peut la mesurer?

M. McGuire: Malheureusement, nous n'avons pas de base de données statistiques régulières qui nous permettrait de mesurer cette capacité. Toutefois, les niveaux d'emploi révèlent certainement une dispersion de la capacité. Ainsi, par exemple, dans ma société, aujourd'hui, nous fonctionnons aux niveaux d'emploi de 1979. Je puis vous dire que nos installations sont utilisées à 50 p. 100 environ de leur capacité. Voilà une des difficultés lorsqu'on essaie d'obtenir un rendement respectable sur l'actif, et voilà qui illustre bien une concurrence accrue.

M. Attewell: Merci, monsieur le président.

Le président: Monsieur Orlikow, *at least*.

M. Orlikow: Je peux très bien comprendre que vous ayez l'impression que la déréglementation et certaines dispositions du projet de loi rendront la vie très difficile aux sociétés à cause d'une plus grande domination des grosses sociétés, des sociétés américaines probablement. Toutefois, il est intéressant de constater que maintenant précisément, quand s'offre la possibilité que de grandes sociétés se portent acquéreuses des chemins de fer CN, ces derniers ferment leurs portes dans ce secteur. En effet, le CN vend, plus précisément donne, son entreprise de camionnage.

Les dispositions de ce projet de loi et la proposition du ministre des Transports contenue dans le document *Aller sans entraves* m'inquiètent. Que se passera-t-il dans une province comme le Manitoba, où c'est un organisme provincial qui s'occupe de la délivrance des permis routiers? La province est étendue, mais la densité de sa population est très faible à l'extérieur de l'agglomération de Winnipeg. La Commission des permis essaie de veiller à ce que les compagnies de camionnage qui desservent certaines régions comme la région entre les lacs, entre Winnipeg et Dauphin et ensuite du côté de Flin Flon, aient assez à faire pour se maintenir à flot. Avec la déréglementation, qu'adviendra-t-il de l'organisme qui délivre les permis et qui s'occupe de la réglementation? Qu'adviendra-t-il des compagnies qui essaient de se maintenir à flot?

M. McLaren: Monsieur Orlikow, il me faudrait beaucoup de temps pour répondre à cette question. La déréglementation ne sera pas universelle. Les commissions provinciales vont être maintenues. Les provinces peuvent réglementer de façon

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from extra-provincially, because that is federal. It will come under Mr. Mazankowski's Motor Vehicle Transport Act, the test that is going to apply.

There is a major concern in the trucking industry in Canada now because of deregulation. Not only will there be service to all points or will people abandon points and rationalize their systems but, on the big inter-city routes, there is going to be massive rationalization.

In the smaller areas, it is hard to say. Some people say that smaller areas will be abandoned. I do not know whether you can say that will happen or not ahead of time. But certainly provinces are concerned in trying to maintain that internal distribution network; in other words, an adequate regular service of reliable truckers. They want to maintain that for local distribution.

You are going to have, with deregulation, the prospect of bigger interprovincial carriers being able to go beyond major break-off points, like Winnipeg, and off-load at individual places. Your American trucker is going to come into Canada, off-load in Montreal or Toronto, and he is then going to be able to look for back-haul, because there is a lack of back-haul going to the States. He can then tap back-haul traffic, which used to be hauled back into Toronto or Montreal or Winnipeg by a local trucker. He can send his empty truck out, if it is close enough, to pick that freight up before he heads back to the United States. That could affect the efficiency of the local market.

It is already happening, perhaps more so in the Province of Quebec than anywhere. There have been a couple of examples of U.S. carriers moving in and affecting the efficiency of the local market in their search for back-haul. So you are really throwing everything wide open as to where the efficiencies go. One of our concerns is that the efficiencies are liable to go to the very big shippers, the conglomerate shipper, who can get the very best deal, with the railways carving out a confidential deal. This is what the for hire trucker always has to remember, and why what we publish by agreement in the general freight tariff is really only a starting point. Ultimately, you end up making your money off the independent action tariff, which is really a competitive tariff.

The concern we have is that very big shipper conglomerates are going to be, under deregulation, free to engage in intercorporate back-haul. They can haul the freight for related companies, which they now cannot do or only to a very limited extent, and then get common carrier licences to complement that. So all the efficiencies of deregulation, or most of them, are going to accrue to a relatively few very large carriers and very large shipper conglomerates. They will be able to internalize those efficiencies. They will be able to get common carrier licences, just to complement their own private fleet

[*Translation*]

différente le trafic intraprovincial et le trafic interprovincial, ce dernier étant du ressort du gouvernement fédéral. En effet, cela relèvera de la Loi sur le transport par véhicules motorisées de M. Mazankowski, et certains critères seront appliqués.

On s'inquiète énormément de la dérèglementation dans le secteur canadien du camionnage. Non seulement toutes les localités seront desservies ou certaines seront abandonnées au profit d'une rationalisation des réseaux, mais les longs trajets intercités subiront une rationalisation intense.

Dans les petites régions, il est difficile de dire ce qui arrivera. Certaines personnes prétendent qu'elles seront abandonnées. Je ne sais pas si l'on peut dire d'avance ce qui se passera. Toutefois, les provinces sont certainement soucieuses de maintenir leur réseau interne de distribution. En d'autres termes, elles veulent maintenir un service régulier adéquat de camionneurs fiables. Elles veulent maintenir cela à des fins de distribution locale.

Avec la déréglementation, on prévoit des transporteurs interprovinciaux plus gros capables d'aller au-delà des principales plaques tournantes comme Winnipeg pour desservir des localités individuelles. Les camionneurs américains vont venir au Canada, décharger des marchandises à Montréal ou à Toronto, et ils pourront ensuite prendre un autre chargement pour le retour, car il y a des lacunes de ce côté-là sur les trajets vers les États-Unis. Les camionneurs américains pourront donc se charger de ce service qui exigeait autrefois qu'on passe par Toronto, Montréal ou Winnipeg et qu'on fasse appel à des camionneurs locaux. Si la distance le permet, les camionneurs américains pourront envoyer un camion à vide pour prendre un chargement à destination des États-Unis. Cela pourrait avoir une incidence sur l'efficacité du marché local.

Du reste, les choses ont commencé à se passer ainsi dans la province de Québec plus qu'ailleurs. On a vu quelques exemples de transporteurs américains qui par leur intervention ont eu une incidence sur l'efficacité du marché local, car ils cherchaient une cargaison de retour. Ainsi, les choses sont tout à fait remises en question du point de vue de l'efficacité. Une de nos préoccupations est que les économies dues à une plus grande efficacité reviendront au très gros transporteur, aux conglomérats, qui peuvent décrocher les meilleures affaires, alors que les chemins de fer auront conclu des marchés confidentiels. Cela, le camionneur indépendant ne doit pas l'oublier, et c'est pourquoi ce qui est publié après entente dans la liste générale des tarifs de marchandises n'est qu'un point de départ. En dernier ressort, les bénéfices sont réalisés à partir des tarifs indépendants qui sont véritablement concurrentiels.

Nous craignons que les grands conglomérats de transport puissent, avec la déréglementation, conclure des ententes entre eux pour les cargaisons de retour. Ils pourront dès lors transporter des cargaisons pour des compagnies associées, ce qu'ils ne peuvent pas faire du tout, ou seulement de façon très limitée actuellement. Ils pourraient ensuite obtenir un permis de transporteur public pour compléter cela. Ainsi, tous les avantages de la déréglementation, ou la majeure partie, reviendraient à une poignée de très gros transporteurs ou à des conglomérats de très gros transporteurs. Ils pourront ainsi se

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operations, hauling between related companies. Whether that will affect the smaller distribution routes north into Manitoba or not is harder to say.

Mr. Orlikow: Will the large American transportation companies not have the edge, and not only because their market is so much bigger? You have the economies of scale. Also, maybe this will not continue forever, but right now the price of fuel, which must be an important factor in trucking, is substantially lower in the United States. Also, I think I am right that minimum wage laws in the United States are substantially lower than Canada's.

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Do not all these factors, plus others you have explained, give the American companies a tremendous edge in really moving into Canada and taking a substantial part of the market?

Mr. McLaren: Absolutely. Pat, do you want to talk to that?

Mr. McGuire: You are 100% right. There are several advantages the American carriers have, but the number one advantage is that every aspect of their operating cost is less than a Canadian carrier's, from the standpoint of capital purchases through labour, through taxation. Also, they have a greater availability of human resource. As a result, they can very silently and effectively—Canada is such a minute, micro-market in comparison with the United States—predate the Canadian carrier very easily, and do it almost on an overnight basis.

Mr. McLaren: Mr. Orlikow, you touched on fuel. Right now in eastern Canada truckers are going across the border. We are sending tankers over and we are bringing back U.S. diesel, or maybe Canadian diesel that has been dumped in the U.S. market, the U-turn phenomenon, and we are saving 6¢ to 8¢ a litre on bringing in U.S. fuel compared to the best price we can get from Canadian petroleum companies. So the American carrier has an advantage there on operations that are close to the border compared to the Canadian carrier to some extent.

Mr. Orlikow: I would have thought that a real competition law would say to Esso and the other companies you cannot charge a price in Canada for your fuel . . . charge so much lower a price in the United States that it pays people to drive down to the United States, buy the Canadian fuel which is being shipped and sold to the United States, bring it back to Canada, and still save money. There is something very strange about that whole operation.

[*Traduction*]

répartir entre eux les avantages. Ils pourront obtenir des permis de transporteur public pour compléter les activités de leur propre parc de véhicules, et ils s'associeront avec d'autres compagnies pour le transport des cargaisons. Il est encore plus difficile de savoir si cela aura une incidence sur les trajets plus courts dans le nord du Manitoba.

M. Orlikow: Les grandes compagnies américaines n'auront-elles pas la haute main et ce, pour d'autres raisons que parce que leur marché est beaucoup plus gros? Ils bénéficient d'économies d'échelle. D'autre part—mais il est possible que cela ne continue pas indéfiniment—actuellement le prix du pétrole, qui est un facteur important dans le secteur du camionnage, est considérablement plus bas aux États-Unis. En outre, je pense ne pas me tromper en disant que le salaire minimum est aux États-Unis bien inférieur à ce qu'il est au Canada.

Tous ces facteurs donc plus d'autres dont vous avez parlé, font que les compagnies américaines ont barre sur les Canadiens, les incitent à venir ici et à accaparer une part importante du marché, n'est-ce pas?

M. McLaren: Vous avez tout à fait raison. Pat, voulez-vous ajouter quelque chose?

M. McGuire: Vous avez entièrement raison. Les transporteurs américains jouissent de nombreux avantages, mais le principal est que tous les éléments de leur prix de revient sont inférieurs à la situation des transporteurs canadiens, qu'il s'agisse de l'immobilisation ou de la main-d'oeuvre, en passant par les impôts. En outre, ils peuvent compter sur de plus grandes ressources humaines. Par conséquent, ils peuvent en douce et très efficacement se saisir du marché canadien, et cela très facilement, presque du jour au lendemain, le Canada étant un micro-marché, très réduit, par rapport à celui des États-Unis.

M. McLaren: Monsieur Orlikow, vous avez parlé du carburant. Actuellement, dans l'Est du pays, les camionneurs traversent la frontière. Nous envoyons là-bas des camions-citernes qui ramènent du diesel américain ou encore du diesel canadien qui a fait l'objet de dumping sur le marché américain, par un retournement radical, et nous épargnons entre 6c. et 8c. le litre en achetant du carburant américain et ce, par rapport aux prix les plus avantageux que l'on peut obtenir auprès des sociétés pétrolières canadiennes.Le transporteur américain a donc cet avantage-là pour ce qui est de ses activités près de la frontière.

M. Orlikow: J'aurais cru qu'une véritable Loi sur la concurrence exigerait que Esso et les autres compagnies pétrolières n'imposent pas un prix sur le carburant au Canada, alors que ce prix est considérablement moins élevé aux États-Unis si bien que cela incite les gens à se rendre aux États-Unis pour acheter du pétrole canadien vendu là-bas pour ensuite le ramener au Canada et épargner. Il y a quelque chose de très bizarre dans toute cette activité.

[*Text*]

Mr. McLaren: The petroleum companies of course argue that their rate of return these days is not very good, and we will let them look after themselves in that regard.

But clearly by dumping surplus product into the United States at what you can get for it you avoid getting into any kind of a serious price competition domestically for that product. There is no question about it. It is kind of laundered and then we bring the stuff back into Canada at lower prices. In fact, in one case I am aware of a wholly-owned distributor for a major oil company in eastern Canada was told that if he had to compete because of truckers hauling fuel in from the States he could go down there and buy it himself and not buy it from the parent plant.

So there are all kinds of wrinkles going on there. But it is quite true that we have a serious problem with respect to the Americans. We really want to try maintain some ground rules if we can. We know that the position is going to get hyper-competitive and that cannot be avoided. The Canadian market is very different from the American. They have 42 cities with a population of over one million; we have three. That gives them 860 traffic routes connecting populations of over a million, scattered pretty well all over the continent. We have pockets of concentration.

Deregulation in the States has meant that the truckload carrier and the less-than-truckload carrier have become two different industries, as Mr. McGuire has touched on. In Canada every trucker, given the nature of our market, has to be a mixed freight carrier. We go out west with General Freight Consolidated, LTL manufactured goods. We have about 15 commodity movements, all rail competitive, which account for 70% of our freight coming back.

So we have really a lot of problems and a great deal of hyper-competition. I do not think the committee needs to be concerned about a lack of competition in trucking which will lead to independent action tariffs being the dominant tariffs which will govern how freight is carried. We are trying to protect a system that allows us to deal in a rational way with a pricing mechanism on a comprehensive basis, and that is what we feel is at risk with the particular wording in proposed subsection 32.(1.3).

Mr. Orlikow: Mention has been made about this case in western Canada, which has been going on since 1978. You explained from your point of view why it has taken so long and still has not been settled.

If there has been so much difficulty in successfully prosecuting under the conspiracy section in the past, do you think it is appropriate that we have a stronger conspiracy section? If so, would you support such a section? How best would it be worded, in your view?

[*Translation*]

M. McLaren: Les sociétés pétrolières manifestement prétendent que leur taux de rendement en ce moment n'est pas très bon, et il vaut mieux les laisser se débrouiller.

Manifestement, en choisissant de procéder au dumping des excédents de production aux États-Unis, ce qui permet d'en tirer ce qu'on peut, on évite toute concurrence menaçante pour ce produit sur le marché interne. C'est indéniable. C'est ainsi qu'on s'en débarrasse et ensuite le même produit se retrouve au Canada, mais il a été acheté à moindre prix. En fait, je connais un distributeur dont une grande compagnie pétrolière est entièrement propriétaire dans l'Est du Canada à qui on a dit que, s'il souffrait de la concurrence que lui faisaient les camionneurs qui achetaient leur carburant aux États-Unis, il n'avait qu'à se rendre là-bas lui-même pour l'y acheter, ce qui lui éviterait d'acheter à la société-mère.

On constate donc qu'il y a toutes sortes d'irrégularités. Il est cependant indéniable que les Américains nous causent toutes sortes de difficultés. Nous voulons essayer de préserver certaines règles fondamentales, si possible. Nous savons que la situation va devenir très concurrentielle, c'est inévitable. Le marché au Canada est très différent de ce qu'il est aux États-Unis. Il y a là-bas 42 villes dont la population dépasse le million. Nous n'en avons que trois. Cela leur donne 860 trajets pour relier des agglomérations de plus d'un million d'habitants, réparties sur tout le continent. Nous n'avons que quelques enclaves où il y a concentration de population.

Aux États-Unis, la déréglementation a signifié que les transporteurs à plein chargement et les transporteurs qui voyageaient sans atteindre la pleine capacité constituent désormais deux secteurs différents, comme l'a expliqué M. McGuire. Au Canada, tout transporteur, étant donné la nature de notre marché, appartient à l'un et à l'autre des secteurs. On va donc dans l'Ouest avec la *General Freight Consolidated*, avec un chargement partiel de produits manufacturés. Au retour, nous ne pouvons compter que sur 15 denrées, pour lesquelles les chemins de fer nous font concurrence, ce qui représente 70 p. 100 de la cargaison de retour.

Nous faisons donc face à beaucoup de difficultés et à une concurrence intense. Je ne pense pas que le Comité ait besoin de craindre le manque de concurrence dans le secteur du camionnage qui pourrait donner lieu à l'établissement de tarifs indépendants qui domineraient le secteur du transport des marchandises. Nous essayons de protéger un réseau permettant de rationaliser un mécanisme d'établissement des prix suivant une méthode englobante, et c'est pourquoi nous nous estimons menacés par le libellé du paragraphe 32.(1.3) proposé.

M. Orlikow: On a parlé de ce cas dans l'Ouest, où la situation remonte à 1978. Vous avez expliqué pourquoi selon vous il avait fallu tant de temps, et ce n'est même pas encore réglé.

Puisqu'on a eu tant de mal à obtenir gain de cause lors de poursuite en vertu de l'article sur la conspiration par le passé, ne conviendrait-il pas de renforcer cet article-là désormais? Dans l'affirmative, peut-on compter sur votre appui pour un tel article? Comment devrait-on le libeller à votre avis?

[*Texte*]

• 1210

Mr. McLaren: Oh, my gosh!

Mr. McGuire: I think, generally speaking, and to go back to Mr. Ouellet's remarks, there may be an opportunity for us to be in support of some language that would permit us, as an industry, to disseminate our pricing to our users. To do so in a format that we can afford to abandon the present system as an operator administratively would be devastating because there would be no opportunity for us to afford the distribution on an economic basis.

Mr. Orlikow: Can I ask one last question? In 1983 five van lines and their tariff bureau pleaded guilty to conspiring to lessen competition unduly in the interprovincial transportation of used household goods within Canada over a 17-year period starting in 1963. Five companies were fined and were issued with a prohibition order, which directed them to disband the tariff bureau and prohibited the five van lines and moving companies affiliated with them from engaging in various forms of anti-competitive behaviour in the future. What has happened with it?

Mr. McLaren: This is the status; this is what happened. I would like to make one point of clarification. The only similarity between the van line operation and the trucking industry is that they both use trucks.

The van line case involved five or six agencies, each with individual members. The allegation was that they had, between them, about 98% of the market.

There was no question that if an agreement could be established, you admit the undueness test. It is exactly the opposite scenario that we are talking about in trucking. There is no question that we have an agreement because we publish it and sell it to people.

The question is the undueness test and the difficulty of establishing it on a micro, overlapping market basis. This is where our problem comes in. We are asking, as far as the agreement part is concerned, that we be allowed to explain the rationale for what we are doing, and not have it foreclosed on us, as we think proposed subsection (1.3) would do.

The van lines were all American-owned, or at least four out of the five of them were. All of their annual statements in the United States—the van lines are public companies—all had a footnote at the bottom that they were under a heavy trust prosecution in Canada. They decided to settle. It was really the flip implication of what we are talking about. They had the entire market. There was just the question of whether they were agreeing with each other. They were not prepared to fight it.

Mr. Orlikow: So you are saying there is no resemblance between this situation and yours.

Mr. McLaren: No. There are two elements to section 32. They were caught under the reverse element to where our problem is.

[*Traduction*]

M. McLaren: Oh, mon Dieu!

M. McGuire: En règle générale, et cela reprend les propos de M. Ouellet, nous pourrions appuyer un libellé qui nous permettrait, en tant que secteur, de répercuter nos prix sur les usagers. Si nous le faisions actuellement suivant une méthode qui nous permettrait d'abandonner le régime actuel, ce serait catastrophique du point de vue administratif pour l'opérateur, car nous n'aurions pas les moyens de faire la distribution de façon rentable.

M. Orlikow: Puis-je poser une dernière question? En 1983, cinq compagnies de camionnage et leurs bureaux de tarification ont plaidé coupables à des accusations de conspiration pour diminuer la concurrence indûment dans le transport interprovincial de marchandises usagées au Canada sur une période de 17 ans, à partir de 1963. On a imposé des amendes aux cinq compagnies, et elles ont été frappées d'une ordonnance d'interdiction, qui exigeait le démantèlement de leurs bureaux de tarification et leur interdisait, à elles comme à leurs succursales, de s'adonner à diverses pratiques anti-concurrentielles à l'avenir. Que s'est-il passé après?

M. McLaren: Eh bien, précisément cela. C'est ce qui s'est passé. Je voudrais ajouter une précision. Le seul point commun entre une société de déménagements interurbains et le secteur du camionnage est que les deux utilisent des camions.

Dans le cas que vous avez cité il y a cinq ou six organisations en cause, qui ont chacune des succursales. Le chef d'accusation portait qu'ensemble elles détenaient 98 p. 100 du marché.

Nul doute que si un accord pouvait être conclu, il fallait faire intervenir le critère de concurrence indue. Dans le cas du camionnage, la situation est tout le contraire. On ne peut nier qu'il y a accord puisque nous le publions et nous le vendons.

La contestation surgit à propos du critère de concurrence indue et de la difficulté de l'appliquer dans le cas d'un mini-marché avec chevauchement. C'est là que surgit la difficulté dans notre cas. Nous demandons, pour ce qui est de l'accord, qu'on nous permette d'expliquer nos raisons et qu'il n'y ait pas forclusion, comme nous pensons que le prévoit le paragraphe 1.3 proposé.

Toutes les compagnies de transport par camion dont vous avez parlé étaient propriétés américaines, du moins quatre des cinq. Tous leurs états financiers annuels qui doivent être déposés aux États-Unis parce qu'elles sont des compagnies publiques, comportaient une note disant qu'elles faisaient l'objet de poursuites au Canada. Elles ont décidé de transiger. En fait, il s'agissait tout simplement d'une conséquence marginale de ce dont nous parlons. Elles détenaient tout le marché. Il s'agissait de voir si elles s'entendaient entre elles. Elles ont choisi de ne pas contester.

M. Orlikow: Vous dites donc qu'il n'y a pas de points semblables entre cette situation et la vôtre.

M. McLaren: Non. Il y a deux éléments à l'article 32. Ces compagnies étaient dans une situation inverse à celle qui nous cause des problèmes.

[*Text*]

The Chairman: Are there any more questions?

On behalf of all my colleagues, I would thank the representatives of the Canadian Trucking Association for coming. You made a very good appearance. Have a good lunch.

Mr. McLaren: Thank you, Mr. Chairman.

Le président: Cet après-midi, à 15h30, c'est M. Daniel Martin Bellemare qui sera notre témoin. Nous n'avons pas encore reçu son mémoire. On me dit qu'il a a été mis à la poste jeudi dernier, mais nous ne l'avons pas encore. Le professeur Donald N. Thompson viendra également témoigner.

I now declare the session adjourned until 3.30 p.m.

AFTERNOON SITTING

• 1535

Le président: Il est passé 15h30, l'heure fixée pour le début de la réunion; il est entendu que deux personnes, au moins, doivent être présentes pour entendre les témoins, un député et le président; nous allons commencer lentement.

M. Cadieux: Monsieur le président, par courtoisie pour M. Ouellet, de l'opposition, si on nous dit qu'il est en chemin, je pense que l'on pourrait attendre, deux minutes. Est-il en chemin? Par courtoisie, je pense que l'on pourrait attendre. Nous avons, quand même, jusqu'à 16h45?

Le président: On a 45 minutes.

M. Cadieux: Par courtoisie, j'attendrais jusqu'à ce que l'adjoint de M. Ouellet nous dise s'il est en route ou non. Si vous le permettez, monsieur le président.

Le président: Mon cher collègue, il est permis de poser une telle question et de vous glorifier auprès de nos collègues de l'opposition. Et je vous félicite d'avoir pris une telle initiative.

M. Cadieux: Ce n'est pas une question de se glorifier, monsieur le président, ni directement ni indirectement. Mais s'il est en route, il vaut mieux attendre quelques minutes pour profiter de sa connaissance de ce dossier aussi important; il a oeuvré durant de nombreuses années, à titre de ministre, sous l'ancien gouvernement.

Le président: Nous attendrons donc trois minutes. Nous commencerons dans trois minutes avec ou sans la présence de M. Ouellet.

M. Cadieux: Je suis à votre disposition, monsieur le président. Je me range à vos décisions toujours éclairées.

Le président: Je l'apprécie énormement, mon cher collègue.

• 1537

• 1540

Le président: Les trois minutes étant écoulées, nous reprenons.

[*Translation*]

Le président: Y a-t-il d'autres questions?

Au nom de mes collègues, je remercie les représentants de l'Association canadienne du camionnage. Votre contribution a été excellente. Bon appétit.

M. McLaren: Merci, monsieur le président.

The Chairman: This afternoon, at 3.30, our witness will be Mr. Daniel Martin Bellemare. We have not yet received his brief. I am told that it was mailed last Thursday but we have not received it yet. Professor Donald N. Thompson will also be a witness.

La séance est levée. Nous reprendrons à 15h30.

SÉANCE DE L'APRÈS-MIDI

The Chairman: It's past 3:30, and the meeting is due to start. It was agreed that two members, at least, must be present in order to hear the witnesses, that is a member of Parliament and the Chairman. Let's proceed in no haste.

Mr. Cadieux: Mr. Chairman, out of respect for Mr. Ouellet, a member of the Opposition, since we are being told that he is on his way, I believe we should wait a few minutes. Is he on his way here? After all, we still have until 4:45.

The Chairman: We still have 45 minutes.

Mr. Cadieux: I am prepared to wait until Mr. Ouellet's assistant tells us whether or not he is on his way here. With your kind permission, Mr. Chairman.

The Chairman: My dear colleague, such a question is quite allowed and there's nothing wrong in acting nobly in full view of your colleagues from the Opposition. I must congratulate you for such an initiative.

Mr. Cadieux: I am not trying to act nobly, Mr. Chairman, in full view or otherwise. But if he is on his way here, we may as well wait a few minutes since he is quite knowledgeable of this important file. He worked for several years in his capacity as a minister under the old administration.

The Chairman: Let's wait another three minutes, and then we'll begin with or without Mr. Ouellet.

Mr. Cadieux: I am all with you, Mr. Chairman, and I submit to your decisions which are always wise.

The Chairman: I do appreciate it, my dear colleague.

The Chairman: The three minutes being up, we shall resume.

[*Texte*]

Me Bellemare nous fera un bref exposé. J'aimerais d'abord qu'il se présente et qu'il parle du travail qu'il occupe actuellement, pour le bénéfice de certains membres. Vous avez la parole.

M. Daniel Martin Bellemare (conseiller juridique): Merci beaucoup, monsieur le président.

Mon nom est Daniel Martin Bellemare. Je suis avocat. J'ai été reçu au Barreau de la province de Québec au mois d'octobre, 1984. Je travaille pour un organisme à but non lucratif, chargé d'aider les jeunes qui veulent créer leur propre entreprise.

C'est un plaisir de faire part de mes commentaires aux membres du Comité chargé d'étudier le projet de loi C-91.

Pour commencer, je dirai que le projet de loi C-91 ne m'apparaît pas comme une loi sur la concurrence. C'est une loi qui vise davantage à rendre les entreprises canadiennes concurrentielles sur les marchés internationaux, d'abord et avant tout. À mon avis, des modifications importantes devraient être apportées au projet de loi, en vue de lui donner une orientation axée davantage sur la protection des petites entreprises et des consommateurs.

J'attire votre attention sur la création du Tribunal de la concurrence. Tout d'abord, il faudrait préciser les qualifications requises pour être membre de ce Tribunal ou membre du Conseil consultatif. Étant donné que les décisions du tribunal sont prises par la majorité des membres le composant, qu'il est composé de membres et de non-membres et que ces non-membres peuvent être amenés à trancher des questions mixtes de droit et de fait, je crois qu'il serait plus approprié de prévoir, dans la loi, le type de qualifications que les membres du Tribunal devraient avoir pour y siéger.

Il y a aussi les pouvoirs du directeur des enquêtes et recherches. La réforme proposée dans le projet de loi C-91 l'a été en raison d'une décision rendue par la Cour Suprême dans l'affaire Southam. Cette décision vise les pouvoirs de perquisition et de saisie mentionnés aux alinéas 10.(1) et 10.(3) de la Loi sur les coalitions.

• 1545

Je crois, en ce qui concerne les pouvoirs de saisi et de perquisition du directeur, qu'il serait approprié de procéder à une réforme de ces pouvoirs et de judiciariser le processus.

En ce qui concerne les pouvoirs d'assigner des témoins et la production de documents, je crois qu'il n'y aurait pas lieu de judiciariser le processus. Cela permettrait de doter le directeur des enquêtes de recherche d'une méthode d'enquête plus souple et plus efficace. À mon avis, pour rencontrer cet objectif, le directeur des enquêtes et recherches devrait jouir des pouvoirs dévolus aux membres de la Commission sur les pratiques restrictives du commerce; c'est-à-dire qu'il devrait jouir des pouvoirs d'un enquêteur en vertu de la partie 1, de la Loi sur les enquêtes. Les citoyens ordinaires, en vertu des lois provinciales, que ce soient les lois sur les commissions d'enquête ou les lois sur le coroner, peuvent être enjoints par les commissaires de produire des documents ou de témoigner. Il ne devrait

[*Traduction*]

Mr. Bellemare will make a brief presentation. I would like him to introduce himself first of all, then tell us about the work he is doing presently, for the benefit of some of the members. The floor is yours.

Mr. Daniel Martin Bellemare (Legal Counsel): Thank you very much, Mr. Chairman.

I am Daniel Martin Bellemare. I am a lawyer. I was called to the Quebec bar in October 1984. I work for a non-profit organization whose objective is to help out young people who want to set up their own business.

It is a pleasure to be able to present my comments to the members of the committee examining Bill C-91.

First of all, I would like to say that Bill C-91 does not seem to me to be a Bill on competition. The legislation's first and foremost objective is to make Canadian business competitive on international markets. In my opinion, substantive changes should be made to the Bill to orient it more to protecting small business and consumers.

I would draw your attention to the establishment of the competition tribunal. First of all, it would be better to specify the qualifications required to become a member of this tribunal or the advisory council. As the decisions of the tribunal are to be made by a majority of its members, as it is made up of members and non-members, and since non-members can be called upon to give an opinion on questions of mixed law and fact, it would seem to me more appropriate to specify in the legislation the type of qualifications tribunal members should have in order to sit.

As to the powers of the Director of Investigation and Research, the reform suggested in Bill C-91 is being put forth because of a decision rendered by the Supreme Court in the Southam affair. This decision affects the powers of search and seizure set out in paragraphs 10.1 and 10.3 of the Combines Investigation Act.

I think that the director's powers of search and seizure should be reformed and that there should be a judiciary process.

On the other hand I do not think it is necessary to have a judiciary process with respect to the issuance of subpoenas and written returns. This would give the Director of Investigation and Research a more flexible and efficient method of conducting inquiries. In order to meet this objective, the Director of Investigation and Research should have the powers assigned to members of the Restrictive Trade Practices Commission; namely the powers of a Commissioner appointed under Part I of the Inquiries Act. Under provincial legislation, such as acts respecting public commissions of inquiry and coroners, ordinary citizens can be required by the commissioners to produce written returns or to testify. The same should apply to companies being investigated under the Combines Investigation Act.

[*Text*]

pas en être autrement pour les entreprises faisant l'objet d'une enquête en vertu de la Loi sur les coalitions.

En ce qui concerne les infractions relatives à la concurrence, les adverbes «déraisonnablement» et «indûment», aux alinéas 32.1*b*) et *c*) de la loi devraient être supprimés. Deux décisons ont été rendues par les tribunaux: la première, dans l'affaire *Thank Lining Corporation* et dans l'affaire *Southam Thompson Newspaper*, en novembre 1983; et l'autre décision est rapportée dans le *Canadian Patent Reporter*. Ces deux décisons ont établi que l'ajout du paragraphe 1.1, à toutes fins pratiques, n'avait pas précisé la portée des deux mots. Nous en sommes encore au stade où le mot «indûment» s'interprète toujours selon la définition retenue par la Cour suprême dans l'affaire *Aetna Insurance*. Face à ces deux décisions qui n'ont peut-être pas donné ce qu'on en attendait, puisqu'on a amendé la loi, il y aurait peut-être lieu de retirer ces deux adverbes des paragraphes 32.1*b*) et *c*).

Ensuite, il y a l'abrogation du paragraphe 32.5*e*) et les dispositions proposées pour régir les accords de spécialisation. Ces deux dispositions ne donnent pas suffisamment de garanties pour ces accords d'exportation; elles n'auraient aucun effet anticoncurrentiel sur le marché canadien. Il y aurait donc lieu de régir plus rigoureusement ces entreprises. On éviterait qu'elles n'aient des effets nuisibles sur la concurrence nationale.

Finalement, lorsque des entreprises dans des secteurs industriels où la concentration économique est très forte, sont reconnues coupables de transgression de l'article 32, en ayant suivi ce qu'on appelle une ligne de conduite parallèle qu'on désigne, en anglais, par *Councious parallelism*, je crois que des dispositions devraient être prévues dans la loi. Comme on le propose dans l'abus de positions dominantes, on devrait pouvoir avoir recours aux tribunaux qui permettraient la dissolution ou de se départir d'actifs pour rétablir une saine concurrence sur les marchés en question.

Un autre aspect très important de la réforme proposée est celui du monopole. On propose de décriminaliser les fusions et les monopoles en abrogeant l'article 33 de la loi. À mon avis, l'article 33 ne devrait pas être abrogé. Le terme «monopole» devrait plutôt être redéfini et la notion d'«intérêt» public devrait être précisée.

Je vois une contradiction dans l'augmentation, de 1 à 5 millions de dollars, des amendes pour les complots visés à l'article 32 de la Loi relative aux enquêtes sur la coalition et de décriminaliser les fusions et les monopoles; toutes ces pratiques ont, à toutes fins pratiques, le même effet, à savoir, de priver le public d'une saine concurrence. De plus, une infraction à la loi pourra être une mesure dissuasive qui pourrait se révéler très efficace.

Les dispositions sur l'abus de positions dominantes sont incomplètes. Elles ne concernent que l'abus susceptible de provoquer une situation monopolistique. Une entreprise pourrait avoir une structure industrielle anticoncurrentielle et la loi ne le prévoit pas. Il faudrait prévoir cette éventualité. Aussi, les dispositions sur les monopoles et le but de position dominante devrait s'appliquer aux conglomérats, c'est-à-dire

[*Translation*]

With respect to offences in relation to competition, the adverbs "unreasonably" and "unduly" in Section 32.1(*b*) and (*c*) of the Act should be removed. Two decisions have been handed down by the courts: the first, in *Thank Lining Corporation* and in *Southam Thompson Newspaper*, in November 1983, the other decision being reported in the *Canadian Patent Reporter*. These two decisions held that the addition of subsection 1.1 had not, to all intents and purposes, clarified the meaning of the two words. The world "unduly" is still interpreted according to the definition used by the Supreme Court in the *Aetna Insurance* case. In light of these two decisions, which may not have had the intended effect, given that the Act was amended, it might perhaps be a good idea to withdraw the two adverbs in Sections 32.1(*b*) and (*c*).

There is also the question of repealing Section 32.5(*e*) and the proposed provisions governing specialization agreements. These two provisions do not provide enough protection for export agreements; they would have no anti-competitive effect on the Canadian market. Undertakings of this type should therefore be governed more strictly to ensure that they have no harmful effects on domestic competition.

Finally, in cases where companies involved in industries with very high economic concentration are found guilty of violating Sectin 32, as a result of conscious parallelism, I think that there should be specific provisions contained in the Act. As is suggested in the case of abuse of a dominant position, the parties should be able to seek redress from the courts, which would allow dissolution or divestiture of assets to restore healthy competition in the markets in question.

Another very important aspect of the proposed reform relates to monopolies. The proposal is to decriminalize mergers and monopolies by repealing Section 33 of the Act. I do not think Section 33 should be repealed. The term "monopoly" should instead be redefined and the concept of "public interest" should be clarified.

In my opinion there is a contradiction in the fact that the fines for conspiracy, referred to in Section 32 of the Combines Investigation Act, have been increased from $1 to $5 million, on the one hand, while on the other hand mergers and monopolies have been decriminalized. All these practices have essentially the same effect, namely, to deprive the consumers of healthy competition. Moreover, violation of the Act could constitute a very efficient deterrent.

The provisions on the abuse of dominant position are incomplete. They relate only to abuse that could result in a monopolistic situation. A company could have an anti-competitive industrial structure and the Act does not provide for this. There must be provision for such an eventuality. In addition, the provisions on monopoly and the abuse of dominant position should apply to conglomerates, that is,

[*Texte*]

aux entreprises impliquées dans différents secteurs d'activités et qui ont des opérations très diversifiées.

• 1550

Finalement, j'ai des propositions concernant des aspects plus généraux, reliés à la législation sur la concurrence.

En premier lieu, je pense que des ressources additionnelles devraient être allouées au Bureau de la concurrence pour faire appliquer la Loi sur la concurrence. Les entreprises devraient être assujetties à la Loi sur l'accès à l'information, pour permettre une plus grande ouverture des activités des entreprises et pour permettre aux citoyens d'obtenir des informations afin de demander des enquêtes au directeur des Enquêtes et Recherches, le cas échéant.

Une mention particulière devrait être ajoutée au projet de loi pour que les entreprises réglementées soient assujetties à la loi. Je suggère aussi que la Loi sur le tribunal de la concurrence ou la Loi sur la concurrence reconnaisse aux individus, particuliers ou corporatifs, le droit de s'adresser au tribunal pour demander une ordonnance, en vertu de la Partie VII de la Loi sur la concurrence.

Une réforme concernant les personnes qui font l'objet d'une enquête est proposée. Le projet de loi dit, par un amendement apporté à l'article 8 de l'actuelle Loi relative aux enquêtes sur les coalitions, que ces personnes devraient avoir la possibilité de demander au directeur des Enquêtes et Recherches où en est rendue l'enquête.

Je crois que ce pouvoir devrait aussi être accordé à ceux qui demandent une enquête. Les individus faisant l'objet d'une enquête, dans un cadre quelconque, ne se voient pas reconnaître ce privilège par la loi.

Il y a aussi l'alinéa 31.1*b*) de la Loi relative aux enquêtes sur les coalitions qui devrait permettre, aux individus qui ont subi un préjudice en raison d'un comportement allant à l'encontre de la Partie VII, un recours en dommages-intérêts. La loi devrait permettre à ces gens l'accès aux dossiers des procédures engagées par la Cour pour qu'ils puissent entreprendre des poursuites en dommages-intérêts.

Un paragraphe devrait être ajouté au paragraphe 31.1 de l'actuelle loi, pour permettre des dommages-intérêts exemplaires dans le cas d'individus condamnés en vertu de la loi pour violation d'une quelconque de ses dispositions.

Je propose aussi que les individus ou les corporations trouvés coupables, en vertu de la loi, soient obligés d'en informer le public et les actionnaires; l'information au public se ferait à travers les media et l'information aux actionnaires à travers les rapports annuels remis aux actionnaires et à ceux qui ont investi dans ces entreprises. À mon avis, c'est une mesure qui pourrait avoir un effet dissuasif significatif.

Pour les procédures devant être notifiées au directeur des Enquêtes et Recherches, en vertu de la partie VIII, je crois que le directeur des Enquêtes et Recherches devrait être tenu de faire de la publicité concernant ces transactions que ce soit dans la *Gazette du Canada* ou les media. Cela permettrait au

[*Traduction*]

companies involved in various sectors and having very diversified activities.

Finally, I have some proposals on more general aspects of the question related to competition legislation.

In the first place, I think that additional resources should be assigned to the Bureau of Competition Policy to implement the Competition Act. Companies should be subject to the Access To Information Act, to ensure greater corporate accountability and to allow citizens to obtain information so that they can request the Director of Investigation and Research to conduct investigations.

A specific provision should be added to the Act to indicate that the legislation applies to regulated businesses. I would also suggest that either the Competitional Tribunal Act or the Competition Act should acknowledge that individuals and corporations have the right to petition the tribunal to seek orders under Part 7 of the Competition Act.

There is a proposal to change the legislation regarding individuals who are being investigated. The Bill states, through an amendment to Section 8 of the present Combines Investigation Act, that these individuals should be able to ask the Director of Investigation and Research for a report on the progress of the inquiry.

I think this power should also be extended to individuals who request an inquiry. Individuals who are under investigation, for whatever reason, do not have this privilege under the Act.

Section 31.1(*b*) of the Combines Investigation Act should allow individuals who have suffered losses through someone's non-compliance with Part 7 of the Act the remedy of recovering damages. They should have access to the whole record of proceedings brought by the court, so that they can file for damages.

A subsection should be added to Section 31.1 of the present Act, to allow punitive damages to be assessed against individuals found guilty of violating one of the provisions of the Act.

I also recommend that individuals and corporations found guilty of violating the Act be required to inform both the public and their shareholders of the fact. The public would be informed through the media, and the shareholders would be informed in the annual reports distributed by the company. I believe such a measure could have great potential for deterrence.

In the case of procedures for which notice should be given to the Director of Investigation and Research, under part 8, I think the Director should be required to publicize these transactions either in the *Canada Gazette* or in the media. This would allow the public to make representations and to assist

[*Text*]

public de faire des représentations et d'assister le directeur des Enquêtes et Recherches et les intervenants.

Je crois aussi que les administrateurs siègeant sur des conseils d'administration des entreprises et qui sont reconnus coupables d'une infraction à la loi, devraient, temporairement, se voir refuser le droit de siéger sur les conseils d'administrations, pour une période de temps fixée par la loi.

Pour ce qui est de la prescription et des limitations des recours prévus aux paragraphes 66*a*) et 69 de la Loi sur la concurrence, tel que prévu, je crois qu'il y aurait lieu de reconsidérer cela sérieusement. Il faut un certain temps avant que les effets d'une fusion se fasse sentir. Je pense que le trois ans permis pour intenter des procédures devant le tribunal de la concurrence est trop court. Par exemple, dans l'affaire des allumettes, chez Eddy Match, une condamnation a été rendue dans une cause de monopolisation; il a fallu 23 ans avant que l'ensemble des fusions donne lieu à un monopole. Plus récemment, il y a eu l'affaire Irving où, cette fois-là, il y a eu un acquittement. Il a fallu, à peu près 27 ans, avant qu'Irving prenne le contrôle de tous les quotidiens de langue anglaise au Nouveau-Brunswick. Alors, je pense qu'il n'y a pas lieu de limiter dans le temps l'engagement des procédures devant le tribunal de la concurrence pour obtenir qu'une entreprise se départisse d'actifs en rapport avec l'acquisition d'actions ou de participation dans une entreprise, ou tout autre forme de fusion.

• 1555

En ce qui concerne les fusions complétées avant l'entrée en vigueur de la loi, on devrait peut-être s'en remettre à une décision rendue dans l'affaire *The United States of America versus Du Pont de Nemours* où la Cour suprême des États-Unis a conclu que lorsqu'une demande concernant une acquisition d'actions est faite, l'effet de la fusion devait être évalué au moment même où la demande est présentée devant les tribunaux.

Quand des entreprises désirent se fusionner, ces entreprises devraient assumer le fardeau de démontrer que la fusion proposée n'aura pas d'effets anti-concurrentiels, comme le projet de loi le mentionne.

Il y a tout le domaine des fusions qui concerne les conglomérats. Une étude été faite aux États-Unis: *Conglomerate Mergers: Their Effects on Small Business and Local Communities*. Elle a établi que les sociétés de portefeuilles qui font l'acquisition de différents types d'entreprises ont contribué à diminuer substantiellement la participation des petites entreprises dans l'économie. Je proposerais donc que l'article 65 du projet de loi sous étude contienne une disposition spécifique pour traiter de ce genre d'acquisition d'actifs ou d'actions. Ces acquisitions ne devraient être permises que s'il est prouvé, par ceux qui font ces acquisitions, que les populations concernées, et le public en général, retireront un bénéfice.

Et, le dernier point sur lequel j'insisterai devant ce Comité, est qu'une loi devrait être adoptée pour protéger les petites entreprises contre les prises de contrôle des grosses entreprises étrangères ou canadiennes. La place des petites entreprises doit être préserver dans l'économie canadienne. Lorsque de telles

[*Translation*]

the Director of Investigation and Research and the parties involved.

I also think that members of boards of directors of companies found guilty of violating the Act should be temporarily suspended from the boards of directors. The period of suspension would be provided for in the Act.

I think that the provisions regarding limitations laid down in clauses 66(*a*) and 69 of the Competition Act should be rethought. It takes some time before the effects of a merger are felt. I think that the three-year period provided to bring an action before the competition tribunal is too short. For instance, in a case involving matches and the Eddy Match Company, there was a conviction on the charge of creating a monopoly; a period of 23 years went by before all the mergers resulted in a monopoly. More recently, in the Irving case there was an acquittal. It took about 27 years before Irving acquired control of all the English language dailies in New Brunswick. Therefore I do not think it advisable to impose any time limits on the initiation of proceedings before the competition tribunal to oblige a company to divest itself of an asset relating to the acquisition of shares or an interest in a firm or any other type of merger.

As to mergers completed before the coming into force of the act, the best approach might be that taken by the U.S. Supreme Court in U.S. vs E.I. Du Pont de Nemours; in this case it was concluded that when an application relating to the acquisition of shares is made, the effect of the merger should be assessed at the time when the application is made to the tribunal.

The onus to demonstrate that a merger or a proposed merger does not prevent or lessen competition substantially should rest with companies wishing to merge, as is suggested in the bill.

Then there is the area of conglomerate mergers. An American study entitled *Conglomerate Mergers: Their Effects on Small Business and Local Communities* showed that holding companies which acquire different types of firms have contributed to a substantial reduction of the role played by small businesses in the economy. I therefore propose that clause 65 of the bill under study include a specific provision for this type of acquisition of shares or assets. Such acquisitions should be permitted only if they are of significant benefit to the local community and the public at large.

The last point I would like to stress before the committee is that legislation should be enacted to protect small businesses from takeover by large companies either domestic or foreign. The position of small businesses in the Canadian economy must be preserved. When such takeovers occur, they must not

[*Texte*]

acquisitions ont lieu, qu'elles ne se fassent pas à l'encontre de la concurrence; que ces transactions aient pour effet d'améliorer l'efficacité économique pour le plus grand bien de la collectivité.

Dans la mesure où les amendements que je viens de vous soumettre respectueusement seront adoptés, nous aurons une loi qui reconnaîtra deux droits à la population canadienne: le droit à des marchés concurrentiels, et le droit des individus à se lancer en affaires et de jouer un rôle à travers l'entrepreneurship au Canada. Sinon, j'ai le pressentiment que la Loi C-91 demeurera une loi favorisant les consortiums, les regroupements d'entreprises et les fusions au nom de la concurrence.

Je vous remercie, monsieur le président.

Le président: Merci, monsieur Bellemare.

M. Ouellet peut-il commencer les questions?

M. Ouellet: Monsieur le président, je voudrais d'abord m'excuser auprès de notre témoin. J'ai dû faire un court discours à la Chambre des communes sur le projet de loi C-96; ce qui m'a retardé un peu. Mais j'ai brièvement pris connaissance du document de Me Bellemare. Je veux le féliciter des suggestions fort pertinentes pour rendre la loi plus forte, pour qu'elle soit plus articulée.

Je ne peux pas faire autrement que de me réjouir que Me Bellemare soit allé à une si bonne école. Je suis sûr que ses relations avec M. Ralph Nader aux États-Unis lui ont permis d'acquérir une conscience sociale importante. Je lui souhaite de devenir, au Canada, un autre Ralph Nader. Nous en avons grandement besoin au Canada. On sait à quel point M. Nader est devenu célèbre aux États-Unis. Il a rendu de grands services à la population américaine. Je ne sais pas si Me Bellemare a l'intention de faire la même chose au Canada, mais je lui souhaite beaucoup de succès pour devenir une conscience des consommateurs et des consommatrices.

• 1600

Je voudrais lui poser une première question, monsieur le président.

Vous nous dites dans votre exposé que les compagnies seraient mieux protégées que les citoyens ordinaires lors des enquêtes du directeur des coalitions. Pouvez-vous nous expliquer comment vous arrivez à cette conclusion?

Me Bellemare: J'en arrive à cette conclusion, monsieur Ouellet, parce que le projet de loi C-91 veut reformuler l'ensemble des pouvoirs du directeur des enquêtes et recherches. Il est prévu, dans le projet de loi, pour les mandats de perquisition et de saisie, pour les documents des entreprises pour fins d'informations et pour les *subpoena* envoyés aux témoins, qu'il faudra maintenant l'autorisation d'un juge. D'accord? Ce sont les articles 9 et suivants du projet de loi C-91.

Je fais remarquer au Comité que l'arrêt Southam ne discute que de la question des pouvoirs de saisie et de perquisition. Les personnes faisant objet de l'enquête disaient que les pouvoirs de perquisition et de saisie allaient à l'encontre de l'article 8 de la Charte canadienne des droits et libertés.

[*Traduction*]

have detrimental effects on competition but rather should result in an improvement of economic efficiency for the benefit of the community.

To the extent that the amendments which I have respectfully submitted to you are adopted, we will have legislation recognizing that the population of Canada has two rights: the right to competitive markets as well as an individual right to entrepreneurship. Otherwise, I believe that Bill C-91 will remain an act favouring mergers, consortiums and joint ventures in the name of competition.

Thank you, Mr. Chairman.

The Chairman: Thank you, Mr. Bellemare.

Would Mr. Ouellet like to begin questioning?

Mr. Ouellet: Mr. Chairman, I would first of all like to present my apologies to the witness. I had to make a short speech in the House of Commons on Bill C-96 and this explains my slight delay. But I have had a chance to look through Mr. Bellemare's statement. I would like to congratulate him for his good suggestions about making the bill stronger and more consistent.

I am very happy that Mr. Bellemare went to such a good school. I am sure that his contacts with Mr. Ralph Nader in the United States have heightened his social consciousness. I hope that he will become another Ralph Nader in Canada. There is a great need for such a person in our country. We know how famous Mr. Nader has become in the United States. He has rendered great services to the American population. I do not know whether Mr. Bellemare intends to imitate him in Canada, but I hope that he is very successful in becoming the conscience of consumers.

I would like to ask a first question, Mr. Chairman.

In your statement you say that companies would be better protected than ordinary citizens when a combines investigation is held. Could you explain to me how you have reached this conclusion?

Mr. Bellemare: I have come to this conclusion, Mr. Ouellet, because Bill C-91 attempts to reformulate the different powers of the Director of Investigation and Research. The bill requires the authorization of a judge for search and seizure warrants for company documents required for information purposes and for the subpoenas addressed to witnesses. Such provisions are to be found in clause 9 and following of Bill C-91.

I remind the committee that the Southam decision refers only to the matter of powers of seizure and search. The persons under investigation claimed that the search and seizure provisions went against section 8 of the Canadian Charter of Rights and Freedoms.

[*Text*]

Maintenant, ce n'est pas parce que les pouvoirs prévus aux paragraphes 10.(1) et (3) de l'actuelle Loi relative aux enquêtes sur les coalitions vont à l'encontre de la Charte qu'il faut procéder à une réforme en profondeur des pouvoirs d'assigner des témoins et d'envoyer des formulaires pour fins d'informations.

M. Ouellet: Oui.

Me Bellemare: Je pense qu'on devrait reconnaître, *ipso facto*, au directeur des Enquêtes et Recherches, les pouvoirs actuellement dévolus aux commissaires qui sont membres de la Commission sur les pratiques restrictives du commerce, en vertu de la Partie I de la Loi sur les enquêtes. Que le directeur puisse lui-même, d'office, demander à des gens de fournir des documents ou de se présenter devant lui pour témoigner.

M. Ouellet: Vous vous référez, je pense, à la page 6 de votre mémoire, à la loi concernant les enquêtes publiques.

Me Bellemare: Oui.

M. Ouellet: Et aussi à la Loi du coroner.

Me Bellemare: Oui.

M. Ouellet: Évidemment, vous avez raison de le dire que les citoyens sont obligés de comparaître, de témoigner, de produire leurs documents devant ces enquêtes publiques ou devant le coroner.

Me Bellemare: Oui.

M. Ouellet: Mais évidemment, ce ne sont pas toujours des poursuites criminelles, devant le coroner. Cela peut l'être, oui.

Me Bellemare: Oui, c'est le genre d'enquêtes dont je parle.

M. Ouellet: Alors, vous prétendez que les compagnies demandent un traitement préférentiel par rapport aux citoyens.

Me Bellemare: À mon avis, c'est le genre de traitement qu'on leur accorde dans la réforme proposée. Oui.

M. Ouellet: D'accord.

La deuxième chose que je veux vous demander concerne les dommages exemplaires.

Me Bellemare: Oui.

M. Ouellet: Qu'entendez-vous par dommages exemplaires? Croyez-vous que s'il y a dommages exemplaires, il devrait également y avoir responsabilités? Si quelqu'un va devant le tribunal et soumet une proposition qu'une firme a violé la loi, mais que finalement la firme est acquittée. Est-ce que ceux qui ont soumis la cause devant le tribunal devraient payer non seulement leurs frais, mais les frais de la compagnie qui a été indûment amenée devant le tribunal? Est-ce ce que vous avez à l'esprit ou si c'est seulement dans le cas où la compagnie est condamnée?

• 1605

Me Bellemare: Évidemment, les dommages-intérêts exemplaires s'appliquent seulement dans le cas où une entreprise est condamnée. Je vois difficilement comment on

[*Translation*]

However, it is not because the powers listed in paragraphs 10(1) and (3) of the present Combines Investigation Act go against the Charter that it is necessary to undertake a thorough reform of the power to subpoena witnesses and send forms for information purposes.

Mr. Ouellet: Yes.

Mr. Bellemare: I think that the Director of Investigation and Research should be granted the same powers as the Commissioners of the Restrictive Trade Practices Commission under Part I of the Investigations Act. The Director himself should be entitled by right to instruct persons to provide documents or testimony.

Mr. Ouellet: I believe that it is on page 6 of your brief that you referred to the act concerning public investigations.

Mr. Bellemare: Yes.

Mr. Ouellet: As well as to the Coroners Act.

Mr. Bellemare: Yes.

Mr. Ouellet: You are quite right in pointing out that citizens are under an obligation to appear and to testify, to produce documents for public investigations or the coroner.

Mr. Bellemare: Yes.

Mr. Ouellet: Of course, the coroner does not always deal with criminal proceedings. Although in some cases they are.

Mr. Bellemare: Yes, this is the type of investigation I am referring to.

Mr. Ouellet: So you are claiming that companies are asking for preferential treatment in relation to ordinary citizens.

Mr. Bellemare: In my opinion, this is the type of treatment which they are being given in the proposed reform.

Mr. Ouellet: I see.

My second question concerns punitive damages.

Mr. Bellemare: Yes.

Mr. Ouellet: What do you mean by punitive damages? Do you think that if there are punitive damages, there should also be liability? Assuming that someone submits a claim to the tribunal alleging that a firm broke the law and the firm is eventually acquitted. Should the plaintiff pay not only their costs, but also those of the company which was unduly brought before the tribunal? Is that what you have in mind, or would this only apply in those cases where the company is convicted?

Mr. Bellemare: Of course, the punitive damages would only apply in those cases where the company is judged to be guilty.

[*Texte*]

pourrait allouer des dommages-intérêts exemplaires à une entreprise qui n'est pas condamnée.

M. Ouellet: Ce n'est pas ce que je veux dire. Si la compagnie n'est pas condamnée, l'intervenant devrait-il payer les frais encourus par la compagnie pour se défendre?

Me Bellemare: Je pense que cela devrait être laissé à la discrétion du juge, dépendamment tout type de litige, notamment en matière d'allocation des dépenses et des frais encourus devant les tribunaux pour faire valoir des droits. Je pense que chaque cas devrait être tranché à sa juste valeur, au mérite.

M. Ouellet: Mais il serait possible que la cour demande à ceux qui ont présenté la requête d'assumer les frais de la compagnie jugée non coupable?

Me Bellemare: Je préférerais laisser cela au juge du fonds.

M. Ouellet: Alors, quand vous parlez de dommages exemplaires, que voulez-vous dire exactement?

Me Bellemare: Il faudrait prévoir une forme de dommages-intérêts, d'abord, pour dissuader toute forme de violation de la loi et, ensuite, pour faire en sorte que toute forme de violation de la loi ne soit pas payante . . . Qu'il soit plus dommageable de violer la loi, que cela puisse laisser supposer des coûts plus importants que sa violation.

Mais je ne suis pas partisan d'une formule aussi stricte qu'aux États-Unis avec le *triple damage suit*. Je laisse cette question à la discrétion du tribunal, dans chaque cas, pour que les dommages imposés soient appropriés.

M. Ouellet: En d'autres mots, vous ne recommandez pas un maximum. Vous croyez que la cour devrait avoir l'entière discrétion pour établir la pénalité et qu'il ne devrait pas y avoir un maximum d'inscrit dans la loi.

Me Bellemare: Sous réserve, évidemment, que ce ne soit pas plus payant d'enfreindre la loi que de la respecter.

M. Ouellet: Merci, monsieur le président.

The Chairman: Mr. Attewell, please.

Mr. Attewell: Thank you, Mr. Chairman. I would just like to ask the witness a few questions. Mr. Bellemare, I understand one of your roles is to help young entrepreneurs start businesses. In relation to the aspects of this proposed bill, what are some of the problems these young people are encountering?

Mr. Bellemare: I would like to made clear before this committee that I am testifying on behalf of myself. I am not testifying on behalf of the group I am working for, but there is a relation between the proposal I am sharing with you and the work I am doing. As I pointed out in the document, small business and consumers should be more protected. I think it is very important to have a bill which is aimed at protecting consumers and small business in order to preserve competition and entrepreneurship in Canada. I do believe the kind of proposal I am making here is aimed at promoting both competition and entrepreneurship.

[*Traduction*]

I cannot envisage asking a company which is not found guilty to pay punitive damages.

Mr. Ouellet: That is not what I meant. If the company in question is not found guilty, then should the plaintiff pay the costs incurred by the company to defend itself?

Mr. Bellemare: I believe that that should be left to the discretion of the judge, who will make a decision according to the type of lawsuit he is dealing with, especially in the case of costs allocated in order to cover the expenses brought about by the defence of rights. I believe that each case should be judged individually, on its own merits.

Mr. Ouellet: But would it be possible for the court to ask those who have filed the complaint to pay the costs of the company if it is found not guilty?

Mr. Bellemare: I would prefer to leave that up to the judges.

Mr. Ouellet: In that case, when you speak of punitive damages, what do you mean exactly?

Mr. Bellemare: Some type of damages mechanism should be provided for, first, in order to discourage people from violating the law and, second, in order to make the system such that it does not pay to violate the law. That going against the law does one more harm and can wind up costing a lot more money.

I would however not advocate as strict a formula as that which exists in the United States, with the triple damage suit. I would prefer to leave this to the discretion of the tribunal which should, in my view, set appropriate damages in each case.

Mr. Ouellet: In other words, you are not recommending any maximum. You believe that the matter of penalties should be left entirely up to the courts and that no maximum should be set out in the act.

Mr. Bellemare: Provided, of course, that it costs more to go against the law than to respect it.

Mr. Ouellet: Thank you, Mr. Chairman.

Le président: Monsieur Attewell, s'il vous plaît.

M. Attewell: Merci, monsieur le président. J'aimerais moi aussi poser quelques questions au témoin. Si j'ai bien compris, monsieur Bellemare, l'un de vos rôles, c'est d'aider de jeunes entrepreneurs à démarrer. Dans le contexte du projet de loi dont nous sommes saisis, pourriez-vous nous expliquer à quels problèmes ces jeunes entrepreneurs se trouvent confronter?

Me Bellemare: Je veux tout d'abord préciser que les propos que je tiens devant vous aujourd'hui n'engagent que moi. Je ne comparais pas au nom du groupe pour lequel je travaille, bien qu'il y ait des liens entre la proposition que je vous ai expliquée et le travail que je fais. Comme je le souligne dans mon exposé, la petite entreprise et les consommateurs devraient être mieux protégés. Je pense d'ailleurs que, si l'on veut préserver la concurrence et l'esprit d'entreprise au Canada, il nous faut absolument avoir une loi qui protège les consommateurs et la petite entreprise. Je suis en fait convaincu que la proposition que je vous ai soumise permettrait, si elle était adoptée, de promouvoir et la concurrence et l'esprit d'entreprise.

[*Text*]

• 1610

Mr. Attewell: What are the constraints that these entrepreneurs you are trying to help are seeing? Is it that there are just too many big companies or too little competiton?

Mr. Bellemare: I cannot testify on behalf of these people. The only thing I can say here is that in my opinion the level of concentration in Canada is somewhat alarming. I think the more resources are concentrated in the hands of few large companies, the less the small entrepreneurs have chances to start businesses and be prosperous.

Mr. Attewell: This question my be covered in your brief. I heard you speak, but I have not had time to read the brief. What is your definition of a conglomerate?

Mr. Bellemare: A conglomerate consists of holding companies which hold either shares, capital or assets in unrelated enterprises. For instance, Bell Canada enterprise is a conglomerate. It is involved in telecommunications, printing, real estates and energy. Holding companies have assets or stocks in unrelated companies. I think that is the definition of a conglomerate.

Mr. Attewell: Do you consider that bad for a country? Is it good? Might it be either?

Mr. Bellemare: A conglomerate can have anti-competitive impacts. It can represent a kind of threat. In the first page of my introduction, I referred to a statement by Senator Edward Kennedy which proposed to introduce a protection act for small and independent businesses in the United States. The fact that assets and capitals are concentrated in less and less hands may be a threat not only to the economic prosperity and democracy in the marketplace, but also to the social and political life of our society.

Mr. Attewell: It seems to me that when you speak of conglomerates, you seem to be thinking of large, extremely powerful . . . There is another name that can be applied to smaller companies and large ones, too, and that is diversification.

Mr. Bellemare: Yes, it is.

Mr. Attewell: There are thousands of small business people in this country who have more than one interest. Some may do this for seasonal purposes. They do something in the winter months and something . . . Other businesses grow. There may be cycles. You want to be in a certain business that has some ups and downs and get into another business at the same time to kind of even out those cyclical natures. Presumably, you are not against that.

[*Translation*]

M. Attewell: Quelles sont les contraintes que ces entrepreneurs que vous essayez d'aider ont identifiées? Le problème est-il tout simplement qu'il y a trop de grosses sociétés ou bien qu'il n'y a pas assez de concurrence?

Me Bellemare: Je ne puis répondre pour eux. Tout ce que je puis vous dire, c'est qu'à mon avis, le niveau de concentration qui a été relevé au Canada est quelque peu inquiétant. Il me semble que plus les ressources sont concentrées dans les mains d'un petit groupe de sociétés importantes, moins les petits entrepreneurs ont la possibilité de se lancer en affaires et de prospérer.

M. Attewell: Cette question doit être examinée dans votre mémoire. J'ai suivi votre exposé, mais je n'ai pas eu le temps de lire le mémoire. Comment définiriez-vous le mot conglomérat?

Me Bellemare: Un conglomérat est un ensemble de sociétés de portefeuilles qui détiennent soit des actions, soit des capitaux, soit une partie des biens de plusieurs entreprises qui ne sont pas liées les unes aux autres. Par exemple, la société Bell Canada est un conglomérat. Elle a des intérêts dans plusieurs domaines, notamment les télécommunications, l'impression, l'immobilier et l'énergie. Les sociétés de portefeuilles possèdent des parts ou des biens de plusieurs sociétés qui ne sont pas rattachées les unes aux autres. Voilà comment je définirais le mot conglomérat.

M. Attewell: Pensez-vous que les conglomérats soient une mauvaise chose pour un pays? Ou une bonne chose? Ou soit l'un soit l'autre?

Me Bellemare: Un conglomérat peut nuire à la concurrence. Les conglomérats peuvent représenter un genre de menace. À la première page de mon introduction, je fais part d'une déclaration du sénateur Edward Kennedy, qui préconisait l'adoption d'une loi visant à protéger les petites entreprises et les entreprises indépendantes aux États-Unis. Que les biens et les capitaux soient concentrés dans les mains de joueurs de moins en moins nombreux peut menacer non seulement la prospérité économique et la démocratie sur le marché, mais également la vie sociale et politique de la société.

M. Attewell: Il me semble que lorsque vous parlez de conglomérat, vous songez à de grosses et très puissantes . . . Il y a un autre terme qui peut s'appliquer tant aux petites qu'aux grosses sociétés: la diversification.

Me Bellemare: C'est exact.

M. Attewell: Il y a des milliers de petits entrepreneurs ici, au Canada, qui s'intéressent à plus d'une chose. Certains d'entre eux diversifient leurs activités parce qu'elles sont saisonnières. Ils font quelque chose pendant l'hiver et autre chose . . . D'autres entreprises prennent de l'ampleur. Il se peut qu'il y ait des cycles. Si vous voulez oeuvrer dans un secteur qui connaît des hauts et des bas, vous voudrez peut-être vous lancer dans un autre domaine en même temps pour équilibrer un peu les choses. J'imagine que vous ne vous opposez pas à cela.

[*Texte*]

Mr. Bellemare: It is not this kind of enterprise I am referring to here. I am referring more specifically to very large companies that own interests in several businesses who are in themselves often very large. For instance, Bell Canada Enterprises held an interest in TransCanada Pipeline. TransCanada Pipeline is a very large company, but Bell Canada Enterprises is also a very large company. So is Northern Telecom. That is the kind of corporate organization I am referring to.

Mr. Attewell: One example of a man who started with very humble means would be Mr. Paul Desmarais who had a bus line out of northern Ontario, I gather. He went on to some pretty big things—a power corporation. I do not know if you have studied his history, but it created thousands of jobs in this country. Would you have stopped him at a certain stage and told him that he had grown too large?

That may be an unfair question. He is one of the most powerful individuals in this country today. Do you think he is too powerful?

Mr. Bellemare: I do not know how I could answer your question. What I am referring to in this paper is, like I said a few moments ago, the fact that economic concentration is growing very fast in Canada. This could represent a threat to entrepreneurship. I believe this. A large corporation like a power corporation might want to take over Télémétropole. Yes, I think this kind of take-over could be harmful for the public interest, as the CRTC said last week, I think. Yes, I do believe.

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Mr. Attewell: It is a little difficult, I think, to draw the line on where you do step in with some of these individuals. Could you share with us a little further your notion of protecting small business from being taken over by other companies? What sort of structure or guidelines would you have on it?

Mr. Bellemare: As it was pointed out in the documents on page 15, I think we should have legislation aimed at encouraging and helping small business to be prosperous and to be very well integrated in the economy, rather than to have the kind of situation where small businesses are harassed, if I can express myself in this way, by larger corporations. This can create the situation where these people are in a position where they sell their companies rather than continue to operate it in a competitive market. This is the kind of thing I would like to have protected by the law in order to be sure, for instance, when large corporations are taking over smaller ones, that it is either because the small businesses in question are not prosperous or because superior efficiency will result because of it, but not because they want to eliminate competitors or because they want to be better established in the marketplace. This is the kind of thing I would like to have protected in the Small and Independent Business Protection Act.

[*Traduction*]

Me Bellemare: Ce n'est pas ce genre d'entreprise que j'ai en tête. Je songe ici davantage aux très grosses sociétés qui ont des intérêts dans plusieurs entreprises, qui sont elles-mêmes souvent très grosses. Les Entreprises Bell Canada, par exemple, avaient des intérêts dans TransCanada Pipelines. La TransCanada Pipelines est une très grosse société, mais les Entreprises Bell Canada sont elles aussi très importantes. On pourrait dire la même chose de Northern Telecom. Voilà le genre de sociétés auxquelles je songe.

M. Attewell: M. Paul Desmarais est un homme qui a commencé avec pratiquement rien. Si je ne m'abuse, il a monté un service d'autobus dans le nord de l'Ontario. Puis, il a entrepris des projets plus importants, et il a notamment fondé une société d'énergie. Je ne sais si vous connaissez son histoire, mais il a créé des milliers d'emplois au Canada. L'auriez-vous arrêté à un moment donné pour lui dire qu'il avait pris trop d'ampleur?

C'est peut-être un peu injuste de vous poser cette question. M. Desmarais compte aujourd'hui parmi les personnes les plus puissantes au Canada. Pensez-vous qu'il soit trop puissant?

Me Bellemare: Je ne saurais comment répondre à votre question. Comme je le disais il y a quelques instants, ce dont je traite dans mon exposé, c'est du fait que la concentration économique est en train de s'intensifier à une allure très rapide ici au Canada. Ce phénomène pourrait menacer l'esprit d'entreprise. C'est en tout cas ce que je pense. Il se pourrait qu'une grosse société, par exemple une compagnie d'électricité, veuille acheter Télémétropole. Oui, je pense que ce genre de prise de contrôle pourrait nuire à l'intérêt public, et c'est d'ailleurs ce que le CRTC a déclaré la semaine dernière, si je ne me trompe.

M. Attewell: Il est sans doute difficile de tracer une ligne de démarcation et savoir précisément quand il faut intervenir dans ce genre de situation. J'aimerais cependant savoir à quoi vous pensez précisément lorsque vous nous recommandez de mieux protéger les petites entreprises contre leur absorption éventuelle par de grosses sociétés? Quel genre de structure ou de critères envisageriez-vous?

Me Bellemare: Comme je l'indique à la page 15 de mon document, il faudrait que la loi serve à encourager les petites entreprises et à les aider à prospérer et à s'intégrer harmonieusement à notre système économique, plutôt que de les laisser se faire harceler, si je peux employer ce terme, par les grandes entreprises. Ces petits entrepreneurs préfèrent alors vendre leur entreprise, plutôt que de continuer à l'exploiter dans un marché compétitif. La loi devrait donc leur offrir une certaine protection, afin de s'assurer que la prise de contrôle d'une petite entreprise par une grosse n'est justifiée que par le manque de rentabilité de la première, ou par le gain d'efficacité qui en résultera; en d'autres termes, il s'agit de s'assurer qu'une prise de contrôle ne sert pas tout simplement à éliminer des concurrents ou à augmenter la place de l'acquéreur sur les marchés. Voilà donc le genre de garanties qu'une loi sur la protection des petites entreprises devrait offrir.

[*Text*]

I think also that when a large corporation wants to make acquisitions of stocks or assets, it should also have to divest from other stocks or assets it has in order to make it more fair and in order to keep the economy more *polyvalent*. How do you say it in English?

Mr. Attewell: You gave a couple of examples there; they both seem to be a little negative. There can be some positive ideas.

Let us say a husband and wife get a small business growing and they create jobs and profits. People on an earnings multiple, whether it is eight times earnings, or ten times earnings, might be the ones who want to sell out. They are not being harassed by a big business. They just simply have something started and it is now making $30,000 a year and maybe they can sell it for $300,000. How would you differentiate if you start to put in a structure that has to look at every small business acquisition? How would you differentiate between people who quite willngly want to sell for the profit potential or switch to another business? The last thing they will want is government interference with their ability to sell it to somebody else. How would you handle this?

Mr. Bellemare: As I said on page 2 of my documents, the anti-trust law must allow enterprises to grow large enough to realize economies of scale, but also prevent aggregation of economic power that would only contribute to enhance political influence, which is clearly against public interest. I am saying, as is provided in the section ruling abuse of dominant position, if a company or a business grows and grows because it is more efficient than its competitors, it is a different thing from an enterprise that grows because of mergers anti-competitive practices. I think a clear line must be drawn in order to protect and encourage the former and to discourage the latter.

Mr. Attewell: So you see in subclause 51.(4), regarding superior competitive performance, that there is a proper spot or place for it.

Mr. Bellemare: Absolutely.

Mr. Attewell: Thank you, Mr. Chairman, I think this is all for now, thank you.

The Chairman: Thank you, Mr. Attewell. Mr. Orlikow, please.

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Mr. Orlikow: I take it, Mr. Bellemare, that you are less than enthused about this bill and what it will do to help Canadians have a better life. Would you agree that this is a fair assessment of your submission?

Mr. Bellemare: Yes, I would.

Mr. Orlikow: I just want to follow up on a question which Mr. Attewell raised. Let us take Power Corporation, the take-over of Gulf or the take-over of Hiram Walker, which is going on right now. Have there been any studies done to show that after the take-overs, these companies are more efficient, are

[*Translation*]

J'estime également que lorsqu'une grande entreprise veut faire l'acquisition d'actions ou de biens, elle devrait être obligée de se départir des autres actions ou biens qu'elle détient, par souci d'équité et pour rendre l'économie plus polyvalente.

M. Attewell: Vous venez de nous donner quelques exemples un peu négatifs, mais il y en a certainement de positifs.

Prenons l'exemple d'un couple qui exploite une petite entreprise, la fait prospérer et crée des emplois. Ceux qui ont, à la revente, un potentiel de profit de 8 à 10 fois supérieur à leur chiffre d'affaires sont peut-être tentés de vendre leur entreprise. Ils ne sont donc pas harcelés par les grandes entreprises. Ils font par exemple 30,000$ de chiffre d'affaires par an et pourraient peut-être revendre leur entreprise pour 300,000$. Comment feriez-vous cette distinction si vous mettiez en place une structure d'intervention dans chaque cas de prise de contrôle d'une petite entreprise? Comment feriez-vous la différence avec les petits entrepreneurs qui veulent réellement vendre leur société pour réaliser un profit ou tout simplement pour se reconvertir? Ces gens-là ne tiennent certainement pas à ce que le gouvernement intervienne dans cette transaction. Comment feriez-vous alors?

Me Bellemare: Comme je l'indique à la page 2 de mon document, la loi anti-trust doit permettre aux entreprises de se développer suffisamment pour réaliser des économies d'échelle, mais elle doit aussi empêcher toute concentration du pouvoir économique qui ne sert qu'à accroître l'influence politique, ce qui est manifestement contraire à l'intérêt public. Comme le prévoit l'article relatif à l'abus de position dominante, si une entreprise se développe parce qu'elle est plus efficace que ses concurrents, son cas est bien différent de celle qui se développe grâce à des fusions et à des pratiques anti-concurrentielles. Il faut donc tracer la ligne de démarcation, afin de protéger la première et de décourager la deuxième.

M. Attewell: Selon vous, donc, le paragraphe 51(4), qui porte sur l'efficience économique supérieure, a tout à fait sa place.

Me Bellemare: Tout à fait.

M. Attewell: Merci, monsieur le président. C'est tout pour l'instant.

Le président: Merci, monsieur Attewell. Monsieur Orlikow.

M. Orlikow: J'en conclus, monsieur Bellemare, que vous êtes loin d'être convaincu que ce projet de loi va améliorer le sort des Canadiens. Je vous ai bien compris?

Me Bellemare: Oui.

M. Orlikow: Permettez-moi maintenant de revenir sur une question soulevée par M. Attewell. Prenons l'exemple de la *Power Corporation*, de la prise de contrôle de Gulf ou de celle de Hiram Walker, dont on parle en ce moment. Des études montrent-elles qu'après la prise de contrôle, la société devient

[*Texte*]

doing more scientific research and development, have produced new products, and have created more jobs?

Is it not a fact that the real winners of all this are not the Canadian people through more jobs or more efficiency, but the wheeler-dealers who promote these deals and the senior officers of the corporation, such as the officers of Hiram Walker who agreed to this take-over and are each guaranteed a million and a half dollars in salary in the next three years together with huge profits for stock for which they did not pay a cent, but will be able to sell whenever they want and make a big capital gain?

Mr. Bellemare: I do agree, and I would like just to add a point before this committee. For instance, in the 1960s, there was a senate committee on anti-trust and monopoly in United States, which held hearings and released a report. It concluded that monopoly and oligopoly industries cost the U.S. economy between $48 billion and $60 billion a year in lost output of goods and services because of economic concentration.

Also, according to an internal study realized in the 1960s by the U.S. Federal Trade Commission, if large oligopoly and monopoly industries were broken up, prices would fall by 25% or more. That is the kind of thing I am referring to when I am referring to large corporations who have market power because of the place they have in the market as opposed to their efficiency.

Mr. Orlikow: You say on page 6 that the proposal is more effectively protecting corporations and individuals being investigated than ordinary citizens.

Mr. Bellemare: Yes.

Mr. Orlikow: You say it should be the opposite. Can you give me a short illustration of what you mean? Please try and keep it short because I have a limited time for my questions.

Mr. Bellemare: As I said to Mr. Ouellet a few moments ago, I think individuals and corporations should be recognized as having equal rights under the law. Since individuals may be compelled under provincial statutes to provide documents or to testify before these committees, I do not see why it should be different for a corporation investigated in relation with trade practices. This is basically what I am saying in the documents.

Mr. Orlikow: You are saying, as some other witnesses have, that the inclusion of the word "unduly" creates a tremendous loophole. You are basing that, I suppose, on the kind of decisions the courts have made in the cases they have dealt with up until now.

Mr. Bellemare: No. Do you mean at page 8 of the document?

Mr. Orlikow: I am talking about page 7, at the bottom.

Mr. Bellemare: Yes, at page 7 of the document, I am referring to the decisions in Aetna Insurance. There were two separate court decisions: Atlantic Sugar and Aetna Insurance.

[*Traduction*]

plus efficiente, fait davantage de recherche fondamentale et appliquée, fabrique de nouveaux produits et crée davantage d'emplois?

N'est-il pas vrai qu'en fin de compte, les bénéficiaires réels de ce genre de transaction ne sont pas les Canadiens eux-mêmes, comme ce serait le cas si l'on enregistrait une augmentation de l'efficience de la société et du nombre d'emplois créés, mais que les bénéficiaires réels sont ceux qui manigancent ces transactions avec les dirigeants de l'entreprise, comme c'est le cas des dirigeants de Hiram Walker qui ont accepté cette prise de contrôle en échange d'un salaire garanti d'un million et demi de dollars pour les trois prochaines années et de profits énormes sur des actions qu'ils ont eues gratuitement et qu'ils pourront revendre quand ils le voudront?

Me Bellemare: Je suis tout à fait d'accord avec vous, mais permettez-moi d'ajouter quelque chose. Par exemple, dans les années 60, un comité sénatorial américain a organisé des audiences et a publié un rapport sur les trusts et les monopoles dans ce pays. Ce rapport concluait que les monopoles et les oligopoles coûtaient à l'économie américaine entre 48 et 60 milliards de dollars par an en pertes de biens et de services, et ce, à cause de la concentration du pouvoir économique.

A la même époque, la *Federal Trade Commission* américaine a elle aussi réalisé une étude qui indiquait que la suppression des oligopoles et des monopoles entraînerait une chute des prix d'au moins 25 p. 100. Voilà donc le genre de choses auxquelles je pense lorsque je prétends que des grandes entreprises dominent un marché en raison de la part qu'elles en détiennent et non pas en raison de leur efficience.

M. Orlikow: À la page 6 de votre mémoire, vous affirmez que, pour ce qui est des enquêtes, le projet de loi protège davantage les sociétés que les simples citoyens.

Me Bellemare: En effet.

M. Orlikow: Vous prétendez que ce devrait être le contraire. Pouvez-vous m'en donner un petit exemple? Soyez bref, je vous prie, car je n'ai pas beaucoup de temps.

Me Bellemare: Comme je le disais tout à l'heure à M. Ouellet, on devrait partir du principe que les particuliers et les sociétés ont des droits égaux devant la loi. Étant donné que les simples citoyens peuvent être obligés, par une loi provinciale, à fournir des documents ou à témoigner devant ces comités, je ne vois pas pourquoi il devrait en être autrement pour une société qui fait l'objet d'une enquête sur les pratiques commerciales qu'elle a utilisées. Voilà mon argument.

M. Orlikow: À l'instar d'autres témoins, vous affirmez que l'inclusion du terme «indûment» ouvre la voie à toutes sortes d'abus. Je suppose que vous vous fondez sur les décisions qu'ont prises les tribunaux jusqu'à présent.

Me Bellemare: Non. Voulez-vous parler de la page 8 du document?

M. Orlikow: J'en suis au bas de la page 7.

Me Bellemare: À la page 7, je parle des décisions qui ont été prises dans l'affaire *Aetna Insurance*. En fait, il y a eu deux

[*Text*]

Mr. Orlikow: Are you saying that to include in the bill the word "unduly" . . .

Mr. Bellemare: It should be repealed, in my opinion.

Mr. Orlikow: Do you think that word will give a defence to companies?

Mr. Bellemare: Yes, and I think it is not an appropriate test to determine whether or not a combine is lessening competition or raising prices.

Mr. Orlikow: On page 12, you say that the private plaintiff should have standing to petition the tribunal, and then on page 13 you say that:

> Victims of restrictive trade practices should be able to recover punitive damages.

Are you suggesting that what we need is a clause which would permit class action; in other words, groups of people who felt they were being harmed could take an action together; is that what you are suggesting?

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Mr. Bellemare: You raise a very good issue, because I know that in Quebec and in Ontario, there is class action legislation but maybe in relation to anti-combines, it would be appropriate to have a class action before the Federal Court of Canada in order to allow consumers or enterprises injured because of a violation of the law to gather across the country and to petition a tribunal having jurisdiction throughout the country to recover damages. I think this could be a very good thing for the advancement of anti-combines legislation and litigation.

Mr. Orlikow: You say on page 12 that corporations should be subjected to the Access to Information Act, and you say "this would enhance corporate accountability". At the present time a great deal of the information we get about corporations we get through the fact that the Securities and Exchange Commission in the United States requires companies whose shares are trading on the American stock markets to file information, so we get the kind of information I referred to a few moments ago—that Hiram Walker executives, in arranging for the take-over, have ensured that they will be very handsomely compensated.

What you are saying, I assume, is that not only the general public but the stockholders in the company should be entitled to know what the hell is going on in that company.

Mr. Bellemare: Yes, and I think the rights you have described in relation to the Securities and Exchange Commission in the United States should also be available here in Canada for Canadian citizens.

Mr. Orlikow: Do you think it should be part of this act, or just a separate act altogether?

[*Translation*]

décisions distinctes, celle de *Atlantic Sugar* et celle de *Aetna Insurance*.

M. Orlikow: Estimez-vous qwue l'inclusion dans le projet de loi du terme «indûment» . . .

Me Bellemare: À mon avis, ce terme devrait être supprimé.

M. Orlikow: Craignez-vous que ce terme offre un moyen de défense aux entreprises?

Me Bellemare: Oui, et je ne pense pas que ce soit un critère adéquat pour déterminer si une fusion entraîne une diminution de la concurrence ou une augmentation des prix.

M. Orlikow: À la page 12, vous dites que le plaignant devrait avoir le droit d'intenter des poursuites devant un tribunal, et à la page 13, vous affirmez que:

> Les victimes de pratiques commerciales restrictives devraient pouvoir obtenir des dommages exemplaires.

Voulez-vous dire qu'il nous faut un article autorisant les poursuites collectives? En d'autres termes, les gens s'estimant lésés par ce genre de pratiques pourraient tous ensemble intenter des poursuites? Est-ce cela que vous recommandez?

Me Bellemare: Vous soulevez une question très intéressante, car je sais que le Québec et l'Ontario ont adopté des lois sur les poursuites collectives; toutefois, dans le cadre d'une loi sur les coalitions, il vaudrait peut-être mieux prévoir des poursuites collectives devant la Cour fédérale du Canada afin de permettre aux consommateurs ou aux entreprises lésés par une pratique illégale d'intenter tous ensemble des poursuites devant un tribunal ayant une compétence nationale pour obtenir des dommages-intérêts. À mon avis, une telle disposition améliorerait considérablement la Loi sur les coalitions et faciliterait le règlement des litiges.

M. Orlikow: À la page 12, vous affirmez que les sociétés devraient être assujetties aux dispositions de la Loi sur la liberté d'information, afin, comme vous le dites, de les obliger à mieux rendre des comptes. À l'heure actuelle, c'est surtout par l'entremise de la *Securities and Exchange Commission* des États-Unis que nous obtenons des informations sur ces entreprises, car cette commission oblige les sociétés dont les valeurs sont cotées à la bourse américaine à lui soumettre des informations, et c'est de cette façon que nous en obtenons. C'est ainsi que nous avons appris que les dirigeants de Hiram Walker s'étaient assurés une bonne petite indemnisation en échange de la prise de contrôle de leur société.

Je suppose donc qu'à votre avis, non seulement le grand public mais les actionnaires d'une société devraient avoir le droit de savoir ce que diable il se passe dans ladite société.

Me Bellemare: C'est cela, et j'estime également que les droits dont vous avez parlé au sujet de la *Securities and Exchange Commission* aux États-Unis devraient également exister au Canada, pour les citoyens canadiens.

M. Orlikow: Cela devrait-il être inclus dans ce projet de loi ou faire l'objet d'un autre texte législatif?

[*Texte*]

Mr. Bellemare: No, concerning the Freedom of Information Act, I think a modification should be introduced in the bill in order to provide for such a remedy.

Mr. Orlikow: In the United States, in certain cases, directors of companies found guilty have been sentenced to prison. We have not had this in Canada. Do you think it would be a useful section to add to this bill?

Mr. Bellemare: Well, I think there is this kind of provision in proposed section 32, where if you are going to conspire [*Inaudible—Editor*] . . . indictable offence and is liable to imprisonment for five years or a fine of $4 million, I think it should be left to the court to decide whether or not this kind of penalty should be appropriate.

Mr. Orlikow: But until very recently, not only have we not had anybody sentenced to prison but the fines have been very small. In fact, really, until the last couple of years the fines have been almost like a licence to continue. You pay a small fine; you have made hundreds of thousands or millions of dollars, you pay a fine of $10,000 or $50,000 or $100,000, and then continue to do the same thing you have done up to now—fleecing the public.

Mr. Bellemare: Yes. This is the reason why I propose some kind of punative damages, and I do agree with the increase of the fine in the bill from $1 million to $5 million.

Mr. Orlikow: On page 8, you say that the repeal of paragraph 32.(5)(*d*) creates a large loophole. Could you explain what you mean?

Mr. Bellemare: Yes. What I am saying on page 8 of my document is that the repeal of paragraph 32(5)(*d*) is of concern because if I read the bill without paragraph 32.(5)(*d*) of the actual Combines Investigation Act, this means that an agreement only related to export of product from Canada is not subject to section 32 of the act, even if it does lessen or if it is likely to lessen competition unduly in relation to a product in the domestic market.

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In other words, I am not sure whether the actual provisions of the bill concerning specialization agreements and the repeal of paragraph 32.(5)(*d*) of the bill will guarantee Canadian consumers and small businesses competition in the marketplace because, as I said a few moments ago, there is no guarantee section 32 will apply. I think if we allow enterprises to combine to export products, we should be very sure this kind of agreement does not have any harmful effect in the domestic market. This is what I am saying on page 8 of the document.

Mr. Orlikow: At the bottom of page 8 and the beginning of page 9, if I understand you correctly, you oppose the decriminalization of monopoly which is proposed in this bill.

[*Traduction*]

Me Bellemare: On pourrait inclure dans ce projet de loi une modification correspondante de la Loi sur la liberté d'information.

M. Orlikow: Aux États-Unis, il est arrivé que des directeurs d'entreprise trouvés coupables fassent l'objet de peines d'emprisonnement. Cela ne s'est jamais produit au Canada. Pensez-vous que nous devrions prévoir cette possibilité dans le projet de loi?

Me Bellemare: Je pense que l'article 32 permet ce genre de chose, puisqu'il y est dit . . . [*Inaudible—Éditeur*] . . . que celui qui a commis une infraction est passible d'une peine d'emprisonnement pouvant aller jusqu'à cinq ans ou d'une amende de 4 millions de dollars; c'est donc au tribunal de décider si ce genre de sanction est approprié.

M. Orlikow: Jusqu'à très récemment, non seulement nous n'avons envoyé personne en prison, mais nous avons imposé des amendes vraiment ridicules. En fait, jusqu'à il y a deux ans, l'imposition d'une amende revenait à donner le feu vert. En effet, vous payez une petite amende de 10,000$ ou de 100,000$ après avoir fait des profits de milliers ou de millions de dollars, et ensuite, vous recommencez la même chose, c'est-à-dire que vous continuez à plumer les Canadiens.

Me Bellemare: Oui, et c'est la raison pour laquelle je propose des dommages exemplaires et que j'approuve la disposition du projet de loi faisant passer l'amende de 1 à 5 millions de dollars.

M. Orlikow: À la page 8, vous affirmez que la suppression de l'alinéa 32.(5)*d*) ouvre la voie à des abus. Qu'entendez-vous par là?

Me Bellemare: La suppression de l'alinéa 32.(5)*d*) me pose des problèmes car, sans cet alinéa, la Loi relative aux enquêtes sur les coalitions signifie qu'une entente concernant exclusivement l'exportation d'un produit du Canada n'est pas assujettie à l'article 32 de la loi, même si cette entente diminue ou risque de diminuer la concurrence de façon indue sur le marché intérieur.

Autrement dit, je ne suis pas certain que les dispositions actuelles du projet de loi concernant les accords de spécialisation, ainsi que la suppression de l'alinéa 32.(5)*d*) de ce projet de loi, soient une garantie pour les consommateurs canadiens et les petites entreprises que la concurrence jouera effectivement sur le marché car, comme je l'ai dit il y a quelques instants, rien ne vous dit que l'article 32 sera effectivement appliqué. Si nous permettons effectivement aux entreprises de s'entendre, au sein de coalitions, pour exporter leurs produits, nous devrions nous assurer que ce genre d'entente ne nuit pas au marché intérieur. C'est exactement ce que j'explique à la page 8 de notre document.

M. Orlikow: Au bas de la page 8, et en haut de la page 9, si je vous comprends bien, vous vous opposez à cette décriminalisation de la notion de monopole proposée par ce projet de loi.

[*Text*]

Mr. Bellemare: Yes, I do. I propose that rather than repeal section 33, because the Attorney General has not been very successful in the prosecution under this section of the bill, the definition of monopoly should be re-defined in order to make clear that public interest in the case of a monopoly refers to a superior efficiency or necessity to realize economies of scale.

Mr. Orlikow: At the bottom of page 11, you say:

> The list of "anticompetitive act" should be enlarged to encompass . . . price-fixing, agreement to lessen competition, predatory pricing, resale price maintenance, advertising expenses . . .

Price-fixing and resale price maintenance are the kinds of things the independent gasoline distributers have been complaining about. They are locked into agreements with their companies, whether it be Esso or Shell or you name it. The company has complete control over everything they do, from the price they will pay for the gasoline to the price they can charge for the gasoline to the length of their lease to everything else.

Is this the kind of thing you feel is not included because we do not include under "anti-competitive act" the provisions you are suggesting should be added?

Mr. Bellemare: I think the things you just mentioned a few moments ago should be considered anti-competitive acts, because often they are the result of a dominant position in the market. I do not think it would be included just because the definition of abuse of dominant position and anti-competitive act in the bill is not limitative. I think it should be included to make sure it would be included.

Le président: Merci, monsieur Orlikow. Puisqu'il n'y a plus d'intervenants sur la liste, je dirai, au nom de mes collègues, membres du Comité législatif sur la Loi sur la concurrence, que nous avons apprécié votre présence; et, comme le disait M. Ouellet, au début, je pense que votre motivation et la profondeur de vos arguments prédisent un bel avenir pour vous. Nous vous souhaitons tout le succès possible dans la poursuite de vos objectifs personnels.

Merci de votre présence.

Me Bellemare: Je vous remercie beaucoup, monsieur le président. J'aimerais remercier tous les membres du Comité pour les questions qui m'ont été posées. Je suis sûr qu'elles contribueront à éclaircir certains des arguments que j'ai fait valoir devant le Comité.

Merci infiniment.

Le président: Merci beaucoup. L'assemblée préfère-t-elle attendre une couple de minutes. M. Thompson est déjà parmi nous.

Mr. Orlikow: Forgive me, Mr. Chairman, a short break, if you will?

The Chairman: Two minutes.

[*Translation*]

Me Bellemare: Oui. Plutôt que l'abrogation de l'article 33, qui n'a finalement pas donné grande satisfaction au procureur général lorsqu'il l'a invoqué pour engager des poursuites, je propose que la définition de monopole soit révisée, afin qu'il soit bien clair que cette notion d'intérêt général, lorsque l'on parle de monopole, veut dire efficacité accrue, ou nécessité de réaliser des économies d'échelle.

M. Orlikow: Au bas de la page 11, vous dites:

> La liste des agissements «anti-concurrentiels» devrait être plus complète et comporter notamment . . . le blocage des prix, les ententes visant à nuire au jeu de la concurrence, toute pratique déloyale en matière de fixation des prix, l'imposition des prix au détail, les dépenses de publicité . . .

Le blocage des prix et l'imposition des prix au détail sont déjà quelque chose dont se plaignent les distributeurs indépendants d'essence. Ils sont tenus par des accords qu'ils ont passés avec les grandes compagnies, Esso ou Shell, etc. La compagnie a le contrôle absolu de tout ce qu'ils font, c'est-à-dire du prix d'achat ou du prix de vente de l'essence, de la longueur du bail, etc.

Pensez-vous que ce genre de pratique ne soit donc pas visée par les nouvelles dispositions, étant donné la définition des agissements anti-concurrentiels qui y est utilisée?

Me Bellemare: Je pense effectivement que tout ce dont vous venez de nous parler devrait être considéré comme agissements anti-concurrentiels, étant donné qu'il s'agit en fait de l'exploitation d'une position dominante sur le marché. Or, étant donné la définition des agissements anti-concurrentiels qui est donnée dans le projet de loi, et celle de la position dominante, je crains que ça ne soit pas le cas. Je voudrais donc être certain que ce genre d'agissements soient effectivement inclus dans la liste de définition.

The Chairman: Thank you, Mr. Orlikow. I have nobody left on my list, so, on behalf of my colleagues, and of the members of the legislative committee studying the Competition Act, I would like to tell you that we did appreciate your testimony; and, as Mr. Ouellet was saying, at the outset, I think that considering your motivation and the depth of your arguments, we can expect for you a beautiful future. So we wish you all the best in your career and in the pursuit of your personal goals.

Thank you for coming.

Mr. Bellemare: I thank you very much, Mr. Chairman. I would like also to thank all the members of the committee for the questions which were asked to me. I am sure they will contribute to clarify some arguments which I made before the committee.

Thank you very, very much.

The Chairman: Thank you very much. Would you like to adjourn for a couple of minutes, or listen right away to Mr. Thompson who is already here?

M. Orlikow: Excusez-moi, monsieur le président, nous pourrions ajourner quelques minutes, si vous le voulez?

Le président: Deux minutes.

[*Texte*]

• 1635

• 1640

The Chairman: May I introduce to you Professor Donald N. Thompson. He is working at York University. As I mentioned earlier, Mr. Thompson, you have 15 minutes for your presentation and about an hour for a question period.

Professor Donald N. Thompson (Individual Presentation): Thank you, Mr. Chairman. By way of background, gentlemen, I appear here on my own behalf, as I understand Bill Stanbury did. I do not know if anyone else has appeared before you representing no one except their own opinions. I am a professor, as the Chairman has said, at York University—

Mr. Ouellet: Mr. Bellemare just did.

Prof. Thompson: I see. I heard only the last few minutes of his presentation.

I am a professor at York University in Toronto, where I have taught in the area of competition policy. I have taught anti-trust law at Harvard Law School, which is unique only in that I am not a lawyer. I should emphasize this at the beginning, because many of the issues I touch on are legal issues, and I do it with great trepidation.

I am probably one of the only Canadians who has testified before both a Commons committee in the United Kingdom and the Antitrust Monopoly Sub-Committee in the United States on anti-trust matters. That makes me either very brave or something. I have written several books and articles on the area, and all this brings me to an interest in the topic and to appearing here today.

I thank your clerk for inviting my submission. The submission originated as a discussion document I wrote as a discussion paper with a number of colleagues interested in this area at York University and elsewhere. It was published in a book in the last week, called *Reaction: The New Combines Investigation Act*, which I am sure you have seen. The submission to you, at the request of your clerk, is identical to the article which appeared in the book.

The brief deals with abuse in a dominant position only, but I will comment initially on a couple of other areas which I think tie into it and raise questions which I will leave with you because I do not have answers to them.

I think bringing dominant-position mergers and so on into civil jurisdiction is long overdue, proper and reasonable and has been the approach of several governments to this matter. It

[*Traduction*]

Le président: Puis-je vous présenter le professeur Donald N. Thompson, de l'Université York. Comme je l'ai dit tout à l'heure, monsieur Thompson, vous avez 15 minutes pour votre exposé, et nous pourrons ensuite avoir une heure pour les questions et les réponses.

M. Donald N. Thompson (professeur, à titre personnel): Merci, monsieur le président. En guise d'introduction, messieurs, je vous rappellerai que je comparais ici en mon propre nom, comme l'a d'ailleurs fait Bill Stanbury, si je ne me trompe. Je ne sais pas s'il y en a eu d'autres comme cela. Je suis professeur, comme le disait le président, à l'Université York . . .

M. Ouellet: M. Bellemare lui aussi comparaissait à titre individuel.

M. Thompson: Je vois. Je ne suis arrivé qu'à la fin de son témoignage.

J'enseigne à l'Université York de Toronto et je suis spécialiste des questions de concurrence. J'ai également enseigné le droit anti-trust à l'Ecole de droit de Harvard, ce qui mérite d'être signalé puisque je ne suis pas avocat. Je tiens donc à le dire tout de suite, étant donné qu'il m'arrive fort souvent d'aborder des questions faisant intervenir le droit, et ça n'est pas sans appréhension que je le fais.

Je suis par ailleurs sans doute l'un des seuls Canadiens à avoir été invité à témoigner par un comité de la Chambre des communes du Royaume-Uni, ainsi que par le *Anti-Trust Monopoly Sub-Committee*, sous-commission américaine chargée de discuter des questions de droit anti-trust. Après cela, je risque au moins de faire figure de brave. J'ai écrit également un certain nombre d'ouvrages et d'articles sur la question; je me suis donc au total beaucoup intéressé au sujet, voilà pourquoi je suis ici aujourd'hui.

Je remercie donc votre greffier de m'avoir invité à vous faire cet exposé. Mon mémoire reprend un document de travail que j'ai rédigé avec un certain nombre de collègues de l'Université York et d'ailleurs, qui s'intéressent également à ce domaine. Ce document a ensuite été publié sous forme d'ouvrage, la semaine dernière, sous le titre *Reaction: The New Combines Investigation Act* (Réaction: la nouvelle Loi relative aux enquêtes sur les coalitions); vous en avez certainement vu des exemplaires ici ou là. Mon mémoire, à la demande de votre greffier, reprend l'article que j'ai fait paraître dans cet ouvrage.

Il est uniquement question dans le mémoire d'abus de position dominante, mais je ferai d'abord un certain nombre d'observations portant sur certains points qui se rattachent à cette question, sans apporter moi-même de solutions ni de réponses, car je n'en ai pas.

Je pense qu'il était grand temps de décriminaliser ces questions de fusion entraînant des positions dominantes, c'est tout à fait raisonnable et cela correspond tout à fait à la

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[*Text*]

makes sense because the offences we are talking about are not seen as criminal offences. It is not possible to know the outcome in advance, and it puts an unreasonable burden of proof on the director in terms of pursuing cases.

It leaves, however, some interesting questions when you think of the constitution of a tribunal which will hear these cases. Some of these are simply legal questions as to the constitution of a lay tribunal which will serve as a court of first jurisdiction, but I will leave those to others to discuss.

As I said, I think the constitution of the tribunal raises some questions. One is the idea of four judicial members and eight lay members, with the eight lay members and the four judicial members named by the Minister. What we have learned from other tribunals—the Australian Trade Practices Tribunal, the Swedish market court and others—is that it matters less how you structure the tribunal than who you appoint. Tribunals are largely masters of their own process, so it is not the process which breaks down; it is the level of appointment. This has certainly been the experience in Australia.

As I read it, the proposed act says the Minister may consult but need not listen when he makes an appointment. I do not know if it is something which should be made more explicit, and I do not know how you would do it, but it seems to me the danger in the tribunal as it is structured is the kind of person who is appointed and not the process as it is set out.

However, let me suggest to you one other problem with the tribunal. The more I discuss this with colleagues, the more I am convinced it is an interesting problem. The bill talks rather glibly about questions of law or questions of mixed fact and law as though those categories were well set out.

Let me leave you with the following question. There are three stages in the process a tribunal goes through. One is interpreting the legislation, which is clearly a question of law. The second stage is the identification of the relevant facts. Most people would say that this is a question of law although members of the Federal Trade Commission in the United States would tell you that is not a matter of law, it is a matter of good lay input. The third step is determining what evidence is capable as proof of such facts. All the lawyers I have talked to have said that it is a question of law. Every layman I have talked to has said it is a question of mixed law and fact and that lay members should take part in.

• 1645

I raise this because what I see happening in the tribunal—it happened in Australia, I understand—is that the lay members and judicial members are each getting so caught up in

[*Translation*]

position de plusieurs gouvernements sur cette question. Je pense que c'est tout à fait justifié étant donné que les infractions dont nous parlons ne sont pas considérées comme des crimes. Nous ne savons pas ce que cela va donner, mais le fardeau de la preuve qui incomberait au directeur serait beaucoup trop lourd à porter.

Toutefois, il reste un certain nombre de questions intéressantes à poser à propos de la composition de ce tribunal. Certaines de ces questions font intervenir le droit, puisque certains des membres du tribunal ne seront pas des juges, et que celui-ci sera une cour de première instance; mais je laisserai à d'autres la responsabilité de trancher là-dessus.

Comme je l'ai dit, la composition de ce tribunal soulève un certain nombre de questions. Il y aura d'une part quatre juges et huit membres extérieurs à la profession judiciaire, la totalité des membres étant nommés par le Ministre. Ce que nous avons pu apprendre d'ailleurs—je pense à l'*Australian Trade Practices Tribunal* (Tribunal australien des pratiques commerciales), et au tribunal suédois correspondant, etc.—c'est que c'est moins la structure du tribunal que la personnalité de ses membres qui compte. De façon générale, les tribunaux sont en effet maîtres chez eux, et ce ne sont pas tant les règles de fonctionnement du tribunal qui posent des problèmes que la personnalité de ses membres. C'est en tous les cas ce que l'expérience australienne nous a enseigné.

Si j'ai bien lu, le projet de loi précise que le Ministre peut se laisser conseiller, mais qu'il a toute liberté pour procéder aux nominations. Je ne sais pas s'il faudrait être plus clair, ni comment vous vous y prendriez, mais je pense qu'il faudrait bien faire remarquer que ce tribunal risque de causer des problèmes non pas tant en raison des règles de fonctionnement que des personnalités qui y siégeront.

J'aurais encore, au sujet de ce tribunal, une autre remarque et critique à vous soumettre. Plus j'en discute avec mes collègues, plus je suis convaincu que c'est un problème intéressant. Le projet de loi, en effet, mélange un petit peu à la légère les questions de droit et les questions de fait, comme si ces catégories étaient bien définies au départ.

Permettez-moi donc de soumettre à votre réflexion le problème suivant. Tout tribunal, dans sa procédure, passe par trois étapes. Il y a d'abord l'interprétation de la loi, qui est de toute évidence une question de droit. La deuxième étape est l'identification des faits. La plupart des gens disent que c'est un travail de juriste bien que les membres de la Commission fédérale du commerce des États-Unis prétendent que ce n'est pas une question de droit mais simplement de dossier bien documenté. Troisièmement, il faut choisir les preuves susceptibles de corroborer les faits. Tous les juristes à qui j'en ai parlé m'ont dit que c'était une question de droit. Tous les non-juristes à qui j'en ai parlé m'ont dit qu'il fallait combiner droit et fait et que les membres non juristes devraient participer à cet exercice.

J'évoque ce problème parce que dans ce genre de tribunal—je crois que c'est ce qui se passe en Australie—les membres non juristes et les membres juristes défendent tellement leurs

[*Texte*]

defending their position that you are getting conflicts that are interfering with the resolution of questions on the tribunal. Whether you can or should set out an interpretation of what are questions of law or mixed fact and law, I do not know, but I suggest it to you as a issue you might look at because it is a problem.

Let me say a couple of things about the remedies available to the tribunal in, say, the abuse of dominant-position cases. This is section 51.

Basically the only remedy available to them that is going to get used at all is an order prohibiting the practice. Divestiture of assets or shares is going to happen rarely, if at all. An interim order is going to happen rarely, if at all, because it is like a party order and, accordingly, if you think through the process it is almost never going to be granted. There are no fines or other punitive actions. I understand there are consititutional concerns that kept those out. This leads to a position which certainly all the lawyers I have talked to have said would be their position with a client and that is to do it until you get caught. You then negotiate an order with a director on consent because there are no penalties.

My point is if there are no penalties, you do not need a lot of protection for the firm or rigorous provisions in the statute because there are no penalties for an accidental violation of it. It is always open to the firm to go to the director and negotiate a simple consent order. This really leaves little concern for future private actions based on it. There is really no danger of accidental prosecution.

There are a set of merger provisions which are important for the following reasons. The merger provisions have a whole series of exceptions and modifications . . . must substantially lessen competition, must take into account foreign competition, the failing firm test, the availability of substitutes, barriers to entry, the efficiency gains test. The result of that is going to be that very few mergers are deterred. The emphasis of enforcement of this statute is going to come down to policing conduct of the resulting merged firm on things like abuse of dominant positions rather than policing mergers. Properly it should probably be on conduct and not on structure, but the way the merger provision is phrased makes it much more important that dominant firm conduct is caught properly.

This brings me to the provisions regarding joint dominance. This is in sections 50 and 51. I am sure you have heard these discussed many times so let me go over them only quickly.

It seems to me that there is a combination of five things in here that make the provision almost unenforceable. First of all, in the definition of dominance, it talks about the substantial or complete control of a class of business. That is a very restrictive definition. Secondly, you have a intent test: the object or practice must be to lessen competition. You talk about the purpose of the object or the design of the dominant firm . . . an intent test. Thirdly, you have an effect test: it must have the

[*Traduction*]

positions respectives que cela entraîne des conflits ayant une incidence négative sur les délibérations. Qu'il soit possible ou qu'il soit nécessaire de dissocier les questions relevant du droit pur ou d'une combinaison du droit et des faits, je n'en sais rien, mais je me permets de vous conseiller d'étudier la question parce que c'est un problème.

Permettez-moi de vous dire une ou deux choses sur les ordonnances que peut rendre le tribunal dans les cas, disons, d'abus de position dominante. Il s'agit de l'article 51.

En gros, le tribunal ne pourra que rendre une ordonnance interdisant cette pratique. Il arrivera rarement, sinon jamais, qu'il ordonne un désaisissement d'éléments d'actif ou d'actions. Il arrivera rarement, sinon jamais, qu'une ordonnance temporaire soit prononcée puisque sa nature collective la rendra pratiquement impossible dans la majorité des cas. Il n'est prévu ni amende ni autre sanction. Je crois que ce sont des considérations constitutionnelles qui l'en ont empêché. Tous les avocats à qui j'en ai parlé m'ont dit qu'à toutes fins utiles ils conseilleraient à leurs clients de faire comme si de rien n'était tant qu'ils ne se feront pas prendre. S'ils se font prendre il suffira simplement de négocier l'ordonnance avec le directeur puisqu'il n'y a pas de pénalités.

En l'absence de pénalités, il n'y a pas nécessité de protection contre les dispositions rigoureuses de la loi puisque les infractions accidentelles n'entraînent pas de sanctions. La compagnie concernée peut toujours s'adresser au directeur et négocier une simple ordonnance d'exécution. La probabilité d'engagement de procédures est donc très limitée. Le danger de poursuites pour infraction accidentelles est donc pratiquement inexistant.

Il y a une série de dispositions concernant les fusions qui sont importantes pour les raisons suivantes. Les dispositions concernant les fusions comportent toute une série d'exceptions et de modifications . . . Il faut qu'il y ait diminution sensible de la concurrence, il faut tenir compte de la concurrence étrangère, de la déconfiture vraisemblable d'une des parties concernées, de la disponibilité de produits pouvant servir de substituts, de la présence d'entraves à l'accès à un marché et de l'existence de gains réels. Résultat, très peu de fusions seront interdites. Cette loi servira surtout à réglementer les actions résultant d'une fusion, comme par exemple les abus de position dominante plutôt qu'à réglementer les fusions elles-mêmes. Il serait préférable que ces dispositions visent les comportements plutôt que les structures, mais les textes donnent une plus grande importance à l'abus de position dominante.

Cela m'amène aux dispositions concernant la domination par association. Il s'agit des articles 50 et 51. Je suis certain qu'on vous en a déjà beaucoup parlé, je serai donc bref.

Il me semble que la combinaison de cinq éléments rend pratiquement inapplicable cette disposition. Premièrement, la définition parle de contrôle total ou sensible d'un secteur d'activité. Cette définition est très restrictive. Deuxièmement, le tribunal doit conclure que le but de ces agissements est de réduire la concurrence. Il s'agit donc de spéculations sur le but ou l'intention de cette entreprise en position dominante. Troisièmement, il faut que ces agissements aient pour effet de

[*Text*]

effect of preventing or lessening competition. Fourthly, you have a degree of that: the effect of preventing or lessing competition must be substantial. Fifthly, you have a defence: competition lessened as a result of superior competitive performance. That is not defined and I understand that it was part of the original ... negotiation with interested parties would not be defined and would be left to the tribunal.

Those five in combination exclude almost everything you can think of. I have asked several lawyers whether you can infer intent from effect. I told that you cannot because they were drafted as separate sections and therefore are separate tests. So I suggest to you there are five separate hurdles that must be overcome.

• 1650

It is hard to know what this will catch in area of conscious parallelism plus. The onus then falls back on the conspiracy provision, which is clause 32, but this is still to come into law and will only catch those provisions where there is open communication, presumably.

I have based on this a couple of very humble suggestions to you. One is to drop the intent provision, which is proposed paragraph 51.(1)(*b*). In my submission to you, it adds nothing. Intent is extraordinarily hard to prove. To prove it is not necessary because there are no penalties. You just get an order on consent. So you do have to worry very much about people getting innocently caught.

But there is another reason to drop intent, and I think it is a much more subtle one. When you charge a businessman with an offence that involves intent, you get his back up. You are saying he intentionally did something illegal and he fights, because he is not very proud of it and he wants to clear his name.

The other problem is that if you even agree to a consent order where intent was an ingredient of the offence, you leave the door open for a subsequent private suit for damages. If you take intent out, it leads to the possibility of saying to a businessperson that he took this action for every good reason but it turns out to have been enormously anti-competitive, so he should stop it and sign a consent order and we will all go away. If you take it out, you eliminate the danger the businessman sees of a private action for damages which follows. If you take away the ego element in it, it seems to me it adds nothing and you lose nothing by taking it out.

I have a second suggestion about the proposed paragraph. The test for dominance is very restrictive; it is "substantial" or "complete" control. If the test for dominance is very restrictive, you have to have a very permissive test for "joint", because "joint dominance" is what you really want to get at in this provision. You are not going to get it through "conspiracy" or through the merger provision, so you had better get it through this proposed paragraph.

[*Translation*]

prévenir ou de réduire la concurrence. Quatrièmement, il faut que la conséquence de cette prévention ou de cette réduction de la concurrence soit sensible. Cinquièmement, ces agissements peuvent être tolérés si le tribunal conclut que cette concurrence est réduite en raison du rendement concurrentiel supérieur. Cette notion n'est pas définie et je crois comprendre que lors des négociations les intéressés ont préféré qu'elle ne soit pas définie et qu'on s'en remette au tribunal.

Ces cinq éléments combinés excluent pratiquement tout. J'ai demandé à plusieurs juristes si une intention pouvait être déduite d'une conséquence. Ils m'ont répondu que ce n'était pas possible car ces dispositions font l'objet de paragraphes différents et ne peuvent être invoqués simultanément. Cela fait donc cinq obstacles différents à franchir.

Il est difficile de savoir qui sera touché par ces dispositions puisqu'il faudra qu'il y ait parallélisme conscient. La responsabilité en revient donc à la disposition concernant les complots, c'est-à-dire l'article 32, mais cette modification n'a pas encore été adoptée et ne concernera que les ententes flagrantes, je suppose.

Sur la base de ces constatations, je me permets de vous faire une ou deux très humbles suggestions. Premièrement, je vous suggère d'abandonner la disposition fondée sur les intentions, c'est-à-dire l'alinéa 51.(1)*b*). À mon avis, elle n'ajoute rien. Prouver l'intention est extraordinairement difficile. La prouver n'est pas nécessaire puisqu'il n'y a pas de sanctions. Elle entraîne simplement une ordonnance d'interdiction. Il serait fort regrettable que des innocents soient frappés.

Cependant, il y a une autre raison d'abandonner cette notion d'intention et je pense qu'elle est beaucoup plus subtile. Lorsque vous accusez un homme d'affaires d'un délit d'intention, il est prêt à se défendre comme un beau diable. Vous dites qu'il a intentionnellement fait quelque chose d'illégal et il se défend car il n'en est pas fier et il tient à sauvegarder sa réputation.

L'autre problème est que si même vous acceptez une ordonnance alors que l'intention était un des éléments du délit, vous laissez la porte ouverte à des poursuites privées en dommages et intérêts. Si vous supprimez la notion d'intention, cela permet de dire à l'intéressé qu'il a agi pour toutes sortes de bonnes raisons mais que malheureusement ses agissements s'avèrent extrêmement anti-concurrentiels, qu'il faut qu'il y mette fin et qu'il suffit qu'il accepte de signer une ordonnance. Si vous supprimez cette notion, vous éliminez pour l'intéressé le danger de poursuites privées en dommages et intérêts. Si l'ego n'est plus en jeu, il me semble que cela n'ajoute rien et que vous ne perdez rien en la supprimant.

J'ai une deuxième suggestion au sujet de cet alinéa. Le critère est très restrictif: il est question de contrôle «sensible» ou «complet». Si le critère de domination est très restrictif, le critère d'association par contre, lui, est très laxiste alors que c'est justement ces agissements par association qu'il faut viser. Ce ne sont pas les dispositions concernant les complots ou les fusions qui le permettront et il est donc préférable de prévoir ce cas dans cet alinéa.

[*Texte*]

I do not know how you do it, but you need a definition for "joint" that is very permissive and probably suggests that no communication is necessary; it is parallel behaviour only. If it seems to catch things you do not want to catch, remember there are no penalties in this proposed paragraph, so it does not matter if you catch things accidently.

I have one final suggestion, which does not stem from the proposed paragraph but which is a pet project of mine. This popped up. I was director of Research and chief economist for the Royal Commission on Corporate Concentration, the Bryce commission, which 10 years ago—a long time back—looked at this same topic and produced a long report, which all of you have in your shelves and none of you has ever read. But it had a provision in it, which I must admit I wrote and which nobody else cared about, so it stayed in.

The combines legislation should be sunset legislation, just like the Bank Act. This area is so dynamic and governments of all stripes are so damned reluctant to deal with it that it should be sunset legislation; it should disappear every 10 years, until and unless it is specifically brought back, like the Bank Act. I am not suggesting for a moment it should disappear; I am suggesting that the government should be forced every decade to look at it and to bring it up to date. This is my unasked-for suggestion as an appendage to this bill. As I say, it appeared 10 years ago in the Bryce commission report. It was probably the only provision that no one ever so much as referred to, so it probably does not have great public support, but I suggest it to you.

Mr. Chairman, those are my suggestions. I welcome your questions.

Le président: Merci, monsieur Thompson.

Monsieur Ouellet.

• 1655

Mr. Ouellet: I just want to say, Mr. Chairman, that I am more in accord with what Professor Thompson has just told us than with the written document that he submitted. I was very much interested in his oral presentation. I think the questions that he raised in relation to the tribunal are very pertinent, and I am grateful to him that he has submitted this to our attention, because I am afraid that, with all good intentions, a mixed tribunal might create more difficulties than it will solve.

Secondly, his remarks about abuse of dominant positions are remarks that I welcome. And my question is: How can you reconcile this with your statement on page 15 of your written document, where you said:

> ... the provisions in Bill C-91 to deal with the "abuse of dominant position" are a considerable improvement over the monopoly provisions found in Section 33 of the Combines Investigation Act.

[*Traduction*]

Je n'ai pas de solution, mais il faut une définition d'association qui soit très large suggérant que la communication n'est pas une nécessité; il suffit qu'il y ait agissement parallèle. Si des innocents semblent en faire les frais, n'oubliez pas que cet alinéa ne prévoit pas de sanctions et que ce n'est donc pas si grave.

J'ai une dernière suggestion qui ne découle pas de cet alinéa, mais qui correspond à un projet que je caresse depuis longtemps. J'étais directeur des recherches et économiste en chef de la Commission royale sur la concentration des sociétés, la Commission Bryce qui, il y a 10 ans, cela fait longtemps, étudiait cette même question et a rédigé un long rapport qui se trouve sur vos étagères et que vous n'avez jamais lu. Quoi qu'il en soit, il contenait une disposition que j'avoue avoir écrite et à laquelle personne n'a prêté attention, ce qui fait qu'elle est restée dans le rapport.

Les mesures législatives relatives aux enquêtes sur les coalitions devraient avoir une durée finie comme la Loi sur les banques. La dynamique dans ce domaine est telle et les gouvernements, quelle que soit la couleur politique, ont tellement peur de s'y attaquer que ces mesures devraient avoir une durée finie; elles devraient être caduques tous les dix ans et être renouvelées comme dans la Loi sur les banques. Je ne suggère pas un instant qu'elles devraient disparaître; je dis simplement que le gouvernement devrait avoir pour obligation de les réviser tous les dix ans et de les mettre à jour tous les dix ans. C'est ma suggestion non sollicitée que je vous livre comme appendice à ce projet de loi. Comme je viens de vous le dire, cette suggestion figurait il y a 10 ans dans le rapport de la Commission Bryce. C'est probablement la seule disposition dont personne n'a vraiment parlé et je suppose qu'elle ne doit pas tellement avoir la faveur du public, mais je vous la propose quand même.

Monsieur le président, c'était toutes mes suggestions. Je suis prêt à répondre à vos questions.

The Chairman: Thank you, Mr. Thompson.

Mr. Ouellet.

Mr. Ouellet: Je voudrais indiquer, monsieur le président, que je suis plus d'accord avec ce que M. Thompson vient de dire qu'avec son exposé écrit. J'ai été particulièrement intéressé par ses observations orales. Les points qu'il soulève au sujet du tribunal sont très à propos, et je lui sais gré de les avoir portés à notre attention, parce que selon moi, même si nous avons de bonnes intentions, nous risquons de créer encore plus de difficultés avec un tribunal mixte.

Ce qu'il a dit également au sujet de l'abus de position dominante est très juste. Ce que je voudrais savoir, c'est comment concilier ses observations avec sa déclaration écrite, en page 15:

> ... les dispositions du projet de loi C-91 qui traitent «de l'abus de position dominante» constituent une amélioration considérable par rapport aux dispositions sur les monopoles qui se trouvent à l'article 33 de la Loi relative aux enquêtes sur les coalitions.

[*Text*]

By reading this, I have the feeling you like this section. What you told us today is exactly what a number of witnesses have told us before, when they appeared before us to indicate that with all the hurdles, this section is almost unworkable. I have the feeling, in listening to you, that is what you are telling us. So maybe we should not read on page 15 of your written document a support for the clause on the views of dominant position. I think the suggestions you made today to amend the sections are important ones, and I would like a clarification. What do we take—your oral statement or your written submission?

Prof. Thompson: I hope, Mr. Ouellet, they are not all that contradictory. I think the provision as it stands is an improvement over section 33 of the Combines Investigation Act, if only because it comes to a civil tribunal. It is civil in jurisdiction. It probably catches single-firm conduct better than the existing provision. It probably catches some things on the margin of what would be conspiracy better. But I think there is a gap in the middle—a large gap, as you indicated—whereby these five tests would make it very difficult to catch things that we want to catch. And I suggest the changes, again, because if there are going to be no penalties, we need be less concerned about accidentally catching things and more concerned about catching the things we want to catch. I hope that answers your question.

Mr. Ouellet: Well, do you agree with those who have appeared before us and said that unless this section is amended, the section on abuse of dominant position would be almost unworkable? Therefore, the Director of Combines would really have no chance to be successful.

Prof. Thompson: I do not know that it would be impossible, but certainly in the area of conscious parallelism, there are a lot of things I do think it would catch.

Mr. Ouellet: Just one more question; it has to do with the joint ventures. You know the legislation deals with joint ventures and allows a number of activities to take place, especially for export agreement and for world-market consumption. In your document, you have referred to what takes place in the U.S., in Japan, and in Europe to a certain degree, and there has been an effort by some countries to allow concentrations in some areas, to enhance these countries' abilities to catch foreign markets. My reading of this, and correct me if I am wrong, is that this is always done for export purposes, and indeed the rules are pretty strict in relation to domestic markets. Are you afraid, or are you comfortable in the belief that the current legislation would not have negative effects in terms of competition in the domestic market?

• 1700

You talk about the Japan experience. The Japan experience is one where there is heavy concentration, and there is indeed a government effort to allow companies to be more or less alone in a certain field. Yet is it not true that in terms of price for

[*Translation*]

On a l'impression, à la lecture de ce passage, que vous êtes d'accord avec cet article. Cependant, ce que vous venez de nous dire rejoint ce que nous ont déclaré d'autres témoins précédemment, c'est-à-dire que cet article est presque inapplicable avec tous les obstacles qu'il y aurait à franchir. Du moins, c'est mon interprétation de vos propos juste à l'instant. Nous ne devrions pas nous fier à ce qui se trouve à la page 15 de votre exposé écrit et qui semble appuyer les dispositions actuelles du projet de loi sur la question de la position dominante. Vos suggestions d'amendement sont importantes, et c'est pourquoi j'aimerais que vous précisiez. Devons-nous nous fier à votre présentation orale ou à votre présentation écrite?

M. Thompson: J'espère que l'une et l'autre ne sont pas aussi contradictoires que vous le dites, monsieur Ouellet. Les nouvelles dispositions représentent une amélioration par rapport à l'article 33 de la Loi relative aux enquêtes sur les coalitions, ne serait-ce qu'à cause de l'intervention d'un tribunal civil. C'est une question qui est de compétence civile. Le cas des entreprises uniques est probablement mieux couvert qu'en vertu des anciennes dispositions. L'application de la loi est probablement plus étendue pour ce qui est des complots. Comme vous le soulignez, cependant, il y a un trou béant. Les cinq éléments font qu'il est difficile de s'attaquer à tout ce à quoi on veut s'attaquer. Dans les changements que nous apportons, du fait qu'il n'y a pas de sanctions prévues, en particulier, nous devons moins nous préoccuper d'attraper certains cas accidentellement que d'attraper tout ce que nous devons attraper. J'espère que je réponds à votre question.

M. Ouellet: Êtes-vous d'accord avec les témoins précédents qui ont comparu devant nous et qui ont maintenu que si cet article sur l'abus de la position dominante n'est pas modifié, il sera presque inapplicable? Le directeur des enquêtes sur les coalitions n'aura presque aucune chance de réussir.

M. Thompson: Je ne sais pas si ce sera impossible, mais pour ce qui est du parallélisme conscient, je pense que l'article permettra d'attraper beaucoup de choses.

M. Ouellet: Encore une question au sujet des co-entreprises. Comme vous le savez, la loi traite des co-entreprises et permet un certain nombre d'activités, surtout pour ce qui est des ententes sur les exportations et de la vente sur les marchés mondiaux. Dans votre document, vous faites allusion à ce qui se passe aux États-Unis, au Japon et en Europe, dans une certaine mesure. Il est vrai qu'il y a des pays qui permettent certaines concentrations dans des domaines précis pour accroître leurs chances sur les marchés étrangers. Cependant, de la façon dont je comprends le système, vous pouvez me reprendre si je me trompe, c'est toujours dans le contexte des exportations, et pour ce qui est du commerce intérieur, les règles restent des plus strictes. Êtes-vous rassuré, quant à vous, sur le fait que ces dispositions n'auraient pas d'effets négatifs sur la concurrence dans le commerce intérieur?

Vous citez l'expérience japonaise. Il se trouve qu'au Japon il y a une forte concentration et que le gouvernement encourage les compagnies à faire cavalier seul dans certains domaines. Cependant, au Japon, n'est-il pas également vrai que les prix

[*Texte*]

domestic consumption, they have very rigid criteria which force the companies to sell their products at a good price on the domestic market? Obviously, our federal government does not apply mechanisms for price control because of the two level of government. It is more difficult for the federal government to interfere as effectively for price control than for the Japanese or, for that matter, some European country.

What do you think should be done to enhance world market activities for companies, but at the same time protect true competition in the marketplace here in Canada?

Prof. Thompson: It seems you have asked me a whole series of questions, and I am trying to organize them.

I emphasize the U.S. approach to industrial reorganization and the great weakening of their anti-trust as one means to do that. I can give you the statistic that 76% of our exports go to the United States, but then 20% of their world imports come from Canada. We do not constitute more than 1.2% of the imports of any other country in the world, but we constitute 20% of the imports of the largest country in the world. We have to take notice of what the Americans are doing. If they are hell-bent for industrial restructuring and are prepared to relax their anti-trust as a means of doing this, we cannot ignore it. So I emphasize the U.S. experience not because it is good or bad, but because it is a dominant part of our life.

Now, the other side of this is that it is true we will always have more concentrated markets than the Americans. We are caught, in some sense, in the middle, and this may be what Canadians want. We are a free market like the United States; we do not have internal price controls formally or informally as exists in many industries in Japan, for example. At the same time, we do not have the market size of the Americans so we will always have many fewer competitors in any given sector.

The realities are, however, as the Macdonald Commission pointed out on every second page, that we are in an international environment for most goods at most points in time—not services, obviously, but goods—and the kinds of measures of concentration we have used historically are less and less important. Markets which become uncompetitive, quickly become competitive because of new entrants, new initiatives, new products. We do not have to worry about that as much as we did 10 years ago. I think that is accurate.

I think the Macdonald Commission's view of the future, their solutions aside, is probably pretty accurate. If it is accurate, then we need be much less concerned about concentration and much less concerned about the kinds of solutions you have indicated other countries use.

[*Traduction*]

sur le marché intérieur sont soumis à des critères très rigides et que les compagnies doivent vendre leurs produits à un prix avantageux? En ce qui nous concerne, notre gouvernement fédéral n'a pas de mécanisme de contrôle des prix, parce qu'il doit composer avec un autre palier de gouvernement. Il est beaucoup plus difficile pour le gouvernement fédéral de contrôler les prix aussi bien que le gouvernement japonais ou les gouvernements de quelques pays européens.

Selon vous, quelles mesures devraient être prises pour accroître l'activité des compagnies sur le marché mondial, tout en protégeant une concurrence véritable ici sur le marché intérieur?

M. Thompson: Vous m'avez posé toute une série de questions; j'essaie d'y mettre un peu d'ordre.

Je cite l'exemple des États-Unis pour la réorganisation industrielle et le relâchement des lois anti-coalition aux États-Unis comme moyen d'y parvenir. Je puis vous indiquer que 76 p. 100 de nos exportations, par exemple, vont vers les États-Unis, mais que 20 p. 100 des importations mondiales des États-Unis sont en provenance du Canada. Nous ne comptons jamais plus que pour 1.2 p. 100 des importations de tout autre pays. Malgré tout, nous réussissons à nous accaparer 20 p. 100 des importations du plus grand pays du monde. Nous devons être conscients de ce que font les Américains. S'ils sont déterminés à restructurer leur industrie et sont prêts à assouplir leurs lois anti-coalition pour y parvenir, nous ne pouvons pas l'ignorer. J'insiste sur l'expérience américaine non pas parce que selon moi elle est bonne ou mauvaise, mais parce que elle a une très grande incidence sur notre vie.

Par ailleurs, il est vrai que nous aurons toujours des marchés plus concentrés que les Américains. Nous sommes à moyen terme, et c'est probablement ce que nous souhaitons en tant que Canadiens. Nous avons un marché libre comme celui des Américains; nous n'avons pas de contrôle des prix internes de façon officieuse ou officielle comme c'est le cas dans bien d'autres pays industriels, le Japon, par exemple. Par ailleurs, nous n'avons pas de marché de la taille des marchés américains, de sorte que nous devons nous résoudre d'avoir moins de concurrents dans des secteurs donnés.

Comme la Commission Macdonald s'est plu à le souligner toutes les deux pages de son rapport, nous devons évoluer dans un environnement international pour la plupart de nos denrées dans la plupart des circonstances, ici je parle des denrées et non pas des services, et que les concentrations que nous avons connues dans le passé deviennent de moins en moins importantes. Les marchés sur lesquels la concurrence diminue temporairement redeviennent concurrentiels très rapidement à cause de nouveaux participants, de nouvelles idées et de nouveaux produits. Nous n'avons pas à nous soucier de ce danger autant que nous devions le faire il y a dix ans. Du moins, c'est mon avis.

La vision de l'avenir de la Commission Macdonald, mises à part ses solutions, évidemment, est probablement assez juste. Dans ce cas, nous n'avons pas à nous soucier autant de la concentration ou encore des solutions utilisées par d'autres pays dans le sens que vous l'avez indiqué.

[*Text*]

Mr. Ouellet: Mr. Chairman, if I may, I would like to ask a last question in relation to the American experiment. It is true that since President Reagan was elected in the U.S., there has been some substantial ease in relation to anti-trust cases. The biggest example occurred right after his inauguration when the charges against the American oil companies were dropped. I do not know if he had anything to pay back to the oil companies, but one of his first gestures as President was to drop the case against the oil companies.

• 1705

Obviously, a few big mergers were allowed, as you cite in your document, but I do not think there has been any major amendment yet passed by the U.S. Congress. There is a lot of speculation.

Mr. Orlikow: They just do not enforce it.

Mr. Ouellet: There has been the weakening in the enforcement of the anti-trust law in the U.S., but this does not mean that the Americans have embarked on a very drastic change of attitude. If legislation had been passed in the U.S. Congress changing the anti-trust act, that might be different. My feeling is that since there is a new President of a new approach, there has been a lessening of compliance or lessening of enforcement. A new President might entirely change the ball game. Am I wrong to say this?

Prof. Thompson: I believe you are correct. The three major bills which alter triple damage anti-trust actions, for example, are still pending. I do not know if there has been a major change, but I think what is important from a Canadian perspective is the result and not the process by which they got there. The Americans permitted General Electric, the third largest industrial corporation in the United States, to merge with RCA, and they did not challenge it. GE argued that they had to divest those sectors, many of which they sold to Black and Decker, in which the third world would become dominant, and said they had to be bigger and have stable income patterns over time to compete in the world. This is the third largest industrial corporation in the United States. The Reagan administration accepted it and did not challenge it—that is the reality. How they got there may be less important for Canada than the fact that they are there. This is the environment in which we compete, and that is the reality.

Mr. Ouellet: I cannot but remark that this is a witness who has been suggested by my good friend, the representative of the NDP.

Mr. Orlikow: Give me a chance. I will take him on. Give me a little time.

Mr. Ouellet: I wonder why our friends from the government are so afraid of Mr. Orlikow's witness list. Thank you, Mr. Chairman.

The Chairman: Mr. Attewell, please.

Mr. Attewell: Thank you, Mr. Chairman.

[*Translation*]

M. Ouellet: Avec votre permission, monsieur le président, j'aimerais poser une dernière question au sujet de l'expérience américaine. Il est vrai que depuis l'élection du président Reagan aux États-Unis, on relève un assoupissement considérable des poursuites anti-trust. Le meilleur exemple est intervenu juste après son entrée en fonction, avec le retrait des accusations portées contre les compagnies pétrolières américaines. Je ne sais pas s'il avait une dette vis-à-vis des compagnies pétrolières mais l'une de ses premières décisions de président fut d'arrêter les poursuites intentées contre elles.

Manifestement, on a autorisé quelques grosses fusions, ainsi que vous le faites ressortir, mais je ne pense pas que des modifications législatives aient été adoptées par le Congrès américain. Les rumeurs vont bon train.

M. Orlikow: Ils n'appliquent tout simplement pas la loi.

M. Ouellet: Il y a un affaiblissement de la rigueur avec laquelle la Loi anti-trust américaine est appliquée mais cela ne signifie pas un virage à 180 degrés de la politique américaine. Ce serait différent si le Congrès avait modifié la législation. À mon avis, depuis l'élection d'un nouveau président, une approche nouvelle prévaut, celle d'un plus grand laissez-faire mais l'arrivée d'un autre président pourrait de nouveau changer tout cela. Qu'en pensez-vous?

M. Thompson: Je crois que vous avez raison. Les trois grands projets de loi qui veulent modifier la législation anti-trust n'ont toujours pas été déposés, par exemple. Je ne sais pas s'il y a eu de gros changements mais, ce qui compte du point de vue canadien est le résultat et non pas le cheminement par lequel on y arrive. Les Américains ont laissé *General Electric*, la troisième plus grosse entreprise industrielle américaine, fusionner avec la RCA, san intervenir. *General Electric* avait fait valoir qu'elle devait se défaire de ces secteurs, dont elle a vendu une bonne partie à *Black and Decker*, dans lesquels le Tiers monde peut devenir dominant disant que, s'il voulait soutenir la concurrence mondiale, il le lui fallait gagner en envergure et avoir des recettes plus stables. Il s'agit là de la troisième plus grosse entreprise industrielle des États-Unis. Le gouvernement Reagan a accepté cette argumentation, n'a pas contesté—cela est la réalité. Peu importe le cheminement, c'est l'aboutissement qui compte. Voilà l'environnement dans lequel nous devons livrer concurrence, voilà la réalité.

M. Ouellet: Je ne peux m'empêcher de remarquer que c'est mon bon ami, le représentant du NPD, qui a demandé la comparution de ce témoin.

M. Orlikow: Attendez un peu, je vais m'attaquer à lui, laissez-moi un peu de temps.

M. Ouellet: On se demande pourquoi nos collègues de la majorité ont tellement peur de la liste des témoins de M. Orlikow. Je vous remercie, monsieur le président.

Le président: Monsieur Attewell, s'il vous plaît.

M. Attewell: Je vous remercie, monsieur le président.

[*Texte*]

Prof. Thompson: I suddenly feel that I have been painted a colour, and I was not aware of this. I received a call from the clerk. I must tell you that I grew up—Mr. Orlikow does not remember this—about eight doors from him in north Winnipeg, so we have a common background.

Mr. Orlikow: You have gone a long way, and I do not mean just geographically.

Prof. Thompson: This may be his revenge.

Mr. Attewell: Mr. Chairman, you might be able to make a choice. I see you are on Mr. Orlikow's left and on our right, so you can decide.

I have read part of the Bryce commission report, which was struck in 1975 as I recall. I think it was mainly the intended take-over by power of Argus that triggered the process, and I believe your report was submitted in 1977-78, or around that period. I guess I would like to start with a general and somewhat hypothetical question. If you went through that same process today, would you come to the same conclusions which said it is not a significent problem in Canada in 1976-77?

• 1710

Prof. Thompson: In what was a good report in many ways, we totally missed the issue of the ownership of such a large portion of the industrial assets of this country by six families which surfaced ten years later. We did not see that aggregate concentration issue and I am not sure the indications were there in 1975.

When the commission looked at the issue of aggregate concentration, we saw a trend which had levelled out and started to decline slightly at that point. We obviously had higher aggregate concentration at that point than did the United States, but we had figures which were lower then or quite comparable to the Netherlands, Belgium, France, Germany, countries with which we were more reasonably compared. It was certainly visible at the time that size, in terms of risk-taking capability, was necessary to compete in the world market.

So the commission did not see a danger in aggregate concentration which offset the benefits of size and risk-taking capability in the world. We did not see the six family phenomenom arising as it has. I am sure the commission would have spent a great deal more time on that subject than it did.

Mr. Attewell: Do you believe the commission would have come to a quite different conclusion?

Prof. Thompson: Not about aggregate concentration because there you are talking about the ownership of assets by the largest 50 or 100 or 200 entities, but perhaps it would have in regard to the six family phenomenom and the cross-ownership of industrial and financial assets in particular.

[*Traduction*]

M. Thompson: J'ai tout d'un coup l'impression que l'on m'a colé une étiquette, sans même que je le sache. J'ai reçu un coup de téléphone du greffier. Je dois dire que j'ai été élevé—M. Orlikow ne s'en souvient pas—à huit maisons de chez lui, dans le quartier nord de Winnipeg, et nous avons donc des origines communes.

M. Orlikow: Vous avez fait beaucoup de chemin, et je ne parle pas seulement au sens géographique.

M. Thompson: C'est peut-être sa revanche.

M. Attewell: Monsieur le président, vous pouvez peut-être faire un choix. Je vois que vous êtes à la gauche de M. Orlikow et à notre droite, si bien que vous pouvez décider.

J'ai lu en partie le rapport de la Commission Bryce qui fut créée en 1975, si je me souviens bien. Il me semble que c'était la prise de contrôle souhaitée par Argus qui avait déclenché le processus et je crois que vous avez déposé votre rapport vers 1977 ou 1978, dans ces années-là. Je crois que je vais commencer par une question d'ordre général, peut-être hypothétique. Si vous deviez refaire le même travail aujourd'hui, tireriez-vous les mêmes conclusions qu'à l'époque, à savoir que cela n'est pas un problème important au Canada?

M. Thompson: Dans ce qui était à tous les égards un excellent rapport, nous sommes totalement passés à côté de la question de l'appartenance à six familles seulement d'une si grande partie de l'infrastructure industrielle de notre pays, comme on a commencé à s'en rendre compte dix ans après. Nous n'avons pas perçu ce problème de la concentration et je ne suis même pas sûr que les indices en existaient déjà en 1975.

Lorsque la Commission s'est penchée sur la question de concentration globale, nous avons constaté que la courbe croissante avait commencé à s'infléchir et même à s'inverser, à l'époque. Nous connaissions manifestement au Canada une concentration globale supérieure à celle des États-Unis mais nos chiffres étaient inférieurs ou très comparables à ceux des Pays-Bas, de la Belgique, de la France, de l'Allemagne et de pays de taille comparable à la nôtre. Il était déjà apparent, à ce moment-là, que notre prise devait être de taille imposante si elle voulait pouvoir prendre des risques et soutenir la concurrence sur le marché mondial.

La Commission n'a donc pas vu de danger dans cette concentration, d'inconvénient susceptible de l'emporter sur les avantages de la taille et de la capacité à prendre des risques. Nous n'avions pas décelé le phénomène des six familles. Je suis sûr que s'il avait été apparent à l'époque, la Commission y aurait consacré beaucoup plus de temps.

M. Attewell: Pensez-vous que la Commission aurait tiré une conclusion sensiblement différente?

M. Thompson: Pas tellement sur la concentration générale, car il s'agit là de la portion de l'infrastructure industrielle aux mains des 50, ou 100 ou 200 plus grosses quantités, mais certainement en ce qui concerne le phénomène des six familles et la propriété croisée des entreprises industrielles et financières en particulier.

[*Text*]

Mr. Attewell: Do you have any thoughts on not so much where they are today, but how they got there? I am thinking of some of the ways they have been financed, whether it is some very substantial tax incentives of various forms, the use of non-voting stock to create some tremendous leverage, or the extensive use of after-tax prefered issues in firms such as Trilon. I know we are little off the track here, but these tools, if you will, have certainly gone a long way to create the size they now enjoy, in my opinion. Do you have any thoughts in this area?

Prof. Thompson: No. Those are only issues we looked at at the time, but a decade later I would not want to comment on them. They are not subjects I have looked at closely.

Of course what we looked at 10 years ago was the reality that a large concentration of capital in Canada would invest outside of Canada, if you denied it the opportunity to invest in Canada. So the trade-off was always investment and jobs against the little more concentration, and jobs are a great deal more important to people who do not have them, as many people came to our hearings and told us. The commission obviously thought trade-off was an acceptable one at the levels of 1975. If they looked at six or ten firm concentration in Canada today, I do not know what conclusions they would reach.

Mr. Attewell: Was there or is there a possible error in peoples minds on this idea about having to be world class to be able to compete? I think there are different instances where that can be refuted. Firms find a particular niche, a particular product line which may be pretty narrow in some cases. I forget the name of the firm, but there is a firm over Burlington way which manufactures windshield wipers for cars and sells millions of them to Japan, for instance. So this idea of the world-class size,so to speak, can be over-rated as opposed to having a unique product and making the best of that.

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Prof. Thompson: Sir, I think that is true and you can certainly find many examples of small firms. The one which is often cited is a company in Ontario which makes home fire alarms, those little $10 devices where you put in nine-volt batteries and then place them in your ceiling. The company has more than 50% of the world market in them. But the examples in my submission are in low-technology, low-risk areas.

The kinds of companies we want to encourage are in the high-tech industries of the future, in biotechnology to give you an example. They are high risk, high capital requirements where you need massive size to take risks on foreign markets. We want to encourage those areas and those industries where you have to have size or clout.

Mr. Attewell: Where would you think that capital will come from? Will it come from these six families, or are they too busy eating each other up?

[*Translation*]

M. Attewell: Avez-vous des opinions concernant les moyens par lesquels cette concentration a été obtenue? Je pense en particulier aux techniques de financement, qu'il s'agisse des très importantes concessions fiscales, sous diverses formes, de l'emploi des actions sans droit de vote pour créer d'énormes effets de levier ou de l'usage massif d'actions privilégiées dans des entreprises comme Trilon. Nous nous éloigons peut-être là un peu de notre sujet mais ces outils, si vous voulez, ont certainement largement contribué à gonfler la taille de ces groupes, à mon avis. Avez-vous des idées là-dessus?

M. Thompson: Non. Nous n'avons survolé que rapidement ces questions à l'époque et, aujourd'hui, 10 années plus tard, je ne voudrais pas émettre d'opinion. Je ne m'y suis pas intéressé de près.

Evidemment, ce que nous avions considéré il y a 10 ans était la réalité qu'une grosse concentration de capital en des mains canadiennes irait s'investir à l'étranger si on l'empêchait de s'investir au Canada. Il fallait toujours peser dans la balance d'un côté l'investissement et l'emploi et, dans l'autre plateau, un peu plus de concentration et ce qui compte le plus aux yeux des chômeurs c'est l'emploi, ainsi que nous l'ont dit maints intervenants aux audiences. La Commission, manifestement, a jugé en 1975 que le compromis était acceptable. Je ne sais pas si elle parviendrait à la même conclusion aujourd'hui, face à six ou dix entreprises dominantes seulement.

M. Attewell: Ne pensez-vous pas que cette idée qu'il fallait être deux d'envergure mondiale pour soutenir la concurrence était à l'époque, et même aujourd'hui, une idée fausse? Je pense que l'on pourrait citer quantité d'exemples pour la refuter. Mais l'entreprise trouve un créneau particulier, une gamme de produits particulière qui peut être très restreinte. J'ai oublié le nom de la société, mais il y a une entreprise à Burlington qui fabrique des essuie-glace de voiture et qui en vend des millions, même au Japon. On accorde peut-être trop d'importance à cette notion de l'envergure mondiale, par opposition à l'exploitation d'un créneau très précis du marché.

M. Thompson: C'est bien vrai, je pense que l'on pourrait citer beaucoup d'exemples de petites entreprises qui réussissent. Celle que l'on cite souvent était l'entreprise de l'Ontario qui fabrique des avertisseurs d'incendie domestiques, ces petites appareils à 10$ qui marchent sur une batterie de 9 volts, que l'on fixe à son plafond. Cette société détient plus de 50 p. 100 du marché mondial de ces appareils. Mais les exemples que je donne dans mon texte concernent tous des productions de petites technologies et à faible risque.

Celles que nous voulons encourager sont des industries de pointe, dans le domaine de la biotechnologie, par exemple. Elles ont deux gros besoins en capital à risque et seule une entreprise de grosses dimensions peut se permettre de prendre des risques sur les marchés étrangers. C'est le genre d'activités que nous voulons encourager et ces entreprises ont besoin de beaucoup de poids.

M. Attewell: D'où proviendront ces capitaux, à votre avis? Proviendront-ils des six familles ou bien sont-elles trop occupées à se manger les unes les autres?

[*Texte*]

Prof. Thompson: Well, I suggest only that if we are going to have those kinds of industries in Canada, the capital and the size have to come from somewhere. Now it can come from government guarantees of export activity. You know, there are ways of absorbing the risk-taking activity. I am not sure I would suggest those to you but there are other ways of doing it.

But simply as a response to your question, I think the small companies you see active in the world are in low-tech, low-risk industries. The high-tech, high-risk industries require size and clout from whatever source.

Mr. Attewell: I also appreciated your comments, as Mr. Ouellet said, on the mix and makeup of that tribunal. I think there really is some good food for thought.

In your conclusion on page 15 you talk about the process being arguably more difficult under joint monopolies. Can you expand a bit on that? Are you saying that you can catch them if they are doing it, but harder if three or four are involved? What do you really mean there?

Prof. Thompson: The examples in section 50 I think are largely examples of single-firm conduct that would be caught under this. I think the provision catches that well, and it may catch a few things which are so close to conspiracy that if this did not exist they would get caught under section 32.

The question is, does it catch the joint dominance shared, oligopoly conscious, parallel behaviour situations that we worry about. It seems to me that it does not in many cases because you have five different barriers to surmount. If I mis-stated this, I apologize. It is really my sense that it is less effective when applied to joint monopolistic situations than when it is applied to single-firm monopolies.

Mr. Attewell: Lastly, Mr. Chairman, can you maybe share your views with the committee on this area of financial institutions being controlled by non-financial institutions? Can you just elaborate on your concerns in that area?

Prof. Thompson: It is a very different topic than competition policy. I guess it basically seems to me that the dangers in having joint ownership of industrial and financial assets outweigh the benefits.

It is beneficial to have financial institutions which evaluate investment proposals by Canadian companies independently of any but investment criteria. You lose something when you take away that level, no matter how many Chinese walls you erect in the midst of diversified companies, and I am not sure you gain anything in return. It just seems to me that the risks outweight the benefits.

[*Traduction*]

M. Thompson: Je dis seulement que si nous voulons avoir ce genre d'entreprises chez nous au Canada, les capitaux et l'envergure devront provenir de quelque part. Elle peut provenir de garanties gouvernementales données aux exportations. Vous savez, il existe des moyens d'absorber les risques. Je ne préconise pas nécessairement ce moyen-là, mais il y en a d'autres.

Pour répondre à votre question, je pense que les petites entreprises qui se taillent des succès dans le monde concernent des activités de faible technologie et de faible risque. Les industries de haute technologie, à risque élevé, ont besoin d'envergure et de poids, peu importe d'où ils les tiennent.

M. Attewell: J'ai apprécié également, comme M. Ouellet, vos idées sur la composition du tribunal. Je pense qu'il y a là bonne matière à réflexion.

Dans votre conclusion à la page 15, vous dites que le processus serait plus difficile à l'égard des monopoles à plusieurs. Pourriez-vous nous préciser votre pensée à cet égard? Pensez-vous qu'il serait plus facile de réprimer les monopoles d'une entreprise, mais beaucoup plus difficile de réprimer les oligopoles? Qu'entendez-vous par là?

M. Thompson: Les exemples que nous avons vus avec l'article 50 intéressent principalement les cas de monopoles à une seule entreprise. Je pense que cette disposition est bien adaptée à ces cas-là, et peut-être même à quelques autres comportements qui sont tellement proches de la conspiration qu'ils tomberaient sous le coup de l'article 32 si l'article 50 n'existait pas.

La question est de savoir si cette disposition permet également de prévenir les cas de domination à plusieurs, d'oligopoles, de comportement parallèle qui nous inquiètent tant. Il me semble que ce ne sera pas toujours le cas car il y a cinq barrières différentes à surmonter. Veillez m'excuser si je me suis mal exprimé. Je considère que cette disposition est moins efficace lorsqu'elle s'applique à des monopoles à plusieurs qu'à des monopoles véritables.

M. Attewell: Pourriez-vous enfin nous dire votre avis concernant toute cette question des établissements financiers contrôlés par des entreprises non financières? Pourriez-vous nous préciser votre pensée à ce sujet?

M. Thompson: Cela est un sujet tout à fait différent de celui de la politique de concurrence. Il me semble, pour résumer, que les dangers de la propriété cnojointe d'actifs industriels et financiers dépassent les avantages.

Il est bénéfique que les établissements financiers évaluent les projets d'investissement des entreprises canadiennes selon des critères indépendants de toute considération autre que d'investissements. Vous perdez quelque chose dès que vous supprimez cette indépendance, peu importe le nombre de murs de Chine que vous érigez à l'intérieur de groupes diversifiés et je ne suis pas certain que l'on gagne quoi que ce soit en échange. Il me semble tout simplement que les risques dépassent les avantages.

[*Text*]

Mr. Attewell: What do you mean by independent? Brascan has directors on four of the five largest banks in this country. How independent is that?

Prof. Thompson: Well, you are asking to what degree boards treat companies represented by other board members differently, and I do not know the answer to that.

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Certainly, a number of bankers appeared before the royal commission and stated very unequivocally that this did not happen, but I just do not know.

Mr. Attewell: But we do know they get drawn in. The Canadian Imperial Bank of Commerce got drawn into some extremely substantial loans with executives of Massey-Ferguson which would not likely have occurred had there been a little more independence in those particular days. Do you have any more thoughts on this, financial or non-financial?

Prof. Thompson: No.

Mr. Orlikow: Mr. Chairman, just let me make a comment on Mr. Ouellet's needling of me; that because what Professor Thompson is saying is not in accord with what I believe, somehow I made a mistake in suggesting he be invited.

When I heard the Minister had an advisory committee, which I thought was mostly from business and the corporate law sector, I got a list of all the professors who had done work and written on competition policy and suggested they be called. I do not think from memory there was one left-of-centre economist on the list, so because I suggested they be called did not mean I thought I would agree with them.

Professor Thompson, I suppose one of the reasons some of us did not pay much attention to the report of the Bryce commission was we foresaw then what you are talking about now; the problems of concentration, the problems we get as a result of the mergers and the formations of these huge conglomerates.

I will just mention a few examples. We have Bell Canada which recently bought TransCanada Pipelines. We have the CPR which a few years ago bought Canadian International Paper, which has been a loser ever since. We have Power Corporation which recently wanted to buy a television station. And we have Imasco under the Reichmanns and the Bronfmans.

Is there any evidence, have any studies been done, to your knowledge, which would indicate that after these individual companies were taken over by the conglomerates, the companies became more efficient, did more scientific research and development, developed new products? Most important, were more jobs created after the take-overs than before? Is it not a fact that the real winners are the people who arrange these mergers, the major stockholders, and of course the officers

[*Translation*]

M. Attewell: Qu'entendez-vous par indépendants? Brascan a des membres au conseil d'administration de quatre des cinq plus grosses banques du pays. Quelle sorte d'indépendance est-ce là?

M. Thompson: Vous me demandez dans quelle mesure les conseils d'administration traitent différemment les compagnies représentées en leur sein, et je ne connais pas la réponse.

Certes, un certain nombre de banquiers ont comparu devant la commission royale pour dire en termes non équivoques que cela n'était pas le cas, mais je ne sais pas.

M. Attewell: Mais nous savons qu'elles se laissent entraîner. La Banque Impériale canadienne de commerce s'est laissée entraîner à des prêts très massifs à Massey-Ferguson qu'elle n'aurait sans doute pas accorder s'il y avait un peu plus d'indépendance à l'époque. Avez-vous d'autres idées là-dessus, sur le plan financier ou sur d'autres plans?

M. Thompson: Non.

M. Orlikow: Monsieur le président, laissez-moi répondre aux pointes que M. Ouellet m'a lancées, le fait que le professeur soit en désaccord avec mes opinions signifierait que j'aurais commis une erreur en l'invitant.

Lorsque j'ai entendu que le ministre disposait d'un comité consultatif, que je croyais composé essentiellement de spécialistes du droit des affaires, je me suis procuré une liste de tous les professeurs d'université qui ont écrit sur la politique en matière de concurrence et ai proposé de les inviter. Je ne crois pas, si je peux me fier à ma mémoire, qu'il y avait un économiste de gauche sur la liste, si bien que le fait d'avoir proposé de les inviter ne signifie nullement que je m'attendais à partager leurs opinions.

Professeur Thompson, je suppose que l'une des raisons pour lesquelles certains d'entre nous n'ont guère prêté attention au rapport de la commission Bryce, est que nous nous attendions alors à ce qui s'est effectivement produit depuis, à savoir les problèmes de la concentration, les problèmes que nous connaissons par suite des fusions et de la création de ces énormes groupes.

Je me contenterai de mentionner quelques exemples. Il y a Bell Canada, qui vient d'acheter récemment *TransCanada Pipelines*. Il y a CPR qui a acheté il y a quelques années *Canadien International Paper*, qui essuie des pertes depuis. Il y a *Power Corporation* qui voulait acheter récemment une station de télévision. Et il y a Imasco, avec les Reichmann et les Bronfman.

A votre connaissance, des études ont-elles été faites qui établiraient que ces sociétés, après leur rachat pour les conglomérats, soient devenues plus rentables, et aient effectué davantage de recherches scientifiques, et mis au point davantage de nouveaux produits? Surtout, ont-elles créé davantage d'emplois après leur absorption? N'est-il pas vrai que les véritables gagnants sont ceux qui organisent ces fusions, les principaux actionnaires et, bien sûr, les dirigeants qui monnaient leur assentiment?